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

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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

1 *Judgment of the Second Senate of 30 June 2009* [2009] 2 BvE 2/08.

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,³ 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.⁴ 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,⁵ 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.⁶ 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.

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.

4 The *Lisbon Decision* has been extensively commented on by many scholars. See for example: Erik O Eriksen and John E Fossum, 'Bringing European Democracy Back In – Or How to Read the German Constitutional Court's Lisbon Treaty Ruling' (2011) 17 *European Law Journal* 153; Tom Eijsbouts, 'Wir Sind Das Volk: Notes about the Notion of "The People" as Occasioned by the Lissabon-Urteil' (2010) 6 *European Constitutional Law Review* 199; Dieter Grimm, 'Comments on the German Constitutional Court's Decision on the Lisbon Treaty: Defending Sovereign Statehood Against Transforming the European Union into a State' (2009) 5 *European Constitutional Law Review* 353; Matthias Niedobitek, 'The Lisbon Case of 30 June 2009 – A Comment from the European Law Perspective' (2009) 10 *German Law Journal* 1267 and Christian Wohlfahrt, 'The Lisbon Case: A Critical Summary' (2009) 10 *German Law Journal* 1277.

5 Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community (Treaty of Lisbon).

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 fulfil all the criteria that the principle of representative democracy imposes 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

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.'¹¹

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.¹² 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.

¹² Kathalijne Buitenweg and Joost Lagendijk, 'Nawoord: Testament van Twee Landverraders' in Aysel Sabahoglu (ed), *Ons belang in Europa* (Wetenschappelijk Bureau GroenLinks 2009) 64-65.

Parliament regard themselves as representatives of European movements or public interests in addition to feeling attached to their national party and country.¹³

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'.¹⁴ 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.¹⁵

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

13 Jacques Thomassen and Hermann Schmitt, 'Partisan Structures in the European Parliament' in Richard S Katz and Bernhard Wessels (eds), *The European Parliament, National Parliaments and European Integration* (Oxford University Press 1999).

14 Hanna Fenichel Pitkin, *The Concept of Representation* (University of California Press 1967) 215-218.

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.

2. Discordance among Provisions

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.

¹⁶ Wilhelm Lehmann, 'European Democracy, Constitutional Identity and Sovereignty: Some Repercussions of the German Constitutional Court's Lisbon Judgment' (Policy Department C: Citizens' Rights and Constitutional Affairs of the European Parliament 2010) PE 425.618.

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.

1976 Direct Election Act, providing for the European Parliament's direct elections.²⁰ 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.²¹ This concept was linked to electoral rights from the start – as citizenship generally is.²² 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'.²³ 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?²⁴ 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.

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.

23 This point is well made by Gerkrath. Jörg Gerkrath, 'Representation of Citizens by the EP' (2005) 1 *European Constitutional Law Review* 73, 75.

24 Christopher Lord and Johannes Pollak, 'The EU's Many Representative Modes: Colliding? Cohering?' (2010) 17 *Journal of European Public Policy* 117, 126.

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

25 Julian Priestley, *Six Battles That Shaped Europe's Parliament* (John Harper Publishing 2008) 82.

26 European Parliament Decision 2005/684/EC Euratom adopting the Statute for Members of the European Parliament [2005] OJ L262/1. See also Chapter 6.

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.

28 Protocol of 8 April 1965 on the Privileges and Immunities of the European Communities [1967] OJ L152/13 (in Dutch).

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,

29 Direct Election Act (n 20).

30 Council Decision 2002/772/EC Euratom amending the Act concerning the election of the representatives of the European Parliament by direct universal suffrage [2002] OJ L283/1.

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.³² 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.³³ The European Parliament thus actively fosters transnational cooperation of its members.

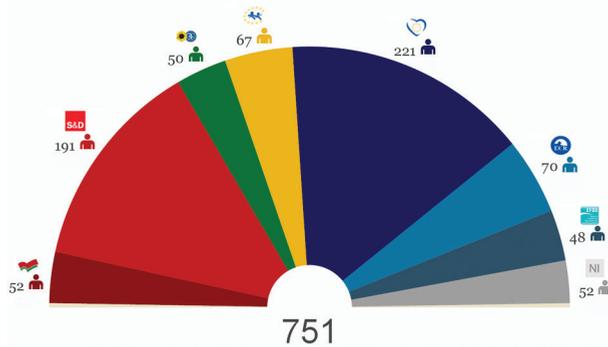
The decision to organise itself along ideological lines can be regarded as posing a *claim* regarding whom the European Parliament represents, and how its members must carry out their representative mandate. It can be appreciated as a statement by the European Parliament underlining that it is the representative 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’.³⁴ 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.³⁵ 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.

32 See for example Simon Hix, Gérard Roland and Abdul Noury, *Democratic Politics in the European Parliament* (Cambridge University Press 2007) 22; Richard Corbett, Michael Shackleton and Francis Jacobs, *The European Parliament* (7th edn, John Harper Publishing 2007) 70-71 and Martin Westlake and Leon Brittan, *A Modern Guide to the European Parliament* (Pinter 1994) 190.

33 Pierpaolo Settembri, ‘When Is a Group Not a Political Group? The Dissolution of the TDI Group in the European Parliament’ (2004) 10 *The Journal of Legislative Studies* 150.

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.



Graph 1. Visualisation of division of seats in the European Parliament³⁶

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

³⁶ The picture concerns the 8th European Parliament. See website of the European Parliament: <<http://www.europarl.europa.eu>>.

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.³⁸ The role that the European Parliament plays in democratic representation in the European Union has also been the subject of important theoretical work.³⁹ 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.⁴⁰ 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.⁴¹ 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:

'a compromise between equal representation of the Union's citizens and appropriate representation of the peoples of the member states.'⁴²

Europe's Elected Parliament (Sheffield Academic Press 1999); Luciano Bardi, 'Party Groups and Representation in the European Union: Theoretical and Empirical Considerations' [2009] Department of Political Science and International Relations (Autonomous University of Madrid) Working Papers <<https://www.uam.es/>> accessed 14 April 2013.

38 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).

39 See for example Ben Crum and John E Fossum, 'The Multilevel Parliamentary Field: A Framework for Theorizing Representative Democracy in the EU' (2009) 1 *European Political Science Review* 249.

40 Tapio Raunio, 'Parliamentary Questions in the European Parliament: Representation, Information and Control' (1996) 2 *The Journal of Legislative Studies* 356. Raunio's analysis of written questions of members of the European Parliament revealed that members simultaneously represent regional interests, sectorial interests, party interests, and European interests.

41 See for example Marco Goldoni and Patricia Mindus, 'Between Democracy and Nationality: Citizenship Policies in the Lisbon Ruling' (2012) 18 *European Public Law*.

42 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).⁴³ 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*.⁴⁴ 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.⁴⁵ 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.⁴⁶ To that end, he takes refuge in a rhetorical twist. First, Duchateau appears to replace 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.⁴⁷ 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.⁴⁸ But he fails to explain how the appeal to slavishly translate the electoral provisions in

43 *Judgment of the Second Senate of 30 June 2009* (n 1) para 280.

44 *Ibid* para 211.

45 Christoph Schönberger, 'Lisbon in Karlsruhe: Maastricht's Epigones at Sea' (2009) 10 *German Law Journal* 1201.

46 Michiel Duchateau, *Het Europees Parlement als Transnationale Volksvertegenwoordiging* (Kluwer 2014). See also Hans Herbert von Arnim, 'A Salary of 9,053 Euros for Members of the European Parliament?' [2004] *Forschungsinstitut für öffentliche Verwaltung bei der Deutschen Hochschule für Verwaltungswissenschaften Speyer*.

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.⁴⁹

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 *de jure* and *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. *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.⁵⁰ The rational choice approach has increased, for example, our understanding of why members *join* a European political group when they enter the European Parliament.⁵¹ It helps members to accomplish their goals. However, rational choice theory cannot fully account for the reasons why European political groups were *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.

49 See Article 232 TFEU.

50 See for an analysis of this approach, Mark A Pollack, 'The New Institutionalism and European Integration' in Antje Wiener and Thomas Diez (eds), *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), *Explaining Institutional Change. Ambiguity, Agency, and Power* (Cambridge University Press 2010).

51 See for more Chapter 7.

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.⁵² 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.⁵³ 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.⁵⁴

'[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.'⁵⁵

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'.⁵⁶ 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.

52 James Fearon and Alexander Wendt, 'Rationalism v. Constructivism: A Skeptical View' in *Handbook of International Relations* (SAGE Publications 2002) 60. See also Edwin Amenta and Kelly M Ramsey, 'Institutional Theory' in Kevin T Leight and J Craig Jenkins (eds), *Handbook of Politics: State and Society in Global Perspective* (Springer 2010).

53 Berthold Rittberger, *Building Europe's Parliament: Democratic Representation Beyond the Nation-State* (Oxford University Press 2005).

54 See for criteria of representative democracy Bernard Manin, *The Principles of Representative Government* (Cambridge University Press 1997).

55 Rittberger (n 53) 34.

56 'Working Document on a proposal for a modification of the Act concerning the election of the members of the European Parliament by direct universal suffrage of 20 September 1976' (Rapporteur: Andrew Duff) (EP 2010, PE 441.236).

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.'⁵⁷

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.⁵⁸ 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'.⁵⁹ 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

57 Debate of 11 May 1960 regarding the Election of the European Parliament Through Direct Universal Suffrage [1960] Contribution Schuijt.

58 Explanatory statement of Patijn in reference to Article 14 of the Draft Convention. Report on the adoption of a draft convention introducing elections to the European Parliament by direct universal suffrage (Rapporteur: Schelto Patijn) (EP 1974, A0-0368/74 0010).

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.'⁶⁰

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.⁶¹

60 'Political Representation', The Stanford Encyclopedia of Philosophy (2011 edn.) <<http://plato.stanford.edu/entries/political-representation>> accessed 4 March 2010.

61 Michael Saward, *The Representative Claim* (Oxford University Press 2010).

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.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 over-riding 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,

⁶² See for more on Saward’s theory Chapter 2, sections 1.2 and 1.3.

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 undertaken 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 representative 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 relation 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 autonomy 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 European 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 Parliament represents (see section 2). In my search to find an explanation for these differences, I was guided by the comments that my esteemed predecessors Schuijt 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 representative 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) representation, 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 define 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.⁶³ Incremental changes to different sets

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

Rule-making power of the European Parliament		
High	Low	Developing
Political groups		
	Immunity provisions	
		Electoral provisions
		Salary provisions

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

Rosemary CR Taylor, 'Political Science and the Three New Institutionalisms' (1996) 44 *Political Studies* 936.

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?

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