

EU NETWORKS UNDER THE NEW CONSTITUTION: IMPACT ON DOMESTIC CONSTITUTIONAL STRUCTURES

by
András Sajó, Budapest*

This paper discusses the constitutional problem posed by the operations of independent national (regulatory) agencies which form transgovernmental networks, and in particular networks of such agencies within the European Union. The transgovernmental networks of the Union are a neglected area of constitutional thought. These structures might be decisive for the structure of contemporary government. It is quite likely that such structures represent the primary model of emerging efficient international cooperation. They will stay with us, but we don't know yet how to handle them in order to satisfy the normative expectations of democratic constitutionalism – if there is any means of governance to control them. Given the uncertainties this paper should be read as a research proposal and not as a paper offering conclusions.

In the definition of “transgovernmental networks” I follow Kal Raustiala. “Transgovernmentality” refers to the involvement of specialized domestic officials who directly interact with each other, “often with minimal supervision by foreign ministries. They are “networks” because this cooperation is based on loosely-structured, peer-to-peer ties developed through frequent interaction rather than formal negotiation. Thus defined, the phrase ‘transgovernmental networks’ captures a strikingly wide array of contemporary cooperation.”¹

There are many forms of institutionalized networking in the Union with different levels of involvement and integration of national independent agencies. Probably the most advanced, integrated, most formalized (and legally protected) instance of such networking is centered around the European Central Bank (the European System of Central Banks). The network of European central banks is close to the ideal type of agency networking resulting in insularism of the institution both at European and national levels. The network insulation increases insularism of the participating agencies at the national level. Such networks may represent new agglomerates of

* University Professor Dr. András Sajó, Central European University, Legal Studies Department (www.ceu.hu).

1 Kal Raustiala, “The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law,” 43 *Virginia Journal of International Law* (2002) 1-92, 5. Consider also Thomas Risse-Kappen, *Cooperation Among Democracies: The European Influence on U.S. Foreign Policy*, Princeton: Princeton University Press (1995) 38 (defining “transgovernmental coalitions” as “transboundary networks among subunits of national governments forming in the absence of central and authoritative national decisions”).

governmental power; such governance structures escape traditional accountability. The internationalization of independent national agencies contributes to the loss of democratic control over such agencies in the national setting and contributes to the emergence of international governance structures that might evade the formal control of the participating states as sovereign entities. They escape the formal control of international bodies with express power, including the constitutional organs of the European Union. On the other hand, independent agencies and other forms of 'neutral power' enjoy non-democratic legitimation and this legitimation might be reinforced by participation in the network. Whatever happens it is not on the radar of constitutional law and constitutionalism.²

The above developments necessitate a rethinking of both national and EU constitutional structures, processes and guarantees in order to assess the consequences of such developments, both domestically and at the European level. It seems imperative to balance these new powers and reduce the constitutional deficit that might result from the network arrangements.

For the traditional constitutional theorist the problem with the Union and with the European Constitution is the apparent irrelevance of traditional constitutional structures of democratic governance and government. Separation of powers, federalism, popular control via election seem to be of little relevance. This problem is often discussed in terms of democratic deficit, although it is a much broader problem, namely that of constitutionalism. Constitutionalism has a special meaning or dimension in the context of the European Union: here constitutional organs of member states exercise arguably limited control over the Union institutions. Such arrangement is unorthodox in modern state formations where the formal legal control of territorial units over the center is hardly ever dominant. Lack of control by these member state constitutional bodies and behind these bodies that of the citizens of the member states, diminishes the constitutional relevance of the domestic entities at home too. The Constitution for Europe has only consolidated this pattern.

National constitutions have only partly admitted these difficulties. Already these days important state functions escape the traditional democratic and rule of law based control offered by the constitutional nation-state. Critics of the traditional constitutionalist position, especially those analysts who approach the problem of state-centered constitutionalism from the perspective of the EU, criticize state constitutions as being to some extent '*passé*.' In their view the domestic constitution and

2 See Neil Walker, "The Idea of Constitutional Pluralism," 65 *Modern Law Review* (2002) 317-359, text accompanying note 89.

related constitutional values cannot play any more the central role that they did play in modernity because of the transnational or global dislocation.³

Obviously, networks represent a fundamental challenge to the relevance and possibility of the concept of constitutionalism. The theoretical and empirical possibility of the constitutionalization of intergovernmental networks (particularly but not exclusively within the EU) requires further thinking.⁴ At the end of the day the problem of transgovernmental networks raises the following broader issues:

- a. is constitutionalism possible at the national level, when the state is allegedly losing importance;
- b. (and related to the first issue) is constitutionalism possible at the transgovernmental level where the institutions, values, and traditional value-holders of constitutionalism are allegedly missing?⁵

Even if one accepts that some kind of *Ersatz* constitutionalism might be generated in the transgovernmental and other transnational governance structures of the post-state (including private) ordering there are undeniable “problems of translation”.⁶

In order to highlight the constitutional problem of transgovernmental networks first I will look at the emergence of independent agencies in the domestic setting of the modern state. Second I consider the phenomenon of networking with special regard to EU networks. In the resulting power arrangements related to international network of agencies, a number of democratic control and legitimacy issues emerge. Public authority is exercised beyond the state territorial boundaries, oftentimes without proper authorization and democratic control. Finally I will discuss some

3 The dislocation challenges the role of the modern state constitution as “a central mechanism which enabled the recognition, coordination, assimilation and self-legitimation of the legal and political systems”. Damian Chalmers, “Post-Nationalism and the Quest for Constitutional Substitutes,” 27 *Journal of Law and Society* (2000) 187-217, 179. The challenge to state-centered theories originates in the new institutional perception of the European Union. Integration is a “polity creating process in which authority and policy-making are shared across multiple levels of government – subnational, national and supranational.” See Gary Marks et al., “European Integration from the 1980s: State-Centric v. Multiple-Level Governance,” 34 *Journal of Common Market Studies* (1996) 341-378, 342. For a review of the debate see Paul Craig, “The Community Political Order,” 10 *Indiana Journal of Global Legal Studies* (2003) 79-124.

4 For the possibility of restoring constitutionalism in the dual and interrelated world of the European postnational and the national state levels through constitutional pluralism see Walker, *op. cit.* note 2.

5 Even if there were networked value holders (like networked courts or religious organizations entering into networks and inter-denominational dialogues) the fundamental individualistic component of state-based constitutionalism has disappeared. Conceding that the individualism of state centered constitutionalism is purely speculative it operates as a normative assumption (that the state is for and about participating individuals); such assumption cannot be made where states, agencies and structured movements ‘talk’ to each other.

6 Joseph H.H. Weiler, *The Constitution of Europe “Do the New Clothes Have an Emperor?” and Other Essays on European Integration*, Cambridge: Cambridge University Press (1999) 270.

measures that might counter some of the trends that result from EU networking. These measures might serve constitutionalism at the national level as well as democratic governance in the EU.

I. Independent agencies: neutral institutions in the modern state

The modern state (as a network of organizations) pretends to be non-partisan or neutral in an increasing number of instances. Institutional arrangements are developed to make that claim credible.

The modern state is identified not only with representative institutions but also with administrative structures operated as public bureaucracies.⁷ Public bureaucracies offer a degree of neutrality in the sense of not necessarily being politically partisan. However, the depoliticization of public administration remains incomplete. The social desire for a non-partisan state machinery can not be entirely satisfied through the establishment of a civil service. Rather, in order to further isolate some parts of the civil service from partisan politics, *neutral regulatory institutions* emerged early in the 20th century. (See the creation of federal and state agencies to regulate railroads and public utilities in the United States.) In principle, these neutral institutions are to a great extent autonomous and independent of political bodies or democratic politics. The analysis of the actual institutions indicates how limited such independence and autonomy actually was. Nevertheless, they often have enough autonomy to remain independent from the political branches if they really wish to do so. Autonomous bodies may be biased but, in principle, are beyond partisan politics and, therefore, their rule-making and decisions are deemed to be neutral in the sense of non-political. This trend is rooted in the growth of *independent expert bodies*. In complex societies, many traditional governmental functions were transferred to in-

7 Impartial institutions (like courts, and constitutional courts in particular) also contribute to the neutralization of the state. Contrary to institutions like independent agencies, courts stand *above* identifiable contests. They are impartial in the sense that they don't follow independent professional policy goals other than that related to self-preservation. See András Sajó, "The Concepts of Neutrality and the State," in Ronald Dworkin et al. (eds.), *From Liberal Values to Democratic Transition*, New York/Budapest: CEU Press, (2003) 107-144.

U. S. independent agencies, such as the Federal Trade Commission, were originally designed to be exempt from *executive* control. See *Humphrey's Executor v. U.S.* 295 U.S. 602 (1935). This understanding differs markedly from the one voiced by the Council of Europe (below), which denies *legislative* oversight. Note further that the characterization of agencies as "executive" or "independent" is the result of ad hoc political decisions. Peter L. Strauss, "The Place of Agencies in Government: Separation of Powers and the Fourth Branch," 84 *Columbia Law Review* (1984) 573-669.

dependent organizations, which were legitimated in terms of their professional expertise.⁸

The transfer of decision-making to neutral public institutions remains problematic. Policy-making institutions that are insulated from the democratic process are not necessarily fully neutralized in the sense of being exempt from political influence, but, at least, they are insulated *vis-a-vis* the democratic process. Of course, such insulation may also allow elected officials, government bureaucracies and interest groups to exercise even *more* political influence than in a transparent democratic setting. Neutralization has very often been a way to protect particular groups by excluding contrary political influences. The design of insulated public institutions is, after all, left overwhelmingly to legislation that often follows a logic completely alien to institutional neutrality. The withdrawal of the state from certain public domains is often determined by major performance failures accompanied by successful resistance to government by the regulated. Quite often politicians seek to avoid responsibility, and independent agencies allow politicians to avoid responsibility. Note that most of the independent state agencies which were created to enhance credibility serve special interest groups and only indirectly the general public: it is the trust of these special interests that is at stake. (Central banks directly serve the financial community; the media regulatory agency is catering to broadcasters, etc.).

Neutralization relies on a specific form of authority derived from the professionalism and expertise enabled by neutral institutional settings. Neutral institutions satisfy a normative expectation of trustworthiness as identified by Margaret Levi: "Institutional trustworthiness implies procedures for selecting and constraining the agents of institutions so that they are competent, credible, and likely to act in the interests of those being asked to trust the institution."⁹ Neutral institutions are the ultimate attempt of state trust building in an untrustworthy state.

Neutrality, together with other fuzzy concepts (impartiality, integrity, autonomy, etc.), plays a considerable legitimating role in liberal democracies. It promises that public and private spheres of life will avoid the totalitarianism of the "political." In principle, the neutralization of public institutions will enhance their trustworthiness. One may assume that the existence of trustworthy institutions may have a positive impact on the political trustworthiness of the whole political regime. This is, however, hard to corroborate. The actual institutional designs and political realities offer limited possibilities for non-partisan neutral professionalism to prevail.

8 Broadcasting regulation by independent regulatory agencies exemplifies a relatively recent world-wide attempt to neutralize oversight of the communicative sphere. Here, various institutional solutions guarantee the independence of the regulated media and the neutral handling of broadcasting-related matters. This is done "officially" in order to avoid politicization or because the public interest cannot be served well in a partisan manner. The contemporary solutions range from quasi self-regulation by those concerned to regulation by non-governmental bodies as decision-makers, and to insulated independent governmental bodies.

9 Margaret Levi, "A State of Trust," in Valerie Braithwaite and Margaret Levi (eds.), *Trust and Governance*, New York: Russell Sage Foundation (1998) 77-101, 80.

Even where professionalism prevails, neutrality may suffer from insularity. If insularity means non-interference it may result in a lack of social responsiveness. If the performance of the neutral institution follows the dictates of the internal self-interest of the organization (becoming a hotbed of corruption), it will undermine trust in the institution, notwithstanding the formal fairness of its procedures. Moreover, these institutions tend to keep their decision-making process non-transparent.

II. *Networks of independent agencies with special regard to the EU and related legitimacy issues*

Networks emerge both at the national and international (intergovernmental) level and are of quite different nature both at the national and international level. Transnational (intergovernmental) networks emerge in the globalization process, although for quite different reasons. The above mentioned neutral institutions of the state have a tendency to coalesce with their foreign equivalents, which are considered to share their professional interests and deontics. This is, of course, enabled and even encouraged by the increased level of interconnectedness among national governments and their need to coalesce internationally in the global world economy. “The result is a world order in which global governance networks link Microsoft, the Catholic Church, and Amnesty International to the European Union, the United Nations, the Catalonians, and the Quebecois.” The power shift is part “of a larger paradigm shift in optimal organizational form: from hierarchy to network, centralized compulsion to decentralized voluntary association. Both shifts are rooted in the information-technology revolution ... that simultaneously empowers individuals and groups [while] diminish[ing] traditional authority.”¹⁰ Networks of national regulatory authorities (independent agencies) and conglomerates of national and international regulators play a particularly important role among these networks of international governance. They are structured around international regulatory or coordinative institutions of governance, or may exist even without such “centers”: in that case they provide for their self-organization and co-ordination. Further, very often the transnational network of the independent agencies is not exclusive in the sense that other stakeholders might join the network. Such *restricted openness* allows for the participation of non-governmental entities, and of the private sector in what may end up in joint or delegated exercise of public authority, or in its privatization.

The European Union offers a number of instances of European governance networks, beginning with comitology, through information, policy, enforcement, etc., networks. To mention only a few different networks, we have Europol, and law en-

¹⁰ Anne-Marie Slaughter, “Government Networks: The Heart of the Liberal Democratic Order,” in Gregory H. Fox and Brad R. Roth (eds.), *Democratic Governance And International Law*, Cambridge: Cambridge University Press, (2000) 199, 200.

forcement cooperation around the European warrant; the European Monitoring Centre for Drugs and Drug Addiction, etc. It should be noted that networks do have the power to push European level legislators towards increased recognition and at the same time towards greater powers and more integration. Telecommunications presents a pertinent example: here the Open Network Provision (ONP) Committee (established in 1990) developed in a way into an increasingly more powerful self-regulating network authority, which successfully lobbied for increased powers for national regulatory authorities (NRA) during the 2002 reform of the telecommunications sector. Even the operations of the ECJ vis-à-vis national courts might be seen as a special form of networking (including personal encounters among judicial leaders). Here the information is overwhelmingly determined by the Court but there is coordination that more or less bypasses traditional national relations. The national legislative branch is bypassed too, resulting in a new relation between the national legislative and judicial branches.

It should be added that complimentary European networks emerge outside the Union, where the Union has limited jurisdiction: for example in the case of broadcasting regulatory agencies within the Council of Europe. Further, the European networks participate in a coordinated fashion in global networks which further increases their relevance. For example, the coordination among EU telecommunication regulators enabled them to speak with one voice for certain European telecommunication standards, which were accepted as global standards through the International Telecommunication Union.

The Union moves to become a loose administrative state that consists of networks of national and Union level administrations (independent agencies) and a central Commission bureaucracy that acts as a coordinator and generator (a kind of spiritual leadership) of such networks. The model has the potential advantage of avoiding the problems of majoritarian democracy at the nation state level – majoritarianism being the prevalent, non-deliberative model in most member states. Such majoritarianism tends to disregard minorities, especially if it is coupled with nationalism, where majority means rule by national majorities. The diffusion of power that is offered by the European structures is certainly a welcome constitutional correction to majoritarianism which remains a fundamental problem to constitutionalism in parliamentary systems. The growing number of independent, democratically non-accountable European institutions, patterns of co-ordinated partnerships, etc., which at the same time increase the power of their national counterparts (which form an increasingly interrelated network) changes the constitutional landscape, moving towards more *pouvoir neutre*. The deliberations within these institutions, and within the network, however, remain non-transparent and do not contribute to public *and* rational deliberation.

Joseph Weiler pointed out quite some time ago that the above developments present new challenges to democracy. There might be network-based, governance related problems which simply do not appear on the radar of the supranationally (e.g. Commission) oriented EU observers. It is now “time to worry about infranationalism--a complex network of middle-level national administrators, Community ad-

ministrators, and an array of private bodies with unequal and unfair access to a process with huge social and economic consequences to everyday life.”¹¹

There is little accountability left for the networks as these are neither national nor European Parliament level mechanisms, which would guarantee control over the networks. This is, at least to some extent, countered by the traditional advantages of professionalism and neutrality resulting from expert knowledge and (alleged) lack of political partisanship and private interest related bias. Lack of democratic participation is partly countered by the invitation of *select stakeholders*, which entails the risk of special interest representation, although, at least formally, the advantages of deliberation are still preserved. The bottom line is that from the perspective of nation states the citizens have no guarantees that the bureaucrats of the agencies will represent their interests.¹² Likewise, from the perspective of the Union there is no guarantee for European advantage maximization. Further, partly from a European constitutional perspective but also from the perspective of the member state there is a related problem of uncontrolled and perhaps unconstitutional delegation of legislative power. The formally responsible or at least authorized EU law-making organs delegate substantive decision-making to bodies which have a composition that is not even determined by the formally empowered law-making body.

It was argued that comitology (as a form of intergovernmental networking) enables a deliberative process.¹³ I will not go into the details of the democratic (deliberative values of comitology). But reasonable doubts were formulated in this regard. I will only quote the one formulated by Beate Kohler-Koch: “None other than comitology, that notorious system of inter-bureaucratic negotiation-diplomacy that even parliamentarians wish to abolish in the interest of democracy, is supposed to bring an element of democratically-legitimated politics into the Community?”¹⁴

However, it is premature to reduce this problem of accountability to democratic deficit. Democracy should not be equaled with standard forms of representative government combined in a few cases with referendum. Complimentary forms of political participation are part of political democracy and the network structures may offer forms of participation through professional and policy networks. Such arrangement, however, smack of neo-corporatism: this is participation by invitation only.

11 Joseph H.H. Weiler, “To Be a European Citizen--Eros and Civilization,” 4 *Journal of European Public Policy* (1997) 495-519, 512.

12 “Even in democratic societies, the borderline between legitimate transgovernmental behavior and treason may be unclear.” Robert O. Keohane and Joseph S. Nye, “Transgovernmental Relations and International Organizations,” 27 *World Politics* (1974) 39-62, 49.

13 Christian Joerges and Jürgen Neyer, “From Intergovernmental Bargaining to Deliberative Political Processes: The Constitutionalisation of Comitology,” 3 *European Law Journal* (1997) 273-300, 282.

14 Beate Kohler-Koch, “Die Europäisierung nationaler Demokratien: Verschleiß eines europäischen Kulturerbes?” [The Europeanization of National Democracies: Deterioration of a European Cultural Heritage?], in Michael Th. Greven (ed.), *Demokratie, eine Kultur des Westens?* Opladen: Leske + Budrich (1998) 277.

The apparent attempts to include some of stake-holders into the network deliberation remains problematic. International networks are new opportunities of exclusion and inclusion.¹⁵ Inclusions of select private partners result in what, among others, Alfred Aman has observed primarily in regard to national governments in the process of globalization, namely that the result is:

- (1) new blends of public and private power at all levels of government;
- (2) a redefinition of what is public and what is private;
- (3) greater reliance on bargaining and negotiation models of decisionmaking when it comes to the way the state exercises its power;
- (4) a diminution of public participation stemming from increased reliance on privatization and, in effect, the delegation of public functions to private entities; and
- (5) a market discourse that arguably narrows the role of noneconomic values in decisionmaking processes.¹⁶

Moreover, it is hard to deny even within post-modern concepts of democracy that “we can get along adequately with the notion of democracy as ‘rule by the people,’ or, to narrow down the idea a bit more, as rule by a demos, a citizen body consisting of members who are considered equals for purposes of arriving at governmental decisions.”¹⁷

The governance based on agency networking is not only a constitutional problem for the Union. The fact that the inter-governmental networks operate in a constitutional limbo at the EU level aggravates the lack of constitutional control at the member states level. As Susan Marks has explained, “democracy cannot flourish in nation-states unless efforts are made to democratize the processes of transnational and global decision-making as well.”¹⁸

Although the transgovernmental networks of the Union raise issues of democratic deficit, it is not out of question that networks themselves will offer legitimate alternatives to the constitutionally and democratically problematic official government structure that is consolidated in the Constitution for Europe. After all, there are important arguments in favor of transgovernmental networks: “the transgovernmental

15 David Kennedy has questioned whether exploring the “disaggregation of the state and the empowerment of diverse actors in an international ‘civil society’ without asking who will win and who will lose by such an arrangement” is prudent. David Kennedy, “When Renewal Repeats: Thinking Against the Box,” 32 *New York University Journal of International Law and Politics* (2000) 335-500, 412.

16 Alfred C. Aman, Jr., “Globalization, Democracy, and the Need for a New Administrative Law,” 10 *Indiana Journal of Global Legal Studies* (2003) 109-137, 125.

17 Robert A. Dahl, *Democracy and Its Critics*, New Haven: Yale University Press (1989) 83.

18 Susan Marks, “Democracy and International Governance,” in Jean-Marc Coicaud and Veijo Heiskanen (eds.), *The Legitimacy of International Organizations*, Tokyo: United Nations University Press (2001) 47, 66; see also Robert Howse, “The Legitimacy of the World Trade Organization,” in Coicaud and Heiskanen, *Ibid.*

cooperation is a significant development in international law, but it is likely to bolster liberal internationalism as much--or more--than it will undermine or displace it.”¹⁹

It is clear that the Union has at least the potential for a new form of governance where the political element of government is replaced with alternative forms of interest group politics that are developed within policies. These governance structures seem to enjoy the same efficiency based legitimacy that was enjoyed by independent agencies at the national level, and have the advantage (or the semblance) of being non-political. Of course, such legitimacy runs the same risk national regulatory agencies are facing: in case of poor performance nothing remains to legitimize them.

Obviously, network governance is not the end of politics in the sense that neutral institutions still enable domination which remains the goal and result of political games. But one should keep in mind the advantages of transgovernmental networks before condemning the phenomenon itself. After all, irrespective of deontological considerations that echo liberal constitutionalism, independent agencies, both at national and Union levels were created not only because of the advantages the regulatory network systems offered to interest groups politics. These professional, beyond-the-reach-of-ordinary-politics networks are also devices of *quasi-constitutional pre-commitment*. Such pre-commitments are crucial for the stability and sustainability of any constitutional system, particularly in democracies, where democracy, as Juan Linz has often stated, is about the non-perpetuation of the regime. Without such arm's length operating agencies the democratic welfare redistribution would have become unsustainable. Democratic politics is *too responsive* to short term constituency interests pushing the responsive welfare state to unsustainable largesse. It was for such reasons that regulation through independent agencies (and in a way the whole concept of neutral powers) emerged.²⁰ Independent agencies protect estab-

19 Raustiala, *op. cit.* note 1.

20 For a study of the constitutional relevance of independent agencies and their networking, A. Sajó, “The Concepts of Neutrality and the State,” in Ronald Dworkin et al. (eds.), *From Liberal Values to Democratic Transition*, New York/Budapest: CEU Press, (2003) 107-144. Sajó, *op. cit.* note 6. András Sajó, “Neutral Institutions: Implications for Government Trustworthiness in East European Democracies,” in János Kornai and Susan Rose-Ackerman (eds.), *Building a Trustworthy State in Post-Socialist Transition*, New York: Palgrave Macmillan (2004); on networking in international relations Anne-Marie Slaughter, “Global Government Networks, Global Information Agencies, and Disaggregated Democracy,” 24 *Michigan Journal of International Law*, (2003) 1041-1075; on European networks Renaud Dehousse, “Regulation by Networks in the European Community: the Role of European Agencies,” *Journal of European Public Policy*, (1997) 246-261. In 2002 Majone found that although political compromise resulted in institutional designs with ambiguous responsibilities and uncertain competencies, “the issue of independent and credible European agencies is still very much alive”. Giandomenico Majone, “Functional Interests: European Agencies,” in John Peterson and Michael Shackleton (eds.), *The Institutions of the European Union*, Oxford: Oxford University Press (2002) 322.

lished interest groups against newcomers who would use parties through parliament and the executive; and protect these established interests against politically induced redistributive policies. The autonomous independent regulatory agencies are created in the name of the needs of the socio-economic regime (or the whole polity) to protect itself against its own self-destructive mechanisms. The independent central bank is built to resist the welfarist inflationary policies of elected governments, etc.

III. *Is there a solution (if we need one at all)?*

At this point, once again, I would like to emphasize that any serious proposition regarding constitutional policies applicable to transgovernmental European networks is premature, partly because the very nature of the contribution of these networks is debatable. All what follows below is to be understood as *research hypothesis or research agenda*.

It is formidably difficult to control these European networks of governance through institutions of traditional popular representation (Parliaments).²¹ Here I have in mind both transnational parliamentary control (the European Parliament) and control at the level of national representative government. The difficulties of national parliaments are fundamentally related to the nature of the European institutions. Parliaments are entering into a dialogue with the national executive, at best, while the national executive is certainly not the main player of the Union, even if it were able to determine the action of the national administrations that participate in the European network governances –which seems not to be the case. Of course, some incremental changes to increase the role of national and European parliaments are possible, especially through formal coordination of their work in the supervision of networks.²² The Constitution for Europe has deliberately abandoned that avenue. Alternatively the EU Committee system should be made more democratic, although

Any discussion of democratic accountability in the network age should start from Slaughter's warning: "the impossibility of fully "reaggregating" the state in a tidy democratic package will ultimately require a much more sophisticated understanding of networks and the interaction of nodes in a network with each other, whether individual or institutional." *op.cit.* 1068.

21 Notwithstanding the rich literature on networks and policy networks the domestic and European constitutional implications of the network phenomenon are disregarded in the constitutional literature. It seems that the problem of the lack of interface between networks and constitutional structures is neglected both intellectually and in practical terms.

22 Slaughter, 2003. *op. cit.* note 18, at 1057 encourages the formation of legislative networks, perhaps of representatives of key legislative committees, to share information and coordinate efforts to pass parallel domestic legislation. To the extent that interest groups cannot get access to spoils that are offered through the control over government, or that majorities cannot force welfare redistribution through legislation the Union as a network of independent regulators that aims to provide an ever increasing number of harmonized governmental welfare is unacceptable in terms of national Realpolitik. Such diametrical opposition to spoils-based Realpolitik lends a certain attractiveness to network-governance.

this is technically hard to devise, and it certainly did not ever happen. It was also suggested in the literature that the EU committee system “must be based upon, and controlled by, constitutional provisions favouring a ‘deliberative’ style of problem solving.”²³ Important problems of transgovernmental networks might be solved at the level of administrative law, if a global administrative law will ever emerge,²⁴ and, likewise, a European administrative law might take care of many of the practical problems below the constitutional level.

The difficulty of interconnectedness between these independent regulatory network structures and national parliaments puts the traditional role of the legislative branch into jeopardy. For a popular sovereignty (people’s self-determination) based understanding of parliamentarism the trend, if continues, cannot be accepted and the resulting sense of democratic deficit may result in a sense of lack of legitimacy. Alternatively the networks of governance that claim to offer non-partisan expert knowledge will lend a new, expertise based legitimacy to the European and interrelated national governments. In more practical terms democracy through national parliaments cannot tolerate such developments.

Of course, it is easy to suggest that network accountability should be increased, partly by writing requirements of transparency into the respective directives, and also into national laws regulating the activities of the participation of the administrative agencies in the transnational networks. Further, there can be legal mechanisms that require reporting to national parliaments and the European Parliament. One could even play with the idea that powers to sanction network participants be granted to the national and European Parliament, although this is more than problematic in the context of executive-legislative branch relations as it represents a constitutionally extremely suspicious intervention into the executive branch. But even if one disregards the constitutional-normative considerations, it is unlikely that measures of transparency and accountability to bodies of popular representation can be very successful, simply because of lack capacity to supervise the professional bodies. Moreover, additional control around the European Parliament runs the risk that the committees of the Parliament will become new centers of networking, providing superfluous legitimacy to the continued and unhindered operations of transgovernmental networks.

Perhaps, alternative forms of control (supervision) and self-referential accountability might ease the challenge that traditional constitutional structures could not

23 Joerges and Neyer, *op. cit.* note 11, at 282.

24 Richard B. Stewart, “Administrative Law in the Twenty-First Century,” 78 *New York University Law Review* (2003) 437-460, 448-50 (describing “[v]arious forms of flexible agency-stakeholder networks for innovative regulatory problem-solving [that] have been developed in order to avoid the limitations of top-down command regulation and formal administrative law procedures”). See also Stewart’s et al. discussion of global administrative law at NYU. See also the discussion draft by Richard B. Stewart, *U.S. Administrative Law: A Resource for Global Administrative Law?* Available at http://www.law.nyu.edu/kingsburyb/spring04/globalization/stewart_012604.pdf

handle so far. “Government networks have specific properties that are highly conducive to self-regulation.”²⁵ After all, as Majone has pointed out, the credibility of the members of the network depends on each other’s reputation, hence they will monitor each other – are in a way accountable to each other.²⁶

The independent regulatory agencies obviously run counter to traditional notions of accountability hence they have the birthmark of lack of legitimacy. To the extent the independent agencies exercise powers delegated by elected bodies and exercise powers within the rule of law there is some derivative legitimacy to their action, notwithstanding the possible unconstitutionality of delegation.²⁷ However, such independent agencies that monitor each other might contribute towards minimal constitutionalism in the sense of avoidance of tyranny. Institutions of representative democracy became part of the checks and balances scheme; they serve as important counterbalance to the other branches but fail to deliver in most parliamentary systems. In the Union a network of independent regulatory agency networks *may* offer an alternative non-tyrannical solution to the dilemma of constitutional government where institutions of representative democracy failed to deliver. Unfortunately the draft European Constitution did not address the agency problem and had left European and national (coordinated) administrative implementation unsolved.

Needless to say, independent agencies are still not fully independent from the political branches and even less from interest politics, though such independence is more likely at the Union level. To the extent the Union is indeed an administrative state (with an overloaded bureaucracy that is made up of generalists) the Union does not presuppose much democratic control either through national parliaments, or through a Union level parliament.

To sum up once again from the perspective of constitutionalism and constitutional legitimacy²⁸ traditional constitutional considerations and expectations do not apply in a satisfactory way to European level network regulatory systems which make the traditional constitutional design at the national level irrelevant, without offering sufficient constitutional anchor (for legitimacy) at the European level. Nevertheless, the promised a-political (non-partisan) and professional performance may offer new

25 Slaughter, 2004., *op. cit.* note 18, at 311.

26 Giandomenico Majone, “The New European Agencies: Regulation by Information,” 4 *Journal of European Public Policy* (1997) 262-275, 262, 272.

27 See Giandomenico Majone, “Regulatory legitimacy” in Giandomenico Majone (ed.), *Regulating Europe*, London and New York: Routledge (1996) 285-86. Majone, *ibid.* adds that “Recent empirical research provides additional evidence in favour of the thesis that non-majoritarian decision-making mechanisms are more suitable for complex, plural societies than are mechanisms that concentrate power in the hands of the political majority.”

28 Note that the way European bureaucracy mastered governance beyond the state is “not the very way in which preferences get ‘aggregated’; the aggregation “is perhaps just a function of dominance.” “In any case, as Europe’s response to the Statue of Liberty, comitology may not be quite as inspiring.” Kalypto Nicolaidis and Robert Howse, “This is my EUtopia. Narrative as Power,” 40 *Journal of Common Market Studies* (2002) 767-792, 771-72.

sources of legitimacy, *if* it is backed by efficient service delivery by the policy network.

Further, the democratic ideal requires “that politically responsible institutions should determine the direction of government policy.”²⁹ It is not excluded that government policies (developed at the national level or derived from Union policies) will respond to (or correspond with) the wishes of the citizenry but the institutional guarantees for such correspondence are limited in the emerging national-European constitutional complex. After all, as long as citizens perceive themselves as members of a national (and in particular ethnic or other ascriptive) community there are only limited opportunities to force the government to be responsive to that community in the democratic process for the simple reason that the national government’s powers became limited in the Union and cannot respond in matters that are determined in intergovernmental or interagency levels. As to the European level the national community has limited opportunities to exercise influence through democratic process, not only because its representatives will act as cosmopolitans in the European decision-making bodies, but also because of the very limited influence ethnic community representatives, especially coming from small nations will have. Further, if one accepts that intergovernmental and policy network institutions are the one which take the decisions that effect daily life the democratic accountability will be of limited relevance.

Lack of political (democratic) accountability is aggravated by the legalistic difficulties of holding policy-makers responsible. Rule of law based considerations appear to be easy justifications for not calling to accounts government officials and their cronies for misappropriation of public monies, for acquiescing in government stupidity, overspending and inaction.

Once the political and economic system fails to deliver the expected radical improvements in the life of the citizenry popular distrust in representative democracy will emerge. Such distrust contributes to the de-legitimization of other forms of democracy (e.g. deliberative democracy). A more deliberative form of democracy that might be still a possibility within the Union is a concept that is not grasped and given the disenchantment with vote-based forms of democracy, binding mandate and recall, it will be difficult to learn for the European citizens to appreciate a more subtle and more demanding form of democracy where deliberation takes place outside the traditional interaction of separated branches of government, a deliberation among non-elected, hardly accountable actors.

The possible end of ‘democracy as we know’ and traditional constitutionalism is not the beginning of domination by uncontrolled and diffuse powers. There is place for liberal though non-democratic control mechanisms. Some of the politically non-

29 Terrance Sandalow, “Racial Preferences in Higher Education: Political Responsibility and the Judicial Role,” 42 *University of Chicago Law Review* (1975) 653-704, 695 and 700. Michelman finds these positions to be two distant or different positions. Frank I. Michelman, “Terry Firma: Background Democracy And Constitutional Foundations,” 99 *Michigan Law Review* (2001) 1827-1851, 1839.

accountable networks may operate in such manner (as is the case with financial controls - an area that remains underdeveloped in the Union). Further, judicial review may counter part of the accountability deficit.

A partial constitutionalization of policy networks is not out of question either. *If* the decision-making of the independent agency, and the communications among the agencies were transparent, the decisions reasoned and were to follow professional and objective criteria, the decision would correspond to a fundamental value of democracy as deliberative democracy. In this understanding parliament is just one forum that provides the opportunity for public reflection: although independent agencies operating in a transnational network do not provide the opportunity for participation, there is at least deliberation that is expected from participation based government. But policy networks are not the opposite of participation: they do offer *intense* participation for a select few (i.e. expert and interest groups). The constitutional dimension of this type of participation concerns the determination of the fair conditions of the *selective* participation. But participation that is based on traditional egalitarian majoritarianism does not offer the intellectual framework for the constitutionalization of selective participation.