

NETWORK FOR A EUROPEAN *DEMOI*-CRACY: ARE THE NATIONAL PARLIAMENTS UP TO THE JOB?*

Vesco Paskalev **

‘It would be madness and inconsistency to suppose that things which have never yet been performed can be performed without employing some hitherto untried means.’¹

*Summary: This article focuses on the new opportunity for the national parliaments to get involved in the EU legislative process which is provided by the so-called yellow card mechanism introduced by the Lisbon Treaty. I start with a discussion of the incentives for national parliaments to seize the new opportunity to influence European decision-making. I argue that the importance of the mechanism goes far beyond its stated goal to enforce the subsidiarity principle. Its true significance will first be in the engagement of parliaments in debates on the substantive issues of European policy, and second in stimulating cooperation amongst the parliaments of different Member States. In turn, this engagement and cooperation of parliaments can be expected to bring about communication among the citizens across national public spheres and their engagement with substantive policy issues rather than merely arguing for or against integration as is the case today. Thus, this modest-looking mechanism promises to nurture a transnational network of public spheres and to become what may be called a *demoi*-cracy. I also argue that the creation of such a network democracy (post-national rather than supra-national) is the only available road for democratisation of the EU because it does not depend on a forged common identity or solidarity. In the final section, I discuss experience with the mechanism during its first year, which seems disappointing.*

* A shorter and earlier version of this article was published as a working paper of the European University Institute, Florence (WP 21/2009 Law) <http://cadmus.eui.eu/bitstream/handle/1814/13005/LAW_2009_20.pdf?sequence=1>, accessed 22 September 2011, and on the SSRN. I am grateful to the participants of the Jean Monnet seminar ‘Advanced Issues of European Law’, Dubrovnik, April 2011 for their very considerate and helpful comments.

** The author is a PhD researcher at the European University Institute, Florence, and has been advisor to the Committee on European Integration of the Bulgarian Parliament.

¹ Francis Bacon, *Novum Organum: True Directions Concerning the Interpretation of Nature* (first published 1629, Kessinger Publishing 2004).

Introduction

On 1 December 2010 the Lisbon Treaty entered into force and finalised a decade-long torturous process that polarised the opinions of scholars, politicians and citizens throughout Europe. But if there is anything in the Treaty which should be cheered by all sides of the debate on European integration, it is the 'yellow card' mechanism, conceived by the Convention on the Future of Europe with the heading Early Warning Mechanism (EWM).² It provides the institutional framework for public deliberation on issues of European governance, within national parliaments (NPs) and also *between* them. It should be liked by the sceptics as it subjects the Union legislation to national scrutiny, but also by the federalists as it can be expected to create the much craved European public sphere. In my view, this is the kind of mechanism needed to democratise the Union and to make it open, inclusive and responsive to the will of all European citizens who may, but also may not, have much in common. Its core virtue is that it creates incentives for public discourse on *substantive common issues* first *within* the national public spheres of the Member States, and second, and more importantly, *among* the NPs in a network which in the long run can amount to an overarching discursive network of interconnected public spaces. Until now, the public spheres in Europe have remained largely national and the emergence of a robust single European one is nowhere in sight. Arguably, the EWM can foster communication within a network of autonomous but interconnected public spheres which, if robust enough, is the critical condition for the emergence of a transnational democracy. If successful, Europe may become a single and democratic polity for many distinct *demoi* and, contrary to the famous appeal of Habermas and Derrida,³ without forging a common European identity beforehand.

It is ironic that I have to argue with Habermas using the arguments from his own earlier works,⁴ but in my view his latest papers on European values do not fit easily with the concept of *critical deliberation* in the public sphere; according to his theory of communicative action, there seems to be no need for common values, identity or solidarity to have a democracy,

² As the Lisbon Treaty does not name this mechanism, I will use the abandoned 'Early Warning Mechanism' and 'EWM' for convenience, or the yellow card, which is how it has come to be popularly known since the Convention.

³ Jürgen Habermas & Jacques Derrida, 'February 15, or What Binds Europeans Together: A Plea for a Common Foreign Policy, Beginning in the Core of Europe' (2003) 10 *Constellations* 291.

⁴ See Jürgen Habermas, *The Structural Transformation of the Public Sphere: An Inquiry Into a Category of Bourgeois Society* (MIT Press 1991), hereinafter *Public Sphere*; Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (Polity Press 1996), hereinafter *BFN*; and Jürgen Habermas, *The Inclusion of the Other: Studies in Political Theory* (MIT Press 1998), hereinafter *The Other*.

whether a transnational one or not.⁵ I take decision-making through inclusive and rational public deliberation to be the critical condition for a government of the people(s), hence democracy may be easier in a community of people united by identity, but it is at least conceptually possible also in a group of strangers who have nothing in common but two *interests*: an interest in common governance and an interest in subjecting it to public criticism. Thus, to make governance democratic, only a robust and inclusive discussion in which *common opinions* are formed is necessary. I take it for granted that interest for common governance in practically all areas of life for all people in Europe exists. Now with the EU in place to realise this governance, the second is of concern to us: that the people subjected to common governance are in turn enabled to subject the existing system of governance to public criticism and make its decisions *responsive* to the shared opinions they form. The obvious condition for the opinions to be common is that the critical discussion must transcend the national fora where it originates. This is what happened at least once - on 15 February 2003: the antiwar opinions transcended the national spheres where they were formed and became common, ie they were formed by the critical communicative exchanges of all citizens, even though in terms of identity these people remained Germans, French and English, rather than Europeans.⁶ This suggests that paneuropean public deliberation and public opinion is possible, even when none of the participants considers himself 'European'. The difficulty is that for the opinions formed to be transnational, the public discourses need to transcend their usual national *loci*, ie people from different Member States need to speak to and listen not only to their compatriots, but to the citizens of other states, and this is exactly what the EWM can incentivise. The EWM was proposed as a network which fosters communication without the need for a new institution to be established, and in the same vein it can encourage democratic discourse without the need for a single demos to be forged.

In the following section I briefly discuss the project for the *construction* of European identity and/or a European public sphere, as advanced by Habermas's later writings, the former German foreign minister Joschka Fisher and many other intellectuals. I raise several objections against its necessity and argue that this is a solution to the wrong problem. While the identity elements of this project are contested, critical communication stands out as the one irreducible element of a deliberative democratic system. In the third section, I explore how the EWM may become the institutional vehicle to realise it in a debating network of par-

⁵ For a similar argument, see Justine Lacroix, 'Does Europe Need Common Values? Habermas vs Habermas' (2009) 8 European Journal of Political Theory 141.

⁶ This is supported by the annual Eurobarometer surveys, but also by the fact that many Americans (estimated at about 500,000 in New York City alone) demonstrated against the war on that date, and hence apparently did not become European.

liaments. Then I argue why a critical network rather than a single critical public sphere is both a more realistic and more desirable solution. In the final section I discuss experience with the mechanism in its first year, and in that light the prospects for bringing the Union closer to its citizens appear much grimmer.

The constructivist project

It can be assumed intuitively that a paneuropean sense of solidarity and identity is a *sine qua non* for any kind of common governance, and even more so in order to make this governance a democratic one. That is why systematic projects to forge a European identity started with the very birth of the EEC, and purely intellectual exercises in that can be traced back to the Middle Ages. The notion of the democratic deficit arose more recently, with the creation of the political union by the Maastricht Treaty and with the increased ambitions for even more comprehensive political integration. In response to the deficit stick and the ambitions carrot, the identity issue came to the fore, and found its culmination during the deliberations of the Convention on the Future of Europe (2002-2003). Paradoxically, at precisely the same time Europe appeared more divided than ever on the Iraq war. Despite the apparent division among the governments, many European intellectuals, with Jürgen Habermas and Jacques Derrida being the most famous, noticed the actual commonality of the opinion of European citizens. This prompted their famous 'Declaration' which announced and welcomed the birth of the 'European Public Sphere'.⁷ Habermas and Derrida were right in their announcement, but for the wrong reasons. (I cannot help adding that six years later the child is still in its nappies and is unlikely to grow to maturity anytime soon.) Actually, in the 'Declaration' itself, Habermas is ambiguous about his reasons for celebration: on one side, he states that 'A *transformative* politics, which demand that member states ... form a common will, must take recourse to the motives and attitudes of *the citizens themselves*'.⁸ This need for the formation of a common will of Member States which corresponds to the will of the citizens is very much in line with Habermas's earlier views expounded in the '*Public Sphere*' and '*BFN*'. On the other side, he claims that '*Only* the consciousness of a shared political fate ... can halt the outvoted minorities from obstruction of majority will'.⁹ This second claim seems a step back from his original and more ambitious concept that through inclusive deliberation of free and equal citizens in

⁷ Jürgen Habermas & Jacques Derrida, 'February 15, or What Binds Europeans Together: A Plea for a Common Foreign Policy, Beginning in the Core of Europe' (2003) 10 *Constellations*, hereinafter 'Declaration', 291.

⁸ Habermas, 'Declaration' (n 7) 293, emphasis of the original.

⁹ Habermas, 'Declaration' (n 7) 293.

a common public sphere a common will must be formed, which cannot be equated with the will of the majority. This is contrary to the Rousseauian formula Habermas had referred to in *The Other*, according to which the 'democratically structured opinion- and will-formation make possible rational agreement even between strangers. Because the democratic process guarantees legitimacy in virtue of its procedural characteristics, it can if necessary bridge gaps in social integration'.¹⁰ Only a few years ago, Habermas seems to have supported the concept of 'procedural popular sovereignty' at the core of which was only 'the practice of deliberation between participants in communication who want to arrive at rationally motivated decisions'.¹¹

I strongly support his first claim, but find the second worrisome for two reasons. First, if the 'consciousness of shared fate' is a valid requirement for European democracy, then it becomes imperative for European identity to be constructed out of thin air as soon as needed. Second, this claim betrays the ambitions of his own theory of deliberative democracy to be sustainable in a community of strangers who remain strangers.¹² In the 'Declaration', as well as in many of his other recent writings,¹³ Habermas points to 'the reciprocal acknowledgment of the Other in his otherness',¹⁴ yet he goes a long way along the second path in enumerating 'European values' which are shared by all and thus can form the foundation of European identity-as-attachment-to-them: preference for the welfare state, secularisation, a 'keen sense of the dialectic of enlightenment' and 'no naively optimistic expectations about technological progress'. Although I generally share all of these values, they are either far from common (for the almost half a billion citizens living in 27 different Member States!) or have become universal, as Habermas himself acknowledges. In either of the two cases, these values apparently lack the commonality which is necessary to rally the outvoted minority behind the will of the winning majority. He is perhaps most explicit in these constructivist efforts in 'Why Europe',¹⁵ where he promotes the concept of a European 'distinctive form of life'. It is not very clear what it means, yet matched with the social agenda advanced in the same article, it must be quite a thick concept.

¹⁰ Habermas, *The Other* (n 4) 138.

¹¹ Habermas, *The Other* (n 4) 138.

¹² There is a third reason that is not relevant for this paper – if deliberative democracy needs a sense of identity and shared values, apparently it cannot make a normative foundation for a world government.

¹³ For example, see Jürgen Habermas, 'Why Europe Needs a Constitution?' (2001) 11 *New Left Review* 5-26, hereinafter 'Why Europe' in Jürgen Habermas, *The Divided West* (Polity Press 2006). Here is not the place to go into detail to show how the allegedly common values are incompatible with the existing variety in Europe.

¹⁴ Habermas, 'Declaration' (n 7) 294.

¹⁵ Habermas, 'Why Europe' (n 13).

All this is disappointing, because one of the most significant contributions of Habermas to the European democracy debate is his dismissal of the 'no-demos thesis' by showing that the demos is self-constituting and that demos and democracy co-originate in a circular stepwise process: 'the collective identity ... exists neither independent of nor prior to the democratic process from which it springs'¹⁶ and also:

A prior background consensus based on a homogeneous culture is not necessary, because democratically structured opinion- and will-formation *make possible rational agreement even between strangers*.¹⁷

And once again:

It is through the shared will to found a state and, as a consequence of this resolution, through the constitution-founding practice itself that the participants constitute themselves as a nation of citizens.¹⁸

He applies this thesis to the demos-democracy relation after the constitutional moment too, but maintains the need for *a single demos*, self-constituted as it may be, in order to sustain the democracy after it. Indeed, citizens by his account 'constitute themselves as a people, and thereby delimit themselves both socially and territorially from their environment'.¹⁹ He discusses this in further detail in the *Postnational Constellation*, describing a process of historic oscillation between the opening of the existing lifeworlds upon new impulses toward modernisation and then *closing* once more at a higher level.²⁰ But a European polity created in this way will be quasi-national and not post-national, and thus his project for the creation of European identity, albeit thinner than a national one, justly faces the virulent objections of Eurosceptics.

Habermas's reason to stop short of disposing of demos completely is his desire for a more substantial content of democracy.²¹ He needs the constructed new identity not to make the existing Union more democratic (liberally-democratic), but to enable it go farther and to make it socially-democratic (perhaps he would respond to this by denying that such a distinction exists).²² But this is a non-starter: in order to provide ground

¹⁶ Habermas, 'Why Europe' (n 13) 15.

¹⁷ Habermas, *The Other* (n 4) 137-138.

¹⁸ Habermas, *The Other* (n 4) 140.

¹⁹ *The Other* (n 4) 140. In this, Habermas was echoed by Joschka Fisher in his famous speech 'From Confederacy to Federation: Thoughts on the Finality of European Integration', delivered at the Humboldt University in Berlin, 12 May 2000.

²⁰ Jürgen Habermas, *The Postnational Constellation: Political Essays* (MIT Press 2001) 83.

²¹ His craving for solidarity to sustain Europe-wide redistributive policies permeates virtually all of his writings on Europe. The most recent example is his essay 'Is the Development of a European Identity Necessary, and Is It Possible?' in *The Divided West* (n 13).

²² The ongoing crisis with the Greek sovereign debt shows that redistribution may be needed not only for social purposes, but this does not undermine my argument that identity is needed not to democratise governance but to allow for certain substantive goals.

for the problematic redistribution at the European level, Habermas suggests even more problematic identity creation. By doing this, he unites against himself the neo-liberals and the nationalists, enabling their so far separate arguments to reinforce each other.

I will leave him to this double challenge alone, and will focus on the problem with the outvoted minority. It seems that Habermas will agree that the problem appears only from a broader perspective, eg if redistributive decisions of a much larger scale are to be taken. But in the EU of today there are rarely any clear contradictions between immediately identifiable majorities and minorities. For example, in the current debt crisis no one has ever counted *majorities* for or against certain positions (although cleavages between North and South, or thrifty and profligate countries, do appear. In less salient issues, this is even more so, because, in Abromeit's apt description, the Union is:

characterised by 1) various levels (community, member states, sub-national units) as well as 2) various dimensions (territorial and 'functional') of policy making; that combines (3) highly complex formal (institutionalised) as well as (4) equally complex informal ways of decision-making; that binds together, furthermore, (5) actors of varying degrees of 'Europeanization', acting (6) in policy areas of different degrees of Europeanization and (7) with different numbers of participants, agreeing policies (8) under different decision rules.²³

The sheer complexity in such a system helps to avoid the cleavages that the forged European identity is supposed to mitigate – often it is impossible to identify the winners and the losers of the policies. For example, the current bailouts may appear to benefit Greece and Ireland at the expense of Germany, but they also benefit the German banks who were recklessly crediting these countries. Christopher Lord aptly noted that 'it is unsurprising that a great many Union procedures are aimed at avoiding such a clash of majorities'.²⁴ What we can all identify now is a complex web of regulation which is subjected to very limited, if any, critical public scrutiny. The EU legislative process is depoliticised and expert-driven to such an extent that it is impossible to identify the majority, the will or the reason behind the policy a citizen may dislike. Certainly, the popular press is able to 'appoint' winners and losers, but it has never been a champion of accuracy, and the complexity of the EU only makes this easier to do.

In my view, this lack of awareness and understanding is the cause of the democratic deficit, and this is to be overcome with communication

²³ Heidrun Abromeit, *Democracy in Europe: Legitimising Politics in a Non-State Polity* (Berghahn 1998) 8.

²⁴ Christopher Lord, 'New Governance and Post-Parliamentarism' (2004) POLIS Working Paper, School of Politics and International Studies, University of Leeds 7.

in the public sphere, and not by forging identity. Identification with an untransparent (or more precisely incomprehensively transparent) Europe will be no more democratic than identifying with the Charlemagne Empire that preceded it. It is not the outvoting of some, but the alienation of all which is problematic. Therefore, alienation will not be overcome if we all become constitutional patriots, but by fostering debates in the public sphere. Habermas does not notice that this democratic deficit was present from the birth of the EEC²⁵ and hints that for as long as the European integration consisted only of the creation of a common market there was no need to make it more democratic. Yet the problem was there, only it was not seen by the public, and this is hardly surprising as the EEC itself was not noticeable to the public at large either. As I have noted, Habermas ignores the democracy deficit of the EEC because of his more ambitious goal to make the Union social-democratic. So he sees the EEC as a mere tool to bring the prosperity necessary for the national welfare state, and from such a perspective the need for supranational democracy does not exist. Now, as he sees the welfare state threatened by globalisation, the need to socially democratise the Union comes to the fore. And he is right that in order to sustain the redistributive policies dear to him, a European identity must be forged. But making it a *liberal* democracy is a precondition for this.

Here I need to distinguish myself from the common criticism of Union complexity. Let me be clear on this: the complexity of the EU is here for a purpose, and is here to stay. The complexity is not a historical pathology of the Union, but is one of its main virtues, developed to protect the ever-growing diversity of interests in a continent-wide polity. In vain is the European identity commonly advanced to solve this problem as well – this is the line of reasoning of the federalists, to which Habermas arguably can be enlisted, but which is better exemplified by Joschka Fisher.²⁶ Apart from the lack of intellectual imagination, this thesis lacks realism as well. To substitute all the mechanisms of the existing consociational democracy with a federation with parliamentary government requires a very robust sense of identity, much greater than mere constitutional patriotism provides, which (fortunately) is nowhere in sight.

Thus, not identity but complexity is the circle the Union has to square: to find a way to make the European public(s) aware of the substantive

²⁵ Other critics have not missed that: Ian Ward notes that 'Monnet designed a form of administrative governance, for which democracy could only be an undesirable distraction' (Ian Ward, 'Identity and Democracy in the New Europe' in Andrew Scott & Zenon Bankowski (eds), *The European Union and Its Order: The Legal Theory of European Integration* (Blackwell 1999) 198).

²⁶ Fisher (n 19). Perhaps the most recent call for the creation of a United States of Europe was made in 2006 by the former Belgian prime minister and current leader of the liberals in the European Parliament, Guy Verhofstadt.

European policies, to enable them to criticise these policies and to form shared opinions on these substantive issues. I believe that a possible answer is provided by the deliberative democracy theory of Habermas in an attenuated version, ie by the concept of communicative action among strangers who have no special emotions towards the constitution of their community of communication.

The Early Warning Mechanism as a communicative network

Protocol 2 on the Application of the Principles of Subsidiarity and Proportionality attached to the Lisbon Treaty entrusts the national parliaments (NPs) with responsibility, albeit a very limited one, to participate in the general legislative process of the EU.²⁷ The responsibility is for soft control of the compliance of draft community legislation with the subsidiarity principle. According to arts 6 and 7 of the Protocol, all draft legislative acts will be submitted to NPs and they will have eight weeks²⁸ to express objections with reasoned opinions if the proposal violates the principle of subsidiarity.²⁹ If one third³⁰ of the NPs³¹ adopt such opinions, the Commission will have to 'review' it and 'adopt a reasoned decision to maintain, amend or withdraw the draft'. The control is soft, and cannot amount to a 'red card', ie no number of NPs can formally block any legislative proposal.³²

²⁷ Although their involvement was called for by the Protocols on the role of national parliaments attached to the Treaties of Amsterdam and Nice, they did not go beyond providing the NPs with information (which today is published on the internet anyway) and encouraging them to control their own governments on European issues (which they do by virtue of national law in any case). Note also that the Lisbon Treaty provides for prior notification of the NPs when the bridging clause is employed (art 48, section 6 and 7, para 3 of the amended Treaty on EU) and they can effectively veto the decisions approved pursuant to it. While this is relevant for what amounts to treaty amendments rather than a substantial policy issue, this additional power will also result in deeper involvement of the parliaments.

²⁸ The Council and the EP cannot consider the draft before the expiry of this period (art 4 of the Protocol on the Role of National Parliaments).

²⁹ The same mechanism applies to any issue when the draft bill is to be adopted on the ground of the flexibility clause (art 352 of the Treaty on the Functioning of the EU).

³⁰ One quarter of them in cases of proposals in the Area of Freedom, Security and Justice.

³¹ In order to accommodate the bicameralism of some of the MSs, each parliament is given two 'votes', which are to be cast together by unicameral legislatures, and separately by each chamber in bicameral ones.

³² There was such a proposal for the Convention - if a second threshold of two thirds of the NPs is reached, the Commission would be obliged to withdraw the draft legislation - but it was rejected. Instead, the Lisbon Treaty introduced an 'orange card', which provides that if half of the NPs opine negatively and the Commission still wants to maintain the proposal, it must provide a reasoned opinion on the subsidiarity issue and a separate vote must be taken on whether there is compliance with the subsidiarity principle, both in the EP and the Council (ie they may immediately vote it down), before they begin deliberation on the substance of the proposal (art 7, para 3 of the Protocol). For the purposes of the present article, the differences between the effect of the two 'cards', namely the extra votes in the EP and Council, are not relevant and will not be discussed.

The immediate purpose of this mechanism is to give teeth to the subsidiarity principle³³ and provide an institutionalised check on the creeping competences of the Union at the expense of MSs, ie of national parliaments. This new *ex ante* control is of substantial concern to some Member States, especially since so far the subsidiarity principle has been considered to be nonjusticeable. However, if my arguments in the present paper are correct, the effect of the EWM, because of its softness, will be more substantial not in terms of subsidiarity control, but in terms of publicity – in involving the NPs in deliberations of substantive community policies.³⁴

There are several reasons for observers to be sceptical about the prospects of the EWM. The most apparent is the limited time available for the adoption of the reasoned opinions. Although now the time has been extended to 8 weeks from the original 6 proposed in the Constitution, it is still considered too short to allow parliaments any real possibility to make meaningful use of the EWM. The other reason is the observable apathy of the NPs to engage in matters of substantive European policies. Students of parliaments in Europe have identified a number of rational disincentives, the most important of which are the ‘executive dominance’ common for all parliamentary systems and the classical tenet that the function of a parliament is not to engage in governance but only to hold the government to account. There are plenty of studies confirming these views empirically, and there is the telling example of COSAC which, during its two decades of existence, is all but redundant and virtually unnoticed even by academics.³⁵ The third reason for scepticism is the lack of resources of NPs. Even if the parliaments wish to engage, they need significant administrative and expert capacity for meaningful engagement in substantive European issues, which is nowhere the case. The fourth reason is that the control provided by the EWM is limited to subsidiarity

³³ It is noteworthy that the EWM is stipulated in the Protocol on the Principles of Subsidiarity and Proportionality, and not in the Protocol on the Role of National Parliaments.

³⁴ This is not to say that its impact on subsidiarity will not be significant. Even though it is not discussed here, it may prove to be much ‘harder’ than expected: Michael Dougan suggests the possibility of subtle interplay between the national parliaments and the ECJ: ‘With such a wealth of material [provided by parliaments’ reasoned opinions], argumentation over subsidiarity could metamorphose from the politically subjective into the readily justiciable’ (Michael Dougan, ‘The Treaty of Lisbon 2007: Winning Minds, Not Hearts’ (2008) 45 CML Rev 661). Similarly, Wyatt suggests that by the yellow card mechanism the NP *in tandem* with the ECJ can become an effective check on the EU legislation but can also ‘enhance the sense of ownership of the European project at the national level’ (Derrick Wyatt, ‘Could a “Yellow Card” for National Parliaments Strengthen Judicial as well as Political Policing of Subsidiarity?’ (2006) 2 Croatian Yearbook of European Law & Policy 1).

³⁵ COSAC stands for the Conference of Community and European Affairs Committees of Parliaments of the European Union. It consists of members of the national parliaments which meet biannually, and was charged by the Treaty of Amsterdam to make contributions to the community institutions ‘in particular on the basis of draft legal texts’.

issues only. Even though under this guise many substantive objections may be raised, this still unduly blunts an edge whose sharpness is yet to be seen. Finally, this control is bound to be negative, and there is no way for NPs to make any positive proposal at any stage of the process.

However, there are reasons to expect the EWM to work, too. The first is that the voice of the NPs is not weighted in the counting towards the threshold. Thus, the governments of small Member States who fear being outvoted in the Council may choose to use the NP they dominate to oppose the proposal. Second, the votes of the second chambers, which are usually sidelined in the domestic legislative process, are now equalised, so this European mechanism may tempt some of their members to employ it for domestic purposes. This becomes all the more important having in mind that executive dominance is characteristic only of the chambers which elect and sustain the government, while the chambers which have no such responsibilities are free to seize this opportunity for engagement.³⁶ Third, a government may choose to improve its bargaining position in the Council by having its parliament publicly committing it to a certain position.³⁷ Fourth, the short deadline may indeed preclude most of the incentives of the NPs, but as a result the parliaments will have their say *before* the government minister expresses his or her position, and perhaps even before the government forms any position at all.³⁸ Last, with regard to the prevailing consensual mode of decision-making

³⁶ Indeed, on the basis of the data from the subsidiarity checks organised by COSAC during 2005-2009, Kaczynski found that: 'Tellingly, in bicameral systems the national senates are usually more active than national lower chambers' (see Piotr Maciej Kaczynski, 'Paper Tigers or Sleeping Beauties? National Parliaments in the Post-Lisbon European Political System (CEPS Special Report, February 2001)).

³⁷ Bargaining theory confirms both with abstract models and with empirical experiments that the credible prior commitment of one party to a certain outcome improves its bargaining position. However, this may be counterproductive – the public commitment made by the parliament may hinder the chances for the minister to exchange his or her support on this issue for support for another issue that is more important for the state. The latter rationale may discourage ministers from using parliaments strategically, yet if they do use them, the effect can be to have less log-rolling and more principled decision-making in the Council.

³⁸ Such a race of parliament with government may look as hopeless as the race of the proverbial tortoise with Achilles, yet one should bear in mind that many decisions (up to 90%, according to M Mattila quoted by Ana Fraga, 'After the Convention: The Future Role of National Parliaments in the European Union (And the Day after ... Nothing Will Happen)' (2005) 11 *Journal of Legislative Studies*) are made not by ministers in the Council, but by senior public officials in COREPER and the working parties which precede it. While Fraga notes this as a reason for the hopelessness of parliamentary involvement, it may work both ways. Frank Häge suggests that one of the reasons for bureaucrats not to agree on a bill in COREPER/working parties and to push it up to ministerial level (B item on the Council agenda) is their being uncertain about the position of their minister (Frank M Häge, 'Politicizing Council Decision-making: The Effect of EP Empowerment' (paper presented at the Legislators of Europe EUI SPS Workshop, April 2009)). If informed by a formal opinion of their national parliament, national bureaucrats can start behaving in ways yet unseen.

in the Council (even where qualified majority voting is the formal rule)³⁹ it is highly probable that a series of well-grounded negative opinions from one third of the NPs will be sufficiently persuasive for a few ministers to change their mind and vote down the proposal, even if most of the other power players choose to ignore them.⁴⁰ Dougan recognises that:

if a sufficient number of national parliaments were to register serious objections to a given legislative proposal on subsidiarity grounds, the political costs for the Union institutions of simply ignoring that opposition – or at least, of doing so on any sort of regular basis – would be severe.⁴¹

For all these reasons, I am inclined to think that the EWM will provide sufficient incentive for NPs to engage at least occasionally in substantive discussions on draft European legislation. Even if the resources of the NPs, which will remain limited, make their actual interventions rare, it is sufficient for a single such precedent to substantially change the European legislative process and place it under the shadow of the EWM. It should also be noted that even if these incentives for the NPs do not work all the way down to the actual adoption of reasoned opinion and that the parliament ultimately abandons the issue, misses the deadline or defers to the government, it will still make a huge difference if this was done after a robust deliberation on the substance of the European issue in the national public space. Even when nothing happens in terms of power politics, there may be a significant difference in terms of public resonance. The experience of the Select Committees of the House of Commons is a good example of this: they were introduced in 1979 for the purpose of ‘redressing’ the balance of power in the UK, they made no impact on the power balance, yet because of their publicity-related functions they were considered a success.⁴²

³⁹ For a recent empirical study, see Daniel Naurin & Helen Wallace, *Unveiling the Council of the European Union: Games Governments Play in Brussels* (Palgrave Macmillan 2008).

⁴⁰ Further to these reasons, we may consider the decision of the German Constitutional Court on the constitutionality of the Lisbon Treaty, which made use of several of its procedures (bridging clauses and the flexibility clause) dependent on prior authorisation of the Bundestag in each particular case, which guarantees its greater involvement with the respective issues (BVerfG, Judgment of 30 June 2009).

⁴¹ Dougan (n 34) 658.

⁴² The Convention itself is another example of the soft power of deliberative democratic institutions: the Convention did not have *any* substantive powers (and was composed predominantly of members of national parliaments with all their usual disincentives), yet the Constitution drafted by it was adopted by the governments with almost no changes (and despite the fierce opposition of one veto player – the Polish government). The power of the Convention was only in its openness to the public and its ability to focus public attention in all Member States. Its deliberations were closely followed by the media across all countries, and it managed to mobilise public expectations for support of its project, creating a true ‘constitutional momentum’.

What has been left out of the discussion so far is the need for a considerable amount of *concerted* action of NPs to reach the threshold if the EWM is to take off. This is the critical premise, which may either lead to the generation of a European communicative *network*, or may make the EWM completely redundant. The EWM is the best institutional *incentive* one can provide for NPs to cooperate with each other, but whether they will actually pick it remains to be seen. A note of scepticism is necessary here: in order to be able to use the mechanism, parliaments have to invest considerable resources, with the burden placed on the first mover. So, they will be tempted to wait for the reasoned opinions of their peers and join by copy-pasting them, which would naturally lead to the inaction of all. Yet, it is quite likely that there will be a few entrepreneurial chambers⁴³ to launch the process and enable all to realise the extent of their new power. Still, if there are several initial failures, the EWM will probably be abandoned. The comparison with COSAC, which is largely ignored, bodes ill, but it should be noted that COSAC does not have any of the initiatives available through the EWM.⁴⁴

Let me be clear: even if the NPs pick the incentive provided by the EWM, this will not change significantly the institutional balance and the relative weight of NPs, either in the EU or regarding their own governments. The only thing we can expect the NPs to do is to engage seriously in debates on substantive European issues, which so far they rationally ignore. And this is all we need to bring Europe home and, to paraphrase Leo Amery's oft-quoted summary of the functions of the British Parliament, to '*secure full discussion and ventilation of all matters*'⁴⁵ of European interest. This is echoed today by Francesco Rizzuto:

In the absence of Union-wide mechanisms to aggregate and articulate political choices, the legitimacy of the European Union will only be enhanced effectively if national constitutional norms, procedures and political practices are modified to render the EU/member state interface more *visible*⁴⁶

and also by Michael Dougan, who notes that the new responsibility of the NPs 'could increase the accountability and legitimacy of the EU's lawmaking bodies, and enhance in an unprecedented way the sense of

⁴³ Ironically, the parliaments of the most Eurosceptic countries may be expected to make the biggest contribution to the generation of the European communicative network.

⁴⁴ The EWM can raise the importance of COSAC as well. Even though its meetings will continue to have no substantive output, they are the most likely place for the members of the national parliament to develop the necessary network capital.

⁴⁵ Leo Amery, in an oft-quoted description of the function of the British parliament (Leo Amery, *Thoughts on the Constitution* (OUP 1947) 12).

⁴⁶ Francesco Rizzuto, 'National Parliaments and the European Union: Part of the Problem or Part of the Solution to the Democratic Deficit in the European Constitutional Settlement?' (2003) 9 *Journal of Legislative Studies* 106 (emphasis added).

“ownership” of the European project at national level’.⁴⁷ Ana Fraga, who is otherwise very sceptical about the EWM (and indeed about other proposals for the involvement of NPs discussed at the Convention), also recognises that:

by setting a threshold for the number of parliaments’ votes, together with the requirement to provide reasoned opinions, [the EWM] creates incentives for a greater exchange of information between the NPs, as each parliament will need information if one of the others is planning to submit an opinion stating that the incentive breaches the principle of subsidiarity.⁴⁸

More generally, Thomas Risse takes note of

[the] general agreement that modern democracies rely upon multiple channels of intermediation between private actors in civil society and public authorities in order to insure the legitimacy and effectiveness of governance.⁴⁹

One such important transnational channel is expected to emerge if the NPs engage in a network of communication and if this leads to the development of an overarching public sphere. It should be remembered that the reasoned opinions are to be negative, ie they will promote precisely *critical* public opinion, and they will enable the network of parliaments to become the ‘critical authority’ which ‘subjects to publicity’ the exercise of political and social power by the EU.⁵⁰ This critical and transnational public discourse is what legitimises the rulemaking. According to Habermas, the critical condition for democracy to exist is the availability of communication structures at every level of opinion- and will-formation, and law- and policy-making:

if discourses ... are the site where a rational will can take shape, then the legitimacy of law ultimately depends on a *communicative arrangement*: as participants in rational discourses, consociates under law must be able to examine whether a contested norm meets with, or could meet with, the agreement of all those possibly affected.⁵¹

In my reading of Habermas in the preceding section, all we need is for the citizens of Europe to ‘have at their prior disposal the social perspective of a practical reason that *tests laws*’.⁵² This critical exami-

⁴⁷ Dougan (n 34) 659.

⁴⁸ Fraga (n 38) 499.

⁴⁹ Thomas Risse, ‘An Emerging European Public Sphere? Theoretical Clarifications and Empirical Indicators’ (paper presented at the Annual Meeting of the European Union Studies Association (EUSA) 2003) 2.

⁵⁰ Habermas, *Public Sphere* (n 4) 236.

⁵¹ Habermas, *BFN* (n 4) 103-104 (emphasis added).

⁵² Habermas, *BFN* (n 4) 93 (emphasis added).

nation of European legislation by concerned publics has so far been missing in the EU. This critical testing can happen in two mutually enforcing modes – in formal institutions like the European Parliament or NPs, as well as in the media. Given the central place the parliaments still occupy in national public spaces and the media attention they still enjoy, it is a fair assumption that if parliaments communicate in the institutional network provided by the EWM, the development of intense communication among the national public in the informal media network will follow. In several recent studies, Thomas Risse and his collaborators found some evidence for the emergence of a European public sphere ('common meaning structures and frames of reference' in the media debates⁵³), but so far it has been very thin. Thus, the EU remains elitist and undemocratic.

Of the many reasons which have so far obstructed the development of the paneuropean public sphere, there is one that deserves particular attention and it is the insulation of NPs from each other. Hanna Arendt notes that the very enclosure of the Greek *polis* by walls created the *agora* – a protected domestic space 'where free men could meet as peers on any occasion' and that the 'public space does not become political until it is secured within a city, is bound'.⁵⁴ Similarly, modern democracy developed within the enclosing borders of the emergent nation states. Thus, nowadays, established national public spaces tend to enclose themselves against external, ie European, influences in an act of self-protection. The modest promise of the EWM is to penetrate these impermeable national public spheres; a more ambitious one is to create a virtual agora, where MPs from various Member States can meet as peers on any occasion.

Demos or demoï: communicative network and shared culture

The reasons why the EWM should work as elaborated in the preceding section allow me for this section to assume counterfactually that the EWM has already taken off, in order to compare the advantages of a communicative network of *demoï* to those of the single public sphere of a *demos* (the latter being no less counterfactual). A smoothly working EWM would mean that (1) NPs engage in debates of at least some *substantive* European legislation; (2) this engagement of the NPs has prompted rather robust discussion on these issues in national public spheres; and (3) on these issues there is considerable transnational exchange of arguments between NPs and the media. If these assumptions hold, it will

⁵³ Risse (n 49) 3. See also Marianne van de Steeg & Thomas Risse, 'The Emergence of a European Community of Communication (2007) Working Paper' <<http://www.isn.ethz.ch/isn/Digital-Library/Publications/Detail/?ots591=0C54E3B3-1E9C-BE1E-2C24-A6A8C7060233&lng=en&id=31385>> accessed 15 September 2011.

⁵⁴ Hannah Arendt, *The Promise of Politics* (Schocken Books 2007) 123.

follow that *some* genuine European issues will be identified, possibly in a single public sphere and debated in several public spheres in generalised (ie non-parochial) terms. The question that arises here is whether the existence of such a network for transnational communication and criticism is premised on the existence of common values and identity. Certainly, communication may be catalysed by common values and identity, but can it flourish without them?

The theory of deliberative democracy seems to provide ground for a positive answer, with Habermas himself noting that government by common public opinion is possible when

the same themes ... acquire simultaneously the same relevance for a large public that remained anonymous and ... spur citizens separated by great distances to make spontaneous contributions. This process gives rise to public opinions that aggregate themes and attitudes to the point where they exercise political influence.⁵⁵

Remarkably, he emphasises the need for 'a network that gives citizens of all member states an equal opportunity to take part in an encompassing process of focused political communication' which requires on one hand 'institutionalised deliberation and decision-making within parliaments' and on the other 'an inclusive process of informal mass communication'.⁵⁶ Indeed, he speaks about a European public sphere in the singular but most importantly he defines it in *functional* terms, so it may very well have functional equivalents in other forms. If a single identity-based EU-wide public sphere is not possible or not desirable, its function may be taken by an institutionalised deliberative network around which a web of informal transnational channels develops to connect the simultaneous discourses in the national public spheres. There is precious little evidence that the second is possible and already happening (albeit to a very limited extent) – Risse's studies of media reporting on particular European issues showed a high degree of similarity in the way 'the same European themes are discussed at the same time at similar levels of attention across national public spheres', although the overall attention paid to these issues remains low in comparison with the national topics: 'People do not talk about Europe that often, but if and when they do, they establish a *community of communication* across borders'.⁵⁷

These deliberations on European issues which transcend the single domestic public sphere and take place in separate but simultaneous spaces that are still nationally centred, I believe, are both more likely and more desirable for democracy in Europe. They would constitute a

⁵⁵ Habermas, *The Other* (n 4) 153.

⁵⁶ Habermas, 'Why Europe' (n 13) 17.

⁵⁷ Risse (n 49) 9 (emphasis added).

demoi-cracy – a polity of multiple communities, which is ‘realized through interlinked procedures and multiple participations of citizens’.⁵⁸ Thus, *demoi*-cracy is different from federation and confederation in that it provides an institutionalised network where citizens from distinct *demoi* deliberate together horizontally across borders. Only such a network would allow the many *demoi* to ‘turn relevant societal problems into topics of concern’.⁵⁹ So far, most European problems have been identified and solved by a black-boxed entity referred to as ‘Brussels’, and even though it is doing relatively well in terms of output, it remains remote; what is missing is communication with citizens. Citizens cannot have democratic input on decision-making, nor can they hear the justification, nor can they challenge this justification in a public forum. Calls for intensified deliberations between European institutions and citizens are common, but vertical solutions would work in a state (or federation); what is needed is horizontal deliberations among citizens with regard to European policies.⁶⁰

Habermas stands very close to this vision when noting that the real advance towards a European ‘sphere of publics’ would be ‘the national media to cover the substance of relevant controversies in the other countries’.⁶¹ The EWM should be good on this, as NPs, to mobilise the support of their peers across borders, will have to find a way to communicate their domestic concerns to them. Unlike governments, who also need support in Council votes, parliaments are unable to speak with a single voice in private, so all interests will be present in the discussion, and all arguments subjected to public scrutiny.

In the famous ‘Declaration’, as well as in many of his other recent papers, Habermas maintains that the ‘shared political culture’ is another condition for this model to work. If he meant culture in a weak sense (recognition of the other, of the rule of law and other basic principles of democracy) it is a *sine qua non* indeed, but to this extent it is already available. If political culture is taken in any stronger sense, its necessity must be justified, and generally there are two ways. The first is the dis-

⁵⁸ Francis Cheneval and Frank Schimmelfenning, ‘The Case for Demoicracy in the EU’ (paper presented at the European Union Studies Association Conference, Boston, March 2011) <http://euce.org/eusa/2011/papers/8h_cheneval.pdf> accessed 15 September 2011. For a comprehensive discussion of the meaning and the theoretical background of the concept of *demoi*-cracy, see Jan-Werner Müller, ‘The Promise of “Demoi-Cracy”: Democracy, Diversity, and Domination in the European Public Order’ in Jürgen Neyer and Antije Wiener (eds.) *Political Theory of the European Union* (OUP, 2010).

⁵⁹ Habermas, ‘Why Europe’ (n 13) 18.

⁶⁰ Ironically, the key to more democracy in the EU lies in the national political systems. Cheneval and Schimmelfenning rightly point out that the EU is approaching the standards for *demoi*-cracy, but the *demoi*-cratic deficit is at the national level. See Cheneval and Schimmelfenning (n 58),

⁶¹ Habermas, ‘Why Europe’ (n 13) 18.

cussed need for a degree of solidarity among citizens which can make a European social democracy possible. Legitimate or desirable as it may be, it was argued above that this is a separate goal, contingent and posterior to the European liberal democracy. The second justification is that the shared culture is instrumental to enable the communication itself. In the remainder of this section I will discuss this latter rationale.

Shared culture matters. The existing shared traditions and civic culture do enable understanding and agreement between people and this is precisely why the existing identities direct public debates to the national fora and not to the European forum. Hence, even in the longer run, any switch of the limited attention people pay to politics in a 'European' direction is unlikely. A possible parliamentarisation of the EU will not create European public space comparable to national public spaces around local parliaments any time soon.

Thus, the EU appears to be quite a unique polity which must provide governance at one level, while the citizens affected by that governance scrutinise it together, if at all, at another level. Still, this should not be a problem – if European-level issues are discussed at the national level in terms of the European level. Alas, currently European issues are discussed at the national level but only in national terms. This parochialism is allowed by the closed borders of national public spheres. Now, the political leaders do not *need* to speak to the citizens of the other states and that is why they do not need to frame their arguments in European rather than national terms. It turns out that the robust parochial discourse in the national public spheres chokes the nascent discourse in the emerging European public sphere. This problem was recognised from as early as the Amsterdam Treaty, and its Protocol on the Role of National Parliaments was an attempt to engage the national publics in discussion on matters of EU governance. This attempt did not deliver, and the robust debates are still going on, mostly within the public spheres of Member States on national issues. If nations are, and if they remain, the main deliberating fora, then it seems natural to devise institutional ways to bring into them European issues in European terms, rather than construct new spaces or identities to compete with them. The Early Warning Mechanism provides one possible way to square this circle – to employ the potency of national discourses to deliberate on EU governance, and, conversely, to make national discussions heard Europe-wide.⁶² Whether this mechanism will succeed in bringing democracy to the EU 'depen-

⁶² The Lisbon judgment of the German Constitutional Court (see note 38 above) can be seen both as protective of the national public sphere against the transfer of influence to Europe, but also as bringing European discourse home by requiring the involvement of the Bundestag with European issues on an *ad hoc* basis, especially in the case of employment of the flexibility clause.

ds not on a *collectively acting citizenry* but on the institutionalization of the corresponding *procedures and conditions of communication*, as well as on the interplay of institutionalized deliberative processes with informally constituted public opinions'.⁶³ And these are Habermas's words, not mine.

The advantage of this idea in comparison to the constructivist project is that in this way the EU and Member States can, instead of competing, build upon each other. As Nicolaidis suggests: 'Contrary to the fears of many supranationalists ... national level democratic control over the expansion of EU powers does not mean "less" Europe'.⁶⁴ Democratic control over the *exercise* of EU powers means 'more' Europe, as it brings the European issues into the most robust public spheres available so that they will affect the opinions that are *formed* in these spheres. Thus, European citizens will be actively participating in European governance by virtue of their participation in democratic processes at national level.⁶⁵

It should be noted that even though identity may not necessarily be a *sine qua non* for public deliberation of matters of common governance, it greatly facilitates the discourse and this is precisely why the existing national public spheres successfully compete with the nascent European one despite the institutional promotion of the latter. The reason is simple - within a national public sphere, there is no reason for the discussion to be focused on the most pressing European issue, and even if this happens the issue need not be discussed in generalised (other-regarding) terms. Even in the Member States where extensive control of national parliaments already exists (eg in Scandinavian ones), it does not require cooperation with other national parliaments, so their discussions may remain parochial. What is necessary for the discourse started in one national public sphere to transcend it is for it to be phrased in such a way as to be understandable to the citizens in the other public spheres, ie to be phrased according to 'common meaning structures and frames of reference', in Risse's terms. He calls the communities which have developed such frames of references which facilitate understanding 'communities of meaning' and has found evidence for the emergence of such a community of communication in Europe. The introduced notion of communicative communities is not a new guise for identity construction: community is meant here only in an epistemological sense: a group of people who are able to understand each other. They need not agree on anything of sub-

⁶³ Habermas, *BFN* (n 4) 298 (emphasis added).

⁶⁴ Kalypso Nicolaidis & Stephen Weatherill (eds), *Whose Europe? National Models and the Constitution of the European Union* (OUP 2003) 145.

⁶⁵ It should also be noted that the promise of the EWM is that the critical discourse in national parliaments is not only robust but also inclusive, as inclusive as the *demoi* are in the Member States.

stance, but the only thing necessary is that citizens are mutually aware of each other's viewpoints. Risse calls this 'identity' light, 'since it does not imply a deep sense of loyalty toward each other'.⁶⁶

It should also be noted that even if this community of communication develops further in the course of future European deliberations, it will always remain much weaker than the national communities of communication, which are in a much better competitive position along this epistemic dimension as well. That is why the NPs will remain the proper fora for public deliberation on substantive European issues even in the long run. If the European demos is taken to mean citizens discussing *together* issues of public interest, it will hardly ever come into existence. Therefore, any solution of the democratic deficit should involve retaining the central role of NPs, where citizens do talk together, and finding an effective institutional device to link them in such a way that people start listening to each other across the existing boundaries. Now I turn to the EWM again to discuss whether it can become such a device in the light of its first year in force.

The first year(s): half full or half empty?

After elaborating why the EWM and NPs would make a difference, I now turn to the empirical evidence on whether they do have any impact. So far, there has been little evidence that the expected collaboration even begins to happen. As of 1 June 2011, there has not been a single case where a yellow card was raised to a legislative draft. The Commission proudly takes this as proof that its proposals conform to the subsidiarity principle, but the more realistic explanation is that the EWM has not delivered *yet*.

Of course, one and a half years is a period too short for any conclusion to be drawn, but we should have in mind that the first experiments with the mechanism started well before its formal introduction with the Treaty of Lisbon. On the other hand, during that period, quite a number of initiatives started and reasoned opinions were issued even if the card threshold was never met.

COSAC started experimenting with the EWM in 2005 in the aftermath of the Convention. It selected several legislative proposals which were distributed to the NPs, which adopted reasoned opinions. There were eight such checks; the highest participation rate was in 2009 when 36 (out of 40) chambers from 25 Member States delivered opinions (of these, only

⁶⁶ It is true that, as Risse notes, 'the more we debate issues, the more we engage each other in our public discourses, the more we actually create political communities'. However, this may be the eventual long-term result of the communication, and by no means its precondition.

one was negative). The highest rejection rate was in the first check (2005) when 15 (out of 50) opinions found a violation of the subsidiary principle. These experiments are considered to be generally successful and show that the NPs have the capacity to engage in scrutiny of substantive (and quite technical!) EU legislation. What is more important for the argument advanced here is that they have *collaborated* to enhance their capacities. NPs have also established a specialised system for electronic information exchange – the Inter-parliamentary EU Information Exchange (IPEX) and now use it to inform each other when a chamber is subjecting a certain European bill to a subsidiary check. The other way for coordination is the regular Monday Morning Meetings of the representatives of NPs in Brussels.⁶⁷ There is one noteworthy internal limitation that most of the NPs have not overcome – in most chambers the final decision on the reasoned opinion must be adopted by the full plenary or after a cycle of consultations between various committees, which delays the process.⁶⁸

The second way the NPs were involved in substantive EU policy-making before the EWM entered into force was the so-called Barroso initiative. In 2006, the Commission undertook⁶⁹ to forward to the NPs all draft bills and consultation papers and invited them to express their opinions on them. The invited opinions were not to be limited to subsidiarity alone, but could raise any substantive issues.⁷⁰

Jans and Piedrafita noted that some NPs have quite actively exploited the opportunities for involvement and since 2005 the Commission has received 450 opinions from 33 chambers from 24 Member States.⁷¹ More importantly, the number of submissions is increasing with time. The Commission cared to respond to about 100 of them, yet an actual difference made by such a submission is yet to be seen. As suggested here, the absence of an observable policy change resulting from a submission is not a huge problem, as it is the involvement of NPs which is valuable *per se*. Yet, if this tendency continues, the parliamentarians (and their constituencies) who cannot see the impact of their opinions will cease to submit them. If in future *this* turns out to be a problem, the incentive of NPs to become involved can be strengthened through the introduction of a ‘red card’ mechanism triggered by a higher majority. In such a case, stalemate should not be feared because if the threshold for a yellow card

⁶⁷ See Kaczynski (n 36) 11.

⁶⁸ *ibid.*

⁶⁹ Commission, ‘A Citizens’ Agenda – Delivering Results for Europe’ COM (2006) 211 final.

⁷⁰ After the Lisbon Treaty entered into force, COSAC discontinued its experiments, but the Barroso initiative is supposedly still operational (although I could find no evidence of the NPs using it outside the subsidiarity checks pursuant to EWM).

⁷¹ See Theo Jans and Sonia Piedrafita, ‘The Role of National Parliaments in European Decision-Making’ EIPASCOPE 2009/1.

is reached only too rarely, the red card will be even rarer. However, the hint of a possibility for such serious consequences will motivate both the NPs and the Community institutions to engage substantively with the drafts through the EWM.⁷²

The first year of experience with the EWM itself was not so successful: 'only 59% of the scrutiny processes initiated were completed on time'.⁷³ There were two cases when enough NPs initiated a scrutiny procedure to raise a yellow card. However, most of them could not deliver the opinions on time, so they actually reached only 11% and 13% of the necessary votes. Kaczynski's conclusion is that 'both cases have shown that the real capacity (not virtual as in the try-outs) to produce a reasoned opinion claiming a subsidiarity breach is questionable'.⁷⁴

What was more disappointing for the expectations elaborated above was that even if some of the parliaments engaged fairly intensively with subsidiarity checks, they did so individually and did not coordinate with each other. Their failure to communicate together suggests that the COSAC experiments were successful because they were initiated and orchestrated by its secretariat. Worse still, relative success in those cases might suggest that at least some institutional capacity was available, so what was missing was the initiative. Looking on the bright side, there were two cases when the incentive was sufficient for 16 and 20 parliaments to start the procedure,⁷⁵ yet the capacity to finish on time (without orchestration) was missing. Thus, the most immediate explanation of the modest results of the first year is that the eight weeks that NPs have to adopt their opinion is too short for a parliament to react. However, it is much longer in practice as the drafts are forwarded to each NP *after* they have been translated, while the MPs use the English version in the meantime.

Another explanation is that subsidiarity is too narrow an issue, and this is often deplored both by academia and the NPs themselves. Philip Norton,⁷⁶ the House of Lords⁷⁷ and several other parliaments have voiced

⁷² Similarly, Raunio argues that the introduction of the red card would allow national MPs to take the EWM seriously. (Tapio Raunio, 'Destined for Irrelevance? Subsidiarity Control by National Parliaments' (2010) Elcano Royal Institute, Madrid, Working Paper 36/2010.

⁷³ Kaczynski (n 36) 11.

⁷⁴ Kaczynski (n 36) 13.

⁷⁵ With 18 and 25 votes amounting to 33% and 46% respectively. Data provided by Kaczynski (n 36) 13.

⁷⁶ Philip Norton, 'National Parliaments and the Lisbon Treaty' (The Norton View, 12 February 2011) <<http://nortonview.wordpress.com/2011/02/12/national-parliaments-and-the-lisbon-treaty/>> accessed 15 September 2011.

⁷⁷ European Union Committee, *The EU Reform Treaty: Work in Progress* (HL 2006-07, 180) <<http://www.publications.parliament.uk/pa/ld200607/ldselect/1deucom/180/18002.htm>> accessed 15 September 2011.

the opinion that NPs are actually more concerned with violations of the *proportionality* principle and there is no reason for scrutiny of the two to be separated.⁷⁸ In other cases, NPs voiced their confusion concerning what subsidiarity is. I still maintain, as suggested earlier, that the fuzziness of the term can be exploited by the NPs and that it allows them to opine on anything. Apparently, however, this may happen only after they come to terms with using it.

An even more pertinent explanation is the inertia of both MPs and bureaucracy. One and a half years is quite insufficient for both to learn how to use the mechanism. Adam Lazowski provides telling examples of the struggle of European bureaucracy to publish new legislation in the Official Journal in the languages of the new Member States for quite some time after their accession.⁷⁹ The use of the EWM seems more complicated, so the learning process can be expected to take longer. Indeed, it might be a matter of learning - Kaczynski observes that 'the existing trend of growing communication between the Commission and national parliaments ... can suggest a growing awareness in some of national parliaments about the possibilities of influencing the EU decision-making process'.⁸⁰ Of course, the danger is that if learning takes too long, the impetus of the new may be lost and the EWM forgotten.

Yet another explanation – a worrisome one – is that NPs are already disappointed at the lack of impact of their positions. Norton bitterly notes that the experience the NPs have already had within the Barroso initiative has been counterproductive as, even though some of them were regularly submitting observations, these had no impact on the legislation at all.⁸¹ The EWM, like many other novelties, is facing a chicken and egg problem – in order to make a difference, NPs have to actively engage in the scrutiny of draft legislation, but the MPs will engage only if they expect to make a difference (so that they can impress their constituencies). This is well understood by the House of Lords which noted in one report that:

the raising of a yellow card would have a significant effect on the EU institutions ... if national parliaments operate the mechanism effec-

⁷⁸ In my view, the reason is that observance of proportionality is believed to be effectively controlled by courts, while subsidiarity has always been considered to be nonjusticiable and unenforceable in practice. Thus, the Convention struggled to find a solution to this problem and came up with the EWM.

⁷⁹ Adam Lazowski, 'The Absorption Capacity of the European Union and Lisbon Treaty' (presentation at the Jean Monnet seminar 'Advanced Issues of European Law', Dubrovnik, April 2011).

⁸⁰ Kaczynski (n 36) 13.

⁸¹ Norton (n 76). Yet he seems optimistic: 'The way forward, in my view, is the bottom-up approach, with like-minded national parliaments getting together and doing so not only with regard to draft legislative proposals but also at a much earlier stage and seeking to influence the agenda rather than simply waiting to see what comes along'.

tively it would be hard for the Commission and the Council to resist such a sustained political pressure.⁸²

Finally, the most unfortunate explanation for the so-far modest results is that European citizens are disinterested in substantive EU policy issues and this is why institutional mechanisms such as the EWM will be insufficient to incentivise their representatives to engage in them. If this is the case, the prospects for bringing the Union closer to its citizens look much grimmer. Indeed, the mechanism relies too much on the MPs⁸³ who must be very entrepreneurial to venture into the EWM. Jans and Piedrafita note that ‘the ability of individual MPs to influence European policies is extremely limited and a strong focus on EU affairs may not be instrumental in attracting voters’, yet they hope that ‘*l’appetit s’accroît en mangeant*’.⁸⁴ If the argument of this article that engagement through the NPs is the only avenue for the democratisation of the EU is correct, we should hope that the interest of both MPs and the public may increase over time. At the very least, if the tendency for increased involvement remains, ‘there would be less room for political anti-Brussels accusations, as *politically* the national parliaments would now be co-responsible for the European legislation’.⁸⁵ The source of his optimism is the fact that so far at least some of the NPs have exhibited an appetite for involvement. With a little more temperate optimism, it is also observed that ‘in the long run, this could ... make it harder for national governments to play the “parliamentary card” when meeting their colleagues in Brussels’.⁸⁶ Thus, at the very least, if the EWM remains redundant and does not foster inter-parliamentary communication, its very existence may reduce the opportunities for shifting responsibilities which fuel Euroscepticism.

⁸² European Union Committee, *Strengthening National Parliamentary Scrutiny of the EU – the Constitution’s Subsidiarity Early Warning Mechanism* (HL 2004-05, 101), quoted in Wyatt (n 34) 12.

⁸³ And especially on those from the opposition, since those from the government majority may have better channels for policy influence.

⁸⁴ Jans and Piedrafita (n 71). Further, they note that even if all of the available mechanisms for involvement are weak, ‘if we consider the combined effect of the different avenues in a dynamic perspective, they may jointly trigger a reassertion of national parliamentary influence in the European policy process’.

⁸⁵ Kaczynski (n 36) 14. Similarly, Wyatt suggests that the ECJ may interpret the lack of a yellow card by the NPs as their implicit endorsement of the draft legislation as far as subsidiarity is concerned (Wyatt (n 34) 12).

⁸⁶ Bruno de Witte, Alexander Trechsel, Dragana Damijanovic, Elin Hellquist, Joseph Hien, Paolo Ponzano, ‘Legislating after Lisbon: New Opportunities for the EP (2010) EUDO study <<http://www.eui.eu/Projects/EUDO/Documents/EUDO-LegislatingafterLisbon%28SD%29.pdf>> accessed 29 June 2011.

Conclusion

In Karen Schiele's phrase, the EU suffers from adherence to the concept of nation-state, and Habermas has not overcome this concept. He deconstructs the concept of demos-nation, but only to call for its reconstruction in a broader and thinner version at a European level. This is empirically difficult, as nations are here to stay, and theoretically disappointingly modest. His concept is supranationalist, and all that it can deliver is the re-creation of the nation on a larger scale. Habermas acknowledges this modesty – 'the challenge before us is not to *invent* anything but to *conserve* the great democratic achievements of the European nation-state, beyond its own limits'.⁸⁷ I believe the Early Warning Mechanism introduced by the Lisbon Treaty promotes a truly postnationalist option by allowing complete separation of the ideas of demos and democracy. The EWM may be not sufficient, or may remain redundant, yet it is a step in the right direction, while the constructivist project is not.

Beyond the EWM, in this article I have argued for the possibility of *demosi*-cracy: a truly postnationalist democracy, where discourses are not mediated by nationality, even though for the time being they will remain clustered in nation-centred public spheres (and to a certain extent will be mediated by nation-centred political parties). To the extent that communication transcends national spheres, the democratic deficit of the EU will be overcome.

A more sweeping conclusion is that democracy is impossible, not without (single) demos, but without shared space and robust public discourse on the general issues of common interest, and the demos should be conceived as the most common public space. However, if the cosiness of a single space is not available, a network will do. Habermas is right that on 15 February 2003 the European Public Sphere was born, but not because of the displayed unity of values, but because the same European theme was discussed at the same time with the same level of attention across national public spheres, and the level of attention was the highest one. Here it is suggested that a *demosi*-cracy, an institutionalised network where many *demosi* deliberate together, can make such so-far sporadic events a matter of course. It is unclear yet whether the Early Warning Mechanism can bring this about, as it is a means that has never been tried. But the purpose is also to achieve something that has never been done.

⁸⁷ Habermas, 'Why Europe' (n 13) 6.