

OPAL Online Paper Series | 1/2012

Parliamentary democracy and the Treaty of Lisbon

Enrique Barón Crespo

Sponsored by:



This online paper series is published by the
Observatory of Parliaments after the Lisbon Treaty (OPAL).

OPAL is a scientific consortium comprising researchers from four partner institutions:



University of Cologne

OPAL Online Papers are published at **www.opal-europe.org**.

Series Editors: Thomas Christiansen & Ariella Huff

ISBN: 978-90-818813-0-2

Previously published in Spanish by Centro de Estudios Políticos y Constitucionales Madrid, Real Instituto Elcano and Fundación Manuel Giménez Abad (2010)

Parliamentary democracy and the Treaty of Lisbon

Enrique Barón Crespo

Introduction

The long-awaited entry into force of the Treaty of Lisbon significantly strengthens Parliamentary democracy in the European Union. Title II of the TEU, 'Provisions on Democratic Principles', states that the functioning of the Union is founded on representative democracy, based on the direct representation of citizens in the EP and of Member States in the European Council (Article 10).

The Treaty explicitly recognises dual democratic legitimacy. At Community level, the official recognition given to codecision as ordinary legislative procedure, its extension to new fields (35 legal bases rising to 85) and the EP's election of the President of the Commission reinforce the Parliamentary system. At Council level, the statement in Article 12 that national Parliaments (NPs) contribute actively to the good functioning of the Union, completed with Protocol No 1 on the role of national Parliaments in the European Union and Protocol No 2 on the application of the principles of subsidiarity and proportionality, opens the door to significant progress in democratic coordination between the Union and Member States.

These are not unprecedented innovations, however. The Treaty of Lisbon has simply incorporated the outcome of discussions by the Convention which drafted the Constitutional Treaty with the active involvement of members of the Parliaments and governments of all Member States, plus the then candidate countries, MEPs and the European Commission. Rather than pure theoretical speculation, this work was based on experience of a constitutional process that had been in progress for over half a century.

Parliamentary democracy is currently the common political system of the 27 EU Member States, whether monarchies or republics. Moreover, for the first time in history, it is the preferred system for all Europeans, with the exception of Belarus. In order to put this historic milestone into perspective, the origins of the process must be revisited, since it was not a clear-cut issue at the time.

The creation of the European Union involved a genuine process of historic change with a view to making amends. The founding fathers shared the experience of two great European wars that developed into World Wars, and a turbulent interwar period when Parliamentary democracy was the political system that was most reviled and disparaged by both left- and right-wing

dictatorships. Mussolini and fascism represented the first experiment with a different system: as early as 1915, Mussolini wrote that 'I am increasingly convinced that Parliament is Italy's bubonic plague which poisons the blood of the nation. It must be extirpated.' Hitler marked his arrival in power with the symbolic burning of the Reichstag. Carl Schmitt's interpretation of the crisis of Parliamentary democracy drew heavily on the conservative philosophy of his mentor Donoso Cortés and his defence of the decision-making State and opposition to attempts to found the State on the reviled 'discussing class'. The Bolsheviks, meanwhile, replaced the Duma with the Soviets and developed the 'popular democracy' system. Political regimes whose common ambition was to abolish Parliament as the State's crucial legitimate power, replacing it with rubber-stamping echo chambers, spread virtually throughout the continent, with variations across countries.

The founding fathers also shared experiences of Parliamentary democracy. At the first Hague Congress of the European Movement in 1948, the political Resolution called for 'the convening, as a matter of real urgency, of a European Assembly chosen by the Parliaments of the participating nations'. Its first product was the Council of Europe, followed by the European Convention on Human Rights.

The first step in the gestation of the EU was the founding of the European Coal and Steel Community (ECSC). The ECSC Assembly was born in 1952 at the Council of Europe, with the Secretaries-General of the Parliaments of the six founding States acting as midwives. At the inaugural session, chaired by the veteran Belgian Parliamentarian Paul-Henri Spaak, Jean Monnet, President of the High Authority that preceded the current Commission, said that 'Within the limits of its competence your Assembly is sovereign. It is the first European Assembly endowed with the power of decision. This responsibility makes you and us the trustees of the entire Community and together the servants of its institutions.' The following speaker, Chancellor Adenauer, Chairman of the Council of Ministers, was even more emphatic: 'You are the first sovereign Parliament in Europe built on a supranational basis.' Chancellor Adenauer went on to say that the formation of the Assembly marked fresh and significant progress in the project of creating a new Europe (Opening session of the Common Assembly, 11 September 1952).

This revolutionary statement was subsequently repeated by Robert Schuman as the first President of the 1958 European Assembly, which decided to change its name to the European Parliament. The Assembly was addressed as if it were a sovereign Parliament with full powers, when it was, in fact, an Assembly of national Members of Parliament appointed at second-hand on an advisory basis. His prescient vision foresaw a future that was to become a reality much later.

Age-old confrontation and reticence were overcome not by drafting a European Constitution, but step-by-step, with failures such as the European Defence Community and successes such as the

Treaty of Rome, which was drafted by a French Jewish professor who had been victimised by the Vichy regime, Pierre Uri, together with a former official of the Reich, Hans von der Groeben – a fine example of reconciliation.

At base, the proposal involved committing to a shared destiny based on common values and institutions: Parliamentary democracy, division of powers, respect for human rights and a social market economy. This was the reason for the nascent Community's polite rejection of the Spanish application for membership submitted by the dictator Franco in 1962.

From this founding phase, relations between NPs and the EP developed in two stages, the first concluding in 1979: a European Parliament composed of members elected at second-hand within their national assemblies on an advisory basis and with a nascent budgetary power shared with the Council of Ministers in some areas.

The main feature in this stage of European legislation, based on the primacy of Community law over Member State law within the exercise of its jurisdiction, was that Commission proposals were amended and adopted behind closed doors by the Council of Ministers, under the sword of Damocles of unanimity represented by the Luxembourg Compromise. This gave rise to the objection to the 'democratic deficit', referring essentially to the European pillar.

From a Member State perspective, legitimacy was conferred by the representative nature of the Minister who was part of the Council, though as the House of Lords Foster report indicated, the United Kingdom had pledged, as a condition of membership of the EC, to accept the collective authority of a legislative body of which only one member was accountable to the House of Commons. In practice, the NPs organised themselves as they saw fit to exercise their governments' supervisory tasks: the Danish Folketing through the Internal Market Committee with direct mandates to Ministers, including telephone consultations from the Council meeting room, while the Belgian Parliament worked intensely through the '*Comité d'avis*' [Advisory Committee], but, in general, did not scrutinise Community legislation very intensely.

The election of the EP by universal suffrage from 1979 represented a substantial change. On the one hand, by blocking three budgets, the EP sought to assert its power of budgetary authority on an equal footing with the Council of Ministers, a procedure subsequently ratified by a Court of Justice ruling. On the other, the process of sharing legislative power with the Council began along the same lines. In parallel, there was a speedy shift towards the separation of mandates between the European mandate and the national mandate, dictated not by law but as a result of experience and priorities. The Single European Act was a first step towards establishing the cooperation procedure.

The 1990 NP-EP Rome Conference

The major leap forward came in the wake of the democratic revolution represented by the fall of the Berlin Wall in November 1989, the '*annus mirabilis*' symbolising the end of the Cold War.

Parliamentary democracy was strengthened firstly by the EP's immediate favourable reaction to the momentum of history, with strong support for German unity and close cooperation with the Bundestag to ensure that East German nationals were integrated as full citizens. The EP also presented the December 1989 Strasbourg European Council with a 10-point set of actions that substantially extended the ongoing preparation of economic and monetary union to political union, based on the Treaty on European Union (known as the Spinelli Treaty), drafted and approved by the EP in 1984. A temporary committee on German unity was set up to carry out this task, and the Colombo, Martin, Giscard d'Estaing, Duverger and Herman reports on European union were approved.

A year later, following the signing of the Charter of Paris, in which, for the first time, democratic values were recognised as common to all countries in Europe and which proposed a system of security and cooperation, the first EP Conference with the national Parliaments of the Community met in Rome.

The *Assises*, a French term similar to *assembly* or *congress*, were not the brainchild of the EP alone but derived partly from the suggestion tabled by President Mitterrand as President of the Council to promote a meeting with the NPs. This was 'self-convened', in that it was a decision to meet taken simultaneously by all the participating Parliaments. It took place from 27 to 30 November 1990 in the majestic auditorium of the Italian *Camera dei Deputati* in Montecitorio (Rome), under the joint chairmanship of the host Nilde Iotti and the Speaker of the Senate, Giovanni Spadolini, on the eve of the Rome European Council that convened the Treaty of Maastricht Intergovernmental Conference. President Rita Süßmuth of the Bundestag, Charles-Ferdinand Nothomb, Speaker of the Belgian *Chambre des Représentants* and the Frenchman Laurent Fabius, Speaker of the *Assemblée Nationale*, were also very heavily involved in this process. The Members of Parliament present included Giorgio Napolitano and Valéry Giscard d'Estaing.

In my opening speech as President of the EP, I set out our vision for the meeting by stating that we had a shared responsibility to strengthen Parliamentary democracy and to ensure that our deliberations contributed decisively to European unity.

After three days of intensive discussions, a motion for a resolution tabled by the Speaker of the Belgian Chamber of Representatives, Charles-Ferdinand Nothomb, was approved by a convincing

majority (out of 189 voters, 150 voted for, 13 voted against and 26 abstained). The text, which clearly favoured moving towards the creation of the European Union, broke a psychological barrier and strongly encouraged the leaders to take a number of decisions that would subsequently have to be ratified by their own national Parliaments.

The Resolution began by stating that, rather than being a product solely of diplomatic and government cooperation, European integration required the Parliaments of the European Community to play a full part in defining the guidelines to transform the Community into a European Union based on the principle of subsidiarity, and regretted that the competences transferred to the Community were subject to an unsatisfactory degree of Parliamentary scrutiny – a statement that was a forerunner of the 1993 German Constitutional Court Decision.

Its core content involved the following proposals:

- **Towards European union**, in which the creation of a large market without internal borders involved the creation of a single currency, which would require an economic union together with increased economic, social and regional cohesion, to be funded by own resources (an as yet unresolved matter), a strengthening of democratic legitimacy with a political union that includes a Common Foreign and Security Policy (CFSP) and the extension of majority voting, a common social policy, active gender equality policies in all areas, an enhanced regional policy, greater Community environmental competence, recognition of cultural diversity and the institution of European citizenship including the Declaration of Fundamental Rights approved by the EP in 1989.
- **Strengthening of democratic legitimacy in relations between the Community and the Member States**: the time was considered to be right to transform relations as a whole between Member States into a European Union, with a Constitution drafted with EP and NP involvement, with enhanced cooperation and conferences organised when key issues are under discussion, particularly at the time of the Intergovernmental Conferences (IGCs), with the Commission gradually performing executive functions, a legislative codecision procedure between the EP and the Council and the general use of majority voting in the latter, ensuring a more assertive role for NPs in defining their respective governments' positions on Community policies and the exercise of due diligence in transposing rules.
- **Strengthening of democratic legitimacy within the Community institutions**. Prior to ratification by NPs, the revision of the Treaties would have to be approved by the EP, a process that would be closely linked to the IGCs, codecision between the EP and the Council of Ministers should be the norm, with the right to initiate in the event of the Commission's failure to do so, Council legislative sessions would have to be public with majority voting, except for the accession of new members or the extension of powers, Commission and EP

terms of office would be simultaneous, and the President of the Commission would be elected by the EP on the proposal of the European Council by absolute majority, with a vote of confidence in the new Commission and a call for Member States to contribute towards making up the democratic deficit by means of systematic information policies and oversight by the NPs.

- **Subsidiarity.** The principle that would guide any new allocation of competence to the Union, whereby the Union will act only to carry out the tasks entrusted in the Treaties to achieve the objectives defined. The Court of Justice would monitor its a posteriori application and the regions organised with political powers must be taken into account.
- **Relations with other countries.** Recalling that Community preference should not turn the EC into a fortress, the aim was to increase cooperation with the other European States, including the accession of any democratic State that would be willing and able to accept Community objectives and responsibilities. Bearing in mind the positive events in Central and Eastern Europe at the time, partnership agreements were proposed.
- **Relations with international institutions.** Permanent joint consultation with the Council of Europe, cooperation with EFTA and a specific function within the UN, the CSCE and the Atlantic Alliance.
- **Relations with developing countries.** Permanent policy of support to the lasting development of all peoples throughout the world, the battle against poverty being prioritised.

The Resolution concluded by calling for the Intergovernmental Conferences that were to be convened to incorporate their proposals on an official basis. It did, in fact, set out the major lines of the process that came to fruition first in the Treaty of Maastricht and led subsequently to the Treaty of Lisbon 20 years later.

As for the Community dimension, the EP, strengthened by this shared programme, launched the initiative of the Preparatory Interinstitutional Conference (PIC), at which a delegation of 12 MEPs sat down and negotiated for the first time with the 12 Governments, the Council and the Commission to draft plans for reform on a joint basis.

Both initiatives, the conference with Member State Parliaments and the PIC, represented an experience that was a forerunner of the Convention method.

From Maastricht to Nice

With this impetus and after protracted negotiations, the leaders were able to approve the Treaty of Maastricht, which transformed the Community into a European political, economic and monetary union, with citizenship and the single currency as basic elements, EP involvement in

inaugurating the President of the Commission and legislative codecision as major democratic institutional developments.

In the European open constitutional process, the Treaty went beyond the initial establishment of the four freedoms creating the common or internal market with a federal monetary union. This included the predominantly intergovernmental dimensions, Common Foreign and Security Policy (CFSP) and Justice and Home Affairs (JHA), which meant that the establishment of the common core based on the Community method by the 'façade with three pillars' had to be changed. This broad interpretation extended the influence of policies managed at European level to a clear majority of budget and socio-economic matters with an impact on the other pillars, the external and the internal.

The Conference with the national Parliaments was not an isolated act. It led to the creation of the 'Conference of Community and European Affairs Committees of the Parliaments of the European Union', known by the colourful acronym COSAC, and the 'Conference of Presidents' of such Parliaments, in addition to the holding of regular meetings of committees and other bodies.

Against this background, the strengthening of Parliamentary democracy has become central to the formulation of policies at European level in order to avoid the easy claim that such policies are imposed from Europe, which presents Brussels as a national sovereignty-devouring Moloch of sorts. In the light of this manipulation, the old principle of Roman law that the cause of the cause is also the cause of the effect should be remembered: the fundamental cause is represented by the Treaties negotiated and ratified by all Member State Parliaments which establish duties of transposition, the development of primary European law and democratic oversight of their representatives' action.

The Treaty of Maastricht also included the principles of subsidiarity and proportionality, by virtue of which the Union should act only if the objectives of the proposed action cannot be sufficiently achieved by the Member States – either at central or regional and local level – and are better achieved at European level due to the scale or effects of the proposed action. Under the principle of proportionality, the content and form of the Union's involvement must not go beyond what is necessary to achieve the objectives of the Constitution.

It can be said without fear of exaggeration that the Treaty of Maastricht was consistent with the political momentum of the Assizes Resolution and gave shape to the respective proposals. This explains the majority support given to the Treaty in national Parliaments at the time of ratification, in a not very favourable context of serious economic crisis, monetary tensions that led to the withdrawal of the British pound from the EMS (European Monetary System) and the wars bringing about the breakup of Yugoslavia which threatened to take Europe back to the interplay

of alliances that led to the Great War. The recourse to plebiscites was more complex but ultimately successful: in the case of France, the referendum called by President Mitterrand won the day with 51.4% of the votes, while, in Denmark, after the first referendum was defeated by 50 000 votes, it was approved with opt-out clauses in currency and defence.

The progress brought about by the Treaty stepped up the pace of an unprecedented constitutional process, which can be likened to a sculptor who constantly shapes and refines his work of art. The rhythm of a Treaty every four years explains this effort: Amsterdam and then Nice. In the 1990s, moreover, the process of convergence required to construct economic and monetary union developed. The Union was, in turn, enlarged to 15 (with the accession of Austria, Sweden and Finland and Norway's rejection of membership), and the process of negotiating the most extensive enlargement to a further 10 Central and Eastern European countries began (Estonia, Latvia, Lithuania, Poland, Hungary, the Czech Republic, Slovakia, Slovenia, Malta and Cyprus). This represented a transformation at the heart of the Continent, where the two World Wars had begun, that was brought about due to the common wish for stability and good-neighbourliness and the break-up of the Soviet empire.

The constructive role of NPs throughout this complex and turbulent period has not been adequately valued. The commitment made at the Rome Conference and the creation of an institutional framework such as the COSAC, involving regular meetings with a common agenda, has undoubtedly played a significant role. Once again, Amiel's old aphorism, reprised by Jean Monnet, that experience starts over with every individual and that only institutions become wiser, as they amass collective experience, has proved to be true.

The nine months' gestation of the Treaty of Nice was salutary in this respect: while the Intergovernmental Conference (IGC) concluded in failure and the exhaustion of the closed-door method, the first Convention that worked quite openly in parallel on drawing up the Charter of Fundamental Rights concluded successfully. The governments and representatives of Member State and candidate country Parliaments took part in this Convention, together with the European Parliament and the Commission. The constitutional method to discuss the reform of the Treaties openly and in public had been consolidated.

The Constitutional Convention

At the second Convention at which the text of the Constitutional Treaty was drafted jointly by national Members of Parliament and MEPs, with representatives of governments and the Commission, relations between NPs and the EU were discussed in depth. The principle of subsidiarity – 'all competences not conferred upon the Union in the Treaties remain with the

Member States' – was the point of reference for defining the sharing of competences: exclusive competences, shared competences and supporting, coordinating or complementary activities.

In order to emphasise the monitoring of subsidiarity, a working group was set up under the chairmanship of the MEP Iñigo Méndez de Vigo, the proposals of which were incorporated into the Protocol on the application of the principles of subsidiarity and proportionality, based on the following precepts:

- the three institutions of the Union are responsible for ensuring that the principles of subsidiarity and proportionality are complied with;
- the Commission, by virtue of its monopoly of legislative initiatives, must consult all those affected before proposing a legislative act;
- any Commission legislative proposal must include a 'subsidiarity sheet' enabling the financial impact and legislative repercussions of such a measure to be assessed;
- the Commission will forward all its legislative proposals directly to Member State NPs;
- all Member State NPs will have a period of six weeks in which to forward to the Presidents of the three institutions a reasoned opinion explaining why the proposal is deemed not to comply with the principle of subsidiarity;
- when the reasoned opinions represent at least one third of all Member State NPs, the Commission will have to re-examine its proposal;
- after this review, the Commission may maintain, amend or withdraw its proposal;
- NPs may lodge an appeal with the Court of Justice for infringement of the principle of subsidiarity.

This was a novel way of resolving one of the four central aspects of Declaration 23 annexed to the Treaty of Nice on the role of NPs in the European architecture. The change is qualitative in monitoring subsidiarity: it changes from *a posteriori* monitoring attributed to the Court of Justice – which the latter has never exercised – to *a priori* monitoring by NPs. It also allows national Parliaments to be involved from the outset in drafting Community legislation, since all legislative proposals are received directly from the Commission.

The Treaty of Lisbon

The Treaty of Lisbon has not only incorporated the work of the Convention but has done so, to some extent, by adding Article 12 to the chapter on fundamental democratic principles, in which the duty to 'ensure' by NPs established in Article I.3 of the Constitutional Treaty becomes a duty to 'act' by establishing that 'National Parliaments contribute actively to the good functioning of the Union':

- through being informed by the institutions of the Union and having draft legislative acts of the Union forwarded to them,
- by seeing to it that the principle of subsidiarity is respected,
- by taking part, within the framework of the area of freedom, security and justice, in the evaluation mechanisms for the implementation of the Union policies, and through being involved in the political monitoring of Europol and Eurojust,
- by taking part in the revision procedures of the Treaties,
- by being notified of applications for accession to the Union,
- by taking part in the inter-parliamentary cooperation between NPs and with the EP.

From the constitutional point of view, this rule represents a significant step forward in consolidating the functioning of European representative democracy.

For NPs, taking part responsibly and effectively in the European legislative process and monitoring subsidiarity requires active involvement in that process from the outset. This question arises above all in relation to their own governments, which are part of the European legislative process through the Council, which means that they have a duty to keep Parliaments informed. The Commission may cooperate in the task, though it is not responsible to NPs. Similarly, a regular joint working relationship and exchange of information should be established among national Members of Parliament and MEPs from the same country, something that also involves establishing internal working practices in Parliamentary groups and political parties. In the case of the federal countries or those with autonomous regions (Germany, Spain, Belgium), the question extends to matters that may be the responsibility of the regions or communities that have their own political powers that may be affected by European legislation.

The task now is for each national Parliament to organise itself, in accordance with its own Constitution, in order to include and develop the examination and monitoring of the European legislative process from the outset in its rules of procedure. This will undoubtedly involve a significant internal volume of work for each Parliament. No one may impose external guidelines on that task, since it is a matter that falls within each Member State's sovereign power. Examining how to reinforce inter-Parliamentary coordination, which requires calendars which are closely synchronised with those of the European legislative process, is another matter.

Whatever the case, it is not an overstatement to say that the European Union is becoming a Parliamentary democracy to which can be applied what Publius argued in Federalist Papers No 39: 'A composite Republic, neither wholly federal nor wholly national.' In the European version, Article 1 of the Treaty states that the Treaty of Lisbon marks a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as

openly as possible and as closely as possible to the citizen. Parliamentary democracy is a guiding principle of that process.