Introduction

> Perhaps no other field of human knowledge is the source of such abundant and perpetual illusions as the science that deals with political institutions. Political institutions are phenomena the mere description of which is an operation of gigantic proportions. And this not only because the form of the political institutions often disguises and distorts their substance, but also because, being the outcome of a continuous and insurmountable conflict of irreconcilable principles, those institutions always present themselves under multiform and elusive appearances.
>
> Santi Romano[1]

I.1 Framing the Phenomenon

Secret, opaque, messy, stealthy, furtive, clandestine, surreptitious, underhanded. I am not speaking of a private lodge or, worse, of a sinister organization plotting against the prosperity and well-being of a state or a region. I am speaking of the European legislative machinery. These are some of the adjectives that one comes across when reading newspapers and blogs.[2] Academic literature also abounds with fierce criticisms. Many scholars believe that supranational legislation is the outcome of an impenetrable, adrift, detached process, which does not live up to the

[1] Santi Romano, "Lo Stato moderno e la sua crisi," in *Scritti minori* (Giuffrè, 1950), vol. 1, p. 311 (my translation).

[2] Charlemagne, "Giving Faces to 'Faceless Eurocrats,'" *The Economist*, 21 May 2022; Hendrik Wieduwilt, "Viele heimliche Gesetzgeber: Für die Flut der Vorschriften sorgt längst nicht mehr nur der Bundestag," *Frankfurter Allgemeine Zeitung*, 28 November 2018; Jim Yardley, "Has Europe Reached the Breaking Point?," *The New York Times Magazine*, 15 December 2015; Harry Cooper, "Where European Democracy Goes to Die," *Politico*, 12 July 2016.

democratic credentials the European Union supposedly adheres to.[3] And to make matters worse, the legislative process of the EU has also been criticized from inside the European institutional setup. On 12 July 2016, the European Ombudsman, at the end of an own-initiative inquiry into the transparency of the European legislative process, published a decision reproaching the supranational institutions for lacking accessibility and proximity to the citizens and recommending more openness and accountability.[4]

To be sure, one of the main targets of public criticism is an established practice of the European legislature known as "trilogues." By this term, scholars and practitioners refer to informal meetings held behind closed doors by small groups of representatives from the Parliament, the Council, and the Commission. During these meetings, which can take place at different stages of the legislative procedure, participants discuss and negotiate *en petit comité* legislative files, with a view to drawing their political views together. In figurative terms, trilogues have often been likened to a sort of "smoke-filled room," which in US political jargon is a place where a small group of powerful people take secret decisions that do not pay regard to the general interest.

On the face of it, the European legislative process can hardly be imagined without trilogues. These have become standard practice for the adoption of EU legislation. Given the inherent difficulties in attaining policy changes (legislative procedures at EU level have been designed to protect the interests of minorities and to empower veto players),[5] trilogues play the key function of simplifying the legislative environment in which the institutions operate. The diffusion and relevance of these meetings is confirmed by data. The latest activity report of the European Parliament (EP) shows that, during the last parliamentary term (2014–2019), the EP took part in about 1,135 trilogues, which in turn led

[3] See, e.g., Alberto Alemanno and Laurent Pech, "Thinking Justice outside the Docket: A Critical Assessment of the Reform of the EU's Court System" (2017) 54 *Common Market Law Review* 129–175 at 147: "Trilogues are sufficiently problematic from the point of view of transparency and democracy that the [Court of Justice] should have refrained from agreeing to participate in informal negotiations regarding a contentious reform in a format which is hard to reconcile with the democratic requirements flowing from Title II of the TEU."

[4] European Ombudsman, "Decision of the European Ombudsman Setting Out Proposals Following Her Strategic Inquiry OI/8/2015/JAS Concerning the Transparency of Trilogues," OI/8/2015/JAS, 12 July 2016.

[5] George Tsebelis, *Veto Players: How Political Institutions Work* (Sage/Princeton University Press, 2002), p. 248 ff.

to the adoption of 314 legislative files. This is an average of a little under four trilogues per adopted file, similar to the figures of the previous parliamentary term (2009–2014).[6]

Trilogues have also received official recognition outside the supranational institutional milieu. In 2011, for instance, the German Federal Constitutional Court referred to trilogues when striking down a national provision that stipulated a 5 percent threshold in the election of German representatives to the European Parliament. The Court argued that the elimination of the 5 percent threshold was not likely to jeopardize the overall good functioning of the EP, whereas its maintenance was liable to disproportionately violate the rights of the German citizens and political parties to electoral and equal opportunities. As regards trilogues, the Court stated that "[e]ven if parliamentary representatives had to consult with a larger number of political forces in the European Parliament, it is neither explained nor otherwise evident that representation of the European Parliament in the trilogues would no longer be possible, or only at disproportionate expense."[7] In other words, the Court recognized the importance of trilogues for the European legislative process and took the trouble to elucidate that its decision was not liable to place an undue burden on their workings.

Now, trilogues are part and parcel of one of the most influential political systems in the world, which wields power over about 450 million people. After the elections to the Indian Lok Sabha, the elections to the European Parliament are – at least on paper – the "second-biggest democratic show on Earth."[8] They take place in twenty-seven Member States, which in turn participate in the adoption of European legislation through their governmental representatives in the Council and must then implement and enforce such legislation in their respective territories under the shadow of primacy and direct effect. All these circumstances make a rather compelling case for a thorough study of trilogues and their interplay with the democratic order set out in the Treaties. I will shortly explain how this study intends to contribute to the existing literature on the topic. But before that, a brief explanation of the book title is in order.

[6] 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 8 f.

[7] German Federal Constitutional Court, Case No. 2 BvC 4/10, 9 November 2011 – *Fünf-Prozent-Sperrklausel EuWG*, para. 114.

[8] "Changing Parliamentary Perspectives," *The Economist*, 18 May 2019.

I.2 Trilogues as the Democratic *Secret* of European Legislation

The most conspicuous word in the title of this book is, probably, "secret." The use of "secret" is readily explained. The word is taken from Walter Bagehot's 1867 book *The English Constitution*. At the very beginning of that book, Bagehot famously argued that "the efficient secret of the English Constitution may be described as the close union, the nearly complete fusion," the "singular approximation" of the executive and legislative powers.[9] I believe this is a suitable description of what happens in trilogues. They indeed realize a singular approximation of the different European legislative institutions. And although this approximation is not as complete as in Bagehot's cabinet, it is strong and structured enough to create "a combining committee," "a *hyphen* which joins, a *buckle* which fastens."[10] It is therefore possible to claim that trilogues are the "efficient secret" of the European constitution: something not expressly regulated in the Treaties, but crucial to the existence and functioning of the European political system. But that is not all.

Next to its most traditional meaning of something "unknown or unrevealed,"[11] the word "secret" as in *The English Constitution* has at least two other meanings. The first meaning captures the nature of the cabinet as "something surprising or extraordinary,"[12] something that commands reverential respect mixed with wonder and that makes the English constitution superior to other constitutions (especially that of the United States).[13] The second meaning encapsulates the successful institutionalization of a constitutional body, a body that has to be kept firmly divided from the Monarchy and from the House of Commons, despite conflating elements of both – "a committee of the legislative body selected to be the executive body."[14] This reading is predicated on the etymology of the

[9] Walter Bagehot, *The English Constitution* (first published 1867, Cambridge University Press, 2004), p. 8 f.

[10] Ibid., p. 10.

[11] Against the notion that Bagehot's *The English Constitution* was unveiling something unknown or unrevealed, Miles Taylor, "Introduction," in Walter Bagehot, *The English Constitution* (Oxford University Press, 2009), p. xxi, arguing that "the idea of cabinet government had already become well-known by the time Bagehot produced his work."

[12] "secret, n., sense I.4.c," in *Oxford English Dictionary* (Oxford University Press, July 2023).

[13] There is no sentence that can better convey this sense of surprise and awe than the following: the cabinet "is a creature, but it has the power of destroying its creators. It is an executive which can annihilate the legislature, as well as an executive which is the nominee of the legislature. It *was* made, but it *can* unmake; it was derivative in its origin, but it is destructive in its action." See Bagehot, *The English Constitution*, p. 11 f.

[14] Ibid., p. 9 f.

word "secret."[15] "Secret" derives from the Latin word "*secretus*," which is the past participle of "*secernere*." By employing this word, Bagehot also indicates a product or device that results from the (inter)action of other elements and grows separate from them. To the extent that the notion of "efficient secret" hints at such a process of individualization, it proves suitable to describe the actual nature of trilogues as separate, autonomous constitutional joint bodies.

Finally, there is another reason why Bagehot's book and his "efficient secret" are so valuable for my work. As Bagehot set about writing his account, he was aware that the existence of a powerful body such as the cabinet might appear at odds with the traditional understanding of the English political system as hinging on the sovereignty of Parliament. In the introduction to the 1872 second edition of the book, he admitted as much by stating: "No doubt it may be beneficial; many seeming anomalies are so, but at first sight it does not look right."[16] As the trajectory of the cabinet in the constitutional history of England teaches us, knowledge and time may indeed turn anomalies into systems. Who would nowadays deny that the "efficient secret" described in *The English Constitution* embodied a key development towards a more accountable constitutional order?

Bagehot argued his case with such prowess, vitality, and authority that, as Kenneth Wheare maintained, what he "said happened soon became accepted as what should happen. His work was descriptive; it became normative."[17] I cannot aspire to such greatness. I will thus content myself with providing some arguments in favor of trilogues and, thereby, a perspective other than the one from which they are usually approached and appraised. At this point the question legitimately arises: why have I not kept the adjective "efficient" in the title? Trilogues are often criticized for epitomizing a typical fixation of the European institutions with efficiency, in defiance of other important legitimacy channels.[18] Since the objective of this book is to argue that trilogues are not just legitimate for

[15] This hypothesis is not unlikely, considering Bagehot's keen interest in physiology. See, e.g., Walter Bagehot, *Physics and Politics* (first published 1873, Cambridge University Press, 2010).

[16] Bagehot, *The English Constitution*, p. 212.

[17] K. C. Wheare, "Walter Bagehot" (1974) 40 *Proceedings of the British Academy* 173–197 at 195.

[18] For an effective presentation of this criticism, Päivi Leino, "The Politics of Efficient Compromise in the Adoption of EU Legal Acts," in Marise Cremona and Claire Kilpatrick (eds.), *EU Legal Acts: Challenges and Transformations* (Oxford University Press, 2018), p. 30.

their (purported) efficiency but also – and above all – for the procedure they instantiate, I have chosen to drop the adjective entirely.

I.3 The State of the Art: A Short Literature Review

There is a significant body of literature concerning the European legislative process and trilogues. Many of those contributions are descriptive in nature and are often written by former or current civil servants with first-hand experience of how legislation comes into existence.[19] Although these contributions may sometimes have limited theoretical and normative ambitions, they serve an important objective: they provide a true-life understanding of how the European legislative process plays out. And such an understanding is a "commodity" that non-insiders might find rather difficult to attain. Other contributions, instead, contain both descriptive and normative parts. After sketching out the relevant legal framework, these works discuss the problematic issues that arise from trilogues and affect the EU legislative process. They often put the emphasis on the lack of transparency and/or on the alteration of the institutional balance in the actual functioning of, and interplay between, the European legislative institutions. This strand of literature

[19] Here is a partial list of contributions written by (former or still in office) EU officials that have enriched my understanding of the European legislative process: Andrea Manzella, "Legislation and Legislative Procedures between the Parliament, the Council and the Commission," in Giuliano Amato, Enzo Moavero-Milanesi, Gianfranco Pasquino, and Lucrezia Reichlin (eds.), *The History of the European Union: Constructing Utopia* (Bloomsbury, 2019), p. 199 ff.; Anita Bultena, "Negotiations in the Ordinary Legislative Procedure: The Perspective of the European Parliament," in Flora A. N. J. Goudappel and Ernst M. H. Hirsch Ballin (eds.), *Democracy and Rule of Law in the European Union: Essays in Honour of Jaap W. de Zwaan* (Asser Press/Springer, 2016), p. 93 ff.; María Gómez-Leal Pérez, "El procedimiento legislativo ordinario en la práctica: los acuerdos en primera lectura" (2015) *Cuadernos Europeos de Deusto* 101–118; Javier Guillem Carrau, "Los trílogos en el procedimiento legislativo de la UE: el *informal law making* en la nueva agenda legislativa europea" (2014) 92–93 *Revista de las Cortes Generales* 45–74; Katrin Huber and Michael Shackleton, "Codecision: A Practitioner's View from Inside the Parliament" (2013) 20 *Journal of European Public Policy* 1040–1055; Enrique Barón Crespo, "El desarrollo de la codecisión como procedimiento legislativo de la UE" (2012) *Cuadernos Europeos de Deusto* 19–47; Una O'Dwyer, "La dynamique historique des relations interinstitutionnelles. Le point de vue d'un praticien sur l'évolution de la procédure de codécision" (2010) *Revue du droit de l'Union européenne* 487–526; 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. 183 ff.; Christian Pennera and Johann Schoo, "La Codécision – Dix ans d'application" (2004) 40 *Cahiers de droit européen* 531–565; Michael Shackleton, "The Politics of Codecision" (2000) 38 *Journal of Common Market Studies* 325–342.

encompasses in-depth doctrinal analyses,[20] including the only two monographs (in German) on the topic to date.[21]

Trilogues have also drawn the attention of political scientists. Their contributions are mainly based on inductive argumentation and hypothesis testing and comprise theoretical and empirical studies, both quantitative and qualitative. Some of these studies focus on the question as to which institution has profited the most from the practice of trilogues;[22] some others provide evidence as regards the impact of trilogues on the interplay and internal organization of the different institutions;[23] and others still investigate the conditions under which trilogues are likely to occur and succeed.[24] Moreover, many studies elaborate on the democratic legitimacy of European legislation;[25] and some have finally begun to use

[20] Jelena von Achenbach, "Transparenz statt Öffentlichkeit und demokratischer Repräsentation: Aktuelle Entwicklungen des Verhandelns in Trilogen im EU-Gesetzgebungsverfahren" (2018) *Die Öffentliche Verwaltung* 1025–1034; Francesca Martines, "I triloghi alla luce dei principi di democrazia, equilibrio istituzionale, efficienza e trasparenza" (2018) *Diritto pubblico comparato ed europeo* 311–348; Deirdre Curtin and Päivi Leino, "In Search of Transparency for EU Law-Making: Trilogues on the Cusp of Dawn" (2017) 54 *Common Market Law Review* 1673–1712; Jelena von Achenbach, "Verfassungswandel durch Selbstorganisation: Triloge im europäischen Gesetzgebungsverfahren" (2016) 55 *Der Staat* 1–39.

[21] Fabian Giersdorf, *Der informelle Trilog. Das Schattengesetzgebungsverfahren der Europäischen Union* (Duncker & Humblot, 2019); Jelena von Achenbach, *Demokratische Gesetzgebung in der Europäischen Union* (Springer, 2014).

[22] Rory Costello and Robert Thomson, "The Distribution of Power among EU Institutions: Who Wins under Codecision and Why?" (2013) 20 *Journal of European Public Policy* 1025–1039; Olivier Costa, Renaud Dehousse, and Aneta Trakalová, "Codecision and 'Early Agreements': An Improvement or a Subversion of the Legislative Procedure?" (2011) *Notre Europe*.

[23] Tom Delreux and Thomas Laloux, "Concluding Early Agreements in the EU: A Double Principal–Agent Analysis of Trilogue Negotiations" (2018) 56 *Journal of Common Market Studies* 300–317; Frank M. Häge and Daniel Naurin, "The Effect of Codecision on Council Decision-Making: Informalization, Politicization and Power" (2013) 20 *Journal of European Public Policy* 953–971; Huber and Shackleton, "Codecision."

[24] Rik de Ruiter and Christine Neuhold, "Why Is Fast Track the Way to Go? Justifications for Early Agreement in the Co-Decision Procedure and Their Effects" (2012) 18 *European Law Journal* 536–554; Christine Reh, Adrienne Héritier, Edoardo Bressanelli, and Christel Koop, "The Informal Politics of Legislation: Explaining Secluded Decision Making in the European Union" (2011) 46 *Comparative Political Studies* 1112–1142; Anne Rasmussen, "Early Conclusion in Bicameral Bargaining: Evidence from the Co-decision Legislative Procedure of the European Union" (2010) 12 *European Union Politics* 41–64.

[25] Santino Lo Bianco, "Informal Decision-Making in the EU: Assessing Trialogues in the Light of Deliberative Democracy," in Jaap de Zwaan, Martijn Lak, Abiola Makinwa, and Piet Willems (eds.), *Governance and Security Issues of the European Union: Challenges Ahead* (Asser Press/Springer, 2016), p. 75 ff.; Christine Reh, "Is Informal Politics Undemocratic?

comparative analysis to offer a "realistic" perspective of the European legislative process.[26] Although not presenting conclusive results, this literature is of crucial importance for those legal scholars who are interested in offering a reliable normative assessment of the complex dynamics at play when the EU institutions legislate. My work has benefitted immensely from these contributions.

As this short review makes clear, though, trilogues are not exactly virgin territory. Hence the question: what is the contribution I intend to make with this book? My contribution is threefold. First, I provide a comprehensive reconstruction of the workings of trilogues, relying on internal documents collected through a series of access-to-documents requests. Secondly, I give a meaning to the legal notion of informality, understood as one of the most defining yet most elusive features of trilogues. Thirdly, I square the practice of trilogues with the European democratic order set out in the Treaties, eventually showing that such a practice is compatible with a model of "negotiation democracy." My work is doctrinal, in that it reconstructs the nature and practice of trilogues by giving systematic meaning to a collection of fragmented legal material. It is theoretical, in that many of the conclusions that I reach have a cognitive dependence on scientific theories.[27] Here, in greater detail, is how I intend to proceed.

I.4 Structure of the Book

This book begins with a chapter devoted to the history of trilogues, tracing their origins and showing why they were created and how they have changed over time. In particular, the chapter highlights that trilogues have characterized the "European way" of adopting legislation since 1975, when the Parliament attained its first competences in budgetary matters and successfully advocated for the establishment of a conciliation procedure. The establishment of this procedure, which bears

Trilogues, Early Agreements and the Selection Model of Representation" (2014) 21 *Journal of European Public Policy* 822–841; Christopher Lord, "The Democratic Legitimacy of codecision" (2013) 20 *Journal of European Public Policy* 1056–1073.

[26] Justin Greenwood and Christilla Roederer-Rynning, "Taming Trilogues: The EU's Law-Making Process in a Comparative Perspective," in Olivier Costa (ed.), *The European Parliament in Times of EU Crisis: Dynamics and Transformations* (Palgrave Macmillan, 2019), p. 121 ff.

[27] Holger Andreas, "Theoretical Terms in Science," in Edward N. Zalta (ed.), *The Stanford Encyclopedia of Philosophy* (2021).

striking similarities to today's trilogues, should be regarded as a "critical juncture." It set a specific trajectory of institutional development and consolidation that has significantly shaped legislative interactions up to the present day, especially in the wake of several Treaty amendments that have increasingly placed the three institutions in a relationship of mutual dependence.

Chapter 2 presents the current institutional framework, with a special focus on the exercise of the legislative function. After a brief presentation of the most relevant institutional principles, notably those of effectiveness, institutional balance, and sincere cooperation, the chapter turns to the Parliament, the Council, and the Commission and explains their prerogatives and internal structures in the light of the concept of "executive federalism." The chapter shows that the legislative institutions of the EU, in line with the principles of autonomy and internal differentiation, allocate important preparatory tasks to different internal bodies – parliamentary committees, Committee of Permanent Representatives (Coreper), and *Groupe des relations interinstitutionnelles* (GRI), and analyzes the role of those bodies in the adoption of legislation.

Chapter 3 reconstructs the functioning of the European legislative process in practice. To this end, it systematizes the main normative instruments that steer and discipline the behavior of European political actors and civil servants, including the (rather bare) Treaty provisions, the relevant interinstitutional agreements, the European Parliament's Rules of Procedure, and the provisions set out in internal documents, especially administrative circulars. This chapter posits that administrative circulars are important for institutional interactions, as they contribute to regularizing the conduct of political actors (regulative component), creating normative expectations (normative component), and generating values, beliefs, and assumptions that actors internalize and accept as part of their "repertoire of unquestioned routines and habits" (cultural-cognitive component).[28] As far as trilogues are concerned, all these provisions testify to the existence of a norms-based, institutionalized environment, congenial to legal analysis.

[28] W. Richard Scott, *Institutions and Organizations: Ideas, Interests, and Identities*, 4th ed. (Sage, 2014), p. 56, who puts forward the following "omnibus conception of institutions: Institutions comprise regulative, normative, and cultural-cognitive elements that, together with associated activities and resources, provide stability and meaning to social life."

Chapter 4 is dedicated to the concept of informality as a crucial legal concept for the understanding of trilogues. It begins from a twofold observation. First, the informal nature of trilogues is stated in black and white in a significant variety of legal instruments. Secondly, the role of legal scholarship is to make sense of that unequivocal characterization. Drawing on institutional theory, this chapter argues that informality is a full-blown concept of EU law, and sets about defining its characteristics. To that end, it compares trilogues with two other informal bodies, namely the Euro Group and the informal Council meetings. The core idea of this chapter is that the codification of informality translates into legal terms the intention of the institutions to protect certain spaces from an excessive penetration of legal normativity. This intention, in turn, is indicative of the desire to preserve those spaces for the emergence of powerful social frameworks where genuine exchanges among actors may occur[29] – exchanges that should be conducive to compromise.

Chapter 5 is comparative in nature and explores the enactment of legislation in two federal polities, namely the United States and Germany. The objective of this chapter is to highlight that while national legislative processes are dominated by party politics, the European legislative process is dominated by trilogues – and, to some extent, trilogues make up for the absence of a genuine party system at EU level. It is within and between political parties and trilogues, respectively, that positions are discussed, coalitions cemented, institutional interdependences managed, political differences solved, and compromises brokered. When legislative files eventually reach the floor of the competent legislative institutions, their fate is – most of the time – already sealed. This chapter aims at highlighting that leaving legislative and inter-chamber coordination to party structures is no more – and possibly less – democratically accountable than entrusting it to trilogues, especially in times of strong partisanship and grand coalitions.

Finally, Chapter 6 examines the main findings about trilogues in light of the democratic principles set out in the Treaties. In particular, the chapter argues that trilogues offer an important democratic contribution because they put compromise at the very heart of the European legislative process. Compromise, through its practice of mutual concessions, is arguably the best means to approximate two constitutional requirements: equality and representation – or, better put, the aspiration to democratic equality in a

[29] Ibid., p. 59.

system of representative institutions. Furthermore, the chapter argues that the existence and prevalence of trilogues reveal the EU's structural closeness to those polities that belong to the model of "negotiation democracy." This model was developed by Gerhard Lehmbruch with special reference to Germany, Austria, and Switzerland. I argue that Lehmbruch's model provides a fruitful basis for comparative research and a solid foundation for understanding the EU.

Three final caveats are in order. First, analyzing trilogues means gaining in-depth insight into how European institutions enact legislation. Following the well-known "inter-supra-infra trichotomy" developed by Joseph Weiler,[30] this book concerns the supranational mode of government. Secondly, and relatedly, the book elaborates neither on the role of national apex courts (be they constitutional or supreme) nor on the role of national parliaments. The main argument for such an exclusion is that although those actors powerfully influence the interpretation and application of EU law, they are not part of the European legislative authority as such and do not directly participate in the adoption of Union legislation. However, national parliaments are key vehicles of democratic legitimacy; the Treaties expressly expect them to hold their governments to account, especially when those governments act as members of the Council (Art. 10 (2)(2) TEU); and the legitimacy of the whole EU is vitally dependent on their active contribution. This analysis therefore considers, whenever relevant, the effects of trilogues on the ability of national parliaments to control their governments. Finally, this book begins from the assumption that the democratic credentials of the European Union are significantly perfectible. However, it also posits that those credentials are not as precarious as is often maintained, and this is also due to the important contribution of trilogues. What follows is an attempt to substantiate that claim and thereby to mitigate the aura of suspicion that lingers around the European legislative machinery.

[30] J. H. H. Weiler, "European Democracy and Its Critics: Polity and System," in *The Constitution of Europe: "Do New Clothes Have an Emperor?" and Other Essays on European Integration* (Cambridge University Press, 1999), p. 274.