The Composite Case for National Parliaments in the European Union: Who Profits from Enhanced Involvement?

Philipp Kiiver*

National parliaments near-universally endorsed in the European Union constitution-building process – Case for national parliaments a composite one: different scholarly approaches and national and European institutions support a greater role for national parliaments for different reasons – The overall endorsement of national parliaments remains a balancing act between competing agendas – Future reforms and treaty-drafting efforts most likely will continue to favour approaches of open-ended political content – No risk for the national governments nor Union institutions.

Introduction

When the Convention and the subsequent Intergovernmental Conference adopted the Treaty establishing a Constitution for Europe, one of the most remarkable institutional innovations featured in the text was the prominent focus on the role of the national parliaments in the European Union. The Constitutional Treaty was the first of its kind in fifty years even to mention the term 'national parliaments' in its text proper, and it went on to furnish the parliaments with rights and privileges in the European integration process in general, and – by stimulating and facilitating sharper domestic scrutiny of European affairs, for instance, via notification procedures – in the Union decision-making process in particular. Some of the adopted features are significant; most are, individually, rather modest or not entirely new, and even strictly speaking would not require a new treaty in order to work, but in context they still add to the higher profile that national parliaments would receive. What makes this particularly remarkable is that the national parliaments seem to be discovered but recently for a European purpose,

* Assistant Professor of European and Comparative Constitutional Law, Maastricht University.
I am thankful to Prof. Tapio Raunio and my fellow participants in earlier conferences for their helpful comments.

European Constitutional Law Review, 2: 227–252, 2006

DOI: 101017/S1574019506002276

while they in fact have existed, and have been operating in the European Union context, all along. And what makes the exercise even more remarkable is the fact that it appeared to be so widely endorsed. The Convention's proposals on the national parliaments were hardly controversial, which also indicates that the issue of strengthening the national parliaments will remain on the agenda on the future of Europe even though the Constitutional Treaty itself, after the 'no' votes in France and the Netherlands, either is dead or frozen. In other words, with or without a new treaty, Europe is embracing its national parliaments. This article looks behind the constitution-building enthusiasm and analyses the different reasons that would make the national parliaments potentially attractive to different institutional actors and proponents of different ideologies or scholarly views in the European Union. Starting with a brief overview of the historical, current and possible future role of the national parliaments in the European Union, it addresses the issue from the point of view of the proponents of national sovereignty and statehood, from a Europhile and from a multi-level governance point of view, as well as from the perspective of the national governments individually, from the perspective of the Council as a Union institution, from the point of view of the European Parliament, the Commission as well as the national parliaments themselves. Having analytically 'dissected' the case for national parliaments into several simplified sub-cases, all of which support national parliaments for partly divergent reasons and to different degrees, the recent treaty-level effort shall be reassessed in that light. This re-assessment shall allow an appreciation of the case for national parliaments in reality, not as an obvious and long-overdue priority, but as a delicate balance between partly overlapping and partly competing agendas. This appreciation in turn will help explain why the Constitutional Treaty addressed national parliaments in the way and to the extent that it did, and it will allow finally some predictions as to how future Union-level efforts to cater to national parliaments will be conditioned by the composite character of the overall goal to give national parliaments a more prominent role in the European Union.

The national parliaments in the European Union

In the institutional set-up of the European Union, with its central institutions and its member states, the latter being represented by the national governments, traditionally little attention is paid to any particular, let alone independent, role for the national parliaments. If they are remembered, then typically as peripheral institutions in the European Union, or as the 'losers of integration' who have ratified European treaties, thereby giving away law-making powers to Brussels, without ensuring effective national parliamentary oversight over their governments'

decisions in the Council.[1] To put it bluntly, national executives play European legislators under complex and secretive bargaining rules, and their parliaments at home have to accept, possibly implement into national law, binding Union legislation; they are too slow, too uninformed, and often too bored to enforce government accountability for European affairs; parliaments are ignorant of what their governments intend to do in the Council beforehand, and merely watch as the governments scapegoat 'Brussels' for unpopular decisions afterwards. Of course this is a very simplistic and not entirely accurate first impression of the situation, and even though it helps to explain the general background of demands for more active national parliaments in the European Union, it still begs for an important qualification: there is no such thing as 'the' national parliaments, let alone 'the national parliaments as domestic losers'.

First, the national parliaments are a highly heterogeneous group of institutions, if we can speak of a group at all. Judging on which bodies are represented in COSAC, the half-yearly conference of European affairs committees of the national parliaments plus a delegation from the European Parliament, the picture could not be more diverse. COSAC includes delegations not only from unicameral parliaments, but also delegations from chambers which are not elected directly (e.g., the Dutch Senate), or partly appointed (e.g., the Irish Senate), or not elected at all (e.g., the UK Lords); it includes chambers from federal systems where the national parliament is not always the competent domestic legislator, and it includes a delegation from the German *Bundesrat* which is a co-legislator but, in terms of its composition, not a parliament, staffed as it is with members of the *Länder* governments. At the same time, COSAC – and therefore the standard definition of a national parliament in the European Union – does not cover regional parliaments, even though they at times might have more convincing credentials as representative and legislative assemblies, when compared to central assemblies.[2] And as to the central parliaments, their competences, election mode, composition, functions, history, culture, working style and self-perception concerning their role in their own political system and in Europe differ greatly from one member state to another. It is true that the European functions of national

[1] Cf. D. Rometsch and W. Wessels (eds.), *The European Union and member states: towards institutional fusion?* (Manchester, Manchester University Press 1996), p. 334; A. Maurer and W. Wessels (eds.), *National Parliaments on their Ways to Europe: Losers or Latecomers?* (Baden-Baden, Nomos 2001), p. 28; T. Raunio and M. Wiberg, 'Parliamentarizing Foreign Policy Decision-Making: Finland in the European Union', 36 *Cooperation and Conflict* (2001) p. 61-86 at p. 62; A. Cygan, 'The Role of National Parliaments in the EU's New Constitutional Order', in T. Tridimas and P. Nebbia (eds.), *European Union Law for the Twenty-First Century* (Oxford, Hart 2004), p. 153.

[2] See for an account how the federal and sub-national assemblies in hyper-federalized Belgium respond to treaty developments: W. Pas, 'The Belgian "National Parliament" from the Perspective of the EU Constitutional Treaty', in Ph. Kiiver (ed.), *National and Regional Parliaments in the European Constitutional Order* (Groningen, Europa Law Publishing 2006).

parliaments, as they are typically summarized, are three-fold: they ratify European treaties and authorize transfers of competences to the European Union; they implement Union legislation or policies into the domestic legal order; and they enforce the accountability of their governments via domestic ties of parliamentary confidence. In the light of the constitutional heterogeneity of the member states, however, we would need to add caveats in each case: national parliaments ratify treaties *where and in as far as* they have the power to do so, their powers being limited by referendums, and the powers of lower chambers being limited by assent procedures involving an upper chamber; national parliaments implement Union legislation and policies *where and in as far as* they have the power to do so, their powers potentially being limited by, *inter alia*, federalism or devolution; and national parliaments enforce ministerial accountability in the strict sense *where and in as far as* they may sanction the government as a matter of national constitutional law – something that often does not apply to upper chambers – and subject to political priority-setting.[3]

Second, there is no such thing as 'the' national parliaments as 'losers' of European integration, because not all parliaments had equally much to lose in the first place, and not all parliaments stood by passively as European integration deepened. In fact, especially since the Single European Act and the Maastricht Treaty, even the 'weaker' national parliaments have been adapting to the conditions of European Union membership,[4] in particular to the fact that Union law-making does not require their assent in the way domestic legislation does, that an impact on the content of Union laws can only be had via pressing the governments *ex ante*, that even then the governments can be outvoted under qualified majority voting, and that the effect of parliamentary oversight in general depends on information and an efficient institutional and procedural set-up including, in particular, a well-balanced co-operation between generalist European affairs committees and sectoral standing committees.

Third, the activity of national parliaments no longer is confined to a domestic context; it no longer is determined exclusively by internal constitutional rules. While Union-level instruments emphasize that domestic parliamentary scrutiny of European affairs remains primarily something for the member states to decide for themselves,[5] the European level does occupy itself with at least facilitating

[3] See Ph. Kiiver, *The National Parliaments in the European Union: A Critical View on EU Constitution-Building* (The Hague/London/New York, Kluwer Law International 2006), p. 9-16.

[4] See Ph. Norton (ed.), 'National Parliaments and the European Union', 1 *The Journal of Legislative Studies* (1995), special issue 3; D. Judge, 'The Failure of National Parliaments?', 18 *West European Politics* (1995), p. 79-100; A. Maurer, *National Parliaments in the European Architecture: Elements for Establishing a Best Practice Mechanism,* European Convention Working Group IV working document No. 8, 2002.

[5] See the Preamble to the Amsterdam Protocol on the role of national parliaments in the European Union; Preamble to the COSAC Guidelines for relations between governments and Parlia-

such scrutiny and inviting direct national parliamentary contributions.

The first occasion that national parliaments were addressed explicitly in the European Union treaty context was in two Declarations annexed to the Maastricht Final Act.[6] The Declarations recognized the need for national parliaments to receive timely Union-related documentation, in order to carry out effective scrutiny, and the need to step up inter-parliamentary co-operation. The Amsterdam Treaty included a Protocol[7] which recognized COSAC as an inter-parliamentary conference, provided an obligation for the Commission to send, and for the national governments to forward, Brussels documentation to the national parliaments, and which introduced a six-week timeframe for *ex ante* scrutiny between the introduction of a proposal and the placement of the item on the Council agenda. The Constitutional Treaty represents a new effort in consolidating and, at least on face value, further promoting a direct national parliamentary involvement in Union affairs: it provides for distribution of all Union consultation papers and legislative proposals among the national parliaments, the documentation being sent directly, not just forwarded by the governments;[8] for notification prior to the application of the flexibility clause,[9] national parliamentary monitoring of the activities of Europol and Eurojust,[10] notification about incoming Union membership applications,[11] notification of treaty revision initiatives,[12] and notification prior to the intended application of the passerelle clause;[13] an early warning system against alleged breaches of the principle of subsidiarity in Union legislative proposals, with the possibility to force the initiator – typically the Commission – to reconsider a proposal if enough national parliaments have filed complaints,[14] as well as the possibility for any national parliament to veto the application of the passerelle clause, and thereby to block a unanimous vote in the European Council to move towards qualified majority voting or towards co-decision with the European Parliament in a given policy area.[15] The latter two features are direct veto

ments on Community issues (instructive minimum standards) ('Copenhagen Parliamentary Guidelines'), 2003/C 154/01; Art. 9 of the Final Report of the European Convention's Working Group IV; Preamble to the Protocol on the role of national parliaments in the European Union annexed to the Treaty establishing a Constitution for Europe as of 29 Oct. 2004, CIG 87/2/04 REV 2, hereinafter: TCE.

[6] Declaration No. 13 on the role of national Parliaments in the European Union, Declaration No. 14 on the Conference of the Parliaments.

[7] Protocol on the role of national parliaments in the European Union.

[8] Arts. 1 and 2 of the TCE Protocol on the role of national parliaments in the European Union.

[9] Art. I-18 (2) TCE.

[10] Arts. I-42 (2), III-260, III-261, III-273 and III-276 TCE.

[11] Art. I-58 (2) TCE.

[12] Art. IV-443 (1) TCE.

[13] Art. IV-444 (3) TCE.

[14] Arts. I-11 (3) and III-259 TCE, as well as TCE Protocol on the role of national parliaments in the European Union and TCE Protocol on the application of the principles of subsidiarity and proportionality.

[15] Art. IV-444 (3) TCE.

mechanisms, with the distinction that the early warning system implies a veto that is collective (i.e., based on the counting of incoming complaints under thresholds of one-third and one-quarter of votes) and relative, while the veto against the passerelle is individual and absolute.

With the Constitutional Treaty rejected in France and the Netherlands, these two innovations have been rejected as well. Yet the signal that was sent by the very adoption of the text already has had an effect of its own. National parliaments of course are free to include subsidiarity considerations in their ordinary scrutiny work anyway, and COSAC even has conducted a very instructive subsidiarity experiment in anticipation of the Treaty's eventual entry into force.[16]

What is important to note for now is that all the listed features, past, present, or future, are to strengthen, or make more visible, the role of the national parliaments in the European Union. Apart from formal Union instruments, informal appeals for national parliaments to become more active in this field, and to use the means of control and deliberation they already possess, are prominently voiced.[17] But here the question arises as to what purpose this exercise could possibly serve. It appears that the notion that the European Union could do with some extra parliamentarism, transparency, accountability, subsidiarity and democracy is one that most observers easily can subscribe to; yet it is far from obvious how, and why, the national parliaments should assume this task. Arguments and motivations for supporting the national parliaments in this matter are in fact manifold, and they should be reviewed, also in the light of the caveats and qualifications that have been considered above, for each angle, each point of view, each camp of real or apparent supporters individually.

Cui bono? Potential advocates of stronger national parliaments

Proponents of national sovereignty and statehood

Those who qualify the European Union merely as a form of international cooperation between otherwise autonomous and sovereign member states safely may be considered natural supporters of stronger national parliaments in the European Union. If legitimacy and democracy are derived from parliament, then the

[16] See for an account of the experiment: COSAC Secretariat, *Report on the results of COSAC's Pilot project on the 3rd Railway Package to test the 'Subsidiarity early warning mechanism'*, XXXIIIrd COSAC, 17-18 May 2005; for a discussion see Kiiver, *supra* n. 3, p. 158-161. A COSAC follow-up pilot project conducted in 2005-2006 concentrated on the Commission's legislative program to identify the most controversial projects in terms of subsidiarity.

[17] See COSAC, Guidelines for relations between governments and Parliaments on Community issues (instructive minimum standards) ('Copenhagen Parliamentary Guidelines'), 2003/C 154/01; European Convention, Declaration on the role of national parliaments to raise national European awareness, CONV 834/03.

parliaments of the member states should, according to that view, be the ones who should be treated with priority. Worded negatively, this approach would deny the capacity of the European Parliament, or at least the European Parliament alone, to deliver a degree of deliberation, accountability and democracy that would match what we are used to at the national level. That negative approach is, of course, well-known: in the absence of a European *demos* with a shared culture, collective historical memory, language, party landscape and media, no Europe-wide community of solidarity can exist that would tolerate left-right cleavages, the imposition of moral judgments, and a redistribution of wealth between shifting minorities and majorities. The European Union is left as an entity that derives its legitimacy solely or predominantly from the consent of the democratic member states that are willing to commit themselves to such a scheme.

The national parliaments would exercise a number of functions in such a construct. First, as the European Union remains a treaty-based organization, the national parliaments would be the 'Masters of the Treaties', with an inherent right or even duty to monitor the exercise of powers that they have delegated, in particular, to the Council. The monitoring of the application of the principle of subsidiarity neatly fits into that line of thought, as the delimitation of transferred powers would be emphasized, competence-creeps contained, and the exercise of competences kept closer to the democratic national level. Second, in the absence of credible representative institutions at the Union level, national parliaments would have to ensure that the public interest and voter preferences are imprinted onto government policy in the European Union context. By briefing and debriefing ministers on their negotiations in the Council, for instance, the national parliaments would make the national standpoint more representative of domestic left-right preferences.[18] Such imprint would be particularly vital, as, again, Union legislation does not require the passing of a bill through the national parliament itself. Third, again, in the absence of a credible deliberative forum at the Union level, national parliaments would have to engage in public debate on policy measures, so that minorities would not feel excluded from the decision-making process, even though that process does not take place in the national capital.

These three points are broadly democracy-related and do not necessarily equate to Euroscepticism. Certainly, Eurosceptics will have little trouble in depicting the European Union as being intergovernmental in purpose, or as the mere sum of its members, in advocating brakes on further European integration and even a pos-

[18] Cf. T. Raunio, 'Always One Step Behind? National Legislatures and the European Union', 34 *Government and Opposition* (1999), p. 180-202 at p. 202; R. Holzhacker, 'The Power of Opposition Parties in National Parliaments to Scrutinize EU Decision-making in the Member States: Comparing Laws, Institutions, and Party Behaviors', Conference Paper, University of Limerick, 21-22 May 2004, p. 7.

sible 'repatriation' of competences to the member states, and in stirring scepticism of the European Parliament as an improbable substitute for national parliaments. Still, attachment to national statehood or sovereignty and scepticism of the European Union, or at least the European Parliament, does not have to coincide, in spite of their proximity. The only qualification that may be made at this stage is that, as noted earlier, national parliaments are a very heterogeneous category of bodies. This means that they are not necessarily the ones who receive powers repatriated from the Union level, as member state regulation is not always national parliamentary regulation; that voter imprint on policies varies from chamber to chamber even in purely domestic context; and that a particular national parliament or chamber may not even *wish* to subscribe to such an adversarial approach to the European Union or its government itself. Scholarly or ideological points of view rely on a certain degree of generalization in this respect, and this is something worth bearing in mind in the present discussion.

Europhiles

While sovereignists and Eurosceptics can be seen as natural proponents of stronger national parliaments in the European Union, whether that be justified or not, and whether that be a concretely substantiated demand or merely a vague appeal, even the supranationalist, federalist and integration-friendly camp seems to have acquired a taste for national parliamentary involvement. The added value national parliaments can yield for Union purposes essentially has been identified already; the only difference now is the reverse angle. Thus, if national parliaments can call to account the national governments for their Union policy domestically, then this is a quality that can be used to support the Union's two-tier legitimacy as derived from the European Union citizens, represented in the European Parliament, and the member states as represented in the Council.[19] If the national parliaments can provide an imprint of voter preference onto government policies and subject bargaining tactics to domestic scrutiny, then this is a feature that can be used to communicate Europe downwards, and to make the decision-making process more transparent.[20] If the national parliaments can guard the principle of subsidiarity, then this is a capacity that can be used to make clearer 'who does what' in the European Union.[21] All of the above benefits – enhanced Union legitimacy perception, enhanced downward communication, transparency and clarity

[19] See Art. I-46 (2) TCE.

[20] See European Convention, *supra* n. 17.

[21] Cf. B. Donnelly and L. Hoffmann, 'The Role of National Parliaments in the European Union', The Federal Trust for education and research, European Policy Brief 2004, issue 3, p. 3; W. Swenden, 'Is the European Union in Need of a Competence Catalogue? Insights from Comparative Federalism', 42 *JCMS* (2004), p. 371-392.

of competence allocation – if they materialize, could make the European Union more accessible to the citizen, and stabilize the system against eruptions of popular frustration, such as negative referendum votes. Allowing for sharper domestic scrutiny in the run-up to Council negotiations would combat the practice of scapegoating 'Brussels' as a faceless machine. This all can be essential to promoting familiarity with, social acceptance of, and conscious support for the European integration project.

The earlier qualification that national parliaments are a rather heterogeneous group, if that is a group at all, of course applies here as well. Not all parliaments or chambers have the constitutional competence or political ambition to implement what scholars and ideologues might prescribe. And although the purpose of this article is to chart a map of potential supporters of national parliaments and apply it to recent treaty developments, rather than to refute that idea altogether, it should be useful to place yet another caveat with Europhile support for this cause. Historically, a pro-European stance would be irreconcilable with subjecting Union decision-making to scrutiny by a set of national institutions that are elected to represent, and enforce accountability in the name of, the national interest and the national interest only.[22] While national stakes in Union legislation cannot be reasoned away, and are not even inappropriate to voice, they are represented by only one of the two chambers of the Union legislature and even there they are subject to compromise: the Council co-exists with the European Parliament, and any one national government is but one out of twenty-five in that Council.[23] Still, it should be noted that Europhiles may have their reasons for embracing the national parliaments as well, be it that 'scrutiny' may then not be understood as 'strict control and national hand-tying routine' but, depending on the purpose, rather as 'benevolent debate and communication'. A simple juxtaposition of 'pro' and 'anti' national parliaments would miss the subtlety of a careful choice of terminology that can appear to endorse national parliaments in general, while sliding down the scale from parliamentary 'control' and 'scrutiny' to 'deliberation' and 'communication'.

Proponents of multi-level governance

To add a third theoretical approach to the picture, before turning to the institutions and their pragmatic interest in the national parliaments, we might consider

[22] See B. Hoetjes, 'The Parliament of the Netherlands and the European Union: Early Starter, Slow Mover', in A. Maurer and W. Wessels, *supra* n. 1, p. 346; Kiiver, *supra* n. 3, p. 99-105.

[23] It is for legitimacy perception however irrelevant to the public of any given member state how many of the national parliaments in the EU scrutinize their governments effectively: one-half is neither better nor worse than one-third, see Ph. Kiiver, 'The National Parliaments in an Enlarged Europe and the Constitutional Treaty', in K. Inglis and A. Ott (eds.), *The Constitution for Europe and an Enlarging Union: Unity in Diversity?* (Groningen, Europa Law Publishing 2005).

the ideas of multi-level governance and multi-level constitutionalism. It should be noted that multi-level governance, as it is understood by political scientists, tends to focus on intergovernmental and inter-administrative co-operation, so that national parliaments feature only marginally. In constitutional legal thinking, however, constitutional pluralism, when adapted, may offer a modern and at the same time reconciliatory approach to parliaments in the European Union polity. Rejecting both sovereignist and federalist ideologies as backward and state-centred, multi-level approaches tend to embrace the European Union as a complex system of countervailing powers, checks and balances, and diffuse decision-making loci supported by overlapping identities – European, national, regional, socio-economic, etc. The European Union is accepted as being more than a free-trade area, and more than the mere sum of its member states, yet a hierarchical federation-type relation between the European Union and the member states is rejected.[24] Even if the European Court of Justice is the only court that can annul Union legislation, and the European Court of Justice insists on the principles of direct effect and supremacy of Community law over national law, national courts may accept supremacy only by virtue of a domestic constitutional provision, not by virtue of the Court of Justice's case-law, and then reserve the right to set aside Union legislation when it violates national constitutional law.[25] The hierarchy between the European Union and the member states thereby becomes confused, and we are invited to acknowledge that, rather than to squeeze reality into inappropriate state-based blueprints.

A similar approach can be taken to the issue of national parliamentarism in the European Union. In keeping with the two-tier legitimacy of the European Union, it would seem only natural that the national and the European levels of parliamentarism are intertwined, that parliaments across Europe co-operate with each other, that the European polity becomes 'polycentric', and that national parliaments with sharp domestic scrutiny of the Council policy complement the European Parliament in its co-legislative task as regards the Council, and in its controlling task as regards the Commission.[26] Yet like the two other scholarly or ideological approaches to the complex, proponents of multi-level governance and

[24] Cf., among many others, K. Nicolaïdis, 'The New Constitution as European Demoi-cracy?', Federal Trust online paper 38/03, <www.fedtrust.co.uk>; J. Weiler, 'In Defence of the status quo: Europe's constitutional Sonderweg', in J. Weiler and M. Wind (eds.), *European Constitutionalism Beyond the State* (Cambridge, CUP 2003).

[25] Cf. M. Claes, *The National Courts' Mandate in the European Constitution* (Oxford, Hart 2006).

[26] Cf. K. Neunreither, 'The Democratic Deficit of the European Union: Towards Closer Cooperation between the European Parliament and the National Parliaments', 29 *Government and Opposition* (1994), p. 299-314; H. Hofmann, 'Parliamentary Representation in Europe's System of Multi-Layer Constitutions: A Case Study of Germany', 10 *Maastricht Journal of European and Comparative Law* (2003), p. 39-65; Ph. Dann, *Parlamente im Exekutivföderalismus – Eine Studie zum Verhältnis von föderaler Ordnung und parlamentarischer Demokratie in der Europäischen Union* (Ber-

multi-level constitutionalism rely on generalization and abstraction to make their point. As they combine the first two thoughts into one, they naturally also import the flaws of both. Thus, not all parliaments or chambers can and want to do what is expected of them, and sharp national parliamentarism is not reconcilable necessarily with an ever closer union. Yet again, the example is to show that stronger national parliaments potentially can be favoured in different quarters, be it that the main drive behind the outlined scholarly approaches to polycentric and multi-level constitutionalism and governance is description and conceptualization, rather than the pursuit of a specific result-oriented policy agenda.

The national governments

Apart from abstract or theoretical considerations on democracy, legitimacy and constitutional law, there are also practical reasons for particular actors in the European Union to support sharper national parliamentary scrutiny (or deliberation) as regards Union decision-making. As the first of such set of actors, we may consider the national governments. Indeed, although it would seem that governments are the prime victims of domestic scrutiny of their Council bargaining, there are some things to be said in favour of such a practice.

To begin with, a government whose negotiating position has been subject to *ex ante* scrutiny in its national parliament, or chamber thereof, can be more certain of domestic support for its policy. If both the government party or parties and the opposition have given their informed consent to a standpoint, rather than being left in the dark, backing from the home front can be a useful bargaining chip in Brussels.[27] Taking this reasoning a step further, a government might make its position less negotiable by referring to its parliament as a domestic hand-tying institution.[28] Depending on the degree to which the hand-tying is real and a mandate is binding, as opposed to more informal arrangements that can be ignored and overridden,[29] the government can increase its bargaining effectiveness. As regards the home front itself, the government can make parliament its accomplice, implicating it in Union decision-making and possibly pre-empting domestic criticism.[30] Finally, on a more strategic note, the government as an institution

lin/Heidelberg/New York, Springer 2004), p. 417; L. Besselink, 'National Parliaments in the EU's Composite Constitution: A Plea for a Shift in Paradigm', in Kiiver (ed.), *supra* n. 2.

[27] See Chr. Sasse, *Regierungen, Parlamente, Ministerrat – Entscheidungsprozesse in der Europäischen Gemeinschaft* (Bonn, Europa Union Verlag 1975), p. 88.

[28] See R. Pahre, 'Endogenous Domestic Institutions in Two-Level Games and Parliamentary Oversight of the European Union', 41 *Journal of Conflict Resolution* (1997), p. 147-174.

[29] See D. Dimitrakopoulos, 'Incrementalism and Path Dependence: European Integration and Institutional Change in National Parliaments', 39 *JCMS* (2001), p. 405-422.

[30] See Sasse, *supra* n. 27; M. Niblock, *The EEC: National Parliaments in Community Decision-Making* (London, Chatham House 1971), p. 49.

– or the member state at large – can enhance the continuity of the representation of its interests in the Council if it keeps the national parliament involved in European affairs. The idea would be that if the opposition forms or joins a new government, it could take over from its predecessor more smoothly if it had enjoyed sufficient access to information and will-formation all along.[31] This should be especially important to small member states, and to member states with a fragmented party landscape and a tendency to have flexible multi-party coalitions.

Of course, not all member states are small or have multi-party coalitions. Again, the heterogeneity of member states and their parliaments affects the validity of general arguments. Speaking more concretely, we also should have some other reservations against this pragmatic train of thought. Government rhetoric to give the national parliaments a stronger role *in general* may cease swiftly when it comes to domestic scrutiny of government policies in its *own* parliament.[32] As hinted above, hand-tying practice, such as *ex ante* mandating routines, are credible only if the government truly waives the right to override parliamentary opinions at its discretion, which is not always the case. Blaming the national parliament for rigid positions in the Council may be attractive, but so is blaming 'Brussels' for unpopular decisions at home. And implicating parliaments in decisions at will is arguably not the same thing as truly subjecting a policy to sustained parliamentary scrutiny.

The Council

The national governments thus may have cause to embrace their parliaments individually; but also when meeting in the Council, in as far as we can attribute a 'corporate identity' to the Council as a Union institution, the governments may have a vested interest in the matter. The Council as a co-legislator at the European Union level has, just like the other Union institutions, an interest in that its adopted decisions are followed and implemented smoothly in the member states. Assuming that national parliaments are not only controlling organs but also domestic law-makers – even though that is not the case in all chambers as the distribution of law-making powers varies from one member state to another – an early involvement of national parliaments may secure soft transposition of legislation. In other words, a parliament that has debated a Union decision at the draft stage will be less likely to mount a rebellion at the implementation stage.[33] Incidentally, the Convention method of treaty revision can be seen from that angle, too: involving

[31] See Raunio and Wiberg, *supra* n. 1.

[32] See Norton, *supra* n. 4, p. 186.

[33] Cf. W. Urbantschitsch, *National Parliaments in the European Union – The Austrian Experience* (Graz, Forschungsinstitut für Europarecht, Karl-Franzens-Universität 1998), p. 65; J. Fitzmaurice, 'National parliamentary control', in M. Westlake, *The Council of the European Union,* revised edn. (London, John Harper 1999), p. 337.

national MPs in treaty drafting helps prevent unforeseen resistance during the ratification stage. In either case, time spent debating early can be saved later.

In spite of this, the Council would have to accept a trade-off at this point. The drawback of sharpened *ex ante* scrutiny by national parliaments is decreased decision-making efficiency. By increasing the number of players, allowing ministers to be tied to domestic constraints, and by inflating the national stakes through polarized domestic debates in the process, the confidentiality and speed of Council negotiations no doubt would suffer.[34] Agreements reached at a preliminary stage would become fragile as well. Openness and accountability in a legislative process is by no means an outlandish proposition; at the same time, however, it should be noted that the Council is not intended – and no more than the German *Bundesrat* – for purposes of popular representation. It is to reflect federalism, not democracy. Imposing parliamentary standards upon an inherently non-parliamentary institution may damage the quality of the legislative output while eclipsing the locus where parliamentary standards are needed very much, namely, the European Parliament. Yet again, suffice to note that the Council as a body can have an opinion of its own concerning the role of the national parliaments.

The European Parliament

The relation between the national parliaments and the European Parliament is a tricky one. It is tempting to state that they are allies, in that they have the joint task of parliamentarizing the European Union. On the other hand, we may note that there is an undeniable potential for structural rivalry between the two tiers of parliamentarism. This not only concerns conflicting claims for exclusive popular representation in the European Union, it also concerns diverging long-term interests: co-decision strengthens the European Parliament, but makes the decision-making process more complex to follow for national parliaments; qualified majority voting speeds up the process for the Union legislator, but deprives national parliaments of their bite, as the own government can be outvoted even if it had been tied to a strict negotiating mandate; broader Union competences benefit the European Parliament, but drain the national parliaments of their competences; a large Union budget gives leeway to the European Parliament, but national parliaments of net contributors retain their own priorities regarding the use of taxpayer money domestically.[35] Moreover, national parliaments inevitably represent the

[34] See F. Hayes-Renshaw and H. Wallace, *The Council of Ministers* (London, Macmillan 1997), p. 291; Urbantschitsch, *supra* n. 33, p. 60; Dann, *supra* n. 26, p. 413.

[35] See T. Von der Vring, 'On legitimation of the European Union – National Parliaments and the European Parliament', in G. Winter (ed.), *Sources and Categories of European Union Law – A Comparative and Reform Perspective* (Baden-Baden, Nomos 1996), p. 406; S. Smismans, 'The Role

national interest (e.g., what government position is best for Sweden?), and making that element more prominent is not helpful necessarily to the promotion of all-European left-right voter alignment in the European Parliament.

Nevertheless, the European Parliament understands that national parliaments are courted better than feared and that embracing them while dictating the agenda is preferable to losing out in competence struggles.[36] In its structural opposition to the Council, the European Parliament even may profit from having national parliaments subscribe to its views, so that it can squeeze the Council from two sides, as it were. It would be interesting to see whether the European Parliament would profit or suffer from decreased Council efficiency. In any event, the European Parliament also has a cost-benefit analysis to make for recruiting national parliamentary allies, on the one hand, especially in areas where there is no co-decision,[37] and accepting the ensuing re-nationalization of politics through enhanced domestic salience of Union policy, on the other hand. But the fact that there might be a benefit to the European Parliament in the first place is worth noting already by itself.

The Commission

In some respects, when it comes to promoting the role of the national parliaments in the European Union, the Commission faces a trade-off not unlike those of the European Parliament and the Council. As a body initiating legislation, the Commission has an interest in decision-making efficiency; on the other hand, as the guardian of compliance with Union law, it also has an interest in ensuring smooth and loyal implementation of decisions in the member states, which is where the national parliaments come in handy. As a supranational institution that is not bound by instructions from the national capitals, it must broker and mediate between competing national interests, and it does not help if the stakes are inflated by sharper domestic scrutiny and debate. On the other hand, as a Brussels power-house it can profit from enhanced credibility, transparency, legitimacy and acceptance through national parliamentary deliberation,[38] as long as its ties of formal accountability towards the European Parliament are not distorted. If national parliaments insist that the Commission take the principle of subsidiarity

of the National Parliaments in the European Decision-Making Process: Addressing the Problem at the European Level?', 9 *ELSA Selected Papers on European Law* (1998), p. 49-76 at p. 52; A. Cygan, *National Parliaments in an Integrated Europe – An Anglo-German Perspective* (The Hague/London/New York, Kluwer Law International 2001) p. 4; C. Harlow, *Accountability in the European Union* (Oxford, OUP 2002) p. 107.

[36] See Fitzmaurice, *supra* n. 33, at p. 337.

[37] Cf. EP Committee on Constitutional Affairs Report of 23 Jan. 2002, A5-0023/2002.

[38] Cf. European Commission, *European Governance – A White Paper,* COM (2001) 428 final.

more seriously than it currently does, the result may be inconvenience, on the one hand, but a firmer moral standing, on the other hand. The Commission may be affected less by ideological considerations on what the European Union is exactly, and where the appropriate locus of popular representation lies, than the European Parliament. The Commission also can function modestly, if a crisis rears its head, as a European civil service; the credibility of the European Parliament however depends on the stability of the notion of a European Union citizenship. Still, also from the Commission's point of view, the national parliaments may yield some added value, whether that is offset eventually by other properties or not.

The national parliaments themselves

While all the scholarly and institutional stakeholders are weighing the pros and cons of closer national parliamentary involvement in the European Union, we of course should not forget to turn to the national parliaments themselves. What can they gain from a stronger role? The answer seems obvious: a higher degree of control over domestic will-formation on Union questions, over the government's bargaining position in the Council, and over the course of European integration in general. However that is not the most intriguing question. What is more important is why they do not seem to be using their powers to a greater extent. After all, most measures calling for sharper scrutiny require neither large-scale constitutional reforms nor a treaty amendment. Where a parliamentary system of government is in place already, the cabinet is accountable for all its policies anyway, be they foreign or domestic. Effective enforcement of that accountability is then merely a question of the proper allocation of time and resources, of different priority-setting on the agenda, of energy to acquire experience in European affairs, of money to fund support staff, possibly of the will to re-arrange internal committee procedures to become more efficient and effective, or of the readiness to enter into inter-parliamentary networking. Yet again, without going into too much detail, there is no such thing as 'the national parliaments'. Political science research of the 1990s indicates that the form and intensity of European scrutiny in a parliament or chamber depends on many factors, such as political culture and the pre-existing institutional setting, the degree of government dominance and the salience of Union matters among national political parties and the public at large.[39] Where a parliament offers loyal support to a stable majority government, and where parties and voters are united in a benevolent consensus as to the desirability of European integration, scrutiny in that area is not likely to be sharp.

[39] See T. Bergman, 'National parliaments and EU Affairs Committees: notes on empirical variation and competing explanations', 4 *Journal of European Public Policy* (1997), p. 373-387; Raunio, *supra* n. 18; Maurer, *supra* n. 4.

Pro-European consensus furthermore tends to include the idea that parliamentarization of the European Union should be carried out appropriately by increasing the weight of the European Parliament, not by interfering in Brussels with petty domestic concerns. In other words, what a particular parliament or chamber can gain from enhanced activity depends on what that parliament or chamber had to lose as European integration progressed, what it actually lost, what it wants to gain, and what it wants to regain itself. Reasons for constraint and self-constraint may be very much valid, and dismissing moderation as a failure or a shortcoming with respect to an ideal prototype parliament would miss the point that national parliaments are as diverse as the systems they represent – not only in their competence and functioning, but also in their ambition and self-perception.

Apart from that, we also should be careful when using the term 'national parliament' as though it described an 'actor' in a constitutional setting. What we are in fact dealing with are multi-faceted, multi-member assemblies comprising several overlapping categories of sub-actors: individual MPs, political party groups, wings within parties, committees, or the plenary. Equating 'the parliament' to 'the parliamentary majority', for instance, would ignore the fact that overall parliamentary permissiveness depends on the preferences and conduct of individual political parties in parliament, and that it in turn is heavily influenced, among other factors, by whether these particular parties are in government or in the opposition. Similarly, the politicization of European affairs depends not on the willingness of the plenary as an actor to engage in debate, but on the willingness and capacity of dissenters as sub-actors to take issue.

The Constitutional Treaty precedent: the case for national parliaments put to the test

Above we have considered the case for embracing the national parliaments in the European Union by dissecting this case into different, simplified views on the matter. The sub-cases remaining after analytical disaggregation are of course partly overlapping. Thus, an emphasis on national statehood is not an isolated cause by itself, but it can attach to specific actors, such as a Eurosceptic national government. Not all sub-cases prescribe a strong political agenda either: the exercise of conceptualizing the European polity as a polycentric or multi-level construct, rather than as a classic federation, does not call immediately for certain policy measures. It does 'free the mind' to a certain extent, however, in that it can widen the notion of accountability, and promote the perception that in a polycentric or multi-level Europe, national parliaments need not be tied down to their domestic setting,

and can venture very well into confronting, say, the European Commission.[40] Other ideological points of view, as well as the points of view of different institutions, come with policy preferences of a more specific kind. The described points shall be contrasted now with the recent treaty-making attempt in relation to national parliaments, namely the European Union Constitutional Treaty, in a sample of instances where the Treaty addresses national parliaments. It should be noted that the exercise does not imply that the different schools of thought, such as the Eurosceptic camp, or the institutions, such as the Commission, all had an equal weight in the Convention process or the IGC. Yet the exercise may show that the Treaty provisions do reflect a certain balance, rather than a single agenda, especially where the Treaty could have gone further than it did. This should help us better understand Union constitution-building efforts of the past, and at the same time anticipate future efforts by acknowledging their inherent constraints.

The symbolic mentioning of national parliaments

As noted at the outset, the Constitutional Treaty was the first of its kind to mention the term 'national parliaments' in its text proper. We might start out with a central provision, Article I-46 (2), which, under the heading of the principle of representative democracy governing the European Union, states: 'Citizens are directly represented at Union level in the European Parliament. Member States are represented in the European Council by their Heads of State or Government and in the Council by their governments, themselves *democratically accountable* either *to their national Parliaments*, or to their citizens (emphasis added).'

This provision may be understood now to have different meanings, and the main question is whether it has any substantive content, or whether it is purely symbolic in nature and purpose. In the light of the constitutional autonomy of the member states, as also reiterated in Article I-5(1) of the Constitutional Treaty, coupled with the treaty-based character of the European Union, it can be argued safely that this provision cannot prescribe, authorize, fix, or alter the rules governing executive accountability at the domestic level which flow directly from national constitutional law. Nor is this provision intended to fix any rules: in fact, in other instances in the Treaty, the autonomy of national parliamentary politics is recognized explicitly.[41] For the rest, it is hard to conceive how a national parliament could seek to enforce domestic political accountability by relying on a European Treaty provision.

Another way to look at the mentioned provision is to qualify it as a restatement of existing constitutional practice, symbolically elevating national accountability

[40] Besselink, *supra* n. 26.
[41] See the list of references *supra*, n. 5.

routines to a role in the functioning of the European Union at large. This is a multi-level understanding of Europe at its best. It seeks to reconcile (and perhaps it puts them off at the same time) Eurosceptics, hesitant parliamentarians or voters who would have to ratify the Treaty as a whole, and Europhiles, including integration-friendly MPs, in that the European Union explicitly is confirmed to rest on two tiers, a national and a European one, without any visible priority for one or the other. As to the role accorded to national parliaments, for an otherwise cautious institution such as the European Parliament, it should be an inexpensive gesture to nod to principles that are in place anyway. We should note, it is not entirely unproblematic simply to declare that governments are accountable to national parliaments, since if they are, they are to different extents: the French President for instance is not accountable to the French parliament at all (a point recognized by the IGC but initially overlooked by the Convention, which referred to parliamentary accountability only and forgot directly elected Heads of State),[42] and if we qualify an upper chamber (say the French Senate) as a parliament as well, formal accountability, in the sense of a government's reliance on parliamentary confidence, in fact would not be present either.[43] Clearly, the wish to make a gesture trumped sensitivities to national constitutional particularities, so that a provision got adopted which, for all we know, was not strictly necessary, and which might be placed equally, if not more appropriately, in a Preamble.

A third view that might be taken on Article I-46(2) is that it is in fact neither a prescription of domestic practice nor a symbolic upgrading of national parliaments, but a symbolic codification of the *status quo*. The European Parliament might have to live with being placed on equal footing with parliaments in the member states; this however may prevent the unfolding of a worst-case scenario, namely the creation of a 'Third Chamber' comprised of national parliamentarians at Union level, next to the European Parliament.[44] If the alternatives are structural competition with a new Union body, on the one hand, and keeping the national parliaments where they are, in the member states, on the other hand, the latter option clearly has to be the European Parliament's preference, as well as the preference of many others, including most national parliaments.[45] To secure this,

[42] Cf. the original wording of Art. 45 (2) draft TCE as of 18 July 2003, CONV 850/03: 'Citizens are directly represented at Union level in the European Parliament. Member States are represented in the European Council and in the Council of Ministers by their governments, themselves accountable to national parliaments, elected by their citizens.' This is not a mere ambiguity of translation with a comma for the word 'or', cf. the French version ('…qui sont eux-mêmes responsables devant les parlements nationaux, élus par leurs citoyens') and the even clearer German version ('…die ihrerseits den von den Bürgerinnen und Bürgern gewählten nationalen Parlamenten Rechenschaft ablegen müssen.')

[43] See for a discussion: Kiiver, *supra* n. 3.

[44] Ibid., p. 133-145.

[45] Ibid., p. 121.

it is not too high a price to symbolically recognize the accountability of governments to parliaments – in fact, as long as that principle is codified, a direct competition with national parliaments at Union level is avoided.

Access to information and scrutiny delays

The notion that the active and *ex ante* participation of national parliaments in Union affairs requires timely information was among the first to be made explicit in a treaty context.[46] Already Maastricht Declaration No. 13 noted that it would be desirable for parliaments to receive Union documentation in good time. Both the Amsterdam Protocol on national parliaments and the Constitutional Treaty and its protocols continue along this way by consolidating and expanding facilities enabling national parliaments to receive relevant documentation.[47] In addition, the Amsterdam Protocol introduced, and the first Constitutional Treaty protocol insists on the observance of a six-week timeframe during which national parliaments should be able to conduct *ex ante* scrutiny of Union proposals. The Constitutional Treaty provides for even more instances of notification of national parliaments, and for a scrutiny task with respect to Europol and Eurojust, subject to a 'European Law', which also should include a regular reporting obligation to national parliaments.

Access to information and time for scrutiny are, one might contend, more inexpensive concessions to national parliaments, or their supporters, since they do not equate automatically with stricter scrutiny, especially if only Commission documentation is put on the Internet, and if the decisive Council and Coreper deals are struck behind the scenes, irrespective of any time windows. On the other hand, the formulations became increasingly categorical from Maastricht via Amsterdam to the Constitutional Treaty, starting out in a cautious manner: Maastricht Declaration No. 13 referred to the purpose of the forwarding of Union documents as being for 'information or possible examination', which arguably is not quite the same thing as strict scrutiny. Still, again the alternatives are worth considering: what has *not* been achieved? Systematic documentation and openness of non-legislative Council activity areas, most notably the Second Pillar, still are excluded from the Constitutional Treaty's scope. Commitment to a minimum time window (which for a real impact of course sets in too late) is maintained, yet scrutiny reserves, by which in some member states ministers are barred from giving consent to Union measures pending parliamentary deliberation at home, still

[46] See also Raunio, *supra* n. 18; V. Miller and R. Ware, 'Keeping National Parliaments Informed: The Problem of European Legislation', 2 *The Journal of Legislative Studies* (1996), p. 184-197.

[47] See *supra* n. 8 et seq.

are not recognized formally in the Council.[48] Access to all Union information is associated readily with enhanced transparency and willingness to submit Union policies to systematic scrutiny in the national parliaments, which can seem desirable from several points of view as discussed earlier; it also can have however a detrimental effect, in that parliaments are being suffocated (deliberately?) in paper.[49] Either way, information facilities remain sufficiently open-ended, with the actual use of information being left to the parliaments themselves, so that the idea can be embraced by many, if for different reasons.

Subsidiarity

Although it is not the most significant empowerment of national parliaments under the Constitutional Treaty, the notion that national parliaments are the guardians of the principle of subsidiarity has received by far the most attention in the ongoing debate. Although it surely merits a more detailed analysis,[50] a condensed review should make clear the subtle balancing exercise that has been carried out here. Thus, Eurosceptics, and even otherwise Europhile actors who have to 'sell' the Treaty to the parliaments and the voters, should rejoice if regulations are ordered to the lowest sensible level; they also should rejoice if subsidiarity enforcement is taken out of the hands of the Commission, the Council and the European Parliament, which can only profit from creeping competence, and given into the hands of external players. In line with multi-level governance thinking, national parliaments would be engaging in a competence dialogue with the Union institutions, raising their own awareness of Union matters in the process.

The early warning system on subsidiarity is binding enough for national governments to stir up credible opposition to unwelcome Commission proposals in their home parliaments; yet it is not binding enough to represent a real threat of a deadlock in case national parliaments rebel against their governments, and the Commission, and demand the withdrawal of a proposal. The system forms an integral part of the Treaty, and it is painted with constitutional language, hard-law vote distribution and majority thresholds for objections against proposals; yet it is based at the same time on a protocol, not the Treaty proper, and its value is largely political: subsidiarity itself requires political judgments and is far less workable than, say, proportionality,[51] and national parliaments do not need a one-third

[48] See Cygan, *supra* n. 1.

[49] Urbantschitsch, *supra* n. 33, p. 47; see also S. Weatherill, 'Using national parliaments to improve scrutiny of the limits of EU action', 28 *European Law Review* (2003), p. 909-912 at p. 911.

[50] See Kiiver, *supra* n. 3, p. 153-168; J. Peters, 'National Parliaments and Subsidiarity: Think Twice', 1 *EuConst* (2005), p. 68-72.

[51] The TCE protocol envisages a check on both subsidiarity and proportionality, but the voting mechanism is meant for subsidiarity only.

minority as prescribed in principle in the protocol to make a strong point. In fact, they do not need a protocol at all in order to pay attention to subsidiarity in their ordinary work in the first place. The Council and the Commission become receptive to national parliamentary sensitivities, but cannot be halted formally in their legislative process. Nor can they, for subsidiarity infringements, be brought before the Court of Justice by national parliaments directly, since national parliaments as such are not awarded *locus standi* as privileged applicants,[52] whereas indirect actions, whereby a parliament asks or forces its own government to bring a member state action, are available anyway, so that no real concession has been made here either.[53] The European Constitution appeases national parliaments with subsidiarity powers, perhaps sublimely implying that national parliamentary activity should be limited to subsidiarity checks *only*, while again making sure that national parliaments stay where they are, at the domestic level.

In the sufficiently prominent and tough sounding, yet at the same time sufficiently political and non-binding, usable and exploitable manner in which the subsidiarity enforcement mechanism has been devised, this feature of the Constitutional Treaty represents a splendid example of how national parliaments (and subsidiarity) are receiving centre stage and still remain acceptable for overall endorsement. So much so, in fact, that pilot projects on the use of subsidiarity checks are long underway already,[54] and that the idea, barring any truly radical transformations in how the Union functions, likely is not to fall out of fashion any time soon.

The passerelle veto

If there is one instance where the Constitutional Treaty really gave national parliaments the tools to make themselves heard, it is the general passerelle clause. Devised to simplify treaty amendments regarding Union legislative procedures, by authorizing unanimous votes in the European Council rather than a formal treaty amendment and ratification in all the member states, the passerelle clearly adds to the flexibility of the European integration process. At the same time, the use of the clause is conditioned, under Article IV-444(3), by the possibility that any one national parliament or chamber can veto in an absolute manner the simplified

[52] Under Art. 8 of the TCE subsidiarity protocol, the ECJ 'shall have jurisdiction in actions on grounds of infringement of the principle of subsidiarity by a European legislative act, brought in accordance with the rules laid down in Article III-365 of the Constitution by Member States, or notified by them in accordance with their legal order on behalf of their national Parliament or a chamber of it.'

[53] It would have been problematic, too, since it would be up to the member states to determine which assemblies qualify as a national parliament or chamber thereof, and by what kind of majorities (or minorities) they would decide to bring an action, see Kiiver, *supra* n. 3, p. 164-167.

[54] See *supra* n. 16.

treaty amendment. Compared to the non-binding subsidiarity enforcement mechanism, the passerelle veto is almost offensively strict, and it makes one wonder why it nevertheless received such a low profile in the current debate.

One might contend that the veto is not so strict after all, since an ordinary treaty revision would require ratification in the member states, which puts parliaments in a vetoing position as well, be it that the passerelle veto opens an opportunity for rejection only, whereas a ratification calls for a positive approval of a change of procedure.[55] We might add here that ratification referendums are not stipulated, but where a referendum is possible, nothing would preclude a member state from holding one first, before deciding on whether or not to reject the transfer. Still, placed in the immediate context of a (looming) qualified majority voting or co-decision procedure, a 'one-house veto' by any one national parliament or chamber, so to speak, forms an impressive concession to integration-wary parliamentarians and voters. It also should placate sceptic governments, which is probably the reason the one-house veto was inserted: a majority cabinet should have little difficulty obtaining support for a parliamentary rejection of deeper European integration. The one-house veto therefore can be equated to a large extent with a one-government veto, which applies in usual unanimity cases anyway, and which is something the Commission and the European Parliament can do little about.

Nevertheless, the enthusiasm for handing the parliaments something 'toothy' may have led to a miscalculation as to the effects of the one-house passerelle veto. For while one-government vetoes are a very normal phenomenon, when parliaments are involved, it would have to be sorted out to determine which national chambers should wield the veto. The majorities in unicameral parliaments and lower chambers may follow loyally the government (after all, in a sense they *are* the government), but upper chambers are less predictable. The passerelle veto thus in fact represents a considerable empowerment of the senates, placed as they are on an equal footing with lower chambers. The system becomes even less predictable when chambers decide to lower voting thresholds, enabling a parliamentary minority to cast a veto.[56] And the Belgian scenario, where the powerful sub-national assemblies are domestically co-equal to the federal parliament, so that each of them might claim potentially to be the chamber of the 'national parliament' in a wide sense and go on to sabotage the European Council, clearly was not foreseen at all.[57]

[55] See B. De Witte, *The National Constitutional Dimension of European Treaty Revision – Evolution and Recent Debates* (Groningen, Europa Law Publishing 2004).

[56] This in a hypothetical analogy to the real German intention to allow one-third of the *Bundestag* to bring, via the government, an annulment action before the ECJ, see *supra* n. 53.

[57] See Pas, *supra* n. 2.

The composite case for national parliaments: An outlook

As the fate of the Constitutional Treaty remains uncertain, to say the least, some of the Treaty's features might become obsolete; others do not strictly require a treaty amendment and could work already, or after an adjustment of lower-level instruments; still others might re-appear at the next treaty drafting exercise. Here we shall focus on four specific features that are either unresolved or are otherwise bound to stay on the agenda in regard to the role of national parliaments in the European Union.

The first is the status of scrutiny reserves, which restrict ministers' freedom to agree to Council measures as long as their home parliament still is conducting *ex ante* scrutiny. It has been suggested that such reserves should feature explicitly in the Council's rules of procedure.[58] Since this move would not require a new treaty, it is more likely to be implemented than others; however, again competing agendas have to be taken into account, in spite of the endorsement of national parliaments in general. A government might be tempted very much to obstruct Council voting by claiming to be powerless pending parliamentary scrutiny, and in fact encourage such scrutiny by its own loyal parliamentary majority for as long as possible; yet it remains in the interest of each government, and the Council as a whole, to be able to break an impasse caused by an abuse of procedures in a two-level game. The same holds true for the Commission and the European Parliament. The alternatives are non-extendable time windows for scrutiny, which exist now, or, for example, scrutiny reserves that are subject to majority overrides in the Council. Until such time, ministers will have to enforce the reserves that are imposed on them by seeking to delay Council voting more or less informally.

A second feature is the direct *locus standi* of national parliaments before the Court of Justice. Rejected in the Constitutional Treaty context, it might herald a new and significant involvement of national parliaments in enforcing subsidiarity in particular, or legality of Union action in general.[59] As long as it would be up to the member states to decide what in their system qualifies as a national parliament, and by which majorities it acts, the Court and the European Union legislators would have to brace themselves for the potential receipt of annulment actions from regional parliaments, unelected senates, or parliamentary minorities. While not impossible, this probably would call for a more fundamental review of the current, exceedingly narrow admissibility criteria for annulment actions before the Court, the distinction between privileged and non-privileged applicants, and the concept of the uniform representation in court of the member state by the

[58] See Cygan, *supra* n. 1; see also the recommendations by the Convention's Working Group IV, Final Report, CONV 353/02, p. 9.

[59] Advocated, *inter alia*, by Donnelly and Hoffmann, *supra* n. 21, p. 4.

government and the government only.[60] To limit the inflow of applicants, such as regional chambers (or municipalities, for that matter), a theoretical option would be to draw up an exhaustive list of parliamentary chambers deemed to qualify as national parliaments – that hardly is conceivable, in the light of the constitutional autonomy of the member states and some of their eccentricities. For the time being, however, a parliament of course is free to persuade its government to launch a Court action on behalf of the member state, and any Union institution will be ready to accord, or in fact acknowledge in writing, just that.

A third point of attention might be the question of whether a one-house veto against the application of the passerelle clause is worthy of being retained in a future treaty. In a way, the same objections can be raised as the ones already noted regarding *locus standi* for national parliaments: barring exhaustive lists of parliaments, the governments in the European Council would be exposing themselves not just to relatively easily controllable lower chambers, but to other parliamentary or quasi-parliamentary actors from their own as well as from other member states. What the IGC probably had in mind was a regular unanimity clause for the passerelle, decorated with parliamentary involvement that does not go much further than the veto that is available in ordinary treaty ratification procedures anyway. Apart from other concerns, however, it should be noted that, in contrast to voters, parliaments do not tend to refuse ratification of international package deals, whereas an isolated 'no' against qualified majority voting in a sensitive policy area is easily obtained. It is therefore very conceivable that a future IGC might reconsider the option of binding one-house vetoes, and stick to unanimity proper. Of course, as long as it does not matter whether a 'no' comes from the British prime-minister or from the House of Commons, the 'no' being certain and the effect being the same, the one-house veto might live on as a brake on integration with a parliamentary touch.

A fourth point, finally, is the repeated use of the Convention method of treaty revision. Involving as it does national parliamentarians, or their representatives, the Convention method has many of the advantages identified with respect to the subsidiarity early warning system: the Convention method is prominent, legally codifiable, yet ultimately, conditioned by a subsequent IGC, non-binding. Like subsidiarity enforcement, it signals transparency, and it might make bitter pills go down more easily at the ratification stage, at least as far as MPs are concerned. Possible causes for cautiousness would be only that Conventions might lose their captivating effect if held on too regular a basis, and that the captivating effect itself was so far poor or absent. Societal debate during the last Convention was more

[60] See on the case-law regarding actions by regions: P. Van Nuffel, 'What's in a Member State? Central and Decentralized Authorities before the Community Courts', 38 *Common Market Law Review* (2001), p. 871-901.

than modest, and the method obviously did not impress French and Dutch voters regarding the result. It might be a fundamental point for reflection that national parliamentary activity always is deprived of its positive effects when carried out away from home: the fact that a share of the Convention consisted of national MPs did not bring the process any closer to most national parliaments, let alone the citizens.[61] Perhaps Union decision-making comes with a degree of remoteness that cannot be brought down below a certain minimum; the role that national parliaments play in actually bridging that remoteness will remain the subject of subtle calibration of interests between different actors, who all might embrace national parliaments in general, but retain their reservations regarding the practical effect of such endorsement.

Conclusion

The Convention on the Future of Europe and the IGC undoubtedly made an effort to emphasize the importance of the national parliaments in the European Union. Emphasis of importance however is not to be confused with a veritable constitutional overhaul, and a significant shift of the centre of gravity from the European Union to the member states, or from the European Parliament to the national parliaments. Eurosceptics undoubtedly will favour the national parliaments as brakes on integration and national parliamentary control as evidence of the idea that the member states, not the supranational institutions, remain in the driver's seat in the European Union. For that reason, the European Parliament and, to some extent, the Commission, rightfully are careful in courting the national parliaments. Europe may be a polycentric multi-level polity in which national parliaments are free to engage in open dialogues across the European Union organization, yet this does not take away the existing institutional preferences of the key actors. The national governments may emphasize the role of the national parliaments in general terms, and may even involve pragmatically their own parliament in national will-formation – to secure support, pre-empt criticism, deliberately tie their hands in the Council, or consolidate national policy. On the other hand, overriding inconvenient parliamentary instructions remains tempting, while efficiency and confidentiality in the Council suffer from domestic politicization and the introduction of new and external stakeholders to the game.

The way in which the European Union Constitutional Treaty addressed the national parliaments reflects the fact that the case for national parliaments is really a composite one, a case that can be dissected into several sub-cases. Preference was

[61] See on the relation between parliamentary Convention involvement and the negative referendum result in the Netherlands: O. Tans, 'The Dutch Parliament and the European Constitution: How Yes led to No', in Kiiver (ed.), *supra* n. 2.

given, and most certainly will be given in the future, to provisions that are symbolically weighty and come with the decorum of hard constitutional law, but which either acknowledge the *status quo*, so that they do not concede anything, or codify the status quo, so that more threatening reforms are prevented (e.g., a national parliament may call the government to account domestically; a national parliament may ask the government to bring a court action; a national parliament may check subsidiarity and send an angry letter to the Commission, all true with or without a treaty). Preference furthermore tends to be given to provisions that are light on substance, open-ended, with an air of informality and awareness-stimulation about them, not result-orientation, such as (short) scrutiny delays and information and notification facilities; to provisions that truly empower national parliaments but can be interpreted as a proxy for governmental action, such as the one-house veto against the application of the passerelle clause, which easily can be mobilized by a half-way stable majority cabinet; and to provisions that signal openness and involve, or implicate, national MPs, without removing the governments' prerogatives in the integration process, such as the Convention method of treaty revision, or the Union institutions' prerogatives in the legislative process, such as the early warning system on subsidiarity. Further-reaching innovations to the benefit of national parliaments, including those that have been discussed and rejected in the Convention, would call for more fundamental institutional reform; the adopted notions can be embedded in the already existing set-up.

Future treaty-makers only will need to watch out that, first, they do not get more than they have bargained for, in that also regional parliaments or parliamentary minorities, as well as unelected upper chambers, may 'jump on the train' and claim treaty rights, arguing that they too are 'national parliaments'. Second, obviously after the French and Dutch referendums, they will need to ask themselves whether the pseudo-concessions they were willing to make in the Constitutional Treaty, and the inflationary use of hard constitutional language for soft political arrangements, are truly convincing. Third, and most importantly, they should keep asking themselves whether further-reaching reforms still would serve a purpose that can be widely endorsed across ideological camps and agendas.

https://doi.org/10.1017/S1574019606002276 Published online by Cambridge University Press