

National Parliaments and EU Economic Governance. In Search of New Ways to Enhance Democratic Legitimacy

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Abstract The current economic crisis has challenged the democratic model of representation within the European Union. The author mentions three fundamental tensions that characterize the legal position of EU states: First, the tension between national sovereignty and economic stability; second, the tension between executive and legislative powers; third, the tension of the gradual introduction and development of redistributive policies at the European level. According to the author, the debate on the ‘democratic deficit’ is still alive. One of the strongest points of critique on the entire EU has been that there is no concrete democratic path for the national governments. Many measures have been taken to address the economic crisis, such as treaties and soft law instruments. These have led to a new EU Economic Governance Model, where public finance and macroeconomic policies of member states are being coordinated. EU institutions are, on one hand, involved via the European Semester and on the other hand via special procedures in case of problems. The author considers the role of the European Parliament still weak in this issue, as it has no real powers. Arguments therefore arise for stronger national parliaments, for example to compensate this lack of power. The author reminds that national governments are still the key players in defining national economic policies. Although the procedural role of national parliaments in the EU dominates, the author claims that the essential issue is which substantive roles they must pursue in the field of economics.

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1 Introduction

Democratic legitimacy has long been a concern in the European Union. The issue has been addressed by scholars from various disciplines and at various levels (from the conceptual to the concrete level of the actual functioning of the EU). But also in political circles and society at large the issue has featured high on the agenda.

The Treaty of Lisbon constituted a consolidation of this constitutional model of EU democracy. The representative democracy has explicitly been designed as the foundation of the Union (Article 10 TEU), supplemented with elements from other democratic models. Article 12 TEU establishes a dual model of democracy which is vested in the European Parliament and national parliaments jointly. This democratic model is currently severely challenged by the economic crisis and the measures that have been adopted to combat it. But the crisis has also highlighted that the democratic model lacks elaboration and precision. Efforts to further clarify the model have been limitedly successful. European Council President Van Rompuy—who has actually been one of the few to make a serious attempt—has come not much further than to link democratic control to the level at which decisions are made.¹ And even this claim is problematic as it proves increasingly difficult to assign measures adopted to combat the economic crisis to a specific level of government. But more about that later. Suffice it for now to conclude that the democratic model introduced by the Treaty of Lisbon has come at a crossroads. Being far from complete and greatly challenged in the current economic crisis, the democratic model is transforming and will need to do so in such a way as to respect the democratic values formulated in the Basic Treaties. I will focus on the role of national parliaments in the current crisis. First, I will set out three major tensions that define the role of national parliaments in both substantive and procedural terms. After this, I will consider the constitutional developments that shaped national parliaments' position in the European Union up until now, including some of the most important trends and positions in scholarly debates. Subsequently, I will analyze the necessity of national parliaments' involvement in the emerging

¹http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/132809.pdf (last accessed 21 February 2014).

system of economic governance. Lastly, I will make some observation on how such involvement could be shaped.

2 Fundamental Tensions

The legal position of national parliaments is characterized by at least three fundamental tensions. The first is the tension between national sovereignty and economic stability. Arguably, the principle of national sovereignty favors national decision making, whereas the interconnectedness of European economies requires the European level as the most appropriate for effective decision making aimed at economic stability. A dominant 'frame' is, thus, that of the transfer of sovereignty from national to European levels. In this sense, national sovereignty becomes a synonym to the—independent—exercise of powers. The European Union's 'translation' is the principle of conferral (Article 5 TEU) which establishes the ultimate locus of powers at the national level and the Member States' conferral as the mechanism of empowerment of the EU. The discussion on the EMU illustrates the dominance of this frame as well as the problems related to it. As regards the further strengthening of the EU economic governance, the Dutch Prime Minister Rutte has argued that national sovereignty has not been at stake, since the actual transfer of power in the field of monetary and economic policies had already taken place by the entry into force of the Treaty of Maastricht (the establishment of the EMU itself). Yet, the further shaping of the EMU highlights other aspects related to national sovereignty. The decreased importance of the Council in EMU decision-making processes and the possibility for automatic imposition of sanctions also touch upon national sovereignty. More importantly, economic policy coordination affects national parliament's budget rights. Thus, when viewed in light of national sovereignty, the issue of transfer of powers only seems to cover part of the legal developments.

Another tension that shapes the legal framework in the field of economic policies relates to the tension between executive and legislative powers. Institutions currently taking the lead in combating the economic crisis include the European Council, the Council, the Eurogroup, the Commission, and national governments. We thus witness 'executive dominance' both at the European and national levels. Parliaments are struggling to ensure democratic control over these executive decisions. Budget rights of national parliaments are at stake, but their position also deserves attention in light of the position of the European Parliament. The latter institution still has a rather weak position in the framework. This may be explained from various reasons. No substantive powers are included for the European Parliament under the ESM treaty, but also the Treaty on Stability, Coordination and Governance (the "Fiscal Compact") does not include substantive powers for the European Parliament. But also within the EU basic treaties the powers of the European Parliament in economic policies (e.g., within the European semester) are limited.

The third tension regards the gradual introduction and development of redistributive policies at the European level. New issues of solidarity are raised, between and inside the Member States.² The ESM is a key instrument here, but the euro crisis measures also affect the balance between the state and the market, and between the public and private domain in fundamental ways. As such, these measures highlight tensions that have defined political landscapes in the Member States. The creation of the Banking union is the prime example here. The key issue is the scope of discretion which will be left to banks and other financial institutions. This touches upon political choices that were previously reserved for the national political arena. Thus, the interplay between tensions (national/European; state/market) further exacerbates the complexities.

3 National Parliaments and Democratic Legitimacy in the European Union

The first strand of strengthening democratic legitimacy has focused on the European Parliament. The introduction of the term “institutional balance” has confirmed the ‘coming of age’ of the institution.³ The Treaty of Lisbon has marked a further—but arguably only intermediate—step in this process of a gradual strengthening of the European Parliament’s powers.⁴ Nevertheless, the debate on what has been coined the ‘democratic legitimacy deficit’ is still a vivid one. Fundamental questions include the lack of a European *demos*⁵ which is seen by some as an obstacle to the emergence of a real, functioning democracy at the European level. The decision of the German constitutional court on the legality of the Treaty of Lisbon may be seen as an example of that reasoning.⁶ Thus, the very foundations of democracy in the European Union are being challenged. Constitutional scholars have responded to the democratic challenges by creating new constitutional theories that accommodate the wish to seek democratic legitimacy of the EU at levels other than that of the EU itself.⁷

²In her Conclusion to the Pringle case A-G Kokott discussed the emergence of inter-state financial solidarity: Conclusion of 26 October 2012, Case C-370/12, nyr. Borger has further developed this idea in: Borger 2013, pp. 7–36.

³Corbett et al. 2007, p. 245.

⁴See for an overview of the European Parliament’s new powers under the Treaty of Lisbon: Piris 2010, p. 118 ff.

⁵See critically on this e.g. Weiler 1995, pp. 219–258.

⁶Lisbon Case, BVerfG, 2 BvE 2/08 from 30 June 2009, available at: http://www.bundesverfassungsgericht.de/entscheidungen/es20090630_2bve000208.html.

⁷These include the constitutional theories of Multilevel constitutionalism (coined by Pernice 2002, p. 511) and legal pluralism (coined by Walker 2002, pp. 317–359).

Although one of the first comparative analyses of the role of national parliament dates back to the early 1970s,⁸ only in the 1990s did the theme actually gain greater wings. Normative and conceptual analyses have been carried out, but also institutional, administrative, and organizational issues have been studied (e.g., information dependencies and flows, the parliamentary procedures for selection of EU legislative proposals for scrutiny, the scrutiny procedures themselves and inter-parliamentary cooperation).⁹ In the new century, new impetus has been given to the theme. Following the European Council Laeken Declaration, the European Convention that presented a proposal for a European Constitution, had included both a working group on national parliaments and one on subsidiarity which presented their findings. The option suggested already by the European Council to empower national parliaments to scrutinize EU legislative proposals on compliance with the principle of subsidiarity, eventually made it into the Treaty of Lisbon.¹⁰

The ‘coming of age’ of national parliaments as constitutional actors in the European Union has not escaped criticism, however.¹¹ One of the fundamental points of critique has been that the EU constitutional architecture lacks a clear choice for a particular democratic model, which leads to diverging expectations on what the role of national parliaments should entail.¹² Also, the new mechanism for subsidiarity scrutiny has been criticized. It has been questioned whether this mechanism may actually contribute to EU legitimacy and whether it actually enables national parliaments to influence EU decision making (especially in light of the necessary cooperation between national parliaments).¹³ Another issue has been whether national parliaments would actually limit themselves to the application of the subsidiarity principle. It might perhaps be expected that national parliaments would extend scrutiny of EU legislative proposals to issues such as the legal basis and proportionality of the measure at hand and even political expediency in general.

However, on the basis of the actual functioning of the Early Warning Mechanism (as introduced by the Subsidiarity Protocol), substantial parts of this critique must be rebutted. Subsidiarity scrutiny may effectively lead to ‘yellow cards’ being raised, as a result of which the European Commission must reconsider its proposal. National parliaments’ rejection of the so-called ‘Monti-II’ Regulation¹⁴ was the first example, to be followed in the Fall of 2013 with the rejection of the Regulation of the Council on the establishment of the European

⁸Niblock 1971.

⁹See *inter alia* Cygan 2001; Smith 1996; Norton 1996 and Laursen and Pappas 1995.

¹⁰Protocol no. 2.

¹¹See e.g. Kiiver 2006 and Cygan 2001, pp. 478–497.

¹²Nettesheim 2005, p. 358.

¹³Cygan 2012a, pp. 55–73, b, pp. 517–533.

¹⁴Proposal of 21 March 2012 of the Commission for a Council Regulation on the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services, COM(2012) 130 fin.

Public Prosecutor's Office (EPPO).¹⁵ Undeniably, it has proved unrealistic to expect national parliaments to focus on the subsidiarity aspects of proposed legislation. Still, the analysis of subsidiarity aspects constitutes the central element of national parliaments' scrutiny procedures.¹⁶

4 National Parliaments in EU Economic Governance: Why?

The aggregate of measures to address the economic crisis constitutes a legal patchwork. Some measures have been adopted in the form of a treaty (the Treaty on Stability, Coordination and Governance—TSCG and the Treaty establishing the European Stability Mechanism—ESM). Other measures take the form of EU secondary law such as the so-called legislative 'six-pack' (2011) and 'two-pack' (2013). Also, soft law instruments such as the 'Euro-plus pact' have been adopted. Furthermore, the Treaty on the Functioning of the EU (TFEU) has been amended by the decision of the European Council to amend Article 136 TFEU to allow the setting up of the stability mechanism. This was one of the first occasions when the simplified treaty revision procedure was applied.¹⁷ The effectiveness and the legality of these measures have been heavily analyzed and debated, by scholars, courts, and politicians alike.¹⁸ The need to ensure democratic accountability of EU economic governance has been voiced quite widely as well, but this has—as yet—not resulted in concrete plans of how to shape this.

Arguably, democratic accountability depends on the nature and type of decision making. The legal acts mentioned above have all been adopted and entered into force, which has resulted in a renewed EU economic governance model. The cornerstone of that model is the system of coordination of public finance policies of the Member States and coordination of their macroeconomic policies. Since the entry into force of the legislative six-pack, for both parts of these economic policies financial sanctions may be imposed on Member States that fail to fulfill the requirements, albeit many procedural steps must be taken before such sanctions may actually be imposed. The involvement of EU institutions in national economic policies is twofold.¹⁹ The regular system involves a procedure that is called

¹⁵COM (2013) 534 fin.

¹⁶van den Brink 2011, pp. 160–180.

¹⁷Article 48(6) TEU.

¹⁸To mention just a selection of contributions: the Pringle case in which the ECJ reviewed the legality of use of the simplified treaty revision procedure: C-370/12. Craig has analyzed the legality of the Fiscal Compact in: Craig 2012, p. 231.

¹⁹In fact, a third type of involvement may be identified for countries that have received financial assistance on the basis of the European Stability Mechanism (ESM). This is actually the most far reaching form of EU involvement. The ESM will, however, be excluded from the scope of this contribution.

the European Semester, which is a yearly cycle of economic policy coordination and which essentially boils down to a policy dialogue between European and national institutions. This regular system is supplemented with special procedures which apply in case of problems: the Excessive Deficit Procedure (EDP) and the Excessive (macroeconomic) Imbalances Procedure (EIP).

The role of the European Parliament in the system of economic governance is still weak. An ‘Economic Dialogue’ has been set up, but this involves no real powers for the European Parliament. The position of the European Parliament is equally weak in ESM decision making. Thus, a strong argument for greater national parliaments’ involvement emerges, especially for those that see a primary role for national parliaments in areas in which the EPs’ lack of powers needs to be compensated for.

Another argument would be that the European Semester directly affects national parliamentary budget rights.²⁰ These rights, often enforced only after fierce struggles, have enabled parliaments to influence national economic policies but also to claim influence far beyond the economic domain.²¹

Thirdly, economic policy coordination in the EU becomes increasingly political in nature. This may come as a surprise in light of efforts to ‘de-politicize’ some of the substantive norms of the SGP, e.g., by obliging the Member States to implement them in provisions of national law, ‘preferably of a constitutional nature’ (Article 3(2) TSCG). The reality of EU economic policy coordination reveals a far more political picture, however. The coordination of macroeconomic policies is political in nature and has—now that a macroeconomic imbalances procedure has been included—been strengthened significantly. But also the coordination of national public finance policies has become more political in nature. Notably the Commission disposes of more policy discretion than before. The reason is the Commission’s application of the exception it may grant to comply with the budgetary objectives.²² In the current crisis in which many Member States have difficulties in meeting these objectives, the exemptions and the conditions the

²⁰More in detail on this issue for the Dutch context: Report W01.12.0457/I of the Dutch Council of State of 18 January 2013 on the embedding of democratic control in the reform of economic governance in Europe to combat the economic and financial crisis; also Emmerik and Diamant 2013, pp. 94–129.

²¹The Dutch Council of State made a distinction between formal and substantive budget rights with the latter concept referring to this further-reaching influence, *infra* nt. 20, p. 4.

²²Article 5 Regulation 1466/97/EC as amended by Regulation 1175/2011/EU on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies. This provision reads as follows: “In the case of an unusual event outside the control of the Member State concerned which has a major impact on the financial position of the general government or in periods of severe economic downturn for the euro area or the Union as a whole, Member States may be allowed temporarily to depart from the adjustment path towards the medium-term budgetary objective referred to in the third subparagraph, provided that this does not endanger fiscal sustainability in the medium term.”

Commission attaches to these exemptions greatly enhance the political nature of the decision making, thereby calling for democratic control.

Lastly, a stronger involvement of national parliaments is warranted in light of the ‘country-specific’ nature of a large part of the decision-making process. The European Semester encompasses several general elements (i.e., elements that apply to all Member States). Substantial parts, however, deal with the evaluation of national economic policies. As such, they involve a policy dialogue between the Commission, the Council (and the European Council) on the one hand and national institutions, most notably national governments, on the other. Thus, it would be more of a rational choice to involve national parliaments in these country-specific parts of the European semester than it would to turn to the European Parliament to ensure democratic control.

5 National Parliaments in EU Economic Governance: How?

The role of national parliaments has a procedural and a substantive dimension. However, the procedural dimension often dominates in this discussion. Apparently, the idea is that by creating effective procedures democratic legitimacy by national parliaments will be ensured. Yet, the substantive dimension is relevant as well. A lot of the discussion on the introduction of the Early Warning System on subsidiarity scrutiny indeed focused on procedural aspects of subsidiarity. The substantive role of national parliaments in this new mechanism has thus largely been neglected, although the substantive dimension was indicated by the subsidiarity principle. The risk of focusing too much on procedural aspects is what the Dutch Council of State has called ‘democratic alienation’.²³ Despite stronger parliamentary powers, the distance between citizens and parliaments still increases, and the former feel neither represented by politicians nor responsible for the measures they adopt.

But is the mechanism set up by the Treaty of Lisbon suitable for application to EU economic governance? Although subsidiarity is a general principle, applicable to all institutions and to all their actions,²⁴ it is undeniably geared to *legislative* measures of the European Union. The Early Warning Mechanism is limited to scrutiny of draft legislative acts. This may well be explained by the fact that at the European level the adoption of legislation outweighs executive measures by far (as the latter are to a great extent reserved for national and subnational authorities). Arguably, with the Early Warning Mechanism, national parliaments have claimed a co-legislative role at the European level. In EU economic governance, however,

²³P. 6 of its report.

²⁴Article 1 of Protocol no. 2 attached to the Treaty of Lisbon on the application of the Principles of Subsidiarity and Proportionality.

measures are mostly executive in nature. Thus, rather than legislative powers and procedures, mechanisms of democratic control and accountability are called for.

Also, unlike most other areas of EU activity, EU economic governance challenges national parliaments' positions as representatives of tax payers. Decisions to grant financial aid to economically troubled Member States directly affect tax payers' interests and the same is true for the European semester—especially since it now involves prior involvement in national budget setting procedures.

The subsidiarity Early Warning System would, thus, not be an appropriate instrument. However, the so-called 'Barroso-initiative' does provide for useful inspiration here.²⁵ This initiative involved sending all Commission proposals to national parliaments and an invitation to them to react to these proposals. As such, it was meant as a mechanism that should precede the activation of possible Early Warning Mechanisms. Thus, a direct institutional link was created between national parliaments and the European Commission.

Such a direct link between national parliaments and the European Commission should also be activated within the system of EU economic governance. Especially the increasing political role of the Commission (as was argued above) is an important reason for such a direct link. National parliaments have been experimented somewhat with establishing such a link (e.g., by inviting 'EMU-commissioner' Rehn to attend parliamentary sessions). Such experiments should result in a stable institutional arrangement. As such, this proposal differs from the model European Council President Van Rompuy has put forward. In his October interim report on the Future of the Economic and Monetary Union²⁶ he formulated the principle that democratic control should be exercised at the level at which decisions are taken. Fundamentally, the 'Van Rompuy' principle presupposes that levels of government in the European Union are still clearly separable, but this is less and less so. A direct institutional link between national parliaments and the European Commission would be an acknowledgement of the increased intertwining and interconnectedness of levels of governance.

But also the relations between national governments and national parliaments need to be adjusted to the changed realities. Despite EU involvement, national governments are still key players in defining national economic policies. National parliaments need new powers and mechanisms of control over their national parliaments. Again, the German Constitutional Court may serve as an example. It has *inter alia* prescribed that the national parliament should have a—prior—say on issues such as decisions on the national contribution to the authorized capital stock of the ESM. Essentially, however, this is an internal situation and much depends on the actual position of national parliaments within their respective national constitutional systems.

²⁵See Jancic 2012.

²⁶'Towards a Genuine Economic and Monetary Union' of 12 October 2012, available at: http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/132809.pdf (last accessed: 21 February 2013).

The above observations may seem to focus—again—on the procedural aspects rather than on substance. But the essential issue is in my view what substantive roles national parliaments need to pursue and which roles they themselves wish to pursue. If such roles include the exercise of fiscal sovereignty, they should not remain passive and deplore the alleged loss thereof, but seek new ways to pursue it. As has been shown, there are certainly ways available to do so.

References

- Borger V (2013) How the Debt Crisis Exposes the Development of Solidarity in the Euro Area. *Eur Const Law Rev* 9(1):7–36
- Corbett R, Jacobs F, Shackleton M (2007) *The European Parliament*, 7th edn. Harper, London
- Craig PP (2012) The Stability, Coordination and Governance Treaty: Principle, Politics and Pragmatism. *Eur Law Rev* 37:231–248
- Cygan A (2001) *National Parliaments in an Integrated Europe: an Anglo-German perspective*. Kluwer International, The Hague
- Cygan A (2011) The Parliamentarisation of EU Decision-Making? The Impact of the Treaty of Lisbon on National Parliaments. *Eur Law Rev* 36:478–497
- Cygan A (2012a) Collective Subsidiarity Monitoring by National Parliaments after Lisbon—The Operation of the Early Warning Mechanism. In: Trybus M, Rubini L (eds) *After Lisbon: The Future of European Law and Policy*. Edward Elgar, Cheltenham, pp 55–73
- Cygan A (2012b) National Parliaments within the EU Polity—no Longer Losers but Hardly Victorious. *ERA Forum* 12(4):517–533
- Emmerik ML, Diamant M (2013) Het Nederlandse budgetrecht in Europees perspectief. *Tijdschrift voor Constitutioneel Recht* 4(2):115
- Jancic D (2012) The Barroso Initiative: Window Dressing or Democracy Boost? *Utrecht Law Rev* 8(1):78
- Kiiver Ph (2006) *National Parliaments in the European Union*. Kluwer, Deventer
- Laursen F, Pappas SA (eds) (1995) *The changing Role of Parliaments in Europe*, EIPA
- Nettesheim M (2005) *Developing a Theory of Democracy for the European Union*. Berkeley J Int Law 23:358
- Niblock M (1971) *The EEC: National Parliaments in Community Decision-making*. Chatham House, London
- Norton Ph (ed) (1996) *National Parliaments and the European Union*. Frank Gass, London
- Pernice I (2002) Multilevel Constitutionalism in the European Union. *Eur Law Rev* 2002:511
- Piris JC (2010) *The Treaty of Lisbon. A legal and political analysis*. Cambridge University Press, Cambridge
- Smith E (ed) (1996) *National parliaments as cornerstones of European integration*. Kluwer Law International, The Hague
- van den Brink A (2011) Substantiating Subsidiarity. The Interpretation and Meaning of the Principle after Lisbon. In: Trybus M, Rubini L (eds) *The Future of European law after Lisbon*. Edward Elgar Publishers, Birmingham, pp 160–178
- Walker N (2002) The Idea of Constitutional Pluralism. *Modern Law Rev* 65(3):317–359
- Weiler JHH (1995) Does Europe need a Constitution? Demos, Telos and the German Maastricht Decision. *Eur Law J* 1(3):219–258