

The role of Parliaments in international affairs: fostering democracy through the oversight of governmental action

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1. Introduction. The role of Parliaments in international affairs: overcoming the idea of an 'executive dominance'

International affairs as a policy area comprising issues of security, defence and diplomacy is traditionally regarded as a field of executive dominance, differently from domestic policy. Historically, the Executive has conducted international relations through bilateral confidential diplomacy¹, while it was to Parliaments simply to ratify international agreements. Only a few prominent Houses (such as the Senate of the United States) enjoyed a stronger role in foreign affairs.

In the XXth century, the increase of multilateral cooperation and the establishment of international organisations determined a flourishing of intergovernmental relations. Within international institutions, Governments negotiate and adopt agreements without prior consultation of parliaments, which only intervene in the ratification and implementation of treaties and governmental decisions.

This situation is still topical. Nowadays the decision-making powers of Parliaments *vis-à-vis* intergovernmental relations in the international sphere are limited, formally and substantially². Against this framework, part of the literature has underlined the existence of a "a democratic deficit in world politics" hindering the legitimacy of international organisations according to democratic standards³.

However, over the decades parliaments have managed to develop procedures aimed at gaining space for manoeuvre in the sphere of intergovernmental relations⁴. Rather than insisting for direct decision-making power, they have developed the capacity to examine, verify, question, debate, support, influence, challenge, criticise, amend and censure governmental proposals, decisions and actions. Parliaments have established oversight procedures in different stages of policy-making which include a large variety of tools. National Parliaments of EU Member States use many of these procedures to oversee governmental EU policies.

The oversight function performed by Parliaments in international affairs has contributed to hold Governments to account for their intergovernmental activity, engaging them in a 'two-level game' of

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¹ On the executive prerogative (the so called 'Crown prerogative') in foreign affairs in the British legal tradition, see Bradley, AW and Ewing, KD, *Constitutional and Administrative Law* 15th ed (London, Longman, 2011) 233 and 309 ff.

² See Riesenfeld, SA and Abbott, FM, *Parliamentary participation in the making and operation of treaties: a comparative study* (Dordrecht, Kluwer Academic Publishers, 1994). Carstairs, C and Ware, R (eds), *Parliament and International Relations* (Bristol, Open University Press, 1991).

³ Moravcsik, A, 'Is there a 'Democratic Deficit' in World Politics? A Framework for Analysis' (2004) 39 *Government and Opposition* 336 ff.

⁴ Andrés, M and Stavridis, S, 'Parliaments and Parliamentarians as International Actors' in B Reinalda (ed), *The Ashgate Research Companion to Non-State Actors* (Farnham, Ashgate, 2011) 101.

parliamentary oversight. Scholars have traditionally used a ‘two-level’ model to describe the influence of domestic constraints, related to parliamentary participation in the ratification of treaties, on the bargaining processes in which national governments engage in the international arena⁵. These studies have contributed to highlight that the preferences of domestic (parliamentary) actors do count for executives involved in intergovernmental cooperation.

It could also be argued that the ‘two-level game’ describes the approach of Parliaments engaging in the oversight of governmental foreign policy. In the international sphere, Parliaments tend not only to scrutinise (*ex ante*) and oversee (*ex post*) their own Governments’ decisions and actions; they are also interested to have an influence on intergovernmental decision-making, because that the results of intergovernmental activities affect their sovereignty in the national domain. Following the game-theory, holding the executive accountable for its performance at the intergovernmental level might expand Parliament’s win-set and offer political leverage *vis-à-vis* the executive and public opinion in the domestic arena⁶. Party strategies and oversight incentives relating to two-level international cooperation have also been hypothesized drawing on the principal-agent theory⁷.

From a constitutional point of view, however, the possibility for National Parliaments to engage in a two-level game is not always apparent. It requires a permanent multilateral organisation with a structured intergovernmental dimension. It reaches its maximum development in the EU supranational architecture⁸, due to the existence of a double circuit of legislative-executive relations linking national parliaments not just to their own Governments, but also to the institutions of the EU fragmented executive. In other international organisations, by contrast, the intervention of national parliaments in the intergovernmental sphere is always mediated by national Governments. This structural difference contributes to explain why procedures established for the scrutiny of EU affairs differ from those used for the scrutiny of international affairs⁹.

The lack of research on the legislative-executive relations in the international domain has thus led part of the literature to question whether the traditional ‘executive dominance’ thesis is supported by empirical evidence¹⁰.

In comparative terms, the capacity of National Parliaments to engage in the oversight of international policy depends on a variety of legal and pre-legal factors. On the one hand, it is determined by the type and intensity of formal constitutional powers vested on the parliament *vis-à-vis* the Government in

⁵ See Putnam, RD, ‘Diplomacy and Domestic Politics: The Logic of Two-Level Games’ (1988) 42 *International Organization* 427-453; Evans, PB, Jacobson, HK and Putnam, RD (eds), *Double-edged diplomacy: International bargaining and domestic politics* (Berkeley, University of California Press, 1993); Mo, J., ‘The logic of two-level games with endogenous domestic coalitions’ (1994) 38 *Journal of Conflict Resolution* 402-422.

⁶ In a parliamentary system, conditions influencing the two-level game are identified by Pahre, R, ‘Endogenous domestic institutions in two-level games and parliamentary oversight of the European Union’ (1997) 41 *The Journal of Conflict Resolution* 148 in the “problem of hand tying”, related to the fact that “the same parties make up the legislature, choose a government, and form an opposition”. It is appropriate to treat executive preferences as exogenous only for a directly elected executive.

⁷ Raunio, T and and Wagner, W, ‘Towards Parliamentarisation of Foreign and Security Policy?’ (2017) 40 *West European Politics* 1-19, spec. 8 f.

⁸ Following the recent fortune of parliamentary scrutiny in the EU architecture, literature focusing on the role of National Parliaments in the scrutiny of EU affairs is extensive; *ex multis*, see Auel, K, ‘Democratic Accountability and National Parliaments: Redefining the Impact of Parliamentary Scrutiny in EU Affairs’ (2007) 13 *European Law Journal* 487 ff.; Sprungk, C, ‘Even more or even better scrutiny? Analysing the conditions of effective national parliamentary involvement in EU affairs’ (2010) 14 *European Integration online Papers*; Karlas, J, ‘National Parliamentary Control of EU Affairs: Institutional Design after Enlargement’ (2012) 35 *West European Politics* 1095 ff.; Auel, K, Rozenberg, O and Tacea, A, ‘To Scrutinise or Not to Scrutinise? Explaining Variation in EU-Related Activities in National Parliaments’ (2015) 38 *West European Politics* 282 ff.

⁹ A connection between these two fields lies in the idea, supported by Fitzmaurice, J, ‘National parliaments and European policy-making: The case of Denmark’ (1976) 76 *Parliamentary Affairs* 282, that a strong tradition of parliamentary involvement in the foreign policy making process is a pre-requisite for the establishment of a successful system of national parliamentary control of EU affairs.

¹⁰ Raunio and Wagner, *supra* at 6, 1 ff.

international affairs. On the other hand, it is influenced by the executive-party dimension¹¹, the party system, the system of political-party incentives faced by parliamentarians¹², the accessibility of information, the availability of adequate administrative structures, the relationship with external independent authorities acting in support for parliamentary investigation. In short, it is deeply affected by the standard oversight capacity that the Parliament is able to exercise in respect to the executive.

Both the legal and pre-legal factors can only be understood within the reference form of government, which explains, for example, why foreign powers of the US Congress¹³ do not find correspondence in systems featuring a confidence relationship between the legislative and the executive.

Given the existence of a variety of influencing conditions, to evaluate concretely the effectiveness of parliamentary oversight of international affairs one can focus on the three dimensions used by part of the literature to assess national parliamentary participation in EU policy-making¹⁴.

The first dimension is the timing of, and access to relevant information related to intergovernmental cooperation and co-decision. It is assumed that parliaments are more likely to exercise an effective and intense oversight of international affairs if they intervene prior to intergovernmental decisions, rather than afterwards.

The second dimension consists of the tools and procedures supporting the oversight of international affairs. These are usually derived from the general oversight toolbox available to parliaments, including questions, hearings, reports, inquiries, opinions, resolutions and mandates. Other informal practices may develop in response to concrete oversight requirements.

Finally, the third dimension is associated to the transparency and publicity of intergovernmental oversight processes. Under certain conditions, higher standards of publicity provided through the accessibility of parliamentary acts and debates can foster governmental accountability in international policy-making. By contrast, under other conditions, privacy of meetings and confidentiality of informations are necessary preconditions for allowing members of parliament to be acquainted on the status of intergovernmental negotiations and diplomatic relations.

These three dimensions are used as a reference background in the paper in order to assess the oversight role of parliaments in the international domain, focusing on foreign policy. The comparative analysis (§ 2), based on selected national cases adopted as reference benchmark (Denmark, France, Germany, Italy, Spain, Sweden, and the UK¹⁵), is aimed at evaluating the different forms of oversight that Parliaments can exercise in foreign policy and at highlighting their intrinsic political nature. Issues of effectiveness are also taken into consideration, by focusing on the three above mentioned dimensions.

Based on this comparative analysis, § 3 questions the respective role of politics and jurisprudence in setting the executive-legislative balance of powers in foreign affairs. Insights from benchmark countries confirm the difference between an interpretive and a noninterpretive judicial review of political relations in foreign affairs; these premises are reassessed in § 3.3. to critically discuss the *Miller* case¹⁶ as a form of judicial reinterpretation of Parliament's scrutiny of foreign affairs.

¹¹ Parliamentary oversight reveals distinctive enforcing mechanisms in majoritarian and consensus democracies, according to the party system and the political structure of the Government. See Lijphart, A, *Patterns of democracy* (New Haven, Yale University Press, 1999).

¹² Whereas domestic politics is permeated by party-political conflicts, the common sense of national unity often makes it easier to build consensus over foreign policy issues, thus setting aside ideologies in favour of the national interest. However, as highlighted by Raunio and Wagner, *supra* at 6, 5, the internationalisation of political issues traditionally left at the remit of domestic actors and the politicisation of international relations have augmented the electoral relevance of foreign affairs.

¹³ On the prerogatives conferred to the US Congress in foreign, security and military policy and on their historical evolution, featured by the setting of increasingly tighter, preventative limits to presidential action, see Milner, HV and Tingley, D, *Sailing the Water's Edge: The Domestic politics of American Foreign Policy* (Princeton, Princeton University Press, 2015); Campbell, CC and Auerswald, DP (eds.), *Congress and Civil-Military Relations* (Washington DC, Georgetown University Press, 2015).

¹⁴ Rozenberg, O and Hefffler, C, 'Introduction' in C Hefffler, C Neuhold, O Rozenberg and J Smith (eds) *The Palgrave Handbook of National Parliaments and the European Union* (London, Palgrave Macmillan, 2015) 11 ff. These dimensions are adopted in the paper as a reference toolbox for assessing the effectiveness of parliamentary scrutiny of intergovernmental relations in multi-level policy systems.

¹⁵ Comparative data mainly focus on the experience of Lower Houses. However, issues of major relevance concerning the participation of Upper Houses in foreign policy are occasionally taken into consideration.

¹⁶ R (*Miller*) v *Secretary of State for Exiting the European Union* Supreme Court Judgment (2017) UKSC 5.

2. How Parliaments oversee governmental foreign policy at domestic level: a comparative overview

Parliamentary oversight of foreign policy can take the form of three procedural schemes: preventative scrutiny to influence governmental action beforehand; *ex post* oversight aiming at holding the government to account for its past decisions; informative control providing citizens with increased levels of transparency.

The following paragraphs aim at demonstrating that the oversight toolbox available to parliaments in the foreign policy area is not entirely derived from the tools and procedures applicable to domestic matters¹⁷. On the one hand, even ‘ordinary’ oversight procedures and practices (such as questions, debates, inquiries, hearings), when applied to foreign affairs, acquire a distinctive institutional relevance, due to the two-level nature of international cooperation and the confidentiality normally implied by intergovernmental negotiations. On the other hand, the need to cope with the traditional executive dominance in foreign matters has enabled parliaments to acquiring means of influence/control over policy-making that are unique to this sector.

Figure 1 offers an overview of most relevant sectorial oversight tools handled by Parliaments of the reference benchmark in the foreign policy field¹⁸.

2.1. Preventative scrutiny tools

In foreign policy, Parliaments can count on a variety of preventative scrutiny tools. Many are derived from the general oversight toolbox. They include the adoption of resolutions and motions to address political directions and guidelines to the Government, and others. MPs also make frequent use of questions to force the Government to sharing information or stating its position on specific foreign policy issues. Inquiries might as well be triggered to provide Parliaments with investigative prerogatives on selected foreign affairs.

Apart from standard oversight tools, over the decades Parliaments have developed other sectorial procedures and practices unique to this sector. The most influential preventative scrutiny tools are those related to the treaty-making process (see *infra* 2.2.). However, Parliaments may resort to other ‘preventative’ tools for scrutinising governmental action in foreign policy before any formal decision is adopted.

Many of these *ex ante* scrutiny tools are embedded in the daily activity of foreign affairs committees¹⁹. Their continuous relationship with government representatives offers the opportunity of formal and informal interaction on foreign policy upcoming issues. These contacts are usually developed in private meetings, close to the public (unlike in the French National Assembly). Committees may have access to confidential information concerning ongoing diplomatic relations, treaty negotiations or other forms of governmental engagement in foreign affairs. These inputs may be debated in committee to draft reports addressed to the plenary.

For instance, according to the *Riksdag* Act, the Committee on Foreign Affairs of the Swedish Parliament is required to prepare matters concerning: the relations and agreements of the Realm with other states and international organisations; Swedish representation abroad and development assistance; and other matters concerning foreign trade and international economic cooperation, provided that these matters do not fall within the competence of other committees²⁰. In these areas, the committee prepares a report that serves as a basis for debate and decision in the Chamber²¹.

¹⁷ Contra, Raunio and Wagner, *supra* at 6, 12.

¹⁸ For a comparative overview, see also the Inter-parliamentary Union Parline Database on National Parliaments (<http://www.ipu.org/parline-e/parlinesearch.asp>) - ‘National reports on oversight of foreign affairs’. For an exhaustive list of the oversight tools and procedures supporting National Parliaments’ participation in foreign policy-making, see also the Report by the Inter-Parliamentary Union to the Second World Conference of Speakers of Parliaments, New-York, 7-9 September 2005, ‘Parliamentary Involvement in International Affairs’ (<http://www.ipu.org/splz-e/sp-conf05.htm>).

¹⁹ On the exercise of the scrutiny function by standing committees, see Fasone, C, *Sistemi di commissioni parlamentari e forme di governo* (Padova, Cedam, 2012).

²⁰ The Committee on Foreign Affairs also prepares matters concerning appropriations falling within expenditure areas ‘Foreign policy administration and international cooperation’ and ‘International development cooperation’. See the

The Danish *Folketing's* Foreign Policy Committee - due also to its special status, settled in the Act on the Foreign Policy Committee (Act. no. 54 of 5 March 1954) - enjoys reinforced information prerogatives²². The Government is bound to discuss with the Committee, in camera²³, matters of importance to Denmark's foreign policy.

The Foreign Affairs Committee of the German *Bundestag*²⁴ enjoys a large variety of oversight tools and procedures in foreign policy²⁵. It is the main, but not the sole parliamentary body in charge of the scrutiny of governmental foreign policy, which often falls under the scope of sectorial committees. Compared to the other standing committees of the *Bundestag*, it is a 'necessary' commission enjoying a special constitutional status, directly provided by 45.a of the Basic Law. Differently from plenary sittings, its meetings are held in camera²⁶.

The committee is entitled to be adjourned on the state of governmental action in the different areas of German foreign policy; however, over the decades, there have been shortcomings in the Government's capacity to fulfill these duties²⁷.

Issues of foreign policy are ordinarily dealt by two standing committees of the Spanish *Congreso de los Diputados*: the 2nd Committee on Foreign Affairs and the 19th Committee on International Cooperation for Development. The establishment of a permanent, non-legislative committee on matters relating to the international cooperation and development was foreseen by art. 15.3 of Act No. 23/1998 dated 7 July, highlighting the political relevance of cooperation policy²⁸. Additionally to the general oversight tools provided by art. 44 of the *Congreso's* Rules of procedures, and shared with other standing committees, the 19th Committee enjoys additional informative prerogatives, foreseen by art. 15.3 of the Act No. 23/1998²⁹.

A peculiar prerogative of the Foreign Relations Committee of the French National Assembly is the right to engage in extensive hearings of the Minister for Foreign Affairs, to be held approximately once every five or six weeks. Hearings, like all the activity of the committee in foreign affairs, are held in open sessions. Moreover, the National Assembly, by common practice, does not usually enable to start

Supplementary Provision 4.6.6. to the Rules of procedures (*Riksdag* Act). For some empirical data, proving that the international concern of Swedish parliamentary committees has risen over the years, especially in areas traditionally regarded as domestic, see Jerneck, M, Sannerstedt, A and Sjdlin, M, 'Internationalization and Parliamentary Decision-making: The Case of Sweden 1970-1985' (1988) 11 *Scandinavian Political Studies* 169-192.

²¹ Committee reports offer minorities the opportunity to present their alternative proposals (known as reservations) and to have them included in the committee report. For further details on committee work, see Arter, D, *The Scottish Parliament: A Scandinavian-Style Assembly* (New York, Routledge, 2004) 137 ff.

²² The Committee must be informed by the Government on matters relating to foreign policy by receiving relevant memoranda from the Ministry of Foreign Affairs and reports from Danish Embassies.

²³ Consultations between the Government and the Foreign Policy Committee are not open to public and they are subject to strict confidentiality standards.

²⁴ By contrast, in matters of foreign policy, the main function performed by the *Bundesrat* does not lie in the scrutiny of governmental action, but rather in the participation in the treaty-making process. See Tomuschat, C, 'Parliamentary Control over Foreign Policy in the Federal Republic of Germany', in A Cassese (ed.), *Parliamentary Control Over Foreign Policy: Legal Essays* (Alphen aan den Rijn, Sijthoff & Noordhoff International Publishers, 1980) 41 ff.

²⁵ These are based on 'general' oversight prerogatives of the *Bundestag*, as set among others by art. 43 of the Basic Law, which mostly applies to committee meetings. See Majonica, E, 'Bundestag und Außenpolitik', in HP Schwarz (ed), *Handbuch der Außenpolitik* (München, R. Piper, 1975) 122 ff.

²⁶ Secrecy and confidentiality requirements for classified material whose knowledge by unauthorised persons would endanger the security of the Federal Republic of Germany or one of its *Länder*, seriously harm their interests or their reputation or be of great advantage to a foreign state are detailed in the Annex (Rule 2) of the *Bundestag's* Rules of procedure.

²⁷ Some examples are provided in Tomuschat, supra at 22, 34, referring to Government's failure, after 1977, to submit its comprehensive report on the annual sessions of the UN General Assembly.

²⁸ The establishment of this sectorial committee is foreseen in both the Spanish Congress and the Senate, pursuant to the provisions of their respective rules of procedure.

²⁹ Pursuant to art. 15.3 of the Law, the Committee must be informed by the Government on the state of execution and fulfillment of programmes, projects and actions foreseen by the Director Plan and the Annual Plan (the two programmatic documents stating governmental guidelines in the international cooperation respectively for the legislative term and the reference year); moreover, it is adjourned on the evaluation of the cooperation policy and results of the preceding Annual Plan.

a committee of inquiry on foreign affairs or defence issues³⁰. However, since 2000 there has been a frequent use of informative missions (art. 145 of the Rules of procedure), as a common oversight tool aiming at gathering evidence on specific matters relating to French foreign policy³¹.

By contrast, the Foreign Affairs Committee of the UK House of Commons³² usually undertakes inquiries into its area of competence, comprising (according to Standing Order No. 152) oversight of the policy, administration and expenditure of the Foreign and Commonwealth Office. Inquiry powers in foreign policy allow the Committee to obtain documents and records, hear persons and periodically report to the House on the state of the inquiries³³.

In Italy inquiry powers have been used in foreign affairs appointing temporary inquiry committees, most often bicameral. By contrast, the foreign policy standing committees at the Chamber and at the Senate use ordinary oversight toolbox to scrutinise governmental management of foreign affairs³⁴.

Other tools for preventative scrutiny of foreign policy do not directly affect the role and activity of the Foreign Affairs Committee. One of this relates to the participation of parliamentary delegations in intergovernmental meetings, on the base of written rules or informal practices enabling MPs to be part of governmental delegations in international conferences or other multilateral or bilateral meetings. Parliamentary involvement at this stage may offer the opportunity to get direct and timely access to privileged and confidential information concerning the state of foreign affairs. Moreover, it may support forms of MPs' direct dialogue with governmental representatives that may result in early reconsideration or reframing of the national position in the intergovernmental sphere.

In Denmark, MPs can participate in intergovernmental meetings at the request of Government³⁵. Also in France, parliamentarians from both Houses regularly attend intergovernmental meetings at the Government's initiative. A parliamentary delegation is always present at the UN General Assembly and at the WTO Conferences. Moreover, parliamentary delegations usually join most relevant foreign missions involving the President of the Republic, the Prime Minister or the Minister for Foreign Affairs. In the UK, the participation of a parliamentary delegation to an intergovernmental conference entirely depends on the initiative of the Government. It is up to the Government to appoint members of the delegation; however, the executive might choose to allow the Houses to make proposals through non-binding resolutions.

Another form of preventative scrutiny, mainly in Nordic Countries, consist in the establishment of sectorial parliamentary advisory bodies competent on foreign affairs. Such bodies may serve as a source of privileged and confidential information, although subject to secrecy requirements, and as a mean for addressing opinions to the government prior to any strategic decision at the international level.

³⁰ One reason behind this practice lies in the provision (art. 5-bis of the Ordinance No. 58-1100 of the 17 November 1958, as modified in 2000) that special or standing committees can hear any persons they may deem necessary, exception made for those matters under a secrecy regime or regarding the national defence, foreign affairs, the internal or external State security. On the limits to the information and enquiry power, see also Thiers, E, 'Le contrôle parlementaire et ses limites juridiques: un pouvoir presque sans entraves' (2010) 134 *Pouvoirs* 71-81. The practice has acknowledged some exceptions over the decades. See for instance the Inquiry Committee on the conditions to set free some Bulgarian nurses and medical professionals prisoners in Lybia and on the recent French-Lybic agreements, created the 27 October 2007.

³¹ On the use of the informative missions in foreign policy, see Brana, P, 'Retour sur la Mission d'information parlementaire française sue les événements de Srebrenica (2001)' (2007) 65 *Culture & Conflicts* 52-61.

³² The House of Lords does not have a standing committee responsible for the oversight of foreign policy.

³³ Scrutiny of foreign policy is performed also by other committees (among others, the Liason Committee, the Joint Committee on Human Rights, composed of members from both Houses and the Intelligence and Security Committee). Although they face resource constraints, Committees still prove an efficient scrutiny tool in the UK tradition in foreign affairs, as they take evidence from the government binding its members to provide timely responses (on this point, see Weir, S (ed), *A World of Difference. Parliamentary Oversight of British Foreign Policy. A Report by the Democratic Audit, the Federal Trust and One World Trust* (London, One World Trust, 2007) 8.

³⁴ On the role of Italian parliamentary committees in the scrutiny of foreign policy, see Cassese, A, *Parlamento e politica estera: il ruolo delle Commissioni Affari esteri* (Padova, Cedam, 1982) and Longo, F, *Parlamento e politica estera: il ruolo delle commissioni* (Bologna, Il Mulino, 2011).

³⁵ Following a consolidated parliamentary practice, every year the *Folketing* appoints, in two rounds, twelve MPs (six for each round) delegated to participate in the government delegation representing Denmark at the UN General Assembly held every autumn in New York.

It is the case of the Swedish Advisory Council on Foreign Affairs, chaired by the Head of State and composed by the Speaker and nine other MPs elected by the *Riksdag* for the entire electoral period³⁶. The Government must regularly inform the Council on any foreign policy issue of specific relevance for the security of the country and to consult the body before taking any decision of major importance. Highly restrictive confidentiality requirements are provided to grant respect of foreign policy's secrecy standards³⁷.

By contrast, art. 19.3 of the Danish Constitution Act entrusts the standing Foreign Affairs Committee of the *Folketing* with the prerogatives of an advisory body in foreign policy. The government is required to consult the Committee before making any decision of major importance in foreign policy. In line with this constitutional prerogative, the Committee enjoys a special status, laid down by statute.

In the French Parliament, in October 2008, it was established a temporary working group with a sectorial competence on the international financial crisis, upon initiative of the National Assembly and the Senate. The body was expected to make proposals on how to face the international financial and economic crisis and hence allow a parliamentary contribution to the definition of the French national position in the G20 intergovernmental meetings. During its mandate, it has released three reports, two in preparation for the November 2008 and the September 2009 G20 meetings and one intermediate³⁸.

2.2. The role of Parliaments in treaty-making: preventative scrutiny and *ex post* oversight

In most Western democracies, treaty-making is a prerogative of Governments, but Parliaments have their say in scrutinising or overseeing governmental action. Parliamentary prerogatives, based on the Constitution or the law, range from the power to sanction treaties under negotiation and demand the government to issue reservations to the power to approve treaties signed by the government. In some countries the Parliament is responsible for the adoption of international law into domestic law.

Tools and procedures offered to National Parliaments in treaty-making vary significantly depending on a number of factors. One influencing factor is the dualist or monist nature of the relationship between international law and the domestic legal system³⁹.

In monist systems, where international treaties do not need to be implemented through domestic legislation, the executive is usually bound to have the approval of the Parliament prior to assuming any binding international commitments. The rationale is preventing that through its treaty-making power the executive unilaterally alters domestic legislation. By contrast, in dualist systems, prior parliamentary authorisation is less common: Parliaments do intervene in a later stage, after the treaty is concluded, before its ratification⁴⁰.

Comparison shows that the dichotomy monist-dualist is far from clear cut. However, it is useful to highlight that the participation of parliaments could take the form of *ex ante* scrutiny or *ex post* oversight of international treaties. The cleavage between the two dimensions is represented by the timing of the legislative involvement, that could precede or follow the formal signature of the treaty.

³⁶ By contrast, according to Supplementary Provision 8.8.1 to the *Riksdag* Act, the Secretary of the Council is appointed by the Government. Rules on the convocation of the Council and the conduction of proceedings are set by Chapter 13, Article 2 of the Instrument of Government.

³⁷ According to art. 7 of the *Riksdag* Act, the Advisory Council on Foreign Affairs meets behind closed doors. The Prime Minister may permit a person other than a member, deputy member, minister or official to be present. A member, deputy member or official present for the first time at a meeting of the Advisory Council on Foreign Affairs shall affirm that he will abide by the obligation to observe silence.

³⁸ See Marsac, JR, 'Intervention' in Assemblée parlementaire de la Francophonie, *Actes du séminaire parlementaire sur les pouvoirs de contrôle et d'information des Parlements en matière internationale, le financement des partis politiques, la fonction publique parlementaire et la communication parlementaire. Bujumbura (Burundi), les 26 et 27 novembre 2009* ([http:// apf.francophonie.org](http://apf.francophonie.org))

³⁹ On the main features of these two systems, see Fiesler Damrosch, L. and Murphy, SD, *International Law: Cases and Materials*, VI ed. (St. Paul, West Academic Publishing, 2014) 621 ff. On the conventional nature of the dichotomy, which does not find full correspondance in the practice due to the existence of systems combining elements of the dualist and of the monist approaches, see Crawford, J, *Brownlie's Principles of Public International Law*, VIII ed. (Oxford, Oxford University Press, 2012) 50.

⁴⁰ For a comprehensive comparative empirical analysis of the role of Parliaments in treaty-making, see Verdier, PH and Versteeg, M, 'International Law in National Legal Systems: an Empirical Investigation' (2015) 109 *The American Journal of International Law* 514-533.

In a number of countries, parliamentary intervention precedes negotiations by governments and can hence be classified as a form of preventative scrutiny⁴¹.

In both cases, the Parliament is usually unable to condition governmental negotiations. The role during treaty negotiations of the US Senate through ‘consultations’, based on a long-standing tradition, leads to the conditional approval of the treaty by the Senate⁴² and does not find similar models in European-style democracies. Parliaments in Europe are not usually formally involved in shaping the text of the treaty, as they only have the power to approve or reject it as a whole. However, some formal tools (such as reservations) or informal practices (inter-branch bargaining with the government) may offer to assemblies the opportunity to play an influence on the government.

For instance, in Sweden the *Riksdag*'s approval is required before the Government concludes an international agreement which is binding upon the Realm if the agreement requires the amendment or abrogation of an act of law or the enactment of a new act of law; or if it otherwise concerns a matter to be decided by the *Riksdag*. In such cases, if a special procedure is required for the decision of the *Riksdag*, the same must be applied in approving the agreement⁴³.

The *Riksdag*'s approval is also required if the agreement is of major significance⁴⁴: in this case, the Government may act without obtaining the *Riksdag*'s approval if the interests of the Realm so require, conferring with the Advisory Council on Foreign Affairs before concluding the agreement⁴⁵. The procedure clearly gives the Parliament a strong influence over treaty-making⁴⁶: although it does not have any formal right to amend treaties, in practice their approval can be subject to specific conditions. For more important treaties, the *Riksdag* is consulted during negotiations and it can vote a resolution to demand the Government either to modify its position or to cease the negotiation. These decisions may be binding, depending on the nature of the treaty. In any case, a motion of censure may be used if the Government does not comply with the political directions voted by the Parliament⁴⁷.

Special constraints are provided for the transfer of decision-making authority to a foreign or international body outside the framework of the EU cooperation. This transfer is subject not just to substantial limits⁴⁸ but also to a special procedure, based on a decision by the *Riksdag* supported by not less than three quarters of those voting and more than half the total membership vote⁴⁹.

⁴¹ In theory, the tradition of parliamentary preventative intervention in treaty-making could be considered typical of monist states, where treaty provisions are directly incorporated into domestic law. However, in the practice, as the distinction between dualist and monist approaches is losing significance, this assumption is less explicative. As a matter of facts, Sweden itself belongs to the dualist tradition and even Denmark is not explicitly monist. Grimheden, J, ‘The self-reflective human rights promoter’, in J Grimheden and R Ring (eds), *Human Rights Law: from Dissemination to Application. Essays in Honour of Göran Melander* (Leiden, Martinus Nijhoff Publisher, 2006) 120.

⁴² This tradition dates back to George Washington’s consultation with the Senate during the negotiation of his first treaty with Southern native americans. Consistently with this tradition, the Senate Committee on Foreign Relations can propose amendments to a treaty; in this case, the President must decide whether to accept the conditions and renegotiate the treaty or to abandon it. In the practice, multilateral treaties’ renegotiation is usually considered infeasible, because it involves a large number of countries; by contrast, some bilateral treaties have been renegotiated after Senate consideration. In a few cases, the treaty was abandoned as reservations or amendments proposed by the Senate were unacceptable either for the President or for other signatory parties. See Kennedy, KC, ‘Conditional Approval of Treaties by the US Senate’ (1996) 19 *Loyola International & Comparative Law Journal* 89-93; US Congressional Research Service, *Treaties and Other International Agreements: The Role of the United States Senate* (106th Congress, Committee Print, January 2001).

⁴³ See Chapter 10, art. 3.1 and 3.2 of the Swedish Instrument of Government.

⁴⁴ Treaties involving human rights, defence alliances, changes in criminal law, environmental and association agreements usually fall within this category. See Cope, NL, ‘Treaty law and national legislative politics’, in W Sandholtz, CA Whytoc, *Research Handbook on the Politics of International Law* (Cheltenham, Edward Elgar Publishing, 2017) 116 ff.

⁴⁵ Chapter 10, art. 3.3 of the Instrument of Government.

⁴⁶ On the Swedish *Riksdag*'s strong power of control on governmental foreign policy, see Stromholm, S (ed), *An introduction to Swedish Law*, Vol. 1 (New York, Springer, 2013) 67; Matz, J, ‘Parliamentary decision making and foreign policy: Sweden's participation in international armed missions and the crucial role of the Riksdag’ (2013) 33 *Parliaments, Estates and Representation* 186-201.

⁴⁷ Cameron, I, ‘Swedish Parliamentary Participation in the Making and Implementation of Treaties’ (2005) 74 *Nordic Journal of International Law* 429-458.

⁴⁸ See Chapter 10, art. 7.1. and 7.2. of the Instrument of Government. The transfer requires explicit support in fundamental law.

⁴⁹ Chapter 10, art. 6.2. of the Instrument of Government.

The Danish Folketing has a similar role in international treaty-making by⁵⁰: it must approve beforehand any international obligation which for fulfilment requires the concurrence of Parliament or which is otherwise of major importance⁵¹. By common practice, the Ministry of Foreign Affairs confers with the Parliament while negotiating the treaty: this is not a constitutional duty, as a binding mandate system is limited to negotiations in the European Council or in the EU Council of Ministers and does not apply to extra-EU negotiations. However, the Minister usually presents the position of the government and answers questions in the Committee for Foreign Policy. Committee's views are not binding on the government but they may implicitly be considered political conditions for the ratification of the treaty. As soon as negotiations are concluded, the treaty is laid before Parliament for ratification and implementation.

The Committee on Foreign Policy, after having examined the treaty, issues a report with recommendations to the plenary. In Germany, the conclusion of specific categories of international agreements is subject to prior parliamentary approval; this is the case of treaties involving 'political relations' of the State or relating to subjects of federal legislation⁵². The identification of the agreements subject to this prior parliamentary authorisation is uneasy to define legally, due to the ambiguity of the expression 'political relations' (on this point, see *infra* § 3.1.).

There is no compulsory involvement of the Parliament in the negotiations' stage that, according to art. 32 of the Basic Law, is the sole responsibility of the government. When negotiations are pending, the Parliament cannot object to international treaties but competent committees may address non-binding recommendations to the plenary⁵³.

When negotiations have been formally closed, the Parliament cannot table any amendment to the treaty⁵⁴, although it may reject it altogether. The approval of the Parliament is binding for the adoption of the treaties and for their transposition into the domestic legal system. In accordance with Article 59.2 of the Basic Law, the Federal President can submit the formal approval of the treaty to the other negotiating partners only once the treaty has been approved by the *Bundestag* and the *Bundesrat*. The consent is given in the form of a federal law⁵⁵. The procedure follows the ordinary *iter legis*; however, the plenary may only adopt or reject the whole proposal⁵⁶, without amending it or picking some parts⁵⁷. The Spanish system, due also to its monist approach to international law, endows the *Cortes generales*⁵⁸ with a large variety of scrutiny powers and tools with respect to treaty-making⁵⁹. In a number of cases,

⁵⁰ Although in Denmark the relationship between international and domestic law is not explicitly regulated in the Constitution, international obligations must be formally 'translated' into domestic law by means of internal legislation, approved by the Parliament. Consequently, it is considered as a dualist system. See Gulmann, C, 'The Position of International Law within the Danish Legal Order' (1983) 52 *Nordisk Tidsskrift for International Ret* 45-53.

⁵¹ Art. 19 of the Constitution. This implies that the majority of foreign policy decisions regarding agreements with other countries must be approved by Parliament. See Thorpe, S, 'Denmark', in R Gaebler and S Alison (eds), *Sources of State Practice in International Law*, II ed. (Leiden, Brill Nijhoff, 2014) 179.

⁵² See art. 59 of the Basic Law. Following art. 32, foreign affairs fall under the exclusive competence of the Federation; however, before the conclusion of a treaty affecting the special circumstances of a *Land*, that *Land* must be consulted in timely fashion.

⁵³ On the political influence that these recommendations, regardless of their non-binding nature, can exert on the Government, directing the decision-making process in the plenary, see Deutscher Bundestag, 'Parliament's Role in International Treaties' (2017) WD 2 – 3000 – 038/17 (<https://www.bundestag.de/blob/.../wd-2-038-17-pdf-data.pdf>). By contrast, committees rarely make use of the alternative tool, consisting of sending a letter to the Government describing the political and legal view on negotiated questions.

⁵⁴ Art. 82.2 Rules of Procedure of the German *Bundestag*.

⁵⁵ A federal law is also required in case of transfer of sovereign powers to international organisations or integration into a system of mutual collective security (art. 24.1. -24.2 of the Basic Law).

⁵⁶ On this point, see *infra* § 3.

⁵⁷ Following art. 78 of the *Bundestag*'s Rules of procedure, moreover, the approval of these laws is subject in the *Bundestag* to two (instead of the ordinary three) readings (three readings may be required by decision of the *Bundestag*). Motions for amendments to these treaties are not admissible (art. 82 of the Rules of procedure).

⁵⁸ Powers vested on the *Cortes general* in the treaty-making process provide a rather symmetric role for the two Houses.

⁵⁹ Remiro Brotons, A, 'Comentario a los arts. 93 y 94 de la Constitución', in O Alzaga (ed), *Comentarios a la Constitución española de 1978*, vol. VII (Madrid, Cortes Generales, 1998)491 ff.; Riquelme Cortado, R, 'La tramitación de los tratados

set by art. 94 of the Constitution, prior authorisation of the parliament is a condition for the State to enter any commitment through treaty or other international agreement⁶⁰. In these cases, the *Cortes generales* cannot amend the treaty, but they can introduce reserves or interpretative declarations if the treaty so allows. The legal nature of the parliamentary authorisation is not specified by the Constitution. Although the Rules of procedure of the Houses make reference to the ordinary law-making procedure⁶¹, with some adaptations and limitations⁶², only from the formal point of view can the authorisation be considered a statutory law, as the Parliament lacks substantial power over the treaty⁶³. By contrast, in cases provided by art. 93 of the Constitution (treaties by which powers derived from the Constitution are transferred to an international organization or institution), the authorisation by the *Cortes generales* takes the form of an organic law, to be approved by absolute majority. This reinforced procedure requires therefore a solid parliamentary consensus⁶⁴. Treaties not subject to parliamentary authorisation are submitted to both Houses after being concluded by the Government (art. 94.2 of the Constitution), which is required to comply timely with this duty. In other countries, mostly following a dualist approach to international law, the Parliament intervenes once the Government has concluded the negotiation process and has signed the treaty: at the stage preceding the ratification, the Government lays the treaty before Parliament to obtain its explicit or implicit consent, depending on the applicable rules. Due to the different timeframe, Parliaments following this scheme tend to exercise a form of *ex post* oversight of governmental action. This is the case of France and Italy, where Parliament's intervention takes the form of a law authorising the ratification of selected treaties. In France, a law is required for authorising the ratification of a number of treaties considered of paramount importance, which are listed in art. 53 of the Constitution⁶⁵. The Parliament does not vote the treaty signed by the executive article by article, nor has it the right to amend it. but can only accept

internacionales y el reglamento del Congreso de los Diputados de 1982' (1982) 34 *Revista española de derecho internacional* 409-436.

⁶⁰ These comprise: treaties of a political nature; treaties or agreements of a military nature; treaties or agreements affecting the territorial integrity of the State or the fundamental rights and duties established by the Constitution; treaties or agreements which imply financial liabilities for the State; treaties or agreements which involve amendment or repeal of some law or require legislative measures for their execution.

⁶¹ See art. 155 and art. 156 of the *Congreso's* Rules of procedure and art. 144 of the *Senado's* Rules of procedure.

⁶² The main differences from the ordinary law-making procedure consist of the following. First of all, the initiative is reserved to the Government and it is temporally limited: the Government is required to submit to the two Houses the agreement approved by the Spanish Council of Ministers and the text of the treaty with the proposed reserves and declarations; the submission must occur within 90 days from the approval of the governmental agreement that can be delayed up to 180 days (art. 155 of the *Congreso's* Rules of procedure). In second place, any disagreement between the two Houses shall be solved through a conciliation mechanism based on the appointment of a Mixed Committee; in case of persistent disagreements between the two Houses, the final decision is left to the *Congreso*, by absolute majority (see art. 158 of the *Congreso's* Rules of procedure and art. 145 of the *Senado's* Rules of procedure). Finally, the authorisation is reserved to the plenary following art. 75.3 of the Constitution which prevents international matters from being delegated to standing committees.

⁶³ Some scholars consider it as a sort of legislative delegation to the Government to negotiate and ratify the treaty, following the guidelines approved by the Houses. See Santaolalla López, F, 'La ley y la autorización de las Cortes a los tratados internacionales' (1981) 11 *Revista de derecho político* 29-56 and Serrano Alberca, JM, 'Artículo 94', in F Garrido Falla et al (eds), *Comentarios a la Constitución*, III ed (Madrid, Civitas, 2001) 1475-1488.

⁶⁴ Art. 93 of the Constitution.

⁶⁵ Peace treaties, trade agreements, treaties or agreements relating to international organisations, those committing the finances of the State, those modifying provisions which are the preserve of statute law, those relating to the status of persons, and those involving the ceding, exchanging or acquiring of territory, may be ratified or approved only by an Act of Parliament. They shall not take effect until such ratification or approval has been secured.

or deny the authorisation to the ratification. The Houses cannot amend the text⁶⁶ or propose reserves⁶⁷.

One of the major problems in France is that between the signature and the ratification significant delays may occur⁶⁸. Shortened procedures and simplified practices have hence been introduced.

On the one hand, a shortened procedure was introduced in the Rules of procedure of the National Assembly, enabling the Conference of the presidents of parliamentary groups to avoid preliminary discussions and move directly to the final vote⁶⁹.

On the other hand, the presidents of the Foreign Affairs Committees of the two Houses have agreed on the implementation of a simplified bicameral procedure for the approval of ratification bills: in a *de facto* unicameralism, the rapporteur of the bill already approved by the other House report briefly to its committee. This practice is not binding and it can be at any time reconsidered by the rapporteurs of the Houses.

By contrast, art. 128 of the Rules of procedure of the National Assembly gives the plenary the power to vote a motion to recommit to return the bill authorising the ratification to committee. In these cases, the committee is required to draft a new report. This procedure has been implemented on many occasions, allowing MPs to obtain more information or foster further confrontation with the government⁷⁰.

Likewise in Italy, the approval of the Parliament is required for authorising the ratification of a number of treaties, listed in art. 80 of the Constitution: treaties of a political nature⁷¹, treaties that lay down arrangements regarding arbitration or judgement, treaties that imply territorial changes, treaties involving financial obligations and treaties involving legislative amendments. The parliamentary authorisation takes the form of a law, approved by both Houses with the ordinary procedure. It is not possible approval in committee without a vote of the plenary⁷². Parliamentary authorisation precedes the ratification but follows the formal conclusion of the treaty by the government, thus preventing the parliament from playing a formal role in the negotiations stage.

Scholars have intensively debated on whether the law of authorisation is adopted in the exercise of a legal oversight function or it rather relates to parliamentary power to address directives to the government⁷³. More recently, some scholars have highlighted the political nature of the oversight

⁶⁶ Until 2003, art. 128 of the Rules of procedure of the National Assembly explicitly prevented deputies from tabling amendments concerning bill authorising the ratification of an international treaty. The provision was repealed in 2003, but the *Conseil Constitutionnel* in the Decision No. 2003-470 DC of 9 April 2003 specified that this modification cannot be interpreted as an implicit authorisation enabling deputies to submit reservations, interpretative conditions or other modifications.

⁶⁷ However, according to the organic law 15 April 2009, the ratification bill must be integrated by explicative documents specifying the purposes followed by the Government, the economic, legal and financial impact of the treaty on the domestic system, the reservations and interpretative declarations adopted by the executive in the negotiation stage.

⁶⁸ On average, the delay between the signature and the ratification is of three years and two months, allocated in the administrative stage between the signature and the adoption of the ratification bill by the Council of Ministers and the subsequent parliamentary stage.

⁶⁹ According to art. 103 of the Rules of procedure, the shortened procedure can be activated on request of the Government, the Speaker, the President of a parliamentary group or the President of the Committee for Foreign Affairs. In the practice, however, the Conference of the Presidents of the parliamentary groups (with the agreement of the Government and the Committee for Foreign Affairs) decides which international treaties are subject to the shortened procedure. During the XIV legislative term of the National Assembly (20 June 2012 - 20 June 2017), 156 treaties have been examined through the shortened procedure and 23 have been ordinarily debated in session (due either to the relevance of the treaty or to the opposition of one or more parliamentary groups). See Assemblée Nationale, 'Fiche de synthèse n. 42: La ratification des traités', 1 Juin 2017 (<http://www2.assemblee-nationale.fr/decouvrir-l-assemblee/role-et-pouvoirs-de-l-assemblee-nationale/les-fonctions-de-l-assemblee-nationale/les-fonctions-legislatives/la-ratification-des-traites>).

⁷⁰ *Ibidem*.

⁷¹ In the same way as other dualist countries featured by *ex post* parliamentary involvement in treaty making, the Italian criterion of the 'political nature' leaves wide margins of discretion to the Government in determining which treaties should be subject to parliamentary authorisation before ratification. On this point, see Cassese, A, 'Articolo 80', in G Branca (ed), *Commentario alla Costituzione*, Vol. 2 (Bologna, Società editrice del Foro italiano, 1979) 150-196.

⁷² Art. 72 of the Italian Constitution.

⁷³ V. S. Romano, 'Saggio di una teoria sulle leggi di approvazione' (1898) *Il Filangieri* 161-169; 249-271; 330-345 (250 f.); C. Mortati, *Le leggi provvedimento* (Milano, Giuffrè, 1968).

function of the Parliament in authorising the ratification of the treaty, consisting of the evaluation of governmental activity in view of an evaluation, associated to a sanction (the denial of the authorisation)⁷⁴.

The parliamentary law of authorisation cannot be amended by Parliament: this principle is not formally declared by the Constitution or by the Houses' Rules of procedure but it is regarded as a constitutional convention⁷⁵. The text of treaty itself cannot therefore be modified by Parliament nor subject to any interpretative clauses. The Houses can either entirely approve or reject the text of the treaty. However, consistently with the dualistic nature of the Italian system, the Parliament can amend the provisions of the authorisation law that discipline the treaty execution in the internal legal system, as long as they do not impact on the treaty itself. In some cases, international controversies have arisen concerning the adoption of statutory provisions instrumental to treaty execution which were supposedly contrasting with treaty obligations⁷⁶.

Moreover, the law of authorisation can include further provisions, others than those authorising the ratification and those giving execution to the treaty, in order to adapt the internal legal system to the new international obligations; these provisions can be amended in Parliament, as long as there are margins of discretion available to Parliament⁷⁷.

A different form of 'negative' power is instead reserved to the UK Parliament in treaty-making. Under the Royal Prerogative, it is for the UK Government to negotiate, sign and ratify treaties. Parliament has traditionally enjoyed a limited role in this process⁷⁸: following the informal 'Ponsonby Rule'⁷⁹, the Government laid before Parliament treaties that, after the signature, had to be ratified. The Parliament had no statutory role in the ratification process and could only exercise political pressure over the government⁸⁰. Formal parliamentary approval was only required for those treaties implying a change in UK legislation, a grant from public funds or altering the territory of the kingdom.

After many years of advocated reforms aiming at strengthening Parliament's role on treaties, the Constitutional Reform and Governance Act 2010, entered into force on 11 November 2010, gave Parliament the statutory power to block treaty ratification⁸¹.

Any treaty subject to ratification must be laid before Parliament jointly with an Explanatory Memorandum reporting on the treaty's financial implications, on its implementing means and on any

⁷⁴ V. Lippolis, *La Costituzione italiana e la formazione dei trattati internazionali* (Rimini, Maggioli, 1989) 62 ff. A. Manzella, *Il Parlamento*, III ed (Bologna, Il Mulino, 2003), 443.

⁷⁵ On the parliamentary practice featuring the unamendable nature of the law of authorisation, see Lai, L., 'Il controllo parlamentare sul controllo estero del Governo: l'autorizzazione alla ratifica dei trattati internazionali in prospettiva comparata', in VV.AA., *Il Parlamento della Repubblica: organi, procedure, apparati*, Vol. 3 (Roma, Camera dei deputati, 2013) 999-1088, spec. 1022 f. The unamendable nature of the law of authorisation was intensively debated in Parliament during the ratification of the Treaty adopting the Constitution for Europe, in 2005: see Piccione, D., 'L'inemendabilità della legge di autorizzazione alla ratifica della Costituzione europea e il falso mito del "principio di non regressione"' (2005) *Rivista AIC* (www.rivistaaic.it).

⁷⁶ Manzella, supra at 74, 372, recalling the Agreement between Italy and Switzerland on letters rogatory, concluded on 10 September 1998. Switzerland delayed the ratification of the Treaty until 2003, after Italian jurisprudence had settled a restrictive interpretation of the Italian law of authorisation and execution (Law 5 October 2001, no. 367), contested by the Swiss authorities.

⁷⁷ L. Paladin, 'Ciò che rimane del concetto di legge in senso formale', in VV.AA., *Studi in onore di Manlio Udina*, vol. II (Milano, Giuffrè, 1975) 1753 ff.

⁷⁸ See Templeman, S., 'Treaty-Making and the British Parliament' (1991) 67 *Chicago-Kent Law Review* 459-463.

⁷⁹ On the Ponsonby Rule, a constitutional practice for parliamentary scrutiny of treaties started in 1924 following a Government undertaking, see Harrington, J., 'Scrutiny and Approval: the Role of Westminster-style Parliaments in Treaty-Making' (2006) 55 *International and Comparative Law Quarterly* 121-159, spec. 127 ff.

⁸⁰ The main opposition party or another party in the House of Commons could, for instance, table a motion requesting that a treaty was not ratified before the House or a Committee had the opportunity to discuss the act. This request (that is still today available to members of the House of Commons) did not however bind the Government.

⁸¹ The reform was anticipated by informal practices aiming at granting the Parliament reinforced scrutiny tools over treaty-making. In particular, since 2000 the UK Government has undertaken to send copies of the treaty laid before Parliament to the relevant departmental select Committee of the House of Commons for examination and debate. See UK Ministry of Justice, 'The Governance of Britain: War Powers and Treaties: Limiting Executive Powers' (2007) CM 7239 (<https://www.gov.uk/government/publications/the-governance-of-britain-war-powers-and-treaties-limiting-executive-powers>).

UK reservation or declaration to the treaty. The procedure involves both the House of Lords and the House of Commons, but only the latter has the power to block ratification indefinitely by repeatedly passing motions⁸² that a treaty should not be ratified⁸³. Neither House has resolved against ratification under the new procedure so far.

Although the reform has significantly reinforced Parliament's participation in treaty-making, three factors seem to limit its role⁸⁴. In the first place, the 2010 Act has introduced a 'negative resolution' procedure enabling the Houses only to oppose to the treaty, without debate and vote of the ratification. Secondly, some types of treaties are excluded from the procedure: the 2010 Act only covers treaties that are binding under international law (thus excluding Memorandums of Understanding) and in exceptional cases the Government can ratify the treaty without laying it before Parliament⁸⁵. Thirdly, the 2010 Act does not provide any mechanism for the Parliament to scrutinise treaties during negotiations, when the text of the treaty still can be changed: parliamentary debates may occur at this stage, but they only have political significance⁸⁶; Ministers commonly inform relevant select committees before signing a treaty, but the effects of this practice are not clear.

Other limits are due to the effects produced by the 2010 Act in the parliamentary practice so far: there have been very few parliamentary debates on international treaties that do not require implementing legislation. The dominant format followed by the UK Parliament in the oversight of governmental foreign policy still rests on the adoption of domestic implementing legislation: by common practice, the UK Government tries to ensure that domestic law is adjusted to international obligations before the treaty is formally ratified; it is up to the Parliament to adopt any implementing legislation, following the usual legislative procedures.

To sum up, the variety of practices featuring, at domestic level, the role of Parliaments in treaty-making, does not allow to answer the question of whether *ex ante* or *ex post* parliamentary involvement is more protective of domestic accountability and sovereignty⁸⁷. The picture is even more complex if one considers that the participation of parliaments cannot simply be explained in terms of formal procedures and binding powers. The relationship between MPs and governmental representatives is often played on an informal ground, through unproceduralised contacts and exchanges of information. These less visible forms of interaction are deeply embedded in the political relationship between the government and the parliament and are influenced by tactical or strategic evaluations rooted in the two-level game theory. § 3.1. will provide an overview of these political forms of interaction that bypass

⁸² The motion must be agreed on the floor of the House unless the Government refers the motion to a delegated Legislation Committee for a debate, after which either the Government or the Opposition could refer the motion for debate and eventually vote to the floor of the House.

⁸³ After being laid before Parliament, the treaty cannot be ratified for 21 sitting days. If during this period either House does not resolve against ratification, the Government can proceed to ratification; by contrast, if either House resolves against ratification, the Government must lay before Parliament a statement setting out the reasons in support for ratification. If only the Lords and not the Commons resolve that the treaty should not be ratified, the Government, after having laid its statement, may go ahead and ratify. If the Commons resolve against ratification (regardless of the Lords' decision), the Government may not ratify the treaty for a further 21 sitting day period from when Government's statement is laid before the Houses. If for a second time the Commons resolve against ratification, the process is repeated and the process can be continued indefinitely.

⁸⁴ See Lang, A, 'Parliament's role in ratifying treaties' (2017) 5855 *House of Commons Library Briefing Paper* (<http://researchbriefings.parliament.uk/ResearchBriefing/Summary/SN05855#fullreport>).

⁸⁵ Also some EU treaties (namely, treaties that amend the main EU treaties) are excluded from the 'negative resolution' procedure as according to the European Union Act 2011 (part 1) they can only be ratified after being approved by an Act of Parliament. By contrast, the 2010 Act applies to agreements concluded by the EU with third parties (and, potentially, also to the withdrawal from agreements concluded between the UK and the EU under Article 50 of the TEU - on this point, see § 4).

⁸⁶ In some cases, competent parliamentary committee may engage in an official debate concerning the state of ongoing treaty negotiations. This happened in July 2013, when the Commons Backbench Business Committee arranged a debate on the EU-US trade and investment agreement (TTIP) when formal negotiations had just started. Further investigations into negotiating the agreement were hence started by the Commons' European Scrutiny Committee and the Lords' EU Committee.

⁸⁷ On this question, see Verdier and Versteeg *supra* at 40, 517.

formal powers and procedures but nonetheless may exercise a no less relevant impact over the content of international law⁸⁸.

2.3. Transparency and publicity of foreign affairs as means of informative control

The secrecy often associated to intergovernmental negotiations of international agreements make transparency and publicity of information a particularly relevant issue for the control of foreign policy. Parliaments' involvement in foreign affairs may therefore reveal its added value in providing public access to information and documents that are not subject to specific confidentiality requirements.

Examples of plenary debates on foreign policy issues are commonly offered by Parliaments. These occur not just on occasion of plenary votes on treaty ratification or other statutory laws dealing with foreign affairs; most often, the hearings, motions, resolutions and questions on the conduct of foreign policy give parliamentarians the opportunity to engage in a plenary debate on selected topics.

Certain Parliaments⁸⁹ provide specific procedures for enabling the plenary to be periodically adjourned on the status of governmental foreign policy. This is the case of Sweden's foreign policy debate, to be held every February in the plenary room⁹⁰. The debate is opened with the presentation by the Minister for Foreign Affairs of the Statement of Government Policy on Foreign Affairs; the debate is participated by diplomats from a large number of countries. Recurring debates on foreign policy are provided in each parliamentary session by the Danish Folketing⁹¹. In the German *Bundestag*, debates on foreign policy are mainly carried out at the committee level, thus falling short of publicity requirements⁹²; however, political parties can urge the Government to provide answers in the plenary on governmental foreign policy guidelines. Stemming from political inputs, often relating to contingencies in the foreign policy governmental action, these debates do not respect precise deadlines⁹³. In France, due to the open publicity regime of the Foreign Affairs Committee, the hearing of the Minister for foreign affairs held in Committee twice a year provides an opportunity for public debate on current foreign policy issues. As for the plenary, foreign policy represents a recurring issue for debate; questions addressed to the Government twice a week are the privileged mechanism for having a confrontation with the Government on foreign affairs' state of the art.

Also the practices of parliamentary diplomacy and participation in interparliamentary cooperation can be considered as indirect means of informative control of official (governmental) diplomacy and intergovernmental cooperation⁹⁵. On the one hand, in the realm of parliamentary diplomacy Parliaments occasionally engage in bilateral and multilateral meetings and initiatives. On the other hand, they participate in different formats of international cooperation featuring a permanent interparliamentary dimension. Both dimensions offer them the opportunity to have access to privileged

⁸⁸ See Cope, *supra* at 44, 124.

⁸⁹ In the Italian Parliament, for instance, foreign policy is commonly debated in the plenary by means of the ordinary oversight procedures (the most relevant ones being governmental reports to the House and motions). By contrast, there are no sectorial procedures for the foreign policy sector offering the plenary additional opportunities for gathering evidence and holding the government to account.

⁹⁰ See the Statement of Government Policy, released in the Parliamentary Debate on Foreign Affairs, 15 February 2017 (<http://www.government.se/statements/2017/03/statement-of-government-policy-in-the-parliamentary-debate-on-foreign-affairs-2017/>).

⁹¹ Plenary debates on foreign policy issues are organised on average ten times per session. Once every session, the situation of foreign policy is discussed during an interpellation debate. See Art. 38 of the Constitution Act.

⁹² This feature reveals itself consistent with the nature of the German *Bundestag* as a 'working', rather than as a 'talking' parliament. On the *Bundestag*'s characterisation as an 'Arbeitsparlament', see Steffani, W, *Parlamentarische und präsidentielle Demokratie. Strukturelle Aspekte westlicher Demokratien* (Opladen, Springer, 1979) 77 f.

⁹³ In the opening of his speech to the *Bundestag* plenary on "The continued participation by German armed forces in training support for the security forces of the Kurdistan-Iraq regionale government and te Iraqi armed forces", held in 26 January 2017, the German Minister for Foreign Affairs highlighted that "almost exactly three years have passed since we first discussed the grand coalition's foreign policy guidelines here in the German Bundestag".

⁹⁴ Weir, *supra* at 33, 10.

⁹⁵ See Decaro, C and Lupo, N (eds), *Il "dialogo" tra Parlamenti: obiettivi e risultati* (Roma, Luiss University Press, 2009).

information and documents and to exercise a preventative scrutiny or an *ex post* oversight on specific aspects of the governmental conduct in foreign affairs.

National Parliaments' participation in the interparliamentary dimension is usually achieved through delegations of MPs, governed by rather differentiated rules and practices. The selection of international parliamentary institutions where the Parliament is permanently represented changes consistently from one House to the other. With the exception of Sweden⁹⁶, most parliamentary cases examined (Denmark⁹⁷, Germany⁹⁸, France⁹⁹, Spain¹⁰⁰ Italy¹⁰¹) do not have a formal regulation of the issue and rather tend to manage the formation of delegations through parliamentary conventions or agreements between the two Houses, at least in the case of bicameral delegations that are a common practice in Italy, France and Spain¹⁰². The dominant format is that of permanent delegations of MPs, whose duration corresponds to the legislative term, reflecting the numerical strength of each party in

⁹⁶ See the supplementary Provision 7.1.1. to the Rules of procedures (*Riksdag* Act), providing for the election of Swedish delegations to the Nordic Council, the Council of Europe and the Parliamentary Assembly of the Organisation for Security and Cooperation in Europe. Delegations are elected for a period corresponding to the whole electoral period of the *Riksdag*, exception made for the Nordic Council's delegation that is elected for each session.

⁹⁷ The Danish Parliament appoints delegations to the Inter-Parliamentary Union (IPU), the OSCE Parliamentary Assembly, the NATO Parliamentary Assembly, the Parliamentary Assembly of the Council of Europe, the Parliamentary Assembly of the Union for the Mediterranean, and the Nordic Council. By common practice, members of these delegations are appointed through the same system as committee members (proportionality to parties' number of seats in Parliament, according to Section 52 of the Constitution Act). Only some delegations have a permanent membership, whereas others are composed on a rotational basis.

⁹⁸ The German *Bundestag* provides delegations to the NATO Parliamentary Assembly, the OSCE Parliamentary Assembly, the Parliamentary Assembly of the Union for the Mediterranean; the Black Sea Economic Cooperation and the Baltic Sea Parliamentary Conferences. The formation of delegation is determined on conventional basis.

⁹⁹ The French Parliament has permanent (bicameral) delegations to the IPU, the *Assemblée parlementaire de la Francophonie*, the parliamentary assemblies of the Council of Europe, OSCE, Organisation of the Treaty of the Nord Atlantique, Black Sea Economic Cooperation, Union for the Mediterranean and the Parliamentary Assembly of the Mediterranean.

¹⁰⁰ Criteria regulating the activity of parliamentary delegations representing the Spanish *Cortes Generales* abroad are agreed at the beginning of each legislative term by the Bureau of the two Houses. For the current legislative term, see the criteria approved on the 16 February 2016 (<http://www.congreso.es/portal/page/portal/Congreso/Congreso/Internacional>). The creation and activity of any such delegation is subject to bicameral agreements involving the Bureau of the *Congreso* and of the *Senado*.¹⁰¹ In the current legislative term (XVII, started in March 2013), five international parliamentary delegations have been established, representing the Italian Parliament by NATO, the Council of Europe, the Organisation for Economic Development and Co-operation (OECD), the Central Europe Initiative (CEI) and the Union for the Mediterranean. These delegations act as permanent bodies, elected by each House in the plenary or appointed by the Speaker; they enjoy a representative mandate for the electoral term: members of the delegation are durably empowered to fulfil, in representation of their country, a certain mandate by an international parliamentary assembly. Their composition follows the proportions among political groups. Until 1979, delegations representing the Italian Parliament in the European Parliament also were formed accordingly. On these practices, see Griglio, E, 'Procedures vis-à-vis the European Parliament and the Other National Parliaments: Interparliamentary Cooperation' in N Lupo and G Piccirilli (eds), *The Italian Parliament in the European Union* (London, Hart, forthcoming).

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¹⁰² Due to the symmetric nature of Italian bicameralism, Italian parliamentary delegations are always formed on a bicameral basis, featuring an equal representation of the Chamber of deputies and of the Senate. Also French parliamentary delegations are bicameral, but available places are usually divided between members of the National Assembly and of the Senate in the proportions of 3/5 and 2/5; an exception is represented by the delegation to the IPU, composed by 50 deputies and 50 senators. By contrast, other asymmetric bicameralisms do not always conceive parliamentary delegations as bicameral bodies; for instance, in Germany a very limited number of delegations (those relating to the NATO and the Baltic Sea) show a bicameral composition, including also representatives from the *Bundesrat*.

parliament. This format is expected to guarantee continuity and consistency in the activity of the delegation.

A peculiar procedure features the formation of UK Parliament's delegations to interparliamentary assemblies: it is up to the Government and specifically to the Prime Minister to appoint members of the delegation, selecting them from both Houses by means of written statement in Parliament¹⁰³. The party distribution of seats must reflect the composition of the House of Commons; nonetheless, the derivation from a governmental appointment risks conditioning the independence and autonomy of action of selected members.

In addition to the participation in most renowned international parliamentary assemblies, some Parliaments choose to be represented by a permanent delegation in those regional fora acting as interparliamentary arenas for the economic, political, social and cultural cooperation within a specific regional area. This is the case, among others, of the *Assemblée parlementaire de la Francophonie* for the French Parliament, of the Latin American Parliamentary Forum for the Spanish *Cortes Generales*, of the Ionic-Balcanic Initiative for the Italian Parliament. Among Scandinavian countries, a peculiar forum for regional interparliamentary cooperation is the Nordic Council, complemented by the Nordic Council of Ministers as intergovernmental forum¹⁰⁴. The Council has the power to initiate proposals and to give advice on matters pertaining to Nord countries co-operation. It may adopt recommendations, make other representations or issue statements of its views to one or more Nordic countries' Governments or to the Council of Ministers. Moreover, it is given the opportunity to state its views on major issues of Nordic cooperation unless this is impracticable due to time constraints¹⁰⁵. The integration between the national and international levels and between the parliamentary and governmental dimensions is ensured by the internal organisation of the Secretariat. As a matter of fact, the Secretariat of the Nordic Council shares its premises with the Secretariat of the Nordic Council of Ministers in Copenhagen and it is supported by national secretariats in each Nordic Parliament.

Finally, a peculiar form of international engagement featuring the experience of the French National Assembly is represented by the participation in the election observation mechanisms involving the international community. The National Assembly has conventionally fixed some criteria for deciding in which cases should its members participate as observers in the electoral mechanisms¹⁰⁶. Since the 1990's, the Assembly has participated in more than 200 election observation missions.

To sum up, all these practices of parliamentary diplomacy and interparliamentary cooperation (increasingly developed among parliaments, and especially among parliaments of the EU) represent a rather strategic oversight means for sharing information and best practices¹⁰⁷.

3. Political vs judicial interpretation of the executive-legislative balance of powers in international affairs

¹⁰³ The UK Parliament has permanent delegations to the Parliamentary Assembly of the Council of Europe, the Nord Atlantic Treaty Organisation Parliamentary Assembly and the OSCE. In the case of the NATO Assembly, the appointment of the parliamentary delegation falls under the responsibility of the Secretary of State for Foreign and Commonwealth Affairs.

¹⁰⁴ For the composition of the two bodies, see art. 47-48 of the Helsinki Treaty, the Treaty of Co-operation between Denmark, Finland, Iceland, Norway and Sweden signed on 23 March 1962 and entered into force on 1 July 1962.

¹⁰⁵ See art. 44, 45 and 46 of the Helsinki Treaty.

¹⁰⁶ These criteria provide, among other factors: a) an explicit request by the competent Authorities of the State involved; b) the rule of universal suffrage for the elections; c) the political significance of the observation mechanism; d) the positive advice of the Minister for foreign affairs; e) the absence of restrictions to the observation mechanisms. See *Assemblée Nationale*, 'Fiche de synthèse n.57: Les activités internationales de l'Assemblée nationale', 31 May 2017 (www.assemblee-nationale.fr).

¹⁰⁷ On inter-parliamentary cooperation in the EU as a means for sharing information and best practices, potentially instrumental to reinforced scrutiny of governmental activity, see Fromage, D, 'Increasing Interparliamentary cooperation in the EU: Current Trends and Challenges' (2016) 22 *European Public Law* 749-772; Cooper, I, 'The Emerging Order of Interparliamentary Cooperation in the EU: Functional Specialization, the EU Speakers Conference, and the Parliamentary Dimension of the Council Presidency' (2017) *European University Institute Working Papers RSCAS 2017/05* 1-18, Bolleyer, N, 'Executive-legislative relations and inter-parliamentary cooperation in federal systems – lessons for the European Union' (2017) 24 *Journal of European Public Policy* 520-543.

Formal procedures supporting the oversight of foreign affairs are not able, alone, to explain how Parliaments interpret this function in the daily management of the confidence relationship with the Government. It is at this stage that political interpretations (arising from the Parliament itself or urged by the Government) of how to implement parliamentary formal prerogatives in foreign affairs may lead to unexpected results. Such interpretations may completely overturn the original aim and scope of formally provided tools and procedures; or they may lead to different procedural solutions, either created for that purpose or derived from the standard oversight toolbox.

This sphere of political interpretation finds its limit in the judicial interpretation of the executive-legislative balance of powers in foreign affairs. Constitutional provisions or conventions setting the formal role of the Parliament *vis-à-vis* the Government are subject to Constitutional Courts' interpretation. Judicial decisions shed light on the practical implications and on the limits of parliamentary involvement in foreign affairs. However, a question arises as to the limits that these judicial interpretations may find due to the intrinsically political nature of the role played by Parliament in the oversight of foreign affairs¹⁰⁸.

3.1. Political interpretation

The comparative overview has shown that in foreign affairs Parliaments may exercise oversight powers that, at certain conditions, are legally binding to the Government. However, whereas the US Senate probably embodies the House with comparatively the maximum amount of 'hard' power in foreign affairs, Parliaments in Europe are rather weaker if not in the access at least in the practical implementation of formal oversight tools.

In most European parliamentary-style democracies, within the sphere of foreign affairs the role of the Parliament can be appreciated in political rather than in legal terms. Any House, especially those lacking binding oversight tools and procedures, can exercise an impact on governmental foreign policy depending on a variety of political and pre-legal factors (see *supra* § 1). Hence, the Parliament's interaction with the executive can hardly be forced into predefined legal schemes resulting in formal constraints and veto powers. Rather, this interaction is better explained in terms of political influence¹⁰⁹ that the Parliament exercises in the regards of the Government, in some cases acting indirectly and informally by means of moral (political) suasion or through media covering¹¹⁰.

¹⁰⁸ These remarks specifically refer to those countries envisaging a well established system of judicial review. As a consequence, Denmark and Sweden are not specifically taken into consideration, although their Supreme Courts have the competence to execute (an essentially limited but growing form of) judicial review. See Lindblom, PE, 'The Role of the Supreme Courts in Scandinavia' (2000) 39 *Scandinavian Studies in Law* 324-366. In Scandinavian countries, a difference should be made between judicial review and constitutional review in general. The latter, in fact, is performed by different subjects, including domestic bodies ultimately accountable to Parliament, such as parliamentary committees or ombudsmen (see Follesdal, A and Wind, M, 'Introduction - Nordic Reluctance towards Judicial Review under Siege' (2009) 27 *Nordisk Tidsskrift for Menneskerettigheter*, 131-141, spec. 132). This argument contributes to explain why in these countries the distinction between political and judicial interpretations of the legislative-executive balance of powers proves a less significant argument.

¹⁰⁹ The 'influence' capacity of Parliaments has been a major issue of discussion in comparative politics. A long-standing approach to this notion was provided by Bernard Crick in his 'The Reform of Parliament', first published in 1964, where he advocated that the parliament should have to spend less time on "ritualistic forms of debates and divisions on legislation which is going to be passed anyway and more time on the scrutiny of administration. The latter task should be meant in terms of influence rather than direct power; advice rather than command; criticism instead of obstruction; scrutiny instead of initiation" (B Crick, *The reform of Parliament* (London, Weidenfeld and Nicolson, 1964) 193). Different classifications and approaches have hence been advanced, comparing both codified powers and performances in the policy-making process, to assess the role that Parliaments can play beyond their formal powers. For our purpose, it is appropriate to recall the distinction by Philip Norton - Norton, P, *Parliaments in Western Europe* (London, Frank Cass, 1990) -, which is based on the traditional Mezey's classification of Parliaments according to their formal powers and level of support by the public or the elites - see Mezey, M, *Comparative legislatures* (Durham, Duke University Press, 1979). On this debate, see also Meg Russell, 'Assessing the policy impact of Parliament: methodological challenges and possible future approaches' (2009) *Paper for PSA Legislative Studies Specialist Group Conference, 24 June 2009*, https://www.ucl.ac.uk/constitution-unit/research/parliament/policy-impact/policy_impact_parliament.pdf.

¹¹⁰ Baum, MA and Potter, PBK, *War and Democratic Constraint: How the Public Influences Foreign Policy* (Princeton, Princeton University Press, 2015)

It is unquestioned that procedures do matter; however, when formal tools available are not enough, in European-style parliamentary forms of government Parliaments can still count on the political confidence relationship to exercise an influence on foreign policy. Literature¹¹¹ has hence suggested “conceiving of legislative-executive relations as a continuous process of (re)calibration of powers and competences in response to developments within the political arena, on the one hand, and in a state’s international environment on the other”.

Many examples prove that the power exercised by Parliaments in foreign policy is often independent from formal provisions and constraints.

On the one hand, some participatory practices involving the Parliament in the foreign policy-making have been developed without a clear legal basis, in response to political contingencies or institutional strategies. In these situations, the Parliament often resorts to standard oversight tools featuring its relationship with the Government to hold the latter accountable for its past foreign policy action and/or to address future decisions.

The 2013 House of Commons’ vote on military involvement in Syria offers a relevant example of political influence exercised by the Parliament beyond any specific institutional, legal or constitutional authority¹¹². The defeat of the Government motion submitted by UK Prime Minister David Cameron offered the Parliament a decisive influence over UK foreign policy, thus marking an historical decision in British parliamentarism¹¹³. According to some commentators, explanations of this success for Parliament must be found on a political ground, namely on the assumption that tighter legislative oversight can be triggered by a lack of trust in the Government¹¹⁴.

Standard oversight tools used by Parliaments to exercise an influence over the governmental conduct of foreign affairs may vary from adopting a motion¹¹⁵ to making an announcement in the House; from calling a parliamentary question for answer to starting an investigation on governmental action. All these standard methods of parliamentary oversight may, in cases of emergency, be used by the Parliament aiming at directing governmental foreign policy action¹¹⁶.

In some situations, the informal involvement of Parliament beyond codified procedures is deliberately pursued by the Government to prevent potential stalemates at the international stage. For instance, in Germany the Government is not formally bound to inform the Parliament on ongoing treaty negotiations. However, to prevent the risk that the Parliament might reject the treaty at the stage of the ratification pursuant to art. 59.2 of the Basic Law, the executive tends to inform the Foreign Affairs Committee in advance of any treaty negotiation and to adjourn it, jointly with other competent sectorial committees¹¹⁷, about the stage of negotiations. Government’s will to engage in an early involvement of the Parliament depends on tactical evaluations well explained by the two-level games metaphor.

Occasionally, the Government may try to foster prior parliamentary involvement by means of extra-parliamentary forms of scrutiny. This occurred during UK Government’s public consultation on amending the 1972 Biological and Toxin Weapons Convention; the consultation, carried out between April and September 2002 while negotiations were ongoing, was directed at defining the position to be

¹¹¹ Raunio and Wagner, *supra* at 6, 6.

¹¹² In fact, there is no constitutional requirement to consult Parliament in advance on such decisions.

¹¹³ The only precedent is represented by Lord Noth’s defeat in 1782 in the House of Commons on a matter of war and peace.

¹¹⁴ Kaarbo, J and Kenealy, D, 'Precedents, Parliaments and Foreign Policy; Historical Analogy in the House of Commons Vote on Syria' (2017) 40 *West European Politics* 62-79, spec. 63.

¹¹⁵ See for instance the Resolution adopted on October 13, 2014, by the House of Commons (by a majority of 274 votes, with 12 opposing votes), urging the government to “recognize the state of Palestine alongside the state of Israel as a contribution to securing a negotiated two-state solution”. House of Commons Hansard Debate 13 October 2014, ‘Backbench Business. Palestine and Israel’, part no. 40, vol. no. 586, Columns 61-128.

¹¹⁶ See House of Commons Information Office, 'Treaties' (2010) *Factsheet P14 Procedure Series* (<https://www.parliament.uk/documents/commons.../p14.pdf>).

¹¹⁷ Other involved committees might be the Committee on Foreign Affairs, the Committee on Human Rights and Humanitarian Aid, the Committee on Economic Cooperation and Development of the *Bundestag* as well as the Committee on Legal Affairs of the *Bundesrat*.

adopted at the international level. Through the consultation, the executive sought views not just from public opinion, but also from MPs¹¹⁸.

On the other hand, Parliaments often prefer using informal rather than formal powers when the latter threaten to undermine national commitments assumed or to be assumed at the international and supranational level.

To make some examples, the German Parliament has so far never rejected the ratification of an international treaty negotiated by the Government¹¹⁹. By contrast, MPs (and especially foreign affairs committee members) are willing to play an indirect role in influencing treaty negotiations by means of their political relations with government representatives¹²⁰.

The *Bundestag*'s approval on 16 November 2001 of the vote of confidence tabled by the Government on the decision regarding the participation of German troops in the so called 'War on terrorism' in Afghanistan has been interpreted as a further blow in the exercise of a strong, binding, parliamentary control of executive power in Germany¹²¹.

Practices developed by the French Parliament in trying to broaden its margins of *manoeuvre* over the treaty-making process confirm that in many cases the National Assembly tries to overcome the rigidity of the treaty ratification procedure by means of soft powers. For example, during the past legislative term (the XIV), in view of the ratification of the agreement with the United States on the indemnisation of Shoah victims deported in France, the Foreign Affairs Committee of the National Assembly tried to overcome the prohibition to amend the treaty by means of a diplomatic note, based on art. 79 of the Wien Convention¹²², aiming at modifying the content of article 1 of the agreement¹²³. In this case, an extra-parliamentary tool was spent by the National Assembly to exercise a formal influence over the decision-making process.

Other cases confirm the reluctance of French National Assembly to push its formal prerogatives in foreign affairs to the extreme. In cases of parliamentary disagreements over a treaty negotiated by the Government, rather than vetoing the ratification and exposing the country to major international responsibilities, the National Assembly seems to prefer alternative, less constraining, solutions. These may envision that the Foreign Affairs Committee, after having formally approved its report on the ratification law, takes action on the Government to prevent or delay the issue's inscription in the plenary agenda. In some cases, the Government renounced to discuss the ratification in the plenary due

¹¹⁸ See the Consultation paper presented to Parliament by the Secretary of State for Foreign and Commonwealth Affairs by Command of Her Majesty, 'Strengthening the Biological and Toxin Weapons Convention: Countering the Threat from Biological Weapons' (April 2002) Cm 5484 (http://collections.europarchive.org/tna/20080205132101/www.fco.gov.uk/Files/kfile/btwc290402_0.pdf).

The engagement in a public consultation prior to treaty ratification was started as governmental practice since 2000, when a consultation was promoted on a draft International Criminal Court Bill, leading to the ratification of the 1998 Rome Statute for the International Criminal Court.

¹¹⁹ The single case of rejection of an international treaty by the German Parliament dates back to 1962 and concerns the treaty on the cession to France of the Mundatwald, in the Land of South Palatinate. See Anderson, JR, 'Parliamentary Control and Foreign Policy in Germany. The Bundestag's Use of Formal Instrumentalities in Overseeing the Administrations' Foreign Policy' (2002) 64 *German Politics and Society* 1-14.

¹²⁰ The effects of this informal interaction are not easy to trace nor to evaluate. They might include the use by the Houses of "means based on communication, aimed at persuading the executive to voluntarily change its policies". For a collection of examples of the *Bundestag*'s application of these informal (argumentative) methods to influence the executive in changing its foreign policies, *ibidem*, 10 f.

¹²¹ In this precedent, two factors have contributed to inhibit a strong parliamentary oversight. On the one hand, the decision of the Government to transform one of the most important foreign policy debates in the *Bundestag* into a more general policy debate constrained by the vote of confidence. On the other hand, the decision of a considerable number of members of the *Bundestag* to vote in favour of the Government in spite of their continuing opposition to the provision of German troops in Afghanistan. On these points, Paulus, AL, 'Quo vadis Democratic Control? The Afghanistan Decision of the Bundestag and the Decision of the Federal Constitutional Court in the NATO Strategic Concept Case' (2002) 3 *German Law Journal*.

¹²² The recalled provision enables the correction of formal mistakes.

¹²³ See Assemblée Nationale, *supra* at 105.

to informal solicitations addressed by political groups after a formal vote was celebrated on the ratification law at committee level¹²⁴.

3.2. Judicial interpretation

National constitutional traditions show a large variety of jurisprudential cases dealing with the interpretation and implementation of constitutional clauses affecting the role of the Parliament and the Government in the management of foreign affairs. This interpretative function may offer Constitutional Courts a strategic role in shaping the institutional design of the executive-legislative relationship.

In some countries, the Constitution itself explicitly provides the intervention of the Constitutional Court in case of uncertainties on the treaty's compliance to Constitution. This judicial review formally addresses treaties' material consistency with the Constitution rather than their adoption and implementation procedures; however, it can be used as a tool for solving conflicts between the legislative and the executive power.

In Spain, for instance, according to art. 95 of the Constitution, the conclusion of an international treaty containing stipulations contrary to the Constitution shall require prior constitutional amendment. Access to the Constitutional Court, to declare whether or not such a contradiction exists, is open both to Government or to either House, following specific procedures¹²⁵.

The French Constitution sets two ways of direct access to the *Conseil Constitutionnel* for a preventative scrutiny of international treaties' compliance to the Constitution. One is provided by art. 54, enabling the President of the Republic, the Prime Minister and the President of either House to refer to the Constitutional Council an international undertaking suspected of infringing the Constitution. The other is regulated by the so called '*saisine*', the procedure authorising sixty Members of the National Assembly or sixty Senators to challenge a bill before the Council. These two ways of access have been realigned by the constitutional law 25 June 1992 as to standardise the appeal procedures and enable both categories of subjects to challenge the ratification bill at any time of the parliamentary proceeding¹²⁶. If the Constitutional Council holds the unconstitutional nature of the international undertaking, authorization to ratify or approve it may be given only after amending the Constitution.

Apart from these reserved competences, Constitutional Courts may play a pivotal role in interpreting general constitutional clauses on treaty ratification procedures, thus factually contributing to defining the respective position of the Government and the Parliament. In many countries, due also to the rather generic formula provided by the Constitution for filtering treaties subject to parliamentary scrutiny, the constitutional judge may hence have large margins of discretion in setting the role of the Parliament.

In Spain, for instance, in case of disagreements over the treaty classification first set by the Government¹²⁷, the Court may intervene, judging either on the treaty's compliance to Constitution (art.

¹²⁴ The Committee has followed this procedure on more than one occasion: in the XII legislative term, after having approved the authorisation to ratify a fiscal convention between France and Lybia, the Committee demanded that the bill was not placed on the plenary's agenda before some hostages held by Lybia were not released; in the XIII legislative term, a similar practice was followed during the examination of the Partnership and Cooperation Agreement with Turkmenistan. In the last legislative term, in January 2017, the Government, at the specific request of some political groups represented in the Conference of the Presidents of the National Assemblies, decided to withdraw from the agenda of the plenary the bill authorising the agreement with Mauritius on the economic, scientific and environmental co-determination of the 'île de Tromelin that had already been approved by French Senate in 2012 and by the *Assemblée Nationale* in 2013 (see 'L'accord de cogestion de l'île de Tromelin retiré de l'ordre du jour de l'Assemblée', in *Le Monde.fr*, 17.,01.2017).

¹²⁵ See also art. 157 of the Congreso's Rules of procedure and art. 147 of the Senado's Rules of procedure.

¹²⁶ Before the entry into force of the constitutional law 25 June 1992, in fact, ratification bills could only be challenged by means of the *saisine parlementaire* of art. 61 Const. after being approved by Parliament (before they were enacted by the Head of the State). On the role exercised by the *Conseil constitutionnel* in assessing the constitutional compliance of international engagements, see Maugué, C, 'Le Conseil constitutionnel et le droit supranational' (2003) 105 *Pouvoirs* 53-71.

¹²⁷ The Government first decides on the classification of the treaty, but the Parliament may try to reclassify the treaty to set a role for the two Houses in the ratification process. See for instance the debate urged by parliamentary groups on occasion of the Spanish adhesion to the North Atlantic Treaty. For more details, Linares, A, 'La adhesión de España a la Otan: notas para una revisión crítica' (2013) 32 *Historia Actual Online* 23-30.

95 of the Constitution) or on the conflict between the Government and the *Cortes* (art. 32 of the Law on the Constitutional Court)¹²⁸. Some of the decisions adopted by the *Tribunal Constitucional* have exercised a major impact on the role of the Parliament in foreign affairs. Among others, the decision of the Constitutional Tribunal on the Law 13/1999 regulating the adherence of Spain to different Agreements of the International Monetary Fund¹²⁹ has contributed to highlight the specificity of the parliamentary procedure for the approval of the authorisation law. This procedure is the only admissible pursuant to art. 94 of the Constitution; compared to the standard procedure, authorisation to ratification differs for the role of the Senate and for the reserved object (its unique scope consisting of the ratification), thus preventing any parliamentary legislative addition.

Also in Germany, the Federal Constitutional Court has defined the term ‘political relationship’ provided in the Constitution (art. 59 and 24) for filtering treaties subject to prior parliamentary approval. Its jurisprudence¹³⁰ has contributed to restricting the Parliament’s application of this tool only to agreements that affect the German state in its territorial integrity, its independence, its position or its influence in the international community. It has hence prevented an expansive interpretation of art. 59.2 of the Basic Law, combining “an (unnecessarily) broad reading of the executive power in foreign affairs with a narrow construction of parliamentary participation in treaty-making”¹³¹.

In France, due to the *Conseil Constitutionnel*’s self-restraint in assessing the procedural regularity of the conclusion of international treaties¹³², it is the *Conseil d’Etat* - jointly with the Court of cassation - who has come to play a pivotal role in the defence of parliamentary prerogatives¹³³. In the *Arrêt SARL du parc d’activité de Blotzheim*¹³⁴, the *Conseil d’Etat* has formally established its administrative jurisdiction over the review or the regularity of treaty ratification procedures, up to the assessment of whether a treaty belongs or not to the categories listed in art. 53 of the Constitution and is hence subject to prior parliamentary authorisation. The *Conseil* has eventually conceded that in litigations based on the application of an international treaty or agreement any party might invoke that the treaty or agreement was not regularly ratified or approved¹³⁵.

All these cases should be assessed in the light of the dichotomy between the two prevailing approaches to constitutional adjudication, labeled as “interpretive” (or “clause-bound interpretive”) and “noninterpretive” judicial review¹³⁶: the former refers to constitutional decisions based on value

¹²⁸ Santaolalla López, F, ‘La ley y la autorización de las Cortes a los tratados internacionales’ (1980) 11 *Revista de Derecho Político* 29-56.

¹²⁹ STC 155/2005 dated 9 June 2005. See Urrea Corres, M, ‘La autorización parlamentaria en la celebración de Tratados Internacionales: una reserva orgánica y de procedimiento; comentario a la sentencia del Tribunal Constitucional 155/2005, de 9 de junio’ (2006) *Revista General de Derecho Europeo* 20 ff.; Santaolalla López, F, ‘Decreto ley, ley y tratado internacional. Comentario a la ley STC 155/2005 de 9 Junio’ (2006) 18 UNED. *Teoría y Realidad Constitucional* 399-428.

¹³⁰ BVerfGE 1, 372, in the complaint (2BvE 2/51 of 29 July 1952) on the French-German economic agreement dated 10 February 1950 lodged by the socialist political group of the *Bundestag*.

¹³¹ Paulus, *supra* at 120.

¹³² Pursuant to art. 55 of the Constitution, international engagements supersede statutory laws if they are duly ratified or approved. The *Conseil Constitutionnel* has no formal title to assess that these procedural conditions are respected; however, it might incidentally engage in this scrutiny during the examination of an appeal under artt. 54 and 61 of the Constitution. In some jurisprudential cases, it has advanced a judicial interpretation of categories of treaties subject to parliamentary authorisation according to art. 55 of the Constitution. See for instance the *Décision* no 70-39, 19-6-1970 on the scope of international engagement “modifiant des dispositions de nature législative”. For further examples, see Maugüé, *supra* at 125, 28.

¹³³ The *Conseil d’Etat*’s engagement in this form of judicial review dates back to the *Arrêt Nicolo* of 20 October 1989. See Carcassonne, G, ‘Faut-il maintenir la jurisprudence issue de la décision n. 74-54 DC du 15 janvier 1975?’ (1999) 7 *Cahiers du Conseil constitutionnel* 93 ff.

¹³⁴ *Conseil d’Etat (Assemblée)*, 18 December 1998, no. 181249. See Raynaud, F and Fombeur, P, ‘Conditions d’application en France d’un traité international dont la ratification ou l’approbation est intervenue sans avoir été autorisé par une loi’ (1999) *AJDA* 127 ff.; Lachaume, JF, ‘Jurisprudence française relative au droit international’ (1999) 45 *Annuaire français de droit international* 803-841.

¹³⁵ *Conseil d’Etat (Assemblée)*, 5 mars 2003, *Arrêt Aggoun*, no. 242860. The judicial review by the *Council d’Etat* finds its limit in those treaties that are ratified pursuant to a parliamentary law of authorisation: in these hypothesis, the administrative jurisdiction yields to constitutional jurisdiction.

¹³⁶ Perry, J, *The Constitution, the Courts, and Human Rights* (New Haven, Conn.: Yale University Press, 1982) 6 and 11 detects in the legitimacy of non-interpretive judicial review “the central problem of contemporary constitutional theory” (*ibidem*, 6).

premise that is explicit either in the Constitution's text or in the structure of government created by the Constitution; the latter, by contrast, includes all other review referring to a value judgement other than one constitutionalised¹³⁷.

This debate might be considered out of date, due to the shift towards a modern judicial review based on the assumption that judges exercise what is fundamentally a legislative power¹³⁸. However, the dichotomy still can contribute to shed light on the differentiated institutional implications deriving from an interpretive or noninterpretive approach to judicial review. With specific reference to the addressed issue of the executive-legislative balance of power in foreign affairs, it is clear that noninterpretive methods of constitutional adjudication are more likely to encroach political interpretation of the Parliament-Government relation, and hence to fall short of expected outcomes. This hypothesis is discussed in the following Section, focusing on the *Miller* case.

3.3. The *Miller* case as an instance of non-interpretive judicial review

The R (*Miller*) v *Secretary of State for Exiting the European Union* judgement by the UK Supreme Court¹³⁹ offers a significant case of noninterpretive judicial interpretation of the relationship between the Parliament and the Government.

On the question whether art. 50 of the Treaty on the European Union for exiting the EU could be triggered by the Executive without the intervention of the Parliament, the Supreme Court ruled against the Government.

It considered the Resolution of the House of Commons of 7 December 2016 calling on Ministers to commit to publishing the Government's plan for leaving the EU to be a politically relevant act and stated that parliamentary legislation embodied in a statute was required to establish a sort of prerogative power in favour of Ministers enabling them to give Notice of the EU exit.

A critical assessment of the *Miller* case can be tested focusing rather than on the conclusions, which grounds the need for a parliamentary statutory law on the protection of individual rights, on the arguments advanced in support of the justiciability of the executive-legislative relationship.

Majority judges and minority judges (particularly Lord Reed and Lord Carnwath) have supported similar arguments on the appropriate extent of judicial control on the executive-legislative relationship in foreign affairs. Although with different solutions, they all have agreed on the opinion that prerogative treaty making powers and foreign relations in general are not justiciable. In support of this premise, majority judges recalled the dualist theory, arguing that the exercise of prerogative power to make or unmake treaties is consistent with the rule that ministers cannot alter UK domestic law. Further arguments relating to the idea that Courts should not overlook the constitutional importance of

On the difference between interpretive review and textualism, see Morris, AA, 'Interpretive and Noninterpretive Constitutional Theory' (1984) 94 *Ethics* 501-514; the Author points out that interpretivism rather represents a version of original intentionalism.

For an overview of the background understanding of the judiciary's role in the interpretation of legislative text in the US tradition, see Eskridge, WN Jr, 'All About Words: Early Understandings of the "Judicial Power" in Statutory Interpretation, 1776-1806' (2001) 1516 *Columbia Law Review Faculty Scholarship Series* 990-1106. On interpretive methods applied in the exercise of judicial review by the US Supreme Court, see also Eig, LM, 'Statutory Interpretation: General Principles and Recent Trends' (2011) 7-5700 *Congressional Research Service* (www.crs.gov).

¹³⁷ According to Ely, JH, *Democracy and Distrust: a Theory of Judicial Review* (Cambridge, Harvard University Press, 1980), 2-3, the dichotomy between interpretive and noninterpretive judicial review ("the former indicating that judges deciding constitutional issues should confine themselves to enforcing norms that are stated or clearly implicit in the written Constitution, the latter that courts should go beyond that set of references and enforce norms that cannot be discovered within the four corners of the document") is considered "false"; to reduce the potential anti-democratic character of judicial review, the Author hence elaborates a theoretical basis for a broadly 'interpretive' judicial review.

¹³⁸ For a review of three contemporary theories sharing the acceptance of modern judicial review (those by Ronald Dworkin, Jesse Choper and John Hart Ely), see Wolfe, C, *The Rise of Modern Judicial Review* (New York, Basic Books, 1986) 215 ff.

¹³⁹ For an overview of the arguments identified by the Divisional Court in the *Miller* case (R (*Miller*) v. *Secretary of State for Exiting the European Union* (2016) EWHC 2768), see, among others, D. Feldman, 'Brexit, the Royal Prerogative, and Parliamentary Sovereignty' (8 November 2016) U.K. Constitutional Law Blog (www.ukconstitutionallaw.org).

ministerial accountability to Parliament are in Lord Reed’s dissenting opinion and alike in Lord Carnwath’s opinion (see *infra* Figure 2).

However, the conclusions of majority judges on the role of Parliament in triggering art. 50 TEU seem to contradict the above mentioned premises. Soon after having recalled the non-justiciability of the prerogative power in foreign affairs, in response to the suggestion “that it should not cause surprise if ministers could exercise prerogative powers to withdraw from the EU Treaties, as they would be accountable to Parliament for their actions”, majority judges highlighted that:

“There is a substantial difference between (i) ministers having a freely exercisable power to do something whose exercise may have to be subsequently explained to Parliament and (ii) ministers having no power to do that thing unless it is first accorded to them by Parliament. The major practical difference between the two categories, in a case such as this where the exercise of the power is irrevocable, is that the exercise of power in the first category pre-empts any Parliamentary action. When the power relates to an action of such importance to the UK constitution as withdrawing from the Treaties, it would clearly be appropriate for the power to be in the second category”.

It is clear that the ‘appropriateness’ argument supporting the submission of ministerial action to prior parliamentary approval bypasses the judicial restraint on the exercise of prerogative power in foreign relations¹⁴⁰.

	Arguments on the appropriate extent of judicial control of the executive-legislative relationship in foreign affairs	Conclusions concerning the role of the Parliament in the triggering of art. 50 TEU
Majority judges	<ul style="list-style-type: none"> Non-justiciability of foreign relations - prerogative treaty-making powers (55; 92) The exercise of prerogative power to make or unmake treaties is consistent with the rule that ministers cannot alter UK domestic law (dualist theory) (56) 	<ul style="list-style-type: none"> <i>Ex post</i> accountability to Parliament does not enable Ministers to exercise prerogative powers to withdraw from the EU (as it would pre-empt any parliamentary action) Rather, when the power relates to an action of such importance to the UK Constitution as withdrawing from the Treaties, ministers have no power to do that unless it is first accorded to them by Parliament (92)
Dissenting judge (Lord Reed)	<ul style="list-style-type: none"> Controls over the exercise of ministerial powers under the British Constitution are not solely, or even primarily, of a legal character Courts should not overlook the constitutional importance of ministerial accountability to Parliament. Ministerial decisions in the exercise of prerogative powers, of greater importance than leaving the EU, have been taken without any possibility of judicial control. (...) the legalisation of political issues is not always constitutionally appropriate, and may be fraught with risk, not least for the judiciary (240) 	<ul style="list-style-type: none"> Ministers are entitled to give notification under article 50, in the exercise of prerogative powers, without requiring authorisation by a further Act of Parliament (177) Recalling the Secretary of State's arguments: Ministers of the Crown are politically accountable to Parliament for the manner in which this prerogative power is exercised, and it is therefore open to Parliament to require its exercise to be debated and even to be authorised by a resolution or legislation (162)
Dissenting judge (Lord Carnwath)	<ul style="list-style-type: none"> The Executive is accountable to Parliament for its exercise of the prerogative, including its actions in international law. That account is made through ordinary Parliamentary procedures. Subject to any specific statutory restrictions (such as under the Constitutional Reform and Governance Act 2010), they are a matter for Parliament alone. 	<ul style="list-style-type: none"> At least at this initial stage of service of a notice under article 50(2), the formality of a Bill is unnecessary to enable Parliament to fulfil its ordinary responsibility for scrutinising the government’s conduct of the process of withdrawal (255) (...) the service of the article 50 notice will be subject

¹⁴⁰ A comparison with South African High Court judgement on the withdrawal from the International Criminal Court (*Democratic Alliance v. Minister of International Relations and Cooperation and Others* – 22.02.2017) proves a rather interesting argumentative exercise. The South African judgement, in fact, is similar to the Miller decision in the conclusions, as it states that the executive is not allowed to withdraw from the International Criminal Court without prior parliamentary approval. However, High Court’s arguments are more closely bound to the legal implications of constitutional silence: in addition to the separation of powers, the focal point is seen in the principle of legality which implies that all Government action must comply with the law, that is, that the executive has no implicit powers without prior statutory authorisation of the Parliament. See Goss, C, ‘Analysis: Constitutional Aspects of Treaty Withdrawal - South Africa and the Rome Statute’ (21 March 2017) *Blog of IACL, AIDC* (<https://iacl-aidc-blog.org/2017/03/21/analysis-constitutional-aspects-of-treaty-withdrawal-south-africa-and-the-rome-statute/>).

	<ul style="list-style-type: none"> The courts may not inquire into the methods by which Parliament exercises control over the Executive, nor their adequacy (249) 	to Parliamentary scrutiny in whatever way Parliament chooses. It will be for Parliament and the Executive acting in partnership to determine the timing and content of the legislative programme (264)
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Figure 2 – Overview of majority and minority judges’ main arguments on the justiciability of the executive-legislative relationship in foreign affairs

Against this argument, one first concern involves the dichotomy between political and legal constitutionalism¹⁴¹. On the one hand, this affects the question as to which extent parliamentary control of the executive should be taken into account when determining the appropriate extent of judicial control¹⁴². Conversely, it has to do with the question as to whether judicial control finds in the political control embedded in the confidence relationship one legally relevant criterion.

From a statutory point of view, under the 2010 Government Act, the withdrawal from agreements concluded between the UK and EU should follow the same procedure provided for the agreements concluded by the EU with third parties: the Government negotiates and concludes the agreement under the prerogative power and when the agreement is concluded, it is formally sent to both Houses for being scrutinised and possibly blocked by the House of Commons. Due to statutory silence, what happens in the stage that precedes the beginning of negotiations is entirely left to the Government’s responsibility, which is accountable to Parliament¹⁴³.

Through the ‘appropriateness’ argument, the Supreme Court ushers in the executive-legislative management of foreign affairs an external, binding constraint (the approval of a parliamentary statutory law) that is not formally required by UK constitutional system. As far as this constraint does not have a direct legal basis in the UK constitution, it acts as a judge-made rule of constitutional construction.

A second concern involves the activism of the Supreme Court and the risk that it may fall short of expected outcomes¹⁴⁴. The parliamentary follow-up of the Miller decision, resulting in the approval of the European Union (Notification of Withdrawal) Act, seems to offer two elements in support for this argument. One relates to the nature of the bill, an extremely short measure, comprising only one substantive and formal provision enabling the Prime Minister to notify the European Council of the United Kingdom’s intention to withdraw from the European Union. The second element derives from the ‘semi-fast tracked’ procedure followed in Parliament in the passage of the bill¹⁴⁵. Hence, critics of the Miller decision might not be able to find in the procedure strong arguments in support for an effective parliamentary scrutiny.

¹⁴¹ In response to the post by Nick Barber, Tom Hickman and Jeff King on the legal obligation to get parliamentary approval before triggering art. 50 TEU, one main argument relates to the idea that “it is to Parliament itself, not the courts, to ensure that the Government allows it to exercise the influence it should have, and to decide what it is” (Law, S, ‘Article 50 and the Political Constitution’ (18 July 2016) *U.K. Constitutional Law Blog* (<https://ukconstitutionallaw.org>)).

¹⁴² See Elliot, M, ‘Analysis/The Supreme Court’s Judgement in Miller’ (25 January 2017) *Public Law for Everyone* (<https://publiclawforeveryone.com/2017/01/25/analysis-the-supreme-courts-judgment-in-miller/>)).

¹⁴³ On the cases behind statutory silence on the issue whether legislation was needed to trigger art. 50 TEU, see D. Howart, ‘On Parliamentary Silence’ (13 December 2016) *U.K. Constitutional Law Blog* (<https://ukconstitutionallaw.org>)).

¹⁴⁴ Arguments in support for this position can be found in US scholars’ defence against judicial activism and in the idea that “The judge’s authority to compel obedience comes from that external decision (that is, from the decision settled by the Framers of the Constitution or the drafters of a statute), not from the judge’s own desires. This is not to say that judges must “find” rather than “make” law. (...) The point of this discussion is that the more meaning added by the judge, the less powerful the judge’s claim to obedience”. Easterbrook, FH, ‘Legal Interpretation and the Power of the Judiciary’ (1984) 7 *Harvard Journal of Law and Public Policy* 87-99, spec 97.

¹⁴⁵ On this point, see the Conclusions of the report approved by the House of Lords Select Committee on the Constitution, ‘European Union (Notification of Withdrawal) Bill’ (23 February 2017 - 8th Report Session 2016-17) *HL Report 119* (<https://publications.parliament.uk/pa/ld201617/ldselect/ldconst/119/119.pdf>): “13. We recognise the political imperatives that lie behind the decision to fast-track the European Union (Notification of Withdrawal) Bill, and any concerns we might have about the curtailment of parliamentary scrutiny of such an important constitutional measure are alleviated by the brevity and simplicity of the Bill. We note, however, that fast-tracking a Bill of such constitutional significance is an exceptional procedure. This occurrence ought not to be used as a precedent in relation to future measures of constitutional significance, such as the ‘Great Repeal Bill’ and other Brexit-related legislation”.

From a theoretical point of view, this concern recalls functionalist explanations: against any formal emphasis on the principle of separations of powers as capable of ensuring the subjection of executive power to both parliamentary and judicial control, functionalist approaches rather highlight the overlapping between the “political” and the “legal” constitution¹⁴⁶. The inter-penetration of law and politics in cases involving government policy, as in the situation decided in *Miller*, may hence be advocated as a powerful argument for judicial restraint.

4. Conclusions

Comparative overview of parliamentary participation in foreign policy shows that different procedural schemes are applicable: preventative scrutiny suitable to influencing governmental action beforehand; *ex post* oversight aiming at holding the Government to account for its past decisions; and informative control providing citizens with increased levels of transparency. The existence of a large variety of relational functions driving the legislative-executive interaction in international affairs explains why a single model cannot explain parliamentary oversight of foreign policy. Some common trends may however be identified.

A common trend features the conceptualisation and the procedural implications of the oversight of foreign affairs as it is interpreted by the Parliaments examined in this paper: the reliance on non-binding oversight mechanisms whose institutional outcome can only be understood within the domain of the confidence relationship.

Committee oversight of foreign affairs entirely rests upon tools aiming at gathering information, fostering a dialogue with the Government, addressing to the executive directions or opinions on the conduct of foreign relations without any association to veto powers¹⁴⁷. All the procedures and tools relating to Parliament’s informative control over governmental foreign policy clearly fall within this ‘soft’ conception of parliamentary oversight. This is specifically the case of plenary debates. The inter-parliamentary and international activity developed by Parliaments is another dimension instrumental to a cooperative conceptualisation of the oversight function. In this respect, in some Parliaments (especially Parliaments of Nordic Countries, such as Denmark and Sweden) structural organisational solutions have been developed in the form of advisory councils competent on foreign affairs.

A part from these ‘soft’ mechanisms, in the sphere of treaty-making and treaty-ratification Parliaments can exercise binding, mandatory forms of parliamentary oversight. The timeframe, intensity and scope of parliamentary involvement can vary substantially. Some Parliaments may be asked to give a formal consent before the conclusion of treaties and agreements (Sweden, Denmark, Germany and Spain), while others authorise the ratification of the treaty after the Government has assumed formal obligations at the international level (Italy and France). A preventative involvement in treaty-making may grant some Parliaments (particularly, Sweden, Denmark and Spain) a large variety of scrutiny prerogatives and tools. Parliamentary participation in treaty-making and ratification may fall under a reinforced procedure (Spain) and be solidly anchored to judicial review; or it may be subject to a discretionary and purely negative parliamentary intervention (UK). The scope of treaties subject to parliamentary scrutiny or oversight can also vary significantly.

However, regardless of these formal and procedural differences, Parliaments are often unwilling to use formal veto powers that might seriously compromise governmental engagements at the international level. Rather, the analysis of political dynamics shows that in many cases Parliaments prefer to play an influence through informal and soft, relational mechanisms of interaction with the Government.

This preminence of political dynamics over formalised procedures raises some major questions on the sustainability of the executive-legislative network of factual relations *vis-à-vis* expectations of accountability and democratic scrutiny in the domain on international affairs.

¹⁴⁶ Griffith, JAG, ‘The Common Law and the Political Constitution’ (2001) 117 *Law Quarterly Review* 49. See also Id, *The Politics of the Judiciary* (Manchester, Manchester University Press, 1977) 127 ff.

¹⁴⁷ As noted by Norton, P, *Parliament in the 1980s* (Oxford, Basil Blackwell, 1985) 53, committees’ influence relies not only upon the expertise and cogency of their reports, but also upon “how far government is willing to initiate, review or change a polity”.

To limit governmental political discretion in the management of foreign policy, reinforce parliamentary scrutiny and minimise the risk of disagreements between the Government and the Parliament over international engagements, one could advocate the introduction of more formalised and binding scrutiny tools, such as the mandating mechanism that binds the Government before an international treaty is formally concluded¹⁴⁸.

Many national democracies have lately confronted themselves with this option as a potential means for strengthening democratic accountability in the management of foreign policy. However, a preliminary question arises on the desirability of statutory reforms to be adopted at domestic level, aiming at reinforcing the formal position of the Parliament *vis-à-vis* the Government in the oversight of foreign policy.

Attempts made in UK to strengthen formal tools available to Parliament in treaty-making have not proved completely satisfactory. The 2010 Government Act has left the oversight relationship entirely at the discretion of the Parliament, thus entirely relying on the political dimension.

Limits faced by statutory reforms of this sort lie in the endogenous nature of changes introduced: as they are negotiated with the Government through parliamentary proceeding, these changes are not likely to enable the Parliament to go much further in the formal regulation of oversight powers. It is unusual that a Government might accept a substantial limitation of its foreign policy capacity and allow the Parliament to play an increasingly constraining role.

These internal factual limits contribute to explain why only an external subject, endowed with definitive power, such as Constitutional and Supreme Courts, could prove capable of introducing substantial innovations in the executive-legislative relationship. Paradoxically, however, this external factor is deemed to face the same limits that it is supposed to overcome. In fact, the political relevance of the executive-legislative relationship in international affairs raises a major question on the feasibility of noninterpretive judicial decisions, as in *Miller*.

Two arguments have been taken into consideration in this respect. The formal argument refers to the constitutional significance of the confidence relationship that risks being challenged and potentially weakened by the intrusion of external legal arguments, such as those dealing with the protection of individual rights, forcing the executive-legislative relationship to the respect of specific procedures. This risk is emphasised in case of bicameral procedures involving Upper Houses excluded by the confidence circuit in the decision-making. Moreover, the effectiveness argument highlights that a judicial interpretation may fall short of expected outcomes: judicial attempts to crystallise the executive-legislative interaction might result in the external imposition of a formal parliamentary engagement, discouraging the research of politically agreed procedural solutions that might favour a substantial participation of Parliament in the decision-making.

¹⁴⁸ This hypothesis has been long debated in the UK, due also to the creeping insatisfaction for the results of the 2010 Government Act. For an overview of the debate and an evaluation of arguments against this option, see Lang *supra* at 84, 23 f.