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The 'Deparliamentarisation' of Legislation: Framework Laws and the Primacy of the Legislature

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1. Introduction

Legislatures have been called the 'least examined branch' of government and legislation and regulation the 'stepchildren of legal education'.[1] Although perhaps a little too pessimistic, there is much truth in this. For most lawyers and legal scholars, legislation is something that is just there and needs to be interpreted. The preparation of legislation and the 'deal-making', 'horse-trading' and 'pork-barrelling', to use Waldron's words,[2] that takes place during the drafting process is something that we are usually more than happy to leave to policy-makers and politicians. This is a serious mistake, though. Important choices that are being made during the preparatory phase, such as whether or not to regulate, at what government level and through what sort of rules may have major constitutional consequences. In this contribution I would like to illustrate this by discussing a topic that, at first sight, seems rather dull and bureaucratic, namely the use of framework legislation; laws with open target-oriented rules leaving much room for the delegation of policy decisions to the executive, administrative agencies or private rule-makers.

Surely there must be constitutional limits with respect to framework legislation, one would think, especially if this is such a common phenomenon. This is only partly true, though, and does not seem to solve the problem, as will be explained later. More important for the moment is that both in the Netherlands and in other neighbouring countries,[3] and even at the level of the European Union, there are signs of an increasing use of framework laws going hand in hand with sometimes excessive delegation of legislative powers. According to Kirchhof, these are all symptoms of a much broader and more encompassing process of the creeping 'deparliamentarisation' of legislation. In Kirchof's view, important legislative decisions are today increasingly outsourced to EU institutions, to executive bodies and administrative agencies, to private rule-makers and so on.[4] Comparing the situation in the Netherlands with the EU level, this article aims to address the following research question:

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1 See respectively R.W. Bauman & T. Kahana (eds), *The least examined branch: the role of legislatures in the constitutional state*, 2006 and M. Froomkin, 'Climbing the Most Dangerous Branch of Government: Legisprudence and the New Legal Process', 1988 *Texas Law Review* 5, pp. 1071-1098 at p. 1071.

2 J. Waldron, *The dignity of legislation*, 1999, pp. 1-2.

3 Framework laws appear under different names: '*Loi cadre*', '*Rahmengesetze*', '*Ramlagstiftning*', 'Skeleton laws', '*Kaderwetgeving*' and so on.

4 P. Kirchhof, 'Entparlamentarisierung der Demokratie?', in A. Kaiser & T. Zittel (eds.), *Demokratietheorie und Demokratieentwicklung. Festschrift für Peter Graf Kielmansegg*, 2004, p. 362.

> *To what extent do we need more or other constitutional rules or practices to prevent the situation where, due to an increasing use of framework laws on the national and the EU level, important legislative decisions are gradually transformed into more neutral-looking administrative or organisational problems, which may then be settled by executive bodies, by administrative agencies, or by other non-elected private regulators?*[5]

The idea of comparing the role of the national legislature with the one of the EU legislature is inspired by the fact that framework legislation also plays a role on the EU level where it may not only affect the position of the European Parliament (EP) but can also infringe upon the 'primacy' of national parliaments. The situation in the Netherlands is interesting for other EU Member States because, on the one hand, the functional concept of the primacy of the parliamentary legislature has a long and rich history in this country,[6] where on the EU level it is just emerging and has not been much debated yet. On the other hand, the Lisbon Treaty does contain rules with respect to the limits on framework legislation and delegation (especially Articles 290 and 291 TFEU), while the Dutch Constitution (*Grondwet*) does not contain a general provision on legislative primacy setting limits on the delegation of legislative decisions, as one finds, for example, in Germany and France (see hereafter).[7] The Dutch Constitution only contains special restrictions with respect to the delegation of legislative powers, mostly in relation to fundamental rights. Moreover, where the Court of Justice of the European Union (CJEU) can and does review the legality of EU framework laws, Article 120 of the Dutch Constitution explicitly prohibits any judicial review of primary legislation.[8]

Quite paradoxical is that the Dutch prohibition on courts engaging in a judicial review of primary legislation is sometimes seen as evidence of the existence of the primacy of the parliamentary legislature. Nevertheless, one could just as well argue that the absence of judicial review is the main reason why the principle of legislative primacy itself is so poorly protected against threats from the inside (party politics) or the outside (supranational law and policy-making). After all, currently it is Parliament, and Parliament alone, that decides which regulatory measures are so essential that they shall not be delegated. If Parliament would be able to fulfil this task properly, why is there so much debate about excessive delegation, deparliamentarisation and the privatisation of regulatory decisions?

2. Order of the argument

In order for outsiders to understand the constitutional function of the idea of the primacy of the legislature in the Netherlands, I will first explain the history and evolution of the concept. After this, the question why framework legislation is being accused of undermining the position of Parliament in the legislative process will be addressed together with the constitutional rules and practices that are supposed to prevent this from happening. Then the debate will turn to the EU context, first of all to reveal how the implementation of EU legislation may affect the primacy of the national legislature due to the fact that especially EU directives are often transposed through delegated legislation where it is not always clear whether this is necessary. Secondly, the focus will shift to the rise of framework legislation at the EU level and how this may affect the primacy of both the European and the national parliamentary legislature. Next, I will return to the debate about constitutional reform in the Netherlands in order to see if it would make sense to incorporate the primacy of the legislature in the text of the Constitution. Assuming that a reform of the Dutch Constitution with regard to the position of the parliamentary legislature is not likely

5 See with respect to the situation in Swedish environmental law and framework laws the warning by A. Kronsell, 'Sweden: setting a good example', in M. Skou & D. Lieffering (eds.), *European environmental policy. The pioneers*, 1997, pp. 40-80.

6 The term 'functional' concept is chosen because according to the text of the Constitution there is no formal hierarchy between the Government and the two Houses of Parliament (the House of Representatives and the Senate). Constitutional customary law, however, requires parliamentary involvement for significant Government interventions that restrict the rights and freedoms of citizens. The whole idea of the primacy of the legislature is built on the fact that certain Government interventions are so important that they cannot do without there being a basis therefor in an Act of Parliament.

7 For a comparative overview see: H. Pünder, 'Democratic Legitimation of Delegated Legislation – A Comparative View on the American, British and German Law', 2009 *International Comparative Law Quarterly* 58, pp. 353-378.

8 Art. 120 of the Dutch Constitution reads: 'The constitutionality of Acts of Parliament and treaties shall not be reviewed by the courts.'

to occur anytime soon,[9] I will sketch three different ways of moving forward with respect to the future role of the national Parliament in the legislative process. Essentially the role of Parliament is to represent the people's will in the process of regulating themselves and this is what the primacy of the legislature is all about. Does the core of that idea still hold true or does it need readjustment?

3. The rise and fall of the primacy of the legislature

The idea behind the primacy of the legislature in the Netherlands goes back to at least the first half of the 19th century. An important constitutional moment was the adoption in 1818 of a law (named '*Blanketwet*') on the basis of which violations of Royal Decrees were automatically turned into criminal offences.[10] As a consequence, Royal Decrees (nowadays 'Orders in Council' (*algemene maatregelen van bestuur*)) were increasingly used instead of Acts of Parliament. While Van Hogendorp, the drafter of the 1815 Constitution, was very much against this law, even he could not prevent a tractable Parliament from approving the *Blanketwet*, which was in fact a blank delegation of legislative powers to the King seeking to expand his influence.

In the course of the 19th century, however, the King started to overestimate his authority by issuing more and more Royal Decrees. With the introduction in 1840 of – at first still limited – ministerial responsibility requiring the countersignature of a Minister for every Royal Decree or Act of Parliament,[11] the power of the King declined. A landmark case in this process was the *Meerenberg* case of the Dutch Supreme Court (*Hoge Raad*) of 1879. The case concerned a Royal Decree containing an obligation for psychiatric hospitals to keep a register of their patients. The managers of one of these hospitals, with many upper-class patients, refused to establish such a register in order to protect their patients' privacy and claimed there was no basis in an Act of Parliament for such a far-reaching obligation. Despite the fact that the Government referred to the *Blanketwet* and to the role of the King as part of the executive, the Supreme Court ruled that the heart of the matter in this case was not whether the Constitution denied the Crown (the King and his Ministers) a right to issue generally binding legal rules *(algemeen verbindende voorschriften*), but whether there was an explicit legal basis in the Constitution itself or in an Act of Parliament providing the authority to establish such rules. The court decided that such a competence could not be derived from the *Blanketwet* or from the general and indeterminate competence of the executive enshrined in the Constitution.

Meerenberg was a landmark case because it made clear that the power of the Crown was counterbalanced by the position of Parliament.[12] The Crown cannot have a right to enact generally binding regulations unless an Act of Parliament grants such a right for a specific purpose.[13] Nonetheless, already at the end of the 19th century the practice of delegating legislative powers from the parliamentary legislature to the Council of Ministers (*Ministerraad*) and to individual Ministers had become so popular that the centre of gravity had again shifted from Parliament to the executive. This time it was not an overactive King, though, but Parliament itself that was responsible for a growing dominance of the executive in legislative law-making. From 1870 onwards a shift from a 'night-watchman state' or 'minimal state' towards a 'social welfare state' took place accompanied by more emphasis on Government intervention through legislation.[14] Soon this led to complaints that Acts of Parliament were increasingly lacking content. In 1910 Struycken signalled that the legislature was increasingly providing the administration with a blank

9 See the Cabinet reaction to the proposals for constitutional reform made by the State Commission on Constitutional Reform, *Kamerstukken II*, 2011/12, 31 570, no. 20.

10 Law of March 6 1818, *Staatsblad* 181, 12. The old Dutch word '*blanket*' can be translated as 'blank'.

11 Previously Acts of Parliament were signed by the King without the countersignature of a Minister.

12 About this case see W. Voermans, 'De Tachtigers in het recht: het Meerenberg arrest', 2009 *Ars Aequi*, pp. 597-600.

13 There is only one minor exception to this ruling which concerns the role of 'Independent Orders in Council' (*zelfstandige algemene maatregelen van bestuur*). Because the consequences of *Meerenberg* were initially seen as quite harsh for especially the Royal family, the 1887 Constitution granted the executive the power to enact Orders in Council with generally binding legal rules without there being an explicit basis in an Act of Parliament. These rules, however, cannot be sanctioned with criminal penalties. Independent Orders in Council have rarely been used during the past few decades.

14 Samuel van Houten's Children's Act of 1874 is often seen as the start of a movement towards more social welfare-oriented legislation. The law was issued to protect children against forced labour under poor working conditions. The law itself, by the way, was poorly enforced. It took until the enactment of the Compulsory Education Act for children from 6 to 12 in 1901 before that situation really started to change.

delegation of powers to shape the relationship between the Government and citizens through permit systems, concessions, dispensations et cetera. Administrative decisions needed to have a formal basis in legislation but often that was just about it. Framework laws usually left administrative bodies with a wide margin of discretion and according to Struycken this should be compensated by more room for a judicial review of administrative decisions.[15]

Framework legislation received another boost due to the worldwide economic crisis following the 1929 Wall Street crash and the call for strong Government leadership in order to deal with the growing political tensions between European countries between the First and Second World War. Because the political landscape was heavily divided and parliaments were not decisive in taking action to deal with the tremendous socio-economic problems of the time, there was a strong call to grant the executive far-reaching powers. Framework laws or Skeleton bills, as Lord Heyward called them, enabled the executive to take all sorts of emergency measures without parliamentary approval.[16]

Even though the 1930s clearly demonstrated, especially in Germany and France, what the dangers can be of relying on framework laws and excessive delegation of legislative powers,[17] these have not disappeared in the post-war welfare state. The main reason for this is, as Pünder has argued, that it is no longer possible to govern a highly interventionist state solely through primary legislation.[18] In the German and French Constitutions, however, the role of Parliament as part of the legislature was codified in the Constitution,[19] whereas in the Netherlands until today no explicit reference can be found concerning the primacy of Parliament as enshrined in Instruction 22 of the Instructions on legislative drafting (*Aanwijzigen voor de regelgeving*) (see Section 5) in issuing primary legislation, despite the fact that since the beginning of the 20th century complaints can be heard about the enormous increase in Government intervention through legislation with Acts of Parliament often providing only a formal basis for Government intervention without serious parliamentary involvement with regard to the content of the rules or the scope and focus of delegated rule-making.[20]

The latter is why Böhlingk argued in the 1950s that framework laws threatened to turn the rule of law upside down.[21] Like Struycken, Böthlingk was very much in favour of strengthening the system of the judicial review of administrative decisions in order to compensate for the loss of democratic legitimacy due to the growing lack of content in many policy-driven Acts of Parliament. The core question, however, is to what extent judicial review and democratic legitimacy in legislation can really function as communicating vessels. Judicial review first and foremost relies on output legitimacy – the accountability of judges depends on the reasoning of their decisions – whereas in legislation the democratic legitimacy is derived from the input of the people through their representatives. If laws are not acceptable for the people they may vote for new representatives but not for a new judiciary, at least not in the Netherlands or at the EU level. In that sense 'the legislature' should not be envisaged as a person but as a method to express the public will.[22]

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15 Van Wijk had an interesting metaphor concerning the retreat of the legislature. He called it a 'progressive retreat'. His argument was that as soon as the legislature grants the executive more discretion, this should also lead to more instead of less judicial restraint. H.D. van Wijk, *Voortgaande terugtred*, 1959. In Struycken's view legislative restraint and judicial review went more hand in hand albeit at that time the type of judicial review he had in mind was a fairly marginal form.

16 Lord Hewart of Bury, *The New Despotism*, 1929, p. 14: 'The bureaucratic expert "clothes himself with despotic" power since he can (a) get legislation passed in skeleton form; (b) fill up the gaps with his own rules, orders and regulations; (c) make it difficult or impossible for Parliament to check said rules, order and regulations; (d) secure for them the force of statute; (e) make his own decision final; (f) arrange that the fact of his decision shall be conclusive proof of its legality; (g) take power to modify the provisions of statutes; and (h) prevent and avoid any sort of appeal to a Court of law.'

17 P. Lindseth, 'The Paradox of Parliamentary Supremacy: Delegation, Democracy and Dictatorship in Germany and France, 1920s-1950s', 2004 *The Yale Law Journal* 13, pp. 1341-1415.

18 H. Pünder, 'Democratic Legitimation of Delegated Legislation – A Comparative View on the American, British and German Law', 2009 *International Comparative Law Quarterly* 58, pp. 353-378 at p. 355.

19 In particular Art. 80 of the German Constitution and Art. 34 of the French Constitution.

20 In particular A.A.H. Struycken, *Administratie of rechter*, 1910, p. 16.

21 F.R. Böhtlingk, *De rechtsstaat Nederland*, inaugural lecture Amsterdam (UvA), 1958, pp. 7-8.

22 J. van der Hoeve, 'Het juridisch luistercollege', 1974 *Ars Aequi*, p. 21.

4. The problem with framework laws in the Netherlands today

Some of today's problems with framework laws and the decline of parliamentary primacy through framework legislation have been explained in a rather compact and straightforward way by the Dutch Council of State (*Raad van State*). In its annual report 2006, for example, it is stated that:

> 'Laws should be normative. Framework laws lacking material norms may be an illustration of the fact that legislation has become a subdivision of public policy-making. What is often ignored is that legislation has more and other functions than translating (future) policy into law without regard for this normative aspect. Flexibility and the possibility to make tailor-made public rules are arguments which are often mentioned in favour of this type of legislation but these do not justify that laws are degraded into a normal policy instrument. Framework laws do not protect citizens against the Government because they lack substance [translation RvG].'[23]

To be able to understand what lies behind this comment one has to realise that since 1999 around 75 per cent of Dutch legislation at the level of the central Government is secondary legislation, which means that there is either no parliamentary involvement at all or very little involvement.[24] As such this does not need to be a problem as long as the 25 per cent of the parliamentary legislation contains the most essential political decisions leaving only technical details or minor issues to other regulators. There are hardly any guarantees, though, that this is actually the case. On the contrary, what we see is that framework laws are often presented as relatively neutral decisions providing procedural rules in order to delegate non-technical policy choices to executive or administrative bodies.

A good example is the framework bill for animal care,[25] which has as its central norm respect for the 'intrinsic value' of animals without specifying what that means in terms of rights and obligations, thereby leaving the standard-setting with regard to how (not) to treat animals primarily to secondary legislation. This decision was supported by the argument that a framework law would be necessary to be able to implement European legislation in a flexible and effective way, anticipating the establishment of a future European 'framework regulation' on animal care. Moreover, the Government claimed that the delegation clauses did not really broaden the scope of the bill compared to existing legislation. The framework bill was supposed to be an attempt to stop the fragmentation of animal welfare law, while for the rest it should be seen as 'business as usual'. The Council of State, however, heavily criticized this bill because the protection of the intrinsic value of animals as the central aim of the bill was considered to be far too vague to effectively limit the delegation of regulatory powers to secondary or tertiary rule-makers. Nonetheless, much of the Council's criticism was overruled by the Government and not backed up by the opposition in Parliament. Only the Party for the Animals (*Partij voor de Dieren*) demanded the withdrawal of the draft until all the open norms and conditions for the delegation of regulatory powers in the bill were specified. The Government refused this and ultimately the majority in Parliament went along with it.[26]

This is only one example of how a draft for a framework bill is de-politicized. Similar patterns of framework laws with far-reaching delegations of regulatory powers being presented as 'low politics' can be observed again and again.[27] In particular, the timely and flexible implementation of (future) EU laws

23 Yearly report by the Council of State, The Hague 2006, p. 57. (<http://www.raadvanstate.nl/publicaties/jaarverslagen/>).

24 P.O. de Jong et al., *Wikken, wegen en toch wetgeven*, 2009, p. 195.

25 *Staatsblad* 2011, no. 345.

26 See *Kamerstukken II*, 2008/09, 31 389, no. 9, p. 8.

27 A highly controversial recent example of presenting delegated legislation as a politically neutral delegation that has not (yet) attracted much attention is the Ministerial Regulation of January 26th 2012 (*Staatscourant* 2012, no. 1933) with regard to the mandate of the Council for the judiciary (*Raad voor de rechtspraak*) by the Minister of Justice to settle disputes concerning the compensation of damages as a consequence of unlawful judicial decisions (e.g. courts not deciding cases within a reasonable period of time as mentioned in Art. 6 ECHR). The operating on behalf of the Minister of Justice puts the Council in a difficult position here since the Council is first and foremost supposed to act as an independent advisory body that represents the interest of the judiciary. Moreover, one may have serious doubts whether such a controversial issue that touches upon the independent and impartial position of the judiciary as part of the Trias Politica should be regulated through a Ministerial Regulation instead of an Act of Parliament or at least an Order in Council. The very brief explanatory note to the regulation tries to give one the impression that this is a purely technical matter but I am pretty sure that if this subject would have been brought up in Parliament, it would have raised political controversy. Apart from that, the regulation seems

is often presented as a legitimate reason to opt for a framework bill.[28] Fortunately, Parliament sometimes succeeds in piercing the veil of policy-neutral framework bills as happened with respect to the Public Procurement Bill (*Aanbestedingwet*). The Dutch Senate (*Eerste Kamer*) refused to sign this bill because it was seen as a hollow bill, desperately in need of substance.

As far as substance is concerned, the bill was lacking an integrity check while a parliamentary inquiry had just shown numerous cases of fraud in procurement procedures in the construction industry. Moreover, 250 civil servants responsible for procurement management at local governments, public schools, healthcare facilities and other government agencies had signed a petition to withdraw the bill because it would paralyze existing public procurement practices, increase administrative burdens, and lead to a tremendous increase in litigation.[29] After years of deliberation and formal consent by the House of Representatives (*Tweede Kamer*), the Senate blocked the bill even though the Government stressed its importance in order to comply with European law. The Government also claimed that the delegation clauses were in accordance with the Instructions on legislative drafting.

The debate in Parliament around the Public Procurement Bill shows that one can have very different views on the restrictions which the primacy of the legislature imposes on the use of framework laws. Therefore it may not come as a surprise that framework laws can be a successful tool to circumvent parliamentary involvement and effective legislative scrutiny by the Council of State. After all, apart from a few delegation prohibitions in the Constitution, such as Article 104 determining that taxes imposed by the state shall be levied pursuant to an Act of Parliament, most of the constitutional 'hard law' on what may and may not be left to secondary legislation concerns restrictions on delegation in the sphere of fundamental rights. Even there, much leeway is usually given to the legislature and despite the fact that both the Council of State and the Dutch Senate have repeatedly warned against the use of framework bills in combination with far-reaching forms of delegation, no serious action has been undertaken to put a stop to this. Empirical-legal research has in the meanwhile shown that in particular with regard to the transposition of EU laws the Government is pushing delegation to its constitutional limits.[30]

Against that background it is surprising, to say the least, that the Scientific Council for Government Policy (SCG) (*Wetenschappelijke Raad voor het Regeringsbeleid*, *WRR*) has held a warm plea for more 'substantive framework laws' in its report 'The future of the *Rechtsstaat*'.[31] According to the SCG the combination of a legislative framework, with a few principle-based norms and a broad 'delegation' of rule-making power to private actors in the field offers a potential solution to the growing lack of democratic legitimacy in much policy-driven legislation. It would not only help to close the knowledge and information gap on the part of the Government, but could also increase citizens' acceptance of legislation. The SCG's argument in favour of substantive framework bills in combination with private rule-making rests on the recognition of three structural challenges that Parliament is facing regarding its traditional role in the legislative process: 1) the Europeanisation of national legislation; 2) the increasing pace of technological development and constant innovations in fields like medicine and biology and information technology; and 3) a lack of specialist expertise needed to 'translate' scientific knowledge into rules.[32]

What the SCG does not mention, however, is that the democratic legitimacy of substantive framework laws relies heavily on the level of participation of non-state actors in the rule-making process and the extent to which these are willing and able to represent the interests of all parties involved. The experiences with substantive framework laws in the Netherlands have not always been outright positive in this respect. An ex post evaluation of the Care Institutions (Quality) Act (*Kwaliteitswet zorginstellingen*),[33]

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to conflict with Art. 91-96 of the Act of April 18th 1827 on the composition of the judiciary and the organisation of the justice system and with Instruction 24 of the Instructions on legislative drafting.

28 See R. van Gestel & J. Vleugel, *Herijking van het primaat van de wetgever: de betekenis van kaderwetgeving en delegatie*, The Hague 2012 (study on behalf of the Dutch Council of State, in which 25 framework laws were studied and 15 MPs, Senators and Government officials were interviewed about their experiences with framework bills).

29 See: <http://www.binnenlandsbestuur.nl/digitaal/nieuws/senaat-verwerpt-aanbestedingswet.242369.lynkx> (last visited 4 March 2013).

30 M. Bovens & K. Yesilkagit, 'The EU as lawmaker: the impact of EU directives on national legislation in the Netherlands', 2010 *Public Administration* 88, no. 1, pp. 57-74 at p. 59.

31 WRR, 'De toekomst van de nationale rechtsstaat', 2002.

32 Ibid. p. 242.

33 Law of January 18th 1996, concerning the quality of healthcare institutions, (*Kwaliteitswet zorginstellingen*), *Staatsblad* 1996, no. 80.

for example, which was considered to be a model act in the early 1990s trying to combine broad duties of care in primary legislation with private self-regulation,[34] revealed all sorts of flaws: the process of private rule-making through consensus-building took a very long time, the rules were hard to enforce and they were also too much focussed on procedural aspects.[35] Hence substantive framework laws are certainly no miracle cure for every illness associated with the primacy of the national legislature. Whether they will work depends on many contextual variables, including the self-regulatory capacity of non-state actors, the enforceability of the private rules and the availability of measures to deal with free riders.

5. The constitutional framework

One can be brief about the Dutch constitutional framework for the protection of the principle of the primacy of the legislature because there is hardly any framework. The written text of the Constitution makes no explicit reference to the idea although the State Commission on Constitutional Reform (*Staatscommissie Grondwet*) has called for an inquiry as to whether Article 89 of the Dutch Constitution should be clarified in order to give expression to the principle of legality and the primacy of the legislature.[36] Unfortunately, this advice was not endorsed by the Government.[37] As a consequence, the only rules aimed at protecting the primacy of the legislature are currently laid down in the Instructions on legislative drafting,[38] which are internal guidelines addressing only Ministers, State Secretaries and the departmental sections that report to them, including civil servants involved in the preparation of legislative drafts.[39] Compliance with the instructions cannot be enforced through judicial review. Moreover, the key instructions remain rather vague. Instruction 22, which 'codifies' the idea of legislative primacy, for example, determines that:

> 'If the elements of a regulation are divided between an Act of Parliament and subordinate generally binding regulations, the main elements of the regulation shall, in any event, be contained in the Act. The primacy of the legislature shall be the guiding principle in deciding which elements shall be laid down in the Act and which shall be dealt with by delegated legislation.'

Although Instruction 22 as such seems clear, the explanatory note to the instruction can easily create confusion. It states, among other things, that 'the scope' and 'structural elements' of the regulation and in many cases the 'main permanent norms' shall be laid down in an Act of Parliament; however, in the interest of accessibility, the note says: 'it may be advisable not to include substantive norms in an Act of Parliament, but to leave it to a subordinate legislative authority to draw up an integrated substantive regulation.' Especially the last part seems to undermine the whole idea behind the primacy of the parliamentary legislature. The provision even seems to collide with Instruction 24, which seeks to provide guidelines with respect to what needs to be regulated through an Act of Parliament and provides a list of topics thereto. The problem with this instruction is that the list of topics is non-exhaustive whereas the instruction starts with the phrase that 'as much as possible, the following shall be laid down in an Act of Parliament'. This 'as much as possible' opens the door wide open for a very narrow interpretation of the primacy of the legislature. Moreover, Instruction 334 also creates an exception to the protection offered

34 Relevant in particular is Art. 2 of the Care Institutions (Quality) Act, which contained a provision requiring hospitals and other healthcare institutions to offer 'responsible care'. What responsible care meant in practice and how it should be implemented in specific facilities needed to be decided via codes of conduct and private certification schemes.

35 A.F. Casparie et al., *Evaluatie Kwaliteitswet zorginstellingen*, November 2001 and Algemene Rekenkamer, 'Implementatie Kwaliteitswet zorginstellingen', *Kamerstukken II*, 2008/09, 31 961, no. 1-2, p. 12.

36 The author of this publication raised a question regarding the primacy of the legislature at the Internet forum established by the State Commission but the answer was that the question fell outside the scope of the Commission's assignment. Another colleague at Leiden University even developed a new draft Art. 89 in order to codify the case law with respect to the delegation of legislative power to the executive and the admissibility of Independent Orders in Council.

37 *Kamerstukken II*, 2011/12, 31 570, no. 20.

38 The instructions regarding the parliamentary primacy of the legislature are derived from a report by a committee chaired by J.M. Polak, 'Orde in de regelgeving', The Hague 1985.

39 Instruction 4 of the Instructions on Legislative Drafting as established by a decision of the Prime Minister, Minister of General Affairs of 18 November 1992, *Staatscourant* 1992, no. 230. An English version of the Instructions can be found on the website of the Centre of Expertise for legislation of the Dutch Ministry of Justice for which legal scholars are entitled to receive a login name. See <https://www.kc-wetgeving.nl/login> (last visited 4 March 2013).

by the primacy of the legislature as laid down in Instructions 22 to 24 in case of the implementation of EU laws. It provides a whole list of circumstances determining in which case Parliament does not need to be involved in the transposition of directives.

The bottleneck of the whole primacy of the legislature concept in the Netherlands is that it is essentially based on a 'Von Munchausen construction'.[40] It is Parliament itself that needs to monitor and enforce the instructions on legislative drafting in order to prevent the executive from overstretching its powers as a partner in the drafting of Acts of Parliament by delegating essential parts of an act to non-elected bodies.[41] The Council of State, which is the most important independent body responsible for the scrutiny of legislative drafts, does not have the power to block a draft that violates the primacy of the legislature and, as mentioned before, Article 120 of the Constitution prohibits any judicial review. So even if we would have an article in the Constitution explaining which sorts of 'essential' elements need to be laid down in an Act of Parliament and what kind of decisions may be delegated that would probably not put a stop to framework laws conflicting with a supremacy clause. On might argue that there is still no constitutional problem because Parliament can block the passing of framework laws and/or the excessive use of delegation, but if that were entirely true then why did we need the *Meerenberg* case or the *Fluoridering* case,[42] why do we need Instructions 22 to 24 of the Instructions on legislative drafting, and why does Parliament want to be formally involved in the enactment of certain forms of delegated legislation if these rules may only concern non-essential elements or technicalities that 'just' need to be executed through secondary legislation?[43]

The true answer to this last question seems to be that we do have a problem. A construction in which certain forms of delegated legislation need to be approved by Parliament ('*voorhangen*') can only work if this happens occasionally and if Parliament is really able and prepared to assess the content of the delegated rules. In practice, though, the House of Representatives frequently insists on the right to be formally involved in delegated acts but the reason the Government agrees to this seems to be twofold: 1) to prevent 'even worse' amendments to the parent act[44] and 2) because the House of Representatives usually barks but does not bite in the sense that it rarely activates the right to revoke delegated rules.[45] Hence the parliamentary involvement with delegated legislation functions more like a political lubricant in the negotiations between the Government and Parliament than as a serious form of legislative scrutiny to protect the primacy of the legislature. All this becomes painfully clear in the parliamentary involvement with the implementation of EU legislation.

6. Delegation and European framework laws

6.1. Transposition of EU laws through secondary legislation

Although the Netherlands has no separate legislative fast-track procedure for the implementation of EU directives, empirical studies show that 'the dominance of the executive vis-à-vis Parliament [in the transposition of EU laws] is quite overwhelming',[46] especially if one compares the relatively small number of directives transposed via primary legislation to directives implemented by means of Orders in Council

40 Baron Karl Friedrich Hieronymus, Freiherr von Münchausen (1720-1797) was a German nobleman who was a famous raconteur of tall tales, which were first collected and published by an anonymous author in 1781 and later translated into English as 'Baron Munchhausen's Narrative of his Marvellous Travels and Campaigns in Russia', also called 'The Surprising Adventures of Baron Munchhausen'. One of the stories concerns a situation in which the Baron escapes from a swamp by pulling himself up by his own hair.

41 Art. 81 of the Dutch Constitution reads: 'Acts of Parliament shall be passed jointly by the Government and the Parliament.'

42 HR 22 June 1973, *NJ* 1973, 386. See more recently also HR 23 May 2003, *AB* 2004, 157. In the *Fluoridering* case the Supreme Court decided that adding fluoride to the drinking water of people without their consent is such a fundamental decision that it requires a basis in an Act of Parliament.

43 The explanatory note to Instruction 35 of the Instructions on legislative drafting states: 'Ideally, if powers to lay down particular regulations are delegated to a subordinate authority Parliament should not be involved. However, in occasional cases parliamentary involvement in delegated legislation cannot be avoided.'

44 T.C. Borman, 'Het ambacht: De voorhang van het Besluit luchtkwaliteit: een wetgevingssoap in 25 afleveringen', 2003 *RegelMaat*, no. 6, p. 244.

45 V.M. Reimert, 'Voorwaardelijke delegatie in de parlementaire praktijk', 2001 *RegelMaat*, pp. 185-193.

46 M. Bovens & K. Yesilkagit, 'The EU as Lawmaker: The Impact of EU Directives on National Regulation in the Netherlands', 2010 *Public Administration* 88, no. 1, p. 68.

or Ministerial Regulations.[47] The Council of State, however, has declared over and over again that the normal constitutional rules and procedures should apply in case of the transposition of EU directives in order to respect the primacy of Parliament.[48] It has also successfully resisted the use of Henry VIII clauses enabling the amendment of primary legislation through delegated legislation because this would blur the hierarchy of norms.[49]

Instruction 334 makes an exception (only) in case a) an EU legislative act which needs to be implemented leaves little or no discretionary power to the national legislature;[50] b) the decision to be implemented has a more detailed character;[51] c) the time for implementation is shorter than usual;[52] d) frequent changes of the implementing act are to be expected in the future[53] and e) delegation fits better with the current legislative system in which the implementation rule is going to be included.[54]

Practice nevertheless shows that there has been constant pressure from the Government on Parliament to accept the transposition of EU directives via delegated legislation, especially in order to avoid untimely implementation and to facilitate flexible future amendments. Quite often, though, especially the Council of State and the Senate are not convinced by the Government's argumentation of the necessity to speed up the implementation process or to opt for more flexible arrangements. For example, sometimes the Council finds the argument of timely implementation implausible in case the Government has taken an unusually long period for the preparation of a draft, whereas the deadline for transposition was clear right from the start. In that case the argument that there is no time for parliamentary involvement becomes a self-fulfilling prophecy. Besides, empirical studies reveal that the preparation of national laws by the Government usually takes up at least as much time as the deliberation of a draft during the parliamentary phase, while experience has shown that in case of emergencies both Houses of Parliament can work very quickly.[55] This casts doubts on whether parliamentary deliberation is really the biggest factor of delay.[56] Moreover, as Martin has pointed out, strong national parliamentary involvement with EU decision-making during the preparatory phase can also speed up and facilitate later transposition as the situation in Denmark has proven.[57] This raises the question whether the desire to accelerate the legislative process in case of the transposition of EU laws is really a good reason for bypassing parliaments.[58]

6.2. EU framework laws and delegation and the consequences for Parliament(s)

Even more interesting than the role that delegation plays in the transposition of EU laws is the emergence of framework legislation at the European level. According to De Witte what happens more and more often is that: 'first a framework directive is adopted, which is then later filled in by means of specific directives, so that in the end the national authorities have little to regulate.'[59]

47 See Bovens & Yesilkagi, supra note 46.

48 *Kamerstukken I*, 2004/05, 29 200 VI, F.

49 That Henry VIII clauses are in principle not allowed is now also 'codified' in Instruction 34.

50 In that case implementation through an Act of Parliament has little added value because there is little or no freedom of choice for the national Parliament.

51 This does not really appear to be an exception because (technical) details may always be delegated according to Instructions 22-24.

52 Here the risk of an infringement procedure and liability for untimely implementation must be balanced against the added value of parliamentary involvement. In the case of a very short deadline for implementation one may usually expect the piece of EU legislation to be of higher political relevance which implies that the stronger involvement of national parliaments during the preparatory phase is more likely and hence perhaps (a little) less of a need to have a renewed parliamentary debate later at the national level.

53 This is more of a practical argument.

54 This exception shows signs of circular reasoning because, according to the system of the instructions on legislative drafting, whether delegation should be allowed or not in the national legal system is governed by the same Instructions 22-24, which lay down the main rules determining when delegation is allowed.

55 A good example is the prohibition of 'naked short selling' in the aftermath of the credit crunch. This legislative draft was sent to Parliament on October 1th 2008 and appeared in the Official Journal (*Staatsblad*) on October 10th of the same year. So it took less than 10 days to guide the draft through both Houses of Parliament. See for other examples: S.E. Zijlstra (ed.), *Wetgeven*, 2012, p. 264.

56 J.F.L. Roording, 'Versnelling van wetgeving: Over uiteenlopende ontwikkelingen en eigenwijze actoren', 2012 *RegelMaat* 27, no. 3, pp. 126-139 with lots of references to earlier (empirical) studies concerning the duration of the legislative process.

57 L. Martin, *Democratic Commitments*, 2000, pp. 147 et seq.

58 A comparative study by B. Steunenberg and W. Voermans has moreover shown that EU Member States with special fast-track procedures for the transposition of EU laws do not perform better in the long run in terms of timely implementation. A stronger involvement by national parliaments in the preparation of EU laws appears to be at least as effective as special measure to speed up the transposition at the rear end of the legislative chain.

59 B. de Witte, 'Legal instruments, Decision-Making and EU Finances', in P.J.G. Kapteyn et al. (eds.), *The Law of the European Union and the European Communities*, 2008, p. 284.

What are framework directives then? Here the text of the Lisbon Treaty abandons us because no definition is given of this type of regulatory instrument. Moreover, the terminology that directives themselves use may be deceiving. The Services Directive, for example, is often considered to be a framework directive, although the 'framework label' did not return in the final version of the text of the directive. In an explorative study by Curtin and others the following definition is given on the basis of a literature review and an in-depth analysis of five framework directives:

> 'As framework directives may be considered all directives with 1) a wide scope of application, 2) relying on broad norms with open texture, 3) leaving serious room for follow-up regulation by a European institution either through 3a) delegating to the tertiary legislature (usually the Commission) or 3b) by giving a legislative mandate to the "secondary EU legislature". The fact that a directive labels itself as a framework directive cannot be decisive but may serve as a rebuttable presumption.[60] [translation RvG]'

In their explanation of this definition the researchers add, among others, that almost every directive contains at least some sort of delegation to the Commission but as long as this delegation concerns purely technical measures without any 'political room for manoeuvre', we should not speak of framework legislation. This leaves aside the fact that the follow-up legislation by the secondary or tertiary EU legislature may very well contain much more detailed norms than the 'parent directive'. In practice this means, though, that by the Member State's acceptance of a framework directive it becomes much more difficult to say no to the follow-up legislation for national parliaments, especially if these parliaments are not involved in the transposition of the 'daughter directives'.

What one should not forget either is that states that want to transpose framework directives in a coherent and systematic way in their national legislation are easily driven towards implementation by way of a national framework bill with broad delegation clauses. After all, when the European framework directive itself needs to be transposed into national legislation the content of the follow-up legislation will normally still be unknown. Transposing both the parent directive and the daughter directives through primary legislation at the national level can easily blur the hierarchy of norms and the relationship between the lex generalis and lex specialis nature of the rules. Transposition by means of secondary legislation, however, is problematic for another reason. In case a framework directive delegates legislative powers to the European Commission, this could result in a double democratic deficit. After all, framework directives leave a broad margin of regulatory discretion to the executive and in case of delegated rule-making to the Commission, whereas the European Parliament is not involved. When the Commission rules are subsequently transposed through secondary legislation at the Member State level, this means that the national Parliament will be bypassed too. One wonders whether national parliaments realise what the consequences are.

6.3. The constitutional framework for framework directives

The problem with the 'constitutional' framework at the EU level is that framework directives are not a 'recognised species' under the Lisbon Treaty. The TFEU does not contain a definition of these directives or any special rules, which means that the normal treaty provisions for delegation apply. What does this entail?

First of all, Article 290 TFEU determines that the primary legislature (usually the European Parliament and Council) may only delegate the power to supplement or amend *non-essential elements* of the basic instrument in rules of general application (called non-legislative acts).[61] As both Van den Brink

60 D.M. Curtin et al. (eds.), *Zoektocht naar de aansluiting tussen het Nederlandse en het Europese regelgevingssysteem. Aan de hand van vijf kaderrichtlijnen in Nederland*, Ministry of Justice, The Hague, September 2010, p. 27.

61 According to Paul Craigh the whole distinction between delegated and implementing acts is highly problematic, not least because of the wording in Art. 290 that delegated acts are of general application and 'amend or supplement' non-essential elements of the legislative act. The borderline between, for instance, supplementing a legislative act and hence adding new non-essential rules and adding something that is not really new but just a specification of what is meant by the delegating act is unclear. See P. Craigh, 'Delegated Acts, Implementing Acts and the New Comitology Regulation', 2011 *European Law Review*, no. 5, pp. 671-687.

and Voermans have argued,[62] this standard creates a sort of primacy of the legislature at the European level; the European Parliament and Council regulate essential elements and the Commission – through delegation – may be authorised to take care of less important issues through delegated legislation. But how does this relate to the fact that framework directives usually contain open norms, which are not detailed in terms of content and are supposed to leave at least a minimum amount of political room for manoeuvre for the secondary or tertiary EU legislature? Does this not conflict with the text of Article 290 TFEU, which determines that only non-essential elements of a legislative act may be delegated and also lays down that the objectives, content, scope and duration of the delegation shall be explicitly defined? Moreover, if framework directives are relatively low on content, is it not difficult to determine what the essential and non-essential elements of the directive are and, accordingly, what the scope of the delegation entails in practice?[63]

Secondly, the borderline between delegated acts and implementing acts remains vague, even after the Lisbon Treaty. The basic idea is of course that in case of delegated acts, the European Parliament and Council exercise control over the rule-making by – in most cases – the Commission, whereas in case of implementing acts control over the Commission is the prerogative of the Member States. The problem, however, is that Article 291 TFEU does not define what implementing acts are. In principle implementation concerns acts to give effect to legislative acts, while delegated acts amend or supplement EU legislative acts and hence add new – non-essential – elements to it, but in practice the distinction between both types of acts is rather fluid. As Christiansen and Dobbels have shown, the fact that Member State representatives have more control in comitology committees than under the informal consultation procedure set up by the Commission for the drafting of delegated acts is the Council's main motive to try to limit the use of delegated acts as much as possible.[64] As a consequence Member States are often seen to argue in favour of implementing acts or the ordinary legislative procedure, while in the meantime promoting the use of sunset clauses in the delegation of powers to the Commission.

Thirdly, in case framework directives are going to be misused to bypass the conditions laid down in Articles 290 and 291 TFEU, probably the only credible referee is going to be the CJEU. This can easily lead to accusations of judicial activism since the EP and Council will probably see themselves as the organisations in charge. A case from September 5th 2012, however, shows that the CJEU may no longer be reticent to intervene if the court believes that treaty provisions are being disrespected.[65] In this case the court annulled Council Decision 2010/252/EU of 26 April 2010 supplementing the Schengen Borders Code because: 'implementing measures cannot amend essential elements of basic legislation or supplement it by new essential elements.'[66] More interesting is that the CJEU added to this that:

> 'Ascertaining which elements of a matter must be categorised as essential is not – contrary to what the Council and Commission claim – for the assessment of the European Union legislature alone, but must be based on objective factors amenable to judicial review.'[67]

Behind this consideration, a power struggle seems to be taking place between the EP and Council and the CJEU over the interpretation of what legislative supremacy entails. The EP and Council appear to argue that the European Union legislature can itself fix the limits for the delegation, define what the essential aims of the basic legislation are and also decide over the essential elements which cannot be delegated. In other words the EP and Council believe that defining the scope of the delegation is the prerogative

62 A. van den Brink, 'Primaat van de wetgever', in R.H. van Ooik & R.A. Wessel (eds.), *De Europese Unie na het Verdrag van Lissabon*, 2009 and W. Voermans, 'Delegation is a Matter of Confidence: The New EU Delegation System under the Treaty of Lisbon', 2011 *European Public Law* 17, no. 2, p. 321,

63 Also in the past the Court of Justice has been hesitant to review whether these sorts of substantive criteria were taken into account by the legislature. See H. Hofmann, 'Legislation, Delegation and Implementation under the Treaty of Lisbon: Typology Meets Reality', 2009 *European Law Journal* 15, no. 4, p. 489.

64 T. Christiansen & M. Dobbels, 'Non-Legislative Rule Making after the Lisbon Treaty: Implementing the New System of Comitology and Delegated Acts', 2013 *European Law Journal* 19, no. 1, pp. 42-56 at p. 44. See also S. Peers & M Costa, 'Accountability for Delegated and Implementing Acts after the Treaty of Lisbon', 2012 *European Law Journal* 18, no. 3, p. 443.

65 Case C 355/10, 2012.

66 Consideration 66.

67 Consideration 67.

of the legislature, which means the CJEU should not interfere with this. The CJEU, however, seems to argue the other way around. Although the EU legislature can lay down the conditions for delegation in primary legislation, the CJEU stresses that these conditions have to be 'objective', which means that they are more than just a matter of political desirability in a particular case. In order to guarantee that this will actually be the case, decisions with respect to the scope of delegation and implementation need to be subject to judicial review. Especially now that delegation and implementation are considered to be mutually exclusive concepts,[68] it is going to be very interesting to see to what extent the CJEU is going to respect the (emerging) primacy of the EU legislature.

Fourthly, one may wonder if Articles 290 and 291 TFEU could also play a role in the 'delegation' of rule-making by the EU legislature to private organisations. If not the strict criteria for delegating legislation may be bypassed by outsourcing rule-making to private organisations as we have seen, for example, in the New Approach directives. The implementation of framework directives through private rule-making is limited because of the conditions the CJEU has set with respect to implementation, such as the binding nature of the rules that are used for transposition. This requirement of legally binding implementation prevents the use of pure self-regulation because that would lead to ultra vires effects.[69] Co-regulation, in which a directive clearly sets out the conditions that need to be met by self-regulation in the implementation process, may be allowed but even in that case it is not clear how far delegation to private rule-makers may go. What is unknown, for example, is to what extent the *Meroni* doctrine of the Court of Justice,[70] which clearly limits the possibility of entrusting certain regulatory tasks to private law bodies with distinct legal personality, still holds true.[71] It is widely argued, for instance, that EU New Approach directives, which rely heavily on the harmonisation of product standards by private standardisation bodies, fall short of fulfilling the *Meroni* criteria for delegation but the Court of Justice has so far never hinted in that direction.[72] If the CJEU would be prepared to give more leeway for the implementation of directives through negotiated rule-making,[73] this could also broaden the room for (substantive) framework directives. At the same time this would make a debate about the democratic legitimacy of co-regulatory schemes even more pressing since we know that the equal participation of all relevant stakeholders is certainly not self-evident in situations where the legislature relies on private rule-making in the implementation of EU laws.[74]

7. The bigger picture behind framework legislation and the outsourcing of legislative powers

Constitutional lawyers and specialists in EU law from the different Member States have not fully thought through the rise of framework laws and the outsourcing of regulatory powers to the executive, to administrative agencies and to self-regulatory bodies that one can witness both on the national and the EU level. Is it a coincidence that on both levels of government similar trends can be spotted? In his magnificent book *Power and Legitimacy: Reconciling Europe and the Nation-State*,[75] Peter Lindseth argues that there is a lot of common ground between the developments in the Member States and on the EU level. Starting from the 19th century origins of administrative law-making leading to more and more independence of the executive and of administrative bodies, the author provides an overview of how this process unfolded in the UK, France and Germany. An important argument in Lindseth's work appears to be that European integration, rather than being a sui generis project, represents a supranational

68 See Communication from the Commission to the European Parliament and the Council on the Implementation of Art. 290 of the Treaty on the Functioning of the European Union, COM(2009) 673 final and European Commission, 'Implementation of the Treaty of Lisbon. Delegated Acts. Guidelines for the Services of the Commission', Brussels 2011, p. 9.

69 See on this far more elaborately: F. Cafaggi, 'Private Regulation in European Private Law', EUI working paper, RSCAS 2009/31, pp. 11-15.

70 Case 9/56, *Meroni*, [1958] ECR 133 and Case 10/56, *Meroni*, [1958] ECR 157.

71 Doubts are cast by T. Tridimas, 'Community Agencies, Competition Law, and ECSB Initiatives on Securities Clearing and Settlement', 2009 *Yearbook of European Law* 28, p. 216. See: <http://fds.oup.com/www.oup.com/pdf/13/9780199571253_chapter1.pdf> (last visited 4 March 2013).

72 See with further references: H. Schepel, *The Constitution of Private Governance, Product Standards in the Regulation of Integrating Markets*, 2005, p. 227.

73 That more leeway should be given for co-regulation as an implementation mechanism is suggested in the 'Interinstitutional agreement, Better law-making', OJ C 321, 31.12.2003, p. 1.

74 See P. Verbruggen, 'Does Co-Regulation Strengthen EU Legitimacy?', 2009 *European Law Journal* 15, no. 4, pp. 431–432.

75 Peter L. Lindseth, *Power and Legitimacy. Reconciling Europe and the Nation-State*, 2010, 364 p.

equivalent of the deparliamentarisation of law-making that is going on at the Member State level. In other words: European supranationalism reflects the administrative governance paradigm that has taken over in the Member States.[76]

At first sight, this seems paradoxical since so much attention by politicians and constitutional lawyers has been devoted to strengthening the position of the European Parliament as a primary source of legitimacy for EU legislative law-making. As we have seen, this culminated in the Lisbon Treaty, where the co-decision procedure was turned into the ordinary normal legislative procedure of Article 289 TFEU in which the European Parliament is now placed on an equal footing with the Council in its control over decisions (not) to delegate legislative powers to the executive. At second sight, however, the increasing importance of the role of the European Parliament in the legislative process has gone hand in hand with growing attention for alternative modes of regulation (e.g. self-regulation and co-regulation) and administrative governance (e.g. agency rule making), accompanied by a more participatory understanding of EU democracy. In this respect Curtin, Hofmann and Mendes have rightfully argued that the Lisbon Treaty links openness, transparency and participation at treaty level with the legitimacy of non-legislative rule making.[77] Their perspective on executive rule-making reveals a broader and much more sophisticated view of democratic legitimacy in an increasingly multilevel and multipolar European legal order than the debate over the demarcation line between delegation and implementation.[78]

I would argue that it is precisely because of the growing intertwinement of EU and national law-making that the traditional community method of legislating has reached its limits. In a European Union of 27 Member States with different (legal) cultures, economies, and socio-political systems the drafting of EU legislation has become so complex and time-consuming that it cannot keep pace with the development of EU policy making that touches upon virtually every policy objective dealt with by the Member States. Apart from that, traditional EU legislation often leads to extremely detailed rule-making that is full of compromises and which also does not enhance the quality of legislation. Hence, thinking in terms of alternatives for and in EU legislation has become unavoidable.

At a deeper level, the rise of administrative governance should be seen as a symptom of the ongoing instrumentalisation of law-making in Europe. For legislatures at various levels of government, this has resulted in a shift from the *codification* (capturing in laws what grew bottom-up from society) towards the *modification* of human and corporate behaviour (law as a policy instrument).[79] As a result it soon became clear that it is impossible to steer a highly complex society applying a rational central rule approach resulting in detailed instructions to the executive.[80] Alternative modes of regulation had to be developed to keep up with the policy ambitions of the expanding European Union. Accordingly, the executive and the judiciary were left with more and more discretion. Some have even argued that Montesquieu's concept of the Trias Politica has gradually transformed into a Duas Politica in which the executive and the judiciary have taken over much of the power of the legislature.[81] Others have argued that a new separation of powers doctrine is likely to emerge in the twenty-first century but it is unlikely that it is going to consist of the three simple boxes (legislature, executive, and judiciary) it contains today.[82] Therefore, we might have to think about more fundamental constitutional reforms.

8. Do we need to revitalise the primacy of the legislature?

All in all there is ample reason to reconsider the current constitutional embedding of the idea of the primacy of the national legislature especially now that: 1) framework laws seem to be on the rise both at

76 T. Isiksel, 'Review of Peter L. Lindseth "Power and Legitimacy. Reconciling Europe and the Nation-State"', 2012 *European Constitutional Law Review* 8, no. 1, pp. 128–138 at p. 129).

77 D. Curtin et al., 'Constitutionalising EU Executive Rule making Procedures: A Research Agenda', 2013 *European Law Journal* 19, no. 1, p. 5.

78 See also D. Curtin, *Executive Power of the European Union*, 2009.

79 T. Koopmans, 'De rol van de wetgever', in *Honderd jaar* rechtsleven*, Nederlandse Juristen-Vereniging, 1870-1970*, 1970, pp. 211-235.

80 H.R. van Gunsteren, *The Quest for Control: A Critique of the Rational-Central-Rule Approach in Public Affairs*, 1976.

81 M.G. Rood, *Heeft de rechter een taak in zogeheten politieke zaken?*, 1975, p. 32; A.F.M. Brenninkmeijer, 'De plaats van de rechter in onze constitutionele rechtsorde', in J.M. Polak et al., *De rechter als dictator? Dynamiek in de trias. Verschuivingen in de verhouding regelgeving, bestuur en rechtspraak*, 1987, pp. 51-70; T. Koopmans, *Courts and Political Institutions*, 2003, p. 247.

82 B. Ackerman, 'Good-bye Montesquieu', in S. Rose-Ackerman & Peter L. Lindseth, *Comparative Administrative Law*, 2010, p. 129.

the European and the national level, increasingly threatening to overstretch the 'transmission belt theory' on delegation in which the legitimacy of secondary legislation, agency rule-making and self-regulation and co-regulation need to be linked to parliamentary involvement;[83] 2) European and national legislation are becoming more and more intertwined, which makes it increasingly hard to determine where the centre of gravity for democratic legitimacy should lie: with the EU, with the national parliaments or perhaps with a more institutionalised cooperation between the EP and national parliaments (see hereafter); 3) law-making by executive bodies, independent administrative agencies and private rule-makers both at the national and the EU level has taken such a high flight that one may wonder whether it does not threaten democracy.[84]

It is obvious that framework laws may affect the ideas behind legislative supremacy, such as the safeguarding of democratic legitimacy (involving the people in the process of legislation through representation by Parliament), legal certainty (citizens should not be surprised by drastic Government interventions taken without parliamentary consent) and careful deliberation (primary legislation is enacted through a relatively heavy procedure for the scrutiny of legislative drafts). For the situation in the Netherlands, however, it would not make much of a difference to adopt an article in the Constitution, like Article 80 of the German Basic Law (*Grundgesetz*), stating that the content, purpose, and scope of the authority conferred by the primary legislation shall be specified in the law. As long as Article 120 of the Constitution remains intact no judicial review will be possible anyway.[85]

Neither would codifying the principle of legislative primacy resolve the current confusion over the legitimacy of national actors operating in the EU law-making process versus the legitimacy of EU legislation affecting national laws on the basis of involvement by the EP itself. As Besselink and Van Mourik have rightfully argued, the Dutch Parliament has always understood its role in the EU law-making process mainly as a compensation for the lack of parliamentary legitimacy at the EU level.[86] This might raise the idea that our Parliament no longer has a role to play in EU decision-making as soon as the EP is sufficiently involved in the EU legislative process. As Besselink and Van Mourik have argued, this would be a dangerous misconception, though, because it might suggest that the national executive is no longer accountable towards the Dutch Parliament for decisions taken at the EU level, such as the enactment of framework directives, as long as the EP has agreed with these decisions. This, of course, runs against Article 12 TEU, assigning national parliaments, among others, with the task of checking whether EU institutions respect the principle of subsidiarity. Moreover, Article 290 TFEU shows that strengthening the position of the EP regarding the decision to delegate regulatory powers by laying down the criteria for delegation has limited impact as long as the 'delegation' of regulatory powers to administrative agencies and self-regulatory networks falls outside the scope of this article.

What does all this mean for the future of the primacy of the national legislature? If the current constitutional rules fall short, how could we prevent that due to the use of framework laws, be it on the national or the EU level, important legislative decisions are defined as bureaucratic or technical-legal problems, which may then be settled by non-elected rule-makers?

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83 For the US it was R.B. Stewart, 'The Reformation of American Administrative Law', 1975 *Harvard Law Review* 88, p. 1667 who pierced the veil of what he called the transmission belt theory in administrative law-making by pointing, among others, to the increasing influence of independent administrative agencies on law-making.

84 L. Mader, 'Congress Conclusions', in L. Mader & M. Tavares Almeida (eds.), *Quality of Legislation. Principles and Instruments: Proceedings or the Ninth Congress of the International Association of Legislation (IAL) in Lisbon*, 2011, p. 325.

85 Even if this prohibition would be lifted, one may wonder whether a constitutional court would easily overrule the legislature in setting the limits for delegation. In Germany this is seldom the case and some scholars there have argued that the decision as to what belongs to the legislature in Parliament is first of all a political instead of a legal decision. See S. Magiera, 'Allgemeine Regelungsgewalt zwischen Parlament und Regierung', 1974 *Der Staat* 13, no. 2, p. 22.

86 L.F.M. Besselink & B. van Mourik, 'The Parliamentary Legitimacy of the European Union: The Role of the States General within the European Union', 2012 *Utrecht Law Review* 8, no. 1, pp. 28-50 at pp. 48-50.

9. Three ways to move forward

9.1. A European Senate to protect the primacy of the national legislature

Since EU legislation and the way that legislation is shaped increasingly influence the primacy of the national legislature, for example by issuing European framework laws, it is important that national parliaments are going to fulfil a more active role in the process of EU law-making since they still constitute the 'institution closest to the people' in the EU.[87]

As long as decisions concerning what should be regulated through primary legislation with parliamentary involvement and what may be delegated are first and foremost seen as political decisions, one option could be to strengthen the role of national parliaments at the EU level by introducing a European Senate consisting of members of national parliaments.[88] Here one could kill two birds with one stone. First a European Senate might serve to guarantee compliance with the subsidiarity principle in a much more effective way than the current subsidiarity protocol allows for, thereby also preventing a creeping erosion of the primacy of the national legislature. Second, a Senate made up of members of national parliaments could play an important role in the scrutiny of draft EU legislation,[89] especially with respect to the constitutional, socio-economic and political consequences that draft EU laws might have for the Member States.[90] This could go well beyond the current monitoring of subsidiarity issues and include: a critical assessment of the consideration of alternatives to legislation (self-regulation, co-regulation, communicative instruments) through impact assessments;[91] monitoring the choice between different types of legislation (e.g. regulations versus directives, directives versus framework directives, or temporary versus more permanent rules) and deciding the government level at which the rules need to be made (delegation); considering whether there are practical stumbling-blocks for the implementation and enforcement of EU laws at the national level, and so on.

Like no other institution, a European Senate should be able to see through strategic arguments of the Commission and the Council to outsource certain regulatory decisions to non-elected bodies in order to bypass the EP or to 'fly under the radar' of certain forms of legislative scrutiny (e.g. consultations, IAs, subsidiarity checks et cetera). Moreover, a Senate would probably feel less restrained than the CJEU in deciding whether the criteria in Article 290 TFEU have been respected or not. As far as the protection of national interests is concerned, modern Senates typically represent the interests of sub-states within federal government systems. Even if one does not perceive the EU as an emerging federation, it is not hard to see that a European Senate could play an important role in protecting the interests of national parliaments and their role in the legislative process. Moreover, a very critical assessment of possible infringements of the primacy of the (national) legislature by a European Senate could also make the CJEU feel a little less restrained in applying Article 290 TFEU and guarding the limits of the subsidiarity principle.

9.2. Procedural rules on secondary legislation in combination with judicial review

A second strategy to deal with the declining primacy of national legislatures due to the rise of framework legislation could be to accept delegated legislation as a fact of life and try to remedy the lack of democratic legitimacy by developing special procedural rules for delegated rule-making and introduce the possibility of a judicial review of these rules by administrative courts. In the Netherlands Jurgens has gone quite far in this direction. In his article 'The Myth of Meerenberg',[92] he has argued in favour of more instead

87 R. Holzacker, 'Parliamentary Scrutiny', in M. Vink & P. Graziano, (eds.), *Europeanization. New Research Agendas*, 2007, p. 144.

88 See in the same sense the final report of the 'Future of Europe group' of 17 September 2012 (Westerwelle Committee): <http://www.cer.org.uk/sites/default/files/westerwelle_report_sept12.pdf> (last visited 8 March 2013).

89 Which is seen as a typical task of Senates. See M. Russell, *Reforming the House of Lords*, 2000, pp. 21-22.

90 See G. van der Schyff & G.J. Leenknegt, 'The Case for a European Senate. A model for the representation of national Parliaments in the European Union', 2007 *ZÖR* 62, pp. 237-258, who argue among other things on p. 240 that: 'executive power is thus quite strongly represented at European level, but this is not counter-balanced by legislative control, thereby removing Europe even further from Europeans'.

91 Which is a weak spot in the current system of EU impact assessments. See A. Meuwese & L. Senden, 'European Impact Assessment and the Choice of Alternative Regulatory Instruments', in J. Verschuuren (ed.), *The Impact of Legislation*, 2009, pp. 137-175.

92 E.C.M. Jurgens, 'De mythe van Meerenberg', 1993 *Nederlands Juristenblad* (special *Zorgen om wetgeving*), pp. 1383 et seq.

of less independent regulatory powers for executive bodies and administrative agencies but not without compensation through the introduction of a judicial review of these regulations.[93] According to Jurgens, the role of Parliament versus the Government in the legislative process has been off balance for quite some time now,[94] not least because of the poor way Parliament is supported by experts in comparison to Government departments, which are responsible for over 90 per cent of the legislative drafts in the Netherlands. The control function of Parliament with respect to delegated legislation should instead be replaced by the judicial review of secondary legislation, which is already possible in the civil courts.

A review of delegated legislation by the civil courts does not seem very realistic, though, because the threshold in terms of costs and necessary expertise is too high. A more feasible option would probably be to adopt the American approach in which there is more room for regulation by independent administrative agencies.[95] Following the US Supreme Court's reasoning,[96] public participation in the rule-making process serves as compensation for the lack of a substantive definition of the empowering norms in case of delegation. In turn the Administrative Procedure Act (APA) enables direct public influence on the rule-making authority of regulatory agencies, thereby strengthening the democratic legitimacy of regulations whereas the participatory rights of citizens and interest groups can be enforced in court relatively easily. In case of Orders in Council, Ministerial Regulations and rules made by independent administrative agencies in the Netherlands, we could introduce a special procedure in the General Administrative Law Act (GALA) (*Algemene wet bestuursrecht*, *Awb*) for participation in the law-making process and lift the prohibition of Article 8.2 GALA to enable the judicial review of delegated legislation by administrative courts.

Regulating delegated rule-making in this way does not solve the problem that certain topics are presented as rather neutral decisions that may be delegated without involvement by Parliament. It could, however, substitute the lack of parliamentary involvement with delegated legislation by introducing more direct influence from relevant stakeholders who can then bring forward that certain legitimate interests have not been taken into account. These 'stakeholders' could even go to court if they believe that procedural rules for delegated rule-making have been violated.

9.3. Substantive framework legislation but with conditions for private rule-making

A third road that could be followed might be to rely more on substantive framework laws and co-regulation mechanisms.[97] In both cases self-regulation serves as an implementation mechanism to fill in open norms in legislation. The difference between co-regulation and (national) substantive framework laws is that in the first case the EU legislation entrusts the attainment of the regulatory objectives defined by the legislative authority to private parties (economic operators, social partners, NGOs) at the Member State level,[98] whereas in the second case, standard-setting by the legislature and self-regulation remain within the realm of the nation state. In both cases the crux is to combine legislative action with actions taken by the private actors most concerned, drawing on their knowledge and practical expertise.[99] The result could be wider ownership of the policies in question by involving those most affected by

93 See for a criticism of Jurgens' position W. Voermans, 'Toekomstperspectieven voor het primaat van de wetgever', 1998 *RegelMaat*, no. 1, pp. 35-40, who advocates a 'fast-track procedure' for Acts of Parliament where political debate on the main issue would suffice and a certain minimum number of MPs decide that there is no need to follow the normal procedure. Voermans' own solution has the disadvantage that it suffers from the same problems as we see today, namely: how to make a distinction between essential and non-essential decisions and why would MPs be eager to follow the fast-track procedure?

94 M. Scheltema, *De Partijdige wetgever*, 1984.

95 In the US in 2008 the number of statutes considerably outnumbered the amount of regulations (284 statutes vs. 3,955 regulations) but these numbers tell only a small part of the story, as Bressman, Rubin and Stack have argued, because many of the most significant decisions on social and economic policy are outsourced to regulatory agencies. See for an overview: L. Schultz Bressman et al., *The Regulatory State*, 2010, p. 2 et seq.

96 In particular *Schechter Poultry Co v US* (1935) 295 US, 495 et seq.

97 See for example the White Paper, European Governance, COM(2001) 428 final, p. 20: '"framework directives" should be used more often. Such texts are less heavy-handed, offer greater flexibility as to their implementation, and tend to be agreed more quickly by Council and the European Parliament.'

98 A good example of multilevel governance.

99 See for example Art. 37(1) of the Services Directive 2006/123, providing for 'the drawing up at Community level, particularly by professional bodies, organisations and associations, of codes of conduct aimed at facilitating the provision of services or the establishment of a provider in another Member State.' L. Senden. 'Soft Law, Self-Regulation and Co-Regulation in European Law: Where Do They Meet?', 2005 *Electronic Journal of Comparative Law* 9, no. 1, <http://www.ejcl.org/> (last visited 4 March 2013).

implementing rules in their preparation and enforcement. This might even achieve better compliance, even where the detailed rules are non-binding.

The latter will only hold true if the conditions under which self-regulation may be used as a gap-filler are clear and the effectiveness, efficiency and legitimacy of the private rules are somehow monitored and the participation of relevant stakeholders in the self-regulatory process can be enforced in court in case of cartel-like behaviour or other forms of abuse of power. It is probably no coincidence that the EP has expressed its concerns that co-regulation may lead to 'legislative abstinence' and that one of the risks is that only lobby groups and powerful economic actors will benefit from it.[100] Similar concerns with respect to 'legally conditioned self-regulation' have been raised on the national level.[101]

Part of the solution here could be to develop a European Administrative Procedure Act (EPA) similar to the one that exists in the US but with more attention for different forms of new governance, such as self-regulation and co-regulation. As Meuwese, Schuurmans and Voermans have argued: 'The EU administration is deeply involved in regulation, more independent and less intensely controlled by political bodies than Member States administrations are. These features imply that the present constitutional framework is not entirely fitting.'[102] Accordingly, the EPA could lay down procedural rules providing guidance for especially the CJEU with respect to the conditions under which 'negotiated rule-making' by private organisations may serve to implement EU framework directives.[103] One could think of rules such as: the notification of a co-regulatory scheme, procedural guarantees for the involvement of all relevant stakeholders, provisions on the extension of private rules for non-participants (free riders) and possibilities for judicial review. At the national level special provisions for self-regulatory instruments, which are somehow linked to legislation, could be laid down in the GALA.

Perhaps it might seem paradoxical for the legislature to codify procedural rules for co-regulation and self-regulation but behind all the debates about the delegation of law-making and new governance there is often still the state. Very rarely have alternatives to legislation completely taken over the role of state-made law. Far more often new modes of regulation and governance seem to function best 'in the shadow' of the law. As Michael Taggart has convincingly shown for the situation in the UK, Canada and New Zealand, the (nation) state has not 'retreated' in any real sense since the 1980s, but rather engaged with the private sector in much more complicated patterns of legal interrelationships and interdependence.[104] Both the national and the EU legislature will have to adjust their style of law-making to these changing circumstances. That does not necessarily imply, though, that national parliaments simply have to give away (all of) their 'disposing power'; their 'power to decide who decides'.[105] In that sense we should not throw away the primacy of the legislature – at least not until we find a better concept. On the other hand, this should be seen as a challenge for legal scholars to come up with alternative constitutional concepts and models, which are able to cope with the growing plurality of public, private and hybrid lawmakers.

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100 Of course from a political science perspective one might also argue that the 'concerns' of the EP with respect to self-regulation and co-regulation are fed by the fear of losing power. Be that as it may, there are today hardly any procedural rules with regard to the role of alternatives to legislation in the EU law-making process. In that sense the EP is right that the privatisation of rule-making could affect the primacy of the legislature.

101 See for concern on the EU level for instance the EP Report on the institutional and legal implications of the use of 'soft law' instruments, June 292007, 2007/2028(INI)) (A6-0259/2007) and the EP Report on 'Better law-making 2006' pursuant to Art. 9 of the Protocol on the application of the principles of subsidiary and proportionality from June 29 2010, (2009/2142(INI)), (A6-0355/2008).

102 A. Meuwese et al., 'Towards a European Administrative Procedure Act', 2009 *Review of European Administrative Law*, 2, no. 2, pp. 3-35 at p. 27.

103 See the report by the Ziller Committee, 'Alternatives in drafting an EU administrative procedure law', European Parliament, Brussels 2011, <http://www.europarl.europa.eu/committees/lt/juri/studiesdownload.html?languageDocument=EN&file=59979> (last visited 4 March 2013). In this report it is also argued that a European administrative procedure act should include delegated rule-making.

104 M. Taggart, 'From "Parliamentary Powers" to Privatization: The Chequered history of Delegated Legislation in the Twentieth Century', 2005 *University of Toronto Law Journal* 55, pp. 626-627.

105 T.W. Merrill, 'The Disposing Power of the Legislature', 2010 *Columbia Law Review* 110, pp. 452-478 at p. 454.