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LISBON TREATY AND THE POSSIBILITY OF A  
EUROPEAN NETWORK *DEMOI-CRACY*

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## **Abstract**

The paper discusses the Early Warning Mechanism (EWM) to be introduced by the Lisbon Treaty, the incentives of the national parliaments to use it and the limited opportunity it opens for bringing Europe closer to its citizens. It is suggested that the EWM provides Europe with a chance to develop a transnational network of public spheres and to become a *demoi*-cracy.

Regardless of the success of the EWM as an institutional means to bring to that end, the author argues that the creation of a network democracy (post-national instead of supra-national democracy) is the only available road for democratisation of the EU anyway, because only it does not depend on forged common identity or solidarity. In doing this, the paper draws from the earlier books of Habermas and argues with his own latter writings.

## **Keywords**

*Demoicracy*, Lisbon Treaty, “yellow card”, Early Warning Mechanism, Habermas



“It would be irrational, and contradictory, to suppose that things that have never yet been done could be done, except by means not yet tried.”<sup>1</sup>

## Introduction

The Lisbon Treaty seems finally on the short track towards entering into force, and if there is anything in it, which should be cheered by all sides of the debate on European integration, this is the “yellow card” mechanism, originally proposed by the Convention on the Future of Europe with the heading Early Warning Mechanism (EWM).<sup>2</sup> It provides the institutional framework for public deliberation on practically all issues of European governance, within the national parliaments (NP) and also *between* them. It should be liked by the sceptics, as it subjects the Union legislation to national control, and by the federalists as it can be expected to create the much craved European public sphere. In the present paper I shall advance the thesis that this is the mechanism needed to democratize the Union and to make it open, inclusive and responsive to the will of all European citizens who may have, but also may not have much in common. The mechanism provides 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 national parliaments in a network which in longer run will amount to an overarching network of discursive 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. The EWM is to foster the communication within a network of autonomous but interconnected public spheres which, if robust enough, is the critical condition for the emergency of a transnational democracy. If successful, Europe may become single and democratic polity for many distinct *demoi* and, contrary to the famous appeal of Habermas and Derrida,<sup>3</sup> without need to ‘forge European identity’ beforehand.

On the basis of the concept of deliberative democracy, advocated by Habermas himself<sup>4</sup>, the present paper will argue that a common identity (or solidarity) is not a *sine qua non* for a transnational democracy. This is so if we take decision-making through inclusive and rational public deliberation to be the single foundational principle of modern democracy. Hence, democracy is possible not only in a community of people united by identity or solidarity, but also for a group of strangers, who have nothing in common but two *interests*: interest in common governance and interest in subjecting it to public criticism. To make this 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 our concern: the people subjected to the common governance to be enabled to subject this (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 become common, i.e. formed by the critical communicative exchanges of all citizens, even though

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<sup>1</sup> FRANCIS BACON, *Novum Organum* (1620), quoted in JOHN TEMPLE LANG, 'The Commission: The Key to the Constitutional Treaty for Europe', (2003) 26 *Fordham International Law Journal*, 3.

<sup>2</sup> As the Lisbon Treaty does not name this mechanism, I will use the abandoned ‘Early Warning Mechanism’ and ‘EWM’ for convenience.

<sup>3</sup> 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*, pp. 291-297.

<sup>4</sup> See JÜRGEN HABERMAS, *The Structural Transformation of the Public Sphere: An Inquiry Into a Category of Bourgeois Society* (1991), henceforth “*Public Sphere*”; JÜRGEN HABERMAS, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (1996), henceforth “*BFN*” and JÜRGEN HABERMAS, *The Inclusion of the Other: Studies in Political Theory* (1998), henceforth “*The Other*.”

in terms of identity they remained German, French and English, rather than Europeans.<sup>5</sup> This suggests that paneuropean public deliberation and public opinion is possible, even when none of the participants considers himself “European”. Certainly, the critical condition for such transnational public opinion is the critical exchanges to transcend their usual national locus, i.e. people from different Member states to speak to and to listen to each other, and this is exactly what the EWM provides them with incentive to engage in. The EWM is the institutional means to encourage networking without creating new institution, and without additionally encumbering the process of lawmaking in the EU.

In the following section I will briefly discuss what I call constructivist project, intended to the *construction* of European identity and/or European public sphere, as advanced by Habermas. I will raise several objections against its necessity, and will argue that this is the solution to a wrong problem. While the identity elements of this project are contested, the critical communication stands out as the one irreducible element of deliberative democratic system and in the third section I will explore how the EWM may become the institutional vehicle to realise it in a debating network of Parliaments. Finally, I will conclude with discussion on the need for shared political culture and argue why critical network rather than single critical public sphere is more realistic and more desirable solution.

### The Constructivist Project

It is intuitive to assume that a pan-european 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 democratic one. That is why systematic projects to forge a European identity started with the very birth of 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 of 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, exactly during 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 the European citizens. This prompted their famous Declaration which announced and welcomed the birth of “European Public Sphere.”<sup>6</sup> 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 his nappies and is unlikely to grow to maturity anytime soon.) Actually, in the Declaration itself Habermas is ambiguous on 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*.”<sup>7</sup> This need for formation of 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.”<sup>8</sup> This second claim seems to step back from his original and more ambitious concept that through inclusive deliberation of free and equal

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<sup>5</sup> This is supported by the annual Eurobarometer surveys, but also by the fact that many Americans (estimated about 500 000 in New York City alone) demonstrated against the war on that date, and apparently did not become European in this way.

<sup>6</sup> 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 the ‘*Declaration*’, p. 291.

<sup>7</sup> *Declaration*, p. 293, emphasis of the original.

<sup>8</sup> *Declaration*, p. 293.

citizens in 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.”<sup>9</sup> Only few years ago, Habermas seems to have support the concept of “procedural popular sovereignty” in the core of which was only “the practice of deliberation between participants in communication who want to arrive at rationally motivated decisions.”<sup>10</sup>

I strongly support his first claim, but find the second very concerning for two reasons. First, if the “consciousness of shared fate” is 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 community of strangers who remain strangers.<sup>11</sup> In the Declaration, as well as in many of his other recent writings<sup>12</sup> Habermas points on “the reciprocal acknowledgment of the Other in his otherness”<sup>13</sup>, 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, ‘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 billion citizens living in 27 different member states!) or have become universal, as Habermas himself acknowledges. In any 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 Needs Constitution”, where he promotes the concept of 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 seems quite a thick concept.

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 circular stepwise process: “the collective identity ... exists neither independent of nor prior to the democratic process from which it springs”<sup>14</sup> 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.*”<sup>15</sup>

And also:

“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.”<sup>16</sup>

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<sup>9</sup> *The Other*, p. 138.

<sup>10</sup> *The Other*, p. 138.

<sup>11</sup> 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.

<sup>12</sup> See JÜRGEN HABERMAS, ‘Why Europe Needs Constitution?’, (2001) 11 *New Left Review*, pp. 5-26, hereinafter ‘*Why Europe*’ in JÜRGEN HABERMAS, *The Divided West* (2006). Here is not the place to go in detail to show how the allegedly common values are incompatible with the existing variety in Europe.

<sup>13</sup> *Declaration*, p. 294.

<sup>14</sup> *Why Europe*, p. 15.

<sup>15</sup> *The Other*, pp. 137-138.

<sup>16</sup> *The Other*, p. 140.

Yet he does apply this thesis to the demos-democracy relation after the constitutional moment, but maintains the need for *a single demos*, self-constituted as it may be, in order to sustain the democracy after it. Indeed, citizens on his account “constitute themselves as a people, and thereby delimit themselves both socially and territorially from their environment.”<sup>17</sup> This he does in most details in the Postnational Constellation describing a process of historic oscillation between opening of the existing lifeworlds upon new impulses toward modernization and then *closing* once more on a higher level.<sup>18</sup> But a European polity, created in this way will be quasi-national and not post-national, and thus his project for creation of European identity, albeit thinner than national, justly faces the virulent objections of euroskeptics.

Habermas’s reason to stop short of disposing of demos completely is his desire for more substantial content of democracy.<sup>19</sup> He needs the constructed new identity not to make the existing Union more democratic (liberally-democratic), but to enable it go further and to make it socially-democratic. Thus, in order to provide ground for the problematic redistribution at European level Habermas suggest 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 twin challenge alone, and will focus to the problem with the outvoted minority. It seems that Habermas will agree that it appears only in perspective, if redistributive decisions of a much larger scale are to be taken. Actually, in the EU of today there are rarely any clear contradictions between immediately identifiable majorities and minorities. In Abromeit’s apt description the Union is “characterised by 1) various levels (community, member states, subnational 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 “europeanisation”, acting (6) in policy areas of different degrees of europeanisation and (7) with different numbers of participants, agreeing policies (8) under different decision rules.”<sup>20</sup> The sheer complexity in such system helps to avoid the cleavages that the forged European identity is supposed to mitigate – it is difficult to identify neither the winners, nor the losers of any policy. Christopher Lord aptly noted that “it is unsurprising that a great many Union procedures are aimed at avoiding such a clash of majorities.”<sup>21</sup> Perhaps even if massive redistribution starts today, the lack of solidarity will not even arise as problem, because a minimum of democratic criticism of the substantive EU policies is not met today. Such minimum of criticism in the public sphere is necessary to identify the winners and losers and to raise the controversies that the solidarity is supposed to bridge. Without such a minimum, now the identity and solidarity issues do not arise. What we all can 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.

In my view this lack of awareness and understanding is the cause of the democratic deficit, and this is to be overcome with communication in the public sphere, and not by forging identity. Identification with an untransparent (or more precisely incomprehensively transparent) Europe shall be no more

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<sup>17</sup> *The Other*, p. 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.

<sup>18</sup> JÜRGEN HABERMAS, *The Postnational Constellation: political essays* (2001), p. 83.

<sup>19</sup> His craving for solidarity to sustain Europe-wide redistributive policies permeates virtually all of his writings on Europe. Most recent example is his essay “Is the Development of a European Identity necessary, and is it possible?” in *The Divided West*.

<sup>20</sup> HEIDRUN ABROMEIT, *Democracy in Europe : Legitimising Politics in a Non-state Polity* (1998), p. 8.

<sup>21</sup> CHRISTOPHER LORD, ‘New Governance and Post-Parliamentarism’, POLIS Working Paper, School of Politics and International Studies, University of Leeds, 2004, p.7.

democratic than identifying with the Charlemagne Empire that preceded it. It is not the outvoting of some, but alienation of all which is problematic. Therefore, the 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 since the birth of EEC<sup>22</sup> and hints that as long as the European integration consisted only of creation of a common market there was no need to make it more democratic. Yet the problem was there, it was only not seen by the public, and this is hardly surprising as the EEC itself was not noticeable for the public at large either. In my opinion Habermas ignores the democracy deficit of the EEC because he has more ambitious goal – not just democratising the Union, but making it social as well (perhaps he would argue that no such distinction exists). So he sees the EEC as a mere tool to bring the prosperity necessary for the national welfare state, and on such view indeed the need for supranational democracy does not exist. Now, as he sees the welfare state threatened by the 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 liberal democracy is a precondition to this.

Here I need to distinguish myself from the common criticism of the 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.<sup>23</sup> Apart from the lack of intellectual imagination, this thesis lacks realism as well. A sense of identity, which will allow us to substitute all the mechanisms of the existing consociational democracy for a federation with parliamentary government will require very thick sense of identity, much greater than the mere constitutional patriotism provides and which fortunately is nowhere in sight.

Thus, not the identity but the complexity is the circle the Union has to square: to find a way to make the European public(s) aware of the substantive European policies, to enable them to criticise these policies and to form shared opinions on these substantive issues. I believe the deliberative democracy theory of Habermas, in an attenuated version, i.e. concept of communicative action among strangers who have no special emotions to the constitution of this communicative action, provides one possible answer.

## **Early Warning Mechanism as Communicative Network**

The Protocol 2 on Application of the Principles of Subsidiarity and Proportionality attached to the Lisbon Treaty is the first act of primary legislation, which entrusts the national parliament with responsibility, albeit very limited, to participate in the general legislative process of the EU.<sup>24</sup> The responsibility is for soft control for compliance of the draft community legislation with the subsidiarity

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<sup>22</sup> 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, *The European Union and Its Order: The Legal Theory of European Integration* (1999) p. 198).

<sup>23</sup> See note 17. Perhaps the former Belgian prime-minister and current leader of the liberals (ALDE) in the European Parliament Guy Verhofstadt made the most recent call for creation of United States of Europe.

<sup>24</sup> 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 NP with information (which today is published in the internet anyway) and encouraging them to control their own governments on European issues (which they do by virtue of national law anyway). Note also that the Lisbon Treaty provides for prior notification of the NP 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 substantial policy issue, this additional power also will result in deeper involvement of the parliaments.

principle. According to Art. 6 and 7 of the Protocol all draft legislative acts will be submitted to the NP and they will have eight weeks<sup>25</sup> to express objections with reasoned opinions if the proposal violates the principle of subsidiarity.<sup>26</sup> If one third<sup>27</sup> of the NP<sup>28</sup> 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’, i.e. no number of NP can formally block any legislative proposal.<sup>29</sup>

The immediate purpose of this mechanism is to give teeth to the subsidiarity principle<sup>30</sup> and provide an institutionalised check for the creeping competences of the Union at the expense of MS, i.e. of the national parliaments. This new *ex ante* control is of substantial concern to some Member states, especially because so far the subsidiarity principle was considered to be injusticeable. 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 national parliaments in the deliberations of the substantive community policies.<sup>31</sup>

There are several reasons for observers to be sceptical for the prospects of the EWM. The most apparent is the limited time available for the adoption of the reasoned opinions – although now it is extended to 8 weeks from the original 6 proposed in the Constitution, it is still considered too short to allow the parliaments any real possibility to make a meaningful use of the EWM. The other reason is the observable apathy of the NP to engage in matters of substantive European policies. The students of NP in Europe have identified a number of rational disincentives, 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 empirically, and there is the telling example of COSAC which during its two decades of existence is all but redundant and virtually unnoticeable even by academics.<sup>32</sup> The third reason for scepticism, related to this lack of incentive, is the lack of resources of NPs. Even if the parliaments wish to engage they need significant administrative and expert capacity for a meaningful engagement in substantive European issues which is nowhere the case. The

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<sup>25</sup> The Council and the EP cannot consider the draft before expiry of this period (Art. 4 of the Protocol on the Role of National Parliaments).

<sup>26</sup> 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 Functioning of the EU).

<sup>27</sup> One fourth of them in cases of proposals in the Area of Freedom, security and Justice.

<sup>28</sup> In order to accommodate the bicameralism of some of the MS, each parliament is given two ‘votes’, which are to be cast together by the unicameral legislatures, and separately by each chamber in bicameral ones.

<sup>29</sup> On the Convention there was such a proposal - if a second threshold of two thirds of the NP is reached, the Commission to be obliged to withdraw the draft legislation - but it was rejected. Instead, Lisbon Treaty introduced an ‘orange card’, which provides that if half of the NP opine negatively and the Commission still wants to maintain the proposal, it must provide reasoned opinion on the subsidiarity issue and a separate voting must be taken on the compliance with the subsidiarity principle both in the EP and the Council, 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 EP and Council, are not relevant and will not be discussed.

<sup>30</sup> 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.

<sup>31</sup> 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 *Common Market Law Review*, p. 661.

<sup>32</sup> COSAC stands for 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.”

fourth reason is that the control provided by the EWM is limited to subsidiarity issues only. Even though under this guise many substantive objections may be raised, it is still unduly blunting an edge the sharpness of which is yet to be seen. Finally, this control is bound to be negative, and there is no way for the NP to make any positive proposal at any stage of the process.

However there are reasons to expect the EMW to work, too. The first is that the voice of the national parliaments is not weighted in the counting towards the threshold. Thus, the governments of small member states who fear being outvoted in 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 equalized, 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 the executive dominance is characteristic only for the chambers which are electing and sustaining the government and the chambers which have no such responsibilities are free to seize this opportunity for engagement. Third, a government may choose to improve its bargaining position in Council by having its parliament publicly committing it to certain position.<sup>33</sup> Fourth, the short deadline may indeed preclude most of the incentives of the NP, but as a result of it the parliaments will have their say *before* the government minister had expressed her position, and perhaps even before the government had formed any position at all.<sup>34</sup> Last but not least, with regard to the prevailing consensual mode of decision-making in Council even where qualified majority voting is the formal rule<sup>35</sup>, it is highly probable that a series of well-grounded negative opinions from one third of the NP will be sufficiently persuasive for a few ministers to change their mind and vote down the proposal even if most other power players choose to ignore it.<sup>36</sup> 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”<sup>37</sup>.

For all these reasons I am inclined to think that EWM will provide sufficient incentive for NP to engage at least occasionally in substantive discussions on draft European legislation. Even if the resources of the NP, 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 be also noted that even if these incentives for NP do not work all the

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<sup>33</sup> Bargaining theory confirms both with abstract models and with empirical experiments that the credible prior commitment of one party to certain outcome improves its bargaining position. However this may be counterproductive – the public commitment made by the parliament may hinder the chances of the minister to exchange her support on this issue for support for another issue, more important for her state. The latter rationale may discourage the ministers from using parliaments strategically, yet if they do use it, the effect will be to have less log-rolling and more of principled decision-making in Council.

<sup>34</sup> Such race of parliament with government may look as hopeless as the race of the proverbial turtle 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 *The Journal of Legislative Studies*, ) are made not by the ministers in Council but by senior public officials in the COREPER and the working parties which precede it. While Fraga notes this as a reason for hopelessness of parliamentary involvement, it may work both ways. Frank Häge suggests that one of the reasons of bureaucrats not to agree on a bill in COREPER/working parties and to push it up to ministerial level (B item in 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', presented at "The Legislators of Europe", EUI SPS Workshop, April 2009). If informed by a formal opinion of their national parliament, they can start behaving in ways yet unseen.

<sup>35</sup> For a recent empirical study see DANIEL NAURIN & HELEN WALLACE, *Unveiling the Council of the European Union: Games Governments Play in Brussels* (2008).

<sup>36</sup> Further to these reasons we may consider the decision of the German Constitutional Court on the constitutionality of Lisbon Treaty, which made the use of several of its procedures (bridging clauses and the flexibility clause) dependent on prior authorisation from the Bundestag in each particular case, which guarantees its greater involvement with the respective issues (BVerfG, Judgment of 30 June 2009).

<sup>37</sup> MICHAEL DOUGAN, *op. cit.*, p. 658.

way down to the actual adoption of reasoned opinion and 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 significant difference in terms of public resonance. The experience of the Select Committees of the House of Common is a good example of this: they were introduced in 1979 with the purpose to ‘redress’ 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 success.<sup>38</sup>

What was left out of the discussion so far is the need of considerable amount of *concerted* action of national parliaments to reach the threshold if the EWM is to take off the ground. This is the critical premise, which may either enable the generation of the European communicative *network*, or make the EWM completely redundant. The EWM is the best institutional *incentive* one can provide to the national parliaments to cooperate with each other, but whether they will actually pick it remains to be seen in the future. A note of scepticism is necessary here: in order to be able to use the mechanism the 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 it, which would naturally lead to inaction of all. Yet, it is quite likely that there will be few entrepreneurial chambers,<sup>39</sup> 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 that is largely ignored bodes ill, but it should be noted that COSAC does not have any of the initiatives available through the EWM.<sup>40</sup>

Let me be clear: even if the NP pick the incentive provided by the EWM this will not change significantly the institutional balance and the relative weight of national parliaments neither in EU, nor vis-à-vis their own governments. The only thing we can expect of the NP to do is to engage seriously with 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*”<sup>41</sup> of European interest. It 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*”<sup>42</sup> and also by Michael Dougan, who notes that the new responsibility of the NP: “could increase the accountability and legitimacy of the EU’s lawmaking bodies, and enhance in an unprecedented way the sense of “ownership” of the European project at

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<sup>38</sup> 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 of their usual disincentives), yet the Constitution drafted by it was adopted by the governments with almost no changes (and despite of the fierce opposition of one veto player – Polish government). The power of the Convention was only in its openness to public and its ability to focus the public attention in all Member states. Its deliberations were closely followed by the media across all countries, and it managed to mobilise public expectation for support of its project, creating a true “constitutional momentum”.

<sup>39</sup> Ironically, the parliaments of the most euro-sceptic countries may be expected to have the biggest contribution to the generation of European communicative network.

<sup>40</sup> 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.

<sup>41</sup> LEO AMERY, in an oft-quoted description of the function of the British parliament (Thoughts on the Constitution, 1947, p. 12.).

<sup>42</sup> 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 The Journal of Legislative Studies, p. 106, emphasis added.

national level.”<sup>43</sup> Ana Fraga, who is otherwise very sceptical for the EWM (and indeed the other proposals for involvement of NP 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.”<sup>44</sup>

More generally Thomas Risse expresses “[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.”<sup>45</sup> One such important transnational channel is expected to emerge if national parliaments engage in a network of communication and this leads to development of overarching public sphere around them. It should be reminded that the reasoned opinions are to be negative, i.e. will promote precisely the *critical* public opinion, and 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.<sup>46</sup> This critical and transnational public discourse is what legitimizes the rulemaking. It is Habermas who conditions the democracy on the availability of communicative 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.”<sup>47</sup>

On my reading of Habermas what we need is that the citizens of Europe “have at their prior disposal the social perspective of a practical reason that tests laws.”<sup>48</sup> This critical examination of European legislation by concerned publics is so far missing in the EU. This critical testing can happen in two mutually enforcing modes – in formal institutions like the European Parliament or national parliaments as well as in the media. Given the central place the parliaments still occupy in national public spaces and media attention they still enjoy it is a fair assumption that if parliaments communicate in the institutional network provided by 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 emergence of a European public sphere (“common meaning structures and frames of reference” in the media debates<sup>49</sup>), but so far it is very thin. Thus EU remains elitist and undemocratic.

Of the many reasons which have so far obstructed the development of paneuropean public sphere there is one that deserves particular attention here and it is the insulation of national parliaments from each other. Hanna Arendt notes that the very enclosure of the Greek polis by walls created the agora - protected domestic space “where free men could meet as peers on any occasion”<sup>50</sup> and that the “public space did not become political until it is secured within a city, is bound.” Similarly, the modern democracy developed within the closing borders of the emergent nation states. Thus nowadays

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<sup>43</sup> DOUGAN, *op. cit.*, p. 659.

<sup>44</sup> FRAGA, *op. cit.*, p. 499.

<sup>45</sup> THOMAS RISSE, 'An Emerging European Public Sphere? Theoretical Clarifications and Empirical Indicators', in Annual Meeting of the European Union Studies Association (EUSA) 2003), p. 2.

<sup>46</sup> Words of Habermas, not mine, in *Public Sphere*, p. 236.

<sup>47</sup> *BFN*, p. 103-104, emphasis added.

<sup>48</sup> *BFN*, p.93, emphasis added.

<sup>49</sup> THOMAS RISSE, *op. cit.*, p. 3. See also MARIANNE VAN DE STEEG & THOMAS RISSE, The Emergence of a European Community of Communication, Working Paper at <http://www.isn.ethz.ch/isn/Digital-Library/Publications/Detail/?ots591=0C54E3B3-1E9C-BE1E-2C24-A6A8C7060233&lng=en&id=31385>.

<sup>50</sup> HANNAH ARENDT, *The Promise of Politics* (2007), p. 123.

the established national public spaces tend to enclose themselves against external, i.e. European influences in act of self-protection. The modest promise of the EWM is to penetrate these impermeable national public spheres; the more ambitious one is to create virtual agora, where MPs from various member states can meet as peers on any occasion.

### **Demos or *Demoi*: Communicative Network and Shared Culture**

For all of the reasons suggested in the preceding section for the rest of this paper I will assume that the EWM is working, i.e. (1) that national parliaments engage in debates of at least some *substantive* European legislation, (2) that this occupation of NP has prompted considerably robust discussion on these issues in national public spheres and (3) that there is considerable transnational exchange of arguments between national parliaments and national media on these issues. If these assumptions hold it will follow that *some* genuine European issues will be identified (possibly in a single public sphere), debated in several public spheres in a ‘generalised’ way by an overarching communicative network. 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 noting that government by common public opinion is possible when “the same themes to acquire simultaneously the same relevance for a large public that remained anonymous and to 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.”<sup>51</sup> 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.”<sup>52</sup> Contrary to his call to forge European identity, this European public sphere is defined in *functional* terms, and therefore the common single public sphere may very well have functional equivalents in other forms. If single identity-based EU-wide public sphere is not available, its function may be taken up by a institutional deliberative network around which a web of informal transnational channels develop 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 high degree of similarity in the way “same European themes are discussed at the same time at similar level 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.”<sup>53</sup>

These deliberations on European issues which transcend the single domestic public sphere and are taking place in separate but simultaneous spaces that are still nationally-cantered I believe are both more likely and more desirable for a European democracy. This will be *demoi*-cracy – where many distinct *demoi* can “to turn relevant societal problems into topics of concern.”<sup>54</sup> So far these problems are identified and solved by a black-box in Brussels and even though it is doing it relatively well, it remains remote and lacks communication with citizens – neither citizens can have democratic input to decision-making, nor can they hear the justification, nor anyone can challenge this justification in a public forum.

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<sup>51</sup> *The Other*, p. 153.

<sup>52</sup> *Why Europe*, p. 17.

<sup>53</sup> RISSE, p. 9, emphasis added.

<sup>54</sup> *Why Europe*, p. 18.

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.”<sup>55</sup> EWM may be expected to be good on this as NP in their attempt to mobilise support of their peers will have to find a way to communicate their domestic concerns to their peers. Unlike the 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.

However, in the Declaration, as well as in “Why Europe Needs Constitution?” and many of his most recent papers, Habermas maintains that the “shared political culture” is another condition for this model. If he meant culture in a weak sense (recognition of the other, of rule of law and other basic principles of democracy), I agree that such shared culture is a *sine qua non* indeed, but to this thin extent it is already available. If political culture is taken in any stronger sense, its necessity may be justified in two ways. The first is the discussed need for a degree of solidarity among citizens which can make possible a European social democracy. Legitimate or desirable as it may be, it was established 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 remains of the paper I will discuss this latter need for shared culture.

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 focus public debates to the national *fora* and not to the European forum. Hence even in a 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.

Thus, the EU appears to be quite unique polity, that must provide governance at one level, while the citizens affected by that governance, discuss it together, if at all, at different level. This is how the problem of ‘democratic deficit’ persists today, despite the increased powers of the European Parliament.<sup>56</sup> The democracy may exist without a single demos, but cannot exist without critical public discussion and it turns out that the robust discourse in the national public spheres choke the nascent discourse in the emerging European public sphere. This problem was recognised as early as the Amsterdam Treaty and its Protocol on the Role of National Parliaments was an attempt to engage the national public spaces in discussion on matters of EU governance. This attempt failed, and the robust debates are still going on predominantly within the public spheres of Member States on national issues. If nations are and shall remain the main deliberating *fora*, then it seems intuitive to devise institutional ways to bring the European issues in them, rather than construct new spaces and identities to compete with them. Thus, the Early Warning Mechanism provides one possible way to employ the potency of the national discourses to deliberate on EU governance, and more importantly, to make national discussions heard Europe-wide.<sup>57</sup> And whether this mechanism will succeed in bringing democracy to the EU “depends 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.”<sup>58</sup>

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<sup>55</sup> *Why Europe*, p. 18

<sup>56</sup> It has been suggested that this may change if the EP is properly empowered. This assumption seems intuitive and the low turnout on EP elections may be due to its limited powers, however during the last decade EP acquired arguably more policy-making influence than many national parliaments, still the turnout on European elections is decreasing.

<sup>57</sup> The recent judgement of *Bundesverfassungsgericht* (see note 36 above) can be seen both as protective of the national public sphere against transfer of influence to Europe, but also as bringing the European discourse home by requiring involvement of the Bundestag with European issues on *ad hoc* basis esp. in case of employment of the flexibility clause.

<sup>58</sup> *BFN*, p. 298, emphasis added.

The advantage of this project to the constructivist idea of identity is that in this way the EU and member nations can instead of competing, built upon each other. As Nicolaidis suggests: “Contrary to the fears of many supranationalists, such national level democratic control over the expansion of EU powers does not mean “less” Europe.”<sup>59</sup> Democratic control over the *exercise* of EU powers means “more” Europe, as it brings the European issues into the most robust public spheres available, and the resulting discussions are heard between the member states and in Brussels, so that they shall affect the opinions that are subsequently formed.<sup>60</sup> Thus, European citizens will be actively participating in the European governance by virtue of their participation in democratic processes at national level.<sup>61</sup>

It should be noted that even though identity may not necessary be a *sine qua non* for public deliberation of matters of common governance, it facilitates greatly the discourse and this is precisely the reason why the existing national public spheres successfully compete with the nascent European one despite the institutional promotion of the latter done with regard to the EP, the Convention etc. Yet, within a national public sphere there is no reason the discussion to be focused on any issue, including that of European governance. What is necessary for the discourse started in one national public sphere to transcend it is to be phrased in such way to be understandable to the citizens in the other public spheres, i.e. 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 finds evidence for the emergence of such community of communication in Europe. The introduced notion of communicative communities is not a new guise for the identity construction: community is meant here only in epistemological sense: group of people who are able to understand each other. They need not to agree on anything of substance, the only thing which is 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.”<sup>62</sup>

It should be also 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 much more competitive position along this epistemic dimension as well. That is why the national parliaments will remain the proper *fora* for public deliberation on substantive European issues even in a long run. If European demos is taken to mean citizens discussing *together* issues of public interest, it will hardly ever come into existence and therefore the solution of the democratic deficit will remain in retaining the centrality of national parliaments, where citizens do talk together, and linking them in a network in such a way that people listen to each other across national boundaries.

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<sup>59</sup> NICOLAIDIS, KALYPSO NICOLAIDIS & STEPHEN WEATHERILL, 'Whose Europe? : National Models and the Constitution of the European Union', (2003), p. 145.

<sup>60</sup> Extensive control of national parliaments already exists in some of the Member States (esp. the Scandinavian), but unlike the EWM it does not require cooperation among the national parliaments, hence does not promote any transnational public discourses.

<sup>61</sup> It should be also 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 *demos* in the Member States are.

<sup>62</sup> It is true that as Risse notes that “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 now means its pre-condition.

## **Conclusion**

In Karen Schiele's phrase, the EU suffers from the adherence to the concept of nation-state, and Habermas does not overcome this concept. He deconstructs the concept of demos-nation, but only to explicitly call for reconstruction of it 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 recreation 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."<sup>63</sup> 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 *demosi*-cracy account laid out above offers a concept for truly postnational democracy, where representation is not mediated by nationality (though it will remain located in nation-centered public sphere and to a certain extent will be mediated by nation-centered political parties). The communication will be centered in national spheres but they will not be isolated from each other. To the degree this happens the democratic deficit will be overcome. The EWM may be not sufficient, or even may remain redundant, yet it is a step in the right direction, while the constructivist projects are not.

A bolder conclusion is that the democracy is impossible not without (single) demos but without shared space and robust public discourse on the general issues of common interest. Whenever a single demos is not available, a *demosi*-cracy, that is deliberation of many *demosi* together may 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 at the same level of attention across national public spheres and the level of attention was the top one. Here is suggested, that an institutionalised network of public *fora* can make such encompassing common public sphere permanent. It is unclear yet whether the Early Warning Mechanism can bring about it, as it is means that was never tried, but the purpose is to achieve something that was never done as well.

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<sup>63</sup> *Why Europe*, p. 6.

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