



The European Union and the nation state

Anand Menon - 10 October 2013

With national legislators involved in EU decision making, not only would national and EU politics be organically linked, but national parliamentarians would find it harder to criticize it for the sake of populist appeal

In an excellent recent Policy Network paper, Damian Chalmers provides a characteristically detailed, forensic and insightful assessment of the chronic problems of legitimacy now widely acknowledged to characterize the European Union. Unlike so many others who have written on the 'democratic deficit,' he goes beyond spelling out the nature of the problem and suggests several practical solutions to it. Again unlike most existing accounts, he focuses not on the need for institutional change in Brussels, but on ways to ensure that the Union enjoys democratic authority within the member states. The proposals are interesting and original. They are also flawed and based on a misleading interpretation of the legitimacy problem currently confronting the Union.

To summarize a complex and subtle paper rather crudely, Chalmers argues that national parliaments should be integral to testing democratic authority and ensuring the democratic responsiveness of the EU. Thus, they should enjoy far greater control over EU legislation, including the ability to assent to proposed legislation; propose both revisions to existing legislation and new legislative acts, and, finally, disapply existing EU law.

There is much to admire in this paper. Perhaps ironically, some of its most important arguments appear almost as an afterthought, and relate to the options confronting Britain in its relations with its EU partners. Chalmers argues convincingly that not only would a state that chose to leave the EU continue to be governed by European laws in those areas of EU activity in which it chose to participate, but also, and more strikingly, that significant amounts of EU law would continue to be applied even following a complete exit.

Turning to the core of the paper itself, whilst there is undeniably a genuine dissatisfaction on the part of many Europeans with the way the European Union acts, both Chalmers' definition of the fundamental problem, and the solutions he proposes to it, are flawed in several respects.

The analysis of the conditions under which the European Union might add democratic value is sensible enough. Yet Chalmers displays a remarkable degree of faith in the ability of national parliamentarians to act as arbiters of the EU's competence. He is right to argue that the Council and Commission have 'neither the incentives nor the disposition to assess the democratic value of a measure.' There is, however, little reason to believe that national parliaments will be able to do so more effectively.

Because they are amongst the main losers from the process of EU competence creep, parliaments do not, as Chalmers quite rightly states, have any reason to be relaxed about the spread of EU law. Quite the contrary, they have a vested interest in blocking this process at every turn, whatever the motives for it. Indeed, given the stipulation that EU action should be allowed only 'where it secures greater democratic value than other avenues of action,' it is difficult to envisage any circumstances in which national parliamentarians (and I'm thinking here in particular of those in a governing party such as the Conservatives) might decide to admit to their own failings by accepting this to be the case.

Equally, the ability to disapply certain EU laws that impose significant costs has much merit. Again, however, the process identified to achieve this leaves much room for scepticism. Let's leave aside the 'independent study' on which such an assessment would be based (and surely the fate of Gordon Brown's five tests on UK entry to the euro should warn us of the dangers of 'tests' applied to sensitive political issues). To entrust national parliaments with the job of deciding whether an EU law should be suspended within their territory would leave the door open for populist grandstanding and political game playing of the worst kind, as parliamentarians contort themselves in an attempt to dress ideological preference as democratic principle.

This faith in parliamentary process forms part of a striking paradox at the heart of the paper. On the one hand, and perhaps unusually for a lawyer, Chalmers ascribes to parliaments a role that many, including this author, would prefer to see entrusted to courts. On the other, he views the problems confronting the Union, and the putative actions of parliaments under his proposals in addressing them, in highly rationalist, perhaps even legalistic terms.

To deal with process first, I am not convinced that, when it comes to matters of EU competence, national courts could not act as arbiters. As Chalmers himself notes, the German constitutional court has been increasingly prone to rule on the democratic implications of EU action, and has made it clear that it will not accept EU laws that violate democratic identity. Far from legal reasoning being 'too formal and too narrow,' as Chalmers asserts, it will provide precisely the kind of objective interpretation of the question of competence that parliaments will not provide. Equally, in this context, it is unclear precisely what added value the proposed Constitutional Council would provide. Other, of course, than the enjoyment of watching the squabbles over the selection of the 'eminent public figures.'

Whilst eschewing courts as a venue for the resolution of competence related questions, Chalmers provides a rather rational and legalistic account of the grievances that necessitate some kind of institutional solution. This is every much the tenor of his notion of 'democratic authority' by which we are to adjudge who should wield competence in what area. He argues that 'what bothers citizens is less how Brussels decides things but rather the amount and quality of EU rule,' and the way it encroaches on domestic self-government. Consequently, objective assessment of the relative democratic merits of EU and national action will serve to dissipate this discontent.

Yet this analysis ignores the visceral nature of much contemporary opposition to the European Union, while his benign view of parliaments underestimates the visceral nature of the national politics of European integration. The fundamental problem confronting the EU is not merely competence creep but, more broadly, a growing sense that 'we' in nation states are governed by 'them' in Brussels.

Chalmers' proposals would address some of these issues. Certainly, it seems sensible that if there are significant objections to an EU measure among member states, it should be reconsidered. It also makes sense for national parliaments to enjoy some degree of legislative initiative. In the view of this author, national courts are better placed than national parliaments to police the kinds of competence issues that Chalmers highlights.

Yet there are issues beyond competence that must be addressed in order to tackle the Union's legitimacy problems. Whatever the legislative mistakes of the past – and these certainly should be addressed – and in addition to a need to prevent EU law making in areas where there is strong member state opposition to this, care must be taken to ensure that future EU legislation is not seen as being imposed on member states against their will. The most obvious means of closing the gap between 'us' and 'them' would be for national representatives to play a role in shaping that legislation. Providing national parliaments with a sense of ownership over what the EU does would prevent the kind of political posturing that often marks discussion of EU-related subjects in member states such as the UK. They

would be drawn unto day to day policy making on routine technical issues with, nevertheless, real socio-economic implications. This rather than taking dramatic stances over legislation already passed that, for one reason or another, has engendered national ire. With a role in policy making itself parliamentarians will, in other words, be drawn into becoming responsible stakeholders in a European political system comprising both EU and national levels, rather than simply cheerleaders for the rights of the national.

With national legislators involved in EU decision making, not only would national and EU politics and policy be organically linked, but national parliamentarians, having some ownership over the system, would find it harder to criticize it for the sake of populist appeal. Down the line, it may even be that, once they have become responsible stakeholders in the EU system, they could be trusted to discuss and rule on the limits of its competence.

Anand Menon is Professor of European Politics and Foreign Affairs at Kings College London