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INSTITUTIONAL BALANCE AND REPRESENTATIVE THEORY (CRITICAL REMARKS)

The term «institutional balance» has permanently come for use in the constitutional law of the European Union. Academic literature offers a diverse scope of different approaches from rather simplified «*who* (which institution) and *how* (according to what procedure)» by A. Verhoeven [13, p. 205] to «a euphemism which ‘masks an inherent institutional tension between the intergovernmentalism and surpanationalism» [3, p. 21]. However, quite general understanding of «institutional balance» is «the distribution of powers within a supranational or international organisation and the relationship between its organs» [10] or «an accepted term for describing the complex allocation of powers amongst the various organs established within the Community context» [3, p. 58].

But what are the reasons for allocation of powers between the EU institutions in one or another way? The most common reply to this question is the representative approach (*In terms of the EU studies representation is discussed in two major aspects –territorial and functional. The article will deals with functional representative model.*). P. Craig introduces his understanding of the institutional balance with the reference to «republican conception of democratic ordering, embodying the ideal that the form of political ordering should encapsulate a balance between different interests, which represented different sections within civil society» with its goal «to ensure that decision-making served the public good rather than narrow sectional self-interest» [4, p. 41].

The contemporary representative approach is based upon presumption that the EU institutions *inter alia* fulfil the representative role. In the Lisbon Treaty the approach is reflected in Article 10 of TEU and Article 17 of TEU.

These normative provisions repeat a rather well-known postulate that the Council represents the interests of the member-states, European Parliament – interests of citizens of the member-states, «brought together in the European Union» and Commission – the common interests of the European Union [9]. (*The Union’s institutional framework can be called, a «balancing act» between the representation of the interests of the Member States, the*

representation of the political will of the citizens, and the representation of the general interest of the Union).

The scholars elaborated this approach with further connection of the institutional balance concept with the representative basis: «*The institutional balance requires the makers of the European constitution to shape institutions and the interactions between them in such a manner that each interest and constituency present in the Union is duly represented and cooperates with others in the frame of an institutionalized debate geared towards the formulation of the common good. At the same time, the formulation of the common good should never lead to an unequal and unnecessary sacrifice of individual liberty*» [7, p. 47].

In short, the above quotation is the key idea behind the concept. In theory the concept may sound attractive and reasonable. But further in-depth study reveals many gaps thus raising extensive critiques. Below will be discussed the most evident problems with this approach.

A. *Representative theory ignores vast layers of the EU political processes.*

The practice of European Union policy- and decision-making process is far away from transparency. This fact has been constantly repeated in the academic literature. As it was highlighted, «substantial elements of European governance operate in the margins of or wholly outside constitutional frame as defined by the institutional balance. The whole area of executive rule-making within the European Union is characterized by intricate institutional elements such as comitology committees and agencies and operates in a constitutional twilight zone, regulated only by a few and ambiguous Treaty provisions, some case-law of the European courts, incomplete pieces of secondary legislation and a number of declarations and inter-institutional agreements» [7, p. 48]. S. Smismans continues «The gap between institutional reality and formal constitution as expressed by the institutional balance is so big that one can question whether the latter can (still) be assumed to ensure the rule of law and the legitimacy of European governance» [11, p. 91]. E.-U. Petersmann adds that «the law-making processes of the EU takes place behind the closed door. All too often, they are dominated by the protectionist group interests...» [8, p. 1125].

The quoted scholars focus upon the practical aspects of policy- and decision-making process in the EU, which is drastically different from any theoretical model. And an attempt to ignore the reality while modeling political processes usually misleads. The fact that substantial part of the EU decision making is done outside the representative bodies undermines the complete concept as this part of the process is simply ignored. Indeed, what kind of representation it is, when «neither European Parliament nor media is in the position to review, evaluate or monitor what is happening in the committee rooms» [3, p. 72]. The same applies to the numerous agencies, which «do not have regulatory functions although the expertise they provide is used by the principal policy-making institutions and actors and affects the implementation process» [6, p. 239].

Certainly, practice differs from any theoretical matrix, but in this case the degree of deviation matters. And if the degree of deflection goes far beyond acceptable errors than the concept has to be changed to take into consideration the maximum quantity of the facts it is designed to explain. From this point of view representative model does not cover a vast amount of processes, dealing with the initial and preparatory phases of the legislative and decision-making process, where the numerous committees and agencies are involved.

B. *Based on presumption.*

The formula, which is the cornerstone of the representative approach, is certainly not a fact. The contrast can be best observed on the example with the European Parliament, which is presumed to represent the people of member-states «brought together by the Union». In reality, its representative ability is an issue in question. E.-U. Petersmann underlines this fact separately [8, p. 1126]. (*The European Parliament does not offer an effective substitute, as a result of its limited powers, inadequate representativeness, the absence of a European political party system and the insufficient democratic accountability of its members*). S. Douglas-Scott mentions well known weakness of the European Parliament as well as its lack of the legislative initiative [1, p. 132]. K. Leanaerts and A. Verhoeven also emphasize specific status of the European Parliament («*The European Parliament does not represent a European people nor, certainly, a European general will, in fact, institutional balance in precisely designed to ensure that a plurality of interests participate in the formulation of a European common good*») [7, p. 57].

The formation of «common good» leads to a potential conflict between the European Parliament as a forum to formulate the concept and the Commission, which «is not a representative body, yet its members are called to act in the general interest of the Community» [7, p. 51]. In fact this issue has already been raised to some extent by S. Smismans [11, p. 97]. («*When 'the general interest of the Community' is understood as the pursuit of the objectives of the Treaty, the Commission could be assumed to represent this interest. Yet could 'the general interest of the Community' not equally be understood as the general interest of all European citizens? And would then, for instance, the European Parliament not be best placed to represent this interest?*»)

But the situation, when the concept is formulated in the EP and then is fulfilled by the Commission falls into the scheme of parliamentary republic, which is not certainly the case with the European Union. The Commission originally designed as the as the engine or driving force of the European Union [12, p. 29], for the decades has been the one, who determines the «common good» and not just fulfill others' ideas. And it will hardly yield its authorities to determine the direction of the EU further development on a mere ground that it represents neither the people of Europe nor the member-states.

L. Hoffman adequately emphasized internal weakness of the representative model, thus trying to draw attention to its essence instead of the façade, which is of usual and convenient reference [2, p. 5]. (*Quite often the institutional balance is viewed as the balance of representation model within which «the Commission represents the Union's interests, the Council the member state governments and the Parliament the EU citizens. Each of the stakeholders is adequately represented so the only thing missing is public participation and interest*»).

C. **Representative approach is methodologically improper.**

The attempts to widen the representative concept to all EU main bodies and then to second-level organs and still then to all institutions and agencies leads to nowhere, thus creating a complete chaos instead of a harmonious system. Commenting upon Lenaerts and Verhoeven concentration of the interest representation on Council and European Parliament S. Smismans tries to widen the application of the concept to the complete list of the main institutions:

“With some goodwill one could also argue that the Court of Justice represents the abstract interest of justice or rule of law, and the Court of Auditors the interest of financial accountability”

And the representative nature of the Commission "can only be thought of in terms of "standing for an abstract idea" [11, p. 96-97].

Further discussing the idea to define institutional balance in broader terms by including into the system such bodies as the Economic and Social Committee and the Committee of the Regions S. Smismans remarks:

"This formulation suggests that the institutional balance could also include the many bodies and representative structures for functional participation established by secondary European law" [11, p. 98].

But there are questions to follow - Is the list of institutions to be considered part of the institutional balance as legal principle thus complete? Or should also organs such as the European Central Bank or the European Investment Bank, which are equally enshrined in the Treaty, be part of the list? Own answer of S. Smismans is accurate and adequate:

"by including automatically in the institutional balance all organs enshrined in the Treaty, the concept would be reduced to a simple application of the rule of law and would be emptied of its 'legitimizing potential'" [11, p. 99-100].

Another aspect of the unfoundedly broad use the representative model is the methodological fault, since no unified formula of representation is offered. Instead of one criterion there is a line of different ones varying from people or countries to various ideas, interest groups, etc. And the list can be continued, thus creating a universe of representative bodies and another universe of groups and ideas still to be represented on the EU level. The absence of unified criteria for representation as well as the absence of clear rules for the representative mechanism undermines the stability of the complete concept. As it is emphasized by G. de Burca:

«Even if the "institutional balance" is not treated by the Court as a rigid rule but a more fluid principle safeguarding pluralism within the policy process [5, p. 285], there are nonetheless major concerns about those interests exactly are being represented» [3, p. 74].

D. Does not have clear logics behind if compared with a state.

This is probably the biggest problem with the attempts to apply the representative model as the basis for the power distribution between the EU institutions. If compared to a state, this model lacks the clear and simple logics. In a state the fact that the parliament is formed by the universal suffrage and further presumption that it represents the civil society leads to the straightforward conclusion that the parliament:

- A. Has the representative function – i.e. is entitled to speak on behalf of nation;
- B. Has moral and legal grounds to make laws;
- C. Can form and/or control the government;
- D. Makes and controls the budget.

With regards to the EU even if agree with either the initial representative model dealing with the Commission-Parliament-Council triangle or any derived model from those including just five (seven) main bodies to those spreading the representation to most of the committees and agencies, then there is no answer to the simple question, which follows up – so what? What is the practical outcome from the presumption that Economic and Social Committee «shall consist of representatives of organisations of employers, of the employed, and of other parties representative of civil society, notably in socio- economic, civic, professional and cultural areas» (Article 300 TFEU), and the Court of Auditors represents «the interest of financial accountability» [11, p. 97]. And what are the criteria to ensure that

the powers, entrusted to the body in any way correspond to the level of representation, it is assumed to reflect?

Therefore there is a gap between the concept itself and the actions, which are purportedly taken on its basis. The attempts to apply the representative model look more like a *post factum* analysis rather than a genuine basis used within the negotiation process as for the power distribution between the EU institutions.

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