Special Book Review Symposium

Power and Legitimacy

Bruno de Witte

Peter L. Lindseth. *Power and Legitimacy. Reconciling Europe and the Nation-State* (Oxford University Press), 2010, 364 p.

Unlike the other contributors to this book symposium, my own academic background is that of law rather than political science. Reading Peter Lindseth's book through the spectacles of an EU law scholar, I found his historical account of the development of the European integration process – and, hence, also of European Community law – illuminating, and it helped me to make better sense of traditional controversies among lawyers about the nature of European Community law (and now, European Union law).

I will not say more about the content of Lindseth's historical account, which is nicely summarized in Türküler Isiksel's comments, except to say that his discussion of the early years of the European Communities is very persuasive, in particular when – building on his earlier writings – he shows how the Community Treaties of the 1950s fitted nicely within what he calls the 'post-war constitutional settlement' in Western European countries. Important administrative functions had been delegated domestically to governments and independent administrative organs, subject to constitutional legitimation being provided by oversight mechanisms; similarly, important administrative functions were also delegated to supranational organs, subject to nationally-based oversight mechanisms. His emphasis on the administrative nature of the powers delegated to the new European institutions, and on the conceptual continuity with what had occurred at the national level in previous years, is very well taken.

Yet, this should not hide the fact that the legal instruments used for effectuating this delegation were very different in both cases: domestic legislation on the one hand, and international treaties establishing international organizations on the other. The ECSC Treaty and the EEC Treaty, although fitting with the post-war constitutional settlement in their founding member states, were also bold experiments of international law. Those treaties contained a number of suprana-

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tional elements, all of which had separately been experimented with before, but the combination of which was unprecedented. The Court of Justice further emphasized those innovative elements in its creative case-law. As a result, something curious happened in the legal literature from the 1960s onwards. Although the view that the European Community was, and had to remain, a creature of international law could seem logical in view of the fact that it was based on international treaties concluded by states, that view was in fact heavily contested. This contestation has been encouraged by some rulings of the European Court of Justice and developed by a large part of legal writing. It is today a commonly held view in the European legal literature that even if the EC did conform to the status of 'international organization' in its early days, it has now moved well beyond that. The European Community proved to be so peculiar that many Community lawyers started to argue, from a very early stage, that it was not an international organization at all, but 'something else', a *sui generis* legal order that does not fit in the traditional dichotomy between (federal) states and international organizations, and that to continue to refer to it as an international organization is 'to try to push the toothpaste back in the tube.'[1]

However, this view was not shared by all EU legal writers, and it was contested or ignored by public international lawyers who continued to include the European Community and the European Union within the category of international organization. They take the view that 'no matter how *sui generis* the European Community might be, it is often considered as the most highly developed specimen of the species, and as a model for other international organizations to emulate.'[2] The contrast between these two scholarly accounts (that of EU law and that of international law) on the question of legal qualification is quite remarkable, and it is even more remarkable that very few authors, on either side, have much time for trying to explain and justify their positions. Peter Lindseth's book, although it does not openly take sides in this debate among lawyers, is very relevant to the debate. By its sober, historically grounded reminder of the EU's roots in national constitutional law and of the fact that the European Union institutions exercise powers delegated to them under national constitutional law, it supports the view of those who think that the European Union is indeed still an international organization, although a much more sophisticated one than most others.

[1] Joseph H.H. Weiler and Ulrich R. Haltern, 'Constitutional or International? The Foundations of the Community Legal Order and the Question of Judicial Kompetenz-Kompetenz', in A.-M. Slaughter et al. (eds.), *The European Courts and National Courts – Doctrine and Jurisprudence* (Hart 1998) p. 331-364, at p. 342.

[2] Jan Klabbers, 'The Changing Image of International Organizations', in J.M. Coicaud and V. Heiskanen (eds.), *The Legitimacy of International Organizations* (United Nations University Press 2001) p. 221-255, at p. 224. Again, many similar quotations from international legal writing could be added.

Roughly half of Peter Lindseth's book analyzes the historical development until the mid-1960s, and the other half continues the story until the present day. Lindseth does not introduce very sharp temporal divides, though, because his central argument is that the postwar constitutional settlement of the 1950s – which involved the delegation of administrative powers to supranational institutions subject to national oversight mechanisms – still explains the operation of the present-day European Union. Whereas I do not seek to challenge the historical account up to the 1960s – indeed, I found it superbly done and full of new insights – I do have some doubts about the continuity thesis, as I will explain below.

Three chapters together constituting the core of the book analyze the three national oversight mechanisms that cumulatively keep in check the supranational institutions: national executive leadership since the 1950s, national judicial review since the 1960s, and national parliamentary scrutiny since the 1970s. The temporal distinction between those three elegantly conveys the message that national oversight mechanisms have developed and diversified in order to keep a check on forms of supranational activity which were themselves developing and diversifying. Thus, national courts needed to enter the picture only from the 1960s onwards, because that was the time when the European Court of Justice developed its doctrines on direct effect and primacy of EC law, thus creating new challenges for national sovereignty that required new forms of oversight to be exercised by the national supreme courts. In other words: mediated legitimacy by national institutions had to be augmented as the scope of supranational powers increased.

I do not find this elegant scheme entirely persuasive, though. To my mind, there has always been, and there still is, a huge difference between the oversight by national executives – which is detailed, consistent and exercised on a daily basis through the various Council formations – and the oversight by national judiciaries and parliaments – which is marginal, intermittent and very unequal from one country to another. Whereas the German Constitutional Court has been an important source of oversight (not least in its current role of protector of the German parliament in the economic governance reforms), and whereas the parliaments of the UK and Denmark actively scrutinize the initiatives taken in Brussels, many national supreme courts and many national parliaments have remained very marginal players in the oversight game. Is the mere *possibility* of exercising oversight on EU activity meaningful if it is never used?

Let us take the case of national parliamentary scrutiny, which Lindseth examines in Chapter 5 of his book. The increasing oversight role of national parliaments is explained by the author by the fact that national *executive* oversight had been incapable of stemming the 'competence creep' of the European Union, and the resulting increase in the impact of EU law on domestic policy-making. Single governments were unable to stem this impact due to the expansion of qualified

majority voting in the Council, and all governments proved anyway rather unwilling to do so for a number of reasons including the 'Brusselization' of the national civil servants assisting the governments in conducting their EU affairs. The new oversight role given to national parliaments was, for a long time, purely a matter of national law. Denmark and the United Kingdom formed the models which other national parliaments sought to imitate, with some degree of success. A novelty of more recent years, timidly initiated by the Treaty of Amsterdam and confirmed more decisively by the Treaty of Lisbon, is that national parliaments are being thrust in an oversight role by supranational law itself. Lindseth argues that this 'increase in the national parliamentary role is a further reflection of the fundamentally administrative character of European integration' (p. 227) and adds that 'the national parliaments remain the ultimate principals in the European system, while the European Parliament is fundamentally an agent' (p. 229). Much of this argument depends on the value attributed to the 'early-warning mechanism' introduced by the Treaty of Lisbon, allowing national parliaments to express their misgivings about EU legislative initiatives on subsidiarity grounds, by means of 'reasoned opinions'. In a report based on data available in September 2011,[3] we can read that during the almost two years since the Lisbon Treaty's entry into force (which occurred on 1 December 2009), 57 reasoned opinions had been delivered by the altogether forty national parliaments or chambers of parliament entitled to do so. Eleven of those forty had not adopted any single such opinion. The highest number of negative opinions (namely, nine) related to a proposal for a directive on a Common Consolidated Tax Base, but this figure is still much below the threshold of 1/3 of national parliaments that must be reached for a 'yellow card' to be waved in front of the Commission. It is quite possible, of course, that misgivings expressed by just a few national parliaments may also have an inhibiting impact on EU legislative initiatives, but there is no firm evidence for this as yet. More important, perhaps, than the considerable difficulty in operating the early warning mechanism is the fact that it is very narrowly designed: it only affects *initiatives* for EU legislation made by the Commission, but it does not target the further life of a legislative initiative in the course of the co-decision procedure where, thanks mainly to the role of the European Parliament, additional 'competence creep' happens quite frequently. Moreover, the role of national parliaments is limited to subsidiarity control, whereas the main contentious issues today are about the *content* of legislative initiatives that are unquestionably within the limits of EU competence, if only because they aim at amending previously existing EU laws.

[3] Conference of Parliamentary Committees for Union Affairs of Parliaments of the European Union (COSAC), 'Sixteenth Bi-annual Report: Developments in European Union Procedures and Practices Relevant to Parliamentary Scrutiny', October 2011 (available on www.cosac.eu).

This leads me to a related point, namely to the role of the European Parliament. The fact that Lindseth gives little attention to this institution is also noted by Bartolini and Isiksel in their comments, and is indeed rather striking. I wonder whether that institution, in its current post-Lisbon operation (now that the co-decision procedure applies to 90% of the legislative acts adopted by the Union) can still be said to be captured by the mediated legitimacy mechanisms described in the book. Unlike the national parliaments in Europe, which are directly connected to their governments by means of the political parties, the European Parliament is a genuinely independent political actor, unchecked by either Commission or Council. Since it is not subject to control by the Council, it is also not subject to the oversight by national executive leaders. Admittedly, even under co-decision the EP does not legislate freely and its views must be endorsed by a qualified majority of member state representatives in the Council, but this is not a guarantee for control by the *single* national governments; they may find themselves outvoted and unable to resist legislative choices promoted by the EP. As I mentioned above, national *parliaments* leave the decision-making game once a file is in its co-decision mode, and national *courts* have – so far – never directly invalidated an act produced by the EU legislative process. So, the national oversight mechanisms seem to have no real bearing on the activity of the European Parliament. Is it not a little contrived, then, to characterize this European Parliament as being still, fundamentally, an administrative agent of the member states?

So, whereas I fully agree with Peter Lindseth's thesis that national constitutional law – and national constitutional institutions – continue to provide the European Union with both its political impetus and its political and legal legitimacy, I am less convinced that the various national oversight mechanisms are still able to constrain the exercise of power by the EU institutions. To the extent that EU institutions such as the European Parliament and the European Central Bank act outside such national constraints, additional forms of legitimation are needed. To that extent, it does make sense, in my view, to speak about the need for, and existence of, European *constitutional* law. The European Union is not just a very sophisticated form of international administration; it has also developed a system of constitutional law of its own which is analogous, in many ways, to national constitutional law and at the same time closely integrated with it.