

# IMPROVING THE UNION'S DEMOCRATIC LEGITIMACY: THE EUROPEAN PARLIAMENT AND NATIONAL PARLIAMENTS

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## I. What kind of democratic legitimacy?

There is a general understanding of the European constitutionalism, that any public power imposing rights and duties on the people must be democratically legitimated by the people as an ultimate possessor of the sovereign self-determination potential. As the European Union exercises its powers *vis-a-vis* individuals, it must be subjected to the same fundamental principle, otherwise it could not be called the constitutional community any more.

Although the ECJ referred to this point as early as in 1979<sup>1</sup> the doubts existed not only about the real democratic legitimacy of the Union's institutions and their action, but „the democratic deficit“ was described by some<sup>2</sup> as a *structural* defect of the Union, as an inborn weakness, disqualifying it from the constitutional perspective. The pre-constitutional arguments are famous: the lack of a collective identity in a heterogeneous multi-cultural milieu, the lack of communication in a multi-lingual community as a pre-requisite for the European public area, etc. The common denominator of this criticism was the paradigm of the ideal of democratic legitimacy of public authorities in a classical national state as the *tertium comparationis* used for the assessment of the Union.

The first counter-argument should accept the underdeveloped political parties' structures at the European level, political debates on domestic affairs dominating the elections into the European Parliament and the low participation of the Union's citizen at the elections. But, on the other hand: the participation of citizens at the national parliament elections has been going down even in the countries, having the twohundred-years-old and uninterrupted democratic tradition; the multi-lingual country like Switzerland is obviously not lacking the national identity; the introduction of the common currency-euro enhanced and networked the all-round European debates, as well as the demise of the European Commission in the spring 1999, etc.

The scepticism on the democratic nature of the European integration project and its improving capacity has not gained ground, as the Protocol on the Future of the EU annexed to the Treaty of Nice and the Laeken Declaration, addressing the basic challenges the Union is facing, showed. Nevertheless, the reforms for a renewed Union should be aware of the distinction, that the increase of the democratic legitimacy and transparency of the present institutions and the role the national parliaments have to play in the European decision-making process must reflect the different position of the citizen within the Union, as compared with its position in a Member State only. His/her identity is a multi-level one, as

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<sup>1</sup> *SA Roquette Freres v. Council*, case 136/79, [1980] ECR 3333.

<sup>2</sup> *D. Grimm*, Does Europe Need a Constitution?, (1995) 1 ELJ, p. 303.

a rule stronger at the national than at the European level and weaker at the national than at the local (municipal, regional) level. The intensity of self-identification is a complex phenomenon. It is influenced not only by common values, social traditions and cultural heritage of the given polity, but by the efficiency of the polity's action in representing and protecting the interests of its member.

Therefore, the advancing focus of the European integration project on the individual, accompanied by the progressing europeanisation of the respective political and legal instruments of the enforcement of his/her position, adequately articulated in the European Constitution, would promote and speed up building of the European identity, too.<sup>3</sup> As the European identity always remains different from the national one in terms of its substance and scope, *different* will be also the *claims of democratic legitimacy* of the public power at each of both levels, including the *means of their settlement*. The national experience of the democratic control of the executive branch of government by the parliament cannot be simply transferred on the specific modus of governance with the unprecedented dimension. The European decision-maker is too distant from the European destinator of the decision to enable the same controlling and participatory schemes working there with the same or at least similar effect as in the national state. Therefore, in addition, more appropriate measures should operate there, like decentralization of decision-making (legitimacy through subsidiarity).

## **II. Two Ways of Legitimizing the Union**

There is a *double main source* of democratic legitimacy of the decision-making institutions in the EU:

- first, the Union-based (supranational) one – the European Parliament, composed of the representatives of the Union's peoples elected by the direct suffrage (still without any uniform election procedure) and the electoral constituencies determined nationally;
- second, the Member States-based (governmental) one – the Council, composed of the national representatives at the ministerial level, whose appointment reflect national parliamentary majorities supporting the governments they so represent

The existence of such a dual model is not an irregularity or timely solution of the system. It reflects the bipolar nature of the balance of powers and responsibilities. Because the institutional balance of the Union (horizontal dimension of its powers) should remain - in principle – untouched during the reform initiated by the Laeken Declaration, I can abstain from the review of legitimacy of other institutions (Commission, ECJ), leaving aside the European Central Bank as a special case or the issue of direct democracy at the European level (European public voting-Referendum).

### **1. Legitimacy through the European Parliament**

Should the role of the European Parliament, strengthened by the further extension of its tasks (the right of legislative co-decision, the appointment of the President of the Commis-

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<sup>3</sup> J. Habermas, Die postnationale Konstellation und die Zukunft der Demokratie, in: *ibid.*, Die postnationale Konstellation. Politische Essays (1998), pp. 91 et seq.

sion and review of its executive function) be more legitimized by the creation of a *joint European electoral constituency* or by a combination of its elements with the current separate national constituencies? The consistent answer could be a uniform election procedure (based on the principle of proportionality *or* majority) as proposed by the Amsterdam Treaty (Art. 190 IV - „according to the principles common to the Member States“), replacing the existing plurality of national procedures. There is no space for the principle of subsidiarity, as no homogenous representation of the European peoples could be reached.

A certain *over-representation of the small states* (even after the re-weighting of votes in the Treaty of Nice), justified by the respect to the protection of voting minorities, seems to be not a serious threat to the principle of democracy; as practiced in some federal states (the Danish minority parties in Schleswig-Holstein need not to overcome the 5 %-barrier of votes for entering in the local parliament, as prescribed in general for other parties). The *limit for the total number of the MEPs* is rational and acceptable from the perspective of democracy, because it guarantees the minimum standard of participation in the EP-debates for all.

Concerning the law-making function of the European Parliament, instead of its immediate *right of legislative initiative* its request for drafting of an act by the Commission (as at present articulated in Art. 192 TEC) accompanied by the duty of the Commission – in case of rejection to do so - to disclose its reasons would meet the expectations of the citizens. The preservation of the „Community method“ should be preserved, as it proved itself until now. The extension of the co-decision procedure, counter-balancing the the qualified majority voting in the Council, would be the main contribution of the European Parliament to the improvement of legitimacy of the law-making process in the Union. Together with the *election of the President*, it would enhance the position of the European Parliament in a desirable manner. Besides the real independency of the European Central Bank and the Court of Auditors, another independent body – the Competition Authority – could be separated from the Commission, reflecting the experience from the national level.

The reintroduction of the *dual mandate for the MEPs* as well as the establishment of the new chamber of the European Parliament on the basis of the national Parliaments would lead to the over-representation of national interests, taking into account the national majorities in the background of the ministers of the Member States in the Council. There would not be any „added value“ to the democratic legitimacy of the decision-making at the Union's level.<sup>4</sup>

## 2. Legitimacy through the Council

The direct participation of the national parliaments is limited to exceptional cases (to some few issues of the third pillar – Police and Judicial Cooperation in Criminal Matters, citizenship, the elections procedure to the European Parliament and financing the EC budget). Other influence of each national Parliament on the European affairs depends upon its

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<sup>4</sup> I changed my opinion in this respect recently; for my former view, see: J. Zemanek, Anticipating the Role of the Czech Parliament as a Decision-maker in EU-affaires, in: Perspectives of the Nice Treaty and the Intergovernmental Conference in 2004, Nomos, Baden-Baden 2002, p. 70.

constitutional prerogatives *vis-a-vis* the national executive branch of government and is, therefore, only indirect one, in particular:

- in the ratification of the Treaties and their amendments as the core provisions of
- the primary law;
- in the determination of the position of the respective ministers in the Council;
- in the undertaking parliamentary scrutiny on the Union's policy and legislative proposals
- before their adoption by the Council and the European Parliament;
- in the *ex post* control of the ministers in the Council;
- in the transposition of the Community directives into the domestic legal system (if this task has not been delegated to the Government or some other state body).

The accountability of the ministers (of the Government) to the national Parliament is the instrument through which the representation of opinions of the people as *pouvoir constituant* is ensured. Otherwise the executive invades into the powers of the national legislator.<sup>5</sup> Its position has been made easier by the Protocol on the Role of National Parliaments in the EU annexed to the Amsterdam Treaty, providing for the transmission of Commission's policy documents and legislative proposals to national parliaments and their involvement in the inter-parliamentary consultative forum through the Conference of the Community and European Affairs Committees of Parliaments of the European Union (COSAC).

Would the direct *involvement of the national MPs* in the representation of the Member State strengthen the democratic legitimacy of the Council? The course of deliberations in the Council would become more open, but the Council's position in the „institutional triangle“ within the Union would become disbalanced. Making the parliamentary control of the executive at the national level the object of a European regulatory performance would be contrary to the principle of subsidiarity, but some guidelines as a *soft-law* might be supportive. The direct formal involvement of national Parliaments in the law-making process within the Union or the ratification of Union's legal acts by them would threaten the effectiveness of its action. The reliable way of improving the democratic control without adverse by-effects remains *addressing the problem at its source*: to intensify the meaningful dialog of national Parliaments with the Governments on the basis of tasks and principles of their implementation, cleared by the European Constitution.

The preliminary conclusions of the European Convention<sup>6</sup> seem to follow this direction. The scrutiny of the Government's action in the Council could be facilitated by the opening of all its legislative sessions for public, by the better access of the public to Council's documents as well as by the strict observance of the Amsterdam *Protocol on the Role of National Parliaments in the European Union*, avoiding preliminary agreements by the Working Groups in the Council or by the COSAC. National parliamentary scrutiny reserves should

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<sup>5</sup> F. Maiani, Role of National Parliaments in EU Legislative Procedures. Refor, Perspectives, in: Perspectives of the Nice Treaty and the Intergovernmental Conference in 2004, Nomos, Baden-Baden 2002, p. 96.

<sup>6</sup> Final Report of Working Group IV on the role of national parliaments, CONV 353/02 from 221 October 2002.

be given a clearer status in the Council's *Rules of Procedure*, specifying the time-limit in order to escape delays in the decision-making process at the EU-level. An *ex ante* monitoring and control by the national Parliaments of regarding the principles of subsidiarity and proportionality („early-warning system“) with the occasion to raise objections at any later stage, if the substance of the initial legislative draft had been changed, would be welcome, as well as the other option of the European Convention – establishing the Convention as a method for future reforms of the Treaty.

