

Conclusion: Evaluating the Forces of Interstitial Institutional Change

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The articles in this volume provide evidence supporting the claim that organisational actors within the EU do engage in contestation over competences over a wide variety of legislative and policy-making procedures. Far from defining EU politics, treaty texts are only their beginning. The articles also provide evidence that informal changes may be translated into treaty change at a later date, although the evidence for this is more mixed. The various authors seek to take our initial arguments as a starting point to build on and point to important ways in which these arguments can be amended or extended. Nonetheless, it is clear that closer attention to processes of contestation and of interstitial change holds great promise as an approach to the understanding of EU politics.

In the introduction, we laid out a set of arguments regarding interstitial change in the European Union. The different articles in this volume have, in different ways, sought to assess the applicability of these arguments to different areas of institutional politics in the European Union. In this concluding article, we summarise and assess their findings. What do the different contributions have to say with regard to both the assumptions and explanatory model that we offer in the introduction? What differences can we observe between institutional politics in different areas of EU decision-making? What are the underlying reasons for these differences?

We begin by examining whether or not the empirical findings in this volume call for any revision of the fundamental assumptions of our argument. We then examine how the different contributions speak to the two key questions that our Introduction set out. First, under which conditions does interstitial change occur in the different areas of decision-making; what is the underlying causal process that determines whether it occurs; and which kind of interstitial change occurs? Second, where interstitial change of institutional rules takes place, what are the conditions

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under which it is formalised in a subsequent revision of the formal rules governing the European Union; and what are the underlying causal processes that determine whether it is formalised or not?

Initial Assumptions

We started out with the assumptions that (a) the organisational actors involved in the application of the formal rules seek to maximise their institutional competences and for this reason engage in institutional politics in order to widen those competences, and (b) that this is possible given that the formal institutional rules at a particular point in time and then applied on a daily basis are ambiguous or incomplete contracts. The contributions to this volume share these assumptions in part, but also reconsider them in interesting ways.

First, our argument that actors are fundamentally motivated by the desire to maximise their influence over policy by strengthening their decision-making competences is a necessary simplification which, like all necessary simplifications, does violence to reality. All of the contributions provide strong evidence that competence maximisation is a powerful and, indeed, sometimes overwhelming motivation. But as James Caporaso points out here, there is also some evidence that actors may be motivated by other factors. Carl-Fredrik Bergström, Henry Farrell and Adrienne Héritier provide a critique of approaches that treat delegation as purely a matter of reducing transaction costs and offer a detailed account of the politics of the struggle over whether and how to legislate or delegate. Yet some attention to transaction costs is necessary in order to understand why principals might want to delegate in the first place. Catherine Moury, too, discusses this problem, arguing that we might usefully distinguish between the member states' interests in renegotiating the Treaty (where some do wish to delegate extensive powers) and their interests as collectively represented by the Council (which has often sought to 'claw back' authority).

Moury also points to some interesting problems in the notion of ambiguity itself. She shows that conflicts over a rule and conflict among rules may occur if an institutional rule seems to be unambiguous under one definition, as long as the rule does not preclude the emergence of a parallel interstitial (informal) rule, which may contradict the first (formal) rule and overturn it. Thus, in Moury's account, the selection of a candidate for the Presidency of the Commission is clearly subject to the control of the member states in the Treaty. This did not prevent the Parliament from introducing a parallel informal institutional rule providing for a hearing for the presidential candidate in the plenary of the Parliament and subsequent expression of an opinion. This form of ambiguity is endemic – it is difficult to imagine that even the most precise of rules will have any success in precluding the emergence of all possible parallel competing or modifying interstitial informal rules.

In one sense, this is an instance of rule ambiguity and incompleteness. The emergence of such informal rules is possible because they are not clearly forbidden by the formal rule in question, and no formal rule can possibly exclude all the potential informal rules that might challenge it in practice. But in another sense, this kind of incompleteness is different from, and more radical than, the more limited form that is usually discussed under the rubric of incompleteness.¹ In that sense Caporaso (2007) is right when he argues that institutional rules, by definition, are never complete and indeed should be incomplete.

Thus, there is strong support for the argument that competence-maximising motives and rule incompleteness are key factors driving institutional politics. They do not, however, preclude the possibility that other forms of motivation which may be clearly exogenous to the model, such as new functional exigencies in the external environment, or other forms of incompleteness than those that we theorise here, play an important role in determining outcomes.

Institutional Change between Treaty Revisions

The first part of our argument concerns the kind of interstitial changes that are likely to emerge as a result of the incompleteness of treaty texts. In the Introduction, we argued that interstitial institutional change would reflect the relative bargaining strength of actors, as measured by (a) the effective veto rights that the formal institutional setting at *tI*, the time of bargaining, provided them with, and (b) the attractiveness of the fall-back position available to actors, i.e. their time horizon and vulnerability in the event of a breakdown of negotiations. We argued that there are two main processes of interstitial institutional change: bargaining over informal rules that compete with, complement or specify existing formal institutional rules (Farrell and Héritier 2003); or selection of one of several possible lower-order rules covered by one and the same higher-order rule (what Jupille 2007 describes as procedural politics). Both processes may lead to rule change.

We find confirmation from the empirical findings in this volume of the claim regarding the first causal mechanism that formal institutional rules (which are incomplete contracts) in their daily application may give rise to informal institutional rules and that these informal rules reflect the relative bargaining power of the actors involved. The authors' contributions and our own framework focus primarily on informal rules that do not merely complement or specify existing formal rules so as to reduce transaction costs and increase efficiency. Rather, bargaining over informal rules may lead to changes in actors' policy roles. In short, they may have redistributive consequences, and thus are likely to involve contestation. Rasmussen shows how the Commission's effective right of initiative has been reshaped through a bargaining process that has led to a 'reinterpretation and renegotiating of the agenda-setting powers of the three EU bodies in practice diminishing the

Commission's and increasing the Council and Parliament's powers'. Farrell and Héritier (2003; 2007) have shown how ambiguities in the Maastricht and Amsterdam Treaties led to bargaining and the creation of informal institutions shifting the power in favour of the Parliament. Moury finds strong evidence that the Parliament has pushed through interstitial institutional change that has culminated in an effective investiture process for individual Commissioners, again a power shift in favour of the Parliament. Bergström, Farrell and Héritier discuss the only modestly successful efforts of the Parliament to gain greater influence over comitology. Bouwen shows how Commission–Parliament bargaining has shaped procedures for the consultation of civil society.

Interestingly, and somewhat contrary to our expectations, there is also evidence that actors can occasionally win political concessions in negotiations even when they do not have any effective veto power. Moury demonstrates that the Parliament was very successful in bargaining with the Commission in order to achieve informal institutional gains before it acquired effective veto power. A new informal rule was developed by the Parliament, which provided that the candidate for the Presidency of the Commission was to be subject to a hearing in the Parliament's plenary. However, as Moury argues, the Parliament did not have any bargaining power *vis-à-vis* the Commission; it could neither block nor delay the process of nominating a presidential candidate. Rather, the rule emerged from voluntary collusion between two actors, the Parliament and the Commission. The Parliament unilaterally demanded the rule and the Commission obliged. Why did the Commission do this? One hypothesis might be that the Commission believed that the Parliament would be more likely to cooperate with the Commission's legislative programme if the Parliament won this concession. Another is that it wished to retain the Parliament's support in its more general set of disputes with the Council. It is worth noting, however, that transforming this bilateral understanding between the Parliament and Commission into an effective role for the Parliament in confirming the President required tough bargaining with the Council, and a threat by the Parliament to veto the entire Commission if it did not get its way. As Crawford and Ostrom (1995: 584) argue, the constellation of actors subject to an institution is important – a rule that was easy to negotiate with the Commission proved rather more difficult when the Parliament sought to extend its application to effectively limit member state choice, too.

Similarly, concerning comitology, Bergström, Farrell and Héritier describe the introduction of the *droit de regard* between the Commission and the Parliament, in which the Commission relatively easily conceded that the Parliament should have all information regarding comitology decisions from the very beginning. Again, however, formalising this informal rule proved lengthy and difficult when the member states became involved.

We furthermore argue that the bargaining power of an actor to press for interstitial rule changes that favour its interests is increased when it can use

its rights under the Treaty to credibly threaten to block or delay decision-making. Bergström, Farrell and Héritier on comitology and Moury on the right of investiture of the Commission demonstrate that once the Parliament had gained the legal right to delay or even block the decision-making process, it had much more bargaining power to obtain the kinds of institutional changes that it wanted. In the case of comitology, the Parliament had more success in pressing its institutional objectives in comitology after it had been granted new powers under codecision. In the case of the investiture of the Commission, once the Parliament had gained the right to be consulted regarding the candidate for the Presidency, it had the power to delay and when it had gained the right to confirm the Presidential candidate, the door was open to an effective right to confirm individual Commissioners. Hence our hypothesis that a capacity to delay or block a decision-making process in one arena increases the bargaining power of an actor in a linked arena – and accordingly his or her power to shape informal rules in that later arena – seems to enjoy substantial empirical support.

This hypothesis is also borne out empirically by Farrell and Héritier on codecision and early agreements. The Parliament very skilfully used its power to delay and block legislation in order to strengthen its position *vis-à-vis* the Council in the codecision procedure. This led, in turn, to the development of the informal rule of early agreements, after an initial phase of conflict in which the Council attempted to minimise the ability of the Parliament to shape legislation under codecision. Once the Council had been forced to accept that the Parliament would play an important role in shaping legislation, it had a strong incentive to agree to procedures that would streamline decision-making by allowing negotiations between the two parties to commence at an early stage.

But not all informal interstitial rules are easily agreed upon. In the case of the informal institutional rule regarding consultation with civil society organisations, Bouwen shows that the Parliament rejected the informal institutional rule proposed by the Commission precisely because it feared that it would lose power and influence. It successfully bargained with the Commission, threatening not to approve the proposed rule in order to pressure the Commission into changing its proposal. The Commission obliged, omitting those parts of the proposal that had received most criticism from the Parliament. Again, we see support for our hypothesis that an actor's influence on the shape of an informal institutional rule depends on its ability to delay or block a decision.

Turning to the second causal mechanism underlying the emergence of interstitial institutional change, i.e. procedural politics, Jupille argues that in cases in which there are several institutional rules to choose from, each involved actor seeks to obtain the use of the institutional rule that maximises its own competences. Jupille offers striking statistical evidence to bear out this argument. 'Procedural politics' appears to be endemic in situations in

which there is some degree of ambiguity over the appropriate legal base for a given item of legislation. He finds strong empirical evidence to support the contention that procedural politics is more likely where there is ambiguity over the legal basis than where there is not. He also finds that the desire of actors to maximise their competences has strong predictive power; this 'alone correctly predict[s] 79 per cent of all revealed procedural preferences where fights over rules occur'.

Bergström, Farrell and Héritier also show how selection over rules comes into play in comitology: both the Commission and the Council have pushed at various stages for comitology procedures maximising their particular influence. In the battles over comitology in the 1990s, the Parliament came to the Commission's aid, pushing for less restrictive comitology procedures that would give the Commission more freedom and, not coincidentally, indirectly strengthen the Parliament. Moreover, the Commission, Council and (increasingly) the Parliament have fought not only over the specific procedures chosen in a given instance, but over the wider menu of choices, seeking, in the case of the Parliament and Commission, to take the more restrictive procedures off, or, in the case of the Council, to keep them on the table. In some cases of conflict the actors have turned to the European Court of Justice to solve the conflict, but the ECJ has been highly reluctant to go against the member states' wishes, given the sensitivity of the issue area and the lack of treaty text to interpret.

In the area of comitology, not only is there choice between different possible comitology procedures, but between delegation (comitology) and legislation, as such, as discussed by Bergström, Farrell and Héritier. They argue that when offered a choice between legislation and delegation, the actors seek to choose the avenue of decision-making in which they have the more extensive competences. Thus, the Parliament, to protect its institutional rights in legislation, seeks to stem an expansion of delegation; the Commission favours delegation if the controlling powers of the Council are limited; and the Council prefers forms of delegation in which its formal powers are extensive. Again, in the case of conflict, actors can (and have) asked the ECJ whether delegation or legislation is more appropriate. We expect that this will continue to be a key source of antagonism between Council, Parliament and Commission.

Translating Interstitial Change into Treaty Revisions

The second key question that our arguments seek to answer is when these interstitial changes in institutional rules, are, or are not, translated into formal changes in future rounds of treaty revisions. First, we argue that in cases in which all actors, i.e. member states, empowered to decide agree that it is appropriate to formalise an interstitial institutional practice that has arisen, it will be formalised. Similarly, when all member states are opposed to such a practice, they will bring through formal institutional changes to

overturn it. When member states are in disagreement, they are likely either to let the informal institution continue as an informal institution, or they will refrain from using it. The first is more likely in the absence of external pressure from organisational actors who can make credible threats), while the latter will occur where there is pressure from organisational actors who can make credible threats.

These claims receive some support from Farrell and Héritier's findings regarding the formalisation of early agreements. In this case, all actors agreed to formalise the informal rule of fast-track legislation because it was an efficient solution given that the Council had already conceded a substantial role to the Parliament in the codecision process. In a second instance, the Intergovernmental Conference effectively recognised an informal rule pushed by the Parliament that prevented the Council making use of its right to reintroduce the common position after a failure of the conciliation procedure, because the Parliament threatened to block the codecision procedure by regularly voting down the reintroduced common position.

The claims also receive some support from Moury, who demonstrates how the Parliament has succeeded in turning informal gains into formal institutions in several important instances. In contrast, Bergström, Farrell and Héritier argue that the Parliament did not succeed in having the informal *droit de regard* over comitology that the Commission had granted it formalised until quite recently, despite its best efforts. One reason was the lack of a favourable formal treaty provision that would have lent itself to a more extensive interpretation through bargaining. Another was the lack of favourable ECJ decisions. Moreover, the designing actors, i.e. member states, were not willing to formalise an institutional rule bilaterally agreed upon by the implementing actors, i.e. the Parliament and the Commission.

However, our contributors also offer some important qualifications to our arguments. Rasmussen asks some important questions about actors' underlying preferences for formalisation. She argues that actors only have an incentive to formalise existing informal institutional rules if the costs of formalisation are not too high, the effects of informal rules are uncertain and there are no undesired side-effects. She shows that the formalisation of the informal right of initiative as it exists for the Council and the Parliament has not been sought because the costs of informality are not considered to be too high, and because there would clearly be undesirable side-effects. Moreover, the application of the informal rule produces little uncertainty.

Her explanation for a preference for formalisation of an informal rule could be applied to other areas of institutional politics as well. Bouwen argues that the Commission has not sought a formalisation of the informal rule of consultation with civil society, apparently because it fears that this would have unfavourable side-effects, i.e. the questioning of its right of initiative. In contrast, Bergström, Farrell and Héritier show that the Parliament sought to obtain a formalisation of the *droit de regard* because the Commission did not keep its informal commitment to brief the

Parliament promptly and regularly on comitology decision drafts. Here, the Parliament was in part motivated by the uncertain application of the informal rule to move towards a greater degree of formality.

One could go further in refining the argument over actors' preferences regarding formality and informality. Negotiation theory argues that actors need to prioritise their preferences in order to achieve them. Trying to maximise several institutional gains at the same time weakens your negotiation position. Therefore, actors tend to establish an order of ranking of priorities. In institutional battles, interviews with Parliament officials suggest that the most important issue was codecision. The right of investiture of the Commission was also important; comitology² and the right of initiative were less so. Thus, the lack of formalisation in the latter instances perhaps also reflects the relative priorities of the main *demandeur* of change. This said, integrating these insights with the simpler theory that we have presented here is a task that goes considerably beyond the of this volume.

Jupille presents some support for the framework, but also some interesting conundrums. On the basis of an initial analysis of the statistical evidence, he finds clear indications that interstitial developments have implications for formal institutional change, but also shows that technical disputes appear to be more important than political ones. He recommends more extensive testing on a wider dataset. If his results were to be borne out on a wider scale, they would call some of the underlying logic of our framework into question. This said, as Jupille notes, these findings are at odds with other research (including other articles in this volume) which strongly indicates that the Parliament has won important and substantive political gains.

Finally, Moury points to a dynamic that the Introduction does not discuss. The fact that informal institutions already exist means that formalisation may be relatively 'cheap' and more easily conceded by those opposed to it. In a sense, as Moury argues, this reflects Moravcsik's (1993) argument about the dynamic of IGC negotiations. However, in an even more important sense it undercuts it; the 'preferences' of states in this instance are not determined by domestic factors, but instead by factors endogenous to the process of European integration. The reason why concessions are 'easy' is because they reflect gains that have already been made by the Parliament or other actors.

We agree with Caporaso's cautionary remark that the argument of endogenous institutional change should not be pushed too far by providing an exclusively endogenous account of institutional change. An entirely endogenous account of institutional change would be a chimera; clearly, there has to be some interaction between institutions and their environment for change to occur. Indeed, our theory invokes precisely such interactions when it refers to the concept of ambiguity. Rules are ambiguous because they have to be applied in an environment which has changed in ways that

were not anticipated *ex ante*. It is exactly because of this collision between rules and external environment that there are opportunities for actors to reshape rules to their advantage.

Nonetheless, the theory that we present is quite different in its logic and implications from theories that see institutional change as a simple and direct consequence of changes in external factors, whether these factors be member state interests as in the arguments of Moravcsik (1993), or in functional needs (as in much of the early literature on economic integration). Even if a purely endogenous theory of change would not work, currently dominant theories place far too little emphasis on endogenous factors, and on the ability of actors within the legislative and policy processes to creatively reshape institutions.

A New Research Agenda

The contributors assembled here demonstrate the promise of a research agenda examining conflicts over competences in the European Union. They highlight the vital role that bargaining strength and the ability of actors to make credible threats play in the long-term institutional development of the European Union. This work builds on the insights of scholars such as Hix (2002), who have sought to apply the idea of incomplete contracts to EU politics, and shows how these insights point in a different direction than currently dominant approaches. If we are to take the logic of incomplete contracts seriously, we must pay proper attention to the *ex post* bargaining over how institutions are to be interpreted, and how this feeds into future iterations of institutional change. Finally, it holds out some promise of integrating the insights of rational choice institutionalism (North 1990; Knight 1992; Farrell and Knight 2005) with the emphasis of historical institutionalists like Paul Pierson (1996) on variation in time horizons and similar factors. Many important aspects of institutional politics in the European Union have gone under-examined because they do not fit very well into the conventional stories of intergovernmentalism *versus* neo-functionalism, or rational choice theory *versus* constructivism.

We and our co-authors hope to have laid out the beginnings of an approach that has a wider application to the EU and indeed to other contexts where periods of interstitial adaptation are interspersed among periods of formal institutional change. What kind of research agenda does this approach imply? First, and most obviously, there is a need for more empirical work to test the arguments that we make here across a variety of policy areas and institutional arenas within the EU. This work should ideally include the testing of hypotheses through large-N statistics, but it should by no means be limited to that. In an important essay, Peter Hall (2003) has argued that regression analysis and its cousins fit poorly with theoretical approaches which make the ontological assumption that politics is characterised by either path-dependent feedback loops or by strategic

interaction. Our contentions about politics invoke both kinds of theories. Therefore, we suspect that the application of process tracing and related methodologies will be necessary to uncover the relevant causal pathways and to properly test our arguments.

Second, we suggest that future work should endeavour to integrate a third causal process of institutional change which we only discuss in passing in our Introduction, but which Leonor Moral Soriano discusses at length: it should encompass legal interpretation – the authoritative interpretation of an institutional rule – in such a way as to make it a binding reference point for all successive conflicts of application. While our Introduction primarily deals with this as an exogenous parameter, Moral Soriano demonstrates that the institutional rules concerning the vertical distribution of competences between actors, i.e. between the Union and member states, are highly ambiguous, offering fertile ground for such conflicts which then, in turn, are settled by Court rulings. Actors turn to the ECJ, and the Court issues rulings that constitute an interstitial change which subsequently may be formalised in treaty revisions. But actors also use precedents from previous Court rulings when they wrangle over the selection of rules in order to improve their own bargaining position and the outcome of selection.

Legal interpretation may condition bargaining over informal rules or choice over legal bases, but it cannot be reduced to either. And it has real consequences: the legal interpretation of an institutional rule thereafter serves as a binding reference point in the further application of this institutional rule. Moral Soriano demonstrates that this provides a dynamic in its own right, and that it is fundamental to the kinds of institutional change that we seek to theorise. Integrating this third mechanism of institutional change, as it has been elaborated by Sandholtz and Stone Sweet (1998) among others, with the theory that we outline, represents an important future research agenda.

Notes

1. It is an open question whether a narrower version of incompleteness, or the more radical version that Moury's findings point to, provide the better basis for future research (however, we note that the research agendas generated by the two are by no means mutually exclusive).
2. Only recently has the objective to contain delegation/comitology as opposed to legislation gained high agenda priority for the Parliament.

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