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EDITORIAL COMMENTS

Union without constitution

1. Institutional achievements and failures

The Intergovernmental Conference (IGC) is over; it has produced a new draft Treaty to be submitted to the Member States for ratification. However, one of the essential problems for which the whole process of revision had been engaged remains unsolved: the institutions of the Union have not been adapted to future enlargement. This is the most obvious Amsterdam failure.

It should not be said that the results reached have been negligible as far as the institutions are concerned – and institutional questions very often cannot be isolated from questions of substance.[1] The code-cision procedure has been simplified and extended to new domains – social provisions, customs cooperation, combating fraud. The European Parliament gains more influence in the procedure for designating the President of the Commission and its members. On the other hand, there are very few new cases of majority voting, including in the area of Common Foreign and Security Policy (CFSP).

In the domain of the CFSP it is perhaps a good thing that the "high representation" for CFSP is to be the Secretary General of the Council and not a high-flying political personality, which is what the French negotiators had hoped at one time. Such a high flyer would have put in the shade the presidents of the Council and of the Commission, who are the only legitimate embryo of an EU executive. In a declaration

1. See the Editorial comment, "The Treaty of Amsterdam: Neither a bang nor a whimper", 34 CML Rev., 767–772.

annexed to the Treaty, a hope is expressed that the vice-president of the Commission should be in charge of external relations: does that mean that the Member States would welcome the effective involvement of the Commission in CFSP affairs? The future will tell! The creation of a policy planning unit (declaration to be added to the Final Act) including people coming from Member States, the Commission and the WEU would also be a factor of cohesion in that area. Incidentally, it should be noted, although it does not directly concern the institutions, that the United Kingdom and the neutral Member States have maintained their hostility to any inclusion of the WEU within EU, a situation which does not augur well for the future development of a European defence policy.

Much has been said already of the inclusion of part of the "third pillar" (Justice and Home Affairs, JHA) in the EC Treaty, and of the flexibility clauses which appear under three different forms in the three pillars, with escape clauses which recall the Luxembourg Compromise.[2]

The unsolved institutional problem, which is crucial in determining the future of the Union, is that of delegating limited but essential powers of direction to a permanent executive authority. A Union composed of fifteen States and which plans to admit fifteen new members in the coming years cannot be governed on a part-time basis, by ministers and Heads of State and Government who are legitimately absorbed by the defence of their national interests. These questions were raised in September 1994 in a document produced by the CDU-CSU (the Lämers-Schauble Report), proposing that the Commission become the government of the Union. This proposal was harshly rejected by the "big" States, which did not take advantage of this occasion to deal decisively with the problem of the size of the Commission, of its relations with the European Council, of the voting rules in the Council and the allocation of votes to Member States. All this remains in suspense.

A protocol on enlargement provides in quite complex terms that when the first enlargement takes place, the Commission should not count more than one national of each Member State; but this is on condition that all the Member States have previously agreed on a new reallocation

2. See Editorial comments, loc. cit.

of votes which would also satisfy those Member States (the "Big" ones) who have to renounce their possibility of having two nationals in the Commission. There is no guarantee that the Member States succeed within two or three years' time in agreeing on institutional evolutions they have not been able to discuss extensively during the 1996 IGC.

Equally disappointing is the absence of results on significant, although less strategic, institutional or legal issues which were put on the agenda of the IGC at the time of drafting the Maastricht Treaty, issues such as the legal personality of the EU, a hierarchy of norms, subsidiarity (the conclusions of the European Counsel of Edinburgh of 12 December 1992 clearly inspire the new protocol on subsidiarity annexed to the Amsterdam Treaty, but no proper clarification has been put in operation).

2. Impetus for integration?

It is tempting to say that, in comparison with previous revisions of the EC Treaty, it is the first time that so little progress has been registered actually in the direction of more integration. From the establishment of a Single Council and a Single Commission (1965), through the amendment of budgetary and financial provisions (1970 and 1975) to the Single European Act (1986) and the Treaty on European Union (1992), the European Community has moved from package deal to package deal, with a good deal of inertia and some shortcomings (such as the Luxembourg Compromise, although that was not a Treaty revision), in the direction indicated by the Schuman Declaration: "creating an ever closer union among the people of Europe". To mention the most recent institutional evolutions, the Single European Act introduced the procedure of cooperation and increased the number of cases of majority votes; the Maastricht Treaty launched the twin ships of European Union and European citizenship. On the other hand, this new draft Treaty of Amsterdam gives substance to centrifugal forces which came into sight for the first time in the Single European Act and took on firmer shape in the Maastricht Treaty. Not only are there a number of protocols and declarations which disfigure the unity of the Treaty, and not only is

the "pillar" structure maintained, but within each pillar, including the "Community" pillar, a number of exceptions, escape clauses, special regimes of flexibility, and special provisions concerning the jurisdiction of the Court blur the general design of the European Union. This makes the whole construction indecipherable even for experts, not to mention the man in the street. The legal notion of the European construction is subtly changing: the inability of Member States to agree on the conditions for efficient functioning of the institutions of integration, leaves the way open for new scope of cooperation within or outside the EU Treaty. Is it some consolation to recall that, for instance, the Single European Act and the Treaty of Maastricht were subject to severe criticism at the time they appeared?

3. A question of method

After Maastricht, Amsterdam again demonstrates that for the revision of a Treaty, which is at the same time the "Constitutional Charter" of the Union, an intergovernmental conference is not the best forum for elaborating coherent solutions to complex institutional problems.

In the old days of the EEC, technical revisions of the treaties used to take place without an intergovernmental conference of the Member States playing any significant role. The European Single Act was adopted after extensive intergovernmental discussions, but was efficiently prepared on the basis of the work of an independent expert committee (the Dooge Committee), and the Treaty of Rome itself was preceded by the independent reflections of the Spaak Committee. The Westendorp Committee, whatever the personal merits of its chairman and participating members, suffered from the presence of representatives of Member States, appointed in that quality. Imagination and audaciousness had to give way to diplomacy, with two negative consequences: lack of transparency of the process, lack of coherence of the result.

In the earlier stages, there was some attention paid to transparency, when the various institutions – Commission, Parliament, Council, Court of Justice – publicly expressed their views concerning their expe-

rience of EU Treaty and their expectations for the future. The Westendorp Committee prepared a working document, which was published. But, up to the last minute, the Member States did not make their respective positions known. The national parliaments were not involved. The press and media, not directly informed, remained mostly silent, and the people of Europe did not feel concerned. Obviously, the lessons of the Maastricht ratification, with all its difficulties, had not been heard.

As regards the absence of clear and coherent inspiration, this may be due in part to the inhibitions of the negotiators, but also to the wide scope covered by the conference. At first, ambitions were limited to the topics defined in the Maastricht Treaty itself, which included the institutions, the CFSP and JHA. Then the scope was enlarged to include a long list of matters – from asylum to overseas territories – which appear in the table of contents of the Amsterdam Treaty. Incontestably, the Member States have all powers to decide to add new topics of discussion to those initially defined.[3] However, this wide extension of the scope of revision poses a threat to the European construction itself. Even if the concept of *acquis communautaire* is occasionally put forward in order to protect vital parts of the existing construction, the frequency of revision and the variation in the scope of revision even during the conference itself seem to indicate that nothing is "achieved" in the sense of being completed. Are the true contours of the European Union still to appear?

Any process of revision generates expectations among the élite, but also among the people in the street, the young, the jobless, etc.. These groups, rightly or wrongly, anticipated, with the "Construction of Europe", important changes with practical and positive consequences in their everyday life. When the results are not convincing on major institutional questions, disappointment and disaffection for the whole idea of European construction are to be expected.

3. Art. N TEU.

4. The importance of a constitution

A common currency, a common foreign and security policy and coordination of economic policies are necessary in order to build a convincing European Union. But in order really to exist, the EU has to become a common ambition, a common representation of a desirable social order for the people of Europe. The EU needs a constitution, not only in the technical sense of a supreme law distributing powers between institutions, but in the sense of a Charter defining the values in consideration of which a number of people have decided to live together under a common political authority.

One of the paradoxes of the present situation in the European Union is that the fifteen Member States, although they may entertain divergent philosophical conceptions on the respective role of the State and the nation,[4] share common constitutional principles. One is the principle of free election, at regular periods, with proper political choice; the modes of election vary, but in all Member States the governments – under presidential or parliamentary regimes, in centralized or federal States – are democratically elected. No less important is the constitutional guarantee of fundamental rights of individuals, with judicial control of this guarantee. These two constitutional principles, common to European States, do not make a European constitution.

As underlined in the previous issue of this Review,[5] the Amsterdam Treaty contains interesting innovations on the question of fundamental rights; while no declaration as such has been adopted, a new procedure is set up in view of sanctioning efficiently any Member State which might seriously and persistently infringe the principles stated in Article F(1) (of the Draft Treaty). Of course, it is very unlikely that recourse would actually be had to such a provision.

If the Member States have not agreed on a reform of institutions it is not because of divergences of ideas on democratic principles or free elections, it is because they did not feel bound to succeed. To repeat

4. See Allott, "The crisis of European constitutionalism: Reflections on the revolution in Europe", 34 CML Rev. (1997), 439.

5. *Supra* note 1.

what has been brilliantly demonstrated by Philip Allott in this Review[6] the European Union "*lacks a coherent idea of its actuality, an ideal of its potentiality*". What is missing is the ability of the fifteen to define a common political project for the realization of which it would be worth giving up a little more of the prerogatives of nation state. The added value of peace and well-being for the people of Europe, which had inspired the Founding Fathers in the 1950s, seems to have vanished into a more modest ambition of regional cooperation. By sticking to that limited aim, the treaty makers reduce even the need for a European Constitution.

6. Op. cit. *supra* note 4 at 488.