

**MAASTRICHT**

*Faculty of Law*



Maastricht University

***The Treaty of Lisbon, the National Parliaments and the  
Principle of Subsidiarity***

*Philipp Küiver*

All rights reserved. No parts of this paper may be reproduced in any form without the permission of the author(s)  
This paper can be downloaded without charge from the Social Science Research Network electronic library.

# THE TREATY OF LISBON, THE NATIONAL PARLIAMENTS AND THE PRINCIPLE OF SUBSIDIARITY

PHILIPP KIIVER\*

## §1. INTRODUCTION

Another European treaty is signed, and again the role of national parliaments in the European Union has been enhanced. Under the Treaty of Lisbon, national parliaments have eight weeks to scrutinize EU proposals before they are put on the Council agenda, up from the current six weeks. And already the Constitutional Treaty, Lisbon's immediate predecessor, boosted the number of times national parliaments were mentioned in the EU treaty context. Why all this professed enthusiasm for national parliaments? In many respects, treaty provisions enhancing the role of national parliaments in EU decision-making are the sugary coating around a bitter pill. The pill is of course the European integration process itself, designed to help the patient – the European citizen – in ways too numerous to recite. And yet, what we also taste is the bitterness of domestic decision-making autonomy draining away in the course of supranational processes. Here national parliaments offer the perfect solution: turning them from marginal and passive institutions into active players on the European scene reminds us of the sweetness of the days when laws were made by the people for the people, in an elected and recognizable deliberative forum, and in the cosy context of the democratic nation-state.

## §2. A CYNIC'S VIEW

Of course, the use of national parliaments as a sugar coating for European medicine has wider implications. Firstly, it relies on the readiness of the citizen, even a Eurosceptic one, to believe in the desirability of European integration based on the added domestic parliamentary ingredient. In the context of both the Constitutional Treaty and of Lisbon, the enhanced role of national parliaments was, and remains, a major selling point to

---

\* Senior Lecturer, European and Comparative Constitutional Law, Maastricht University.

many governments in Europe. At the same time, however, we know that sugar coatings must under no circumstances interfere with the chemical properties of the prescribed substance itself: it is just to facilitate intake, not to change the composition of the pill proper. Indeed, when we subject the actual parliament-friendly treaty provisions to more rigorous scrutiny, we do in fact see that the coating really is just a coating. The power transfer from European institutions to national parliaments is marginal at best; much of it is purely symbolic; and ultimate decision-making prerogatives continue to lie where they were before, namely in the hands of the EU institutions and the national governments. One example is the Early Warning System for the principle of subsidiarity, introduced originally by the Constitutional Treaty and beefed up under Lisbon. The system is intended to provide national parliaments with an opportunity to react to EU legislative proposals before they are adopted; however, the parliaments' voice is only consultative, as proposals do not have to be withdrawn if they face opposition from national parliaments. The granted 'right' for parliaments to send angry letters to the Commission is not exactly a momentous constitutional rupture either. The big innovation introduced by Lisbon as compared to the Constitutional Treaty is that if complaints constitute a majority of votes distributed to the national parliaments (two votes per parliament) and the Commission nevertheless sticks to the original text without amendment, the European Parliament or the Council may kill the proposal before the first reading. But again, it is not the national parliaments themselves that are able to stop the proposal, only to provide others with ammunition. Nor will parliamentary opposition even make the proposal more vulnerable by bringing down voting thresholds: both the European Parliament and the Council will still take their respective decision on the proposal by (qualified) majority. The European legislative process keeps running based on its tested institutional logic; the sweetness of the process seems to be another matter altogether.

### §3. A VIEW LESS CYNICAL

The involvement of national parliaments in the EU via parliament-friendly treaty provisions is, however, not necessarily meaningless. In order to appreciate this, we need to reconsider the actual purpose of including national parliaments in European treaties. We need to make a distinction between, on the one hand, the conferral of power to national parliaments in the first place, and, on the other, the stimulation to use the power that national parliaments already have. The former we might call the *constitutive* value of treaty provisions: how much authority is granted to national parliaments in EU decision-making procedures. The latter we might call the *catalytic* value of treaty provisions: to what extent can those treaty provisions put persuasive pressure on national parliamentarians to develop political initiative in the EU context themselves. An analysis of the former is clearly a lawyer's job; any analysis of the latter would have to be at least inter-disciplinary, with substantial input from *inter alia* political scientists. It is suggested, as far as national

parliaments and subsidiarity are concerned, to base our reflections in this matter on such a distinction. Firstly, how much new power is given to national parliaments, that is power that they did not have before. Secondly, how much 'old' power, that is prerogatives that national parliaments enjoy already by virtue of their domestic constitutional law, is or can be activated and put to new use in practice.

#### A. THE NATIONAL PARLIAMENTS IN THE EUROPEAN TREATIES

The most prominent feature of the Treaty of Lisbon, as far as national parliaments are concerned, is indeed the Early Warning System whereby national parliaments are to check and enforce compliance with the principle of subsidiarity in EU legislative proposals. The System as such had already featured in the Constitutional Treaty; it is not the only context in which national parliaments are addressed, nor is this the first time that they are directly addressed. Most treaty-level instruments so far concerned the right of national parliaments to be informed of EU developments,<sup>1</sup> and the encouragement of inter-parliamentary co-operation, including co-operation with the European Parliament.<sup>2</sup> Since the Treaty of Amsterdam, a six-week time period between the publication of an EU legislative proposal and the setting of the item on the Council agenda is in force, so as to allow national parliaments some time to scrutinize it *ex ante*.<sup>3</sup> In addition, both the Constitutional Treaty and the Treaty of Lisbon provided for an involvement of national parliamentarians in the ordinary treaty revision procedure (via the Convention method, which includes parliamentarians from the member states in the drafting of treaty amendments),<sup>4</sup> and in the simplified treaty revision procedure better known as the passerelle (each individual national parliament may veto a European Council decision to change a European legislative procedure).<sup>5</sup> But where the day-to-day legislative process is concerned, the Early Warning System remains the main feature of note.

<sup>1</sup> See Maastricht Final Act declaration No. 13; Title I of the Protocol on the role of the national parliaments in the European Union (consolidated Protocol No. 9) inserted by the Treaty of Amsterdam ('the Amsterdam Protocol'); Protocol No. 1 to the Constitutional Treaty and its equivalent under the Treaty of Lisbon. In addition, a range of specific provisions in both the Constitutional Treaty and in the Treaty of Lisbon stipulates the notification of national parliaments of certain events, such as the intended use of the flexibility clause under Article 308 EC. See also, Ph. Kiiver, 'The European Constitution and the role of national parliaments', in A. Albi & J. Ziller (eds.), *The European Constitution and National Constitutions: Ratification and Beyond* (Kluwer Law International, 2007).

<sup>2</sup> See Maastricht Final Act declaration No. 12; as regards the recognition of COSAC, the conference of European affairs committees of the national parliaments plus a delegation from the European Parliament, see Title II of the Amsterdam Protocol and its equivalents under the Constitutional Treaty and the Treaty of Lisbon.

<sup>3</sup> Article 3 of the Amsterdam Protocol, retained under Constitutional Treaty Protocol No. 1.

<sup>4</sup> Article IV-443 of the Constitutional Treaty and Article 1(56) of the Treaty of Lisbon regarding Article 48 EU in the post-Lisbon numbering.

<sup>5</sup> Article IV-444 of the Constitutional Treaty and Article 1(56) of the Treaty of Lisbon regarding Article 48 EU in the post-Lisbon numbering. Under Lisbon, the national parliamentary veto is expanded to

## B. THE EARLY WARNING SYSTEM

The Early Warning System is based on the interception by national parliaments of EU legislative initiatives, on the opportunity for them to file objections on grounds of perceived violations of the principle of subsidiarity, and the counting and weighing of incoming complaints. Two votes are distributed per parliament, with both being retained by unicameral ones and being shared out between chambers where the parliament is bicameral.<sup>6</sup> Each objection would thus be worth one or two votes depending on the national constitutional arrangement. Objections (called ‘reasoned opinions’) formally force the initiator of the draft act to reconsider the act or to provide new reasons, though not necessarily to withdraw it, where incoming votes reach one-third of the total votes distributed (i.e. 19 out of 54 in the EU-27, which could, for example, be eight unicameral parliaments plus two lower chambers plus one upper chamber) or one-quarter (i.e. 14 votes) in freedom, security and justice matters.<sup>7</sup> The system is complemented by the possibility of governments to file annulment actions against already adopted legislation on subsidiarity grounds with the European Court of Justice (ECJ), either by themselves or on behalf of their national parliaments or chambers thereof.<sup>8</sup> Lisbon now strengthens this Early Warning System for subsidiarity by stipulating that where a ‘simple majority’ of votes allocated to national parliaments constitute objections, the Commission would have to justify the proposal again, and, if the proposal is not changed, both the Council

---

cover the passerelle in the area of family law as well, Article 2 (66) of the Treaty of Lisbon regarding Article 65 EC (Treaty on the Functioning of the EU).

<sup>6</sup> A note for Belgian readers: an early version of the Constitutional Treaty spoke of either unicameral or bicameral parliaments; in the Constitutional Treaty’s final version, however, a distinction was made between unicameral parliaments and parliaments that are *not unicameral*, apparently implying that a parliament can have more than just either one or two chambers. Indeed, in a Final Act declaration, hyper-federal Belgium had insisted that all its federal, regional and community assemblies (the federal Senate, the Flemish parliament, the German-speaking community parliament, etc.) should be considered as forming part of one composite multicameral parliament. The existence of the category ‘non-unicameral’ seems to support the notion that not only the bicameral federal parliament but also the sub-national parliaments should be able to cast a vote in the Early Warning System, and that two votes could be shared out among more than two chambers. Lisbon now provides for ‘two votes, shared out on the basis of the national Parliamentary system. In the case of a bicameral Parliamentary system, each of the two chambers shall have one vote.’ This means that in bicameral parliaments both chambers must have an equal say (even if chambers are not co-equal under domestic law); for Belgium, it means that it should be possible to keep the sub-national parliaments involved: one could argue that the two votes may still be ‘shared out’ among many chambers, since the system is not bicameral but multicameral so that the ‘bicameral clause’ does not apply to Belgium. Also under Lisbon, Belgium reiterated its earlier declaration regarding the composition of its national parliament. See for the solutions devised under the Constitutional Treaty, W. Pas, ‘The Belgian “National Parliament” from the Perspective of the EU Constitutional Treaty’, in Ph. Kiiver (ed.), *National and Regional Parliaments in the European Constitutional Order* (Europa Law Publishing, 2006).

<sup>7</sup> Articles 6 and 7 of the Lisbon Protocol on the application of the principles of subsidiarity and proportionality (‘the Lisbon Subsidiarity Protocol’), as well as Protocol No. 2 to the Constitutional Treaty.

<sup>8</sup> Article 8 of the Lisbon Subsidiarity Protocol, as well as Protocol No. 2 to the Constitutional Treaty.

(by 55% of its members) and the European Parliament (by majority of votes cast) could terminate the consideration of the proposal if either of them finds that subsidiarity has been breached.<sup>9</sup> The time given to national parliaments for their *ex ante* review of EU proposals has been extended from the previous six weeks to eight.<sup>10</sup>

#### §4. LITTLE CONSTITUTIVE VALUE ...

In line with the priorities already formulated at Nice, the Early Warning System combines the Union's declared attachment to both the national parliaments and the principle of subsidiarity, allowing the former to enforce the latter. We should not be too uncritical on this point, however. The 'right' of national parliaments to send complaints to the initiator of EU legislation, typically the Commission, which then may or may not lead to a reassessment of the act, is after all not a new right. It is a prerogative that parliamentarians have anyway, with or without an Early Warning System.<sup>11</sup> The same applies to the 'right' of parliamentarians to ask their government to bring an annulment action before the ECJ. In both cases, no-one can prevent parliamentarians from getting in touch with the Commission, or from pressing their cabinet into bringing a member state action as a privileged applicant.

Lisbon does add some strength to the subsidiarity enforcement system, in that where national parliamentary complaints represent a 'simple majority of the votes' distributed to them, rather than a minority of one-third or one-quarter, it is now easier for either the European Parliament or the Council to kill the bill before the first reading. Indeed, the original Early Warning System had been criticized for merely being a 'yellow card' procedure with no teeth. But how much more bite do parliaments have now? Firstly, while the Treaty of Lisbon somewhat confusingly speaks of a 'simple majority' as the threshold for the new additional procedure, this majority is still calculated as a share of the total votes distributed rather than as a share of the votes actually cast. That means that the so-called 'simple' majority requirement is, in fact, an *absolute* majority requirement: 28 votes out of 54 distributed in the EU-27. Secondly, both the procedure applied to national parliaments as well as the procedure applied to the European Parliament and the Council is based on the objections by (qualified) majorities, not blocking minorities. The Council requires a majority of 55% of its members to object, the European Parliament a majority of votes cast. Where such a critical mass is achievable, approval of a proposal would have been highly unlikely in any case, and it would never have made it through the co-decision procedure: it would have been shelved anyway. Legislative procedural

<sup>9</sup> Article 7 (3) of the Lisbon Subsidiarity Protocol.

<sup>10</sup> Article 6 of the Lisbon Subsidiarity Protocol and Article 4 of the Lisbon Protocol on the role of national parliaments in the European Union.

<sup>11</sup> Perhaps the only exception is the rationalized parliament of France, where even the right of parliament to adopt objections to Commission proposals first had to be inserted into the French Constitution.

prerogatives therefore remain largely in the hands of the national governments and the EU institutions, both acting by majorities.

## §5. ... BUT SOME CATALYST POTENTIAL

Of course one may dismiss the parliament-friendly treaty provisions in Lisbon and its predecessors as being provisions that merely acknowledge, petrify, or dignify the *status quo* without actually changing anything; as soft and open-ended provisions whose practical use depends on the will of parliaments themselves; and as provisions that enable governments to mobilize their parliaments, i.e. their own parliamentary majorities, as a democratically-flavoured proxy for pure executive action.<sup>12</sup> The appealing promise of having such provisions is that, like the sweet coating on a bitter pill, a parliament-friendly clause will make primary and secondary European law easier to 'sell' in the member states, both to the parliaments themselves and to voters. The limitation is that national parliamentary involvement should be credible enough, but not so excessive as to disrupt the tested interplay between supranational and national interests in accordance with the Monnet method. It should therefore not be surprising that European treaties are more gesture than substance when it comes to national parliaments: the Early Warning System as envisaged by Lisbon amounts to an indirect involvement of parliaments, based on notification and consultation, and triggered by the will of safe majorities rather than minorities in both the member states and the EU institutions.

We may recall, however, that what makes parliamentarians reluctant to invest time and resources in the scrutiny of European affairs is, to a large extent, a lack of incentive: low voter interest, for example, or the fact that it may be frustrating to forge a national consensus on an EU matter which may yet be modified, outvoted or overruled once compromises are reached in Brussels.<sup>13</sup> The key, then, is to stimulate and provoke politicization of EU matters where that is feasible. This can be done by keeping national parliamentary involvement in EU matters on the agenda to the point that it becomes embarrassing for parliamentarians *not* to use the tools they have to engage in the supranational process.

---

<sup>12</sup> See Ph. Kiiver, 'The Composite Case for National Parliaments in the European Union: Who Profits from Enhanced Involvement?', 2 *Eur. Const. L. Rev.* 227 (2006).

<sup>13</sup> See Ph. Kiiver, 'Europe in Parliament: Towards Targeted Politicization', *Scientific Council for Government Policy (WRR) online paper no. 23* (2007) at [www.wrr.nl/content.jsp?objectId=4040](http://www.wrr.nl/content.jsp?objectId=4040). For a near-comprehensive overview over the literature in this field see the portal created by the Stiftung Wissenschaft und Politik at [www.swp-berlin.org](http://www.swp-berlin.org).

## §6. THE SYSTEM LIVES

Even without having entered into force, the original Early Warning System provisions from the Constitutional Treaty have prompted the Commission to notify national parliaments directly of its proposals, although it does not have to do so. The Commission has agreed to accept and consider letters from national parliaments on the basis of the Early Warning System as if that system were in force already. The provisions have led COSAC, an inter-parliamentary conference, to conduct pilot projects on the collective and coordinated use of the procedure, and to upgrade its IPEX inter-parliamentary database as a tool for mutual digital information. The provisions have led the Dutch parliament to even set up a special committee for the review of EU drafts for their compliance with the principle of subsidiarity, along with the already existing European affairs committees proper. The new committee proudly reports that since it has started reviewing Commission proposals, the Dutch cabinet is supplying its preliminary opinions on these drafts more quickly than it used to. The committee furthermore reports that the sectoral parliamentary committees (on economic affairs, agriculture, etc.) that are asked to give an expert opinion, follow up on these requests for an opinion with scrutiny of their own which goes beyond mere subsidiarity clearance. In fact, the internal use of the term ‘Early Warning System’ has changed: designed to ‘warn’ the European Commission of possible subsidiarity breaches, it is now seen as a mechanism to ‘warn’, or to alert, sectoral committees of the national parliament about potentially relevant proposals from Brussels.<sup>14</sup>

## §7. PUTTING PRESSURE ON THE PARLIAMENTS

Thus, the more legal tools the European treaties provide, the greater the chance that it may become embarrassing for parliamentarians to ignore them. The more information that is made available, and the more prominent the veto mechanisms are – even if these mechanisms are mediated and more symbolic than genuinely empowering – the more vulnerable parliamentarians in government and opposition alike should become to charges from the media and the general public that they fail to influence EU decision-making even though they evidently could. Where parliamentarians become convinced that scrutiny is necessary and that subsidiarity must now be checked because a treaty says so, even when that treaty confers little or no actual power to the parliaments, the exercise may already have served a purpose. Hollow treaty provisions could become a catalyst for real parliamentary action. The exact degree to which this actually happens should of course be the subject of further research. But the sweet coating on the pill may yet prove to have a medical value of its own.

<sup>14</sup> Evaluatierapport Tijdelijke Commissie Subsidiariteitstoets, presented to the speakers of both chambers on 16 April 2007 (Kamerstukken I/II 2006–2007, 30953 C and no. 3).