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SECOND-ORDER INSTITUTIONALIZATION IN EUROPE:
How to solve collective action problems under conditions of diversity
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1. Introduction

I argue that - given the diversity of member states - the formal institutional structure of the European Union would regularly lead to an impasse in decision-making, were it not for the existence of informal second-order institutions which have emerged to overcome impending deadlocks. This second-order institutionalization has developed along three different paths; the explicit interpretation and clarification of formal rules; the explicit and implicit development of new soft institutions as a way to expand the areas of activity; and a more stealthy kind of "kitchen politics" to circumvent formal institutional impediments to decision-making by concealing planned or ongoing changes. I go on to argue that the emergence of an informal second-order institutionalization in European decision-making has triggered off attempts to accommodate these de facto changes within the formal institutional order.

The various stages and modes of institutional development can best be explained by linking four institutional, theoretical strands: the theory of institutional design which takes into consideration distributional impacts of institutional rules may account for the first phase of treaty development (Knight 1992). The theory of exploitation of existing formal institutions by organizational entrepreneurs (North 1995) explains aspects of the specification and - thereby - incremental change of formal rules. The theory of spontaneous institutional development with its emphasis on the generation of social conventions (Calvert 1995) sheds light on the emergence of informal social rules of coordination. And sociological organization theory which points out that decision-making processes frequently are as much concerned about creating actors' commitment as they are about rationally weighing the costs and benefits of specific decisions, explains how institutional rules are changed in a stealthy way.

I will illustrate my general argument about second-order institutionalization using various empirical examples of recent European policy-making.

2. Sources and forms of second-order institutionalization

I start from the basic assumption that the core feature of the European polity is the diversity of its members. This diversity accounts for the construction of the formal Community institutions in such a way as to preserve this heterogeneity and to safeguard member-state sovereignty. That is, the founding member states established a polity of a decentralized, fragmented nature without a strong central power in which the decision-making by the various bodies is interlinked. Many actors and institutions are involved in the decision-making process which makes it a rather unwieldy and cumbersome process. This part of institutional development may well be accounted for by the claim that new institutional set-ups are negotiated in view of their likely distributional impacts (Knight 1992; Knight 1995). In this specific case, the institutional impacts at stake are decision-making competences and sovereignty which through powerful European supranational institutions would have been shifted to the supranational level, a decision to which member states were reluctant to agree. Hence by intention an institutional structure was created whose central decision-making powers are left to an intergovernmental body, the Council of Ministers, whose Parliament is relatively weak, and whose decision-making process is contingent on the simultaneous consent of several institutions. However, by introducing such a fragmented decision-making structure the founding members inadvertently created a power vacuum into which some actors moved, applying strategies of second-order institutionalization to overcome decision-making deadlocks.

The first, explicit, straightforward strategy is the clarification, interpretation and modification of existing rules which in turn become the guidelines for subsequent action. In theoretical terms I argue that once rules have been put into place in bargaining processes with a view to their distributional effects, they will be exploited, applied and interpreted by entrepreneurial actors in ways that best fit their own particular agendas. The latter seek to enhance their territory of activities. By investing in the acquisition of knowledge and the coordination of skills, they gradually learn how to wield more power in policy-making and in so doing step by step alter institutions and may produce results which differ from these intended by the designers of the formal institutional structure (North 1995).

In the European context, with its complex and interlinked decision structure it was particularly the Commission and the European Court of Justice which, by means of clarification and adjudication, have specified formal rules and mediated between conflicting actors to overcome policy stalling. The Court acts as arbiter in decisional conflicts interpreting and specifying rules which then function as reference points of further decision-making (Stone Sweet, Brunell 1998). Thus the ECJ has constantly defined and redefined such concepts as "market control" and "market share" in interpreting statutes, regulations and derogation clauses thereby significantly contributing to the creation of a regional European integrated market (Egan 1998; Shapiro 1968). And the Commission struggled to determine what exactly constitutes an "equivalent to a quantitative trade barrier", the latter being prohibited by the Treaty of Rome (Art. 30).

The Commission has frequently applied entrepreneurial strategies to widen its terrain. As the central node in the numerous interactions between the most diverse actors in various policy areas it is the sole actor with an overview of all on-going policy developments and is engaged in multiple negotiation arenas. It also has intimate knowledge of the complicated institutional rules and knows how to play on them. It uses both capacities to seize opportunities to act in order overcome decisional deadlocks by applying strategies such as issue-linkage and other means of striking compromises to achieve its policy goals.

A recent example of how a redistributive conflict has been resolved and a policy impasse avoided in an institutional context which requires unanimous decision-making is the compromise struck in the reform of the regional funds policy. The regional aid package is overdue for reform. Particularly the prospect of new central and east European countries joining the EU has put pressure on the Commission to speed up reform. Many parts of the present Union currently receiving regional aid - intended for the poorest areas - will lose it before enlargement. Of course, individual member states have sought to retain their share of EU structural funds. The conflict was resolved by on the one hand reinterpreting the competencies. Invoking the subsidiarity principle the unpleasant decision about which regions will be denied aid was handed on to national governments. On the other hand the blow to those regions defined from the center as no longer poor (where GDP is below 75% of European average in the last three years), will be softened by receiving transitional aid for a period of six years (King and Benoit 1998).

An example where the Commission and the ECJ interacted in the clarification and interpretation of rules to the effect of breaking a decision-making deadlock is the Working Time Directive. This illustrates one major way used to bring about policy innovations by using formal rules in an inventive and creative way, such as playing the "treaty-base game" (Rhodes 1995). The contested policy issue is shifted under the decision-making rule most conducive to change, the Qualified Majority Rule. Thus the Commission repeatedly sought to outwit the British government which was vetoing the working-time measure by linking contractual rights to health and safety issues which are decided under QMR of Art. 118a. The British did not implement the directive and brought an action in the ECJ challenging its legal basis under QMR, arguing that the regulation of working time should not be mixed with social (health and safety) issues. In 1996, the Court ruled that the directive had been adopted correctly on the basis of Art. 118a and called for a broad interpretation of the words 'working environment', 'safety' and 'health' using the definition of the World Health Organisation (Héritier 1998).

The second mode of overcoming policy-making gridlocks by developing second-order institutions is to establish soft institutions or informal rules in the context of the existing formal institutions in order to modify them and thereby circumvent a decisional impasse. The introduction of soft rules may take the shape of an explicit intentional strategy or a spontaneous, decentral co-ordination (Demsetz 1988).

The intentional and direct way of establishing soft institutions is frequently applied by the Commission. It has introduced business round tables to push national governments' policy in a new direction, such as in research and technology and telecommunications policy. The establishing of both Community policy areas had initially met with the resistance of member-state governments and were introduced in a subtle and low-profile way by instituting an exchange of information and views, or by offering funds which could be used on a voluntary basis. Similarly, in order to give itself a role in implementation of European legislation which - under existing formal rules is predominantly left to member states - the Commission organised information campaigns, and scoreboards of implementation performance to shame governments into compliance. For the same purpose it cooperates with sub-national public and private actors in order to obtain information about implementation practices.

The other type of informal rules emerge decentrally and spontaneously as social conventions. Here the uncertainty about the preferences of others promotes behaviour that resolves a collective action dilemma. It makes sense to shape the other actors' perceptions of one's preferences and to give signals that you are willing to cooperate and willing to trust. These signals enable the like-minded to locate others which are trustworthy, who in turn can build a reputation of responding

cooperatively to trust (Bates 1988). Because actors prefer coordination at one of the cooperative outcomes, as opposed to non-coordination, they will use whatever salient information (focal point) in order to achieve that coordination (Schelling 1960). Other actors will in time follow suit, and a social convention is established which provides information about the future actions of others (Knight 1995).

A well known example of a decentralized development of such a social convention, is the rule of diffuse reciprocity in the Council of Ministers. It is an informal mechanism which ensures that the interests of one member state are not blatantly disregarded when conflicts are settled because all countries are aware that on some future occasion they may be the ones in a minority corner. COREPER, for example, the committee of permanent representatives, has developed a peer-consciousness that is oriented towards the notion of fairness and keeps alive the memory of advance concessions (Héritier 1997). An institutionalised preference for cooperation has emerged. There is a belief that all participants will profit in the long-term since offending one another's interests in an outspoken way would make future retributions likely (Schmidt 1995). And since member states are highly likely to stay together under the common roof of the European Union, they are well advised to establish a fair balance between all concerned actors.

Finally, there is a more hidden mode of playing with the formal institutional rules by using them creatively in such a way as to take most actors by surprise. Formal decisions are used in order to trigger further decisions of which most concerned actors were unaware when giving their initial consent. As opposed to the first two modes of second-order institutionalization, this type of policy-making by subterfuge constitutes a way of circumventing deadlock which contradicts an important feature of institutions as such: being known and accepted by all parties concerned, being based on shared expectations about appropriate behaviour. Instead, this type of second-order institutionalization is surreptitious by nature and remains in a gray area of unofficial short-cuts, thrives on and seeks to exploit uncertainty, and is sheltered from general public scrutiny. It may consist of modes of self-commitment where the implications of such commitment are unknown, and the insulation of critical decision-making phases. Sociological organization theory (Brunsson 1989) points out that by doing so organizations seek to deal with conflicting expectations in their environment, pinning actors down as long as they are not fully aware of the implications of a decision and potential conflicts. The organizational leadership will seek the commitment of actors for a specific course of action without their knowing what this decision will imply in the long run. In terms of participatory scope, the organizational leaders seek to avoid stalling by insulating the decisional process from the participation of a larger number of actors. Decisions are wrapped up 'behind closed doors' so that due to their complexity they are difficult to unravel at a later stage when more actors are allowed to participate in decision-making. Both modes of this 'kitchen-type of politics', 'early commitment' and 'insulation' used in institutional political life would not be raised to a level of formal rules.

We are faced with this unofficial 'under-cover' mode of institutional development in a deadlock-prone polity such as the European Union quite often. One example where the introduction of a new institutional rule unavoidably will subsequently trigger extensive decisions on institutional changes of which the actors were initially unaware, is the decision to establish a monetary union which has been qualified as a Trojan horse in European policy making. It will exert pressure on all involved to additionally introduce a common monetary policy and fiscal policy, together with a deregulation of financial markets. In other words there are long-term policy implications and spill-over effects which were not the object of explicit acquiescence of all actors involved when the initial decision was made at the Maastricht conference.

Another example of how a precise and extensive institutional commitment has been created without the actors involved being aware of what they committed themselves to, is the 1982 Framework Directive on Industrial Installations. Although this directive initiated the Commission's important change in strategy from a quality oriented towards an emission-based policy, the decision-making process proved surprisingly unproblematic. The measure was adopted after only a year of negotiations - a very short period by EU standards. One reason for this was that the directive itself did not lay down special emission limits for pollutants, restricting itself to general procedural provisions about the licensing of industrial plants. The absence of statutory limits possibly led some countries at the time of negotiations to misjudge the full consequences of the provisions. 'We were astounded ourselves at how quickly the thing was dealt with. We'd never expected that it (the directive) would be adopted in less than a year. For me there's only one explanation: the member states didn't realize at the time what they were signing' (Interview with the EU Commission, DG XI, Sept 1993 - in Héritier, Knill and Mingers 1996:180).

Another mode of under-cover institutional change may be brought about by secluding institutional change in circles of experts which is quite often the case in complex technological fields of decision-making such as the Volatile Organic Compound Directive in environmental policy.

3. Conclusion

It was argued that - given the consensual decision rules - the heterogeneity of the goals of member-state actors and the fragmented institutional structure tend to lead to a decisional stalemate. This deadlock is overcome by three modes of second-order institutionalization, that is the explicit and straightforward specifying and modification of existing formal rules and negotiations in the context of the existing institutional framework; the formation of new informal soft rules; and the "undercover" trapping of actors into decisions. Thus the institutions established in the 1950s have produced institutional consequences which none of the involved actors - who have sought to influence these structures according to their interests - were able to foresee. Rather the changes have evolved along different and unanticipated paths.

These three forms of second-order institutionalization in turn often become the reason of a renewed formal institutional change because they highlighted weaknesses of existing formal rules and suggest possible improvements. However, the transaction costs involved in formally changing institutional structures are high precisely because of the diversity of European actors and the existing consensual decision rules. Therefore, it is very likely that the three modes of second-order institutionalization will be of continued importance in the working of the European Union.

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