The Future of Supranational versus Intergovernmental Mechanisms in EU Law

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Abstract

Decision-making procedures remain a central point of debate in EU Law today, notwithstanding the entrenchment of the 'Community method' across much of the areas of EU competence following the Treaty of Lisbon. Supranationalism entails an atypical – relative to international law - degree of decision-making power for supra-State institutions. Although this supranationalism has been strongly marked by the concepts of uniformity and effectiveness, the evolution of EU law also demonstrates marked examples of a pragmatic accommodation of concerns different to the core value of integration. Through methods such as derogations, enhanced cooperation and flexible integration, extra-Treaty mechanisms, the emergence of mutual recognition, opt-outs, the Open Method of Coordination, the *de facto* suspended application of parts of EU law, and the addition of subsidiarity and proportionality as restraining tools on EU action, the EU has often been more responsive to diverse conceptions of integration than the core supranational or Community method might permit. While the core internal market of the EU, in which context the Community method emerged, has become accepted and legitimised, this is so less in other areas EU competences, especially in areas such as external relations and some aspects of shared competences. This paper first surveys ways in which the EU adopts variable decision-making procedures, including what makes it distinct relative to other international organisations. The paper then considers ways in which, and why, EU decision-making procedures might be varied in future Treaty changes or institutional reforms.

Terminology

- **Terminology more prevalent pre-Lisbon**, but still captures important legal reality of Treaties

- **Supranational** ↔ 'The Community method':
  - Degree of transfer of competence to collective transnational level

- **Intergovernmental**
  - Traditional relations at international level between executive counterparts

Features of Supranationalism

International Law

- Optional jurisdiction of courts
- Opt-in, opt-out executive law-making
- Autonomous incorporation in national law
  - Monism v dualism
  - Hierarchy
- Decentralised self-help (mostly)
- 'Ordinary international law' interpretation?
- International secretariat

Supranational

- Compulsory jurisdiction
- Majority voting in law-making incl. by directly-elected EP
- Enforcement doctrine for national law
  - Direct effect
  - Supremacy
- State liability (but ultimate fallback)?
- Teleological interpretation
- Executive initiative

→ **Enforcement and the character of law**: compulsory jurisdiction most decisive?
- but also the teleological method of ECJ: qualitatively distinct in its degree
  - best illustrated by fundamental issue of interpretation of competences

→ **EU law harnesses authority of national law**

→ **Sum greater than the parts**, e.g. Court and Commission (Conant, Stone Sweet)

‘Dual character of supranationalism’

- Weiler’s 1981 article in *YEL* (1981)

- (i) **Normative (legal) supranationalism**
    - (ii) **Decisional (political) intergovernmentalism**
    - After SEA, move back to decisional supranationalism?

- **Neofunctionalism**
    - v. **Intergovernmentalism**

- ‘**New intergovernmentalism**’ → more behavioural/empirical/political,

→ Who is in driving seat? What are the political and legal practices?

Maastricht-Lisbon – ‘Europe of bits and pieces’?

- Intergovernmental Pillars: ‘variable geometry’
- Optional jurisdiction of ECJ in Third Pillar (JHA) (ex Article 35 TEU)
- Non-standard law-making (no direct effect; supremacy?)
- ‘Community method’ in First Pillar
- Gradual supranationalisation
  - JHA split leaving judicial cooperation in criminal matters in Third Pillar
  - Pillars eventually abolished, but still some intergovernmental features
    - i. law-making excluded in CFSP
    - ii. Special legislative procedures in former Third Pillar, e.g. emergency break, opt outs, reverse integration (for UK and Ireland)
- Fiscal Compact and ESM Treaty: hybrid method

Why does the distinction still matter?

- It **conveys the legal character of the EU relative to other international law entities**

- It illustrates the **variability of future treaty developments**
  - Past examples
  - Future possibilities

- Understanding the ***interaction*** **of supranational features**

- Understanding **the importance of the Court**: thinking of how to relate ECJ to SOP without 'court bashing'
  - Context of the ECJ operating in an 'unusually permissive environment' (Stone Sweet)
  - Dis-analogy with 'national' SOP? (problem of *sui generis* classification)