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ROBERT SCHUMAN CENTRE FOR ADVANCED STUDIES

# GENÈSE ET DESTINÉE DE LA CONSTITUTION EUROPÉENNE

Commentaire du Traité établissant une Constitution pour l'Europe  
à la lumière des travaux préparatoires et perspectives d'avenir



# GENESIS AND DESTINY OF THE EUROPEAN CONSTITUTION

Commentary on the Treaty establishing a Constitution for Europe  
in the light of the *travaux préparatoires* and future prospects

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CHAPTER VI  
PROSPECTS FOR NATIONAL PARLIAMENTS  
IN EU AFFAIRS –

What should and could be saved  
in the case of non-ratification?

BY

MARTA CARTABIA

I. AFTER THE REFERENDUMS: TOWARDS A “*SELECTIVE IMPLEMENTATION*” OF THE CONSTITUTIONAL TREATY?

1. Although the French and Dutch referendums have cast a dark shadow on the future of the Constitutional Treaty, it might still be worthwhile to reflect on the role of national parliaments in the European political architecture. Indeed many of the new functions envisaged by the Constitutional Treaty for national parliaments follow a new direction which could be pursued even in the case of non-ratification of the Constitutional Treaty as a whole. This is true in particular for the two protocols on national parliaments and subsidiarity. Before discussing the reasons why I hold this position, I would like to sketch a possible path towards such a goal.

2. Various solutions have been put forward to save the Constitutional Treaty – or at least some parts of it – even in the case of non-ratification,<sup>1</sup> because, *from a legal perspective*, the negative result of the ratification procedure in one or some Member States does not necessarily mean the complete abandonment of the ambitious project. The “escape routes” suggested cover a wide range of possi-

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<sup>1</sup> See the *Preface* to this volume and the introduction to part II. See also L.S. ROSSI, ‘En cas de non ratification’, *RTDE*, 2004, p. 621. B. DE WITTE, ‘La dimensione nazionale della revisione dei trattati europei’, *Quaderni Costituzionali*, 2005, p. 39. J. ZILLER, ‘La ratification des traités européens après les référendums négatifs: que nous disent les précédents danois et irlandais’, *Rivista italiana di diritto pubblico comunitario*, 2005, p. 365.

bilities all fitting into the broad wording of Declaration 30 attached to the European Constitutional Treaty, which explicitly deals with this problem and defers the decision to the European Council. These possibilities range from the renegotiation of the Constitutional Treaty to forms of closer cooperation between some of the Member States, and from the use of inter-institutional agreements, to the withdrawal of the Member States reluctant to embrace ratification, from the informal and spontaneous application of some rules by the European institutions to compromises at the interpretative level in the wake of the Danish and Irish precedents. Some of these "escape routes" could and should be used to save and implement the protocols on subsidiarity and national parliaments even in the case of non-ratification of the rest of the Constitutional Treaty. In particular, the protocols concerning national parliaments could become a forerunner in order to proceed to "*selective implementation*" of some parts of the Constitutional Treaty.

3. Of course, some of the most urgent and crucial problems, such as all those concerning the political institutional system, cannot easily be solved without the formal amendment of the Treaties. However, the case of national parliaments is an exception, because most of the rules and principles concerning their functions in the European context have not (yet) been formalized within the Treaties and consequently can be modified and developed without formal revision of the existing Treaties.

4. That is why the protocols on national parliaments – to borrow an expression from Neil Walker,<sup>2</sup> – could be recovered using a process of constitutionalization (with a small "c") which follows the classic method of the small steps that shaped the pace of European integration from the Schuman Declaration of 9 May 1950 onward: "the European constitution will not be made all at once", we could say, paraphrasing the celebrated expression that marked the birth of European integration.

5. Therefore, staying on the path suggested by the founding fathers, certainly one of the "small steps" which is easiest to take – although perhaps not the most urgent – in the constitutionaliza-

<sup>2</sup>N. WALKER, 'Una costituzione con la "C" maiuscola o con la "c" minuscola?', *Quaderni Costituzionali*, 2005, p. 881.

tion process of the European Union involves the role of national parliaments for four reasons :

- (i) the need to strengthen the democratic legitimation of the European institutions is one of the most sensitive problems, alongside the issue of a clearer division of competences, as was stated in the Laeken Declaration on the Future of the Union. The two protocols concerning national parliaments address both of these issues proposing some solutions, although not always satisfying;
- (ii) general consent was reached on aspects of the Constitutional Treaty that involve national parliaments – while *on the contrary* we can say that the French and Dutch dissent, while difficult to interpret, was in no way due to the new constitutional provisions concerning national parliaments;
- (iii) the powers attributed to national parliaments from the new protocols 1 and 2 appended to the Constitutional Treaty can be easily carved out from the other institutional reforms of the Constitutional Treaty and as a result implementation could proceed without bringing in other more delicate, complex and controversial problems; and finally because,
- (iv) the principal innovations concerning national parliaments do not necessarily need a revision of the Treaties in order to be implemented. On the contrary they can already be implemented by the European institution or at the national level (see *infra* section VI)

6. Perhaps it is no accident that a Research Paper published immediately after the French and Dutch referendums by the House of Commons affirms that there are some reforms that can be implemented even without the Constitution.<sup>3</sup> One such reform is precisely the “democratic reform” which uses the *early warning system* to involve national parliaments in the monitoring of competences and subsidiarity.<sup>4</sup>

<sup>3</sup> House of Commons, ‘The Future of the European Constitution’, *Research Paper 05/45*, 13 June 2005, p. 32.

<sup>4</sup> The position of the House of Commons is that since the principle of subsidiarity is already contained in the Treaties, it offers the legal basis for an intergovernmental or inter-institutional agreement that implements the contents of the protocol on subsidiarity, without waiting for the results of the overall constitutional reform. Adding to these considerations is the fact that some of the main innovations contained in the European Constitutional Treaty regarding national parliaments do not require additional interventions in Europe, as they can be implemented at the national level. See further section VI.

## II. DEMOCRATIC LEGITIMATION AND DIVISION OF COMPETENCE

7. Although national parliaments have already been taken into consideration within the democratic network of the European institutional architecture, it is the European Constitutional Treaty that for the first time outlines a direct relationship between the European institutions and national parliaments. In the past, national representative assemblies were considered only in order to ensure sufficient parliamentary information and in order to foster the inter-parliamentary cooperation among them. Before the European Constitutional Treaty, the problem of the position of national parliaments in the European institutional system was perceived as a problem of *national* constitutional law; therefore, to date, the European constitutional system has shown no interest in defining the *European status* of national parliamentary assemblies. The Treaties of Maastricht and Amsterdam have created the conditions for national parliaments to intervene in European affairs, but the intensity of the intervention and the instruments of action of national parliaments depended entirely on national constitutional systems. These have gradually elaborated powers of scrutiny reserve, the power to issue resolutions and binding mandates on national governments, in harmony with the tradition and constitutional culture of each Member State.

8. On the whole, the Constitutional Treaty boosts the value of national parliaments as never before, in compliance with the directions contained in Declaration 23 appended to the Treaty of Nice. There are many significant provisions that involve them and entrust them with responsibilities in delicate sectors. While we cannot refute the observation that the European Parliament has been strengthened much more than national parliaments,<sup>5</sup> (which have obtained results much inferior to the ambitions of some of them), it is also true that wider berth has been given to the national representative assemblies in the institutional system of the Union compared to the prior situation. The presence of representatives of national parliaments as part of the Convention charged with the task of drawing up the text of the Constitutional Treaty was impor-

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<sup>5</sup> P. MAGNETTE, *The Democratic Deficit Revisited*, Academy of European Law, 7 July 2005.

tant for this significant evolution. Expanding the parliamentary component of the Convention and extending it to representatives of national parliaments has positively affected the results achieved.<sup>6</sup>

9. For the first time, the Constitutional Treaty takes into consideration national parliaments for two main purposes: in order to improve the democratic performance of the European Union institutional system; in order to underpin the disappointing judicial review of competences by means of a political procedure which involves both European and national institutions.

10. The new provisions that concern national parliaments in the Constitutional Treaty have already been analyzed in greater detail in Sleath's chapter in the first part of this book<sup>7</sup> and have been divided into three groups: a. the information duties directed to facilitate parliamentary scrutiny and influence on national governments; b. the provisions giving national parliaments a power of veto or a "brake function" in a number of constitutional procedures; and c. the early warning system in the legislative process.

11. Hereinafter some of the major points resulting from the previous analysis will be discussed. First of all, national parliaments are not directly involved in the decision-making process at European level, whereas they are given important powers of veto in some procedures, that are constitutional in nature (Section III). Second, as far as parliamentary information is concerned, the real value added from the shift towards direct communication between European institutions and national parliaments is questionable (Section IV). As far as the new early warning system on the principle of subsidiarity is concerned, one could question the decision to distinguish between monitoring compliance with subsidiarity from a more general scrutiny over the division of competences in a more comprehensive sense and in particular the feasibility of excluding national parliaments from scrutinising the political merits of each European measure, considering that in most cases monitoring competences would involve a political evaluation of the act under scrutiny (Section V).

<sup>6</sup> See on this point Chapter XIV, Section II, Part I, by William SLEATH.

<sup>7</sup> *Ibidem*, Section III.



### III. NATIONAL PARLIAMENTS, ORDINARY LEGISLATIVE PROCEDURES AND CONSTITUTIONAL PROCEDURES

12. Considering the many important openings offered to national parliaments and the emphasis which has been put on their role in the democratic life of the Union, one cannot help noticing that no role is assigned to national parliaments in the European decision-making process. National parliaments are in no way called by the Constitutional Treaty to become legislators or co-legislators in the European Union. As Sleath points out, they are not even consulted by the Commission in the preliminary stages of legislative drafting.<sup>8</sup>

13. The chance for the national parliaments to take part in the European decision-making process was linked to the proposal to institute a second (or third) European parliamentary chamber made up of representatives of the national parliaments, supported by the president of the Convention, Giscard d'Estaing<sup>9</sup> and by numerous European political *leaders*. This proposal was quickly shelved, due to the clear opposition of the European Parliament, as well as several national parliaments,<sup>10</sup> especially those national parliaments where scrutiny of the European policies of the respective governments functions better. The fear of complicating the institutional structure of the Union, further burdening the European decision-making processes, and introducing an institutional rival of the European Parliament rapidly led to a shelving of this bold initiative. After all, the dual legitimacy of the Union based on the will of citizens and the states is already reflected by the co-presence of the European Parliament alongside the Council of Ministers in the legislative process.

14. The same concerns were probably at the basis of the similarly clear and peremptory decision not to attribute a direct role to

<sup>8</sup> *Ibidem*.

<sup>9</sup> See CONV 369/02. On this point see G. G. FLORIDIA, *Il cantiere della nuova Europa*, Bologna, Il Mulino, 2003, p. 121 *et seq.*

<sup>10</sup> Peremptory in this sense was the Report by the European Parliament on the relationship between the European Parliament and the national parliaments in European integration, *rapporteur* Giorgio Napolitano, of 23 January 2002, A5-0023/2002 Final, paras. 17-19 ('Napolitano Report'); See also the report by the House of Lords, Select Committee on European Union, 'A Second Parliamentary Chamber For Europe: An Unreal Solution To Some Real Problems', 7<sup>th</sup> Report, 27 November 2001.

national parliaments in the European decision-making process, but on the contrary, to maintain and reinforce, where possible, their mediated participation through scrutiny of the national governments that sit on the Council. In particular the idea was abandoned since the Napolitano Report,<sup>11</sup> which clearly proposed to strengthen the parliamentarization of the Union in two complementary but distinct ways: expanding the powers of the European Parliament as part of the decision-making process of the Union and supporting the powers of national parliaments towards their respective governments.

15. Yet, we might have expected more, considering the emphasis that was placed on the role of national parliaments in the democratic life of the Union during the process of constitutionalization. The Nice Declaration 23 on the future of the Union, clearly indicated the theme of the role of national parliaments in the European architecture as one of the four fundamental priorities to be faced. And what is more, the objective was to improve the democratic legitimacy and transparency of the European institutions, and to bring the latter closer to the citizens of the Member States.<sup>12</sup> The issue of reinforcing the democratic legitimacy of the European institutions was the *leit-motif* of the entire process of constitutionalization. As part of this general concern relating to the distance between the European institutions and the political leaders and the peoples of Europe, the involvement of national parliaments in the European Community institutional system was to constitute an essential remedy, able to build a bridge between the *citizens of the Member States* – as pointedly expressed in declaration 23, avoiding all mention of European citizens! – and the *institutions of the Union*.

16. However, as we have seen, the road that would directly implicate national parliaments in the European decision-making process was abandoned because it was sure to be too costly in terms of loss of efficiency. All things considered, the decision to drop any proposal aiming at direct participation of national parliaments in the European decision-making process was a wise decision.

<sup>11</sup> *Ibid*, para 3.

<sup>12</sup> See in particular points 5 and 6 of the Nice Declaration 23.

17. Alongside the problem of strengthening European democracy, one of the dominant concerns of the reform of the treaties was also *simplification*: not only of the texts – as stated in declaration 23 – but in general, of the institutional structure and decision-making processes. Expansion of the Union to 25 Member States has highlighted the problem of simplification because the European institutions, designed on criteria adapted to a Union made up of a few countries, are no longer suited to absorbing the impact of a number of members that has quadrupled over the years. The decision-making processes, already considered cumbersome, slow and complicated<sup>13</sup> do not support the introduction of new phases and new co-decision makers, such as national parliaments or a new European parliamentary house.

18. Moreover, when the decision-making procedures suffer from an excess of guarantees, there are increased risks of a move towards more streamlined and practical, and therefore more effective, venues. The long and complicated history of the move away from parliament-made law toward government-made delegated legislation that occurred in several European systems is quite meaningful from the perspective considered here. Besides, the European system already experimented on its escape routes, well-documented by the development of delegated regulation and the proliferation of the so-called committee-approach. This is why it is important not to lose sight of the imperative needs of the effectiveness of deliberation, even in a system more inclined to increase discursive democracy as a specific form of supranational democracy.

19. Insisting on the involvement of national parliaments in the European legislative process would also have resulted in a collision course with the expansion of the role of the European Parliament. The democracy deficit in the European decision-making processes has gradually decreased, thanks to the expansion of the powers of the European Parliament in the decision-making process. From the embryonic form of participation to European legislative production in the form of non-binding opinions, the procedures of consultation and co-decision making have been strengthened, to ensure an effective weight to the European Parliament in forming the acts of sec-

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<sup>13</sup> R. MASTROIANNI, 'Le competenze dell'Unione', *Rivista dell'Unione Europea*, 2005, p. 390.

ondary law. Every amendment of the European treaties has placed more consideration on the European Parliament, protected by a watchful case-law of the European Court of Justice that has made an important contribution in supporting the European Parliament in the name of democracy.<sup>14</sup> This has inevitably led to rivalry between the European Parliament and national parliaments<sup>15</sup> during the drafting process of new institutional architectures that tend to make them fight for space and functions in the same legislative procedure.

20. Therefore, it would also seem wise to shelve the more sensational proposals, such as the creation of a second European parliamentary house made up of representatives of the Member States and with legislative powers equal to the current European Parliament in the ordinary decision-making procedure. As has been clearly noted by Sleath,<sup>16</sup> it is not the business of national parliaments to take on a central role in the daily business of the European Union.

21. By contrast, many agree with the idea of introducing national parliaments in the revision procedures of the treaties and in other procedures having a "constitutional flavour", such as the "*passerelles*" towards the majority voting system and towards the ordinary legislative procedure, and so on.<sup>17</sup> These procedures need a more significant democratic foundation and stronger guarantees. That is why in these cases the national parliaments were given the role of an extra "constitutional brake", to use Sleath's expression.<sup>18</sup>

22. In this respect, it is important to stress the basic distinction between ordinary or daily legislative procedures and constitutional procedures, (or, put in other words, a dichotomy should be made separating *the domain of politics* from *the domain of polity*). In fact, in constitutional procedures and in other procedures of a constitutional flavor the need for guarantees and democratic participation prevails over the need for simplification, timeliness and speed. Although the risk is a slowing down of the decision-making process

<sup>14</sup> See S. NINATTI, *Giudicare la democrazia?*, Milano, Giuffr , 2004.

<sup>15</sup> See also M. WESTLAKE, 'The European Parliament, the National Parliaments and the 1996 Intergovernmental Conference', *Political Quarterly*, 1995, p. 59.

<sup>16</sup> See W. SLEATH, Chapter XIV, Section III.

<sup>17</sup> See W. SLEATH, Chapter XIV, Section IV.

<sup>18</sup> See W. SLEATH, Chapter XIV, Section III, paragraph 2.

or even jeopardizing its effectiveness, the involvement of national parliaments in this kind of procedure is valuable, since it provides a wider democratic basis for the fundamental decisions of the Union. As has been said, the participation of national parliaments might be a brake in European procedures, but in constitutional decisions well-functioning brakes can on occasion be useful. Moreover, since national parliaments are called on to ratify the revised treaties following the national constitutional procedures, giving them a role in the European stage of the revision procedure might possibly simplify the subsequent national stage of the procedure, i.e. that of ratification.

#### IV. DIRECT INFORMATION FROM THE EUROPEAN INSTITUTIONS

23. Going back to the ordinary legislative decision-making process, national parliaments can participate only by means of scrutiny of national governments. The Constitutional Treaty does not provide a common system of scrutiny. As Sleath has pointed out, the Constitutional Treaty concentrated on facilitating the work of Parliaments and did not even attempt to establish a common system of scrutiny.<sup>19</sup> It would have been impossible to converge into a single model of scrutiny so many different traditions – which rank from the British model based on strict parliamentary control over the government to the French model, based on the separation of the two institutions.

24. In order to facilitate parliamentary scrutiny of national governments the protocol on national parliaments provides for a huge range of documents to be directly communicated from the European institutions to national parliaments. The Treaties of Maastricht and Amsterdam already aimed at ensuring that the acts, proposals and documents of the European institutions were communicated promptly to national parliaments. The European Constitutional Treaty does not abandon this original decision, but perfects it in several ways. The most significant change in this

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<sup>19</sup> During the work of the Convention, national parliaments were not able to defend a common line regarding their powers in the future European architecture, because there are many different national constitutional traditions concerning the place of parliaments in the political systems. See Chapter XIV, Part I, by William SLEATH.

respect is that national governments no longer play an intermediary role.<sup>20</sup> Until now, information regarding European acts was addressed to national governments, which in turn were responsible for handling timely transmission to national parliaments. The European Constitutional Treaty transfers the obligation of information directly to the European Union institutions: on the Commission, for the most part, but also on the Council, on the European Parliament and the Court of Auditors. For the first time, national parliaments are in direct contact with the European Community institutions and in particular with the Commission, the true brain of the European institutional system. All forms of mediation disappear and the national parliaments tend to become direct stakeholders of the Community institutions.

25. What is the added value of this direct relationship between the national parliaments and the European institutions? And more specifically, what are the advantages that can be drawn from the fact that the information of the national parliaments will be handled directly by the European institutions, rather than by national governments? This innovation certainly can facilitate punctual and complete communication. Considering that the term proposed as a guarantee for the possibility for national parliaments to intervene is relatively brief – approximately six weeks – surely direct information allows national parliaments to take full advantage of the time available, avoiding the intermediate steps currently envisaged which only reduce or even thwart it in terms of effectiveness.

26. However, suppression of the government filter, along with an extension of the number of documents to transmit to national parliaments, runs the risk of flooding national parliaments with documentation, without being accompanied by a preventive selection by governments so that parliamentary examination can concentrate on the most important acts. The nature of the completeness, timeliness and direct information that theoretically should serve to reinforce the control of national parliaments over their governments could in

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<sup>20</sup> The second important change concerns the range of acts to be communicated to national parliaments. In fact, the protocol on the role of national parliaments in the European Union extends the number of documents to be communicated to national parliaments. The third major change concerns the delay to be respected between the information of the national parliaments and the discussion of the draft in the Council.

practice produce disorienting effects and lead to inferior results. In other words, considering that the European Constitutional Treaty operates in order to enable national parliaments to take full advantage of the information received for the purposes of *scrutiny* of the government's politics in European affairs, it is not certain that complete information about a huge range of documents would serve the purpose of effective scrutiny over national governments acting in the Council.

27. It is worth briefly mentioning how the British system works in this respect as it offers one of the most effective models of parliamentary scrutiny of national governments. Significantly British scrutiny does not cover all legislative drafts proposed in the European legal order. On the contrary, British *scrutiny* is characterized by its selectivity, depth, timeliness and the flexibility of parliamentary examination. In particular, as regards selection, among the numerous working documents processed by the European institutions and the European Commission, the British Houses reflect and work only on those which are considered most interesting. The "*sift*" is considered an important factor in permitting significant control over European decisions. The first subject asked to cooperate on the work of selection is the government. It has the burden of transmitting timely and qualified information to the parliament, sending all the European documents appended with a specific *explanatory memorandum* which reveals the main contents of the text to be examined, the applicable procedures, an indication of the legal basis, the political and financial implications and the examination times in Europe.<sup>21</sup> That is why, in the light of the British experience, dropping governmental intermediation in the informa-

<sup>21</sup> A decisive sift is carried out by the *select committees* for European affairs. In the House of Commons, the select committee carries out an important preliminary role because it can decide whether to drop the proposal or defer it to the House, and its decision is supported by an explanatory report. In the House of Lords, it is up to the president of the Select Committee on the European Union to make the selection, dropping about one-fourth of the proposals forwarded by the government, deferring the others to the sub-committees competent in the matter, instituted as part of the select committee (there are no permanent commissions competent in European matters). On this question, see for example P. NORTON, 'The United Kingdom: Political conflict, parliamentary scrutiny', in P. NORTON (ed.), *National Parliaments and the European Union*, London, 1996, p. 52 *et seq.* and H. KASSIM, 'The United Kingdom', in H. KASSIM, G. PETERS, V. WRIGHT (eds) *The National Coordination of EU Policy*, Oxford, Oxford University Press, 2000, p. 22, at p. 42 *et seq.*

tion procedure of national parliaments does not seem to be an essential and urgent reform to be obtained at any cost.<sup>22</sup>

#### V. THE EARLY WARNING SYSTEM AND THE "COMPENSATION" THEORY

28. Having set aside the legislative decision-making process, the issue of competences and subsidiarity became the natural ground for more active involvement of national parliaments in the European system. In fact, at a certain point in the work of the Convention, the reflection on the role of national parliaments and subsidiarity intersected,<sup>23</sup> as was historically documented by the joint meeting of the two working groups assigned to explore each of the two problems.

29. It was inevitable that the two issues would meet, for a number of reasons, including the fact that the theme of competences was one of the most important in the work of the Convention. Actually it has long been pointed out that the division of competence and the principle of subsidiarity are almost non-justiciable and need to be submitted to political control. Up to now, the European Court of Justice's attempts to review compliance with competence boundaries and the principle of subsidiarity produced disappointing results: in spite of the fact that the Court of Justice has faced the problem several times, it has demonstrated a very indulgent attitude toward the political institutions, limiting its work

<sup>22</sup> Apparently, direct information from the Commission and the other European institutions supplied to national parliaments would be lost in the case of non ratification of the Constitutional Treaty. In fact, only the legal *obligation* would be lost, but not the *possibility* that the European institutions and, in particular, the Commission freely apply the guidelines indicated in the protocol on national parliaments, spontaneously informing the national parliamentary houses of the acts indicated there. Moreover, big improvements in the information procedures could be introduced at national level. In Italy, for example, a recent law of 4 February 2005, n. 11, *Norme generali sulla partecipazione dell'Italia al processo normativo dell'Unione europea e sulle procedure di esecuzione degli obblighi comunitari*, has replaced the old law *La pergola* of 9 March 1989, n. 86, under the influence of the protocols annexed to the Constitutional Treaty. The new law demands that the Government provide broader, more qualified and timely information to Parliament, by means of electronic support.

<sup>23</sup> See A. VERGÉS BAUSILI, 'Rethinking the Methods of Dividing and Exercising Power in the EU: Reforming Subsidiarity and National Parliaments', *Jean Monnet Working Paper* 9/02, 2002.



only to checking that the documents submitted to its revision were motivated and accepting that the motivation could be implicit.<sup>24</sup> This is no surprise, since the issues of competence and subsidiarity have an intrinsic political nature and can be carried out preferably in a political venue, eventually resulting in judicial review concerning the correct development of the political procedure.<sup>25</sup>

30. It might have been possible to consider political scrutiny assigned to one or more European institutions: the European Parliament, Council and Commission. Nevertheless, the institutions involved in the European political decision-making process have shown themselves to be too flexible about European competences to rely on their contribution for the purposes of an effective application of the principle of subsidiarity: since they are inclined to favor integration, the European Parliament and the Commission have traditionally maintained a favorable attitude toward the growth of European competences; on their part, the national governments in the Council very seldom raise significant limits to the expansion of European competences, as they frequently take advantage of the opportunity to deal with certain problems on the European level instead of the national level.

31. Consequently effective political scrutiny over competences and subsidiarity should be attributed to institutions not directly involved in the European decision-making process: this led to the natural candidature of national parliaments, in search of a role on the European scene, to act as guardians of subsidiarity (and competences). Although it was not foreseen from the beginning, during the work of the Convention it became clear that the logical solution for the problem of strengthening scrutiny over the division of competences was to involve national parliaments.

<sup>24</sup> See G. DE BÚRCA, 'Il ruolo della Corte di giustizia nel processo di decisione politica nell'UE', in G. GUZZETTA (ed.), *Questioni costituzionali del governo europeo*, Padova, CEDAM, 2003, p. 111.

<sup>25</sup> See A. D'ATENA, 'Sussidiarietà e sovranità', in *La Costituzione europea*, Associazione italiana dei costituzionalisti, Yearbook 1999, Padova 2000, p. 17 et seq. and F. PALERMO, *La forma di stato dell'Unione europea*, Padua, 2005, and in particular p. 120 et seq., who believes that the form of collaborative government of the European Union gives preference to participatory proceduralized involvement as a form of prevention of jurisdictional conflict and a form of jurisdictional review predominantly focused on procedural aspects.

32. On the other hand, since the age of the Treaty of Maastricht, and especially since the Maastricht decision of the German Constitutional Court, a very tight nexus was drawn between the problem of the expansion of European competences and national parliaments. This is where the role of national parliaments is reconnected for the first time to the problem of democratic legitimation of the European Union as a composite system which calls for original and unusual solutions with respect to those prevailing in state systems. This is where the role of national parliaments is also reconnected for the first time to the issue of competences of the European institutions.<sup>26</sup> Since then, it has come to be known that every expansion of the competences of the European institutions corresponded to a progressive reduction of the functions of national parliaments in the national legal system. It was therefore considered indispensable to affirm a power of control by national parliaments on the expansion of European competences. This has led to the tendency to involve national parliaments in the revision of treaties – which normally takes the decision to attribute *new competences* to the Union – and in the monitoring of the principle of subsidiarity, which makes it possible to check that exercise of competences already attributed remains within the limits set by the treaties.

33. In the light of these considerations, the approach of the European Constitutional Treaty appears reasonable, as it tends to “reward” national parliaments, which hand over their legislative functions to the European institutions, by attributing new monitoring functions especially in the area of competences. So, national parliaments enter the European system essentially as monitoring bodies. The early warning system gives national parliaments a new function which is very promising for their role in the European Union as well as for the relationship between the Union and the Member States.

34. A critical remark is to be made against the early warning system as regards the scope of the powers granted to national parliaments. According to protocols 1 and 2, the early warning system

<sup>26</sup> This aspect of the Bundersverfassungsgericht's Maastricht ruling is underlined in C. HARLOW, *Accountability in the European Union*, Oxford, Oxford University Press, 2002, 82 *et seq.* See also S. NINATTI, 'La formula parlamentare europea dagli esordi al trattato costituzionale', *Rivista italiana di diritto pubblico comunitario*, 2004, p. 1395, at p. 1411.

can be used only in order to monitor respect for the principle of subsidiarity. The two protocols do not allow national parliaments to use the same system in order to raise doubts about more comprehensive problems of the division of competences, nor to highlight a violation of the principle of proportionality. For the same reasons that national parliaments have been entitled to a monitoring power over subsidiarity they could also have been entitled to the same powers on other issues of division of competence and proportionality. The Constitutional Treaty could have given national parliaments a wider function of review and scrutiny over all issues related to the division of competence between the Union and the Member States, well beyond the subsidiarity question and including also the question of proportionality. A wider range of claims concerning the boundaries between the Union and the Member States should be included in the early warning system or whichever other scrutiny procedure is to be carried out by national parliaments.

35. In any case, with regard to national parliaments, the Constitutional Treaty seems to abandon the myth of "legislative centrality" which stresses the pre-eminence of the representative bodies in law-making procedures. Rather, by stressing their monitoring functions, it aims to involve national parliaments in the European scenario with new responsibilities, calling on them to give a special contribution in areas not occupied by other institutions. In this perspective, one promising idea is that of "*compensation*" elaborated by Enoch Alberti and Eduardo Roig:<sup>27</sup> these scholars believe that it is not useful to seek to restore national parliaments to the situation existing prior to European integration by attempting to give them their original legislative centrality. Forms of compensation must be achieved in order to meet the main constitutional principles implied by parliamentary participation, in particular, the guarantees of political pluralism and promotion of political debate, through new means and institutions which have not yet been explored. The proposal of involving national parliaments in monitoring competences, subsidiarity and proportionality seems to be a good and promising application of the Spanish theory of compensation, as it gives a say

<sup>27</sup> E. ALBERTI ROVIRA and E. ROIG MOLÉS, 'El nuevo papel del los parlamentos nacionales entre derecho constitucional nacional y derecho constitucional europeo', in M. CARTABIA, B. DE WITTE, P. PÉREZ TREMPs (eds.) *Constitución Europea y constituciones nacionales*, Valencia, Tirant lo Blanch, 2005, p. 449.

to national parliaments at the European level in the fields where they have lost their legislative powers.

#### VI. INTEGRATING EUROPEAN AND NATIONAL CONSTITUTIONAL SYSTEMS: THE SCRUTINY RESERVE

36. Going back to our introductory remarks, how could the early warning system be saved in the case of non-ratification of the European Constitutional Treaty? Apparently national parliaments and European democracy would definitely lose out on a great opportunity. How could the early warning system be implemented without the Constitutional Treaty?

37. Although the early warning system as such cannot be implemented without a revision of existing European law, I do not believe that all of this part of the results achieved by the work of the convention will end up in the rubbish bin.<sup>28</sup> Many of the possibilities outlined in the Constitutional Treaty could be recovered.

38. At first glance there are significant obstacles to the possibility that the early warning system might survive without the Constitutional Treaty. But on more thorough examination, a similar monitoring of the principle of subsidiarity (and we might even add competence and proportionality) could easily be absorbed as part of the national scrutiny procedures on European affairs that Parliaments carry out in almost all the Member States. In other words, the monitoring of competences, subsidiarity and proportionality could become an essential part of the national procedures which in all countries enable national parliaments to control and influence the action of governments in European affairs, with more or less effective instruments, depending on the constitutional options of each country. There is clearly a huge difference between the early warning system and the scrutiny reserve,<sup>29</sup> since only the first gives national parliaments the opportunity to directly intervene in European procedures and to directly address the Commission at the very beginning of the legislative process. However, the scrutiny reserve has some virtues which deserve to be considered and discussed.

<sup>28</sup> See the effective and satirical image on the cover of *The Economist* 19 June 2003.

<sup>29</sup> On the scrutiny reserve, see para 39.

39. Let us try to imagine the Italian system and the instruments currently available to the Houses to intervene in European policies. Law 11 of 2005<sup>30</sup> provides the *scrutiny reserve*, a well-known and well-experimented instrument in comparative law and in particular in British law. The scrutiny reserve aims to grant the Houses the necessary time to express their opinion on European legislative drafts before they are discussed in the European Council: in the cases indicated by the law, the scrutiny reserve compels the national government not to undertake agreements with European partners at least until the competent parliamentary bodies have concluded the parliamentary debate or after a certain period of time has elapsed (20 days), generally considered sufficient to allow an examination of the act in question.<sup>31</sup>

40. It is not difficult to imagine that the whole parliamentary procedure of monitoring of European policies, including the scrutiny reserve, could be extended to policing compliance with the principle of subsidiarity, division of competences and proportionality. Scrutiny of the political merits of European acts and monitoring respect for subsidiarity, proportionality and the division of competences could easily and usefully be merged in the same procedure. One can even say that the two facets of the scrutiny – on the political content and on competences/subsidiarity – are difficult to separate.

41. Unification of the two kinds of scrutiny might even offer some advantages. As already mentioned, channeling the scrutiny of subsidiarity into the more general “mandate” addressed to the ministries that take part in the Council might reduce the risk that the position of each Member State in the decision-making process is split or schizophrenic. Indeed, keeping the two forms of parliamen-

<sup>30</sup> *Supra* note 22.

<sup>31</sup> The scrutiny reserve has a ‘double core’. In fact, while it is true that the original and fundamental *ratio* of the scrutiny reserve is to enable the Houses to intervene specifically and promptly in the formation of European acts, influencing the action of government, it is also true that setting parliamentary reservations gives the government the opportunity to take time and obtain a deferral of an unwanted deliberation. The parliamentary reservation is conceived to favour parliaments, but sometimes it also favors the governments. Furthermore, even when the reserve is used for purposes which are not merely dilatory, but meet the genuine aim of involving the representational bodies in the most delicate decisions, the governments are strengthened by the support of the national parliaments and they are more likely to obtain the result they want to reach.

tary control on EU affairs apart raises the risk that the government supports a given proposal in the European Council of Ministers, only for the parliament to thwart it using its independent power of early warning. This introduces an "element of internal conflict between the parliaments and national executives, which it would probably be wiser to confine to its own context, the national context."<sup>32</sup>

42. In addition to this advantage, gaining control over subsidiarity at the national level would have the merit of unifying in a single process both the scrutiny of the political merits and the scrutiny of competences and subsidiarity. Many have doubted the actual possibility of enforcing control over subsidiarity without being influenced by the political content of the legislative act under examination. The scrutiny on subsidiarity, the division of competences and proportionality can hardly be disentangled from the political questions arising from the specific problem.<sup>33</sup> From this perspective, the idea of absorbing scrutiny of subsidiarity, competence and proportionality in the procedure of general scrutiny of European affairs might even be worthwhile.

43. But much (almost everything) is left in the hands of national parliaments themselves. The protocols offer an opportunity and in some sense a challenge to national parliaments. In those countries where the mechanisms of *scrutiny* already function well, the decision to recover the *early warning* system on subsidiarity within the national procedure of parliamentary scrutiny will be a good alternative to its introduction in the European procedure. It is however more difficult to imagine that national parliaments that play a marginal role in European policies will be able to incorporate the innovations of the European Constitution into internal law. What comes to mind are two essential and opposing cases: the United Kingdom and France. Faced with the definitive text of the European Constitutional Treaty, the English parliament expressed dis-

<sup>32</sup> R. MASTROIANNI, *supra* note 13, at p. 412.

<sup>33</sup> A. VON BOGDANDY and J. BAST, 'I poteri dell'Unione: una questione di competenza. L'ordine verticale delle competenze e proposte per la sua riforma', *Rivista italiana di diritto pubblico comunitario*, 2002, p. 303, especially at p. 346. On the difficult separation between control on subsidiarity and political control, see also J. PETERS, 'National Parliaments and Subsidiarity', *European Constitutional Law Review*, 2005, p. 68.

appointment for the overall weakness of the system that enabled parliaments to raise a "yellow card" without being able to then raise a "red card". The *early warning* system was considered ineffective on the whole.<sup>34</sup> On the other hand, the *Conseil constitutionnel*<sup>35</sup> held that in order to ratify the two protocols on national parliaments and subsidiarity, a constitutional revision was necessary, because the balance between the government and parliament would be impaired. In fact, France has already provided for a constitutional law in this area, which will take effect concurrently with the European Constitutional Treaty.<sup>36</sup>

44. Why such divergent reactions? Why is the same proposal perceived as a small step forward by one side and as a startling factor for the national constitutional equilibrium by the other? It is clear that the differences of the different national constitutional environments lead to opposing results.

45. Naturally, the European institutions might foster the role of national parliaments in European Union affairs by introducing adequate rules to the internal regulations of the Council or by stipulating specific inter-institutional agreements with a view to formalizing the *status* of the scrutiny reserve and the effects of the remarks made by national governments in relation to the principle of subsidiarity (competence, and proportionality). An important reform could also be to complete public disclosure of the acts of the Council, in order to allow national parliaments more effective control over the work of the respective governments in European affairs.

46. However paradoxical it may sound, some of the progress intended by the Constitutional Treaty in reference to national parliaments can also be implemented *without* the Constitutional Treaty. It will not be wasted thanks to a combination of reforms of national law, secondary law, practice and inter-institutional agreements of the Union institutions.

<sup>34</sup> House of Commons, 'The Treaty Establishing a Constitution for Europe: Part IV and Protocols', *Research Paper 04/77*, 21 October 2004.

<sup>35</sup> See the ruling on 19 November 2004, n. 2004-505 DC, *Traité établissant une Constitution pour l'Europe*.

<sup>36</sup> Loi constitutionnelle n° 2005-204 du 1<sup>er</sup> mars 2005 modifiant le titre XV de la Constitution, *J.O* n° 51 du 2 mars 2005, page 3696 which has introduced Articles 88-5, 88-6, 88-7 to the French Constitution.

47. In this area, there is clear interaction between the national constitutional systems and the European constitutional system, in the wake of the theories of *multilevel constitutionalism* that have effectively described the peculiar characteristics of the European constitutional system. In relation to the role of national parliaments, two constitutional levels (but perhaps it would be better to say 26 levels) have such a great influence and impact that the individual national parliaments' ability to take action and influence Europe in terms of effectiveness, depends on a complex intertwining of regulations and political and constitutional conditions, which are only partly conditioned by European constitutional regulations. We cannot use the singular in talking about *the* role of national parliaments in the European architecture, because there are a *variety of models*,<sup>37</sup> mainly elaborated by the individual national systems as well as by European law. One benefit of this intertwining of national constitutional systems and the European constitutional system would be the attempt to find a reasonable and practicable response to the difficulties encountered by the European Constitutional Treaty, in order not to squander the positive results attained through the work of the Convention without ignoring the dissent manifested by the French and Dutch peoples.

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<sup>37</sup> See also P. MAGNETTE, *Controler l'Europe, Pouvoirs et responsabilité dans l'Union européenne*, Brussels, Université de Bruxelles, 2003, p. 83; E. SMITH (ed.), *National Parliaments as Cornerstones of European Integration*, The Hague, Kluwer, 1996; P. NORTON (ed.), *supra* note 22.



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