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International Law Summary

Democratic Deficit: National Parliaments and the European Union

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INTRODUCTION¹

This is a summary of a meeting of the International Law Discussion Group that addressed the role of national parliaments with respect to legislative proposals put forward by the European Commission. The speakers gave perspectives informed by their respective professional backgrounds – parliament, government and academia. This was followed by discussion in which the audience participated, posing questions, making comments and suggestions. The meeting was held under the Chatham House Rule.

THE EUROPEAN PARLIAMENT

The lack of democratic legitimacy in the European Union (EU) has been a long-held concern regarding the power with which the European Commission is vested. The issue extends across the EU and is not limited to the United Kingdom (UK).

One means by which criticism was countered was an increase in the power vested in the European Parliament, the EU's directly elected institution. Members of the European Parliament (MEPs) have been keen to advocate this solution given the shift of power from the national level to the European level. It has been relatively easy for MEPs to enhance their influence by amending their Rules of Procedure on the basis of new treaties. With each successive treaty revision the European Parliament has extended its role in the legislative process by way of the co-decision process and by strengthening its role in the Brussels inter-institutional balance. The 2007 Lisbon Treaty, which entered into force in December 2009, established the co-decision procedure of the European Parliament and the Council of Ministers as the default decision-making procedure, according the European Parliament veto power over the majority of EU legislation.

However, despite its increasing powers and influence, there remains a perception that the European Parliament does not connect voters with the EU and does not cure the democratic deficit. This perception is strong enough to prompt reflection in Brussels about the role of national parliaments within the EU. It is worth noting that the European Parliament elections, which began in 1979 and are held every five years, initially enjoyed a voter turnout of 62 per cent, which has since decreased to 45 per cent.

¹ This summary was prepared by Shehara de Soysa.

NATIONAL PARLIAMENTS

There is a theory that national parliaments have democratic legitimacy at a national level, the replication of which is sought at the EU level. The UK government is of the view that national parliaments are the main source of democratic legitimacy and accountability in the EU; they are closest to citizens across Europe, best understand their concerns, are best able to represent them and also have a significant degree of expertise on the impact of legislation in domestic contexts. Accordingly, the question arises as to whether there is a way to translate the democratic legitimacy of national parliaments onto the EU stage such that they become actors that influence the course of EU legislative negotiations. The role of national parliaments has been the object of much greater interest and concern in the last year in the United Kingdom since Prime Minister David Cameron articulated it as one of his key reforms. Speeches followed from the Foreign Secretary and the Europe Minister also expressing the role of national parliaments as a key reform for aspects of the EU.

The crisis in the eurozone has led to proposals to tighten governance of eurozone national budgets by the EU. Such proposals are accompanied by a renewed interest in whether national parliaments can play a role in the eurozone at EU level to ensure that there is democratic legitimacy for whatever tightening mechanism is put in place.

The role of national parliaments with respect to the EU has primarily been to scrutinize national governments with a view to informing the public and their respective chambers of what governments do, and to influence government policy.

In the UK House of Commons the EU scrutiny mechanism allows the placing of a scrutiny reserve on proposals. The convention is that a minister does not go to Brussels to agree a proposal until it has been cleared from scrutiny. The convention is sometimes breached but there is a genuine and general desire on the part of government not to breach it.

The House of Lords appoints an EU committee that is supplemented with six sub-committees. The House of Lords also has a scrutiny reserve and also undertakes in-depth enquiry into major EU policies. The House of Lords' main EU committee is currently enquiring into the role of national parliaments in the EU, on which it has received much evidence in recent months.

National parliamentary scrutiny of the EU has changed slightly but significantly with the subsidiarity early-warning mechanism introduced by the Lisbon Treaty, designed to enable national parliaments to monitor EU compliance with the principle of subsidiarity which determines when the EU is competent to legislate, and contributes to decisions being taken as closely to the citizens they affect as possible. It was a

political principle and now, with its enhanced status in the Lisbon Treaty, it is a legal principle on the basis of which national parliaments can seek the annulment of a legislative act. National parliaments have eight weeks from the publication of a proposal in which to write a reasoned opinion stating why the proposal does not comply with the principle of subsidiarity. The mechanism operates by way of thresholds: if a third of national parliaments assert the non-compliance of a proposal with the principle of subsidiarity (or a quarter of national parliaments in the field of justice), the European Commission is required to reconsider the proposal but is within its rights to continue with the proposal, notwithstanding national parliaments' objection. If half of national parliaments claim that the principle of subsidiarity has been violated, the Commission is again required to reconsider the proposal, although in this instance if it wishes to proceed, it must provide a justification to ministers in the Council of Ministers and to MEPs who may decide that the commission should not proceed. The first threshold is termed the 'yellow card', and the second, the 'orange card.' There have been two occasions where yellow cards have been reached – the first in respect of a proposal regarding the right to strike and the second, over proposals to set up a European Public Prosecutor's Office. The House of Commons submitted reasoned opinions on both proposals, the first of which was ultimately discontinued, although the commission rejected the arguments of national parliaments in both instances.

There is scope for collaboration between national parliaments. However, it is difficult for parliaments to converge on a single position because they have so many different points to make, not all of which actually relate to subsidiarity. Further, there are some issues on which ministers and national parliamentarians wish to take a leading role and others on which they are happy to be led. This is particularly the case of smaller member states. However, to issue a reasoned opinion might be too big a decision for many parliaments to use a template drafted by another parliament.

ADDRESSING THE DEMOCRATIC DEFICIT

National parliaments and governments are not necessarily in opposition to each other – both have important roles in addressing the democratic deficit. The decision in the United Kingdom to adopt a reasoned opinion is led by parliament. The role of government is to ensure that parliament is provided in a timely fashion with as much information as possible such that the decision-makers have sufficient information before them when considering whether or not to adopt a reasoned opinion. As a national parliament it is vital to know what the government thinks about subsidiarity on any particular issue – it has greater means to understand the effect that proposed

legislation will have on existing national legislation than the parliament does, limited as it is by a timeframe of eight weeks.

The UK government is of the opinion that the EU manifests a democratic deficit. This concern is seemingly shared by voters; in April 2012 polls indicated that more people were not satisfied with the functioning of democracy at the EU level than those that were. Research indicates that EU support is waning amongst young people in particular. This declining support is a great concern for governments.

There are questions as to whether the legal dimension introduced so far is adequate to help overcome the democratic deficit. One issue is the manner in which the early-warning mechanism can be used. Another is the lesson to be drawn by national parliaments from the European Parliament.

The mechanism for bringing together national parliamentary chambers, the Conference of Parliamentary Committees for Union Affairs of Parliaments of the European Union (COSAC) has traditionally been seen as a fairly weak organization. However, over the years its importance has grown. This has been accompanied by two further changes since the Lisbon Treaty; two new inter-parliamentary organizations have come into being. One for foreign and security policy was envisaged by the Lisbon Treaty and the other has come about as a result of the eurozone fiscal compact. Accordingly there are now three different fora in which national parliamentarians and MEPs assemble on a regular basis. These meetings provide the opportunity for parliamentarians to acquaint themselves with one another and by chance, in the margins of meetings, to discuss how the yellow card might be exercised. The two instances thus far where the yellow card threshold has been reached have not occurred as a result of national parliamentarians examining a proposal and spontaneously objecting in sufficient numbers to trigger the yellow card but rather as a result of *groups* of national parliamentarians working together in a more effective way. Thus, the yellow card system can work and this within eight weeks. The problem lies in the fact that the European Commission has not been persuaded that the views of national parliaments on subsidiarity should be taken seriously.

Prior to the 1980 *Isoglucose* ruling, the European Commission would propose legislation that the Council of Ministers would block if so inclined and the views of the European Parliament were not taken into account. Gradually this position evolved and the European Parliament came to be consulted rather than ignored. The Commission came to recognize that putting forth proposals that the Council of Ministers would perhaps reject was potentially a fruitless exercise. To address this concern it began

consulting on drafts before making proposals. What may be required is a mechanism that allows national parliaments to be more effectively consulted before legislation is proposed rather than after, as in the case of the European Parliament, the Council of Ministers and the permanent representatives of national parliaments.

The current mechanism for yellow cards is such that national parliaments cannot claim to have hugely significant powers but they do have the capacity to decelerate the process and prompt the European Commission to reflect that it should engage to a greater degree with national parliaments earlier in the process of formulating legislative proposals.

The yellow card mechanism is functional in its present form but could be improved with some modification of the rules. The time limit of eight weeks may be too short. And national parliaments might devise other modes of communication to secure common views on commission proposals, such as live-streaming and video-links that would circumvent the difficulty of securing the physical presence of the representatives of 42 chambers (including the European Parliament).

Proposals on the means by which to achieve a strengthened role for national parliaments include a greater role for national parliaments in upstream engagement and a strengthened role on the policing of subsidiarity, as actors who should be systematically consulted as, and indeed before, legislation is brought forward and whose views should be taken seriously. It is felt that the threshold for securing a yellow card is too high. A suggestion made by the Foreign Secretary is the establishment of a red card whereby national parliaments exceeding a certain threshold claiming that a proposal violates the principle of subsidiarity would require withdrawal by the commission of the proposal. Another idea that has been floated by the House of Commons is the extension of this mechanism, as well as of the yellow card, to apply retroactively to the existing body of EU legislation. National parliaments themselves seek a greater role. The commission has agreed a number of times on paper though not necessarily in practice with the notion of an expanded role for national parliaments.

PROSPECTS FOR PROPOSALS TO REMEDY THE DEMOCRATIC DEFICIT

Many proposals would require treaty change for their implementation. But the position of the UK government, as set out in the evidence that the Minister for Europe gave in the House of Lords' enquiry into the role of national parliaments in the EU, is that much of what has been proposed to remedy the democratic deficit could be delivered

through political commitment, rather than formal treaty change. For instance, there could be political agreement to act as if a red card had been issued when in fact a yellow card had been issued and to articulate such changes in subsequent treaties.

It was suggested that it is perhaps erroneous to concentrate exclusively on national parliaments. One problem is that there is much public opinion that does not find its way through the channel of parliament but rather in single issues, demonstrations, etc. This is markedly more the case now in comparison with 15 or 20 years ago. One response might be to encourage action by MEPs by giving them the option, for example, to join national select committees relevant to their areas of interest in their home parliament. This would facilitate a continual interchange between proceedings in the European Parliament and national parliaments, which could help parliaments collectively to overcome the democratic deficit; at present there is a sense of distance between them.