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WHI - Paper 5/01

THE ROLE OF NATIONAL PARLIAMENTS IN THE EUROPEAN UNION

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TO BE PUBLISHED IN:
DIMITRIS MELISSAS/INGOLF PERNICE
PERSPECTIVES OF THE NICE TREATY AND THE INTERGOVERNMENTAL CONFERENCE IN 2004
NOMOS, BADEN-BADEN 2001

JULI 2001

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A. Introduction

Declaration No 23 on the Future of the Union attached to the Treaty of Nice sets the agenda for a broad public debate in preparation of the next Intergovernmental Conference (IGC) to be held in 2004 which shall, inter alia, address “the role of national parliaments in the European architecture”. The Nice IGC avoided to talk of an institutional reform and continued avoiding the use of the word “constitution”, but it is clear that institutional and, indeed, constitutional matters are at stake where people talk about the democratic legitimacy for the European Union¹. And this is what our subject is

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¹ For a “postnational” concept of constitution which is not related to the concept of State see: I. Pernice, “Europäisches und nationales Verfassungsrecht”, (2001) 60 *VVDStRL* 148 at 155 et seq.

about: the European Parliament gives the European public authority direct legitimacy through its assent, co-decision, co-operation and opinions required under the legislative procedures laid down in Articles 192, 251 and 252 EC and referred to in the provisions of the Treaties conferring specific powers to the Community. Yet, no Community legislation will enter into force without the consent of the Council; and the only bodies which can provide democratic legitimacy and control to the Council are the national Parliaments.

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.² It will be shown in the following paragraphs, however, that national parliaments do indeed 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 (see B. below). It is important to *understand* the role of the national parliaments as part of the European system of governance in the light of what I call “multilevel constitutionalism”³ (see C. below). 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 (see D. below).

B. The role of national parliaments in the European Union today

The actual role of the national parliaments in the European Union can be summarised 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).

I. Constitution-making powers of national parliaments

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

² S. Puntcher-Rieckmann, *Die kommissarische Neuordnung Europas* (1998), pp. 195 et seq.

³ I. Pernice, “Constitutional Law Implications for a State Participating in a Process of Regional Integration. German Constitution and ‘Multilevel Constitutionalism’”, in: E. Riedel (ed.), *German Reports on Public Law Presented to the XV. International Congress on Comparative Law, Bristol, 26 July to 1 August 1998* (1998), pp. 40-65; in more detail: I. Pernice, “Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitution-Making Revisited?”, (1999) 36 *CMLRev.* 703; I. Pernice, F. C. Mayer, *De la constitution composée de l’Europe*, (2000) 36 *RTD eur.*, 623, 631-640.

more involved in the process of negotiation when the national positions on any proposals are to be formulated. Article 23(3) of the German Constitution makes this clear in providing for consultation of the Bundestag by the government in any matter of the European Union, including amendments to the Treaties.⁴ The third sentence of Article 23(1) requires specific procedures when a Treaty amendment effectively entails changes of the German constitution (two third majority in both houses of the parliament and respect for the constitution's essential principles)⁵. It follows that, in participating in the revision of the Treaty which gives the European construction democratic legitimacy,⁶ the parliament exercises basic constitutional powers. Other national constitutions and laws confer on their parliaments similar means of participation.⁷ 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 organised. 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.“ with a view to preparing the next IGC in 2004. It is clear that item four of the emerging debate, „the role of national parliaments in the European architecture“, has much to do not only with the European legislative process but with the very procedures for the revision of the Treaties.

II. National parliaments and European legislation

National parliaments play an important role in the legislative process of the European Union both as a source of legitimacy (1) and in making Community legislation effective at the national level (2). Yet, strong arguments exist why national parliaments are not able, not sufficiently organised or, at least, not prepared to meet this „European“ function properly (3).

⁴ For a detailed analysis of the German practice see M. Kaufmann, *Europäische Integration und Demokratieprinzip* (1997), esp. pp. 363 et seq.

⁵ Cf. Art. 79(2) and (3) of the German constitution.

⁶ See for this function very clearly the Maastricht judgement of the German Constitutional Court (1993) BVerfGE 89, 155 at 184.

⁷ E.g. Article 23e of the Austrian constitution. Article 88.4 of the French constitution only refers to acts of the European Union. As to specific requirements for the ratification of the Treaties revising the TEU see Article 29(4) of the Irish constitution, Article 20(2) of the Danish constitution, Article 28(2) and (3) of the Greek constitution etc.

⁸ P. Craig, „Constitutions, Constitutionalism, and the European Union“, (2001) 7 *ELRev.* 125; Pernice, *supra* note 1, based on a „postnational“ concept of constitution (*ibid.* pp. 155 et seq.); with a „cosmopolitan“ view: P. Eleftheriadis, „The European Constitution and Cosmopolitan Ideals“, (2001) 7 *ColJEL* 21; more limited: A. Dashwood, „The Limits of European Community Powers“, (1996) 21 *ELRev.* 113 at 114.

⁹ In Austria, the accession to the Union was considered to involve a total revision of its Federal Constitution See for details Th. Öhlinger, *Verfassungsfragen einer Mitgliedschaft zur Europäischen Union* (1999) reported by F. Hoffmeister, 2000 *Deutsches Verwaltungsblatt* 1296.

1. Source of legitimacy for European legislation

Beside the growing role of the European Parliament, democratic legitimacy is still considered to be provided to the Council mainly through the national parliaments.¹⁰ They elect - or, at least, control the policies of - the national governments, including in their capacity as European legislators.¹¹ Not only national constitutions provide for the consultation¹² 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 provides for timely information of the national parliaments and time for their consultation by the governments on all consultative documents and proposals of the Commission, so as to allow the national parliaments to develop and express their position and, eventually, control the government representatives in the Council effectively. It also gives the joint conference of the European affairs committees of the national parliaments and the European Parliament, COSAC, a formal status and a consultative function.¹⁴

It has been argued that around 80% of the relevant economical and social legislation in the Member States are determined by directives of the Community¹⁵ - an even higher percentage applies

¹⁰ This is the basic assumption of the German Constitutional Court in its judgement on the Maastricht Treaty (1993), BVerfGE 89, 155 at 185. In general, see: H.-G. Kamann, *Die Mitwirkung der Parlamente der Mitgliedstaaten an der europäischen Gesetzgebung* (1997), esp. pp. 263 et seq.

¹¹ For procedures and difficulties see the overview given by S. Hölscheidt, "Parlamentarische Mitwirkung bei der europäischen Rechtsetzung", (1994) 77 *Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft* 405 at 410 et seq.

¹² For the necessary feed-back with the national parliament within the terms of the German Constitutional Court, see: S. Griller, "Zur demokratischen Legitimation der Rechtsetzung in der EU", (1995) 3 *Journal für Rechtspolitik* 164 at 165 et seq.

¹³ See Article 23(2) and (3) of the German Grundgesetz, Article 88.4 of the French constitution, Article 23 e of the Austrian constitution (for details see Griller, *supra* note 12, pp. 167 et seq.; Article 6(2) of the Danish Law on the accession to the EC of 11 Oct. 1972, and on this: J. Alboek Jensen, "Prior Parliamentary Consent to Danish EU Policies", in: Smith (ed.), *National Parliaments as Cornerstones of European Integration* (1996), p. 39 at 45 and H. Hegeland/I. Mattson, "To Have a Voice in the Matter: Comparative Study of the Swedish and Danish European Committees", (1996) 2 *J.L.S.* 198-215(3). The Parliament of Finland even has its representatives in Brussels, see § 33a of the Constitution of Finland, Chapter 4a of the law on the Parliament and M. Wiberg/T. Raunio, "Strong Parliament of a Small EU Member State: The Finnish Parliament's Adaptation to the EU", (1996) 2 *J.L.S.* 302-321(4). For the works of the German Committee for European affairs see: F. Pflüger, "Die fortschreitende europäische Integration und der Europaausschuss des Deutschen Bundestages", (2000) 23 *Integration* 229-244. A comparative description can be found in: P. Norton (ed.), *National Parliaments and the European Union*, (1996). Reports on the situation in France, Germany, United Kingdom, Spain, Austria and Sweden can be found in J. Schwarze (ed.), *Die Entstehung einer europäischen Verfassungsordnung. Das Ineinandergreifen von nationalem und europäischem Verfassungsrecht* (2000). On Sweden see also H. Hegeland, Hans/I. Mattson, Ingvar: "Another Link in the Chain: The Effects of EU Membership on Delegation and Accountability in Sweden", (2000) 6 *J.L.S.* 81-104(1) For an overview with more references see: Ch. Sobotta, *Transparenz in den Rechtsetzungsverfahren der Europäischen Union* (2001), pp. 149-61; Kamann, *supra* note 10, pp. 45-194. For the British practice see T. Pratt, "The Role of National Parliaments in the Making of European Law", (1998) 1 *C.Y.E.L.S.* 217-231, E. Denza, "Parliamentary Scrutiny of Community Legislation", (1993) 14 *Stat. L.R.* 56-63 and T. Bates, "European Community Legislation before the House of Commons", (1991) 12 *Stat. L.R.* 109-134; for the problems after devolution see: C.A. Carter, "Democratic Governance Beyond the Nation State: Third-Level Assemblies and Scrutiny of European Legislation", (2000) 6 *European Public Law* 429 at 434 et seq.

¹⁴ On the post-Amsterdam COSAC see Lord Tordoff, "The Conference of European Affairs Committees: A Collective Voice for National Parliaments in the European Union", (2000) 6 *J.L.S.* 1-8(4), A. Dashwood, "European Community Legislative Procedures after Amsterdam", (1998) 1 *C.Y.E.L.S.* 25 at 26-8 and V. Miller/R. Ware, "Keeping National Parliaments Informed: The Problem of European Legislation", (1996) 2 *J.L.S.* 184-197(3).

¹⁵ Statement of the German Constitutional Court, BVerfGE 89, 155 (173) - *Maastricht*, referring to the speech of the former President of the European Commission, Jacques Delors, at the European Parliament of 4 July 1998 (EC-

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” (Lisbon- and Gothenburg process¹⁶). These policies do indeed concern more and more questions of internal character and have a direct impact on the life of the citizens. Where the great political directions regarding the needs and interests of the citizen are determined at the European level, the national political debate would miss the point, if it would not follow the policies made within the European institutions more closely and address these issues with priority. Consequently, it seems to be necessary at this stage to view and run national elections more in the European perspective, as “European elections”, instead of what seems to be common practice today: running European elections with national subjects.

2. Implementing Community legislation

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.¹⁷ The implementation of Community directives certainly demands high skills, responsibility and European loyalty of the parliamentarians, but if national parliaments are to maintain a meaningful political role and legislative function, they must exercise fully their control of the ministers in the Council regarding the legislation which they will have to transpose and integrate in the national law at a later stage. Of course, the more frequent use of framework-directives such as referred to in Article 5(3) EC and the Protocol on Subsidiarity and Proportionality would leave more room for national discretion,¹⁸ but what is more important is the choice of policies and the result to be achieved (Article 249(3) EC).

Another important function and responsibility of national parliaments relevant to the implementation of European policies has not yet received sufficient attention: Declaration (No 43) on the Protocol on the Application of the Principles of Subsidiarity and Proportionality, attached to the Treaty of Amsterdam, confirms that the administrative implementation of Community law is, in principle, a matter for the Member States in accordance with their respective constitutional provisions. Regarding environmental policies this principle is expressly stated in Article 175(4) EC. The Court of Justice has confirmed, in its 1983 *Milchkontor*-Decision, that the Member States have, in the absence of specific provisions on the administrative procedures, the general responsibility

Bulletin 1988, No. 7/8, p. 124), and to the former Commissioner Martin Bangemann, in: Brückner (ed.), *Europa transparent: Informationen, Daten, Fakten, Hintergründe* (1991), p. 5.

¹⁶ See Presidency conclusions Gothenburg European Council, 15 and 16 June 2001, points 20, 33-43.

¹⁷ This has been observed already by J.H.H. Weiler/U. Haltern/F. Mayer, “European Democracy and its critique”, (1995) 18 *West European Politics* No. 3 5 at 7; see also Carter, *supra* note 13, p. 430.

¹⁸ See Kaufmann, *supra* note 4, pp. 374 et seq.

under Article 10 EC to implement Community law effectively and without discrimination in accordance with the relevant national provisions and procedures.¹⁹ Regarding judicial protection, it is clear from Article 234 EC that the system is based on the competence of the national courts applying and giving effect to Community law, while the Court of Justice has the last word on questions of interpretation and the exclusive competence to judge on the validity of Community law.²⁰ It is for the national parliaments to make sure that the national administrative and judicial system is meeting these functions effectively and in accordance with the principles of Article 6(1) and 2 TEU as well as with the European Charter of Fundamental Rights (Article 51(1) ECFR). The legal system, including the individual rights it provides for the citizens of the Union, and the functioning of the European Union as such relies and, indeed, depends on the strict respect of these principles which only each national legislator in its “European” function can ensure. This is why Article 7 TEU even provides for sanctions in the case of serious and persistent breaches of the principles mentioned in Article 6(1) TEU, and why functioning administrative and judicial systems in the candidate countries are an essential condition for their accession to the European Union.

3. Difficulties in meeting the European function of national parliaments

It is clear that national parliaments have problems to cope with the new European dimension of their responsibility.²¹ 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. 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 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 co-ordinated, national policies.

Yet, national parliaments lack capacity and adequate structures to meet this new challenge. They must realise that they have not only a national, but also a European function.²² 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 Council²³ but also to allow the minister participating actively participating in the deliberations instead of being isolated and outvoted.²⁴ Finally, to facilitate the necessary communication between national parliaments,

¹⁹ [1983] ECR 2633 at 2664 et seq.

²⁰ See also [1987] ECR 4199 - *Foto Frost*.

²¹ See P. Norton, Conclusion: Addressing the Democratic Deficit, in: by P. Norton (ed.), *National Parliaments and the European Union*, (1996), p. 177 at 186 et seq.; M. Höreth, *Die Europäische Union im Legitimationstrilemma* (1999), p. 299.

²² For this claim see already W. Steffani, “Das Demokratie-Dilemma der Europäischen Union. Die Rolle der Parlamente nach dem Urteil des Bundesverfassungsgerichts vom 12. Oktober 1993”, in: *ibid./U. Thaysen* (eds.), *Demokratie in Europa: Zur Rolle der Parlamente* (1995), p. 33 at 44 and 47.

²³ This is pointed out by Höreth, *supra* note 21, p. 300.

²⁴ See for an example of the inefficiencies of the Austrian solution of binding instructions of the parliament to the minister (transport of living animals): Griller, *supra* note 12, pp. 170 et seq.; see also the decision of the German Constitutional Court in the case of the television-directive, on the limits of the powers given to the federal minister at the Council: BVerfGE 92, 203 at 236 et seq.

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.

III. Control on the general budget of the European Union

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“ 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.

IV. Control of the governments' European appointment policies

There is no other democratic body than the national parliaments to give legitimacy to and exercise democratic control on the national governments in their European policies. Such control, however, is particularly weak regarding the occupation of the leading positions in the European institutions. According to Article 214(2) EC the governments, acting by “common accord”, play the central role in the nomination and appointment of the President and the other members of the Commission. The Judges and Advocates-General of the Court of Justice and the Judges of the Court of First Instance are appointed by common accord of the governments of the Member States (Articles 223(1) and 225(3) EC). The President, the Vice-President and the other Members of the Advisory Board of the European Central Bank are appointed by common accord of the governments of the Member States at the level of Heads of State or Government (Article 112(2) lit. b EC), while it is the Council who appoints the members of the Court of Auditors (Article 247(3) EC), the members of the Economic and Social Committee (Article 258(2) EC), the members of the Committee of the Regions (Article 263(3) EC) and the Secretary General and the Deputy Secretary-General of the Council (Article 207(2) EC). The Treaty of Nice gives the appointment of the Commission in the hands of the Council, which will also be competent to appoint the members of the judicial panels can be established under the new provision of Article 225a EC.

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. Only the Austrian constitution provides expressly for parliamentary accord or participation (Article 23c(2)-5). 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.

C. National parliaments in the light of „multilevel constitutionalism“

Multilevel constitutionalism is an expression for a specific theoretical approach to the understanding of European integration.²⁵ It is based on a “postnational” notion of constitution.

I. A “postnational” concept of constitution

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” (Habermas),²⁶ 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.

It should be emphasised 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.²⁷ 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.²⁸ 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.²⁹ The constitution is, indeed, to be understood as the expression of a social contract between the citizens.³⁰

²⁵ See *supra* note 3.

²⁶ J. Habermas, “Die postnationale Konstellation und die Zukunft der Demokratie”, in: *ibid.*, *Die postnationale Konstellation. Politische Essays* (1998), pp. 91 et seq. M. Zürn, “The State in the Post-National Constellation - Societal Denationalization and Multi-Level Governance”, *ARENA Working Papers* WP 99/35, www.arena.uio.no; G.F. Schuppert, “Demokratische Legitimation jenseits des Nationalstaates. Einige Bemerkungen zum Legitimationsproblem der Europäischen Union”, in: W. Heyde/T. Schaber (eds.), *Demokratisches Regieren in Europa? Zur Legitimation einer europäischen Rechtsordnung* (2000), p. 65 at 76 et seq.: “Die postnationale Konstellation oder die EU als dynamisches Mehrebenensystem”.

²⁷ For an application of the notion to the UN-system see B. Fassbender, *UN Security Council Reform and the Right of Veto* (1998), pp. 19 et seq., 89 et seq.; for other references see also R. Uerpman, “Internationales Verfassungsrecht” (2001) *Juristenzeitung* 565.

²⁸ For more detail and explanation see Pernice, *supra* note 1, pp. 155-63.

²⁹ See P. Häberle, *Verfassungslehre als Kulturwissenschaft* (2nd ed. 1998), p. 620; H. Hofmann, “Von der Staatssoziologie zur Soziologie der Verfassung?”, (1999) *Juristenzeitung* 1065 at 1066; K. Sobotta, *Das Prinzip Rechtsstaat* (1997), pp. 30 et seq.

³⁰ For the use of the paradigm of “social contract”, not among states as “formally equal sovereign members” - such as explained by A. Føllesdal, “Democracy and Federalism in the European Union”, in: *ibid.*/P. Koslowski (eds.), *Democracy and the European Union* (1998), p. 230 at 231, but in the original contractual sense of Rousseau see, with more references: J.H.H. Weiler, “...We will do. And Hearken’. Reflections on a Common

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.³¹ 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.

II. Constitution and legitimacy of European supranational public authority

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. The British Foreign Secretary, Jack Straw, recently pointed out quite rightly: “Europe simply provides a further layer of identity” to the British.³² 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”, without such a people or nation necessarily pre-existing.³³ 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 supranational legislative power like the European Union. Where national constitutions provide, by integration clauses or otherwise, for the participation in a supranational organisation or, expressly, in the European Union

Constitutional Law for the European Union”, in: R. Bieber/P. Widmer (eds.), *The European Constitutional Space* (1995), p. 413 at 439; I. Pernice, “The framework revisited: Constitutional, federal and subsidiarity issues”, (1996) 2 *Columbia Journal of European Law* 403 at 419; E. J. Mestmäcker, “Risse im europäischen Contrat Social”, in: *Hanns Martin Schleyer-Preis 1996 und 1997, Veröffentlichungen der Hanns Martin Schleyer-Stiftung*, vol. 48, p. 53 at 54; P. Häberle, “Stellungnahme zum Projekt der Zukunftswerkstätte ‘Transnationale europäische Verfassung’”, in: (1998) 4 *Die Union, Vierteljahresschrift für Integrationsfragen*, hrsgg. von der *Europäischen Kommission Vertretung Österreich* 125; I. Pernice, F.C. Mayer, S. Wernicke, “Renewing the European Social Contract. The Challenge of Institutional Reform and Enlargement in the Light of Multilevel Constitutionalism”, in: M. Andenas, J. Gardener (eds.), *Can Europe Have a Constitution? Conference at King’s College London, February 2000* (forthcoming).

³¹ In how far the constitutional tradition of the United Kingdom, which is the only Member State not officially recognising the concept of constitutional popular sovereignty, can be harmoniously combined with this concept is examined by D. Thym, “European Constitutional Theory and the Post-Nice Process”, in: M. Andenas/J. Usher (eds.): *The Treaty Of Nice, Enlargement and Constitutional Reform* (forthcoming).

³² J. Straw, *A Europe for its citizens*, Lecture at the Royal Institute of International Affairs, Chatham House, 27 July 2001; see also C. Carter/A. Scott, “Legitimacy and Governance Beyond the European Nation State: Conceptualising Governance in the European Union”, (1998) 4 *ELJ* 429 at 442: “one might conceptualise being at one and the same time a Scot, a Briton and a European. There is no necessary contradiction between these roles”. It is difficult to follow Karl Doehring’s contribution to the discussion, “Europäisches und nationales Verfassungsrecht”, (2001) 60 *VVDStRL* 357, stating that for him “double identity” was to date for him the classical characteristic of schizophrenia.

³³ See also H. Steinberger, “Der Verfassungsstaat als Glied einer europäischen Gemeinschaft”, (1991) 50 *VVDStRL* 9 at 25; for this self-referential approach more in detail: I. Pernice, “Der Europäische Verfassungsverbund auf dem Wege der Konsolidierung. Verfassungsrechtliche Ausgangslage und Vorschläge für die institutionelle Reform der Europäischen Union vor der Osterweiterung”, (2000) 48 *Jahrbuch des Öffentlichen Rechts* 205 at 211 et seq.

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.³⁴

III. National parliaments in the European multilevel constitutional system

This understanding is particularly important with a view to the impact of such a creation on national constitutions and the respective competencies and functions of their institutions. Indeed, 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.³⁵ 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.³⁶ 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”.³⁷ 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

³⁴ For the term see: A. Føllesdal, “Democracy and the European Union: Challenges”, in: *Ibid./P. Koslowski (eds.), Democracy and the European Union* (1998), p. 1 at 4. In Germany, this concept is used by U. Di Fabio, “Eine europäische Charta”, (2000) *Juristenzeitung* 737 at 741.

³⁵ For the “Europeanisation” process with impacts on the national system of governance, public policy and the individual, see Carter/ Scott, *supra* note 32, pp. 437 et seq.; the changes of national constitutions in the process of integration are summarised by Schwarze, *supra* note 13, pp. 512 et seq.; see also H. Bauer, “Europäisierung des Verfassungsrechts”, (2000) 122 *JBl.* 750 at 754 et seq.

³⁶ P. Allott, “Integration von Verfassungen, nicht von Staaten. Ein Heilungsvorschlag für die europäische Krankheit”, *Frankfurter Allgemeine Zeitung No. 107*, 9. May 2001, p. 13.

³⁷ For more detail see: I. Pernice, “The European Constitution (Sinclair House Talks Bad Homburg May 2001)”, (2001) 21 *Human Rights Law Journal* (forthcoming; November).

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,³⁸ 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.³⁹

D. Enhancing the role of national parliaments in the European Union

Discussing the role of national parliaments in the European architecture may already appear as a first means of enhancing this role: it raises the awareness for the existing powers they have and which they may use to a greater extent.⁴⁰ It helps to determine, as done above, how the exercise of these powers may be facilitated and become more effective. And, on the basis of an understanding of the Union as a multilevel constitutional system, it allows to evaluate or develop new proposals how the role of national parliaments could be enhanced for the sake of democracy, transparency and effectiveness.

A number of proposals for an enhanced role of national parliaments are already on the table.⁴¹ They shall be discussed (I) before additional arrangements are developed for consideration (II).

I. Proposals under discussion

1. The most radical proposal, so far, has been to subject Community legislation generally to the acceptance or **ratification by national parliaments**. This would, indeed, be a roll back to the system of an international organisation, overload the national parliaments and, thus, lead to a completely inefficient system. There seems to exist no serious support of this proposal in the actual political debate.
2. It was the German minister for foreign affairs who suggested, in his Humboldt-speech in May 2000, to create a European Parliament with two chambers with a view to bringing “together the different national political elites and then also the different national publics”: One of the chambers would be “for elected members who are also members of their national parliaments”, the other representing the Member States following the model of the US-Senate

³⁸ See A. von Bogdandy, “Das Leitbild der dualistischen Legitimation für die europäische Verfassungsentwicklung. Gängige Mißverständnisse des Maastricht-Urteils und deren Gründe (BVerfGE 89, 155 ff.)”, (2000) 83 *KritV* 284 at 286 et seq..

³⁹ For the requirement of a “functioning political infrastructure which mediates between decision-makers and citizens” as a precondition for democracy see: M. Jachtenfuchs, “Democracy and Governance in the European Union”, in: A. Føllesdal/P. Koslowski (eds.), *Democracy and the European Union* (1998), p. 37 at 48.

⁴⁰ See also the comments of the German Green party of 4 July 2001: ‘Post-Nizza’ - *Europa gemeinsam vertiefen. Bündnisgrüne Eckpunkte für den Reformprozess und die europäische Verfassungsdebatte*, para. 13, calling for more effective instruments for framing and controlling the governments policy at the European level.

⁴¹ See also the ideas discussed by Höreth, *supra* note 21, pp. 299 et seq.; for earlier proposals: K. Pöhle, “Europäische Union à la Maastricht - Eine ernste Herausforderung für die Parlamente der EG”, (1993) *Zeitschrift für Parlamentsfragen*, pp. 49 et seq.

or the German Bundesrat.⁴² This proposal has rightly been criticised for bringing the European Parliament back to the original situation before 1976. It would well avoid splitting the political elites, but it seems to be difficult for such “**double-mandate**” members to cope with the double work load.

3. Broader support is given to the proposal to create a **second legislative chamber** of the European Parliament which should consist of national parliamentarians. It would represent the citizens more directly, thus strengthening the national foundation of European legitimacy. Coming close to the Senate-model,⁴³ it would, however, duplicate national representation at the European Union level unless the Council were substituted by such a second chamber. It would also weaken the European Parliament, increase the complexity of the decision-making process⁴⁴ and be contrary to the call for the clarification of the accountability of the decision-makers. More importantly, in most Member States the government itself can be considered as the elected representative(s) of the national parliament, and there seems to be no added value in electing other representatives of a Member State for, finally, the same function which is already assumed by the governments. If the members of the second chamber were to be full members of the national parliaments and had, in addition, to follow the complete legislative work of the Union, again, the question of workload would arise.
4. This may be the reason why Tony Blair, the French Senate and more recently also the Danish minister of foreign affairs, Mogens Lykketoft, plead for a **second chamber with limited powers**, in particular without a legislative function, the basic task of which would be to ensure that the Union does not exceed its competencies and respects the principle of subsidiarity.⁴⁵ No further details on the composition and functions of such a new body have been developed so far, but it seems to come close to what my proposal of July 2000 was to deal with the problem of the “catalogue of competencies”:⁴⁶ the creation of a Parliamentary Subsidiarity Committee, to which I will come back later.
5. Such a control function would also be the task of a **European Congress**, composed of the national parliaments, which the French Prime-Minister Jospin has suggested in his speech of 28 May 2001.⁴⁷ Jospin also proposed that this Congress should annually debate the situation of the Union in general and decide amendments to the Treaty as far as they are just technical rules on the common policies and not of a constitutional character. It is questionable, however, if such a huge Congress of thousands of parliamentarians would be a workable institution, whether decision-making of such a body would be more democratic and, therefore, preferable to national ratification of amendments to the Treaty, and how a

⁴² J. Fischer, From Confederacy to Federation - Thoughts on the finality of European integration, www.auswaertiges-amt.de/6_archiv/2/r/r000512b.htm, also in: Walter Hallstein-Institut für Europäisches Verfassungsrecht (Hrsg.), *Verfassungsrechtliche Reformen zur Erweiterung der Europäischen Union*, FCE 2 (2000), p. 171 at 178.

⁴³ For the creation of a Senate: L. Siedentopf, *Democracy in Europe* (2000), pp. 147 et seq.: “A European Senate is badly needed...”.

⁴⁴ See H. Laufer, *Föderalismus als Strukturprinzip für die Europäische Union* (1998), p. 106.

⁴⁵ T. Blair, *Europe's Political Future*, Speech by the Prime Minister to the Polish Stock Exchange, Warsaw, Friday 6 October, <http://www.fco.gov.uk>; D. Hoeffel, “Rapport d'information fait au nom de la délégation du Sénat pour l'Union européenne sur une deuxième chambre européenne”, *No. 381 Sénat session ordinaire de 2000-2001*; M. Lykketoft, Speech of 26 August 2001, at the Außenpolitische Gesellschaft, reported in: *Frankfurter Rundschau* No. 198 of August 27, 2001, p. 2: “Die Suche nach Gegengewichten”.

⁴⁶ I. Pernice, “Kompetenzabgrenzung im Europäischen Verfassungsverbund”, (2000) *Juristenzeitung* 866 at 874 and 876.

⁴⁷ L. Jospin, *Intervention sur 'L'avenir de l'Europe élargie'*, 28 May 2001, www.premier-ministre.gouv.fr/fr/p.cfm?ref=24927&txt=1.

distinction could reasonably be drawn between technical provisions of the Treaties and those of a “constitutional character”.

6. The idea of creating a European Congress has also been supported by the Financial Times Germany. But, following this proposal, it should consist of national and European parliamentarians and ratify all amendments to the Treaties. Furthermore, a **Convention** for the preparation of such amendments is proposed to be built out of this Congress and make proposals to be submitted to the heads of state and government for discussion and adoption. While the idea of creating a Convention for the preparation of drafts for the amendment of the Treaties is getting more and more support, it is doubtful whether there is any added value in creating it out of such a Congress. The model used for the European Charter of Fundamental Rights, where representatives of the governments and the Commission participated as well, has proved to be efficient and useful. And it is highly questionable if the adoption of amendments to the Treaties should reasonably be given to a Congress the (majority-?) vote of which would substitute the ratification by each national parliament. This solution would not enhance, but weaken the role of national parliaments. It would also change the character of the Union the legitimacy of which is based both on the peoples of the Member States individually and their joint identity as citizens of the Union represented by the European Parliament.
7. With a view to give representatives of national parliaments direct information of and influence on the legislative work of the Council, the Commissioner responsible for institutional matters, Michel Barnier, has proposed to modify the composition of the Council: not only a ministers but **also a member of the national parliament should represent each Member State in the Council**.⁴⁸ This proposal would certainly provide more transparency and better means of parliamentary control of the work of the Council. It seems to be worth elaborating further on this idea, although the basic question of added value would appear as well, if the parliamentarians in the Council are just other representatives of the national coalitions supporting the governments. To make the parliamentary control and possible influence more efficient, a member of the national opposition may be a more adequate “watchdog” for each minister. This member would be well informed on the policies pursued by the minister and could initiate and guide the debate in the national parliament on the matters in question.

I. Suggestions for further consideration

Many of the proposals commented above have great merits and need further elaboration. It would seem, however, that considering to enhance the role of national parliaments with a view to more democracy, transparency and efficiency in the European institutional system should aim at avoiding double work for parliamentarians and concentrate on issues which facilitate the exercise of the European function of the national parliaments and for which national parliaments are specifically qualified. Bearing this in mind, the following steps are suggested for further consideration:

⁴⁸ Michel Barnier at a brainstorming-session in Berlin, June 2001. See also W. Dix, “Charte des droits fondamentaux et convention. De nouvelles pour réformer l’UE?”, (2001) RMC 305 at 310. K. Lenaerts/E. de Smijter, “The Question of Democratic Representation. On the democratic representation through the European Parliament, the Council, the Committee of the Regions, the Economic and Social Committee and the National Parliaments”, in: J.A. Winter/D.M. Curtin/A.E. Kellermann/B. de Witte (eds.), *Reforming the Treaty on European Union - The Legal Debate* (1996), p. 173 at 187 et seq.; A. Duff, *Reforming the European Union* (1997), pp. 58 et seq., fears negative impacts on the accountability of the ministers at the Council, but the presence of parliamentarians, in fact, would make accountability effective.

1. Facilitating parliamentary control of the Council as a legislative body

Where the Council meets and works as a legislative body, its work should be public.⁴⁹ Publication of the minutes of the results and explanations of votes as well as of the statements in the minutes at the Council acting in its legislative capacity, as provided for by Article 151(3) EC after Amsterdam,⁵⁰ is simply not sufficient. Parliamentary control would be further facilitated by an arrangement under which the composition of the Council is opened to the participation of two parliamentarians representing the parliamentary majority and the opposition. The national parliamentarians would not necessarily participate in the vote, but they could follow closely the policies of the ministers and report to the national parliaments. Legislative proposals of specific interest for a national parliament could then be discussed in the national parliament on a basis of full information “from the front”. Thus, the work of the ministers would be scrutinised more effectively.

2. Early consultation of national parliaments in the legislative process

Practice has shown that once a legislative proposal has been made by the Commission to the Parliament and the Council, little room is left for substantial changes in the policy. While, in preparing its proposals, the Commission broadly uses the advice of national experts from national governments, meeting in ad hoc consultative committees, as well as from „civil society“ (lobbyists), national parliaments are generally excluded from information and advice. Consequently, with a view to giving national parliaments the necessary information and some influence on the substance of the legislation to be decided by the Council and implemented by the Member States, a procedure of „early consultation“ of the national parliaments should be considered. „Early“ means the brainstorming-stage at which the Commission is making up its mind about the basic features of the act in question. Green papers and white papers are a way by which such consultation could be initiated, but in cases where this procedure would be too heavy and long, the parliaments could also just be informed and consulted on the general policy to be pursued in the proposal. A representative of each national parliament could then join the consultative committee and present written submissions or explain the position(s), if any, taken at the national level.⁵¹

3. Creating a Parliamentary Subsidiarity Committee

Giving room to the idea of a second chamber mentioned above, but with a view to limit its functions to those for which the national parliaments have a specific competence and interest, I suggest the creation of a new Parliamentary Subsidiarity Committee (PSC) the function of which would be to watch the respect of the principle of subsidiarity and the limits of competencies given to the Union. Practice shows that the governments often use the European channel for the implementation of policies that they may not succeed in pursuing at the national level, neglecting the limits of competencies set in the Treaties. As a consequence, national parliaments' power for legislation is pre-empted and they are generally unable, in a given case, to stop the European process. The PSC would not have a veto, but being consulted at an early stage in the legislative process in any case of doubt, it could give a negative comment and explain for which reason the limits of competence or the principle of subsidiarity are violated. It should be composed of two or three elected representatives of each national parliament and give its advice on request by a Member

⁴⁹ See already Steffani, *supra* note 22, p. 47.

⁵⁰ On this achievement in Amsterdam see: R. Dehousse, “European Institutional Architecture after Amsterdam: Parliamentary System or Regulatory Structure?”, (1998) *EUI Working Paper* RSC No. 98/11, www.iue.it/RSC/WP-Texts/98-11.htm, 2.1.2.

⁵¹ See also the proposals of Lenaerts/de Smijter, *supra* note 48, pp. 186 et seq.

State, an institution of the European Union or on the initiative of its chairman. Its advice would not be binding, but it would force the European Parliament and the Council to argue carefully, why they think that a competence is given and the principle of subsidiarity is respected when they pursue the legislative project. It will always remain the ultimate task and responsibility of the Court of Justice to judge upon the legality of the act, in case it is seized, but the arguments exchanged between the institutions and the PSC could be a helpful basis for its legal judgement.

4. The Convention model for the preparation of the IGC 2004

As the example of the European Charter of Fundamental Rights has shown, a convention composed of members of national parliaments and the European Parliament besides representatives of national governments and the Commission is a successful way not only to reach workable solutions, but to involve national parliaments and the general public they represent in the European constitutional process. The relative influence of each national parliament on the outcome is certainly very limited.⁵² Important, however, is the direct participation of national parliamentarians in the drafting of the Treaty revision and the communication which is facilitated with the national parliaments. Moreover, parliamentarians are more easily ready to depart from traditional diplomatic models and language and able to find innovative solutions which are balanced, workable and understood by the citizens. It is clear that the draft issued by the Convention would be binding on neither the governments nor the national parliaments in the process of negotiation and later ratification, but it could help overcoming the diplomatic character of the Treaty revision, which has not only proved inefficient but also seems inadequate regarding the constitutional character of the process.

5. Parliamentary participation in the procedures of appointment

It has been explained above that national governments nominate and appoint the persons which have the principle say in the European institutions quite independently. Giving the parliaments a more direct say at least at the national level on who is nominated by each government as a candidate for such positions would clearly increase not only the influence of the national parliaments but enhance the direct legitimacy of the people appointed and of their institutions. It should be considered, of course, if this function should continue to be exercised by national institutions or, better, by the European Parliament, at least for the appointment of the President of the Commission.

6. Reorganising the national parliaments

Given their new European challenges and functions, national parliaments should become aware that they are part of the European constitutional architecture and consider reorganising themselves. This implies not only enhancing the role of their Committees for European affairs, but also considering new procedures and arrangements which are open for a close communication with the European Parliament and the other national parliaments and building networks for discussing questions of common interest.⁵³ The European function of national parliaments would also have

⁵² See the critics of P.M. Huber, "Die Rolle der nationalen Parlamente bei der Rechtssetzung oder Europäischen Union. Zur Sicherung und zum Ausbau der Mitwirkungsrechte des Deutschen Bundestages", in: Hanns Seidel Stiftung (ed.), Aktuelle Analysen 24 (2001), pp. 51 et seq., who proposes, instead, the consultation of the national parliaments on the draft before and after the IGC.

⁵³ For some proposals of this kind see Pflüger, *supra* note 13, pp. 243 et seq., namely creating an office of the Bundestag at the seat of the European Parliament, more frequent joint meetings of the European Parliament and the European affairs committees of the national parliaments, revitalisation of the "assises" etc. For existing forms

consequences for the work of the political parties and, in particular, on the subjects to be chosen for the electoral campaigns. It will become more and more important to see, to what extent candidates for membership of the parliaments or even for functions at the governmental level are able to participate in the European communication and networking systems, to pass the will of the people over to the European level. And there will also be an increasing need for national parliamentarians as an interface between European politics and the local, regional and national interests of the respective electorates.

E. Conclusions

National parliaments play a key part in the constitutional process of the European Union. But several steps should be taken, first, to rise 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 conceptualise 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. Within a two-tiered system for the provision of legitimacy, 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.