

MIND THE GAP: THE EVOLVING EU EXECUTIVE AND THE CONSTITUTION

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Ladies and Gentlemen!

This is the third Walter van Gerven lecture and the content of my lecture is meant as a tribute to him as it concerns issues that he has thought about long and deeply. Moreover in the spirit of his work I hope to make a small contribution to developing further thinking about what in a sense can be called his pet academic project, that of *Ius Commune*, latterly a Research School in the Netherlands. In this context, it is timely that the *Ius Commune* research school has been re-certified in 2003 for the coming five year period but includes formally for the first time a ‘public law limb’ to match its private law counterpart. Not surprisingly the overall body of *Ius Commune* is currently rather lop-sided in its posture given that the private law limb has had time and occasion to develop its academic muscle. Its public law counterpart is, like a sickly patient, still just gathering its energies. But as we all know late-starters can catch-up very successfully in the longer run. With the fertile soil and experience of the school as a whole an onward march of both limbs in tandem is what we can hope to see in the near future. And in that respect too we have the balanced work of Walter van Gerven as an inspiring model, combining as it does both private law and public law in the context of an ever closer Europe.

High or low politics in the European Union anno 2004?

Turning to the subject of my lecture, the manner in which the European Union is evolving both as a constitutional order and as a political and administrative system, I would start with the following observation. With the process of the Convention on the Future of Europe¹ and more recently of the Inter-Governmental Conference much attention has been focussed on the high politics involved², on the negotiations between states as to voting percentages and veto rights, on the formal political and constitutional and legal provisions. Important though this may be what tends to get neglected at this level and at this moment in time is the equally crucial question of the legal and institutional practices and the informal as well as formal context within which the grand constitutional narrative will apply -if and when it emerges.

¹ Website of Convention on the Future of Europe: <http://european-convention.eu.int>

² Website of the Inter-Governmental Conference: <http://ue.eu.int/igc/index.asp?lang=en>

My lecture this afternoon wishes to deliberately focus in large measure on what can be called the more low level politics of the EU in order to get a sense of how the EU has evolved in institutional practice over the course of, say, the past decade. This is important because this is the institutional and political environment within which the Constitution will be applied. Even the most impressive of structures must adapt to the environment in which they find themselves in order to anchor themselves in a firm fashion and experience renewed growth. To use the imagery of gardening, if the sub-soil is not properly prepared and nourished the chances of a mighty olive tree actually taking root and eventually bearing fruit, are slim. So I must now dig a little to the sub-soil of the EU to appreciate its composition and state of health. But first I would start by identifying –and even defining for my purposes–some specific –and rooted–landmarks.

Political Landscape and Working Definitions

The principal unit in which and through which political power is exercised is the State. The State is of course a variable and changing commodity subject to internal and external forces and challenges, including the contemporary, rather pervasive challenge of globalisation.³ In Europe in addition, many challenges are posed to the traditional perception of the State through the depth and breadth of the evolving activities of the EU as a newly political “union”. The State still remains critical to the constitutional worlds of law and politics but so too, incrementally, does the European Union which is evolving its own constitutional worlds of law and politics. The interaction between those constitutional worlds of the State and of the European Union is sometimes intense and at other times fragmented. Precisely that uncertain interaction emblemises many of the contemporary challenges regarding legitimacy and accountability in both contexts.

We are quite familiar with how we must categorise the state as a political entity, but much less so with regard to the European Union (and its predecessor, the European Community). Is it an international organisation, albeit in a uniquely integrated form? Or is it a would-be-state that will ultimately replace the constituent Member States? Or is it to be understood in terms of a federal or a confederal system of government? The answer to this question as to the nature of the EU is not

³ A. Tomkins, *Public Law* (Cambridge, 2003).

categorical and depends very much on the given theoretical perspective of the scholar answering the question. In effect there are different scholarly communities in existence who analyse the EU in different conceptual terms and rarely talk to one another across those conceptual divides. It is not my intention in this lecture to enter into this on-going discussion further other than to position my thinking firmly in the camp of those who analyse the EU as in any event an evolving political system (in counterpart with its-by now- well established legal system). The approach of analysing the EU in terms of a –separate- political system is relatively new and transcends disciplines as both political scientists⁴ and lawyers (Walter van Gerven being one of the first⁵) analyse its component parts in this fashion. The use of the conceptual language of “the political system” is in fact able “to encompass pre-state/non-state societies, as well as roles and offices that might not seem to be overtly connected with the state”.⁶ In the EU context the use of this classic language in political science terms as well its set terms of reference has the major advantage of allowing the EU to be treated as a political system and in this sense as something that is also comparable to other political systems.

Given this helpful theoretical framework, enabling one to analyse the EU in substantive terms as a (would-be) political system it is possible to address to the EU the questions that can be addressed to any political system. The frame of comparison with state or indeed other international organisations or federal states is on this analysis not relevant since the purpose of using the term political system is precisely, by using a more abstract category, to avoid the confines of other more precise categories and offices that might not seem to be overtly connected with the state”.⁷

I now move down a level in my analysis to that of the notion of executive power. The scope and nature of executive power is difficult to define in substantive terms. One approach is to identify a core set of tasks that are commonly undertaken by the executive branch of government across various political systems. In the words of Paul Craig: “The executive will usually plan the overall priorities and agenda for

⁴ See, S. Hix, *The Political System of the European Union*, 2nd Edition, London: Palgrave, forthcoming January 2005.) and P. Mair, “Popular Democracy and the Construction of a European Union Political System”, paper presented to the workshop “Sustainability and the European Union”, ECPR Joint Sessions, Uppsala, April 2004.

⁵ See, W. van Gerven, *The European Union: a Polity of States and Peoples*, (Oxford, 2005, forthcoming), chapter 1.

⁶ Finer, 1970, p5, quoted by P. Mair, (2004) op.cit.

⁷ Finer, 1970, p5, quoted by P. Mair, (2004), op.cit.

legislation. It will normally have principal responsibility for foreign affairs and defence. The executive will have an important say in the structure and allocation of the budget. It will also have responsibility for the effective implementation of agreed policy initiatives and legislation that has been enacted”.⁸ The executive can generally be said to have two types of power: political, the leadership of society through the proposal of policy and legislation (agenda-setting and initiative of measures) and administrative, the implementation of law, the distribution of public revenues and the passing of secondary and tertiary rules and regulations.⁹ I use the term “executive” in this lecture as spanning the political and the administrative spheres and being part of both. In other words, it expresses the idea that the administration is part of the system of government and administrators complement the political role of those who are either elected (as in principle the Ministers in Council/European Council) or appointed by those who are elected (the case of the Commissioners).

My use of the term the EU executive in the title of my lecture as opposed to the terms EU administration or the EU Government is deliberate. It harks back to the notion of separation of powers emanating from John Locke and Montesquieu and representing the separation of the rule –making power by the legislature, the power to apply the rules and policies by the executive power and the judicial power. The foundational idea here was that if these three powers are rigorously separated with checks against the usurpation of one type of power by another actor, the utilization of power will be kept under control. Few political systems operate even in theory by a strict separation of power and the European Community and the later EU certainly never ever had that pretence¹⁰. Indeed how could it be otherwise when the key decision-making organ, the Council of Ministers was effectively the (co-) legislator and the repository of executive power and the Commission often considered the key executive organ in the EU also had law-making powers?

Traditionally it was readily assumed that the European Community did not have its own executive power, rather its decisions were in the vast majority of cases executed (implemented) by the Member States and their national executive authorities on its

⁸ P.Craig, “European Governance: Executive and Administrative Powers Under the New Constitutional Settlement” in J. H.H. Weiler and C.L.Eisgruber, (eds.) *Almeuland: The EU Constitution in a Contextual Perspective*, <http://jeanmonnetprogram.org/papers/04/040501-12.html>

⁹ S. Hix, op.cit., chapter 2, p.2.

¹⁰ Lenaerts K. (1991), Some Reflections on the Separation of Powers in the European Community, *Common Market Law Review*, Vol. 28, No 1, pp. 11-35. See further, A. Verhoeven, *The European Union in Search of a Democratic and Constitutional Theory* (Kluwer, 2002).

behalf (subject to the over-riding duty of loyalty copper-fastened in Article 10EU). Rather, it was only in relatively exceptional case (competition policy for example, among a few other policy fields) that the Commission could be regarded as performing functions itself to be considered as innately executive in nature. The Commission can indeed be described as the “core executive” of the Community/Union.¹¹ Its tasks gel remarkably well with what has earlier been described as the central executive tasks in any political system: it initiates legislation and thus up until recently was the only agenda-setter in the EU context; it is the most important executive actor when it comes to implementation of legislation and delegated rule-making; it has a leading role in external relations and is responsible for drawing up and accounting for the Union budget. But unlike national administrations it is not in the business of service delivery and it only has a limited “direct administration” (for example, in the fields of competition policy) much of its focus is on policy-making and regulation. It depends heavily on national administrations in respect of service delivery and enforcement. At the same time, its tasks have increased dramatically in the intervening years without any corresponding increase in resources. As an administration it has become more and more dependent on staff seconded for short periods from national administrations and on short-term contracts with a wide variety of “experts”.

In the words of one scholar “The European Commission is one of the most unusual administrations ever created. It was born as a body that would perform both mundane administrative and overtly political tasks. It has always found it difficult to perform them simultaneously and well”.¹² At the same time it is undoubtedly the case that the European Commission has evolved fairly dramatically in a changed institutional balance within the EU to become much more politicised as a result of the growth in the powers of control of the European Parliament over its appointment and exercise of powers.¹³ The Commission it seems is best understood if compared with a national executive: “The Commission consists of a series of executive politicians who are in charge of various administrative services. Similar to national executives the Commission is authorized to initiate and formulate policy proposals and to implement

¹¹ See, S. Hix, op.cit at p.32.

¹² J.Peterson, “The Santer era: the European Commission in normative, historical and theoretical perspective” *Journal of European Public Policy* (1999) pp.46-65, at p.60.

¹³ See further, G.Majone, “The European Commission: The Limits of Centralization and the Perils of Parliamentarization”, *Governance: An International Journal of Policy, Administration and Institutions*, Vol.15, No.3, (2002), pp.375-392.

policies, or more commonly, to monitor their implementation.”¹⁴ However the Commission does not represent a kind of parliamentary government, even if there are clear signs that the College of Commissioners is gradually becoming more and more dependent on the European Parliament.

Be that as it may the Commission has clearly not got control of all executive tasks performed at the EU level. If we return once more to the definition of executive power I gave earlier in my lecture then it is clear that the Council of Ministers also exercises executive powers and not only in the sense of implementing powers, especially with regard to the newer policy areas since the Treaty of Maastricht. When we consider the delegation of executive powers at the horizontal EU level therefore then an imaginary chain of delegation from the national arena fragments further as de facto there are effectively two non-majoritarian institutions (the Council can in part be classified in these terms, the Commission certainly) performing tasks of an executive nature in the EU and both of them moreover separately delegate discrete executive tasks to a variety of independent non-majoritarian agencies for a variety of reasons. The latter are formally termed the “decentralised agencies” of the European Union.¹⁵ Such bodies are non majoritarian in nature and are established in order to perform defined tasks in a relatively autonomous fashion at the European level. The Council of Ministers can act on its own in establishing non-majoritarian institutions at the EU level without formally involving the European Parliament (or indeed the national parliaments) in its decision to delegate powers. The Commission as a non-legislative power can delegate its powers and tasks to non-majoritarian institutions (with varying degrees of involvement of one or both arms of the EU legislative authority in some instances).

What is fascinating in the newly signed Treaty Establishing a Constitution for Europe (hereafter: Constitutional Treaty) is the attempt to inculcate a clearer distinction between in particular the legislative power and what is in fact the executive power. The executive power is defined more in terms of what it is not: i.e. it is not the legislature and does not adopt legislative acts: it adopts non-legislative acts¹⁶. Despite leaving a lot to be desired in terms of conceptual and terminological precision, it does, for the keen reader, make visible that the non-legislative power in the EU is exercised

¹⁴ See, M.Egerberg, “The European Commission –the evolving EU Executive”, ARENA Working Papers, WP 02/30, <http://www.arena.uio.no/>

¹⁵ See the web site: http://www.europa.eu.int/index_en.htm.

¹⁶ Title V, Chapter I, Article I-35 of the Treaty Establishing a Constitution for Europe.

not only by the Commission but also by the Council (and even in a number of cases by the European Council). This empirical fact is confirmed at several levels in the Constitutional Treaty as signed In Rome at the end of October 2004. Yet the Constitutional Treaty itself falls short of “constitutionalizing” a framework for the administration of the European Union as a whole, despite the fact that its ambition and purpose is to take a unitary and coherent approach to the Union institutional and legal framework. I will return to this point later.

The Control Problem

I will now move to some nuts and bolts of the EU Executive, in particular of the Commission. I am sure you recall the two reports of the Committee of Independent Experts almost six years ago now, which provided a snap-shot of an ill-managed executive power with too few resources to carry out the tasks allotted to it by its political masters¹⁷. Moreover the system of control, both internal and external, over those executive tasks “contracted out” to outside bodies was found to be structurally inadequate. I am sure too that you recollect reading that famous line in the Committees first report which lent itself so effortlessly to our media sound-byte age. It spoke of it, and I quote, “becoming difficult to find anyone who has even the slightest sense of responsibility within the Commission”¹⁸. Harsh words indeed and the problem of a lack of a sense of responsibility for the wider public interest (the *res publica*) is a very real one.

The more immediate problem was the lack of control at various levels and by various persons in the hierarchy with the ultimate control and political responsibility lying with the Commissioners themselves. If I fast forward to the solutions taken in a fairly wide-ranging process of administrative reform then it is clear that the new Financial Regulation which entered into force on 1 January 2003 deserves pride of place¹⁹.

The Committee of Independent Experts accepted in their reports that the Commission will, and I quote “in future, have a huge nature of tasks to perform, the temporary and specialised nature of which requires them to be contracted-out –sub-

¹⁷See the website of the Committee of Independent Experts:
http://www.europarl.eu.int/experts/default_en.htm

¹⁸First Report of the Committee of Experts, p. 144, <http://www.europarl.eu.int/experts/pdf/reporten.pdf>

¹⁹ Council Regulation 1605/2002 of 25 June 2002, on the Financial Regulation applicable to the general budget on the European Communities, Official Journal L 248, Vol. 45, 16 September 2002, 0001-0048

contracting being justified on the grounds of efficiency, expediency and cost". The Financial Regulation mandates the Commission to entrust tasks, when it shares administration, to national public-sector bodies as well as to bodies governed by private law with a public service mission guaranteed by the State²⁰. Moreover, the Commission may entrust purely private sector entities with tasks involving technical expertise and administrative, preparatory or ancillary tasks involving neither the exercise of public authority nor the use of discretionary judgment²¹.

At the same time the Financial Regulation also regulates the manner in which the Commission undertakes its own direct administration. This phenomenon has grown rapidly in recent years, amounting currently to approximately one sixth of the Community budget, in the order of 14 billion Euros per year²². Whereas in the past the Commission chose largely ad hoc arrangements when contracting out wide-ranging tasks to outside bodies without having adequate control and audit procedures in place, new legal structures are now in place to assist the Commission in its exercise of what it perceives to be "non-core" functions. Very briefly a new type of executive agency having legal personality and thus existing separately from a Commission department but remaining under its direct control has been brought to life both in the Financial Regulation itself²³ and in a subsequent Council Regulation²⁴. In terms of legal status executive agencies are Community bodies, with a public service role, albeit possibly of a temporary nature²⁵.

In terms of the tasking of such executive agencies the Commission can entrust the agency with any tasks required to implement a Community programme, with the exception of "tasks requiring discretionary powers in translating political choices into actions"²⁶. The intent is clear, the operation and control in practice may, as history teaches us, prove more difficult. The degree of discretion which will imply a political choice (as opposed to a purely administrative one of how to manage a project or award a contract) will need gate-keepers.

²⁰ Council Regulation 1605/2002, Art. 54 (2c)

²¹ Council Regulation 1605/2002, Art 57 (2)

²² Craig P., *The Constitutionalization of the Community Administration*, Jean Monnet Working Paper 3/03, New York, NYU School of Law, 2003, p. 6, <http://jeanmonnetprogram.org/papers/03/030301.html>

²³ Council Regulation No 1605/2002, Art 54 (2a)

²⁴ Council Regulation (EC) No 58/2003 of 19 December 2002 laying down the statute for executive agencies to be entrusted with certain tasks in the management of Community programmes Official Journal L 011 , 16/01/2003 P. 0001 - 0008

²⁵ Council Regulation No 1605/2002, Art. 55(1)

²⁶ Council Regulation No 58/2003, Art. 6 (1)

In terms of gate-keepers the putative role of the Court of Justice is not unimportant. The relevant provision of secondary legislation does not stipulate that the legality of the acts of the executive agency can be reviewed under the relevant Treaty article (currently Article 230 TEU) on the same conditions as the acts of the Commission itself. Rather a serpentine provision provides that the Commission can itself review the legality of the agency's acts with only that decision by the Commission subject to further appeal to the ECJ²⁷. This novel internal review procedure by the Commission of the legality of agency decisions can be instigated by any person directly or individually concerned or by a Member State²⁸. Moreover the Commission can during this internal review procedure suspend the implementation of the measure or prescribe interim measures or decide that the Agency must amend it in whole or in part which the Agency is then obliged to do, without it itself having any possibility of recourse to the ECJ against that decision²⁹. This may be especially problematic if the internal hearing is by the same DG as set up the Agency with the danger of a conflict of interest. Also there seems to be the problem that where the Commission upholds the appeal there seems to be no recourse to the Court of Justice³⁰.

These agencies are termed by the Commission as “Community bodies”³¹. In fact this seems a misnomer; the term “Commission bodies” is more accurate given the fact that they are exercising specific tasks of implementation and administration directly delegated by the Commission itself to them without intervention of any outside body. The fact that the agencies will have legal status does not alter their basic relationship of dependence on the Commission as neatly illustrated by the question of legal review of the acts of such agencies. In effect therefore the Commission must be regarded as being legally responsible and liable for the legality of the Agencies actions.

The positive aspects of what has been achieved are considerable and I agree with Paul Craig, a law professor at Oxford University, who speaks of the “constitutionalization” of the Community Administration by the provisions of the Financial Regulation³². According to him this important measure introduced –for the first time- overarching principles of constitutional significance framing “the entirety

²⁷ Council Regulation No 58/2003, Art. 22(2)

²⁸ Council Regulation No 58/2003, Art. 22(1)

²⁹ Council Regulation No 58/2003, Art. 22(5)

³⁰ P. Craig, *The Constitutionalization the Community Administration*, Jean Monnet Working Paper 3/03, New York, NYU School of Law, 2003, p. 17

³¹ Council Regulation No 58/2003, Preamble (7)

³² P. Craig P, *op.cit.* at p. 1

of the Community administration”. Note the words Community as opposed to Union administration –I will return to this point later.

The “governance” perspective on Community/Commission bodies

The second strand to the Commission’s reform activity around the question of how it exercises its tasks and functions is the whole governance debate which the Commission initiated with a White Paper in July 2001³³. Governance can to some extent be considered a modern-day “weasel” word –a word that allows its users to avoid the term “government” and hence to duck some inconvenient and complicated problems in the distinction between authority on the one hand and power (or influence) on the other. Talking about governance as opposed to government facilitates a certain tendency to want to conceal the locus of governing authority. The slipperiness of the label calls to mind the conversation of Alice and Humpty Dumpty in Lewis Carroll’s *Through the Looking Glass*:

“When I use a word”, Humpty Dumpty said, in a rather scornful tone, “it means just what I choose it to mean, neither more nor less.”

“The question is,” said Alice, “whether you can make words mean so many different things.”

In a recent Communication on Governance and Development Policy³⁴ the Commission seems –perhaps to its own surprise- to take the advice of Alice to heart. This recent Communication is remarkably more precise than its White Paper on Governance as to what exactly the term “governance” means, namely- and I quote- “The way public functions are carried out, public resources are managed and public regulatory powers are exercised is the major issue to be addressed in that context”³⁵. It is in fact the “how” question of government writ large. One of the absolutely core activities of the Commission is regulation, to such an extent that certain political scientists believe the EU(EC) to be essentially given over to regulatory type activities (“regulatory state” in the jargon). What exactly is meant by the term regulation in this context? Many authors, especially in context of EU studies, limit the use of the term

³³ The White Paper on European Governance of 25 July 2001, COM (2001) 428 final
http://europa.eu.int/comm/governance/white_paper/index_en.htm

³⁴ Communication from the Commission to the Council, the EP, and the EESC: Governance and Development of 20 October 2003, Com (2003) 615 (01)
http://europa.eu.int/eur-lex/en/com/cnc/2003/com2003_0615en01.pdf

³⁵ Communication from the Commission to the Council, the EP, and the EESC: Governance and Development of 20 October 2003, Com (2003) 615 (01), p. 3

to rule-making (as delegated by the Council) and limit that further to consideration of “comitology” type procedures. While this is an important part of the field of study it is a rather narrow approach. On a broader reading regulation means much more than the enforcement and implementation of formal and informal rules. Indeed, “much regulation is accomplished without recourse to rules of any kind. It is secured by organizing economic incentives to steer business behaviour, by moral suasion, by shaming, and even by architecture. On this broadest view, regulation means influencing the flow of events.”³⁶ In fact on this broad view regulation means much the same as “governance” as opposed to “government”. The distinction between governance and regulation is narrowing “as governments shed their responsibilities for service provision and shift more of their energies to regulating the service provisions of other types of actors”, a development that has been dubbed, in the national context, the “new regulatory state”.³⁷

This broader view of regulation as effectively governance is highly relevant to our understanding of the subject in the EU context. Governance as EU observers will know has become quite an obsession with the Commission in recent years. In July 2001 after an extended process of reflection and study it produced a White Paper on the subject and since then it has mapped out a course of implementation of many of the key initiatives contained in that White Paper. The broader role envisaged by the Commission as to the manner in which her activities as a public administration are changing clearly fits within the broad definition of regulation given above. But, and this is crucial, the Commission has been mapping out a path of activities and of steering of economic actors in a manner that cannot readily be regarded as involving delegated functions from the Council (with or without the European Parliament). Instead, it involves a considerable element of the Commission as what one might term an “autonomous” actor or (very loosely) agent working out for herself what her role is in a rapidly changing economic, political and global context.

Let me focus a moment on the narrower issue of the regulatory process. In the vast majority of cases it is the Council who must decide how legislative acts must be implemented. It is in this sense that the Council is often said to possess the original executive power of implementation at the Union level. Already for many years now it

³⁶ See, C.Parker and J.Braithwaite, “Regulation” in P.Cane and M.Tushnet, *The Oxford Handbook of Legal Studies*, (Oxford, 2004), pp.119-145, at p.119.

³⁷ *Ibid*, at p.119.

has systematically delegated this power to the Commission but subject it to certain procedural and other restraints in what has become known as the “comitology” system.³⁸ Simplifying greatly it can be said that the functions of these committees were two-fold: first, by being composed largely of national civil servants to enable the member states to inject a significant element of inter-governmental control over the manner in which the Commission fulfilled the execution of its regulatory tasks. Second, by in addition including-as appropriate- national scientists in their composition they were a valuable and necessary source of scientific and technical expertise that the Commission was unable to supply in-house.

It is often pointed out in this regard that if the direct intervention of the legislative power were necessary for the adoption of such acts of implementation then the activities of the European Parliament might become "congested" which would prevent it from concentrating on its primary constitutional function, namely the legislative function. However, whenever a power is granted to modify a legislative act, it is generally provided for a "heavy" comitology (intervention of a regulatory committee or of a management committee comprising representatives of the Member States³⁹) and of a strict control by the European Parliament, which could include a right of call back for the legislator in certain cases.⁴⁰ Executive rule-making at the European level has arisen as a consequence of the delegation of certain powers from the Council (as the original legislative body) to the Commission so as to allow the latter to take legally binding “technical” or “administrative” decisions⁴¹. With regard to the newer policy fields, especially that of justice and home affairs there was some tendency initially for the Council to keep the rule-making power in this regard for itself. In practice however in recent years the Council has tended to delegate the power to the Commission but constrained by a virtually identical system to that applying in other policy areas.

³⁸ Council Decision of 13 July 1987, 87/373/EEC, (First Decision) and Council Decision of 28 June 1999, 1999/468/EC (Second Decision) laying down the procedure for the exercise of implementing powers in the Commission.

³⁹ See, for instance, the committees in the field of consumer health and of food safety (judgments of the CFI II September 2002, T-13/99, *Pfizer v. Commission*, and T-70/99, *Alpharma v Commission*).

⁴⁰ The idea is that one who gives mandate can withdraw that mandate. See, in that regard, the proposal for the simplification of the adoption procedure for the European legal framework for financial services, better known as the "Lamfalussy method". For an analysis see, N.Molony, “The Lamfalussy Legislative Model: A New Era for the EC securities and Investment Services Regime”, ICLQ (2004) 509.

⁴¹ M. Cini, “Implementation” in M. Cini, *European Union Politics* (Oxford: Oxford University Press) ,2004. pp. 349-364, at p.354.

Comitology refers to “the methods according to which committees composed of representatives of the Member States form a framework within which the Commission exercises the executive powers which are delegated to it”.⁴² A classical legal approach to comitology thus regards it as strengthening administrative governance within the EU. Lawyers have tended to focus on the manner in which (procedures, controls etc) executive power in particular is “delegated” from the Council as principal to the Commission as agent according to the provisions laid down in the text of the treaties itself and later worked out in secondary legislation. One typical requirement is that the Commission be assisted, in its preparatory work, by a committee composed of civil servants from the Member States administrations or external experts from the member States. Very often these legal studies do not range beyond the largely descriptive and even where the title might indicate otherwise do not consider the conceptual framework of “delegation” as such.⁴³ The fact that the Council has when exercising its formal powers of delegation opted to impose procedural controls on the manner that delegated power has been exercised by the delegate (in the form of committees composed of representatives of the Member States),” inter-governmentalising” in the view of some the (delegated) tasks performed by the Commission, has been the main focus of the legal debate. A political science approach on the other hand tends to focus on the fact that intergovernmental bargaining takes place within the stronghold of the exercise of supranational executive power, thus contradicting certain integration theories.⁴⁴ One lawyer, Joseph Weiler, takes this approach to its logical conclusion by positing that as a result of (essentially) comitology one can speak of an “infra-national” mode of governance in addition to a “supra-national” and an “inter-governmental” mode of governance.⁴⁵ This manner of viewing the different types of governance nestling within the EU as such has consequences for the types of normative frameworks that apply.

⁴² J-P Jacque, “The principle of institutional balance” 41 *Common Market Law Review* (2004), pp.383-391, at p.385.

⁴³ One example is provided by the doctoral thesis by Carl Frederik Bergstrom defended at the University of Stockholm, entitled *Comitology. Delegation of Powers and the Committee System* which at no stage considers the meaning and or implications of “delegation of powers” as such.

⁴⁴ See, C. Joerges, “Bureaucratic Nightmare, Technocratic Regime and the Dream of Good Transnational Governance” in: C. Joerges and E.Vos, *EU Committees. Social Regulation, Law and Politics* (Oxford, 2002) at p.10.

⁴⁵ See, J. Weiler, “Epilogue: ‘Comitology’ as Revolution – Infranationalism, Constitutionalism and Democracy” in C.Joerges and E.Vos, *ibid*, at p.339.

For a long time one of the major structural criticisms was of the structural opacity of such committees and their remoteness from any accountability process. Both the numbers and composition of such committees as well as their specific tasks and decisions resided in a rather grey and shadowy zone. In this respect some substantial reforms have been carried out by the Commission over the course of the past few years. Thus, for the first time ever the Commission has recently drawn up a complete list of all the committees which assist it in the performance of its functions and this is regularly updated and published via its Internet site⁴⁶. Moreover the Commission also publishes on its Internet site the agendas and minutes of meetings of such committees.

With regard to the specific “comitology” committees the inclination of the Commission has been not to regard them as part of the Commission itself given the fact that they were staffed by the Member States and that the Commission’s role was more of a facilitator rather than as directing their work. Nevertheless in an important judgment of the Court of Justice in 1998 in the *Rothmans* case the Court, after an extensive examination of the issue, concluded that such committees were in fact –and ironically given their original control function- to be regarded as part and parcel of the Commission itself⁴⁷. This at least has the merit of making it clearer in terms of ultimate responsibility that the buck stops with the Commission itself.

In its White Paper on Governance the Commission flagged the fact that in its view there was a need for more independent and autonomous structures in the form of European Regulatory Agencies that would be delegated with certain specific regulatory functions⁴⁸. This type of agency would go far beyond those existing independent Community Agencies which have been conferred with more limited tasks, largely in the field of information collection and sharing and indeed in the Commission’s view would replace to some extent at least the current “comitology” structures. Such a perspective obviously represents a quantum leap in the Commission’s thinking with considerable structural and accountability implications relating to the role which such centralised EU Agencies with regulatory powers would play in the definition of rules in defined (often technical) areas.

⁴⁶ List of Committees which assist the Commission in the exercise of its implementing powers, OJ 2000/C/ 225/02.

⁴⁷ Case T-188/97, *Rothmans International BV v Commission of the European Communities*, Judgment of the Court of First Instance of 19 July 1999, ECR 1999 Page II-02463 , par. 49

⁴⁸ The *White Paper on European Governance* of 25 July 2001, COM (2001) 428 final, p. 24

The Commission, in December 2002, as part of the implementation of its White paper on Governance, the Commission issued an important communication on the operating framework for such European Regulatory Agencies⁴⁹. I wish to dwell on certain aspects of this proposed operating framework for a moment. In the first place the establishment of such Agencies is to be seen as part of the Commission's attempt to re-focus on what it terms its "core functions" of policy-making and policy enforcement. They will have –this is the intention- a significant and autonomous role in performing essentially what can only be regarded as part of the Commission's own executive duties. In other words, in specific policy sectors, these Regulatory Agencies will enact regulatory instruments subject to a general framework of conditions governing their creation, operation and supervision. The specific intention is that certain of these regulatory agencies will be empowered to adopt individual decisions binding on third parties in the specified policy area. The main advantage of using such agencies, and I quote the Commission itself, that "their decisions are based on purely technical evaluations of very high quality and are not influenced by political or contingent considerations"⁵⁰.

Unlike the new executive agencies which I referred to earlier they will be organisationally and functionally autonomous of the Commission and its departments, although provision may be made for the Commission to appoint a certain number of the members of their Administrative Board as well as direct participation in the appointment of the Director. In terms of direct political supervision some role is envisaged for the Council and the European Parliament, in the form of hearings of the agency Director and Annual Reports. Judicial supervision, in addition to an internal review procedure, will be provided as might be expected under the general framework of the Courts in Luxembourg and their general jurisdiction. The intention clearly is that the Commission will not be legally or indeed politically responsible for the legality or otherwise of their actions.

Let me now round off my discussion of the Commission and the overall reform of the manner in which it exercises its executive functions. Rather like an onion the Commission is engaged in a process of shedding layers or skins in an exercise which

⁴⁹ Communication from the Commission of 11 December 2002, *The Operating framework for the European Regulatory Agencies*, Com (2002) 718 final
http://europa.eu.int/comm/governance/docs/comm_agence_en.pdf

⁵⁰ Communication from the Commission of 11 December 2002, *ibid.* p. 5

is designed to produce a new slim-lined core bureaucracy focussing in a visible and coherent fashion on its “core functions”. In so doing it is right now in the middle of a sophisticated differentiation exercise entailing the establishment of new structural layers enjoying various degrees of autonomy from the core Commission bureaucracy.

There are several risks involved in this latter exercise none of which have been properly highlighted in the debate to date. First and not least, accountability may well be at risk. This is not so surprising given that the accountability of the Commission remains problematic at the level of the EU itself, although definite improvements have been made. Thus the fact that the political responsibility of the Commissioners themselves, both individually and collectively, is incrementally being sharpened and refined, also in the current constitutional debate, represents real progress. At the same time what remains problematic within the Commission itself is the internal accountability of the bureaucracy to the responsible Commissioners, both individually and collectively, as indeed the Eurostat scandal once again highlights. How much more complicated is this relationship where the bureaucracy in question is at one step removed, such as the comitology committees or the new executive agencies?

Moreover it is suggested that with regard to the new regulatory agencies the accountability question has not been properly thought through. Is the future for the European Union indeed to be that of what Majone has referred to as the “regulatory state” with non-majoritarian institutions taking potentially far-reaching decisions with only the weakest of links to a directly elected Parliament⁵¹? Or must we indeed focus much more squarely on the overall governing framework and seek to safeguard basic principles of parliamentary and participatory democracy in line with the promise held out in Title VI of the Constitutional Treaty on the “democratic life of the European Union”⁵²? I believe this to be one of the most crucial tasks ahead-Constitution or no Constitution.

Second, and not unimportantly the principle of legality may be at risk. Finally the risk is of the fragmentation of the executive function at the level of the EU itself despite Commission rhetoric that it will safeguard what it terms the unity and integrity of the executive function at Community level. Moreover this risk is exacerbated considerably by the fact that the Commission and its agencies and committees, of

⁵¹ See. G.Majone, *Regulating Europe* (Londodn, 1996).

⁵² Art. I- 46, Title VI “The Democratic Life of the Union”, *Treaty establishing a Constitution for Europe*

whatever type, are not the only executive actors at the level of the European Union. Rather during the course of the past ten years in particular the Council of Ministers and bodies and organs established by the Council also exercise tasks of an executive nature and must be considered when looking in a holistic fashion at the manner in which the EU executive function is exercised. The fact is that this incremental and not highly visible phenomenon is either over-looked or, more likely, pragmatically ignored, by a Commission desiring to be seen as the sole locus of executive power in the Union. Basically the point is that we could (if time and space permitted) conduct the same exercise with regard to the Council as we have just completed with regard to the Commission. The difference is that there is no Committee of Independent Experts to give objective visibility to the real problems within its own administration. Nor has a serious process of internal administrative reform been undertaken in anything like the same fundamental manner.

A brief consideration of the executive tasks of the Council

It is indeed not customary to regard the Council as exercising administrative and executive power in any kind of significant manner. That this has been the case effectively for the past decade, since the changes introduced by the Treaty of Maastricht, leads to the question, given the nature of the Council as an inter-governmental body composed of Ministers and subject to a rotating Presidency (every six months) ,how it could in practice perform administrative executive-type tasks? The answer lies to a significant extent in a more sophisticated appreciation than has often been the case hitherto, of the driving role played by the bureaucracy (permanent officials) and by the national civil servants who sit permanently in the Council's under-belly of working parties, co-ordinating committees and so on and so forth in driving forward specific measures (within the broad parameters of policy set by the Member State holding the Presidency at a given moment in time).

The General Secretariat of the Council has for example evolved in recent years from a rather passive role to a much more active one in assisting the Presidency "not only in the application of procedures, but also in preparing for substantive negotiations; at the same time, the role of the Legal Service has become established and has developed to encompass intergovernmental conferences; in general, the six-monthly rotating Presidency with its increased role has made it more and more necessary to call upon the General Secretariat's assistance in ensuring continuity and

efficiency of work by giving successive Presidencies the benefit of the experience it has accumulated over the years”⁵³. Political scientists are beginning to recognise the fact that the General Secretariat of the Council has indeed a very pivotal role to play in behind the scenes outcomes and even has shifted outcomes closer to its own vision of the manner in which the EU has evolved on a number of occasions⁵⁴.

It has incrementally acquired a role which parallels that played by the Commission administration in other (EC) policy areas. The fact that, for example, the development of significant aspects of CJHA policy-making has been based on action plans, such as the Action Plan on Organized Crime⁵⁵ or the Tampere Action Plan is closely linked to the emergence of a more autonomous role for the Council General Secretariat. Thus the Secretariat has been charged with the task of implementing various recommendations contained in the High Level Report. In that context it has taken initiatives independently of the Member States themselves. More recently a number of Council instruments have conferred the Council (in practice its Secretariat General) with tasks concerning the evaluation of implementation measures very similar to what is carried out by the Commission with regard to the classic EC areas. Moreover, the appointment of a CFSP High Representative (who at the same time serves as a Secretary General of the Council) provided for in the Treaty of Amsterdam made this point particularly clear, as the relevant tasks include the framing, preparation and implementation of the Union’s foreign policy decisions⁵⁶. In addition to the normal resources of the General Secretariat he has at his disposal a “policy planning and early warning unit” (PPEWU)⁵⁷. This has grown over time to include responsibility over an entire military structure which is currently under construction as well as a category of “non crisis military management” (in other words, policing, law and administration).

What had begun to emerge in the legal practices over the years with regard to the executive functions of the Council has been confirmed in the provisions of the

⁵³ Trumpf/Piris Report, *Operation of the Council with an Enlarged Union in Prospect*, Report by the Working Party set up by the Secretary-General of the Council, CFSP Presidency Statement (Brussels, 1999).

⁵⁴ See, for example, D.Beach, “The Unseen Hand in the Treaty Reform Negotiations: the Role and Influence of the Council Secretariat”, 11 *Journal of European Public Policy* (2004), pp.408-439 and T. Christiansen, “Out of the Shadows: The General Secretariat of the Council of Ministers” R.M. van Schendelen and R.Scully (eds), *The Unseen Hand: Unelected Legislators in the EU* (London, Frank Cass, 2003) p. ?

⁵⁵ Action plan to combat organized crime (Adopted by the Council on 28 April 1997), OJ C 251 , 15/08/1997 p. 1 - 16

⁵⁶ Art. 26 (ex. Art. J.16), Consolidated Version of the Treaty of the European Union

⁵⁷ Declaration No 6 of Treaty of Amsterdam (Declaration on the establishment of a policy planning and early warning unit)

Constitutional Treaty. It is clear that the Councils executive powers do not only involve implementation of laws. Indeed, the recent practice of the Council has been to delegate such implementation tasks to the Commission, even with regard to the newer policy areas of justice and home affairs. In an increasing number of cases the Council as an executive power has a function independent of the Legislature. This is the case of acts in the CFSP area, by which the EU defines its policy towards third countries⁵⁸, of some acts in the field of police cooperation⁵⁹, as well as of acts concerning the working the Economic and Monetary Union, which aim at reacting to particular situations that are hardly liable to ex ante legislative regulation⁶⁰. This can be termed the "autonomous" role of the Council acting as an "executive" power. That includes operational activities which are given a certain pride of place in the provisions of the Constitutional Treaty. The Final report of the European Convention's Working Party on Justice and Home Affairs underscores the need for a clearer distinction between the Council acting in its legislative capacity and the Council exercising specific executive functions which specifically seems to turn on what is termed "operational collaboration". This brought with it the creation of a more efficient structure for the co-ordination of operational co-operation at *high technical level* within the Council, namely the merging of various existing working groups and redefining the mission of the so-called "Article 36 Committee", so that it would in the future focus on co-ordinating operational co-operation rather than becoming involved in the Council's legislative work. The idea that this reformed structure would focus on the co-ordination and oversight of the entire spectrum of operational activity in police and security matters (inter alia police co-operation, fact-finding missions, facilitation of co-operation between Europol and Eurojust, peer review, civil protection) took root in the Draft Constitution as proposed to the IGC and ultimately in the final text of the Constitutional Treaty. But as the CIE put it in their second report: "the distinction between formulating and implementing policy, namely between policy and operational matters is a falsely rigid one, difficult to define in principle and even more difficult to apply in practice"⁶¹.

⁵⁸ Art III-222 and Art. III-198(1), Treaty establishing Constitution for Europe

⁵⁹ Art. III-176(3) and Art.III-178, Treaty establishing Constitution for Europe

⁶⁰ Art III-71 (3), (4) and Art. III-72, Treaty establishing Constitution for Europe

⁶¹ See Committee of Independent Experts (1999), Second Report on "Reform of the Commission-Analysis of current practice and proposals for tackling mismanagement, irregularities and fraud", Volume II, para. 7.9.1., available at <http://www.europarl.eu.int/experts/pdf/rep2-2en.pdf>

Another aspect of the wider institutional architecture of the Union is the incremental creation and tasking of multifarious (autonomous) EU Agencies and miscellaneous bodies or quasi-autonomous “committees”⁶². For example, the EU Satellite Center, is an independent organization with its own legal personality “while retaining close links with the Council...”⁶³. Europol is probably the best known example of an independent organ set up by the Member States with -rather weak- links to the Council whose tasks have been incrementally expanded to cover those of a more operational nature such as its participation in so-called ‘Joint investigation teams’. It was established by multi-lateral Convention under the terms of the Maastricht Treaty. Europol has in recent years quite extensively exercised a power to negotiate and conclude international agreements with third countries and other international organisations. Thus the Director of Europol has been authorised by the Council to conduct secret negotiations with the United States on various issues, including the exchange of personal information⁶⁴. The results of these negotiations were presented back to the Council for the go-ahead and the Director of Europol was again authorised to proceed to signing the agreement. Not only was all of this conducted in secret with virtually no effective input by parliaments, be they European or national, but it speaks volumes about the manner in which the traditional role of the Commission has been usurped in the field of external relations. But the life-world of these Agencies etc and their institutional and legal practices have been largely ignored by the provisions of the Constitutional Treaty.

In the past months and years a whole series of new Agencies such as European Food Safety Authority, European Maritime Safety Agency, European Aviation Safety Agency and the European Agency for the Management of Operational Co-operation at the External” have been created by the Council. Unlike the Commissions’ attempt to structure and rationalize its Agencies the Council seems to work on a purely *ad hoc* basis inventing a new or modified formula every time thus contributing considerably to the overall structural opacity. Time does not permit me to go further in this context in my analysis of these new agencies⁶⁵.

⁶² http://europa.eu.int/agencies/index_en.htm

⁶³ <http://www.eusc.org/html/centre.html>

⁶⁴ Europol Press Releases, 20 December, 2002

⁶⁵ But see further on these agencies, D.Curtin, “Delegation to EU Non-Majoritarian Agencies and Emerging Practices of Public Accountability” in: D.Gerardin and N.Petit, *Which Regulatory Authorities in Europe?* (Routledge, publication forthcoming, 2005).

My purpose in this lecture has been to sketch a picture of how the Union executive and its administrative arm is evolving, spanning not only the Commission but also very much the Council and potentially in the future too the European Council. This picture seems to be consolidated and expanded in the provisions of the Constitutional Treaty. In a recent book Peter Ludlow describes the European Council as and I quote: “the arbiter of systemic change, the principal agenda setter, the ultimate negotiating body and the core of the EU executive”⁶⁶. Nevertheless, as Javier Solana the Council Secretary General and the High Representative recently noted that the European Council “is increasingly asked to spend time on laborious low-level drafting work which adversely affects normal Community procedures”⁶⁷. These knotted roots are thriving in the very under-soil that the Constitutional Treaty, now signed and if ratified, is being placed.

Concluding remarks.

So where does this leave us in the European Union with our newly signed Constitutional Treaty? In my view we have a Constitutional Treaty which will not be written in stone for say the next 50 years, a hope expressed by one of its most influential architects, Valerie Giscard D’Estaing. I don’t think this Constitutional Treaty is even a framework for the next 10 years. But that does not make me a Euro-sceptic or an opponent of the Treaty/Constitution. I am certainly neither. Rather it reflects an understanding of the EU coming from behind in many structural respects in its nascent practice of political integration. It has now discussed and resolved a number of not unimportant issues in this regard but it reflects in part the bare and partial trunk of our olive tree and not the branches and not the fruit. At the same time it must be recalled that without a solid trunk the branches and fruit can have no separate existence.

The manner in which powers and tasks are being delegated in practice to a whole series of non-majoritarian agencies established and active at the European level of governance is a striking illustration of the development in practice of institutional structures outside the formal Treaty framework. Still today there is no legal basis in

⁶⁶ P. Ludlow, *The Making of the New Europe: the European Councils in Brussels and Copenhagen 2002* (Brussels, Euro Comment 2004) p.12.

⁶⁷ Report by J.Solana, “Preparing the Council for the Enlargement”, Brussels, 11 March 2002, Council of the European Union, Doc.No. S0044/02, available at:

http://europa.eu.int/futurum/documents/speech/sp070302_2_en.pdf

the constituent Treaties (nor the Constitution) enabling the structural establishment of such European-level Agencies. Yet in practice it is not just the Commission delegating functions to executive and regulatory agencies as part of its ongoing re-focusing on its core (political) tasks it is also (and increasingly) the Council delegating or giving executive and operational-type tasks to European level agencies that previously belonged to the Member States. At the same time there is a rich seam of legal and institutional practices surrounding the creation and functioning of such European level agencies.

At the time when the European Constitutional Treaty adopts a horizontal approach to the European Union, doing away with the divisive “pillars” and introducing a single system of legal instruments and of decision-making procedures, the time has come to lift the veil on the agencies and view in a horizontal fashion their activities, tasks and accountability provisions. In this view it can no longer make sense to “constitutionalise” the Community administration – the same needs to happen with regard to the EU-wide *Union* administration. Moreover in that context it may be especially relevant to develop coherent thinking on an understanding of public accountability for action and inaction that exists alongside more vertical forms of accountability via the mechanisms of representative democracy. This is all the more the case in a political system which is not grounded (and probably never will be) within a parliamentary system of governance and where the distance between the evolving public administration (and its outposts) at the European level and its “subjects”, the citizens of the Member States of the EU, is particularly wide and the structures of access and voice both under-developed and mightily complex.

Like any good gardener we now need to turn attention to the fertilizer which can reach deep into the sub-soil. We need overarching laws (Financial Regulations, access to information provisions, scrutiny mechanisms and all the rest), and principles and ethical guidelines that will embrace holistically all the separate parts of the plural Union executive. But we also need gardeners with a rooted knowledge but a general vision of the landscape who can emerge from the trenches of their rigid specializations to survey the battlefield. The foundations may well be formed in synergy with national political and administrative traditions and cultures.

In turning to landscape architecture maybe the dramatic new Dutch Embassy in Berlin, designed by a world famous Dutch architect Rem Koolhaas, can provide inspiration. The project was described by one reviewer as being an exercise in

communication, "...doors slide open as you approach, the mobile steel plate of the massive front door metaphors the state's legislative fluidity, and everywhere there are views out: through glass flooring, windows and cuts in the building's structure. Even the roof peels back". The fact that this building is of a structure that allows the citizens and their representatives to see and understand the inner workings of the buildings, entrails and all, of this glass-walled structure should contain an intellectual message and political challenge for the evolving politics of our times.