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Killing the EU rather than quitting it

Olivier Rozenberg - 10 October 2013

We have known since Bagehot that democracy through parliaments is about discussions rather than decisions. Parliaments are essential to any democracy because they question, scrutinize and criticize

The perspective of an in-out referendum in the UK constitutes a fantastic incentive for British politicians and academics to conceive new ways of governing Europe. Even if their efforts of imagination are often remarkable, emerging propositions may constitute a threat for the viability of the EU in the future. A good example of this is provided by Damian Chalmers's recent Policy Network paper [Democratic Self-Government in Europe](#). It is worth looking in details at his proposals as they may be influential on the emerging debate on the reform of the governance of the EU. For instance, in a speech delivered on 31 May 2013, the UK Foreign Secretary, William Hague, stated: "We should think about going further still and consider a red card to give national parliaments the right to block legislation that need not to be agreed at the European level".

Chalmers proposes various measures for reinforcing national parliaments' rights vis-à-vis the EU legislative procedure. Some proposals appear not to be really significant. This is the case for reform 1 that proposes "a stronger duty on the Union to set out in detail the added democratic value of a measure". Others could have positive effects as reform 3 which enables national parliaments to set the legislative agenda by imposing the European Commission to make legislative proposals. This could indeed be a valuable input for the Commission and is in continuity with the so-called political dialogue established between national parliaments and the Commission for the last several years. Likewise, the right to petition a constitutional council for obtaining the disapplication of an EU law (reform 5) can be a way to enhance civic participation and is reminiscent of the newly adopted procedure of the European Citizens' Initiative.

Yet, two other, and far more crucial, proposals appear to constitute a serious threat for the viability of the EU as a political system producing collective, constraining and effective norms rather than useless and symbolic statements. Both proposals suggest that national parliaments should be able to block legislation, collectively at the proposal stage in one case, individually once EU law has been implemented in the other.

First, Chalmers suggests that "unless two thirds of parliaments indicate their support for a measure, a Commission proposal should not go forward to the Council" with, in addition, the possibility to give conditional support. This proposal would reverse the existing procedure according to which one third of the parliaments can warn the Commission about a possible infringement of the subsidiarity principle. Whereas currently parliamentary silence counts as implicit consent, it is proposed to call for an explicit consent from no less than 18 parliaments in Europe. In other words, national parliaments would collectively become co-legislators of the EU legislative procedure, in addition to the European Parliament and the Council of the EU.

Such a revolutionary proposal calls for several comments:

1. National parliaments would de facto be given more influence than their respective governments in the legislative procedure since they would act before the Council and the European Parliament. As this deviates from the shared model among national democracies which is characterised by the domination of their executive, it means that in most of the member states, national governments will have the possibility to act twice within the legislative procedure: a priori through their parliamentary majority and a posteriori through the Council. What is ultimately proposed is to add something like a pre-reading stage to the co-decision procedure where national governments can try to block proposals. They are therefore offered an opportunity to circumvent the need to enter into dialogue with the European Commission and the European Parliament.
2. As is obvious from the above paragraph, Chalmers' proposition greatly increases the complexity of the decision-making process. Not only because it adds a new level to the already intricate legislative procedure, but because the usual institutional domination of the executive power over the legislature in many member states also makes it difficult to assess if and why a parliament will be willing to block a proposal. According to the type of democracies, the key actors at this stage will be the Prime minister, backbenchers, pivotal party groups in Parliament, coalition parties in government etc.
3. The decision-making process will be far less predictable under this new procedure. As there is no permanent body where representatives from national parliaments meet, this first reading by national parliaments will inevitably be de-centralised. The protocol on subsidiarity of the Lisbon treaty offers a good example of such process since national parliaments should reach a threshold to force the Commission to justify the proposed legislation. The implementation of the protocol since 2009 indicates how difficult it is for national chambers to coordinate with each other. The aggregation of their views looks, in most cases, like a random game.
4. Granting the same weight to each national parliament will mechanically benefit small member states by giving, for example, the House of Commons half the weight of the Luxembourgish Chambre des députés - not exactly in the interest of the British people. By contrast, the Council of the EU and the European Parliament take into account the size of each country either in their composition or in their decision-making rules.

To sum up, Chalmers's proposal of an early mandatory support by a qualified majority of national parliaments would result in greater domination by governments in the legislative process (especially governments of small member states), a greater complexity and unpredictability of the EU decision-making and, above all, a greater risk of blocking the system. To some extent, we could follow his suggestions if they were proposing less EU decisions in exchange of more democratic procedure. However, it is contestable whether the system would be genuinely more democratic as the clarity and predictability of decision-making as well as proportional representation of the member states can also be considered democratic goods – and important ones.

The second proposal calls for fewer comments. Chalmers suggest that “if the parliament judges that the costs of EU law are significant it may suspend the EU law within its territory”. This would be no more than the end of the primacy of EU norms on which European integration has been built since the very beginning. Seemingly conscious that such reform could damage the whole European edifice; Chalmers tries to minimize its effect. He writes that, in the case of the disapplication of EU law, “the European Council shall endeavour to secure an amicable settlement” but that “if it fails to reach [one], national law shall remain in

place”. In other words, no legal constraint is placed on parliaments. Chalmers also states that few cases would ever be open as passing “anti-EU legislation” [sic] in Parliament would take time. This is especially doubtful since a motivated majority can act quickly in most of the parliaments in Europe. He finally adds that a member state would limit their use of free-riding for reputational reasons. This statement – which implicitly acknowledges that many governments would hide themselves behind their parliaments – can be questioned: Indeed, numerous examples of European history indicate that the diplomatic reputation of a given member state is of limited weight when national decision-makers face a salient domestic political issue. Between the country image among European diplomats and the mobilisation of their voters, backbenchers will not hesitate long.

This second proposal would seriously damage the authority and capacity of the EU not only because many atomised opt-outs are to be feared but also because such a possibility constitutes a strong incentive for any member state not to apply EU law. The certainty of reciprocity was the cement of Europeanisation; break it and you destroy the EU. Here the analogy with the US system and the numerous possibilities to disobey federal laws appears to be spurious as the EU, a regional emerging system, has more to fear than an established federation. Moreover, the idea that national parliaments would have to protect the essential character of “domestic democratic values” against Brussels does not stand as long as no legal limits are given of those values. To take a French example, it may make sense to find a system where no EU law could damage the French notion of *Laïcité* (secularism), but once you have settled it, how can you prevent the French Parliament from opposing, for instance, the opening of the mail service or railway transport to quote a few internal market reforms that would certainly be regarded as a threat for national values by a majority of French MPs?

To sum up, the costs of Chalmers’ proposals for the viability of the EU are obvious whereas its democratic benefits can be questioned – especially in a period where European institutions are passing less and less directives and regulations year after year. We have known since Bagehot that democracy through parliaments is about discussions rather than decisions. Parliaments are essential to any democracy because they question, scrutinize and criticize. If progress has to be made in the EU in that direction, granting parliaments collective or individual red cards will not help.

The allied ingenuity about national parliaments actual role in domestic systems as well as the mismatch between the costs and benefits of the proposed reforms lead us to think that democratizing the EU is, ultimately, not the real purpose of Chalmers’ note. More surely, Chalmers’s aim is about finding an acceptable solution to prevent the UK from quitting the EU. He relevantly observes that any Western country out of the EU, even the US, is constrained to respect EU norms. On this basis, he concludes that it is better to remain within the EU with the possibility to block, suspend and disobey those norms. Taking the risk of breaking the EU rather than quitting it: this unsafe and rather cynical advice does not have much to do with genuine democratic self-government.

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