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National and Regional Parliaments in the EU decision-making process, after the Treaty of Lisbon and the Euro-crisis

by

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Abstract

The Treaty of Lisbon increased the role of National and Regional Parliaments in the EU decision-making process, in order to compensate for some of the weaknesses of the European institutional architecture. Neither National nor Regional Parliaments are given a real power of veto. However, their active involvement – through the day-to-day activity of direction and scrutiny of their executives and sometimes through the triggering of the "early warning mechanism" – can significantly help in closing the gap between (mainly national) politics and (mainly European) policies and in letting national public opinions have a say in the decisions being taken "in Brussels". Their active involvement seems even more necessary after the Euro-crisis, which has brought about a steady acceleration of both the trends towards a more inter-governmental EU and the development of an "asymmetric" Europe. Under the light of these trends, in fact, a further increase of the scrutiny function of the European Parliament seems an unrealistic scenario and, in any case, not sufficient in order to oversight and to counterbalance the fragmented (and, thus, very powerful) executive power of the EU.

Key-words

National Parliament, Regional Parliament, EU democracy, early warning system, political dialogue

1. Parliament and Democracy in the founding European Treaties: for a long time, two forbidden words

For a long time the words "Parliament" and "Democracy" were absent in the founding Treaties and were in any case never used to refer to the institutions of the European Communities.

As is well known, the expression "European Parliament" did not appear in the founding Treaties and it was necessary to wait until the mid-Eighties for it to be included in the Treaties and not only in the official documents of that Institution.

In fact, the Treaty establishing the European Coal and Steel Community-ECSC of 1951, coherently with the functionalist approach suggested by Jean Monnet, established what was generically called an 'Assembly', with only exclusively consultative powers and made up, on the model of the consultative Assembly of the Council of Europe[I], of 78 members designated by each national parliament, among its members, once a year. This was also because, in the minds of the drafters of the ECSC Treaty – not very unlike the ones of the drafters of the statute of the Council of Europe – the relations between Assembly and High authority (the future Commission) were conceived more like those between the board of directors and the assembly of shareholders in a private company, rather than those between a government and a parliament (Costa 2001: 20 ff.).

Nevertheless, at least a couple of elements, both present since the very beginning, seem to some extent original, and subversive with respect to the traditional logic of an assembly of an international organisation (arts. 21 and 24 of the ECSC Treaty). Reference is made, firstly, to the fact that in the ECSC Treaty the possibility was advanced of an election of the Assembly members by direct universal suffrage, alternatively to their designation by the national parliaments. And, secondly, to the provision that a motion of censure could be put forward, by which the Assembly, with a qualified majority (with more than two thirds of the votes and more than half of the components), would oblige the members of the High Authority to resign.

Similar institutions, also called "Assemblies", were foreseen by the European Economic Community-EEC and European Atomic Energy Community-EURATOM treaties of 1957. At the same time, an agreement was drawn up by which it was established

that the institutions outlined in the three treaties would have been common (with their relative functions remaining separate nonetheless, to be exercised according to the conditions foreseen by each treaty). It was the same Assembly, thus unified, by way of its own resolutions, to be called first of all the "European parliamentary Assembly" in 1958 and then the "European Parliament" in 1962.

For the name "European Parliament" to make its appearance in the text of the treaties it has been necessary, as mentioned above, to wait for the European Single Act, which was signed in 1986 and came into force in 1987: that is, seven or eight years following the direct election of the Assembly-Parliament in 1979.

It has been necessary to wait even longer in order to see the word "democracy" appear in the provisions of the treaties.

The word "democracy", in fact, made its modest appearance in the preamble of the just mentioned European Single Act of 1986[II], and then in the articles of the European treaties only with the Treaty of Maastricht of 1992, but in this case with exclusive reference to the systems of government of the Member States, on the one hand, and to the policy of development cooperation and the Common Foreign and Security Policy (CFSP), on the other[III].

It is only with the Treaty of Amsterdam of 1997 that the democratic principle is explicitly referred also to the European Union itself, stating that "the Union is founded on the principles of liberty, democracy, the respect for human rights and fundamental freedoms, the rule of law, principles which are common to the Member States" (Article 6 TEU).

This extreme caution, not to say reluctance, of the founding treaties to tackle the crux of the democratic nature of the European architecture comes as no surprise, if one considers the clearly elitist genesis of the European integration process and its purely internationalist original background (Nugent 2010: 99; Habermas 2012: 342; Weiler 2012: 256 ff.) and the fact that such process has certainly not seen the peoples, and to a lesser degree the (controversial, in its own existence) European people, as protagonists (Grimm 1995; Della Valle 2002).

Moreover, in the meantime, the Court of Justice had already set out and made use of – although initially somewhat carefully – the democratic principle, even before its written formulation in the treaties: deriving it from the common constitutional traditions of the

Member States and defining it as a general principle of the law of the European institutions (Ninatti 2004: 6 ff and 70 ff.; Lenaerts 2013: 281 ff.).

The German Federal Constitutional Court, with its decision on the Treaty of Maastricht of 12 October 1993, had then with unusual emphasis, pointed out the risk of contradiction between the structure of the European architecture and democratic principle (as is expressly stated by Article 20 of the German fundamental law), forcing the European institutions to no longer evade the question (Sorrentino 1994; Cartabia 1994), and somewhat proposing to the EU the German model of parliamentary democracy.

2. The democratic principles in the Treaty of Lisbon

With the Treaty of Lisbon – which follows, for the most part, what was already stated on this by the treaty adopting a Constitution for Europe – the framework has changed dramatically. The Treaty deals directly with the "democratic challenge facing Europe"[IV] and does this by using all the possible available arrows in the bow of the European integration process. That is to say, all the forms of democratic legitimacy: those already present since the origin of the European construction, as well as those that have been progressively added over the decades, and lastly some newly introduced or enhanced ones with the same Treaty of Lisbon.

This is then why Title II (enumerated as "Provisions on democratic principles")[V] contains an important statement with a general slant in Article 10.1: "The functioning of the Union shall be founded on *representative democracy*".

Literally, as it can be remarked, not the European Union in itself, but only its functioning is founded on representative democracy. As if to say, we are aware that to state that the structure of European Union has been or is founded on representative democracy would be a somewhat too strong affirmation, and only partially corresponding with the truth. It would have meant to deny the above mentioned pactional and elitist origins of European development, as well as the persistent and rather increasing intergovernmental elements that distinguish its structure (Dehousse 2011; Fabbrini 2013); or the considerable weight that lies – in such legal system, perhaps even more so than in that of the Member States – with independent bodies or authorities unconnected from any form of link with the circuit of political representation (starting with, in many ways, the European

Commission and the European Central Bank) (Bredt 2011). Instead, the attention is more realistically directed at the capacity to effectively guarantee a democratic character in the carrying out of the functions of the European Union.

From the standpoint adopted here, the reference made not to democracy without adjectives, but to "representative democracy" is fundamental: in the awareness that the latter, also known as "parliamentary democracy", is the form of "democracy of the moderns" being referred to. Moreover, the reference to democracy *tout court* would have been equivocal, considering that, as has been pointed out (Ridola 2010: 327), in the history of Europe and therefore in its constitutional patrimony, a multiplicity of models of democracy is to be found, which have been enacted: procedural and substantial democracy; representative and plebiscitary democracy; *Volksdemokratie* and *Bürgerdemokratie*.

This has also been at the expense of not including in the expression "representative democracy" the forms of direct democracy or participatory democracy[VI]. Or, perhaps better, seeing that some institutes ascribable at least in part to these other forms of democracy are foreseen by the successive provisions, recognising in such other forms of democracy an ancillary role in the completion of representative democracy, which remains the principal characterisation of democracy in Europe (Starita 2011; Bifulco 2011; Manzella 2013; Pinelli 2013).

The representative channels of which the democracy of the European Union avails itself are essentially two, taking the shape of a "dual system of representative democracy" (Verhey 2009: 240). They are both referred to in para. 2 of Article 10 TUE. The first, more direct, and in force since 1979, consists in the election of the European Parliament, which represents the European citizens at European Union level. The second, more indirect, whose origins can be traced back to the beginning of the European integration process, is today enforced through the government of the Member States – present both in the European Council (with their respective heads of state or, more frequently, of government), and in the Council of Ministers – which are "in turn democratically responsible either before their national parliaments or before their citizens".

3. A "multilevel parliamentary field" in the EU compound Constitution

For a long time, especially after 1979, the word "Parliament" in the European integration process has been used rather exclusively to refer to the European Parliament. It was by means of this word and through this institution – extremely capable of using the rhetoric formula of the "democratic deficit" for its own advancement (Della Cananea 2003; Ziller 2013: 315) – that, as we have just seen, the idea of democracy started to find a place in the institutional architecture of the then European communities (Costa 2001: 29 ff.).

Both national and subnational Parliaments, indeed, were not deemed relevant neither in the institutional architecture, nor in the EU decision-making processes.

National parliaments were completely covered by their respective Governments, at least in the day-to-day decisions, centered on the Council (of ministers). And, internally, European affairs were almost always considered as a part of foreign affairs, therefore mainly inside the powers of the Government (except for the ratification of the Treaties).

In order to have their say in EU affairs, subnational parliaments had to overcome a double obstacle: their regional Governments and the idea that all subnational institutions were irrelevant in the EU decision-making processes (only partially attenuated with the creation of the Committee of the Regions: Fasone, in this issue). It is not by chance that – as we will see in § 5 – subnational parliaments and, more generally, subnational institutions often tended to be considered as equivalent, in the EU polity, to lobbies and pressure groups and, as can be easily imagined, to act consequently.

With the Treaty of Lisbon, national parliaments have been defined an essential element for the democratic legitimacy and for the good functioning of the EU (Article 12 TEU). More specifically, they have been granted several information rights towards EU Institutions and have also been admitted directly to the decision-making processes of the European Union, through a list of powers.

Article 12 TEU groups together the principal functions expected of the national parliaments. It opens with a general affirmation, according to which "National Parliaments contribute actively to the good functioning of the Union" (Louis 2009; Olivetti 2012). And it refers explicitly to the contents of Protocol No. 1 (on the role of the national parliaments in the European Union) and Protocol No. 2 (on the application of the principles of subsidiarity and proportionality), as well as to a series of articles in the TEU and TFEU.

Some of these "European powers" of national parliaments are individually attributed to each chamber (the power of information; those which enable an act to be brought before the Court of Justice); others to each national parliament, thus requiring a double approval in the case of bicameral parliaments (the veto powers in the "*passerelle*" clauses); others must be exercised in "groups of chambers", which are variously composed, on condition that they reach a certain threshold (this is the case for the verification of the respect for the principle of subsidiarity, in order to trigger the "yellow card" and "orange card" mechanisms); others, finally, for reasons of necessity are in collective form, usually with the involvement of the European Parliament (for example, the "convention method" and the multiple features that inter-parliamentary co-operation can assume).

Of these powers, the most visible has been the subsidiarity check on the EU legislative acts that national Parliaments can exercise through the "early warning system". In this last check, whose procedure is foreseen by Protocol No. 2, it is also provided that some Regional Parliaments could be involved, although through their national parliaments. To use the wording of Article 6 of this Protocol, "It will be for each national Parliament or each chamber of a national Parliament to consult, where appropriate, *regional parliaments with legislative powers*".

That is why, after the Treaty of Lisbon, some authors have envisaged the existence of a "multilevel parliamentary field" (Crum-Fossum 2009: 249 ff.), in which neither the European Parliament, nor national Parliaments, nor regional Parliaments could play an exclusive role any longer, given the fact that most of the policies are decided at more than one level of government. All those legislatures share a quota of political representativeness in the European "representative democracy".

Furthermore, it is clear that in this rather crowded field, the interparliamentary cooperation (between the European Parliament and national Parliaments; among national Parliaments; and among national Parliaments and their regional Parliaments) could play a crucial and difficult role.

Moreover, this theory of a multilevel parliamentary field seems quite perfectly coherent with the idea of the EU as a legal system with a composite Constitution, which is currently the subject of lively debate among constitutional scholars (Avbelj-Komarek 2012; Martinico 2013a). It is obviously not a debate that can be addressed here. It is only interesting to note that, as Parliamentary law, in the countries of continental Europe, is

often deemed to be a part of Constitutional law (Gianniti-Lupo 2008; Avril-Giquel 2010: 2), the way we define the latter with regards to the EU reflects also on the way we analyse the former (and *vice versa*). Also in the evolution of European integration, as happened in the Constitutional history of most Member States, Parliaments and Constitutions are marching together, often sharing the same path.

4. National Parliaments in the Treaty of Lisbon: a heterogeneous family

The national Parliaments are a somewhat numerous "family" of institutions, which are very heterogeneous both at a quantitative and qualitative level, often with century-old traditions behind them (Kiiver 2006; Kaczyński, 2011). In order to obtain an idea of this heterogeneity, suffice it to recall that in the European Union, now composed of 28 Member States, there are 41 parliamentary chambers (13 bicameral and 15 unicameral parliaments); and that they go from 59 members in the House of Representatives in Cyprus to 760 Lords in the United Kingdom. At a qualitative level, it is sufficient to observe that, among these 41 assemblies, there are also chambers (for example, with life tenure) made up of representatives, some of whom are hereditary (for example, the House of Lords, albeit to a much lesser extent than in the past) or appointed at government discretion. In addition, some chambers exist whose members represent the governments of autonomous territories: see, for example, the German *Bundesrat*. In the latter case, as is well-known, even the very parliamentary nature of the assembly is subject to debate, given that, in this chamber, only the *Länder* executives, and not the people, are represented, and that, therefore, its members have a different status from that the one of the political representatives, exercising a free mandate (Falcon 1997: 277; Ruggiu 2006: 205).

All the members of this heterogeneous family have been identified in the Treaties as "national Parliaments". It could be interesting to comment on the adjective chosen and then to ask whether this picture could be hypothetically somewhere altered in the future, for instance through a Constitutional revision suppressing or reforming one or both Chambers in one of the Member States.

It is, in fact, well-known how the phenomenon of European integration is generally placed in contraposition to the nationalistic tendencies which have long prevailed

throughout the continent, and how the development of this phenomenon, following forms and modalities which differ greatly from the traditional character of inter-*national* organisations, often tends to be considered as one of the indices of the overcoming of the logic of the nation-state in the contemporary world[VII]. It thus comes as no surprise that the entire European construct has endeavoured – and, indeed, continues to endeavour – to resist the call to a return to every form of terminology that makes explicit reference to the idea of the nation (especially where it is conceived in an ethno-linguistic manner). And yet, contrary to this tendency, the term "national" re-appears, in the European treaties, precisely in the very discipline addressed to those who, with more neutral terms which are only slightly more articulate, could have been called the "Parliaments of the Member States".

This essentially seems to be due to practical identification reasons, which establish the need to distinguish, with a concise and unambiguous formula, every reference to such parliaments with regard to those made at the European Parliament and also those which, as we have just seen, Article 6 of Protocol 2 defines as "regional parliaments with legislative powers".

Nevertheless, it cannot be excluded that, besides these reasons of a practical identification nature, there are no other reasons which have determined the adoption of this term, indeed already established in the institutional practice, in the Treaties. These further reasons may be linked to the fact that parliamentary institutions of the Member States are often deemed, especially when observed "from Brussels", as the arenas in which national public opinions manifest themselves more directly. Thus, *politics*, still prevalently anchored in its national dimension, often dependent on populist and demagogic instincts and passions, whose figurative and institutional manifestation more often and more frequently takes place in the assemblies, and especially on the floors, of the various parliaments of the Member States (which are, themselves, often rich with national history, and in which passionate and hard-fought debates arise).

With this term, however, appearing here for the first time in the main text of the Treaty (Bellamy 2013: 508), the Treaty of Lisbon intended to "capture" a very precise family of institutions, which have already been on the European scene for some time, but to which it now gives some autonomous functions: that is, which can be exercised even independently of the respective governments.

Thus, as already remarked, national parliamentary law in some way comes to share the composite nature that it is already actually seen to have, in the Member States of the European Union, in Constitutional law. The attributive sources of powers to national parliaments, in fact, are no longer just the Constitution and, occasionally, national legislation, but also the EU treaties (including their protocols) and, if need be, the secondary norms of EU law. It follows that the parliamentary rules of procedures are thus called to design procedures relating to the exercise not only of the powers conferred by national sources of law, but also those stemming from norms of EU law.

It is in this sense – namely, that of composite parliamentary law – that the solution to the problem of the identification of "national Parliaments" should also be framed. This competence does not appear to have been fully assumed by the EU legal order (nor can it be, in fact, in the name of the principle of respect for the constitutional identity of the Member States, as explicitly stressed in Article 4, para. 2, TEU). The identification of what the term "national parliaments" actually means cannot, however, be totally left to the individual Member States, which would have *carte blanche* in this field, without encountering any limitation on the part of EU law. The latter, in effect, could impose limits, in the name of protecting the common constitutional traditions of the Member States, recognised as general principles of EU law in Article 6 para. 3 TEU (thus, avoiding, for instance, the identification of the national parliament in one Member State only with one or two non-elected Chambers).

5. Regional Parliaments with legislative powers: a strange family

As previously remarked, almost no place was reserved, in the original European institutional system, for subnational Parliaments. The traditional principle of the indifference of the European Communities, and then of the EU, for the internal constitutional structure of the Member States, also called "blindness" towards the territorial organization of federal and regional Member States (Weatherill 2005: 3 ff.; Savino 2007; Raspadori 2012: 16; Borońska-Hryniewieka 2013; Martinico 2013b; Fasone in this issue), was the first obstacle. The second obstacle was represented by the strongest role and significance given to the Regional Governments, instead of the Regional Assemblies, in the

EU decision-making process (D'Atena 2003; Spadacini 2007; Rivosecchi 2009; Antonelli 2010; Olivetti 2013).

The creation, with the Treaty of Maastricht, of the Committee of Regions did not alter the general picture. It is true that the members of this advisory body are chosen amongst those people who "either hold a regional or local authority electoral mandate or are politically accountable to an elected assembly" (Art. 300.3 TFEU). However, in accordance with the traditional principle of indifference or blindness, from a formal point of view, they are appointed by the Council, as per the proposals made by each Member State (art. 305 TFEU). Therefore, the intermediation of national governments is still essential in order to be chosen as a representative in the Committee of Regions. Furthermore, although not being an assembly representing States, national delegations have considerable influence in the functioning of the Committee of Regions, at the expense of the interests of single regional and local autonomies, represented in a very heterogeneous way (Domenichelli 2007: 21; Piattoni 2012; Fasone in this issue).

However, the traditional "blindness" of the EU has been gradually attenuated thanks to the activism of some among them (Brunazzo 2005) and the Treaty of Lisbon now expressly states a number of principles inspired by the very opposite view. It does so both where it recognises the national identity of each Member State (Article 4.2 TEU), "inherent in their fundamental structures, political and constitutional, *inclusive of regional and local self-government*" (Di Salvatore 2008; Guastaferro 2012; Vecchio 2012; Martinico 2013b), as well as in the new formulation of the subsidiarity principle (Article 5.3 TEU), which expressly considers also regional and local levels within the Member State (Schuetze 2009; Borońska-Hryniewiecka 2013).

Coherent with this new framework are numerous provisions of the Treaties and Protocols, among which Article 2 of Protocol No. 2, according to which the consultations undertaken by the Commission cannot disregard the Member States' subnational units, when their competences might be affected by the EU policy or because of the envisaged impact of the EU action on the local communities (i.e., citizens, local administrations, firms). And it states so, namely with the aim of verifying if the action complies with the principle of subsidiarity. The provision is specifically referred to all pre-legislative consultations, which take place before the beginning of the legislative process, even before a legislative proposal is drafted by the Commission, and which are generally carried out on

documents that are devoid of legal effects, such as green and/or white papers and/or communications. In this way, subnational entities are able to interact, at this very preliminary stage and together with interest groups, with the Commission without the "filter" of the Member States and on their own initiative (Fasone-Lupo 2013).

All those innovations led to the emergence of the "regional Parliaments" in the EU legal system. This occurred explicitly in the procedure of the early warning system, in which – as we have seen in the previous paragraph – all the national parliaments are now involved. According to Article 6 of Protocol No. 2, also some sub-national Parliaments could take part in this procedure: "It will be for each national Parliament or each chamber of a national Parliament to consult, where appropriate, *regional parliaments with legislative powers*".

Actually, this is quite a vague provision. Leaving to the other contributions of this special issue the task to examine what the main interpretative and implementing problems are, we would concentrate only on a single issue, regarding the identification of the category here outlined. It is interesting to understand for which reasons this category of "regional parliaments with legislative powers" appeared, in these terms, in Protocol No. 2.

The main reasons – as frequently happens in EU law, in whose framing interest groups play an important role – have to do with the ways and the forms in which territorial interests are organised. In this case, in November 2000, right in the wake of the Laeken declaration of 2001 and then in coincidence with the works of the Constitutional Convention, the Regions benefiting of a wider autonomy, clearly not satisfied by the role then played by the Committee of Regions, decided to create a new association: called REGLEG-Conference of Regions with Legislative Powers (Jeffrey 2005: 38 ff.; Domenichelli, 2007: 35 ff.). They decided to find their element of identification in the fact of being able to exercise "legislative powers". This criterion, although founded more on the holding of formal powers – their qualification as legislative being decisive – than on substantial autonomy, allowed the involvement in this association of the most active entities: that is, all the regions of 5 Member States (Austria, Belgium, Germany, Italy and Spain, for a total of 67 Regions) and 6 other Regions included in 3 other Member States (Åland from Finland; Azores and Madeira from Portugal; Scotland, Wales and Northern Ireland from the United Kingdom).

In parallel with the REGLEG – and actually with even older origins, since the late Nineties, the first meeting being held in 1997 – another association was created: the CALRE-Conference of European Regional Legislative Assemblies, which collects 77 presidents of European regional legislative assemblies (the same ones mentioned above, plus Italian autonomous provinces of Trento and Bolzano and the Spanish autonomous cities of Ceuta and Melilla) (Domenichelli 2007: 43; Raspadori 2012: 32 ff.).

It is interesting to observe that, also from a textual point of view, the provision of Article 6 of Protocol No. 2 imports the same vocabulary adopted by the CALRE. Thus using, in the English language, the word "Regions", to refer to subnational entities with legislative powers; and the word "Parliament", to refer to their legislative assemblies.

This leads to some kind of adaptation also of the national terms traditionally (and often constitutionally) used to refer to these institutions. So, for instance, we find "regionalen Parlamente" in the German version of the Protocol, instead of "Landtage", which is the term normally adopted for addressing these institutions in Germany (except for Berlin, Bremen and Hamburg) or in Austria; or "Parlamentos regionales" in Spanish, instead of "Parlamentos Autonomicos"; or "Parlamenti regionali" in Italy, in this way adopting an expression which is unknown to the Italian Constitution (which uses "Consigli regionali") and, most of all, that the Italian Constitutional Court had considered, not so many years earlier, as inacceptable if employed by any of these assemblies, even if used in addition to "Consiglio regionale" (decisions No. 106 and 306 of 2002: Lupo 2002).

Notwithstanding the specific attention paid, as already remarked, by Articles 4.2 and 5.3 TEU and by Art. 2 of Protocol No. 2 to the regional and local dimensions of the EU action, no *sui generis status* is guaranteed to regional and local governments within pre-legislative consultations, compared to interest groups, with or without a limited territorial dimension (Fasone-Lupo 2013). Their conduct often resembles that of lobbies, more than the behaviour of institutional actors: as has been pointed out, "in practice, distinctions between territorial public authorities and territorially based interests are difficult to make, because territorial public authorities work to attract, promote and protect key private interests within their domain" (Greenwood 2011: 178)

However, if this is true from an historical point of view, explaining the origins of the involvement of (some) Regional parliaments in the subsidiarity check, this could change in the future, partly thanks to this mechanism, indeed. In the early warning system, in fact,

regional parliaments are asked to intervene not in the same way as lobbyists, but as parliamentary institutions: so, their duty is that to act trying to consider also and foremost the general point of view, verifying the compliance with the principle of subsidiarity – although considered in a broad meaning, as we will see in the next paragraph – instead of promoting uniquely their specific territorial interest. What they say will probably be heard only if they manage to take a position that can be joined by other parliaments, national and regional, especially if it signals a violation of the subsidiarity principle. In the latter case, in fact, regional Parliaments' representatives have the possibility – recognised by Art. 8 of Protocol No. 2 – to bring the act adopted by the EU Institutions before the Court of Justice, either through their national Parliament (Granat 2013: 446 ff.) or through the Committee of Regions (Bußjäger 2010; Fasone in this issue).

6. Two possible interpretations of the "early warning system": a legal or political scrutiny?

The involvement of national and regional Parliaments in the "early warning system" has been interpreted in two different ways. With some simplifications, we could say: either essentially as a legal instrument, in which Parliaments need only to verify if the proposed act complies with the principle of subsidiarity, intended *stricto sensu*; or, on the contrary, mainly as a political instrument, in which Parliaments can evaluate the proposal not only regarding its compliance with the principle of subsidiarity, but also according to other parameters and criteria.

Along the first interpretative line we can place, first of all, the arguments used by Philip Kiiver. In the light of an in-depth monographic study of the topic, he has defined the function that lies with national parliaments of checking subsidiarity as a legal-institutional advisory function: an advisory function which is rather narrow, and similar to that one entitled to the *Conseil d'Etat* in France. In other words, scrutiny under the early warning system should focus "on the lawfulness, on the admissibility of legislation, rather than its political desirability" (Kiiver 2012: 133).

A collocation along the same lines can be reserved for a study conducted by Federico Fabbrini and Katarzyna Granat. They upon the basis of an accurate reading of the text of the treaties, have reached the conclusion that the scope of application of the early warning

system should remain bound to a strict interpretation of the principle of subsidiarity, excluding all other types of evaluation. Therefore, the role of parliaments "under Protocol No. 2 should be limited to the analysis of the subsidiarity of a legislative proposal and not extend to the evaluation of its proportionality, necessity or political merits" (Fabbrini-Granat 2013: 116).

On the other side, already immediately after the Constitutional Treaty other authors expressed their perplexity on the possibility of a subsidiarity check completely autonomous from the evaluation on the political substance of the draft legislative act. The reference is here to some contributions of Marta Cartabia, who argued that the introduction of a control over subsidiarity at the national level has the advantage of "unifying in a single process both the scrutiny of the political merits and the scrutiny of competences and subsidiarity" (Cartabia 2007b: 1099). Moreover, in order to show the difficulties of a sharp and rigid distinction between legal and political checks when exercised by a Parliament, she proposed an evocative parallel with a failed attempt, in Italy, to delineate a specific parliamentary evaluation on the existence of the pre-requisite of urgency and necessity of each decree-law enacted by the Government, distinct from the evaluation of the content of the same act (Cartabia 2007a; see also D'Andrea 1983; Rizzoni 1993; Ghiribelli 2011).

This argument has been strengthened after the adoption of, upon initiative of the Commission and even before of the coming into force of the Treaty of Lisbon, the "Barroso procedure" (also called the "political dialogue": Jancic 2013: 83 ff.; Casalena-Fasone-Lupo 2013). Thanks to this procedure, which allows national parliaments to send any contribution to the Commission regarding its acts (notwithstanding the respect of the time-limit, the legislative nature of the act nor the explicit consideration of the principle of subsidiarity) and obliges the Commission itself to reply to each parliamentary contribution, president Barroso managed to neutralise the negative potential influence of the involvement of parliaments in the EU decision-making process. Thus, showing not only that the Commission is not afraid of standing up to the national parliaments, but also that it counts on their effective and active involvement in order to enhance the EU decision-making process and to strengthen the support and legitimacy of its own initiatives.

Furthermore, in arguing in favour of a wide conception of subsidiarity check, it has been observed that the subsidiarity principle has a variety of meanings and dimensions, being far from being understandable uniquely as a legal principle (Estella 2002: 2 ff.).

Therefore, such a kind of principle seems to require a flexible and comprehensive check, exercised firstly by political bodies, as national and regional parliaments, at an earlier stage than by the Court of Justice. This is the case, for instance, of the reading of the subsidiarity principle proposed by Neil MacCormick, who considered subsidiarity as the key organising principle that can help to make the EU more legitimate. Among the four possible dimensions of this principle, the author identifies the "rational legislative subsidiarity", as that requiring a collective exercise of decision-making in the European Union, through the involvement of local assemblies, regional and national legislatures, in addition to the European Parliament (Mac Cormick 1999: 155; Fasone 2013: 170 ff.).

Moreover, it can be added that both the theses of Kiiver and Fabbrini-Granat, although accurately formulated and soundly based, have the defect of underestimating the nature of parliaments, national as well as regional ones. Parliaments are institutions that are completely political, and therefore their procedure tend to be "multifunctional", that is, somewhat free in the aim they are pursuing through them (Manzella 2001; Lupo 2013: 127 ff.). As a result, they are free to interpret the meaning and function of their interventions in the EU decision-making process differently, according both to the context and to the case in question. They are obviously bound to observe the EU treaties, but remain free to interpret them, especially if the coordination among them shows itself to be a loose one and if they can find an echo in the EU institutions of their chosen interpretation[VIII].

In short, every parliament is free to interpret the functions conferred upon it by EU law in the manner which it retains to be most beneficial and to intertwine them in a single procedure. It can do so either in a general way, at the moment in which it outlines, by means of a norm of parliamentary law – irrespective of whether these norms are legislative or contained in the rules of the chamber –, a procedure for the expression of reasoned opinions and of contributions, as well as the policy-direction to the EU activity of the government. Or concretely, at the moment in which it finds itself before a specific proposal of a EU draft legislative act and decides which "slant" and which "sense" to give to its intervention (being able, under the circumstances, to opt for a more legalistic interpretation of its role, or to highlight the political profile of its opinion).

It goes without saying that the legal effects – and also the political effects – originating from a reasoned opinion in which a claim of infringement, either in part of an act or in its totality, is made with regard to the principle of subsidiarity *stricto sensu* do not coincide with

those of a contribution in which some suggestions have been put forward about the relative substance of the specific measure. However, it seems difficult to sustain that this distinction can be made *a priori* and imposed, in the same exact terms, on all the national parliaments, identifying – with precision – the profiles that come under the principle of subsidiarity and those which do not. This does not exclude, however, that a series of general orientations could be made in time (not only by individual national parliaments, but also, at EU level, by the Commission, the European Parliament or by the COSAC) that go in the direction of the adoption of forms of conduct which, while not uniform, are nonetheless better co-ordinated and more coherent on the part of (at least most of) the national parliaments.

The division among the scholars we have seen in the interpretation of the role exercised by parliaments reappeared in the evaluation of the first application of the "yellow card" procedure. The threshold established by the Protocol no. 2 (one third of the votes assigned to all the national parliaments)[IX] was reached for the first (and, for the moment, only) time, on a proposed regulation on the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services (COM (2012)130 final: so called "Monti 2" proposal)[X]. In its reply to national parliaments, the Commission, while not retaining that the principle of subsidiarity had been infringed, and thereby re-affirming the correctness of its work in drafting the proposed regulation, has, however, recognised the difficulty of obtaining "the necessary political support" for the proposal in the last stages of the decision-making process, and consequently decided to withdraw it[XI].

The decision of the Commission to withdraw the proposal, although re-affirming that it complied with the principle of subsidiarity, would not have made any sense, and would have sounded contradictory, producing negative effects for the future (as noted by Fabbrini-Granat 2013: 142), had the Commission not implicitly acknowledged the national parliaments as having a role that exceeded the strict scrutiny of the principle of subsidiarity. The "yellow card" was clearly a sign that that proposal did not have sufficient support to get it through the European legislative process (Barrett 2012: 599). This is exactly the reason why the Commission decided to withdraw it, instead of engaging itself in a struggle versus national parliaments on the compliance with the principle of subsidiarity and instead

of amending the draft regulation in order to consider and eventually accept the remarks coming from them.

7. The need for Parliaments in the EU decision-making process, to diminish the "democratic disconnect"

It should not be forgotten that the rationale of the involvement of the national parliaments in checking whether the principle of subsidiarity has been respected is double.

On the one hand, this involvement certainly intended to re-vitalise the principle of subsidiarity and to stimulate a more incisive judicial review on the part of the Court of Justice, which can act more incisively thanks to the evaluation provided (and those requested by the European institutions and national government) by the national parliaments; and thus increase the observance of the principle of subsidiarity, understood as a guarantee of the sphere of competence of the Member States. On the other hand, it also aimed at including, in the often "cold" EU decision-making process, institutions which are usually "warmer" and closer to *politics*, which still remain firmly embedded within the Member States.

In this way, the institutions which symbolise *politics* at national level have been admitted to the EU governance architecture, with an array of powers which are rarely configured as definitive and insuperable (as it would happen if the proposal to introduce a kind of "red card", that is a veto power, to a certain number of national parliaments, had been approved)[XII], but which, nonetheless, do appear to be rather significant in the formation process of European politics (the *policies*).

This intention seems both noble and worthy of merit: that of somehow bringing *politics* and *policies* closer (Schmidt 2006: 5 f.), thus reducing the "*democratic disconnect*", which is the cause of many problems of contemporary Europe (Lindseth 2010: 234 ff.), and thereby diminishing the risk that institutional crises in which national public opinions reject the EU treaties, such as those which occurred in the referenda in France and in the Netherlands in 2005, could be repeated (Manzella 2008: 334).

Thus, the early warning system seems to pre-suppose a high level of discretion on the part of the national parliaments, even in the application of the same rules (at least with regard to those imposed by EU law). The circumstance in which, with reference to a

specific proposal, the same rules can be interpreted diversely according to the parliament involved, fully seems to refer – analogously to the hypothesis, to some degree complementary, of a different interpretation on the part of the same parliament dependent on the issue in question – to the sphere of auto-determination conferred upon the political organs and constitutional status of the national parliaments. What we are looking at, in other words, is a manifestation (as already noted, with legal effects, albeit not particularly destructive effects), in the EU decision-making process, of the plural structure of the European Union, and, in particular, in the constitutional identity of each Member State, as expressly safeguarded by Article 4.2 TEU.

The way in which the early warning system develops in each national parliament tends to be influenced, to some degree, by its national characteristics, by its political and institutional culture (first and foremost, with regard to the process of European integration, but also with regard to the equilibrium between the parliament and the government), by the configuration of the parliamentary groups and commissions, as well as the influence of the parliamentary bureaucracy. All these elements can be fairly easily traced back to the constitutional identity of each Member State.

8. Perspectives: the increasing role of the "other Parliaments", after the Eurozone crisis and the difficulties of the European Parliament in an asymmetric Europe

As we have seen, EU democracy relies not only on the legitimacy provided by the directly elected European Parliament, but also on roots deriving from the national level (in turn strictly connected, especially in federal and regional States, with the sub-national representative bodies). Therefore, it is necessary to devote specific attention to the mechanisms of this double channel of EU parliamentary democracy, in order to understand the tangles of EU democracy.

The longstanding tension towards the recognition of a legitimacy criterion for the EU architecture has recently grown in importance, as the Eurozone crisis started questioning the "output legitimacy" of the EU institutional system and its policies[XIII]. The need to counterbalance the effects of the financial and economic crisis has led the European institutions to urge for the adoption of quick and intrusive measures, investing some of the

core competences of the Member States, in particular those relating to the budgetary and financial decision-making. This situation boosts the need for democratic legitimacy of the EU institutions, due to the fact that the increased risk of a possible divergence between European budgetary and financial policies and voters' preference makes it more difficult to justify the autonomy of the EU legal order.

The legitimacy problem of the EU in the Eurozone crisis is moreover exacerbated by the fact that one of the two channels of European parliamentary democracy – the one relying upon the European Parliament – does not seem capable any longer of fully complying with the expectations concerning its always increasing contribution to fostering democracy in the EU.

As it is well known, from the Single European Act of 1986 to the Lisbon Treaty of 2007, the European Parliament has in fact experienced a constant trend towards the enlargement of its functions, which has been very important, but has turned out to be not sufficient to assure the democratic legitimacy of the EU (as shown by the constant decrease of the citizens' participation in European elections).

However, this constant trend seems to be stopping or at least slowing down after the coming into force of the Lisbon Treaty. The weakening of the European Parliament, in particular, can be considered as a consequence both of the crisis of the "community method" (and the already mentioned trends towards more intergovernmentalism in the EU and in the European Economic and Monetary Union) and of the coming into force of new legal constructions (such as the so called "Fiscal Compact"), separated from the EU and not involving all Member States.

In a wider picture, the perspective of a more intergovernmental and a more asymmetric EU will undoubtedly weaken the role of the European Parliament, given the fact that the EU still needs it as a political representative body and as a legislature in the full sense of the word. Therefore, the European Parliament, being the institution "composed of representatives of the Union's citizens" (Article 14.2 TEU), cannot act through bodies composed according to a principle different from that of the proportional representation of all the MEPs, elected in all the EU Member States.

The insufficiencies of the European Parliament as the unique or even the main channel of democratic legitimacy for a more and more intergovernmental and asymmetric European Union justify the need to reinforce the other channel, the one based on the role

of national (and regional) Parliaments (Griglio-Lupo 2012; Groppi-Spigno-Vizioli 2013). As rightly observed (Lindseth 2011), "when push comes to shove, European integration still needs democratic legitimation coming from the national level, both in a formal and substantive sense". In other words (Weiler 2013: 249), "the Union has had to turn to its Member States for salvation. The solutions will still have to be European, but they will not be ideated, designed and crafted using the classical 'Community method' but will have to be negotiated among and validated by the Member States. They will require the 'legitimacy resources' of the Member States—though in many countries these are close to depletion too—in order to gain valid acceptance in Europe". Or, if you prefer to adopt the approach proposed by other authors, the legitimacy of the European Union, being a "demoicracy", that is "a Union of peoples, understood both as states and as citizens, who govern together but not as one" (Nicolaidis 2013: 353), needs to rely, especially during critical phases, not only on the representatives of the European demos, but also on those of the demoi of the Member States (and, in certain cases, even of those of their sub-entities).

In this context, this special issue of Perspectives on Federalism *aims at offering some elements on the experiences of the regional parliaments in two of the most decentralised Member States of the EU: Italy and Spain. Through the essays included, written both by Constitutional Law and Parliamentary Law scholars and by some senior officials working in national or regional parliaments of the two countries, the reader is able to understand how complex, but at the same time how interesting the "European activities" of the regional parliaments have become. And how much those activities have been evolving and increasing, together with the European role of Spanish* Comunidades Autónomas *and Italian* Regioni*, after the coming into force of the Treaty of Lisbon.*

The idea underlying the researches collected in this special issue is that most of the innovations that nowadays occur in the Constitutional Law of the EU Member States derive from the evolutions of the European integration process. Regional (as well as national) parliaments are no longer what they used to be twenty or even ten years ago. One of their most interesting current tasks is exactly that of following the activities of the European Union. It is not a passive task, as what takes place in the European Union is a complex decision making-process in which States as well as Regional institutions, including their parliaments, do have a say and can therefore – if able to act timely, being well informed and finding the right alliances – play a very significant role. The more this task will be played actively, the more those parliaments will offer a contribution to the democratic legitimacy of the European construction.

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[I] It is symptomatic that also the Assembly of the Council of Europe (1949), even though later in time (starting from July 1974), substituted, first *de facto* and later *de iure* (see a deliberation of the Committee of Ministers, in 1994), its own name, "Consultative Assembly", with that of "Parliamentary Assembly" (Evans-Silk 2008: 35 ff.).

[II] See the third and fourth paragraphs of the preamble of the Single European Act, in which the States declare themselves "determined to work together to promote *democracy* on the basis of the fundamental rights recognised in the constitutions and laws of the Member States, in the Convention for the Protection of Human Rights and Fundamental Freedoms and the European Social Charter, notable freedom, equality and social justice". And, at the same time, "convinced that the European idea, the results achieved in the fields of economic integration and political cooperation, and the need for new developments correspond to the wishes of the *democratic* peoples of Europe, for whom the European Parliament, elected by universal suffrage, is an indispensable means of expression".

[III] See, respectively: Article F of the Treaty on the European Union (TEU), according to which "The Union shall respect the national identity of its Member States, whose systems of government are founded on *democratic* principles"; Article 130U tr. EC, according to which the Community policy on development cooperation "shall contribute to the general objective of developing and consolidating *democracy* and the rule of law, and to that of respecting human rights and fundamental freedoms"; and, finally, Article J.1 TEU, according to which, among the objectives of the Common Foreign and Security Policy, there is "to develop and consolidate *democracy* and the rule of law, and respect for human rights and fundamental freedoms".

[IV] As expressly defined in the declaration approved by the European Council of Laeken, 15 December 2001, in which, in approving the mandate for the Constitutional Convention, it was furthermore underlined how "the European institutions must be brought closer to its citizens", to remedy the fact that they "feel that the Union should involve itself more with their particular concerns, instead of intervening, in every detail, in matters by their nature better left to Member States' and regions' elected representatives". Furthermore, "they feel that deals are all too often cut out of their sight and they want better democratic scrutiny". The answer is, therefore, inevitably that to increase the democratic legitimacy and transparency of the institutions of the European Union.

[V] The corresponding headings (of title VI of part I: arts. from I-45 to I-52) of the treaty establishing a Constitution for Europe (from now on, Constitutional treaty) was less technical and more evocative, referring to "The democratic life of the Union" (a formula which furthermore persists, as will be seen, in art. 10 para.3, TEU). Even in the subjects addressed it appeared wider and more vague: the principle of democratic equality; the principle of representative democracy; the principle of participative democracy; the social partners and autonomous social dialogue; the European mediator; the transparency of the work of the institutions, bodies and organisms of the Union; the protection of personal data; and the status of the churches and non-confessional organisations (Ridola 2010: 354 ff.).

[VI] The question of the identification of the contents of "participatory democracy" is not dealt with here, nor are its relations with other contiguous forms of democracy, such as "deliberative democracy". See Bifulco (2011) and, with regards to regional experiences in Italy and Spain, Gianfrancesco-Lupo-Mastromarino (2012). The term "participatory democracy" appeared in the Constitutional treaty, as the heading of art. I-47 (its content basically corresponding to the one of art 11 TEU, mentioned in the paragraph below).

[VII] The dominant ideology of the European integration process is, therefore, that of a form of overcoming nationalism and nations, especially in their ethno-linguistic conception (from the Ventotene Manifesto 1941 to Habermas 2012). However, it has been remarked that the European integration institutions have been a creation of the same European nation states, in order to better pursue their own national (economic) interests (Milward 1992: 18; Moravcsick 1998: 3 ff.; for a recent re-reading, Lindseth 2012: 458 ff.).

[VIII] See the report on subsidiarity and proportionality (19th report on Better Lawmaking covering the year 2011- COM(2012) 373 final, 10 July 2012, 4 ff.), in which the European Commission, after having remarked that "Apart from the more formal aspects, the content and reasoning of the reasoned opinions sent to the

Commission in 2011 also varied", nevertheless "considers that the issuance of a reasoned opinion on a Commission proposal and the arguments on which it is based, fall solely within the responsibility of each national Parliament". In order to have an idea of the different interpretations of the subsidiarity check see COSAC, Eighteenth Bi-annual Report: Developments in European Union Procedures and Practices Relevant to Parliamentary Scrutiny, 27 September 2012, p. 3 ss. (available at http://www.cosac.eu/en/documents/biannual).

[IX] The threshold levels of the "yellow card" (one-third raise an objection) and the "orange card" (the majority raise an objection) in the procedure of the *early warning system* are stated in Article 7 of Protocol no. 2: "Each national Parliament shall have two votes, shared out on the basis of the national Parliamentary system". Adding, immediately afterwards, that, "In the case of a bicameral Parliamentary system, each of the two chambers shall have one vote". Essentially, in a European Union with 28 Member States, a total of 56 votes are conferred, 2 for every Member State, and the threshold levels for attaining the "yellow card" and the "orange card" are set at 19 votes (14 when the proposal concerns the area of freedom, security and justice in conformity with Article 76 TFEU) and 29 votes, respectively. On this criterion, which gives equal "weight" of each Member State, with a criterion which clearly favours the smallest states, it has been observed that it raises a clear paradox, according to which the chamber of representatives of Malta counts for twice as much as the German *Bundestag* in this procedure (Kiiver 2012: 62).

[X] 12 Parliaments (for a total of 19 votes) issued reasoned opinions (the threshold, with 27 Member States, was then at 18 votes), with a variety of reasons (Granat 2012; Fabbrini-Granat 2013: 135 ff.): Belgian *Chambre des représentants*, Danish *Folketing*, Finnish *Eduskunta*, French *Sénat,* Latvian *Saeima*, Luxembourg *Chambre des Députés*, Maltese *Kamra tad-Deputati*, Polish *Sejm*, Portuguese *Assembleia da República*, Swedish *Riksdag*, Dutch *Tweede Kamer*, UK *House of Commons*.

[XI] See, for instance, the letter from the deputy president of the Commission, Šefcovic, to the president of the Italian Senate, Schifani, on 12 September 2012. For a more general reconstruction, also referring to the exchanges of information preceding the issue of the reasoned opinion and to the comments from the national parliaments to the withdrawal of the draft regulations, see COSAC, *Nineteenth Bi-annual Report: Developments in European Union Procedures and Practices Relevant to Parliamentary Scrutiny*, 17 May 2013, p. 30 ff. (available at http://www.cosac.eu/en/documents/biannual) and the Commission annual report on subsidiarity and proportionality, covering the year 2012 (COM(2013) 566 final, 30 July 2013, 6 ff.).

[XII] The proposal aiming at introducing a "red card", already discarded during the Constitutional Convention, has been recently (on 31 May 2013) re-advanced by the UK Foreign Secretary, William Hague (http://www.bbc.co.uk/news/world-europe-22730226).

[XIII] As observed, «The question for the EU, then, is not only whether it can get the economics right – thereby ensuring more 'output' legitimacy – but also whether it can get the politics right, through greater 'input' legitimacy» and greater 'throughput' legitimacy (Schmidt 2012: 108). For incisive critical approaches to the theory of the "output legitimacy" see Bellamy (2012: 500) and Weiler (2012: 255). The latter remarks that the output legitimacy theory reminds that one of *panem at circenses* and that, in any case, it cannot be proposed anymore for a simple empirical reason: that is, that the output of the EU is judged, rightly or wrongly, deceiving.

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