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The Role of National Parliaments - The Dutch Experience in Comparative Perspective

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In this paper, I briefly sketch the role of the parliament of the Netherlands with regard to the EU in two respects: that of parliamentary scrutiny of European decision-making and that of the role of parliament as legislature in the context of implementation of EC measures.
In order to be able better to recognize the peculiarities of a particular national constitutional feature, such as the rules and practice of national parliaments with regard to EU decision-making, it is useful to sketch the broader comparative spectrum. In such an approach, it is necessary to make some remarks of a general nature on the constitutional context and background in which national parliaments function. These are abstract and in a sense present a caricature of reality, precisely because they abstract from reality. But in order to distinguish and understand the variety of systems and practices, these abstractions may be illuminating. In this paper I therefore open with some general remarks before proceeding to sketch a number of features of the role of parliament in the Netherlands with regard to EU decision-making.

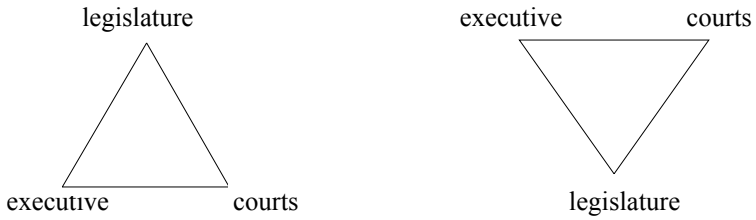
I. The Comparative Spectrum

Constitutional Determinants and the Role of National Parliaments
Parliaments generally have two types of function. The first is to exert some control over the exercise of governmental powers; parliaments do this mainly by holding governments to account about what they do or fail to do, and exercising sanctions with regard to this. The second function is a legislative function; in the exercise of legislative power a certain amount of cooperation is required from parliament. The extent to and manner in which these functions are put into effect varies among the various European countries, and is to a large extent determined by the constitutional context within which parliaments operate.
One element of this constitutional context is the system of government. Obviously, the perception of parliamentary powers in presidential or semi-presidential systems is different from that in a parliamentary system of government. In a parliamentary system of government, parliament is in principle supreme, in the sense that the government or cabinet cannot function without sufficient political support of parliament. In a (semi-)presidential system, the head of the executive has an electoral mandate of its own, which necessarily places parliament in a different position towards the government as compared with parliamentary systems. Hence, in general, the extent of powers of control over the exercise of governmental power is more limited, due to the (at least relatively) “autonomous sphere” of governmental power compared to those in parliamentary systems.
Also with regard to legislation the distinction between parliamentary and (semi-)presidential systems is relevant. Powers, including legislative ones, are not only divided but also separated more strictly in semi-presidential systems than in parliamentary systems; this is conspicuous in

France, for example, where some forms of legislation are withheld from parliament and fall within the exclusive province of the government.
In terms of constitutional contexts, there is another, more elusive aspect which seems of some relevance, and is concerned with constitutional types and traditions. It is the (again somewhat schematic) distinction between what I call "old-style" constitutions and "revolutionary" constitutions. The "old-style" constitutions tend not to be very legalistic; they are less formal and less rigid then many other constitutions; they tend to devote a large amount of space to customs and conventions of the constitution; they are usually a product of historical evolution rather than revolution; they are flexible, incremental and inclusive; they are pragmatic and tend to be declaratory of a certain (quasi pre-existing) constitutional state of affairs. The archetype is the British Constitution, but I would also count the Constitution of the Netherlands in this category of constitution. The "revolutionary" type of constitution is the product of some revolution or cataclysmic event, such as a civil or international war, or past totalitarian experiences. These constitutions come from drawing boards and are in the form of blueprints; they are constitutive of a reality as it should be; they are strongly ideological, at least in their preambles, and they tend to be exclusive. They are maintained by a legalistic conception of the rule of law and are upheld by courts as much as by the constitutional protagonists themselves. Archetypes of a revolutionary constitution are the French Constitution since the French revolution, or the American Constitution; however, since the second world war perhaps the German constitution is taking over the paradigmatic status from France.

The role of legislatures
One particular constitutional aspect of the role of parliament as legislature is the part played by legislation itself within the constitutional system. An important heirloom of the French revolution is the idea that the representatives of the sovereign people, assembled in parliament, should hold the power to make rules which are binding on citizens. From this flowed the principle of legality, that is to say the principle that authority over citizens should be based on the laws established by acts of parliament. Clearly, this idea creates a tension between legality and the rule of law, particularly when this is articulated as majoritarian democracy versus human rights.

A further consideration relates to the division or separation of powers in terms of the trias politica. Initially, the idea in most European constitutional systems was that the legislature should be supreme among these three powers, the executive and judiciary being bound by and subjected to the laws passed by the legislature. In fact, the development throughout Europe has been that the executive has become dominant over the legislature - standing as it does both at the beginning of the legislative procedure as initiator of policies and legislation, and at its end as the instance which is to execute and apply the laws which it has mostly itself initiated and which often grant it wide discretionary powers. Large scale delegation of legislative powers to the executive, which is the rule in most European countries, has further contributed to this. The counterweight is no longer parliament, which tends to have an interest in keeping the government of the day in power and facilitating it in pursuing its policies, rather than "making life difficult" for it, as it is sometimes perceived. Instead of parliament, the courts have now been charged with the task, or have taken it upon themselves, to protect citizens from undue interference by public authorities with their rights and liberties. In fact the triangle of the trias politica, where the legislature used to be at the top, has been turned upside down, with the executive and courts keeping each other in balance at the top, while parliament has a more subservient role to play.



The relationship between the role of the European Parliament and that of the national parliament

Perceptions of the relationship between the national parliament and the European Parliament differ. To some extent, the perception of this relationship is determined by the perception of the relationship between the EU and the national political and legal orders. Are they two separate orders, and if so, does that mean that each is autonomous within its own sphere? Or are they perceived as one single legal order, or as intertwining or composite orders? More often than not, these underlying questions are not articulated, and clear answers are not provided. This contribution is neither the time nor the place to address them. Nevertheless, we can observe that sometimes the view is put forward that with regard to a particular matter either the European Parliament should have a say in things, or the national parliament. This is an "exclusionary" approach. The opposite view also exists: that both EP and national parliaments have a role to play, even concerning one and the same issue. This could be called a "concurrent" approach.

The next question is: with regard to what does a national parliament have a role to play? Is it with regard to the decision-making of the EU in general, or focused only on the role of national actors, especially the ministers and what Euro-speak calls the "head of government" - a constitutionally non-existent office in all the Member States - in the European Council and Council?

Behind all this there is a representational issue. At the national level, the parliament usually represents the "people", "nation", or simply constituency, and this may be further differentiated in bicameral systems where one of the houses represents a regional or non-federal entity or even a social class. The European Parliament is said to be composed of "representatives of the peoples of the States brought together in the Community" (189 [formerly 137] EC). But what does that mean in relation to what a national parliament is supposed to represent? Does it confirm the existence of concurrent representation, or is it confirmation of competing representation? And do the representatives of the Member States in the Council not represent their respective peoples, on whose parliamentary representatives their functioning depends in most Member States, at least indirectly? Most of these questions and their answers have remained implicit in positions taken. But traces of them, sometimes vague, confused and contradictory, can be found in positions adopted by national parliaments and their members, as we will see when we turn to a brief sketch of the Dutch experience.

II. Some aspects of the Dutch Experience

A. Scrutiny

Introduction

By way of introduction, I briefly sum up some traits of the constitutional system of the Netherlands and of attitudes towards international relations and European integration in general.

As I already intimated above, we have a constitution of the "old style" type. Although the Constitution is written and rigid, it is very frequently amended, and nearly all those amendments codify an existing state of affairs, or more recently are of a technical kind. In short, they are usually superfluous; the value of the Constitution is in the practice and its text is epiphenomenon. Significantly, the core rule of the parliamentary system of government - i.e. the rule that a cabinet has to resign when it is censured by the Lower House - which was established in the 1860s, has never been enshrined in the Constitution. The most important novelty of the overall revision of the Constitution in 1983, was the codification of a catalogue of fundamental rights - although most of them were already acknowledged in some form or other. But, like another 3 or 4 countries in the world, courts in the Netherlands are not allowed to review the constitutionality of acts of parliament. This contributes significantly to a weak constitutional culture in legal terms. It is "not done" to try to win an argument in parliament over the question whether something is an infringement of a provision of the Constitution; this should be done on "political" as opposed to "legal" grounds, is the prevalent view in our parliament, the States-General.

There is another aspect of the Constitution of the Netherlands which seems to go, in some respects, in another direction. The country has pursued a policy of internationalism in its foreign policy ever since it gave up its neutrality at the beginning of the Second World War (in fact, we only had one World War, because we were neutral during the first). Particularly, as the country lost its most important colony (Indonesia) in the East, the orientation was transatlantic and European. Constitutionally, internationalism was expressed in one of the very few ideologically tinged provisions, article 90 of the Constitution: "The Government shall promote the development of the international legal order." Since 1953 all treaties in principle need parliamentary approval, either tacitly or by act of parliament (Article 91 Constitution). Treaties may diverge from the Constitution as long as they are approved with a two thirds

majority in both houses of parliament (Article 91(3) Constitution). And legislative, executive and judicial powers may be transferred to international organizations, as was already understood to be the case before 1953 (Article 92 Constitution). Unlike treaties, decisions of international organizations constitutionally do not need to be submitted for parliamentary approval.
Monism had already been recognized in the case law of the Supreme Court when in 1953 two provisions were introduced into the Constitution, one postulating the direct effect of self-executing treaty provisions and of decisions of international organizations, and the other granting such provisions a higher rank over any conflicting national provision, including the provisions of the Constitution itself (Articles 93 and 94 Constitution). In fact, the prohibition for courts to review the constitutionality of acts of parliament is greatly compensated by these provisions, which are upheld by all courts: since the 1980s the courts have begun to set aside provisions of acts of parliament in order to give primacy to self executing provisions of treaties. It is most likely that the Court of Justice of the EC modelled its case law in Van Gend en Loos and Costa ENEL on the logic of the Dutch constitutional provisions.
The Netherlands foreign policy has been characterized as that of the simultaneous personification of the Vicar and the Merchant. As a small country with an open economy, the Netherlands is to a large extent dependent on international commerce and profits from the extension of the internal market to large parts of Europe, international liberalization, reduction of trade barriers etcetera. At the same time, a certain internationalist moralism is prevalent. International relations are not only based on trade and commerce, but also on development cooperation. And next to the principle of profitability, which certainly contributed to a general Euro-enthusiasm, an issue such as the democratic deficit has bothered politicians, members of parliament foremost, from the very first beginnings of post-war European integration.

Parliamentary scrutiny of European decision-making
The scrutiny of the process of concluding and amending primary EC and EU law, the treaties, has on the whole not been very different from that of other treaties. Although parliament may be said to have been informed to a larger extent than with other treaties, at least until the Treaty of Amsterdam, the government did so only in general terms of political priorities, rather than in terms of actual provisions and proposals. This led to a hilarious resolution shortly before the conclusion of the Treaty of Maastricht, in which the Lower House asked the government for the text of the draft then being discussed, which had already been published in *Europe* weeks before and which the government persisted in refusing to present to the Lower House even confidentially. Even after the end of the Maastricht summit at which the text was as good as finalized, the government failed to inform parliament about the agreed texts. Also, the Netherlands is notoriously late in ratifying treaty amendments. There is no good explanation for this, because there has always been a huge support for them, although from Maastricht to Nice, parliament has on the whole been critical for the treaties' not going far enough on the road towards European unity. In fact, only the issue of the democratic deficit, which in the Netherlands is usually considered a result of too few powers for the European Parliament, has attracted much criticism. Critical attention has focused on this issue from 1956 onwards and the debate has been fuelled by the introduction of the intergovernmental pillars in the Treaty of Maastricht.
(Very recently the possibility of a consultative referendum has been introduced, and a constitutional amendment is pending which would introduce a decisive referendum, which could also be called with regard to the approval of treaties. As European integration is not a

very divisive issue in the Netherlands, it is at present not expected to cause the type of problems for European integration as in the case of say Denmark or Ireland.)
As we remarked above, the implications of the European treaties are not different from those of other treaties; primacy of directly effective treaty provisions and of decisions of international organizations exists for all treaties and international organizations.
This constitutional state of affairs may also explain why it took a fairly long time before parliamentary scrutiny of EC and EU decision-making took a more definitive shape.
Basically, concern was expressed about the lack of powers of the European Parliament, yet for the first thirty-five years the conclusion was not drawn that this gap could, for what it is worth, be filled by national parliament's scrutiny. In the 1960s some concern arose in parliament over rules affecting the powers of taxation which were created at the European level. This led to the adoption of a resolution in the Lower House to the effect that the government were not to take definitive decisions in the Council with regard to Community legislation regarding the size and the distribution of the tax burden, except after consulting parliament.[1] This resolution has been lost in parliament's short memory. Such proceedings with regard to what we now know as "first pillar" decisions are considered unbecoming and inappropriate because it would mean arrogating a power which should belong to the European Parliament. Even if the EP has been withheld a proper role in a number of instances, it is common understanding in the Dutch parliament that it is not for national parliaments to hold up decision-making in Brussels. A reservation of parliamentary scrutiny would lead, in the perception of Dutch MPs, to what they refer to as "Danish situations", about which the wildest fantasies exist in The Hague.

First pillar
As to first pillar decision-making, only by the end of the 1980s and the first half of the 1990s had a more systematic parliamentary scrutiny developed. In brief, it consists of the following practices.
The agenda of European Council meetings is sent to the Lower House and is discussed usually in the Committee for European Affairs, and after each meeting of the European Council a plenary debate takes place in the Lower House with the prime minister.
Since the late 1980s, the annotated (provisional) agenda of each Council meeting is sent to the relevant parliamentary committee of the Lower House. Also after each Council meeting a report of the meeting is sent to that committee. The annotated agenda or the report is discussed with the relevant minister whenever the committee deems it necessary. Whether they actually do so, depends on the relevant committee: some committees are much more active than others in this respect. The standing committee for agriculture, for instance, has a long tradition of such committee debates with the minister, who - judging by the reports of the meetings - is quite willing to provide any kind of information to the committee and freely discusses nearly any issue. Other committees are (or I should perhaps say: used to be) much more reticent, and so are the relevant ministers. But, on the whole, one may say that the flow of information provided in such committee debates has become more satisfactory than it was at earlier stages.
One major problem, though, is the fact that due to the chaotic ways of diplomacy in Brussels, agendas keep changing and even three days in advance there is no certainty whether the various items on the agenda will actually reflect the agenda on the basis of which the Council

[1] The so-called *motie-Berg*, named after the MP who initiated the resolution, see Appendix to the Proceedings of the Lower House [Bijlage Handelingen TK] session 1966-1967, 8556, nr. 8.

will be meeting a few days later. This makes the discussions - which usually take place on the Thursday of the week before the relevant Council meeting - often awkward and uncertain.
Another procedure is that of the so-called "*fiches*", short notes by an interdepartmental group of civil servants, which contain an abstract of the contents and implications of what the ministries consider the most important draft-decisions. Since 1991 such notes have been sent with regard to draft-directives, and since June 1992 also other drafts and documents are covered in the notes. This state of affairs is explained by the fact that the Lower House was at first not interested in scrutiny of the decision-making in Brussels, but only concerned about the long delays in implementation of directives (and relevant regulations). In fact, up until 1993 parliamentary attention was hardly ever focussed on the contents of the directives but only on the (lack of) speed with which they were implemented. MPs overlooked the fact that in countries where proper scrutiny took place, implementation had the shortest delays (prominently UK and Denmark). Also here, things have begun improving since approximately 1993.
The third type of document which the Lower House receives are the policy overviews concerning the development of the Communities and the EU in general. A yearly overview of the developments is sent, which is strictly speaking based on a duty contained in the Act of Parliament approving the treaties establishing the EEC and Euratom.[2] These used to be discussed with the minister of Foreign Affairs in a committee meeting, but nowadays the yearly report is called the "State of the Union" and is discussed in the plenary of the Lower House, with Dutch members of the EP present and speaking since the year 2000.

Some institutional remarks
Common to these three forms of information of and accountability towards parliament, is that Parliament makes itself entirely dependent on the government for information. There is hardly any sign at all that Parliament ever responds directly to things happening in Brussels or Strasbourg.
The legal basis for the forms of information and holding the government to account, is quite weak. They are based on the general duty of government to inform parliament if so requested by the House or any of its members (Article 68 Constitution). The further arrangements with regard to first pillar decision-making are entirely informal, based on unpublished exchanges of letters between the Speaker and the government.
Also there is, in my opinion, no adequate infrastructure for the Lower House to exert its constitutional role more powerfully. I mentioned in passing the Committee for European Affairs. This was only established in 1986, that is to say 30 years after the establishment of the EEC. This Committee is composed of members who are also members of the committees of the Lower House which are most involved with European integration. The Committee has mainly a coordinating role, signalling relevant *fiches* to relevant committees, sometimes trying to instigate a discussion on a certain topic.
One problem is that the parliamentary committees, unlike the situation in many other Member States, only have the power to inform themselves of certain matters, and only in that indirect manner the plenary. They do not issue any conclusions or resolutions as a committee. They merely prepare debates for the member themselves (and other MPs to the extent that they

[2] Articles 4 and 5 of the relevant Acts published in the *Staatsblad* (Official Journal of the Kingdom). 1957, 493 and 494.

would attend a meeting - which as a rule is public - of the committee as a member of the public; which they hardly ever do). Also, there is no hierarchy between the various committees. Hence,
committees are - as in other countries - in a sense autonomous in their dealing with matters. This poses a severe constraint on the coordinating role which the Committee for European Affairs wishes to play. There manner in which this is solved, is by organizing joint meetings of this Committee with other relevant parliamentary Committees. This phenomenon is generally accepted and in fact leads quite effectively to a certain amount of coordination.
Another problem is that of the role of "spokesmen" in the Lower House. MPs take pride in being spokesman of their parliamentary group on a certain issue. This is a matter of huge internal in-fighting and is related to the pecking order within political groups. This means that the role of spokesman in a certain field - which often coincides with the field of a ministerial department - is defended fiercely even within political groups. This does not foster harmony and coordination.
A particularly important problem - which is hardly seen as such by the MPs themselves - is the nearly total lack of support. Thorough and effective scrutiny requires a high degree of expertise in all the relevant fields. This expertise is - except for a limited number of issues - not present among the MPs themselves. The Lower House has 150 members divided at present over 9 political groups, the largest three having 45, 39 and 28 seats respectively, the smallest three 3, 3 and 2 respectively. On average every MP has two individuals for support, and the staff of committees and House is extremely small. In fact, the Committee on European Affairs itself has half a clerk, a quarter of a staff member and half a secretary at its disposal for the discharge of its duties. It is remarkable that there is any substantial scrutiny at all.

Third pillar
With regard to the decision-making in the third pillar, the rules and principles are quite different. Here the framework is provided by a provision which was taken up in the Act of Parliament approving the Treaty of Maastricht by a parliamentary amendment. I reproduce it in full, in the version of the Act of Parliament approving the Treaty of Amsterdam:

> Article 3
> 1. The draft of a decision [Dutch: *ontwerp-besluit*] which intends to bind the Kingdom shall be published and laid before the States-General immediately after the text of the draft has been established, and before any decision-making takes place by the Council under Title VI of the Treaty on the European Union as amended by the Treaty mentioned in Article 1 of this Act [the Treaty of Amsterdam].
> 2. In derogation of the first paragraph, the draft of a decision in the sense of that paragraph can be laid before the States-General confidentially if exceptional circumstances of an imperative nature specifically require that the draft be of a secret or confidential character.
> 3. The States-General's *consent* shall be required before a representative of the Kingdom can co-operate towards the passing of a decision as intended in the first paragraph.
> 4. Tacit consent shall have been given if within fifteen days after the draft decision has been laid before the States-General, no wish has been expressed by or in the name of one of the Houses that the draft decision shall need the express consent of the States-General.
> 5. The third paragraph shall not apply to the conclusion [Dutch: *vaststelling*] of treaties.

So whenever a binding decision is in the making in the third pillar, both Houses of Parliament have to give prior consent, either expressly or tacitly. The reasons for introducing this requirement of consent, were mainly concerned with the fact that the relevant decisions are

taken in an intergovernmental context, with little or no influence from other institutions than the Council only. In a sense such decisions, of which the content cannot be clearly deduced from the treaty, in this intergovernmental setting amount to a treaty dressed up in a different form. This concern was compounded by the view that these decisions may affect fundamental citizens' interests.

The precedent for such a parliamentary consent procedure was set by the Schengen Agreements. There, opposition was voiced against the decision-making procedures and their lack of transparency, particularly as regards the Schengen committee. As the third pillar regarded similar types of decisions, the Lower House, in a fit of consistency, introduced the same consent procedure into the Treaty of Maastricht. In fact, the incorporation of the relevant third pillar and Schengen affairs into the first pillar, in title IIIA EC Treaty as amended by the Treaty of Amsterdam, led to a further, but temporary, consent procedure being introduced with regard to this title.[3]

This procedure has so far never led to a situation in which consent was refused, because mostly the views of the minister coincide sufficiently with those of parliament - as can be expected in a parliamentary system of government in which there are close political relationships between members of the cabinet and the political majority. On several occasions, parliament has forced the government to make a reservation of parliamentary consent in Brussels. This was most usually caused once again by the fact that texts of draft-decisions were not available to the national parliament in time for it to give its consent. The Upper House in particular has taken a strong stand against the regular frustration of the parliamentary consent procedure due to the dynamics of decision-making in Brussels. This is the more significant because the Upper House, which in general plays a politically subordinate role to the Lower House, is not very actively engaged in other aspects of scrutiny of European decision-making. It may be explained by the fact that according to constitutional convention it is first the Lower House which deals with a matter if the same matter also has to be dealt with by the Upper House. This consecutiveness is derived from the constitutional provisions on the passing of bills, according to which a bill must first pass the Lower House before the Upper House can deal with it. Also in this context the Upper House is beset with time constraints, particularly in the sphere of fiscal legislation which usually has to enter into force on 1 January, but can only be dealt with by the Upper House in a few days left at the end of December - much to the frustration of the members of this House.

Consistency?

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[3] Article 4: 1. Paragraphs 1, 2 and 3 of Article 3 shall apply to the draft of a decision under Title IIIA of the EC Treaty as amended by the Treaty mentioned in Article 1, which intends to bind the Kingdom, in so far and as long as Article 73 O, second and fourth paragraph of that Title has not been applied.
2. Paragraph 1 shall not apply with regard to measures taken by the Council in accordance with the procedure of the third paragraph of Article 73 O of the EC Treaty as amended by the Treaty mentioned in Article 1.

Article 5: The first to fourth paragraph of Article 3 shall apply to a draft decision which intends to bind the Kingdom, to be taken under Article 2, first paragraph, first to third alinea, of the Protocol integrating the Schengen acquis into the framework of the European Union, attached to the Treaty intended in Article 1.

Article 6: The agreements under Article 6 of the Protocol integrating the Schengen acquis into the framework of the European Union attached to the Treaty mentioned in Article 1 shall not require the approval of the States-General.

One may wonder whether the practice of scrutiny of the Dutch parliament is consistent. In the field of first pillar decision-making, any hint that parliament should have a right first to scrutinize, let alone to consent to, European measures before the Council takes a stance, is taboo. Let European issues be European, and let national matters be national, seems to be the leading thought. The alleged absence of "European-ness" in the third pillar decision-making structure, has led to the national parliament stepping in. This is viewed as a temporary stop-gap until the Treaties have been revised in the sense that the other European institutions can play their own role also under this pillar.

This reasoning has obvious flaws. Thus, a number of decisions under the first pillar do not allow for any substantial role for the Parliament, sometimes at least formally not even for the Commission, *viz* the measures under the former Article 136 EC (now 187 EC), which have been quite controversial in the Kingdom of the Netherlands, particularly in the eyes of the overseas territories (witness the long series of butter, rice and sugar cases concerning the CTO-decisions at the ECJ). On the other hand, it is no longer true to say there is no role for the Commission and EP, and even the Court of Justice, in all third pillar decisions.

Another inconsistency seems to be the fact that the decisions under the second pillar can have a far-reaching impact, also affecting very important interests of the State, without there being any parliamentary influence, either European or national. So the limitation of the consent-procedure to the 3rd pillar only, seems somewhat arbitrary.

When we look at the practice, a scrutiny of first pillar decision-making has developed which in reality is not so very different from that under the third pillar. Of course, the requirement of "consent" is lacking with regard to the first pillar measures (with the exception of those under Title IIIA EC). But this has never become an acute reality. In fact, the minister of Justice complains both in first and third pillar contexts about the frustration of European decision-making by the insistence of parliament on scrutinizing the decision-making. That he has had to make a reservation of parliamentary scrutiny under the third pillar and is not required to do so under the first pillar, may not have struck him. In fact, his irritation as to such reservations in the first pillar may exist with regard to the other Member State representatives in the Council, who make such reservations due to their own national procedures.

The question is whether such irritation is justified. It is frequently pointed out that it is impossible to arrive at consensus in Brussels if all national parliaments must agree with the decisions to be taken. Personally, I find this unconvincing, unrealistic and unwise. First of all, there are fewer and fewer decisions which require consensus among the members of the Council. But even so, is it really true that a minister who has the support of his parliament cannot so easily consent to a decision in the Council as one who fails to be supported by his parliament, or has to remain uncertain as to the position which his parliament takes? Is it wise for a minister whose functioning as minister depends on the trust and confidence he enjoys in his national parliament (and not at all of that of the European Parliament), not to hear the views of his constituency on a measure which might be controversial? Could such an attitude of benign or malign neglect realistically be expected from a minister? Moreover, is it really a good thing for the legitimacy of EU measures in the Member States not to involve the democratically elected representatives in matters on which the member in the Council has to decide, but to which these representatives might have considerable objections? And why would it be so much more easy to arrive at consensus (if at all required) if representatives act without support from national parliaments rather than with their support? Might the reason for this not at the same time explain the lack of confidence and trust of citizens in the EU?

B. Implementation

The legislative role of parliament is strongly affected by the large number of EC directives and regulations which require implementation. There is a strong sense in national parliaments that the European obligation to pass certain legislation erodes the role of parliament as legislature. This is exacerbated by the time constraints which go with implementation. In the Netherlands this latter point is borne out by the long delays in implementing EC measures, although it must be said that these delays also occur in cases of implementation by statutory instruments other than acts of parliament.

Let me first sketch the constitutional parameters applicable to legislation.

The Constitution vests the legislative power in the parliament and government who together decide on Acts of Parliament (Article 81). The question has always been how far legislative power rests exclusively with this legislature. It is now accepted that all exercise of public authority requires a basis in an Act of Parliament if such exercise restricts rights and the liberty of citizens or is otherwise burdensome. Only if this is not the case can rules binding on citizens be made by an Order in Council (*algemene maatregel van bestuur*) which has no basis in an Act of Parliament. Binding rules can only be made by ordinary royal decree or ministerial regulation if they have a basis in an Act of Parliament. Another important principle, related to the principles just mentioned, is that "blanket delegation" is prohibited, also for Acts of Parliament.

Now, as it happens there are a large number of provisions in Acts of Parliament which delegate the power to implement "EC regulations", or "EC directives", or often "provisions of treaties and of decisions of international organizations which are binding upon the Kingdom" to the government or a minister, which can variously take measures of implementation by Order in Council or ministerial decree. Often the Act of Parliament will specify the areas with regard to which the government or minister can make regulations which are binding on citizens, but often this is done in very broad terms, such as "in the interest of the environment". One may wonder whether the limits of the prohibition of blanket delegation is not reached or even transgressed.

This phenomenon of delegation to lower rule-making authorities is now increasingly taking the shape of a delegation of certain matters to one level lower than is otherwise the case in the relevant Act. That is to say, where the Act delegates a matter to regulation by Order in Council in cases which do not have any relation with implementation of EC or other international law, in case of implementation of EC-measures, the minister is competent to make such regulations; if a matter is in an area which is regulated by the Act itself, it will be the competence of the government by Order in Council to take implementing measures. Sometimes - but not always - these implementing measures have to be submitted to Parliament before they can become operative.

This development has been taken to its logical conclusion in a number of Acts, which have recently become controversial, which give the power to the government by Order in Council, or even to the minister by ministerial decree, to rescind provisions from the Act of Parliament and make binding regulations which substitute for the original provisions of the Act of Parliament. Usually, such measures are to be submitted for information to Parliament a number of weeks before they become operative.

These last forms of implementation, in particular - in practice referred to as "accelerated implementation" - have become controversial. They raise a number objections from the point

of view of constitutional law. One of the objections is that the hierarchy of norms is thus turned upside down. Thus it is one thing to have the power to fill up empty gaps in the legislation by lower legislative measure - which is a power which is deemed legitimate only under certain circumstances normally - but quite another to repeal existing provisions of Acts of Parliament and even replace them with norms which are not those of the legislature itself. Normally, a decision of a certain authority can only be repealed by an *actus contrarius* of the same authority, or possibly a higher authority. How can a specific regulation with a specific content which is of lower rank put an end to the norms contained in a higher norm, unless the lower-ranking regulation is elevated to at least equivalent rank of the one replaced? In other words, in order to avoid problems of hierarchy, the norms made by a "lower authority" legally have to acquire the rank of the norms made by a higher authority. Perhaps in a country with a constitutionally unlimited parliamentary sovereignty, parliament can alienate even its own sovereignty, but in a country like the Netherlands, the logic of hierarchies of norms are not overturned so easily.

This type of issue, however, has not been addressed yet in the Netherlands. Instead the reasoning is entirely instrumental. Efficiency is the main concern. There is a European obligation and (in the Netherlands) a great problem of time, created above all by inadequate organizational and departmental structures. By the way, the latter have improved in recent years and where organizational measures have been taken, delays are reduced greatly or even disappear.

Often the argument of lack of discretion is put forward to advance the cause of delegated legislation. If a measure exclusively implements a European instrument which leaves no or little discretion, there is not much to be decided, and hence the implementing measure might just as well be taken by a minister and not take up precious time of parliament, or so the reasoning goes. However, it is in practice hard to assess exactly how much discretion is involved, and how much discretion is taken to implement a measure in this way or another. It may well be that in terms of the EC-instrument there is little discretion, but often at the national level existing legal frameworks, definitions and concepts must be altered, which necessarily impinges on regulations or regulative structures which have regard to other cases than those covered by the EC instrument. In such a situation - and many exist in practice - does the implementing measure exclusively implement the European instrument? In its original intention the answer may be affirmative, but in its results the answer must be negative. The *Maher* case shows that also the opposite occurs, where the EC-regulation leaves a number of alternative choices to the Member States, but within at least some of these Member States these choices are dictated by the circumstances and the system already existing in the relevant Member State. It would seem that here the mirror situation exists: in its intention of the EC-instrument is to leave discretion to Member States, but in its end result there seems to be no discretion. As a total outsider, it is interesting to see that Irish courts have had to give an extensive interpretation of the aims of the EC-instruments and assess the relevant economic and legal circumstances in order to arrive at the conclusion that there was in fact no real discretion in the end for the Irish minister. I respectfully submit that it is striking how elaborate such an interpretation needed to be, before that conclusion could be arrived at.

In this type of situation, therefore, there seems to be an important discretionary moment in the assessment of prevalent circumstances. In short, also here the argument of a relative lack of discretion does not seem a very cogent reason for diverging from the ordinary constitutional hierarchy of norms.

As concerns the role of parliament, the consequences of large scale delegation of legislative powers and powers of repeal and substitution are significant. The principle that the exercise of public authority should be based on an act of parliament, is a typically continental heritage of the French revolution. Citizens should only be bound by rules which their representatives have had a say in. Bypassing parliament is from this point of view an awkward enterprise which may undermine the democratic legitimacy of implementing measures, especially if it is done in order to comply with a norm in which no parliamentary organ has been involved, as is the case in, say, milk quota regulations requiring implementation, or other Commission regulations or measures.
Legislating by Act of Parliament also has a function in terms of its public consideration and deliberation; this communicative function is lacking in most forms of delegated legislation. MPs tend to pose questions; they may sometimes consult with outsiders and at least they represent outsiders, whereas the legal drafters at the ministries are not supposed to represent anyone except the minister.
These issues are now under debate in the Netherlands. The Upper House has passed a resolution asking the government for a study of possibilities of introducing a provision in the Constitution which makes forms of "accelerated implementation", such as the repeal of provisions of acts of parliament and their substitution by lower regulations, an exceptional situation.[4]

Conclusion

There are many questions which remain open for the future development of the European Union. One of them is the role of national parliaments. The constitutional and political role the national parliaments have played over approximately the last century and a half, has given them a position which the European Parliament somehow is still lacking. It is not quite clear that national parliaments are to give up their role in the national legal order whenever European issues are at stake, for lack of certainty which European institution has taken over its functions or equivalent. The constitutional make-up of the European Union is still too uncertain simply to write national parliaments out of the scenario definitively. This is reflected in the national experiences of the role which various national parliaments have so far wished to play with regard to European affairs. The French even changed their Constitution on a fundamental point when approving the Treaty of Maastricht in order to enhance the role of parliament vis-a-vis the government acting on the European stage (Article 88-4 Constitution). The Dutch, ostensibly adhering to the theory that European affairs are a matter for the European Parliament, have adapted their practice and their laws so as to make sure that as long as this is a theory only, the national parliament asserts its representative role.

[4]Resolution of the *Eerste Kamer* (Upper House), *Kamerstuk* (Parliamentary Documents) 2000-2001, 26200 VI, nr. 37b, passed on 5 December 2000.