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*Insiders or Outsiders?*

Besselink, L.

#### DOI

[10.1093/acprof:oso/9780198791621.003.0002](https://doi.org/10.1093/acprof:oso/9780198791621.003.0002)

#### Publication date

2017

#### Document Version

Final published version

#### Published in

National Parliaments after the Lisbon Treaty and the Euro Crisis

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[Link to publication](#)

#### Citation for published version (APA):

Besselink, L. (2017). EU Constitutionalism and National Parliaments: Insiders or Outsiders? In D. Jančić (Ed.), *National Parliaments after the Lisbon Treaty and the Euro Crisis: Resilience or Resignation* (pp. 25-35). (Oxford Studies in European Law). Oxford University Press. <https://doi.org/10.1093/acprof:oso/9780198791621.003.0002>

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# 2

## EU Constitutionalism and National Parliaments

### Insiders or Outsiders?

*Leonard Besselink\**

In this chapter, I reflect on the ways in which the national parliaments (NPs) of the Member States relate to the European Union (EU). In certain respects, they seem to be outside the EU legal order, but both in practice and legally they are at the same time part of the European legal order. I engage in this reflection starting with an abstract consideration of the issue of whether NPs are insiders or outsiders. Next, I reflect on the question of the way in which the euro crisis and the recent direct calls to the people in the form of referenda affect the legitimating role of parliaments in the EU.

#### 1. In or Out?

We start with some basic questions. What is ‘inside’? What is ‘outside’? And inside what, or outside what? Simple as they may seem, these questions are fundamental. We can picture the sequence of these questions as follows. Graphically, this would seem to be the ‘outsider’ position:



Figure 1

\* This chapter elaborates some initial thoughts developed in Section V of ‘The Place of National Parliaments Within the European Constitutional Order’ in Cristina Fasone and Nicola Lupo (eds), *Interparliamentary Cooperation in the Composite European Constitution* (Hart Publishing 2016) 23–38, at 34–37.

And this is the ‘insider’ position:



Figure 2

This, however, would not reflect the real situation as to the relation between the EU and the NPs of the Member States.

The ‘outsider’ position sketched above suggests that Member State parliaments and the EU are juxtaposed, stand side by side, the one not really touching upon the other. That has never really been the case, since originally NPs appointed the members of the European Parliament (EP), which was then called ‘Assembly’. Moreover, within Member States, NPs have in one way or another always kept themselves busy with at least certain types of European activity, such as agriculture (Common Agricultural Policy (CAP)) and finance (VAT) already long before direct elections.<sup>1</sup> For that matter, they did so also with regard to and within parallel European organizations that have from the beginning maintained a relationship with the project of integration: notably, the Western European Union and the Council of Europe.

The ‘insider’ picture could also be a misrepresentation, in as much as NPs are not locked into the EU institutional frame in the exclusive way that this picture would suggest. Two different, somewhat more abstract pictures would pose the question whether NPs are insiders or outsiders more correctly:

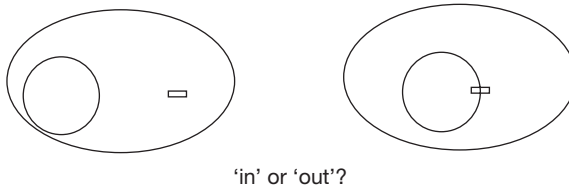


Figure 3

In these two representations, the larger circles represent the encompassing European political and constitutional order, the EU is symbolized by the smaller circles, and NPs by the small rectangle. The pictures articulate in two different ways the manner in which NPs, as integral parts of a wider European political order, relate to the EU: as outsiders or, alternatively, as at least partially participating within the EU.

From the legal point of view of EU law, the latter seems the better representation. This is the case at least since the EU Treaty recognized that NPs ‘contribute actively to the good functioning of the European Union’,<sup>2</sup> granting them a competence of their

<sup>1</sup> See the early involvement of NPs in European affairs in Michael Niblock, *The EEC: National Parliaments in Community Decision-making* (Chatham House 1971).

<sup>2</sup> TEU, art 12.

own. National parliaments each act within the EU framework independently from governments, or at least are constitutionally mandated to do so in terms of EU law.<sup>3</sup> A whole range of provisions in primary EU law give NPs a role to play.<sup>4</sup> Moreover, even without an explicit legal basis, they participate in the ‘political dialogue’ that the former Commission President José Barroso started.<sup>5</sup> National parliaments act not only as Member State representatives, therefore, but also as Union actors, most evidently in the framework of subsidiarity review (the ‘early warning system’),<sup>6</sup> which goes as far as granting them the power to bring a case to the Court of Justice of the European Union (CJEU).<sup>7</sup>

But the notion of ‘national parliaments’ in all these provisions is *not* an autonomous EU concept. Their role within the framework of the EU does not enclose them in any exclusive manner within the bounds of EU law. They are set up, empowered, and regulated by national constitutions. Even the matter of who determines and issues the ‘two votes’ that each parliament is given in the context of subsidiarity review under Article 7 of Protocol No 2 is exclusively governed by national law.

We can conclude, therefore, that insofar as EU law empowers them to act within the EU framework, national parliaments, as *EU actors within the EU legal order*, are:

- governed *heteronomously* by the constitutive rules of national constitutional law
- attributed with *certain* powers under EU law as regards their proper function within the EU legal order and
- regulated *equally* by EU law and national law as regards the use of their EU-related powers.

Hence, from the *national constitutional perspective*, NPs are constituted *autonomously* by national constitutional law, and when acting within the legal framework provided by EU law, they are heteronomously attributed certain powers in the EU decision-making structure that are regulated by EU law, without erasing their powers and the regulation of their exercise under national law when acting in the EU context.<sup>8</sup>

## 2. Foundational and Ordinary Political Legitimacy: The Legitimizing Role of National Parliaments

How does this state of affairs contribute to the parliamentary democratic legitimacy of the Union in its present state?

<sup>3</sup> This is no different when we look at the language of art 8 of Protocol No 2, which speaks of subsidiarity complaints being ‘brought in accordance with the rules laid down in Article 263 of the Treaty on the Functioning of the European Union by Member States, or notified by them in accordance with their legal order on behalf of their national Parliament or a chamber thereof’. The ‘Member States’, ie as represented by their governments, bring cases merely as messengers of the parliaments that—under the Protocol—determine whether a case alleging infringement of subsidiarity is brought. No parliament has brought such a case as yet.

<sup>4</sup> TEU, arts 5(3), 10(2), 12, 48, and 49; TFEU, arts 69, 70, 71, 81 (family law), 85 (Eurojust), 88 (Europol), and 352(3); Protocols Nos 1 and 2; Protocol No 36, art 2(2)(b), as well as Fiscal Compact, art 13.

<sup>5</sup> Davor Jančić, ‘The Barroso Initiative: Window Dressing or Democracy Boost?’ (2012) 8 Utrecht L Rev 78.

<sup>6</sup> Anna Jonsson Cornell and Marco Goldoni (eds), *National and Regional Parliaments in the EU-Legislative Procedure Post-Lisbon: The Impact of the Early Warning Mechanism* (Hart Publishing 2016).

<sup>7</sup> Protocol No 2, arts 6, 7, and 8. See further on the relationship between courts and NPs in the chapter by Cristina Fasone and Nicola Lupu in this volume.

<sup>8</sup> See other constitutional aspects of national identity in the introductory chapter to this volume.

A first distinction could be made between foundational legitimacy and legitimacy in the day-to-day political operation of the Union. With ‘foundation legitimacy’, I refer to the legitimacy deriving from NPs’ involvement when becoming a Member State of the Union and whenever a step is taken towards further integration that makes a fundamental change to the Union’s powers under primary law. In this respect, parliaments have an enabling or preventing power.<sup>9</sup>

This foundational legitimacy is to be distinguished from the legitimating function of national parliamentary review as regards day-to-day EU decision-making by the Union’s institutions under the powers that have been conferred upon them. This comprises NPs’ scrutiny of EU decision-making,<sup>10</sup> mandating their executives,<sup>11</sup> triggering scrutiny reserves,<sup>12</sup> and, in appropriate cases that are determined primarily by national constitutional law, approving or vetoing certain EU decisions.<sup>13</sup> All this is *aimed at* EU decision-making, and has its effects in the EU institutions, mainly the Council.

These effects can, for instance, be observed when national parliamentary scrutiny requires a Member State representative in the Council to make a reservation pending the completion of such scrutiny,<sup>14</sup> or, even more visibly, when scrutiny results in a negative rather than a positive vote that is instigated by a parliament’s power of influence over the national executive rather than by the national executive itself (be it based on a legal veto, mandating power, or ordinary political influence). Yet, such influence takes shape and is mainly performed within the national context of parliamentary activity. This may seem paradoxical because the activity takes shape in the national context, but the results play out in the EU context. Note that in the vast majority of cases they play out *invisibly*, inasmuch as scrutiny, mandating, and parliamentary votes on draft EU decisions lead to a positive outcome: they approve of the EU decision, thus providing it with a degree of parliamentary democratic legitimacy. That this may in a sense not be very noticeable does not in itself diminish the legitimating role of NPs, although that invisibility might foster the idea in the general public that EU decisions

<sup>9</sup> See TEU, arts 48 and 49; TFEU, arts 69, 70, 71, 81, 85, 88, and 352(3).

<sup>10</sup> This was a prominent practice by the House of Lords and the House of Commons since the UK accession, which was taken over around the same time by other parliaments. See more on the UK Parliament in the chapter by Julie Smith in this volume.

<sup>11</sup> Typical for the Danish Parliament since the cabinet crises that were triggered by Community law decisions in the fields of agriculture and fisheries shortly after Denmark’s EU accession.

<sup>12</sup> Now a common feature for virtually all NPs, although it is up to national governments to invoke those reserves in the Council.

<sup>13</sup> Historically, the first parliament to claim a veto right as to the position to be taken by the representative in the Council was the Netherlands. This was performed through the *Berg* Resolution of the Netherlands Lower House of 11 January 1967. See Leonard Besselink and Brecht van Mourik, ‘The Parliamentary Legitimacy of the European Union: The Role of the States General in the European Union’ (2012) 8 *Utrecht L Rev* 28. In the Netherlands, a further parliamentary veto right was enacted concerning binding decisions in the field of justice and home affairs in which the EP had no role to play. This was done by means of the Act approving the Maastricht Treaty and subsequent amendment Treaties, but most of the veto rights were withdrawn in the Act approving the Lisbon Treaty. In the UK, parliamentary approval requirements, thus creating veto rights, have been created for the UK in the European Union Act 2011 and its ‘shopping list’ of parliamentary approvals and referenda. In Germany, such approval rights were enacted with regard to the financial and monetary instruments of the European Financial Stability Facility and the European Stability Mechanism in the *Integrationsverantwortungsgesetz*, and the *Gesetz über die Zusammenarbeit von Bundesregierung und Deutschem Bundestag in Angelegenheiten der Europäischen Union*. See Leonard Besselink and others, Study for the European Parliament, DG for Internal Policies, Policy Department C: Citizens’ Rights and Constitutional Affairs, ‘National Constitutional Avenues for Further EU Integration’, March 2014, available at [http://www.europarl.europa.eu/RegData/etudes/etudes/join/2014/493046/IPOL-JURI\\_ET%282014%29493046\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2014/493046/IPOL-JURI_ET%282014%29493046_EN.pdf) (last accessed 10 October 2016).

<sup>14</sup> Katrin Auel, Olivier Rozenberg, and Anja Thomas, ‘Lost in Transaction? Parliamentary Reserves in EU Bargains’, OPAL Online Paper No 10/2012.

are taken beyond any kind of national oversight. Facing internal criticism, politicians too often find it easier to ride the bandwagon of the national 'right' and the European 'wrong' than acknowledging that they themselves have gone along with and often also endorsed those same EU decisions.

The visibility of the legitimating role of NPs is somewhat clearer as regards subsidiarity scrutiny and the political dialogue with the Commission, since this is indeed largely (although of course not exclusively) shaped in the institutional context of the EU.<sup>15</sup> But here the ultimate impact is rarely direct. This indirectness—apart from institutional short-sightedness of a very restrictive and the Commission's overly legalistic approach to the principle of subsidiarity—is to a great extent due to the early stage at which this national parliamentary influence occurs. Apart from the role of the Council in the 'orange card' procedure,<sup>16</sup> it is only in the subsequent parliamentary scrutiny that any early parliamentary hesitations or objections—if these were not already shared by the relevant parliament's executive—could become effective and result in a negative vote on the part of the relevant member of the Council. Streamlining subsidiarity and subsequent scrutiny is thus of the greatest practical relevance for rendering parliamentary influence on EU decision-making effective.

To sum up, with regard to EU instruments given to NPs, domestic parliamentary action takes place within an EU framework, but the results are to a large extent dependent on subsequent scrutiny in the national parliamentary arena, which may or may not result in a negative vote cast in the Council. These somewhat paradoxical ways in which national and EU law are entwined, illustrate nicely that it is not really possible to say that NPs are simply insiders or outsiders vis-à-vis the EU, even when they are active. The boundaries, if there are any, are essentially fuzzy and blurred.

### 3. Day-to-day Political Legitimacy: the Sanctioning Powers of the European Parliament and National Parliaments

A differentiation between the legitimating functions can be observed when we compare NPs and the EP. The EP does indeed provide direct parliamentary legitimacy basis for the political day-to-day functioning of the Commission and for the adoption of legislation for which codecision (now ordinary legislative procedure) is required. It has powers of sanction towards the Commission that go well beyond the letter of the Treaties. Contrary to what Article 17 TEU suggests, not only does a newly established Commission collectively require a vote of confidence of the EP, but *individual* candidates for the new Commission after EP elections also need such confidence. This was the case with the investiture of the first Barroso Commission in 2005 when Buttiglione was rejected as a candidate for the post of Commissioner, and this was confirmed in the subsequent practice.<sup>17</sup> Moreover, the

<sup>15</sup> This also has a certain transnational component inasmuch as there are sometimes 'horizontal' processes of communication and coordination, such as through the EU Interparliamentary Exchange platform (IPEX). These are used to achieve certain results in the early warning mechanism of subsidiarity review. A good example of it is the third yellow card, raised against the Commission's proposal for the revision of the Posting of Workers Directive, which was the result of a coordinated effort of the newer Member States from Central and Eastern Europe and Denmark.

<sup>16</sup> Protocol No 2, art 7(3)(a) and (b).

<sup>17</sup> Thomas Beukers, 'The Barroso Drama. Enhancing Parliamentary Control over the European Commission and the Member States: Constitutional Development Through Practice' (2006) 2 *EuConst* 21.

2015 elections of the EP and practice of indicating *Spitzenkandidaten* has meant a shift away from the letter of Article 17 TEU as regards the power of the European Council freely to designate the president of the new Commission towards following the preference of the Parliament, as was done that year by designating the candidate of the winning European party—Jean-Claude Juncker.<sup>18</sup> This trajectory of the democratic powers of the Parliament over the Commission—and actually already as regards its powers of the purse strings decades ago—follows closely that of the development of the parliamentary system of government in many of the Member States.

In this regard, NPs lack the power of sanction: they cannot vote out the Commission (as the EP can); nor can they vote out the Council as a collective body (which the EP cannot either). But constitutionally they do have a firm grip over the individual members of the Council, which the EP does not have. This is hardly ever commented on in EU law textbooks, but Article 10 TEU is quite right in saying that the Council is legitimated by NPs insofar as:

Citizens are directly represented at Union level in the European Parliament. Member States are represented in the European Council by their Heads of State or Government and in the Council by their governments, themselves democratically accountable either to their national Parliaments, or to their citizens.

European politics has indeed played a role within many other Member States on a variety of cases that were specific to that Member State. It is no accident that in several Member States parliamentary debates take place after and before meetings of the European Council.<sup>19</sup> This is the opportunity for parliaments to sanction the governments in the countries with parliamentary systems, while in France this is done more intermittently at presidential elections. In fact, it may be good to remind ourselves that parliamentary scrutiny in Denmark, for instance, was triggered by and took form immediately after the national political upheaval over the EC Council decisions concerning pork prices and herring quota shortly after the accession of Denmark.<sup>20</sup>

<sup>18</sup> For different perspectives on this innovative aspect of EU politics see Marco Goldoni, 'Politicising EU Lawmaking? The Spitzenkandidaten Experiment as a Cautionary Tale' (2016) 22 ELJ 279; Thomas Christiansen, 'After the Spitzenkandidaten: Fundamental Change in the EU's Political System?' (2016) 39 WEP 992; Desmond Dinan, 'Governance and Institutions: The Year of the Spitzenkandidaten' (2015) 53 JCMS 93; Sara B Hobolt, 'A Vote for the President? The Role of Spitzenkandidaten in the 2014 European Parliament Elections' (2014) 21 JEPP 1528.

<sup>19</sup> See more in Roger J Goebel, 'The European Council After the Treaty of Lisbon' (2011) 34 Fordham Int'l LJ 1251; Wolfgang Wessels and others, Study for the European Parliament, DG for Internal Policies, Policy Department C: Citizens' Rights and Constitutional Affairs, 'Democratic Control in the Member States of the European Council and the Euro Zone Summits', January 2013, available at [http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/474392/IPOL-AFCO\\_ET\(2013\)474392\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/474392/IPOL-AFCO_ET(2013)474392_EN.pdf) (last accessed 10 October 2016).

<sup>20</sup> The 'bacon crisis' contributed to the early dissolution of parliament in November 1973. Helle Krunke, 'Developments in National Parliaments' Involvement in Ordinary Foreign Policy and European Policy—Denmark' (2007) 13 EPL 335, 339–41. On the present functioning of the mandating system of the Danish Parliament, see Mette Buskjaer Christensen, 'The Danish Folketing and EU Affairs: Is the Danish Model of Parliamentary Scrutiny Still Best Practice?' in Claudia Hefffler and others (eds), *The Palgrave Handbook of National Parliaments and the European Union* (Palgrave Macmillan 2015).



#### 4. The Foundational Legitimizing Power Resides in National Parliaments

Contrary to much of the anti-EU populist rhetoric, it is quite clear that from a foundational perspective NPs have retained their role as sovereign gatekeepers. It was NPs which were to decide the foundation, the accession, and amendment of the EU Treaties. They are the Masters of the Treaties insofar as they determine, as a matter of principle, the constitutional outlines of the Union, both in its constitutive aspect, the institutions constituted, and as regards these institutions' empowerment at the moment of approval of the Treaties and their amendments.

In this regard, the EP is not quite the NPs' match. The EP can propose amendments to the Treaty and must be heard on proposed amendments by the European Council,<sup>21</sup> but it has neither the monopoly to initiate Treaty amendments nor any decisive powers. Only under the procedure to switch from unanimity to qualified majority and from the special legislative procedure to the ordinary legislative procedure, do relevant decisions require the 'consent' of the EP.<sup>22</sup> So, the EP provides less democratic legitimacy to *constitutive* acts than NPs do. Because they do so together but also severally, one can say that they do that not only by acting as the European Masters of the Treaties but also as autonomous bodies. They are indeed both European actors as well as sovereign gatekeepers.

#### 5. The Crises of European Integration: Parliaments on the Brink of European Disintegration

When we look at the legitimating role of NPs in the functioning of the EU, the Union is much as Andrew Shonfield famously depicted it in 1972: it is not supranational in the simple, old-fashioned sense of standing above the Member States; 'bits and pieces' of Member States are themselves part of the Union. The resulting Europe of bits and pieces together looks more like a bag of marbles than a melting pot.<sup>23</sup> And indeed, the prevailing compilation of difficulties facing the Union may make one wonder whether the bits and pieces will hold together and whether the marbles will spill away in all different directions.

The crises that Europe faces comprise the complex of the banking, public finance, and monetary crises and the complex of the migration crisis and related xenophobic populism. The latter translates into a revival of the rhetoric of sovereignty and a call for EU exit referenda well beyond the UK, a call that echoes the populist reproach of the very undemocratic nature of the Union.

<sup>21</sup> TEU, art 48(2)–(3). See more in Cesare Pinelli, 'The Convention Method' in Nicola Lupo and Cristina Fasone (eds), *Interparliamentary Cooperation in the Composite European Constitution* (Hart Publishing 2016).

<sup>22</sup> TEU, art 48(7). See more in Katarzyna Granat, 'Interparliamentary Cooperation and the Simplified Revision Procedures' in Nicola Lupo and Cristina Fasone (eds), *Interparliamentary Cooperation in the Composite European Constitution* (Hart Publishing 2016).

<sup>23</sup> Andrew Shonfield, *Europe: Journey to an Unknown Destination* (Penguin Books 1973) 17. This was originally broadcast by the BBC in 1972 in the form of lectures, available at <https://soundcloud.com/bbreithlectures/rla-andrew-shonfield-europe> (last accessed 10 October 2016) at 15':10"–16':55".



## 6. The Impact of the Euro Crisis

Let us first say something about the euro crisis and the role of parliaments. Parliaments' functions have been touched to their core by the perceived necessity to have a coordinated approach to fiscal matters that affect the prime amongst parliamentary powers: the power of the purse strings. The previously existing EU rules of the Stability and Growth Pact were complemented first with a so-called 'Six Pack' of five Regulations and a Directive (2011), then with the 'Two Pack' of Regulations introducing coordination, supervision, and surveillance of the national fiscal situations (2013). In addition, rescuing funds in the form of the European Financial Stability Facility and the European Stability Mechanism were set up formally outside the EU law framework and the so-called 'Fiscal Compact', ie the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (2012), was concluded containing an obligation to introduce a 'balanced budget' rule in the national constitutional orders.<sup>24</sup> These measures have together given a strong supervisory role to the Commission over core areas of national parliamentary powers.<sup>25</sup> Thus, an interstate agreement such as the Fiscal Compact, a treaty under public international law that would in EU jargon be considered 'intergovernmental', creates significant powers for supranational EU institutions, even for the Court of Justice for that matter.<sup>26</sup>

This is not to say that NPs' role adumbrated by Articles 10 and 12 TEU is totally ignored. The Fiscal Compact has required the introduction of independent national budgetary authorities to supervise national compliance, while these are supposed to 'fully respect the prerogatives of national Parliaments'. True to the composite nature of democracy in the context of integration within the Union, the Fiscal Compact also provides for the setting up of an inter-parliamentary conference of European and NPs' committee representatives, the so-called 'Article 13 Conference'.<sup>27</sup> The Fiscal Compact suggests that this is as 'provided for in Title II of Protocol (No 1) on the role of national Parliaments in the European Union', but of course this Protocol does not provide for such conferences, which strictly speaking are outside the EU treaty framework.

Again, the conclusion must be that the Fiscal Compact adds to the 'composite' nature of the Union and the parliaments' role within it.<sup>28</sup> On balance, on the one hand, parliaments have a role to play; but, on the other hand, the Fiscal Compact changes NPs' role altogether as compared to the days when Member States were autonomous in budgetary matters.<sup>29</sup>

## 7. Referenda on Membership, Association, and Exit

It is true to say that the EU is not founded on a direct foundational act of the peoples of the Member States establishing the Union or acceding to the Union. Nevertheless,

<sup>24</sup> See further Leonard Besselink and Jan Herman Reestman, 'The Fiscal Compact and the European Constitutions: "Europe Speaking German"' (2012) 8 *EuConst* 1 (Editorial).

<sup>25</sup> Michael W Bauer and Stefan Becker, 'The Unexpected Winner of the Crisis: The European Commission's Strengthened Role in Economic Governance' (2014) 36 *J Eur Integration* 213.

<sup>26</sup> Fiscal Compact, art 8.

<sup>27</sup> See more on this in the chapter by Ian Cooper in this volume.

<sup>28</sup> Leonard Besselink, *A Composite European Constitution* (Europa Law Publishing 2007). See another interpretation of 'compositeness' in Philipp Kiiver, 'The Composite Case for National Parliaments in the European Union: Who Profits from Enhanced Involvement?' (2006) 2 *EuConst* 227.

<sup>29</sup> See further Davor Jančić, 'National Parliaments and EU Fiscal Integration' (2016) 22 *ELJ* 225.

we must note that in nineteen out of the twenty-eight Member States there have been popular referenda—mostly with a positive outcome. These concerned becoming or remaining a member of the EU or Treaty amendments (notably, but not exclusively, the Maastricht and Lisbon Treaties and the Treaty establishing a Constitution for Europe).<sup>30</sup>

If we then connect Article 10(1) TEU with foundational legitimacy as defined in this chapter, this Article does not quite represent the reality either,<sup>31</sup> given that it stipulates that ‘the functioning of the Union shall be founded on representative democracy’. This is because for two-thirds of the Member States, the Union is founded on an act of direct democracy. However, as long as a third of the Member State populations have not at any time had the chance to participate in such referenda, the ones held are insufficient to conclude that together they make for a popular constitutive, foundational act of the Union.

Pressure exists in various Member States towards direct legitimation in the form of calls for referenda.<sup>32</sup> Unlike the days of the abortive Treaty establishing a Constitution for Europe, referenda do seem to be sought as a method to imbue the Union with legitimacy, but are to the contrary motivated by questioning the popular support for the process that has led Member States to integrate in the Union in order to cope with problems that were considered could not adequately be resolved or governed by individual European states in isolation.<sup>33</sup> The EU is put to the test.

This was the case with the consultative and corrective<sup>34</sup> referendum in the Netherlands on 6 April 2016. A private initiative of anti-EU activists managed to collect 300,000 signatures to have a referendum on the Act approving the Association Agreement with Ukraine. This was carried out just months after the passage of the new Consultative Referendum Act 2014, which enabled a corrective consultative referendum to be held after the adoption of acts of parliament and prior to their entry into force.<sup>35</sup>

The promoters of the referendum acknowledged that the Act approving Ukraine’s association might not be the best target for an EU referendum, but they considered it the only feasible manner to have the European project put before the people. In the referendum, 61 per cent of voters voted against the Act, with a turnout of 32 per cent—the ‘no’ vote thus comprising less than 20 per cent of the electorate. This percentage is slightly lower in proportion to the members of parliament who voted against the approval of the Association Agreement in the Lower House (*Tweede Kamer*).

Under the present legislation, the outcome of the referendum is valid if 30 per cent of voters turn out. The outcome is not binding, but it appears politically difficult to ignore

<sup>30</sup> For the calculation I used the following website of the Danish Parliament that provides data on all EU referenda: <http://english.eu.dk/en/faq/faq/referendums> (last accessed 10 October 2016). See a more analytical overview in Matt Qvortrup, ‘Referendums on Membership and European Integration 1972–2015’ (2016) 87 *Pol Quarterly* 61.

<sup>31</sup> This would require the reader to trivialize the words ‘the *functioning* of the Union’ as if it reads ‘The Union shall be founded on representative democracy’.

<sup>32</sup> Fernando Mendez, Mario Mendez, and Vasiliki Triga, *Referendums and the European Union: A Comparative Inquiry* (Cambridge University Press 2014).

<sup>33</sup> See more on the reasons behind governments’ voluntary promises to hold EU referenda in Kai Oppermann, ‘The Politics of Discretionary Government Commitments to European Integration Referendums’ (2013) 20 *JEPP* 684.

<sup>34</sup> The referendum outcome was not legally binding and therefore *consultative*; it was *corrective* in the sense that it could only be triggered after the adoption of an Act, with a view to assessing the approval or rejection of it by the electorate. This is the only possibility for holding a referendum under the present constitutional rules and legislation in the Netherlands.

<sup>35</sup> Act of 30 September 2014 on the consultative referendum [*Wet van 30 september 2014, houdende regels inzake het raadgevend referendum (Wet raadgevend referendum)*].

the clear majority of the vote, even if the ‘no’ vote represents only such a small minority of the electorate. Legally, the result is not binding, but the national government must reconsider its position. Prime Minister Mark Rutte announced that the Association Agreement would not be ratified ‘unconditionally’, and has sought a Decision by the European Council to take away a number of concerns the government understands the referendum outcome to mean. At the time of writing, the European Council has adopted the desired Decision, but it is uncertain whether the Dutch Parliament will find this sufficient.<sup>36</sup>

On 23 June 2016, the UK electorate voted by a narrow majority of those who voted (51.9 per cent against 48.1 per cent) to leave the EU.<sup>37</sup> Just as in the Dutch case, this majority did not constitute a majority of the electorate, with the ‘Leave’ votes constituting less than 38 per cent of the electorate. Contrary to the referendum in the Netherlands, however, the British referendum was not corrective, but must be considered abrogative, in as much as it aims to bring to an end the legal and constitutional situation as it applied generally thus far. So, unlike corrective referenda that are held to enable the electorate to prevent a certain act of a legislature to enter into force, the electorate thus being a popular corrective of an explicit and concrete parliamentary majority on a precise piece of legislation—in an abrogative referendum a matter on which parliament has not taken a specific position is left to the popular will to decide. Hence, the relation between an electorate voting in parliamentary elections and that voting in a referendum cannot easily be established.

For assessing the referendum’s representative legitimacy, the turnout is not decisive, at any rate in its relation to the electorate represented in parliament. Moreover, the British referendum did not have any threshold, so it could not create a dilemma for the ‘Remain’ voters as to whether they would contribute to reaching the threshold by voting and thus to the validity of the outcome (as was a massive dilemma in the Netherlands Ukraine referendum that dominated the news and media on the day of the vote). Therefore, however narrow the margin, the results in the UK can be considered both representative and legitimate in terms of numbers and voters.

There is uncertainty, however, as to how long the outcomes of popular referenda hold their legitimating authority. The British referendum of 1975 had evidently reached its ‘use by’ date in June 2016. So who knows whether in forty years there might be another referendum on UK accession to the Union—if the UK and the EU still exist then.

## 8. Conclusion: National Parliaments Within the EU

Where does this leave the NPs of the Member States that are inside the EU and intend to remain so?<sup>38</sup> Should we divert our attention to the people rather than to its parliamentary representation?

<sup>36</sup> The Decision sets out the common understanding of the Parties to the Association Agreement that Ukraine is not a candidate Member State, that the Agreement does not provide for collective security guarantees, free movement of workers, or Member State obligations to provide bilateral financial support to Ukraine, while the combat of corruption in Ukraine and cooperation to strengthen the rule of law is aimed at strengthening the judiciary’s independence, and Ukraine’s compliance with the EU’s fundamental values is subject to monitoring and sanctions. See European Council conclusions on Ukraine (15 December 2016), Annex I.

<sup>37</sup> The electorate counted 46,500,001 voters. The turnout was 72.2 per cent with ‘Remain’ receiving 16,141,241 votes (48.1 per cent of the votes cast) and ‘Leave’ 17,410,742 votes (51.9 per cent of the votes cast). See the official results at <http://www.electoralcommission.org.uk/find-information-by-subject/elections-and-referendums/upcoming-elections-and-referendums/eu-referendum/electorate-and-count-information> (last accessed 10 October 2016).

<sup>38</sup> At this stage, an equally interesting and speculative question is that of the extent to which the British Parliament and the devolved parliaments of Scotland and Wales will act as participants that

There are certainly indications that some of the social determinants of representative politics in Europe that affect representative democracy have eroded.<sup>39</sup> In many ways, one could say that in terms of constitutional history the ‘long’ 19th century (from the French Revolution to the First World War) was about democracy in an institutional sense, revolving around the powers of governments versus parliaments, which resulted in the adoption of the general franchise and in the establishment of some form of parliamentary government in practically all European states. The 20th century, at any rate since the end of the Second World War, became the century of individual constitutional rights. In the early 21st century, individualism drives to further extremes under the influence of technological change. What are paradoxically called ‘social media’ are extremely individualist media, to which anyone can have active access—and a ‘public’ can too, provided one’s messages are short and easy to understand.

Politics is deeply affected by this. Aggregation of political action through organized social movements in the form of political parties has become more difficult as these are no longer the main channels of political opinion formation leading to political action. Fragmentation may sooner or later spill over to the institutions of politics and actually make the polity, as we have known its development since the end of the Middle Ages, a less self-evident form of living in pursuit of happiness.

In many ways, political and institutional fragmentation is not only *inwards* from state and government to individual citizens; it institutionally extends *outwards* as well. Parliaments are no longer institutions that operate within the confines of single states only. They are ‘genetically’ state institutions, constituted in accordance with the historical preferences and developments of the state involved, and at the same time actors in the surrounding world, most specifically and practically regulated in the EU context.

As long as the Union has been neither legitimated nor delegitimated by referenda, there is a crucial role for NPs. They provide day-to-day democratic legitimacy, including a sanctioning power as regards Member State representatives in the Council. They provide such legitimacy also for EU decision-making in general to the extent of their scrutinizing activity in parallel to the legitimating function of the EP.

There is still much reason to divert attention away from popular and populist politics towards the democratic legitimating function of parliaments, although there may well be space to make their role more visible and transparent<sup>40</sup> in the complex order of the Union as a political entity that aims at the common good in an era of globalization.<sup>41</sup>

are more ‘inside’ or more ‘outside’ the EU—and what the difference would be once an agreement has been struck with the EU on the terms of ‘Brexit’. At any rate, notwithstanding pledges to fulfil EU legal obligations and the unaltered national constitutional rules, Westminster must be considered to be more outside it than was the case before the June 2016 EU membership referendum.

<sup>39</sup> See a brief analysis of the case of the Netherlands in Leonard Besselink and Monica Claes, ‘The Netherlands’ in Anneli Albi (ed), *National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law* (Springer 2017, forthcoming). See more on the present-day understanding of popular sovereignty from a Canadian background in Simone Chambers, ‘Democracy, Popular Sovereignty, and Constitutional Legitimacy’ (2004) 11 *Constellations* 153.

<sup>40</sup> One particularly important improvement would be in the area of scrutiny of the principle of conferral, similar to scrutiny of subsidiarity. See Davor Jančić, ‘The Game of Cards: National Parliaments in the EU and the Future of the Early Warning Mechanism and the Political Dialogue’ (2015) 52 *CML Rev* 939.

<sup>41</sup> See further discussions in Robert O Keohane, ‘Nominal Democracy? Prospects for Democratic Global Governance’ (2015) 13 *ICON* 343; Wojciech Sadurski, ‘Supranational Public Reason: On Legitimacy of Supranational Norm-producing Authorities’ (2015) 4 *Glob Con* 396.