1 A Historical Reconstruction

1.1 Introduction

This chapter provides a historical account of when trilogues were conceived and how they have developed and adapted over time. The reason for starting my analysis of trilogues with a historical reconstruction is that *history matters*. History matters because institutions, like other human constructs, do not enjoy unfettered control over their development. As Paul Pierson put it,

> [E]arly steps in a process may fundamentally restrict the range of options available at later ones; identifying the mechanisms that generate such constraints can be a source of powerful insights into the determinants of institutional change; important influences on courses of development may operate only over extended periods of time and are unlikely to be captured by snapshot accounts focused on the choices of particular actors.[1]

Indeed, examining trilogues using this theoretical approach enabled me to appreciate features that I would otherwise have overlooked, dismissed as irrelevant, or not understood.

Unlike many scholarly contributions, which tend to trace the origins of trilogues to the inception of the codecision procedure in 1993,[2] I will show that trilogues have shaped legislative interactions ever since the Parliament gained its first prerogatives in budgetary matters in 1975. This account will lay bare two interdependent and self-reinforcing institutional trends. On the one hand, it will highlight the increasing strengthening of the European

[1] Paul Pierson, *Politics in Time: History, Institutions, and Social Analysis* (Princeton University Press, 2004), p. 133 f.

[2] See, e.g., the widely cited publication by Michael Shackleton, "The Politics of Codecision" (2000) 38 *Journal of Common Market Studies* 325–342.

Parliament as a legislative powerhouse. On the other hand, it will show the concurrent proliferation of trilogues as a tool to ensure legislative cooperation and conflict resolution. In this context, it is not easy to discern if trilogues have been the cause or the effect of these developments – it is something of a chicken-and-egg question. It is, however, safe to maintain that, in terms of power enhancement, the European Parliament has been the ultimate beneficiary of these dynamics.

My reconstruction will take a diachronic approach. It will start with a brief presentation of the state of European institutions at the beginning of the 1970s (Section 1.2). It will then analyze a "critical juncture" of the European constitutional evolution, namely the signing of the 1975 Joint Declaration on Conciliation, which created the first trilogues (Section 1.3). The chapter will then move on to explore the content and meaning of the 1982 Joint Declaration on Budgetary Matters, which transferred the conciliation procedure to the context of budgetary negotiations and gave it the official name of "trilogue" (Section 1.4). It will then show how, under the Single European Act and the cooperation procedure, trilogues came to acquire features and functions of common practice (Section 1.5). It will conclude with an appraisal of the post-Maastricht era (from 1993 until today), which has brought about a veritable revolution in the European legislative culture and has enshrined trilogues as the secret of European legislation (Section 1.6).

1.2 The Starting Point: The Council, the Commission, and a Harmless Assembly

To fully appreciate this historical account, it is important to briefly present the overall political context within which the institutional developments under consideration took place.[3] I would like to begin with an anecdote reported by David Williamson, a long-standing European civil servant and Émile Noël's successor as the Commission's Secretary-General (1987–1997):

I do recall that soon after I first arrived in the European Commission and was still unversed in the balance of power, we were concerned to move fast on a particular piece of proposed legislation. "Does the European Parliament have to be

[3] Report of the Working Party Examining the Problem of the Enlargement of the Powers of the European Parliament: "Report Vedel," 25 March 1972, at 32 f. On the Vedel Report, Avi Shlaim, "The Vedel Report and the Reform of the European Parliament" (1973) 27 *Parliamentary Affairs* 159–170.

consulted?" I asked my colleagues. "Yes" they said. "Well, what was their opinion?" "I do not know, I shall have to go and see."

After checking, the Parliament's opinion turned out to be negative. As Williamson added, with a hint of sarcasm, this was "consultation differing little from non-consultation."[4]

In the original setup, the Assembly was undeniably weak. It was widely perceived as a fledgling institution, not worthy of being called "Parliament."[5] Margaret Thatcher is even said to have referred to it as a "Mickey-Mouse Parliament."[6] Indeed, the founding Treaties had endowed the Assembly with a mere advisory role. Legislation resulted from an exclusive dialogue between the Commission, as proposer, and the Council, as decider. In the intentions of the Treaties' drafters, however, this was only the starting point for a more ambitious political plan.[7] A window of opportunity for reforming the institutions presented itself at the beginning of the 1970s. Amid a situation of growing international economic instability, due to the end of the Bretton Woods system and the 1973 oil crisis, many key actors began to advocate for a more influential, more assertive, and stronger Europe. These actors maintained that only a united Europe could address the structural problems of an increasingly complex and interdependent world.[8] However, they also believed that the Council, with its "pure, diplomatic style negotiations,"[9] could not provide the supranational power structures with an adequate degree of

[4] David Williamson, "Conciliation Procedure in the European Law-Making Process" (2006) 12 *Journal of Legislative Studies* 1–7 at 2.

[5] It is no coincidence that the Treaty drafters chose to call it "Assembly" rather than "Parliament." The Assembly gave itself the name "European Parliament" through a two-line resolution in 1962. It presented this name change as an innocuous measure to bring clarity to the uncertainties deriving from the fact that "sa dénomination n'[était] pas identique dans les quatre langues officielles de la Communauté" (its name [was] not identical in the four official languages of the Community). See Résolution relative à la dénomination de l'Assemblée, OJ 1962 No. P31/1045.

[6] Charlemagne, "A Powerful Yet Puny Parliament," *The Economist*, 22 October 2020.

[7] See, e.g., Opinion of Advocate General Roemer in Joined Cases C-27/59 and C-39/59 *Campolongo* v. *High Authority* EU:C:1960:21, p. 418, affirming that the "European Treaties . . . constitute no more than the partial achievement of a far-reaching general programme which is characterized by the overriding concept of a more extensive integration of European States."

[8] The Vedel Report stated, in rather dramatic terms, that "[t]he 'crisis of civilization' in the world of today, the protest everywhere against existing societies . . . the emergence of issues, newly discovered or resurrected, which cast doubt on man's very reasons for living – all this would suggest that Europe's mission in the decades ahead is taking on a new dimension." See "Report Vedel," at 21.

[9] Ibid., at 27.

legitimacy, especially with a view to strengthening the stance of the Communities both inside and outside Europe.

In such a context, many turned their attention to the European Parliament. Of course, the EP was following all these developments with keen interest. Since the beginning of the 1960s, it had sought a greater role in the supranational institutional setup. On several occasions, it had justified its claims in the following terms: "[T]he powers of the European Parliament must be extended in order to strengthen the democratic structure of the Community."[10] In other words, the EP was convinced that placing itself at the very heart of the European edifice was crucial to make the supranational polity more democratic. To bolster its case, it structured the discourse about its role around the correspondence between parliamentarization and democratization.[11] This correspondence is ideologically palatable and politically unattackable. It therefore enjoyed great resonance among many prominent politicians and scholars.[12]

In those years, an important thrust towards the parliamentarization of the Communities also came from the "Group Vedel." Created by the Commission in 1971, this working group was composed of fourteen independent experts. Its task was to assess the consequences of strengthening the role of the EP in the Communities' institutional setup. In its final report, the Group affirmed that "[a]s the authors of the Treaties were interested more in the construction than the government of Europe, they did not give the Parliament a very important place among the Community institutions, no doubt thinking that the matter would

[10] Résolution sur les compétences et les pouvoirs du Parlement européen, OJ 1963 No. P106/1913 (my translation).

[11] By "parliamentarization," EU legal scholarship usually refers to the process by which, since the 1970s, the European Parliament has been progressively expanding its legislative influence. It is worth remembering, however, that the concept pertains to constitutional law history and indicates the process by which, over a span of about 100 years – starting with Great Britain in 1832–1834 and concluding with Germany in 1917 and Spain in 1931 – European constitutional monarchies gradually lost the prerogative to appoint and dismiss ministers at will. See Dieter Nohlen, "Parlamentarisierung," in Dieter Nohlen and Rainer-Olaf Schultze (eds.), *Lexikon der Politikwissenschaft: Theorien, Methoden, Begriffe* (C. H. Beck, 2002), vol. 2, p. 612.

[12] See, e.g., David Marquand, *Parliament for Europe* (Jonathan Cape, 1979), p. 87 ff. For a critique of the correspondence between parliamentarization and democratization, Joseph H. H. Weiler, "Parlement européen, integration européenne, démocratie et légitimité," in Jean-Victor Louis and Denis Waelbroeck (eds.), *Le Parlement européen dans l'évolution institutionnelle*, 2nd ed. (Editions de l'Université de Bruxelles, 1989), p. 325 ff.

have to be reviewed when the time came: hence the legal and political ambiguity of the European Parliament's position."[13]

At the time, the report enjoyed a positive reception in the institutions, in the national bureaucracies, and in the academic world.[14] However, as one of its drafters showed, the report had a significant impact beyond the years immediately following its adoption.[15] It not only provided influential guidance for subsequent Treaty reforms,[16] it also contributed in a crucial manner to establishing the principle of parliamentarism as the accepted standard of legitimacy in the supranational political discourse.[17] Following this principle, all the successive amending Treaties expanded the scope of the EP's legislative competences. The parliamentarization of the EU started in the 1970s – with the attribution to the European Parliament of its first prerogatives in budgetary matters and its first direct election in 1979 – and continued in the 1980s, 1990s, and 2000s, through a series of amending Treaties that led to the creation of what now is a full-fledged bicameral system, with the Parliament and the Council as equal branches of the European legislative authority.

It is in that context that the establishment and institutionalization of trilogues took shape. The intensification of the interinstitutional contacts deriving from the growing influence of the EP urged the institutions to devise means to coordinate their interplay. Created shortly after the 1970s Budgetary Treaties, trilogues have been adjusting themselves to the constantly changing institutional environment for almost fifty years. In this sense, they have shown a high adaptive capacity. But before starting with the historical reconstruction of trilogues, a clarification is in order.

[13] "Report Vedel," at 29.

[14] Mary T. W. Robinson, "The Political Implications of the Vedel Report" (1972) 7 *Government and Opposition* 426–433 at 432.

[15] Jochen Abr. Frowein, "Erinnerungen an die 'Groupe Vedel,'" in Ulrich Becker, Armin Hatje, Michael Potacs, and Nina Wunderlich (eds.), *Verfassung und Verwaltung in Europa: Festschrift für Jürgen Schwarze zum 70. Geburtstag* (Nomos, 2014), p. 57 ff.

[16] Julie Garman and Louise Hilditch, "Behind the Scenes: An Examination of the Importance of the Informal Processes at Work in Conciliation" (1998) 5 *Journal of European Public Policy* 271–284 at 272, maintaining that "[c]odecision-making was mooted as early as 1972 in a Parliamentary report entitled 'The Enlargement of the Powers of the European Parliament.'"

[17] Skeptical about the suitability of the parliamentary form of government for the supranational integration process were the two German members of the "Group Vedel," namely Jochen Abr. Frowein and Ulrich Scheuner. See Jochen Abr. Frowein, "Die rechtliche Bedeutung des Verfassungsprinzips der parlamentarischen Demokratie für den europäischen Integrationsprozeß" (1983) 18 *Europarecht* 301–317 at 302.

In what follows, I will speak of a variety of institutional mechanisms and processes that, despite being called by different names ("conciliation," "tripartite dialogue," "tripartite meetings," and so on) and being enshrined in different documents, present the same underlying logic as well as similar and relatively stable features. I will therefore treat those mechanisms as belonging to the same class of phenomena and employ a descriptive paradigm, which I will simply term "trilogue." This paradigm will encompass all mechanisms with a reasonable degree of institutionalization, whereby groups of representatives from the Parliament, the Council, and the Commission gather to discuss legislative matters and reduce the risk of gridlocked political conflicts, with the Commission usually playing the role of mediator. I will thus show that there exists a clear pattern of institutional development, featuring the continuity of this paradigm. In the analysis, all the mechanisms belonging to the trilogue paradigm will be either called by their specific names ("conciliation," "tripartite dialogue," "tripartite meetings," and so on) or generally labeled as "trilogues."

1.3 The 1975 Joint Declaration on Conciliation: The Blueprint of Trilogues

In 1970 and 1975, the Member States signed the so-called Budgetary Treaties, namely the Treaty of Luxembourg and the Treaty of Brussels.[18] These Treaties endowed the European Parliament with competences of budgetary decision-making and oversight.[19] With the former Treaty, the EP acquired the competence to decide on the noncompulsory expenditure of the then European Economic Communities, especially those disbursements not "necessarily resulting from the Treaty or from acts adopted in accordance therewith."[20] With the latter Treaty, the EP was endowed with the competence to reject the draft budget in its entirety.[21]

[18] The Treaty of Luxembourg was signed on 22 April 1970 and became effective on 1 January 1971. See Traité portant modification de certaines dispositions budgétaires des traités instituant les Communautés européennes et du traité instituant un Conseil unique et une Commission unique des Communautés européennes, OJ 1971 No. L2/1. The Treaty of Brussels was signed on 22 July 1975 and became effective on 1 June 1977. See Treaty Amending Certain Financial Provisions of the Treaties Establishing the European Economic Communities and of the Treaty Establishing a Single Council of the European Communities, OJ 1977 No. L359/1.

[19] Richard Crowe, "The European Budgetary Galaxy" (2017) 13 *European Constitutional Law Review* 428–452.

[20] Art. 203(4), (5), and (6) EEC Treaty, as amended by the Treaty of Luxembourg.

[21] Art. 203(8) EEC Treaty, as amended by the Treaty of Brussels.

The European Parliament welcomed these constitutional changes, believing that they embodied an important – albeit long-overdue – step forward in the process of democratizing the European legal order.[22] This new institutional balance was also welcomed by the European Commission, which in those years saw its legislative influence decline, especially due to the 1966 Luxembourg Compromise, and came to consider the European Parliament as a potential ally in its efforts to countervail the overpowering role of the Council in legislative matters. However, the European Parliament was not entirely satisfied. According to a prevalent view among Members of the European Parliament (MEPs), the creation of a new budgetary order not only called for an equal participation of the EP in the adoption of the yearly financial plan,[23] but it also required the EP's contribution to the adoption of any decisions that might impact on the Communities' funds. In particular, the EP felt that the establishment of a real supranational budgetary authority went hand in hand with its involvement not only a posteriori – when deciding the annual budget – but also a priori – when passing legislation with a strong impact on the coffers of the EU.[24] Impeding the European Parliament from having a say over those decisions was tantamount, so the EP's argument went, to "a reduction in parliamentary democracy in the Community and the Member States as a whole."[25]

By employing all political means at its disposal,[26] the EP convinced the Council and the Commission to sit at the negotiating table and discuss how to strengthen its budgetary competences. The three institutions

[22] On various occasions, the EP had claimed the power of the purse for itself. See, e.g., Resolution Embodying the Opinion of the European Parliament on the Communication from the Commission of the European Communities to the Council on the Strengthening of the Budgetary Powers of the European Parliament, OJ 1973 No. C87/8, para. 10, stating that "in all parliamentary democracies, Parliament alone can approve new expenditure, even when the constitution restricts the right to propose such expenditure to the Executive."

[23] Crowe, "The European Budgetary Galaxy," 431.

[24] European Parliament, "Report Drawn Up on Behalf of the Committee on Budgets on the Letter from the Council of the European Communities on the Draft Joint Declaration by Parliament, the Council and the Commission on the Establishment of a Conciliation Procedure," PE 39.488/fin., 17 February 1975, at 10.

[25] Ibid., at 10.

[26] For instance, Georges Spènale, then Chairman of the EP's Committee on Budgets and future President of the EP, tabled a motion of censure against the Commission led by Sicco Mansholt on 16 November 1972 and withdrew it on 12 December 1972, after the Commission committed itself to putting forward, as a matter of priority, proposals relating to the widening of the Parliament's budgetary power. See ibid., at 17.

agreed to find solutions that did not involve amendments to the Treaties.[27] After almost two years of interinstitutional talks, the negotiating teams reached an agreement. Drawing from a short resolution recorded in the minutes of the Council on the date of the signing of the Treaty of Luxembourg (22 April 1970),[28] the institutions decided that the reinforcement of the EP's budgetary competences was to be attained by establishing a conciliation procedure. The details concerning the functioning of this procedure were laid down in an interinstitutional agreement: the Joint Declaration on the Conciliation Procedure of 4 March 1975.[29] The objective of the procedure was to enable the Parliament to participate in the preparation and adoption of decisions "which g[a]ve rise to important expenditure or revenue to be charged or credited to the budget of the European Communities."[30] By so doing, the Joint Declaration acknowledged what many regarded as a "logical connection" between budgetary competences and legislation giving rise to expenditure.[31]

The procedure was to take place in a "'Conciliation Committee' consisting of the Council and representatives of the European Parliament," with the Commission participating in the work and actively assisting the

[27] Ibid., at 19.

[28] Francesco Pasetti-Bombardella, "Le Parlement face au Conseil," in Jean-Victor Louis and Denis Waelbroeck (eds.), *Le Parlement européen dans l'évolution institutionnelle*, 2nd ed. (Editions de l'Université de Bruxelles, 1989), para. 33. For the text of the Council's "Resolution on Community acts having a financial effect and on cooperation between the Council and the Assembly," see European Parliament, "Budgetary Provisions of the Treaties of the European Communities (Derogation Period) – Annexed Documents and Implementing Procedure," December 1972, at 11.

[29] Joint Declaration of the European Parliament, the Council and the Commission, OJ 1975 No. C89/1. For a detailed analysis of the Joint Declaration, John Forman, "The Conciliation Procedure" (1979) 16 *Common Market Law Review* 77–108. This procedure is not to be confused with the conciliation procedure provided for by Art. 294(10) TFEU, within the framework of the Ordinary Legislative Procedure. The English term "conciliation" is somehow misleading because it applies to both procedures. Other European languages employ different terms: *concertation* and *conciliation* (French), *Konzertierung* and *Vermittlung* (German), *concertazione* and *conciliazione* (Italian).

[30] The establishment of the conciliation procedure went well beyond what was strictly required by the Treaties. See Forman, "The Conciliation Procedure," 81. The Council agreed to sign the Joint Declaration because the Parliament had suggested that, should its requests remain unfulfilled, it would have used its newly acquired budgetary prerogatives to prevent the implementation of legislation with budgetary consequences. See Richard Corbett, Francis Jacobs, and Darren Neville, *The European Parliament*, 9th ed. (John Harper, 2016), p. 306.

[31] "Report on European Institutions: Presented by the Committee of Three to the European Council (October 1979)," at 58.

other institutions. The procedure could be started under specific conditions, namely that the draft piece of legislation had general application and appreciable financial implications and that its adoption was not required by acts already in existence. The Conciliation Committee could be convened upon request of either the Parliament or the Council and only to the extent that "the Council intended to depart from the Opinion adopted by the European Parliament." When the positions of the two institutions were "sufficiently close, the European Parliament may give a new Opinion, after which the Council [had to] take definitive action." This meant that the Council remained formally free, when adopting the act in question, to depart from the outcome of the negotiations. As a former President of the European Parliament put it, the procedure was "more like an appeal for clemency in which the MEPs ask[ed] the national Ministers in Council to think again." But, as he also conceded, it occasionally proved effective in enabling the EP to influence specific pieces of legislation.[32]

The conciliation procedure was the first genuine manifestation of the trilogue paradigm.[33] It provided for the creation of a three-party body in charge of facilitating the attainment of agreements between the Parliament and the Council in case of political differences. The Commission participated in the meetings to help the other two institutions settle their divergences. The Council took part in the Conciliation Committee with a delegation led by the incumbent Presidency and comprising all its members.[34] The Parliament participated with a delegation consisting of nine MEPs reflecting the political composition of the Parliament and including the chairs and rapporteurs of the committees concerned.[35]

[32] Lord Plumb, "Building a Democratic Community: The Role of the European Parliament" (1989) 45 *The World Today* 112–117 at 114.

[33] It is worth highlighting that the Joint Declaration on the Conciliation Procedure is still in force. There is at least one case in which a conciliation procedure might be launched, notably when the Council intends to adopt implementing measures of the Act concerning the election of the representatives of Parliament by direct universal suffrage. See Act Concerning the Election of the Representatives of the Assembly by Direct Universal Suffrage, OJ 1976 No. L278/5, Art. 13. See also Forman, "The Conciliation Procedure," 98 f.

[34] Forman, "The Conciliation Procedure," 87 f.

[35] See Art. 22A of the EP Rules of Procedure in force at that time, as modified by Resolution on the addition to the Rules of Procedure of the European Parliament of a new Rule 22A on the conciliation procedure embodied in the Joint Declaration of the European Parliament, the Council and the Commission of 4 March 1975, OJ 1977 No. C6/82.

In its first years of application, the conciliation procedure was launched seldom, despite all the debates and political ferment that had preceded its inception.[36] As affirmed by the "Three Wise Men Report" of 1979,[37] this situation was due to the existence of conflicting opinions among the institutions as to the real purpose and implications of conciliation.[38] The procedure could indeed have a dual effect. On the one hand, it could promote closer and smoother cooperation among institutions. On the other hand, it could serve more dubious purposes, such as the alteration of the institutional balance set out in the Treaties. The Council was especially wary of the possibility that the Parliament might exploit the conciliation procedure to attain more influence in the legislative realm. Many specialists of European institutional affairs believed that "in the eyes of the EP, the broad aim of [conciliation] was to gradually place Parliament on an equal footing with the Council not only in budgetary matters, but also in the legislative process as a whole."[39]

At the end of 1981, interested in strengthening the legislative influence of the EP and in finding a common solution to the poor implementation of the conciliation procedure, the Commission presented its fellow institutions with a new draft Joint Declaration. The Commission's draft envisaged an important novelty: the extension of the conciliation procedure to *all important* Community acts.[40] In response to this initiative, the EP adopted an amended text of the Commission's draft, in which it expressed its interest in devising a real legislative cooperation with the Council by means of a new Joint Declaration.[41] Even the European Council, in the

[36] At the end of 1978, the institutions had initiated only four conciliations, although the Commission had identified more than twenty other cases where the procedure might have applied. See Forman, "The Conciliation Procedure," 90.

[37] On the initiative of Giscard d'Estaing, then President of the French Republic, the European Council, in the Brussels Summit of 4 and 5 December 1978, decided to set up a working party, also known as Committee of the Three Wise Men, and gave it the task to formulate suggestions as to how to ameliorate the working of the institutions. Part of the "Three Wise Men Report" was dedicated to the conciliation procedure. See "Report on European Institutions," at 84 ff. For an insider perspective on the report, Edmund Dell, "The Report of the Three Wise Men" (1993) 2 *Contemporary European History* 35–68.

[38] "Report on European Institutions," at 84.

[39] Emilio Wille, "The Conciliation Procedure and the European Parliament's Pursuit of Legislation Power" (1984) 49 *Il Politico* 489–500.

[40] European Commission, "Communication to the Council and the European Parliament on the Conciliation Procedure," COM(81)816 final, at 2.

[41] Resolution on the Draft Second Joint Declaration of the European Parliament, the Council and the Commission on the Conciliation Procedure, OJ 1984 No. C10/31. See also Wille, "The Conciliation Procedure," 491.

famous Stuttgart "Solemn Declaration on European Union" of June 1983, declared itself willing to "enter into talks with the European Parliament and the Commission with the aim, within the framework of a new agreement, of improving and extending the scope of the conciliation procedure."[42] Political will across the institutions seemed to converge.

As it turned out, a formal amendment of the Joint Declaration proved impossible. Despite various attempts to reach an agreement in the Council, the Danish delegation stubbornly opposed any changes to the status quo. As a stopgap solution, the Council agreed to apply the 1975 Joint Declaration in a more flexible way. In practical terms, the Council acceded to applying conciliation to cases that, strictly speaking, did not fall within the concept of legislation with "appreciable financial implications."[43] Such a solution prevented interinstitutional conflicts from coming to a head, but it clearly fell short of placating the Parliament's quest for a greater role in the adoption of European legislation. More confrontations were to come.

That said, it is possible to affirm that the signing of the 1975 Joint Declaration marked the genesis of trilogues.[44] In fact, the success of the conciliation procedure was conditional upon its ability to create a genuine trilogue among the legislative institutions. Such a belief was stated in unequivocal terms by the Commission in a 1981 communication: "[I]f the conciliation procedure is to achieve its objective, a genuine 'trialogue' must be established during which the Commission will have to make every effort to foster political understanding between the three institutions."[45] In other words, the establishment of the conciliation procedure should be regarded as a "critical juncture" in the development of the supranational legislative authority. It gave birth to a paradigm that, as will emerge in the remainder of this chapter, has had a long-lasting institutional legacy, becoming the secret of the European legislative process.[46] For instance, the conciliation procedure – and the trilogue embodied therein – represented the blueprint for the negotiation and

[42] European Commission, "Solemn Declaration on European Union," Bulletin of the European Communities No. 6/1983, at 26.
[43] Corbett, Jacobs, and Neville, *The European Parliament*, p. 307.
[44] Fiona Hayes-Renshaw and Helen Wallace, *The Council of Ministers*, 2nd ed. (Palgrave Macmillan, 2006), p. 216.
[45] European Commission, "Les relations entre les institutions de la Communauté," COM(81) 581 final, 7 October 1981, at 12 (my translation).
[46] Pierson, *Politics in Time*, p. 135: "Junctures are 'critical' because they place institutional arrangements on paths or trajectories, which are then very difficult to alter."

drafting of the 1982 Joint Declaration on the Budgetary Procedure.[47] And it is not by chance that the term "trilogue" made its first official appearance in the French version of that declaration. Let us take a closer look.

1.4 The 1982 Joint Declaration on Budgetary Matters: Let's Call It "Trilogue"

As already mentioned, the budgetary Treaties of 1970 and 1975 introduced into EU primary law the distinction between compulsory and noncompulsory expenditure. Under those Treaties, the Council gained final say over the compulsory expenditure, whereas the Parliament gained final say over the noncompulsory expenditure. However, this soon proved to be a poor choice in terms of constitutional design.[48] By establishing a two-pronged budgetary authority – with Parliament and Council exclusively responsible for specific types of expenditure – the Budgetary Treaties did nothing but render the adoption of the annual budget a battlefield for power struggles between the two institutions.[49] Especially after 1975, these struggles occurred almost yearly and "each year with similar, if not identical, features."[50] They essentially concerned the distinction between noncompulsory and compulsory expenditure and therefore the delimitation between the Parliament's and the Council's budgetary competences.

Indeed, the adoption of the EEC's budget was – and still is – fraught with problems,[51] such as finding common ground between the Commission and the required majorities in the Council and in the EP; reaching a compromise within an extremely tight time limit of about three months; and to do all this while complying with a highly intricate and technical body of EU law – the Financial Regulation and the Multiannual Financial Framework, among others.[52] Advocate General Mancini went as far as to maintain that "the machinery established by

[47] Joint Declaration by the European Parliament, the Council and the Commission on Various Measures to Improve the Budgetary Procedure, OJ 1982 No. C194/1.
[48] Pieter Dankert, "The Joint Declaration by the Community Institutions of 30 June 1982 on the Community Budgetary Procedure" (1983) 20 *Common Market Law Review* 701–712.
[49] William Nicoll, "EEC Budgetary Strains and Constraints" (1987) 64 *International Affairs* 27–42 at 28.
[50] Opinion of Advocate General Mancini in Case C-34/86 *Council* v. *Parliament* EU:C:1986:221, para. 2.
[51] See, e.g., Case C-77/11 *Council* v. *Parliament* EU:C:2013:559.
[52] Nicoll, "EEC Budgetary Strains and Constraints," 30.

the Treaty for preparing and adopting the budget was virtually impossible to operate."[53] It is against this backdrop that the 1982 Joint Declaration on Budgetary Procedure and the "Tripartite Dialogue" came into being. Here are the facts.

In 1981, the Parliament and the Council proved unable, despite all efforts, to strike a compromise on the noncompulsory expenditure. This inability left the Communities without a financial plan for 1982. Feeling that such an impasse was primarily due to the noncooperative attitude of its fellow institutions, the Council initiated legal proceedings before the Court of Justice.[54] In a last bid to reach an agreement, the Presidents of the Parliament and the Council began joint discussions and, as from the beginning of March 1982, they were joined by the President of the Commission. The negotiations eventually led, in June 1982, to the signing of the Joint Declaration on the Community Budgetary Procedure and the withdrawal of the Council's lawsuits against the Parliament and the Commission.[55]

The 1982 Joint Declaration established an interinstitutional coordination mechanism called "Tripartite Dialogue."[56] The French version of that declaration employed the term "trilogue."[57] This was the first time that the term was used in a legal instrument. The "Tripartite Dialogue" or "trilogue" provided that whenever either the Parliament or the Council could not accept the expenditure classification put forward by the Commission in its draft budget, the matter had to be referred to a meeting of the Presidents of the Parliament, the Council, and the Commission. After this meeting, the President of the Commission, in its

[53] Opinion of Advocate General Mancini in Case C-34/86 *Council* v. *Parliament*, para. 2. See also Jean-Paul Jacqué, "La pratique des institutions communautaires et le développement de la structure institutionnelle communautaire," in Roland Bieber and Georg Ress (eds.), *Die Dynamik des Europäischen Gemeinschaftsrechts* (Nomos, 1987), p. 378.

[54] Case C-72/82 *Council* v. *Parliament* and Case C-73/82 *Council* v. *Commission*.

[55] Jean-Louis Dewost and Marc Lepoivre, "La déclaration commune du Parlement européen, du Conseil et de la Commission relative à différentes mesures visant à assurer un meilleur déroulement de la procédure budgétaire, signée le 30 juin 1982" (1982) 25 *Revue du Marché Commun* 514–525 at 515.

[56] Florian von Alemann, *Die Handlungsform der interinstitutionellen Vereinbarung* (Springer, 2006), p. 328.

[57] The German version used the term *Dreiseitendialog*, whereas the Italian version used the term *dialogo a tre* (see para. II.5. of the 1982 Joint Declaration). However, many actors preferred to use the French term *trilogue* also when writing or speaking in other languages. See, e.g., the then Council's Director-General Nicoll, "EEC Budgetary Strains and Constraints," 32.

capacity as chair of the "Tripartite Dialogue," had to report to the Parliament and the Council. Following the political priorities laid out by the three Presidents, the budgetary authority was called upon to work out the details of the draft budget, thus ensuring its timely adoption.

As shown by this description, there exists an evident resemblance – if not a seamless continuity – between the 1975 Joint Declaration on Conciliation and the 1982 Joint Declaration on Budgetary Matters, in that they both envisaged trilogues among representatives from the three institutions to facilitate legislative coordination and political disputes resolution. This resemblance was so readily apparent that, after the adoption of the 1982 Joint Declaration, political and judicial actors kept on using the term "conciliation" to refer to the recently established "Tripartite Dialogue."[58] These circumstances are evidence of an incipient consolidation of the trilogue paradigm. Such consolidation was further bolstered by the Court of Justice a few years later, in its 1986 landmark judgment in *Council* v. *Parliament*.

In that judgment, which arose from an action for annulment against the 1986 budget and concerned the interplay between the disputing institutions in the exercise of the budgetary power, the Court affirmed that "it may not intervene in the process of negotiation between the Council and the Parliament which must result ... in the establishment of the general budget of the Communities." It also added that "it [did] not have to consider to what extent the Council's or the Parliament's attitude during the entire negotiations on the budget prevented them from arriving at an agreement," concluding that "problems regarding the delimitation of ... expenditure ... [were] the subject of an interinstitutional conciliation procedure set up by the [1982] Joint declaration ... and that they [were] capable of being resolved in that context."[59]

These excerpts not only show that the Court acknowledged the legal relevance of the "Tripartite Dialogue" set out in the 1982 Joint

[58] See, e.g., European Parliament, "Report Drawn Up on Behalf of the Committee on Budgets on the Joint Declaration by the European Parliament, the Council and the Commission on Various Measures to Improve the Budgetary Procedure," PE 79.445/fin., 6 July 1982, at 7. In legal scholarship, Nigel G. Foster, "The New Conciliation Committee under Article 189b EC" (1994) 19 *European Law Review* 185–194 at 189, who, while predicting little relevance of conciliation after the establishment of the codecision procedure by the Treaty of Maastricht, added: "with the exception of use in the budgetary procedure." This provides further evidence of the fact that, in the eyes of political actors and legal scholars, "conciliation" and "Tripartite Dialogue" were practically the same thing.

[59] Case C-34/86 *Council* v. *Parliament*, paras. 42, 45, and 50, respectively.

Declaration.[60] They also indicate that the Court saw the "Tripartite Dialogue" as the most appropriate context to sort out budgetary conflicts and as a stage beyond the reach of its scrutiny.[61] Arguably, such case law further motivated the institutions to stick to the "Tripartite Dialogue," improving, refining, and crystallizing its functioning.[62] So much so that they concluded four other interinstitutional agreements on budgetary matters in 1999,[63] 2006,[64] 2013,[65] and 2020[66] – all of them based on the trilogue paradigm. But these events had an impact beyond the field of budgetary cooperation as well. In the second half of the 1980s, the Parliament, the Council, and the Commission employed the trilogue paradigm with increasing regularity and consistency, to the point that, at the beginning of the 1990s, it was officially labeled a "general practice." In this regard, a crucial intersection was the adoption of the Single European Act and the introduction of a new legislative procedure: the cooperation procedure.

[60] Jacqué, "La pratique des institutions communautaires," p. 396.

[61] The judgment eventually pushed the institutions to resume trilogues and led to the adoption of the budget only one week after its delivery. See European Commission, "Resumption of 1986 Budget Procedure," Bulletin of the European Communities No. 7–8/1986, at 10. On this judgment, Roland Bieber, "Rechtswirkung und gerichtliche Kontrolle des EG-Haushalts. Zugleich Anmerkung zur Entscheidung des EuGH vom 3. Juli 1986, Rs. 34/86 (Rat gegen Europäisches Parlament)" (1986) 101 *Deutsches Verwaltungsblatt* 961–968 at 966. For a critical appraisal, Francesco Pasetti-Bombardella, "La controversia fra il Consiglio e il Parlamento europeo sul bilancio generale 1986" (1986) *Rivista di diritto europeo* 207–216.

[62] About two years after the 1986 judgment, the ECJ, in another case relating to the Communities budget, brought about a partial *revirement* of its case law. After confirming its findings in *Council* v. *Parliament*, the Court added that the Treaties empowered it to verify whether "in the context of inter-institutional cooperation the institutions . . . ignore the rules of law [or] exercise their discretionary power in a manifestly wrong or arbitrary way." See Case C-204/86 *Greece* v. *Council* EU:C:1988:450, para. 17.

[63] Interinstitutional Agreement of 6 May 1999 between the European Parliament, the Council, and the Commission on Budgetary Discipline and Improvement of the Budgetary Procedure, OJ 1999 No. C172/1.

[64] Interinstitutional Agreement between the European Parliament, the Council and the Commission on Budgetary Discipline and Sound Financial Management, OJ 2006 No. C139/1.

[65] Interinstitutional Agreement of 2 December 2013 between the European Parliament, the Council, and the Commission on Budgetary Discipline, on Cooperation in Budgetary Matters and on Sound Financial Management, OJ 2013 No. C373/1.

[66] Interinstitutional Agreement of 16 December 2020 between the European Parliament, the Council of the European Union, and the European Commission on Budgetary Discipline, on Cooperation in Budgetary Matters and on Sound Financial Management, as well as on New Own Resources, including a Roadmap towards the Introduction of New Own Resources, OJ 2020 No. L433I/28.

1.5 The Single European Act: Trilogues Become a General Practice

The Single European Act (SEA) was signed in February 1986 and became effective in July 1987. Among its objectives was the extension of the EP's legislative prerogatives. To this end, the Treaty envisaged the following innovations: the establishment of two new legislative procedures called "cooperation procedure" and "assent procedure," respectively, as well as the extension of the already existing consultation procedure to other policy fields.[67] As the name suggests, the assent procedure required the Council to obtain the Parliament's "yea" before certain legislation could be passed – the assent required an absolute majority of MEPs' votes. The cooperation procedure, instead, provided for two readings of the Commission's draft legislative act and entitled the EP to reject the Council's first reading common position; such an objection by the EP could then be overruled only by a unanimous vote in the Council.[68]

These changes gave relevant political leverage to the Parliament, which could make it arduous for the Council to pass unwelcome legislation. However, these new procedures, especially the cooperation procedure, were often criticized for being too messy and for putting at risk the ability of the institutions to decide. In some remarks made in March 1986 during a conference on the Single European Act in Brussels, Pierre Pescatore, former judge at the Court of Justice of the European Communities, gave his pointed appraisal of the cooperation procedure:

> [T]he implementation of the [cooperation procedure], with its numerous hitches and time limits, will considerably slow down the already difficult and excessively long decision-making process; . . . it is clear that if there are divergences between the different parties taking part in the procedure, the result will be non-decision i.e. a blocking of the system. This is obvious from article 149, par. 2, lett. f.[69]

In the light of this widely held concern, and since the Intergovernmental Conference had decided not to codify "conciliation" into the Treaties,[70]

[67] For a detailed account of the Single European Act's negotiating history, Jean De Ruyt, *L'Acte unique européen: commentaire* (Editions de l'Université de Bruxelles, 1987), p. 67 ff.

[68] The cooperation procedure applied primarily to the establishment of the internal market, but also in the fields of social policy, economic and social cohesion as well as research and technological development.

[69] Agence Europe, "Europe documents n. 1397," 27 March 1986. See also Pierre Pescatore, "Some Critical Remarks on the 'Single European Act'" (1987) 24 *Common Market Law Review* 9–18.

[70] De Ruyt, *L'Acte unique européen*, p. 121. See also Claus-Dieter Ehlermann, "Die Einheitliche Europäische Akte: Die Reform der Organe" (1986) 9 *Integration* 101–107 at 106. Ehlermann,

EU institutions and legal scholars began to discuss the appropriateness of applying the trilogue paradigm to the newly established procedures.[71] Especially the European Parliament, which had declared itself unhappy with the outcome of the SEA's negotiations,[72] stated that after the entry into force of the amending Treaty on 1 July 1987, it would have "exploit[ed] to the very limit the possibilities offered by [it]," including the application of conciliation in all the new policy areas within the purview of the Communities. It is indeed in this period that the EP, regardless of the procedure to be applied, began to introduce in its legislative resolutions the following standard formula: "[T]he European Parliament ... reserves the right to open the conciliation procedure should the Council propose to depart from this opinion."

In the following years, the EP adopted other resolutions concerning the application and workings of conciliation. For instance, it reiterated "its request that the conciliation procedure be extended to all major areas of legislation in order to allow a dialogue in the search for compromises between the two arms of the legislative authority."[73] Furthermore, it called upon the Council and the Commission to "reach agreement with Parliament on a second Joint Declaration on the conciliation procedure," with a view to extending its scope to "all major Community legislation including those areas subject to the cooperation procedure."[74] In its relentless pursuit of legislative influence, the EP finally claimed the prerogative "to demand the opening of the conciliation procedure with the Council if the Council wishe[d] to provide for a committee procedure [that is, comitology] in a legal act."[75]

The Council and the Commission never took a conclusive position about these requests.[76] After the adoption of the SEA, they were probably

who acted as the Commission's legal advisor in the negotiations on the Single European Act, reported that the Parliament, too, showed little interest in formalizing the trilateral meetings in the Treaties.

[71] Roland Bieber, "Das Gesetzgebungsverfahren der Zusammenarbeit gemäß Art. 149 EWGV" (1989) 22 *Neue Juristische Wochenschrift* 1395–1402 at 1400.

[72] Resolution on the Position of the European Parliament on the Single Act Approved by the Intergovernmental Conference on 16 and 17 December 1985, OJ 1986 No. C36/144.

[73] Resolution on the Results Obtained from Implementation of the Single Act, OJ 1988 No. C309/93.

[74] Resolution on the Conciliation Procedure, OJ 1989 No. C69/151. See also Kieran St. Clair Bradley, "Legal Developments in the European Parliament" (1989) 9 *Yearbook of European Law* 235–270 at 247.

[75] Resolution Closing the Procedure for Consultation of the European Parliament on the Proposal for a Regulation Laying Down the Procedures for the Exercise of Implementing Powers Conferred on the Commission, OJ 1986 No. C297/94.

[76] Foster, "The New Conciliation Committee," 190.

reluctant to conclude new interinstitutional agreements with the EP or to endorse its requests officially, lest the Parliament might gain further legislative influence. They preferred, instead, to involve the EP on a case-by-case basis, when reasons of political expediency so suggested. But the Parliament was not happy with such an arrangement. Eager to convey its sense of frustration and disappointment, it voted on a resolution to complain that conciliation had "so far proved of limited value." But it also affirmed that the procedure retained "the potential for developing into a valuable means of reconciling divergences of view." The Council and the Commission were therefore asked to cooperate "to make [conciliation] more effective and also to ensure its smooth combination with the cooperation procedure."[77]

Although I do not doubt that the resolution was motivated by a genuine perception of being excluded from legislative matters, I would take the Parliament's complaints with a pinch of salt. Different sources reveal that, in those years, European legislative institutions were making fair use of trilogues, and that the Parliament was involved in a fruitful dialogue with its counterparts, sometimes even beyond what the Treaties allowed.[78] For instance, the Parliament, the Council, and the Commission launched conciliation when discussing the adoption of a regulation amending the European Regional Development Fund.[79] They also relied on the procedure when drafting the Community Charter of the Fundamental Social Rights of Workers, adopted on 9 December 1989 by a declaration of all Member States (except for the United Kingdom).[80] Moreover, in April 1989, a parliamentary delegation led by its Vice-President gathered with the Council and the Commission to reach a compromise on two regulations concerning own resources collection.[81] Finally, trilogues played a pivotal role when, after the German reunification on 3 October 1990, the European institutions were to ensure the "rapid passage" of emergency interim measures to

[77] Resolution on the Conciliation Procedure.
[78] Lord Plumb, "Building a Democratic Community," 114.
[79] Resolution on the Results of the Conciliation with the Council on the Proposal for a Regulation Amending Regulation (EEC) No 724/75 Establishing a European Regional Development Fund, OJ 1985 No. C72/56.
[80] Bradley, "Legal Developments in the European Parliament," fn. 72. As pointed out by Bradley, resorting to conciliation for negotiating the Social Charter clearly went "beyond the terms of the Joint Declaration of 4 March 1975 on the conciliation procedure" (fn. 167).
[81] Statement by the President, OJ 1989 No. C158/14.

allow a seamless incorporation of the former Democratic Republic into the Communities.[82]

Besides, only a few years after the EP's abovementioned complaints, the institutions adopted an interinstitutional agreement, with the title Arrangements for the Proceedings of the Conciliation Committee under Article 189b, which was preceded by the following joint statement:

> Current practice under the cooperation procedure generally, particularly in the most sensitive cases, involves talks between the Council Presidency, the Commission and the Chairmen or/and the rapporteurs of the relevant committees of the European Parliament. The Institutions confirm that this practice should continue and could be developed under the procedure provided for in Article 189b of the Treaty establishing the European Community [codecision procedure].[83]

And so they did. After the Treaty of Maastricht became effective, the "talks" between the Parliament, the Council, and the Commission acquired the features of an entrenched institutional practice. So much so that in 2000 a keen observer of institutional affairs could maintain that it had become almost impossible to imagine the legislative process without those talks.[84] As I will show in the next section, the complexity and *lourdeur* of the newly established codecision procedure prompted the Parliament, the Council, and the Commission to give more structure and stability to the trilogue paradigm. The idea of codeciding, instead, made the institutions feel part of a joint enterprise that encouraged them to modify their self-understandings and their mutual behaviors.

1.6 From Maastricht to Lisbon: The Flourishing of Trilogues

On 1 November 1993, the Treaty of Maastricht entered into force.[85] It introduced important constitutional changes, including the codecision procedure.[86] Established alongside the consultation, the assent, and the

[82] Martin Westlake, "The Community Express Service: The Rapid Passage of Emergency Legislation on German Unification" (1991) 28 *Common Market Law Review* 599–614.

[83] Art. 189b: Phase preceding the adoption of a common position by the Council, OJ 1993 No. C329/141.

[84] Shackleton, "The Politics of Codecision," 336.

[85] Treaty on European Union, together with the Complete Text of the Treaty Establishing the European Community, OJ 1992 No. C224/1.

[86] For one of the most famous critical reviews of the negotiation process of the Treaty of Maastricht, see Deirdre Curtin, "The Constitutional Structure of the Union: A Europe of Bits and Pieces" (1993) 30 *Common Market Law Review* 17–69.

cooperation procedures, codecision provided for the equal participation of the Council and the Parliament in the adoption of European legislation. At the beginning, it applied to fifteen legal bases. The following amending Treaties – the Treaty of Amsterdam in 1999, the Treaty of Nice in 2003, and the Treaty of Lisbon in 2009 – extended its scope of application, so that the codecision now applies to eighty-five legal bases. The Treaty of Lisbon also changed its official name into "Ordinary Legislative Procedure" (OLP).[87]

In its Maastricht version, the codecision procedure envisaged up to three readings, with the possibility for the Parliament and the Council to convene a Conciliation Committee in case of outstanding political differences. The Committee could be established during the second reading and consisted of members of the Council (or their representatives) and an equal number of representatives of the European Parliament. Its task was to facilitate an agreement between the co-legislators on a draft text, with the Commission taking all the necessary initiatives for reconciling the EP's and the Council's positions. The procedure has essentially remained unaltered ever since, except for some innovations introduced by the Treaty of Amsterdam.[88]

[87] Apart from further extending the scope of application of the codecision procedure, the Treaty of Lisbon introduced in primary law the distinction between "Ordinary Legislative Procedure" (OLP) and "Special Legislative Procedures" (SLPs). The OLP "shall consist in the joint adoption by the European Parliament and the Council of a regulation, directive or decision on a proposal from the Commission." The SLPs, instead, shall consist in "the adoption of a regulation, directive or decision by the European Parliament with the participation of the Council, or by the latter with the participation of the European Parliament" (Art. 289 TFEU). In the case of SLPs, the "participating" institution can be required either to give its consent (formerly known as "assent procedure") or to draw a nonbinding opinion (consultation procedure) on draft legislation. The Treaty of Lisbon also eliminated the cooperation procedure.

[88] These were indeed not insignificant changes. First, whereas the Treaty of Maastricht obliged the co-legislators to always start the second reading, the Treaty of Amsterdam gave the possibility to the Council and the Parliament to conclude the procedure at the end of the first reading, with the Council adopting the first-reading opinion of the Parliament. Secondly, the Treaty of Maastricht provided that, after the unsuccessful convening of the Conciliation Committee, the Council could reinstate its second-reading common position, obliging the Parliament to reject it with an absolute majority, if necessary. The Treaty of Amsterdam eliminated the right of the Council to reinstate its second-reading common position. This meant that if there had been no agreement between the Parliament and the Council after the Conciliation Committee, the draft act fell. In essence, the changes introduced by the Treaty of Amsterdam are still in force today.

In this new institutional context, trilogues played a key role. They are widely credited with having supplied a set of arrangements by which legislative interactions and conflicts could be adequately managed, channeled, and framed. They not only inspired the creation of the Conciliation Committee,[89] whose workings have been further regulated in a series of interinstitutional agreements concluded in 1993,[90] 1999,[91] and 2007.[92] They also provided the practitioners of codecision with a hands-on scheme to structure institutional interactions *before* conciliation. These interactions came to resemble those "talks" that, according to the 1993 Resolution on Article 189b, the institutions used to carry out under the cooperation procedure, and that they pledged to continue and develop under the codecision procedure. In this respect, it is worth considering the opening passage of a short report prepared by the European Parliament a few months ahead of the 1996 Intergovernmental Conference that led to the adoption of the Treaty of Amsterdam:

> The codecision procedure introduced by Article 189b of the Treaty on European Union confirms the trend, which was heralded by the conciliation procedure introduced in 1975, and subsequently by the cooperation procedure set up by the Single European Act, towards basing legislative decision-making processes on dialogue and negotiation between Parliament/the Council and the Commission.[93]

At the same time, the prospect of conciliation led the practitioners of codecision to believe that "conciliation should not be seen as the automatic and sole mechanism for resolving conflicts of opinion."[94] As the cited report put it, codecision implies "a cumbersome procedure which may go as far as four readings. There is no requirement to go through all the stages of the procedure; on the contrary: the aim should be to reach

[89] The features of the Conciliation Committee make it akin to domestic inter-chamber coordination mechanisms, especially the German *Vermittlungsausschuss*, as provided for by Art. 77 of the German Basic Law. On these similarities, Dana Burchardt and Max Putzer, "Kompetenzgrenzen im deutschen und europäischen Vermittlungsverfahren" (2011) 26 *Zeitschrift für Gesetzgebung* 68–91; Foster, "The New Conciliation Committee," 191 ff. On the functioning of the German *Vermittlungsausschuss*, see Chapter 5, Section 5.3.2.

[90] Arrangements for the Proceedings of the Conciliation Committee under Article 189b, OJ 1993 No. C329/141.

[91] Joint Declaration on Practical Arrangements for the New Co-decision Procedure (Art. 251 of the Treaty Establishing the European Community), OJ 1999 No. C148/1.

[92] Joint Declaration on Practical Arrangements for the Codecision Procedure of 13 June 2007 (Article 251 of the EC Treaty), OJ 2007 No. C145/5.

[93] European Parliament, "Task-Force on the 'Intergovernmental Conference': Briefing No. 8 on the Codecision Procedure," JF/bo/146/95, 20 July 1995, at 1.

[94] Shackleton, "The Politics of Codecision," 330.

agreement in the early stages of the procedure so as to avoid, if possible, entrenched positions which would make it excessively lengthy."[95] So, as soon as codecision came into force, the institutions began to organize trilogues to make the legislative process more cooperative and effective. Although in an initial phase these trilogues served only as preparatory meetings for the Conciliation Committee,[96] soon enough the institutions began to move them further upstream, in first and second reading.

With their proliferation also came their first official acknowledgment. The 1999 Joint Declaration referred to them as "appropriate contacts" and, more importantly, as a "practice" worth preserving and expanding. Shortly thereafter, in a report to the European Council, the Council affirmed that those contacts were "essential" to the success of codecision, adding that they were "needed throughout the procedure."[97] The Parliament and the Commission certainly shared this belief, as they agreed to adopt the 2007 Joint Declaration on Codecision, which includes the following clauses: the "practice involving talks between [the institutions] has proved its worth"; "the institutions confirm that this practice ... must continue to be encouraged."

What is also worth highlighting is that the European legislative institutions have essentially agreed to limit the degree of formalization of trilogues. For instance, in the above-cited report, the Council stated that there was "no need for these instruments to be formalized," insisting on preserving their "vitality and flexibility."[98] A similar view was expressed at the end of 2002 by the Working Group IX on Simplification during the drafting of the Treaty establishing a Constitution for Europe. In its final report to the Convention, the Working Group specified that, after holding a hearing of two experts,[99] the majority of its members

[95] European Parliament, "Task-Force on the 'Intergovernmental Conference,'" at 1.

[96] Shackleton, "The Politics of Codecision," 334, where the author affirms that it was during the Spanish Presidency, in the second half of 1995, that the institutions "agreed on the general principle of holding preparatory trilogues." See also Sophie Boyron, "Maastricht and the Codecision Procedure: A Success Story" (1996) 45 *International and Comparative Law Quarterly* 293–318 at fn. 62.

[97] Council of the European Union, "Report by the Presidency and the General Secretariat of the Council to the European Council on Making the Co-decision Procedure More Effective," 13316/1/00 REV 1, 28 November 2000, paras. 8 and 32.

[98] Ibid., para. 36.

[99] The two experts were Giorgos Dimitrakopoulos, then Vice-President of the European Parliament with responsibility for conciliation, and Jean-Paul Jacqué, then Director of the Codecision Unit in the Council. See European Convention, "Final Report of Working Group IX on Simplification," CONV 424/02, 29 November 2002, at 24.

declared themselves against making a reference to trilogues in the Constitutional Treaty because the "effectiveness of the institutional 'trialogues' lay in their flexibility and informal nature."[100] Again, on the occasion of a conference for the twentieth birthday of the codecision procedure, Jean-Paul Jacqué affirmed that the set of common rules and principles governing the operation of that procedure – in particular, the Treaties and the 2007 Joint Declaration on Codecision – had been purposely conceived in vague terms, so that practitioners could enjoy "the necessary degree of flexibility and discretion when dealing with the 'hidden part of the iceberg.'"[101]

What is more, the inception of codecision and the thriving of trilogues came with another important – although less evident – development. They entrained a deep change in the legislative culture of the EU, especially as regards the hitherto prevalent style of communication and interaction. A shift from a confrontational to a more cooperative interplay occurred. As an observer put it, codecision and trilogues ushered in "a new dynamic within the legislative arena of the European Union"; they "created a virtuous circle in which co-operation and trust were mutually reinforcing" and favored "the growth of shared norms of behavior encouraging the search for consensus."[102] In other words, they contributed in a decisive way to generating social capital among political actors.

When it was only consulted, the EP used to have an "*attitude tribunicienne*."[103] In its resolutions, instead of proactively contributing to the making of EU legislation, it usually adopted impressive-sounding phrases and fascinating oratory and later complained about not being taken seriously by the Commission and the Council, which favored a more pragmatic, to-the-point approach. After codecision, the EP saw its role and responsibilities change significantly. It was now involved on equal terms with the Council in the adoption of many legislative acts; it had to justify its policy preferences vis-à-vis its electorate and its legislative partners; it had to ensure the quality of European legislation. In other words, the Parliament was no longer a fledgling institution and had to act accordingly.

[100] Ibid., at 25.
[101] European Parliament, "20 Years of Codecision: Conference Report," 5 November 2013, at 4.
[102] Shackleton, "The Politics of Codecision," 326 f. and 333.
[103] Jean-Paul Jacqué, "Une vision réaliste de la procédure de codécision," in Aline De Walsche and Laure Levi (eds.), *Mélanges en hommage à Georges Vandersanden: promenades au sein du droit européen* (Bruylant, 2008), p. 197.

For its part, the Council had been the undisputed master of the supranational legislative authority for about forty years. Its working culture featured discreet diplomatic negotiations and the persistent search for compromise.[104] Not surprisingly, the Council considered the EP unsuited to its newly acquired position. It deemed it almost "vexing" to share its legislative power with such an unpragmatic and clamorous institution. In the first years of codecision, the Council saw the Parliament as a *parvenu* that lacked the required institutional experience and gravitas. Yet the new procedure had put the Parliament and the Council on an equal footing. It had made them interdependent, thereby imposing goal-oriented cooperation. This situation impelled both institutions to set aside old prejudices and change perspectives.

The Commission had to adapt to the changed institutional setting as well. After Maastricht, it was no longer in a tandem relationship with the Council. It was now part of a genuine legislative triangle. Exploiting its near monopoly over the legislative initiative, its mastery of technical information, and its presence throughout all legislative stages (Council meetings, Coreper meetings, EP committee meetings, and so on), the Commission further established itself as a connecting link between the two co-legislators. The legislative dialogue was now the prerogative of the Parliament and the Council; the Commission participated in it with a view to assisting the two co-legislators in reaching viable compromises, while promoting the general interest of the Union.

That said, the Conciliation Committee and the "appropriate contacts" have enjoyed two opposite fates. The former has steadily lost importance, whereas the latter have increasingly established themselves as part and parcel of the supranational legislative process. In the fifth legislative term (1999–2004), the proportion of codecision files that reached the conciliation stage amounted to 22 percent. In the sixth (2004–2009), seventh (2009–2014), and eighth (2014–2019) legislative terms, this fell dramatically to 5 percent, 2 percent, and 0 percent, respectively, thereby rendering the Conciliation Committee all but obsolete.[105] Other data also needs to be factored in, namely that in the fifth legislative term the percentage of

[104] Jacqué, "Une vision réaliste," p. 192.

[105] European Parliament, "Activity Report: Developments and Trends of the Ordinary Legislative Procedure: 1 July 2014–1 July 2019 (8th Parliamentary Term)," PE 639.611, at 3. In the fourth legislative term (1994–1999), the proportion of codecision files that reached the conciliation stage amounted to 33.5 percent. See Andreas Maurer, "(Co-)Governing after Maastricht: The European Parliament's Institutional Performance 1994–1999," POLI 104/rev., October 1999, at 20. It is worth remembering, though, that

codecision files that were adopted either at the end of the first reading (with the Council adopting the Parliament's first reading position) or at the beginning of the second reading (with the Parliament adopting the Council's first reading position) accounted for 54 percent of all enacted legislation. In the sixth, seventh, and eighth legislative terms, this increased to 82 percent, 93 percent, and 97 percent respectively, thereby rendering second and third legislative readings practically redundant.[106]

These developments substantiate the claim that since codecision became effective, the legislative culture of the EU has undergone profound changes. A consensus among the institutions has emerged as to the necessity of endorsing trilogues as the secret of European legislation.[107] Such a consensus is reflected in the above figures, which testify to the near obsolescence of the Conciliation Committee and the dramatic increase of legislative acts adopted at first reading. These developments also confirm that trilogues are so ingrained in the constitutional fiber of the EU that analyzing the European legislative process without considering them would be like separating the bones of the law from the flesh of real constitutional life. To avoid such a "painful" separation, the next two chapters will be devoted to reconstructing the operation of the supranational legislative process in the light of trilogues. But before that, I will close this historical reconstruction with some concluding remarks.

1.7 Conclusions

The entry into force of the Budgetary Treaties marked an important moment in the history of European legislative relations. It set in motion a process whereby the Parliament, exploiting the power of the purse, could effectively "blackmail" the Council into sharing an ever-increasing portion of legislative powers. For its part, the Council could not always oppose outright a greater involvement of the representatives of the peoples of Europe in the supranational legislative process without jeopardizing its own legitimacy. It was therefore cyclically forced to make concessions.

during the fourth legislative term it was not yet possible to conclude codecision files at first reading (see fn. 88).

[106] European Parliament, "Activity Report," at 3.

[107] On the existence of such a consensus, Christilla Roederer-Rynning and Justin Greenwood, "Black Boxes and Open Secrets: Trilogues as 'Politicised Diplomacy'" (2021) 44 *West European Politics* 485–509 at 493 ff.

A first crucial concession, which I regard as a "critical juncture," was the signing of the 1975 Joint Declaration on Conciliation. With it, the institutions introduced a trilogue paradigm whereby three small delegations from the Parliament, the Council, and the Commission met to discuss and negotiate the content of relevant pieces of European legislation, with the Commission participating as mediator. Despite having taken different forms ("conciliation," "tripartite dialogue," "tripartite meetings," and so on) and having undergone some inevitable adjustments, that paradigm generated positive feedback and led to political actors preserving and improving it over the years, especially after the inception of the codecision procedure. These circumstances not only bespeak the high adaptive capacity and resilience of the trilogue paradigm, but they also reveal its essentiality for the European legislative process.

A key role in this evolutionary process has been played by the interinstitutional agreements and the EP's Rules of Procedure. The former have been used, time and again, as means to supplement and better structure the European constitutional framework,[108] thereby giving birth to a sort of *Inter-Organ-Geschäftsordnungsrecht* (interinstitutional rules of procedure).[109] The latter have often been employed by the Parliament to crystallize institutional practices, especially when these entailed power gains for itself vis-à-vis the other institutions. To be fair, the EP has also contributed to making trilogues more open to public scrutiny. With the "Manzella Report" in 1998,[110] the Parliament launched a phase characterized by regular amendments to its Rules of Procedure to improve the transparency of the legislative process. With this in mind, I can now turn to analyzing in greater detail the current role and internal functioning of each of the three institutions that make up the European legislative triangle.

[108] Roberto Baratta, "Notes sur les fonctions et limites des accords interinstitutionnels," in Antonio Tizzano (ed.), *Verso i 60 anni dai Trattati di Roma: stato e prospettive dell'Unione europea* (Giappichelli, 2016), p. 37 ff.

[109] Roland Bieber, "Artikel 232 (ex-Artikel 199 EGV) [Geschäftsordnung; Verhandlungsniederschriften]," in Hans von der Groeben, Jürgen Schwarze, and Armin Hatje (eds.), *Europäisches Unionsrecht*, 7th ed. (Nomos, 2015), vol. 4, p. 679.

[110] Resolution on the New Codecision Procedure after Amsterdam, OJ 1998 No. C292/140.