The European Parliament’s quest for representative autonomy: An internal perspective

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The question of whom the European Parliament represents has no easy answer. Some legal provisions indicate that the European Parliament represents the peoples of the member states; others frame it as the representative body of the Union citizens. Parliament’s representative status is still a work in progress. Its evolution is driven in particular by actions of the European Parliament itself. Step by step it Europeanises its electorate and the representation thereof.

The treaties of the European Union have provided the European Parliament with only limited rule-making power to define whom it represents. However, Parliament’s need and capacity to act are also determined by what is considered appropriate behaviour. As the present study reveals, it is generally accepted that elected parliaments ought to have substantial ‘representative autonomy’. The existence of this norm explains why, in defiance of formal limitations, the autonomy of the European Parliament to define itself and its electorate has effectively increased since the moment it was directly elected in 1979.

The European Parliament’s Quest for Representative Autonomy provides better insight into the nature of the European Parliament, and of the developments of parliaments in general.

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The European Parliament's Quest for Representative Autonomy
The European Parliament’s Quest
for Representative Autonomy
An Internal Perspective

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voor Maarten
Dankwoord

Ik was Europees actief lang voordat ik lid werd van een politieke partij. Via het NIVON en de Internationale Jonge Natuurvrienden werd ik rond mijn 20ste gekozen in het bestuur van een koepel van internationale jongerenorganisaties. Het was mijn eerste vertegenwoordigende functie. Met jongeren uit alle landen probeerden we invloed uit te oefenen op het beleid van de Raad van Europa. Het vele reizen kwam mijn twee studies aan de Universiteit van Amsterdam niet ten goede – tot uitgesproken irritatie van mijn toenmalige mentor: Tom Eijsbouts. Ruim 15 jaar later trof ik Tom opnieuw, bij een radio-uitzending over de Europese verkiezingen waarin ik terugblikte op twee termijnen als Europarlementariër. Hij stelde voor om mijn politieke ervaringen te laten bezinken in een promotietraject. Het zou me een herkansing geven in de academische wereld en een mogelijkheid om Europa als vakgebied nog niet los te laten. Ik heb het het met beide handen aangegrepen.

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Summary

Samenvatting

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Part I. Representation and Autonomy: The Frame
1. Whom Does the European Parliament Represent?

The origin of this study is the controversial judgment of the German Federal Constitutional Court (GFCC) regarding the Lisbon Treaty.¹ It was handed down on Tuesday, 30 June 2009, just weeks before the end of my second (and final) term as a member of the European Parliament. In this Lisbon Decision, the Court addressed the question of whom it is that the European Parliament represents. This involved the question of whom it is that I had been, and was still, representing as an elected member. The Court’s findings puzzled me. They contradicted the Treaty, and disqualified part of how I had viewed my own representative status. The Court held that:

‘Even in the new wording of Article 14.2 Lisbon TEU, and contrary to the claim that Article 10.1 Lisbon TEU seems to make according to its wording, the European Parliament is not a representative body of a sovereign European people. This is reflected in the fact that it is designed as a representation of peoples in the respective national contingents of Members, not as a representation of Union citizens in unity without differentiation, according to the principle of electoral equality.’²

Crucial elements of the European Parliament’s nature were ignored. Important rules that determine how members of the European Parliament can carry out their representative mandate, and how they can present themselves to their electorate, were brushed aside. Yet, the Court did have, on the face of it, a number of solid points. In essence, the Court denied the European Parliament any real capacity to be considered a representative of Union citizens. It did so on account of no system being in place of one man-one vote to determine the composition of the European Parliament. The weight per vote depends on where it is cast. Therefore, the European Parliament is described by the Court as a representative body of the peoples of the member states. An understandable qualification, it would seem, but it clashed with my personal experience. During the ten years in the European Parliament, I had not regarded myself as being only a representative of the Dutch people. I had functioned

² Ibid para 280.
as a member of a European political group (the Greens/European Free Alliance) and had felt myself to be the representative of Green voters throughout Europe as well.

Further reflections on this puzzle started me on an academic journey. It resulted in this thesis on the quest of the European Parliament to define itself whom it represents and in what manner. Over time, I came to realise that Parliament’s need to shape its own representative status, even in defiance of formal limitations to do so, has made the co-existence of diverging formal provisions unavoidable. This thesis does not conclude that the German Federal Constitutional Court was entirely wrong in its qualification of the European Parliament; it only holds that it was wrong in denying the European Parliament any status at all in representing Union citizens as a whole.

1. The Problem

As the Lisbon Decision prompted this examination, it merits some further explanation. While the Court’s description of Parliament’s representative status is most relevant for my thesis, the complaints and proceedings did in fact not centre on this. They concerned the general compatibility of the Basic Law, Germany’s constitution, with the Treaty of Lisbon, the German law of approval, and two other German laws that would accompany the Treaty’s ratification. The Court found that the new Treaty was not in violation with this Basic Law. The reasoning behind this is that the Federal Republic of Germany remains sovereign, and its institutions remain capable of upholding the provisions in the Basic Law. The Court does not reject the argument of the applicants that the exercise of public power by the institutions of the European Union is insufficiently legitimated when measured by the standards of representative democracy. However, it is of the opinion that this legitimation is not really necessary.

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3 I will use the term representative status to refer to all binding rules that contain assumptions, 'claims', about whom a parliament represents. When the word parliament is written with an upper-case letter P, I refer to the European Parliament specifically; when it is written with a lower-case letter p, I refer to parliaments in general.


6 Judgment of the Second Senate of 30 June 2009 (n 1) para 401.
As the Treaty of Lisbon:

‘neither transfers constituent power, ... nor does it abandon state sovereignty of the Federal Republic of Germany’, 7
‘the democracy of the European Union cannot, and need not, be shaped in analogy to that of a state’. 8

In the Court’s view, member states continue to provide the legitimacy for decisions taken, even when these decisions are taken at the level of the European Union. The European Parliament is regarded as a supplementary structure, ‘eine ergänzende Mitwirkungsmöglichkeit’, aiming to increase the involvement of citizens in the decision-making. 9 As such, the composition of the European Parliament need not in itself fulfill all the criteria that the principle of representative democracy imposed on core institutions.

The Court could have ended its commentary regarding the European Parliament at this point. Further commenting on Parliament’s composition was no longer necessary once it had been marked as a supplementary institution that is not needed for providing Union decisions with public legitimation. Instead, the Court chose to qualify the European Parliament above and beyond the facts of the case before it. Its characterisation has attracted much attention in academic circles and beyond. This is very understandable, as it goes to the heart of the relevance and the mission of the European Parliament and even the European Union.

In paragraph 280 of the Lisbon Decision, the Court denies – plainly and clearly – that the European Parliament can be regarded as the representative body of Union citizens.

‘Measured against requirements in a constitutional state, even after the entry into force of the Treaty of Lisbon, the European Union lacks a political decision-making body created in equal elections by all citizens of the Union and with the ability to uniformly represent the will of the people.’ 10

Apparently, the European Parliament cannot be seen as representing Union citizens because of the absence of a European election procedure that gives equal weight to the votes of these citizens. The European Parliament is not elected by a system of ‘one man, one vote’. Instead, Article 14(2) TEU, second sentence onward, stipulates that its 751 seats are assigned on the basis of a system of degressive proportionality. Moreover, it is agreed that member states are entitled to a minimum number of

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7 Ibid para 275.
8 Ibid para 272.
9 Ibid para 274.
10 Ibid para 280.
representatives, and that the numbers should not exceed an established maximum. In this system, the votes of citizens from smaller countries have a relatively higher impact on the composition of Parliament than those from citizens in larger member states. This shows when we compare the number of representatives from Malta and Germany. Malta, with only 400,000 inhabitants, is the smallest EU-member state. It is entitled to six members in the European Parliament. Germany is entitled to 96 seats, despite having more than 82 million inhabitants. Thus, a Maltese member stands for less than 70,000 citizens; a German one for more than 850,000. It is because of this system that the German Federal Constitutional Court regards the European Parliament as ‘eine Vertretung der Völker der Mitgliedstaaten’.

‘Against this background, as seats are allocated to the Member States, the European Parliaments factually remains a representation of the peoples of the Member States.’

In this view, the European Parliament is not, and cannot be regarded as, a representative body of Union citizens as long as no European sovereign people (Staatsvolk) exists that elects the European Parliament by a system of ‘one man, one vote’.

Linking the representative status of the European Parliament to the election system seems compelling. But is it correct to base the former exclusively on this one set of rules? That is ‘the problem’ that the title of this section refers to, the issue that triggered my academic investigation.

The conclusion that the European Parliament represents the peoples of the member states was diametrically opposed to what Joost Lagendijk, my colleague at the time, and I had just contended in a book on the occasion of our retirement from Parliament. In the final chapter, we felt duty-bound to answer the question that was most frequently put to us during our terms in office: ‘Do you represent Dutch or European citizens?’ We were not comfortable with either of these options. In our view, we were first and foremost representatives of the European Green movement. Of course, it should be acknowledged that we were elected by Dutch voters. During our terms in office, we had more contact with Dutch voters than with other Union citizens. We were more aware of the impact of legislation on Dutch society than on those in other countries. And this had no doubt influenced our voting behaviour occasionally. Nevertheless, we perceived ourselves as representatives of neither the Dutch people as a whole, ‘het Nederlandse Volk’, nor the body of Union citizens as a whole. Instead, our efforts were to represent the Green movement across the board, including the voters of our sister parties in other countries. We were not alone in this view. Apparently, it is a general phenomenon that members of the European

11 Ibid para 284.
Parliament regard themselves as representatives of European movements or public interests in addition to feeling attached to their national party and country. In retrospect, I now find our idea of whom we represented inadequate. We were so engaged in clarifying and stressing that national barriers were not the dominant matter in our daily work that we had failed to fully appreciate the theoretical underpinnings of our mandate. In modern representative democracies, parliaments are meant to display not only the diversity, but also the unity of the electorate. Elected representatives give expression to certain views, fears and dreams that are shared by a particular sub-group of the electorate (e.g., the Green voters). At the same time, they have a responsibility for the ‘common good’. By the laws that they decide in parliament, representatives bind the electorate as a whole; not only the group that they claim to represent. In taking these decisions, parliament stands for the whole. This can be defined as representation as well.

For its part, the electorate has a similar dual nature. It consists of very different people who belong to very different (and shifting) sub-groups. They are divided. They share characteristics with other citizens of the same nationality, the same political affiliation or the same sex. The divides along political lines become very noticeable during election time. On a more abstract but real level, elections bring about unity as well. Together, citizens authorise the representatives who will take decisions in their name. By going to the polling station, citizens confirm (and reinforce) the fact that they belong to the same polity.

The multiplicity of the representative mandate of members of national parliaments is very familiar to us. These members are generally not defined as only representing a particular local constituency or a political party. They are regarded as representatives of the nation as a whole as well. Many national constitutions include a provision that expressly emphasises the latter. This leads us to the question of whether the European mandate also has these double layers.

My colleague Lagendijk and I were elected on the ticket of GroenLinks, the Greens in the Netherlands. This made us the representatives of a particular sub-group of Dutch voters. We gave expression to those Dutch voters who believe in a sustainable, ecological course; other Dutch colleagues were committed to representing a more liberal, social-democratic, or Christian-democratic one. At the same time, when we were deciding on directives and other rules, we committed all Union citizens to the same obligations, regardless of whom they had voted for, or in which country they had cast their vote. This had a unifying effect. Looking at our mandates in this light seems to indicate that next to being the representatives of the GroenLinks voters, we were representatives of the Union citizens as a whole as well.

This brings us back to the Lisbon Decision. Indeed, it is unmistakable that all Union citizens together bear the brunt of the decisions taken by the European Parliament.

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15 This point will be further elaborated in Chapter 2, section 2.
institutions. Yet, it is equally true that not all Union citizens formally have an equal say in these decisions. In the composition of the European Parliament, strict electoral equality only exists between citizens living in the same country. This undermines the argument of the existence of a represented unity, at least to some extent. The standard of ‘one man, one vote’ continues to be a strong argument to define the European Parliament as the representative body of the peoples of the member states. However, Parliament’s task, and the fact that it is elected by Union citizens in a single election, steers the definition of Parliament’s status in another direction.


At a closer look, discordance between rules defining the electorate of the European Parliament is found all across European Union law: both in primary and in secondary law.

2.1. In EU Primary Law

The matter of the European Parliament’s formal representative status preoccupied the members of the European Parliament themselves following the Lisbon Decision of the German Federal Constitutional Court. In 2009, the President of the Committee on Constitutional Affairs Carlo Casini requested that the secretariat of the European Parliament evaluate whether the Court’s thesis on the European Parliament was inevitable or contestable. The task to assess the different interpretations and reactions from the academic world fell to Wilhelm Lehmann.16

In his conclusions, Lehmann first seeks to devalue the Court’s main argument concerning electoral equality. In his view, the Court has (deliberately) constructed ‘a constitutional dead end’.17 Admittedly, ‘one man, one vote’ is an important guiding principle for the organisation of a democratic institution. However, it is unnecessary to attach an absolute importance to it for the assessment of whether a parliament qualifies as a representative body of a particular polity. As such, the criterion can only be met by certain centralised states. Even in a federal state such as Germany, the votes of citizens do not carry equal weight in the decision-making process. It is evident that ‘one man, one vote’ is even less of a viable test of democracy in the European Union, considering that there is no sovereign European people that shows itself in a parliament. The authority of the European Union rests on a dual basis: on the totality of the Union’s citizens and on the peoples in the European Union organised by their respective member states’ constitutions. Organising the European Parliament along the principle of ‘one man, one vote’ is not only unattainable, but also unnecessary. Even without it, Parliament can be presented as the representative body of a European polity.


17 Ibid 6.
Additionally, Lehmann extensively points to the existence of provisions, other than the electoral, which are also relevant in defining the representative status of the European Parliament. One of these is a Treaty provision that explicitly provides that the European Parliament is the locus for representation of Union citizens. The first sentence of Article 14(2) TEU articulates that:

‘The European Parliament shall be composed of representatives of the Union’s citizens.’

Article 14(2) is a new provision, inserted into the TEU by the Treaty of Lisbon. How is it possible, Lehmann writes, that the Court simply sets this provision aside? It ‘does not give this any importance for its reasoning on democratic legitimacy at a European level’.18 Lehmann has a valid point in criticising the Court for not having attributed any value to Article 14(2) TEU. However, in his publication, Lehmann does not explain how, and to what extent, the new provision should be taken into account. The significance of Article 14(2) TEU for the question of whom the European Parliament represents remains insufficiently explored.

To gain a better understanding of what the new text implies, it is useful to look at the original text, as well as the provisions that interact with it. Prior to the Treaty of Lisbon, Article 189 EC defined the European Parliament differently: as the representative body of the peoples of the member states.

‘The European Parliament, which shall consist of representatives of the peoples of the States brought together in the Community, shall exercise the powers conferred upon it by this treaty.’

An almost identical provision can be found in the Treaty of Paris (1951).19 This means that for more than half a century, the answer to the question of whom the European Parliament represents remained the same – at least according to the letter of the Treaties. It was the representative body of the national peoples. The relevance of the national structures for the representative status of the European Parliament was furthermore underlined by the fact that for more than twenty-five years, members held a dual mandate, and were appointed by the national parliaments (1952-1979).

In the last four decades, significant steps have been taken to create a more self-standing electorate of the European Parliament. First and foremost, this was achieved by creating more distance between the Parliament and the structures of the member states. An important decision in this regard was the adoption of the

18 Ibid 5.
19 Treaty establishing the European Coal and Steel Community (ECSC Treaty) art 20.
The European Parliament’s Quest for Representative Autonomy: An Internal Perspective

1976 Direct Election Act, providing for the European Parliament’s direct elections. Since 1979, the composition of the European Parliament is determined by popular vote. This established a direct formal relationship between the European Parliament and the citizens whom it represents. Additionally, new legal concepts have been created. Most notably, the Treaty of Maastricht introduced a Union citizenship. This concept was linked to electoral rights from the start – as citizenship generally is. Union citizens have the right to vote and to stand as a candidate in elections to the European Parliament in the member state in which they legally reside. Whether they are nationals of that state is deliberately made irrelevant. The consequence of this choice is the emergence of an obvious tension between the electoral rights based on Union citizenship and Article 189 EC. As a result of the first, people are called on to vote in the European election in their capacity as Union citizens, not as nationals of a member state. However, the latter defined the European Parliament as the representative body of the peoples of the member states, not of Union citizens.

The Treaty of Lisbon has altered that precarious situation. The new formula, laid down in Article 14(2) TEU, first sentence, implies that Parliament’s authority is no longer based on its representing several peoples but the collective of ‘Union citizens’. Article 10(2) TEU, first sentence, strengthens the direct link between this single group and the European Parliament further: ‘Citizens are directly represented at Union level in the European Parliament’. Parliament’s task is thus to stand and act for Union citizens. With the introduction of these new provisions in the Treaty of Lisbon, the discordance that existed between the idea and rules on Union citizenship and the formal definition of Parliament’s representative status has thus disappeared.

However, another anomaly now shows itself even more prominently. For, how should we understand the unity of the group of Union citizens, when the weight that is attached to their votes differs and continues to depend on their place of residence? And what is the value of the unity of Union citizens, when there is no single procedure for acquiring Union citizenship? Obtaining this citizenship, including the electoral rights, solely depends on the possession of the nationality of a member state. As a result, there are 28 different ways to become a Union citizen.

The one conclusion that we can draw from the above is that primary law continues to contain discordant provisions. These different provisions provide us with diverging answers on the question of whom the European Parliament represents. It also shows that the representative status of Parliament is still developing.

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20 Act concerning the election of the representatives of the Assembly by direct universal suffrage [1976] OJ L278/1. In this thesis, I will refer to this Act as the Direct Election Act.
21 Treaty on European Union (Maastricht Treaty). Union citizenship is currently provided by Article 20(1) TFEU. ‘Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship.’
22 Articles 20(2)b and 22(2) TFEU.
2.2. In EU Secondary Law

Diverging rules about Parliament’s status occur not only in primary law, but also in secondary law. The discordance pervades the whole architecture of the European Parliament. This appears, for instance, when we compare the immunity provisions of the members of the European Parliament with the provisions regulating their salary. Both sets of rules are relevant for the representative status of Parliament. They create the conditions under which the members can carry out their representative mandate, and thus represent the electorate. But above all, both sets of rules contain assumptions about whom the electorate is.

The current rules on the remuneration of members of the European Parliament have only been in effect since July 2009. Previously, members were paid the equivalent of the salaries of national parliamentarians, out of national budgets. The dependency on national regulations was a legacy from the time that all members had both a European and a national mandate. One would expect that this practice had ended as soon as members were elected by direct suffrage and (most) only had a single – European – mandate. However, when the Direct Election Act was concluded, the member states failed to agree on a Union salary for the members of the European Parliament. As a result, the latter continued to be paid a national salary, collected from the national taxpayers. The message sent to the public was that members were representatives of national peoples.25

In 2005, after decades of discussions, agreement on a common statute for members of the European Parliament was finally reached.26 As of 2009, members earn the same salary: 38.5 per cent of the basic salary of a judge of the European Court of Justice. It is paid from the European budget, and members pay EU tax on it. Hence, at least on the face of it, it seems that the current salary arrangement define the European Parliament as the representative body of Union citizens rather than of national peoples.27

The immunity provisions present a different picture. The Protocol on the Privileges and Immunities (PPI) was agreed on in 1965. The text pertaining to the European Parliament has not changed since, essentially framing members of the European Parliament as representatives of national peoples.28 Although members enjoy equal protection on the parliamentary premises in Strasbourg and Brussels, the level of their legal protection outside these premises differs, and depends on the country in which they are elected. By virtue of Article 9(a) PPI, members are subject to the immunity rules that apply to the members of their national parliament. The variation in legal protection that this rule causes can have serious implications when members from different countries together organise political demonstrations or other

27 In Chapter 6, we will see that this conclusion is not fully accurate. Even today, there are differences in net salaries because member states may levy national taxation additional to Union taxation. Nevertheless, these differences are of a different order than before.
activities outside Parliament’s headquarters. Then, for exactly the same actions, some of them may face prosecution, and others not. Chapter 5 will establish to what extent Article 9(a) PPI has been amended in practice. However, at face value, this legal provision regarding immunity stands in the way of enabling members to represent a Union electorate.

The dual nature of the European Parliament’s subject presents itself not only when comparing different sets of rules, but also by inconclusive arrangements within sets of rules. The most well-known of the latter category are the electoral rules. The election of members of the European Parliament is governed by the Act concerning the election of the members of the European Parliament,\(^29\) This Direct Election Act was agreed in 1976, and revised in 2002.\(^30\) It contains common principles that ensure a level of convergence between the national laws on the basis of which members are elected. As a result, a national mandate is made incompatible with a European one in all member states. Also, in all countries, European elections are conducted on the basis of proportional representation and held within the same period. This convergence emphasises the existence of a represented unity of Union citizens and reinforces it (see above).

However, the Act does not address all relevant issues. These can therefore be regulated by the member states, as a result of which electoral provisions continue to vary widely. There are differences in the number of constituencies, the level of a minimum threshold, the use of the system of a Single Transferable Vote, and the right to vote for European citizens living abroad. Moreover, it is the member states that are in charge of organising the elections, and of determining the voting conditions. There appears to be no intention to eliminate this diversity in the near future.\(^31\) The dissimilarity in the electoral procedures does not prevent Union citizens from acting as a single group. Nevertheless, the very idea that it already is one is at least challenged.

The Rules of Procedure of the European Parliament also have an impact on how the elected members can represent, and define, their electorate. Therefore they too contribute to Parliament’s representative status. A quick glance at these rules teaches us that members are not enabled to formally speak in the European Parliament on behalf of ‘the peoples of the member states’. The words ‘national delegation’ or ‘national group’ are mentioned not once, let alone that these entities are attributed legal rights to function as platforms for representation by members.

Instead, the European Parliament has chosen to organise itself along ideological lines. European political groups set the agenda of the European Parliament, coordinate the voting behaviour of their members, and distribute money, personnel,

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29 Direct Election Act (n 20).
31 The Treaty of Amsterdam amended the original provision that provided a legal basis for a uniform procedure for direct universal suffrage. Nowadays, the election procedure of the European Parliament only needs to be grounded in ‘common principles’, such as the principle of proportional representation. Article 223(1) TFEU.
positions, and speaking time. The decision to work in European political groups has far-reaching implications for the manner in which members undertake their parliamentary work. Members speak in plenary, or participate in parliamentary committees, on the ticket of their European political group. This inevitably means that their statements and voting behaviour not only reflect on them individually; they are also judged in relation to those of the group of which they are member. By participating in a European political group, members take on an additional responsibility. In addition to being a representative of their own electorate, they are also in some sense representatives of the European political group to which they belong.

The criteria for establishing a European political group are strict. For one, it must be sufficiently European. According to Rule 32 Rules of Procedure 2015, groups must consist of at least 25 members, sharing a political affiliation, and originating from at least seven member states. Political groups consisting of members from only six countries or less, are simply not recognised. Members who cannot join or form a European political group are destined to go through parliamentary life as ‘non-attached members’, and as a result, have less parliamentary rights and material advantages. The European Parliament thus actively fosters transnational cooperation of its members.

The decision to organise itself along ideological lines can be regarded as posing a claim regarding whom the European Parliament represents, and how its members must carry out their representative mandate. It can be appreciated as a statement by the European Parliament underlining that it is the representative body of a unitary electorate for which ideological differences are more relevant than national divides. Christian Wohlfahrt speaks in this regard of Parliament’s ‘self-understanding’. This claim, or ‘self-understanding’, is apparent in the graph that is commonly used for visualising the European Parliament’s distribution of seats (see graph 1). It corresponds roughly with the seating order of members in the plenary chamber. Each colour represents a distinctive European political group. At a glance, we can see that, immediately following the elections of 2014, seven different European political groups were formed; 52 members remained non-attached. The fact that the members of the European Parliament have been elected in 28 different countries, and under 28 different electoral systems, is not made visible in this presentation of the European Parliament.

34 Wohlfahrt (n 4) 1279.
35 As of June 2015, there are 8 European political groups; the number of non-attached members reduced to 15. See also Chapter 7.
While the graph and Parliament’s factual seating order express the non-relevance of nationality for the decision-making in the European Parliament, a hidden reality exists. Even though the internal Rules of Procedure of the European Parliament make it impossible for members to function as representatives of national groups, the internal Rules of Procedure of the European political groups do not. As we shall also see in Chapter 7, national delegations are central formal actors within the European political groups. The discrepancy between Parliament’s Rules of Procedure and rules of the European political groups once again confirms the existence of discordant provisions across the board.

3. Scholarship on Discordance

When we consider all the formal provisions discussed, it is simply impossible to provide an unequivocal, adequate answer to the question of who it is that the European Parliament represents. The authority of the European Parliament seems to rest on two pillars. It is the representative body of the peoples of member states, yet the representative body of Union citizens as well. How do other scholars analyse this inconclusive situation?

3.1. Ignore, Accept, or Reject the Discordance

The literature on the European Parliament and the political representation that it offers is rich. Yet, explaining the co-existence of different provisions regarding whom Parliament represents has not been a dominant issue in that literature.37


37 For example the work of the following scholars have greatly contributed to a better understanding of the European Parliament without accounting for the discordant provisions regarding its representative status. David Judge and David Earnshaw, The European Parliament (2nd edn, Palgrave Macmillan 2008); Amie Kreppel, The European Parliament and Supranational Party System: A Study of Institutional Development (Cambridge University Press 2002); Julie Smith,
Many scholars have studied and drawn valuable conclusions on the development of the above-described provisions concerning the elections, the division of seats in the European Parliament, the salary and immunity provisions, and the functioning of members in European political groups.\(^3\) The role that the European Parliament plays in democratic representation in the European Union has also been the subject of important theoretical work.\(^4\) However, these studies were often conducted without reconciling the different provisions on the European Parliament’s representative status, and even without attempting to do so. The discordance was ignored.

Other scholars, mainly political scientists, have taken note of the multiple representative roles that members of the European Parliament perform, without regarding it as a worrying phenomenon.\(^5\) They accept the discordance as, in their eyes, multiplicity is inherent in political representation. Members of national parliaments also function simultaneously, or alternately, as representatives of their nation, as representatives of their political party, and as spokespersons of a particular constituency. From this perspective, members of the European Parliament simply face additional responsibilities at the European level. Questions about the implications of these different roles for the formal status of the European Parliament are often not raised by them.

When scholars, in both the legal and political science field, discuss the different rules and practices in relation to each other, the explanation for their simultaneous existence is generally found in the dynamics of the political process.\(^6\) The emerging institutional architecture is analysed as the result of on-going developments, and the result of political struggle and conflicting interests. Jörg Gerkrath, for instance, sees democracy by definition as an unfinished affair. He qualifies the current distribution of seats in the European Parliament as:

\begin{quote}
’a compromise between equal representation of the Union’s citizens and appropriate representation of the peoples of the member states.’\(^7\)
\end{quote}

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\(^3\) Relevant literature on these areas is found in the subsequent chapters on the electoral provisions (Chapter 4), the immunity provisions (Chapter 5), the salary arrangement (Chapter 6) and the internal organisation of the European Parliament (Chapter 7).


\(^7\) Gerkrath (n 23) 76.
It is a pragmatic approach, in which differences between the provisions are recognised, and not regarded as a source of discomfort.

Others, however, struggle with the duality. They reject the idea that discordant legal provisions can exist side-by-side. These scholars seek the solution in making a well-reasoned choice between the diverging provisions. Which one is the ‘real’ one? In this exercise, overriding importance is attributed to the provisions concerning the seat distribution and the organisation of elections. Actually, the German Federal Constitutional Court (GFCC) has best captured this purist approach. From the lengthy Lisbon Decision, it appears that the Court has taken due notice of the discordant provisions. It has evaluated the fact that the first sentence of Article 14(2) TEU describes the European Parliament as the representative body of Union’s citizens, and that the next sentences of this Article 14(2) TEU determine the composition of the European Parliament by a system of degressive proportionality (see above). In the view of the Court, these provisions cannot coexist, or at least, they are not both determinants of Parliament’s representative status. Whom the European Parliament represents must be deduced from the electoral provisions alone. To arrive at this choice, the Court has elevated the principle of electoral equality to the status of an issue that affects human dignity. Human dignity goes to the core of what the Court means to defend. When citizens’ human dignity is violated by certain rules, these rules are per se rendered inapplicable in Germany. Following this reasoning, the second sentence of Article 14(2) TEU stands in the way of attributing formal significance to the first.

The Federal Court’s idea has also been tempting for some scholars. In a recent PhD thesis, Michiel Duchateau denies the European Parliament the capacity to represent Union citizens. To that end, he takes refuge in a rhetorical twist. First, Duchateau appears to replaces the words ‘Union citizens’, as found in Article 14(2) TEU, with ‘European people’. Then he argues that, considering there is no such thing as a ‘European people’, Parliament cannot be seen as its representative body. This approach of the matter does however not explain why the Union citizens (rather than a fictitious European people) are disqualified as the electorate of the European Parliament. In the view of Duchateau, the electoral rules are so dominant that other rules should fall in line. He even suggests that the European Parliament should abandon or alter its current organisation in European political groups. But he fails to explain how the appeal to slavishly translate the electoral provisions in

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43 Judgment of the Second Senate of 30 June 2009 (n 1) para 280.
44 Ibid para 211.
47 Duchateau (n 46) 418.
48 Ibid 428.
Parliament’s internal organisation relates to Parliament’s treaty-enshrined prerogative to decide on its own organisation.\footnote{See Article 232 TFEU.}

The above has shown that the discordance in the rules regarding whom the European Parliament represents, is approached in different ways by different scholars. Some ignore the existence of divergent rules, some reject this situation as unacceptable, and others simply accept it – as the reality that it is. The present investigation aims to shed light on how this reality has come about. It seeks an explanation. As such, it accepts the fact that seemingly contradictory sets of rules co-exist and exert influence simultaneously.

3.2. Explain and Appreciate the Discordance

The provisions that shape Parliament’s representative status are the product of distinctive developments. They have been adopted in different eras, on the basis of different treaty articles, and by different actors, each wanting to accomplish change at a different pace, and possibly even in different directions. The fact that the sets of rules each have a legal basis, and that they have been decided accordingly, means that their existence is an undeniable legal fact. They have per definition 100 per cent authority. To explain the complicated outcome that we are facing, one could study, rule by rule, the inter-institutional battles that have taken place. This requires insight in the \textit{de jure} and \textit{de facto} powers of the different actors, and their actions. Yet, for a full comprehension of events, and to understand the evolution of rules, this functional explanation needs to be complemented by the study of driving forces behind change. The present study centres on such a driving force. It focuses only on the drive and actions undertaken by the European Parliament itself. The contributions of other actors to shaping Parliament’s representative status are not taken into account, or only very marginally.

Scholars have made different assumptions about the motives of the European Parliament to undertake certain actions. \textit{Rational choice} models focus on the individual members and assume that their preferences are fixed and exogenously given. Members are seen as strategically seeking to maximise their individual gains at minimal costs and thus to vote for a proposal and act in the way that is most profitable to them.\footnote{See an analysis of this approach, Mark A Pollack, ‘The New Institutionalism and European Integration’ in Antje Wiener and Thomas Diez (eds), \textit{European Integration Theory} (2nd edn, Oxford University Press 2009). See also Peter A Hall, ‘Historical Institutionalism in Rationalist and Sociological Perspective’ in James Mahoney and Kathleen Thelen (eds), \textit{Explaining Institutional Change. Ambiguity, Agency, and Power} (Cambridge University Press 2010).} The rational choice approach has increased, for example, our understanding of why members \textit{join} a European political group when they enter the European Parliament.\footnote{See for more Chapter 7.} It helps members to accomplish their goals. However, rational choice theory cannot fully account for the reasons why European political groups were \textit{created} in the first place. Due to the set of assumptions that it relies on, it glosses over important motives behind institutional change and creation. To capture these motives nonetheless, it is useful to turn to other strands of literature.
Theories of sociological institutionalism and historical institutionalism are the most promising in this respect. They put social contexts, including normative ideals, at the heart of their analysis. They recognise that norms may constrain actors in taking certain decisions, and that they may equally facilitate and invite other actions. Norms can induce decision-makers to take a certain course of action because this would be appropriate, desirable or needed, even when the individual gains of those involved would be suboptimal and sometimes even in defiance of formal limitations. The organisation of the European Parliament in European political groups, rather than in national groups, may be such an appropriate decision in the post-World War II era.

A ground-breaking study of the structuring effect of norms on the design of the European constitutional order was authored by Berthold Rittberger. In *Building Europe's Parliament – Democratic Representation Beyond the Nation-State*, Rittberger explains particularly well that the standards embedded in the concept of representative, parliamentary democracy, have played a dominant role in designing the European Parliament from the start.

‘[T]he creation and successive empowerment of the EP suggests that political elites’ concerns about democratically legitimate governance structures played an important role in constructing the EU polity long before the public, media, and social scientists became interested in the issue.’

The ideal of representative democracy can explain a series of decisions, including the organisation of direct European elections. The adoption of Article 14(2) TEU, defining the European Parliament as the representative body of Union citizens, can be explained thusly as well. It was regarded as appropriate to ‘further development of transnational politics, leading to a more popular recognition of the post-national political space’. The desire to structure an organisation in line with a particular norm may lead to the adoption of certain legal provisions, even when they clash with other provisions that are already in place.

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55 Rittberger (n 53) 34.
3.3. Parliament’s Right and Duty

This study indicates the existence of a norm that is particularly relevant for the development of parliaments. It concerns the liberty that an elected parliament *ought to have* in defining the subject that it represents, and in shaping the conditions for how it is represented. The existence of this norm surfaced after studying numerous debates that were held within the European Parliament, notably regarding the election procedure and the statute for members. In these debates, prominent members did not only express their long-held ambition to be involved in institutional change, but they also argued that this would be *appropriate*. For example, during a debate about European elections in 1960, the Dutch Christian Democrat Wim Schuijt stated as fact that:

> ‘[I]n any modern democracy it is one of the inalienable tasks of the parliament to establish an electoral system, if necessary in co-operation with the executive authority.’

In Schuijt’s understanding, the liberty to structure the electorate that it represents always belongs to a parliament. It would therefore be appropriate to give the task to shape the electoral system to the European Parliament too. Sixteen years later, a similar debate took place, this time with a leading role for the Dutch Social Democrat Schelto Patijn. He stated diplomatically that ‘it could be argued’ that the European Parliament should be *exclusively* vested with the power to make its own electoral arrangements, and that the Council should not have any decision-making power in this domain. Parliament’s power in this area was regarded appropriate, and that of the Council in fact not. The statements of these members show that, in their view, there is a commonly held ideal that parliaments, as representative bodies, ought to be able to determine, or at least have a fundamental say over, their own representative status. While this norm seems a logical concept to these politicians, it has been underexplored by scholars in their studies on the development of the European Parliament. Some have touched upon it briefly. For instance, in an article on representation in the European Union, Christopher Lord and Johannes Pollak observed that prominent members of the European Parliament seem convinced that their parliament has ‘both a right and a duty to propose its own institutional design’. Members feel entitled *and* obliged to take the lead in decisions regarding Parliament’s institutional and representative role. This ‘right and duty’ was not based on a treaty-given power, but emanated from a norm. Regrettably, Lord and Pollak have not elaborated

59 Lord and Pollak (n 24) 124.
or explained the norm, despite the fact that it raises interesting questions. What has the impact of the norm been on the development of the European Parliament? Does it explain why Parliament seeks to extend its rule-making power regarding certain sets of rules and why it took certain decisions? On what basis does the European Parliament believe it is the appropriate institution to structure its electorate? And what does this structuring actually entail? The present investigation will seek to fill this lacuna in the literature, and study the norm – both in theory and in fact.

4. Representative Autonomy – Driving Change

At first glance, one may question whether defining the electorate is a matter of choice. In a representative democracy, an elected parliament exercises power because it represents citizens from whom the authority emanates. Put in these terms, parliaments have to respect the existing unity of an electorate and reflect its diversity; not restructure it. However, this line of argument ignores that the nature of the diversity is not always self-evident. The electorate is a very diverse group that may be represented, and therefore defined, along different dividing lines. It also ignores that the composition and the definition of an electorate can change over time. The urgent question is whether parliaments by definition have a role in defining the electorate. Is it part of parliament’s ‘inalienable task’?

4.1. Representation through Claim-Making

Answering this question should start from exploring more in depth what political representation actually is. This exercise is undertaken in Chapter 2 of this study. The Stanford Encyclopedia of Philosophy provides the following definition:

‘Political representation occurs when political actors speak, advocate, symbolize, and act on the behalf of others in the political arena. In short, political representation is a kind of political assistance.’

The definition emphasises that political representation is about action, about actively making citizens’ voices, views, and perspectives ‘present again’ in the political debate. However, this definition also implies that representatives are rather passive in shaping whom they represent. They are seen as a kind of political roadside assistance, helping you to get from one place to another. Representatives are regarded as transmitters of a message, which implies that the sender of the messages is exogenously defined.

Recent insights of political scientists, most notably of Michael Saward, have taught us that political representation is in fact a more creative process than that.

His findings have overhauled the standard account on representation. As elections are anonymous, representatives do not know exactly who have voted for them, and for what reasons. Moreover, the group of people that a representative has to speak for is generally very large and highly diverse. Therefore, it is necessary that representatives pick, choose, and construct the motives, and even the identity of their electorates.\textsuperscript{62} They make claims about these – representative claims. Representatives offer constructs that unite ‘their’ citizens, and seek recognition for these in a permanent interactive process of claim-making, claim-rejecting, claim-adapting and claim-accepting. They are entitled to such creative acts on the basis of their free mandate.

The work of political scientists such as Saward lies in the area of substantive political representation. How do representatives act? The focus of this study is a different one. It turns to formal rules, and concerns the claim-making of a parliament rather than of individual representatives. This has not yet been addressed in the literature.

As I will explain in the course of this study, electoral rules, constitutional provisions, and even Rules of Procedure, all contain assumptions, claims, about the electorate. They depict the represented in a particular way. To illustrate, one can look at how parliaments are organised. It is quite common for a parliament to be organised along ideological lines. In fact, it is so common that one may overlook the claim-making that underlies it. Yet, the idea that ideology is the overriding dividing line in society is only an assumption. Other choices could have been made instead, such as organising parliament along geographical, religious, or gender lines. Such choices would entail different claims about the electorate and what it wants its representatives to do. In fact, it would also lead to different discussions in parliament.

The matter that I want to understand is what role parliaments should play in establishing claim-containing rules. Is defining them indeed parliament’s ‘right and duty’? Chapter 2 will explain that a parliament, as a representative body, should at least not be side-lined in this process. Individual representatives must be at liberty to make substantive representative claims on the basis of their free mandate. Derived from this, parliament as an institution must be in the position to make supporting formal claims. Moreover, the involvement of a parliament in defining its representative status seems necessary from the point of view of institutional balance. When a parliament lacks this power, there is a risk that other institutions impose representative claims that are considered inappropriate, or that do not match the concerns of citizens. This may lead to low turnouts and endanger parliament’s legitimacy, position and power.

What these arguments indicate is that any parliament should have a certain liberty to define whom it represents, and in what manner. I shall call this norm representative autonomy. I consider it to be a crucial dimension of parliamentary autonomy.

4.2. New Parliaments, Controversial Claims

The idea that a parliament has a role in defining its electorate may be upsetting to some. That is understandable. After all, most established parliaments are organised along dividing lines that are already long embedded in social reality. Equally,
national parliaments generally represent an established unity. The construction
that preceded this unity has long been forgotten. Therefore, the inherent power of
parliaments to define the politically relevant divides in society, and to create unity
by representing a contestable ‘whole’, now goes largely unnoticed and uncontested.

The creative aspect of claim-making is particularly noticeable when it is under-
taken by new parliaments (such as the European Parliament), and by parliaments
in societies where revisions to the constitutional foundations are being discussed
(such as in Belgium, Spain, and the United Kingdom). These parliaments face the
challenge of constructing and seeking recognition for new or modified representa-
tive claims, which inevitably causes controversy. The relevance and implications of
parliamentary representative autonomy then come to the fore most explicitly. It is for
this reason that the European Parliament forms an interesting case to study in rela-
tion to representative autonomy. Nevertheless, the concept itself has an explanatory
value in the context of the development of other parliaments as well.

5. Research Question and Methodology

5.1. Theoretical Framework

Let me return to my own journey, and how the concept of representative auton-
omy fits in. As I have previously mentioned, it was the Lisbon Decision, qualifying
the European Parliament as the representative body of the peoples of the member
states, that triggered my investigation in what sets of rules actually define the Euro-
pean Parliament’s representative status, and how it was defined therein (see above
section 1). A quick scan soon clarified that Parliament’s subject is characterised in
different ways, through different sets of rules. Consequently, the electorate and other
(European) institutions are offered diverging claims about whom the European Par-
liament represents (see section 2). In my search to find an explanation for these dif-
ferences, I was guided by the comments that my esteemed predecessors Schuitj and
Patijn had made during debates in the European Parliament. They both indicated
the necessity for the European Parliament to have a say over whom it represents (see
section 3). The European Parliament needs, what I call, representative autonomy (see
section 4), just like any other parliament. It seemed that the quest for this repre-
sentative autonomy has induced Parliament to act even when it lacked the formal
competence to do so, and even when its actions contradicted existing sets of rules.
In the face of these acts, I decided that it was necessary to further develop the theory
on the concept of representative autonomy. This became the theoretical framework
of my thesis.

To build this framework, I engaged with academic literature on (political) rep-
resentation, and parliamentary autonomy in general. It resulted in the definition of
representative autonomy that was referred to above: it is a parliament’s liberty to de-
fine and to represent itself and its electorate at its own discretion. From the literature
study, I have also concluded by which standards representative autonomy, and its
evolution, may be observed. It appears that the most crucial aspects in this light are
a clear motive (own preferences) of parliament, and consistent action in line with this.
5.2. Question and Perspective

In this study, I take an internal perspective. This means that I will leave aside how the representative claims by the European Parliament are received by the public or by other institutions. I only concentrate on the actual claim-making. I analyse Parliament’s actions to amend crucial sets of rules that change its own representative status. The existing literature on the evolution of the European Parliament, generally explains Parliament’s actions by its drive for more power and competences. The added value of my investigation is to see if Parliament’s actions (and in particular those regarding its own representative status) can also be read in terms of it undertaking its core representative task.

The research question is formulated as follows:

**How has the European Parliament developed the liberty to define whom it represents, and how should this be understood in terms of representation?**

To establish whether the European Parliament has developed its liberty, it is first of all necessary to take stock of the powers that it already had in the areas concerned. To what extent did it have a right to decide, a right of initiative, and/or a right to amend the rules at stake? With that starting position in mind, I will then outline the most important actions that the European Parliament has taken in order to change the rules, and thereby offer the electorate a different representative claim than the one previously given. From this overview, it will be evident whether the European Parliament has managed to develop its powers de jure and/or de facto. It will also reveal which instruments the Parliament relied on to achieve its goals.

In order to answer the second part of the question, I turn to an approach that is less common in legal studies. I will take the consecutive changes in the rules as a source for study. In law, formal rules are often only taken as an object for study. To understand what Parliament’s motive has been for a particular decision, scholars are used to analyse the formulation and the justifications given for a particular set of rules. When applying this method to claim-containing rules, it would require an analysis of the historical origins and exegesis of legal texts of inter alia the Direct Election Act, Article 14(2) TEU and Parliament’s Rules of Procedure. It is however not my intention to shed light on Parliament’s objectives regarding each of these rules in particular. I want to understand whether there is a particular dynamic, flowing from Parliament’s representative task and position as citizens’ representative, which makes it almost inevitable that the European Parliament takes action to change such rules at its own discretion. Incremental changes to different sets

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63 Pollack has argued that actors are sometimes restricted from changing a certain course of action because previous decisions have caused them to be ‘locked in’. Pollack (n 50). See also Sven Steinmo, ‘What Is Historical Institutionalism’ in Donatella Della Porta and Michael Keating (eds), *Approaches in the Social Sciences* (Cambridge University Press 2008); Peter A Hall and
of rules will be studied with a view to bring to light how the European Parliament perceives its responsibility for shaping its own representative status. Will it show that the concept of representative autonomy is useful in explaining Parliament’s actions? Taking the changes as a source for study, in order to discover a certain pattern or norm, is an approach that fits the tradition of historical institutionalism. 64

5.3. Selection of Rules to Study

Many different sets of rules are relevant for determining Parliament’s representative status. Some form part of primary law, some of secondary law. Several rules have already been referred to in this chapter. However, there are also other relevant rules that have not yet been mentioned, such as the rules regarding the verification of mandates and the rules on European political parties. As it is nearly impossible, and not necessary for answering my research question, to conduct an extensive, historical analysis of the development of Parliament’s involvement with all these rules, I have made a selection.

The criterion in this selection process was that the selected set should encompass maximum diversity in terms of Parliament’s (initial) rule-making powers. The selection should include the rules by which the European Parliament decides (quasi-) unilaterally; rules for which the European Parliament is highly dependent on other institutions; and rules by which Parliament’s rule-making powers have considerably changed over time. These ‘extremes’ best allow us to see how the European Parliament has accomplished change in defiance of formal limitations, as well as what representative claim it constructs when it is not hampered by these limitations, which is a strong indication of its intrinsic preference. On the basis of this criterion, the following areas have been selected.

Table 1. Criteria for selecting sets of rules to study

<table>
<thead>
<tr>
<th>Rule-making power of the European Parliament</th>
<th>High</th>
<th>Low</th>
<th>Developing</th>
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<tr>
<td>Political groups</td>
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<td>Immunity provisions</td>
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<td>Electoral provisions</td>
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<td>Salary provisions</td>
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The rules on the powers and composition of European political groups form part of Parliament’s Rules of Procedure. They are decided by the European Parliament alone, without interference from the other institutions. 65 The evolution of these rules thus provides us with useful information about how the European Parliament wants

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64 Amenta and Ramsey (n 52).

65 Article 232 TFEU.
to present itself to citizens when it has maximum liberty. The immunity provisions are an example of the other end of the spectrum, with the European Parliament barely having a say. As the provisions are regulated in a Protocol to the Treaties, the European Parliament is dependent on the member states for any changes to be made. If Parliament has nonetheless managed to accomplish change, this may indicate that a parliament’s need for representative autonomy is a powerful drive. Also it may be that other actors recognise its inherent need, resulting in a more lenient attitude towards Parliament’s interventions. The rule-making power of the European Parliament regarding the electoral law, and regarding its members’ remuneration, has substantially changed over the years. Both will be studied, as they will best show how the European Parliament has enhanced its powers. The scope of the study will encompass only the time period in which the decisions with the most impact were taken. For the electoral provisions, this is the period culminating in the Direct Election Act, adopted in 1976. For the salary provisions, this is the period after the first direct election of 1979, ultimately leading to the decision on a statute for members in 2005.

6. Relevance of This Study

The added value of my work is claimed to be threefold. First of all, it sheds new light on the capacity of the European Parliament to change its own institutional design. It has been argued by courts and scholars that the member states are the masters of the treaties. Moreover, as we have seen above, many hold that the representative status of the European Parliament is only defined by the rules regarding its composition, over which Parliament’s rule-making power is limited. On the basis of these assumptions, one would be inclined to think that the European Parliament is not in the position to alter its own representative status. However, a better understanding of political representation, as a dynamic process involving claim-making and claim-adapting, allows us to see that not a single provision, but rather a whole web of rules, defines a parliament’s status. When the European Parliament has augmented its autonomy in relation to these rules, it has thereby enhanced its constitutive power to some extent.

The study also sheds light on the special nature of the European Parliament as compared to the other EU institutions and bodies. The members of the European Parliament are not civil servants, and the European Parliament is of a fundamentally different nature than for instance European executive agencies. Its members are directly elected by citizens, and all hold a free representative mandate. While all institutions, including executive agencies, can develop in unexpected ways, and often seek to strengthen their position, the determination of the European Parliament to find its own path is not (just) typical institutional behaviour. Parliament’s drive and capacity to shape its own representative role are likely to emerge from normative notions as well. Therefore, the actions by the European Parliament need to be considered in the light of parliament’s raison d’être: its mission to represent citizens. This perspective is offered in the present study.

Finally, the societal relevance is that this study clarifies whom the European Parliament represents. The Parliament suffers from widespread misunderstandings about its very nature. These misunderstandings are present in public discussions, in scholarly debates, and in legal rulings, as was demonstrated in the Lisbon Decision.
The present investigation will assist in addressing them, and present a more encompassing picture.

7. Structure

To start with, it is necessary to develop the theoretical framework more in-depth. This is undertaken in Chapter 2. It explains why parliaments must have substantial representative autonomy. Political representation requires that members of parliament make claims about their electorate in the political arena, and that parliament as a whole is in a position to shape its own representative status. As noted before, this urgency is linked to the free mandate of the representatives, as well as the need for institutional balance. Chapter 3 then introduces the central institution of the present study, showing in particular its formidable capacity for change. The European Parliament started out as an appointed, rather powerless body. With these features, its representative autonomy was low. Over time, the European Parliament developed and obtained substantial budgetary, legislative, and oversight powers. Moreover since 1979, its members have a direct, free mandate. This increased the European Parliament’s need for more representative autonomy and its capacity to develop it. In the subsequent chapters, we see how it has undertaken this.

In Chapter 4, the focus is on the electoral provisions, and in particular the adoption of the 1976 Direct Election Act. Even though this piece of legislation is vital for Parliament’s representative status, Parliament’s formal say over it was initially limited. The member states had the last word. The question that arises is whether the European Parliament accepted its dependence, in particular considering that it was not yet directly elected. Or did it – even as an appointed body – (try to) find alternative ways to get a foot in the door, and influence how the electorate was structured and represented? And if so, what justification did the European Parliament have for its interference?

The next two chapters deal with rules that determine the conditions under which the parliamentary mandate is exercised. Chapter 5 concerns the legal status of members, and Chapter 6 their financial status. Initially, members of the European Parliament were dependent on national legislation for their immunity and salaries. As a result, their positions were divergent, which compromised the idea that the European Parliament was a unitary institution representing a unitary electorate. Parliament’s liberty to make formal representative claims by these sets of rules was almost nil at the start. The end-result is however different. Therefore, they form interesting material to find how representative autonomy can be won, but also to observe what the obstacles are in this process.

In Chapter 7, the last set of rules is described: those governing Parliament’s internal organisation. As the European Parliament is at great liberty to establish these rules, they best demonstrate how Parliament wants to represent its electorate. Earlier, we have seen that the European Parliament has chosen to organise itself along the lines of political affiliation, and to make European political groups powerful actors. The focus in this chapter lies on the impact of this on how members formally carry out their representative mandate. How does it change the formal representative claim of the European Parliament, and affect those of individual members?
Finally, in Chapter 8, the main conclusions are drawn. We can then see the different sets of rules in relation to each other. Has the European Parliament re-defined whom it represents, and how has it done so? Has it found a self-standing electorate, or is it still a representative body with a derived electorate? Does the European Parliament formally represent Union citizens or national peoples? And when the answer is not so conclusive: how can we come to terms with this ambiguity in the legal provisions?
2. The Concept of Representative Autonomy

Analysing whom it is that parliament formally represents first of all necessitates a clarification of what is meant by political representation. Only then can we establish with whom the parliament is engaged in a representative relationship, and who shapes (or ought to shape) this relationship. In order to advance in the debate about the definition of the European Parliament as a representative body, the present chapter undertakes precisely this theoretical exercise.

The notion of political representation has fundamentally altered over the years. Initially, the relationship between members of parliament and parliament’s subject was unconnected to electoral rights. This is why, according to 18th-century British political doctrine, the American colonists were *represented* in the British parliament, even though they were not in the position to cast their vote. The British parliament was regarded as the representative of all people of the empire by way of the figure of ‘virtual representation’.1 However, ever since the American and French revolutions, the idea has gained ground that citizens should decide for themselves who rules in their name.2 The notion of representation is nowadays linked to the liberty of the represented to vote for their representatives.3 How exactly we should understand the relationship between the representatives and represented, is a complex matter. The thoughts on this issue continue to develop.

The structure of this chapter is as follows. Section 1 lays the necessary groundwork. It elaborates how political representation is generally viewed. Particular attention is paid to recent insights that stress the dynamic nature of the relationship between representatives and represented. Section 2 builds on these findings. It explains what *formal* political representation is, and by which rules the formal representative status of a parliament is determined. Next, in section 3, the focus is on the role of parliaments in deciding these rules, and thus in defining the electoral relationship. It explains that such a role is necessary and intrinsically linked to the free, representative mandate of its members and to the principle of separation of powers. Parliaments

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2 Marc Van der Hulst, *The Parliamentary Mandate: A Global Comparative Study* (Inter-Parliamentary Union 2000) 6. His book is a useful study on parliamentary mandates in general and on the status of members in particular.
3 Often, I shall use the term ‘representative’ when referring to members of parliament. I am aware that representatives may also be unelected, and that representation can occur outside the political arena. (See for more on this, section 1.3.) However, for the purpose of this investigation, I will concentrate on elected, political representatives.
need a level of what I called ‘representative autonomy’. Section 4 further defines this new notion, placing it next to other dimensions of parliamentary autonomy. Moreover, it explains how parliaments can develop representative autonomy in defiance of formal rules and limitations. Finally, in section 5, the findings of the chapter are brought together. It underlines why the angle of representative autonomy may be instrumental for better understanding of certain actions of the European Parliament.

1. The Essence of Political Representation

Most people will have a general idea of what political representation is. Nevertheless, defining it very precisely is challenging. Almost fifty years ago, Hanna Pitkin picked up on this challenge, and wrote her influential book ‘The Concept of Representation’. In this, she analysed the origin of the word ‘representation’, and its use in different domains – including arts, religion, law and politics. The fruit of Pitkin’s labour is a straightforward, generic definition. It defines representation as:

\[
\text{‘[T]he making present in some sense of something which is nevertheless not present literally or in fact.’}^{6}
\]

It is a useful definition that helps us to understand the core task of representatives in the political arena. Political representatives need to speak out and to act in such a manner that citizens are made present, even when they are not present in person, and in a manner responsive to them. The strength of this definition is that it captures well the creative and active dimension of political representation. Its weakness is that it assumes that citizens can be ‘made present’ in an objectively accurate manner, – as if representatives know for sure what their voters want them to say and do. The assumption has remained unquestioned until recently. In the past decade, several political scientists, notably Saward, have pointed out that political representation is in fact a more dynamic and creative process. In this view, representatives put forward and permanently adapt certain ‘claims’ about the electorate. The electorate is not and cannot be a source of objective ‘knowable’ information. It is simply too diverse for that. The implication of the recent insights for formal representation will be explained in section 2. First, I need to flesh out what this new perspective on political representation entails. For that, it is useful to first recapitulate the traditional account of the relationship between representatives and represented (section 1.1), and subsequently contrast it with new ideas about the role of representatives (section 1.2) and the represented (section 1.3).

5 The word ‘representation’ has a Latin origin (repraesentare). It can be translated as ‘making appear’. Ibid 3.
6 Ibid 8-9.
7 Ibid 209.
8 Michael Saward, The Representative Claim (Oxford University Press 2010).
1.1. Traditional Scholarly Views on Representation

Analysing the relationship between representatives and represented, scholars have traditionally distinguished the ‘trustee’ model and the ‘delegate’ model. In the ‘delegate’ model, the task of the representatives is to act in line with the expressed preferences of the represented. Representatives are expected to record the views of their electorates, and to transmit this information in parliament. As a result, they will most likely advocate the interest of the constituency rather than the interests of the nation at large. When the delegate model is taken to the extreme, representatives are reduced to mere messengers of their voters, without any autonomy to act.

In contrast to this, the ‘trustee model’ foresees only a marginal role for the represented. Citizens are only involved in the process of selecting their representative. Once in office, representatives follow their own judgment about what they consider to be the right course of action. They act as a kind of ‘paternalistic aristocrats’, and often aim to balance the short-term interest of the represented with their own long-term interests and with the good of the nation at large. Edmund Burke is a well-known advocate of this model. He argued that representatives should not simply serve the expressed preferences of constituencies, as this may be detrimental for the good of the whole:

‘Parliament is not a congress of ambassadors from different and hostile interests, which interest each must maintain, as an agent and advocate, against other agents and advocates; but Parliament is a deliberative assembly of one nation, with one interest, that of the whole... You choose a member, indeed; but when you have chosen him he is not a member of Bristol, but he is a member of Parliament.’

In this view, representatives need sufficient autonomy from the electorate in order to do their work well. Representatives should take the lead in the political process, and

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10 Pitkin (n 4) 276. One of the most famous advocates of the delegate theory is James Madison. He feared the diminished influence of local and particular interests in a large constituency. In more modern times, German scholars in particular have subscribed to this theory, such as Gerhard Leiboltz and Hans Wolff.

11 Ibid 209. See also Nadia Urbinati, Representative Democracy: Principles and Genealogy (University of Chicago Press 2006).

12 Pitkin (n 4) 146.

13 Edmund Burke outlined his ideas in a speech, held on 3 November 1774, in Bristol.
not permanently seek the approval of the constituents. A contemporary of Burke, the French representative and philosopher Condorcet lucidly underlined this point.

‘As a representative of the people, I shall do what I believe best serves their interests. They appointed me to expound my ideas, not theirs; the absolute independence of my opinions is my primary duty towards them’.14

In the trustee model, representatives are less responsive to sanctions by the represented. There can be different justifications for this model. In the first place, it may be assumed that it leads to better policies when representatives are at liberty to decide their own course of action. This is for instance the case when the capacities of the represented are questioned. Secondly, the involved may believe that sanctions are simply not necessary. This occurs, for instance, when representatives are selected on the basis of their resemblance to the represented (descriptive representation).15 The resemblance between representatives and represented is then expected to ensure congruence of views.

Scholarly discussions have thus moved on two (inter-related) axes. The first is about whether representatives must foster the good of the whole or of a part (their own constituency). The second concerns the nature of the representative relationship. In the last decade, researchers have developed different views on the latter. A particularly important scholar in this regard is Mansbridge.16 She classified different models that each have their own normative criteria by which to evaluate the representation that takes place. In a first model, the actions and achievements of representatives are set off against the promises that they made prior to their election – ‘promissory representation’.17 An alternative (or complementary) approach is to measure whether the actions of the representatives correspond to what the electorate is likely to approve at the next election – ‘anticipatory representation’.18 In yet another model, representatives take decisions on the basis of their own intrinsic principles, or on the basis of their own experiences and common sense – ‘gyroscopic representation’.19 The question is then whether the voters were aware of the qualities and terms of references of their candidates at the moment that they selected the representative.20

14 Condorset as cited by Van der Hulst (n 2) 7.
15 Pitkin (n 4) 113; Corina Wolff, Functional Representation in the EU: The European Commission and Social NGOs (ECPR press 2013) 45.
17 Mansbridge, ‘Rethinking Representation’ (n 16) 516.
18 Ibid.
19 Ibid 520.
20 As a fourth model, Mansbridge distinguishes surrogate representation. This occurs when constituents consider themselves to be represented by an elected representative, even though they have not elected the representative. See, for more, section 1.3.
Rehfeld considers this categorisation too generic and broad. In theory, gyroscopic representation does not exclude that representatives are responsive to sanctions. Just as representatives who seek the good of a part (a constituency) may not necessarily fear non-re-election. In response to Mansbridge, Rehfeld refined the distinctions and came up with no less than eight different types of representative relationships.\(^{21}\)

While different scholars have thus taken different approaches, and sometimes strongly disagreed with each other, their concepts show many similarities as well. Most importantly, they imply that representatives know who voted for them and what their interests are. Without exception, the above-described models assume that the represented are a source of objective information. Castiglione and Warren have illustrated this well in their schematic definition of how political representation is traditionally viewed.

\[\text{\textbf{A. Political representation involves a representative X being authorised by constituency Y to act with regard to good Z. Authorization means that there are procedures through which Y selects/directs X with respect to Z, and that responsibility over actions/decisions of X rest with Y.}}\]

\[\text{\textbf{B. Political representation involves a representative X being held accountable to constituency Y with regard to good Z. Accountability means that X provides, or could provide, an account of his/her decisions or actions to Y with respect to Z, and that Y has a sanction over X with regard to Z.}}^{22}\]

This definition describes the political process in an almost mechanical manner. It highlights the often-made assumption that representatives can know what the interests of their voters are. However, it is precisely this underlying assumption that can be questioned. Who constitutes the group of ‘voters Y’ and what is its interest? The next section will underline that the electorate is in fact not a coherent group that can be defined by objective standards. This insight changes our understanding of political representation. Moreover, and most valuable for the present study, it also changes our perception of how the electorate is defined and by who.

1.2. Political Representation as Claim-Making

The British political scientist Saward has put the spotlight on the weaknesses in the traditional scholarly views on representation.\(^{23}\) His book, ‘The Representative Claim’, provides the bridge that I myself needed between theories on representation and political practice. In this, Saward points out that a real constituency is less organised and more diverse than the one-dimensional figure ‘Y’ in the scheme above suggests. Representatives are elected by numerous people who each vote by secret ballot. As voters do not attach shopping lists to their ballots, it is open for

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\(^{21}\) Rehfeld (n 9).

\(^{22}\) Castiglione and Warren (n 9) 6.

\(^{23}\) Saward, The Representative Claim (n 8).
The European Parliament’s Quest for Representative Autonomy: An Internal Perspective

interpretation by whom and on which basis representatives have been authorised to engage in the act of representation. Moreover, even when the motives and views of all voters would have been knowable information, the sum of all the different views and desires of the individual voters is too multi-faceted to ‘make present again’ in full.\textsuperscript{24}

Consequently, what really happens in the political arena, is that representatives make well-educated guesses (or convenient assumptions) about the identity of their voters and about the opinions and perspectives they hold. Whether this corresponds to reality is not a matter of mathematical inevitability. Both the expressed preferences of the electorate, and the implied coherence of this group, are nothing more (or less) than a claim.\textsuperscript{25}

‘A might well represent B. What B is – what words or images are taken to characterise her or him (or it) – as an electoral or other potential construction, for example, is often highly debatable. A must portray B, and adjust himself or herself or itself to some selective version of B, an activity that goes to the very heart of political representation. A can only represent B by constructing a contestable “B”.’\textsuperscript{26}

The definition of a representative’s electorate is thus always and inevitably a human construction. Nevertheless, it may correspond quite well to how the electorate defines itself. The reason for this is that representatives will seek acceptance of their claim, which stimulates the construction of claims that are perceived as realistic. (The role of the electorate and the interaction with the representative will be further explained below.)

In order to represent a particular electorate, representatives thus choose which of the electorate’s (perceived) features, dreams, perspectives, interests and views they highlight, and then claim that these are indeed the most relevant ones. The act of picking and choosing may be offensive to those who believe that a parliament should perfectly mirror the electorate.\textsuperscript{27} However, creating an exact miniature of the population is not only impossible, but it is not even the objective of political representation. The objective is to bridge differences between citizens in a convincing manner.\textsuperscript{28} The creation of credible constructs is instrumental in this regard.

Political representation thus involves the making of credible claims. It should be noted that it is possible, and even appropriate, for representatives to make multiple representative claims. They adapt the claims depending on the occasion and on the audience to whom they are made. This phenomenon has been called ‘shape-

\textsuperscript{25} Saward, \textit{The Representative Claim} (n 8) 51.
\textsuperscript{26} Ibid 16.
\textsuperscript{27} Inter alia Adams, the second president of the United States, and Mirabeau, one of the leaders of the French Revolution and member of the National Assembly, envisioned a parliament that would perfectly reflect the actual population. Pitkin (n 4) 60-62.
\textsuperscript{28} Hannah Arendt, \textit{The Human Condition} (The University of Chicago Press 1958) 15.
The Concept of Representative Autonomy

shifting’. A clear example of ‘shape-shifting’ was given by Rutte, prime minister of the Netherlands, in November 2012. When he was criticised for his commentary on the position of the Queen in the Dutch government formation process, he replied that he did not make these comments in his capacity of prime minister, but as party leader of the Dutch Liberal VVD. It shows that in different situations, representatives can define themselves and their electorates in different ways.

1.3. The Role of the Electorate. Limitations of This Study

While representation involves claim-making, the reverse is not always true. The act of claim-making is not by definition an act of representation: representation always requires recognition. To understand when representation occurs, it is useful to turn back to Rehfeld. In ‘Towards a General Theory of Political Representation’, he points out that:

‘Representation really does happen whenever a particular audience recognises a case that conforms to whatever rules of recognition it uses, regardless of whether these rules are just or unjust, fair or unfair, legitimate or illegitimate’.32

Rehfeld’s work not only refers to representation by politicians. It includes non-elective representation, such as that of civil servants in diplomatic relations and of non-governmental organisations. It clarifies that also people who have not been formally endorsed as elected representatives by any constituency, can function as representatives in public debates. Spokespersons of non-governmental organisations, such as Greenpeace, and individuals, such as the Pakistani schoolgirl Yousafzai, may claim to speak for a larger audience, and even be recognised for it.

The rules of recognition, which are used to decide whether a claimant is a representative, differ depending on the function that is at stake. When we look at political representation in parliaments, we have to distinguish between formal and substantive representation. Claimants are formally recognised as representatives when they fulfil the appropriate formal criteria. These rules of recognition are laid down in the electoral law. They generally include provisions on the number of votes required, the eligibility of candidates and the incompatibility of mandates. Elected persons only transform into representatives with accompanying rights and privileges after their

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32 Rehfeld (n 31) 4.
33 Ibid 2.
credentials have been verified. Whether the electorate feels represented by them, is irrelevant in this process.

Of course, in the day-to-day politics, the actual substantive recognition by the electorate plays an important role. Citizens judge representative claims. Claims can be rejected, or recognized gradually, partly or fully. There are no simple criteria by which to measure recognition. It often comes about in an inter-active, dynamic process, in which representatives permanently readjust their claims, depending on the reactions by the electorate. When representatives find that their original claim was not well received, they may, for example, choose to sharpen their message. A clearer focus may be more appealing to a particular group. Alternatively, representatives may choose to be less articulate, hoping that a larger audience is attracted by their more general claim. When the electorate rejects the representative claim, it means that the claimant is not regarded as a representative of that group.

The essence of political representation is that the electorate is not only the judge, but also the object of claim-making. It is not necessary that the electorate was a coherent group prior to representation taking place. Its coherence can be the consequence of political construction and representation. This aspect underlines the creative power of politics, and deserves to be further explained.

The previous section stressed the multifaceted nature of the electorate. It is therefore impossible to represent this electorate perfectly. Already, the identity of each individual person is multi-layered, changeable and fluid and thus difficult to capture. Yet, some aspects of these fluid identities may freeze and become more dominant as a consequence of the act of representation. It may lead to group-formation. When representatives construe an electorate of which they say that it has certain common features, and when this claim is appealing to this electorate and considered befitting, it may actively start to identify itself (more) with these features and consider itself a fixed group. Political representation seeks to have an impact on the identity of the represented group. For this, it is not critical that people have actually voted for a candidate. People may identify with a claim, irrespective of having endorsed the candidate formally.

The process of claim-making and claim-endorsing can influence citizens’ perspective on the composition of society. In her study on parliamentary discourse practises, Ilie confirms that representatives continuously construe new political landscapes.

> ‘Parliamentary debates do not only reflect political, social and cultural configurations in an ever changing world, but they also contribute to shaping these configurations discursively and rhetorically.’

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34 Saward, The Representative Claim (n 8) 56.
36 Mansbridge, ‘Rethinking Representation’ (n 16) 522.
When recognized, their representative claims develop meaning in the real world.

To capture how claim-making works in practice, and how it can influence the identity of people, it is useful to discuss a specific case. The example taken is about the Dutch politician Geert Wilders, the leader of the PVV party. In a speech, made at the occasion of the presentation of the party’s candidates for the 2010 national elections, Wilders explicitly put forward a claim about who constitutes the PVV’s electorate.

‘We side with those people who don’t get it for free. We side with Henk and Ingrid. Ordinary Dutch people who work hard and are worried about the safety of their city, neighbourhood and street, about mass immigration and Islamisation, about poor care for their parents, about high taxes, the economic crisis and the study grants of their children.’

Wilders also specified who is to blame for the worries and problems of ‘Henk and Ingrid’: the left-wing elite, living in fancy homes along the canal belt of Amsterdam. By Wilders’ frequent references to ‘Henk and Ingrid’, the couple has become a symbol for a group that is portrayed as homogeneous. In reality, the electorate of the PVV is more diverse, as any group of people is. Some of the PVV’s voters may actually not be such ‘hard-working citizens’ or may not be worried about mass immigration. It is possible that they are angry with the establishment over other matters, for instance a decision by their city council to build an expensive town hall. It cannot even be ruled out that some PVV voters actually live along the canal belt of Amsterdam. What Wilders does, is to frame his electorate as if it is a rather coherent group. Moreover, he positions himself as the logical representative of that group. Wilders’ actions have affected the general perception of the composition of Dutch society. As a consequence of the increased recognition for the existence of a definable group of ‘Henk and Ingrid’, people identify or contrast themselves with the fictitious couple, at the expense of other identifications. In this particular claim-making exercise, it seems that part of the Dutch electorate has transformed, to a greater or lesser extent, into Henks and Ingrids (or their opposites).

For the purpose of the present investigation, I will not take into consideration the role of the electorate as the endorsers of claims. I will also not deal with non-parliamentary forms of representation, or question the representativeness of elected members of parliament either. The focus in this study is on the claim-making, and on the liberty that a parliament has (or ought to have) in offering the formal claims to the electorate that it deems fit. Formal recognition for these claims coincides with the adoption of the rules containing them.

Footnote 38: Speech by Geert Wilders, 26 April 2010 (translation KB).
2. Structures and Representation

We have seen above that rules determine when a claimant transforms into a formal representative with full rights. The present section holds that they have another significance as well: as *vehicles* for claim-making. Rules contain in and of themselves claims about the identity of the electorate. Like substantive claims, such formal claims involve choice and can always be contested. This contention will be shown in two different sets of rules: the electoral provisions and constitutional provisions. The findings will form an important stepping-stone for the next section, in which we will turn to the question of who should be entitled to present such formal representative claims.

2.1. Claims about Dividing Lines in the Polity

Electoral provisions are among the rules of the game for our democracies. They regulate a range of issues, such as who is eligible to vote, who is entitled to hold office, the relationship between the elected and the represented, the incompatibilities of the position in parliament with other mandates, and the method that is used in the voting procedure.\(^\text{39}\) Several scholars have pointed out that the choice for a particular electoral system has an impact on how the seats are distributed in parliament.\(^\text{40}\) For instance, the first-past-the-post system is likely to lead to an overrepresentation of the largest parties and tends to produce a two-party system.\(^\text{41}\) The point I want to make is a different one. Electoral rules do not only influence the distribution of seats among claimants; they also have an impact on how the electorate itself is defined. Different electoral systems highlight different features of citizens, and play down others.

There is no objective standard that tells us on what basis, and along which divides, the electorate should be organised.\(^\text{42}\) We know that the electorate is a highly diverse group, composed of people who belong to many different, overlapping subgroups. These groups may be based on common gender identities or religions, on shared ethnic backgrounds or professional identities, similar interests in social movements, or on some combination of these factors.

\(^{39}\) An overview of the literature on electoral systems and of how electoral systems affect political representativeness of institutions, is provided by David M Farrell and Roger Scully, *Representing Europe’s Citizens? Electoral Institutions and the Failure of Parliamentary Representation* (Oxford University Press 2007) Chapter 3.


\(^{41}\) This is referred to as ‘Duverger’s law’. The research that forms the basis for this law, is found in Maurice Duverger, *Political Parties: Their Organisation and Activity in the Modern State* (Wiley 1954).

\(^{42}\) There are even scholars who have argued that the interests of future generations, non-nationals and non-human nature must be ‘represented’ in parliament as well. See the work of Andrew Dobson, ‘Representative Democracy and the Environment’, *Democracy and the Environment* (Edward Elgar 1996); Kristian Skagen Ekeli, *Representative Democracy and Future Generations* (Norwegian University of Science and Technology 2005). Their contribution is analysed in Saward, *The Representative Claim* (n 8) 111-120.
or any other features. Designing an electoral system involves choosing which societal subgroups should dominate the political process. It is a fundamental choice. The chosen ‘dividing line’ must concern a feature that is relevant for public decision-making. But it must not lead to insurmountable societal schisms. After all, and as explained in section 1.2, the objective of political representation is to build bridges, not to provoke segregation. It is for this reason that constituencies are generally not built on the basis of a shared gender or ethnical background. Instead, the most common choice is for a system in which the division takes place along ideological and/or geographical lines. Resulting from this, debates are generally dominated by ideological and/or territorial concerns.

Saward has shown us that political representatives in fact ‘construe’ their electorate. Now we see that the designers of electoral systems essentially do the same. Their definition of the electorate is the product of choice. In the words of Horowitz:

‘No electoral system simply reflects voter preferences or the existing pattern of cleavages in a society or the prevailing political party configuration. Every electoral system shapes and reshapes these features of the environment’.44

Generally, the chosen cleavages are not unexpected. They tend to play an important role in society already. When this is the case, electoral systems reflect what already exists. Still, it should be noted that the choice is nevertheless not without consequences. Firstly, selecting a representative focus inevitably leads to an undervaluation of other tensions in society, which are likely to receive less (vocal) attention in parliament than may be appropriate. Secondly, the choice for a particular focus sets in motion a particular dynamic. This is similar to what we have seen in the previous section. The choice potentially reinforces the identification of citizens on the basis of that feature, and diminishes the identification on the basis of others. When this happens, the electorate is not only ‘given expression to’, but also transformed to some extent.45

Depending on the situation, it may be detrimental for the legitimacy of parliament when there is only one representational focus. Such a problematic situation arises when all members elected on political parties’ tickets show similar features, in terms of their age, gender, professional background and religion. The identification of large parts of the electorate with parliament will then be troublesome. In such a setting, it may be useful to turn to other instruments (such as the introduction of quotas) and to adopt multiple representative foci.46 It shows that an election system can highlight existing social antagonisms, but also seek to reduce them. Above all, it

44 Horowitz (n 40).
46 Anne Philips, The Politics of Presence (Oxford University Press 1995); Iris Marion Young, Inclusion and Democracy (Oxford University Press 2002).
shows that the design of an electoral system is a matter of making choices. Many of these choices contain representative claims.

2.2. Representation and Formation of a Unity

Elections highlight the existence of societal divides. However, on a more abstract but real level, they bring about unity as well. They unify citizens, who together undertake the act of selecting their representatives. By authorising representatives to take decisions in their name, citizens confirm and strengthen their belonging to the same polity. Together, they face the consequences of how their representatives exercise public power. In turn, this makes the representatives not only representatives of a particular constituency, but of the whole as well.

‘Because representatives make laws that all citizens, not only those who elected them, must obey, political mandate means that representatives represent the entire nation, not just the constituency that elected them.’

The 17th-century English philosopher Thomas Hobbes has contributed greatly to our understanding of this abstract unity. In \textit{Leviathan}, he used the issue of representation as a way to legitimise the existence of an absolute sovereign and enable the creation of a sovereign state. He argued that, irrespective of whether citizens share common features, it is the fact that citizens are represented as a group that makes them a group – over which authority can be exercised.

‘A multitude of men are made to be one person when they are represented by one man or one person, this representation having the consent of every individual in that multitude. What makes the person one is the unity of the representor, not the unity of the represented.’

47 This approach is the opposite of the thesis of Schmitt, who believes that only socio-cultural homogeneous communities can be represented. See for more on this David Ragazzoni, ‘Identity vs. Representation: What Makes “the People”? Rethinking Democratic Citizenship Through (and Beyond) Carl Schmitt and Hans Kelsen’ (2011) 3 Perspectives on Federalism 1.

48 Urbinati (n 11) 132.

49 Pitkin (n 4) 30. The work of Hobbes has served as a springboard for Pitkin and other political theorists to understand that the act of authorisation is fundamental for representation. This does not mean that she fully agrees with Hobbes. In Pitkin’s view, representation is about acting in the interest of the represented, in a manner that is responsive to them. The latter element is absent in the work of Hobbes.

50 Thomas Hobbes, \textit{Leviathan} (1651) 220.
Voters may have many features in common, and even form a socially and culturally homogeneous group. However, this is not a precondition. Their unity may solely rest on the fact that all citizens are subjects, and on their joint act of authorisation. When a shared identity is lacking, the unity can nevertheless be considered to be very weak. Yet, it is possible that it will become strong over time, as voters together face the decisions of their representatives on issues that are relevant for their polity. Because of this dynamic perspective, Urbinati sees representation as a ‘process of unification, not an act of unity’.

Public power is exercised at different levels. At all these levels, elections can be held. In most countries on the European continent, there are elections on the local, regional and national levels. Moreover, the citizens of member states of the European Union can vote at the European level as well. On each level, a different group of citizens is unified. It has resulted in local, regional, and national polities and a European polity. In sum, the decision to create a new level of government, and to organise elections therefore, is far-reaching. It brings into being a new polity, and starts a process of further unification.

Many national constitutions contain explicit references to the unity of the population and/or of the nation state. These differ from the abstract unity described above. In fact, the constitutional provisions can be read as mere instructions to parliament to represent the population as a whole and to uphold its unity. Article 42 of the Belgian Constitution is a good example of this. It reads:

‘The members of the two Houses represent the Nation, and not only those who elected them.’

There are numerous other examples. The Italian Constitution charges its members of parliament with representing ‘the Nation’. The Portuguese one provides that the Assembly ‘represents all Portuguese citizens’, and the Dutch States General should represent the ‘entire Dutch people’. Similarly, the Treaty on the European Union contains the formulation that the European Parliament represents the citizens of the European Union.

At a first glance, these provisions seem puzzling. If constituencies elect representatives, should they then not represent only that constituency, rather than the nation at large? We have touched upon this issue before. Members of parliament have in fact a dual responsibility. While they are elected by parts of the electorate, it is not

51 Lindahl (n 45); Tom Eijsbouts, ‘Presidenten, Parlementen, Fundamenten: Europa’s Komende Constitutie En Het Hollands Ongemak’ Nederlands Juristenblad (2003).
52 Urbinati (n 11) 133-134.
53 Castiglione and Warren (n 9) 4.
54 Article 42 Belgian Constitution.
55 Article 67 Constitution of the Italian Republic.
56 Article 147 Constitution of the Portuguese Republic.
57 Article 50 Dutch Constitution.
58 See in combination Article 10(2) TEU and 14(2) TEU. See also Chapter 1, section 2.1.
simply the interests of these parts that they should emphasise and defend. Parlia-
ments as a whole have a responsibility for the governance of the polity. As Pitkin pointed out in her classic book:

‘[S]omeone has to govern and the national government must pursue the na-
tional interest. If the representatives as a group are given this task, they are
thereby also given the national interest to look after’.59

Often, the constitutional formulations may seem evident and mainly ceremonial. In many contexts, it is fully accepted that members of parliament occasionally act as the representatives of their own constituency and on other occasions (or simulta-
neously) as representatives of the polity at large. In others, however, such a formal instruction can have a real impact. This is the case, in particular, when the unity that needs to be governed is not yet firmly embedded. The members of the European Parliament face such a challenging situation.

2.3. Restructuring the Polity and Society

Previously, it was stressed that electorates are constructs, and that defining them requires making choices. The present section comments on how free such choices really are. Should the electoral design not simply reflect the divides that already dominate society? In other words, is it not imperative that geographical constitu-
encies are created when geographical differences are most pressing? And that rep-
eresentation along political lines is organised when such is in line with actual tensions in society? Can we even speak of ‘representation’ when the electoral system does not reflect the cleavages that are most dominant in public life?

The Greek philosopher Castoriadis pointed out that this is indeed conceivable.60 It is possible to downplay firmly rooted divides by the process and type of politi-
cal representation. In fact, representation can even change the perception of which divides are considered most important. When that actually happens, the electoral design has not only ignored how citizens had expected to be represented, but even changed their expectations. To prove this point, Castoriadis expounded on the achievements of Cleisthenes, an Athenian citizen of the Alcmaeonid family. It is an interesting story, in particular for this study, as it allows us to see what the potential impact is of making formal representative claims.

The story takes place around 510 BC. For a long time, the Athenian government had been dominated by rivalry between four family-based clans. When Cleisthenes assumed the leadership of Athens, he pledged himself to break the power of these clans. He feared that his own position could otherwise be undermined by them. Moreover, Cleisthenes believed that pan-Athenian solidarity, combined with

59 Pitkin (n 4) 218.
60 Cornelius Castoriadis, Philosophy, Politics, Autonomy: Essays in Political Philosophy (Oxford Uni-
regional loyalties, would be more in the interest of Athens than the continued domination of family ties. To achieve his goal, he fundamentally rearranged the political organisation of Athens. Rather than family ties, he made area of residence the dominant factor in citizens’ representation. The new units were not based on a natural, cultural, or historic homogeneity; they were artificial constructs. Yet, over the years, they must have gradually found recognition among the population: Cleisthenes’ reforms lasted for two hundred years. According to Castoriadis, this means that Cleisthenes changed the preferences of the Athenian people, and thus not only their policy but also their society. Blackwell speaks in this context of a changed self-definition.

‘[Cleisthenes] refined the basic institutions of the Athenian democracy, and he redefined fundamentally how the people of Athens saw themselves in relation to each other and to the state.’

The story can be linked back to the findings in section 1.3. It was explained that an electorate might not have formed a coherent group prior to the act of representation. Its coherence may come about as a consequence of this act. While section 1.3 only concerned substantive representation, here we see that formal rules can serve as a drive for a transformation into unity as well. One may wonder how the restructuring of the Athenian political system, and ultimately its society, was possible. Many different factors will have played a role. However, there is one that deserves our attention, as it forms the pre-condition for making any new formal representative claim. It is the fact that Athens was apparently sufficiently autonomous.

The word autonomy, appropriately, originates from ancient Greece. It was used to characterise the political situation in which civic communities possessed self-governing authority. In the context of society, autonomy means that people themselves are at the source of their own institutions. They are even at the source of the traditions that underlie these institutions. This means that citizens can choose freely on which assumptions the electoral provisions should rest and how their representative body should be organised. An autonomous society is the opposite of...

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62 There were thirty trittyes created in Athens. Each trittys was composed of one or more demes (suburbs). Each phile, or tribe, was formed by one trittys from the coast, one from the city and one from the inland area.
63 Blackwell (n 61) 4.
64 Other auteurs have also pointed out that identities can be changed through changes in the way the polity is organised. See for example Simon Hix, ‘The European Union as a Polity’, Handbook of European Union Politics (SAGE Publications 2006) 154.
65 The word αὐτόνομος (autonomous) is a merger of the words αὐτός (autos: ‘self’) and νόμος (nomos: ‘law’). Combined, it can be translated as ‘one who gives oneself one’s own law’: self-ruling or self-governance.
a heteronomous one. In such a society, citizens believe that the existing social order originates in natural law, the will of God, or another external authority. Consequently, the electoral provisions should follow this defined order. Representatives cannot themselves establish new, artificial divides. Even today, the belief in external truths plays an important role in discussions on electoral systems. It stands in the way of radically changing both the political institutions and the composition of the community of citizens. For example, there are scholars who argue that democracy can only exist within a nation state, or those who are convinced that representative democracy requires one single demos and cannot develop into multiple demoi. These theories contain external truths. They blind their supporters to the power of change. External truths may be crucial today, but even they can evolve over time. Like Athenian society, European society can also be restructured. The introduction of political representation at the level of the European Union has set this evolution in motion. We are in the middle of a dynamic process of claim-making, claim-adjusting and claim-accepting. It is part of a natural on-going foundational process: the constituting and re-constituting of our communities.

3. Sources from Which Parliament’s Involvement Springs

The new insights regarding political representation have an impact on identifying the rules that determine whom the European Parliament formally represents. In the traditional account on representation, the electoral relation is defined by rules on the authorisation and accountability of representatives. As a consequence, the most relevant set of rules for defining parliament’s subject is electoral law. However, when the claim-making theory is adopted, there are many other rules to consider. For instance, representative claims can also be found in sets of rules that regulate how and under which conditions the representative mandate can be exercised (see section 3.1).

The aim of the present investigation is not to map exhaustively all the formal rules (and conventions) that contribute to the representative status of a parliament and to the definition of its subject. Instead, I look at the role of parliaments in general (and later of that of the European Parliament in particular) in establishing these claim-containing rules. Sections 3.2 and 3.3 explain the sources from which the need for an elected parliament’s involvement with these rules springs.

70 See Schwartz in Saward, The Representative Claim (n 8) 53.
71 I shall use the word ‘subject’ to refer to the citizens in whose name parliament exercises its authority.
3.1. **Different Legal Bases – Different Decision-Making Procedures**

In a representative democracy, elected assemblies always play an important role in establishing the rules regarding political representation. Yet, their precise involvement differs depending on the respective country’s tradition and the rules concerned. Parliaments generally have a substantial say over the electoral provisions, determining their own composition. These provisions are often laid down in ‘organic law’, and can be determined in the normal legislative process. The main principles concerning the composition of parliament can also be regulated through constitutional provisions. Amending these is much more cumbersome, and usually involves multiple actors.\(^7^2\) Constitutional amendments often require a higher threshold within parliament (a supermajority), the approval of the government, or the convening of a constituent assembly. In some countries, it is even necessary to organise a referendum.

Other sets of rules that contain representative claims are, for example, those that regulate the conditions under which representatives exercise their mandate, such as the rules on their remuneration and privileges. These provisions reveal whether the electorate is regarded as a unitary entity or a pluralistic one. According to the European Commission for Democracy through Law, immunity legislation is ‘first and foremost a matter for the national legislator to decide’.\(^7^3\) This legislator also generally has a large say in its members’ remuneration.

Formal representative claims can also be made by the manner in which parliament is organised internally. This can seriously condition how individual members can exercise their mandate and make individual representative claims. For example, a parliament’s Rules of Procedure may prescribe that members are only granted speaking time when they speak in their capacity as representatives of a political party. This means that they can formally not ask the floor in their capacity as representatives of a geographical constituency. Precisely this provision currently exists in the European Parliament (see Chapter 7). It pictures Parliament’s electorate as one that is divided along ideological, but not along national lines. Regarding their internal organisation, parliaments’ say is generally largest.\(^7^4\) This is also the case for the European Parliament.

While the power of parliaments in laying down the provisions that define their representative status thus varies depending on the country and the rules concerned, an elected parliament is always a relevant actor, be it as the main decision-maker or as the main locus for discussion. The necessity for this involvement is found in two sources. They are discussed below.

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\(^7^4\) Alain Delcamp, ‘The Autonomy of Parliaments’ (Inter-Parliamentary Union 2009) 17.
3.2. **Free Representative Mandate**

The free representative mandate is the first source for the appropriateness, even the necessity, of a parliament’s involvement in making formal representative claims. This free mandate is currently the standard for elected parliaments Europe-wide.\(^{75}\) This has not always been the case. For decades, parliamentarians in countries under communist rule had an imperative mandate instead.\(^{76}\) As a result, their mandates could be revoked when they did not function as desired according to their party.

The free mandate is fundamentally different from the imperative one. Above all, it creates a necessary distance between the representative and the electorate.\(^{77}\) Members are at liberty to represent their electorate in line with their own conscience.\(^{78}\) They cannot be fired prematurely and are obliged to refuse instructions. Members should *represent* citizens and thus be in the position to make claims about them; they should not be at their beck and call at the risk of losing their mandate prematurely. Having an autonomous position is particularly necessary when parliaments have extensive legislative powers, for members have a dual responsibility in that case: to voice the concerns and views of their constituencies, and to act in the interest of the polity at large (see section 2.2).

The principle of the free mandate is laid down in numerous constitutions. For example, the German Basic Law states in Article 38(1):

> ‘The deputies to the German Bundestag are elected in universal, direct, free, equal and secret elections. They are representatives of the whole people, are not bound by orders and instructions and are subject only to their conscience’.\(^{79}\)

An equivalence of this text can be found in the 1976 Direct Election Act regarding the European Parliament:

> ‘Representatives shall vote on an individual and personal basis. They shall not be bound by any instructions and shall not receive a binding mandate’.\(^{80}\)

The autonomy that is granted to members applies to *all areas* of parliamentary work. This means that members may also take their own stance regarding decisions that

\(^{75}\) Van der Hulst (n 2).

\(^{76}\) The imperative mandate still exists in countries such as Cuba, Fiji, India and Namibia.

\(^{77}\) Van der Hulst (n 2) 9.

\(^{78}\) Maria Paula Saffon and Nadia Urbinati, ‘Procedural Democracy, the Bulwark of Equal Liberty’ (2013) 41 Political Theory 441, 453.

\(^{79}\) Basic Law for the Federal Republic of Germany 1949.

\(^{80}\) Act concerning the election of the representatives of the Assembly by direct universal suffrage (Direct Election Act) [1976] OJ L278/1.
alter parliament’s representative status. They are not tied to instructions. The definition of parliament’s status is by definition on-going (see section 2.3). It is an important responsibility for members to continue thinking about how to involve and represent citizens in the best possible manner. Changes may be accomplished through better substantive representative claims of individual members, but they may also require the adjustment of formal representative claims, framing the polity and parliament itself (slightly) different.81 When a parliament has the formal competence to initiate and/or decide on structural change, the implications of the free mandate for the responsibilities of its members are evident. Then, members may contribute to the constitutional changes in line with their own conscience. However, if a parliament has no formal competence in this regard, yet its members have a free mandate, it is likely that conflict will arise. In this situation, members are mandated to make the substantive claims that they deem appropriate, while these claims may be undermined by competing claims that are captured in formal rules.

The occurrence of tension between a parliament’s constitutional limitations and desired political activity is not worrying or exceptional. In fact, it is unavoidable in a lively democracy. Political representation involves action, creation and change. It is not a matter of mechanically carrying out technocratic tasks in a static context. Consequently, political action will always challenge the existing legal order. Hannah Arendt has described this dynamic particularly well.

‘The limitations of the law are never entirely reliable safeguards against action from within the body politic, just as the boundaries of the territory are never entirely reliable safeguards against action from without. The boundlessness of action is only the other side of its tremendous capacity for establishing relationships, that is, its specific productivity.’82

It would be a stretch to argue that the free representative mandate is a licence for members to unilaterally change the rules that have an impact on their parliament’s representative status. That is not the case. However, representatives do not overstep their mandates when they make proposals for change, and ‘mount the barricades’ to fight for approval for these changes. On the contrary, that can only be expected. In doing so they actually engage in fulfilling their core mission: making representative claims in order to best represent the population.

3.3. Separation of Powers

Apart from the free mandate, there is a second source from which the necessity flows that parliaments have a say over their own representative status. That is the
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The constitutional principle of separation of powers. The objective of this principle is the upholding of the rule of law. It serves to prevent the centralisation and abuse of powers by organising checks and balances. By attributing different responsibilities to different institutions, each can play a meaningful role, while ensuring that none dominates. To maintain the balance between different institutions, each must be given an adequate level of autonomy.

The core task of a parliament is to represent the population. It must fulfil this task without undue interference by other powers. This requires that parliament has a substantial liberty to make representative claims, including formal ones, and that other institutions cannot force a representative status upon parliament against its will. This is of fundamental importance, as other institutions may have ulterior motives. They may not intend to make parliament a vital and relevant representative body. It is very well possible that they would be tempted to structure parliament’s representation along dividing lines that do not resonate in society. Such a decision would complicate the relationship between representatives and represented, and slowly but surely undermine the legitimacy of parliament. And as a result, the balance of power could be tipped in favour of the other branches.

It could be argued that, in case a parliament is irrelevant in shaping its own representative status, it does not qualify as a parliament. For how can it truly speak and act in the name of an electorate, when it is dependent on others to make formal representative claims about it? However, it should be noted that it is also not necessary that parliament is the single body involved in these decisions. What is required is that parliament is, at minimum, not side-lined in the decision-making process.

The liberty that an elected parliament needs and ought to have to define itself and its electorate has by now become sufficiently established. The question that remains is how this ‘public ideal’, or constitutional necessity, relates to other liberties that a parliament needs, and that define its parliamentary autonomy. This question is the core of section 4.

4. Representative Autonomy

The word autonomy has acquired meaning in many areas, which also left imprints on the understanding of parliamentary autonomy. Kant, Mill, and – in more recent years – Raz have developed the concept of autonomy in relation to individuals. Personal autonomy is to control, to some degree, one’s own destiny and to shape

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85 Autonomy originates from ancient Greece, where it was used to characterise self-governing civic communities. See section 2.3.
through successive decisions one’s life.\textsuperscript{87} Habermas has added that individual autonomy also necessitates ‘public autonomy’.\textsuperscript{88} Citizens must be able to shape (through elected representatives) the laws to which they are subjected themselves. Autonomy thus involves a free will and action. The present section takes an institutional perspective. It analyses parliamentary autonomy, and distinguishes several dimensions thereof. This includes the liberty of a parliament to make own representative claims, which I shall call ‘representative autonomy’ (section 4.1). The section will further point out how parliamentary autonomy can be extended (section 4.2), and how the quest for parliamentary autonomy can be observed (section 4.3). This information allows us to study, in Chapters 4-7, the development of the European Parliament’s representative autonomy.

4.1. Representative Autonomy as a Core Dimension of Parliamentary Autonomy

The literature on the generic concept of parliamentary autonomy is surprisingly limited. The most informative studies on parliamentary autonomy have been written at the request of parliaments, within the framework of the Inter-Parliamentary Union (IPU).\textsuperscript{89} These are the studies of Couderc (1998), Van der Hulst (2000), Beetham (2006) and Delcamp (2008).\textsuperscript{90}

On the basis of questionnaires and interviews with representatives and parliamentary civil servants, an adequate definition of parliamentary autonomy was developed. Parliamentary autonomy is:

\begin{quote}
‘[T]he ability of Parliament to work out its own standards of operation and to obtain the means necessary to the achievement of its missions, mainly: to represent the population, to express various points of view publicly, to work out and vote the most important standards (generally called laws) and to control in a way as independent as possible the action of the government and operation of the services of the executive.’\textsuperscript{91}
\end{quote}

\begin{thebibliography}{99}
\bibitem{87} Raz (n 86) 369.
\bibitem{89} The Inter-Parliamentary Union is an international organisation of parliaments. It fosters the contacts between parliaments and aims to contribute to better knowledge about their functioning. See for more information their website: www.ipu.org/.
\bibitem{90} Michel Couderc, ‘The Administrative and Financial Autonomy of Parliamentary Assemblies’ (Inter-Parliamentary Union 1998); Van der Hulst (n 2); David Beetham (ed), \textit{Parliament and Democracy in the Twenty-First Century: A Guide to Good Practice} (IPU 2006); Delcamp (n 74).
\bibitem{91} Delcamp (n 74) 7.
\end{thebibliography}
The IPU definition rightly qualifies ‘representing the population’ as a fundamental mission of all parliaments. In the presented text, it is even put as parliament’s first task. It follows that the required ‘ability of Parliament to work out own standards of operation and to obtain the means necessary to the achievements of its missions’ must thus relate to this aspect of representation as well. However, researchers – including those of the IPU – generally fail to point at representation when they discuss and analyse parliamentary autonomy in detail. Then, they only refer to the other tasks of parliaments, notably their task to legislate, to control the executive, and to adopt a budget. In line with this focus, three dimensions of parliamentary autonomy have become relatively well-known: parliamentary ‘legislative autonomy’, ‘budgetary autonomy’ and ‘supervisory autonomy’. They can be defined as follows:

**Legislative autonomy:** the liberty to participate in legislating by initiating, amending, and approving laws;

**Budgetary autonomy:** the liberty to generate resources, and to draw up (by determining the amount and distribution of) the budget of public finances;

**Supervisory autonomy:** the liberty to hold the executive accountable, *ex ante* and *ex post*, and to be able to impose sanctions on it.

As representation is parliament’s core mission, it is necessary to add a fourth definition. I shall call this ‘new’ dimension of parliamentary autonomy *representative autonomy*. On the basis of the findings in the previous sections, it can be described as follows:

**Representative autonomy:** a parliament’s liberty to define and to represent itself and its electorate.

Unlike the IPU, I use the word liberty instead of ability. In my view, this is justified as it underlines the active role of the parliament to decide for itself whether it wants to act – or not act.

The need to distinguish *representative autonomy* as a separate dimension of parliamentary autonomy has become apparent due to the changed perception of what political representation actually is. In the traditional accounts, there is insufficient attention for the creative dimension of politics, and the fact that the electorate itself


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is the object of claim-making. When it is held that political representation involves ‘a representative X being authorised by constituency Y to act with regard to good Z’ (see section 1.1), it seems that the definition of whom the member, and also the parliament at large, represents can be deduced linearly from the electoral provisions. In follows then that a parliament’s representative autonomy could be seen as identical to parliament’s legislative autonomy – or at least its autonomy to change the electoral provisions. This correspondence makes ‘representative autonomy’ as a separate category seemingly superfluous. However when political representation is regarded as a process of claim-making instead (including making claims through formal rules), it becomes evident that parliament’s representative status in fact depends on multiple rules. In that situation, it is useful to distinguish representative autonomy as a separate category. It provides a single framework to analyse coherently parliament’s say over all the different provisions that together shape parliament’s representative status. The new perspective clarifies that legislative autonomy is not identical to representative autonomy. On the one hand, legislative autonomy is too narrow a category to study the evolution of a parliament’s representative autonomy. If we only focus on a parliament’s legislative capacities, we miss the development that may occur regarding its power to lay down constitutional provisions or to decide on Rules of Procedure containing formal representative claims. On the other hand, legislative autonomy can also be considered too broad a category. If we regard the legislative powers as a single category, we may fail to observe that, specifically when it comes to its representative status, parliament is attributed less powers (or in fact more) than in other fields. (As we will come to see, this is the case for the European Parliament. By now, it has substantial legislative powers in almost all policy areas, but its competence is relatively limited when it comes to the decision-making on electoral and constitutional provisions.) Therefore, even though the development of a parliament’s representative autonomy will show overlap with the development of other dimensions of parliamentary autonomy, it is useful to create a specific category.

It should be noted that parliamentary autonomy is not only defined by a parliament’s rule-making powers. The latter is certainly an important component of the former. However, autonomy also requires substantive liberty. Rule-making powers only refer to the formal empowerment of parliament to take decisions. This is in the sphere of facts and competences. Substantive liberty, however, concerns parliament’s range of options. It is possible that a parliament formally has certain rule-making powers, without being in the position to use them as it wants. The matter of substantive liberty is linked to the lesson learned from the reconstruction of Athenian society. In that setting, Cleisthenes had both rule-making power and substantive liberty. He could apparently structure the electorate at his own discretion. However, these elements do not always coincide. It is possible that a society only wants to be structured in a particular way and denies meaning to any other dividing lines. Were a parliament to nevertheless continue to restructure itself and the electorate, it would risk undermining its legitimacy as an appropriate representative body.

Appointed assemblies arguably have less substantive liberty than elected ones. It is more difficult for them to redraw the dividing lines and to create new representative constructs. This is in particular the case when the institutions by which the assemblies’ members are appointed, are strongly rooted in society. The right to take such
fundamental decisions is then likely to be challenged. Such was the situation of the European Parliament prior to its becoming directly elected.

Representative autonomy is a core dimension of parliamentary autonomy. Other core dimensions are legislative, budgetary and supervisory autonomy, as defined above. Through studying organisations, scholars have distinguished other dimensions of autonomy as well, such as organisational, financial, administrative and legal autonomy.94 These are certainly also relevant for parliaments, but they can be regarded as a different type. They are merely enabling dimensions.

For the present investigation, the most relevant enabling type of parliamentary autonomy is organisational autonomy.95 It can be defined as the liberty of parliament to structure its own internal organisation and decide on own procedures. It includes the setting up of parliamentary committees, political groups, and leadership structures, as well as the right to establish Rules of Procedure. In the upcoming chapters, we will be regularly confronted with this dimension.

Enabling dimensions of parliamentary autonomy are meant to serve a purpose rather than being a goal in itself. Irrespective of this difference, all dimensions of autonomy are generally highly desired by parliaments. History has shown us that each dimension can serve as a stepping-stone for developing others. They enable a parliament to function in a particular area in line with its expressed preference, but they are simultaneously vehicles for further constitutional change. The next chapter will provide us with ample examples.96 It is for instance well known that the European Parliament has augmented its legislative autonomy by using its organisational autonomy to amend its Rules of Procedure in an instrumental manner.97 This study concerns the European Parliament’s quest for more representative autonomy. As we will see, also here Parliament’s organisational autonomy has played a crucial role.

Before turning to this practice, it is necessary to first gain better insight in how, in general, parliamentary autonomy can be augmented.

4.2. Developing Representative Autonomy

Scholars often distinguish between de jure and de facto autonomy. De jure autonomy is the liberty that is formally bestowed upon a parliament. De jure ‘representative autonomy’ is thus the liberty that a parliament formally has to make the representative claims that it deems fit, for example through its competence to amend the electoral provisions. There are inevitably some restrictions to this liberty, for instance


96 Chapter 3, section 2.1.

with regard to constitutional change.\textsuperscript{98} It is most probable that the \textit{de facto} situation is different to the one on paper.\textsuperscript{99} Parliamentary autonomy is likely more restricted or more substantial – as the result of actions by parliament itself, by other institutions, or through circumstance. For example, parliament’s liberty is curbed when other branches overstep their power and prevent it from taking the decision that it wants and is allowed to take. This would be the case if a popular executive inappropriately threatens to dissolve parliament. A parliament’s liberty is also restricted in practice if society regards certain constructions, such as the nation state, as unchangeable (see section 2.3). Then, it cannot pursue all the changes that it envisages. The opposite occurs as well as we come to see. Despite formal rules and limitations, parliament may increase its autonomy \textit{de facto}. Through its actions, it limits the autonomy of others. This is especially possible when there is widespread public support for parliament and the course it takes (see below).

In his dissertation, Groenleer argues that autonomy is one of the most valued objectives of organisations.

‘Contrary to what is often thought, they are not constantly striving to expand their budgets and staff or their policy work. Most public organisations actually prefer to have appropriated less money that they can spend as they wish, rather than more money with increased control from external actors’\textsuperscript{100}

Organisations will strive to increase their autonomy \textit{de facto}, and if possible, also \textit{de jure}. While Groenleer’s study focuses on agencies, there is no reason why his observation could not also apply to parliaments. Parliaments too are eager to have a substantial degree of autonomy. However, it is important to point out that the justification for developing its autonomy is very different for parliaments than for agencies. Parliaments’ position cannot be compared to that of agencies or to other institutions. As we have seen in the previous section, parliaments \textit{ought} to have a substantial level of autonomy. This need emanates from their members’ free representative mandate and the principle of separation of powers. As such, parliamentary autonomy is a constitutional necessity. A similar necessity does not exist for agencies. Their autonomy is generally provided for practical considerations, as it is regarded more efficient and effective to mandate agencies with a specific task.\textsuperscript{101} The difference between agencies and parliaments is so fundamental that parliamentary autonomy must be an object of separate study. Nevertheless, the research on agencies can serve as valuable input in order to better understand certain general dynamics.

One of these dynamics that needs to be better understood is how autonomy can be extended. For this, it is useful to turn to the authoritative study of Carpenter

\begin{itemize}
  \item \textsuperscript{98} Groenleer (n 66) 31.
  \item \textsuperscript{99} Ibid 34-35.
  \item \textsuperscript{100} Ibid 30.
  \item \textsuperscript{101} Ibid 33-34.
\end{itemize}
on the autonomy of American agencies. In this study, Carpenter describes how agencies are more successful in acquiring autonomy when they have distinctive preferences, when they demonstrate uniqueness, and when they have managed to acquire ‘political legitimacy’. This legitimacy depends on the development of a direct connection with the public. Having such a link provides the agencies with a new, additional source of legitimacy, where this legitimacy was initially only provided through the principal. Having a direct connection with the public has proven to be an opportunity for changing the terms of delegation without repercussions by the principal. In short, it is through this link that agencies may gain autonomy.

The situation for parliaments is of course a different one. For them, ‘political legitimacy’ is not just an option, but rather a vital precondition for qualifying as a parliament in the first place. Parliaments by definition have a formal legitimacy, which they acquire when the electorate, without pressure and in regular intervals, can elect its representatives from among different candidates. However, in order to successfully push for more autonomy, formal legitimacy is not sufficient. It is necessary for parliaments to develop a strong popular legitimacy as well. That is the lesson that can be drawn from Carpenter’s study, and that is useful for my own investigation. The popular legitimacy of a parliament is enhanced if it is seen to represent the population well and if it is recognised as representing it better than any other institution can. In such a setting, parliament has a strong case to further develop its grip on public power at the expense of other institutions.

Combining the work of Carpenter with the claim-making theory of Saward leads to an interesting conclusion. It seems that a parliament is likely to be more successful in developing its overall autonomy when it is regarded as a more appropriate representative body than other institutions. So, in order to enhance its position, parliament must have an electorate to which this parliament is the most appropriate representative body. This requires that parliament makes adequate claims about itself and its electorate. When other institutions make equivalent representative claims, and maybe even more effective ones, parliament’s efforts to increase its powers are bound to fail. The conclusion that can be drawn, is that having a substantial level of representative autonomy (having the liberty to make and adjust representative claims) is vital for a parliament in order to be able to develop its overall institutional position in the constitutional order.

104 Carpenter (n 102) 352.
105 Groenleer (n 66) 30.
4.3. Standards for Assessing Representative Autonomy

The previous sections have addressed the development of autonomy. But how does this development show? We know that simply studying the consecutive formal provisions on parliaments does not suffice, as their de facto autonomy is likely to deviate from this. And what exactly should be studied? Some scholars argue that only liberty that is won qualifies as real autonomy: otherwise, the liberty concerned should be regarded as given leeway. In relation to parliaments, I do not find this approach suitable. It is true that overstepping de jure limits is a clear demonstration, or even the strongest type of proof, of an institution’s capability to control its own destiny. However, it cannot be ruled out that parliament’s intrinsic preferences are fully in line with the content of the current rules (which it may have established itself). In addition, it may be that a parliament refrains voluntary from overstepping its powers, in order to respect the overall institutional balance. Parliament may then be capable, but unwilling to curb the powers of others. Finally, it seems inadequate to qualify a parliament as lacking autonomy when, in fact, it has substantial powers and liberties, but has not acted in defiance of formal limitations. Studying the development of parliamentary autonomy therefore requires analysing not only the practice, but also the formal rules. The focus will inevitably be on the changes that have taken place therein, as parliamentary autonomy is not a passive quality. It gains meaning when parliament is under pressure by other institutions. In that moment, a parliament’s autonomy (or lack of it) becomes most apparent and is also most relevant. How much autonomy a parliament needs, is impossible to define by general standards. It depends on context and situation.

On the basis of the literature on personal and organisational autonomy, I have come to distinguish the following criteria for establishing a development of parliamentary autonomy. The first criterion is the existence of ‘sustained patterns of actions’. These actions may radically overhaul an existing situation or may consist of decisions to continue work as before. It may aim to change, but also to maintain the status quo. What counts is the fact that successive decisions are taken consciously. The second criterion concerns the content of these decisions. Not all decisions automatically qualify as ‘autonomous’. It is important that the motives of a parliament should not be externally imposed. They should emanate from what can be qualified as parliament’s own preferences. Formulating these preferences, generally by

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108 This argument is made in relation to agencies; it has not been used regarding parliaments. Carpenter (n 102) 17.
109 According to an IPU-questionnaire, parliaments believe that they should not overstep the limits that are set by the constitution. See Delcamp (n 74).
110 Carpenter (n 102) 17; Ellinas and Suleiman (n 107) 7.
111 Groenleer (n 66) 32.
112 Carpenter (n 102).
113 Raz (n 86) 369.
114 Carpenter speaks of ‘irreducibility of preferences’ in this regard. Carpenter (n 102) 25. Skocpol uses the term ‘independent goal formation’. See Theda Skocpol in Caughey, Chatfield and Cohon (n 103) 5. The standard of own preferences can also be found in discussions on personal autonomy. Here, it is referred to as the ‘authentic self’.
majority votes, requires that parliament has the \textit{capacity to act}. This capacity can be regarded as a third criterion by which to measure parliamentary autonomy. A fourth one is the availability of an adequate range of options. As stated before, autonomy involves \textit{choice}. However, the sheer existence of having different alternatives to choose from is not sufficient for an autonomous choice. It is imperative that more than one of these options is really valuable and worth choosing.\footnote{Raz (n 86).} The essence of choice does not go so far as to require that all valuable plans that a parliament may wish to carry out are indeed within reach. After all, autonomy in a representative democracy is inevitably a relative concept. Nevertheless, it does require that a different decision could have been taken.

Lastly, having a degree of autonomy commands some \textit{independence}. Coercion, threats and manipulation all undermine the opportunities for a parliament to make its own decisions. In particular, parliament must be independent, not only from other institutions, but also from undue pressure by the citizens whom it represents. In section 3, it was contended that the principle of separation of powers and the free, representative mandate are the sources that make an adequate level of representative autonomy a necessity for parliament. Here, we see that independence can also be considered a criterion of autonomy.

The current study aims to witness and explain the development of the European Parliament’s representative autonomy. The criteria above will be particularly useful for the first part of this mission. In order to establish whether the European Parliament has enhanced its representative autonomy, in each chapter, an analysis is made of the consecutive actions that were undertaken by Parliament to change the existing situation regarding a particular set of rules containing representative claims. On the basis of parliamentary reports and debates, we can observe whether these actions were in line with Parliament’s own preference. It allows us to conclude whether the European Parliament has contributed to its own institutional design.

\section{Conclusion}

In analysing who it is that a parliament represents, it is necessary to distinguish two capacities. On the one hand, a parliament exercises authority over the whole population. As such, it stands for the \textit{unity} of citizens.\footnote{Section 2.2.} On the other hand, it represents the population’s \textit{diversity}.\footnote{Section 2.1.} In this respect, it stands for the sum of the parts and its structure. We can observe parliament’s dual responsibility, particularly when placing the electoral law beside a provision that is incorporated into many constitutions. The first generally highlights the division of the population over political issues, and offers an arrangement for it to be represented along political dividing lines. The second stresses that parliament should represent the population or the nation as a whole.

The definition of this unity (‘the nation’, ‘the Dutch people’ or ‘the Portuguese citizens’) usually seems obvious and natural. It is seen as reflecting and strengthening
The Concept of Representative Autonomy

The existing social and political reality. The same may be true for the diversity that it represents (along ideological lines, sometimes in combination with geographical constituencies). Nevertheless, it was underlined in this chapter that the definitions of the unity and its divides cannot be objectified. They involve circumstance and choice. This fact is usually under-exposed if the parliaments and the polities to which they relate were established a long time ago. It only becomes apparent that these definitions are matters of choice and not inevitable, when tension arises. This may occur when a parliament is relatively new and its popular legitimacy sometimes questioned, as in the case of the European Parliament. Or it may occur when certain groups no longer want to belong to the polity, as we can witness in Belgium, Spain and the United Kingdom. However, the existence of tension is not worrying per se; it is an intrinsic part of the process of political representation. It drives the development of parliaments and the re-constituting of communities.

Claims about the unity of parliament’s subject and about the dividing lines that are regarded as most relevant for the political decision-making process, can be found in numerous legal provisions. They are explicitly found in the electoral provisions regulating the composition of parliament, but implicitly also in members’ immunity provisions, in the manner in which parliament has construed its internal organisation, and in other sets of rules. The awareness that these provisions contain claims in relation to whom parliament represents, rather than evident truths, is underlined by recent insights into the essence of political representation. Previously, it was held that the identity of the represented was well known, definable and a matter of fact. Therefore, for a long time, discourses about political representation only concerned the precise relationship between the represented and the representative. Political scientist Saward is one of those who questioned this assumption. He outlined that the identity of the group that is represented is actually not evident, and can always be called into question. Therefore, this identity should be studied in the sphere of claim-making, not that of unchangeable facts. The definition of the represented is construed by representatives in a dynamic and creative process, involving the represented themselves as well. Political representation is about actively and permanently (re-)constituting constituencies. In this chapter, it was explained that claim-making occurs not only in substantive representation. Should we be willing to see it, we could note that claims are also captured in formal rules.

The content of representative claims in formal rules has an impact on the functioning of parliament and its members. If unfitting claims are put forward it may undermine parliament’s legitimacy, and hence its position. The reverse holds true as well: if claims about parliament hit the mark, and there is no equivalent representative body that makes a similar claim (and more effectively), parliament is likely to gain power. In other words, formal claims can contribute to altering

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118 Section 2.3.
119 Section 1.1.
120 Section 1.2.
121 Section 1.3.
122 Section 2.
123 Section 3.3.
the institutional balance. Claims also condition the work of individual members. When parliament is structured along ideological lines, members are often obliged to formally speak on behalf of their own political party in parliament, and not in the name of any other constituency. From this perspective, the claims made in formal provisions can curb the liberty of members to carry out their representative mandate as they deem fit.124

In modern representative democracies, great importance is attached to the principle of separation of powers (and/or institutions) and the free mandate. Considering the above, it follows inevitably that an elected parliament ought to have sufficient liberty to make its own formal representative claims about itself and its electorate. It must have, what I have labelled, sufficient representative autonomy.125 This means that, as regards whom it represents, parliament must have the ability to establish rules and have the liberty to construct these rules as it deems fit.126 When this is not the case, and parliament’s representative autonomy is limited, it will seek to develop it. The imperative of this dynamic draws from its status as a representative body in a representative democracy.

The quest for more representative autonomy (and more power in general) is more successful if a parliament is seen as the most appropriate and best placed representative body by the electorate and other institutions.127 To position itself as such, parliament may seek to adapt its working practice, but also change the formal claims in the different provisions mentioned before. As the representative status of a parliament depends on multiple rules, it may start by changing those rules over which it has more power, and hope that, over time, this will lead to changes in the others as well. The quest for representative autonomy will then likely lead to discordance between the different legal provisions applying.

Let us now turn to the principal object of this book’s analysis: the European Parliament. It seems that the level of its representative autonomy is high in relation to certain sets of rules and low in relation to others. It has the power to structure its own organisation and thus to condition how members can exercise their representative mandate. However, it cannot lay down immunity provisions, and it has only relatively recently acquired the power to lay down – together with the Council – electoral provisions (see the following chapters). The representative claims captured in these rules differ and sometimes contradict. Considering the findings in this chapter, it can be assumed that the drive for more representative autonomy has spurred the European Parliament into action regarding all these sets of rules.

However, before we can investigate whether this is indeed the case, by what means Parliament has acted and to what changes in its representative status this has led, we first need to establish another fact. The concept of representative autonomy, as elaborated here, is an essential dimension of parliamentary autonomy.128 The question

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124 Section 3.2.
125 Section 4.1.
126 Section 4.2.
127 Section 4.2.
128 Section 4.1.
may be posed whether it is in fact a fitting concept for the European Parliament. Is the European Parliament indeed a parliament? Understanding the nature of the European Parliament will be the core objective of the next chapter.

The present chapter introduces the main subject of this study: the European Parliament. The nature and functioning of this institution are often poorly understood. It is the only directly elected European institution, yet its legitimacy as a representative body and a relevant parliament is regularly questioned. This chapter sketches the historical development of the powers, the composition, and the internal organisation of the European Parliament. It is not intended as a comprehensive account. Instead, the spotlight is on the parliamentary nature of the institution and on its capacity to transform itself. The previous chapter has shown how those two aspects are intrinsically linked.

The structure of this chapter is as follows. Section 1 concerns the founding of the Common Assembly, and its transformation into the European Parliament. Paying attention to these historical roots is important, as they have determined Parliament’s liberty to define its own power and status. Section 2 shows how the European Parliament has subsequently used this liberty to develop legislative, budgetary and oversight powers. As we shall come to see, this development has taken place at a strikingly rapid pace. Parliament’s capacity to turn itself into an efficient organisation is generally regarded as a determinant factor in this regard. Therefore, section 3 focuses on Parliament’s internal structure. It reveals the dividing lines along which the European Parliament has organised itself. Finally, section 4 marks the transition from studying what Parliament does to how Parliament shapes what it is and whom it represents.

1. The Potential of Political Representation

Accounts on the European Parliament often start in 1958 when it held its constituent session in March of that year. However, the European Parliament has manifestly built on the Common Assembly, which was set up six years earlier. Therefore, the births of both assemblies are the core of this section.

1.1. The Set-Up of the Common Assembly

On 9 May 1950, the French foreign minister Robert Schuman, motivated by economic and security concerns, advocated the setting-up of a supranational European
The European Parliament’s Quest for Representative Autonomy: An Internal Perspective

Coal and Steel Community (ECSC). It was meant ‘as a first step in the federation of Europe’. Concretely, Schuman proposed the creation of two institutions, a High Authority and a Council of Ministers. The first would be attributed with far-reaching executive powers. The second, composed of ministers of each government of the participating member states, would be equipped with legislative and budgetary powers. The initial institutional set-up of the ECSC did not include a parliamentary assembly.

Notably, the German and the French negotiators were uncomfortable with the absence of a body representing citizens. Organising an institutional structure with popular legitimacy was deemed appropriate, and necessary, in order to successfully expand European cooperation into other areas in the near future. The negotiators then discussed two options. The first one was to outsource parliamentary oversight to an already existing parliament – the Consultative Assembly of the Council of Europe. This idea was abandoned due to the political and institutional complications that it would cause. The second option was the setting-up of a new parliament. The Benelux countries were initially not very supportive of the latter proposal, as they feared that a powerful separate body could hinder the efficiency of European decision-making, and potentially even interfere with domestic economic policies. In the end, a compromise was reached by giving the new parliament, called the Common Assembly, only powers of supervision. It could censure the High Authority, but was not provided with legislative and budgetary powers. As such, the Benelux negotiators expected the new parliament to play ‘a negligible role in the Community’s institutional set-up’.

1.2. A Novum: Representing Citizens, Not States

There is widespread agreement among scholars that the Common Assembly started out as a rather powerless institution, in particular when compared with national parliaments. However, there is less agreement on the actual potential of the Assembly.

2. This quote is an extract from his speech, held on 9 May 1950, in which he unfolded his plan. See also David Judge and David Earnshaw, The European Parliament (2nd edn, Palgrave Macmillan 2008) 27-29.
Was it indeed destined to play only a marginal role in shaping the institutional architecture of the European integration project? Or did it – from the start – have the potential to transform itself into a more powerful institution over time, and to contribute to societal change? As we have seen in Chapter 2, the creative potential of a parliament is linked to the free mandate of its members and the necessity to uphold the principle of separation of powers. Some scholars claim that even this rudimentary potential was initially absent. In their view, the Assembly was:

‘[N]ever designed or expected by the founding fathers of the European Community to play a momentous role in the promotion of the European integration.’

Support for this conclusion was notably found in the method underpinning the Assembly’s composition. The 78 representatives were appointed by and from national parliaments. In their capacity as European representatives, they had no direct link with a self-standing electorate. The Assembly also had no competence to adopt new legislation and alter this situation. Therefore, the Assembly was regarded as ill-equipped to enforce institutional change. In this view, the Assembly was designed to depend on other actors for its development.

However, this reasoning overlooks an important aspect that explains why the Common Assembly was always at least an embryonic parliament. Article 20 ECSC is the crux. It defines the members of the Common Assembly as:

‘[T]he representatives of the peoples of the member States of the Community.’

This formulation defines the Assembly as a body representing categories of people. Its members are not delegates of national governments or of member states either. Neither are they only delegates of national parliaments. They are appointed by national parliaments, but should not act upon their instruction.

In his dissertation on the Common Assembly, Kapteyn rightfully points out:

‘One may assume that by this phrase, the modern idea of representation is incorporated in the Treaty.’

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The European Parliament’s Quest for Representative Autonomy: An Internal Perspective

Article 20 ECSC implies the existence of a free, representative mandate. Members have to act as they deem fit. The national parliaments function only as Kreationserogen.¹¹ In this respect, the Common Assembly distinguished itself fundamentally from other international assemblies, such as the Consultative Assembly of the Council of Europe. The latter consists of representatives of each member state.¹² Hence, national parliaments not only determine the composition of the Consultative Assembly, but its decisions as well.

The existence of an implicit free mandate can also be concluded from the task that is attributed to the Assembly. It is empowered to evaluate the work of the High Authority. This Authority was charged with defending the common interest. In evaluating whether it had performed this task well, members of the Common Assembly, through their function, had to adopt the perspective of the joint peoples of the Community, rather than a strict national perspective. The fulfilment of their task thus required independence from national structures.¹³

The free mandate of the members of the Common Assembly was never formally expressed. Nevertheless, the special position of the Common Assembly as a body representing citizens (as opposed to states) was recognised from the start. This is revealed by the fact that the Assembly was requested to draft a blueprint for a future European Political Community (EPC). The need for an EPC had emerged during the discussions on the European Defence Community (EDC).¹⁴ Having a common defence policy and a common coal and steel market increased the need for a federal or confederal structure in which both communities could be incorporated. According to Article 38 of the European Defence Community Treaty, the new structure should be ‘based upon the principle of the separation of powers and including, in particular, a bicameral representative system.’ On the proposal of Alcide De Gasperi and Robert Schuman, the members of the Common Assembly were asked to design a draft treaty along those lines. It shows that the Common Assembly was regarded as the next best thing to a constituent assembly. On 13 September 1952, the Common Assembly accepted to play a leading role in the ‘Ad-Hoc Assembly’ that was formed for this purpose.¹⁵

When analysing the Common Assembly, a distinction can be made between its formal powers and its parliamentary potential. The first were initially very modest. They earned the Assembly the qualification of being ‘toothless’.¹⁶ However, the second was more promising. Due to its composition and its responsibility to act on

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¹¹ Ibid 6.
¹² Statute of the Council of Europe (adopted 5 May 1949, entered into force 3 August 1949) CETS No 001, para 25.
¹³ Berthold Rittberger, Building Europe’s Parliament: Democratic Representation Beyond the Nation-State (Oxford University Press 2005) 100.
¹⁵ CA Resolution of 13 September 1952 on the communication from the President of the special Council of Ministers, OJ No 1 of February 1953 (in Dutch).
¹⁶ Hix and Høyland (n 8) 172.
behalf of the sum of the national peoples, the Common Assembly was designed as an institution that could contribute to constitutional change.

1.3. Raising Expectations about Parliament’s Representative Capacity

The road towards a federal or confederal future turned out to be bumpier than envisaged. On 30 August 1954, the French National Assembly rejected the Treaty of the European Defence Community. This meant that there was no legal basis for the European Political Community. Consequently, the proposals of the Ad-Hoc Assembly were sidelined. After a period of reflection, the six member states of the ECSC decided on a new strategy of more gradual European integration. This strategy is generally referred to as ‘functional’ integration. The idea is that cooperation in specific economic sectors will have spill-over effects in other areas. By addressing these effects step by step, an all-encompassing integration will be accomplished in a gradual manner. The plan for an all-encompassing political community was thus put on ice. Instead, the ECSC members agreed to create a European Economic Community (EEC) and a European Atomic Energy Community (Euratom) in two separate treaties. I will refer to them as the Treaties of Rome.

The institutional set-up of the new communities was remarkable. Each was equipped with an own Council and its own Commission, meaning that there were three of these institutions in total. In contrast, there was only one Assembly charged with all the responsibilities assigned to it by three different Treaties. A special convention ensured consistency between the different Treaty provisions. In the Treaties of Rome, the Assembly was accorded the right to present amendments to the Commissions’ proposals before the Councils of Ministers decided on them. This can be read as a minor involvement of the Assembly in the legislative process.

The decision to keep one single Assembly, rather than setting up another two, was the result of an express request by the Common Assembly itself. The matter was addressed on different occasions, among others in meetings with the President of the

18 Treaty establishing the European Economic Community (Treaty of Rome); Treaty establishing the European Atomic Energy Community (Treaty of Rome).
19 This situation changed only in 1965, with the Treaty establishing a Single Council and a Single Commission of the European Communities (Merger Treaty).
21 Judge and Earnshaw (n 2) 32. See also Richard Corbett, Michael Shackleton and Francis Jacobs, The European Parliament (7th edn, John Harper Publishing 2007) 204.
Consultative Assembly of the Council of Europe and the Assembly of the Western European Union. According to the President of the Common Assembly, Furler:

‘[I]t is barely possible to overestimate the significance of the fact that the control of the three Communities, and the parliamentary-political dynamic, is placed in the hands of a single Assembly.’

He points out that only a single Assembly has the capacity to unify.

Combining the Assemblies into one was a precondition for it to function as a general, a political, body; a change-maker. Having three different Assemblies in place would likely have led to either paralysing intra-parliamentary clashes, or an agreement between the representative bodies to limit themselves to the defined tasks and their formally assigned responsibilities. Such rules would have restricted, what Hannah Arendt terms, the ‘boundlessness’ of political action. The Assemblies would have curbed their own creative potential, and reduced their flexibility to that of a kind of advisory board.

The likelihood that the new Assembly would develop into an elected parliament over time, was enhanced by a new and remarkable treaty provision. This provision instructed the Assembly to design a uniform procedure for the election of its members by universal suffrage. The Assembly was thus given the right of initiative to structure itself, and the polity it was to represent. Many assumed that a direct link with a self-standing electorate would enhance the institution’s legitimacy and its political authority further. It would insert a ‘democratic dynamic’. As we shall see in Chapter 4, the first elections did not take place until 1979. However, that prospect alone sufficed to raise expectations that the Assembly was on its way to becoming a fully-fledged parliament. This in itself increased its capacity and potential.

The Assembly consciously stimulated the expectations, most notably through the adoption of a new name. In the Treaties of Rome, the institution is simply referred to as ‘Assembly’: a neutral label that was regarded as unsuitable and unappealing by many members. In one of the last reports by the Common Assembly, adopted


25 This provision was inserted in all treaties. See new Article 21(3) ECSC, Article 138(3) EEC, and Article 108(3) Euratom.

26 See for example the comments of Tindemans in 1976: ‘Direct elections … will give this assembly a new political authority. At the same time [they] will reinforce the democratic legitimacy of the whole European institutional apparatus’, in Judge and Earnshaw (n 2) 77.

27 Ibid 33.
during its closing session in February 1958, rapporteur Wigny recommended to its successor that it would rename itself.\textsuperscript{28} The new name would have to adequately describe the essence of the institution and raise more expectations amongst the public. Wigny suggested using the name ‘European Parliamentary Assembly’. In his view, this reflected both the political ideal of a European federation and the political choice for a parliament. At the constituent session of the Assembly, in March 1958, the discussion continued. In particular the Dutch social democrat Kapteyn objected to Wigny’s proposal.\textsuperscript{29} He disliked the word ‘assembly’, even in combination with the adjective ‘parliamentary’. The former word simply diminished the potential of the latter. Assemblies have the connotation of being mere talking-shops. Kapteyn’s counterproposal was therefore to use ‘European Parliament’ instead. The discussion led to a typical European compromise. While the Assembly was baptised ‘European Parliamentary Assembly’, it was accepted that the institution would be referred to as \textit{Europees Parlement} and \textit{Europäisches Parlament} in Dutch and German respectively.\textsuperscript{30} The two names, European Parliament and European Parliamentary Assembly coexisted for four years. On 30 March 1962, the decision was taken to use the name ‘European Parliament’ in all languages.\textsuperscript{31}

Several scholars have commented on this decision by Parliament. Some are dismissive, and consider the name change to be of limited real importance.\textsuperscript{32} Others recognise that symbols can be of major importance.\textsuperscript{33} By means of its name change, the European Parliament explicitly presented itself as a representative, parliamentary body. The new name invites the public and the other institutions to compare the position and powers of the European Parliament to that of national parliaments, rather than to other international assemblies. As such, the decision contains a representative claim. It can be read as an attempt to lock-in other actors, and make it more appropriate that Parliament is attributed more competences and a direct popular legitimacy in the near future.\textsuperscript{34} Well aware of these far-reaching implications, several governments vehemently opposed the new name. They continued, for more than

\begin{itemize}
\item\textsuperscript{29} EP Debate of 20 March 1958 on naming the Assembly, Minutes of the European Parliament of May 1958 (in Dutch), 92.
\item\textsuperscript{30} EP Resolution of 20 March 1958 on naming the Assembly [1958] Doc No 3, OJ No 1 of 20 April 1958 (in Dutch). In French, the official new name was Assemblée Parlementaire Européenne; in Italian, Assemblea Parlamentare Europea.
\item\textsuperscript{31} EP Resolution of 30 March 1962 on the renaming the European Parliamentary Assembly, OJ No 3 of April 1962 (in Dutch), 1045. The resolution was introduced, on 29 March 1962, by the presidents of the European political groups: Poher, Pleven and Birkelbach.
\item\textsuperscript{33} Judge and Earnshaw (n 2) 35.
\item\textsuperscript{34} As representative democracy is the widely acknowledged model in Western Europe, it is difficult and costly for the governments of the Member States to withhold a people’s representative important legislative, budgetary and supervising powers. Rittberger, \textit{Building Europe’s Parliament: Democratic Representation Beyond the Nation-State} (n 13).
\end{itemize}
two decades, to refer to the institution as ‘Assembly’.\textsuperscript{35} It was not until the Single European Act of 1986, that the name European Parliament featured in the Treaties.

2. The Instruments to Develop Parliamentary Power

From the very beginning, the European Parliament had a parliamentary potential. Yet, its actual powers were initially limited. This section highlights how these powers were developed, and in particular the role of the European Parliament therein.\textsuperscript{36} Section 2.1 describes the evolution of Parliament’s legislative powers. Here, we witness the importance of a parliament having the right to regulate its own affairs and to adopt Rules of Procedure. Section 2.2 describes the development of Parliament’s budgetary powers. It calls our attention to the relevance of inter-institutional agreements. Section 2.3 describes how Parliament acquired new supervisory powers. It indicates the role of the public for enforcing change.

2.1. Legislative Power – and Rules of Procedure

The European Parliament started off with no significant legislative powers. The Treaties of Rome put the right of initiative for legislative proposals firmly in the hands of the European Commission (except with regard to the electoral provisions).\textsuperscript{37} The Council was made responsible for taking the final decisions. In some policy areas, the Council had to consult the European Parliament first, but it was not obliged to actually take notice of Parliament’s views. In 1973, as part of an effort to improve its relations with the European Parliament, the Council expanded the number of proposals on which Parliament’s advice was asked.\textsuperscript{38} Moreover, the Council committed itself to informing the Parliament about the reasons for departing from Parliament’s opinion, when legislation had important financial consequences or concerned other important matters. However, as we will see below, it was the European Parliament itself that developed bargaining powers through which it could force the Council to respond to its recommendations. Crucial for Parliament’s actions in this regard, was its right to regulate its own affairs.\textsuperscript{39} It could establish its own organisation and draw

\textsuperscript{35} Luuk Van Middelaar, \textit{De Passage naar Europa: Geschiedenis van een Begin} (Historische Uitgeverij 2009) 384-385.


\textsuperscript{37} To simplify matters, I will refer to the European Commission and the Council in the singular. However, it should be noted that until 1 July 1967, there were in fact three Commissions and three Councils (see above).

\textsuperscript{38} Corbett, Shackleton and Jacobs (n 21) 206.

\textsuperscript{39} Mark Williams, ‘The European Parliament: Political Groups, Minority Rights and the “Rationalisation” of Parliamentary Organisation: A Research Note’ in Herbert Döring (ed), \textit{Parliaments and Majority Rule in Western Europe} (Mannheim Centre for European Social Research, Universi-
up Rules of Procedure. This right was given to the Common Assembly in Article 25 ECSC.\textsuperscript{40}

There are certain limitations to Parliament’s right to regulate its own affairs. For example, it cannot decide on the location of its seat, as Article 341 TFEU stipulates that this is a competence of the governments of the member states. Evidently, many issues are not regulated in the Treaties. They can be dealt with by Parliament itself. The right to regulate its own affairs has proven a useful tool in the process of developing legislative powers, as can be illustrated by Parliament’s reaction to the decision of the Court of Justice in the so-called Isoglucose Decision. Parliament then fully exploited the situation to its advantage.

The institutional issue at stake was the influence of Parliament’s opinions. Did the Council have to await the adoption of Parliament’s opinion before taking a decision on a piece of legislation when the Treaty required that this opinion was asked? Concretely, the case concerned a decision of the Council to revise a regulation on the market in isoglucose. The Council wanted this regulation to come into force on 1 July 1979 (for continuity reasons). The European Parliament had put the regulation on its agenda of the May plenary session, well in advance of the deadline. Subsequently, at that session, it decided not to take a final vote on the resolution. Instead, it referred the resolution back to the responsible committee, which would delay the procedure, most likely until mid-July. By way of its right to regulate its own affairs, Parliament was able to do so. However, this procedural manoeuvring threatened to lead to an extension of the Council’s self-imposed deadline. In the face of this, the ministers took the decision not to await Parliament’s final recommendations, and adopted the new regulation. This led a private company to file proceedings before the Court of Justice, supported by the European Parliament.\textsuperscript{41} The plaintiffs argued that an essential procedural requirement had been violated in the decision-making process. On 29 October 1980, the Court accepted this reasoning. It agreed that it was not sufficient for the Council to simply ask Parliament for an opinion.

\begin{quote}
‘The consultation provided for in the third subparagraph of Article 43(2), as in other similar provisions of the Treaty, is the means which allows the Parliament to play an actual part in the legislative process of the Community, such power represents an essential factor in the institutional balance intended by the Treaty. Although limited, it reflects at Community level the fundamental democratic principle that the peoples should take part in the exercise of power through the intermediary of a representative assembly. Due consultation of the Parliament in the cases provided for by the Treaty therefore constitutes an essential formality disregard of which means that the measure concerned is void.’\textsuperscript{42}
\end{quote}

\begin{flushright}
40 Nowadays, it can be found in Article 232 TFEU.
42 Ibid para 33.
\end{flushright}
This ruling gave a boost to Parliament’s self-confidence, credibility and power. The latter was subsequently expanded further by Parliament’s own actions. Just months after the *Isoglucose Decision*, the European Parliament amended its Rules of Procedure. It codified the right of referral back to committee as a formal instrument. No time limit was set before which an opinion should be finalised. It became theoretically possible to delay a procedure indefinitely.

The fact that the legal action leading to the *Isoglucose decision* had followed directly on the first European election, was not incidental. In their comprehensive book on the European Parliament, Judge and Earnshaw note that this first direct election led to an ‘attitudinal change’. The change was noticeable in members of the European Parliament, but also in other actors, such as the Court of Justice and third parties. As the argument of the Court testifies, the European Parliament was increasingly recognised as a representative body with popular legitimisation. Hence, its opinions could less easily be ignored. Ever since the election of 1979, the legislative powers of the European Parliament have substantially increased, to the detriment of the positions of the Council and especially the European Commission.

Several treaty amendments enhanced Parliament’s position. The Single European Act (1986) was the first major revision of the Treaties. It extended Parliament’s legislative involvement, notably by the introduction of the so-called cooperation procedure. Under this procedure, the European Parliament could propose amendments to legislative proposals. If the European Commission supported these amendments, the Council could only reject them by unanimity. Otherwise, it could vote by qualified majority. The Council’s new text, called the ‘second reading’, had to be put to a vote by the Parliament as well. If rejected, the Council could overrule this veto, but only with a unanimous vote and with the agreement of the Commission.

The 1992 Treaty of Maastricht further increased Parliament’s involvement in the legislative process. It introduced the so-called co-decision procedure. This added a ‘third reading’ to the existing procedure. If the Council and the European Parliament failed to agree in two legislative readings, they would enter in direct negotiations with one another in a conciliation committee. The equality suggested in this process was marred by the existence of a fall-back option that was available to the Council alone. The Council could at any moment reintroduce its original position and make Parliament a take-it-or-leave-it bid. When this happened, the only instrument remaining for the European Parliament was to block the proposal altogether.

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45 Judge and Earnshaw (n 2) 38.
46 Ibid 40.
47 The Single European Act introduced other procedures as well. It formalised the consultation procedure that had developed *de facto*, and introduced the assent procedure.
This rule arguably made the Council the effective agenda-setter.\textsuperscript{50} The European Parliament opposed the introduction of this ‘asymmetry into the relative powers of the Council and the EP’.\textsuperscript{51} In response, it turned to its right to adopt its own Rules of Procedure again, and introduced a new Rule 78. According to this rule, the European Parliament would \textit{automatically} vote to reject the common position of the Council following a failure to settle in the conciliation committee.\textsuperscript{52} This decision reduced the chances that intra-parliamentary battles would arise from a decision on Council’s final bid. It made Parliament’s reaction a matter of safeguarding its institutional rights, and it shifted the burden of responsibility for a possible impasse to the Council if the latter used its formal advantage. Through its Rules of Procedure, the European Parliament thus effectively introduced ‘a de facto power of mutual veto’, as Hix and Høyland termed it.\textsuperscript{53} Faced with this situation, the member states decided to eliminate the controversial third reading in the 1997 Treaty of Amsterdam.\textsuperscript{54} In the 2009 Lisbon Treaty, the revised co-decision procedure has been renamed the ‘ordinary legislative procedure’.\textsuperscript{55} It is nowadays the general rule for passing EU legislation.

This short story, describing Parliament’s development into a co-equal legislator, reveals the on-going dynamic between treaty texts and political action. Treaty texts are a source of power as well as a vehicle for change.\textsuperscript{56} They can empower Parliament and simultaneously create new opportunities for it to move just beyond what was agreed. When this happens, the other institutions can try to push Parliament back in the position that it was given \textit{de jure}, or they may accept the new situation \textit{de facto}. In case of the latter, the existing treaties can be amended and come to incorporate the new reality. The European Parliament is well aware of this continuous dynamic and of its own role in it.

\begin{quote}
‘Parliament has traditionally taken the Treaties and tried to stretch them like a piece of elastic, in order to enhance the efficiency and democratic accountability of the Union. Of course, Parliament cannot contravene the Treaties in its Rules of Procedure, but the Treaties inevitably leave room for interpretation and imagination.’\textsuperscript{57}
\end{quote}

\textsuperscript{52} Hix and Høyland (n 8) 173.
\textsuperscript{53} Ibid.
\textsuperscript{54} Hix, ‘Constitutional Agenda-Setting Through Discretion in Rule Interpretation: Why the European Parliament Won at Amsterdam’ (n 36) 259.
\textsuperscript{55} Article 294 TFEU.
\textsuperscript{56} Héritier and others (n 51) 6.
It is within the sphere of interpretation and imagination that the European Parliament has contributed to the extension of its prerogatives. It has exploited omissions or open-textured provisions in the treaties, and provided its own interpretation of rules. This course was supported with a strategic argument.

‘[I]f Parliament were to organise its activities logically to cover a purely consultative and debating role, this evolution might be interpreted as the waiving of any right to (co-) decision, thus endangering the possibility of further development in that direction.’

Parliament therefore claimed to be a co-legislator, before it was given substantial legislative powers. It anticipated and invited these powers. Parliament’s leverage, and thus the success of its actions, was helped by the commitment to representative democracy of member states.

2.2. Budgetary Power – and Inter-Institutional Agreements

The budgetary power of the European Parliament developed through incremental change as well. In this evolution, inter-institutional agreements (IIAs) are of primordial importance. They have fundamentally overhauled the balance of power in between treaty-changes and following interstitial institutional change.

The treaties initially only foresaw a limited involvement of the European Parliament in the budgetary procedure. The Treaties of Rome enabled Parliament to introduce amendments (within a very tight time frame). However, the Council was free to adopt or reject them by qualified majority voting, and to approve the budget that it wanted. Two consecutive budget treaties, signed in 1970 (in Luxembourg) and in 1975 (in Brussels), marked a shift in this regard. They authorised the European Parliament to reject the entire European budget by a two-thirds majority. The new rules also instituted a distinction between compulsory and non-compulsory expenditure. Compulsory were those expenditures that followed from the treaties or from legislation, such as agricultural policy. As it had the last word on legislation, the Council was given the last word on this part of the budget. All other expenditure was labelled as non-obligatory. In this category, the European Parliament could

59 See Rittberger, Building Europe’s Parliament: Democratic Representation Beyond the Nation-State (n 13).
60 IIAs are binding to all contracting institutions. For more information about them, see Andreas Maurer, Daniela Kietz and Christian Völkel, ‘Interinstitutional Agreements in the CFSP: Parliamentarization Through the Back Door?’ (2005) 10 European Foreign Affairs Review 175.
61 Héritier and others (n 51) 9.
– within a maximum range – unilaterally increase or reduce budget constraints, and reallocate money between sections of the budget. The exact classification of each budget item was one of the many sources of conflict between the Council and the European Parliament.

Over the years, many budgets were adopted in a crisis atmosphere. In the absence of legislative competences, the European Parliament sought to enhance its influence on legislation through its budgetary powers. The acquisition of a popular mandate in June 1979 fuelled Parliament’s demand for a greater say. This showed immediately. On 15 December 1979, just months after the first direct election, the European Parliament rejected the budget for the first time. The veto was repeated in December 1984.64

Also the discharge procedure became a battleground. The European Parliament was responsible for evaluating the execution of the budget. It could approve or disapprove the manner in which the Commission had spent the money. In 1984, in relation to the financial year 1982, the European Parliament refused to grant a budget discharge for the first time.65 In 1998, the European Parliament refused discharge for the second time, leading to the resignation of the Santer Commission on 16 March 1999.66

In order to facilitate the relations between the two arms of the budgetary authority, the two institutions engaged in structured inter-institutional negotiations. On 30 June 1982, the Council, the Commission and the European Parliament signed a Joint Declaration ‘on various measures to improve the budgetary procedure’.67 Over the years, it was followed by six inter-institutional agreements (IIAs).68 One of the most important IIAs was signed in 1988. It introduced a seven-year multiannual financial framework, referred to as the ‘financial perspectives’. In the financial perspectives, all expenditure is divided in broad categories. Each has an own ceiling. The institutions cannot transfer money from one category to the other without modifying the agreement. The IIAs have enhanced the European Parliament’s say

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64 Parliament has voted against a budget on more occasions. However, in those cases, an agreement was negotiated shortly thereafter, and in time before the beginning of the next year.
66 Héritier and others (n 51) 54.
67 Joint Declaration by the European Parliament, the Council and the Commission on various measures to improve the budgetary procedure [1982] OJ C194/1.
over the budget as it introduced ‘de facto co-decision powers for the entire budget, including compulsory expenditure’.69

Its increased power made Parliament more responsible. As noted by Corbett et al., the European Parliament was rather ‘opportunistic’ in the early period (until 1988). Ever since, the Council and the European Parliament ‘increasingly seek mutually acceptable outcomes based on a shared perception of each other’s role, rather than Parliament attempting to use the treaty articles to impose its will on the Council.’70

The Treaty of Lisbon has incorporated into primary law many elements that were first agreed in IIAs. It removes the distinction between compulsory and non-compulsory expenditure, and has transformed the multi-annual financial perspectives from a non-binding agreement into a binding one. Scholars fail to agree on whether Parliament’s budgetary powers have been reduced or increased as a result of this codification. For the present thesis, it is not necessary to draw conclusions on that discussion. It suffices to note that the European Parliament has exploited the powers that it had from the start, and in particular since 1979. It interpreted the budget treaties in a ‘maximalist’ way, thereby partly compensating its lack of legislative powers.71 The popular mandate served as a catalyst in this respect. The IIAs have reduced the range of obstructive actions that the Parliament can undertake, in exchange for constructive power.

Only with regard to the Union’s own resources, Parliament has not achieved any significant influence. This contrasts with national parliaments.72 Decisions on ‘own resources’ have remained a matter for the Council and for the member states.73 In 2010, the European Parliament agreed to adopt the 2011 budget with the understanding that the Council and the Commission would consider reforming the system of own resources. However, the Council has not yet shown a willingness to increase Parliament’s prerogatives in this area. It can be expected that this issue will be at the heart of future inter-institutional budget battles.

2.3. Supervisory Power – and the Role of the Public

A third key function of the European Parliament, as of any parliament, is oversight. Over the years, the European Parliament has acquired a range of supervisory powers, with varying impact. For instance, it can ask the Court to take action against the Commission or the Council when they violate (the spirit of) the treaties.74 It can establish a temporary committee of inquiry to investigate violations by member states.75 Members can put written or oral questions to the Council and the Commission.76 And importantly, since 1952, the European Parliament has the power to

69 Héritier and others (n 51) 51 and 54.
70 Corbett, Shackleton and Jacobs (n 21) 250. See also Héritier and others (n 51) 46-59.
71 Héritier and others (n 51) 59; Rittberger, Building Europe’s Parliament: Democratic Representation Beyond the Nation-State (n 13).
72 Judge and Earnshaw (n 2) 198; Priestley (n 65) 7.
73 Article 311 TFEU.
74 Article 263 TFEU.
75 Article 226 TFEU.
76 Article 230 TFEU.
censure the Commission (previously the High Authority). The European Parliament has never adopted a motion of censure. In 1999, a vote on such motion was however only narrowly avoided when the Santer Commission decided to resign prior to the actual vote.

The European Parliament also plays a role in the investiture of the European Commission. The investiture can be regarded as supervision through the front door. Parliament decides whether or not to express political confidence in the Commission President and his or her team. Over the years, Parliament’s role in the investiture has evolved considerably. Important instruments to accomplish this were Parliament’s right to regulate its own affairs, and an inter-institutional dynamic leading to the adoption of IIA’s. But the fact that will be given particular attention at the end of this section is the role of the public. This has shown itself to be a third factor in the development of Parliament’s powers.

Originally, the appointment of the Commission was a matter for the member state governments only.

‘The members of the Commission shall be appointed by the Governments of Member States acting in common agreement.’

Approval by the European Parliament was not required. On several occasions, the European Parliament expressed its desire to be involved in the investiture, but to no avail. After the first direct election in 1979, the European Parliament took a different approach. Once the President of the Commission, Thorn, was appointed, Parliament expressed its desire to ‘hold a public debate in his presence ending with a vote of confidence ratifying his appointment’. Thorn decided to accept the challenge. In November 1980, he outlined his policy aims and priorities to the Political

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77 Article 234 TFEU.
79 Article 158 EEC.
80 Judge and Earnshaw (n 2) 204.
Affairs Committee of the European Parliament. In February 1981, the European Parliament adopted a motion of confidence in his favour, even though it had no legal effect and lacked a legal basis. Eijsbouts qualified this vote as ‘an extralegal remedy of constitutional testing’.83

Parliament’s successful invention was followed by other events. In June 1983, the member states promised to consult the Parliament’s Bureau on the nomination of a new President.84 One year later, they presented Delors as the envisaged President. Delors decided to make Parliament’s ambitions work in his favour. The Commissioners awaited the approval of Parliament before they took their oath before the Court of Justice, thereby strengthening the political position of this collegium. The established practice was formalised in the Treaty of Maastricht. The European Parliament was given the right of consultation on the nomination of the President of the Commission.85 Moreover, the appointment of the Commission as a whole was made subject to Parliament’s vote of approval.86 In a general revision of its rules, the European Parliament managed to build on these treaty changes. It added a new provision in order to expand its right of consultation concerning the Commission Presidency.

‘Parliament shall approve or reject the proposed nomination by a majority of the votes cast.’87

Moreover, it clarified that, should Parliament deliver a negative vote on a President-designate (and that person neither withdraws him/herself nor is withdrawn by the member state), it would block the investiture of the entire Commission.88 Taken together, these decisions effectively changed Parliament’s consultative vote into a one of confirmation.89

When revising its Rules of Procedure, the European Parliament also introduced the possibility to interview candidate-Commissioners prior to their investiture.90 It should be noted that the European Parliament was never given the right to reject individual nominees. It could only accept or reject the Commission as a whole. However, by means of ‘US-style’ hearings, the European Parliament has created an opportunity for itself to put individual Commissioners-designate to the test before voting on the entire European Commission. This maximises the control it has over

83 Eijsbouts (n 78) 164.
84 Solemn Declaration on European Union Bulletin of the European Communities, OJ No 6 of 1983, 24 para 2.3.5.
85 Article 158(1) EC.
86 Article 158(2) EC. See also Hix and Lord (n 78); Magnette (n 78).
89 Héritier and others (n 51) 35.
the appointment of the Commission. Parliament has used its leverage to have individual candidates replaced, and occasionally forced the reshuffling of portfolios.91

The European Commission and the member states were initially not supportive of the introduction of public hearings. Beukers describes, in his thesis 'Law, Practice and Convention in the Constitution of the European Union', why Parliament’s initiative was accepted nevertheless.92 Torpedoing it was simply too problematic, as that would conflict with what is considered an appropriate course of action in a representative democracy.93 Even though there is still no legal obligation for Commissioners-designate to appear for the hearings of the parliamentary committees, it is politically unthinkable for them to fail to do so. This is ‘convention’.

In recent years, the European Parliament also further developed its power to censure. The Treaties do not provide in a forced resignation of individual Commissioners as the Commission is a collegial body bearing collective responsibility. However, theoretically, Parliament can always threaten to force the entire Commission to resign if its demand regarding an individual Commissioner is not met. Therefore, the President of the European Commission and the European Parliament agreed in 2010, by way of an IIA, that Parliament may ask the Commission President to withdraw confidence in an individual member of the Commission. The President will then seriously consider this, and ‘either require the resignation of that Member or explain his/her refusal to do so before Parliament in the following part-session.’94 In practice, this means that the Commission President takes a big risk when he or she sides with a Commissioner who has fallen out of grace with Parliament.

The relevance of both this inter-institutional agreement and Parliament’s right to regulate its own affairs for the enhancement of Parliament’s power in relation to the investiture of the European Commission, seem obvious. Let us now turn to the crucial role that is played by the public: the electorate. It was highlighted before, that the existence of a public ideal of representative democracy has worked to the advantage of the European Parliament. This ideal entails that:

‘[A]ssemblies of representatives elected by the people make and/or decide on the state’s laws and budget, appoint state officials, and hold the executive accountable’.95

Being an elected body, the European Parliament can claim that citizens are the direct source of its authority. This makes it costly for member states to reject Parliament’s

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91 Judge and Earnshaw (n 2) 208-209.
92 Beukers (n 49) 298-203.
93 See also Rittberger, ‘Institutionalizing Representative Democracy in the European Union: The Case of the European Parliament’ (n 5) 29.
95 Definition of Roederer-Rynning and Schimmelfennig, as cited in Rittberger, ‘Institutionalizing Representative Democracy in the European Union: The Case of the European Parliament’ (n 5) 29.
calls for more legislative, budgetary and oversight powers. However, the relation with a self-standing electorate is still relatively underdeveloped. Its development will foster the further empowerment of the European Parliament (see for an explanation of the interaction between empowerment and a direct link with the public Chapter 2, section 4.2). In particular in relation to the investiture of the Commission, one can see how Parliament continuously tries to develop and strengthen the electoral relationship – and so its own position.

High-profile hearings provide a good opportunity in this regard. This ‘invention’ has enabled Parliament to highlight the fact that its relationship with the European Commission is of a political nature, and not a merely technical one. Parliament has made ‘political trust’ a crucial parameter for the endorsement of Commissioners-designate. It no longer suffices that a candidate is considered technically capable to introduce legislation and ensure its implementation. Parliament wants to ensure that the future Commission will advance Parliament’s policy objectives in drafting legislation. Thereby, Parliament presents itself as the most appropriate representative body to defend the interests of citizens. On several occasions, the European Parliament showed its willingness to disapprove a Commissioner-designate when this political confidence was lacking. In the past, this has for instance thwarted the appointment of Buttiglione. This Italian candidate was proposed for a portfolio including civil liberties. However, his stance on women’s rights and equal opportunities raised doubts about his commitment to fight discrimination in a manner that the European Parliament very vocally demanded. After a thrilling and very public showdown, Buttiglione’s candidature was withdrawn.

The relevance of the public in advancing Parliament’s position shows itself even more in the election of Juncker as President of the European Commission in July 2014. This decision was the result of a heated clash between the European Parliament and the European Council. Again, Parliament managed to stretch its de facto powers.

Formally, the European Council is the institution responsible for nominating a candidate Commission President. This person must be proposed to the European Parliament, following consultations with the representatives, and taking into account the political results of the last European election. The decision to link the composition of the executive to the European election aims to enhance the European Union’s democratic credentials, and have a positive effect on voter turnout. The European Parliament’s ambitions reach even further. It wants to strengthen the position of European political parties, and foster a pan-European public space. On 22 November 2012, the Parliament appealed to the European political parties to nominate ‘Spitzenkandidaten’ (leaders of each party’s electoral list) for the upcoming election. Most of them did. The process of nominating candidates, and
undertaking a joint election project, has indeed strengthened the relevance of European political parties.

With this turn of events, and the expectation that it raised, the European Parliament infringed on the Council’s prerogative to nominate. Article 17(7) TEU only stipulates that the European election need to be ‘taken into account’ in the nomination process. It does not say that the winning party can deliver the nominee of its choosing.

However, opposing Parliament’s claim became increasingly difficult for the Council, because it gained substance in the course of the campaign. Several debates were organised between the Spitzenkandidaten, of which nine were televised. Fifteen per cent of citizens (in 15 member states) claimed to have seen at least one of these debates. Voters could therefore be under the impression that the Council would nominate the candidate with most votes. Shortly after the elections, Parliament’s Conference of Presidents met. It was clear that the Christian Democrats had become the largest group in the European Parliament, winning 221 of the 751 seats. Subsequently, the Presidents of Parliament’s European political groups decided that the Christian Democrat Spitzenkandidat, Juncker, should be given the first chance to find a parliamentary majority for his election as Commission President. Governmental leaders, such as the British Prime Minister Cameron and his Hungarian counterpart Orbán, were horrified by Parliament’s actions. Not only did they disagree with the political ideas of Juncker, but they also objected to the infringement on the European Council’s privilege to nominate a candidate. However, the European Council was faced with a determined Parliament, willing to battle. For the Parliament to drop Juncker would have been a defeat and a setback for the influence of citizens in the European Union. Like in the case concerning Buttiglione, Parliament won this historic confrontation. Juncker was elected by the European Parliament on 15 July 2014.

2.4. Comparison to National Parliaments

In the above sections, we have seen that the powers of the European Parliament have evolved at a remarkable pace. Particular momentum was gained after the first direct election. From an assembly with limited scrutinising powers, it has transformed into a parliament equipped with extensive legislative, budgetary and supervisory powers. Nowadays, Parliament has the ability to amend, delay, and even veto
legislation. It shares more similarities with national parliaments than with other international assemblies.\textsuperscript{105} This coincides with the self-perception of the European Parliament, and even its predecessor, the Common Assembly.

\begin{quote}
‘If legitimate doubt arises with respect to a question concerning the status of this Assembly one must seek the solution in the traditional parliamentary law and not in the unfounded comparisons with commissions, assemblies or organizations of an international character.’\textsuperscript{106}
\end{quote}

Today, the powers of the European Parliament are comparable to those of national parliaments. The setting in which it exercises these may seem more complex. This is above all the result of the fact that the architecture of the European Union is frequently, and step-by-step, revised. No blue-print has been designed from the ground up; instead, the adaptations build on what already exists and continuously amend or complement this. In addition, the fact is that the structures of the member states are still firmly embedded in societies. This complicates the search for straightforward alternative structures with substantial popular legitimacy.

Nonetheless, the political structure of the European Union can be equated to that of many states.\textsuperscript{107} The European Parliament and the Council together form the legislative branch.\textsuperscript{108} The European Parliament represents citizens – in their capacity as Union citizens –, whereas the Council, composed of members of national governments, represents the member states.\textsuperscript{109} This bicameral legislature is similar to the American Congress and even more to the two houses of the German Federal Republic, the Bundestag and Bundesrat respectively. The Council and Parliament adopt EU legislation in conjunction. National parliaments hold the Council accountable,\textsuperscript{110} but they also have their own responsibilities in relation to the adoption of primary legislation.\textsuperscript{111}

Turning to the executive tasks, we see that they are performed by multiple actors as well. The European Council, Council and Commission are the main executive bodies. The European Council provides the ‘general political directions and priorities’, and can thus be seen as the more political part of the executive.\textsuperscript{112} It shows that the European Union, like most states, does not have a system of neatly separated

\begin{flushright}
108 Article 14 TEU.
109 Article 10(2) TEU.
110 Article 14(2) TEU.
111 Article 48 TEU.
112 Article 15(1) TEU.
\end{flushright}
powers, but rather a system of separated institutions sharing powers.\textsuperscript{113} This structure requires intensive intra-institutional and inter-institutional bargaining.

The position of the European Parliament does not only depend on the formal role that it is given; it can be expanded in practice. As we have seen, its success depends on open-textured provisions in treaties, the existence of competences in other areas on which it can build, on the willingness of other institutions to cooperate, and on normative notions about what is perceived to be the right course for action.\textsuperscript{114} In exploiting its room for manoeuvre, Parliament’s internal organisation is evidently of vital importance. It determines Parliament’s capacity to take action. How Parliament is internally organised is the subject of the next section.

3. Structuring Parliament’s Diversity

The current European Parliament has a total of 751 members. They represent more than 500 million people, making it the second largest democratic electorate in the world after India. In sixty years, the institution has increased in size tenfold. Twenty-two new countries have joined the European project since the days of Jean Monnet. Members of the European Parliament represent a very heterogeneous mix of citizens with different cultures, languages, histories and religions. The number of national parties with elected representatives in the European Parliament has risen from 54 in 1979 to 209 in 2014.\textsuperscript{115} The proportion of women has risen steadily from one single member to about one in three members of the European Parliament. Moreover, while initially four languages were spoken in the European Parliament, currently there are 24 official languages used, making for a total of 552 possible language combinations.\textsuperscript{116} While the diversity is much more substantial than in national parliamentary bodies, Parliament’s internal organisation is rather similar.

3.1. Building Majorities along Ideological Lines – European Political Groups

In most national parliaments, representatives organise themselves along the lines of parliamentary political groups. This can be explained by the existence of national parties, which serve as vehicles for election. Voters are generally well aware that their vote can be interpreted as support for a particular political programme. Hence, they will expect that representatives belonging to the same party, once elected, will


\textsuperscript{114} Héritier and others (n 51) 7.


\textsuperscript{116} The first official languages were Dutch, French, German, and Italian. Since then, the following languages followed: Danish and English (1973); Greek (1981); Portuguese and Spanish (1986); Finnish and Swedish (1995); Czech, Estonian, Hungarian, Latvian, Lithuanian, Maltese, Polish, Slovakian, and Slovenian (2004); Bulgarian, Irish, and Romanian (2007), and Croatian (2013).
form a coherent political group in parliament. The members of the European Parliament face a different reality. They are elected in different countries, on the ticket of national parties. Most of these parties have adhered to a manifesto of a European political party of which they are member, and are involved in a number of European activities. Nevertheless, most citizens will vote for a candidate on the basis of expectations that are shaped by the party’s national activities. Irrespective of this, the European Parliament has chosen to streamline its activities through European political groups. It does not attribute any formal privileges to national groups. The reasons for this will be explained in Chapter 7. Also the role of European political parties will then be touched upon.

The first three European political groups were formally recognised as early as 1953. Between 1965 and 1979, the number of political groups rose to seven. Since then, their number has remained stable between seven and nine, peaking at ten in 1989. The identity of the European political groups corresponds more or less with the main ideological divides existing in the member states. The traditional ‘left-right’ dimension that dominates many national parliaments is thus also found in the European Parliament. Another dimension, specific for the European Parliament, is the attitude in favour or against European integration. Empirical evidence indicates that members of the European Parliament predominantly vote along ideological lines. A Dutch Socialist is more likely to vote with a French Socialist than with a Dutch Christian Democrat. Nationality is less important to predict voting behaviour. Parliament has been capable of maintaining its organisation along ideological lines despite the immense environmental changes that have taken place, such as the geographical enlargements of the European Union. The respective sizes of the groups vary widely. The Christian Democrat and Socialist groups are by far the largest groups. Over the years, they each held (almost) a third of the seats in the European Parliament. The other groups occupied the remaining third.

The European political groups are of central importance in the functioning of the Parliament. It is through these groups that committee positions are assigned, the agenda of the plenary is coordinated, votes are coordinated, and speaking time is divided (see further Chapter 7).

118 Chapter 7, section 5.4.
122 Hix and Høyland (n 8) 181.
123 Hix, Roland and Noury (n 119) 26.
3.2. Specialisation and Legislation – Parliamentary Committees

Parliamentary committees are the second pillar of the European Parliament. Westlake has qualified the former as the legislative backbone of the European Parliament.\textsuperscript{124} Even when European integration was confined to cooperation on matters of coal and steel, the Common Assembly set up no less than 7 parliamentary committees. They allowed members to discuss a wide variety of topics on a regular basis. Collecting specialised knowledge strengthened the representatives’ (relatively weak) position in relation to the Council and the High Authority.\textsuperscript{125} The committees became the locus of parliamentary debate. Due to the nature of the work, these debates are rather technical at times.\textsuperscript{126}

Over the years, the number of committees has grown, and has stabilised around the twenty committees we know today. Almost every member of the European Parliament is a full member of one committee, and a substitute member of another. The size of each committee differs, depending on its responsibilities and its popularity amongst members.\textsuperscript{127} In principle, the composition of committees mirrors the composition of the parliament at large, which means that the relative size of the European political groups should also be reflected in the committees.\textsuperscript{128} Balancing nationalities is less of a priority, as we will see in Chapter 7, but is not unimportant.

The tasks and influence of the committees have increased apace with the expansions of legislative powers of the European Parliament. Parliamentary reports that deal with proposals for legislation, along with budget amendments, by the Commission, and with members’ own initiatives, are discussed and voted on in committee before being debated in plenary. Generally, there is one person per committee charged with writing the report. This person is called the ‘rapporteur’. The other political groups each appoint from their midst a ‘shadow rapporteur’, who will follow the work of the rapporteur closely and propose amendments on behalf of their European political group. As there is no formal ‘coalition’ or ‘opposition’, the rapporteur, the shadow-rapporteurs and other members involved, are free to seek alliances – sometimes even per amendment. This means that proposals are more likely to be judged on their merits. It also means that, for the public, it is more difficult to recognise who is responsible for European decisions. The permanent negotiations between European political groups on very specific policy matters are a distinguishing feature of the work in the European Parliament. In this regard, it is more similar to the United States Congress than to many national parliaments in the member states of the European Union.\textsuperscript{129}

\begin{thebibliography}{99}
\bibitem{126} Dann (n 113) 35.
\bibitem{127} Corbett, Shackleton and Jacobs (n 21) 128.
\bibitem{128} Judge and Earnshaw (n 2) 176; Corbett, Shackleton and Jacobs (n 21) 126-150.
\bibitem{129} Amie Kreppel, ‘Understanding the European Parliament from a Federalist Perspective: The Legislatures of the United States and the European Union Compared’ in Martin A Schain and
4. Conclusion

This chapter has explored the development of Parliament’s powers. It showed that the legislative, budgetary and supervisory powers of the European Parliament have increased substantially, and within a relatively short period of time. Nowadays, Parliament is co-legislator in most areas, including the budget (expenditures). It is in the position to amend, delay, and veto legislation. The European Parliament also has a say in the investiture of the European Commission, and has the power to censure it. In short, in terms of powers, the European Parliament shares many similarities with national parliaments.\footnote{Anand Menon (eds), \textit{Comparative Federalism. The European Union and the United States in Comparative Perspective} (Oxford University Press 2006).}

From the start, and even when they were still appointed, the members of the European Parliament were people’s representatives.\footnote{Hix, ‘Legislative Behaviour and Party Competition in the European Parliament: An Application of Nominate to the EU’ (n 105) 685.} In contrast to the Consultative Assembly of the Council of Europe, the European Parliament was not the representative body of member states, but the representative assembly of the peoples of the member states. The direct election of 1979 established a direct link with a self-standing electorate, and since then members have an \textit{explicit} free mandate. In this chapter, we have noted the effects of this. The European Parliament has become more self-conscious and assertive. Within months of the first direct election, the European Parliament caused a serious budget crisis and gained a larger role in the legislative process (\textit{Isoglucose Decision}).\footnote{Sections 2.1-2.2.} The election also caused other institutions to increasingly value the actions by the European Parliament in the perspective of a developing representative democracy on a European level.\footnote{Ritberger, ‘Institutionalizing Representative Democracy in the European Union: The Case of the European Parliament’ (n 5).} Parliament’s attempts to gain more power are often seen as \textit{appropriate}, or inevitable, in order to ensure popular legitimacy for the European project at large.\footnote{\textit{SA Roquette Frères v Council of the European Communities} (n 41) para 33. See section 2.1.} This validation has heightened Parliament’s success.

Parliament’s powers were partly attributed to it by ‘the masters of the treaties’ through consecutive treaty changes. To an important extent however, they were (also) \textit{gained}, through a permanent dynamic between political action and events, and the amending of treaty texts. When treaties were amended, they immediately served as springboards for further change. Parliament’s organisational autonomy, notably its right to draw up its own Rules of Procedure, has played a decisive role in this dynamic.\footnote{Section 2.} It enabled Parliament for example to invent hearings in order to scrutinise individual Commissioners-designate,\footnote{Section 2.3.} and to find a mechanism to delay European decision-making,\footnote{Section 2.1.} thereby enhancing its negotiating leverage.
The development of the European Parliament’s political representation and overall powers are intertwined (as of any parliament). The representative mandate brings with it the need to equip Parliament with adequate powers. In turn, these powers can only be justified when it is recognised by the electorate as an appropriate representative body. The need for increased popular legitimacy explains certain actions that were described in this chapter, most notably Parliament’s efforts to make the nomination of the President for the European Commission a matter for European political parties. Parliament seeks to make the European elections more relevant and to draw more authority from these for its action.

In subsequent chapters, we will explore developments in which the European Parliament has followed a similar strategy to what we have seen above: stretching the rules, using already existing powers to foster new ones, and seeking a stronger engagement of the public to strengthen its legitimacy.\(^{138}\) The difference between this introductory chapter (and the work of many scholars), and the bulk of this investigation, is found in the targets and objectives that are studied. The present research is not essentially about the development of Parliament’s powers and what it can do, but about the development of its representative status and what it is.

Chapter 2 outlined that the representative status of a parliament is established by multiple representative claims. Amending these rules has likely been the target of parliamentary action: the objective for Parliament was then to make representative claims about itself and its electorate at its own discretion. In the coming chapters, this assumed Parliament’s quest for representative autonomy will be further substantiated.

\(^{138}\) Section 2.
Part II. Representation and Autonomy: The Practice
4. Electoral Legislation in an Intergovernmental Context

The (potential) position of a parliament is determined, to a substantial extent, by its relationship with the electorate. Whether parliament can develop its powers and strengthen its position in the overall institutional architecture strongly depends on whether it is (expected to be) recognized as a fitting representative body. The electoral provisions are key for shaping this electoral relationship. They contain claims about both the parliament and its subject. Because of the free representative mandate of its members and the principle of separation of powers, a parliament needs to make such formal claims itself, and will therefore seek to have a large say over the electoral provisions.

The present chapter analyses the development of the European Parliament’s powers regarding its electoral provisions. It covers a time-span of almost twenty years, starting from 1958. In these two decades, the European Parliament was still an appointed body. It is only since 1979 that its composition results from popular elections, which are organised every five years. The decision for organising elections was taken in – what I call – the Direct Election Act of 1976, as amended in 2002. The previous chapter has shown that, even when the members were appointed by and from national parliaments, they had an implicit free mandate. The fact that the European Parliament has tried to augment its say over the 1976 decision, and make its own representative claims, can thus be assumed. The question now is how has it done that and to what effect.

The structure of the chapter is as follows. First, it is necessary to establish the manner in which the Treaties bestowed the formal responsibilities. How were the competences distributed between the institutions? This is explained in section 1. Only then can we turn to the actions undertaken by the European Parliament. As we will see, the Parliament has twice drafted a concrete proposal for election legislation in the period studied. The first was in 1960, the second in 1975. Section 2 analyses the 1960 Dehousse Draft Convention, as well as the actions by the European Parliament.
to ensure a follow-up. Section 3 looks into the proposal of 1975, the *Patiijn Draft Convention*, and to Parliament’s efforts to force a decision by the Council. The final part, section 4, will place Parliament’s actions in the context of any parliament’s quest for substantial representative autonomy.

1. **Treaty Provisions Concerning EP’s Direct Election**

The legal basis for the adoption of a uniform procedure for European elections by universal suffrage can be found (through identical provisions) in the Treaties of Rome (1957).\(^5\) It empowers the European Parliament to design the electoral procedure, but does not provide the latter with the right to decide on it. This section first describes the motives for introducing a legal basis for direct elections (section 1.1) and subsequently explains the reason for entrusting Parliament with what can be qualified as a remarkable right of initiative (section 1.2).

1.1. **Motives for a Legal Basis in the Treaties**

The struggle for European elections did not start with the creation of the European Parliament. The idea of a pan-European assembly founded on the will of European citizens had a longer history. It formed an important topic on the agenda of the 1948 The Hague Congress, dedicated to the future of European cooperation.\(^6\) In a resolution, the participants – including well-known figures like Adenaur, Churchill, Mitterrand and Schuman – called upon their governments to build a new Europe based on the principles of human rights and representative democracy.\(^7\) Popular representation would provide legitimacy for far-reaching European integration. They wanted a Europe of people and parliamentarians, not of diplomats.\(^8\)

The creation of the Consultative Assembly of the Council of Europe seemed a first step in that direction. However, while it was composed of politicians, rather than diplomats, the Consultative Assembly fell short of being a body representing citizens. The representatives were not elected, and formally represented their member states instead.\(^9\)

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5 New Article 21(3) ECSC, Article 138(3) EEC, and Article 108(3) Euratom.
6 The meeting was held on 7-11 May 1948, in The Hague – the Netherlands. It was attended by 750 people, among whom journalists, philosophers, entrepreneurs, and church leaders.
During the negotiations on the 1951 Treaty of Paris establishing the European Coal and Steel Community (ECSC), the discussion about elections surfaced again. On a proposal of the Foreign Affairs Committee of the French National Assembly, the drafters included a clause permitting member states to choose whether their representatives to the new Common Assembly were appointed by parliament or selected via direct elections.\textsuperscript{10}

\begin{quote}
‘[T]he Assembly shall consist of delegates who shall be designated by the respective Parliaments once a year from among their members, or who shall be elected by direct universal suffrage, in accordance with the procedure laid down by each respective High Contracting Party.’\textsuperscript{11}
\end{quote}

It was the first time that a supranational parliament could be composed of elected representatives. In practice, however, no member state was willing to organise such elections. Even France opted for the appointment procedure. Direct elections thus remained a theoretical option only.

The real breakthrough came in the proposals for a European Political Community (EPC) and European Defence Community (EDC). As already outlined in the previous chapter, the Common Assembly was asked, by the ministers of foreign affairs of the six ECSC-countries, to form a special Ad-Hoc Assembly, which was invited to draft an encompassing structure for a (con)federal Europe. The structure was to include a parliament that was composed ‘on a democratic basis’.\textsuperscript{12} The Assembly’s draft, adopted on 10 March 1953, foresaw a bicameral parliament. The second chamber was to represent the peoples of the member states; the first chamber would represent the peoples united in the Community. This chamber would be elected by universal, direct suffrage.\textsuperscript{13}

Two main strands of thought explain why the proposal for direct elections received effective support this time around, while it had previously failed.\textsuperscript{14} The first argument is linked to a historical perspective on the nature of European cooperation. The ECSC was set up to conduct a limited task only. With the creation of a political community, the European integration entered a new stage. The aims of the new community were much broader, and included cooperation in sensitive areas such as protecting human rights in the member states and coordination of foreign policy. Considering these far-reaching implications, and the member states’ commitment to representative democracy, it was necessary to base the exercising of public authority

\begin{itemize}
\item \textsuperscript{11} Article 21 ECSC.
\item \textsuperscript{12} Article 38(1) EDC.
\item \textsuperscript{13} Article 11 Draft Treaty embodying the Statute of the European Community (in Dutch), adopted by the Ad Hoc Assembly on 10 March 1953.
\item \textsuperscript{14} Corbett (n 9) 87-90.
\end{itemize}
on the expressed will of citizens.\textsuperscript{15} The second argument focuses on the effect that was expected of direct election. It was expected to contribute to the process of integration. In the eyes of European federalists, the Council of Europe had not delivered what had been hoped for.\textsuperscript{16} It was seen as a rather powerless, passive, intergovernmental body that was incapable of appealing to citizens. The elitist appointment procedure of the Consultative Assembly was not considered helpful in this regard, and should not be copied. Instead, direct elections should be introduced in the new communities to bring about a new dynamic, enhancing citizens’ involvement and (consequently) inspiring the development of further integration:

\begin{quote}
‘[T]he Community can expect from an elected Assembly the impetus needed for its development and guarantees for new and necessary progress.’\textsuperscript{17}
\end{quote}

One can imagine a third (additional) reason why the draft treaty for the European Political Community incorporates a provision for a directly elected Assembly, while previous negotiations failed to produce this result. This concerns \textit{leadership}. This time around, preparing the treaty text was the work of members of parliament. Previously, it had been the responsibility of diplomats and government delegations. It is highly likely that members of parliament value the work of parliaments more than executives do. Moreover, having a free mandate, they may have felt empowered to think beyond what already existed and what was considered most feasible.

In 1954 the dream of a European Political Community was shattered, due to the rejection of the European Defence Community by the French Assembly (see Chapter 3, section 1.2). Yet, the aspirations for direct, European elections did not fade along with that failure. In 1957, two new communities were set up: the European Economic Community (EEC) and the European Atomic Energy Community (Euratom). During the negotiations, the Italian delegation in particular pressed for direct elections for the new Assembly. If this proved a step too far, then at least the ambition of direct elections should be agreed.\textsuperscript{18} The final text revoked the option that the ECSC Treaty had provided, whereby individual member states could designate their representatives through direct elections. Instead, the Treaties of Rome include

\begin{flushleft}
\textsuperscript{15} Berthold Rittberger, “‘No Integration Without Representation!’ European Integration, Parliamentary Democracy, and Two Forgotten Communities’ (2006) 13 Journal of European Public Policy 1211, 1223.
\textsuperscript{16} Rittberger (n 9) 75.
\textsuperscript{17} Heinrich von Brentano in Piodi (n 10) 12.
\textsuperscript{18} Draft minutes of the Conference of Foreign Ministers of ECSC member states, held on 26-28 January and 4 February 1957, as published in: ibid 15.
\end{flushleft}
a legal basis for a future decision to organise direct elections in all member states. To that end:

> ‘The Assembly shall draw up proposals for elections by direct universal suffrage in accordance with a uniform procedure in all Member States. The Council, acting by means of a unanimous vote, shall determine the provisions which it shall recommend to Member States for adoption in accordance with their respective constitutional rules.’

Due to disagreements between the negotiators, the final text is not very detailed. It fails to explicate what a ‘uniform election procedure’ would look like, or to include a concrete timetable for when the goal should be achieved. Consequently, the indirect appointment procedure would remain the norm until there was agreement to select the representatives otherwise. The responsibility to design a proposal that would lead to such agreement was given to the ‘Assembly’, as the official name for the European Parliament was. It was given the right of initiative – an exceptional window of opportunity for an overall rather powerless parliament functioning in an intergovernmental context.

1.2. Parliament’s Powers

In most areas of legislation, the right of initiative is a prerogative of the European Commission. The Commission is considered the best placed institution to ensure coherence in policies and serve the interests of the European Communities/Union at large. Yet, a different choice was made for the design of the electoral provisions. It was not the Commission that was given the right of initiative, but the European Parliament. One may wonder, as Anastassopoulos does, why such a sensitive task was put in the hands of an immature representative body. After all, this task potentially affects the very foundations of the European project.

> ‘How could one justify that members of this Assembly, which was not to have a more substantial voice or role, … have the mandate to draw up proposals for a uniform European electoral system?’

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19 This provision is found in Article 138(3) EEC, Article 108(3) Euratom, and Article 21(3) ECSC, as amended.
21 Nowadays, the right of initiative is laid down in Article 17(2) TEU.
22 Anastassopoulos (n 8).
Why was the right of initiative given to the European Parliament? Smith claims that this should be seen as a mere tactical manoeuvre.

‘The decision that the Assembly should make proposals for direct elections was taken because of anxiety that if the proposals were made in the Treaty framework itself, national parliaments might have refused to ratify the Treaties at all.’23

This exposes how controversial the proposal for direct elections was. However, it fails to clarify why the European Parliament (instead of the European Commission) was put in charge of proposing its own electoral law.

The concept of representative autonomy is more helpful in this regard. It explains why parliaments in general should be the locus of debate on decisions regarding whom they represent (see Chapter 2). Electoral provisions affect the legitimacy and the capacity of a parliament. In the case of the European Communities, the European Commission or the Council could theoretically be tempted to bring into being constituencies that citizens (and/or the European representatives) find inappropriate or unfitting. Such a decision would diminish the support of citizens for the European Parliament, hampering the institution’s power.24 As representative democracy is the template that guides many decisions of the treaty negotiators, it is in fact not surprising that the European Parliament was given the right of initiative.25 Shaping the electoral relationship is a fitting power for a parliament to have. In fact, it can be seen as more remarkable that Parliament was not given any rule-making powers in this regard, because this decision seriously restricted Parliament’s representative autonomy. The lack of rule-making powers for Parliament can however be explained by the intergovernmental context. Member states were not willing to let the European Parliament draw and redraw the lines of the polities, as this may have serious implications for the position of national governments and parliaments.

The Treaties stipulated that any proposal required unanimous approval in the Council to have the force of law. Moreover, it needed to be adopted by the member states in accordance with their respective constitutional requirements. Through this provision, the national parliaments were given an important role. The consent of the European Parliament for the final proposal was not required, not even when the Council made substantial changes to the original text.26 This puts the right of initiative into perspective. Patijn, Parliament’s rapporteur on the electoral provisions

25 See for more about representative democracy as template for decisions, Rittberger (n 9) 198.
26 This position is contested by the European Parliament. It claims that the treaties are not clear whether and if so to what extent the Council may depart from Parliament’s proposals. See Draft revised opinion of 13 December 1974 on the legal aspects of election of the Members of the
in 1974-1975 (see section 3), stated assertively that, until Parliament takes action, ‘the Council cannot take the decisions necessary for introducing direct elections’. This may indeed be true, but is not the full story in my view. Once Parliament had produced a proposal, it was very well possible that a different electoral procedure was adopted to the one envisaged by the European Parliament.

The involvement of national parliaments in the decision-making process is striking. It indicates that electoral provisions were recognised as rules with constitutional implications, that have the potential to re-shape the polity. Such decisions demand the involvement of people’s representatives. In this specific context, it was judged more appropriate to involve national people’s representatives than to attribute rule-making power to the European Parliament.

The fact that a parliament is not fully autonomous in laying down electoral laws is not extraordinary. For example, the French National Assembly needs the consent of either the executive or the people in a referendum if it is to alter the rules by which it is elected. The European Commission for Democracy through Law (the Venice Commission) even recommends that a parliament cannot unilaterally change the rules for upcoming elections. The reason for this is that members can have a personal and financial interest in drafting the rules and boundaries for constituencies in a particular manner. Parliaments must have a strong say in the creation of electoral provisions, but not determine them without checks by other institutions. The rule-making power of the European Parliament was, however, in comparison to other national parliaments, exceptionally weak. It could neither adopt nor veto the decisions that defined its composition. This only changed with the entry into force of the 1992 Treaty of Maastricht. Since then, the European Parliament’s assent is necessary for the adoption of a proposal.

2. The Dehousse Draft Convention (1958-1973)

It took almost twenty years to adopt a procedure for organising direct European elections. During this period, Parliament’s treaty-given powers remained unchanged in this area. Considering the necessity of representative autonomy, it was to be expected that Parliament would try and alter this situation. The present section and the next will analyse Parliament’s actions in this light.

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29 Article 89 French Constitution.
31 Article 223(1) TFEU.
32 Direct Election Act (n 3).

The European Parliament showed itself eager to act upon its right of initiative. The ink on the Treaties of Rome was hardly dry before several members of the newly set-up Parliament argued in favour of immediate action. The involvement of citizens, through direct elections, was regarded as urgent and highly salient. Other, interlinked, goals were to increase Parliament’s powers and to take further steps towards a federal Europe. In setting priorities, many representatives wanted to focus on organising Parliament’s direct election. This was a goal in itself, but also the most promising means to these other ends. In the words of Battista, Chairman of the Committee on Political Affairs and Institutional Questions:

> ‘When we succeed in getting elections by direct universal suffrage, ... we shall, as a Parliament, carry much more weight. We shall enjoy greater prestige and we shall more easily be able to ask and obtain the status of a legislative assembly as opposed to that of a consultative one.’

Direct elections would raise the legitimacy of parliament, and inevitably put pressure on the member states to endow it with legislative powers.

On 22 October 1958, a special Working Party on European Elections was established as a sub-committee of the Committee on Political Affairs and Institutional Questions. It was chaired by the Belgian Socialist Dehousse. The committee considered all the different academic views and political implications of direct elections and formulated a concrete proposal. This was adopted by Parliament on 17 May 1960.

The ‘Draft Convention’, or ‘Dehousse Draft Convention’ deviated in some important respects from what could have been expected on the basis of the explicit provision in the Treaties. First, it proposed an increase in the number of seats of the European Parliament. This implies an amendment of the Treaties, which Parliament

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36 The Draft Convention was accompanied by other reports. There was an introductory report by Fernand Dehousse, which provided the political framework for the subsequent proposals; a report on the composition of the elected Assembly by Faure; a report on the issues relating to the choice of electoral system for the future Assembly by Schuijt; a report on the representation of overseas countries and territories within the elected Assembly by Metzger; and a report on aspects of an information policy which would prepare the public for the European elections by Carboni. Together, they were published under the title ‘Texts relating to the election of the Members of the European Parliamentary Assembly by direct universal suffrage’ [1960] OJ No. 37 of 2 June 1960, 834-860.
was formally not empowered to initiate. Second, while Article 138(3) EEC invites the European Parliament to draw up proposals for direct elections ‘in accordance with a uniform procedure in all Member States’, the Draft Convention postponed this uniformity to a later stage.\(^37\) As will be explained below, this postponement was part of a plan to enable a greater say in the decision-making by the European Parliament.

The increase in the number of members and the introduction of a transitional period are linked. The Draft Convention proposed to increase the total number of members to 426. During the transitional period, one-third of the members (142) would continue to be appointed by the national parliaments from among their own members. The other two-thirds (284) would be directly elected. At the time of this discussion, the European Parliament was composed of 142 members. This meant that the number of representatives selected by the national parliaments, would not be reduced. They would keep their ‘own’ representatives. According to the proposal, the first elections to select the 284 ‘additional’ members would be organised according to the voting systems applicable in the different member states. Then, immediately after these first elections, the procedure would change and be harmonised. This is the crux of the matter. According to Article 9 of the Draft Convention, the newly elected Parliament would draw up and decide on the provisions governing the election of its members by universal suffrage beyond the transitional period. This rule-making power would be given to all representatives without distinction (thus to all 426 members).

\[\text{‘The European Parliament shall lay down the provisions governing the election of representatives after the end of the transitional period provided for in Article 4.’}\(^38\)

According to Dehousse, the European Parliament would have to accept that its composition was temporarily determined by different national provisions, in the understanding that this situation would not last long. A fully uniform electoral system remained the ultimate objective. There were most likely two reasons why such a uniform system was not immediately designed by the rapporteur. The first was a strategic one. It was possibly too maximalist and premature to have a uniform system approved by the member states. The second reason is a more principled one. Dehousse apparently believed that an electoral system needs the signature of elected representatives: they need to be in the position to make their own representative claims. Therefore, a more permanent electoral system could only be designed and agreed once Parliament had been elected by other means.

One can only agree with the rapporteur that:

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\(^37\) Draft Convention on the election of the European Parliament by direct universal suffrage (Draftsman: Fernand Dehousse)\(^{\text{(n 4)}}\) art 9, 834.

\(^38\) Ibid art 9.
The Draft Convention was intended to amend the treaties. It set out to make the European Parliament the only institution responsible for laying down a uniform electoral system – in future. One could argue that national parliaments were given a seat at the table indirectly, by the appointing from their midst of 142 members to the European Parliament. No roles were however foreseen for either the Council or the member states. The electoral provisions were treated as a matter that should involve the representatives of the people(s) only. This strategy of increasing Parliament’s representative autonomy, as encapsulated in the Dehousse Convention, received remarkably little attention from scholars. Many focussed exclusively on the proposal to continue to appoint one third of the members and on the postponement of the uniformity requirement. The much broader implications for Parliament’s powers and autonomy were overlooked.40

The Dehousse Draft Convention is an example of political action creating something new and unexpected. According to the rapporteur himself, this is part and parcel of what it means to be a parliament:

‘The Working Party did not feel obliged to adhere slavishly to the letter of the Treaties. On a question such as a revision procedure, it saw no reason why arguments based on a literal reading of the texts should, by definition, weigh more strongly than political considerations.’41

There is, however, a big gap between designing legislation and the final decision thereupon. By adopting the Draft Convention, the Council and the member states would have written themselves out of the decision-making procedure. Perhaps not surprisingly, they refused to do so, causing many years of stand-still.


2.2. Parliamentary Pressure – without Result

Before the Working Party on European Elections presented its magnum opus, it consulted a wide range of people – including national parliamentarians, experts, and leading governmental figures. It was hoped that such ‘parliamentary diplomacy’ would pave the way for a smooth adoption of Parliament’s proposal in the Council, and in the member states. Nonetheless, the Draft Convention failed to pass even the first hurdle. The Council found itself unable to achieve unanimity. On 10 July 1961, the Foreign Ministers openly admitted deadlock.

‘Five delegations consider it possible for the Heads of State or Government to take a decision right away to consider the action to be taken on the Parliament’s proposal concerning its election. The French delegation considers that the time has not yet come to embark on this course.’

President De Gaulle had well understood that direct elections lay at the heart of a supranational conception of Europe. The seeds for direct elections were already planted in the Treaties of Rome. Yet, De Gaulle was nevertheless unwilling to see them bear fruit. He vetoed universal suffrage for the European Parliament pointblank.

Disappointed by this course of events, many members of the European Parliament reconsidered their earlier priorities. In 1960, they had agreed to prioritise the electoral procedure over other demands, in the anticipation that more parliamentary powers would follow quasi-inevitably from their direct election. After the set-back, they again favoured a two-track approach. On the first track, Parliament pressed for more powers immediately. On the second track, it continued to press, by different means, for the adoption of the Draft Convention. In order to unblock the negotiations in the Council, Parliament adopted resolutions and organised debates. Individual members introduced parliamentary questions, initiated bills in national parliaments, and introduced resolutions at party congresses. In the analysis of

42 The term was used by Van der Goes van Naters. ‘The Case for Elections to the European Parliament by Direct Universal Suffrage’ (n 33) 74.
43 Communiqué of the Foreign Ministers meeting on Bonn, as published in Piodi (n 10) 25.
44 Herman and Hagger (n 40) 16; Pascal Fontaine, *Voyage to the Heart of Europe, 1953-2009* (Racine 2009) 154; Tulli (n 40) 10.
46 Anastassopoulos (n 8) 28; Piodi (n 10) 28.
Herman, these initiatives kept ‘the issue of direct elections alive at the national level during the 1960s and early 1970s.’

The European Parliament also fought back with another instrument – it threatened legal action. In May 1968, possibly inspired by the social unrest that had a great impact on France, twelve members drafted a resolution in which the President of the European Parliament urged the Council to take a decision. In their draft, the members referred to Article 175 EEC. This provision foresees that:

‘In the event of the Council or the Commission in violation of this Treaty failing to act, the Member States and the other institutions of the Community may refer the matter to the Court of Justice with a view to establishing such violation.’

The members claimed that, in this case, the Council had violated the Treaties as it had failed to adopt a common position on the Draft Convention. On 12 March 1969, the European Parliament adopted the resolution, which was intended as a – procedurally required – warning for the activation of Article 175 EEC. A legal challenge was however avoided by Parliament’s leadership, which feared that the case was unwinnable. Indeed, one could well argue that it was not accurate to say that the Council had failed to act. After all, the ministers had attempted to find a common position, but had failed to achieve a result. Others, however, believe that the European Parliament could well have won a legal challenge. In any event, the discussion on Article 175 EEC alone seemed to shake the Council from its apathy.

At their meeting in The Hague on 1-2 December 1969, the Heads of State and Government promised to give ‘further consideration’ to the question of direct elections. This promise was too limited for the European Parliament. It insisted on a specific time-frame, and ‘a suitable consultation procedure between Parliament and the Council’. The request for a consultation procedure is noteworthy. After all, the European Parliament was only given a right of initiative. It had no say in the final

48 EP Motion for a Resolution tabled by Messrs Deringer, Dehousse, Merchiers and others on the direct election of Members of the European Parliament, HA PEO AP PR B0-0050/68 0010 (send back tot committee).
49 EP Resolution of 12 March 1969 on the Council’s Failure to Act (n 45).
51 Steed (n 34) 465.
decision-making. Nonetheless, prominent members of the European Parliament had always held the view that it was unthinkable that the European Parliament would be excluded from this process.

'It is hard to believe that the Councils could depart appreciably from a proposal by the Parliament without consulting the institution directly concerned or without stating its reasons and discussing the wisdom of any amendments made. Nor is it easy to imagine that the system under which the future Parliament is to operate could be decided by the Ministers alone. It seems obvious that collaboration between these institutions does not imply relinquishing powers and prerogatives established by the Treaties. Relations between the Councils and the Parliament are situated in the political rather than in the legal sphere.'

The Council apparently also found it appropriate to involve the European representatives in the decision-making on this subject. It conceded Parliament’s request for a consultation procedure. This procedure did not expand the European Parliament’s powers de jure. The formal decision-making remained in the hands of the Council and the member states. However, it can certainly be qualified as a limited change de facto. Parliament was allowed to play a substantive role in the negotiations.

3. The Patijn Draft Convention (1973-1979)

In 1974, a deal on the Draft Convention was still far off. However, the need for direct elections became more pressing. The European Parliament had acquired substantial budgetary powers since 1970. According to several scholars, this increased Parliament’s need to be elected by popular vote. For its part, the European Parliament stressed that an extension of popular involvement was indispensable due to the plans for a political union that member states aimed to construct by 1980. Moreover, members complained that the dual mandate had become too heavy a burden.

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57 See Chapter 3, section 2.2.


60 Ibid explanatory statement para 3.
To revive the negotiations with the Council, the European Parliament decided to come forward with a new proposal. This section analyses the Patijn Draft Convention, and the actions that followed, from the perspective of Parliament’s quest for more representative autonomy.

3.1. The Backdoor: Treaty Amendment

On 13 September 1973, the Dutch Social Democrat Patijn was appointed as Parliament’s new rapporteur. Sixteen months later, Parliament adopted a new Draft Convention with 106 votes in favour, 2 votes against, and 17 abstentions. In *Europe’s Elected Parliament*, Smith concludes that there is ‘little difference between the Dehousse and Patijn Reports’. Both reports propose that members are elected for five years and that the first European election takes place on the basis of national provisions. A closer look at both reports reveals however that there are noteworthy differences concerning their implications for Parliament’s representative autonomy. In this regard, the Dehousse Convention was more ambitious, or at least it was more explicit about them.

Patijn relinquished the idea of a transitional period. He wanted all representatives to the European Parliament to be directly elected at the same time. Like Dehousse, Patijn was convinced that the electoral provisions that he was designing would only apply to the first European election. The second election would have to be organised on the basis of a common procedure that was still to be agreed. Patijn set the deadline for this future procedure at 1980. The real difference between the two reports lies in the question of who should decide on the new procedure. In the 1960 Draft Convention, the drafting and the adoption of the future system were both placed in the hands of the European Parliament. These were regarded as matters that ought to be decided by representatives and not by governments. The involvement of members of national parliaments was secured through the dual mandate of one-third of the members of the European Parliament. The 1975 Draft Convention foresees very different decision-making. It accepts a strong involvement of the Council and the member states, also for the period after the first direct election of the European Parliament. The European Parliament would keep the right of initiative but it remained for the Council to decide on any proposal and to recommend it to the

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62 Smith (n 23) 55. A similar conclusion is drawn by Tulli in Tulli (n 40).
63 See Articles 5(1) and 9 in the Draft Convention on the election of the European Parliament by direct universal suffrage (Draftsman: Fernand Dehousse) (n 4) 834; and Articles 3(1) and 7(2) of the Draft Convention of 14 January 1975 on the election of Members of the European Parliament by direct universal suffrage (Draftsman: Schelto Patijn) (n 4).
64 See Article 7 and 13 of the Draft Convention of 14 January 1975 on the election of Members of the European Parliament by direct universal suffrage (Draftsman: Schelto Patijn) (n 4). Article 13(1) states that the first elections shall be held no later than the first Sunday of May 1978. Article 7(1) regulates that the European Parliament shall draw up a proposal for a uniform electoral system by 1980 at the latest.
member states for approval in accordance with their constitutional requirements.\textsuperscript{65} Parliament would thus renounce – at least for the time being – its ambition to have formal rule-making power on the electoral system. The reasons for this is probably that Parliament foresaw that in a future revision of the electoral provisions, there would be a power-shift after all.

Patijn did not consider more representative autonomy for the European Parliament irrelevant. On the contrary. He argued that:

\begin{quote}
\textquote{Since the direct election of the European Parliament is at issue here, it could be argued that the Council should have absolutely nothing to do with the electoral arrangements but that the power to make them should be vested exclusively in the European Parliament.}\textsuperscript{66}
\end{quote}

However, in Patijn’s view, it was strategically unwise, and possibly undesirable, to take the ‘extreme’ position of full rule-making power.\textsuperscript{67} He believed that this would cause unnecessary technical and political difficulties.

Patijn was thus willing to compromise on the decision-making for the 1980 electoral rules. At the same time, he insisted on the immediate involvement of the European Parliament in other related matters. His draft convention set out a special procedure for decisions concerning the date of the elections, the immunity and salary provisions of the members, and the numerical composition of the European Parliament.\textsuperscript{68} The special procedure, laid down in Article 14, even potentially applied to matters for which there was no legal basis in the treaties. The rapporteur had found his inspiration for this special flexibility mechanism in the provisions regulating the common market. In his own words, Article 14 ‘corresponds almost exactly to that laid down in Article 235 of the EEC Treaty and Article 203 of the Euratom Treaty’.\textsuperscript{69} Article 235 EEC, and its counterpart in the Euratom Treaty, enabled the Council to do what was necessary to integrate the national markets. Similarly, Article 14 of the Draft Convention could form the basis for implementing and complementary measures, once the goal of organising direct elections was agreed.

Yet, there is an important difference between Article 235 EEC and the proposed Article 14. Patijn also recognised this. This difference concerns the position of the European Parliament. Article 235 EEC states that the Council had to consult the European Parliament before it could make a decision. It was however in no way bound by its advice.

\begin{itemize}
\item \textsuperscript{65} Article 7 ibid.
\item \textsuperscript{66} Patijn Report (n 59) explanatory statement in reference to Article 14.
\item \textsuperscript{67} Ibid.
\item \textsuperscript{68} See Articles 2 and 9 Patijn Convention (n 4), in combination with Patijn Report (n 59), art 14.
\item \textsuperscript{69} See Patijn Report (n 59) explanatory note on Article 14, 29.
\end{itemize}
'If any action by the Community appears necessary to achieve, in the functioning of the Common Market, one of the aims of the Community in cases where this Treaty has not provided for the requisite powers of action, the Council, acting by means of a unanimous vote on a proposal of the Commission and after the Assembly has been consulted, shall enact the appropriate provisions.'

Conversely, Article 14 of the Draft Convention gave Parliament ‘the right of codecision’ on amendments or supplements to the treaties. To claim that Article 235 and Article 14 correspond ‘almost exactly’ may be clever from a strategic point of view, but it deliberately understates the increase in Parliament’s rule-making power that it would bring about.

‘Should reference be made to the procedure laid down in this Article or should it appear that further measures are required to implement direct elections to the European Parliament in accordance with this convention and if the necessary powers are not provided, the Council shall, acting unanimously on a proposal from the European Parliament and with its approval, make the appropriate provisions. The Council shall consult the Commission before making its decision.’ (italics added)

For Patijn, it was ‘particularly obvious that Parliament should have this right [of approval] in a matter that directly concerns Parliament’. It seems to be the case that Patijn could accept the strong rule-making power of the Council and the member states in the electoral procedure only because he simultaneously attempted to limit the scope of this power. Moreover, it is likely that he anticipated that this strong involvement would have a limited duration, and would end when the new procedure was in place – by 1980 at the latest.

3.2. The Council Decides, Parliament Triumphs

The period after the approval of the Patijn report by Parliament was marked by heated debates on the subject in national parliaments, and in official and unofficial Council meetings. The European Parliament continued to exert pressure.

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70 Draft revised opinion of 13 December 1974 on the legal aspects of election of the Members of the European Parliament by direct universal suffrage (Draftsman: Hans Lautenschlager) (n 26) 8.
71 Article 14 Patijn Convention (n 4).
Eurobarometer opinion polls showed that the population was strongly in favour of a directly elected European Parliament, making it harder for the Council not to deliver. Yet, an agreement was far from certain. In his detailed account of this period, Anastassopoulos writes with a keen sense of drama:

‘[T]he President of the European Council and Prime Minister of Luxembourg Gaston Thorn had to ‘lock up’ his colleagues for whole week-ends in the Senningen Castle in order to reach an agreement.’

Finally, on 20 September 1976, the Council formally adopted the Act concerning the election of the representatives of the Assembly by direct universal suffrage. The Direct Election Act did not introduce a uniform electoral procedure. The disagreements between the member states on the details of such a procedure proved too profound. A uniform procedure remained the ultimate objective, but there was no deadline set to achieve this. Pending a uniform system, the members of the European Parliament would be elected through procedures that were governed by the different national provisions of each member state. Several important aspects of Parliament’s proposal were included in the final Act, such as the number of members (which increased to 410), the duration of their mandate (five years), and the fact that elections were to take place within the same few days across the Community. However, in terms of increasing Parliament’s rule-making power, the result was disappointing.

The Council and the member states remained responsible for deciding the electoral provisions and related provisions. Only a few months earlier, on 16 June 1976, the President-in-Office of the Council, Thorn, had announced in the European Parliament that “[i]t will be up to this elected Parliament to fix the number of Members to be elected the second time.” Thorn must have referred to the co-decision powers that Parliament would gain through the backdoor as regulated in Article 14 of the Patijn Draft Convention (see above). However, the Council had been divided on the desirability of this backdoor, as can be read in an internal note of the Council secretariat.

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74 Eurobarometer No 4, October-November 1975.
75 Anastassopoulos (n 8) 35.
76 Direct Election Act (n 3). The Act was attached to Council Decision 76/787/ECSC EEC Euratom of the representatives of the Member States meeting in the council relating to the Act concerning the election of the representatives of the Assembly by direct universal suffrage [1976] OJ L278/1.
77 Ibid art 7(2).
78 These were regulated in Articles 2, 3(1), and 9(1) respectively.
The final decision does include a flexibility mechanism. However, it was a far cry from what Parliament had envisaged in its own Article 14. The scope of the adopted provision was very limited. It only covered measures to implement that which was agreed in the Convention.81 Moreover, Parliament’s role in the decision-making was marginalised. The European Parliament would be involved in negotiations on implementation measures, but it was the Council that would take the final decision. It was thus not up to the newly elected European Parliament to fix the number of members to be elected the second time. Moreover, Parliament was not attributed the right of approval on related matters, such as the legal and financial status of its members that it had demanded.

Nevertheless, we can say that the European Parliament happened to be the real winner of the adoption of the Direct Election Act. The Act changed how Parliament is composed. On 7-10 June 1979 the first direct election took place. As we come to see, this has fundamentally altered the outlook of the European project. The European Parliament was given a self-standing electorate. And citizens transformed from national citizens into citizens who belong to a European polity (as well). The relationship with this electorate still needed (and needs) to be strengthened. Regardless, it had now been formally established. It is from this position that Parliament could seek to strengthen its position further. And it has.

4. Conclusion

This chapter has above all highlighted the built-in tension that arises when a peoples’ parliament functions within a (predominantly) intergovernmental context. Both the representatives and the member states will demand to shape the electoral provisions. The representatives will be driven (inter alia) by a well-established norm that holds that any elected parliament, in a representative democracy, ought to be in the position to structure the polity and make formal representative claims about itself and the electorate.82 It must have substantial representative autonomy. The desire that this norm applies to the European Parliament as well, is noticeable among members of the European Parliament (see the Dehousse and Patijn Draft Conventions), but also beyond. The norm left its imprint on the 1957 Treaties of Rome, in which the European Parliament was attributed an exceptional right of initiative regarding the

81 Article 13 Direct Election Act (n 3).
82 See Chapter 2, section 3.
electoral system. Parliament was empowered to provide the substance for a uniform procedure; the final decision-making however remained – at least initially – in the hands of the Council and the member states. At the time, the members of the European Parliament only had an *implicit* free mandate, as they were *appointed* people’s representatives. From sections 2 and 3, it becomes clear that the European Parliament accepted that this reduced its leverage. Parliament insisted on more rule-making powers regarding the electoral provisions once the free mandate of its members was *explicated* by the organisation of direct elections. The 1960 Draft Convention foresees that an elected European Parliament becomes the sole decision-maker for future legislation; the 1975 Draft Convention accepts a more modest role for the European Parliament to start with.

Direct elections would give the European Parliament a direct link with a self-standing electorate. The perspective of this was incorporated in the European Treaties since 1957, but it fundamentally clashed with the structure of the European Communities at the time. In an overall intergovernmental setting, national governments and member states want to determine the terms of delegations. Their grip on the division of tasks and powers between the institutions inevitably loosens when Parliament has a self-standing electorate on which its authority rests. The impossibility of reconciling the parliamentary need for representative autonomy with the position of national governments in the European Community explains why it took decades to take a decision on organising direct elections.

The relevance of representative autonomy for any parliament clarifies why the Council engaged in negotiations with the European Parliament over the election provisions. This was not required from a *legal* point of view. However, it was vital from a *political* perspective. It was unthinkable not to engage Parliament. The different positions of the national delegations within the Council fall outside the scope of this thesis. They are however very meaningful in order to understand the full history of the Direct Election Act, as the Council blocked the decision-making on this Act for years. Whether Parliament’s need for more representative autonomy was openly discussed during these negotiations is an interesting subject for future research.

Parliament helped to solve the deadlock in the Council, by taking political actions (on the basis of its right to regulate its own affairs) and threatening to take legal action. Moreover, it proposed a new, very moderate draft, at exactly the right moment in time. In 1976, an agreement was finally reached, enabling the first European election to be organised in 1979. In the Direct Election Act, Parliament’s rule-making power regarding future electoral legislation was kept to a minimum. However, this was expected to change, since the Act was regarded as only a ‘provisional arrangement’.

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83 Section 1.2.
84 Chapter 3, section 1.2.
85 Section 2.2.
86 Section 2.2.
87 Section 3.
88 Section 3.2.
It was not until the 1992 Treaty of Maastricht that the European Parliament was
given the right to assent (by a majority of its component members). Significantly,
the formal power of the Council and the member states remained unaltered. Any
text must thus be agreed by the Council acting by unanimity, and adopted by all
28 member states in accordance with their respective constitutional requirements.
This makes it very difficult to achieve change. The only electoral reform after 1976
took place in 2002.89 Hence, the national electoral systems have converged to a cer-
tain extent, but there is still no uniform Union procedure in place. The chances that
this will be accomplished in the future have been reduced by a modification of the
original Treaty provision that was introduced by the 1997 Treaty of Amsterdam. As
a result the current position is that:

‘[t]he European Parliament shall draw up a proposal for elections by direct uni-
versal suffrage in accordance with a uniform procedure in all Member States
or in accordance with principles common to all Member States’. (italics add-
ed)90

The addition, highlighted in italics, reduces the pressure to arrive at a fully uniform
system. Nevertheless, electoral reform remains on the political agenda of the Euro-
pean Parliament. In 2015 for instance, Parliament requested electoral reform for the
next elections in 2019. Its proposals – again – focus on specific steps for more conver-
gence of the electoral procedures, for campaigns in which European political parties
play a more visible role, and for a larger role of the European Parliament in particular
aspects of the decision-making process.91 It shows that the electoral provisions are
permanently a work-in-progress. It also shows that Parliament considers itself to be
the most appropriate institution to press for such changes.

89 Council Decision 2002/772/EC Euratom (n 3). Notably, it requires member states to organise
the elections on the basis of proportional representation and abolishes the dual mandate for
members of the European Parliament.
90 Article 223(1) TFEU.
91 EP Resolution of 11 November 2015 on the reform of the electoral law of the European Union
5. Immunity and the Liberty to Represent

In 1979 the members of the European Parliament obtained a free mandate and a self-standing electorate. Yet their legal and financial status remained tied to national structures, at least initially. The development of the provisions regulating members' immunity and salary is analysed in the present chapter and the next. On a personal note, I can say that because of the manner in which Parliament applied the immunity provisions, I became aware of the fundamental importance of something like representative autonomy, though I had not labelled it then yet. In my last Strasbourg week, on May 5th 2009, Parliament voted to uphold the immunity of a colleague, Mr Patriciello, and thereby seemingly overstepped its competence (see further section 4). As I came to understand, and is elaborated below, Parliament's action can (also) be read as claim-making, which is an essential parliamentary task.

In all European countries, members of parliament enjoy some form of immunity. This serves to uphold the separation of powers and the exercise of the free mandate, as representatives may make unpopular representative claims or express opinions that are upsetting, shocking or disturbing to other powers or the public. The scope and conditions of parliamentary immunity are generally regulated in constitutional texts, statutory law, and parliamentary Rules of Procedure. It is essential for parliaments to have a substantial say over these provisions, as otherwise the whole purpose of parliamentary immunity may be undermined.

In this regard, and in comparison to other parliaments, the position of the European Parliament is precarious. As was indicated in the previous chapter, the competence of the European Parliament to lay down the immunity provisions of its members was (and still remains) limited. Moreover, members do not have an equal legal status, but theirs differ and partly depend on national legislation. This hampers

2 Maria Paula Saffon and Nadia Urbinati, 'Procedural Democracy, the Bulwark of Equal Liberty' (2013) 41 Political Theory 441, 453.
3 See the outline of the European Court of Human Rights on the link between free speech, the separation of powers, and parliamentary immunity, i.e. in Case of A v The United Kingdom [2002] para 77.
their capacity to claim to represent *Union citizens*. The *representative autonomy* of the European Parliament is thus restricted. The central question in this chapter is how the European Parliament has tried to develop it. Through what means has the European Parliament attempted to shape the immunity of its elected members, and to what end?

The structure is as follows. Section 1 outlines the different types of parliamentary immunity that exist in the Union member states. This is necessary as background information, since there is a close correlation between the immunity that is accorded to members of the European Parliament and the immunity that is extended to parliamentarians in their home country. Section 2 subsequently describes the *de jure* immunity provisions of the members of the European Parliament. This section also includes information about the European Parliament’s formal competences to amend the immunity provisions. Once the formal scene is set, the focus is on the actions undertaken. Section 3 takes stock of Parliament’s objectives for change. In section 4, we subsequently observe how it tried to shape the provisions in line with its demands and in defiance of its limited powers. This is where the case of Mr Patriciello will be unfolded. Finally section 5 provides an analysis of the changes accomplished in the light of Parliament’s quest for more representative autonomy.

1. Parliamentary Immunity: Reasons and Forms

Parliamentary immunity is a generic term. It covers all legal instruments that restrict or suspend legal proceedings against parliamentarians. There are two different *types* of parliamentary immunity. I will refer to these as *non-liability* and *inviolability*. The current section outlines their most important features. Moreover, it highlights that there are huge differences between the member states, with regards immunity legislation, due to different historical development and political contexts. As we shall see, this differentiation at the national level stands in the way of providing members of the European Parliament with an equivalent protection.

1.1. Non-Liability in the Exercise of Parliamentary Duties

Non-liability is the most well-known and least controversial type of immunity. It is also referred to as non-accountability or freedom of speech. The first modern parliament that guaranteed non-liability of its members was the British House of Commons. It resulted from an incident at the end of the 14th century, in which a...
member narrowly escaped the death penalty for criticising the King and his court.\footnote{7} Over the years, the right to discuss and deliberate political matters without fear of prosecution became well-established. In 1689, it was formally enshrined in the Bill of Rights.\footnote{8} Nowadays, most countries have regulated non-liability for their members of parliament, including all countries of the European Union.\footnote{9} The European Court of Human Rights has underlined the relevance of non-liability in a democratic political system in several cases. In \textit{Jerusalem v. Austria}, it argued:

\begin{quote}
‘While freedom of expression is important for everybody, it is especially so for an elected representative of the people. He or she represents the electorate, draws attention to their preoccupations and defends their interests. In a democracy, Parliament or such comparable bodies are the essential for political debate. Very weighty reasons must be advanced to justify interfering with the freedom of expression exercised therein.’\footnote{10}
\end{quote}

The definition of ‘weighty reasons’ that justify limiting members’ freedom of speech differs from country to country. The European Commission for Democracy through Law has usefully mapped the different national provisions in its report on the scope and lifting of parliamentary immunities.\footnote{11}

Non-liability protects individual parliamentarians, at the very least, against judicial proceedings challenging statements made in parliament, votes cast, questions asked in writing or vocally, and the drafting of parliamentary texts – such as proposals for legislation, resolutions or amendments.\footnote{12} This narrow interpretation of non-liability, based on a spatial criterion, applies for instance to the representatives of the British House of Commons. As a result, they can be subject to prosecution for statements made outside the parliamentary precincts.\footnote{13} In many other countries, however, it is not the location but rather the substance of the comments that matters.\footnote{14} Did the representatives make the challenged statements in the \textit{exercise of duty}?\footnote{15} Accordingly, members of parliament may be protected against prosecution for statements made on television or during public meetings.

\footnotesize
\begin{itemize}
\item \footnoteref{7} Léon \textsc{R} Yankwich, ‘The Immunity of Congressional Speech – Its Origin, Meaning and Scope’ (1950) 99 University of Pennsylvania Law Review 960, 962.
\item \footnoteref{8} Article 9 Bill of Rights.
\item \footnoteref{9} Marc \textsc{Van} der \textsc{Hulst}, \textit{The Parliamentary Mandate: A Global Comparative Study} (Inter-Parliamentary Union 2000) 66.
\item \footnoteref{10} \textit{Case of A. v. The United Kingdom} (n 3) [79]. It summarises paragraphs 36 and 40 of the \textit{Case of Jerusalem v. Austria} [2001].
\item \footnoteref{11} Report on the Scope and Lifting of Parliamentary Immunities (n 4).
\item \footnoteref{12} Robert \textsc{Myttenaere}, ‘The Immunities of Members of Parliament’ (Constitutional and Parliamentary Information 1998) [22].
\item \footnoteref{13} See, for a description of the British provisions, \textit{Case of A. v. The United Kingdom} (n 3) para 79.
\item \footnoteref{14} Myttenaere (n 12) 13.
\item \footnoteref{15} ‘Parliamentary Immunity: Background Paper Prepared by the Inter-Parliamentary Union’ (UNDP Initiative on Parliaments, Crisis Prevention and Recovery; Inter-Parliamentary Union 2006) 8; Report on the Scope and Lifting of Parliamentary Immunities (n 4) 65.
\end{itemize}
In some countries, the freedom of speech guaranteed through non-liability is unconditional.\textsuperscript{16} Their members of parliament cannot face legal proceedings for \textit{any} kind of statement that they made in the exercise of their parliamentary mandate. Members may only be subjected to disciplinary measures by parliament itself. However, most countries have put restrictions to non-liability.\textsuperscript{17} Some do not extend immunity for remarks that are offensive to the head of state and/or fellow citizens, or that are deemed racist. There are also countries where members may face charges when they comment on court cases that are still pending or when they disclose information gathered during closed-door sessions.\textsuperscript{18}

The protection that non-liability offers, varies. In some countries, it is an absolute privilege. This means that there can be no criminal, civil or disciplinary proceedings taken.\textsuperscript{19} In other countries, proceedings can be entered into, but only after the assembly has given its authorisation.\textsuperscript{20} In most, it prevents at least that members be arrested or summoned before court.\textsuperscript{21}

Non-liability ceases with the ending of the parliamentary mandate. However, the protection that it offered continues to apply. As a result, also when members have left parliament, they cannot be prosecuted for how they have voted or voiced the concerns of their electorate when they were in office.\textsuperscript{22}

\subsection*{1.2. Inviolability for Unrelated Deeds}

Inviolability is a more complex and controversial concept than that of non-liability.\textsuperscript{23} It applies to acts committed \textit{outside} the exercise of the parliamentary mandate. Inviolability can protect members of parliament from arrest, sanctions, prosecutions, and sometimes even from investigation, for matters that they have undertaken in their capacity as normal citizens.\textsuperscript{24}

The historical background for this type of immunity goes back to the aftermath of the French revolution. In 1789, there were genuine concerns among the members of the \textit{Assemblée nationale} that the constitutional provisions on protecting freedom of speech would not suffice to keep them safe and able to perform their parliamentary duties. They feared that members could be silenced by being imprisoned on false charges or because legal action was undertaken on unrelated matters. The Assembly therefore adopted the rule that, in principle, ‘the person of each deputy shall be inviolable.’\textsuperscript{25} Only the Assembly could lift the immunity of members. The French model is thus more encompassing than the Westminster model. Next to extending

\begin{thebibliography}{99}
\bibitem{16} Report on the Scope and Lifting of Parliamentary Immunities (n 4) 67.
\bibitem{17} Myttenaere (n 12) 27-33; Report on the Scope and Lifting of Parliamentary Immunities (n 4) 69.
\bibitem{18} Myttenaere (n 12) 29-30; Report on the Scope and Lifting of Parliamentary Immunities (n 4) 69.
\bibitem{19} Myttenaere (n 12) 34.
\bibitem{20} Myttenaere (n 12) 35; Report on the Scope and Lifting of Parliamentary Immunities (n 4) 73.
\bibitem{21} Myttenaere (n 12) 38.
\bibitem{22} Report on the Scope and Lifting of Parliamentary Immunities (n 4) 61.
\bibitem{23} Van der Hulst (n 9) 142-143; ‘Report on the Scope and Lifting of Parliamentary Immunities’ (n 4) 101.
\bibitem{24} Report on the Scope and Lifting of Parliamentary Immunities (n 4) 105, 108.
\bibitem{25} Van der Hulst (n 9) 65.
\end{thebibliography}
non-liability for duty-related actions, it provides protection for acts that were not undertaken in the exercise of the parliamentary mandate. Most European countries have followed the French example. Only the Dutch have a system that is, in many respects, similar to the British one.

The scope of national legislation on inviolability varies considerably. In some countries, the protection only includes minor crimes. Members of parliament are not exempted from prosecution for charges related to terrorism or other serious crimes, as this could violate public order and public trust. Yet other countries have adopted the opposite of this rule. They argue that there is no reason not to prosecute representatives for minor offences, such as traffic incidents. Such accusations are not likely to damage the functioning and reputation of members to any serious extent and therefore have no detrimental effects on the liberty of a member to carry out his or her representative mandate. The list of differences between national systems is long. In some national systems, members of parliament are only offered protection against criminal proceedings. In others, civil proceedings are also (or even exclusively) covered. In some systems, immunity does not apply to investigations, or in case a member of parliament pleads guilty or is caught in the act. Ostensibly, the scope of parliamentary immunity differs considerably, depending on a country’s institutional structure and political culture. Even the trends regarding inviolability do not move in the same direction. The European Commission for Democracy through Law noted that several new member states of the European Union have opted for a broad concept of parliamentary inviolability when they designed their constitutions in the 1990s. This choice has been criticised for hindering the fight against corruption. In contrast, the general trend in Western European countries is to limit the protection offered to members of parliament for acts that are not related to their parliamentary mandate.

Despite this variety, there are common features that characterise inviolability in basically all European countries. The first concerns its duration. Inviolability is only granted for the duration of the mandate. As soon as the parliamentary mandate has expired, the legal proceedings may start (again). Inviolability aims to delay justice until proceedings cannot interfere with the parliamentary mandate; it is not set out to deny justice. The second common feature is the conditionality of inviolability. In almost all countries, inviolability can be lifted. This is commonly a competence of parliament.

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26 Report on the Scope and Lifting of Parliamentary Immunities (n 4) 117.
27 Immunities Overview (n 4) 12; Report on the Scope and Lifting of Parliamentary Immunities (n 4) 118.
28 Myttenaere (n 12) 86-89; Report on the Scope and Lifting of Parliamentary Immunities (n 4) 88.
30 Ibid 124.
31 Ibid 125.
32 Ibid 121.
33 Myttenaere (n 12) 98.
34 Myttenaere (n 12) 98; Report on the Scope and Lifting of Parliamentary Immunities (n 4) 128.
1.3. The Role of Parliaments to Safeguard Autonomy

The competence to decide on waiver requests is a key instrument for parliament to guarantee the independent functioning of its members, and thereby its own institutional autonomy. Upon reception of a waiver request, parliament needs to assess 'whether proceedings are fair and well founded and not attributable to political or other ill-founded considerations.' When there is fear of *fumus persecutionis*, parliament can decide to uphold a member's immunity. Similarly, a decision to lift immunity is an expression of confidence in fair proceedings, and a confirmation that the work and standing of parliament will not be hindered by it. It should not be seen as a collective belief in the guilt of the colleague concerned. In the countries of the European Union, the independence and quality of the judiciary is generally of a high standard. National parliaments therefore tend to lift immunity when the challenged action falls squarely outside the scope of a member's representative mandate. This trend is fostered by case law of the European Court of Human Rights (ECtHR), which has adopted a *functional approach* to parliamentary immunity.

National parliaments generally also have a second role in relation to securing their members' immunity. They are involved in designing and laying down the immunity provisions. The general rules on immunity are often laid down in constitutional texts and legislation, while the detailed criteria and the procedures for lifting immunity are regulated in parliament's Rules of Procedure. The choice for parliamentary leadership is understandable as immunity aims 'to protect parliament against undue pressure from the executive and the courts'. It would be counterproductive to give other institutions a free hand in shaping and deciding these provisions, as the members of parliament could subsequently end up with inadequate protection, thus endangering the unhampered exercise of their representative mandate. An investigation of GRECO (The Group of States against Corruption) highlighted that many parliaments have neglected to establish clear criteria and procedures for lifting and upholding immunity. This is problematic with a view to fighting corruption and ensuring fair, objective, and equal treatment of individual cases. The European Parliament and the Parliamentary Assembly of the Council of Europe are named as good examples in the study, as they have developed very elaborated sets of rules. The rules of the European Parliament are central in the next section.

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35 ‘Parliamentary Immunity: Background Paper Prepared by the Inter-Parliamentary Union’ (n 15) 14.
37 *Cordova v Italy* (No. 2) App no 45649/99 (ECHR, 30 January 2003); *Keller v Hungary* App no 33352/02 (ECHR, 4 April 2006).
38 Report on the Scope and Lifting of Parliamentary Immunities (n 4) 32.
39 Immunities Overview (n 4) 17; ‘Report on the Scope and Lifting of Parliamentary Immunities’ (n 4) 32.
40 Report on the Scope and Lifting of Parliamentary Immunities (n 4) 129.
41 Ibid 127.
42 Ibid 129.
43 Ibid 130.
Immunity and the Liberty to Represent

2. The Immunity Provisions of Members of the European Parliament

The different levels of immunity that members of national parliaments enjoy in the different member states of the European Union have complicated attempts to agree on the protection of members of the European Parliament. Until today, there is no uniform Union immunity regime in place. National legislation continues to play a significant role. As a result, the liberty of members of the European Parliament to make representative claims about the electorate, and what it deems important, differentiates. This *de jure* situation stands in the way of regarding Parliament, and the electorate whom it represents, as a unity. The legal provisions that are laid down in primary law are analysed below. Section 2.1 introduces the Protocol that regulates the immunity of members of the European Parliament. It is followed by a detailed description of the protection that it offers, both in terms of non-liability and inviolability (sections 2.2 and 2.3). Finally, section 2.4 compares the two-fold responsibility of the European Parliament to that of national parliaments.

2.1. The Protocol of 1965

Unlike other sets of rules that are studied in this thesis, the formal rules regulating the immunity of the members of the European Parliament have barely evolved at all. In 1951, a protocol was concluded regarding the immunities of the institutions and the civil servants of the ECSC, which included provisions on the immunity of the members of the Common Assembly.\(^{44}\) Six years later, similar protocols were attached to the Treaties establishing the EEC and Euratom.\(^{45}\) In 1965, the texts were consolidated in a single Protocol on the Privileges and Immunities of the European Communities (PPI), which was annexed to the Merger Treaty.\(^{46}\) This fifty-year old PPI still applies today.\(^{47}\) The fact that the provisions have not been revised since 1965 is noteworthy, as the setting in which members carry out their European mandate has fundamentally changed in the past five decades.

In 1965, the members of the European Parliament were appointed by and from national parliaments. Accordingly, they all enjoyed protection as members of their national parliaments. Having dual mandates made it *inevitable* that the legal position of the European representatives diverged between one another. The recognition of these differences forms the basis of Article 9 PPI (see section 2.3). At the same time, all representatives were equally in need of legal protection for their work in, and for, the European Parliament, as national immunity provisions do not have

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44 It was attached to the ECSC Treaty in an Annex, in accordance with Article 76 ECSC. The provisions on the Common Assembly were regulated in Chapter III, Articles 7-9.
45 Article 218 EEC; Article 191 Euratom.
46 The Protocol was concluded on 8 April 1965, and annexed to the Merger Treaty in Article 28 thereof. Treaty establishing a Single Council and a Single Commission of the European Communities (Merger Treaty).
47 The PPI is currently annexed to the treaties in Article 343 TFEU, as Protocol No. 7.
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extra-territorial effect. To fill this gap, the member states agreed upon Article 8 PPI (see below section 2.2).48

The number of members with a dual mandate has radically decreased since Parliament’s first direct election of 1979. In the 1976 Direct Election Act, it was still possible to hold a mandate in both a national parliament and the European Parliament.49 However, many political parties strongly discouraged their members from carrying out two mandates simultaneously, and some countries even formally banned dual mandates by means of national legislation.50 In 2002, the Council amended the Direct Election Act, deciding that ‘from the European Parliament elections in 2004, the office of Member of the European Parliament shall be incompatible with that of member of a national parliament.’51 Since 2009, it is in all countries of the European Union forbidden to combine a national with a European mandate. Despite this fundamental change, Articles 8 and 9 PPI continue to apply. Nowadays, Article 9 can no longer be seen as recognising national differences: it now causes differences on the basis of national origin. Whether this is problematic for how members of the European Parliament can carry out their representative mandate can only be concluded after studying the substance of the rules in place. That forms the objective of the sub-sections below.

2.2. Union Immunity in Parliament’s Premises

The structure of the PPI appears to follow the traditional distinction between non-liability and inviolability, with Article 8 capturing the former and Article 9 the latter. Article 8 reads as follows:

‘Members of the European Parliament shall not be subject to any form of inquiry, detention or legal proceedings in respect of opinions expressed or votes cast by them in the performance of their duties.’

By means of this provision, all members of the European Parliament are equally non-liable for opinions expressed, or for votes cast in the exercising of their duties.

48 Before the Treaty of Lisbon, Articles 8 and 9 of the PPI were numbered 9 and 10 respectively. This may cause confusion when reading less recent texts or judgments on the matter. The PPI also includes an Article 7 (former Article 8) that applies to members of the European Parliament as well. It concerns the freedom of movement of members, essentially aiming to ensure that members reach the parliamentary premises without any hinder from customs or police. This provision does not provide immunity in judicial matters, and is therefore not considered further.


Immunity and the Liberty to Represent

parliamentary duties. The drafters of the text assumed that Article 8 PPI would only apply for matters occurring within the premises of the European Parliament. They aimed to protect the representatives from prosecution in relation to statements made and votes cast during plenary meetings, or during meetings of parliamentary (sub)committees, group meetings, and other organs of the European Parliament – such as the Bureau and the College of Quaestors. Article 8 PPI was not meant to apply to other parliamentary-related activities taking place elsewhere, such as speeches at party congresses or interviews in newspapers. That was the subject matter of Article 9 PPI (see below).

Article 8 PPI protects from ‘legal proceedings’ without this concept being further clarified. It is not evident from the text whether the immunity is only granted in connection with criminal proceedings or also in connection with civil proceedings. However, considering that, in 1965, none of the member states granted immunity to their national parliamentarians in civil proceedings, it has been assumed that the intention was only to offer protection in connection with criminal proceedings.

Article 8 PPI provides for absolute immunity for everything within its scope. The European Parliament is thus not entitled to waive it. Even the member of Parliament concerned cannot renounce the protection that the PPI offers. Whether Article 8 protects a member in a specific case, is a matter for the national court to decide. In taking this decision, the court must base itself on Union law alone, as Article 8 makes no reference to national rights. Article 8 PPI does not prevent Parliament from exercising its right to take disciplinary measures when a member has misbehaved. Parliament’s decision should be in conformity with its own Rules of Procedure.

In short, Article 8 PPI creates a common, level playing field for frank discussions within the European Parliament, meaning between members of the European Parliament among themselves and/or between them and institutions such as the European Commission and the Council. It was not designed to provide members with equal protection beyond Parliament’s physical space.

54 ‘Onschendbaarheid En Immuniteiten van de Leden van Het Europees Parlement in Het Systeem van Het Gemeenschapsrecht’ (n 52) 7-8.
2.3. National Immunity in Home Country

Article 9 PPI regulates the inviolability of members of the European Parliament. Unlike Article 8 PPI, it includes references to national legislation. This is included in paragraph (a) of Article 9.

> ‘During the sessions of the European Parliament, its Members shall enjoy:
> (a) in the territory of their own State, the immunities accorded to members of their parliament;
> (b) in the territory of any other Member State, immunity from any measure of detention and from legal proceedings.’

Article 9 PPI reads as a compromise between member states with divergent concerns and different traditions. At the time of drafting, five member states extended a form of inviolability to their members of parliament. Only the Netherlands, the sixth founding state, was not familiar with this tradition. However, it was unwilling to grant the European representatives a level of inviolability that the Dutch national parliamentarians did not enjoy. The other countries for their part were against limiting the protection enjoyed by the members of the European Parliament to non-liability. These and other national differences burdened the negotiations. Ultimately it was agreed to differentiate between acts committed in a member’s home country and those committed in another member state. For acts committed in their own country, members of the European Parliament are entitled to the same level of protection as that accorded to members of their national parliament (Article 9(a) PPI). In other member states, they are protected from prosecution by Union immunity (Article 9(b) PPI).

The consequence of Article 9(a) PPI is that the Dutch members of the European Parliament enjoy less protection in relation to acts committed in the Netherlands, than their French colleagues do for similar acts committed in France. Thereby it does not distinguish between acts undertaken in the performance of parliamentary duty and other acts. Article 9(a) PPI introduces a spatial criterion, not one regarding the content of statements. In the previous section, it was mentioned that certain member states – notably among them the United Kingdom – apply a spatial criterion as well. Although seemingly similar, the effect of the provisions is differently. The limitations that are enshrined in (for example) the British legislation apply to all members of the parliament concerned alike. All members are only protected for prosecution regarding statements made in the parliamentary premises. Such a rule does not undermine the unity of the national parliament. In the case of the European Parliament, the spatial criterion introduces inequality between members. It makes it possible that (depending on national legislation) some members are more at liberty than others

to undertake their representative task as they want and where they want. Their legal position is not identical in relation to speeches at party congresses and debates on national television. Instead, members of the European Parliament are given a similar protection as members of the national parliament in their home country. There is thus a level playing field between members of the same nationality.

An exception to this latter principle is formed by Article 9(b) PPI, which concerns prosecution outside the home country. When acts are committed in one of the other member states, members of the European Parliament have immunity (for the duration of their mandate) except for when they were caught in the act. This is not the case for national parliamentarians. The exceptional position for members of the European Parliament was created to avoid the national embarrassment of having a member of parliament face criminal charges in another member state.57

The choice to make the legal protection of members of the European Parliament comparable to their respective national colleagues can be well understood. In 1965, when the PPI was drafted, members had a dual mandate. Their representative basis was formed by the national peoples, and public discussions were held at a national level. Of course, even then, the European Parliament was to be a unitary institution. The members were given a common task to also represent the sum of national peoples. Therefore, it was important to provide members with the same tools and conditions to carry out this task. Yet, to a large extent, this objective was accomplished through Article 8 PPI. This provision introduced a level playing field as long as the work was undertaken on the physical premises of the European Parliament.

The tension between the representative mandate of the members of the European Parliament and their immunity provisions really started in 1979. With the introduction of direct elections, the task of the European representatives altered, at least conceptually. They now had to reach out to Parliament’s self-standing electorate: an electorate that was not confined to national borders. They had to establish a direct link. Under these circumstances, it is ‘surprising’ – to quote Patricia Leopold – that the direct elections did not coincide with alterations to the immunity provisions, making them more uniform.58 The members were given a direct free mandate, to represent a self-standing European electorate, but the liberty to represent this electorate continued to be tied to national rules. It shows the Direct Election Act as a source of contradictions.

Since the Treaty of Lisbon (2007), the task of the European Parliament to reach out to a Union electorate is strengthened and made more explicit. Article 14(2) TEU defines the European Parliament as the representative body of the Union citizens; Article 10(4) TEU highlights the importance of European political parties for expressing the will of the Union citizens. Reading these two provisions in relation to each other underlines that members of the European Parliament are expected to contribute to the development of cross-border political representation. They should not only relate to a national audience but (also) to Union citizens.

These new provisions make the anomaly that different immunity legislations apply to the members of the European Parliament more visible, as well as more

57 Ibid.
problematic. This raises the question what the European Parliament can do, and does, to mitigate this.

2.4. Parliament’s Lack of Rule-Making Power

Parliaments generally have a two-fold responsibility regarding their members’ immunity (see section 1.3). They have a say in the decision-making process that determines the immunity legislation, and they decide on waiver requests in individual cases. These roles together support the autonomy of parliament. The position of the European Parliament deviates from that of most national parliaments. Regarding the power to lay down its own immunity provisions, it is ill-equipped in comparison.

Article 223(2) TFEU provides the European Parliament with the competence to lay down the rules and general conditions applicable to the exercising of the parliamentary mandate, after obtaining the opinion of the Commission and the approval of Council. As there are no restrictions placed on the scope of Parliament’s regulatory powers, these rules and general conditions may, arguably, include provisions on members’ immunity. However, a new set of rules on immunity, which would be laid down in secondary law, cannot enter into force until the corresponding provisions that are laid down in the PPI, constituting primary law, have been repealed. There is a hierarchical relationship between the different legal acts of the European Union, by which secondary law should not contravene primary law. This is called the ‘hierarchy of norms’. As a result, the adoption of immunity provisions by virtue of Article 223(2) TFEU first requires a decision by the member states to repeal (part of) the PPI. This situation means that the European Parliament is hampered in defining the arena in which its members can undertake their representative task without fear of prosecution. It can neither design nor lay down the immunity provisions, and is hence ill-equipped to support the creation of a level playing field for the political representation by its members.

By contrast, the European Parliament has the power to lay down the conditions and criteria for lifting immunity. This originates in its right to regulate its own affairs, in combination with its privilege to decide on waiver requests. The former is laid down in Article 232 TFEU; the latter in the last sentence of Article 9 PPI.

‘Immunity … shall not prevent the European Parliament from exercising its right to waive the immunity of one of its members.’

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59 This provision was introduced by the Treaty of Amsterdam. See also Chapter 6.
The rules of the European Parliament on the waiver of immunity are laid down in Rule 5-9 of the Rules of Procedure, 2014.\footnote{A thorough description of these can be found in Rosa Raffaelli and Sarah Salome, ‘The Immunity of Members of the European Parliament’ (Policy Department C (Citizens’ Rights and Constitutional Affairs), Directorate-General for Internal Policies, European Parliament 2014) PE 509.981.} As observed by GRECO (see section 1.3), these rules are very detailed. They also regulate certain substantive matters. For instance, Rule 6(2) stipulates the conditions under which members can appear as witness or expert witness in a court case, without their immunity first having been waived. The detailed rules may partly compensate for Parliament’s lack of power – compared to national parliaments – to determine the rules through constitutional provisions and legislation.

Regarding the privilege to waive the immunity of members, the position of the European Parliament is comparable to that of national parliaments. It is at liberty to decide whether or not to lift the immunity of one of its members upon the request of a competent national authority. These decisions are amendable to judicial review.

3. Parliament’s Challenge

Over the years, the European Parliament has battled over the content of the PPI (see below section 3.1) and its lack of power to amend it (see section 3.2). The question is what was behind this criticism. Can this be read as a desire to increase Parliament’s liberty to make own representative claims about itself and its electorate?

3.1. Unity of Parliament and of Its Electorate

In the period that members were appointed by national parliaments, their dependency on national legislation was not regarded as problematic. It was rather seen as a logical consequence of the then existing institutional architecture.\footnote{Report on a Request for the Parliamentary Immunity of a Member to be Waived – Mr. Marco Pannella (Rapporteur: Georges Donnez) (EP 1982, A1-0298/82 0010) para 13 explanatory statement.} This view reveals itself in Parliament’s waiver practice. Prior to 1979, the competent national authorities could either address the national parliament or the European Parliament with a waiver request when the situation called for it. The European Parliament made it clear that the institutional privilege of the national parliaments weighed heavier than its own.\footnote{Ibid para 11.} It therefore decided to lift the immunity of a member when asked, and left the assessment of the facts to the national parliament concerned.\footnote{Report on the request for the withdrawal of parliamentary immunity of two members of the European Parliament (Rapporteur: Otto Weinkamm) (EP 1964, A0-0027/64 0010 (in Dutch)).} After 1979, the European Parliament could no longer renounce its privilege to draw its own conclusions regarding members with a single mandate. However, when
a member held a dual mandate, Parliament would still 'await the decision of the
national parliament before bringing the matter before the European Parliament'.

The European Parliament always promoted a uniform statute for its mem-
bers once they were directly elected. This is not apparent at first glance from study-
ing Parliament's proposals. The Patijn Draft Convention of 1975 (see Chapter 4)
proposed to continue giving members of the European Parliament the same immu-


nity as that enjoyed by members of the national parliaments. The rapporteur
however expected that this situation would be short-lived, and aimed to facilitate
the realisation of direct elections without introducing additional hurdles. Parlia-
ment worked under the hypothesis that, afterwards, a new uniform electoral system
would be agreed by 1980 at the latest. This would include immunity provisions,
or alternatively these could be agreed according to a special procedure that Patijn
proposed in Article 14 of his Draft Convention. In 1983, there was still no uniform
election procedure and members continued to be elected according to divergent
national laws. Nevertheless, the European Parliament pressed the Council to decide
on a common statute for its members. After all, it was not the uniformity of the
electoral rules, but the mere fact that members were directly elected to the European
Parliament that gave them a self-standing electoral basis, and hence called for own
immunity rules (see section 2.3). The continuing application of the PPI was:

‘[N]ot commensurate, in either juridical or political terms, with the changed
position of the European Parliament following direct elections’. 

The PPI was regarded ‘out of date’ and ‘no longer valid’ under the new circumstanc-
es. Some even called it ‘not only nonsensical but even grotesque’.

On 10 March 1987, the European Parliament adopted a report in which it under-
lined the need for a revision. This Donnez-report shows, above all, that the

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65 Report on a Request for the Parliamentary Immunity of a Member to be Waived – Mr. Marco
Pannella (Rapporteur: Georges Donnez) (n 62) para 12 explanatory statement.
66 Draft Convention of 14 January 1975 on the election of Members of the European Parliament by
67 Ibid art 7.
69 Report on the draft Protocol revising the Protocol on the Privileges and Immunities of the Eu-
ropean Communities of 8 April 1965 in Respect of Members of the European Parliament (doc.
C2-31/85 – COM (84) 666 final) (Rapporteur: Georges Donnez) (EP 1987, A2-0121/86 0010);
Report on the reform of the Rules of Procedure with regard to parliamentary immunity (Rule 6)
71 EP Resolution of 10 March 1987 on the draft protocol revising the Protocol on the Privileges and
Immunities of the European Communities of 8 April 1965 in respect of Members of the European
Parliament [1987] OJ C99/44. The report contained Parliament’s response to the Council re-
garding proposals by the Commission to revise the PPI. Following the resolution of the European
members of the European Parliament no longer saw any justification for having the same legal and financial status as members of the national parliament in their home country.

‘[E]qual treatment for European and national parliamentarians of the same nationality is not essential either logically or in practical terms, as opposed to the above-mentioned need to avoid differences in treatment between members of the same assembly.’

Parliament wanted to create more distance from national structures, and strengthen the self-standing position of the European Parliament as ‘the one and only legislative body for Europe as a whole’. The Donnez report presents an overview of Parliament’s institutional and practical arguments to support the case for uniform provisions. Similar sentiments have been repeated in other reports since.

The fact that members have divergent legal statuses is regarded as a potential threat to the internal cohesion of the European Parliament. It challenges ‘the feeling of belonging to one and the same parliament’. By creating ‘first-class members’ and ‘second-class members’, also the institution’s unity is undermined. Moreover, it threatens Parliament’s independence. ‘How can the independence of Parliament be effectively safeguarded in relation to other authorities through the protection of individual members if this protection is not the same for them all?’

Most relevant for the present investigation is the argument that the different provisions lead to divergent representative capacities of the elected members. They have to exercise their representative mandate under unequal conditions. The British Member Hoon has elaborated on the implications.

‘On the very same facts the legal conclusion will depend exclusively on the nationality of the member concerned. It means, for example, that theoretically a continental member would enjoy a wider degree of immunity in the United Kingdom than that enjoyed by the British member in whose constituency the events occurred. That cannot be right.’

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72 Donnez Report (n 69) para 12 explanatory statement.
74 Donnez Report (n 69) para 8 explanatory statement.
75 Ibid.
76 Ibid.
Indeed, it follows from Article 9(b) PPI that non-British members can claim immunity when they participate in an unauthorised demonstration in the United Kingdom. British members walking the same march may however face prosecution. The ‘unfairness’ that Hoon attacks shows in particular when members of the European Parliament of different national backgrounds participate in the same event in the same country. Nevertheless, unfairness is obviously also present when members can criticise the (European) authorities on national television in some countries, while in other countries for doing the same they could face prosecution.

In addition to these fundamental objections, the European Parliament challenges the existing system on a very practical basis. In order to rule on a waiver request, the European Parliament must be fully informed about which law of which member state applies and study those national provisions carefully. This exercise is very time-consuming. Moreover, it presents a considerable risk of errors in interpretation and even misapplication.\(^78\)

For all these reasons, the Donnez-report proposes to revise the PPI, a position that was repeated since. In 2003, the European Parliament once again proposed a uniform legal and financial statute for its members, and this time elaborated how the new immunity provisions should look like. Members would be protected in the exercise of their duties regardless of the location where activities take place:

\[\text{‘A Member may at no time be prosecuted or otherwise be held accountable extrajudicially for any action taken, vote cast or statements made in the exercise of his/her mandate.’}\(^79\)

Moreover, according to the proposal, it would be for the European Parliament to decide whether a statement was indeed made in the exercise of duty and members could rely on their *non-liability*.\(^80\) It is a matter for Parliament, not the courts. The proposal also foresees inviolability of the members: ‘Any restriction of a Member’s personal freedom shall be permitted only with the consent of Parliament, except where he/she is caught in the act.’\(^81\) To what extent this provision would have protected members cannot be proven, as it would depend on the actual waiver practice of the European Parliament.

The 2003 proposal arguably meets all the concerns that were expressed in the Donnez-report of 1987. It simplifies the waiver process, expresses the unity of Parliament and ensures that members from different countries can participate in protests and debates outside Parliament under the same conditions. However, as we come to see in the next Chapter, the proposal was not endorsed by the Council.

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80 Ibid art 4(2).
81 Ibid art 5(1).
3.2. Autonomy to Set Immunity Standards

The European Parliament pursues not only a change in the *substance* of the PPI, but also seeks a larger say in the *decision-making procedure* regarding the immunity provisions. Scholars may consider this demand a typical extension of Parliament’s battle for more legislative powers in whatever policy area. This thesis however, recommends to judge it (also) from a different angle. Having the power to lay down immunity provisions is necessary to support the free mandate of Parliament’s elected members and the separation of institutions (or powers). From that perspective, a stronger position of Parliament is not only desired by Parliament itself, but can be considered particularly *appropriate*. The Commission, the Council, and the member states may in theory have an interest in providing the members of the European Parliament with only a very precarious legal position. This can influence how criticism is voiced. With the gradual increase of power of the European Parliament, this argument has increased in relevance.

It can also be considered appropriate that the European Parliament has a say over the immunity provisions because these provisions contain representative claims. They determine not only how, but also where and in whose name members can speak out without fear of prosecution. *In casu*, they reveal whether the members of the European Parliament are supposed to represent Union citizens and/or national citizens. Such formal representative claims ought not to be made without the elected representatives themselves expressing a view (see Chapter 2). Sir Neil MacCormick, a legal philosopher and former member of the European Parliament, referred to this norm during a debate in 2002, when he said that the European Parliament – ‘as a democratic legislative assembly’ – must have some ‘inherent power’ to shape the immunity provisions.

Until 2005, the European Parliament assumed that the issue of immunity would one day be regulated as part of a general framework, laying down the financial, legal, and social working conditions of its members. Demands for more rule-making powers were therefore not voiced separately in relation to the immunity provisions, but rather in the context of the statute for members (see further Chapter 6). All of Parliament’s proposals for such a statute included provisions on immunity. However, the Council was equally always unwilling to accept these provisions. They therefore were not included in the statute for members that was finally adopted by the Council and the European Parliament in 2005. As part of this negotiating process, on 3 June 2005, the Council promised to examine the request of Parliament to revise the PPI ‘with a view to reach a conclusion as soon as possible’. However, until this day, the

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82 See, for instance, the EP Resolution of 10 March 1987 on the draft protocol revising the Protocol on the Privileges and Immunities of the European Communities of 8 April 1965 in respect of Members of the European Parliament (n 71). See also MacCormick (n 52).
Council has not substantively followed up on this promise. Apparently, it has no real interest to do so. A more extensive Union immunity for members of the European Parliament would strengthen the Union legal order, provide the European Parliament with more (representative) autonomy, and is not likely to promote enthusiasm among the population.

The European Parliament, as we have seen, is formally empowered to draft immunity provisions. It may in principle also take the final decision, after seeking the opinion of the Commission and with the unanimous approval of the Council. However, in the current situation, these powers are dormant. As long as the PPI forms part of primary law, the European Parliament is not in a position to adopt secondary law that contradicts it (see section 2.4). In order to nonetheless make use of its regulatory power, Parliament sought recourse to establishing immunity provisions in a suspended form. In the proposals for a statute for members, Parliament incorporated immunity provisions, but stated that in so far as these provisions conflicted with the PPI, they ‘may not enter into force unless and until an Intergovernmental conference has decided to repeal the corresponding provisions of primary law and that decision has been ratified by the Member States (hierarchy of norms).’

The debates and parliamentary reports testify to Parliament’s frustration with its lack of active rule-making power, which it perceives as an infringement on its parliamentary credentials.

‘The fundamental issue is of whether this European Community is a real community or an international organization. If it were merely an international organization, then the Council would indeed have the prerogative as regards members’ privileges and immunities.’

For ‘a parliament worthy of the name’, it is unacceptable that the Council takes the lead on a matter that goes to the heart of Parliament’s autonomy – and in particular its representative autonomy. Parliament therefore insisted – and continues to insist – on change. However, it did not stop there. The next section analyses how the European Parliament has fostered a uniform legal status of its members by its own actions.

4. Alternative Channels for Change

Despite having limited effective rule-making powers, the European Parliament has nonetheless attempted to develop equivalent legal protection for its members. To this end, it has exploited two instruments. The first is Parliament’s right to regulate...
its own affairs (see section 5.1). The second is Parliament’s privilege to decide on waiver requests (see section 5.2). How it has used these instrument is outlined below.

4.1. Rules of Procedure – an Instrument to Complement Primary Law

In 1953, the European Parliament (then, the Common Assembly) decided, for the first time, on how to proceed if a national authority requested to waive the immunity of one of its members. As the ECSC Treaty, and later the PPI, is silent on the procedure to be followed, the European Parliament could design its own, by virtue of its right to adopt Rules of Procedure. Over the years, Parliament has amended these rules several times. In this process, it has taken decisions that changed the scope of members’ immunity.

The case involving Edgar Faure, a French member of the European Parliament, formed the immediate cause of such a change. Roger Wybot, a French citizen, had initiated defamation proceedings against Faure for remarks that were made on 27 January 1983. On that particular day, the European Parliament was not actually sitting. According to Wybot, this meant that Faure could not rely on his parliamentary immunity. Article 9 PPI only applies ‘during the sessions of the Assembly’ after all. Faure, however, disagreed with this reading. In his view, the word ‘session’ should not be interpreted so narrowly. Supporting Faure’s position, the European Parliament argued before the Court of Justice that the word ‘session’ in Article 9 PPI should be understood as covering a longer period than just the time period of the actual plenary sittings. According to Parliament’s Rules of Procedure, a session starts on the second Tuesday in March and lasts for a year. Accordingly, the European Parliament was ‘in session’ on 27 January 1983. The Court of Justice accepted Parliament’s argument that ‘it was for the Parliament itself to determine the duration of its sessions’. There were no provisions with which this position clashed. Hence, defining the duration of parliamentary sessions falls officially within Parliament’s purview. The effect of Parliament’s actions (and the Court’s judgement) is that all members of the European Parliament enjoy immunity for the same period of time. The duration does not depend on different national laws. Simultaneously, it means that the duration of immunity of members of national parliaments and of the European Parliament – from the same country – may differ.

The above example is not the only one where the European Parliament has taken advantage of the existence of ‘blank spots’ or open-textured provisions in the PPI. In a similar vein, Parliament has created a role for itself in so-called Article 8 cases. In section 2.2, we have seen that the immunity that Article 8 PPI provides cannot

90 CA Resolution of 10 January 1953 concerning some articles of the Rules of Procedure, OJ No 1 of 10 February 1953, art 47.
91 This is currently laid down in Article 232 TFEU.
93 Ibid para 10.
95 Parliament’s session lasted from 9 March 1982 until 7 March 1983 that year.
96 Wybot v Faure and others (n 92) para 10.
97 Ibid para 16.
be waived. Members have an absolute immunity, which means that they cannot be prosecuted in respect of opinions expressed or votes cast in the performance of their duty. Whether a statement falls within the protection of Article 8 is not for the Parliament to decide. Such an assessment is a matter for the national courts.98

The lack of parliamentary involvement in Article 8 cases became the subject of intense discussions in 2002. In the preceding years, several Italian members of the European Parliament had been confronted with legal challenges against opinions they had expressed. At first sight, this seemed a violation of the absolute protection that Article 8 PPI offers. However, Parliament was incapable of protecting its members by upholding their immunity, as it only had the privilege to decide on waiver requests in Article 9 cases. In the absence of a waiver request to which it could respond, Parliament remained empty-handed. Sir Neil MacCormick, rapporteur for the Legal Affairs Committee on a report about the situation of Italian members specifically, expressed the inappropriateness of Parliament’s weak position during a debate on 10 June 2002.

‘If it were the case that members could show that their position as members of this House, as legislators on the European scene, was being prejudiced by conduct of a Member State and there was no way to bring this before the House solely because no appropriate authority in a Member State had sought to have the immunity waived, this would in itself be clearly an unsatisfactory state of affairs.’99

Worried that the protection offered by Article 8 PPI was in practice undermined by the behaviour of member states – in particular the Italian authorities –, the European Parliament amended its Rules of Procedure.

The newly introduced rules had two effects. Firstly, Rule 6(3) ended Parliament’s dependency on other authorities. It is no longer necessary for Parliament to await a formal request by a competent national authority before it can take a stand in an individual case. Parliament can now also proceed to a decision following a request to that end by a member, a former member, or by any other member with the agreement of the member concerned.100 Secondly, a new Rule 7(6) makes it possible that Parliament takes a position even when the case involves Article 8 PPI.101 Hence, by virtue of these two amendments, the European Parliament is no longer bound to passivity when a member faces charges for opinions expressed during the exercise of duty. Andrew Duff, the responsible rapporteur for the rule-change, placed his

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98 This was confirmed by the Court in Alfonso Luigi Marra v Eduardo De Gregorio and Antonio Clemente (n 55) paras 32-33.
100 This provision is currently found in Rules of Procedure of the European Parliament – September 2015 Rule 9(1).
101 This provision is nowadays laid down in: ibid Rule 7(2).
proposals within ‘the context of a reform of the privileges and immunities system’. The European Parliament had found a way to amend the PPI, despite not having the competence to do so head-on.

In conjunction with the adoption of the Duff-report, Parliament adopted the MacCormick resolution to strengthen the legal position of Italian members. The resolution specifically concerned Francesco Enrico Speroni and Alphonso Marra. In this, Parliament requested:

‘[T]he competent courts should be put on notice to transmit to Parliament the documentation necessary to establish whether the cases in question involve absolute immunity under [Article 8] of the Protocol in respect of opinions expressed or votes cast by the members in question in the performance of their duties and (b) that the competent courts should be invited to stay proceedings pending a final determination by Parliament.’

Parliament called upon the courts to respect the immunity of the members concerned until it had arrived at a conclusion on whether the conditions for absolute immunity, as provided in Article 8 PPI, were met. Through this decision, Parliament challenged the understanding that it had no competence to engage in this decision.

In order to understand the effect of Parliament’s new position, it is necessary to study the case of Alphonso Marra. It led to new case law by the Court of Justice. The action against Marra was initiated by De Gregorio and Clemente. They claimed that Marra had insulted them by distributing leaflets containing offensive remarks. Both the Tribunale di Napoli and the Corte d’Appello di Napoli did not consider it necessary to ask Parliament to lift Marra’s immunity. This is understandable as the assessment whether Article 8 PPI applies, falls to the national court. However, the European Parliament disagreed with the findings of the courts. As the leaflets were distributed while Marra was a member of the European Parliament, it qualified his case as a prima facie case of absolute immunity, which should be protected by Article 8 PPI. Through its resolution, Parliament tried to stop Marra’s prosecution, but its efforts were in vein. Before the Corte Suprema di Cassazione, to which Marra subsequently turned, he asserted his immunity again. He requested a decision by the European Parliament on whether or not his immunity should be upheld. By then, the new procedural rules were in force. Unsure how it should proceed after Marra’s request, the Italian Court of Appeal asked the Court of Justice whether it was...
required to await a waiver-decision by the European Parliament before coming to a conclusion. In its judgement, the ECJ stressed that it remains for the national courts to consider whether or not a member enjoys the immunity provided for in Article 8 PPI. It does not fall within Parliament’s powers to alter this situation.

‘[I]t cannot be inferred, even implicitly, from Rules 6 and 7 of the rules of procedure ... that the national courts are obliged to refer to the Parliament the decision on whether the conditions for recognising the immunity are met, before ruling on the opinions and votes of Members of the Parliament.’

The new Rule 7(6) has not empowered the European Parliament to formally establish whether Article 8 PPI applies in an individual case. It has only enabled Parliament to present an opinion, which has no binding effect with regard to national judicial authorities. Nevertheless, this does not render the change in the Rules of Procedure meaningless. Interestingly, the Court of Justice also ruled that the opinion of the European Parliament cannot be ignored. In fact, it underlined that:

‘[T]he duty of cooperation applies in the context of disputes such as those in the main proceedings. The European Parliament and the national judicial authorities must therefore cooperate in order to avoid any conflict in the interpretation and application of the provisions of the Protocol.’

Consequently, if a national court is aware that the European Parliament is formulating an opinion on the immunity of one of its members, it must suspend the legal proceedings. The Marra-ruling thus endorsed Parliament’s right of initiative, and allows it to influence the decisions of the national courts on Article 8 cases.

It is evident that the two challenges described in this section brought about only minor amendments to the PPI. Yet, they show that the European Parliament is unwilling to remain passive when it comes to reforming the immunity provisions.

4.2. Waiver Decisions – Parliament’s Case-Law

The European Parliament cannot delete the references to national legislation in the PPI. This is a fact that Parliament has to deal with until the PPI is either revised or repealed. However, Parliament is at liberty to interpret national legislation when it decides on individual waiver requests. It is not obliged to follow the line of the

107 Alfonso Luigi Marra v Eduardo De Gregorio and Antonio Clemente (n 55) para 35.
109 Ibid para 42.
national parliaments, as it ‘is sovereign in the exercise of its powers’.\textsuperscript{110} Between 1979 and 2009, the European Parliament has been asked to lift the immunity of one of its members 157 times.\textsuperscript{111} This offered 157 opportunities to interpret national legislation. In making these decisions, Parliament was well aware of its institutional objective.

‘[T]he European Parliament should … attempt to follow the precedents which have emerged from its own decisions on requests for the waiver of immunity, with a view to creating a concept of parliamentary immunity which is peculiar to the European Parliament, and could not in any event be identical to the concepts of immunity established by the different customs of the various national parliaments.’\textsuperscript{112}

Parliament should encourage the realisation of Union immunity for all members – albeit within the boundaries set by the PPI. The objective to develop a genuine Union immunity \textit{de facto}, by way of Parliament’s waiver practice, has been confirmed in several parliamentary reports.\textsuperscript{113} This section will outline how the European Parliament has acted to accomplish this.

4.2.1. Union Immunity Extends to Civil Proceedings

A first generic change brought about by the European Parliament concerns the scope of Article 8 PPI. The text of the Protocol does not explicate whether Article 8 PPI can only be invoked in case of criminal proceedings, or also in case of civil proceedings. However, as explained in section 2.2, Article 8 PPI was initially interpreted as applying to civil proceedings only.

\begin{table}[h]
\centering
\begin{tabular}{|c|c|c|c|}
\hline
Legislature & Cases treated in plenary & Decision to waive & Decision not to waive \\
\hline
1979-1984 & 8 & 1 & 7 \\
1984-1989 & 36 & 9 & 27 \\
1989-1994 & 33 & 5 & 28 \\
1994-1999 & 9 & 2 & 7 \\
1999-2004 & 27 & 4 & 20 \\
2004-2009 & 44 & 24 & 20 \\
\hline
\end{tabular}
\caption{Immunities Overview (n 4) 33.}
\end{table}

\textsuperscript{110} Report on a request for the parliamentary immunity of a Member to be waived – Mr. Eric Blumenfeld (Rapporteur: Georges Donnez) (EP 1984, A1-0123/84 0010) para 13 explanatory statement.

In September 2003, the European Parliament nevertheless gave a new interpretation to the scope of Article 8 PPI. The case at hand concerned Sakellariou, a German member with Greek roots. Parliament was asked to lift Sakellariou’s immunity for comments that he had made in 2001, during an interview for the newspaper *Kyriakatiki Eleftherotypia*. When asked about the future of Greek-Turkish relations, Sakellariou said ‘the consequences were likely to be serious if a neighbourhood Mussolini such as Mr Paphathemelis practises foreign policy.’ Following this, Paphathemelis brought an action before the civil division of the Athens Court of First Instance. He claimed damages adding up to roughly 150,000 euro. Lehne, who had been appointed rapporteur for the Committee on Legal Affairs and the Internal Market, studied the case, and concluded that Sakellariou’s immunity should be defended. He arrived at this conclusion despite the fact that Sakellariou was not subject to criminal proceedings, but civil proceedings instead. The reason that Article 8 PPI was nevertheless applied, was that the damages claimed went beyond a reasonable definition of compensation. In fact, they constituted a penalty with deterrent effect. As the effect of these proceedings could be that Sakellariou would feel forced to be less outspoken during the remainder of his representative mandate, his liberty to represent his electorate as he deemed fit was at stake.

Therefore, Lehne suggested that the reference to ‘legal proceedings’ in the PPI should be interpreted as covering civil actions. This was in line with contemporary developments in the law of several countries, including the United States. The European Parliament took over the rapporteur’s suggestion:

> ‘[T]he immunity from legal proceedings enjoyed by members of the European Parliament also covers immunity from civil proceedings.’

The Court of Justice agreed with Parliament’s new line. In the case concerning Marra (see above), it confirmed that Article 8 PPI should apply to civil cases as well. It is possible that the interpretation of the Court was not only influenced by Parliament’s opinion, but also by the developments in law that Lehne referred to. It would require a different line of research to establish this. Regardless, the example stands testimony to the fact that the European Parliament considers itself well positioned to advance substantive changes to the PPI.

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115 Ibid 2 explanatory statement.
116 Report on the request for defence of parliamentary immunity and privileges submitted by Jannis Sakellariou (Rapporteur: Klaus-Heiner Lehne) (n 114) explanatory statement; Offerman (n 53) 12.
118 *Alfonso Luigi Marra v Eduardo De Gregorio and Antonio Clemente* (n 55) para 27.
4.2.2. **Union Immunity outside Parliament’s Premises**

A second change initiated by the European Parliament concerns the core of Article 8 PPI. It is about the definition of what can be regarded as ‘activities that are undertaken in the performance of duties’. Capturing this evolution regarding absolute immunity is complicated, as it involves changes to the interpretation of both Article 8 and Article 9 PPI.

For decades, the immunity of members of the European Parliament for statements made in the exercise of their duty, was regulated by three provisions. Article 8 PPI concerned absolute immunity and applied when the statements were made in Parliament’s precinct; Article 9(a) PPI regulated the immunity for statements made in members’ home countries; Article 9(b) PPI regulated the immunity when statements were made outside Parliament, or in other member states. As a result of this arrangement the legal status of members differed, and for similar statements, some members could face prosecution and others not. Incapable of changing the PPI provisions, the European Parliament found an alternative manner to reduce the differences between members de facto. It established criteria for its waiver decisions that were of a different nature than customary in national parliaments. These criteria did not only aim to ensure that *fumus persecutionis* was avoided, but also set out to make the legal status of the members more comparable. The most important criterion in this regard was that the immunity of a member should be upheld when the alleged offence could be regarded as a ‘political activity’. Thereby, Parliament took it upon itself to define which actions should be protected and which ones not. It is a type of decision that is generally made through the legislative procedure.

For many years, the European Parliament adopted an extremely generous approach to what constitutes ‘political activities’. The case concerning Herklotz illustrates this well. In 1979, Herklotz was anonymously accused of fraud that had been committed in a civic education association of which she was president between 1974 and 1976. In order to start legal proceedings, the Public Prosecutor Office of Frankenthal requested for the waiver of Herklotz’ parliamentary immunity. On the proposal of rapporteur Fischbach, the European Parliament rejected the request. It took into consideration that the accusations against Herklotz were made anonymously, and additionally argued that Herklotz’s activities could be interpreted as falling within the scope of political activities.

> ‘The Legal Affairs Committee ascertained that the facts underlying the anonymous accusations against Mrs Herklotz are related to her political activity, since supporting activities to promote civic training are linked with political activities.’

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119 See section 2.2 and 2.3.
121 Ibid 8.
The German authorities respected Parliament’s decision. Only after her mandate was expired, was Herklotz prosecuted – and convicted.

By giving a broad interpretation to the term ‘political activities’ and by upholding immunity in all such cases, the legal positions of the members of the European Parliament were made more comparable. Herklotz was given a protection, also in relation to acts committed in her home country, that members of the German Bundestag did not have. The impact of national legislation on members’ legal status was thus reduced. Rapporteur Wallis emphasised this result in 2005:

‘Parliament’s decisions have gradually forged a coherent notion of European parliamentary immunity which is, in principle, independent of the various practices of the national parliaments. This avoids differences in treatment between members resulting from their nationality.’

Parliament’s policy regarding Article 9(a) PPI is remarkable. It has apparently managed to limit the differences in treatment on the basis of nationality by virtue of its waiver practice. However, this effect goes against what the drafters of the PPI had envisaged. They had explicitly aimed to uphold the national differences, as was outlined in section 2.3.

In recent years, the European Parliament has become more restrictive in its interpretation of what may constitute a ‘political activity’. The connection between the acts and the parliamentary mandate must now be justified and proven. This is in line with developments of ECtHR case law.\(^\text{[123]}\) As a result of this new approach, the European Parliament lifted the immunity of Mote in 2007, although the charge against him was similar to the one that Herklotz faced more than twenty years earlier.\(^\text{[124]}\)

The European Parliament has maintained a generous policy with regard to expressions of opinion alone. As a rule, these expressions are considered to be part of a member’s ‘political activities’, irrespective of their content. According to Zimeray, one of Parliament’s rapporteurs, it is often too difficult to distinguish between political speeches and speeches that are not connected to a member’s political mandate. As a consequence, they are all regarded as made in the performance of duties.\(^\text{[125]}\) For Parliament, the place where the statements were made, is irrelevant. This could be within Parliament, ‘during demonstrations, at public meetings, in political publications, in the press, in a book, on television, by signing a political tract and even in a court of law.’\(^\text{[126]}\)

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123 *Cordova v Italy* (n 37).
125 Report on the request for waiver of the immunity of Mr Peter Sichrovsky (Rapporteur: François Zimeray) (n 113) 13.
126 Report on the request for the defence of the immunity and privileges of Bruno Gollnisch (Rapporteur: Diana Wallis) (n 122).
Recently, the legal basis on which this protection is built has changed. Parliament has long provided protection outside the parliamentary premises through its policy of upholding immunity when the authorities ask for it to be lifted. This thus involved Article 9 PPI. Nowadays, Parliament acts on the assumption that Article 8 PPI covers all statements made in the exercise of duty, without applying a spatial criterion. The development of Article 8 PPI shows when comparing the decisions of the European Parliament regarding the immunity of Le Pen in 1998, Gollnisch in 2005, and Patriciello in 2009. All cases concern the freedom of speech. To witness the change in Parliament’s approach, it is necessary to note not only which provision of the PPI applied (according to the European Parliament), but also the arguments that Parliament presented to support its choice.

In December 1997, Le Pen launched his book ‘Le Pen, the Rebel’. During the press conference in Munich, he called the gas chambers a detail in the history of the Second World War. Misrepresenting the atrocities committed during the Nazi-period constitutes a violation of German national law. Therefore, the German authorities requested the European Parliament to lift the immunity that Le Pen enjoyed on the basis of Article 9(b) PPI. The Parliament considered the matter, and decided to indeed waive Le Pen’s immunity on 6 October 1998.127 Parliament agreed with the German authorities that Article 9(b) PPI formed the appropriate article for the waiver request. This shows that, at the time, the criterion to establish whether Article 8 PPI or Article 9 PPI applied, was a geographical one. Moreover, Parliament held that Le Pen’s comments could not be regarded as ‘political activities’. If that were to have been the case, it should have upheld the immunity of Le Pen, in the same way as it did with the immunity of Herklotz.

'It appears from the summary of the facts that Mr. Le Pen expressed the sentiments in question during a press conference in connection with the launch of a book on his life and political activities. It cannot therefore be maintained that he was acting ‘in the performance of his duties’, as would have been the case, for example, if he had spoken these words during a sitting of the European Parliament or one of its bodies, or if he had acted as a member or rapporteur of a committee, or indeed in any capacity at all connected with the activities of Parliament.’

Seven years later, a different interpretation was given to Article 8 PPI when the immunity of Gollnisch was at stake. Like Le Pen, Gollnisch had made controversial statements outside Parliament’s headquarters: in his case, during a press conference in Lyon. Remarkably, rapporteur Wallis did not consider the location of Gollnisch’s speech a decisive matter. In agreement with her, the European Parliament expressed

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128 Ibid 8 explanatory statement.
that Gollnisch’ comments potentially fell under Article 8 PPI. 129 This constitutes a noteworthy change. However, when studying the issue further, Parliament decided that Article 9(b) PPI applied nonetheless. The reason for this conclusion was unrelated to the spatial criterion.

‘[Gollnisch had] expressed his opinion about the massacre of Katyn in response to questions from journalists about his highly critical remarks relating to political interference in the Rousso report on the political views of Lyon III University academics. The statements were directly related with the professional activities of Mr. Gollnisch as professor at the Lyon III University and had nothing to do with his duties as a member of the European Parliament.’ 130

From the Wallis report and Parliament’s vote, it became clear that even when members made statements at a press conference outside Parliament, they could be protected by absolute immunity as provided for in Article 8 PPI.

In the case regarding the Italian member Patriciello, the European Parliament tried to stretch the application of Article 8 PPI further. It applied Article 8 for activities that had taken place in Italy, and applied a very generous definition of what can constitute ‘political activities’. In 2007, Patriciello was charged with falsely accusing an officer of the municipal police of Pozzoli of forgery of documents. This forgery had allegedly resulted in traffic fines for the owners of some cars parked close to a neurological institute and Patriciello’s home. By all standards, Article 8 PPI seemed not to apply, not only because the contested statements were made in Italy, but also in particular because there was no obvious link between Patriciello’s accusations and his parliamentary mandate. Patriciello heavily disputed the latter. He claimed that his comments to the police officer were made on behalf of his electorate and for the benefit of citizens. Consequently, Article 8 PPI should be invoked. Surprisingly, the argument was taken over by Parliament’s rapporteur Sakalas.

‘As a matter of fact, in his statements, Mr. Patriciello merely commented on facts in the public domain, the rights of citizens to have an easy access to a Hospital and to the healthcare, which had an important impact on the daily life of his constituents. Mr. Aldo Patriciello did not act for his own interests, he did not want [to] insult the public official but he act[ed] for [the] general interest of his electorate in the framework of his political activity.’ 131

129 Report on the request for the defence of the immunity and privileges of Bruno Gollnisch (Rapporteur: Diana Wallis) (n 122) para III 1 explanatory statement.
130 Ibid III 1a explanatory statement.
As the European Parliament accepted Patriciello’s explanation, it recommended that his immunity would be protected. In 2011, the Court of Justice put an end to this interpretation. It outlined that Article 8 PPI can only apply when there is a direct and obvious connection between the statements made and the parliamentary duties. In the Patriciello case, this direct and obvious link was not found:

‘Having regard to the descriptions of the circumstances and the content of the allegations made by the Member of the European Parliament at issue in the main proceedings, they appear to be rather far removed from the duties of a Member of the European Parliament and hardly capable, therefore, of presenting a direct link with a general interest of concern to citizens. Thus, even if such a link could be demonstrated, it would not be obvious.’

Parliament lost this battle for Patriciello. However, it won the war on an important principle. The Court supported Parliament’s general stance on the scope of Article 8 PPI.

‘It is not impossible that a statement made by those Members beyond those precincts may amount to an opinion expressed in the performance of their duties within the meaning of Article 8 of the Protocol, because whether or not it is such an opinion depends, not on the place where the statement was made, but rather on its character and content.’

The application of Article 8 PPI is thus not necessarily limited to the precincts of the European Parliament. It is the content and the character of the challenged statements that are the determining factors, not the location. As a result, the protection offered to members of the European Parliament in order to represent their electorate without fear of reprisals, has grown more similar. Differences on the basis of national origin have been reduced. Concurrently, Parliament’s waiver practice has increased the differences in legal protection between members of the European Parliament and their colleagues in national parliaments.

132 EP Decision of 5 May 2009 on the request for defence of the immunity and privileges of Aldo Patriciello (n 1).
134 Ibid para 36.
135 Ibid para 30.
5. Conclusion

Rules regarding parliamentary immunities reveal in which arena elected members are expected to carry out their representative mandate, and against which authorities they need protection. It is in that arena that members need special protection in order to represent their electorate as they deem fit. For a long time, the political arena was confined to the parliamentary premises. Therefore, in several countries, members of parliament only have non-liability for statements made in parliament itself.\textsuperscript{136} They may face prosecution for actions outside these premises. The past decades have witnessed rapid changes in how political representation is undertaken. Statements are increasingly made (or repeated) outside the plenary room, on television, twitter or during public events. This phenomenon requires a general re-thinking of the privileges that should be extended to members of parliament. For the European Parliament the matter is even more pressing because of the simultaneous occurrence of a second development. As a result of this development, members now have different levels of immunity even when they evidently undertake core representative tasks.

Over the years, the representative task of the members of the European Parliament has become more transnational, in both form and substance. The European Parliament is held to represent Union citizens, instead of national peoples (Article 14(2) TEU). Moreover, European political parties and European federations of interests groups increasingly organise European activities, and members of the European Parliament more regularly engage in televised debates with their colleagues from different countries. While members of a national parliament enjoy the same legal protection both in and outside their parliament, members of the European Parliament do not have such a level playing field. This inequality is laid down in the Protocol on the Privileges and Immunities of the European Union (PPI), which was drafted as far back as 1965.\textsuperscript{137} Article 9(a) PPI governs that members of the European Parliament enjoy the same immunities as accorded to members of their national parliament in their own state. Within the European Parliament, it provides equal legal protection to the members, by way of Article 8 PPI. As a result of this arrangement, members are not equally protected. Because representation takes place increasingly outside Parliament’s premises (see above), they are even not equally protected when they engage in political activities.

The current immunity provisions undermine the capacity of members of the European Parliament to represent and reach out to all Union citizens, and certainly hamper their formal representative claim to do so. Moreover, the PPI infringes on the idea of institutional unity.\textsuperscript{138} The European Parliament is therefore determined to change the Protocol. Since the Treaty of Amsterdam, it is formally empowered to draft and lay down the statute for its members, from which immunity provisions are not excluded. However, as long as the 1965 PPI is in force, which is a Treaty Protocol and therefore constitutes primary law, this has priority over any piece of secondary

\textsuperscript{136} Section 1.1.
\textsuperscript{137} See Chapter 5, section 2.1.
\textsuperscript{138} Section 3.
Parliament’s power to amend this situation is thus very limited as long as the member states have not revised the Treaty.

This chapter has nonetheless shown that the European Parliament has accomplished relevant changes in the past years, making the legal protection of its members more similar. It did so by building on powers that it was given for different purposes. The most important ones in this regard are Parliament’s right to decide on waiver requests and its right to lay down its own Rules of Procedure. Section 4 described Parliament’s consecutive decisions in detail, which showed two different approaches. Initially, the European Parliament protected its members from prosecution for statements made outside Parliament by refusing to waive their immunity, as it may do according to Article 9 PPI. It thus sought to make their legal status more comparable de facto. In more recent years, Parliament has opted to re-interpret Article 8 PPI. Article 8 PPI provides an equal Union immunity to all members. The modern interpretation has it that the protection of Article 8 PPI covers all duty-related actions, even when they take place in a member’s home country. By subsequently amending its Rules of Procedure, the European Parliament created a legal basis to inform the national courts of its opinion in individual cases. The Court of Justice has confirmed that by virtue of loyal cooperation between the institutions, the national courts are bound to take this advice into account. It did not regard intervention by the European Parliament in principle inappropriate. Hence, it means that even for actions undertaken in a member’s home state, the national courts may be asked to respect the immunity of members of the European Parliament by virtue of Article 8 PPI. The case of Patriciello demonstrates that, to a limited extent, the legal protection of members has been harmonised.

The chain of decisions described above shows how the European Parliament tries to overcome members’ dependence on national legislation as much as possible. With virtually no formal rule-making powers from the start, it has managed to ensure that members from different European political parties and from different countries can debate, participate in demonstrations, and engage in other political activities on a more equal footing. It enables them to represent Union citizens.

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139 Section 2.4.
140 Section 2.4.
141 Section 4.2.2.
142 Section 4.2.2.
143 Section 4.1.
144 Alfonso Luigi Marra v Eduardo De Gregorio and Antonio Clemente (n 55) para 42.
145 Section 4.2.2. Patriciello (n 133).
6. Indemnity and Dependency on National Structures

The justification for a decent salary for members of parliament is similar to that of parliamentary immunity. It contributes ‘to safeguard the free exercise of their mandate and protects them against pressure that might undermine their independence.’\(^1\) The salary of members of parliament is generally referred to as *indemnity*: a compensation for time and efforts spent. Without this compensation, the liberty for members to undertake their legislative and control tasks attentively and extensively, could be hampered. A guaranteed indemnity for its members supports the autonomy of parliament vis-à-vis other institutions and the public.

The provisions regulating members’ salaries enclose more than just the amounts involved: they contain *representative claims*. They define the group of citizens, such as local or national taxpayers, that financially compensates the elected members for their work, and thereby indicate in whose name the elected members carry out their representative task. Salary provisions underline a particular representative relationship and so contribute to shaping the formal representative status of a parliament. Having a say over these provisions is necessary for a parliament to ensure its autonomy in general, and its liberty to make own representative claims about itself and its electorate in particular.

One could expect that the status of members of the European Parliament is laid down in a single document. This is not the case. It is regulated through different sets of rules. Members’ free mandate, the terms for gain and loss of membership, and the incompatibilities of office are laid down in the Direct Election Act of 1976.\(^2\) Their parliamentary immunity is provided for in the 1965 Protocol on the Privileges and Immunities of the European Union (PPI).\(^3\) And since 2005, there is a statute for members regulating the financial privileges of members of the European Parliament.\(^4\) All these rules are established through different decision-making procedures,

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1 Marc Van der Hulst, *The Parliamentary Mandate: A Global Comparative Study* (Inter-Parliamentary Union 2000) 27. In this investigation, I will use the words salary and indemnity interchangeably.
2 Act concerning the election of the representatives of the Assembly by direct universal suffrage (Direct Election Act) [1976] OJ L278/1. See for more Chapter 4.
in different moments of time and – as a result – contain different representative claims.

The present chapter focuses on the most recent of these documents. It analyses the actions that the European Parliament has taken with a view to amend the salary arrangement, and in particular the representative claim therein. It is built up as follows. Section 1 describes the *de jure* situation prior to the decision of 2005 to establish a common Union statute for members. It sets out what salary arrangements were in place in the period between the constituent session of the Common Assembly in September 1952 and the moment that the new salary arrangement entered into force on July 14, 2009. Additionally, it describes the formal powers of the European Parliament to lay down a financial statute for its members. Section 2 examines Parliament’s views on that initial arrangement, and studies the motives behind the changes that it demanded. Subsequently, we turn to the actions that Parliament undertook to accomplish these changes *de jure* and/or *de facto*. Two types of actions can be distinguished. Section 3 concentrates on the development of Parliament’s rule-making powers. Section 4 looks into Parliament’s unilateral decisions to provide its members with financial benefits even in the absence of a common statute. As we will come to see, it did so on the basis of its right to regulate its own affairs in particular. Finally, section 5 analyses how these actions have contributed to changing the financial status of the members of the European Parliament. And above all, how they have fostered the European Parliament’s liberty to make the representative claims that it deems fit.


1.1. National Salaries for European Representatives: An Untenable Situation

Until 1979, all members of the European Parliament held both a national and a European mandate. There was no need to arrange for a salary for their European duties, as all already received a salary for their work in the national parliament. The introduction of direct elections in the Direct Election Act of 1976 changed this radically. Since then, most members are full-time European representatives. The Direct Election Act formulates a limited number of common rights and duties, such as rules on the duration of the parliamentary mandate, the commitment that the representative mandate is a free one, and a list of incompatibilities.5 One could have expected that the Act would also include arrangements for members’ remuneration. This could either have been a European statute or a decision to continue to link the members’ salary to that of the national representatives of their country of origin. The text is however deafeningly silent on the matter. Apparently, the financial status of the members of the European Parliament was ‘too much of a hot potato’.6

5 Direct Election Act (n 2) arts 3, 4 and 6.
The level of parliamentary indemnity is always a precarious issue, closely tied to political culture and the validation of parliamentary work. This explains the existence of steep differences between the salaries of members of national parliaments across Europe. Agreeing a single European arrangement would have required a compromise on this sensitive issue. The member states would have to accept that ‘their’ European representatives would earn either substantially less or more than was deemed acceptable in the national political constellation. Moreover, a separate financial status would set the European representatives at a distance from the national structures. That effect is in particular relevant for the current study. A common financial arrangement would present the claim to the public, and to other institutions, that the members of the European Parliament represent a single, self-standing electorate rather than an electorate that is constructed as the sum of the national ones. The indemnitors would be the Union citizens, rather than the national ones (see below). It seems that the member states were not ready to accept this autonomous position of Parliament in 1976. Instead, they informally agreed that the members of the European Parliament would continue to receive the same allowances, old-age pensions, survivors’ pensions, and other benefits as the members of the national parliaments in the member state in which they were elected. Their salary remained tied to the national political culture. This informal arrangement remained in place until the introduction of a European statute for members in 2009.

The salaries of the directly elected European representatives thus varied considerably for thirty years. For instance, in 1999, members of different countries earned the following amounts (converted to Euros for comparison): a Spanish member earned 2849.14 Euro per month, Dutch members 5399.98 Euro, Austrians 8535.22 Euro, and the Italian members were the front-runners with an indemnity of 9975.74 Euro per month. As the members of the European Parliament were dependent on the national parliaments for shaping the salary provisions, their representative autonomy was very low. Parliament had no liberty to define their indemnitors. In this regard, it was ‘not a fully autonomous political institution’, as Julien Priestley, a former Secretary-General of the European Parliament, remarked.

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8 There were some minor exceptions to this rule. The Dutch members received a lower gross salary than their national counterparts. The remuneration of the latter also included reimbursement for expenses. This amount was deducted from the salary of the Dutch members. The French and Italian members did not enjoy the same pension benefits that their national members were entitled to. See, for more, Julian Priestley, Six Battles That Shaped Europe’s Parliament (John Harper Publishing 2008) 81; Anna Pospíšilová Padowski and Hans Krück, ‘L’Emancipation Difficile Des Eurodéputés – L’Histoire et Le Contenu Du Statut Des Députés Au Parlement Européen’ (2010) 46 Cahiers de Droit Européen 225, 226.
9 The statute was laid down on 28 September 2005. However, it did not come into effect immediately. The members of the 7th legislature (following the European elections of 2009) were the first to which the statute applied.
10 See table of the Committee on Legal Affairs and the Internal Market of the European Parliament, as published in Kaltheuner (n 7) 254.
11 Priestley (n 8) 86.
Moreover, in terms of content, the agreement allied the members of the European Parliament to national structures. As a result, members were treated as if they were ‘national delegates, rather than European representatives’. The national salaries established a formal link between the group of taxpayers in each member state and the members of the European Parliament from that country. This has influenced how the electoral relationship between the members of the European Parliament and their electorate was viewed. Susana Muñoz has described how, ‘[i]n the absence of a single statute, the Members of the European Parliament have generally been regarded as members of national parliaments.’ In this way, the European Parliament was seen as an assembly representing only national peoples.

1.2. Relatively High Rule-Making Power

The fact that the informal agreement remained in force for so long was very confrontational for many in the European Parliament. They had expected that a common salary would be agreed in the years following direct election. In their view, such a decision could, and should, be taken on the basis of the flexibility clause of Article 13 of the Direct Election Act. This provision made it possible to take complementary measures.

‘Should it appear necessary to adopt measures to implement this Act, the Council, acting unanimously on a proposal from the Assembly after consulting the Commission, shall adopt such measures after endeavoring to reach agreement with the Assembly in a conciliation committee consisting of the Council and representatives of the Assembly.’

However, the Council interpreted this provision differently than the European Parliament. In the view of the former, Article 13 only provided a legal basis for measures that were strictly necessary for the implementation, or in other words the organisation, of the direct election. It was not to provide a basis for decision on related matters, such as the remuneration or the legal position of the elected members. According to the Council, there was no legal basis for deciding a uniform salary for members until it was created by the Treaty of Amsterdam (1997). As this

12 Ibid.
14 Priestley (n 8) 81.
15 In fact, as becomes apparent from reading the debate of 15 September 1983, many MEPs recognised the inappropriateness of using Article 13 to establish a uniform statute for members. They insisted on it nevertheless, for tactical and practical reasons. They believed that it would be possible, if there was the political will for it. See for more, section 2.2.
16 Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts (Treaty of Amsterdam). The Treaty was signed on 2 October 1997, and entered into force on 1 May 1999.
Indemnity and Dependency on National Structures

legal basis, laid down in Article 190(5) EC, is crucial for Parliament’s representative autonomy, a closer look is useful.

Article 190(5) EC provides for an unusual decision-making procedure. Butler and Westlake have therefore called it a ‘new and innovative provision’. In particular, it envisages an exceptionally dominant role for the European Parliament.

> ‘The European Parliament shall, after seeking an opinion from the Commission and with the approval of the Council acting unanimously, lay down the regulations and general conditions governing the performance of the duties of its Members.’

In comparison to the common decision-making procedure at that time, two important differences emerge. Firstly, the European Parliament is provided with the right of initiative. It is put in charge of designing the statute for its own members. In most other areas, this remains the task of the European Commission. Secondly, the European Parliament is given the final say. Even in the ‘co-decision procedure’ (nowadays the ordinary legislative procedure), it cannot ‘lay down’ decisions. In this, the European Parliament and the Council are placed on an equal footing, as a decision requires their ‘joint adoption’.

> ‘The ordinary legislative procedure shall consist in the joint adoption by the European Parliament and the Council of a regulation, directive or decision on a proposal from the Commission.’

In the case of the statute for members, the provision explicitly provides the order in which the decision-making should take place. It is the European Parliament that takes the final decision. Evidently, this does not render the role of the Council meaningless. Without the Council’s approval, the European Parliament has no text to adopt. Nevertheless, Article 190(5) EC is constructed with an emphasis on the dominant role that the elected representatives ought to play.

One may wonder why this choice was made. The answer to this question can be found in comparing the extra-ordinary decision-making on the statute for members with another extra-ordinary procedure: the one on the electoral provisions. The two sets of rules are not identical. The European Parliament has the right of consent with

18 Nowadays, the text is found in Article 223(2) TFEU. Initially, the Council had to take such decisions unanimously. Since the Treaty of Nice, it can act by qualified majority, except in relation to the taxation of members or former members. Rules or decisions related to taxation continue to require unanimity within the Council.
19 Article 17(2) TEU.
20 Article 289(1) TFEU.
regard to the electoral procedure, whilst it is up to the Council to ‘lay down’ these provisions. By contrast, Parliament lays down the statute for its members. However, when we look at the right of initiative in these two sets of provisions, the similarities are striking. In both cases, Parliament draws up a proposal. It is apparently deemed inappropriate that the Commission (or any other institution) designs the rules that have an impact on the representative status of Parliament. That is first and foremost a task for the elected representatives themselves. As explained in Chapter 2, the need for this liberty stems from their free, representative mandate as well as the separation of powers principle. The members of the European Parliament have an explicit free mandate since 1979. When we regard Article 190(5) EC in this light, it is perhaps not such a strange procedure after all. The attribution to Parliament of the described far-reaching powers is understandable as Parliament must be in the position to make own representative claims.

2. Parliament’s Challenge

The European Parliament had no formal competence to lay down, or even draft, a statute for members until 1998. Moreover, until 2005, the representative claim that was made in the salary provisions, was that members were the representatives of national peoples. In the previous chapter on parliamentary immunity, we have already concluded that the European Parliament wanted an encompassing uniform statute, including a uniform salary for its members. Before describing – in the remainder of this chapter – the actions that Parliament has taken to further this goal, I first describe why Parliament demanded change. Thereby I focus on Parliament’s institutional motives. There may well have been other motives involved as well. When money is at stake, greed, jealousy and concerns about financial stability are often not far away. This study however concerns the development of Parliament’s capacity to make own representative claims, including through amending or laying down salary provisions. The question that is answered below is whether we can observe, by studying parliamentary reports, debates and decisions, that underlying Parliament’s efforts to accomplish a Union statute for members, there was (also) a desire by Parliament to increase its representative autonomy.

2.1. A Self-Standing Electorate

Parliament’s efforts to achieve a common statute were inextricably interlinked with the introduction of direct elections. Before these were held, the difference in the financial status of members was acknowledged as a logical consequence of the fact that members were selected by, and from, national parliaments. As their representative basis was tied to national institutions, so was their financial situation. How-

21 Article 223(1) TFEU.
22 Priestley (n 8) 87.
ever, once the European Parliament was composed of directly elected members, it insisted on a common, uniform statute without delay.23

Frederike Kaltheuner analysed the arguments that were exchanged in the parliamentary debates in favour of a single salary for all members.24 She found that ‘equal pay for equal work’ formed the dominant motive. Just as we have seen in the previous chapter on the deviating levels of parliamentary immunity, there was resentment amongst the members about the fact that the rules created ‘first class’ and ‘second class’ members in the European Parliament.25 This was regarded both ‘unfair’ for the persons involved and detrimental for the institution’s unity. Let us look at both elements in turn.

On a personal level, one could understand that vast differences in salaries between colleagues may be confronting and a cause for irritation. However, whether these differences can be considered unfair depends on how the comparison is made. Parliament’s records show that the members of the European Parliament compare themselves mainly with each other, and not with their colleagues in national parliaments. This is not an obvious and unavoidable choice. When comparing the workload of members of the European Parliament coming from different countries, we see huge differences between them.26 Members who are elected by a constituency-based system generally have more extra-parliamentary activities than those elected in systems with national lists. Moreover, in some countries, the constituencies are much larger than in others, a fact that also influences the level of work.27 The absence of a uniform electoral system on the European level and the existence of different national political cultures make the work of members of the European Parliament in many respects more comparable to their colleagues in the national parliament than to their colleagues from other countries within the European Parliament.

Additionally, there are large differences in the inconvenience that members of the European Parliament experience. Members from Spain, Greece, or the far north of Finland for instance, need more travel time to arrive at parliamentary meetings than members from the Netherlands, France, and Belgium.28 Travelling long distances is not only time-consuming, but it also makes it more difficult to combine parliamentary work with family life at home. So, also in this respect, the position of the members of the European Parliament coming from different countries is quite varied.

The overriding argument that brought the European Parliament to demand equal pay among one another nevertheless, is its view that members do ‘equal work’ be-

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24 Kaltheuner (n 7).
26 See the findings of the Group of Independent Eminent Persons that was set up to advice Parliament about a proper salary arrangement. ‘Recommendation of the Group of Eminent Persons on the Statute for Members’ (2000) <http://www.cvce.eu/content/publication/1999/11/16/f-11c6b2-a0bc-4b7d-abb8-130db6ddaac8/publishable_en.pdf>. See also Kaltheuner (n 7) 259-260.
27 ‘Recommendation of the Group of Eminent Persons on the Statute for Members’ (n 26).
28 Kaltheuner (n 7) 260.
cause they all equally hold office. They are all member of the same parliament, the European Parliament. Kaltheuner concludes that Parliament’s argument is based on all members having the same ‘work description’. This argument is also found in the conclusion of the group of independent eminent persons that was asked to advise Parliament on the statute for members.

‘The characteristics of Parliamentary office are the same for all Members, irrespective of the electoral system used in their countries. They all carry out the same Parliamentary work in accordance with the rules governing the way in which Parliament operates.’

However, not only a mere ‘work description’ is shared by members of the European Parliament. It is not just that they equally have to participate in meetings in the plenary, of the committees, and of their European political groups. More fundamentally, they share a similar ‘representative basis’. This representative basis is distinctive from that of members of national parliaments. The members of the European Parliament are ‘different animals’, as Priestley remarks. This has become particularly noticeable since the creation of Union citizenship. Since then, members of the European Parliament are elected by citizens in their capacity as Union citizens, while members of national parliaments are elected by citizens in their capacity as nationals. Its election by Union citizens forms the representative basis of the European Parliament. Considering that neither the job description nor the representative basis of the members of the European Parliament and the national parliaments is the same, there is no justification for them being paid the same. The standard of ‘equal pay for equal work’ should thus apply between the members of the European Parliament mutually, irrespective of their nationality, and not between the elected representatives of the same country, irrespective of the parliament in which they were elected. Notwithstanding personal considerations about fairness, the equal pay of members of the European Parliament can be regarded as appropriate from an institutional perspective.

The parliamentary records testify that the members were well aware that a common remuneration would make a different representative claim than the initial arrangement made. It would underline the existence of a distinctive European representative basis. Frassoni, for one, stated that a uniform statute for members would stress that the European Parliament represents ‘the European people’. Not all

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29 Ibid.
30 Ibid.
31 ‘Recommendation of the Group of Eminent Persons on the Statute for Members’ (n 26) 5.
32 Priestley (n 8) 97.
33 See Chapter 1, section 2.1.
members were happy with this implication. This surfaces in for example the contribution of van Dam.

‘[H]aving a Community statute may nurture the idea that Parliament represents one people. But the European Union is made up of a rich diversity of different peoples. We are elected by the people of our own nation and must also bear in mind our national interest.’

The disagreements that were voiced about the desirability of this particular claim only emphasise that opponents and supporters realised that a common financial statute for its members would change the formal representative status of the European Parliament to some extent. The salary provisions would then highlight the fact that the European Parliament is a unitary institution and not a collection of national delegations. Moreover, it would reflect and strengthen the claim that Parliament represents a self-standing electorate composed of Union citizens.

The German social-democrat Rothley, a long-standing rapporteur on this dossier, vocally pressed this point during a parliamentary debate on the statute for members on 2 June 2003.

‘Why is it that this house is in this difficult position? It is because, in 1976, when the Act concerning the election of the Members of the European Parliament by direct universal suffrage was introduced, the Council fought shy of harmonising the general conditions applicable to the exercise of the mandate. It found that too much of a hot potato. That is why the European Parliament retained the structure of a parliamentary assembly even after it started to be directly elected, a structure it retains to this day. The object of this statute is to break down this parliamentary assembly-style structure and for us to become a real Parliament. That is what this Statute is for!’

The European Parliament demanded a common statute as a means to amend its representative status and change its position in the institutional architecture.

2.2. Full Rule-Making Autonomy

For a long time, the European Parliament demanded an increase of its rule-making powers to lay down a statute for its members. The desired level of Parliament’s involvement has been subject to change. In 1960, rapporteur Dehousse proposed to make the European Parliament solely responsible for designing and deciding future

electoral provisions (see Chapter 4). Dehousse did not make explicit whether the same decision-making process would apply for the rules regarding members’ indemnity as well. It can nonetheless be assumed that, in his view, this formed part and parcel of the electoral provisions, and that he did not envisage a more modest role for Parliament on this particular aspect. Fifteen years later, the European Parliament showed itself more willing to share rule-making power with the Council regarding the salary provisions (see Chapter 4). Rapporteur Patijn created a special procedure, in Article 14 of the 1975 Draft Convention, according to which the European Parliament and the Council would have equal rights for adopting measures to implement direct elections. In his explanation, Patijn highlighted that the remuneration of members was one of the matters that ought to be regulated by means of this procedure.

Parliament continued to advocate for equal involvement of Council and Parliament in the years thereafter. Because Patijn’s proposals were not fully endorsed in the 1976 Direct Election Act, the European Parliament was left without rule-making power on the statute for members, and even without a right of initiative (see Chapter 4, section 3.2). Creating a legal basis for a statute in primary law, and a procedure for adopting it, became one of Parliament’s priorities during subsequent treaty revisions. In these proposals, it envisaged an important role for the Council along the same line as finally laid out in Article 190(5) EC.

The call for co-decision between Council and the European Parliament can be read as resignation to the fact that Parliament would (and maybe should) not be fully autonomous in deciding the financial status of its members. However, it may also simply have been a tactical manoeuvre to ensure that Parliament would get a seat at the decision-making table. The latter theory is supported by the fact that, once the European Parliament had acquired the right of initiative and final adoption via the Treaty of Amsterdam, it tried to further augment its powers at the expense of the Council. In the Intergovernmental Conference (IGC), preparing the later Treaty of Nice, the European Parliament proposed to be made solely responsible for establishing a statute for members. Article 190(5) of the EC Treaty should be amended as follows: “The European Parliament shall lay down the regulations and general conditions governing the performance of the duties of its Members.”

Parliament’s 2000 demand is similar to its position forty years earlier. However, today, the desire to fully side-line the Council is not strongly present in the European Parliament. The IGC-proposal was highly controversial within Parliament itself,

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41 Priestley (n 8) 88.
42 Ibid.
and has not been repeated since.\textsuperscript{44} Due to the constitutional implications and the vulnerability of deciding on one's own salary, many members seem ready to accept that Parliament is not in a position to unilaterally settle the status of its members.

At any rate, the involvement of the Council in establishing a European statute for members was much less controversial than the fact that in the pre-statute era members were dependent on national legislation and national parliaments for their legal and financial status. That was conceived as ‘wholly inappropriate and improper’.\textsuperscript{45} Therefore, Parliament’s main priority has been to replace the variety of national legislations by Union legislation as soon as possible.

3. The Battle for the Right of Initiative

We now know Parliament’s formal competences to change the legal provisions as well as its objectives. The central question in the following two sections is how Parliament acted in order to advance its goals. In this exercise, primary law is taken as an external fact. The influence that Parliament may have had on the adoption of the treaty texts is not taken into consideration. Instead, the focus is on the gap between Parliament’s formal powers to lay down a statute and how it has acted to accomplish it nonetheless. This section explains the development of Parliament’s right of initiative.

3.1. Parliament Grabs the Initiative

As stated before, prior to the Treaty of Amsterdam the European Parliament lacked the right of initiative regarding the regulations and general conditions governing the performance of its members’ duties. However, Parliament acted \textit{as if} it had. In 1976, following the adoption of the Direct Election Act, Parliament set up a special parliamentary working group. This group presented the Council input for a future, uniform statute.\textsuperscript{46} In July 1979, a month after the new legislature was invested, a second working group convened, chaired by Glinne. It came forward with a proposal for a common statute in which the salary of the members was calculated as a percentage of the salary of a judge at the European Court of Justice.\textsuperscript{47} Neither proposal evoked a positive response by the Council. Therefore, on 15 September 1983, the European Parliament put some pressure on the Council. It needed ‘to decide on a common statute for the Members of the European Parliament of the European Parliament in time for it to apply to the second term of Parliament.’\textsuperscript{48} In its resolution, Parliament

\textsuperscript{44} The phrase was supported by only a slim majority in the responsible committee. Report on the European Parliament’s proposals for the Intergovernmental Conference (Rapporteur: Giorgos Dimitrakopoulos) (EP 2000, A5-0086/2000).


\textsuperscript{46} Draft Statute of 14 December 1976 for Members of the European Parliament elected by direct universal suffrage (Draftsman: Walter Behrendt) (I/459 F/76 (ASS)).

\textsuperscript{47} Pospisilová and Krück (n 8) 229; Priestley (n 8) 88.

underlined that the content of Council’s decision should be based on a proposal by Parliament’s enlarged Bureau. Designing the text was regarded as primarily a matter for Parliament itself, even though this principle was not laid out as such in primary law. It is noteworthy that the Council and the Commission did not dispute Parliament’s ‘right’ of initiative. They discussed the proposals even in the absence of a formal legal basis for them. The Commission even drafted a formal reaction to Parliament’s proposals. This course of events can be seen as evidence that Parliament managed to develop a right of initiative in practice, an innovation that no doubt was fostered by the existence of the norm that parliaments in general ought to have sufficient autonomy – including in relation to shaping the salary provisions of their members.

While the Council discussed the parliamentary initiatives, it was unable to reach a unanimous decision on them. In order to provide new input and place the issue higher on the political agenda, the European Parliament constituted new working groups in 1995 and 1997. These efforts did not however manage to break the deadlock in the Council.

3.2. Council’s Counterclaim

On 2 October 1997, the Treaty of Amsterdam was signed, giving the European Parliament the right of initiative regarding its members working conditions. The Treaty was to come into effect on 1 May 1999. However, the European Parliament did not want to wait that long before taking new initiatives. It hoped to take advantage of the momentum right away with a view to establishing a statute before the next European elections in 1999. Therefore, on 3 December 1998, it adopted a resolution, containing an expansive proposal. It included provisions on the remuneration of the members, but also on matters such as the incompatibilities of office, the verification of credentials, and parliamentary immunity. As the Treaty of Amsterdam was not yet ratified, the proposal lacked a formal legal basis. According to the European Parliament, this was not necessarily problematic as it could be agreed upon conditionally.

‘[T]his Statute should enter into force as soon as the ratification of the Treaty of Amsterdam provides a legal basis for the adoption thereof’.54

51 Pospísilová and Krück (n 8) 230.
52 Ibid.
54 EP Resolution of 3 December 1998 on the draft statute for Members of the European Parliament (n 53) para D.
However, as in the previous decades, the proposal failed to receive unanimous enthusiasm in the Council. The member states objected to numerous elements of the draft, including the level of indemnity, the retirement age of the members, and the inclusion of provisions on immunity. Moreover, they wanted to add a new element: ‘the possibility of imposing national tax on earnings of Members subject to their national tax system’. Considering its objections, the Council could have rejected Parliament’s texts and awaited new proposals. Instead, the General Affairs Council of 26 April 1999 came up with alternative formulations itself. The minutes of this meeting record the following:

> The Council reached political agreement on an overall compromise concerning the draft Statute for Members of the European Parliament adopted by the European Parliament on 3 December 1998 (13978/98). The terms of the compromise are set out in 7528/2/99 REV 2.
> The Council instructed the Presidency to forward the outcome of its proceedings to the European Parliament and expressed its willingness to give its opinion very swiftly by means of the written procedure on a revised draft which the European Parliament would submit to it formally after 1 May 1999, the date of entry into force of the Amsterdam Treaty containing the legal basis for it.

The Council’s reaction did not go down well with the members of the Legal Affairs Committee. Rapporteur Rothley considered it a clear attack on Parliament’s right of initiative.

> There is no basis in the Treaty for the Council to draw up the text of a Statute, to which Parliament merely gives its assent. Such an approach turns the procedure on its head and constitutes a breach of the Treaty.

One may question whether Rothley was right in a legal sense. After all, at the time that the Council adopted its proposal, the European Parliament was still without a de jure right of initiative. Nevertheless, in view of any parliament’s need for autonomy in this matter, and the fact that Article 190(5) EC would be applicable only a week later, the Council’s proposal can very well be seen as a violation of the spirit of the treaties.

The members of the European Parliament were highly divided on how to respond to the Council. There were many different motives involved. Some members wanted

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55 Pospíšilová and Krück (n 8) 233; Priestley (n 8) 90-91.
58 Ibid.
to reject the Council’s proposal as they felt strongly about safeguarding Parliament’s right of initiative.60 Others used this institutional argument, but in fact simply favoured the content of Parliament’s original text.61 Yet another group of members, consisting of members from northern countries in particular, shared the Council’s criticism regarding the level of the salary and the generous allowances system. They were willing to turn a blind eye to the Council’s intrusion into Parliament’s institutional privileges, and to accept its text as a good basis for negotiations.62

The different positions in the European Parliament can not only be understood as different assessments about what constitutes the most profitable position in terms of financial benefit or institutional power. More than before, it was (also) about reputation, electoral gain, and connecting to the public. The statute has the potential to change the relationship with the electorate. This perspective inspired some members to battle for a statute that was as uniform as possible. Only that outcome would send the unequivocal message that the members of the European Parliament have a self-standing electorate and represent Union citizens as a single group. That was the representative claim that they wanted to make. They resisted the Council’s proposal, which allowed for national taxation, as this would mean that members’ net salaries would continue to differ and to depend on their nationality. Others, however, seriously feared that a too generous scheme, and an exclusion from national taxation, would permanently damage people’s trust in the European Parliament.63 Such rules would not just set the Parliament apart from the national structures, but from citizens as well. Furthermore, and apart from any theories on representation, many members simply feared negative articles in the press if they rejected Council’s proposal for austerity. In short, the reactions by the public had a more direct impact on the actions of the representatives than was customary before.64

After fierce discussions, the European Parliament adopted a new resolution on 5 May 1999, less than a week after the entry into force of the Treaty of Amsterdam.65 The political message is immediately evident at the beginning, in paragraph 1. Parliament ‘[c]onfirms the resolution that it adopted on 3 December 1998’.66 In other words, the majority of the European Parliament decided to reinstate the original text of Parliament as the starting-point of any negotiations. The Council’s text was off the table. Moreover, Parliament reminded the Council that Parliament now formally had the right of initiative, and that the Council was bound to respect that by the duty of sincere cooperation.67

60 See Priestley (n 8) 91.
61 Ibid.
63 Butler and Westlake (n 17) 42-43.
64 EP Resolution of 5 May 1999 on the draft Statute for Members of the European Parliament (n 34) para H. See also Butler and Westlake (n 17) 42-43.
66 Ibid para 1.
67 Ibid para 4. The duty of sincere cooperation is nowadays enshrined in Article 13(2) TEU.
The negotiations were thus undertaken on the basis of the proposals by the European Parliament. Materially, this did not significantly reduce the Council’s influence. The latter used the fact that its approval was imperative to force the European Parliament to draft compromises. The Council may not have been the author, but certainly provided the inspiration for many clauses in Parliament’s texts. To support this conclusion, it is useful to turn to the text that was finally laid down by the European Parliament on 28 September 2005.

Most importantly, the decision determines that all members of the European Parliament are paid the same gross salary. Their salary is set at 38.5 per cent of the basic salary of a judge at the European Court of Justice, resulting in the amount of 7956.87 Euro over which they pay European tax. Also the social provisions, pensions and health insurance are the same for all members (they receive further elaboration in section 4.2). The money is paid directly from the European Parliament budget.

On these issues, the European Parliament could be satisfied with the outcome as it came close to what it had wanted to accomplish. However, on other issues, it accepted painful compromises. The first one concerned taxation. The European Parliament had to accept that member states can levy national taxes on members’ salary, provided that double taxation is avoided. This possibility had been qualified as ‘illegal, unjust and wrong in substance’ in one of the parliamentary debates. It would mean that ‘discrimination’ on the basis of nationality would effectively continue to exist. A secondly compromise related to the reimbursements of expenses incurred by the members. The European Parliament has always strongly opposed the incorporation of detailed provisions on this matter in the statute for members. In its view, such provisions do not fit in a constitutional text. Moreover, Parliament regarded regulations on reimbursements for work-related expenses a matter to decide on independently, as they fell under the scope of Parliament’s right to regulate its own affairs. The Council, however, refused to agree to a Union salary for members without simultaneously restricting Parliament’s liberty to hand out generous allowances. As we will see in the next section, these allowances were the object of much public outcry, as they often exceeded normal compensation for costs incurred. Parliament was forced to accept a provision providing that members would only be entitled to the reimbursement of ‘actual expenses incurred’.

Equally distressing to Parliament was the removal of any references to Union immunity. From the start, it had insisted on a statute that would incorporate both financial and legal aspects of the parliamentary mandate. Yet, after all these decades

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68 European Parliament Decision 2005/684/EC Euratom (n 4) arts 9-10. The amount mentioned, 7956.87 gross per month, took effect as of 1 January 2014. For taxation, see art 12(1).
69 Ibid arts 13-19.
70 Ibid art 12(3).
72 Pospisilová and Krück (n 8); Priestley (n 8) 99.
73 European Parliament Decision 2005/684/EC Euratom (n 4) art 20. This provision should be read in combination with ‘whereas’ 17-18, as will be explained in the next section.
of struggle, it was now left with a text that mainly settled financial matters, and left the differences in members’ legal protection unaffected (see Chapter 5).

One might say that the final compromise is more in line with the Council’s position than with that which the Parliament had set out to accomplish. This is a remarkable outcome, considering Parliament’s exceptionally strong rule-making powers in this dossier. In the previous chapter, we have seen that Parliament’s factual room to manoeuvre often exceeded its formal decision-making competence. Here, the reverse seems to have been the case. How can this be explained? What is the reason that, in respect of the statute for members, Parliament’s power was not increased, and even seemingly diminished \textit{de facto}? Let me give an explanation, in the light of the battle for representative autonomy.

In other areas, Parliament’s effort to increase its representative autonomy was regarded as fitting behaviour in view of its tasks. For instance, its quest for a similar legal protection for all the members of the European Parliament enabling them to engage on an equal footing in European political activities can be accepted as appropriate, or at least as not utterly \textit{inappropriate}. It may also be that the Council could accept Parliament’s autonomous case-law on immunity, and the changes it introduced through the Rules of Procedure (see Chapter 5, section 4), because there was only limited public interest in this matter.

This did not apply to the statute for members. There was more public interest than Parliament may have wanted in how it was shaping the salary provisions. Even the representative claims therein were a matter of concern. Would the members of the European Parliament come to pay national taxes or would their financial status be fully disconnected from national structures? Would their salary be tied to that of national representatives or to that of the scale of European civil servants? These matters were discussed by the public and in national parliaments. Parliament was formally at liberty to take the decisions that it deemed fit with the approval of Council. However, its substantive liberty was limited. There was a serious risk that public opinion would turn against a uniform salary, including the claim therein that members represent, and should thus receive indemnity from, Union citizens. Such a rejection would undermine Parliament’s legitimacy. In the case of the statute, the Parliament was pushed off-stage by the Council. The former lost ground, while the latter strengthened its position. The reason for this twist is that the Council was seen as acting in the interest, and with the approval, of the public. At the end of the day, it was the Council that enhanced its representative autonomy – not the European Parliament. The Council adjusted its representative claim, making itself not only the mouthpiece of national governments, but also the representative body of the national peoples. The strong interventions by the Council in laying down the statute for members of the European Parliament provides us with an interesting new element in the puzzle of how the European Parliament can foster its autonomy. It can only do so when the Council cannot make a \textit{better claim} to represent the electorate.

4. Organisational Autonomy: The Sky and the Limits

Since its election, the European Parliament has fought for a uniform statute for its members. To accomplish this, it did not focus exclusively on the legislative process. In the Eighties and Nineties, Parliament set up several social security schemes for
its members on the basis of its right to regulate its own affairs. In their study on the statute, Pospíšilová and Krück explained the rationale behind the adoption of these schemes. They aimed 'to compensate for the existing inequalities between Members coming from different Member States'. These findings suggest that de facto a minimum statute for members was already in place prior to the 2005 decision, by which one was adopted de jure. The current section examines Parliament’s unilateral decisions regarding its members’ pensions and social securities. Has Parliament, through these decisions, effectively enlarged its representative autonomy in practice?

4.1. Parliament’s Own Social Security Schemes

According to Parliament’s Rules of Procedure, its Bureau is responsible for taking financial, organisational, and administrative decisions on matters concerning the internal organisation of Parliament and its members. This provided, at least in the view of the Bureau, a legal basis for the setting up of own social security schemes. As we will see in the next section, this interpretation was not shared by the Council.

Of all the social security arrangements that have been set up, the voluntary pension fund forms one of the most well-known (and notorious) ones. It was established by a decision on 12 June 1990. All members of the European Parliament were free to join this fund. They had to pay one-third of the contribution; the other two-thirds were paid from Parliament’s budget. The fund provided an additional benefit. It did not replace the national pension pay-out that members were already entitled to (and that national members of parliament received as well). Consequently, those members who decided to opt-into the voluntary pension fund received a double pension for their work as member of the European Parliament. The national pension was largely paid for by the national taxpayer; the European one by those contributing to the Union budget. The decision by the Bureau to establish the voluntary pension fund is remarkable. After all, pensions can be defined as ‘delayed salary’. One would therefore expect that a European pension scheme would be regulated in the framework of a statute for members. From reading the decision, it emerges that the Bureau would have indeed preferred that. However, in the absence of a statute, it considered itself well-placed to create a temporary solution. As indicated in the first paragraph of the Bureau decision, the voluntary pension scheme was established ‘[p]ending the adoption of a single Statute for Members’.78

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74 Pospíšilová and Krück (n 8) 226.
75 Rules of Procedure of the European Parliament – September 2015, Rule 25. The Bureau is composed of Parliament’s President and Vice-Presidents. The Quaestors have an advisory capacity.
76 Rules Governing the Additional (Voluntary) Pension Scheme 1990. See for this arrangement and the following the Rules Governing the Payment of Expenses and Allowances to Members [1999] PE 133116/Q/REV, 56.
77 The budget from the European Union has several sources. Member states pay a percentage of their gross national income (around 0.7 per cent) to the EU budget. Also, a small percentage of VAT (around 0.3 per cent) is paid into it. Other sources are inter alia customs duties on imports from outside the EU, fines, and taxes by EU civil servants.
78 Rules Governing the Additional (Voluntary) Pension Scheme (n 76) art 1.
The voluntary pension fund was not the first decision that the Bureau had taken with regard to pensions. In 1981, it had set up a *retirement pension* fund, seeking to ensure that all members received a pension that was not lower than what members in the national parliaments were entitled to. 79 While this situation was the rule for most members, the French and the Italian members constituted an exception to this. The European arrangement was tailored to them, as they received less than their national counterparts. The 1981 decision was the first in which money was allocated from the European budget for the old-age benefit of members of the European Parliament. Even though it was only limited in scope, it forms an important precedent. It breached the member states’ political agreement of 1976, according to which the salaries of the members of the European Parliament was a matter for the member states in which they were elected (see section 1.1). Once this route was taken, other funds followed. In 1982, the Bureau set up an *invalidity pension*. 80 In 1988, it decided on a *survivors’ pension*. 81 In both cases, the entitlements were linked to that of a European judge, being an autonomous reference standard. Together, the arrangements described above, formed an important part of what can be regarded as a European statute for members *avant la lettre*. When the statute was agreed in 2005, they were either included explicitly in the final text or made superfluous by it. For example, an invalidity pension can be found in Article 15, a survivors’ pension in Article 17, and Article 14 regulates that all former members are entitled to a European old-age pension from the age of 63. By virtue of Article 27, members can no longer join the additional voluntary pension scheme. 82

Also in other areas than pensions, the Bureau has arranged for benefits that normally are part and parcel of a statute for members. The *transitional end-of-service allowance* is an example thereof. Many countries provide their members of parliament with such an allowance in order to guarantee a scrupulous exercise of the representative mandate. The pay-out enables members to decide about resignation or continuation of their office without having to take short-term financial concerns into consideration. However, not all countries have such an arrangement. Consequently, some members of the European Parliament received no, or only a small, allowance at the end of their mandate, whilst others received large amounts. In 1988, the Bureau decided:

79 Rules Governing the Retirement Pension 1981. The decision is incorporated in the Rules Governing the Payment of Expenses and Allowances to Members (n 76).
80 Rules Governing the Invalidity Pension 1982. See Rules Governing the Payment of Expenses and Allowances to Members (n 76).
81 Rules Governing the Survivors’ Pension 1988. See Rules Governing the Payment of Expenses and Allowances to Members (n 76).
If members already received an allowance under national law, they could ask for a European ‘top-up’ in case the national arrangement was less generous than the rule above. The decision thus intended to reduce the differences in financial compensation of the members. However, these differences did not fully disappear, as the Bureau made the entitlements dependent on the national salaries that the members had earned. Nevertheless, it meant that the financial positions of members of the European Parliament became (a little) more comparable. Inevitably, this also meant that the position of members of the European Parliament and members of the national parliaments became more divergent. The temporary arrangement was made redundant by the introduction of a statute for members. The latter foresaw an end-of-service allowance of the same level as the new European salary in Article 13.

The web of financial benefits that was created for members of the European Parliament, also included some other reimbursements. It is not necessary to describe them all in detail. Only the travel allowances still need explicit attention. As indicated earlier, they were at the core of clashes between the Council and the Parliament during the negotiations on the statute for members. At a first glance, travel allowances may seem unrelated to the financial status of members. This latter covers the indemnity of members, composed of pensions, salaries, and social security arrangements. Travel allowances are part of a different category. They are, in principle, only meant to reimburse for costs incurred. However, in the case of the European Parliament, the reimbursements for travel expenses were so generous that members could have an additional income from it if they chose to cash the full amounts (which not all did). It has been argued by several scholars that there was an institutional justification for providing such generous reimbursements. According to Pospisilová and Krück, the payments were part of Parliament’s strategy to reduce the relative differences in members’ national salaries. Priestley also points out that the allowances aimed to ‘soften, or even remove, the impact of the salary discrimination.’

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83 Rules Governing the Transitional End of Service Allowance 1988, art 1. See Rules Governing the Payment of Expenses and Allowances to Members (n 76).
84 Rules Governing the Transitional End of Service Allowance (n 83) art 2.
85 For example, the Dutch and German members of the European Parliament publicly pledged to pay back into the European budget the difference between the actual costs they made for travel arrangements and the amounts that they received for it from Parliament’s administration.
86 Pospisilová and Krück (n 8) 227. See also Muñoz (n 13) 4.
87 Priestley (n 8) 83.
The fact that the Portuguese, Greek and Spanish members, who did well out of this situation, were the poorest paid MEPs, meant that a “hidden salary” evened things up for them.88

The findings in this section support the conclusion of Pospíšilová and Krück that the reimbursements and the social security schemes succeeded in reducing the inequalities between members to a certain extent.89 In this respect, they served their purpose. However, precisely because of this impact, it is difficult to understand how Parliament could decide on the building blocks for a statute in the absence of a treaty basis for such statute. This is the subject to which we now turn.

4.2. Limits on Parliament’s Organisational Autonomy

The decisions described above were taken by the Bureau on the basis of Parliament’s right to regulate its own affairs. This right was originally laid down in Article 25 ECSC, and since 1958, in Article 142 EEC (and Article 112 Euratom). At the time of the negotiations on the statute for members, it was contained in Article 199 EC.90 It reads as follows:

‘The European Parliament shall adopt its rules of procedure, acting by a majority of its members.’

The provision stems from, and reinforces, the fact that the European Parliament is an independent institution.

The use of Article 142 EEC as a legal basis for decisions with financial implications, did not go unchallenged. Even in the period when members of the European Parliament only received relatively modest travel (and subsistence) allowances, and the social security arrangements were not yet in place, several national governments objected this. They argued that Article 142 EEC was not meant as a legal basis for financial handouts. It only served to enable the adoption of procedural rules for organising Parliament’s work properly and effectively.91 In 1980, the matter was referred to the European Court of Justice for a preliminary ruling.

88 Ibid.
89 Pospíšilová and Krück (n 8) 226.
90 Nowadays, it is found in Article 232 TFEU. In this section, I shall refer to the numbering of the provisions at that time. This means that, when referring to Parliament’s right to regulate its own affairs, I shall speak of Article 199 EC. When discussing the legal basis for the adoption of a European statute for members, I refer to Article 190(5) EC.
The concrete question raised in the case of *Lord Bruce of Donington versus Eric Gordon Aspden (Her Majesty’s Inspector of Taxes)* was whether a British member of the European Parliament could be held liable to pay national income tax over the travel and subsistence allowances that he had received from the European Parliament. In its ruling, the Court underlined that the European Parliament ought to be at liberty to reimburse costs incurred by its members. This is an essential privilege that ensures its proper functioning.

‘[I]t is a matter for the Parliament to decide which activities and travel of Members of the Parliament are necessary or useful for the performance of their duties and which expenses are necessary or useful in connection therewith. The autonomy granted to the Parliament in this matter in the interests of its proper functioning also implies the authority to refund travel and subsistence expenses of its Members not upon production of vouchers for each individual item of expenditure but on the basis of a system of fixed lump-sum reimbursements.’

The Court of Justice clarified that it was for the European Parliament itself to decide how the cost would be incurred. This could be done on the presentation of tickets, or by means of lump-sum payments. In both cases, the member states were not allowed to levy national tax on the received payments. At the same time, the Court outlined the limitations to Parliament’s liberty. The restitutions to the members should be ‘reasonable’. They should not be so lavish as to form a disguised remuneration in fact. Considering this criterion, it can be assumed that if a similar preliminary question would have been raised years later, after the European Parliament’s Bureau had established the overly generous reimbursement scheme, the Court would have reached a different conclusion. Also, considering its reasoning, it is likely that the Court would not have accepted Article 142 EEC as the appropriate legal basis for the Bureau’s decisions to set up a voluntary pension fund and other social security arrangements. They were not strictly necessary for the performance of members’ duties.

The introduction of a legal basis for a statute for members in 1997 implicitly underlines that the European Parliament had overstepped its powers in the previous years. The provision regulated that, at least from then onwards, the European Parliament could no longer lay down building blocks for a statute for members on the basis of its organisational autonomy. This had to be done on the basis of Article 190(5) EC, and hence with the approval of the Council. For those who believed that Parliament’s previous acts had fallen within its purview, it meant that Parliament’s liberty was curbed by the introduction of Article 190(5) EC.

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92 *Lord Bruce of Donington v Eric Gordon Aspden* (n 91) para 17.
93 Ibid para 22.
94 Ibid para 21.
The Council held that the new treaty provision formed the appropriate legal basis for all decisions regulating some form of financial compensation for the members. In its view, the Council should thus also have a say in decisions regulating members’ travel costs. The European Parliament strongly disagreed with this. In the aforementioned case of Lord Bruce of Donington versus Eric Gordon Aspden (Her Majesty’s Inspector of Taxes), the Court had highlighted that the European Parliament ought to be at liberty to compensate its members for costs incurred for the performance of their duties. Therefore, it was in line with this early judgment that the European Parliament insisted to keep the full say over its members’ travel allowances, and to retain its organisational autonomy.95

‘There is no reason to call this autonomy in question. Article 190(5) ECT is intended to extend the European Parliament’s powers to regulate its own affairs, not to curtail them.’96

During the lengthy negotiations for the statute, the solution for this dispute was eventually found in the ‘Paquet Cox’, named after the Parliament president who had proposed the strategy. The package managed to square the circle of reconciling Parliament’s right to regulate its own affairs with Council’s objective to avoid an abuse of this right. Both institutions agreed to include in the statute the general principle that Parliament shall reimburse the actual expenses incurred by Members in travelling to and from the places of work and in connection with other duty travel’ in the statute.97 The Bureau of the European Parliament remained formally responsible for laying out the details. However, two additional provisions in the text, accompanying the statute, reduced its effective liberty. A first provision referred to a Bureau decision of 28 May 2003 that (deliberately) had not yet entered into effect. The decision foresaw a ceiling for the reimbursement of costs, and required the presentation of supporting documents such as tickets and boarding passes for air travel and tickets for rail travel. According to paragraph 18 of the statute for members, the decision of 2003 ‘should enter into force at the same time as this Statute’. In other words, once all members received a European salary, the Bureau would stop to provide a ‘hidden’ additional salary. A second limitation was set by paragraph 17 of the statute, reminding the institutions that any new rule ‘must be in conformity with the principles set out by the Court of Justice of the European Communities in the ‘Lord Bruce’ judgment.’98

According to Friedrich, one of the vice-presidents of the European Parliament (and already serving since 1979), the changes meant an infringement on Parliament’s rights:

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95 Report on the draft Statute for Members of the European Parliament (Rapporteur: Willi Rothley) (n 59) explanatory statement, item 3e.
98 Ibid 3.
Overall, the statute has put limitations on how Parliament previously interpreted its right to organisational autonomy. Nevertheless, the statute also offers the European Parliament new windows of opportunity to make rules with an impact on members’ financial situation without the involvement of the Council. Many articles of the statute, having formulated the concerned right in general terms, conclude with the phrase: ‘Parliament shall lay down the conditions for the exercise of this right.’ In line with Parliament’s Rules of Procedure, it is again the Bureau that has to decide on these implementing measures. They will no doubt be interesting material for future research.

5. Conclusion

The European Parliament adopted the statute for members on 28 September 2005, after an opinion given by the Commission, and with the approval of the Council. As a result, all 751 members of the European Parliament receive the same gross salary. No longer are they paid the equivalent of members of the national parliaments of the country in which they were elected. Nowadays, they have specific rules applying to them. The decision to arrange for a common gross salary for all members of the European Parliament, irrespective of where they have been elected, has amended the representative status of the European Parliament. The previous arrangement tied members to national structures (as national parliaments established the level of their salary) and to a national electorate (as national taxpayers paid for it). Conversely, the new status stresses that the European Parliament is a unitary representative body with a distinctive, own-standing electorate.

Still, nationality is, and continues to be, an important feature of Parliament’s electorate. This is also reflected in the salary provisions. The gross salary of all members are now the same, but their net salary is not. Member states are at liberty to impose national taxes on the salary of members of the European Parliament. This decision to allow differentiation may be helpful to avoid that members are (accused of being) alienated from the concerns of citizens, and immune to the rules that apply to them. As such, it may serve the legitimacy of Parliament. However, it also stresses the exist-

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100 See for example arts 15, 17-18, and 20-22.
102 The text was adopted by the Council on 18 July 2005 at its 2674th meeting. Doc. 11173/05.
103 Section 1.1. Section 2 subsequently describes Parliament’s views on this.
ence of different political cultures and a special relationship between members and national citizens. Therefore, to a certain extent, this national taxation can be seen to undermine the claim that Parliament’s electorate is a unitary group.

The continued relevance of the member states also shows itself in how the indemnity is collected. Members of national parliaments receive their salary from the national budget. This is composed (to a large extent) of the contribution by national taxpayers, who can be regarded as their indemnitors. The members of the European Parliament receive their money from the Union budget. One may expect that this is collected from the contributions of Union citizens, making them the indemnitors of the members of the European Parliament. However, the largest source of revenue of the Union budget are contributions by the member states based on a percentage of their Gross National Income. The claim that the European Parliament represents Union citizens (as a unitary group) would be served by a decision to levy Union income tax. Until now, the Treaties do not foresee in this possibility. We can thus conclude that, although the statute of members has raised the profile of the European Parliament as a representative body of Union citizens, the picture is not unambiguous.

Additionally, the development of Parliament’s powers has shown not to be an issue with straight progression and a clear-cut outcome. This can be observed from, for instance, the development of the right of initiative. Parliament has exercised this right, prior to it having been formally granted. The lenience shown by the other institutions is understandable. After all, a statute has the potential to affect the relationship with the electorate. It is therefore appropriate that this statute is designed by those holding free, representative mandates themselves. Parliament’s right of initiative was legally enshrined in the Treaty of Amsterdam (1997), Article 190(5) EC.104 However, Parliament has not always been in the position to exploit it fully. In the years that the statute for members was negotiated (1998-2005), the Council occasionally presented itself as more appropriate representatives of the electorate, and has tried to take over Parliament’s right of initiative de facto. This has restricted Parliament’s liberty substantially.105

The development of Parliament’s rule-making powers has shown setbacks as well. In the Eighties and Nineties, the European Parliament set up a web of financial benefits for its members of a type that normally is incorporated in a statute for members.106 The legal basis for these decisions was found in Parliament’s organisational autonomy.107 While this seems not justified on the basis of the case law by the Court of Justice, the decisions were not legally challenged at the time. Hence, Parliament had expanded its rule-making power. However, when the Treaty of Amsterdam laid down a procedure for establishing a statute for members, this liberty was curbed to a certain extent. The new provision requires that the Council approves any decision on members’ pensions and social security. On top of this, the Council itself also demanded the right of approval on matters related to the travel reimbursements, while

104 Section 1.2. describes the de jure powers; section 3.1. describes how Parliament acted de facto.
105 Section 3.2.
106 Section 4.1.
107 Section 4.2.
the Court had ruled that these decisions could be settled unilaterally by Parliament. The outcome of this battle is a precarious balancing act. The Council accepts Parliament’s liberty to decide on travel reimbursements, as long as it does not fundamentally deviate from a decision by the Bureau that the Council can agree with.\textsuperscript{108}

Overall, the liberty of the European Parliament to present the representative claims it deems fit in a statute for members, has increased. It can initiate and lay down a statute. However, due to the involvement of the Council, Parliament’s autonomy may be more restricted than that of most national parliaments. Let me finalise this chapter by outlining why the involvement of the Council is understandable at this point of Parliament’s development.

First of all, the Council’s involvement follows from the intergovernmental aspects of the European Union architecture. It is evident that a statute for members has constitutional implications. It influences the definition of the European Parliament, and (consequently) the place of the European Parliament amidst the institutions of the European Union. Such decisions normally require approval by the member states. However, as this would go against the norm of providing an elected body with substantial representative autonomy (and would reduce the chance for a statute ever to be approved), it is appropriate that the procedure was relaxed. Nowadays, not the member states, but the Council has to approve the proposed statute (by majority).

Secondly, the Council’s involvement serves as a barrier against self-enrichment of members of the European Parliament. National parliaments are often more in the public eye than the European Parliament. This reduces their liberty to award their members hefty pay rises. The European Parliament has been subject to public criticism as well. However, this was not voiced in all member states. Therefore, the influence of the public’s view on the debate in the European Parliament was less than one may have expected in the presence of a common public space. The need for approval by the Council could be seen as an extra assessment in the absence of such a common European public space.

Like the chapter on immunity, the present chapter has underscored that the European Parliament could increase its representative autonomy through a particular enforcement of its right to regulate its own affairs. It has enabled Parliament to adopt rules influencing members’ parliamentary immunity and their financial position, thereby presenting itself more as a representative body of a Union electorate. The way in which Parliament was organised, enabled it to take such decisions: it determined its capacity to act. Now, it is time to focus on Parliament’s organisation itself, and the representative claims that are encompassed within. That is the purpose of the following chapter.

\textsuperscript{108} Section 4.2.
The previous chapters have demonstrated that the national background of representatives, and of the represented, continues to be a matter of relevance in the rules that – together – define the European Parliament’s representative status. The electoral legislation, the provisions regarding members’ immunity, and the rules regulating their indemnity all offer representative claims concerning both the unity of the Union electorate and the different national representative bases of the members. The internal structure of the European Parliament, governed by Parliament’s Rules of Procedure, seems to constitute an exception to this trend. It appears – at first glance – much less ambivalent about whom it is that the European Parliament represents, as it disregards members’ national backgrounds and stresses their political affiliation. The words ‘national group’ or ‘nationality’ are not even mentioned in the Rules of Procedure. Instead, the European Parliament is organised in European political groups, bringing together members from different national backgrounds and a similar political denomination. The most important decisions are taken within, and between, these groups.

As a consequence of Parliament’s structure, citizens cannot see themselves represented along national lines. The introductory chapter of this thesis already showed how the composition of the European Parliament is generally visualised instead:

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1 At least, they are not mentioned in relation to the work of the members of the European Parliament. They appear only in relation to the selection of people for the ECB’s Governing Council and in the rules regarding the petitions that citizens can file. See Rules of Procedure of the European Parliament – September 2015.

The European Parliament’s Quest for Representative Autonomy: An Internal Perspective

Graph 1. Visualisation of division of seats in the European Parliament

Each of the colours above represents a particular European political group. The fact that members are elected in 28 different member states, often on national lists, is glossed over.

The actual issue addressed in this chapter is the channelling of the representative work of members through European political groups, and the consequences of this for Parliament’s representative claim. To capture the development well, it is necessary to start at the very beginning: at the constituent session of the Common Assembly in September 1952. This era is not unknown territory for the reader of this study, as the historical roots of the European Parliament have also been a topic in all the preceding chapters. Studying the Rules of Procedure may nevertheless shed new light, as Parliament decides on these alone. Analysing their development from the beginning will enable us to gain better insight in the consecutive representative claims that Parliament offers its electorate when it is at liberty to do so.

The outline of this chapter is as follows. The first two sections analyse the decisions taken during the first months of the Common Assembly’s existence. How were the representatives and their electorate framed in the formal decisions taken during this period? Which of their features were polished up, and which ones were swept under the metaphorical carpet? Section 1 studies the decisions with the most visible impact and thus the most explicit claim: the seating-arrangement in plenary, and the election of the first president of the Common Assembly. Section 2 turns to decisions that were less in the public eye: the composition of the Bureau, and the parliamentary committees. Together, these sections illustrate how a balance was struck between highlighting members’ different national backgrounds and their different political affinities. Over the years, the balance has shifted. A defining moment

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3 This picture concerns the 8th European Parliament, reflecting the situation in July 2014, just after the elections.

4 The grey part stands for 52 ‘non-attached’, members who have not joined any of the recognised European political groups. In June 2015, a new European political group was formed: the Europe of Nations and Freedom. Many non-attached have joined that group, which has reduced their numbers. In January 2016, there were only 15 members ‘non-attached’. See the website of the European Parliament: <www.europarl.europa.eu>. 
in that process was the decision to grant European political groups a legal status. That choice is the core of section 3. Since then, the European political groups have gradually gained more privileges. As is apparent from section 4, the empowerment of European political groups has accelerated in particular since 1979, the moment when the members of the European Parliament acquired a popular mandate. Existing theories have not been able to provide a satisfactory explanation for this timing. They cannot clarify why such a fundamental change took place at a moment when the power and competences of the European Parliament remained unaltered. What then is the ‘external need’ to restructure Parliament? The added value of the concept of representative autonomy shows itself when tackling this question. The evolution of European political groups cannot be explained solely in the light of a desire for a more efficient and powerful European Parliament. It is (also) linked to Parliament’s need to make a fitting claim about its electorate and itself following its direct election. The content of this new claim is analysed in section 5. Its ingredients can be found in the formal criteria for the formation of European political groups. One could be inclined to dispense with the investigation at this stage. However, an important development would be missed by focusing only on Parliament’s Rules of Procedure. At the same time as the empowerment of European political groups, the role of national delegations within European political groups was strengthened. This phenomenon is briefly described and interpreted in the penultimate section. Finally, in section 7, conclusions are drawn, and modest predictions for the future made.

1. The Decision to Downplay Nationality

The Common Assembly commenced its work in a building rented from the Council of Europe, with ushers borrowed from national parliaments and provisional Rules of Procedure that were drafted by their secretary-generals. The organisation had to be built from the ground up. Some of the decisions taken during the constituent session would have a strong impact on how the organisation was viewed by the outside world for a long time to come. In the account given of two of these decisions, the seating order in plenary and the election of the president, my focus is on the representative claims that these decisions contain: did the Common Assembly show itself as an organisation of national delegations, or did it develop an alternative profile?

1.1. Seating Order by Surname – the Claim of a Neutral and Technical Parliament

The order in which members sit in plenary is a delicate choice. Existing understandings and preferences will become visible. ‘Who sits with whom’ may seem a prosaic

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5 Kreppel (n 2) 98. For more, see section 4.4.
matter, yet reveals the alliances that prevail and/or that are considered most valuable. In this light, seating orders make assertions about whom members represent, and along which lines they are divided.\textsuperscript{7}

On the very first day in session, 10 September 1952, the representatives of the Common Assembly opted for a neutral seating order. Members sat in alphabetical order of their surname. The reason for this decision seems, above all, to have been a negative one, driven by what the representatives did \textit{not} want to happen. They wished to avoid that the members would sit together in the same national groups with which they had entered the building.\textsuperscript{8} If members could not liberate themselves from their natural inclination to sit with compatriots, the parliamentary debates and decisions would likely be dominated by national interests and sentiments as well. This prospect ran counter to their ambitions. Many of the Assembly’s members hoped to contribute to the shaping of a new reality, in which national particularities were overcome. Therefore, a seating order in national groupings was out of the question. But what could an alternative ordering look like?

In most national parliaments, members are seated together with colleagues from the same party. This can be explained by the relevance of political parties in their election. Political parties serve as vehicles for mobilising voters, and as platforms for the recruitment of representatives.\textsuperscript{9} The members of the Common Assembly were faced with a different situation, considering that they were selected by and from national parliaments. European political parties did not play a role in their recruitment and election, as they then did not even exist. There were signals that cross-border cooperation between political parties, sharing similar ideologies, would develop over time. However, their alliances were still at a very embryonic stage.\textsuperscript{10} It was far from certain that these entities had the potential to mature. There was thus no credible, developed alternative to replace nationality as the logical dividing line between members. As a result, it was felt best to stress their \textit{individual} representative capacity.

One could argue that the newly adopted seating order placed the Assembly at some distance from the national parliaments. It emphasised that the Assembly was not composed of delegates representing member states or national parliaments. There was no show of different national units and a representation of distinctive national peoples. On the downside, it can be said that the individual-based setting displayed the Assembly as a rather technical organisation. Political representation involves giving expression to different interests and views in society. As the electorate is multifaceted, this requires building and showing credible constructs about what ties the (multifaceted) electorate – and their representatives (see Chapter 2). By organising itself in a neutral manner, the Assembly did not present any of such constructs. It left all options open for the future.

\textsuperscript{7} Kreppel (n 2) 179-180.
\textsuperscript{9} See Chapter 2, section 2.
1.2. Insertion of a Political Dynamic

From the first week onwards, members of the same political affinity gathered in European political groups *avant la lettre*. Very soon, these groups gained relevance for the Assembly’s day-to-day functioning. One of the most noteworthy moments that confirmed and strengthened this development, was the election of the first president of the Common Assembly on 11 September 1952.\(^{11}\) In hindsight, we can say that this marked the moment that the development of the Common Assembly diverged from that of the Consultative Assembly.

The election revolved around three main personalities: the German Christian-Democrat von Brentano, the French Christian-Democrat de Menthon, and the Belgian Socialist Spaak. Only the first had officially presented his candidature well in advance. Inevitably, there were differences between the candidates in terms of their experience, views, and personality. However, this was not a determinant factor for their election. What really mattered was the fact that their election presented different representative claims.

If the Assembly voted for von Brentano, it would not simply be interpreted as support for the best man for the job. Instead, his endorsement would be seen as a political statement that nationality mattered for the division of posts. At the time of voting, Germany was the only large member state that did not yet have a national as president of one of the institutions. The president of the ECSC High Authority was a Frenchman, and the chairman of the Court was an Italian. A choice to make Von Brentano head of the Common Assembly would be seen as a traditional trade-off: an effort to distribute prestigious positions evenly between the larger member states.\(^{12}\) This interpretation would have had severe repercussions for the (perceived) autonomy of the Common Assembly. By taking into account the decisions of other institutions for the election of its own president, the Assembly would have compromised its right to freely elect its president. Moreover, it would damage efforts to overcome national rivalries. Both implications were regarded as detrimental to the Assembly’s aspirations of developing into a powerful European parliament.

The candidature of De Menthon was also burdened with institutional connotations, on account of another position held by him. He was the president of the Consultative Assembly of the Council of Europe. It was expected that De Menthon would want to continue in this position. Therefore, were he to be elected as president of the Common Assembly, he would combine the functions.\(^{13}\) Not all members were enchanted with this prospect. A double presidency would bolster the idea that

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\(^{11}\) The legal basis by which the Common Assembly was entitled to elect its president can be found in Article 23(I) ECSC.

\(^{12}\) In German newspapers, the anticipated election of Von Brentano was considered ‘only fair’. See ‘German Editorials’ *Information bulletin* (October 1952). See also Jürgen Mittag, ‘Die Politisierung Der Gemeinsamen Versammlung Der Europäischen Gemeinschaft Für Kohle Und Stahl: Anfänge Transnationaler Fraktionsbildung Im Europäischen Parlament’ (2011) 17 Journal of European Integration History 21.

\(^{13}\) Etienne Deschamps, ‘François de Menthon and His Draft Federal Constitution for a United States of Europe (June 1948)’ (Centre Virtuel de la Connaissance sur l’Europe (CVCE) 2013); Mittag (n 12) 21.
the two assemblies were rather alike, which was precisely a worrying signal for those who had grown disenfranchised with the Consultative Assembly. In their view, the institution had failed to play a strong role in shaping a new Europe. Anticipating his defeat, De Menthon relinquished his place in the race.

Spaak, the third candidate, had been the very first president of the Consultative Assembly. He had resigned from this prestigious post out of frustration with the institution’s limited achievements. Spaak’s election would therefore offer the opposite claim of that of De Menthon, testifying that the Common Assembly was on a different path to that of the Consultative Assembly. On the eve of the election, Spaak raised the stakes by attaching a condition to his candidature. He was willing to stand, provided that all Socialists would vote for him en bloc. If he managed to align all Socialists with his candidature, it would be a strong indicator that the Assembly was more similar to national parliaments than to traditional parliamentary assemblies. It would communicate to the outside world that political affiliation, not nationality, was the dividing line between the members – and thereby also between the electorates. Spaak managed to convince the German Social-Democrats to support him, tipping the balance in his favour. He won by receiving 38 votes in contrast with von Brentano’s 30.

The choice for Spaak can be regarded as the strongest possible claim that nationality was reduced to a matter of second-order significance. However, the paradigm shift was, in reality, neither universal nor absolute. Nationality remained a relevant factor in this election as well. While it may be true that the German, Dutch, and Italian representatives had voted along the lines of their European political groups, thereby splitting the support for von Brentano, the primarily French-speaking members from Belgium, France, and Luxembourg had all voted for Spaak. There are no records that indicate that Spaak objected to this bloc-formation which worked in his favour. Moreover, members may have voted for candidates for other reasons than a shared language or political affiliation. As it turns out, most Catholics (except for the French) had voted for von Brentano, whereas Spaak had secured the support of non-Catholics. Nevertheless, it cannot be denied that the battle for the presidency has been vital in bringing a political spark into the Assembly and in accelerating the relevance of European political groups in the Assembly’s work. It is for this reason that van Oudenhove qualified Spaak’s election a ‘political bombshell’. Moreover, through its decision, the Common Assembly positioned itself as an institution that

15 Mittag (n 12) 20.
16 Schechter (n 14).
18 Mittag (n 12) 21.
20 Mittag (n 12) 22.
21 Van Oudenhove (n 10) 17.
functioned autonomously from national structures and from the other European
institutions.

2. **The Defining Characteristics of Representatives**

The vote on the presidency of the Common Assembly had been a binary choice. Voting for the one candidate was effectively a vote against the other; it was not possible to find a solution in the middle. For other positions, this situation was different. There were several vice-presidents, committee-chairs, and committee members. Having numerous vacancies made it possible to reconcile multiple objectives and to propose trade-offs. The question then arises is: on the basis of what criteria were these positions filled? What type of balance was considered appropriate and/or desirable?

2.1. **Nationality: An Implicit Criterion**

On the first day of the constituent session, the members of the Common Assembly composed a provisional Rules Committee. Its most pressing task was to draft proposals for the composition and election of the Bureau. Within a day, rapporteur Struye presented the Committee’s proposal, in which it recommended establishing a Bureau composed of six members: one president, and five vice-presidents. The proposal was supported by two arguments. Firstly, the Bureau needed to be of a sufficient size if it were to perform all its tasks, including tasks that were generally in national parliaments – undertaken by a group of Quaestors. Secondly, the amount of six would give the Assembly the opportunity to select a Bureau in which representatives of all member states were represented. This was seen ‘logical and reasonable’. Evidently, it is this choice that is most relevant for the current study.

The drafters of the proposal denied any accusations that they introduced national quotas, stressing that it was for the Assembly itself to judge who would be the most fitting candidates. Struye explained that:

> ‘[T]he European character of the Community should induce the Assembly in the selection of the Bureau to only pay attention to the claims of the proposed candidates.’

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22 A permanent Rules Committee was set up two days later. See CA Resolution of 12 September 1952 on the Establishment and Composition of the Committee on Rules, OJ No 1 of 10 February 1953 (in Dutch), 7.

23 Report on the articles of the interim Rules of Procedure regarding the election of the Assembly Executive Committee (Rapporteur: Paul Struye) (CA 1952, AC-0002/52-September 0010 (in Dutch)).


26 Ibid 8.
The Assembly should pick the right person, and not the right country. However, it cannot be denied that the magical number of six made nationality an implicit criterion in the composition of the Bureau, or at least, it allowed for it. During the debate, some members voiced their concerns about the insertion of a ‘national tendency’. Regardless, the proposal was adopted without amendment. The first Bureau of the Common Assembly was indeed composed of members coming from six different member states: Casati (Italy), Fohrmann (Luxembourg), Pünder (Germany), Spaak (Belgium), Teitgen (France), and Vixseboxse (the Netherlands). Based on this alone, one could be inclined to conclude that nationality was of overriding importance for the composition of the Bureau. In fact, as with the election of Spaak, the situation is more complex. The six representatives also happened to stand for different political ideologies. Three of the Bureau members belonged to a Christian-Democrat party (Pünder, Teitgen, and Vixseboxse), two were part of a Socialist party (Fohrmann and Spaak), and one came from a Liberal group (Casati). This ratio corresponded to the relative strength of the European political groups at that moment in time. For the composition of the Bureau, the members of the Common Assembly had thus opted for an intersection of the features nationality and political affiliation. This choice was however not formalised.

2.2. Introduction of National Quota

Regarding the composition of parliamentary committees, there was considerably less reluctance to institute formal quota. The Rules Committee was the first committee that was determined as such. It was comprised of nine members, of which two representatives from each of the larger member states, and one from each of the smaller ones. For nomination, they were dependent on their national group – with which term, I refer to the collective of all representatives of a particular country, regardless of political colours. The composition of the Rules Committee was adopted without debate or opposition.

The so-called ‘Organisation Committee’ was the second committee that was formed in this manner. Its task was to draft proposals on the number of members, the configuration, and the scope of future parliamentary committees. This committee was also to be composed through national quotas. In the debate about its composition, the use of such quota an sich was not questioned. The only controversy was about the precise repartition between national delegations. Rapporteur Struye proposed that the Organisation Committee would count 20 representatives: four each from France, Germany and Italy; three each from Belgium and the Netherlands;

27 Ibid contribution Blaisse, 9-10.
28 Kapteyn (n 19) 36; Van Oudenhove (n 10) 17.
29 See for instance Hix, Roland and Noury (n 2) 22.
30 Van Oudenhove (n 10) 18.
31 Kapteyn (n 19) 35. CA Resolution of 12 September 1952 on the Establishment and Composition of the Committee on Rules (n 22) 7.
32 CA Resolution of 12 September 1952 on the Establishment and Composition of an Organisation Committee, OJ No 1 of 10 February 1953 (in Dutch), 7.
and two from Luxembourg. Having a minimum of two representatives per member state would allow the national groups to nominate members of different political ideologies. Other representatives put forward alternatives for a larger or smaller committee, and with different systems for dividing the seats per national group. Finally, the amended proposal of the Frenchman Mollet was adopted. He had suggested a committee of 22 persons: five from each of the three large countries; three from both Belgium and the Netherlands; and only one from Luxembourg. This ratio mirrored the composition of the Common Assembly along national lines. The only amendment adopted concerned the single seat for Luxembourg. The members agreed to add another seat for the smallest country, after a strong intervention by the Luxembourg member Margue. Margue did not argue for a larger delegation with a view to enable the participation of members coming from different political parties, as Struye had suggested for his original proposal. Instead, the Luxembourger held that his country was entitled to a stronger presence in the committee because of its economic importance in the coal and steel sector.

‘I’m so free to bring in memory that we, Luxembourgers, not just represent a population of 300,000 souls, – which is rather limited – but a steel production of 3 million tonnes a year, which should be taken more into account, considering the interests that are of our concern here.’

The representative claim that is presented here, is that the members of the Common Assembly stand for a national interest as well. The repartition by national quota remained in force for the entire period of the Common Assembly’s existence. Decisions such as this one rightfully led Hix, Noury, and Roland to conclude that the proceedings of the Common Assembly suggested that ‘the new Assembly would be organised around national rather than ideological or partisan affiliations.’

2.3. Intersection with Political Affiliation

In January 1953, the Common Assembly met again. At this meeting, it created seven permanent parliamentary committees. Four of these were to have 23 members,

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34 Kapteyn (n 19) 37.
35 CA Resolution of 12 September on the Establishment and Composition of an Organisation Committee (n 32); CA Debate of 12 September 1952 on Article 39 on the Establishment and Composition of Committees, OJ No 1 of 10 February 1953 (in Dutch) Annex, 64. See also Van Oudenhove (n 10) 37.
36 CA Debate of 12 September 1952 on Article 39 on the Establishment and Composition of Committees, Annex OJ No 1 of 10 February 1953 (in Dutch) (n 35) 64 (translation KB).
37 Kapteyn (n 19) 59.
38 Hix, Roland and Noury (n 2) 22.
which was identical to the number of the Organisational Committee.\textsuperscript{39} The repartition between delegations would also be the same. Five members would come from each of the larger member states, three from both Belgium and the Netherlands, and two from Luxembourg. Three other committees would be smaller, with only nine members each.\textsuperscript{40} Therein, there would be two representatives from the three larger member states, and one from each of the smaller ones.

In his seminal work, ‘The Uniting of Europe’, Haas has qualified the formalisation of national quota as an indication of ‘national representation’.\textsuperscript{41} The term suggests the existence of a formal link between the representatives and a national structure. In that sense, it is not a fully adequate description. It is not the case that representatives were formally representing their national groups. During the session in September 1952, the Common Assembly had indeed asked the national groups to nominate candidates for committee membership. However, in January 1953, the matter of nomination was deliberately left open. Formal dependency on national groups was seen as an infringement of the rights of individual members, which were carriers of a free mandate after all.\textsuperscript{42} Therefore, members were enabled to put themselves forward, or be nominated by a group of colleagues – including by colleagues from different nationalities, even though in practice the national groups continued to play an important role.\textsuperscript{43} Upon the reception of all nominations, it was the Bureau that had to piece together a suitable, balanced composition of each committee. Due to this open procedure – at least formally –, members cannot be seen as officially acting in the name of their national groups. Instead, the quota should be seen as referring to nationality as a relevant characteristic of individual representatives (and of their electorate), which had to be made present in the composition of the committees.

This interpretation is supported by an amendment to the Rules of Procedure that was adopted simultaneously. It charges the Bureau with taking into account both the national background and the political affiliation of members when deciding on the composition of a committee.

\begin{footnotesize}
\begin{itemize}
\item This concerned the following committees: the Committee on the Common Market, the Committee for Investments and the Financing and Development of Production, the Social Affairs Committee, and the Committee on Political Affairs and External Relations of the Community. See CA Resolution of 10 January 1953 on the Number, the Composition and the Competences of the Committees that are Necessary for the Functioning of the Assembly, OJ No 1 of 10 February 1953 (in Dutch), 8.
\item This concerned the Transport Committee, the Accounts and Administrative Committee and the Committee on Rules of Procedure, Petitions and Immunities. Ibid.
\item Kapteyn (n 19) 41.
\item Van Oudenhove (n 10) 16.
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The provision addresses the diversity that exists within national groups, and aims to accomplish an 'equitable representation of Member States and political tendencies'. It acknowledges the multifaceted nature of representation by members. They represent national citizens, as well as citizens who adhere to a particular ideological view. By formally recognising the relevance of political diversity in the repartition of positions, next to the relevance of nationality, the provision can be regarded as 'a watershed'.

3. Formal Recognition of European Political Groups

The relevance of members’ political backgrounds was fostered by the emergence of European political groups. Initially, the organisation of these groups was rather loose. However, they developed at an astonishingly rapid pace into political platforms, thereby strengthening the claim of the Common Assembly, and its successor the European Parliament, of being a political representative body, comparable to national parliaments.

3.1. Creation of a Legal Basis

The Common Assembly discussed the need and desirability of a legal basis for allowing the formal establishment of European political groups for the first time in March 1953. Three months later, on 16 June 1953, the members agreed that this would indeed be the right course to take. Therefore, they amended the Rules of Procedure with the following provision:

1. The delegates may form groups according to political affiliation.
2. Groups shall be formed by handing a declaration of formation to the President, which declaration shall include the name of the group, the signatures of its members and the composition of its bureau. This declaration shall be made public in the Official Journal of the Community.

44 Rule 34 Rules of Procedure of the European Parliament – March 1953. See also Van Oudenhove (n 10) 14.
45 Kapteyn (n 19) 38-42.
46 Common Assembly Proceedings, OJ No 1 of 10 January 1953, 146. See also Van Oudenhove (n 10) 14; Hix, Kreppel and Noury (n 2) 312.
47 Hix, Kreppel and Noury (n 2) 312.
48 Van Oudenhove (n 10) 20; Mittag (n 12) 18.
3. No person may be a member of more than one political group.
4. The number of members necessary to be able to form a group is nine.49

The three existing groups – the Christian Democratic Group, the Socialist Group, and the Liberal Group – complied with the rules already, and could therefore be constituted officially. Within months, they counted 38, 23, and 11 members respectively. Six members remained 'non-attached'.50 The groups were eligible for secretarial support and funding from the Assembly’s budget. This enabled their members to function more independently from the structures of the national parliaments, and to intensify their mutual cooperation.51

The decision to introduce formal criteria for European political groups had been unanimously approved in Parliament.52 However, the question of their financing provoked resistance, in particular by Dutch members.53 The ‘non-attached’ Korthals, for one, objected to the proposal because he believed that parliamentary groups should be the result of the expressed will of the people, and not an invention that is implemented top-down.54 However, the majority of his colleagues disagreed with this view. They felt entitled to exploit their organisational autonomy and encourage the development of new structures. In other words, they believed that it was appropriate to stimulate new channels for representation.

During the debate on amending the Rules of Procedure, some argued that the formal recognition of European political groups would be of little significance.55 Providing a legal basis would only bring the de jure provisions in line with the de facto situation. Retrospectively, we can say that this view does not hold. Van Oudenhove, who wrote his eminent work upon the tenth anniversary of the Common Assembly, observed that ‘in the parliamentary practice which evolved de facto the political groups gradually became the leading force’.56 The formalisation of the political groups served as a catalyst for organising the institution (and in particular its successor) more and more along the lines of these groups. One can say that obtaining a legal basis was a driving motivation, and once achieved, it served as a vehicle for change.

50 Van Oudenhove (n 10) 26.
51 Van Oudenhove (n 10) 23-26; Stein (n 6) 235.
52 CA Resolution of 16 June 1953 on the formation of political groups, OJ No 10 of 21 July 1953 (in Dutch), 155; Van Oudenhove (n 10) 23.
53 Kapteyn (n 19) 47-51.
54 CA Debate of 16 June 1953 on the budget of the Common Assembly, Post 105, concerning funding of the European political groups, OJ No 4 of September 1953 (in Dutch) Annex contribution Korthals.
55 Van Oudenhove (n 10) 22.
56 Ibid 32.
3.2. The Seating-Order Re-Visited

The decision to formalise the role of political groups did not immediately affect the seating order in the plenary room. Members remained seated in alphabetical order. Only within the confinements of the committees did a ‘seat-revolution’ take place. There are no recorded discussions that provide a clear answer as to why the changed practice in committees was not transposed to plenary. An often-heard explanation is that the reason should be ‘sought in the eternal difficulty of determining which groups should sit on the right’. Yet, at the level of the parliamentary committees, this issue was apparently overcome.

A more plausible explanation for the difference may be linked to the fact that members operate much more in the public eye in plenary than in committees. Whilst the public may not even have noticed the seat-swapping in committees, changing the seating order in plenary would have an external effect. It would amend the representative claim that was enshrined in the rules regarding the Common Assembly’s composition. Members may have been unsure whether they were in the right position to do so. After all, they were appointed by national parliaments and their free mandate was only implicit (see Chapter 3, section 1.2). Also, there existed no treaty provision (yet) that mandated the Assembly to change or propose amendments to its composition. Evidently, the Assembly was formally at liberty to determine the seating arrangement by virtue of its organisational autonomy. However, its substantive representative autonomy for taking decisions altering the Assembly’s representative status was still rather limited (see Chapter 2, section 4.1).

The angle of representative autonomy also helps us to understand why, in 1958, the European Parliament managed to overcome the impasse that had existed in the Common Assembly for many years. In March of that year, the European Parliament had assumed the responsibilities of the Common Assembly, and the ones assigned to it by the EEC and Euratom Treaties in 1958. It too was an appointed body. However, the new Treaties made reference to holding direct elections by universal suffrage in the future. The European Parliament was even given the right of initiative to draft the electoral procedure for this. Hence, it was asked to engage in shaping and reshaping the electoral relationship. This new situation may explain why members already pushed for a new seating-order on the first day of the European Parliament’s constituent session, 19 March 1958.

Lapie, the president of the Socialist group, then stressed the need to revise the seating order with a view to highlight the political and parliamentary character of the new Parliament.

57 Ibid 138-140.
58 Ibid 28.
59 The Treaties only refer to the institution as ‘the Assembly’. In 1958, it was renamed the European Parliamentary Assembly by the representatives. The name was changed to European Parliament four years thereafter. See for an elaboration about the name change Chapter 3. As explained I will use the name European Parliament instead of European Parliamentary Assembly.
60 See Chapter 4.
‘No doubt it would have been spectacular, and consequently useful for how this Assembly is regarded, when today the political groups would have been seated, on the very first session, as teams, and when the Assembly, rather than showing off this alphabetical pointillism, would have looked like a painting with large groups of different colours, consisting of the different political groups where internally Members would be seated on alphabetical order. The socialists, the liberals and the democrats would then be seated in different parts of the Assembly. The press, the public and you yourself, Mr. President, could envisage more clearly the political value of our Assembly.’

The desire to emphasise the parliamentary credentials of the new organisation did most likely not only spring from Parliament’s enhanced representative autonomy, but also from a conflict with the Council that arose two months earlier. This made it necessary for Parliament to draw a line, and assert its institutional independence, as we will see below.

The conflict evolved around the presidency of the new Parliament. During a meeting in Paris in January 1958, the Council agreed that it would be most desirable if an Italian member became the first president of the European Parliament. The reason for this was Italy’s relative underrepresentation in the distribution of important international posts. The Council informed the (then still acting) Common Assembly’s Bureau about its wishes through a communiqué. As can be imagined, the governmental interference regarding a sovereign right of (the future) Parliament was not well received. It is fascinating how tactless the Council acted, and how little it seemed to have reflected on the defeat of von Brentano (see section 1.2). It was therefore not a very effective intervention. Like in 1952, the members of the Common Assembly, and its successor the European Parliament, refused to take part in an inter-institutional deal. They insisted on Parliament’s autonomy to make its own choice for a president. In the given situation, it was politically impossible to elect an Italian member from among their ranks. Instead, the three European political groups nominated the Frenchman Schuman. He was elected on 19 March 1958.

Two days after his election, the European Parliament decided to change its seating order. The chosen wording implies that the decision was prompted by a desire to show the parliamentary credentials of the new institution more prominently.

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62 The president of the EEC Commission was the German Hallstein, and the head of the Euratom Commission was the Frenchman Armand.
63 Wigny (n 8) paras 44, 74. See also Franz C Heidelberg, Das Europäische Parlament (Verlag August Lutzeyer 1959) 28; Van Oudenhove (n 10) 147.
64 Van Oudenhove (n 10) 144-148.
It seems evident that the timing for the new seating order is related to the institutional conflict with the Council, as well as the adoption of the Rome treaties in which Parliament was given the explicit task to re-shape the electoral relationship. At any rate, 21 March 1958 is the day that the European Parliament offered a new representative claim to the public. By rearranging the plenary, the members show that the dominant characteristic that divides, and ties them together, is their differences in political views, not their different national background. That is the construct that is offered to the electorate. The European Parliament poses that, for this electorate too, the division along political affiliation may (in certain respects) be more relevant than the division along national lines.

4. Empowerment of European Political Groups

The European political groups have become highly important for the work of members in the European Parliament. For essential representative functions, such as speaking in plenary or participating in committees, members have grown dependent on their political groups. This development will be sketched below, in sections 4.1 and 4.2. Section 4.3 describes the impact of this development on the representative capacity of the ‘non-attached’ members. Finally, in section 4.4, we will turn to the justification for structuring Parliament in this manner. This justification is often sought, and found, in Parliament’s need to function effectively and efficiently. The present investigation, however, studies the empowerment of European political groups in the light of Parliament’s need to shape its own representative status.

4.1. Speaking Time: A Timeslot of European Political Groups

The European political groups started as loose organisations. Members of these groups remained at liberty to act in their capacity as individual representatives. They could intervene in debates in order of registration, and for as long as they wanted. Sometimes, they spoke in the name of other members. However that was always a

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67 Williams (n 2).
68 Van Oudenhove (n 10) 45.
personal choice and happened on a case-by-case basis. The figure of spokesperson was not formally recognised. In practice, members tried to formulate positions together with others, and they did so increasingly within the framework of their European political groups. Soon, it became routine for the presidents (or vice-presidents) of these parliamentary groups to take the floor as first speakers to state their group's position. This development found *de jure* recognition in 1959. The rule-change followed a complaint by an Italian member of the European Parliament, Carboni. He was unhappy about the fact that six colleagues spoke before him, whilst he had been registered as third speaker on the list. In Carboni’s view, the privilege of the groups’ presidents to always speak first in a debate constituted a violation of the equality between members. The Rules and Legal Affairs Committee, which the matter had been referred to, concluded that Carboni was right by the applicable formal standards. Consequently, the European Parliament was faced with the choice: ‘either abolish the practice or legalise it.’ Parliament chose the latter, introducing a new Rule 32 in its Rules of Procedure.

‘On the request of the presidents of the political groups acting as their group’s spokesmen, or of the speakers deputising for the presidents in this task, such persons may be granted priority.’

As a result of this provision, the formal representative capacity of the presidents of the European political groups expanded. It transformed them from only being individual representatives to being representatives of their European political group *as well*. One could even argue that the presidents were transformed into being political representatives of a transnational electorate. After all, the privilege to speak by priority was not granted to them so that they could voice the concerns of their ‘own’ national electorate; it was given to them so that they could speak in the name of the sum of the national electorates of their group’s members.

In the period that followed, another development took place: individual members’ right to speak was put under increasing pressure. The Treaties of Rome had raised the number of representatives to 142, and increased Parliament’s responsibilities. As a result, the meetings needed to be conducted more efficiently and effectively. The existence of European political groups turned out a useful instrument for this rationalisation.

In 1962, members agreed to limit the overall speaking time. Initially, this decision did not entail a formal role for European political groups. Members remained

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69 Kapteyn (n 19) 70.
70 Kapteyn (n 19) 67-76; Van Oudenhove (n 10) 33-34.
71 Van Oudenhove (n 10) 33.
72 Ibid 143.
73 Ibid.
74 The change was adopted, unanimously, on 25 September 1959. In the revised Rules of procedure, it was incorporated in Article 31(2).
equally entitled to speak within the overall time-slot set (albeit with a privileged position for the presidents of the groups). The procedure changed in 1967. As a new rule, the European political groups divided the available speaking time between them through negotiations.76 Subsequently, each group internally decided who would speak in plenary, and for how many minutes. The reason for this was that:

‘According to experience, some debates are unnecessarily prolonged because many speakers belonging to the same group put forward completely similar arguments’.77

Almost ten years later, in 1976, the criteria for the division between the parliamentary groups were fixed and incorporated into the Rules of Procedure.78 They were formulated as follows:

‘The president shall allocate speaking time in accordance with the following criteria: (a) a first fraction of speaking time shall be divided equally among all the political groups; (b) a further fraction shall be divided among the political groups in proportion to the total number of their members; (c) Members not attached to a political group shall be allocated a total speaking time equal to the fraction allocated to the political groups under subparagraph (a).’

Rationing the plenary debates in this manner had important consequences. Not only did it benefit the efficiency of meetings, it also had an impact on how the interventions of members could be framed. European political groups were made the new ‘owners’ of speaking time. Members had voluntary given away their privileges to speak on their own account.79 Under the new system, the opportunity for members to speak in plenary does not only depend on their own representative mandate, it is also linked to that of their colleagues. Therefore, when members speak in the time-slot that is given to their European political group, they assume an additional

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79 Williams (n 2) 394.
responsibility. Besides being a representative of their own electorate, they represent the European political group to which they belong. This point is underlined by the use of a possessive noun in the parliamentary report that regulated the division of speaking time:

‘[G]roups should be required to notify the president of the speaking time allocated by them to their speakers’. (italics added) 80

It is noteworthy that the described change was formalised in 1976, the year in which the Direct Election Act was adopted. A hypothesis on the link between these events will be presented in section 4.4.

Speaking under the banner of European political groups contains a strong representative claim, suggesting that the electorate can be represented by members from another country. Yet, it should be noted that members are not obliged to voice the group’s common position. It is political reality that fellow group members make conflicting statements. What has changed however, is that a speech no longer only implicates an individual member. Members are, in principle, free to underline the common position, or to voice a dissident opinion. However, in case of the latter, it will be evident – to colleagues, other institutions, and the public – that the parliamentary group in question is divided on this issue. The implications of a member’s speech thus have to be carried by the whole group.

Unlike what one may expect, the nationality of members has continued to be a relevant factor for the division of speaking time. In 1967, the Parliament agreed that the chair of a debate should balance between speakers of different political views and people using different ‘languages’. 81 It is a curious provision, as the European political groups were simultaneously given the responsibility to determine the list of ‘their’ speakers. This can only be understood if these groups are seen as the addressees of the norm. They have to ensure that not only speakers from a single nationality are enlisted for a particular debate.

The European political groups channel the representation of members in legislative debates. However, even today, there are still possibilities for members to ask for the floor in an individual capacity – simply on the basis of the own representative mandate. For example, members may give an oral voting explanation on their own behalf at the end of the voting time, or comment on a matter of political importance at the beginning of the session. 82 Moreover, since 2009, the European Parliament has two new procedures, in line with a proposal by rapporteur Corbett. 83 The first is

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82 Rule 183 and Rule 163, respectively, Rules of Procedure of the European Parliament – September 2015 (n 1).
a catch-the-eye procedure. Depending on the parliamentary agenda, the president may decide to open the floor to those who request it, once the scheduled speakers of the European political groups (and one non-attached per round) have finished their contributions. The second innovation is that members may put a question to a colleague. To this end, they have to raise a special blue card. Both provisions aim to introduce more drama and more critical exchanges into the plenary room. In relation to the two innovations, Rule 162(6) calls upon the president to ensure that ‘speakers holding different political views and from different Member States are heard in turn.’ It would be most interesting for political scientists to monitor the development of this balancing act, and to test whether individuals are really equally at liberty to take the floor. It can be assumed that the European political groups continue to regulate the order of speakers between them, de facto, and again at the expense of the rights of individual members and the role of the president.

4.2. Committee Seats: A Group’s Appointment

Not all parliamentary action takes place in the plenary room. Committees are the locus where resolutions are initiated, discussed and amended; sometimes even resulting in final decisions. Determining the composition of committees, with their central importance, therefore involves a heavy responsibility. From a democratic perspective, it is necessary that committees reflect the composition of the European Parliament at large. However, this raises the question of how this composition should be defined, and who determines what a balanced composition entails.

Section 2.3 has described the nomination process in the early years of the Common Assembly. We have seen that, formally, they were entitled to nominate themselves or be nominated by a group of colleagues. In practice, they were put forward by their national groups. European political groups were not privileged with nominating members, as they did not yet exist de jure. Barely two years later, the national groups were stripped of their (only) privilege in the nomination procedure. The European political groups were attributed the responsibility to nominate members in their stead. The European Parliament confirmed this in a resolution of 20 March 1958.

‘The political groups appoint their representatives for the committees that will be formed.’

85 Ibid Rule 162(8).
86 Gail McElroy, ‘Committee Representation in the European Parliament’ (2006) 7 European Union Politics 5, 8-10. See also Corbett, Shackleton and Jacobs (n 2) 126-145.
As this resolution was not laid down in the Rules of Procedure, it has been overlooked by many scholars. Kreppel, for example, concludes that there was an *unofficial norm* that allowed political groups to submit lists for committee assignments, while – in fact – this was based on a formal agreement.\(^88\)

The policy adopted by the members of the European Parliament, and the effect thereof on the representation, are similar to what we have seen regarding speaking time. The European Parliament established a formal link between the committee seat of individual members and the representative mandate of all the colleagues from the same European political group: members are now officially assigned a seat in committee by their European political group. On that account, they can be regarded as *representatives* of their European political group. Members are attributed an additional responsibility. Bowler and Farrell have found that members are well aware of this extra responsibility: ‘the individual members may specialize in their own favoured areas, but they do so under party-group scrutiny and control’.\(^89\)

The new privilege of European political groups puts restrictions on the rights of individual members. They are dependent on the endorsement of their group for obtaining a committee seat. Of course, it should be remembered that the loss of power is not as absolute as it seems. After all, political groups are *composed* of individual members. Their decisions are the result of internal group processes, in which members are actively involved. Thus, while members’ rights were curbed at the level of the overall organisation of Parliament, they were – increasingly – exercised at the level of the European political groups. More accurate would be to say that their influence *shifted* from the primary to the secondary level.

In case a member has no seat on a committee, the possibility exists to participate in committee meetings as a substitute member. The decisions on the nomination of substitutes were not taken in conjunction with those regarding full members, and are also not fully identical. Therefore, they are described here separately.

The figure of substitute did not exist in the Common Assembly. It was only introduced in the European Parliament, in March 1958. Initially, members were free to ask colleagues to replace them in a committee meeting, provided that they had informed the chair of the committee beforehand.\(^90\) There was no obligation for the substitute to have the same political background and/or the same national background as the full member concerned. In 1981, the concept of substitutes became more institutionalised. To each committee, a number of permanent substitutes was appointed that equalled the number of full members. Concurrently, a change in ‘ownership’ of the nomination took place. European political groups were given the privilege to appoint the substitutes for its members.\(^91\)

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88 Kreppel (n 2) 95.
91 Non-attached did not have the possibility to appoint permanent substitutes until 1993.
The introduction of this provision was part of a general revision in which the overall position of European political groups was substantially strengthened.93 In 1991, the demarcation line between representatives from different political groups was drawn more sharply. ‘Clarifications’ were added to then Rule 111, which stressed that ‘a committee member cannot in any circumstances be a substitute for a colleague who belongs to another political group’, and that ‘the status of permanent substitutes depends exclusively on membership of a given political group’.94 The representative claim that is made by these provisions, is evident: in the context of his/her functioning in the European Parliament, the crucial characteristic of a representative is political affiliation.

While European political groups now determine the list of full and substitute committee members, members have not lost all individual entitlements to a seat. If they change political group or become ‘non-attached’, they can hold on to the seat. It has become ‘theirs’ to some extent.95 This rule limits the control that a European political group can exercise over a member. It diminishing the threat that a member’s rebellion will be paid by eviction from the seat of a desirable committee. This limitation on the power of European political groups is a necessary one, as it supports the exercise of the free representative mandate.

4.3. The Disadvantaged Status of ‘Non-Attached’

The trend to attribute privileges and powers to European political groups has serious repercussions for those members who wished to remain ‘non-attached’.96 Evidently, non-attached can exercise, like other members, those rights that are given to individual members. This means that they can provide explanations for their votes, table amendments and motions for resolution, and put written or oral questions to the European Commission. They may also participate in actions that can only be undertaken by a group of members. For instance, there is a provision that regulates that

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93 Kreppel (n 2) 114.
95 This provision is nowadays laid down in Rule 199(1) Rules of Procedure of the European Parliament – September 2015 (n 1).
96 The number of non-attached has remained low. Since 1979, their percentage is usually between 1.4 and 4.8 per cent. Only in 2014 was the group of non-attached substantially larger, at 6.9 per cent. However, already in June of the following year, most of these non-attached together formed the Europe of Nations and Freedom group, dropping the percentage of non-attached back down to 1.8 per cent.
40 members can put a question to the Council or the European Commission for oral answers with discussion. However, the non-attached remain empty-handed when privileges are attributed to European political groups or to members as representatives of their political group. In that case, they are hindered in performing their representative mandate in the same manner and by the same means as their colleagues.

Sometimes, an objective justification exists for the disadvantaged position of non-attached. This is for instance the case regarding the rules determining the composition of the so-called conciliation committees. Members thereof need to make compromises with the Council delegation on particular pieces of legislation. In order to succeed, negotiating members must be able to adequately assess whether a deal with the Council has a good chance to be supported by a majority in the European Parliament, and they must be in the position to foster that support. The members of the European Parliament who are not involved in the negotiating process, but vote on the final result nonetheless, should feel represented by the delegation acting on their behalf. This representation can only be adequately undertaken when it is channelled through the European political groups, or this is at least the view of a majority in the European Parliament. Therefore, since the general revision of the Rules of Procedure of 1993, non-attached members are barred from participating in the conciliation committees. The committees need to reflect ‘the composition of Parliament by political groups’. Just as members can only be substituted by colleagues from the same political affiliation (see section 4.2), they can only be represented by their groups’ colleagues in the negotiations with the Council. Parliament’s reasoning was upheld by the Court of First Instance in the so-called TDI-case (see, for more on this case, section 5).

‘It is then necessary for the Parliament’s delegation entrusted with the task of negotiating with the Council in the Conciliation Committee to be made up of Members able to reflect the political composition of the Parliament, authorised to speak on behalf of other Members and in a position to be supported once an agreement is found with the Council; to that a political group can effectively contribute, unlike a group consisting of Members who do not share political affinities.’

Excluding the non-attached from the negotiations with the Council can thus be justified. In other cases, this justification was not well founded and the disadvantaged

98 There are minor exceptions to this. If non-attached members are president of a committee, or the responsible rapporteur, they are part of the delegation qualitate qua.
position of the non-attached could well be perceived as discrimination. The rules on the investiture of the European Commission show such discriminatory practice. In 1993, the European Parliament decided that only European political groups could draft resolutions in this process.

‘In order to wind up the debate, any political group may table a motion for a resolution which shall contain a statement as to whether Parliament approves or rejects the nominated Commission.’

In this provision, non-attached were effectively withheld the privilege to set the tone through own resolutions. Naturally, also non-attached could vote on the resolutions that were put forward by the European political groups. In that way, they could express their support for, or disapproval of the proposed Commission. However, they could not themselves frame the team, and formulate demands or expectations by way of a resolution. There is no objective reason for only European political groups being given this privilege. If the intention was merely to reduce the workload, and avoid a pile of different resolutions, one could well imagine the introduction of a threshold for signatories. This could be instead of, or in addition to, the right of European political groups to introduce such resolutions.

In 2000, the European Parliament recognised that the existing rule was an ‘anomaly’ and that the dominance of European political groups had gone a step too far. To settle the problem, it was agreed that besides European political groups, also a collective of 32 individual members was entitled to introduce a motion of investiture. That number is nowadays set slightly higher, at 40 members minimum, due to the enlargement of the Union and subsequent increases in Parliament’s size. The new provision ensures that membership of a European political group is no longer a precondition for tabling motions on the investiture of the Commission. Still noted should be that the criteria for political groups and individual members are not identical. Currently, the minimum requirement for the establishment of a political group is set at 25 members. This is substantially lower than the threshold of 40 individual signatures. Consequently, a European political group consisting of 25 members can put forward a motion on the Commission’s investiture, but 39 non-attached (or single members who disagree with their groups’ resolution) cannot. This is yet another example of how the European Parliament encourages representation along the lines of European political groups. Now that it has been established that the activities of members are increasingly channelled through European political groups, a question arises about Parliament’s motive for this.

105 Ibid Rule 32(2).
4.4. **Representative Autonomy: Explaining Groups’ Empowerment**

The most authoritative text on the development of the European political groups since 1970 is ‘The European Parliament and Supranational Party System’ by Kreppel.\(^\text{106}\) Her work stands out, as she has analysed the Rules of Procedure of the European Parliament in combination with the Rules of Procedure of the European political groups. Kreppel points out that the evolution of the European political groups was a consensual affair for a long time. Most members were in favour of empowering groups in order to raise Parliament’s efficiency. This objective also explains the timing of the empowerment, as substantial revisions of the rules were undertaken just after new treaties were ratified or after other major external changes had taken place.\(^\text{107}\) However, to Kreppel’s astonishment, the rules also underwent significant and wide-reaching reform following the first direct election of the European Parliament in 1979.\(^\text{108}\) She finds this odd, as the European Parliament was not given any new competences at that time. And yet, it is since those elections that the European political groups have become ‘a significant force in the activities of the plenary’ (see also section 4.1-4.3 above).\(^\text{109}\) European political groups were given more responsibilities, while the possibilities for members to take action in their individual capacity reduced correspondingly.

This shows that the empowerment of European political groups can be fully explained by neither the traditional focus on Parliament’s battle for ever more (legislative) powers, nor the attempts of individual members to maximise their ability to achieve their goals. Kreppel cannot find ‘any objective need of the Parliament as a whole’ that induced the empowerment of European political groups, and cannot explain why the shift occurred in the period 1979-1986 either.\(^\text{110}\)

\*These reforms, though often made in the name of greater efficiency, were in no way clearly mandated by environmental shifts occurring at the time (the implementation of direct elections and the adoption of the SEA).*\(^\text{111}\)

It is therefore useful to study the development of European political groups from the angle of representation as well. The concept of representative autonomy has an added value in explaining Parliament’s actions. It highlights that, in fact, there was an objective drive for Parliament to restructure, and position, itself as a representative body of a single, unitary electorate. This necessity was not related to the acqui-
sition of any new powers or competences, but rather to the increase of Parliament’s representative autonomy as a result of the election of 1979. This election entrusted the members with the formal task to shape new representative claims, and to seek support for the latter. The explicit free mandate that the representatives were given, explains the timing of Parliament’s actions to empower European political groups. Making full use of its representative autonomy was the ‘public good’ that Parliament strove for.

5. The Content of Parliament’s Representative Claim

The creation and the empowerment of European political groups have altered the representative status of the European Parliament. On account of its structure, Parliament can no longer be seen as only the representative body of national peoples. Instead, members are formally charged with representing (as well) their European political group and, implicitly, a derived electorate, composed of the electorate of colleagues in their group. The question is what this construct actually entails. What should the channel look like? They are ‘European’ and ‘political’ in name. But is the issue of nationality and national interests fully overlooked? And is it possible to set-up European, non-political groups? Answering this question requires an analysis of the formal criteria that are set for the establishment of groups. These criteria concern the minimum number of members required, their national diversity, and their political affiliation. They are studied in sections 5.1-5.3 respectively. Section 5.4 continues to explains how Parliament’s constructs – its representative claim – relates to the electoral provisions through which members are elected on national lists.

5.1. Representative Channels of Substantial Volume

European political groups must have a sufficient number of members in order to be formally recognised. Most national parliament are familiar with numerical thresholds, the exact level whereof varies considerably from country to country. On one side of the spectrum lie the Austrian Bundesrat, the parliaments of Luxembourg and Cyprus, and the Polish Senate. They work with very high requirements of 12, 8.5, 8.1, and 7 per cent, respectively. On the other side of the spectrum lie the Portuguese and Dutch parliaments. The former prescribes a minimum of only 2 representatives for the formation of a group, and the latter does not set any threshold at all.112

From the beginning, the Common Assembly had opted for a relatively high threshold in order to avoid a proliferation of small groups.113 The number of representatives that was minimally required to form a political group was initially set at nine.114 As the Common Assembly consisted of 78 members, this translates to

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11.5 per cent. In 1958, the European Parliament, with its 142 members, more or less maintained the percentage, adopting a numerical threshold of 17 members. Since then the percentages have lowered. This trend mainly occurred due to the numerical threshold holding stable, whilst Parliament grew in size. On one occasion, the European Parliament has actually lowered the requirement. This decision was taken, in 1965, to accommodate the formal recognition of a group of 14 members that already functioned as a European political group de facto.115

In 1973, the percentage fell to around 5 per cent. The minimum number of members was set at 10, provided that these came from at least three different member states (the nationality criterion will be further analysed in section 5.2).116 The number of 10 as an absolute minimum was maintained after 1979. Considering the European Parliament augmented to 410 members in that year, the percentage effectively dropped to 2.3 per cent.117 Currently, the minimum number of members required to form a political group is set at 25, which equals 3.3 per cent of all component members.118

5.2. Requirement of National Diversity

Until 1999, it was possible that all members of a particular ‘European’ political group held the same nationality. This situation has actually occurred twice. The first time was in 1965, when the French Gaullists separated from the Liberal group and formed the European Democratic Union (with only 14 members, see above).119 The second time was just after the 1994 European election, when an all-Italian group was set up under the banner Forza Europa.120 Most members considered the foundation of intra-national groups undesirable.121 In their view, the requirement of multinationality within a single group is indispensable for the fulfilment of Parliament’s tasks. In the words of rapporteur Vernaschi, it ‘provides a means of shaping, within our groups, that European awareness so necessary to countries within the Community’.122 Why this European awareness is so essential, is well explained by the Socialist member Corterier.

115 Corbett, Shackleton and Jacobs (n 2) 71.
119 Corbett, Shackleton and Jacobs (n 2) 71.
120 Ibid 70.
121 Report regarding the Rules of Procedure of the European Parliamentary Assembly (Rapporteur: Adrien van Kauvenbergh) (n 113) 12; Report on an amendment to Rule 36(5) of the Rules of Procedure of the European Parliament on the minimum number of members necessary to form a political group(Rapporteur: Vicenzo Vernaschi) (n 116) explanatory statement, 7.
‘As member of the European Parliament we do not primarily represent our own countries, but the various political tendencies which exist within the European Community. For this reason we have joined together into plurinational groups in the European Parliament. If there were only national groups and no plurinational ones in this Parliament, a genuine European policy would certainly be hardly possible in this Assembly. For this reason the principle of the plurinational composition of the groups is of special importance to us and we cannot abandon this principle.’

It would be impossible for the European Parliament to perform its functions, such as evaluating whether the European Commission is acting in the European interest, were the members of the European Parliament to be focused on pursuing national interests. It is an interesting observation by Corterier. The underlying assumption is that Parliament’s structure – its internal organisation – has an impact on how members undertake their representative tasks. The structure conditions which issues will be raised, in what manner, and even how representatives look upon them. The outcome of a vote by members who function in multinational parliamentary groups is likely to differ from that by members who function in national groups.

The policy of the European Parliament to foster multinational groups was initially one of encouragement. In a decision in 1973, it eased the criteria for the establishment of a European political group should this group be composed of members from at least three member states.

‘A group shall consist of no less than fourteen members. However, it may consist of not less than ten members where these come from at least three Member States.’

Just five years later, following the direct elections of 1979, prominent members aimed to annul this rule. They pleaded for a single numerical criterion, regardless of members’ nationality. This may seem a surprising development, as the new legislature attached no less importance to the development of a ‘European awareness’. However, in their view, the situation had fundamentally altered. The direct elections had transformed the European Parliament, politically and legally, into a representative body of all people living in the European Communities. In this context, it was considered unfitting and counterproductive to stress members’ national backgrounds in formal provisions, as the British member Patterson argued.

123 Corterier, ibid.
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‘[T]his Parliament is an elected Parliament and is not like its predecessor … [T]his Parliament is not based on nationality. This Parliament is based on the whole European electorate and it was therefore felt symbolic that it did not matter how many countries you came from, the minimum size of a political group was going to be the same.‘

Nevertheless, the majority in the European Parliament decided to uphold the earlier policy of encouragement.

‘A minimum number of twenty-one Members shall be required to form a political group if all the Members come from a single Member State. The corresponding number shall be fifteen if the Members come from two Member States and ten if they come from three or more Member States.’

Patterson’s argument has not been reiterated since. Between 1979 and 1999, the numbers were regularly adjusted as a result of enlargements of the Communities, and subsequent increases in the size of the European Parliament. Thereby, the general policy remained intact.

In 1999, the European Parliament took the step from encouragement to obligation. It decided to preclude the legal recognition of groups that were composed of members of one nationality only. National heterogeneity became a conditio sine qua non.

‘A political group must comprise Members from more than one Member State.’

Currently, groups should consist of 25 members coming from at least 25 per cent of the member states. This means that regardless of their size, groups have no legal rights when they comprise members from less than 7 countries. While Parliament has argued that there are good arguments in favour of this decision, it also holds an inherent downside. To a certain extent, it undermines the role of Parliament as the forum where different political views are expressed and exchanged. Several of the smaller political groups are composed of members from less well established political parties. They risk losing their legal status in Parliament when their election result decreases with only a small margin. In order to avoid becoming a ‘non-attached’, members may feel forced to team up with colleagues from different political denominations, thereby compromising the representative claim that they want to propagate.

129 Williams (n 2) 398.
5.3. Shared Political Affinity

The mushrooming of all kinds of ‘technical coalitions’ could be expected, considering the legal rights that European political groups are entitled to and the requirement of multinationality to establish such a group. Random groups of members would seek registration as a European political group, simply to enjoy all privileges. Several national parliaments are familiar with this phenomenon. In Italy and Spain, those members who do not belong to a political group, are automatically part of a technical group.130 The European Parliament has however shown itself opposed to such a development. From the start, it laid down in the Rules of Procedure that members belonging to the same European political group ought to share a similar political vision.131

Despite this formal policy stand, technical groups were tolerated for a long time. In 1979, the European Parliament legally recognised the Group for Technical Coordination and Defence of Independent Groups and Members (CDI). This was composed of a colourful crowd, including the Danish People’s Movement against the EEC, the Irish Fianna Fáil, and the Italian Radicals.132 Other heterogeneous umbrella groups, such as the Rainbow Group, obtained legal status in 1984, 1987, and 1989. They benefitted from the same facilities, and had the same rights as other groups. The European Parliament never demanded that the members involved shared similar political views.

A new situation arose in 1999. On 19 July of that year, the Technical group for Non-attached Members-Mixed Group was set up, known by the abbreviation TDI. The core thereof consisted of members of the French Front National, the Italian Alleanza Nazionale, and the Italian Radicals, whose political ideas were diametrically opposed. The latter can be placed on the far-left of the political spectrum, while the former two are regarded as (extreme) right-wing.133 In order to avoid that the wider public would think of them as political allies, the members decided to distance themselves from each other formally.134 To that end, they attached an annex to the group’s letter of constitution, which stated:

‘The individual signatory members affirm their total political independence of one another. And hence: freedom to vote independently both in committee and in plenary session; each member shall refrain from speaking on behalf of the Members of the group as a whole; the purpose of meetings of the groups shall be to allocate speaking time and to settle any administrative and financial matters concerning the group; the Bureau of the group shall be made up of representatives of the individual members.’135

131 Rule 34 Rules of Procedure of the Common Assembly – March 1954 (n 49). See for more Van Oudenhove (n 10) 23.
132 Corbett, Shackleton and Jacobs (n 2) 72-73.
133 Settembri (n 130) 174.
134 Dell’Alba in Settembri (130) 161.
135 Martinez, De Gaulle and others v Parliament (n 100) para 7.
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The sole objective of their cooperation was to put themselves in a position to exercise their mandate under the same conditions as other members in the European Parliament. Actually, the TDI-members only wanted the same privileges: they were unwilling to carry the same responsibilities. By making an explicit statement of disassociation, they asserted that they would not function as representatives of their European political group when speaking in plenary, or when participating in committees (see section 4.1 and 4.2).

Because of this statement, the constitution of the TDI-group was not in conformity with Rule 29(1) of the Rules of Procedure. The Committee on Constitutional Affairs informed Parliament of this conclusion by letter on 28 July 1999. Additionally, it proposed to add the following interpretative note to Article 29(1):

‘The formation of a group which openly rejects any political character and all political affiliation between its Members is not acceptable within the meaning of this Rule.’

Parliament endorsed the committee’s interpretation, and annulled the official recognition of the TDI Group, on 14 September 1999.

Until today, no legal norm has been developed to monitor and guarantee that representatives within European political groups share coherent political views. It is within the purview of groups themselves to establish criteria for membership, and to ensure sufficient internal cohesion. The one element that is imperative, and that concerns the Parliament as a whole, is that members are willing to be formally viewed as representatives of their group, and in that sense, of each other’s electorate.

5.4. Alternative to and Stepping-Stone for European Political Parties

The previous sections have shown that through consecutive actions, the European Parliament has reduced the capacity of certain individual members to exercise their representative mandates in full. This has been qualified as discrimination, in particular by the non-attached, as the members of the European Parliament are all elected equally. However, as explained in section 4.3, there could be legitimate reasons for Parliament to facilitate certain alliances and discourage others.

The first legitimate objective is most well-known and concerns the contribution of European political groups to an efficient and effective managing of their affairs. By curbing the rights of individual members, the work is rationed, and Parliament’s capacity to act thus enhanced. Fostering that members cooperate in European political groups – rather than any other type of alliance – ensures that Parliament can best fulfil its particular tasks (see section 5.2). If the European Parliament subsequently

137 Martinez, De Gaulle and others v Parliament (n 100) paras 9-11. See also Settembri (n 130) 160.
wants to encourage European political groups, it is bound to simultaneously discourage the existence of technical groups. Were technical groups to provide equal benefits, members would be tempted to find shelter in these less demanding structures, and the organisation of Parliament along political lines would be undermined.139

The second – often less explicated – objective of organising the European Parliament in European political groups concerns the link with the public. On a national level, this link is provided by both national parties and parliamentary groups. At the European level, the political parties are not well developed (yet). In 1992, a legal basis for ‘political parties at European level’ was inserted in Article 191 EC.140 Since 2003, criteria have been established by which European political parties are eligible for funding of European election campaigns.141 Still, national parties continue to play the pivotal role in the campaigns. For a large part, this can be attributed to the current electoral system, which neither allows for Europe-wide lists, nor foresees a uniform procedure. The linkage of national parties to European parties is often not even observed by citizens, and does not seem to determine their voting behaviour.142

In comparison to these European political parties, the European political groups in the European Parliament are more visible in the public debate. Therefore, they are in a position to partially compensate for the immature role of the first. They can provide a better link between the European civil society and the European institutions, and serve as a stepping-stone for the further development of European political parties. The Court has recognised the relevance of European political groups in this respect:

‘[P]olitical groups contribute to the attainment of the political objective pursued by Article 191 EC, that is to say the emergence of political parties at European level as a factor for integration within the Union, contributing to forming a European awareness and to expressing the political will of the citizens of the Union.’143

In his 1994 report on the Rules of Procedure concerning the formation of European political groups, Wijsenbeek even asserts that European political groups can compensate for the absence of a uniform election procedure.

139 Settembri (n 130) 164.
140 This is nowadays laid down in Article 10(4) TEU.
142 Chapter 3, section 2.2 describes that this is subject to change. In 2014 European political parties each presented a candidate for the Presidency of the European Parliament, which led to a relatively high number of cross-European political debates.
143 Martinez, De Gaulle and others v Parliament (n 100) para 148.
Thus there are strong reasons to preserve this transnational political element, particularly because (thanks largely to the reluctance displayed by the representation of the United Kingdom in the Council) there is still no uniform election procedure as provided for in Article 138(3) of the Treaty of Rome, which would be equally capable of providing such an element.144

In Chapter 4, we have seen that Parliament has only limited opportunities to change the electoral provisions. For this, it depends on the Council and the member states. However, by means of its organisational autonomy, it can shape the electoral relationship nonetheless. By fostering the functioning of members in European political groups, members transform (to some extent) into European representatives, charged with expressing the voice of Union citizens (as well). Most remarkable, it is well possible that Parliament’s representative claim would be progressively accepted by the citizens concerned. This is for example the case if citizens feel represented by members from other countries or if they consider that members of the European Parliament represent more than a national electorate alone. If this is the case, citizens themselves transform, equally progressively, into a more European electorate.

6. National Delegations – a Counterclaim

The previous sections have shown that the European Parliament has chosen not to extend privileges to national groups in relation to Parliament’s managing of their affairs. Some minor references were included in the Rules of Procedure on the nationality (or language) of members as a relevant characteristic of individual representatives. However, we have not witnessed that the European Parliament is structured along national lines. There are no formal constructs that reveal members as representatives of a national electorate. At least, not at the level of the plenary. This section moves beyond the Rules of Procedure of the European Parliament and takes a look at the internal rules of the European political groups. At this secondary level, important decisions are taken about the distribution of positions, money, staff, and speaking time. It raises the question of what the formal role is of national delegations within these groups, and how they interacts with the public.145 The development of this role is still underexplored and requires further research.146 For the present investigation, it will suffice to establish whether these internal rules present

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145 National delegations are made up by members from the same country, participating in the same European political group. I use the term national groups to refer to all members from one country, irrespective of their political affinity.

146 My conclusions are based on the rules of procedure of the three main political groups. The data is not readily available and incomplete. Kreppel is one of the few scholars who has studied the internal development of the political groups. See therefore also Kreppel (n 2). For more on the practical functioning of national delegations, see Raunio (n 106) 255.
a different picture than we have seen above, and if they amend Parliament’s representa-
tive claim accordingly.

A first observation concerns the membership of European political groups. Membership is only open to individual members, not to national delegations. This may seem an obvious choice, as members have a free mandate rather than being mandated by their national party. However, in turn, it also stresses their independence. Individual membership also existed in the first years, when members were still appointed by national parliaments. Members are automatically entitled to join a particular European political group if they are affiliated to a national party of that same denomination. Alternatively, in the absence of a link with such national party, they can join a European political group if their membership is endorsed by the other group’s members.147 Because of this individual membership, European political groups cannot be defined as umbrella organisations of national delegations.

A second conclusion that can be drawn from studying the internal Rules of Procedure, is more surprising and seemingly contradicts the first. Members are increasingly approached as subjects of national delegations. In the initial years, this was not yet the case. Then, the words ‘national delegation’, which implies an organised structure, was (deliberately) absent from the rules. The first explicit reference to national delegations can be found in the Christian-Democrat Statutes of 1975.148 Since 1986, also the Statutes of the Social-Democrats include references to national delegations, for example in a rule that instructs the group’s bureau to ensure a fair division of positions between national delegations.149 In both European political groups, the position of larger delegations has been strengthened over time at the expense of smaller ones. Notably, the number of members which a national delegation may appoint to the group’s bureau depends on its size.150 The bureau of the Christian-Democrat group is composed of one person per national delegation, and an additional member for every ten members. Also for the division of important positions in the European Parliament, such as the chairmanship of a committee, a national delegation’s size is a dominant factor.151

The Rules of Procedure of the Liberal group do not refer to national delegations, but to ‘national political party delegations’ instead. The latter are composed of members from the same national party. In case of two competing liberal lists in a particular country (such as in the Netherlands), members are not obliged to form a national delegation together. In the internal rules of the Liberal group, nationality matters as well. This shows in the set-up of their bureau in which each national party has a representative.

147 See for example Rules of Procedure of the Christian-Democratic Group – February 1962. See also Kreppel (n 2) 192.
The legal provisions regulating the operation of the groups of the Christian-Democrats, the Social-Democrats, and the Liberals, all stimulate that members of the same country (or of the same national party) act as if they form a distinctive unity. The claims contained in the latter provisions and those of the European Parliament are therefore not identical. At the primary level, the European Parliament shows itself as a representative body of Union citizens, divided along political lines. Yet, at the secondary level, it appears as a body of national political delegations: a representation of national peoples.

The findings above are in conformity with analyses of other studies on European political groups. According to Hix and Lord, national delegations within European political groups are even ‘as important an organisational focus as the transnational party groups themselves’.153 In her book on the European political groups, Kreppel traced back to when the empowerment of the national delegations had started. The year 1979 was again pointed at as a defining moment.

As before, Kreppel tried to explain this evolution, and the timing thereof, by looking at its potential beneficial effect on the position of individual members and/or on the development of Parliament’s powers. However, she concluded that this approach was not fully satisfactory in the end. Whether the evolution ‘was due to the technical difficulties incumbent with increased membership or a concerted effort on the part of the delegations leaders remains a mystery.’154 In the concluding section, a complementary explanation will be put forward in order to solve part of this mystery.

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152 Article 9(2) Rules of Procedure of the Alliance of Liberals and Democrats for Europe – February 2009.
154 Kreppel (n 2) 210.
7. Conclusion

This chapter has indicated three different developments that shaped the representative claim of the European Parliament, as presented through its internal organisation. The first concerns the organisation of the European Parliament along the lines of political affiliation. Already from the very first week, the members of the Common Assembly (the forerunner of the European Parliament) met in European political groups. They made a conscious decision not to be grouped along national lines, as they felt that this would constitute an inappropriate representative claim. In June 1953, the European Parliament adopted a legal basis for the formal recognition of European political groups, and agreed to provide them with funding and a secretariat. Increasingly, members came to coordinate their work through these groups. The privileges of European political groups as actors radically increased after 1976, the moment that the Direct Election Act was decided. Important instruments for carrying out a representative mandate, such as speaking time in plenary and participating in (conciliation) committees are, since then, formally regulated in, and between, European political groups. As a result, members have acquired an additional responsibility. When they exercise their parliamentary work, they (also) represent their European political group, and, by implication, the electorate of their colleagues to a certain extent.

The second development that took place is related to the criteria for European political groups. Since 1973, the threshold for obtaining legal recognition (and with benefits) was lowered, provided that the group in question was composed of members from different member states. In 1999, the European Parliament decided that ‘uninational European political groups’ were in fact a *contradictio in terminis* and should not exist. Over the years, the number of different nationalities required for the composition of a group substantially increased, reaching the current 7. The derived electorate in whose name most members act in addition to their own (see above), is thus increasingly and necessarily pan-European.

In these two developments the European Parliament presents itself to the public as a representative body of Union citizens, and suggests that among these citizens ideological differences form the dominant dividing line (as far as relevant for the parliamentary work). The claim deviates from the one captured in the electoral provisions, which send the message that Parliament is essentially a representative body of national citizens, given that members are elected on national lists and by a system of degressive proportionality. Parliament could adjust this claim through the use of its organisational autonomy. The substantive liberty to do so emanated from the free representative mandate that members of the European Parliament obtained in 1979. Parliament’s direct election positioned it formally to redefine itself and whom it represent. That is why the year 1979 is so pivotal in terms of Parliament’s development.

The third development that this chapter points at, is the enhancement of the privileges of national delegations within European political groups. Since 1979, national delegations have become formal actors at the secondary level of Parliament’s organisation. It can be assumed that, because national delegations increased their control on the organisation of the European political groups, it was acceptable for them to vest more powers in these groups at the primary level. But there is a second conclusion that can be drawn. The role that national parties and nationality undoubtedly
play within European political groups is less visible to the public – and therefore a feebler claim – than when this role was explicated on the level of the plenary. Apparently, the European Parliament wants to make the European political groups the most visible platforms of representation.

This choice contributes to the European Parliament offering a different type of representation than national parliaments. It positions itself as the appropriate institution for providing decisions on the Union level with democratic legitimacy. As member states have recognised its claim (or at least its potential), the European Parliament has managed to expand its powers in subsequent treaty changes. Most likely, it would not have succeeded at this, had it organised itself along national lines or no lines whatsoever.

Nowadays, the European Parliament is one of the most powerful assemblies of the world. Positioning itself for more power and competences is therefore no longer (or should not be) the main motive guiding Parliament’s organisation. Legitimacy is the more pressing matter now. The European Parliament needs to ensure that the electorate recognises its representative claim as being an appropriate and effective representative body. There are two, very different, strategies that could contribute to this. Each has a different impact on Parliament’s organisation.

The first strategy would be to invest more in building a European public space. People may feel more represented by the European Parliament were they to be more aware of their Union citizenship. This could be encouraged by strengthening the role of European political parties, for instance by presenting European lists at the next European election. Making the presidency of the European Commission one of the stakes at this election, fits in this strategy as well. A second approach is to stop hiding the relevance of nationality in Parliament’s organisation. The link with citizens may be enhanced if national diversity shows itself more prominently. The recognition of national delegations at the primary level could be an option to achieve this end.

Most likely, we will see elements of both in the coming years. At differing moments in time, different decisions will be made – sometimes even conflicting ones. We now know that this is not a reason for concern. After all, politics is not about shaping a linear development, but rather about conflict and ongoing creation. About claims – and adaptation.
Part III. Representative Autonomy: The Case of the European Parliament
8. Representative Autonomy: A Drive for Action and a Vehicle for Change

In the introduction (Chapter 1), I recalled my surprise when learning about the Lisbon Decision of the German Federal Constitutional Court.¹ In 2009, this Court effectively disqualified the European Parliament as a representative body of Union citizens. At face value, its point is strong and compelling. However, it is exclusively based on the fact that the composition of the European Parliament is determined by a system of degressive proportionality. As the weight that is attached to the votes cast by Union citizen differs depending on their country of residence, ‘the European Parliament factually remains a representation of the peoples of Member States’.² On this definition, the European Parliament’s electorate is not a single, self-standing group. The relevance of the electoral system for the definition of whom Parliament represents cannot be denied. Yet, on the basis of ten years of experience as a member of the European Parliament, I sensed that the German judges left important rules out of the equation. They had been overly absolute in their conclusions. Some of the other rules, which have been formally adopted as well, define the electorate as ‘a whole’, and as separate from national structures. The decision by the European Parliament to structure its organisation along the lines of European political groups rather than national groups comes to mind in particular. Its Rules of Procedure, analysed in Chapter 7, prevent members from formally carrying out their mandates as representatives of national peoples. This is a good illustration of how the European Parliament has partly repaired the implication of the electoral rules by decisions that fall within its scope.

I undertook my research in an attempt to understand the co-existence of different sets of rules, and to shed light on their significance for the representative status of the European Parliament. The word ‘status’ refers to Parliament’s position as defined by all formal rules. I focussed on the content and development of four particularly relevant sets of rules: the electoral rules (Chapter 4), the immunity provisions (Chapter 5), the salary provisions (Chapter 6), and the aforementioned rules regarding European political groups (Chapter 7). I have explained my selection in Chapter 1, section 5.3. Each set of rules has an impact on how we should view the representative status of the European Parliament. In understanding how these rules

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² Ibid para 284.
evolved, and how they came to deviate from each other, I have focussed in particular on Parliament’s own drive to bring about change.

In the course of writing this thesis, I have had to accept the sheer impossibility of defining the European Parliament’s subject in absolute and unequivocal terms. Those scholars (or courts) who do so, necessarily present an incomplete picture. Their failure to deal with all of the facts is likely caused by the discomfort that many intuitively feel when confronted with diverging provisions. I hope that the concept of representative autonomy, which I presented in Chapter 2, contributes to relieving some of their uneasiness. This concept stresses that political representation is in part, but essentially, about redefining the polity through a permanent evolution of rules and practices. By their very nature, parliaments – as bodies of political representation – have the drive, one could even call it an obligation, to seek and test constitutional change. I have argued that parliaments even ought to have sufficient autonomy to do so. Many actions by the European Parliament, resulting in diverging provisions, can be viewed in this light. They are the result of typical parliamentary behaviour.

I will outline the four most important findings of this study below.

1. **The European Parliament Defines Both Itself and Its Electorate**

The first conclusion is dominantly present in all chapters regarding rules (Chapter 4-7). From its inception, the European Parliament has undertaken consistent efforts to shape its own representative status. Restructuring itself and its electorate is an on-going process, expressed in decisions big and small. Along the way, Parliament has successfully developed its powers to take such decisions further. From debates and reports, it appears that Parliament considers this appropriate and befitting a parliament.

1.1. **Exceptional Rule-Making Procedures**

The finding that the European Parliament seeks to increase its power to alter its representative status beyond the treaty texts can be no surprise for Parliament-watchers. The introduction of the institution in Chapter 3, on the basis of the work of other scholars, highlights that the same phenomenon occurs in the legislative process, in the budgetary process, and regarding the investiture of the European Commission. The difference is that these other works focus on what Parliament does: on how it has developed its say over policy areas and other institutions. The current study analyses the development of Parliament’s say over what it is: over what kind of representative body it is, and who it is that it represents.

Interestingly, the member states have recognised that the European Parliament should have a special involvement in precisely these rules. This explains why they have provided it with powers that can be regarded as unusual in comparison to Parliament’s powers in other areas. As early as 1958, the European Parliament – then called the Assembly – was given the right of initiative to draw up proposals for

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3 Chapter 3, section 2.
organising direct elections by universal suffrage. Prior to that, its members were asked to design a blueprint for a European Political Community. And in 1997, Parliament was given the right of initiative for, and the final say in, laying down the rules regulating the conditions for the performance of the parliamentary mandate — such as salary provisions. It shows that the decision-making on the provisions that define Parliament and its electorate are hors catégorie. The European Commission is withheld the right of initiative that it has regarding ordinary legislation, and an extra-ordinary role is reserved for national parliaments. Apparently, the question of what the European Parliament is, and whom it represents, is a question that should be answered predominantly by citizens’ representatives.

Initially, the role for the European Parliament in these exceptional decision-making procedures was relatively large. Meanwhile, the European Parliament has become a co-legislator in most areas. In the ordinary legislative procedure, it takes the final decisions together with the Council. In comparison, the power of the European Parliament as regards the electoral procedure in particular is now rather restricted. Its room for manoeuvre is limited by the involvement (and veto) of national parliaments. The reason for this is most likely that the representative status of a parliament carries the potential to redefine society (see section 2).

1.2. Examples of Developed Powers

Over the years, the European Parliament has extended its power to shape the studied sets of rules both de facto and de jure, thereby contributing to the evolution of the European constitution. It has inventively built on competences that were attributed for different purposes. In particular Parliament’s right to decide its own Rules of Procedure has turned out to be a vital instrument for change.

Let me present the most striking example of this, which concerns the immunity of members of the European Parliament and forms the core of Chapter 5. The story is remarkable, as the immunity provisions are laid down in a Treaty Protocol that, legally, can only be changed by the member states. Even though the European Parliament is virtually relegated to the side-lines as regards primary law, it has managed to amend the scope of the immunity offered to members nonetheless.

The provisions that govern the immunity of members of the European Parliament are laid down in the Protocol on the Privileges and Immunities of the European Union (PPI). Article 8 PPI concerns protection against prosecution for actions undertaken in the exercise of duties. For many years, it was evident to all that this ‘non-liability’ did not extend to acts undertaken outside Parliament’s precincts. The latter were covered by Article 9 PPI. According to this, members enjoy the same immunity that members of their national parliament have for actions undertaken in

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4 Chapter 4, section 2.2.  
5 Chapter 3, section 1.2.  
6 Chapter 6, section 2.2.  
7 Chapter 4, section 1.2.  
8 Chapter 5, section 2.4.  
9 Chapter 5, section 2.1.  
10 Chapter 5, section 2.2.
their home country, which means that their protection depends on their country of origin. Only in relation to Article 9 PPI could the European Parliament exercise its right to waive or uphold the immunity of its members when there is fear for fumus persecutionis. Article 8 PPI is an absolute immunity that cannot be lifted. Whether it applies, is for the courts to decide.

For decades, the European Parliament has expressed its desire to end the difference in legal protection caused by Article 9 PPI, and to have the immunity rules of its members harmonised. The geographical criterion was increasingly regarded as unfitting. Firstly, because members can also perform core representative tasks outside parliamentary premises. This is for instance the case when they participate in television debates or give speeches at party conferences. Secondly, a European public space is in the process of emerging. Members occasionally, but increasingly, participate in cross-border political activities. Without uniform immunity provisions, some members of the European Parliament could face prosecution for certain statements, whilst others, for similar acts, would not.

To this day, the demand for equality has not been met. Nevertheless, the European Parliament has found a way to extend the Union immunity of its members captured in Article 8 PPI. It did so by relying on its right to regulate its own affairs, its right to waive immunity, and the treaty-enshrined principle of loyal cooperation.

First, Parliament has re-interpreted Article 8 PPI. The modern interpretation has it that the protection of Article 8 covers all duty-related actions, even when they take place in a member’s home country. Following this turn, Parliament found a manner to express itself on Article 8 cases, as well as to make its opinion heard to the courts. This was accomplished through amending its Rules of Procedure. Currently, the rules enable members (or former members) to request that their immunity is defended, even when theirs is an Article 8 case. Parliament will vote on such requests, and present the relevant national courts with its advice. The European Court of Justice has confirmed that, by virtue of loyal cooperation between the institutions, national courts are bound to take this advice into account. This means that even for actions undertaken in a member’s home state, the national courts may be asked by the European Parliament to respect the protection of this member by virtue of Article 8 PPI. The case of Patriciello has demonstrated that the Union immunity of members has indeed been extended to actions outside Parliament’s precincts. This has effectively reduced, albeit to a limited extent, the differences in legal protection of the members.

This chain of decisions has thus slightly modified the representative status of the European Parliament. It presents the Parliament as a body with an own electorate. Moreover, the members are now in a better position to develop a relationship with this unitary electorate, in an emerging European public space. Members from

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11 Chapter 5, section 2.3.
12 Chapter 5, section 4.2.2.
13 Chapter 5, section 4.1.
15 Chapter 5, section 4.2.2.
different European political parties and from different countries can now debate, participate in demonstrations, and engage in other political activities on an equal footing. Conversely, within one and the same country, the differences between the legal status of members of the national parliament and of members of the European Parliament from that country have increased.

The development of members’ immunities is noteworthy. Yet, it is but one example of how the European Parliament exploits its powers beyond what they were intended for, how it presents its own readings of Treaty provisions, and how it seeks to have them altered *de jure* and *de facto*. The history of the European Parliament shows an evolution – which continues today – as a consequence of permanent interaction between Treaty texts and *faits accomplis*, helped by normative assumptions about the powers that a parliament ought to have (see next section).

Sometimes the bending of the rules was merely a matter of degree. That can be concluded from Chapter 4, describing Parliament’s actions, in the period 1958-1976, to arrive at direct elections. In these early years, the European Parliament was given the right of initiative, but it lacked rule-making powers. Nevertheless, Parliament found alternative ways to exercise influence after it had presented its proposals for legislation. It threatened the Council with legal action if it would not act upon Parliament’s proposals, it pressured Council to engage in inter-institutional negotiations and its members introduced proposals in national parliaments as well. Yet, it can be argued that these actions fall within the sphere of political interpretation of the right of initiative. It goes too far to conclude that Parliament acquired new competences, let alone qualify them as the result of an abuse of power.

The same cannot be said about some of Parliament’s actions in bringing about a Union salary for all its members. As has been described in Chapter 6, Parliament’s decisions went beyond the letter of the Treaties, and can even be seen as examples of détournement de pouvoir. The objective of the European Parliament was understandable: it wanted to end the situation in which members of the European Parliament were paid the equivalent of members of their respective national parliaments, causing considerable differences between members from different countries and violating the claim that Parliament is a unitary institution, representing a self-standing electorate. However, until 1997, Parliament had no right of initiative, let alone any power to lay down the rules for a uniform statute for members. In the absence of this, and in order to minimise the differences in pay *de facto*, Parliament’s Bureau decided to set up different social arrangements that normally are part and parcel of a salary. These arrangements included an invalidity pension, a survivors’ pension, a voluntary pension fund, and a transitional end-of-service allowance. According to the Bureau, the legal basis for this can be found in Parliament’s autonomy to regulate its own affairs and organisation. This stand can be contested though, not only

16 Chapter 4, section 1.2.
17 Chapter 4, sections 2 and 3.
18 Chapter 6, section 2.
19 Chapter 6, section 1.2.
20 Chapter 6, section 4.1.
on moral, but also on legal grounds. Nonetheless, it should be recognised that
the social security schemes contributed to one of Parliament’s self-imposed goals:
making the financial status of its members more equal. Most of the arrangements
that were introduced by the Bureau, were later included in the European statute for
members that was finally decided in 2005. If one sets aside the personal incentives
of members to provide themselves with a Union salary (and which no doubt were
present), one can see the institutional motives. How could a Parliament, which in
Article 14(2) TEU is composed of representatives of Union citizens, accept that
its representatives were dependent on national structures for their indemnity? The
battle for a single salary is just another element of a more encompassing effort to set
national structures at a distance, and to turn the group of members of the European
Parliament into a whole.

2. Representative Autonomy: The Concept

The continuous actions, undertaken by the European Parliament with a view to
changing the rules through which its representative status is defined, deserve a thor-
ough explanation. One may be tempted to place the permanent manoeuvring in
the light of a well-known reflex of institutions to forge their autonomy, and increase
their staff and budget as much as possible. However, such an explanation does not
suffice. The European Parliament is not just ‘any’ bureaucracy: it is a parliament. It
is an elected body, composed of members with free representative mandates. There-
fore, the actions described above can better be studied in relation to Parliament’s
representative role. To enable this analysis, I have introduced – in Chapter 2 – the
concept of representative autonomy. Come to the end of my thesis, we can conclude
that this concept has proven its value. It has shown to be effective in explaining
Parliament’s drive and capacity to change the sets of rules studied here, where occa-
sionally other approaches could not (see section 3). Additionally, it has provided a
plausible explanation for why other actors accepted Parliament’s interventions to
some extent. The latter still deserves further research, however, as the present inves-
tigation only concerned the European Parliament itself.

2.1. The Electorate as a Construct

In order to understand what Parliament’s representative role requires in terms of
liberty to define itself and its electorate, it was necessary to first develop a deeper
understanding of what political representation is. An important part of Chapter 2
has been dedicated to this exercise. It shows that basic assumptions which used to
dominate the literature on political representation, have since been questioned. For
a long time, many scholars worked with models that presume the existence of an
objectively defined electorate that mandates (or delegates) the representatives to act

21 Chapter 6, section 4.2.
22 Chapter 6, section 5. See European Parliament Decision 2005/684/EC Euratom adopting the
23 Chapter 2, section 4.2.
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in their name. This presumption makes it difficult, if not by definition impossible, to explain and justify the existence of rules that define the electorate in a different manner than the electoral provisions do. Therefore, my investigation would have ended here, if it were not for new theories that have been developed more recently.

In these new theories, political representation is described as a dynamic interactive process of claim-making, claim-accepting and claim-adapting. It does not presuppose a homogeneous and static electorate, but instead a diverse and active one. This electorate consists of people with different characters, family situations, abilities, and views. They live in different geographical areas, make different choices in life, and are shaped by different histories. There are not two persons alike. To represent this diverse group, it is therefore necessary for a representative to make credible claims. Claims about who the voters actually are. Claims about what ties them together, what their views, interests, and perspectives are. And claims about the person of the representative him/herself, making him/her the most appropriate representative for this particular electorate. The essence of political representation is not to perfectly mirror the electorate. Political representation is about making credible claims that express politically relevant differences between citizens, and that offer constructs to overcome the individual particularities. Representatives can present their claims in parliamentary debates, in speeches, in interviews, through promotional material, etcetera. The implication of the claim-making theory is that any construct of the electorate is by definition contestable. The electorate cannot be objectively defined; its definition is a matter of actions. Therefore, the coming about of deviating claims about the same electorate is highly likely. This ramification is particularly well-elaborated by Saward in his book 'The Representative Claim'.

A might well represent B. What B is – what words or images are taken to characterise her or him (or it) – as an electoral or other potential construction, for example, is often highly debatable. A must portray B, and adjust himself or herself or itself to some selective version of B, an activity that goes to the heart of political representation.

The claim-making theory has offered elementary insights into how political representation takes place in practice. I have built on the findings of Saward and other political scientists in order to understand what liberty a parliament needs to undertake its representative task. Where they have studied claim-making in the actions of representation, I have instead turned to claim-making in relation to formal rules.

The multiple rules concerning a parliament and its members inevitably contain assumptions as well. They include definitions or premises about the unity that parliament represents (e.g., a nation state or a federation of states) and/or the diversity

24 Chapter 2, section 1.1.
25 Chapter 2, section 1.2.
27 Ibid 27. Chapter 2, section 1.2.
of its population (e.g., diversity along geographical or ideological lines). Contrary to what many believe – and what is comfortable to believe –, these claims are not objective or inevitable. They are matters of choice and circumstance. Therefore, the definition of whom it is that a parliament formally represents, is a question that concerns claim-making, and the answer can always be contested and developed. 28

In substantive terms, political representation succeeds when it is recognised by the electorate. 29 This recognition may grow over time, and possibly remain partial, if it comes at all. The situation is different for formal political representation. Formal claims have a hundred percent authority. When they have a legal basis, and are adopted according to the right procedure, rules are by definition recognised – formally speaking. The acceptance of representative claims by a wider public are crucially important for the functioning of any parliament. In the present investigation, however, I leave this matter aside.

An important focus in this study is whom should be responsible for establishing formal rules containing representative claims. From understanding political representation as a process of claim-making and claim-adapting in combination with our adherence to the ideal of representative democracy, it follows that parliaments themselves ought to have a substantial role in the decision-making process when the rules can alter their representative status. 30 Should it be regarded as ideal that citizens are the ultimate rulers of themselves, the representatives of the people, and not any other institution, must lead the process of representative claim-making. In Chapter 2, section 3, it is outlined that this is indeed the reality in many countries. Most parliaments have a large say over the electoral provisions, forming one of the most important sets of rules concerned. Often, they also play a role in amending the constitution, in establishing the conditions under which the parliamentary mandate is exercised, in the rules regarding national political parties, etcetera. 31 They have a substantial level of, what I have called, representative autonomy. This is the liberty that a parliament has to define and to represent itself and its electorate. 32

When we take a closer look at parliamentary representative autonomy, we see that it springs from two sources. The first source is the free mandate of parliament’s elected members. 33 Having a free mandate entails that representatives are at liberty to make the representative claims that they deem most fitting. Formal rules can support or complement such representative claims. Of course, as decisions are generally taken by a majority in parliament and at different moments in time, it is conceivable

28 Chapter 5, section 2.3.
30 Chapter 2, section 3. Rittberger has found that the ideal of representative democracy had a strong influence on the foundation of the European Parliament, and on subsequent decisions to attribute it with more powers. Berthold Rittberger, Building Europe’s Parliament: Democratic Representation Beyond the Nation-State (Oxford University Press 2005); Berthold Rittberger, “No Integration Without Representation!” European Integration, Parliamentary Democracy, and Two Forgotten Communities’ (2006) 13 Journal of European Public Policy 1211.
31 Chapter 2, section 3.1.
32 Chapter 2, section 4.1.
33 Chapter 5, section 3.2.
that formal claims may jeopardise the representative claims of individuals. We have seen this in relation to the organisation of the European Parliament into European political groups. Organising Parliament in this manner presents the picture of a single Union electorate that is especially divided along ideological lines. National differences between members (and their voters) are understated. For a majority of the members, this claim seems to be in accordance with or complementary to the claims that they wish to present to their electorates. For others, who wish to stress national differences, this arrangement is not supportive at all. The example shows that a parliament’s representative autonomy guarantees (at least) a majority of its elected members that they can carry out their representative mandate as they deem fit.

The second source from which a parliament’s representative autonomy emanates is the principle of separation of powers and/or institutions. To uphold the appropriate institutional balance, each institution must be in the position to defend and foster its legitimacy. A strong relation, both in terms of substance and in form, with the electorate yields a larger autonomy. Conversely, unfitting claims can seriously undermine citizens’ trust in parliament. Therefore, in order to avoid that other institutions would seek to advance their powers at the expense of that of the elected representatives, parliaments need to be a dominant player in the claim-making process, including regarding formal claims.

The liberty to posit claims involves more than simply having sufficient rule-making powers. Members must be in the position to make alternative choices at their own discretion. This can be labelled substantive liberty. It entails a certain freedom to re-construct their electorate. The capacity and implications of restructuring a polity can best be explained on the basis of the example of Cleisthenes. As outlined in Chapter 5, this Athenian leader fundamentally altered the organisation of the political representation of Athens in 510 BC. He replaced the representation along family lines with a representation on the basis of geographical background. Over time, the new structures have redefined how ‘the people of Athens saw themselves in relation to each other and to the state.’ It shows that amending the rules on representation is part of a permanent constituting and re-constituting of our communities.

It is evident that representative autonomy is worth pursuing for any parliament composed of elected members and operating in a representative democracy. It plays a crucial role in their developments. In the first place, representative autonomy is a drive for action. It is an important reason why a parliament demands more rule-making powers, for example regarding the electoral provisions, or seeks to increase its say over these rules by other means. Representative autonomy is also a vehicle for change. It enables parliament to take certain decisions as it deems fit. It provides the justification for parliament to make (new) claims in rules over which it has relatively much power, even when these claims deviate from those in other sets of rules over which its says is more limited.

The notion of representative autonomy provides an explanation for why parliaments behave the way that they do. The former can even help to predict the latter, for

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34 Chapter 5, section 3.3.
36 Saward (n 26) 53.
it seems evident that a parliament composed of members holding free, representative mandates, but with only a limited representative autonomy, will naturally seek to develop this further. Therefore, also the development of the European Parliament, and consequently of the European constitution, can be better understood if the concept of representative autonomy is taken into account.

2.2. The Added Value

The new insights regarding political representation and the applicability of the now developed concept of representative autonomy are both relevant for the discussion of whom it is that the European Parliament represents. Far too long has this important debate been taken hostage by the belief that Parliament’s subject can and must be captured in a clear-cut and unequivocal figure. Proponents of this view maintain that the European Parliament is the representative body of either national peoples, or Union citizens, and they often base this on a single set of rules. However, the understanding of (formal) political representation as a process of claim-making and permanent claim-adapting frees us from this paralysing choice. It clarifies that the representative status of the European Parliament (as of any parliament) does not depend on the precise formulations in the electoral law only. Representative claims are found in numerous provisions, including Rules of Procedures that structure the internal organisation of parliament, in constitutional provisions, in provisions regulating the legal and financial status of members, and in provisions regarding the verification of mandates. Each of these sets of rules presents certain pictures about the ‘whole’ (the unity) that is represented by the European Parliament, and/or about the main dividing lines (the diversity) within this unity. If one were to take only one set of rules into account for defining Parliament, it would result in a distorted picture. All these provisions together contribute to our definition of a parliament’s representative status.

The concept of representative autonomy also sheds light on why different sets of rules often contain diverging representative claims. Claim-containing rules influence the legitimacy and position of the European Parliament. As such, they also have an effect on the on-going balancing act between the different institutions in the European Union. The Council and the European Parliament simply don’t have the same interests when shaping the rules. Additionally, they may have different views on what the most appropriate representative claims would be. Therefore, if an opportunity arises to influence these claims, they both will do so. And, considering their power differs depending on the pieces of legislation at hand, this may quite naturally lead to divergent provisions.

The reason why representative autonomy shows itself as a relevant driving force for change in relation to the European Parliament, and why it may be less apparent in the actions of most other, national, parliaments, is that autonomy always shows most when there is tension. The institutional architecture of the European Union

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37 Seeking to establish the value of each set of rules for the definition of whom Parliament represents, is not part of this investigation. It is even likely that such a proportion cannot be established.
is still under construction. The decisions about how the unity of citizens is defined, and how their divides are organised, are therefore more controversial. National parliaments need less autonomous space as the institutional balance is generally well-established, and their main battles were fought a long time ago. The unity that they represent is generally uncontested – except in some countries, like Belgium, the United Kingdom, and Spain –, and the same holds true for how dividing lines are drawn. The European Parliament is relatively young. The unity that it represents is not yet firmly embedded in social reality, and the diversity that it needs to bridge is more wide-ranging and profound. It is in such strenuous situations that we are confronted, up-front, with the fact that political representation entails restructuring the community.

3. The European Direct Election: A Watershed

Increasing its representative autonomy has always been an ambition of the European Parliament. However, since 1979, it has become crucial. That is the third conclusion of the present investigation: the first direct election formed a watershed. It increased Parliament’s capacity as well as its need to define and to represent a self-standing electorate.

3.1. Until 1979: Limited Authority, Limited Autonomy

From the start, the European Parliament was a representative body of citizens. Unlike many other international assemblies, it was not a gathering of delegates of national governments or of national parliaments. Members had an (implicit) free mandate, even though they were appointed from within national parliaments for almost three decades (1952-1979). As members of the European Parliament, the representatives had a different electorate and a different task than when they functioned as members of their national parliament. This followed from the fact that the European Parliament exercised authority at the European level, where it notably had the power of censure. This task alone, judging whether the European Commission had acted against the interest of the European community, required that the members took into account the interests and views of all member state citizens, and not only of those who had elected them.

But members had a dual task. While having a responsibility for ‘the whole’ of the European communities’ citizens, members were also entrusted to speak up and give a voice to a part of them. This raised the question of how the parts should be defined. As we have seen before, representation by definition requires structuring and re-structuring; it is a permanent search for drawing the most relevant and appropriate dividing lines in a polity. In the post-World War II era, it was felt undesirable and counterproductive by the pioneering representatives to structure Parliament on the basis of nationality. Instead, the members chose to organise themselves along

38 Chapter 3, section 1.
39 Chapter 3, section 1.2.
40 Chapter 2, sections 2.1 and 2.2.
the lines of political affiliation, and set up European political groups. Since 1958, these European political groups are visible in the seating order in Parliament’s plenary. 41 The decision to sit in this way can be read as a powerful claim, not only about the Parliament and its members, but above all about Parliament’s electorate. It presents the electorate as citizens who are more divided over political issues than over matters related to their national background – at least in as far as relevant for the decision-making in the European Parliament. This claim may seem far-fetched, as the members of the European Parliament were appointed by national parliaments, and still described as ‘the peoples of the member States of the Community’. 42 Nonetheless, in the political sphere, and on the basis of its right to regulate its own affairs, the European Parliament was at liberty to make it. 43

3.2. A Self-Standing Electorate

By structuring itself in European political groups, the European Parliament exhibited its political character, which may well have added to the pressure (emanating from the ideal of representative democracy) to organise direct elections for its composition. 44 When this decision was finally taken, in the Direct Election Act of 1976, an untenable situation arose for the European Parliament. The Act raised Parliament’s need for more representative autonomy, but failed to regulate this. Parliament’s rule-making powers were not increased concurrently. The Act thus established a direct link between the members of the European Parliament and the electorate, entrusting the members explicitly with a free, representative mandate, but left Parliament with only limited means to amend the formal representative claims about itself and its electorate. Members continued to earn different (national) salaries, and were not empowered to change this. They still fell under different (national) immunity regimes, and had no say over the Protocol that governed this. They were elected on the basis of different (national) election systems, and had no competence to lay down a Europe-wide system. Still, the elections of 1979 have fundamentally altered the character of the European Parliament and of its electorate. Both became more ‘European’ through the elections alone.

From a theoretical perspective, the citizens of the European communities were already some kind of ‘unity’ prior to the Parliament’s first direct election. After all, the European institutions exercised authority over these citizens – in some areas –, and the decisions by the European institutions affected them all alike. 45 Yet, the unity was weak, and rather abstract. In fact, many citizens may not even have been aware of it, which questions the very idea of this unity for the daily reality. Organising direct election changed this obscure situation. It attributed an active role to citizens in bringing about and confirming their unity. By going to the ballot box together,

41 Chapter 7, section 3.
42 Chapter 3, section 1.2.
43 The right to regulate its own affairs was extended to the Common Assembly since 1952. Article 25 ECSC.
44 Chapter 7, section 3.2.
45 Chapter 2, section 2.2.
European voters underpinned Parliament’s authority to exercise power over them. Their act stressed, as well as fortified, the fact that they formed a group. This new group of citizens, since 1979 positioned to act in a European capacity, constitutes Parliament’s subject.

Even though the Direct Election Act was not accompanied by an increase in Parliament’s rule-making powers to re-shape its representative status, it served as a strong incentive for Parliament to raise its representative autonomy de facto. Moreover, it increased Parliament’s liberty to alter the rules in line with its own ideas. After all representing involves making own representative claims. Since the Election Act Parliament has the norm on its side which stipulates that parliaments in general ought to have a say over their representative status. This increased the European Parliament’s capacity to act.

Each chapter of this research testifies that 1979 formed a vital turning point, a watershed, for Parliament’s efforts to redefine itself and its electorate. In Chapters 5 and 6, we have seen that, since then, the European Parliament insisted on, and undertook action for, a Union statute for members, providing its members with an equal legal and financial status, different from that of members of national parliaments. Chapter 7 shows how since 1979 the impact of European political groups on how members can carry out their representative mandate increased radically. The groups now determine the distribution of plenary speaking among their members as well as the attribution of committee seats. This evolution of the tasks and position of European political groups has affected the representative claims of Parliament as a whole, but also of individual members. It is on the ticket of European political groups that members perform vital parliamentary tasks. Thereby, they are given an additional responsibility. When members speak or act in committee or in plenary, they can be regarded as representatives of their European political group (as well), and with that as representatives of a derived European electorate.

All chapters testify to Parliament’s efforts to distance itself (and its members) from national structures. This apparent objective can be explained as reflecting the representative claims that a majority of the members of the European Parliament each individually want to make. Importantly, there is also an institutional incentive to seek to develop a self-standing electorate and to construct itself as the most appropriate representative of it. It raises Parliament’s legitimacy and is therefore a precondition for Parliament to become more authoritative and obtain a more powerful position amongst all the institution. If the European Parliament continues to be seen as a representative body of national peoples instead, it faces serious competition from national parliaments, and even from the Council for exercising power. It is likely that these two institutions are recognised by the public as ensuring a better political representation of citizens. This is a highly undesirable position for the European Parliament. Firstly, it would jeopardise attempts to increase Parliament’s powers and competences (at the expense of other institutions). Secondly, it would

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46 Chapter 5, section 3; Chapter 6, section 2.
47 Chapter 7, section 4.1 (speaking time) and section 4.2 (composition of committees).
48 Chapter 7, section 4.
49 Chapter 7, section 4.4.
negatively affect the liberty of members of the European Parliament to exercise their mandate as they deem fit in the areas where Parliament is competent to act. Were they to be regarded as second-best representatives of national citizens, members of the European Parliament could feel pressured to follow the decisions that were taken by the national parliaments or the Council. The way out of this danger-zone is for the European Parliament to stress its responsibility to represent citizens in their Union capacity. In that respect, it has a unique position. Making claims about itself as a representative body of Union citizens, inter alia by strengthening of European political groups, thus contributes to Parliament’s overall position in the institutional architecture.

Structuring the European Parliament in European political groups has also increased the relevance of the outcome of the European elections for the majorities in Parliament. At the same time, and due to importance that is attached to representative democracy, it has enabled Parliament to draw more authority from these elections for its own functioning. The latter showed itself particularly in the recent battle for more say over the nomination of the President of the European Commission, which was described in Chapter 3, section 2.3.

While the institutional consequences (and incentives) for changing the sets of rules discussed in this study now seem evident to me, let me confess that during my parliamentary mandate, I had not always viewed the matters in the light of institutional, let alone representative development. Reading the debates since 1952, one could deduce that I was not the only one. Only rarely did members argue that they wanted to change the rules ‘in order to create a unique European relationship with a (emerging) European electorate’. Instead, they simply complained about the ‘unfairness’ that some members earned higher salaries than others; about the existence of ‘first-class’ and ‘second-class citizens’ as a result of the divergent immunity provisions; and about the ‘inappropriateness’ that the financial and legal situation of members depended on national legislation. The main argument given for the development of European political groups is that it would make the parliamentary work more ‘efficient’. Only the amendment to the Rules of Procedures, forcing European political groups to be composed of members from several nationalities, was presented as deliberately having both an internal and an external effect. The relevance for the electoral connection and Parliament’s position in the Union architecture may have been intuitively understood by many, but it was often underdeveloped and understated in debates. The present study will hopefully contribute to a more explicit reflection, within the European Parliament as well as by other institutions, about the implication of changing the rules which affect Parliament’s representative status.

4. Parliament’s Representative Status Is Essentially Ambiguous

The ambition of the European Parliament to develop its representative autonomy is evidently an important motive for its actions. Moreover, it has led to important

50 Chapter 2, section 4.2.
51 Chapter 7, section 5.4.
changes, and continues to do so. This leads to the fourth conclusion: the representative status of the European Parliament is, and continues to be, work in progress.

Parliament is still raising its profile as the representative body of Union citizens. There is a continuum from the initiation of European political groups in 1953 to the appointment of the Spitzencandidaten for the Presidency of the European Commission by European political groups in 2014. In between these milestones, numerous decisions regarding primary law, secondary law, and other rules have been taken, with a greater or lesser involvement of the European Parliament. It has resulted in the current situation, in which the discordance between and within rules about who the European Parliament represents, is even more profound than was presented in Chapter 1. The examples of intrinsic ambiguity came to the fore in the preceding chapters. Members are paid a Union salary, yet member states may levy national taxation. Members now have a Union non-liability (for acts undertaken in the exercise of duty), yet their inviolability (for unrelated acts) continues to differ from country to country. Citizens are called to vote on the basis of their Union citizenship, yet the weight of their vote depends on their nationality. And finally, members are organised within European political groups, yet, within these groups, national delegations play a dominant role. The latter fact is particularly intriguing, as it shows that even when Parliament is fully autonomous in taking decisions, its members choose a structure in which nationality continues to be a relevant factor.

The European Parliament has always stressed the unity of Parliament and its electorate. In its own words, it ‘rejects any interpretation and any action designed to limit or negate the unitary nature of the European Parliament’. At the same time, we have seen that Parliament accepts – or has been forced to accept – the continued relevance of nationality. These two positions can only be combined if nationality is seen as an important characteristic of citizens, and the members are not formally tied to national structures (such as national parliaments), and/or to national entities (such as national peoples), for the exercise of their mandate.

While the status of the European Parliament is not fully European, it is unquestionably presented (both to citizens as well as to other institutions) as a more European representative body than ever before by the sum of the different sets of rules discussed. The European Parliament has shifted the focus of its representation, its centre of gravity. In the past sixty years, the European Parliament has undergone a radical transformation. In a crucial twist, the amended status also (at least potentially) has an effect on the Parliament’s electorate. The on-going change may contribute to re-constructing the polity, just as happened once thousands of years ago in the Athens of Cleisthenes. Representative claims (both formal and substantive ones) can impact on the identity of citizens. When formal provisions define the electorate as a group of Union citizens, this group of citizens exists by definition in form. However, when citizens recognise and endorse this claim, something else occurs: the group of citizens comes about in substance. The process of claim-making, claim-adapting, and claim-accepting then transforms them – to some extent. Until now, it seems

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53 Chapter 2, sections 1.3 and 2.3.
that Parliament’s claims to represent Union citizens finds more acceptance among the other institutions than among the public concerned.

Let us now, at the end of this journey, return to the Lisbon Decision of the German Federal Constitutional Court. In paragraph 280, it reads:

> ‘Even in the new wording of Article 14.2 Lisbon TEU, and contrary to the claim that Article 10.1 Lisbon TEU seems to make according to its wording, the European Parliament is not a representative body of a sovereign European people. This is reflected in the fact that it is designed as a representation of peoples in the respective national continents of Members, not as a representation of Union citizens in unity without differentiation, according to the principle of electoral equality.’

With hindsight, the paragraph has lost much of its compelling logic. First of all, it becomes apparent that the Court has itself introduced a new figure, only to subsequently deny its existence. Neither the Lisbon Treaty, nor any of the provisions in this study, refer to the emergence or existence of a ‘European people’. The German judges ostensibly needed the invention in order to brush aside Article 14.2 TEU more convincingly than they otherwise could. In the second place, we now know that there is no need to polish away Article 14.2 TEU. The provision refers to ‘Union citizens’ as Parliament’s subject. It is a claim that is laid down in primary law. It is thus complete-in-itself. It is by definition 100 per cent authoritative, and, at least formally, recognised. Clearly, it is hard to reconcile this with other claims, notably the one that can be found in the electoral system, which makes the weight of citizens’ votes dependent on their place of residence. Yet, the divergence of these claims is no reason to pick and choose between them. Moreover, it is not a cause for concern. Rather, it gives an indication of where we can still expect political action and confrontation in the future.

54 Judgment of the Second Senate of 30 June 2009 (n 1) [280].
Summary

Part I. Representation and Autonomy: The Frame

Chapter 1. Whom Does the European Parliament Represent?

On June 30, 2009, the German Federal Constitutional Court defined the European Parliament in its so-called Lisbon Decision as a representative body of national peoples. This qualification triggered this thesis. The Court based its judgment exclusively on the electoral system in which the weight per vote depends on where it is cast. The Court thereby attributes no significant value to either Article 14(2) TEU, stipulating that the European Parliament represents Union citizens, or to the fact that members of the European Parliament exercise their representative mandate in European political groups. The decision to ignore these other, deviating formal rules is unsatisfying because they have a legal basis and validity, and are thus, by definition, authoritative. In this thesis, I aim to provide a better understanding of how and why deviations come about between the different sets of rules which together shape Parliament’s representative status. The focus of my research lies in the amendment of its representative status by the European Parliament itself. Parliament hereby contributes to constitutional change, even though it is not authorised to do so in all cases and it is generally thought that constitutional change is a matter for the member states alone. The research question is as follows: how has the European Parliament gained its liberty to define whom it represents, and how should this liberty be understood in terms of representation? By this means I will also answer the question of whom it is that the European Parliament actually – formally – represents.

Chapter 2. The Concept of Representative Autonomy

This chapter contains the theoretical framework of my thesis. I map which rules contribute to the formal representative status of a parliament and whom – in a represented democracy – should be entitled to establish them. The existence of a norm, or a constitutional necessity, about the involvement of a parliament with these rules could explain which role the European Parliament takes upon itself and the level of acceptance for this by other institutions.

In recent years, insights have emerged that provide a new perspective on the concept of political representation and the electorate. The represented have long been considered an objectively definable group. It is however better to consider the definition of the electorate, of what it binds and the sub-groups in which it can be divided, as claims. A claim is artificial, by definition imperfect, and subject to change. Citizens are the object of representative claims, but they also judge them. If insufficient citizens recognize themselves in a representative claim, a representative will probably adjust the claim, or else run the risk of not being (re-)elected. Political representation is, as is well put by Michael Saward, a dynamic and interactive process of claim-making, claim-rejecting and claim-adjusting. This new approach to political representation is important for political scientists, and their study of the
actions of representatives. However, as I show in this thesis, it also touches on formal representation of a parliament. It offers a new perspective on how the representative status of a parliament should be determined.

It is often thought that the definition of whom a parliament represents follows linearly from that which is written about it in electoral law and the constitution. In the latter, the unity of a represented population is often emphasised, whereas the electoral law often underlines the differences between citizens on the basis of political ideals and/or geographical origins. We now observe that the formation of such regional or political electorates actually present claims, which can be also changed. Other lines can have been drawn instead, for example, on the basis of religion or gender, leading to a different definition of the electorate. The new perspective shows moreover that the representative status of a parliament is determined by more than just the above rules. For example, immunity and salary conditions, and even the internal rules of the parliament also include claims about whom the elected members represent (see Chapters 5-7). Because these provisions are not always decided at the same time and by the same actors, they can contain conflicting claims. That is no reason to ignore some of these rules when defining whom a parliament represents. The deviations between them only confirm the dynamic nature of representation.

Whether citizens perceive the claims as appropriate and legitimate is important for the functioning of a parliament, but is beyond the scope of this thesis. I use an internal perspective and just analyse the constructing of claims by the European Parliament.

Claims can result from an existing situation but they can also redefine society. In case they are accepted by the electorate, they can even change the latter’s identity. Claims have creative power. This raises the question of who, in modern representative democracies, should be responsible for the claim-holding rules. Although the level of autonomy therein depends on the constitutional setting, it is clear that an elected parliament is due a large role. The necessity thereof follows firstly from the free mandate of members. Intrinsic to a free mandate is that elected members are at liberty to define their electorate. Formal rules can support, but also undermine, this claim. Thereby, they impact on the representation in practice. Parliamentary involvement is also important to prevent that the balance of powers is disrupted. A misplaced formal representative claim may undermine the legitimacy of a parliament, and lead to other branches, such as the executive, gaining power at the expense of the elected parliament.

I shall call the liberty of a parliament to shape whom it represents and in what manner representative autonomy. This parliamentary representative autonomy involves systematically making decisions based on own preferences, to amend (or confirm) its representative status. The relevance of this standard for the evolution of the representative status of the European Parliament is substantiated in Chapters 4-7.

Chapter 3. The European Parliament: Potential, Powers and Structure

This chapter introduces the European Parliament. It shows how the European Parliament was given and won budgetary, legislative and supervisory powers in a permanent dynamic between treaty texts and political action. The treaties were continuously adjusted to how the power of Parliament had developed de facto, after
which they again served as a springboard for further change. The right of parliament to establish its own Rules of Procedure, proved to be a relevant instrument in the expansion of its position. Since 1979, the members of the European Parliament are elected directly. From the establishment of the Common Assembly in 1952, members may have had a free mandate, but it was obtained indirectly and implicit. Their direct election led to a different, more self-aware attitude of the representatives. This already showed in the first months after the first direct election, when the European Parliament rejected a budget for the first time. The elections also had an impact on other institutions, which found it more difficult to set aside decisions of the European Parliament. As a result, the Parliament gained more control over the legislative process and the composition of the European Commission. The direct election of its members has strengthened the formal legitimacy of Parliament, and thereby fostered an expansion of its powers. The dynamic development of the European Parliament is described by many scholars in terms of evolving competences and power. In this dissertation, I analyse a different evolution: that of the representative status of Parliament. The direct elections have also had a big impact on that. A directly elected Parliament ought to be involved in its own status (see Chapter 2). At the same time, this conflicts with the idea that the constitutional development of the European Union is a matter of the member states. The question is how the European Parliament has made its own formal representative claims nonetheless.

Part II. Representation and Autonomy: The Practice

Chapter 4. Electoral Legislation in an Intergovernmental Context

In this chapter, I describe how and why the European Parliament has tried to increase its say in electoral law: a crucial law for the definition of the electorate and of Parliament as its representative body. In 1958, the European Parliament gained the right to initiate legislation for a uniform electoral procedure. Generally, this initiating right is the prerogative of the European Commission. The exceptional privilege that Parliament gained in this respect, confirms the existence of a norm that representative claims ought to be made by representatives. The ultimate say was still (until the Maastricht Treaty) for the Council and the member states. This could be explained by the predominantly intergovernmental character of the European collaboration at the time. In the period 1958-1976, the European Parliament twice presented a legislative proposal. Therein, Parliament proposed that it would be given more (or even full) rule-making powers to lay down electoral legislation after its members had gained a direct mandate. This can again be seen as proof of a shared belief that a free mandate ought to increase the representative autonomy. The Council recognised that even a non-elected parliament, in which the members only held an implicit free mandate, ought to be able to put their own mark on electoral law. It therefore negotiated with Parliament on the electoral law, even though it was not legally obliged to do so. In 1976, the Direct Election Act was finally adopted. It was seen as a first step towards a uniform procedure. The Act did not increase Parliament's rule-making power. However, the direct link that was established between the European Parliament and a self-standing electorate was in itself a crucial change.
It proved to be a driving force for the strengthening of Parliament’s position – ultimately also in relation to the electoral law and other claim-containing provisions.

Chapter 5. Immunity and the Liberty to Represent

Despite the direct mandate and the self-standing electorate, the legal and financial status of members remained tied to national structures (see Chapter 5 and 6 respectively), and they had no competence to amend this. Their representative autonomy remained limited (at least initially). As regard immunities, that is still predominantly the case.

Immunity provisions define the arena in which, and against whom, representatives are protected to carry out their tasks freely. The legal position of members of the European Parliament is governed by the Protocol on the Privileges and Immunities of the European Union (PPI). Parliament can not amend this, because it concerns primary law: amendment necessitates approval of the member states. By virtue of the PPI, members enjoy the same protection in their home country as is also granted to members of the national parliament by national legislation. In the European Parliament itself, and in other member states, members are protected by Union immunity. A result of this arrangement, which dates from 1965, the legal status of members of the European Parliament differs as soon as they leave Parliament’s premises. In practical terms it means that members are not equally protected when engaging in extra-parliamentary European activities. In terms of claim-making, it undermines the unity of the institution and it presents the European Parliament as the representation of national peoples. Representing all Union citizens would require a uniform legal status, something that the European Parliament itself has long been calling for.

In the absence of uniform rules, the European Parliament has tried to make the legal status of members more similar nonetheless. In order to achieve this, Parliament built on its right to establish its own Rules of Procedures, its right to waive or uphold immunities at its own discretion and the treaty-enshrined principle of loyal cooperation, as a result of which national courts have to take notice of Parliament’s position when a member risks prosecution. Because of Parliament’s decisions, members can now count on a type of European protection for political activities outside Parliament. Hence, European Parliament has, through alternative means, increased the difference in legal status between national and European delegates, and decreased the difference among European delegates. The representative status of the European Parliament has thereby shifted (to a certain extent) in the direction of a representation of Union citizens.

Chapter 6. Indemnity and Dependency on National Structures

The introduction of direct elections initially did not lead to amendment of the salary provisions of members. Until 2005, members received the same salary as members of national parliaments in their member state. Salaries were additionally paid out of the national treasuries of the member states. This situation presented the European Parliament as an assembly representing national peoples. Since 1979, the European Parliament has strived for a member statute including a uniform salary for all members.
This would not only be ‘fairer’ for members, but also be fitting for a representative body for Union citizens. As a directly elected representative body, Parliament also demanded to decide on the salaries of its members itself. Even though a legal basis for a uniform statute was missing from the Treaties, Parliament has submitted proposals thereto since 1979. The other institutions de facto accepted the right of initiative of Parliament. For a long time, no result was achieved however.

In the absence of a uniform statute, Parliament’s Bureau created a web of financial benefits that made the financial status of members more similar. Members could receive – from the EU budget – an additional pension, a survivor’s pension, an invalidity pension and an end-of-service allowance. This was a contested self-enrichment. However, the Bureau presented the measures as building blocks for a future uniform statute. From that perspective, Parliament’s actions can be perceived as the expansion of its liberty to shape itself (and its electorate): claim-making. The legal basis for the measures lay in Parliament’s right to establish its own Rules of Procedure. However, this time, the Council challenged the legality thereof.

In 1997, Parliament obtained the right of initiative and the right to lay down a statute for members, after the approval of the Council. After years of negotiations, a statute for members was finally agreed in 2005, which entered into force in 2009. It incorporated most measures devised by the Bureau. Nowadays, members receive the same salary, which could be seen as a claim that Parliament represents Union citizens. However, on a number of key issues (including taxation) the Council has been obstructive and devalued the completeness of the claim. The fact that the Council was so successful in the negotiations seems to originate in the fact that it presented itself (and was recognised) as a better representative of the electorate in this regard. This increased its leverage. The example shows that the European Parliament can only increase its representative autonomy, when another institution – the Council – is not perceived as a more appropriate representative of its electorate.

Chapter 7. European Political Groups – Channels of Representation

In this last substantive chapter, the internal rules of the European Parliament are focused on. Parliament decides on these independently. Therefore, they are revealing of which representative claim Parliament wants to make in liberty. Almost from the beginning, the European Parliament denied its members the possibility to formally speak on behalf of a national electorate. Members could request the floor in an individual capacity, and (initially loosely) coordinated their work in European political groups. Since 1976, the moment that direct elections for the European Parliament were definitively decided on, the role of the European political groups has been expanded. Since then, speaking time is allocated to political groups, which then internally decide who should speak. On account of this construction, members not only speak in their own right, but they, to a certain extent formally, represent also their groups and – concurrently – the electorate of their colleagues. The committee seats were already divided along the lines of European political groups, whereby members fulfilled multiple representative roles within the parliamentary committees. Since 1979, the European political groups increased their ‘ownership’ over these seats and members may no longer appoint their own substitutes. In conjunction with this development, the criteria for the formation of European political groups have
changed. Over the years, the minimum amount of members a group should have, has been (relatively) reduced. It is seen as more important that groups are sufficiently European, and therefore include members from at least seven different member states. In addition, these members must have shared ideological views. Under the surface, nationality and national delegations continue to play an (even increasingly) important role. Thusly is evident from analysing the Rules of Procedure of the European political groups that important posts are divided along the lines of national delegations. However, the relevance of nationality does not show at the level of the plenary meeting.

The internal rules of the European Parliament ‘reconstruct’ the electorate. In the (most visible) representation, more significance is attributed to ideological differences between citizens than nationality. Individual members can of course construe their own claims, but the formal claim by the European Parliament inevitably colours their actions. Earlier, I argued that representative claims can contribute to changing the identity of the electorate. That happens when a new claim is acknowledged as appropriate. The organisation of the European Parliament makes possible that citizens increasingly identify themselves as Union citizens. But if this happens depends to an important extent on whether Parliament will in fact be able to expand and strengthen its connection with this self-standing electorate.

Part III. Representative Autonomy: The Case of the European Parliament

Chapter 8. Representative Autonomy: A Driver for Action and a Vehicle for Change

It is notable that the provisions that contain claims about the electorate of the European Parliament all are established by special decision-making procedures. From the beginning, the European Parliament was expected to initiate and design formal representative claims. This was even the case in the period that members were appointed, and Parliament overall had limited power. Initially, Parliament’s role in changing its own representative status was thus relatively large. Nowadays, Parliament is a co-legislator in most areas. In comparison to the ordinary legislative procedure, Parliament’s say over its representative status is now relatively limited. It is notable for example that, in respect to electoral law, European Parliament shares its power with the Council and the member states. The fact that electoral laws define a polity, and have the potential to redefine it, may explain why national parliaments are given a relatively large role at the expense of that of the European Parliament.

In this study, I have shown that the European Parliament has actively tried, partially successfully, to change its representative status, even if it was not always authorised to do so. It contributed to its own constitutional change. The right of Parliament to adopt its own Rules of Procedure was crucial in this regard. But its actions, and that of others, were also strongly influenced by the norm, explicated in the present study, that parliaments need a significant level of representative autonomy.

This explains why the year 1979 forms a watershed for Parliament. In that year, the members of the European Parliament obtained an explicit free mandate. Although it was not formally given more rule-making powers regarding its own status, its substantive liberty to take decisions according to its own discretion was increased. Since 1979, the European Parliament – formally – has a direct link with a self-stand-
ing electorate. This representative task *demands* that Parliament offers this electorate representative claims (see Chapter 2). In areas where Parliament had this capability, it has over the years increasingly structured itself as the representative body of Union citizens (see internal organisation – Chapter 7); in other areas, it has managed to do so to a lesser extent. This explains the diverging claims in formal rules.

What answer can we now give to the question of whom the European Parliament actually represents? Analysis of the formal rules shows an intrinsically ambiguous picture. Members earn a Union salary, but pay (depending on the country involved) national taxation; they all have immunity when they act in the exercise of their duties, but beyond that, their legal status differs; they function (also) on behalf of their European political group, but national delegations determine, to a large extent, the terms within these groups; and finally, citizens have the right to vote in European elections on the basis of their Union membership, but there is no equal weight attached to their votes. The European Parliament is in the middle of a transformation in which it increasingly manifests itself – and is defined – as a body representing Union citizens, but to these citizens, nationality (still) continues to be very important. The ambiguous nature of the European Parliament is not a cause for concern. The process of claim-making and seeking recognition is in full swing. The divergent claims do however offer an indication of where we can expect tension, political action and change in the near future.

At any rate, it is certain that it is incorrect to define the European Parliament as a representative body only representing national peoples.
Samenvatting

Deel I. Vertegenwoordiging en Autonomie: Het Raamwerk

Hoofdstuk 1. Wat Bepaalt de Vertegenwoordigende Status van een Parlement?

Op 30 juni 2009 werd het Europees Parlement door het Duitse Federale Constitutionele Hof beoordeeld als een vertegenwoordiging van 
nationale bevolkingen. Deze kwalificatie, gegeven in het zogenoemde Lissabon-arrest, vormt de directe aanleiding tot dit proefschrift. Het Hof baseert zijn oordeel uitsluitend op het kiessysteem voor het Europees Parlement waarin stemmen verschillend worden gewogen, afhankelijk van het land waarin ze zijn uitgebracht. Het Hof kent daarbij geen betekenisvolle waarde toe aan Artikel 14(2) TEU dat stelt dat het Europees Parlement Unieburgers vertegenwoordigt noch aan het feit dat leden van het Europees Parlement zich na verkiezing organiseren in Europese politieke fracties om hun vertegenwoordigende functie uit te oefenen. Het is weinig bevredigend dat deze regels terzijde worden geschoven aangezien zij een juridische basis en geldigheid hebben, en daarmee per definitie gezaghebbend zijn. In dit proefschrift beoog ik inzicht te geven in hoe en waarom soms tegengestelde bepalingen zijn ontstaan die samen de vertegenwoordigende status van het Europees Parlement definiëren. De focus van mijn onderzoek ligt op het amenderen van zijn vertegenwoordigende status door het Parlement zelf. Het Parlement draagt zo bij aan constitutionele verandering, terwijl het daartoe niet in alle gevallen bevoegd is en terwijl veelal gedacht wordt dat constitutionele verandering uitsluitend een zaak van de lidstaten is.

Mijn onderzoeksvraag luidde: hoe heeft het Europees Parlement de vrijheid verworven om zijn electoraat en zichzelf te definiëren; en hoe moet deze vrijheid begrepen worden in termen van vertegenwoordiging? Langs deze weg geef ik ook een antwoord op de vraag wie het Europees Parlement nu eigenlijk – in formele zin – vertegenwoordigt.

Hoofdstuk 2. Het Concept van Vertegenwoordigende Autonomie

Dit hoofdstuk bevat het theoretisch kader van mijn proefschrift. Ik breng in kaart welke bepalingen bijdragen aan de formele vertegenwoordigende status van een parlement, en wie – in een vertegenwoordigende democratie – gerechtigd zou moeten zijn om deze vast te stellen. Het bestaan van een norm over de betrokkenheid van een parlement bij deze regels zou de rol kunnen verklaren die het Europees Parlement op zich neemt bij het amenderen van zijn vertegenwoordigende status en de mate van acceptatie daarvan door andere instellingen.

De laatste jaren is nieuw inzicht ontstaan in het concept van politieke vertegenwoordiging en het electoraat. Degenen die worden vertegenwoordigd zijn lang beschouwd als een objectief te definiëren groep. Beter is echter om de definitie van het electoraat, van dat wat het bindt en van de sub-groepen waarin het kan worden onderverdeeld, te beschouwen als claims. Een claim is kunstmatig, per definitie imperfect, en onderhevig aan verandering. Burgers zijn object van vertegenwoordigende
claims, maar ze beoordelen deze ook. Als zij zich onvoldoende herkennen in een vertegenwoordigende claim zal een vertegenwoordiger deze waarschijnlijk aanpassen of anders het risico lopen niet ge- of herkozen te worden. Politieke vertegenwoordiging is dus, zoals Michael Saward stelt, een dynamisch en interactief proces waarin vertegenwoordigende claims worden gemaakt, afgewezen, aangepast en erkend. Deze nieuwe benadering van politieke vertegenwoordiging is belangrijk voor het bestuderen van politicologische processen over het handelen van vertegenwoordigers. Maar zoals ik in dit proefschrift laat zien, raakt ook de formele vertegenwoordiging. Het biedt een nieuw perspectief op hoe de vertegenwoordigende status van een parlement moet worden bepaald.

Vaak wordt gedacht dat de definitie van wie een parlement vertegenwoordigt lineair voortvloeit uit wat daarover geschreven staat in de kieswet en de grondwet. In die laatste wordt vaak de eenheid van een bevolking benadrukt, terwijl in een kieswet vaak wordt gekozen voor het benadrukken van verschillen tussen (groepen) burgers op grond van politieke overtuigingen en/of geografische afkomst. We zien nu dat het vormen van dergelijke regionale of politieke electoraten eigenlijk verloopt via claims, die dus ook veranderd kunnen worden. Er hadden ook andere scheidslijnen kunnen worden getrokken, bijvoorbeeld op basis van religie of sekse, waardoor het electoraat anders werd gedefinieerd. Het nieuwe perspectief laat bovendien zien dat de vertegenwoordigende status van een parlement door meer dan alleen de bovenstaande regels wordt bepaald. Want bijvoorbeeld ook immunitiete- en salarisbepalingen en zelfs het interne reglement van een parlement bevatten claims over wie de gekozen leden vertegenwoordigen (zie hoofdstuk 5-7). Doordat deze veelheid aan bepalingen niet op hetzelfde moment en niet altijd door dezelfde actoren worden vastgesteld, kunnen regels tegengestelde claims bevatten. Dat is geen reden om sommige bepalingen te negeren bij het definiëren van een parlement. Het bevestigt slechts het dynamische karakter van vertegenwoordiging.

Of burgers de claims ervaren als passend en legitiem is belangrijk voor het functioneren van een parlement, maar valt buiten het bereik van dit proefschrift. Ik hanteer een intern perspectief en analyseer alleen het construeren van claims door het Europees Parlement.

Claims kunnen voortvloeien uit een bestaande situatie maar ze kunnen ook de samenleving herdefiniëren. Wanneer ze erkenning krijgen door het electoraat kunnen ze zelfs de identiteit daarvan veranderen. Claims hebben een scheppende kracht. Dit roept de vraag op wie verantwoordelijk zou moeten zijn voor het vaststellen van ‘claim-bevattende’ bepalingen. Hoewel de precieze mate van autonomie daarin afhankelijk is van de constitutionele setting, is duidelijk dat een parlement hierin altijd een grote rol toekomt. Deze noodzaak komt allereerst voort uit het vrije mandaat van de leden. Het is intrinsiek aan het vrije mandaat dat vertegenwoordigers hun eigen electoraat definiëren; hun eigen vertegenwoordigende claims maken. Formele regels kunnen deze claim ondersteunen, maar ook ondermijnen. Ze hebben daarmee dus een impact op de praktische vertegenwoordiging. Parlementaire betrokkenheid is ook belangrijk om te voorkomen dat de balans tussen de machten wordt verstoord. Een misplaatste formele claim kan de legitimiteit van het parlement ondermijnen en ertoe leiden dat andere machten, zoals de executieve, aan macht winnen ten koste van het gekozen vertegenwoordiging.
De vrijheid van een parlement om zelf vorm te geven aan wie het vertegenwoordigt, en op welke wijze, noem ik vertegenwoordigende autonomie. Parlementaire vertegenwoordigende autonomie behelst het stelselmatig nemen van beslissingen, op basis van eigen preferenties, ter amendering of bevestiging van zijn vertegenwoordigende status. De relevantie van deze norm voor de ontwikkeling van het Europees Parlement maak ik duidelijk in de hoofdstukken vier tot zeven.

Hoofdstuk 3. Het Europees Parlement – Vermogen, Bevoegdheden en Structuur

In dit hoofdstuk wordt het Europees Parlement geïntroduceerd. Het laat zien hoe het Europees Parlement de afgelopen jaren budgettaire, wetgevende en controlerende bevoegdheden heeft gekregen en bevochten, in een permanente dynamiek tussen verdragsteksten en politieke actie. De verdragen werden steeds opnieuw aangepast aan hoe de macht van het Parlement zich had ontwikkeld, waarna ze weer een springplank vormden voor verdere verandering. Het recht van het Parlement om een eigen reglement en werkwijze vast te kunnen stellen bleek bij het uitbouwen van zijn positie een belangrijk instrument.

Vanaf 1979 werden de leden van het Europees Parlement direct gekozen. Al vanaf de oprichting van de Gemeenschappelijke Vergadering in 1952 hadden leden weliswaar een vrij mandaat, maar het was indirect verkregen en impliciet. De directe verkiezingen leidden tot een andere, meer zelfbewuste houding van de vertegenwoordigers. Deze toonde zich al in de eerste maanden na de directe verkiezing, toen het Europees Parlement voor het eerst een begroting verwierp. De verkiezingen leidden er ook toe dat andere instellingen het lastiger vonden om besluiten van het Europees Parlement terzijde te schuiven. Daardoor kon het Parlement steeds meer greep krijgen op het wetgevingstraject en op de samenstelling van de Europese Commissie. De directe verkiezing van zijn leden heeft de formele legitimiteit van het Parlement versterkt, en daarmee een vergroting van zijn bevoegdheden bevorderd.

De dynamische ontwikkeling van het Europees Parlement is door academici tot nu toe steeds beschreven in termen van competenties en macht. In dit proefschrift analyseer ik een andere evolutie: die van de vertegenwoordigende status van het Parlement. Ook daarop hebben de directe verkiezingen een grote impact gehad. Een direct gekozen parlement behoort (mede) over zijn eigen status te gaan (zie hierboven). Tegelijkertijd botst dat met het idee dat de constitutionele ontwikkeling van de Europese Unie een zaak van lidstaten is. De vraag is hoe het Europees Parlement – desondanks – zijn vertegenwoordigende autonomie heeft vergroot.

Deel II. Vertegenwoordiging en Autonomie: De Praktijk


In dit hoofdstuk beschrijf ik hoe en waarom het Europees Parlement heeft geprobeerd om meer zeggenschap te krijgen over de kieswet: een cruciale wet voor de definitie van het electoraat, en van het Parlement als zijn vertegenwoordiger. In 1958 kreeg het Europees Parlement het recht van initiatief om een uniforme Europese kiesprocedure op te stellen. Doorgaans ligt het recht van initiatief bij de Europese Commissie. De uitzonderlijke bevoegdheid die het Parlement ten aanzien van dit
onderwerp kreeg bevestigt dat er inderdaad een norm bestaat dat vertegenwoordigende claims door vertegenwoordigers behoren te worden gemaakt. De uiteindelijke zeggenschap voor de kieswet lag tot het Verdrag van Maastricht (1992) nog wel uitsluitend bij de Raad en de lidstaten. Dit kan worden verklaard uit het overwegend intergouvernementele karakter van de Europese samenwerking destijds. In de periode tussen 1958 en 1976 heeft het Europees Parlement twee keer een wetsontwerp ingediend. Daarin stelde het voor dat zodra zijn leden een direct mandaat hadden gekregen, het Parlement meer (of zelfs alle) zeggenschap zou krijgen over toekomstige kieswetten. Dat demonstreert nog eens de breed gedeelde opvatting dat een vrij mandaat de vertegenwoordigende autonomie behoort te vergroten. Dat zelfs een niet gekozen parlement, waarvan de leden slechts een impliciet vrij mandaat hadden, een stempel behoorde te drukken op een kieswet werd onderkend door de Raad. Deze onderhandelde daarom met het Parlement over de kieswet hoewel de Raad daartoe niet verplicht was. In 1976 werd de Akte voor de rechtstreekse verkiezing van Europese parlementsleden aangenomen. Daarin werd de zeggenschap van het Europees Parlement over toekomstige wijzigingen niet vergroot. Echter de rechtstreekse binding die het parlement kreeg met een eigenstandig electoraat was wel degelijk een cruciale verandering. Het bleek een vliegwiel voor versterking van de positie van het Europees Parlement – uiteindelijk ook met betrekking tot de kieswet en andere claim-bevattende bepalingen.

**Hoofdstuk 5. Immunitéit en de Vrijheid om te Vertegenwoordigen**

Ondanks het directe mandaat en het eigenstandige electoraat bleven de leden van het Europees Parlement voor hun juridische (hoofdstuk 5) en financiële status (hoofdstuk 6) gebonden aan nationale structuren, en waren zij niet bevoegd dit te wijzigen. Hun vertegenwoordigende autonomie bleef dus (aanvankelijk) beperkt. Ten aanzien van de imunitéiten is dat overwegend nog steeds het geval.


Bij afwezigheid van een uniforme regeling heeft het Europees Parlement geprobeerd in een reeks beslissingen de rechtspositie van zijn leden meer gelijkwaardig te maken. De instrumenten die het daarvoor heeft gebruikt zijn het recht om naar
Eigen inzicht immuniteiten van zijn leden te bevestigen (of op te heffen), het recht om een eigen werkwijze vast te stellen, en het verdragsrechtelijke beginsel van loyale samenwerking, waardoor nationale hoven kennis moeten nemen van het standpunt van het Parlement in individuele zaken. Door de beslissingen van het Parlement kunnen leden tegenwoordig ook voor buitenparlementaire politieke activiteiten rekennen op een vorm van Europese bescherming. Daarmee heeft het Europees Parlement, via een niet-geëigende weg, het verschil in rechtspositie tussen nationale en Europese afgevaardigden vergroot, en tussen Europese afgevaardigden onderling verkleind. De vertegenwoordigende status van het Europees Parlement is daarmee iets opgeschoven, richting een vertegenwoordiging van Unieburgers.

Hoofdstuk 6. Salaris en Afhankelijkheid van Nationale Structuren

De introductie van directe verkiezingen had aanvankelijk niet geleid tot aanpassing van de salarisregeling van de leden. Tot 2005 kregen leden van het Europees Parlement dezelfde schadeloosstelling als de leden van nationale parlementen in hun lidstaat. De vergoeding werd bovendien uit de nationale begroting van de lidstaten betaald. De claim die in deze regeling was vervat, was dat het Europees Parlement een vertegenwoordigend lichaam van nationale burgers was. Vanaf 1979 heeft het Europees Parlement gestreden voor een statuut van de leden, waarin een uniform salaris werd vastgelegd. Dit zou niet alleen ‘eerlijker’ zijn voor de leden, maar ook passend voor een vertegenwoordigend lichaam van Unieburgers. Als direct gekozen vertegenwoordiging wilde het Parlement bovendien zelf bevoegd zijn ten aanzien van de salariëring van zijn leden. Hoewel een juridische basis voor een uniform statuut in de verdragen ontbrak heeft het Parlement daartoe vanaf 1979 voorstellen ingediend. Andere instellingen hebben het toegeëigende recht van initiatief van het Parlement geaccepteerd. Het leidde echter lange tijd niet tot resultaat.

In de afwezigheid van een uniform statuut heeft het Bureau van het Europees Parlement een aantal regelingen getroffen waardoor de financiële situatie van de leden in de praktijk meer vergelijkbaar werd. Leden konden onder andere uit de Europese begroting een extra pensioen krijgen, een nabestaandenpensioen, een arbeidsongeschiktheids pensioen en een beperkte wachtgelduitkering. Het was een omstreken zelfverrijking. De maatregelen werden echter gepresenteerd als de bouwblokken voor een toekomstig, uniform statuut. Vanuit die invalshoek kan het handelen van het Parlement worden gezien als het maken van vertegenwoordigende claims en het uitbouwen van zijn vrijheid om zichzelf (en zijn electoraat) vorm te geven. De juridische basis voor de maatregelen werd gevonden in het recht van het Parlement om zijn eigen reglement op te stellen. De rechtmatigheid hiervan werd door de Raad echter ditmaal betwist.

de onderhandelingen lijkt gelegen in het feit dat hij zich opstelde (en gezien werd) als een betere vertolker van het electoraat op dit punt. Dit vergrootte zijn effectieve machtspositie. Het voorbeeld laat zien dat het Europees Parlement alleen zijn vertegenwoordigende autonomie kan vergroten als een ander – de Raad – niet gezien wordt als een geschiktere vertegenwoordiger van het electoraat.

Hoofdstuk 7. Europese Politieke Fracties – Kanalen van Vertegenwoordiging

In dit hoofdstuk staan de interne regels van het Europees Parlement centraal. Deze kan het Parlement zelfstandig vaststellen. Daardoor geven ze een goed beeld van de vertegenwoordigende claims die het Parlement zelf wil maken. Vrijwel vanaf het begin heeft het Parlement zijn leden de mogelijkheid onthouden om formeel te spreken namens een nationaal electoraat. Leden konden op eigen titel spreekrecht aanvragen, en coördineerden (aanvankelijk losjes) hun werkzaamheden in Europese politieke fracties. Vanaf 1976, het moment dat definitief besloten werd tot het houden van directe verkiezingen voor het Europees Parlement, is de rol van de Europese politieke fracties groter geworden. Sindsdien wordt spreektijd toebedacht aan fracties, die vervolgens intern bepalen wie het woord mag voeren. Door deze constructie spreken de leden niet alleen op eigen titel, maar vertegenwoordigen ze in zekere zin formee ook hun fracties en afgeleid – het electoraat van hun collega’s. De commissiezetels werden al langer langs de lijnen van Europese politieke fracties verdeeld, waardoor leden binnen de parlementaire commissies meerdere vertegenwoordigende rollen vervulden. Vanaf de directe verkiezingen is de greep van Europese politieke fracties op de zetels versterkt, en mogen leden niet langer zelf hun plaatsvervangers aanwijzen; de zetels zijn ‘eigendom’ van hun fractie. Tegelijk met deze ontwikkeling zijn de criteria voor de vorming van Europese politieke fracties veranderd. Met de jaren is het minimum aantal leden dat een fractie behoort te hebben (relatief) verlaagd. Het wordt belangrijker gevonden dat fracties voldoen die voldoende Europees zijn, en daarom leden uit tenminste 7 verschillende lidstaten hebben. Bovendien moeten deze leden gedeelde ideologische opvattingen hebben. Onder de oppervlakte spelen nationaliteit en nationale delegaties nog steeds (en zelfs in toenemende mate) een belangrijke rol. Zo blijkt uit de reglementen van de Europese politieke fracties dat langs de lijnen van nationale delegaties belangrijke posities worden verdeeld. Op het niveau van de plenaire vergadering, het meest zichtbare gremium, laat dat zich echter niet zien.

Door de interne regels van het Europees Parlement wordt het electoraat ‘her- schikt’. In de (meest zichtbare) vertegenwoordiging wordt meer betekenis toegekend aan de ideologische verschillen tussen burgers dan aan nationaliteit. Individuele leden kunnen uiteraard een eigen vertegenwoordigende claim maken, maar de formele claim van het Parlement kleurt hun handelen onvermijdelijk. Eerder heb ik betoogd dat vertegenwoordigende claims kunnen bijdragen aan een identiteitsverandering van het electoraat. Dat gebeurt wanneer een nieuwe claim erkend wordt als gepast en goed. Door de organisatie van het Europees Parlement is het nu mogelijk dat burgers zich in toenemende mate als Unieburgers identificeren. Maar of dit gebeurt hangt in belangrijke mate af van of het Parlement weet te overtuigen als vertegenwoordigend lichaam van Unieburgers.
Deel III. Vertegenwoordigende Autonomie: Het Europees Parlement

Hoofdstuk 8. Een Doel en een Middel tot Verandering

Het is opvallend dat de bepalingen die vertegenwoordigende claims bevatten allen in uitzonderlijke besluitvormingsprocedures worden vastgesteld. Vanaf het begin werd van het Parlement verwacht dat het aanjager en schepper van deze bepalingen zou zijn. Dat was zelfs zo in de periode dat de leden benoemd werden en het Parlement weinig macht had. De rol van het Europees Parlement ten aanzien van het amenderen van zijn vertegenwoordigende status was daarmee relatief groot. Inmiddels is het Parlement op de meeste terreinen medewetgever. Ten opzichte van de ‘gewone besluitvormingsprocedure’ is zijn zeggenschap over wie het vertegenwoordigt nu juist relatief beperkt. Zo valt op dat het Parlement ten aanzien van de kieswet zijn macht moet delen met de Raad en de lidstaten. Het feit dat kieswetten een samenleving vormgeven, en de potentie hebben die te herdefinieëren, is waarschijnlijk de reden voor de relatief grote rol voor nationale parlementen en voor de relatief beperkte rol van het Europees Parlement.

Ik heb in dit proefschrift laten zien dat het Europees Parlement actief geprobeerd heeft, en deels met succes, om zijn vertegenwoordigende status te veranderen, zelfs als het daartoe niet altijd bevoegd was. Het heeft bijgedragen aan zijn eigen constitutionele verandering en die van de Unie. Het recht van het Parlement om zijn eigen reglement vast te stellen was daarin cruciaal. Maar zijn handelen, en dat van anderen, blijkt ook sterk beïnvloed door de in dit proefschrift geëxplikeerde norm dat parlementen een belangrijke mate van vertegenwoordigende autonomie nodig hebben en moeten opeisen.

Dit verklaart waarom het jaar 1979 een kantelmoment was voor het Parlement. In dat jaar kregen de leden van het Europees Parlement expliciet een vrij mandaat. Hoewel het Parlement daarmee formeel geen grotere zeggenschap kreeg over zijn eigen status, werd toen wel zijn materiële vrijheid vergroot om besluiten te nemen overeenkomstig de eigen wil. Sinds 1979 heeft het Europees Parlement – in formele zin – een directe binding met een eigenstandig electoraat. Deze vertegenwoordigende taak vereist dat het Parlement dit electoraat vertegenwoordigende claims aanbiedt (zie hoofdstuk 2). Daar waar het Parlement de mogelijkheid had, heeft het zichzelf in de loop der jaren steeds meer gestructureerd als de vertegenwoordiging van Unieburgers (zie interne organisatie – hoofdstuk 7); op andere terreinen heeft het dat in mindere mate kunnen doen (zie overige hoofdstukken). Dit verklaart het bestaan van uiteenlopende claims in formele bepalingen.

Welk antwoord kunnen we nu geven op de vraag wie het Europees Parlement vertegenwoordigt? Beoordeling van de formele regels levert een ambigu beeld op. Leden verdienen een Europees salaris, maar betalen (afhankelijk van het land) nationale belasting; ze hebben allemaal immuniteit voor zover zij handelen in de uitoefening van hun functie, maar daarbuiten is hun rechtspositie verschillend; ze handelen (ook) namens hun Europese politieke fractie, maar de nationale delegaties zijn daarbinnen
belangrijke spelverdelers en ten slotte: burgers hebben stemrecht bij de Europese verkiezingen op basis van hun Unieburgerschap, maar aan hun stem wordt geen gelijk gewicht toegekend. Het Europees Parlement zit midden in een ontwikkeling waarin het zich steeds meer manifesteert – en formeel wordt gedefinieerd – als een vertegenwoordigend lichaam van Unieburgers, maar voor deze burgers is ook hun nationaliteit (nog) van groot belang. Het ambigue karakter van het Europees Parlement is geen reden tot zorg. Het proces van claims maken en zoeken naar erkenning is volop bezig. Wel bieden de uiteenlopende claims een indicatie van waar we nog veel spanning, politieke actie en verandering kunnen verwachten.

Zeker is in ieder geval dat het onjuist is om te zeggen dat het Europees Parlement alleen nationale bevolkingen vertegenwoordigt.
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The European Parliament’s Quest for Representative Autonomy provides better insight in the nature of the European Parliament, and of the developments of parliaments in general.

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