

EDITORIAL COMMENTS

After the European elections: Parliamentary games and gambles

In his lectures at the *Collège de France* between 1989 and 1992, Pierre Bourdieu unfolded the genesis of the modern State as a play on a grand stage, with countless actors, from medieval canon lawyers to the members of latter-day expert committees, all playing their part in establishing and maintaining our belief in the “State” as a collective fiction that affects our lives in many, often imperceptible ways.¹ In Bourdieu’s narrative of the State, the parliamentary game is an important subplot. While often scorned and ridiculed for the bogus fights staged, parliament is the place of organized consent or dissent. By visibly defining the limits of permissible dissent and the ways in which it may be expressed, parliamentary deliberations, however artificial they may seem, contribute to the preservation of public regimes, in particular of those claiming democratic legitimacy. This is what parliaments have done through the ages, and it may be useful to recall that this is what we expect from the newly elected European Parliament as we look at the latest twists in the institution’s convoluted history.

The Spitzenkandidaten: A parliamentary gamble

Let us start with the idea of the *Spitzenkandidaten*. In November 2013, the Party of European Socialists nominated Martin Schulz, the incumbent President of the European Parliament, as “candidate designate” for the presidency of the European Commission. Other political groups represented in the European Parliament followed suit, including the centre-right European People’s Party (EPP) which nominated Jean-Claude Juncker, the former Prime Minister of Luxembourg and ex-President of the eurogroup, as their candidate.² At the time, not all political parties were equally convinced of this initiative, and it gained only limited traction during the election campaign - with the notable exception of some Member States such as Germany and, to a

1. Pierre Bourdieu, *Sur L’État: Cours au Collège de France 1989 – 1992* (Seuil 2012) = *On the State: Lectures at the Collège de France 1989 - 1992* (Wiley, publication announced for July 2014).

2. The other candidates were Guy Verhofstadt (nominated by the Alliance of Liberals and Democrats for Europe), Ska Keller and José Bové (nominated by the European Green Party), and Alexis Tsipras (nominated by the European Left Party).

lesser extent, Austria where televised debates among the candidates attracted considerable attention and probably contributed to an above-average turnout.³ Somewhat tellingly, and indicating a certain unwillingness to embrace the concept in other Member States, the candidates have become known under their German name *Spitzenkandidaten* throughout the EU.⁴ Considering its mixed success as a marketing device for the elections, it seemed conceivable that the campaign with *Spitzenkandidaten* would be a matter of no consequence after the elections, all the more so since Martin Schulz, the most active promulgator and prospective beneficiary of the initiative, only came in second with the result that he was quickly ruled out as a future President (and subsequently even as a member) of the Commission by his own party. However, what has reportedly started as an individual gamble for power became the object of an institutional conflict. Just a few hours ahead of an informal dinner of EU Heads of State and Government on 27 May 2014, the Conference of Presidents of the (outgoing) European Parliament announced that Jean-Claude Juncker, as the candidate of the largest parliamentary group, “will be the first to attempt to form the required majority [under Art. 17(7) TEU]” and, on this basis, invited the European Council “to start inter-institutional consultations in conformity with Declaration 11 [on Art. 17(6) and (7) TEU]”.⁵ The immediate reaction of the European Council, as

3. While the EU-wide turnout was 43.09% in 2014 (compared to 43% in 2009), the turnout in Germany was 47.90% (compared to 43.27% in 2009), and the turnout in Austria was 45.70% (compared to 45.97% in 2009). Source: <www.results-elections2014.eu/en/turnout.html> (last visited 30 June 2014).

4. In many Member States, the *Spitzenkandidaten* did not really attract the attention of the mass media, see e.g. in France <www.lemonde.fr/idees/article/2014/04/30/france-televisions-ou-le-deni-de-democratie-europeenne_4409502_3232.html> (last visited 30 June 2014).

5. European Parliament, press release of 27 May 2014, <www.europarl.europa.eu/news/de/news-room/content/20140527IPR48501/html/Conference-of-Presidents-statement-on-Commission-President-election> (last visited 30 June 2014).

Art. 17(6) and (7) TEU provide:

“(6) The President of the Commission shall:

- (a) lay down guidelines within which the Commission is to work;
- (b) decide on the internal organization of the Commission, ensuring that it acts consistently, efficiently and as a collegiate body;
- (c) appoint Vice-Presidents, other than the High Representative of the Union for Foreign Affairs and Security Policy, from among the members of the Commission.

A member of the Commission shall resign if the President so requests. The High Representative of the Union for Foreign Affairs and Security Policy shall resign, in accordance with the procedure set out in Article 18(1), if the President so requests.

(7) Taking into account the elections to the European Parliament and after having held the appropriate consultations, the European Council, acting by a qualified majority, shall propose to the European Parliament a candidate for President of the Commission. This candidate shall be elected by the European Parliament by a majority of its component members. If he does not

expressed by President Van Rompuy, was framed in diplomatic language that is more reminiscent of exchanges between governments on the brink of hostilities than of the spirit of cooperation between these two institutions. Stressing that “there must first be consultations between the European Council and the European Parliament”, President Van Rompuy curtly replied that “we ... took note of today’s letter sent by the Conference of Presidents of the European Parliament” and that “leaders have given me a mandate to conduct these consultations on behalf of the European Council”.⁶

As it turned out, the European Council proposed Jean-Claude Juncker as candidate for Commission President on 27 June with the support of all of its members except for the Heads of Government of Hungary and the UK. It was a *première* for qualified majority voting in the European Council, but not a happy occasion as it evidenced a rift between the UK Prime Minister, who felt the need to render his unsuccessful opposition to Mr Juncker visible in a show of hands, and most other Heads of State and Government. Irrespective of this outcome, the dispute over the upper hand in the investiture of the President of the Commission that preceded the decision taken by the European Council remains of interest as it raises some highly debated questions.⁷ Is the Parliament’s resolve to have the *Spitzenkandidat* of the largest parliamentary group installed as the President of the Commission in conformity with the Treaty? If so, is the European Council under a legal duty to appoint this candidate? And finally, whatever the *lex lata*, would the emergence of a parliamentary prerogative in this matter be welcome?

obtain the required majority, the European Council, acting by a qualified majority, shall within one month propose a new candidate who shall be elected by the European Parliament following the same procedure.”

6. European Council, press release of 27 May 2014, EUCO 118/14/1 REV1, <www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/142862.pdf> (last visited 30 June 2014).

7. See Mattias Kumm, “Der Europäische Rat ist verpflichtet, Juncker vorzuschlagen”, *Verfassungsblog*, 6 June 2014; Kenneth Armstrong, “Why the European Council is NOT under a legal duty to appoint Jean-Claude Juncker”, *Verfassungsblog*, 11 June 2014; Mattias Kumm, “Why Armstrong is wrong and there IS in fact a legal duty to appoint Juncker”, *Verfassungsblog*, 13 June 2014; Kenneth Armstrong, “Why Kumm is Wrong and there is not in LAW a duty to appoint Juncker”, *Verfassungsblog*, 13 June 2014; András Jakab, “Why the Debate between Kumm and Armstrong is about the Wrong Question”, *Verfassungsblog*, 20 June 2014; all contributions available at <www.verfassungsblog.de> (last visited 30 June 2014); Joseph Weiler, “To Juncker or Not to Juncker – Is That the Question?”, *EJIL: Talk!*, 26 June 2014 (forthcoming editorial of *EJIL* 25:2), <www.ejiltalk.org/to-juncker-or-not-to-juncker-is-that-the-question/> (last visited 30 June 2014).

The present...

As to the first and to the second question, it is submitted that the law as it stands allows both the Parliament and the European Council considerable room for manoeuvre in the process of selecting the President of the Commission. There is, of course, a chronological order to the formal steps determined by Article 17(7) TEU, with the European Council first proposing a candidate who shall then be elected by the European Parliament. But this does not imply a right of the European Council to decide on the suitable candidate unimpeded by the expectations of the Parliament, as expressed in the letter of the Conference of Presidents to the European Council. Moreover, despite suggestions to the contrary, such an early public commitment of the Parliament does not seem to be in conflict with the requirement of “appropriate consultations” referred to in Article 17(7) TEU as a preparatory step for the decision of the European Council. According to Declaration 11 on Article 17(6) and (7) TEU, these consultations take place between representatives of the European Parliament and the European Council “in the framework deemed the most appropriate”, further arrangements being left to a “common accord between the European Parliament and the European Council”. The need to agree on a “framework” for appropriate consultations can only be understood as relating to procedural aspects of the consultation phase, not to the substance of the consultations, i.e. the selection of a suitable candidate. Any legal obligation to cooperate towards an agreement on the substance at this preliminary stage would threaten to undermine both the European Council’s and the European Parliament’s powers in the subsequent stages of the procedure. Therefore, the Parliament and its representatives are legally free to form and to express unilaterally a rather definite view of the person to be named President of the Commission before or during the consultations, however risky or even unwise this may seem.

On the other hand, it follows from the same argument that the European Council is under no legal obligation to defer to the European Parliament’s wish to have a certain *Spitzenkandidat* proposed to it. However, in this regard, two additional aspects merit further attention which, at first view, could tilt the balance in favour of the Parliament. First, under Article 17(7) TEU, the European Council is bound to take “into account the elections to the European Parliament”. While these words are somewhat more precise in a few other languages of the Treaty which refer to the result (“das Ergebnis”, “el resultado”) of the elections and not merely to the elections themselves, this requirement appears still open enough to accommodate a decision of the European Council not to propose a parliamentary *Spitzenkandidat*, but to choose a candidate based on its own interpretation of the will of the European

voters (hoping that a majority of the Parliament will eventually come round to this view). Second, the argument has been made that respect for the Union's foundation on representative democracy (Art. 10(1) TEU) legally requires the European Council to propose a particular candidate if this is the will of a clear majority of the Parliament. But there is little reason to believe that such a subordination of the European Council is dictated by the Union's commitment to democracy. Rather, as Article 10(2) TEU indicates, the European Parliament and the European Council are put on an equal footing. Against this background, under the law as it stands, it appears hardly probable that the Court of Justice, if called upon to decide on these issues in a dispute between the Parliament and the European Council over the selection of the President of the Commission, would give precedence to one of the parties.

... and the (possible) future

However, this does not preclude the emergence of a *Spitzenkandidaten* practice that will eventually solve the constitutional *non liquet*. At present, this time has not yet come. The nomination of Jean-Claude Juncker by the European Council can hardly be interpreted as a submission by the European Council to the *Spitzenkandidaten* concept, but is still the outcome of a typical inter-governmental process in which support for Mr Juncker by a qualified majority of the Heads of State and Government was linked to an agreement on "the strategic agenda of key priorities for the next five years"⁸ and seems to have been driven by diverse factors such as domestic considerations or the anticipation of a quid pro quo, but not mainly by respect for the Parliament's position. However, if such a procedure became a recurring feature of the European elections this could be different. Having been made aware of the impact of this idea by the events in 2014, Heads of State and Government who acquiesce in their respective parties' election campaigns using *Spitzenkandidaten*, and even those who haven't but face electorates whose voting decisions were influenced by *Spitzenkandidaten*, would then find it near impossible to deny the winner their support without severely damaging their democratic credibility.⁹ As a consequence, the European Council's

8. Conclusions of the European Council (26/27 June 2014), EUCO 79/14, <www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/143478.pdf> (last visited 30 June 2014).

9. Some believe that this would already have been the case in the present situation if Jean-Claude Juncker had not been proposed by the European Council; see an interview with Jürgen Habermas, "Europa wird direkt ins Herz getroffen", *Frankfurter Allgemeine Zeitung*, 30 May 2014, p. 9. However, it seems that such a strong link between the decision of a Head of State or Government about the proposal of a successful *Spitzenkandidat* and his or her

power to choose a candidate would be reduced to proposing the *Spitzenkandidat* who is most likely to be supported by a majority of the Parliament. If such a scenario prevailed only hard-nosed believers in a “petrified” constitution would not attach any normative significance to it. By their own actions, the Parliament and the European Council would then have defined their constitutional relationship under Article 17(7) TEU.

Whether this would be a welcome development is not an easy question to answer. To begin with, there is an obvious upside for the democratic legitimacy of the EU. The rise of democracy in the history of Member States is rife with memories of parliamentary struggles against monarchic prerogatives, and at least some of them led to constitutional change. To be sure, such analogies are elusive, and we are as far from juxtaposing autocratic rulers and the European Council as we are aware of the criticism that, due to the distortions caused by degressive proportionality, the European Parliament is not an ideal representative of European voters. But it seems that democracy, like justice, is something that must not only be done, but must also be seen to be done, and in this regard the *Spitzenkandidaten* procedure holds a significant advantage over inter-governmental negotiations, however democratically accountable the actors involved may be. That said, it should not be overlooked that a Commission headed by a President owing his or her office to a successful campaign as a *Spitzenkandidat* will quite likely be politicized, even if not necessarily exactly along the left/right faultlines known from national political discourse. This would be an ambivalent development. While it is true that the Commission has gradually become more and more involved in discretionary decisions of a fundamental social and economic nature, which makes it impossible to sustain political neutrality, there is still its technocratic role as guardian of the treaties that would not be in perfect accordance with its status as a politicized institution. It would, for example, certainly not contribute to the acceptance of sensitive State-aid proceedings against a Member State led by a left-wing government if they were initiated by a right-wing Commission. Any shift in the balance between the Parliament and the European Council should consider these repercussions for the work of the Commission. So what has started as a power struggle between the Parliament and the European Council may in the end have to be embedded in a major institutional reform.

democratic credibility can only be made in some Member States such as Germany, where the *Spitzenkandidaten* were highly visible and Mr Juncker enjoyed the support of Chancellor Merkel when named as *Spitzenkandidat*.

Enter the opposition: A new parliamentary game

Turning from inter-institutional aspects to the internal workings of the European Parliament, the results of the recent elections and the events surrounding the nomination of the President of the Commission suggest that we are about to witness the embryonic stages of the evolution of a parliamentary opposition, as has hitherto been unknown in the European Parliament.¹⁰ Compared to the previous Parliament, there is now, on the one hand, a shrinking, but still sizeable majority that is largely supportive of the status quo of European integration and also of the concept of an “ever closer union”. On the other hand, there is a growing minority that is sceptical or outright hostile towards the EU as we know it. It is of course true that this minority consists of various factions with incompatible visions of a society and the common good, reaching from the radical left (such as the Greek *Syriza*) to the extreme right (such as the French *Front National*). Likewise, it is undeniable that the mainstream groups, in particular the centre-right EPP and the centre-left S&D as the largest groups, are not natural allies, considering their often contrary national backgrounds, and they certainly lack the internal homogeneity and discipline of national parties. But decisions such as the vote on the candidate for the presidency of the European Commission are focal points for the formation of roughly “pro-” and “anti-EU” camps, and there will be more occasions to play out an antagonism along these lines that will, to a certain extent, weld together diverging factions of these camps in their respective “Ayes” and “Noes”.

While this is merely an observation on how the new European Parliament may factually develop, there are also legal implications attached to it. In our editorial comments preceding the European elections in 2009, we urged the Parliament to abandon a consensual approach which hides the really important issues, and to implement reforms which put the political debate back in Parliament in order, among other things, to compel the partisans of European integration to justify their views: “Wasn’t the United States first built on the basis of debates between federalists and supporters of the rights of states? Isn’t it better for this debate in Europe to be held within the parliamentary body, rather than remaining underground and appearing only when referendums are held?”¹¹ As the organization of parliamentary debates

10. The lack of a division between a ruling party (or a coalition of ruling parties) and an opposition has commonly been regarded as a distinctive feature of the European Parliament; see e.g. Everling, “The European Union as a Federal Association of States and Citizens”, in von Bogdandy and Bast (Eds.), *Principles of European Constitutional Law*, 2nd ed. (Hart and C.H. Beck, 2010), p. 701, at 711.

11. “Editorial comment: European elections – is the European Parliament important today?”, 47 CML Rev. (2009), 767.

with a formalized succession of short speeches still does not satisfy this need, there is reason to fear that, despite a composition that reflects all colours and shades of the political spectrum, the existing rules and practices of the Parliament prevent the development of a parliamentary discourse that is worth being noticed.

Moreover, beyond the self-organization of the European Parliament, the emergence of an opposition poses constitutional challenges that have so far only been relevant in national contexts. An opposition has to be protected by minority rights in order to be able to contribute to a functioning democracy. In a report published in 2010, the Venice Commission of the Council of Europe counted “procedural rights of information, representation and participation, speaking and voting rights, the right to table bills and motions, rights of supervision and scrutiny of the executive, and protection against mistreatment by the majority” among these rights.¹² Defining these rights and striking the right balance between minority interests and the majority’s interest in an efficient decision-making process is not just a matter of parliamentary self-regulation; it must also be accompanied by constitutional safeguards as an expression of the Union’s foundation on representative democracy. Depending on how the relationship between the majority and the minority in the new Parliament evolves, the development of constitutionally guaranteed rights of a parliamentary minority may in the future be on the judicial agenda.

The EU: Running low on symbolic capital?

The rising tide of Eurosceptic or even plainly anti-European feeling, mobilized by populist parties across the EU, with record results in Member States such as France and the UK, is of course a matter of concern beyond the proper functioning of the European Parliament. The results of the European elections are an unmistakable sign of a growing distrust in the whole project of European integration. Certainly, technical problems of the democratic governance of the Union such as the distribution of powers on the occasion of the appointment of the Commission President and the rights of minorities in the European Parliament appear small and insignificant as compared to this crisis. Any improvements in the democratic legitimacy of the EU do not seem to be enough to compensate the decrease in the binding force of the

12. European Commission for Democracy through Law (Venice Commission), *Report on the Role of the Opposition in a Democratic Parliament*, adopted by the Venice Commission at its 84th Plenary Session (Venice 15-16 October 2010), para 11; available at <www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD%282010%29025-e> (last visited 22 June 2014).

foundational vision of European integration as a peace project, which is kept barely alive in ritual acts of remembrance of the wars that preceded it, as we are witnessing in 2014. With memories of former atrocities fading away and no other overarching mission in sight, the outlook seems bleak. But such an impression may be deceptive. Once again borrowing from Bourdieu's analysis of the State, our collective belief in an authority with legitimate power does not necessarily depend on a shared vision, but on countless great and small acts by which the "symbolic capital" is accumulated and maintained that allows a State to exercise legitimate power. So even if the election results indicate that the EU is running low on symbolic capital, there is hope that the work of its politicians, judges, civil servants and lawyers will be able restore it little by little, in a myriad of small steps.