

Role of National Parliaments in EU Legislative Procedures Reform Perspectives

By Francesco Maiani*

I. Introduction

The final act of the Nice Intergovernmental Conference includes a Declaration calling for a "deeper and wider debate about the future of the Union" in the perspective of improving its "democratic legitimacy and transparency". Four themes of institutional nature are set therein as the object of the debate. One of these is "the role of national Parliaments in the European architecture"¹.

While the Nice Declaration designates the issue in its whole, the present contribution is more limited in scope, since it deals only with the participation of national Parliaments in EU legislative procedures². On this particular point, a considerable number of opinions and proposals have been formulated during the weeks preceding and following Nice. For his part, Commissioner Barnier recently expressed his concern about "the potentially regressive nature" of the issue if not "addressed properly"³.

In a way, the following contribution reflects and develops this concern. After a succinct description of the role national Parliaments have in EU legislative procedures, the reform proposals currently under discussion will be reviewed. This brief analysis shall be focused on their possible impact on the principles governing the Union's institutional architecture.

II. The current role of national Parliaments in EU legislative procedures

National Parliaments directly participate in EU legislative procedures only in exceptional cases⁴. Apart from these cases, their position in the Union's in-

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¹ Declaration on the future of the Union (hereinafter referred to as the 'Nice Declaration'), Annex IV to the Treaty of Nice, 26.2.2001, paragraphs 3, 5 and 6.

² On the functions national Parliaments have in the EU see Bieber, *Demokratische Legitimation in Europa*, ZEuS 1999, 141 ff. For want of better words, I shall use throughout this contribution the expression 'EU legislative procedures' to indicate the decision-making procedures established in the Treaties and aimed at issuing secondary EU/EC law.

³ Barnier, Address to the European Parliament's Committee on Constitutional Affairs, 6.2.2001 (http://www.europa.eu.int/comm/commissioners/barnier/speecig_fr.htm).

⁴ See articles 34 (2-d) TEU and 22, 190 (4) and 269 ECT.

stitutional architecture is implicitly defined by article 203 ECT, according to which the Council consists "of a representative of each Member State at ministerial level": national Parliaments concur to determine the position of the respective Ministers in the Council. The influence each Parliament has in this process depends upon its constitutional prerogatives *vis-à-vis* the national Government.

In this context, European institutions – in compliance with the principle of loyal cooperation⁵ and within the limits imposed by the principle of institutional autonomy⁶ – are under the duty to help national Parliaments in effectively exercising their functions. To this end, Protocol n.9 provides for the transmission to national Parliaments of Commission policy documents and legislative proposals and for the intermission of a six-week period between the availability to the Council of a legislative proposal and its discussion. This is intended to allow parliamentary scrutiny on EU policy and legislative proposals before they are adopted. Furthermore, the rules on access to Council documents give national Parliaments the instrument to control *ex post factum* the conduct of Ministers in Council⁷.

Concerning the involvement of national Parliaments in European affairs inter-parliamentary co-operation is another important element. Protocol n.9 formally recognises the "Conference of the Community and European Affairs Committees of Parliaments of the European Union" (COSAC). The latter is the forum in which national Parliaments and the EP can on a regular basis exchange their views, discuss topics of common interest and possibly issue common declarations ("contributions") for the attention of the EU institutions. This form of partnership constitutes the application to the relations among the Parliaments of the Union of the principle of loyal co-operation, and does not therefore affect the competencies and prerogatives of the involved parties⁸.

⁵ See article 10 ECT and C-2/88 Imm., Zwartveld, [1990] ECR I-3365, paragraph 17.

⁶ Protocol n. 9 on the role of the national Parliaments in the European Union (1997) (hereinafter referred to as "Protocol n. 9"), preamble: "[...] scrutiny by individual national Parliaments of their own Government in relation to the activities of the Union is a matter for the particular constitutional organization and practice of each Member State". See also COMMISSION, Answer to the Written Question by Jan Lagendijk (OJ C 142, 21.5.1999, 102) and Joint cases C-51/71 to C-54/71, *Internationale Fruit NV v. Produktschap voor groenten en fruit*, [1971] ECR 1107, paragraph 4.

⁷ See article 207 (3) ECT and Dehousse, *European institutional architecture after Amsterdam*, CMLR 1998, 595 ff. at 608. See also articles 6 and 7 Council Decision 1999/385/CE, ECSC, Euratom adopting the Council's Rules of Procedure (OJ L 147, 12.6.1999, 13).

⁸ Protocol n.9, article 11 (7). See also Bieber, *cit.*, at 156. The general meaning of article 10 ECT was accurately described as follows:

"Ce principe oblige les institutions communautaires et les autorités nationales à coopérer de bonne foi, chacune à l'intérieur de son domaine de compétences, pour atteindre les ob-

This institutional setting, or at any rate the institutional practice related to it, has become in time the object of widespread criticism; the Nice Declaration evokes in quite an explicit manner the 'democratic deficit' the Union suffers of⁹. With specific regard to national Parliaments the problem is generally referred to as "executive dominance issue"¹⁰ and described as follows: the Union's institutional framework empowers the executives assembled in the Council to issue legislation. This legislation – by virtue of its supremacy on national law – is destined to become "the supreme law of the land"¹¹ in every Member State. The executives thus encroach upon the legislative powers of the national Parliaments. The latter, with some exceptions, have so far been unable to exert any significant control on European policy.

These being its premises, the current debate on our subject revolves around the question of how to restore national Parliaments in their legislative prerogatives by giving them a significant influence on EU legislation in its making¹².

jectifs du Traite" (DUE, Article 5 du traite CEE. Une disposition de caractère fédéral?, RCADE 1991, vol. II-I, 23 ff. at 35, emphasis added).

⁹ See Nice Declaration, paragraph 6.

¹⁰ See ex pluribus Craig-de Búrca, EU law, Oxford 1998, at 156. The inadequacy of the EP's prerogatives is generally regarded as being part of the same problem (see Rideau, National Parliaments and the European Parliament in Smith (ed.), National Parliaments as cornerstones of European integration, London 1996, 159 ff). The latter is therefore particularly acute in those areas in which neither the EP nor national Parliaments have the instruments to effectively control the Council's activities, e.g. CFSP: see EP Resolution on the relations between the European Parliament and national Parliaments (OJ C 200, 30.6.1997, 153), paragraphs 2 and 4.

¹¹ Weiler, European democracy and its critics, in ID., The Constitution of Europe, Cambridge 1999, 264 ff, at 267.

¹² Inaccountability of the Council to a Parliament is often presented as another element of the Union's 'democratic deficit' (see EP Resolution, cit., paragraph 3 (ii) and Jurgens, A federal option for the EC or a permanent democratic deficit? in Flinterman-Heringa-Waddington (eds.). The evolving role of Parliaments in Europe, Antwerpen 1994, 83 ff. at 86). Given the exceptional nature of its execution competences, however, the Council appears to belong more to the Union's legislative power than to its executive (see article 202 ECT and C-16/88, Commission v. Council, [1989] ECR 3457. See also Jacqué Le Conseil, in COMMENTAIRE MEGRET, Le droit de la CE et de l'Union Européenne, vol. 9, Brussels 2000, at 151). As a matter of EU law, accountability of national Governments vis-a-vis the respective Parliaments is the instrument through which representation (see article 203 ECT) of the nation's will in Council is ensured. The pertinence of the notion of accountability to the Council as such is therefore not self-evident.

III. First option: strengthening the role of national Parliaments in the Council

According to a first approach, strengthening "the power of national Parliaments to affect outcomes in the Council of Ministers"¹³ could solve the problem. The basic features of the European architecture (the 'institutional triangle' and its current balance, the division of labour between national and European institutions) would be preserved. Simply, the representation and confrontation of national interests in the Council would take place, so to say, on a more democratic basis.

To this end, EU law should facilitate the control task of national Parliaments as much as possible. The main obstacle to parliamentary scrutiny on Council meetings and deliberations was once their confidentiality¹⁴, but under this angle things have considerably evolved¹⁵. The provisions of Protocol n.9, for their part, should probably be amended. The 'Contribution' addressed by the last COSAC to the Union's institutions provides us with a valuable inventory of the problems so far left unresolved¹⁶: late reception of documents, lack of parliamentary scrutiny on CFSP, opaqueness of COREPER sessions¹⁷.

Above all, however, each national Parliament should develop more effective means of control on the respective Government. Not surprisingly, it has been proposed that these Parliament-Government interactions, given their fundamental importance for the democratic legitimacy of EU decision-making, should form a "European issue" rather than being regulated by "disparate national laws"¹⁸.

The compatibility of such a suggestion with the principle of institutional autonomy and with the commitment of the Union to respect "the national

¹³ This expression is borrowed from Weiler, cit., at 266.

¹⁴ See Houben, Les Conseils des ministres des Communautés Européennes, Leyden 1964, 177 ff.

¹⁵ See supra footnote 7. See also Council Decision 2000/23/CE on the improvement of information on the Council's legislative activities and the public registrar of Council documents (OJ L 9, 13. 1. 2000, 22).

¹⁶ Contribution addressed by the XXIIIrd COSAC to the institutions of the EU, Versailles, 16-17 October 2000, paragraph 5 (http://www.cosac.org/eng/previous/versailles_2000/documents.html).

¹⁷ The proposed reforms are: (i) immediate transmission, directly by the Commission, of its policy documents and proposals (including those for CFSP and JHA measures); (ii) suspension of debate in Council to consent parliamentary scrutiny also for CFSP proposals; (iii) intermission of a 15-day period between the final reading of a text by the COREPER and the Council decision.

¹⁸ Italian Prime Minister Amato, Comunicazioni alle Commissioni riunite Esteri-Unione Europea della Camera dei Deputati sugli esiti del Consiglio Europeo di Nizza, 13. 12. 2000, 21 (<http://www.governo.it/servizi/interventi/index.asp?a=2000>; our translation).

identities of its Member States” is however dubious¹⁹. Also dubious is the want of such ‘European rules’: albeit in different ways and measures, national parliamentary scrutiny of European affairs has been strengthened in all the Member States²⁰.

In the perspective of involving national Parliaments in the Council works, participation of the former in the latter is also conceivable²¹. ‘Participation’ can mean very different things: Council membership for parliamentarians, free choice of their own representatives by the Member States²² *etc.* While reforms of article 203 ECT are apparently not on the agenda of the next IGC, national parliamentarians could perhaps obtain access to the national delegations alongside the officials assisting the Ministers. This would require only a modification of the Council’s rules of procedure²³.

Such a reform would certainly not be a substitute for parliamentary control at the national level. Quite on the contrary, this kind of ‘access’ might constitute a complementary instrument of control and of ‘real time’ communication between Governments and Parliaments in the course of Council Negotiations²⁴.

IV. Second option: direct involvement of national Parliaments in EU legislative procedures

The alternative solution to the ‘democratic deficit’ issue we have described above is commonly indicated as being the direct association of national Parliaments in EU legislative procedures.

According to some, ‘association’ should mean as a general rule the formal inclusion – in EU legislative procedures – of ratification by national Parlia-

¹⁹ See *supra*, footnote 6 and article 6(3) TEU. See also Pernice/Mayer, *De la constitution composée de l’Europe*, RTDE 2000, 623 ff. esp. 641 ff.

²⁰ See Fitzmaurice, *National parliamentary control*, in WESTLAKE, *The Council of the European Union*, London 1995, 344 ff. In some countries (e.g. Italy) the evolution has been quite impressive: see SENATE (IT), *Answer to XXIIIrd COSAC Questionnaire*, question n° 1 (http://www.cosac.org/eng/previous/versailles_2000/documents.html).

²¹ See e.g. Guena, *Rapport d’information n. 224, fait au nom de la délégation du Sénat pour l’Union Européenne, sur la réforme des institutions de l’Union Européenne*, Paris 1995, at 25.

²² See article 9 UN Charter (national representation in the UN General Assembly).

²³ Council Decision 1999/385, *cit.*, article 4; WESTLAKE *cit.*, at 58.

²⁴ Thus allowing national Parliaments to monitor every stage of the negotiation, instead of being consulted only on the original Commission proposal (see HOUSE OF COMMONS (UK), *Answer to XXIIIrd COSAC Questionnaire*, question n° 3 (http://www.cosac.org/eng/previous/versailles_2000/documents.html)).

ments²⁵. Whatever the gain in terms of ‘more democratic legitimacy’, the price of such a solution would be dramatically ‘less effectiveness’ for EU decision-making. Moreover, from an EU law perspective such an idea is incompatible with the principle expressed in article 7 ECT, according to which “the tasks entrusted to the Community are carried out by [its own] institutions”. In a way, it denies the very idea of European integration.

‘Association’ of national Parliaments to EU legislative procedures is more often proposed in the form of their direct representation within the Union, in an institution other than the Council. The following is a very schematic description of the different proposals currently under discussion.

Firstly, it has been proposed to reintroduce the dual mandate for the members of the European Parliament²⁶, but this sounds almost provocative in the context of a debate on the further democratisation of the Union. “On peut difficilement considérer comme un progrès la renonciation à l’élection au suffrage universel du Parlement Européen”²⁷.

The institution of a chamber composed of national parliamentarians, existing alongside the Council and the EP, has also been proposed under a variety of forms. For instance it has been proposed to attribute some legal effect to COSAC contributions²⁸, or to create a “Foreign Relations Committee” operating only in the framework of the CFSP²⁹.

It has been argued that this would significantly hinder the decision-making procedures and complicate the EU institutional system, rather than making it simpler and more transparent³⁰. These important arguments are well known and it is not necessary to insist on them³¹. Rather, I would like to propose three more themes of reflection.

First, an assembly of national parliamentarians would, given its composition, reflect national interests. Its coexistence with the Council would entail an over-representation of national interests potentially detrimental to the Union’s

²⁵ See e.g. Vaubel’s *Comment in WINTER-CURTIN-KELLERMANN-DE WITTE (eds.) Reforming the TEU*, The Hague 1996, 198 ff. at 201.

²⁶ German Minister Fischer, *Vom Staatenverbund zur Föderation*, Berlin 12. 5. 2000, paragraph 35 (<http://www.WHI-berlin.de/fischer.htm>).

²⁷ Louis, *La réforme des institutions de l’Union Européenne*, RMCUE 2000, 681 ff. at 685.

²⁸ See Jurgens, *cit.*, at 88.

²⁹ Patten, *Sovereignty and Democracy in the European Union*, Oxford 26. 10. 2000 (europa.eu.int/comm/commissioners/patten/speeches/index.htm). See also Guéna, *cit.*, at 39.

³⁰ See Nice Declaration, paragraphs 5 and 6. In my view, this objection applies especially to the proposed institution of a Foreign Relations Committee: the Union’s institutional framework would cease being “single” in the meaning of article 3 TEU.

³¹ See Falkner-Nentwich, *European Union: democratic perspectives after 1996*, Vienna 1995, 92 ff.

capacity of conceiving and pursuing a genuine 'common interest'³². Secondly, assuming that the parliamentary delegations sitting in that assembly would reflect those same national majorities supporting – at the national level – the Governments represented in Council, there is some reason to doubt that such an assembly would be capable of developing an independent policy strategy. If this were the case, then the new institution would miss its purpose of counterbalancing the 'predominance' of the Council. Finally, I wonder if the creation of a 'third chamber' would really bring the Union closer to its citizens as it supposedly should³³. It is far from self-evident that popular confidence and involvement in European governance would benefit from a reform making the Union's institutional framework even more complex³⁴.

V. Concluding remarks

There are reasons to think that the institutionalisation of a direct role of national Parliaments in EU legislative procedures might adversely affect the effectiveness, coherence and transparency of the Union's institutional framework, without necessarily improving its democratic and social legitimacy.

The most coherent solutions to the problem of the 'predominance of the executives' in the Union are those addressing the problem at its source. As for national Parliaments, they should fully engage in controlling the respective Governments' European policy. Where necessary, Protocol n.9 should be amended. The Commission and the EP should, for their part, further intensify their dialogue with national Parliaments. Under all of these respects the evo-

³² See Bieber, cit., at 151-152 and Bieber-Haag, *Le Parlement Européen*, in COMMENTAIRE MEGRET, cit., at 128.

³³ See Nice Declaration, paragraph 6.

³⁴ The institution of an 'advisory committee for subsidiarity' is discussed elsewhere in this volume (see the contribution by professor Pernice), and the arguments developed above only partially apply to it. There are only two remarks I would like to formulate on this specific subject. In the first place, respect of the subsidiarity principle is debated and voted in Council by the Ministers (see Protocol n. 30 on the application of the principles of subsidiarity and proportionality (1997), article 11 (See also articles 1, 4 and 9). Before that, it makes the object of a specific assessment by the national Parliaments (see e.g. Kearse, *Parliamentary Scrutiny of the Third Pillar*, EPL 2000, 81 ff. at 84 and Sauron, *Le contrôle parlementaire de l'activité gouvernementale en matière communautaire en France*, RTDE 1999, 171 ff. at 177). In the light of the tendency towards enhanced parliamentary scrutiny of EU policies (see supra footnote 20), the necessity of creating such a body should be scrupulously assessed. Secondly, the Committee of Regions aspires to a very similar role (see Opinion of the Committee of Regions 2000/C 156/02 on the 2000 Intergovernmental Conference, paragraph 3.2 (OJ C 156, 6.6.2000, 6). See also Jones, *The Committee of Regions, Subsidiarity and a Warning*, EuLR 1997, 312 ff.). The attribution of identical tasks to different institutions should be avoided.

lution we have witnessed in the last years is encouraging, but a solid institutional praxis is in some cases still lacking.

Other fundamental reforms should be achieved with the goal of democratising the Union, first of all a radical clarification of its tasks, structure and powers. This would make the European public power more understandable to citizens, a *conditio sine qua non* for their political participation. Popular participation in European governance, though, will principally depend upon the willingness and ability of national (and in the future, perhaps, European³⁵) political parties to involve the general public in a meaningful debate on European policy choices.

³⁵ On European political parties see EP Resolution on the constitutional status of European political parties (OJ C 20, 20.1.97, 29); Bieber, *Les perspectives d'un statut pour les partis politiques Européens*, RTDE 1999, 349 ff. See also the new article 191(2) introduced by the Treaty of Nice and the Commission proposal (COM (2000) 898 final) on the statute and financing of European political parties (<http://www.europa.eu.int/eur-lex>).