WHAT REFORMS FOR EUROPE WITHOUT A REFORM FOR EUROPEAN REPRESENTATIVE DEMOCRACY?

THE CASE OF THE PARLIAMENTARY INITIATIVE FOR LEGISLATIVE ACTS [*].

I believe that we should reflect on how to strengthen the European Parliament's capacity and centrality, particularly as regards its power of initiative. Like any national parliament, the right of initiative should be conferred on the European Parliament so that our institution can make proposals [...] *and not just be the recipient. This would help give it a greater role*

(D. Sassoli, *Speech by the President of the European Parliament on the Future of Europe*, 9 May 2021)

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Summary. 1. Introduction: autonomy of the European Parliament and protection of minorities in the formation of European legislative acts: the case of the parliamentary initiative. – 2. The (almost complete) absence of a parliamentary initiative of legislative acts at European level: a matter of interpretation? – 3. Parliamentary legislative initiative, the constitutional norms of the Member States and the (possible) revision of the Treaties. – 4. The possible attribution of the legislative initiative to the European Parliament or its components: a quick examination of some adverse arguments. – 5. Conclusions: *a)*. General remarks. – *b)*. Some broader considerations on the *future of Europe*. Strategic pragmatism and constitutional pragmatism. – *c)*. *Eurospeak* as *Newspeak*? The process of European integration: the nationalist misunderstanding and liberalism *under attack*.

1. Introduction: autonomy of the European Parliament and protection of minorities in the formation of European legislative acts: the case of the parliamentary initiative.

Also following the changes made in Lisbon, the European Treaties retain (as a rule) the submission of proposals for European legislative acts as an exclusive competence of the Commission.

In Article 294, par. 2, TFEU, where the disciplinary of the ordinary legislative procedure is found, it is stated that «the Commission shall submit a proposal to the European Parliament and the Council».

[*] *Subjected to blind review*. The work presented here is the version, duly revised and accompanied by notes, of the speech made on the occasion of the Ventotene Conference, *La 'nuova' Unione del Next Generation EU e le riforme per il futuro dell'Europa e del Mezzogiorno*, 27 June 2022.

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Even more explicit the wording in Article 17, par. 2, TEU: «Union legislative acts may only be adopted on the basis of a Commission proposal, except where the Treaties provide otherwise».

Of course, it is significant that Parliament has the power of initiative in the *upmost legislative procedure*: the revision of the Union's Treaties[1]. The power of initiative that the European Parliament does not have for ordinary legislation, is instead attributed to it for the revision of the treaties, i.e. the modification of the primary law of the Union.

In special legislative procedures for the adoption of a regulation, directive o decision the power of initiative is then sometimes attributed to others, including Parliament itself. It exercises the initiative to regulate its organisation[2] (not unlike the ECB, the EIB, and the Court of Justice of the Union) and the procedure for electing its members. In that regard, Article 223 TFEU reads as follows: «The European Parliament shall draw up a proposal to lay down the provisions necessary for the election of its Members by direct universal suffrage in accordance with a uniform procedure in all Member States or in accordance with principles common to all Member States».

In any case, the scope for Parliament to exercise initiative is rather limited. Special legislative procedures cover various degrees of parliamentary participation. Under the *consent procedure* Parliament must give its consent before the Council can adopt legislative acts. Under the *consultation procedure* Parliament is not entitled to do that, but it merely

[1] N. Lupo and A. Manzella, *Il Parlamento europeo. Una introduzione*, Roma, Luiss University Press, 2019, p. 84.

[2] See Article 223, par. 2, TFEU («The European Parliament, acting by means of regulations on its own initiative in accordance with a special legislative procedure after seeking an opinion from the Commission and with the consent of the Council, shall lay down the regulations and general conditions governing the performance of the duties of its Members»); Article 226 TFEU («In the course of its duties, the European Parliament may, at request of a quarter of its component Members, set up a temporary Committee of Inquiry […] the detailed provisions governing the exercise of the right of inquiry shall be determined by the European Parliament, acting by means of regulations on its own initiative in accordance with a special legislative procedure, after obtaining the consent of the Council and the Commission»); and Article 228, par. 4, TFEU («The European Parliament acting by means of regulations on its own initiative in accordance with a special legislative procedure shall, after seeking an opinion from the Commission and with the consent of the Council, lay down the regulations and general conditions governing the performance of the Ombudsman's duties»). As it has been noted, "one of these provisions, on the statute of the Members, has not been used in this post-Lisbon form. In another case, concerning the statute of the Ombudsman, an EP proposal was adopted in February 2019. Agreement was reached on 10 May 2021, leading to adoption of the EP draft regulation on 10 June 2021. On 18 June, the Council gave its consent and the Commission its opinion. The first-ever EP 'regulation on its own initiative' was adopted on 23 June 2021. On the other hand, the EP's proposal on the exercise of the right of inquiry has been blocked, and the EP's current position over the right of initiative may partly reflect frustration with these arrangements": E. Best, *The European Parliament and the Right of Initiative: Change Practice, not Powers*, in *EIPA Paper*, June 2021, p. 5.

needs to be consulted. In these special procedures, as in the ordinary procedure, Parliament has not initiative power.

The question arises as to whether the rules in force can be balanced with the separation of powers (and therefore with the autonomy of Parliament), which can also be regarded as a principle of European law[3] and as a salient aspect of constitutionalism, understood as a historical movement and a legal, political, and philosophical doctrine[4].

The answer seems to be no. Parliament cannot, as a rule, decide to initiate the legislative procedure. This means that its autonomy is not fully guaranteed. In fact, Parliament cannot decide what to deal with. Regarding the formation of legislative acts, an assembly can be defined as autonomous if it can initiate the procedure that leads to their approval (this is of course a necessary condition, even if it is not sufficient). The power of initiative implies that it is necessary to identify which issues Parliament should be dealing with. In the absence of this power, Parliament finds itself paralysed, even when faced with urgent issues (that is to say, issues that parliamentarians consider to be urgent).

As a rule, the European Parliament must await the exercise of *external* initiative. Such a condition makes the legislative body inherently weak and dependent on other powers. In fact, while the *non*-parliamentary legislative initiative (governmental, popular, etc.) may or may not be foreseen – since, if foreseen, it constitutes an interference functional to the realization of the separation of powers according to the model of balance and mutual control or an institution aimed at the realization of the pluralist principle on the level of institutional structure –, the parliamentary initiative of the laws is, instead, a corollary of the separation of powers and its absence is purely and simply a violation of this same principle[5].

Furthermore, under no circumstances shall an individual Member of Parliament or a minority be admitted to submit proposals for legislative acts. Therefore, even in the limited cases in which the initiative is referred to Parliament, parliamentary minorities are not safeguarded. Parliament's initiative implies, in fact, the decision of the majority. Therefore,

[3] See R. Schütze, *European Constitutional Law*, Oxford, Oxford University Press, pp. 58-59. See also S. Fabbrini, *Compound Democracies. Why the United States and Europe Are Becoming Similar*, Oxford, Oxford University Press, 2010, p. 187 ("Although not defined by a formal constitution, the EU governs through a system of separation of powers, functionally preserved by an internal mechanism of checks and balances").
[4] *Ex plurimis*, M. Elliott and R. Thomas, *Public Law*, Oxford, Oxford University Press, 2017, pp. 87-97.
[5] C. Schmitt, *Constitutional Theory*, translated and edited by J. Seitzer, foreword by E. Kennedy, Durham and London, Duke University Press, 2008, pp. 286-301.

it is not allowed for those who are in a minority (and for the smallest of minorities, the individual Member of Parliament) to submit a proposal for a legislative act[6].

It is hardly appropriate to recall that the protection of minorities is also one of the principles of European law[7] and an essential aspect in order to be able to consider an institutional system to be compatible with the liberal (not just majoritarian) model of democracy[8].

Indeed, the absence of initiative from individual Members (or minorities) could have a negative impact on the formation of European legislation. The input of each representative in Parliament could be a valuable element in identifying the problems to be addressed through the adoption of European legislative acts. In this sense, the lack of attribution in question makes the European Parliament less able to reflect social pluralism and less responsive to the needs emerging from the communities.

There are also those who believe that the absence of legislative initiative, as a competence of MEPs, is one of the reasons for the weak link between MEPs and the electorate[9].

2. The (almost complete) absence of a parliamentary initiative of legislative acts at European level: a matter of interpretation?

In the light of what has been observed, it is natural to wonder whether there is scope for an interpretation of European law guided by the principles referred to and which can therefore

[6] Of course, the power of initiative is conferred to a minority in other circumstances: see Article 226, par. 1, TFEU («The European Parliament may, *at the request of a quarter of its component Members*, set up a temporary Committee of Inquiry, to investigate, without prejudice to the powers conferred by the Treaties on other institutions or bodies, alleged contraventions or maladministration in the implementation of Union law, except where the alleged facts are being examined before a court and while the case is still subject to legal proceedings»). See also Article 143, Rules of Procedure of the European Parliament, («Any Member may table a motion for a resolution on a matter falling within the spheres of activity of the European Union. That motion may not be more than 200 words long») and Article 144, Rules of Procedure of the European Parliament («A committee, an interparliamentary delegation, a political group or Members reaching at least the low threshold may ask the President in writing for a debate to be held on an urgent case of a breach of human rights, democracy and the rule of law»).

[7] See S. Carrera, E. Guild, L. Vosyliūtė and P. Bard, *Towards a comprehensive EU protection system for minorities, Directorate-general for internal policies policy department for citizens' rights and constitutional affairs civil liberties, justice and home affairs*, Bruxelles, 2017, pp. 91-104.

[8] R. Dworkin, *Sovereign Virtue. The Theory and Practice of Equality*, Cambridge, Harvard University Press, 2002, p. 363 ("Majority rule is not fair or valuable in itself: it is fair and valuable only when certain conditions are met, including requirements of equality among participants in the political process through which majority will is determined").

[9] On the weak electoral connection and its consequences see S. Hix adn B. Høyland, *Empowerment of the European Parliament*, in *Annual Review of Political Science*, n. 16/2013, p. 184 ("It is not a major overstatement to claim that the electoral connection in the European Parliament is almost nonexistent").

lead to the recognition of the power of initiative to Members of Parliament.

Indeed, the same Statute for Members of the European Parliament (Decision 2005/684/EC, Euratom of 28 September 2005) provides that «each Member shall be entitled to table proposals for Community acts» (Article 5) and, indeed, states in the *whereas clauses* that «the right of initiative referred to in Article 5 is the key right of every Member. Parliament's Rules of Procedure may not render that right nugatory» (point 6).

What actually happens is precisely what (according to the Statute) should not happen: the Rules of Procedure of the European Parliament (RPEP) strip the statement in Article 5, par. 1 of its content. Moreover, it is the same Article 5, par. 2, RPEP to provide that «Parliament shall lay down in its Rules of Procedure the conditions for the exercise of this right».

Besides, the provisions of the RPEP are in line with what is found in the Treaties. As stated before, *only* the Commission normally exercises the initiative of legislative acts.

Therefore, the Statute for Members of the European Parliament does not appear to be suitable for establishing the power of initiative, contrary to what the Treaties (original sources of the Union and, moreover, amended after the adoption of the Statute) and the Rules of Procedure of the European Parliament provide.

On the other hand, it could be observed that the Statute has its 'legal basis' in the Treaties and precisely in art. 223, par. 2, TFEU[10]. Therefore, the Statute could be said to integrate the regulation of the initiative provided for in the Treaties by virtue of the 'coverage' they offer.

It could also be attempted to enhance the remark of Article 17, par. 2, TEU («except where the Treaties provide otherwise») also for other profiles. After all, the Treaties state that «the functioning of the Union shall be founded on representative democracy» (Article 10, par. 1, TEU) and that «citizens are directly represented at Union level in the European Parliament» (Article 10, par. 2, TEU).

There is therefore no lack of *virtuality* inherent in current European law. It contains principles in relation to which the exclusion of parliamentary initiative ends up appearing to be contradictory.

However, in the face of what the Treaties expressly provide, to derive a recognition of the parliamentary initiative from the *coverage* of the Statute *pursuant* to Article 223 TFEU and from the *key principles* (representative democracy, autonomy of Parliament, separation of powers, protection of minorities) would still be an interpretative stretch.

[10] R. Schütze, *European Constitutional Law*, cit., p. 85.

The reference to Article 10, par. 2, TEU seems to be too generic to establish the attribution of a power. In any case, we would be faced with a creative operation, which cannot compete (at least not only) with doctrine.

On the other hand, there is still a possibility that an innovative *interpretation* could be offered by the European Parliament itself. It is not unprecedented, in fact, the case of parliamentary claims of attributions previously reserved to others. Just think of the way in which, in different contexts, the form of parliamentary government has been established[11].

3. Parliamentary legislative initiative, the constitutional norms of the Member States and the (possible) revision of the Treaties.

It is undeniable that, as far as ownership of the initiative is concerned, the distance between national parliaments and the European Parliament is significant. Although the initiative of individual parliamentarians is not always provided (as in Italy and in France[12]), in national legal systems at least the initiative of the legislative body (or of a certain number of parliamentarians, or of groups or committees) is generally contemplated (as in Spain[13], Germany[14] and others member States)[15].

[11] *Ex plurimis*, see B. Aguilera-Barchet, *A History of Western Public Law. Between Nation and State*, Cham, Springer, 2015, pp. 287-318.

[12] See Article 71 of the Italian Constitution and Article 39 of the French Constitution.

[13] See Article 87 of the Spanish Constitution («The Government, the Congress and the Senate are competent to propose legislation, in accordance with the Constitution and the Standing Orders of the Houses»).

[14] See Article 76 of the German Basic Law and Rule 76 of the Rules of Procedure of the German *Bundestag* («Items of business submitted by Members of the *Bundestag*» – bills included – «shall be signed by a parliamentary group or five per cent of the Members of the *Bundestag*, unless the Rules of Procedure prescribe or permit otherwise»).

[15] See A. Maurer and M.C. Wolf, *The European Parliament's Right of Initiative*, Study requested by the AFCO Committee, Bruxelles, Policy Department for Citizen's Rights and Constitutional Affairs, 2020, p. 75: "Concerning the legislative branch, almost every EU Member State […] provides for specific rights of initiative in the Constitution". See pp. 75-88. In Austria, both the individual members of the *Nationalrat* (Article 41, Federal Constitutional Law) and the commissions have the legislative initiative. In Belgium, the individual members of the House of Representatives (as well as the latter, as such) have the legislative initiative (see Articles 75 and 132 of the Constitution). In Bulgaria, every deputy has the power to initiate legislation (Article 87 of the Constitution). In Cyprus the representatives can present bills (Article 80 of the Constitution). In Croatia, the initiative lies with individual deputies, committees, and parliamentary groups (Article 85 of the Constitution). In Denmark, legislative initiative is attributed to individual MEPs. In Estonia the same prerogative is attributed (Article 103 of the Constitution) to members of Parliament, parliamentary groups, and parliamentary committees. In Finland, the initiative lies with individual MEPs (Article 70 of the Constitution). In Greece, the initiative is held by the Parliament (Article 73 of the Constitution). The members of the Irish *Dáil* also have the initiative (they can present the so-called 'Private Member's Bills'; see Articles 20-27 of the Constitution). In Latvia, the power of initiative belongs to at least five deputies (Article 65 of the Constitution). In Lithuania it is up to the members of the Parliament (Article 68 of the Constitution). In Luxembourg it is up to the Parliament (Article 47 of the Constitution) and its members. In Malta too,

This gap between supranational and national legal systems, especially in the light of the so-called *primacy* of European law, poses problems: the ever-increasing importance of European legislative acts clashes with a European legislative procedure in which, so to speak, the autonomy of Parliament is not guaranteed *from the beginning to the end*[16].

Of course, the (almost) complete exclusion of the parliamentary initiative of legislative acts can be explained with the origin of supranational institutions. Even if the EP has progressively acquired an organization and competences similar to those of national parliaments, it is not exactly a legislative body of a (federal) State. Initially the European Parliament was a purely consultative body with members seconded from national parliaments. It has been directly elected since 1979. It is true, of course, that the European Parliament is now vested with significant legislative, control, and budgetary powers. It shapes EU laws, particularly through the co-decision procedure; is involved in the appointment of the Commission and can force the latter to resign; and decides on the EU's annual budget with the Council[17]. Despite of this, it is not a parliament of a federal State, as the consideration of the normative concerning the legislative initiative clearly shows. Comparing national constitutional law with EU law poses methodological challenges, even if a cross-level comparative analysis can contribute to the current understanding of the EU institutional system.

It can be noted, however, that it would certainly be possible – also acceding to the theory of the existence of substantial limits to the revision of the Treaties – to modify the regulation of the legislative initiative at European level: the near-monopoly of the initiative by the Commission does not, in fact, constitute an unchangeable aspect of the Union's

parliamentarians have the initiative, which they exercise by presenting a motion, with only the title of the proposal (see in any case Articles 72-74 of the Constitution). In the Netherlands, the initiative belongs to the lower house (or to the Parliament in joint session: the States General), on the proposal of one or more members (articles 82-83 of the Constitution); in reality, the latter consider themselves owners of the initiative. In Poland, deputies have the right of initiative (Article 118 of the Constitution). In Portugal, the parliamentary initiative of laws belongs to individual deputies and parliamentary groups (Article 167 of the Constitution). In the Czech Republic, the initiative lies with deputies and groups (Article 41 of the Constitution). In Romania to individual parliamentarians (art. 74 of the Constitution) and so also in Slovakia (art. 87 of the Constitution) and Slovenia (art. 88 of the Constitution). In Sweden the members of the *Riksdag* have the initiative, in Hungary the parliamentary commissions and individual deputies (Article 25 of the Constitution).

[16] See P. Dann, *Looking through the Federal Lens: the Semi-parliamentary Democracy of the EU*, New York, NYU School of Law, 2002, p. 46 ("Speaking of a 'parliamentary system' is often misunderstood as meaning a parliamentary system as known from the UK or continental democracies. Yet, the EU surely is not a parliamentary system in this sense. But it is neither a presidential system. What is it then, this system based on federal thus consensual grounds, but with a strong legislature which is not dominating but nonetheless stamping the system?").

[17] T. Raunio, *The European Parliament*, in E. Jones, A. Menon and S. Weatherill (editors), *The Oxford Handbook of the European Union*, Oxford, Oxford Academic, 2012, pp. 365-379.

institutional set-up. Those who argue that there are substantial limits to the revision want to exclude a regression in the *stage* of integration, not only in terms of the Union's competences, but also in terms of the inversion of principles[18]. However, this could hardly be seen in a revision aimed at widening the range of bodies empowered to submit proposals for legislative acts, *a fortiori* if in the sense of strengthening the role of the European Parliament.

4. The possible attribution of the legislative initiative to the European Parliament or its components: a quick examination of some adverse arguments.

Some arguments have been put forward against the possible attribution of the legislative initiative to the European Parliament or its components.

The first of these is that the typical categories of national parliamentary and constitutional law cannot be used at European level. This would mean embracing an approach, critically called "institutional mimicry"[19], without realizing the differences between the supranational and national levels.

This argument can imply a preliminary closure towards an interpretation only because it takes up issues dear to constitutionalism already in relation to national legal systems. It is not difficult to argue, however, that regardless of the origin or value of an interpretation at national level, it is necessary to explain *in the merit* why there would be such significant differences with the European level. In these terms, the point of focus moves from the genesis of interpretation, and its affinities with what is usually supported by national legal systems, to its merit.

And, in fact, a second argument against the attribution of the legislative initiative to the European Parliament or its components relies on the importance, in the supranational

[18] See R. Passchier and M. Stremler, *Unconstitutional Constitutional Amendments in European Union Law: Considering the Existence of Substantive Constraints on Treaty Revision*, in *Cambridge Journal of International and Comparative Law*, n. 2/2015, pp. 361-362 and A. Ruggeri, *Le fonti del diritto eurounitario ed i loro rapporti con le fonti nazionali*, in P. Costanzo, L. Mezzetti, A. Ruggeri, *Lineamenti di diritto costituzionale dell'Unione europea*, Torino, Giappichelli, 2022, pp. 298.

[19] The expression is generally ascribed to the Belgian politician (and former professor of political science) Paul Magnette. See P. Magnette, *What is the European Union? Nature and Prospects*, Houndmills Basingstoke, New York, Palgrave Macmillan, 2005, pp. 1-10. See also B. Guastaferro, *Le declinazioni sovranazionali del principio democratico*, in *Europeanrights.eu*, 10 July 2012, p. 6.

context, of the initiative normally referred to the Commission[20].

The Commission's near-monopoly would be justified for three reasons.

First of all, the proposals made by the Commission would lead to the approval of acts that are qualitatively superior in comparison to those approved on the basis of parliamentary initiatives within institutional systems, in which the members of legislative assemblies are recognised as having the power to submit legislative proposals. The Commission's near-monopoly would ensure, according to part of the doctrine, the activation of the legislative procedure only when necessary and would make it possible to include a long-term perspective in the legislative process[21].

It is also argued that a parliamentary initiative would create the risk of *duplication* (including difficulties encountered in practice, in the exceptional cases where the Commission does not have a monopoly on the initiative)[22].

Finally, the Commission's near-monopoly should be maintained because of the need for legislative proposals from an 'impartial' body towards the Member States[23]: "The Commission has a near-monopoly of legislative initiative in the EU. This power was given to it in order to ensure that the *general interest* would be adequately taken into account in negotiations; to serve as a counterweight to differences in site between member countries;

[20] R. Schütze, *European Constitutional Law*, cit., p. 122: "The Commission is tasked to 'promote the general interest of the Union' through initiatives. It is to act as a 'motor' of European integration. In order to fulfil this – governmental – function, the Commission is given the (almost) exclusive right to *formally* propose legislative bills. The Commission's prerogative to propose legislation is a fundamental characteristic of the European constitutional order. Through it the Commission 'leads' the legislative process within the Union".

[21] R. Corbett, F. Jacobs and M. Schackleton, *The European Parliament*, London, Harper, 2007, p. 238.

[22] E. Best, *The European Parliament and the Right of Initiative: Change Practice, not Power*, cit., p. 10 ff.

[23] See A. Menon and J. Peet, *Beyond the European Parliament: Rethinking the EU's Democratic Legitimacy*, London, Centre for European Reform Essays, 2010, p. 6: "The point of the Commission is partly to act as an impartial referee, ensuring that national governments abide by the rules of the EU game, and partly too to carry out certain, limited executive functions. These latter – such as its ability to propose EU legislation – also depend on its being perceived to be truly impartial in its dealings with the member-States (the whole point of giving this power to the Commission in the first place was to prevent certain countries dominating the legislative agenda). Elections creating a direct link between the Parliament and the Commission would serve to lower, not raise, trust in this impartiality, not merely because it would mean selecting the Commission on the basis of a partisan majority in Strasbourg, but also because there would always be the lingering suspicion that its actions in office were about re-election. Already there are complaints that the Commission is too supine to the whims of MEPs. Giving the EP even more control over it would raise all the problems of political interference that led national governments to delegate tasks to non-elected EU institutions in Brussels in the first place"; and S. Russack, *EU Parliamentary Democracy: How Representative*, in *CEPS Policy Insights*, n. 7/2019, pp. 3-4: "Despite the significant increase in power in terms of legislative procedure and budgetary questions, as well as in exercising control over the executive, the EP lacks a central conventional parliamentary prerogative: the right of initiative, the right to propose new legislation. According to the treaties, the sole right to initiate legislative proposals lies with the European Commission (Article 17(2) TEU) […] At the EU level, this right was granted to the Commission alone so that Community law-making would be more likely to arise out of the general interest, rather than that of specific member States, so as to avoid the dominance of larger member States […] Despite this solid reason, the non-existent right to propose new laws constitutes the most significant lack of EP power compared to national parliaments".

and to promote policy coherence"[24].

All this is rather questionable. In many cases, above all, European regulations and directives have been criticized precisely for the high rate of obscurity that could hardly be said to be lower than that of national (or sub-national) legislation.

No less questionable is the claim that any *duplication* caused by the pluralism of initiative is a serious problem, which is widely disproved by national practice. This problem could arise only if the initiative act was wrongly configured as a request, with the result that Parliament would be obliged to carry out the procedure. However, since this is a proposal, it does not give rise to any obligation to debate or even to deliberate on the part of the European Parliament. Moreover, the risk of duplication is an argument adverse not to parliamentary initiative, but to the pluralism of the initiative. In other words it should lead, for the sake of consistency, to support the need for a monopoly of the initiative always and only in the hands of a single entity.

The idea that the exercise of legislative initiative should then be entrusted to an impartial body is strictly connected with the origin of EU, but it is an idea that clashes with the political nature of the decisions to be taken in a legislative procedure, even more so if it takes place in a context of «representative democracy» (art. 10 TUE).

A third argument against the provision of parliamentary initiative at supranational level is based on the consequent possible claims by the Council of Ministers of the Union. The recognition of parliamentary initiative is considered problematic as it could lead the Council of Ministers to claim the same power.

This, however, does not need necessarily to be regarded as negative. The decisive question – which naturally falls outside the scope of this paper – is whether or not this body is destined to take on the role of *Chamber of States* at European level. If that were the case, it would be expected to give this body, or its members, legislative initiative as well.

A fourth argument used against the provision of legislative initiative to the European Parliament relies on the formal (resolutions) and informal channels (such as the so-called *trilogues*) through which (also) Parliament can request the initiative of the Commission[25].

As is clear, however, soliciting initiatives from others is one thing, being able to exercise

[24] E. Best, *The European Parliament and the Right of Initiative: Change Practice, not Power*, cit., p. 4.
[25] A. Héritier, K.L. Meissner, C. Moury and M.G. Schoeller, *European Parliament Ascendant. Parliamentary Strategies of Self-Empowerment in the EU*, Cham, Palgrave Macmillan, 2019, p. 187.

the initiative independently is another[26]. It is underlined that Parliament's requests are often related to issues that already represent a subject of attention for the Commission. This, in any case, does not show that parliamentary initiative must be excluded.

Finally, a fifth argument against providing for a parliamentary initiative for European legislative acts is that, unlike national systems, the supranational system is too complex. However, this is clearly at odds with the experience of the United States. In fact, members of Congress are holders – indeed, exclusive holders – of the power of legislative initiative[27], in a federal system in which laws valid for a large number of States and citizens are approved, on a territory larger than the European one and marked by a rate of no less 'complexity' from a cultural, economic, political and institutional point of view[28].

5. Conclusions: *a)*. General remarks.

Today the EU is not a parliamentary (and federal) State. The almost complete exclusion of

[26] On the Parliament's formal and informal channels of influence on the EU governance see A. Héritier, C. Moury, M.G. Schoeller, K.L. Meissner and I. Mota, *The European Parliament as a Driving Force of Constitutionalisation*, Policy Department for Citizen's Rights and Constitutional Affairs, European Parliament, europarl.europa.eu, October 2015, p. 76.

[27] *Ex plurimis*, see V. Heitshusen, *Introduction to the Legislative Process in the U.S. Congress*, Washington D.C., November 2020, p. 3 ("Only Members of the House or Senate may introduce legislation, though occasionally a Member introduces legislation by request of the President. Members and their staff typically consult with nonpartisan attorneys in each chamber's Legislative Counsel office for assistance in putting policy proposals into legislative language. Members may circulate the bill and ask others in the chamber—often via Dear Colleague letters—to sign on as original co-sponsors of a bill to demonstrate a solid base of support for the idea. In the House, a bill is introduced when it is dropped in the hopper (a wooden box on the House floor). In the Senate, the bill is submitted to clerks on the Senate floor. Upon introduction, the bill will receive a designation based on the chamber of introduction, for example, H.R. or H.J.Res. for House-originated bills or joint resolutions and S. or S.J.Res. for Senate-originated measures. It will also receive a number, which is typically the next number available in sequence during that two-year Congress").

[28] See S. Fabbrini, *Compound Democracies. Why the United States and Europe Are Becoming Similar*, cit., pp. 203-205 ("The EU is a supranational polity with a necessary degree of institutional ambiguity. This ambiguity has brought some scholars to wonder about its uniqueness and others to assume it is exceptional […] This theory should be disputed. Primarily, in methodological terms. The unique or exceptionalist argument is always theoretically sterile […]. If exceptionalism is interpreted as a combination of specific historical and institutional features, then each and every political system is exceptional. But specificity does not mean uniqueness, since specificity can be recognized as such only through comparison […] But it is in empirical terms, especially, that the uniqueness argument is anything but convincing. Sure, the EU does indeed have an institutional structure and a functional logic quite different from those of the individual European nation-States […] the EU can be fruitfully compared with – especially – federal, noncentralized, or decentralized European nation-States […] but the notion of federalism cannot capture the complex nature of the EU […] If the comparative framework in enlarged to include America as well, it is possible to counter the exceptionalist argument by showing that the EU has evident similarities with the institutional structure and the logic of functioning of the US compound democracy […] The latter, in fact, is the only existing democracy whose structural size and political features are comparable with those of the EU").

a parliamentary initiative reflects the *hybrid* nature of the EU, neither a federal State nor an international organization, and the origins of the European institutional system[29]. The EU is the outcome of an *aggregation*: "It combines confederal and federal, intergovernmental and Community institutional properties. It is a *supranational* polity which combines […] inter-states and supra-states properties. The EU is the answer to a centuries-long fight between European nationalism, a fight which produced two hot wars and a cold war on the European continent in the twentieth century. Also the EU […] is a 'peace pact', an attempt to create a new political order in Europe, first among the countries of its Western part and then among the latter and the countries of its Eastern and Southern parts […] It is an international organization with institutional properties of a domestic one"[30].

In the light of what has been observed, it therefore seems that – since interpretative stretches are not possible – the interpreter is left with nothing but to notice that only a process of historical claim of attribution developed by the European Parliament itself, in practices or in the form of a revision of the Treaties, could lead to a parliamentary legislative initiative (and consequently to strengthen parliamentary democracy at European level).

At the same time, the interpreter can critically observe[31] that the almost complete exclusion of a parliamentary initiative is contradictory to the provision according to which the functioning of the Union is based on representative democracy (Article 10 TFEU), and with the principles of European Law that reveal the *federal ambitions* of the Union. It is no coincidence that the near-monopoly of the initiative has been the subject of (so far in vain) objections by MEPs.

It is clear that a distortion of the importance of parliamentary legislative initiative is not at issue here. The mere recognition of the power to submit proposals for legislative acts to MEPs would certainly not be enough: a broader revision of primary law should be requested to bring about an overall transformation of the supranational institutional set-up. And yet, the exclusion of parliamentary legislative initiative – considering the significance

[29] *Ex plurimis*, see S. Cassese, *Territori e potere. Un nuovo ruolo per gli Stati?*, il Mulino, Bologna, 2016, p. 112; J. Habermas, *The Crisis of the European Union in the Light of a Constitutionalization of International Law*, in *The European Journal of International Law*, n. 2/2012, p. 345; F. Snyder, *The Unfinished Constitution of the European Union: Principles, Processes, and Culture*, in J.H.H. Weiler and M. Wind (editors), *Constitutionalism beyond the State*, Cambridge, Cambridge University Press, 2003, p. 67.

[30] S. Fabbrini, *Compound Democracies. Why the United States and Europe Are Becoming Similar*, cit., p. 173. See also A. von Bongdandy, *La nostra società europea e la sua Conferenza sul futuro dell'Europa*, in *Quaderni costituzionali*, n. 3/2021, p. 700.

[31] See A. Patroni Griffi, *Il diritto costituzionale e l'Europa: note sparse sul ruolo dei costituzionalisti*, in *Diritto pubblico europeo – Rassegna online*, n. 1/2019, p. 24.

it assumes in the law-making process – is undoubtedly indicative of the level of *parliamentarisation* in the European legal system[32]. Unless, of course, the importance of the institution in question is contested also with reference to the national (and sub-national) context. However, this is clearly an issue on which it is not possible to elaborate in this paper, since it is beyond its scope.

If you look at the literature on the institutional set-up of the Union, the issue of the democratic *deficit* is now a classic one[33]. However, whether constructive or destructive, the criticism of the *institutional framework* is, at least predominantly, of a general nature. In other words, these studies are not often specifically devoted to individual aspects of the current system.

On the contrary, it seemed necessary, here, to abandon, as it were, the *macro-criticism*, the assessment of the rate of democracy of the Union as a whole, to embrace the *micro-criticism*, analysing the consistency with the basic principles of European law of a single aspect of the supranational institutional framework.

Precisely in this context, it did not seem pointless to question the possibility of granting Members of the European Parliament (or minorities) the legislative initiative and to stress

[32] A. Héritier, C. Moury, M.G. Schoeller, K.L. Meissnera and I. Mota, *The European Parliament as a Driving Force of Constitutionalisation*, cit., p. 107 ("We may conclude that there are some features of parliamentarisation in the EU to the emergence of which EP contributed, but other features are absent: With the advent of co-decision-making as the ordinary legislative procedure, the EP together with the Council, is now responsible for legislation in almost all areas. However, there is no organized opposition in the EP to systematically criticize the Commission as would be the case in a parliamentary democracy with the opposition. Moreover, the Commission holds the formal right of legislative initiative, not the EP as would be the case in a parliamentary democracy. With an important role in the control of the implementing powers of the Commission (former comitology) the EP has carved out an important role for itself in specifying legislation. Parliamentary features in the sense of co-decision of the EP are missing in the budgetary process on the revenue side. In the decision on who supplies EU financial resources, the member States are still clearly in the driving seat").

[33] *Ex plurimis* see A. Ballangé, *La démocratie communautaire. Généalogie critique de l'Union européenne*, Paris, Éditions de la Sorbonne, 2022, *passim*; R. Bellamy, *Democracy without democracy? Can the EU's democratic 'outputs' be separated from the democratic 'inputs' provided by competitive parties and majorities rule?*, in *Journal of European Public Policy*, n. 1/2010, p. 2; R. Bellamy and D. Castiglione, *Democracy by Delegation. Who Represents Whom and How in European Governance*, in *Government and Opposition*, n. 1/2011, p. 101; J. Coultrap, *From Parliamentarism to pluralism: models of democracy and the European Union's 'Democratic Deficit'*, in *Journal of Theoretical Politics*, n. 1/1999, p. 107; P. Craig, *Integration, Democracy, and Legitimacy, in the Evolution of EU Law*, edited by P. Craig and G. De Burca, Oxford, Oxford University Press, 2011, p. 13; C.E. De Vries, *How Foundational Narratives Shape European Union Politics*, in *Journal of Common Market Studies*, n. 6/2022, p. 11, G. Majone, *Europe's 'Democratic Deficit': The Question of Standards*, in *European Law Journal*, n. 1/1998, p. 5; D. Marquand, *Parliament for Europe*, London, Cape, 1979, p. 64; R. Schütze, *Models of Demoicracy: Some Preliminary Thoughts*, in *EUI Working Paper Law*, n. 8/2020, p. 19; J.H.H. Weiler, *The Political and Legal Culture of European Integration: An Exploratory Essay*, in *Icon*, nn. 3-4/2011, p. 678; J.H.H. Weiler, U. Haltern and F. Mayer, *European Democracy and its Critique*, in *West European Politics*, n. 3/1995, p. 4; D. Wincott, *Does the European Union Pervert Democracy? Questions of Democracy in New Constitutional Thought on The Future of Europe*, in *European Law Journal*, n. 4/1998, p. 419.

how problematic is that the procedure for the formation of European legislative acts does not contemplate an initiative by Members and only envisages, in limited exceptional cases, an initiative by Parliament.

b). Some broader considerations on the *future of Europe*. Strategic pragmatism and constitutional pragmatism.

However, what has just been said, at the same time, makes it possible to make some broader considerations on the *future of Europe*. In fact, there is a link, if one can say so, between *micro*- and *macro-criticality*.

The development model of European integration – *even* in recent decades – seems to respond to the project of a *sui generis* political community, neither an intergovernmental organisation nor a federal State. Giddens wrote in 2007 that federalism is an "anachronistic conception" for the contemporary world, and it is not the best way to decipher the future developments of the European Union. But the driving force behind the European project cannot be a "willing and active cooperation between independent sovereign States". From this point of view, the European Union (although it is not a mere international organisation) is not in place – and is not destined to become – a federal State. The implications of this are clear in Giddens' approach. To exclude the prospect of federalism also means that "the democratic nature of the European Union is not primarily representative, but deliberative"[34].

This idea of integration development – according to a model that is both non-federal and non-representative (at least not predominantly) – seems to have come back again recently during the Conference on the Future of Europe (see the proposals contained in the *report* of 9 May 2022)[35]. However, it is open to criticism.

For reasons related to the global economic context as well as strategic and geo-political, the process of European integration requires, in the contemporary world, to be developed in the sense of an increasingly broad sharing of fundamental political choices at the supranational level. The impact on *territories*, on citizens, of European policies (as also the

[34] A. Giddens, *Europe in the Global Age*, Malden (Ma), Polity Press, 2007, p. 210.
[35] Conference on the Future of Europe, *Report on the Final Outcome*, May 2022, consilium-europa.eu, p. 5 ("the Conference has constituted an unprecedented experience of transnational deliberative democracy"). See also the *Joint Declaration on the Conference on the Future of Europe* signed on 10 March 2021.

implementation of the *Recovery Plan* demonstrates) increases.

Just think of the crisis management determined by the pandemic emergency[36] and the invasion of Ukraine[37]. The decisions taken, in relation to these problems, at European level, end up having a serious impact on the lives of citizens of the Member States: they not only determine (or at least contribute to determining) – to name a few examples – the cost of petrol, the interest rate of loans, financing opportunities for home renovation, etc.; but, in reality, they also involve more than this: maintaining and promoting peace, safeguarding health, combating climate change[38]. These *keywords* of the European political agenda refer to objectives of the activity of public power on which, to a large extent, the quality of life of European citizens depends and will increasingly depend in the future.

Such an increase in integration must be accompanied, from a liberal-democratic perspective, by a reflection on the legitimacy of the supranational institutional set-up.

The extension, in terms of quantity and quality, of the intervention of the European institutions in the social field requires – while taking into account the peculiarities of the supranational level of government and the related difficulties – a reconsideration of the institutional structure. The instruments of participatory and deliberative democracy are surely important but cannot compensate an incomplete realization of the democratic-representative model[39].

In this sense, the reference to US history as an element of comparison – sometimes evoked in the context of public debate – is relevant not because we must accept, in a simplistic way, the idea (utopia?) of the *United States of Europe*, but because it is not useless to observe the affinities between two processes of institutional transformation – the one that

[36] See A. Oleart and N. Gheyle, *Executive gladiators in the European arena: discursive intergovernmentalism in the politicization of the Covid-19 EU recovery plan*, in *Journal of European Integration*, n. 8/2022, pp. 1095-1111; A.M. Porras-Gómez, *The EU Recovery Instrument and the Constitutional Implications of its Expenditure*, in *European Constitutional Law Review*, n. 1/2023, pp. 1-24; L. Quaglia and A. Verdun, *The European Central Bank, the Single Supervisory Mechanism and the COVID-19 related economic crisis: a neofunctionalist analysis*, in *Journal of European Integration*, n. 1/2023, pp. 139-156; L. Schramm and W. Wessels, *The European Council as a crisis manager and fusion driver: assessing the EU's fiscal response to the COVID-19 pandemic*, in *Journal of European Integration*, n. 2/2023, pp. 257-273; J. White, *Constitutionalizing the EU in an Age of Emergencies*, in *Journal of Common Market Studies*, n. 3/2023, pp. 781-796.

[37] See D. Fiott, *In every crisis an opportunity? European Union integration in defence and the War on Ukraine*, in *Journal of European Integration*, n. 3/2023, pp. 447-462; P. Genschel, L. Leek and J. Weyns, *War and integration. The Russian attack on Ukraine and the institutional development of the EU*, in *Journal of European Integration*, n. 3/2023, pp. 343-360; M.A. Orenstein, *The European Union's transformation after Russia's attack on Ukraine*, in *Journal of European Integration*, n. 3/2023, pp. 333-342.

[38] See M. Giuli and S. Oberthür, *Third time lucky? Reconciling EU climate and external energy policy during energy security crises*, in *Journal of European Integration*, n. 3/2023, pp. 395-412.

[39] See J.L. Newell, *European Integration and the Crisis of Social Democracy*, Palgrave Macmillan, Cham, 2022, pp. 123-157.

occurred at the end of the eighteenth century overseas and the one in progress in the Old Continent – obviously very different, and yet both driven by pressing material needs, in particular economic and military[40].

As can be seen from the pages of *The Federalist*, the principles of representative democracy and the (vertical and horizontal) separation of powers were affirmed in the American constituent phase due to the need to define an adequate institutional structure to face complex challenges (such as, at the time, the defence of territorial integrity and sovereignty and the protection of economic interests of the new American States against the European powers), without, however, jeopardizing freedom[41].

From this historical experience it seems to be possible to draw an important lesson. It is impossible to dissociate the *strategic pragmatism* inherent in the dynamics of European integration (the idea that a united Europe is indispensable to ensure prosperity, well-being, security and peace for the peoples of Europe) from the *constitutional pragmatism* (the idea that the increase in European competences implies a system in which political choices are made in a manner consistent with liberal democratic principles, thus ensuring participation and providing suitable mechanisms to allow a control, including of a political nature, that only parliamentary representation is able to offer).

c). Eurospeak as *Newspeak*? The process of European integration: the nationalist misunderstanding and liberalism *under attack*.

It could be argued, however, that these arguments for a complete affirmation of representative democracy constitute the product of a criticisable ideological concept. *Eurospeak* and *Newspeak* are the expressions used, in this regard, a few years ago, by Scruton: the "talks about a united Europe" would be, according to the philosopher, part of a more general trend of our time to uncritically consider everything that is "novelty" and "change" as something positive. The Europeanist ideals, in a similar reconstruction, have therefore been combined with a desire (considered dangerous) for change. In other words, Europeanism would be a form of reformist radicalism, it would belong culturally to all

[40] See again S. Fabbrini, *Compound Democracies: Why the United States and Europe Are Becoming Similar*, cit., pp. 203-204.
[41] See A.R. Amar, *America's Constitution: A Biography*, New York, Random House, 2012, p. 55.

those doctrines for which "transformation" is synonymous with "improvement", with "progress"[42].

However, the adverse nationalist reaction to the European project – or in other cases, at least, to its development – is misleading. The process of European integration puts national communities at risk, it is said. If, however, the reference to national communities to be preserved is to be taken seriously, it should not refer to any context of social life, but to specific forms of cohabitation. The national political communities to be preserved are people who, among other things, live by recognising each other's equal dignity and freedom. The fear of losing all this is understandable and legitimate[43]. And it is true, moreover, that change and progress do not necessarily identify with this.

We must, however, recognise that the global problems to be tackled require decisions taken at supranational level ("there are no local solutions to global problems"[44]) and that many economically and militarily important countries, whose political choices can also have a major impact on the lives of European citizens, have non-liberal and democratic constitutions. As today is also recognized by those who years ago advocated the definitive triumph of the liberal-democratic model, liberalism is subject to serious threats all over the world[45].

So, what do we do then? Is it really true that preserving national communities and strengthening European integration are objectives that must be placed at the opposite end of the spectrum of political positions? Looks like the answer is no.

If this is correct, that between nationalism and Europeanism is a sterile, *trivial* opposition. Institutions are tools for man: Europeans today need supranational institutions no less than national institutions[46]. The real problem is how to ensure that they are not simply effective and efficient, but preserve a lifestyle based also on the sharing of the values of liberal democratic constitutionalism. Can nationalists and Europeanists meet on this ground?

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[42] R. Scruton, *A Political Philosophy. Arguments for Conservatism*, London, New York, Continuum, 2006, pp. 166-167.

[43] J. Habermas, *The Crisis of the European Union in the Light of a Constitutionalization of International Law*, cit., pp. 338-339 ("For a long time, the dense network of supranational organizations has aroused fears that the connection between civil rights and democracy assured by the nation State is being dissolved and that the democratic sovereign is being dispossessed by executive powers operating independently at the global level […] However, I would like to use the example of the European Union to refute a proposition that today provides the main support for political defeatism, namely, the claim that a trans-nationalization of popular sovereignty cannot be accomplished without lowering the level of legitimation").

[44] Z. Bauman, *Society under siege*, Malden (Ma), Polity, 2002, p. 84.

[45] F. Fukuyama, *Liberalism and its Discontents*, London, Profile Books, 2022, p. 19.

[46] See J. Habermas, *The Crisis of the European Union in the Light of a Constitutionalization of International Law*, cit., pp. 344-345.

Abstract: The essay is dedicated to the (almost complete) absence of a parliamentary initiative of legislative acts at European level. This absence reflects the origin of EU and the 'hybrid nature' of the European institutional system (neither federal State nor international organization). Nevertheless, in the paper, it is argued that the absence of a parliamentary initiative of legislative acts is not coherent with some fundamental principles of the EU Law. Without the legislative initiative (at least as a rule), the European Parliament is not autonomous and therefore the principle of separation of powers is not respected. Moreover, the individual members of the European Parliament or the parliamentary minorities are unable to take the initiative. In the conclusions, it is observed that the eventual further development of European integration should require the full realisation of the representative democracy in Europe.

Abstract: L'articolo è dedicato alla (quasi completa) assenza di un'iniziativa parlamentare degli atti legislativi a livello europeo. Questa assenza riflette l'origine dell'UE e la "natura ibrida" del sistema istituzionale europeo (né Stato federale né organizzazione internazionale). Ciò nondimeno, in questo lavoro, si sostiene che l'assenza di un'iniziativa parlamentare degli atti legislativi non è coerente con alcuni principi fondamentali del diritto dell'UE. Senza iniziativa legislativa (almeno di regola), il Parlamento europeo non è autonomo e dunque il principio della separazione dei poteri non è rispettato. Perdipiù, i singoli componenti del Parlamento europeo o le minoranze parlamentari sono prive della possibilità di esercitare l'iniziativa. Nelle conclusioni, si osserva che l'eventuale ulteriore sviluppo dell'integrazione europea dovrebbe richiedere la piena realizzazione di una democrazia rappresentativa europea.

Key words: Representative democracy – parliamentary democracy – European Parliament – legislative initiative – separation of powers.

Parole chiave: Democrazia rappresentativa – democrazia parlamentare – Parlamento europeo – iniziativa legislativa – separazione dei poteri.