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di Cristina Fasone
Ricercatrice di Diritto pubblico comparato
Università LUISS Guido Carli – Roma

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1. Legislative bodies in transformation: placed where?

Legislative bodies have changed significantly in their features and powers over time. This transformation has been affected by the developments that occurred in terms of centrality of Parliaments and Congresses as law-making authorities to which the existence of legislative bodies has been traditionally linked.

In a landmark judgment delivered in 2015 the US Supreme Court considered that also the People voting through a referendum can be qualified as "legislature" as the body entitled to make laws. To this end the Supreme Court upheld the right of Arizona voters expressing themselves by means of a ballot initiative, allowed under the Arizona Constitution (Art. IV, pt. 1, §1), to withdraw from the State legislature the power to draw electoral districts and to grant such a power to an Independent Redistricting Commission. This decision hints to the fact that in a certain legal system and even within the same level of government there are thus multiple competitors for the role of "legislature" and the Parliament is just one of them. Nevertheless, this decision, taken with a majority of 5 to 4, was a controversial one: indeed, in his dissenting opinion Chief Justice Roberts convincingly argued that the decision to equate the People to the legislature is devoid of textual and historic basis, contradicts the Court's precedents and the wording of the Election Clause that clearly refers to a representative institution.

Although, as this ruling proves and as clarified in the next section, it would be inaccurate to equate legislative bodies solely to Parliaments in their entirety – also non-parliamentary institutions, e.g. the

* Peer reviewed.

Council of Ministers of the EU or the People, can act as legislatures and parliamentary organs, like either chambers of a bicameral Parliament or standing committees, fulfill the tasks of legislative bodies –, it cannot be neglected that the first public authority to be associated with law-making still remains the Parliament (or Congress).

Yet, today there are several legislative bodies that potentially compete with the Parliament. First of all, in decentralized systems of government, more than one legislature insists on the same territory. In federal and regional systems, sub-national legislatures are normally established. Likewise, in areas of the world subject to processes of regional integration, also supranational legislatures can be established, like the European Parliament (EP) in the EU. So multilevel or multilayered systems of government are usually featured by a plurality of legislative bodies whose relationships are articulated around principles like conferral of powers, supremacy and primacy, subsidiarity and proportionality.

Second, even within the same level of government the competition among legislative bodies is displayed horizontally between the Parliament and its organs, on the one hand, and executive bodies and agencies exercising a broad range of rule-making and legislative-alike powers, on the other. The result has been the adaptation of parliamentary bodies mainly devoted to undertaking a legislative function to exercise in a more systematic manner the scrutiny and oversight function.[1] This is also confirmed by the circumstance that since the end of the 1970s most democratic Parliaments have been described as law-influencing legislatures, i.e. Parliaments influence the law made by other authorities.[2]

This article has mainly a classificatory intent, given the semantic confusion that terms like "Parliament", "Congress", Legislature" and "Legislative body" tend to create, and aims to trace the evolution of legislative bodies, in particular in multilevel settings. In doing so, it tries to demonstrate that in the Twenty-first century the notions of "Legislature" and of "Legislative body" cannot be attached solely to the Parliament as elected representative institution. Indeed, there are multiple actors enabled to act as legislatures, at supranational, national, and subnational level, even outside the traditional legislative branch.

[1] R. Pelizzo, F. Stapenhurst, *Parliamentary oversight tools. A comparative analysis,* Abindgon, Routledge, 2012, p. 1-74.
[2] P. Norton, *Parliaments: A Framework for Analysis*, in P. Norton (ed.), Parliaments in Western Europe, 2nd edn, London, Frank Cass, 1996, p.5, tends to talk about "policy-influencing legislatures".

2. Parliaments, legislatures and legislative bodies, between political science and constitutional law: misleading terminological associations

Today all 193 United Nations Member States are deemed to have a legislature and the Interparliamentary Union regularly issues reports on its 178 member Parliaments.[3] Despite the apparent "success" of Parliaments at the beginning of the Twenty-firstst century as institutions, on which much could be elaborated to counter this assumption, the data says very little about the nature of those Parliaments and to what extent they can be equated to legislative bodies.

There is, indeed, a certain degree of confusion when playing with the terms "Parliaments", "legislatures" and "legislative bodies" in comparative constitutional law, due to the variety of institutional denominations adopted, in line with century-old traditions. Part of the problem lies in the fact that the discipline has engaged only to a limited extent with legislative bodies, especially in a comparative perspective,[4] and because in certain areas of the world, particularly in Africa and Asia, legislative bodies as functioning Parliaments are fairly recent institutions, going back to the post-decolonization or post Cold War periods, depending on the case.[5] Comparative constitutional scholarship, though not everywhere – exceptions can be found in Europe and in North America[6] – has rather preferred to deal

[3] Cfr. T. Groppi, *Occidentali's Karma? L'innesto delle istituzioni parlamentari in contesti 'estranei' alla tradizione giuridica occidentale*, in *Federalismi.it*, no. 5, 2019, p. 3-4.

[4] As also argued by R.W. Bauman and T. Kahana (eds), *The Least Examined Branch. The Role of Legislatures in the Constitutional State*, Cambridge, CUP, 2009.

[5] Even where bodies aspiring to be "Parliaments-lookalike" were conceived and established, by no means they can be portrayed as law-making authorities in the modern sense. For example, the so-called "Confucian constitutionalism" promoted the set up of a tricameral Parliament whereby next to the House of the Nation and the House of the People there was also the House of *Ru*, representing the 'sacred legitimacy' and the Confucian scholars: see Jiang Qing, *The Way Of The Humane Authority: The Theoretical Basis for Confucian Constitutionalism and a Tricameral Parliament*, in D. A. Bell and R.Fan (eds) *A Confucian Constitutional Order: How China's Ancient Past Can Shape Its Political Future* (Princeton University Press 2013) 41. Indeed, even today in the case of China the bodies entitled to exercise the legislative function, under the Constitution, the National People's Congress and the Permanent Committee, can hardly be equated to a Parliament due to the organization of their business and the reach of their action. A. Rinella, *Cina*, Bologna, Il Mulino, 2013, p. 55-56. In other countries, like in India and in the Southern African region (South Africa, Botswana, Namibia, Lesotho, Swaziland and Zimbabwe) the colonial domination for a long time has prevented local assemblies, often unelected, to act as true legislatures, as the Parliament of the Motherland remained the ultimate authority to enact and modify the laws of the colonies. See, respectively, M. Prasad Singh, *The Decline of the Indian Parliament*, in *INDIA REV.*, VOL. 14, NO. 3, 2015, P. 352 AND D. AMIRANTE, *INDIA*, BOLOGNA, IL MULINO, 2013, P. 33; M. Nicolini, *Insidie "coloniali", rappresentazione cartografica e processi di delimitazione delle aree geogiuridiche africane*, in M. Brutti e A. Somma (eds), *Diritto: storia e comparazione*, Frankfurt am Main, Max Planck Institute for European Legal History, 2018, p. 338 and E. Azevedo-Harman, *Parliaments in Africa: Representative Institutions in the Land of the 'Big Man'*, in *The Journal of Legislative Studies*, vol. 17,no. 1, 2011, p. 65.

[6] See, for example, the work by H. Kelsen [1920], *Vom Wesen und Wert der Demokratie*, translated by N. Graf, in N. Urbinati, N, and C. Invernizzi Accetti (eds), *The Essence and Value of Democracy*, New York, Roman & Littlefield, 2013 and by C. Schmitt [1923], *The Crisis of Parliamentary Democracy*, Cambridge MA, MIT Press, 1986, on parliamentarism. For more recent comparative analyses, see R.W. Bauman and T. Kahana (eds), *The Least Examined Branch. The Role of Legislatures in the Constitutional State*, cit.; J. García Roca, *Control parlamentario y convergencia entre*

with courts and judicial review, fundamental rights and federalism or separation of powers at large without focusing especially on the inter- and intra-institutional dynamic of legislatures.[7] Even when legislatures have been the objects of investigation by constitutional lawyers, the terminological problem has been left largely unexplored.

By contrast, the domain has been extensively covered by political scientists, who have tried to compare and classify Parliaments as legislatures under different variables, all revolving around the ability of Parliaments to affect the legislative outputs, insisting on their policy-making capacity.[8] Interestingly these studies, while devoting little attention to the normative-legal element, in particular constitutional and sub-constitutional rules and practices, have emphasized other functions and virtues of Parliaments – even more significant than the legislative function, they claim – linked to the relationship with the voters, like Parliaments' ability to enjoy popular support. It is not by chance that when describing the UK House of Commons in his seminal work on the English Constitution Walter Bagehot ranked the "elective function", i.e. to express a majority in support of a Prime Minister and her Cabinet, as the most important.[9] Then, he listed the legislative function next to the House of Commons' functions to express the mind of the people, to teach the nation and to communicate grievances.

As put forward in the introductory sections, the underlying assumption of this contribution, which will be explained and justified in the following sections, is that for a number of reasons it is not appropriate to identify *sic et simpliciter* legislative bodies with Parliaments or legislatures without further elaboration, in

presidenzialismo y parlamentarismo, in *Cuestiones constitucionales*, vol. 37, 2017, p. 3 ff., and N. Lupo, *Parliaments*, in R. Masterman and R. Schütze (eds), *The Cambridge Companion to Comparative Constitutional Law*, Cambridge, CUP, forthcoming (September 2019), p. 355-356. On specific national legislatures, see, for example, A. Manzella, *Il parlamento*, 3rd edn., Bologna, Il Mulino, 2003; J. Hamers and B.A. Finkelstein (eds), *The most disparaged branch: the role of Congress in the Twenty-first century*, Symposium in *Boston University Law Review*, vol. 89, no. 2, 2009; W. Ismayr, *Der Deutsche Bundestag*, 3rd edn, Nomos Verlag, Springer, 2012; P. Avril, J. Giquel, and J.-É. Giquel, *Droit parlamentaire*, 5th edn, Paris, L.G.D.J., 2014; W. McKay and C. Johnson, *Parliament and Congress: Representation and Scrutiny in the Twenty-First Century*, Oxford, OUP, 2010; N. Besly and T. Goldsmith, *How Parliament Works*, 8th edn, 2018; F. Santoalla Lopez, *Derecho parlamentario español*, 2nd edn, Madrid, Dykinson, 2019; J. M. Fernandes and C. Leston-Bandeira (eds), *The Iberian legislatures in comparative perspective*, Abindgon, Routledge, 2019.

[7] A tiny minority of textbooks in comparative constitutional law engage with a comparison amongst legislatures or parliaments: exceptions are, for example, W.A. Heringa, *Constitutions Compared: An Introduction to Comparative Constitutional Law*, 4th edn., Intersentia, 2016, p. 97-160. M. Volpi, *L'organizzazione costituzionale. Sezione III - Il Parlamento*, in G. Morbidelli, L. Pegoraro, A. Rinella, and M. Volpi (eds), *Diritto pubblico comparato*, 5th edn, Torino, Giappichelli, 2016, p. 488-511, and P.L. Petrillo, *I Parlamenti*, in T.E. Frosini, *Diritto pubblico comparato. Le democrazie stabilizzate,* Bologna, Il Mulino, 2019 ch. VI. Legislatures have come into play in the theoretical accounts of certain authors, in particular legal and political philosophers mainly indirectly and, in any event, not as the main focus of the analysis: See, for instance, J. Waldron, *Law and Disagreement*, Oxford, OUP, 1999, p. 123-140 and R. Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy*, Cambridge, CUP, 2007, p. 90 ff.

[8] See, for example, P. Norton, *Legislatures in perspectives*, in *West European Politics*, vol. 13, 1990, p. 143-152; D. Arter (ed), *Comparing and classifying legislatures*, Abingdon, Routledge, 2007; Loewenberg, G., *On legislatures: the puzzle of representation*, Boulder, CO, Paradigm Publisher, 2011.

[9] W. Bagehot [1867], *The English Constitution,* edited by M. Tylor, Oxford, OUP, 2001, p. 124 ff.

particular in multi-level systems of government. Indeed, especially in legal systems featured by multiple constitutional layers, interacting with one another, there is a variety of legislative bodies intervening in the law-making process, including a number of different Parliaments (and their organs) having a say on these procedures.

2.1. Parliaments and Congresses as legislative bodies

First of all, Parliaments and Congresses – that is how Parliaments are normally named in presidential systems, in contrast to "fused power systems" or parliamentary-like forms of government[10] – have not always operated as legislatures or legislative bodies. Particularly in the long-standing history of British parliamentarism, Parliaments were originally political assemblies struggling for their autonomy from the Crown, which was gradually affirmed under the power of the purse and the appropriation of budgetary resources, at first. Moreover, certain Parliaments, parliamentary chambers or parts thereof in Europe, in France and in England, for example, acted as courts for some time, with the notable exception of the appellate committee of the UK House of Lords that remained in power as the highest judicial authority in the UK until 2009.[11]

It is only after the three constitutional revolutions – the UK Glorious Revolution of 1688-1689, the American Revolution of 1775-1783 and the French Revolution starting in 1789 – took place as turning points in the birth of Western constitutionalism, that Parliaments and Congresses were credited primarily as legislatures. The legislative turn in the activity of Parliaments and Congresses in the Western legal tradition has also been accompanied by the progressive expansion of the suffrage. Thus, the strengthening of the legislative side of parliamentary activities, as legislation was meant to be an expression of "the general will",[12] coincided with the achievement of universal (male) suffrage.

[10] See A. Kreppel, *Typologies and Classifications*, in S. Martin, T. Saalfeld, and K.W.Strøm (eds), *The Oxford Handbook of Legislative Studies*, Oxford, OUP, 2014, p. 82-100 and N. Lupo, *Parliaments*, cit., p. 347-350.

[11] The *Constitutional Reform Act 2005* established the Supreme Court of the United Kindgom which now fulfils the function of the highest judicial authority. Interestingly, the Supreme Court has original jurisdiction to adjudicated on the devolution issues, whenever the central Government considers that the exercise of legislative powers by the devolved legislatures encroach upon the reserved matters of the Westminster Parliament. Hence the Supreme Court can act as an arbiter in conflict of authority between the regional and the national legislatures. See T. Groppi, *Conflitti devolutivi tra Londra e Edinburgo: nuovi percorsi per il judicial review of legislation?*, in C. Decaro (ed), Parlamenti e devolution in Gran Bretagna, Rome, LUISS University Press, 2005, p. 61-81; P. Leyland, *Constitution of the United Kingdom: A Contextual Analysis*, Oxford, Hart Publishing, 2012, p. 267-272; Lady Hale, President of the Supreme Court, *Devolution and The Supreme Court – 20 Years On*, Speech delivered at Scottish Public Law Group 2018, Edinburgh, 14 June 2018, available here: https://www.supremecourt.uk/docs/speech-180614.pdf.

[12] R. Carré de Malberg, *La Loi, expression de la volonté générale. Études sur le concept de la loi dans la Constitution de 1875*, Paris, Libraire du Recueil Sirey, 1931, p. 16 ff.

2.2. Legislatures as legislative bodies in multilevel settings

If Parliaments are generally identified with legislative bodies, they certainly do not exhaust the entire range of bodies exercising legislative functions in a constitutional system. Indeed, there are legislatures that one can hardly place under the category of Parliaments (or Congresses).

In his renowned speech to the electors of Bristol in 1774, Edmund Burke famously pointed to one of the most significant features of being a Member of Parliament and, consequently, of a Parliament itself: namely to represent the Nation, with a free mandate. This characteristic, that is still attached to the very nature of contemporary Parliaments, cannot be found in every legislature. For example, according to the Basic Law for the Federal Republic of Germany: 23 May 1949 (as amended to 13 July 2017), Arts 55, 59(2) and 122 (1), the German *Bundesrat* is one of the two legislative bodies at federal level though it enjoys more limited legislative powers compared to the *Bundestag* especially after the constitutional reform of 2006. Being an Upper House composed of Ministers of the various *Länder* bound to vote by delegation according to the instructions provided by the Land Government, as confirmed by the federal Constitutional Court (BVerfGE 106, 310), it cannot easily be equated to a parliamentary chamber. In its decision of 25 June 1974 the Constitutional Court appears to endorse this view when affirming that the *Bundesrat* is not a second chamber of a uniform legislature (BVerfGE 37, 363-380). If this statement is remarkable from the perspective of the lack of truly parliamentary credentials of the *Bundesrat*, nevertheless the decision does not affect the constitutional entitlement of the *Bundesrat* to act as a second chamber and, in fact, it is considered as such for the subsidiarity scrutiny of EU legislative proposal under Protocol no. 2 annexed to the Treaty of Lisbon. Even more clearly and despite the supranational context, the Council of Minister of the European Union (the Council) is now universally described as one of the two branches of the European legislature, but it undoubtedly lacks the structural features of a Parliament.

As the example of the Council shows, the identification of legislative bodies exclusively with Parliaments is also problematic in a perspective of multi-level or multi-layered constitutionalism, i.e. when looking at the subnational and supranational levels of government. In Italy, for example, the Constitutional Court excluded that the regional legislative assemblies could name themselves "Parliaments" (decisions no. 106 and 306 of 2002). It did so, in part, according to a textual argument – namely Art. 55 of the Italian Constitution denominates "Parliament" only the bicameral representative institution at national level, while Art. 121 Const. refers to the regional legislative assemblies as "Regional Councils" – but in fact the judgments were mainly grounded on the specific connotative value of the word "Parliament" that, based on Art. 67 It. Const., is deemed to represent the Nation as a whole.

Similarly controversial has been the acknowledgment of the parliamentary nature to institutions at supranational level, in particular to the European Parliament (EP), even after its direct election.[13] In a number of cases the *Bundesverfassungsgericht* has considered the EP as lacking the democratic credentials of "ordinary" domestic Parliaments because of its powers[14] and, most importantly, because of its method of election and its (disproportionate) composition, which over-represents the citizens of small states (see, amongst the many decisions, the "Lisbon Decision", 2 BvE 2/08). Even though other Constitutional Courts have also been asked to decide on the constitutionality of the threshold set by national legislation for the EP's election,[15] only the *Bundesverfassungsgericht* has eventually annulled the provision of the 3% threshold in light of the current legal and factual circumstances that, according to the majority of the Second Senate (5 to 3), does not make the method of composition of the EP respectful of the principles of electoral equality and of equal opportunities.[16] Unlike for the German *Bundestag*, the Court considers that in the case of the EP the electoral threshold cannot be justified with a view to ensuring the Parliament's ability to function, the EP being governed by different dynamics, beyond the majority vs. opposition divide that normally features national Parliaments.[17]

[13] See O. Costa, *Le Parlement européen, assemblée délibérante*, Bruxelles, Édition de l'Université de Bruxelles, 2001, p. 35 ff; Corbett, R, Jacobs, F, and Neville, D, *The European Parliament*, 9th edn, London, John Harper, 2016; N. Lupo, A. Manzella, *Il parlamento europeo. Una introduzione*, Roma, LUISS University Press, 2019, p. 19 ff.

[14] See the German Constitutional Court's "Maastricht Decision", 2 BvR 2134, 2159/92.

[15] Czech Constitutional Court, Pl. ÚS 14/14 on which see H. Smekal and L. Vyhnánek, *Equal voting power under scrutiny: Czech Constitutional Court on the 5% threshold in the 2014 European Parliament Elections: Czech Constitutional Court 19 May 2015, Pl. ÚS 14/14*, in *European Constitutional law Review*, vol. 12 no 1, 2016, p. 148-163; Italian Constitutional Courts' decisions no. 217 of 2010, 110 of 2015, and no. 239/2018, on which see G. Piccirilli, *Maintaining a 4% Electoral Threshold for European Elections, in order to clarify access to constitutional justice in electoral matters: Italian Constitutional Court Judgment of 14 May 2015 No. 110*, in *European Constitutional law Review*, vol. 12 no 1, 2016, p. 164-176 and G. Delledonne, '*A Goal That Applies to the European Parliament No Differently From How It Applies to National Parliaments': The Italian Constitutional Court Vindicates the 4% Threshold for European Elections Italian Constitutional Court. Judgment of 25 October 2018 no. 239/2018*, in *European Constitutional Law Review*, 2019, early view, p. 1-14.

[16] See the German Constitutional Court's ruling in the case 2 BvE 2/13, taken after the Judgment 2 BvC 4/10, 2 BvC 6/10, 2 BvC 8/10 which declared the 5% threshold unconstitutional. Cfr. B. Michel, *Thresholds for the European Parliament Elections in Germany Declared Unconstitutional Twice: Bundesverfassungsgericht Judgment of 9 November 2011, 2 BvC 4/10, 5% threshold Judgment of 26 February 2014, 2 BvE 2/13, 2 BvR 2220/13, 3% threshold*, in *European Constitutional Law Review*, vol. 12, no 1, 2016, p. 133-147.

[17] This understanding of the role of the EP in the dynamic of the EU "form of government", however, has been contradicted by the Council Decision (EU, Euratom) 2018/994 of 13 July 2018 – still under approval at domestic level and that is going to make compulsory for Member States with at least 35 seats in the EP the provision of an electoral threshold from 2 to 5% – as well as by the last decision of the Italian Constitutional Court on the issue, no. 239/2018. The need to seek stability and governability in the EU system of government appears confirmed in particular after the result of the 2019 European elections aiming, on the one hand, to guarantee the EU inter-institutional balance and, on the other, to make the European integration process politically appealing: see E. Cannizzaro, *The 2019 Elections and the Future Role of the European Parliament: Upsetting the Institutional Balance? – Editorial* , in *European Papers*, no. 4, 2019, p. 3-6 and B. Caravita, *Mettere il nuovo Parlamento europeo al centro delle scelte politiche – Editoriale*, in *Federalismi.it,* no. 11, 2019, p. 2-6.

The case of the EP, though, is also a good illustration of the difficulties considering supranational bodies as legislatures or, more precisely, as legislative bodies. In a landmark decision back in 1999 in *Matthews v. United Kingdom* (Application no. 24833/94), the Grand Chamber of the European Court of Human Rights (ECtHR) considered for the first time whether the EP could be treated as a legislature under Art. 3, Protocol no. 1 to the ECHR, according to which "The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature". The exclusion of the UK and European citizens residing in Gibraltar from the EP's elections gave factual evidence to the problem on how to qualify the EP for the sake to apply the ECHR and its Protocol no. 1 to the case. At that time, the EP had already become a directly elected body and, since the Treaty of Maastricht, in force when the judgment was delivered, it had obtained significant law-making powers through the co-decision procedure.[18] Taking stock of these developments, especially on the side of its legislative function, the majority of the Court, hence, held that the EP was a legislature in the meaning of Art. 3, Protocol no. 1. Both the European Commission on Human Rights, which gave its opinion on the case on 29 October 1997, and the two dissenting justices, Sir John Freeland and Jungwiert, followed an originalist approach in the interpretation of Protocol no. 1. By relying on the preparatory work of Art. 3, they contended that the drafters and hence the Article only referred to national or local legislative assemblies and voluntarily excluded supranational representative bodies. However, the joint dissenting opinion also provides insights on the two Justices' view on the EP and on what a legislature actually is in comparison to a Parliament, as if the two terms do not always coincide. They described a legislature as a body having the power to initiate and to adopt legislation, while other "ancillary functions", like the censure of the executive or the approval of the budget "may enhance the body's entitlement to be styled as a Parliament" and its role in promoting an "effective political democracy", but this is not conducive to treating the EP as a legislature. In their view, it lacked (and still lacks) the power of legislative initiative and was unable to pass legislation on its own, without the consent of the Council.

As anticipated, 20 years after this decision and opinions, after several EU Treaty revisions and the EP empowerment, it would be hard to resort to the original intent of the drafters to refuse the status of legislative body or legislature to the EP.

[18] See then Art. 189 of the Treaty of the European Community.

2.3. Legislative bodies that are not fully-fledged legislatures

Once again, the case of the EP lacking the power to initiate and adopt legislation exclusively, is also interesting when evaluating another potential semantic difference between the term "legislature" and "legislative body", although in many languages there is no convincing translation of "legislature" as a stand-alone term other than "legislative branch" (e.g. in French, *corps legislative*; in German *Gesetzgebende Koerperschaft* and *Legislative*). Indeed, also based on the evoked joint dissenting opinion in *Matthews v. the United Kingdom* it appears that the notion of "legislature" is more demanding for the institution under scrutiny in terms of conditions and criteria to be met compared to that of "legislative body". In other words, a legislature has to be self-standing and autonomous when fulfilling the legislative function, i.e. its members or bodies are entitled to propose bills and a majority in the House is empowered to pass legislation on its own, though the Head of State, depending on the system of government, could veto the enactment of the bill or simply refer it back to the legislature for further consideration. Otherwise, we can simply talk of a legislative body, taking part in the law-making process.

If the definition of legislature just provided is followed, then either chambers of a bicameral legislature and committees involved in law-making are certainly legislative bodies but cannot pretend to be legislatures. For example, although many Upper Houses in bicameral systems participate in the legislative process, they cannot ultimately veto the adoption of legislation (the UK House of Lords, the Canadian, French, and Spanish Senates just to mention a few), in particular if money bills are at stake. In other cases, even though the Lower and Upper Houses share the same powers, e.g. in the US Congress, in the Italian Parliament and in the Australian Parliament, neither of them could independently approve a bill regardless of the other chamber. When symmetrical bicameralism is in place, the *iter legis* comes to an end only if the bill is approved by both houses in the same text. This feature makes the Parliament or Congress as a whole the true legislature, while its Lower and Upper House are just legislative bodies participating in the law-making function.

An interesting case to explain this difference between "legislature" and "legislative body" is represented by the work of parliamentary committees. These multi-functional parliamentary bodies, sometimes permanent, some established *ad hoc* or routinely, like the Committee of the Whole House, can take part in the legislative process in a variety of ways, including through the pre-legislative scrutiny of bills and draft statutory instruments as in the case of the UK select committees, otherwise not involved in the actual law-making process. Typically committees 1) can be simply consulted along the process, with opinions that can be more or less binding – often the opinions of the Budget Committee on the fiscal coverage of bills, if negative, can delay the completion of the process or determine further procedural fulfillments; 2) can participate in the drafting and amendment of bills – a power recently acquired even

by the standing committees of the French Parliament, following the constitutional reform of 2008 (Art. 42, Constitution of the French Republic of 5 October 1958, as amended to 23 July 2008); 3) or, in a few cases, can pass bills on their own, upon delegation by the House or assignment by the Speaker (Art. 58 Federal Constitution of Brazil: 5 October 1988, as amended to 14 December 2017); Art. 70 Constitution of Greece: 11 June 1975, as amended to 27 May 2008; Art. 72 It. Constitution; Art. 215 Constitution of the Republic of Paraguay: 20 June 1992, as amended to 17 October 2011; Art. 75 Spanish Constitution: 27 December 1978, as amended to 27 September 2011)[19]. Even when a parliamentary committee is equipped with such a legislative capacity it can hardly be described as a self-standing legislature since it lacks the capacity to pass legislation without the consent of the House and the delegation of legislative authority is usually forbidden in sensitive areas, e.g. money bills, international treaties, constitutional amendments, and for specific sources of the law, e.g. decree-laws and legislative acts of delegation. Moreover, except for Greece, all the other Parliaments or Congresses where committees can adopt legislation on behalf of the House are bicameral, so the committee's vote is not final, and the Lower or Upper House will eventually intervene.

3. Evolution of legislative bodies

If the analysis of legislative bodies is put in a close relationship with the activity of Parliaments and Congresses, then it has to be examined how and to what extent Parliaments and the bodies therein have come to exercise a legislative authority. Indeed, as highlighted in section A, the progenitors of contemporary Parliaments, particularly the English Parliament before the Glorious Revolution or the French Parliament of the *Ancien Régime* at the end of the 17th century, they could hardly be associated with law-making. At that time Parliaments were mainly courts and, in the case of the English Parliament, after the enactment of the *Statutum de tallagio non concedendo* in 1297, they were gradually conferred budgetary powers.[20]

It was only since the end of the 18th century and beginning of the 19th century that Parliaments and Congresses became mainly, though not exclusively, legislative authorities in parallel with the enlargement of the suffrage (section A). The "golden age" of Parliaments, indeed, corresponds to the period of the strengthening of their democratic legitimation and of their legislative function, until World War II (WWII). The adoption of legislation, as the source of the law embodying general and abstract principles

[19] See C. Fasone, *Sistemi di commissioni parlamentari e forme di governo*, Padova, CEDAM, 2012, p. 496-511.
[20] See J. Bell Henneman, *Editor's Introduction: Studies in the History Of Parliaments*, in *Legislative Studies Quarterly*, Vol. 7, no 2, 1982, p. 161-180 and N. Key and R. Bucholz (eds), *Sources and Debates in English History 1485-1714*, 2nd edn,Oxford, Wiley-Blackwell, 2009, p. 155.

meant to encompass legal situations potentially affecting every individual and legal person within the political community, grew quickly, well beyond the areas traditionally reserved for the domain of legislation (e.g. fundamental rights' protection and criminal matters) to cover any area in which the public administration could exercise its authority, in the name of the principle of legality. The expansion of the scope of legislation, in turn, triggered important changes in the internal organization of the main law-making authority, the Parliament. For example, bicameral Parliaments differentiated the powers of their two chambers, typically limiting the veto power of the Upper House, with a view to streamlining the legislative process. By the same token, committees, either special committees, the Committee of the Whole House, and, most remarkably, standing committees mirroring the attributions of the Ministries and executive departments, were set up in order to cope with the increasing amount of legislation, also having a technical nature, in connection to the rise of the Welfare State.

In the functioning of post-WWII democratic constitutional systems, however, the role of Parliaments and parliamentary organs as legislative bodies has gradually but steadily declined.[21] Within the existing constitutional boundaries, the role of the executive branch in adopting acts with the same value as legislation, namely legislative decrees and decree-laws or comparable statutory instruments, has increased substantially. Relatedly, shares of legislative powers have been conferred from the national Parliament to supranational and sub-national legislative authorities (section 2.2). While not leading Parliaments and their organs to give up their legislative function, rooted in the Constitution, these transformations have nonetheless pushed parliamentary institutions to shift their powers in favor of other functions, like those of scrutiny and oversight of the executive as well as on foreign and EU affairs. This implies that parliamentary legislative bodies have been to some extent re-adapted to also fulfill functions that are not only legislative in nature and that tend to improve the functioning of accountability mechanisms – i.e. hearings, fact-finding investigations, inquiries, comply or explain procedures – directed towards the national executive and vis-à-vis sub-national and supranational law-makers.

4. Variety of functioning legislative bodies

The classification of the policy-performance and capacity of legislatures, i.e. Parliaments and Congresses, abound in political science's scholarship. For example, Polsby placed Parliaments on a continuum ranging

[21] Amongst many, see M. Loughlin, *The Contemporary Crisis of Constitutional Democracy*, in *Oxford Journal of Legal Studies*, vol. 39, no. 2, 2019, p. 443, review of M. A. Graber, S. Levinson and M. Tushnet (eds), *Constitutional Democracy in Crisis?*, Oxford, OUP 2018, and T. Ginsburg and A. Z. Huq, *How to Save a Constitutional Democracy* Chicago, University of Chicago Press, 2018. In particular, on the Italian scenario, see F. Dal Canto, *Tendenze della normazione, crisi del Parlamento e possibili prospettive*, in *Federalismi.it* – Special issue no. 3, 2019, on "Parlamento e governo parlamentare in Italia. Verso un affresco contemporaneo", edited by M. Malvicini, p. 35-55.

from "arena legislatures", whose activity consists primarily of debating and ratifying proposals coming from other branches of government, to "transformative legislatures" embodying real and autonomous policy-making capacity.[22] In his seminal work, Mezey classified legislatures' policy-making performance based on their institutional powers (strong, modest or little) and public support (existent or non-existent) leading to a six-fold typology:[23] next to the few "active" legislatures, in particular the US Congress, most democratic legislatures in the Western World were seen as "reactive" to the input of the executive; finally, legislatures with limited support and/or very little formal powers were described as "vulnerable", "marginal" or "minimal". The number of "reactive" legislatures in Europe triggered further categorization by scholars. Norton, for instance, elaborating on this "policy-influencing" legislatures' type ranked legislative bodies as strong (most Nordic legislatures), middle-ranking (e.g. the German Parliament) and weak (e.g. the French Parliament) based on their level of institutionalization, linked to the development of their internal organization and structure.[24] Indeed, features like powers of standing committees and the level of internal coordination of the standing committees' system are usually seen as positively correlated to the legislative performance of Parliaments.[25]

However, when looking at non-Western countries, in particular in Africa, Asia and, partly, in Latin America, studies show that Parliaments and Congresses as legislatures are "minimal" in their legislative capacity, if they retain any influence at all.[26] These legislative bodies are forced to operate, in most cases, in autocratic regimes where the tenets of constitutionalism, namely separation of powers and protection

[22] See N. W. Polsby, *Legislatures*, in F. Greenstein N.W. and Polsby (eds), *Handbook of Political Science*, Reading MA, Addison-Wesley, 1975, vol. 5.

[23] See M.L. Mezey, *Comparative Legislatures*, Durham N.C., Duke University Press, 1979, p. 23.

[24] See P. Norton, *Legislatures in perspectives*, cit, p. 143 ff.

[25] See Lees, J D, and Shaw, M, (eds), *Committees in Legislatures*, Oxford, Robertson, 1979 and S. Martin, *Committees*, in S. Martin, T. Saalfeld, T, and K W Strøm (eds), *The Oxford Handbook of Legislative Studies*, Oxford, OUP 2014, p. 352-370.

[26] In the Asian context see, P. Norton and N. Ahmed, *Legislatures in Asia: Exploring Diversity*, in *Parliaments in Asia,* Abingdon, Routledge, 2013, p. 1-12 and E. Lam Peng, *Parliaments in East Asia: Between democracy and "Asian" characteristics?*, in Z. Yongnian, L. Liang Fook and W. Hofmeister (eds), *Parliaments in Asia. Institution Building and Political Development*, New York, Routledge, 2014, p. 13-26; on the African continent, see W. Hout, *Parliaments, Politics and Governance: African Democracies in Comparative Perspective*, in M. Salih (ed) *African Parliaments Between Governance and Government*, 2005, p. 25-47 and the World Bank Institute's Parliamentary Strengthening Program, in particular the *Parliamentary Involvement in the New Partnership for Africa's Development (NEPAD)*, 2015, http://web.worldbank.org. On Latin America, see M. Alcántara Sáez and M. García Montero (eds.), *Algo más que Presidentes. El Papel del Poder Legislativo en América Latina*, Fundación Manuel Giménez Abad de Estudios Parlamentarios y del Estado Autonómico, Zaragoza, 2011 and B.F. Crisp and C. F. Schibber, *The Study of Legislatures in Latin America*, in S. Martin, T. Saalfeld, T, and K W Strøm (eds), *The Oxford Handbook of Legislative Studies*, cit., 637-641. However, on Latin American Assemblies, G.W. Cox and S. Morgenstern, *Epilogue: Latin America's Reactive Assemblies and Proactive Presidents*, in S. Morgenstern and B. Nacif (eds.) *Legislative Politics in Latin America*, Cambridge, Cambridge University Press, 2002, p.447 have a different standpoint claiming that they do influence the policy process because "the president sometimes attempts to rule through the legislature, rather than around it".

of fundamental rights, are not effectively enforced.[27] This minimal force of legislatures may not allow the detection of any meaningful contribution of them to the constitutional system, in terms of autonomous input (from the executive) to law-making.[28] Nonetheless there are exceptions that do count. For instance, Japan was one of the few countries in Asia where an autonomous and well-established bicameral Parliament, the National Diet, was in operation before WWII and whose role has been seen as increasingly transformative in the policy process, i.e. able to modify the bills put forward by the Government,[29] despite some argue that a trend toward growing executive leadership has been in place since 1993.[30] In the African continent, the federal Parliament of South Africa is quite renown for the degree of openness of its legislative procedures to citizens' participation, also in response to constitutional case law,[31] and in the some countries of the MENA region hit by the so-called "Arab Spring", like Morocco, Jordan and, most of all, Tunisia, although an imbalance in the legislative-executive relationship is still evident, the powers and the autonomy of the Parliaments have been enhanced through constitutional and legislative reforms.[32]

In the Western world as well there are signs of increasing marginalization of parliaments as legislatures: indeed, back in the Nineties, Olson and Norton, already argued that "in most cases the 90 per cent rule applies with 90 per cent of legislative activity being initiated by the executive, which gets 90 per cent of what it wants".[33] Even beyond the rule of law backlash underway in Europe, particularly serious in

[27] See T. Groppi, *Occidentali's Karma?*, cit., p. 11 ff. and P. Schuler and E. J. Malesky, *Authoritarian Legislatures*, in S. Martin, T. Saalfeld, T, and K W Strøm (eds), *The Oxford Handbook of Legislative Studies*, cit., p. 680-692.

[28] See S. Fish and M. Kroenig, *The Handbook of National Legislatures: A Global Survey*, Cambridge, CUP, 2009, p. 756-757.

[29] See A. Miyoshi, *The Diet in Japan*, in P. Norton and N. Ahmed (eds), *Parliaments in Asia*, cit., p. 83-102. Although probably less famous, in Asia the Parliament of Mongolia is considered as the most powerful legislature: see S. Chernvkh, D. Doyle, T.J. Power, *Measuring Legislative Power: An Expert Reweighting of the Fish-Kroenig Parliamentary Powers Index*, in Legislative Studies Quarterly, 2017, p. 312-316. The authors, however, do not elaborate on the separation of powers' problem that the country is facing – and hence on the questionable democratic credentials of the constitutional system – also due to the interference of the Parliament in the exercise of the executive power by the Government without the former being subject to any political pressure, like early dissolution: see M. Odonkhuu, *Mongolia: A Vain Constitutional Attempt to Consolidate Parliamentary Democracy*, in *Constitutionnet.org,* 12 February 2016, http://constitutionnet.org/news/mongolia-vain-constitutional-attempt-consolidate-parliamentary-democracy.

[30] M. Masuyama and B. Nyblade, *Japan: The Prime Minister and the Japanese Diet*, in *The Journal of Legislative Studies*, vol. 10, no. 2-3, 2004, p. 250-262.

[31] See the case of the Constitutional Court of South Africa, *Doctors for Life International v Speaker of the National Assembly and Others* (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC), 17 August 2006. On the participatory nature of the federal law-making process in South Africa as a benchmark, see A. Psygkas, *Revitalizing the "liberty of the ancients" through citizen participation in the legislative process*, in *Annuaire international des droits de l'Homme*, vol. 5, 2010, p. 719-759.

[32] See F. Biagi, *The Separation of Powers and Forms of Government in the MENA Region following the "Arab Spring": a Break with the Past?*, in *Diritto pubblico comparato ed europeo*, no 2, 2018, 381-422

[33] D.M. Olson and P. Norton, *Legislatures in Democratic Transition*, in *Journal of Legislative Studies*, vol. 2, 1996, p. 7.

Eastern Europe,[34] the law-making capacity of Parliaments is undermined. Several factors concurred to this result: some long-standing and only to a certain extent under the control of the Parliaments, like the processes of delegation of powers to international and regional organizations, globalization and the role of financial markets, the rise of the executive dominance and of tight time constraints especially in the critical junctures of the crises, administrative rule-making by independent agencies; some others, relatively new and involving a direct responsibility from the Parliaments themselves, like the threat of populism as a "constitutional project"[35] and the Parliaments' surrender to play any meaningful role in shaping the political directions of a polity even when there are margins to do so.[36] Over the last few years, Parliaments of Western countries have been repeatedly accused of legislative passivity or inertia,[37] to relinquish their role as legislative or constitutional authorities and to be unable to protect themselves unless Courts are willing to do so.[38]

5. The complex and uneven relationship among legislatures in multilevel systems

The situation just highlighted describes a very fragmented and troubled landscape of parliaments acting as legislatures. However, the picture gets even more complex when looking at the relationship among legislatures in multilevel systems of government, i.e. both for subnational legislatures in relation to the federal or the central legislative authority and for the supranational legislature in relation to domestic parliaments. These relationships are by definition asymmetric and uneven as for the inherent authority these many legislatures enjoy and the powers they have been conferred.

[34] To limit ourselves to the European Union, one can easily mention the cases of Hungary and Poland, on which cf. G. Halmai, *A Coup Against Constitutional Democracy: The Case of Hungary*, and W. Sadurski, *Constitutional Crisis in Poland*, both in M. A. Graber, S.Levinson, and M. Tushnet (eds), *Constitutional Democracy in Crisis?*, Oxford, OUP, 2018, p. 243-256 and p. 257-276, respectively.

[35] Populism being a direct enemy of pluralism and of protection of minorities interests like it should be in Parliament, which instead is committed to enforce the populist project: on this point, see P. Blokker, *Populism as a constitutional project*, forthcoming in *International Journal of Constitutional Law*, vol. 17, no. 2, 2019, p. 1 - 22

[36] In particular when Courts – through the political question doctrine and through other techniques, like postponing their decisions or the production of effects of their decisions – provide Parliaments with leeway to pass legislation that could address constitutionality concerns, especially in the field of fundamental right protection: see S. Issacharoff, *Democracy's Deficits*, in *The University of Chicago Law Review*, vol. 85, 2018, p. 485 ff. and, in the Italian case, amongst many, the Italian Constitutional Court's Order no. 207 of 2018.

[37] See C. Fasone, *Legislatures as Hostages of Obstructionism: Political Constitutionalism and the Due Process of Lawmaking*, *Review of Constitutional Studies* – Special Issue on "Politics and the Constitution: A Comparative Approach", *Review of Constitutional Studies,* vol. 21, no 1, 2017, p. 63-84 and S. Issacharoff, *Democracy's Deficits*, cit., p. 497-504.

[38] On this controversial development in Germany and Israel, see, respectively, M. Wendel, *Exceeding Judicial Competence in the Name of Democracy: The German Federal Constitutional Court's OMT Reference*, in *European Constitutional Law Review*, vol. 10, no 2, 2014, p. 263-307 and Y. Roznai, *Constitutional Paternalism: The Israeli Supreme Court as Guardian of the Knesset*, in *Verfassung und Recht in Übersee (VRÜ)*, vol. 51, no. 3, 2018, p. 415-436.

First of all, in particular in federal systems and in regional states only the federal or the national legislature enjoy constitutional supremacy. Supremacy clauses are often embedded into the text of the federal Constitution and federal legislation prevails over state legislation.[39] This happens also in the EU, on the subject-matters for which the Union is competent to act, even though the principle of primacy has never been codified[40] and despite the fact that the principle applies regardless of the EU institution acting as a rule-maker: whether it is the EP, the Council or even the Court.[41]

Under specific circumstances the federal supremacy can be mitigated and even overcome. For example, under section 33 of the Canadian Charter of Rights and Freedoms, the so-called "notwithstanding clause", provincial and territorial legislatures as well as the federal Parliament can temporarily override and bypass certain Charter's rights for a period of maximum five years.[42] Used very rarely since 1982 and only by provincial legislatures, the declaration showing the intent to override the Charter's provisions must be included in a legislative act and clearly points to the relevant section of the Charter that will be bypassed.[43]

Despite the derogatory powers subnational legislatures may be equipped for, with very few exceptions,[44] they are nevertheless devoid of sovereign powers and full constitutional autonomy.[45] The lack of such constitutional powers of Member States and Regions is well shown by the Catalan attempt of secession: besides many declarations and parliamentary resolutions invalidated in previous rulings, the law of the Catalan Parliament of 2017 paving the way to the legal transition (from Spain) and to the foundation of

[39] See, famously, Article VI of the US Constitution.

[40] Since the well-known Court of Justice's ruling in the case 6/64, *Costa v. Enel*, 15 July 1964. See Declaration no. 17 concerning primacy annexed to the Treaty of Lisbon.

[41] See A. Arena, *The Twin Doctrines of Primacy and Pre-emption*, in R. Schütze and T. Tridimas (eds), *Oxford Principles of European Union Law*, vol. 1, Oxford, OUP, 2018, p. 300-348.

[42] The notwithstanding clause can be invoked in relation to the fundamental freedoms (under section 2; of coscience and religion, of thought, opinion, belief, expression, of the press and communication in general, of peaceful assembly and association) and in relation to sections from 7 to 15, including the right to life, liberty and security, the right to a fair trial, and the equality rights.

[43] See J. L. Hiebert, *The Notwitstanding Clause: Why Non-use Does not Necessarily Equate with Abiding by Judicial Norms*, in P. Oliver, P. Macklem, N. Des Rosiers (eds), *The Oxford Handbook of the Canadian Constitution*, Oxford, OUP, 2017, p. 695-713.

[44] For example, Article 39 of the Constitution of Ethiopia, which involves the Legislative Council of the Nation, Nationality or the People seeking secession in the deliberation of the official request to secede. Even in such a case, however, the request of the Legislative Council needed to be then followed bythe action of the federal government and by a referendum. See A. M. Abdullhai, *Article 39 of the Ethiopian Constitution On Secession and Self-determination: A Panacea to the Nationality Question in Africa?*, in *Verfassung und Recht in Übersee / Law and Politics in Africa, Asia and Latin America*,Vol. 31, No. 4, 1998, p. 440-455

[45] See F. Palermo and K. Kössler, *Comparative Federalism: Constitutional Arrangements and Case Law*, Oxford, Hart Publishing, 2017, Part II, chapter 5.

the new Republic has been immediately declared unconstitutional by the Constitutional Tribunal:[46] the Catalan Parliament pretended to act as an autonomous constitution-maker disregarding the authority of the Spanish Constitution, but it clearly lacks this power.

Even when considering only the law-making function, state or regional legislatures look like "second-order" legislatures[47] and there might also be significant differences among them in terms of legislative autonomy and powers as cases such as Belgium, Italy and the UK show.[48] Beyond supremacy and homogeneity clauses the State legislatures need to respect there are a number of other constraints they have to face. This is so due to the dynamic and direction imprinted to the devolution of powers,[49] because state or regional legislatures are often considered as lacking the same representative capacity as the national or federal legislature,[50] and as a consequence of the constitutional case law-derived limits to the full deployment of their autonomy.[51] In some instances, the limitation of the legislative discretion of State legislatures can also depend on certain strategic choice of constitutional politics made at State level and can work as a self-imposition. For example, in the United States, the organization and functioning of the legislative process in the State Congresses is regulated in a very detailed manner under the relevant State

[46] See *Tribunal Constitucional*, STC 4386-2017, judging on la Ley del Parlamento de Cataluña 20/2017, de 8 de septiembre, denominada "de transitoriedad jurídica y fundacional de la República". Cf J.M. Castellà Andreu, *The Reception in Spain of the Reference of the Supreme Court of Canada on the Secession of Quebec,* , in G. Delledonne and G. Martinico (eds), *The Canadian Contribution to a Comparative Law of Secession. Legacies of the Quebec Secession Reference*, London, Palgrave, 2019, p. 69-88.

[47] See W. M. Downs, *Sub-national legislatures,* in S. Martin, T. Saafeld, and K. W. Strøm (eds), *The Oxford Handbook of Legislative Studies*, cit., p. 610

[48] In Belgium the difference is not only between Regions and Communities but also in between Regions and in between Communities even though the level of government is the same. See P. Popelier and K. Lemmens, *The Constitution of Belgium. A Contextual Analysis*, Oxford, Hart Publishing, 2015, p. 71-99 and A. Mastromarino, *Belgio*, Bologna, Il Mulino, 2013, p. 89. On the UK and the very different statuses of Scotland, Wales and Northern Ireland, see P. Leyland, *The multifaceted constitutional dynamics of U.K. devolution*, in *International Journal of Constitutional Law*, vol. 9, no 1, 2011, p. 251-273 and S. Tierney, *Drifting Towards Federalism? Appraising the Constitution in Light of the Scotland Act 2016 and Wales Act 2017*, in R. Schütze and S. Tierney (eds), *The United Kingdom and the Federal Idea*, Oxford, Hart Publishing, 2018, p. 101-122. On the Italian case, the literature of the asymmetries of the regional system is endless. For a recent account of the most recent trends, including the initiatives for a differentiated regionalism besides the Regions provided with a special Statute, and an ample literature review, see A.M. Russo, *Il regionalismo italiano nel vortice autonomistico della differenziazione: l'asimmetria sperimentale tra integrazione e conflitti*, in *Le istituzioni del federalismo*, no 2, 2018, p. 365-392

[49] See, once again, the case of the UK devolution, where the UK Parliament always remain the final legislative authority in the Kingdom and where courts have not hesitated to protect the powers of the Westminister Parliament: cfr. the *Miller* judgment of the UK Supreme Court, [2017] UKSC 5, 24 January 2017, in particular § 129 and 130.

[50] See P. Squire and G. Moncrief, State Legislatures Today: Politics under the Domes, 2nd edn,Lanham, Rowman & Littlefield, 2015, p. 205-224 and the Italian Constitutional Court's decisions nos 106 and 306 of 2002 cited above (section 2.2)

[51] See F. Palermo and K. Kössler, *Comparative Federalism,* cit., Part. II, chapter 8.2. and 8.3. There are nevertheless also instances in which Court significantly contribute to safeguard the powers of State legislatures (and governments) against the the abudes of the federal authorities: see, for instance, Supreme Court of India, *S. R. Bommai v. Union of India*, [1994] 2 SCR 644, 11 March 1994.

Constitution and this significantly affects the political autonomy of the State legislatures compared to the federal Congress, which can benefit of rather laconic constitutional provisions on the matter.[52]

To a certain extent these reflections on State and regional legislatures as "second-order" legislatures can also apply to a very different legislative body, the EP, in comparison to the Parliaments of the Member States. Not only the rhetoric about the European elections as "second-order" elections inevitably impacts on this conclusion.[53] Also, the constitutional constraints under which the EP must act appears rather tight at first sight. As a legislator the EP must abide to the legal bases enshrined in the Treaties as for the precise scope of its action and the nature of the legislative procedure to be followed.[54] Its members lack the power of legislative initiative and thus the EP can legislate only if and insofar the Commission or a group of Member States, when the Treaties so provide, put forward a legislative proposal. Moreover, when considering and amending a draft legislative act, the EP must comply with the principles of conferral, of subsidiarity and proportionality as the powers it exercises have been granted by the Member States, the "masters of the treaties", and it does not hold them on its own. Even if this starting point is certainly true, such an assessment disregards the reality of the EP self-empowerment – also – as a (co-)legislator before and following every Treaty revision.[55] Within these constraints the EP has been able to strengthen its powers to the maximum by acting as a strategic player in the inter-institutional relationship and gaining a considerable influence in many sectors even though it still remains quite weak in the least integrated policy areas.[56]

That said, the analysis of the individual powers and of the relationships between sub-national legislature and the federal or national parliament, on the one hand, and between the supranational parliament and domestic parliaments, on the other, by no means provides a comprehensive assessment of the legislative activities carried out in the federal, regional and EU legal systems. A great deal of legislation is in fact managed and passed through the executives. Intergovernmental relationships are at the core of the functioning of any federal or regional system and intergovernmental agreements and conferences fulfil quasi-legislative functions.[57] In many countries intergovernmental relations have been crucial to let the

[52] See M. E. Libonati, *State Constitutions and Legislative Process: The Road Not Taken*, in *Boston University Law Review*, vol. 89, 2009, p. 863-870.
[53] S. Hix, A. G. Noury, G. Roland, *Democratic Politics in the European Parliament*, Cambridge, CUP, 2007, p. 26-29.
[54] On this point as well as on the principles limiting the EP's range of action, in particular the principle of conferral, see G. Davies, *Democracy and Legitimacy in the Shadow of Purposive Competence*, in *European Law Journal*, 2015, vol. 21, no 1, p. 2-22.
[55] See N. Lupo and A. Manzella, *Il Parlamento europeo. Una introduzione*, cit., p. 45-47.
[56] On the influence of the EP, see, recently, the Special issue on *Power Without Influence? Explaining the Impact of the European Parliament Post-Lisbon*, E. Bressanelli and N. Chelotti (eds), *Journal of European Integration*, vol. 41, no 3, 2019.
[57] See, in detail, J. Poirier, C. Saunders, J. Kincaid, *Intergovernmental Relations in Federal Systems. Comparative Structures and Dynamics*, Oxford, OUP, 2016.

sub-national authorities, the regions and the states, participate in federal or national decision-making, especially lacking a federal second chamber, and they have also contributed to strengthen the powers of the territorial sub-units, including the legislatures.[58]

In the EU, well before the rise of the so-called "new intergovernmentalism" following the Eurozone crisis,[59] intergovernmental cooperation has always been a decisive and inherent element of the European mode of governance.[60] And it could not have been otherwise given the powers conferred to the Council of Ministers as a legislator (Article 16, para 1 TEU) and, recently, to the European Council as the main institution shaping the EU political directions (Article 15, para 1 TEU). The drafting of EU legislation and the adoption of the implementing rules have been made possible thanks to the activities of thousand officials from national executives working in the European capitals or directly in Brussels in a hoc committees.[61] Even though formally they do not contribute to the adoption of legislative acts under Article 289 TFEU, they do participate in the adoption of delegated acts and of implementing acts, which constitute together the bulk of the legal acts passed every year by the EU.[62] Especially on the latter the EP enjoys very little control.[63] On delegated acts the EP, like the Council, can revoke the delegation or can express objections, it hardly does so, and despite the fact that delegated acts should just "supplement or amend certain non-essential elements of the legislative act (Article 290, para 1 TFEU)", in practice they are able to considerably affect the reach of EU legislation and the protection of fundamental rights.[64]

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[58] See J. Gardner, *Canadian Federalism in Design and Practice: The Mechanics of a Permanently Provisional Constitution*, in *Perspectives on federalism*, vol. 9, no 3, 2017, p. 1-30, who however criticises the uncertainty intergovernmental relations have caused to the stability and to the entrenchment of the Canadian Constitution being them by definition flexible devices.

[59] Cf. C. J. Bickerton, D. Hodson and U.Puetter (eds), *The New Intergovernmentalism. States and Supranational Actors in the Post-Maastricht Era*, Oxford, OUP, 2015.

[60]See A. Moravcsik, *Preferences and power in the European Community: A liberal intergovernmentalist approach*, in *Journal of Common Market Studies*, vol. 31, no 4,, 1993, p. 473–524. Indeed, even in the framework of the so-called Community method the EP has not stood prominently as a legislator till recently, with the Treaty of Lisbon, when the co-decision procedure has become the ordinary legislative procedure. Indeed, the EP has been effectively depicted in the past as a "deliberative assembly" struggling for its self-empowerment vis-à-vis the Commission and the Council much more than as a legislature: see O. Costa, *Le Parlement européen, assemblée délibérante*, Bruxelles, Éditions de l'ULB, 2001, p. 120 ff.

[61] C.F. Bergström, *Comitology: Delegation of Powers in the European Union and the Committee System*, Oxford, OUP, 2006, p. 5-7.

[62] European Parliament, EPRS, Giulio Sabbati, *Briefing - European Parliament: Facts and Figures*, Brussels, April 2009, p. 10.

[63] See D. Ritleng, *The Reserved Domain of the Legislature,* and J. Mendes, *The Making of Delegated and Implementing Acts*, in C. F. Bergström and D. Ritleng (eds), *Rulemaking by the European Commission: The New System for Delegation of Powers*, Oxford, OUP, 2016, respectively, p. 144-145 and p. 233-253.

[64] See T. Christiansen and M. Dobbels, *Delegated Powers and Inter-Institutional Relations in the EU after Lisbon: A Normative Assessment*, in *West European Politics*, vol. 36, no 6, 2013, p. 1159-1177.

All these developments in multilevel settings, paired with the increasing rule-making activity of independent agencies at any level of government,[65] ultimately question the very association of legislative bodies and legislatures to parliamentary and congressional institutions and provide a fragmented landscape on the relationship and the asymmetric powers of legislatures in the Twenty-first century, on which further research is absolutely needed.

[65] See D. Custos, *The Rulemaking Power of Independent Regulatory Agencies*, in *The American Journal of Comparative Law* Vol. 54, 2006, p. 615-639 and M. Simoncini, *Administrative Regulation Beyond the Non-Delegation Doctrine. A Study on EU Agencies*, Oxford, Hart Publishing, 2018, chapter 2.