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National Parliaments in the EU's Composite Constitution: A Plea for a Shift in Paradigm

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1 Introduction

In this essay I explore the meaning and implications of two paradigms for the role which national parliaments can play within the European Union's constitutional order. The first paradigm conceives of the EU's constitutional order in terms of 'levels'. Hence, I shall call this paradigm the 'multi-level paradigm' or simply 'levels paradigm'. The second is a paradigm which I shall call 'polycentric'. I first briefly elucidate the 'multilevel' paradigm and how it fits in with the present view of the role of national parliaments with regard to EU decision-making. Next I indicate how a more polycentric conception of the composite European constitutional order would view the role of national parliaments. I trace some signs of such a polycentric approach in the Treaty establishing a Constitution for Europe, and briefly hypothesise how such a polycentric view might offer better chances for the EU's opening up to accountability. In the next two sections I discuss the possibilities of a shift towards the latter paradigm without the Constitutional Treaty being adopted, and on the research agenda that such a shift would imply.

2 'Paradigms'

Talking of paradigms is a manner of making explicit what otherwise remains more or less implicit in the manner of viewing reality. Paradigms concern the starting-points for looking at reality, they are a manner of speaking about perceived reality. They serve as explanatory devices for understanding reality and provide us with alternatives for perceiving reality.[1]

The discussion in this paper abstracts from much detail and nuance. This is partly because of lack of knowledge on the part of its author, and because of the size of this essay, but not just that. It is also linked to the distinction of 'paradigms' in the sense used here to abstract from some of the detail and nuance in the reality paradigms refer to. In this respect the paradigms I discuss are like 'models' in the Weberian sense of 'Idealmodelle' – but these lack the dynamic aspect inhering in the concept of paradigms as competing frames of reference for studying reality over time, during which these frames of reference may overlap, the one may dominate and another come to be superseded.

One further caveat immediately follows from this, and ought to precede our discussion of the substance. This essay is *not* aimed at analysing the scholarly literature and its paradigms; it does not have the aim of studying 'second order' developments. Such an analysis could very well be undertaken, and perhaps it is a propitious moment to do so,[2] but the scope of the paper and the occasion of its writing makes this less opportune.

In this essay I will, then, take the two paradigms adumbrated to be manners of looking at one particular part of political reality, to wit, parliamentary practice with regard to European decision-making. In the

[1] We do not need to agree on Thomas Kuhn's use of the concept and his analysis of shifts in paradigms as an explanation of scientific and scholarly development, as initially developed by Kuhn (1962), further refined in the postscript added to the second edition; nor do we have to agree with his critics. Here I submit that his conviction that the ideas he developed cannot be applied to the law (and legal studies) is to a large extent misplaced.

[2] In the Netherlands, there is a sudden wave of academic opinion which holds that the academic study of law has no method, and a sense of shame for it. Fortunately, this opinion is false, and the sense of shame entirely misplaced. To the extent that there is no single established scholarly method, the situation corresponds with Paul Feyerabend's ideal situation for meaningful science and progress; see Feyerabend (1975).

course of doing so, I attempt to show that different manners of looking at reality ('paradigms') make a difference to finding ways of practical innovation, also in constitutional affairs.[3]

3 The Paradigm of the 'Multilevel' Constitution

The paradigm which conceives of the constitutional order of the EU and its member states as a construct comprising different 'levels', has been predominant. There are various forms which this paradigm has taken in the literature since the 1960s, the one more subtle than the other. I mention the recent coining of the expression 'multilevel constitutionalism' by Ingolf Pernice,[4] which on some points seems to develop a more sophisticated model than the classic European law approach which emerged in the 1960s and still dominates that discipline, but which on the whole ignored the relevance of national constitutional orders within the European construct by positing rather uncritically an unconditional primacy and predominance of EC (and even EU) law over whatever national constitutions might mean to or wish to say on European integration. What the various views hold in common, however, is the essential distinction of different 'levels'.

This thinking in terms of 'levels' has two implications. Firstly, the metaphor of 'levels' easily spills over into speaking of higher and lower levels. The paradigm thus reveals itself as being essentially hierarchical. Secondly, the idea of 'levels' suggests a relative separateness – a view which is compounded by an emphasis on the 'autonomy' claims for the relevant constitutional orders, particularly the EC order. In combining these two features, the paradigm suggests that the levels are in a sense separate from each other, but at the same time – viewed from a 'dynamic' perspective – it essentially leads to a situation in which one level must outweigh or even supersede the other. The 'centre of gravity' within the system can only exist at one level at a time – the levels cannot be coextensive.[5]

The prevalence of the multilevel approach becomes evident when we look at the most common analysis of EU decision-making and the role of national parliaments. The prevailing doctrine of the democratic deficit hinges critically on the 'transfer' of powers from one 'level', the national 'level', to another: the European 'level'. Inherent in speaking of 'transfer', instead of, for instance, 'attribution' or, more neutrally, 'conferral' of powers, is the idea that once a previously national power has moved to the European level, it has somehow 'disappeared' at the national level. Indeed, as regards the decisional institutions, this has had as a consequence that national governments meeting through their representatives in the Council have become pivotal actors to the detriment of national parliaments, also with regard to matters which were previously – i.e. before the transfer to the European level – within the remit of national parliaments, notably legislative power. Not the parliament in the national capital, but Brussels decides.

The scrutiny of European decision-making by national parliaments, in the manner in which it has developed over time, may be thought to counteract this. But actually practice reinforces this way of viewing things. At the national level, governments are scrutinised as to the position which their national

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[3] This is so because, as G.B. Vico pointed out, human and therefore political reality is a man-made, or, more precisely, language-made reality. 'First order' discourse which constitutes practical reality, and 'second order' discourse reflecting on first order realities, are therefore intricately meshed in thee *scienza* with which we are dealing.

[4] See Pernice (1999) and Pernice (2002).

[5] The more sophisticated recent literature acknowledges that there may be a kind of sequence of moments which makes 'shifts' possible from one level to another, which may even be caused by the 'interaction' between the levels. This brings this model close to the polycentric paradigm that I discuss below. I submit that some recent versions of the multilevel paradigm are at a breaking point from the classic one, which crucially hinges on the perception of 'levels' as mutually autonomous higher and lower levels. 'Multilevel' then becomes a misnomer for the actual theory propounded.

representative is to take, or has taken, in the Council in Brussels. Scrutiny thus becomes a purely national matter, aimed at national actors. Its meaning and importance is restricted to the national level. It is a matter of each individual capital. On the whole, the effect of this purely national scrutiny moves national parliaments into a 'monist' position towards their respective governments, in that the separateness of the roles of government and parliament within a national constitutional system is reduced. Scrutiny, which is on the whole distinctly non-partisan and almost a-political, is about articulating the *national* point of view of the member state to be represented in the Council, not about any particular *political* view to be represented at the EU level.

Governments may not like parliamentary scrutiny of what they intend to do in Brussels, particularly when such scrutiny is critical and acquires a certain intensity, but they know that they can also use it to bolster the national viewpoint in the Council.[6] So while it is not in the nature of governments of member states to ask for more intense parliamentary scrutiny of their behaviour, government representatives can be expected also to be able to play the card of national parliamentary problems with intended European decisions in Brussels which, if the game is played skilfully, strengthens their position in the Council. These monist tendencies resulting from parliamentary scrutiny may also explain why the French government at the time of the Maastricht Treaty found it politically acceptable to make a major change to the governmental system, and allow parliamentary resolutions to be directed to the government in European affairs,[7] whereas previously this was constitutionally forbidden as an encroachment on government prerogatives:[8] having a stronger parliament expressing itself on issues arising in Brussels might reinforce the French position in the EU.

So parliamentary scrutiny tends to reinforce a government's view as a solidified national point of view. Also, a national parliament's objections to a draft decision can politically be translated into a firmer position of the member state in the Council. Parliamentary scrutiny practiced in this form contributes to EU decision-making being conducted along predominantly national lines, rather than in a politically partisan manner cutting across internal European borders. This is so with decision-making at the EU level in the Council, and this is so in the parliamentary scrutiny procedures at the national level: European issues are rarely considered the object of partisan politics, but usually as non-partisan national politics. The game is one that is played at neatly compartmentalised 'levels'. It follows the rules and uses the vocabulary of the 'levels paradigm'.

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[6] Contrary to what is often thought, there is no obligation in law for the *Danish* government which would tie it to the parliamentary mandate that it always seeks in the European affairs committee of the *Folketing*; yet two governments fell over decisions they had agreed to in the Council in Brussels. There are commitments for the *French* government to seek parliament's views on draft decisions under Article 88-4 of the constitution, on the basis of a 'circulaire du premier ministre, en date du 19 juillet 1994'. Also, there exist similar obligations for the *British* government under a resolution which was first passed in 1980, *House of Commons Journals* 1979-1980, p. 819, reconfirmed in a resolution of 24 October 1990, p. 646; it was last reformulated in a resolution of 17 November 1998, see *Hansard*, 17 November 1998, Col. 803-804; also regularly published in an appendix to the standing orders of the House of Commons. The *German* government is bound under Article 23 (3) of the *Grundgesetz*, whereas the *Dutch* government is dependent on parliamentary consent for binding Third Pillar decisions, on the basis of the acts of parliament approving the respective treaty amendments since Maastricht, but under no obligation whatsoever as concerns other binding decisions.

[7] Article 88-4 of the French constitution: 'Le Gouvernement soumet à l'Assemblée nationale et au Sénat, dès leur transmission au Conseil de l'Union européenne, les projets ou propositions d'actes des Communautés européennes et de l'Union européenne comportant des dispositions de nature législative. Il peut également leur soumettre les autres projets ou propositions d'actes ainsi que tout document émanant d'une institution de l'Union européenne. Selon des modalités fixées par le règlement de chaque assemblée, des résolutions peuvent être votées, le cas échéant en dehors des sessions, sur les projets, propositions ou documents mentionnés à l'alinéa précédent.'

[8] For the previous situation cf. Conseil constitutionnel, nos. 59-2 and 3 DC, 17, 18, 24 June 1959, *Recueil Conseil constitutionnel*, 58.

4 A 'Polycentric' Paradigm

The European Union can also be viewed other than in terms of separate 'levels' only. For this it is necessary to take the Union not as merely 'Brussels', with 'Brussels' being shorthand for Council and Commission. Nor should it be taken as 'Brussels and Strasbourg' to include the European Parliament as well, nor as any other shorthand for the institutions, organs and bodies of the EC and EU. The European Union can under an alternative paradigm be taken as comprising not only the European institutions, but the member states as well, as is done in normal, everyday speech: the twenty-five member states make up the European Union.

If we focus on the constitutional order of the European Union, this view implies that it comprises not only the constitutional law of the EC and EU treaties and of secondary law, but also the constitutional law of the member states. The EU constitutional order is in this view a more truly composite legal order than is the case in the 'multilevel' approach. In the composite constitutional legal order as viewed here, the situation is polycentric rather than hierarchic, both with regard to substantive constitutional norms,[9] and institutionally. And here the national parliaments come into the picture. National parliaments are not isolated at the national level within the national system, but must be considered part of the larger EU constitutional order. This should imply that they also have a role to play within the broader EU framework, a role which is not constrained to the *national* arena, but precisely is one to be played in the *European* arena.

5 Towards the Polycentric Paradigm

The Treaty establishing a Constitution for Europe provides some interesting clues for this broadening of the context in which national parliaments can act. I point out a few of them. A very general clue, when taken on its own, is Article I-5, concerning the duty of the Union to respect the member states' 'national identities inherent in their fundamental structures, political and constitutional'. In a number of respects, the meaning of this provision is not absolutely clear.[10] We cannot treat them all in the context of this essay. Here I merely point out that the provision may be understood in two ways, each of which corresponds to one of the two paradigms outlined above.

First, the provision can be read in accordance with the distinct 'levels' approach as meaning that the national system is guarded from the European level, the latter not being allowed to interfere with the national constitutional order. Thus, the national level is fenced off from the European level. Parliaments, which are no doubt fundamental to the constitutional structure of the member states, are then restricted to their own national level, also when they deliberate on EU matters and EU decision-making.

An alternative, polycentric way of interpreting this provision, is to understand it as a recognition of the importance and relevance of the values inherent in the constitutional structures of the member states to the EU constitutional order. Parliaments are a crucial element in the constitutional structure of the political and constitutional order of the member states of the European Union. By virtue of Article I-5 this element of the structure is declared part of the identity of the EU itself. Parliaments' role in legitimating democratically the exercise of power by public authorities in this view must of necessity also concern the

[9] The protection of fundamental rights at EU level is a case in point.

[10] Clearly, this Article must be read in the context of the counterbalancing Article I-6 on the EU law's 'primacy over the law of the member states'. This primacy need not be understood in a hierarchical sense, as is often done by European law specialists. At any rate, this Article I-6 in turn must be read without ignoring Article I-5. But there are many other questions of textual and contextual construction of Article I-5.

exercise of power in the framework of, and on the basis of, EU decisions. National parliaments are not necessarily to be restrained only to whatever national authorities do or do not do within the remit of their responsibility, and to the extent of their accountability towards the national parliament in a strictly national one-to-one relationship. National parliaments also have a role to play in the structure of the EU itself.

This reading is reinforced by other provisions of the Constitutional Treaty. The provisions on subsidiarity, in particular, can be read in the light of the polycentric paradigm. The independent role envisaged for national parliaments is neatly brought out in the body of the Constitutional Treaty, by Article I-11 (3) which provides that the institutions of the EU are to apply the principle of subsidiarity, while the national parliaments are to ensure their compliance with it.[11] Subsidiarity is a principle which applies to the EU institutions and its agencies and other bodies, but it is the national parliaments which scrutinise, determine, and hence supervise, whether the EU institutions apply it correctly.

This is confirmed by Article 6 (1) of the Protocol on the application of the principles of subsidiarity and proportionality, which provides for the possibility of national parliaments or a chamber thereof 'to send to the Presidents of the European Parliament, the Council and the Commission a reasoned opinion stating why it considers that the draft in question does not comply with the principle of subsidiarity'. The significant element here, as elsewhere in the Protocol, is that the parliaments (or chambers thereof) are placed in a direct and unmediated relation to the European institutions. They do not address their views on a draft EU measure to their own national government, nor are their views to be transmitted by their governments, but they immediately communicate with the EU institutions. National parliaments are thus made actors with their own independent role to play within the EU constitutional system. They are made an integral part of a truly composite constitutional order.

A new feature of the subsidiarity protocol is the possibility of bringing actions to the European Court of Justice. The relevant provision is Article 8.[12] The first part of this provision suggests little that is new, in as much as it provides for actions for infringements of the principle of subsidiarity being brought by member states in accordance with Article III-365 of the Constitutional Treaty.[13] The very same paragraph of Article 8 immediately adds, however, that the ECJ shall also have jurisdiction in cases '*notified* by [the member states] in accordance with their legal order on behalf of their national Parliament or a chamber of it'. The language is interesting, because it reveals that apart from the actions by *member states* under Article III-365, there is also to be a different action, although it is not called an 'action', which is that by a national parliament or a chamber of it. The reason for considering this a separate type of member state action, different from the one by 'member states', is that it does not emanate from the government, as is usually the case, but that it is an action which is merely to be 'notified by' the relevant member state, read:

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11 Article I-11 (3), indent 2, provides that 'the institutions of the Union shall apply the principle of subsidiarity as laid down in the Protocol on the application of the principles of subsidiarity and proportionality. National Parliaments shall ensure compliance with that principle in accordance with the procedure set out in that Protocol'.

12 'The Court of Justice of the European Union shall have jurisdiction in actions on grounds of infringement of the principle of subsidiarity by a European legislative act, brought in accordance with the rules laid down in Article III-365 of the Constitution by Member States, or notified by them in accordance with their legal order on behalf of their national Parliament or a chamber of it.' In accordance with the rules laid down in the said Article, the Committee of the Regions may also bring such actions against European legislative acts for the adoption of which the Constitutional Treaty provides that it be consulted.

13 Article III-365 (1) provides for review by the Court of Justice of the European Union of the legality of European laws and other acts producing legal effects. Article III-365 (2) of the Constitutional Treaty provides that 'for the purposes of paragraph 1, the Court of Justice of the European Union shall have jurisdiction in actions brought by a Member State, the European Parliament, the Council or the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Constitution or of any rule of law relating to its application, or misuse of powers'.

government. This means that as regards the national parliaments, the protocol here 'pierces the veil' of the member state. Member states are at the EU level represented by the governments in accordance with the general rules and principles of public international law. However, here the Protocol makes clear that it is *not* the government or member state which is actually bringing the action, but the *parliament* or a chamber of it: the government merely 'notifies' it. Parliaments are thus recognised as true actors within the EU constitutional order, also *vis-à-vis* the European Court of Justice under Article III-365 concerning the legality of acts of the EU institutions. National parliaments thus become true actors in their own right in the European Union, prised away from the grip of their governments in the particular context of European Union decision-making.

6 Opening up to Accountability

When we compare the 'multilevel' and the 'polycentric' paradigm, the latter seems, at least theoretically, to offer more opportunities for national parliaments to be involve in EU affairs, thus contributing to a broader democratic legitimacy of the EU institutions' work. To the EU institutions themselves it offers chances for opening up to accountability in contexts in which to date they have not done so save in exceptional cases. This state of affairs is inherent in the 'model' of relations between national institutions and EU institutions of each of these paradigms. Let us have a closer look at the possibilities and limits of each.

In the 'levels' approach, the EU institutions constitute an autonomous level, and the national institutions are restricted within their autonomous level. This means that what happens at one level can be understood properly in the terms of reference of that level only. To put it more concretely, members of the Council are understood only in terms of EU law, and are hence viewed exclusively as members of a European institution. Viewed from the level of the EU, it is merely coincidental that these members happen to be also in a position of ministerial responsibility towards their respective national parliaments, at least in the cases where the member state representative is a minister. If the representative in the Council is actually a member of a state or regional executive within a federal or decentralised member state, as is regularly the case with Germany, Belgium,[14] Austria and the UK – then political responsibility is not articulated at national level but at sub-national level; if the representative in the Council is a civil servant, like a Permanent Representative or another civil servant, the official actually participating in the Council meetings is himself not responsible to the parliament of the relevant member state but to his national minister, who in turn is in principle accountable to his national parliament. In the European Council, the heads of state who form part of it are not accountable to the parliament of the member state they head, but the heads of government are. The actual modalities and possibilities for holding representatives to account before national parliaments differ, and the possibilities and modalities of sanctioning their responsibility differ even more. But from the perspective of the EU level all this is an irrelevant coincidence when we view things within the 'levels' paradigm. Within this paradigm, political accountability is indeed an issue, but the only thing which matters in this regard is the rules of the EU constitution as embodied in the constitutional principles of the treaties and constitutional practice at EU level, *viz.* (1) that the Council can be heard in the European Parliament on the basis of conditions which the Council determines in its own rules of procedure;[15] (2) that there is no relation of accountability between the European Council and the European Parliament; and (3) that otherwise it is only the Commission which can be held to account, and be sanctioned for its political responsibility it holds.[16] All the rest is a matter for the national level.

[14] See the contribution by Wouter Pas in this volume.

[15] Article 197 (4) EC: 'The Council shall be heard by the European Parliament in accordance with the conditions laid down by the Council in its Rules of Procedure.'

[16] Article 197 (2) and (3), and 201 EC; here constitutional practice comes into play as well. This became most evident at the failure of the initially proposed members of the Barroso Commission to acquire the consent of the

Within the 'levels' paradigm, accountability for what representatives have done or failed to do in the Council is a matter based exclusively on national constitutional law. At national level, in turn, a minister is viewed merely as a minister who happened to have sat in the Council, not as a member of the Council; representatives who happen to be ministers of the states within a federation are primarily considered to be governed by the prevailing federal principles; and representatives who are civil servants are (generally) not politically responsible, but their political principal, usually a minister, is so by imputation on the basis of national constitutional law. Accountability exists only to the extent that it is engaged under national constitutional law for what happens to have been done or failed to be done in a more or less fortuitous exterior forum.

Under the 'polycentric' paradigm, by contrast, the EU and national institutions are viewed as forming part of one constitutional order. What happens in EU institutions can be immediately relevant to the national institutions, also in terms of accountability. The fact that Council members are principally ministers is no coincidence, and is of consequence for parliamentary accountability. The *dédoublement fonctionnel* with regard to representatives in the Council and European Council is not accidental but essential; it is essential to EU decision-making to be an object of accountability and hence to acquire legitimacy, not only within the closed terms of EU law in the strict sense, but throughout the whole of the constitutional order which comprises the member state constitutional orders as well. 'Points of contact' and interaction between EU and national political acts, and actors, exist in the polycentric approach to a much larger extent than they do in the levels approach. Accountability is then *not* a matter of separate levels, but a matter which extends throughout the political and constitutional order, and touches both the EU system in the narrow sense and the national systems.[17]

7 Opportunities without a Constitutional Treaty

We have pointed out some features of the Treaty establishing a Constitution for Europe which fit better with the polycentric than with the 'multilevel' approach. As this Treaty will in the short term not enter into force in the manner foreseen, the question arises whether what the polycentric paradigm promises can be realised, a question which also 'tests' whether we are in fact dealing with a paradigm or only an ideological contrivance which does not have any explanatory and heuristic power beyond the text of this one normative instrument of the Constitutional Treaty.

With regard to political accountability towards parliaments, national parliaments can certainly escape from the limitations which inhere in the 'multilevel' view. The possibilities which already exist for national parliaments are several.

- From various sides it has been pointed out that the 'yellow card' procedure under the Constitutional Treaty's subsidiarity protocol can also be put in place even if the Treaty does not enter into force. National parliaments could in practice act voluntarily in accordance with the provisions of the protocol also before, and even without its entry into force. In an inter-institutional agreement, the Commission could bind itself to the practice of reconsidering, or withdrawing, a proposal if it receives too many negative views from national parliaments regarding the proposal's appropriateness in the light of the principle of subsidiarity.

European Parliament, notwithstanding the fact that the Treaty does not explicitly grant them the power to veto Commission members proposed by the governments of the member states. For a detailed description of the events, and a constitutional analysis, see 2 *European Constitutional Law Review* (2005) 153-280.

[17] This is again evidenced by the Barroso affair as discussed in the various articles in *EuConst*, footnote 16 *supra*.

- There is as such no restriction for national parliaments to express views and address them to whichever of the EU institutions, bodies and agencies they find relevant. The French amended their Constitution (entering into force as of the entry into force of the EU Constitutional Treaty), this time not to enable the national parliament to express itself towards its government, but to express itself towards the European Parliament, the Council and the Commission on whether EU proposals are in accordance with the principle of subsidiarity.[18] Other national parliaments might similarly remove national constitutional obstacles for expressing themselves on EU matters towards the EU institutions, should there be such obstacles – probably there are none. By doing so, parliaments could break out from the self-imposed restriction to the national context as the only relevant one even in relation to EU matters.

- National parliaments can on the basis of national law force their government to bring a case to the ECJ. In Germany there is a legislative basis for bringing a case at the ECJ at the request of the *Bundesrat* in the context of the federal division of powers; in France, an explicit constitutional basis for doing so at the request of either house of parliament, in the context of an alleged infringement of subsidiarity, has been created.[19] In other countries, the forces of the parliamentary system of government could, and should, lead governments to bring an action at the request of a parliamentary majority spontaneously. Should this create difficulties, national legislation can be passed to create an obligation for governments to do so.

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[18] *Loi* 2005-204 of 1 March 2005, Article 88-5 of the Constitution is due to read, as from the entry into force of the EU Constitutional Treaty: 'L'Assemblée nationale ou le Sénat peuvent émettre un avis motivé sur la conformité d'un projet d'acte législatif européen au principe de subsidiarité. L'avis est adressé par le président de l'assemblée concernée aux présidents du Parlement européen, du Conseil et de la Commission de l'Union européenne. Le Gouvernement en est informé. […] A ces fins, des résolutions peuvent être adoptées, le cas échéant en dehors des sessions, selon des modalités d'initiative et de discussion fixées par le règlement de chaque assemblée.'

[19] Cf. Germany, *Gesetz* (based on *Grundgesetz* Article 23 (7)) *über die Zusammenarbeit von Bund und Ländern in Angelegenheiten der Europäischen Union* of 1993, § 7: '(1) Die Bundesregierung macht auf Verlangen des Bundesrates unbeschadet eigener Klagerechte der Länder von den im Vertrag über die Europäische Union vorgesehenen Klagemöglichkeiten Gebrauch, soweit die Länder durch ein Handeln oder Unterlassen von Organen der Union in Bereichen ihrer Gesetzgebungsbefugnisse betroffen sind und der Bund kein Recht zur Gesetzgebung hat. Dabei ist die gesamtstaatliche Verantwortung des Bundes, einschließlich außen-, verteidigungs- und integrationspolitisch zu bewertender Entwicklungen zu wahren. (2) Absatz 1 gilt entsprechend, wenn die Bundesregierung in Verfahren vor dem Europäischen Gerichtshof Gelegenheit zur Stellungnahme hat. (3) Hinsichtlich der Prozeßführung vor dem Europäischen Gerichtshof stellt die Bundesregierung in den in den Absätzen 1 und 2 genannten Fällen sowie für Vertragsverletzungsverfahren, in denen die Bundesrepublik Deutschland Partei ist, mit dem Bundesrat Einvernehmen her, soweit Gesetzgebungsbefugnisse der Länder betroffen sind und der Bund kein Recht zur Gesetzgebung hat'; as well as the *Vereinbarung vom 29. Oktober 1993 zwischen der Bundesregierung und den Regierungen der Länder über die Zusammenarbeit in Angelegenheiten der Europäischen Union in Ausführung von § 9 des Gesetzes vom 12. März 1993 über die Zusammenarbeit von Bund und Ländern in Angelegenheiten der Europäischen Union*: 'V. Verfahren vor den Europäischen Gerichten. (1) Im Hinblick auf die hier zu wahrenden Verfahrensfristen unterrichtet die Bundesregierung den Bundesrat unverzüglich von allen Dokumenten und Informationen über Verfahren vor dem Europäischen Gerichtshof und dem Gericht erster Instanz, an denen die Bundesregierung beteiligt ist. Dies gilt auch für Urteile zu Verfahren, an denen sich die Bundesregierung beteiligt. (2) Macht die Bundesregierung bei Vorliegen der Voraussetzungen von § 7 Abs. 1 EUZBLG auf Beschluß des Bundesrates von den im Vertrag über die Europäische Union vorgesehenen Klagemöglichkeiten Gebrauch, so fertigt sie die entsprechende Klageschrift. Von den Ländern wird hierfür rechtzeitig eine ausführliche Stellungnahme zur Sache zur Verfügung gestellt. (3) Nr. 2 gilt entsprechend, wenn die Bundesregierung in Verfahren vor dem Europäischen Gerichtshof Gelegenheit zur Stellungnahme hat.' See also the French constitution, Article 88-5 (2), in its envisaged wording under the 2005 *Loi*, see footnote 18 *supra*: 'Chaque assemblée peut former un recours devant la Cour de justice de l'Union européenne contre un acte législatif européen pour violation du principe de subsidiarité. Ce recours est transmis à la Cour de justice de l'Union européenne par le Gouvernement.'

The duty for a government to bring an action at the ECJ need not be restricted to cases concerning an alleged infringement of the principle of subsidiarity, or to matters which touch states' prerogatives in federal member states. In unitary countries, as in federal states, it is the national parliament's prerogative to exert legislative power, and hence, under a division-of-powers reasoning, most legislative measures of the EU may potentially come within the purview of this prerogative power, and thus affect national parliaments. All justiciable matters which can be entertained at the ECJ can therefore potentially be the subject matter of a duty to bring an action on behalf of a national parliament, such as substantive legality, legal basis, subsidiarity, but also the failure of the EU institutions to respect the time limits allowing for scrutiny as laid down in the Protocol on the National Parliaments of 1997, which failure would affect the rights of national parliaments under the Protocol.

- Members of the European Parliament can, and do, in various manners, and to various degrees, participate in the work of national parliaments, their committees, and the political groups therein. Much has been done about obstacles in this respect, whether they be perceived or real. Attention should also be paid to participation of members of national parliaments in the work of the European Parliament. This is not necessarily a matter of having a 'double mandate' of membership in both the European and the national parliament.

- In national parliaments, ministers are at present held to account only as regards what they have achieved, or failed to achieve, in the Council as national ministers. But this is a very restricted stance which enables ministers to withdraw themselves from accountability for the decisions which are actually taken by the Council. To remedy this, national parliaments should consider their ministers as representatives *of the Council* and hold them to account as such, and not solely and merely as representatives of the member state in some external forum: they are not, as any EC lawyer will admit.

- Similarly, national parliaments should also hold other EU institutions than the Council to account. It is too rare for the Commission president or individual commissioners to defend their views in a national parliament.[20] There is no reason why national parliaments or their committees should not in relevant cases also invite representatives of the other institutions to defend theirs in relevant cases.

If they are to play a role in the European constitutional order of which they are to be fully part, national parliaments must consider the EU institutions as immediate counterparts. Obviously, national parliaments do not provide the only institutional path along which accountability for the EU can be mobilised, nor is that the only manner to provide the EU with legitimacy – far from it. But only if the national parliaments conceive of the EU institutions and themselves as partners and counterparts in the body politic of the Union can the EU descend from its high-level stance and open up to accountability outside its own restricted framework at the EU level.

8 A Research Agenda

The change in paradigm on which the above analysis builds gives rise to many further questions which for lack of space are not be dealt with here. A number of issues for further research must, however, be

[20] A recent example is the appearance of Commission president Barroso in the French Assemblée Nationale on 24 January 2006, in which he gave a speech on the state of the European Union and answered questions from one member of each political group; see *Le Monde*, 'M. Barroso s'explique devant les députés français', 25 January 2006, p. 8. For an impression of the very lively debate see news clip at http://videos.tf1.fr/video/news/newsthemes/france/0,,3280574,00.html. For a full report see www.assemblee-nationale.fr/international/barroso.asp.

specified for a proper, in-depth investigation of the possibilities of national parliaments within the larger context of the EU as a polycentric composite constitutional order.

The actual and potential roles of national parliaments need to be analysed in a more differentiated manner than has happened so far. This can be done along three different axes (which systematically relate such roles to the different types of EU competence) to the various forms of decision-making procedures, which are related to the different instruments in which decision-making results, and to the different European actors involved in the process. As regards the types of EU competence, both practice and the literature have suggested that the national parliaments have more of a role to play when it concerns non-exclusive EU powers and shared powers, than when it concerns exclusive powers. This hypothesis needs testing. It seems to focus strongly on 'input' legitimacy which national parliaments can provide in terms of their powers at the national level. As regards the forms of EU instruments and decision-making procedures, there is a plethora of modalities. Instruments range from treaties, EC instruments, Second and Third Pillar instruments, to benchmarking and reporting within the open method of co-ordination. Decision-making procedures range from 'normal' legislative procedures involving Commission, Council and European Parliament, via delegated executive procedures known as comitology, to informal co-operation. In this respect attention needs also to be drawn to the prevalent idea that (the possibility to resort to) majority voting influences the role which national parliaments can play. If this is true, it needs further investigation in what manner it does so, and what this implies.

As regards the decision-making actors, we have already made a number of suggestions and remarks in the previous sections of this essay. Here I draw attention to the relation with the role attributed to the European Parliament, but which is also relevant for the role of national parliaments with regard to exclusiveness of competence and the type of decision-making procedure. Two main approaches are taken both in the literature and in practice. The first approach views the relationship between national parliaments and the European Parliament as mutually exclusive, and regards the legitimising and accountability function of national parliaments to be sufficiently exhausted wherever the European Parliament has a formal decisive role; little or no room is left for a meaningful role of national parliaments. The other approach considers the two parliaments as complementary, the European Parliament fulfilling a role at the EU level which is not, and cannot be, identical to the role of national parliaments with regard to EU issues.

The theoretical analysis and assessment of these views on the respective roles of national and European parliaments may hinge crucially on the difference in the two paradigms sketched. Nevertheless, independently of such a normative approach it would be useful to see whether in practice national parliaments which ostensibly hold one of these views (a case in point being the Netherlands, where parliament ostensibly only sees a scrutinising role for itself when the European Parliament has no or few powers) still make use of practices of scrutiny or other forms of discussing and reviewing EU decision-making. The more differentiated analysis outlined here should make it possible not only to clarify present roles, but also to suggest new opportunities for national parliaments in the polycentric setting of EU decision-making itself.

9 Concluding Remarks

Exchanging the compartmentalised multilevel approach for a more inclusive polycentric understanding of the composite constitutional order of the European Union changes the perspective on the relevance and role of national parliaments in the EU. We have emphasised the opportunities this offers for opening up the EU to accountability and enhancing its legitimacy. But greater opportunities are no guarantee that they will be used. In fact, one may expect that the putting into operation of the subsidiarity mechanism as envisaged by the subsidiarity protocol to the Treaty establishing a Constitution for Europe may lead to an

investment of scarce resources into one form of early scrutiny which will detract from existing and alternative mechanisms of national parliamentary scrutiny which are at least as far-reaching and meaningful, (or even more so) as the subsidiarity test alone. The subsidiarity test might thus well prove to be a great threat to the much broader role which national parliaments can and should play. In fact, it may force parliaments further into the 'levels' approach: once a matter is considered an EU matter, that is the end of a role for national parliaments, and only in the opposite case (a matter not being suitable for EU decision-making) is there a role for national parliaments.

Scarce resources in terms of time, facilities, budget, staffing, and expertise, are very real obstacles to a meaningful role for national parliaments already at present. They may well remain so in the future. Although paradigm shifts concern ways of viewing reality, and seem to that extent a 'mental' operation, this mental nature of the paradigm shift (or not) is ultimately not decisive. Constitutions do not only live through the ideals, ideas and models which inspire them. Constitutions exist, or do not exist meaningfully depending on the extent to which they are realised, have real existence through constitutional practice. Abiding by a constitution is not an act of piety, it requires action in real life. It is up to the parliaments themselves to realise the shift in paradigm. This requires a great effort on their part to overcome practical obstacles such as those just mentioned. That there are several examples of national parliaments who have been able to do so, is proof that it can be done and should be an inspiration to others.

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