

**THE ROLE OF THE NATIONAL PARLIAMENTS
IN THE EUROPEAN UNION TODAY
IN THE LIGHT OF MULTILEVEL CONSTITUTIONALISM**

Kinga Anetta Trufan ¹

Abstract

The Treaty of Lisbon has granted significant prerogatives to the European Parliament, as part of an effort to make the European Union more democratic, efficient and transparent, and to place the citizens in the centre of the European project. The extension of the co-decision procedure (henceforth known as “ordinary legislative procedure”) has enhanced the European Parliament’s status as a legislative power, giving it more influence in certain fields, including domains in which its role had previously been absent or limited – judicial cooperation in criminal matters, police cooperation, as well as in several aspects of trade and agricultural policy.

The treaty enshrines the well-established practice of the multi-annual financial framework, which requires Parliament’s approval, and creates a balance between the role of the Parliament and that of the Council, in the adoption of the EU budget. The international agreements in the fields subject to the ordinary legislative procedure also require the assent of the European Parliament.

The Treaty of Lisbon consolidates the role of the national Parliaments, which will be able to participate more actively in the working of the Union. They gain more influence over the policy evaluation mechanisms in the field of freedom, security and justice, and the procedures for treaty revision. Most significantly, they have acquired powers to monitor the observance of the principles of subsidiarity and proportionality in the fields that do not fall under the EU exclusive competence. National parliaments should continue to be an important source of legitimacy for the European institutions and policies.

Keywords: Lisbon Treaty, National parliaments, subsidiarity, IPEX, scrutiny

¹ Mrs. Kinga Anetta Trufan is a lawyer in Bucharest, Romania.
Contact: Tel +40 745 015.512; E-mail: kingatrufan@ymail.com

National parliaments have come to play an increasingly important role in the functioning of the EU, cooperating with the European Commission and the European Parliament as well as with each other. The Lisbon Treaty further strengthens their influence on EU decision-making. Yet, a democratic deficit has been observed for a long time in the European Union, and a shift of power from the parliaments representing the “sovereigns” to the executive has been the consequence of integration in Europe so far.

National parliaments have a “European function” and should therefore be considered – much more than generally acknowledged – and understand themselves as an integral part of the institutional architecture of the European Union. This role reaches far beyond their indirect involvement in legislation. National parliaments have also a central constitutional responsibility regarding the establishment and evolution of the European Treaties. In the case of directives they are deeply involved in implementing European legislation and they determine the legal and institutional infrastructure of the Member States whereupon the functioning of the Union is based.

Thinking about the role of national parliaments in the European Union offers not only an opportunity to suggest new functions and powers of the national parliaments with a view to strengthening, if possible, the democratic legitimacy of European legislation, but first to *assess* the real powers and influence they actually (can) have under the existing rules of the Treaty. It is important to *understand* the role of the national parliaments as part of the European system of governance in the light of “multilevel constitutionalism”. It will be on this ground I will consider and *propose* some new arrangements giving the national parliaments a more meaningful and responsible place in the European institutional framework.

The actual role of the national parliaments in the European Union can be summarized in three functions, all reflecting and related to their direct democratic legitimacy: they represent the citizens of the Member States in the process of constituting the Union (I), they are actors in the legislative process of the Union by providing European legislation legitimacy and effect (II) and they are the institutions which are deemed to control national governments regarding their European policies including the nomination of the personnel of the key institutions of the European Union (III).

The European Treaties are negotiated by representatives of the national governments, but they are ratified and given democratic legitimacy by the national parliaments - so far as the national constitutions do not, like in Ireland, provide for a referendum. While Article 48 TEU gives the key function in negotiating any amendment to the Treaties to an Intergovernmental Conference with the executive as the principal actor at this stage, the national parliaments, nevertheless are more and more involved in the process of negotiation when the national positions on any proposals are to be formulated. It follows that, in participating in the revision of the Treaty which gives the European construction democratic legitimacy, the parliament exercises basic constitutional powers.

Other national constitutions and laws confer on their parliaments similar means of participation. Public hearings and debates in national parliaments on the options for the reform of the Treaties give guidance to the negotiators, and only if the negotiators at the Intergovernmental Conference deliver acceptable results taking into account the concerns of their parliaments, a new treaty will have a chance to be ratified.

Yet, the Nice summit has shown, that the classical procedure for the revision of the Treaties has reached its limits. The constitutional character of the European treaties is, indeed, becoming more and more apparent⁸ and their modifying impact on the normative reality of the national constitutions is undeniable⁹, a more direct involvement of the citizens and their democratic representatives in the process needs to be organized. The Nice declaration already indicates the right way, in calling for wide-ranging discussions with all interested parties; representatives of national parliaments and all those reflecting public opinion; political, economic and university circles, representatives of civil society, etc.

Multilevel constitutionalism is an expression for a specific theoretical approach to the understanding of European integration. It is based on a postnational notion of constitution.²

² Bar Christian von. *Principles, definitions and model rules of European private law: draft common frame of reference (DCFR)*. Munich: Sellier, European Law Publishers, 2009, p.352

The term “constitution” is usually defined in relation to states. As states have changed their functions and as the time has come to rethink the concept of statehood in the “postnational constellation” there is also a need to revisit other traditional concepts linked to the political organisation of society. States are no longer able to meet the challenges they stand for. To ensure external and internal security, welfare and the protection of human rights, to govern global markets and the international financial system, to combat climate change, international crime and terrorism, **supranational and international systems** of governance are needed which go beyond traditional forms of **co-operation** between sovereign states.³

It should be emphasized more strongly, on the other hand, that “sovereign” national policies may have an immediate impact on other “sovereign” states. One example was the strength of the German DM and the power of the Bundesbank in leading an independent monetary policy which had great impacts on the policies of other Member states, while its legitimacy was exclusively drawn from the German people. Another example is **climate policy**: present sovereign policies of some industrialised countries with high greenhouse gas emissions may have the effect that other states are heavily injured by desertification or flooding, or are - like the low lying islands in the Southern Pacific - even drawn in the sea. If democracy means that those who are affected by a policy must be at the source of the power exercised, the policies described lack democratic legitimacy. A solution has been found in the European Union by creating the European Central Bank, solutions need to be found for the other challenges to democracy.

“Constitution” does not necessarily imply, or depend on, a state. In a postnational view, this notion also comprises the constituent legal order for other forms of self-organisation of society which are complementary to the states. It is not limiting or “taming” (pre-)existing public powers, but it is, in a contractualist sense, the legal instrument by which public authority is constituted, defined and limited.

There is no more or other (legitimate) public authority than created by the constitution. The constitution is, indeed, to be understood as the expression of a social contract between the citizens. It creates, for purposes of their common interest, institutions and procedures, confers to these institutions regulatory powers with direct effect for them and defines their respective rights and obligations as well as their status as citizens of the organisation, “community” or polity so created. Certainly, in doing so, they are inspired and even bound by internationally agreed common values, traditions and by experience from other societies or states, but what is constitutive for the legitimacy of the political order is the ongoing basic consensus, the *plébiscite de tous les jours* of those who are the subjects of the community and its authorities so created.

The basic assumption of the concept of “multilevel constitutionalism” is that the existence and legitimacy of each level of **political governance** in a layered federal system which comprises the Member States, their regions or Länder, European Union and any additional international centre of public authority and power directly creating rights or obligations of the individual, originates with - and must be founded in - the will of the people affected. We are national citizens regarding our respective state, citizens of our region or Land, European citizens etc. as the case may be. We have multiple identities related to the multilevel structure of the political system which we create in conformity with the principle of subsidiarity to meet challenges at the appropriate level of government.

It is the American example which clearly demonstrates the possibility of the contractual creation of a constitution by people who define themselves as “a people” in the political sense, as the citizens or as a “nation”,⁴ without such a people or nation necessarily pre-existing. In modern democracies, no other body than the citizens – acting together through their institutions (national governments and parliaments) - can be the ultimate origin of supranational public authority and source of **democratic legitimacy** of a

³ Beutler Björn. "State liability for breaches of Community law by national courts: is the requirement of a manifest infringement of the applicable law an insurmountable obstacle?" in *Common Market Law Review*, v. 46, n. 3, June 2009, p. 773-804.

⁴ Chalmers Damian, Monti Giorgio. *European Union law: text and materials: updating supplement*. Cambridge: Cambridge University Press, 2008, p.154

supranational legislative power like the European Union.⁵ Where national constitutions provide, by integration clauses or otherwise, for the participation in a supranational organisation or, expressly, in the European Union and set up specific procedures for the acceptance of the relevant treaties with other States and their peoples, they not only show openness for such a complementary system but also organise the process of its “constitution” by a treaty which is the expression of a supranational or European social contract. National constitutions, thus, are open for the constitution of a supranational framework of political deliberation, decision-making and action which stems from the citizens of the Member States and integrates their institutions as elements in a new system of multilevel democracy.

National constitutions cannot be read and understood, in their real significance, without consideration of the complementary European system. The latter guarantees new fundamental rights and freedoms of the national (and foreign) citizens and limits – or changes - legislative, administrative and judicial powers left with the national institutions, without this being necessarily reflected in the text of the national constitutions. The European function of the national parliaments, described above, is only one example. The conclusion or revision of the European treaties according to the national integration clauses and Article 48 TEU, consequently, is a constitutional process having impact both at the European and the national levels.

Philip Allott recently called for the “**integration of constitutions**” instead of the **integration of states**, involving a modification of the national constitutions towards Europe and the simplification of the European treaties.⁶ But the new clauses proposed for the national constitutions would just reflect and underline what the law already is. Even the use of the competencies conferred to the European institutions permanently modifies the division and balance of powers between the two levels of government. While European institutions are vested with new powers, competencies of the national institutions are divested or modified, both levels of government are interwoven and complementary. But what really matters is that the legitimacy of both levels in the system stems from the same citizens, the citizens to whom the legal acts of both levels also are addressed, and that the system produces for any question concerning the citizens just one legal answer. National parliaments are participating in this ongoing constitutional process, both when the Treaties are revised and when they are applied.

In the light of “multilevel constitutionalism”, national constitutions and the legal order of the European Union are complementary, depending upon each-other and, ultimately and in substance, forming one legal system, the system which I call “the European Constitution”. There is no specific difficulty, on this basis, to conceive national parliaments as an essential element of its functioning.

Representing the peoples of the Member States which have decided to constitute the Union and to give themselves the common status as citizens of the Union, national parliaments play a key role in the whole system: they are the driving force in the constitutional process, principle source of legitimacy for the actors in the European institutions as well as for the policies developed, responsible for the implementation of Community legislation and its integration in and with the national legal systems, and, finally, interface between the two levels of political action. While the Union can be described as a divided power system with competencies shared between the national and the European institutions, it is the national parliaments - apart from the increasing role of the European Parliament - through which, in the double-based system of legitimacy, an important part of democratic legitimacy flows upstream from the citizens to the European institutions and, downstream, effectiveness of their policies to the citizens is provided.

The more people and political parties become aware of this European functions of national parliaments and the more the European component of national elections is realised, the easier it will be to use the

⁵ Wessel Ramses. "The dynamics of the European Union legal order: an increasingly coherent framework of action and interpretation" in *European constitutional law review: EuConst*, v. 5, n. 1, 2009, p. 117-142.

⁶ Wessel Ramses. "The dynamics of the European Union legal order: an increasingly coherent framework of action and interpretation" in *European constitutional law review: EuConst*, v. 5, n. 1, 2009, p. 117-142.

political infrastructures of the Member States to mediate between **European decision-makers** and the citizens.⁷

National parliaments play an important role in the legislative process of the European Union both as a source of legitimacy and in making Community legislation effective at the national level. Yet, strong arguments exist why national parliaments are not able, not sufficiently organised or, at least, not prepared to meet this „European“ function properly.

Beside the growing role of the European Parliament, democratic legitimacy is still considered to be provided to the Council mainly through the national parliaments.⁸ They elect - or, at least, control the policies of - the national governments, including in their capacity as European legislators. Not only national constitutions provide for the consultation or, as it is the case in Denmark, Finland and Austria, for an even stronger say of the national Parliament regarding the positions of their respective ministers to be taken at the Council¹³. This is also the purpose of the Protocol (No 9) on the Role of National Parliaments in the European Union, attached to the Treaty of Amsterdam.

It has been argued that around 80% of the relevant economical and social legislation in the Member States are determined by directives of the Community - an even higher percentage applies probably to environmental law. Against this background it is more than astonishing to observe that public attention continues to be focused on the “internal” matters of each Member State.

National parliamentary debates and elections should, instead, focus much more on European themes, the interest of parliamentarians should concentrate much more on the control of the heads of state and government acting in the European Council and of the ministers acting in the Council. They should be held accountable more expressly for their political achievements at these instances before the national parliaments.

The public discourse on European policies should also be stimulated through national parliaments and this does should not be limited to legislative policies, but should also cover the general political guidance given by the European Council in accordance with Article 4 TEU and include initiatives such as the new form of “open co-ordination”⁹. These policies do indeed concern more and more questions of internal character and have a direct impact on the life of the citizens.

An enhanced scrutiny of national governments by their parliaments seems to be even more necessary if one considers that the “legislative” function of national parliaments is changing: the more legislation is determined by European directives, the more national parliaments are reduced to transpose, implement, make effective and - in some cases - just “rubber stamp” European legislation at the national level. The role of government and parliaments tends to be reversed: the former executive, the governments, are becoming the legislator, and the former legislators, parliaments, insofar assume the function of the executive.¹⁰

It is clear that national parliaments have problems to cope with the new European dimension of their responsibility. The European dimension of their work adds complexity and difficulties. It is not sufficient any more to define and defend national needs and strategies.

To have a real impact on European decision-making, national parliamentarians rather have to explore and keep in mind the needs, policies and strategies of other Member States as well as the processes at the European level and the principles of European law.¹¹

Communication and networks between national parliamentarians are particularly important in the areas of qualified majority voting at the Council. Isolated national policies lead to isolated positions and no

⁷ Schuütze Robert. *From dual to cooperative federalism: the changing structure of European law*. Oxford: Oxford University Press, 2009, p.154

⁸ This is the basic assumption of the German Constitutional Court in its judgment on the Maastricht Treaty (1993),

⁹ See Presidency conclusions Gothenburg European Council, 15 and 16 June 2001, p. 33-43.

¹⁰ Schuütze Robert. *From dual to cooperative federalism: the changing structure of European law*. Oxford: Oxford University Press, 2009.

¹¹ Steiner Josephine, Woods Lorna. *EU law*. Oxford: Oxford University Press, 2009, p. 245-251

impact on European policies at all. While national policies are increasingly determined by European action, European action will increasingly be a function and the result of joint, and this means: early coordinated, national policies. Yet, national parliaments lack capacity and adequate structures to meet this new challenge. They must realize that they have not only a national, but also a European function. They lack information from and communication with the European institutions, and as long as the Council takes its decisions in closed sessions, they even lack the information to control their national governments. Therefore, it is important that the Council meets in public, at least as far as it exercises legislative functions. The ministers in the Council will always need room for negotiation instead of a binding and determined mandate from its parliament, not only to maintain the efficiency of the Council but also to allow the minister participating actively participating in the deliberations instead of being isolated and outvoted.

Finally, to facilitate the necessary communication between national parliaments, networks between parliamentarians of different national parliaments should be established - not only for the members of the committees for European affairs, but for all committees dealing with subjects having a European dimension.

Until the introduction of a real European tax by which the European Union will have to finance itself and its policies through contributions directly levied from the citizens - and will, thus, be directly accountable to the citizens for the expenses made, Article 269(2) EC confers the final say on the system of the Union's „own resources“¹² on national procedures of ratification. National parliaments decide, therefore, on the overall financial resources of the Union and are indirectly responsible - together with the Council and the European Parliament - towards their citizens for the adequacy and use of the financial volume attributed to the Union.

Given the importance of all these functions the governments directly or indirectly through the Council are provided with great powers, while parliamentary legitimacy and control is very indirect and remote. It is up to each national constitution to organise if and how the national parliaments participate in the procedures under which each national candidate for the various positions is chosen.

Generally, the procedures seem to be based on informal constitutional conventions, and parliamentary control is reduced to the general political control the parliaments exercise upon their governments. With the growing impact of European policies on the internal legislation of each Member State it seems to be time to consider new provisions in national constitutions following the Austrian model - unless the European Parliament is given a (stronger) say in the European procedures of appointment.

National parliaments play a key part in the constitutional process of the European Union. But several steps should be taken, first, to raise the awareness of their European functions and, second, to provide for more efficient means for the exercise of these functions. Multilevel constitutionalism offers a way to conceptualize the national and European levels of government as two elements of one constitutional system, in which the national parliaments play an important role as the institutional interface between both levels and the citizens from which legitimacy is derived for decision-making at the national and European level.

Direct democratic control must be strengthened through regular co-decision of the European parliament, but national parliaments acting as European parliaments are complementary and indispensable for the functioning of the European Union, which is a union of peoples (states) and a union of citizens. A set of measures discussed above are to be taken with a view to bring both pillars into effect - and to bring the Union closer to its citizens.¹³

¹² Williams Andrews. "Taking values seriously: towards a philosophy of EU law" in *Oxford Journal of Legal Studies*, v. 29, n. 3, Autumn 2009, p. 549-577.

¹³ Chalmers Damian, Monti Giorgio. *European Union law: text and materials: updating supplement*. Cambridge: Cambridge University Press, 2008, p.177

Representing the peoples of the Member States which have decided to constitute the Union and to give themselves the common status as citizens of the Union, national parliaments play a key role in the whole system: they are the driving force in the constitutional process, principle source of legitimacy for the actors in the European institutions as well as for the policies developed, responsible for the implementation of Community legislation and its integration in and with the national legal systems, and, finally, interface between the two levels of political action. While the Union can be described as a divided power system with competencies shared between the national and the European institutions, it is the national parliaments - apart from the increasing role of the European Parliament - through which, in the double-based system of legitimacy, an important part of democratic legitimacy flows upstream from the citizens to the European institutions and, downstream, effectiveness of their policies to the citizens is provided.

The more people and political parties become aware of this European functions of national parliaments and the more the European component of national elections is realised, the easier it will be to use the political infrastructures of the Member States to mediate between **European decision-makers** and the citizens.

REFERENCES

- BAR Christian von. *Principles, definitions and model rules of European private law: draft common frame of reference (DCFR)*. Munich: Sellier, European Law Publishers, 2009.
- BEUTLER Björn. "State liability for breaches of Community law by national courts: is the requirement of a manifest infringement of the applicable law an insurmountable obstacle?" in *Common Market Law Review*, v. 46, n. 3, June 2009, p. 773-804.
- CHALMERS Damian, MONTI Giorgio. *European Union law: text and materials: updating supplement*. Cambridge: Cambridge University Press, 2008.
- DERLÉN Mattias. *Multilingual interpretation of European Union law*. Alphen/Rijn: Kluwer Law International, 2009.
- ERVO Laura, GRÄNS Minna, JOKELA Antti (eds.). *Europeanization of procedural law and the new challenges to fair trial*. Groningen: Europa Law, 2009.
- FIGUEIRA Filipa. *How to reform the EU budget?: a methodological toolkit*. Stockholm: Swedish Institute for European Policy Studies (SIEPS), 2009.
- HORSPOOL Margot. *European Union law*. Oxford: Oxford University Press, 2008.
- SCHUÜTZE Robert. *From dual to cooperative federalism: the changing structure of European law*. Oxford: Oxford University Press, 2009.
- SCHWARZ Jonathan. "EC remedies for national law in breach of EC law: the United Kingdom's experience" in *Bulletin for International Taxation*, v. 63, n. 5-6, May-June 2009, p. 245-251.
- STEINER Josephine, WOODS Lorna. *EU law*. Oxford: Oxford University Press, 2009.
- STEUNENBERG Bernard, TOSHKOV Dimiter. "Comparing transposition in the 27 member states of the EU: the impact of discretion and legal fit" in *Journal of European Public Policy*, v. 16, n. 7, October 2009, p. 951-970.
- WARD Ian. *A critical introduction to European law*. Cambridge: Cambridge University Press, 2009.
- WESSEL Ramses. "The dynamics of the European Union legal order: an increasingly coherent framework of action and interpretation" in *European constitutional law review: EuConst*, v. 5, n. 1, 2009, p. 117-142.
- WILLIAMS Andrews. "Taking values seriously: towards a philosophy of EU law" in *Oxford Journal of Legal Studies*, v. 29, n. 3, Autumn 2009, p. 549-57