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

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Publication date
2016
Document Version
Final published version

Citation for published version (APA):
Buitenweg, K. M. (2016). *The European Parliament's quest for representative autonomy: An internal perspective*. [Thesis, fully internal, Universiteit van Amsterdam].

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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1   Stephan Thernstrom, *A History of the American People: Volume I to 1877* (Harcourt Brace Jovanovich 1984) 144.
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'.[4] In this, she analysed the origin of the word 'representation', and its use in different domains – including arts, religion, law and politics.[5] The fruit of Pitkin's labour is a straightforward, generic definition. It defines representation as:

> '[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.[7] 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.[8] 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).

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4   Hanna Fenichel Pitkin, *The Concept of Representation* (University of California Press 1967).
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

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Analysing the relationship between representatives and represented, scholars have traditionally distinguished the 'trustee' model and the 'delegate' model.[9] In the 'delegate' model, the task of the representatives is to act in line with the expressed preferences of the represented.[10] 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.[11]

In contrast to this, the 'trustee model' foresees only a marginal role for the represented.[12] 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.'[13]

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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9   Some have referred to them as the 'independent' and 'mandate' theory respectively. Pitkin (n 4); Dario Castiglione and Mark E Warren, 'Rethinking Representation: Eight Theoretical Issues' (2005) <http://www.politics.ubc.ca/fileadmin/user_upload/poli_sci/Faculty/warren/Rethinking_Democratic_Representation_May_2006.pdf> accessed 10 December 2013; Andrew Rehfeld, 'Representation Rethought: On Trustees, Delegates, and Gyroscopes in the Study of Political Representation and Democracy' (2009) 103 American Political Science Review 214; Jane Mansbridge, 'Clarifying the Concept of Representation' (2011) 105 The American Political Science Review 621.
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]

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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.

16 Jane Mansbridge, 'Rethinking Representation' (2003) 97 The American Political Science Review 515; Jane Mansbridge, 'A "Selection Model" of Political Representation' (2009) 17 The Journal of Political Philosophy 369; Mansbridge, 'Clarifying the Concept of Representation' (n 9).

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.

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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.

> '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.
> 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).

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.[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*.[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".'[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.[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.[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-

24   Michael Saward, 'The Representative Claim' (2006) 5 Contemporary Political Theory 297, 68.
25   Saward, *The Representative Claim* (n 8) 51.
26   Ibid 16.
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.
28   Hannah Arendt, *The Human Condition* (The University of Chicago Press 1958) 15.

shifting'.[29] 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.[30] 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.[31] 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 recognizes 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.[33] 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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29 Michael Saward, 'Shape-Shifting Representation' (2014) 108 American Political Science Review 723, 5.
30 'Rutte sprak als VVD-leider over rol koningin' *NU* (online 27 November 2012) <http://www.nu.nl/politiek/2968361/rutte-sprak-als-vvd-leider-rol-koningin.html> last accessed 24 May 2016.
31 Andrew Rehfeld, 'Towards a General Theory of Political Representation' (2006) 68 Journal of Politics 1; Saward, *The Representative Claim* (n 8) 25.
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.[34] 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.[35] 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.[36]

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.'[37]

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34   Saward, *The Representative Claim* (n 8) 56.
35   Gideon Baker, 'Revisiting the Concept of Representation' (2006) 59 Parliamentary Affairs 155.
36   Mansbridge, 'Rethinking Representation' (n 16) 522.
37   Cornelia Ilie, *European Parliaments under Scrutiny* (John Benjamins Publishing Company 2010) 58.

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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.'[38]

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.

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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.[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.[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.[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.[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,

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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.

40   Donald L Horowitz, 'Electoral Systems and Their Goals: A Primer for Decision Makers' (2003) 14 Journal of Democracy 115, 126; Giovanni Sartori in Arend Lijphart, 'Constitutional Choices for New Democracies' (1991) 2 Journal of Democracy 72, 73.

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.

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or any other features.[43] 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

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43   Nadia Urbinati and Mark E Warren, 'The Concept of Representation in Contemporary Democratic Theory' (2008) 11 Annual Review of Political Science 387, 390.
44   Horowitz (n 40).
45   Hans Lindahl, 'European Integration: Popular Sovereignty and a Politics of Boundaries' (2000) 6 European Law Journal 239, 248.
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.[47] 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.'[48]

The 17th-century English philosopher Thomas Hobbes has contributed greatly to our understanding of this abstract unity.[49] In *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 representer, not the unity of the represented.'[50]

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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, *Leviathan* (1651) 220.

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Voters may have many features in common, and even form a socially and culturally homogeneous group. However, this is not a precondition.[51] 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'.[52]

Public power is exercised at different levels.[53] 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.'[54]

There are numerous other examples. The Italian Constitution charges its members of parliament with representing 'the Nation'.[55] The Portuguese one provides that the Assembly 'represents all Portuguese citizens',[56] and the Dutch States General should represent the 'entire Dutch people'.[57] Similarly, the Treaty on the European Union contains the formulation that the European Parliament represents the citizens of the European Union.[58]

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

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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. Parliaments 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 national 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 simultaneously) 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 constituencies are created when geographical differences are most pressing? And that representation 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 political 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

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59   Pitkin (n 4) 218.
60   Cornelius Castoriadis, *Philosophy, Politics, Autonomy: Essays in Political Philosophy* (Oxford University Press 1991).

regional loyalties, would be more in the interest of Athens than the continued domination of family ties.[61] 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.[62] 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.'[63]

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.[64] 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.[65] It was used to characterise the political situation in which civic communities possessed self-governing authority.[66] 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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61 Christopher W Blackwell, 'The Development of Athenian Democracy' [2003] Center for Hellenic Studies (Harvard University) Discussion papers series.
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.
66 Martijn Groenleer, 'The Autonomy of European Union Agencies: A Comparative Study of Institutional Development' (DLaw thesis, Leiden University 2009) 29.

a *heteronomous* one. In such a society, citizens believe that the existing social or-
der originates in natural law, the will of God, or another external authority. Con-
sequently, the electoral provisions should follow this defined order. Representatives
cannot themselves establish new, artificial divides.[67] Even today, the belief in exter-
nal 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,[68] or those who are convinced that representa-
tive democracy requires one single *demos* and cannot develop into multiple *demoi*.[69]
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-ad-
justing and claim-accepting. It is part of a natural on-going foundational process:
the constituting and re-constituting of our communities.[70]

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.[71] 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.

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67   Takis Fotopoulos, 'Obituary: Castoriadis and the Democratic Tradition' (1997) 4 Democracy &
     Nature: The International Journal of Inclusive Democracy.
68   Thierry Baudet, 'The Significance of Borders: Why Representative Government and the Rule of
     Law Require Nation States' (thesis, Leiden University 2012) 155.
69   Lijphart argues that a majoritarian system of government is unsuitable for a heterogeneous so-
     ciety. See Lijphart as discussed in Bernard Steunenberg and Jacques Thomassen, *The European
     Parliament: Moving toward Democracy in the EU* (Rowman & Littlefield Publishers 2002) 11.
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 author-
     ity.

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.[72] 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'.[73] 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.[74] 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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72   The role of the different actors in constitution-making is described in Jon Elster, 'Forces and Mechanisms in the Constitution-Making Process' (1995) 45 Duke Law Journal 364.

73   Report on the Scope and Lifting of Parliamentary Immunities' (European Commission for Democracy Through Law 2014, No 714/2013, CDL-AD(2014)011) para 32.

74   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

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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.

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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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81   Tom Eijsbouts, 'Lisbon and the Quest for the European Public: Let Elections Do Some of the Work' in Ingolf Pernice and Evgeni Tanchev (eds), *Ceci n'est pas une Constitution: Constitutionalisation Without a Constitution?* (Nomos 2009).

82   Arendt (n 28) 191.

constitutional principle of separation of powers. The objective of this principle is the upholding of the rule of law.[83] 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.[84]

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.[85] Kant, Mill, and – in more recent years – Raz have developed the concept of autonomy in relation to individuals.[86] Personal autonomy is to control, to some degree, one's own destiny and to shape

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83   Iain Stewart, 'Men of Class: Aristotle, Montesquieu and Dicey on "Separation of Powers" and "The Rule of Law"' (2004) 4 Macquarie Law Journal 187.

84   Michel Couderc, 'The Principle of Parliamentary Autonomy' [1998] Constitutional and Parliamentary Information; David Beetham, *Parliament and Democracy in the Twenty-First Century: A Guide to Good Practice* (Inter-Parliamentary Union 2006) 117-118.

85   Autonomy originates from ancient Greece, where it was used to characterise self-governing civic communities. See section 2.3.

86   Immanuel Kant, *Groundwork for the Metaphysics of Morals* (Cambridge University Press 1998); John Stuart Mill, *On Liberty* (Longman, Roberts, & Green Co 1859); Joseph Raz, *The Morality of Freedom* (Oxford University Press 1986).

through successive decisions one's life.[87] Habermas has added that individual autonomy also necessitates 'public autonomy'.[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).[89] These are the studies of Couderc (1998), Van der Hulst (2000), Beetham (2006) and Delcamp (2008).[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:

> '[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.'[91]

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87   Raz (n 86) 369.

88   Fan Yang, 'A Discourse on Discourse: Habermas, Foucault and the Political/Legal Discourses in China' (thesis, École normale supérieure de Cachan 2015) 39-40; Jürgen Habermas, *Between Facts and Norms. Contributions to a Discourse Theory of Law and Democracy* (Cambridge: Polity 1996).

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/.

90   Michel Couderc, 'The Administrative and Financial Autonomy of Parliamentary Assemblies' (Inter-Parliamentary Union 1998); Van der Hulst (n 2); David Beetham (ed), *Parliament and Democracy in the Twenty-First Century: A Guide to Good Practice* (IPU 2006); Delcamp (n 74).

91   Delcamp (n 74) 7.

The IPU definition rightly qualifies 'representing the population' as a fundamental mission of all parliaments.[92] 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.[93] 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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92   See also Loretta Ann P Rosales, 'Towards Greater Effectiveness of Parliaments' (2006) <http://www.ipu.org/splz-e/doha06/workshop2.pdf> accessed 26 March 2012.

93   See Delcamp (n 74) 16. See also John M Carey, Frantisek Formanek and Ewa Korpowicz, 'Legislative Autonomy in New Regimes: The Czech and Polish Cases' (1999) 24 Legislative Studies Quarterly 569; David Arter, 'Introduction: Comparing the Legislative Performance of Legislatures' (2006) 12 The Journal of Legislative Studies 245; Rosales (n 92).

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

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94   Couderc (n 84); Koen Verhoest and others, 'The Study of Organisational Autonomy: A Conceptual Review' (2004) 24 Public Administration and Development 101; Delcamp (n 74); Groenleer (n 66).

95   Mark Williams, 'The European Parliament: Political Groups, Minority Rights and the "Rationalisation" of Parliamentary Organisation: A Research Note' in Herbert Döring (ed), *Parliaments and Majority Rule in Western Europe* (Mannheim Centre for European Social Research, University of Mannheim 1995) 392.

96   Chapter 3, section 2.1.

97   Simon Hix, 'Constitutional Agenda-Setting Through Discretion in Rule Interpretation: Why the European Parliament Won at Amsterdam' (2002) 32 British Journal of Political Science 259.

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with regard to constitutional change.[98] It is most probable that the *de facto* situation is different to the one on paper.[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 *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'.[100]

Organisations will strive to increase their autonomy *de facto*, and if possible, also *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 *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.[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

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98   Groenleer (n 66) 31.
99   Ibid 34-35.
100   Ibid 30.
101   Ibid 33-34.

on the autonomy of American agencies.[102] 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'.[103] This legitimacy depends on the development of a direct connection with the public.[104] Having such a link provides the agencies with a new, additional source of legitimacy, where this legitimacy was initially only provided through the principal.[105] 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.[106] 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.[107] 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.

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102 Daniel P Carpenter, *The Forging of Bureaucratic Autonomy: Reputation, Networks, and Policy Innovation in Executive Agencies, 1862-1928* (Princeton University Press 2001).

103 Ibid 1. See also Devin Caughey, Sara Chatfield and Adam Cohon, 'Defining, Mapping, and Measuring Bureaucratic Autonomy' (2009) <http://web.mit.edu/caughey/www/Site/Research_files/CauCoField-BureauAuton(MPSA)2.pdf> accessed 2 April 2014.

104 Carpenter (n 102) 352.

105 Groenleer (n 66) 30.

106 Bernard Manin, *The Principles of Representative Government* (Cambridge University Press 1997) 175.

107 Lipset in Antonis A Ellinas and Ezra Suleiman, *The European Commission and Bureaucratic Autonomy: Europe's Custodians* (Cambridge University Press 2014) 10.

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*.[108] 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.[109] 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.[110] 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.[111]

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'.[112] 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.[113] 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*.[114] 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 *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 *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.[115] 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 *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.

5.   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 *unity* of citizens.[116] On the other hand, it represents the population's *diversity*.[117] 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

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115   Raz (n 86).
116   Section 2.2.
117   Section 2.1.

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.[118] 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.[119] 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.[120] 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.[121] 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.[122]

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.[123] 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 it's 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.

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