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

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4. Electoral Legislation in an Intergovernmental Context

The (potential) position of a parliament is determined, to a substantial extent, by its relationship with the electorate. Whether parliament can develop its powers and strengthen its position in the overall institutional architecture strongly depends on whether it is (expected to be) recognized as a fitting representative body.¹ The electoral provisions are key for shaping this electoral relationship. They contain *claims* about both the parliament and its subject. Because of the free representative mandate of its members and the principle of separation of powers, a parliament needs to make such formal claims itself, and will therefore seek to have a large say over the electoral provisions.²

The present chapter analyses the development of the European Parliament's powers regarding its electoral provisions. It covers a time-span of almost twenty years, starting from 1958. In these two decades, the European Parliament was still an appointed body. It is only since 1979 that its composition results from popular elections, which are organised every five years. The decision for organising elections was taken in – what I call – the Direct Election Act of 1976, as amended in 2002.³ The previous chapter has shown that, even when the members were appointed by and from national parliaments, they had an *implicit* free mandate. The fact *that* the European Parliament has tried to augment its say over the 1976 decision, and make its own representative claims, can thus be assumed. The question now is *how* has it done that and to what effect.

The structure of the chapter is as follows. First, it is necessary to establish the manner in which the Treaties bestowed the formal responsibilities. How were the competences distributed between the institutions? This is explained in section 1. Only then can we turn to the actions undertaken by the European Parliament. As we will see, the Parliament has twice drafted a concrete proposal for election legislation in the period studied. The first was in 1960, the second in 1975.⁴ Section 2 analyses the 1960 *Dehousse Draft Convention*, as well as the actions by the European Parliament

1 Chapter 2, section 4.2.

2 Chapter 2, sections 3.2 and 3.3. In this thesis, I use the term separation of powers and separation of institutions interchangeably.

3 Act concerning the election of the representatives of the Assembly by direct universal suffrage (Direct Election Act) [1976] OJ L278/1; Council Decision 2002/772/EC Euratom, amending the Act concerning the election of the representatives of the European Parliament by direct universal suffrage [2002] OJ L283/1.

4 Draft Convention on the election of the European Parliament by direct universal suffrage (Draftsman: Fernand Dehousse), OJ No 37 of June 1960 (in Dutch), 834; Draft Convention

to ensure a follow-up. Section 3 looks into the proposal of 1975, the *Patijn Draft Convention*, and to Parliament's efforts to force a decision by the Council. The final part, section 4, will place Parliament's actions in the context of any parliament's quest for substantial representative autonomy.

1. Treaty Provisions Concerning EP's Direct Election

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

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

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

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

of 14 January 1975 on the election of Members of the European Parliament by direct universal suffrage (Draftsman: Schelto Patijn) [1975] OJ C32/15.

5 New Article 21(3) ECSC, Article 138(3) EEC, and Article 108(3) Euratom.

6 The meeting was held on 7-11 May 1948, in The Hague – the Netherlands. It was attended by 750 people, among whom journalists, philosophers, entrepreneurs, and church leaders.

7 Political Resolution of the Hague Congress, para 8.

8 Giorgos N Anastassopoulos, *The Debate on the System of Electing the Members of the European Parliament: From a Uniform Procedure to the Common Principles of the Treaties: A Contribution to the Problem of Enhancing the Democratic and Representative Nature of the European Parliament* (Bruylant 2002) 22.

9 Article 25 Statute of the Council of Europe (adopted 5 May 1949, entered into force 3 August 1949) CETS No 001. See for more on the Consultative Assembly, Richard Corbett, 'The European Parliament and the Idea of Representative Government' in John Pinder (ed), *Foundations of Democracy in the European Union. From the Genesis of Parliamentary Democracy to the European Parliament* (Palgrave Macmillan 1999) 89; Berthold Rittberger, *Building Europe's Parliament: Democratic Representation Beyond the Nation-State* (Oxford University Press 2005) 75.

During the negotiations on the 1951 Treaty of Paris establishing the European Coal and Steel Community (ECSC), the discussion about elections surfaced again. On a proposal of the Foreign Affairs Committee of the French National Assembly, the drafters included a clause permitting member states to choose whether their representatives to the new Common Assembly were appointed by parliament or selected via direct elections.¹⁰

[T]he Assembly shall consist of delegates who shall be designated by the respective Parliaments once a year from among their members, or who shall be elected by direct universal suffrage, in accordance with the procedure laid down by each respective High Contracting Party.¹¹

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

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

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

10 Franco Piodi, 'Towards Direct Elections to the European Parliament: Paper Written to Mark the 30th Anniversary of Direct Elections (June 1979)' (Archive and Documentation Centre (CARDOC), Directorate-General for the Presidency, European Parliament 2009) 9.

11 Article 21 ECSC.

12 Article 38(1) EDC.

13 Article 11 Draft Treaty embodying the Statute of the European Community (in Dutch), adopted by the Ad Hoc Assembly on 10 March 1953.

14 Corbett (n 9) 87-90.

on the expressed will of citizens.¹⁵ The second argument focuses on the effect that was expected of direct election. It was expected to contribute to the *process* of integration. In the eyes of European federalists, the Council of Europe had not delivered what had been hoped for.¹⁶ It was seen as a rather powerless, passive, intergovernmental body that was incapable of appealing to citizens. The elitist appointment procedure of the Consultative Assembly was not considered helpful in this regard, and should not be copied. Instead, direct elections should be introduced in the new communities to bring about a new dynamic, enhancing citizens' involvement and (consequently) inspiring the development of further integration:

'[T]he Community can expect from an elected Assembly the impetus needed for its development and guarantees for new and necessary progress.'¹⁷

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

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

15 Berthold Rittberger, "No Integration Without Representation!" European Integration, Parliamentary Democracy, and Two Forgotten Communities' (2006) 13 *Journal of European Public Policy* 1211, 1223.

16 Rittberger (n 9) 75.

17 Heinrich von Brentano in Piodi (n 10) 12.

18 Draft minutes of the Conference of Foreign Ministers of ECSC member states, held on 26-28 January and 4 February 1957, as published in: *ibid* 15.

a legal basis for a future decision to organise direct elections in *all member states*. To that end:

‘The Assembly shall draw up proposals for elections by direct universal suffrage in accordance with a uniform procedure in all Member States. The Council, acting by means of a unanimous vote, shall determine the provisions which it shall recommend to Member States for adoption in accordance with their respective constitutional rules.’¹⁹

Due to disagreements between the negotiators, the final text is not very detailed.²⁰ It fails to explicate what a ‘uniform election procedure’ would look like, or to include a concrete timetable for when the goal should be achieved. Consequently, the indirect appointment procedure would remain the norm until there was agreement to select the representatives otherwise. The responsibility to design a proposal that would lead to such agreement was given to the ‘Assembly’, as the official name for the European Parliament was. It was given the right of initiative – an exceptional window of opportunity for an overall rather powerless parliament functioning in an intergovernmental context.

1.2. *Parliament’s Powers*

In most areas of legislation, the right of initiative is a prerogative of the European Commission.²¹ The Commission is considered the best placed institution to ensure coherence in policies and serve the interests of the European Communities/Union at large. Yet, a different choice was made for the design of the electoral provisions. It was not the Commission that was given the right of initiative, but the European Parliament. One may wonder, as Anastassopoulos does, why such a sensitive task was put in the hands of an, as yet, immature representative body. After all, this task potentially affects the very foundations of the European project.

‘How could one justify that members of this Assembly, which was not to have a more substantial voice or role, ... have the mandate to draw up proposals for a uniform European electoral system?’²²

19 This provision is found in Article 138(3) EEC, Article 108(3) Euratom, and Article 21(3) ECSC, as amended.

20 Christiaan Ziccardi, *An Analysis of the European Parliament’s Electoral Arrangement(s). A Uniform Procedure for the Elections to the European Parliament?* (master thesis, University of Leuven 2005).

21 Nowadays, the right of initiative is laid down in Article 17(2) TEU.

22 Anastassopoulos (n 8).

Why was the right of initiative given to the European Parliament? Smith claims that this should be seen as a mere tactical manoeuvre.

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

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

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

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

23 Julie Smith, *Europe's Elected Parliament* (Sheffield Academic Press 1999) 45.

24 In their book on political representation by the European Parliament, Farrell and Scully underline that the issue of electoral design and legitimacy are strongly linked. David M Farrell and Roger Scully, *Representing Europe's Citizens? Electoral Institutions and the Failure of Parliamentary Representation* (Oxford University Press 2007) 2-3.

25 See for more about representative democracy as template for decisions, Rittberger (n 9) 198.

26 This position is contested by the European Parliament. It claims that the treaties are not clear whether and if so to what extend the Council may depart from Parliament's proposals. See Draft revised opinion of 13 December 1974 on the legal aspects of election of the Members of the

in 1974-1975 (see section 3), stated assertively that, until Parliament takes action, 'the Council cannot take the decisions necessary for introducing direct elections'.²⁷ This may indeed be true, but is not the full story in my view. Once Parliament had produced a proposal, it was very well possible that a different electoral procedure was adopted to the one envisaged by the European Parliament.

The involvement of national parliaments in the decision-making process is striking. It indicates that electoral provisions were recognised as rules with constitutional implications, that have the potential to re-shape the polity.²⁸ Such decisions demand the involvement of people's representatives. In this specific context, it was judged more appropriate to involve *national* people's representatives than to attribute rule-making power to the European Parliament.

The fact that a parliament is not *fully* autonomous in laying down electoral laws is not extraordinary. For example, the French National Assembly needs the consent of either the executive or the people in a referendum if it is to alter the rules by which it is elected.²⁹ The European Commission for Democracy through Law (the Venice Commission) even recommends that a parliament cannot unilaterally change the rules for upcoming elections.³⁰ The reason for this is that members can have a personal and financial interest in drafting the rules and boundaries for constituencies in a particular manner. Parliaments must have a strong say in the creation of electoral provisions, but not determine them without checks by other institutions. The rule-making power of the European Parliament was, however, in comparison to other national parliaments, exceptionally weak. It could neither adopt nor veto the decisions that defined its composition. This only changed with the entry into force of the 1992 Treaty of Maastricht. Since then, the European Parliament's *assent* is necessary for the adoption of a proposal.³¹

2. The Dehousse Draft Convention (1958-1973)

It took almost twenty years to adopt a procedure for organising direct European elections.³² During this period, Parliament's treaty-given powers remained unchanged in this area. Considering the necessity of representative autonomy, it was to be expected that Parliament would try and alter this situation. The present section and the next will analyse Parliament's actions in this light.

European Parliament by direct universal suffrage (Draftsman for opinion: Hans Lautenschlager) (EP 1974, A0-0368/74 0025) para 20.

27 'Direct Elections to the European Parliament, some Working Hypotheses' (rapporteur: Schelto Patijn) (EP 1974, A0-0368/74 0260) para 2.

28 Daniele Pasquinucci, 'Towards a Historical Approach to the European Elections' (March 2008) 10 <<https://usiena-air.unisi.it/handle/11365/4527>> accessed 10 March 2012.

29 Article 89 French Constitution.

30 See the report by Paczolay, member of the European Commission for Democracy through Law. Peter Paczolay, 'The Impact of International Standards on Electoral Law', (presentation VII the World Congress of IACL, Athens 11-15 June 2007) 9.

31 Article 223(1) TFEU.

32 Direct Election Act (n 3).

2.1. *A Blunt Proposal for Full Rule-Making Powers*

The European Parliament showed itself eager to act upon its right of initiative. The ink on the Treaties of Rome was hardly dry before several members of the newly set-up Parliament argued in favour of immediate action. The involvement of citizens, through direct elections, was regarded as urgent and highly salient. Other, inter-linked, goals were to increase Parliament's powers and to take further steps towards a federal Europe.³³ In setting priorities, many representatives wanted to focus on organising Parliament's direct election.³⁴ This was a goal in itself, but also the most promising means to these other ends. In the words of Battista, Chairman of the Committee on Political Affairs and Institutional Questions:

'When we succeed in getting elections by direct universal suffrage, ... we shall, as a Parliament, carry much more weight. We shall enjoy greater prestige and we shall more easily be able to ask and obtain the status of a legislative assembly as opposed to that of a consultative one.'³⁵

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

On 22 October 1958, a special Working Party on European Elections was established as a sub-committee of the Committee on Political Affairs and Institutional Questions. It was chaired by the Belgian Socialist Dehousse. The committee considered all the different academic views and political implications of direct elections and formulated a concrete proposal.³⁶ This was adopted by Parliament on 17 May 1960.

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

33 'The Case for Elections to the European Parliament by Direct Universal Suffrage' (Directorate-General for Parliamentary Documentation and Information, European Parliament 1969) 78.

34 Corbett (n 9) 92; Michael Steed, 'The European Parliament: The Significance of Direct Elections' (1971) 6 *Government and Opposition* 462, 467.

35 EP Debate of 10 May 1960 on the election of the European Parliament through direct universal suffrage, Minutes of the European Parliament of May 1960 (in Dutch) contribution Battista, 19.

36 The Draft Convention was accompanied by other reports. There was an introductory report by Fernand Dehousse, which provided the political framework for the subsequent proposals; a report on the composition of the elected Assembly by Faure; a report on the issues relating to the choice of electoral system for the future Assembly by Schuijt; a report on the representation of overseas countries and territories within the elected Assembly by Metzger; and a report on aspects of an information policy which would prepare the public for the European elections by Carboni. Together, they were published under the title 'Texts relating to the election of the Members of the European Parliamentary Assembly by direct universal suffrage' [1960] OJ No. 37 of 2 June 1960, 834-860.

was formally not empowered to initiate. Second, while Article 138(3) EEC invites the European Parliament to draw up proposals for direct elections ‘in accordance with a uniform procedure in all Member States’, the Draft Convention postponed this uniformity to a later stage.³⁷ As will be explained below, this postponement was part of a plan to enable a greater say in the decision-making by the European Parliament.

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

‘The European Parliament shall lay down the provisions governing the election of representatives after the end of the transitional period provided for in Article 4.’³⁸

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

One can only agree with the rapporteur that:

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

³⁸ Ibid art 9.

'This is one of the most striking proposals of the Working Party's draft. It largely offsets the 'concessions' the Working Party made, for political reasons, regarding the transitional period and the principle underlying it.'³⁹

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

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

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

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

39 Report on the election of the European Parliament by direct universal suffrage (Rapporteur: Fernand Dehousse) (EP 1960, A0-0022/60 0010 (in Dutch)) para 19(2). This report, supplementary selected reports and the minutes of the debates thereon are bundled in a special publication by the European Parliament. 'The Case for Elections to the European Parliament by Direct Universal Suffrage' (n 33).

40 One of the most comprehensive books on the election procedure mentions the transitional period but not its potential as a strategic instrument to increase Parliament's rule-making power. See Valentine Herman and Mark Hagger (eds), *The Legislation of Direct Elections to the European Parliament* (Gower Publishing 1980). See also Smith (n 23); Umberto Tulli, 'A Salutary Shock? The 30-Years Struggle for the Introduction of European Elections.' [2015] SIS Working Paper Series <http://web.unitn.it/files/download/34070/2015_2_tulli.pdf> accessed 10 February 2016.

41 Report on the election of the European Parliament by direct universal suffrage (Rapporteur: Fernand Dehousse) (n 39) para 18.

2.2. Parliamentary Pressure – without Result

Before the Working Party on European Elections presented its magnum opus, it consulted a wide range of people – including national parliamentarians, experts, and leading governmental figures. It was hoped that such ‘parliamentary diplomacy’ would pave the way for a smooth adoption of Parliament’s proposal in the Council, and in the member states.⁴² Nonetheless, the Draft Convention failed to pass even the first hurdle. The Council found itself unable to achieve unanimity. On 10 July 1961, the Foreign Ministers openly admitted deadlock.

‘Five delegations consider it possible for the Heads of State or Government to take a decision right away to consider the action to be taken on the Parliament’s proposal concerning its election. The French delegation considers that the time has not yet come to embark on this course.’⁴³

President De Gaulle had well understood that direct elections lay at the heart of a supranational conception of Europe. The seeds for direct elections were already planted in the Treaties of Rome. Yet, De Gaulle was nevertheless unwilling to see them bear fruit. He vetoed universal suffrage for the European Parliament point-blank.⁴⁴

Disappointed by this course of events, many members of the European Parliament reconsidered their earlier priorities. In 1960, they had agreed to prioritise the electoral procedure over other demands, in the anticipation that more parliamentary powers would follow quasi-inevitably from their direct election. After the set-back, they again favoured a two-track approach. On the first track, Parliament pressed for more powers immediately. On the second track, it continued to press, by different means, for the adoption of the Draft Convention. In order to unblock the negotiations in the Council, Parliament adopted resolutions and organised debates.⁴⁵ Individual members introduced parliamentary questions, initiated bills in national parliaments, and introduced resolutions at party congresses.⁴⁶ In the analysis of

42 The term was used by Van der Goes van Naters. ‘The Case for Elections to the European Parliament by Direct Universal Suffrage’ (n 33) 74.

43 Communiqué of the Foreign Ministers meeting on Bonn, as published in Piodi (n 10) 25.

44 Herman and Hagger (n 40) 16; Pascal Fontaine, *Voyage to the Heart of Europe, 1953-2009* (Racine 2009) 154; Tulli (n 40) 10.

45 See for instance EP Resolution of 27 June 1963 on the powers and responsibilities of the European Parliament, OJ No 106 of July 1963 (in Dutch), 1916; EP Resolution of 12 March 1969 on the direct election of Members of the European Parliament [1969] OJ C41/12 (in Dutch); EP Resolution of 3 February 1970 on the meeting of Heads of State and Government in The Hague on 1-2 December 1969 [1970] OJ C25/28; EP Resolution of 5 July 1972 on the forthcoming Summit Conference of the Heads of State and Government [1972] OJ C82/26. On 6 October 1971, the European Parliament organised a hearing with authors of national bills regarding direct European elections.

46 Anastassopoulos (n 8) 28; Piodi (n 10) 28.

Herman, these initiatives kept 'the issue of direct elections alive at the national level during the 1960s and early 1970s.'⁴⁷

The European Parliament also fought back with another instrument – it threatened legal action. In May 1968, possibly inspired by the social unrest that had a great impact on France, twelve members drafted a resolution in which the President of the European Parliament urged the Council to take a decision.⁴⁸ In their draft, the members referred to Article 175 EEC. This provisions foresees that:

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

The members claimed that, in this case, the Council had violated the Treaties as it had failed to adopt a common position on the Draft Convention. On 12 March 1969, the European Parliament adopted the resolution, which was intended as a – procedurally required – warning for the activation of Article 175 EEC.⁴⁹ A legal challenge was however avoided by Parliament's leadership, which feared that the case was unwinnable. Indeed, one could well argue that it was not accurate to say that the Council had failed to *act*. After all, the ministers had attempted to find a common position, but had failed to achieve a *result*. Others, however, believe that the European Parliament could well have won a legal challenge.⁵⁰ In any event, the discussion on Article 175 EEC alone seemed to shake the Council from its apathy.⁵¹

At their meeting in The Hague on 1-2 December 1969, the Heads of State and Government promised to give 'further consideration' to the question of direct elections.⁵² This promise was too limited for the European Parliament. It insisted on a specific time-frame, and 'a suitable consultation procedure between Parliament and the Council'.⁵³ The request for a consultation procedure is noteworthy. After all, the European Parliament was only given a right of initiative. It had no say in the final

47 Valentine Herman, 'Direct Elections: The Historical Background' in Valentine Herman and Mark Hagger (eds), *The Legislation of Direct Elections to the European Parliament* (Gower Publishing Company Limited 1980) 16.

48 EP Motion for a Resolution tabled by Messrs Deringer, Dehousse, Merchiers and others on the direct election of Members of the European Parliament, HA PEO AP PR B0-0050/68 0010 (send back tot committee).

49 EP Resolution of 12 March 1969 on the Council's Failure to Act (n 45).

50 Draft revised opinion of 13 December 1974 on the legal aspects of election of the Members of the European Parliament by direct universal suffrage (Draftsman for opinion: Hans Lautenschlager) (n 26), 10.

51 Steed (n 34) 465.

52 'Final Communiqué of the Meetings of Heads of Government of the Community (The Hague, 1-2 December 1969)' (Office for Official Publications of the European Communities) Bulletin of the European Communities No 1, para 5.

53 EP Resolution of 3 February 1970 on the meeting of Heads of State and Government in The Hague on 1-2 December 1969 (n 45).

decision-making. Nonetheless, prominent members of the European Parliament had always held the view that it was unthinkable that the European Parliament would be excluded from this process.

'It is hard to believe that the Councils could depart appreciably from a proposal by the Parliament without consulting the institution directly concerned or without stating its reasons and discussing the wisdom of any amendments made. Nor is it easy to imagine that the system under which the future Parliament is to operate could be decided by the Ministers alone. It seems obvious that collaboration between these institutions does not imply relinquishing powers and prerogatives established by the Treaties. Relations between the Councils and the Parliament are situated in the political rather than in the legal sphere.'⁵⁴

The Council apparently also found it appropriate to involve the European representatives in the decision-making on this subject. It conceded Parliament's request for a consultation procedure.⁵⁵ This procedure did not expand the European Parliament's powers *de jure*. The formal decision-making remained in the hands of the Council and the member states. However, it can certainly be qualified as a limited change *de facto*. Parliament was allowed to play a substantive role in the negotiations.

3. The Patijn Draft Convention (1973-1979)

In 1974, a deal on the Draft Convention was still far off.⁵⁶ However, the *need* for direct elections became more pressing. The European Parliament had acquired substantial budgetary powers since 1970.⁵⁷ According to several scholars, this increased Parliament's need to be elected by popular vote.⁵⁸ For its part, the European Parliament stressed that an extension of popular involvement was indispensable due to the plans for a political union that member states aimed to construct by 1980.⁵⁹ Moreover, members complained that the dual mandate had become too heavy a burden.⁶⁰

54 Report on the election of the European Parliament by direct universal suffrage (Rapporteur of introductory part: Emilio Battista) (EP 1960, A0-0022/60 0010 (in Dutch)) para 12. See for similar comments Draft revised opinion of 13 December 1974 on the legal aspects of election of the Members of the European Parliament by direct universal suffrage (Draftsman for opinion: Hans Lautenschlager) (n 26) 9.

55 The delegation of the European Parliament and a delegation of the President-in-Office met on 26 June 1970, 8 December 1970, and 2 March 1972.

56 EP Resolution of 5 July 1972 on the forthcoming Summit Conference of the Heads of State and Government (n 45).

57 See Chapter 3, section 2.2.

58 Juliet Lodge, 'Federalism and the European Parliament' (1996) 26 *The Journal of Federalism* 66; Tulli (n 40).

59 Report on the adoption of a draft convention introducing elections to the European Parliament by direct universal suffrage (Rapporteur: Schelto Patijn) (EP 1975, A0-0368/74 0010) explanatory statement, para 2.

60 *Ibid* explanatory statement para 3.

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

3.1. The Backdoor: Treaty Amendment

On 13 September 1973, the Dutch Social Democrat Patijn was appointed as Parliament's new rapporteur. Sixteen months later, Parliament adopted a new Draft Convention with 106 votes in favour, 2 votes against, and 17 abstentions.⁶¹ In *Europe's Elected Parliament*, Smith concludes that there is 'little difference between the Dehousse and Patijn Reports'.⁶² Both reports propose that members are elected for five years and that the first European election takes place on the basis of national provisions.⁶³ A closer look at both reports reveals however that there are noteworthy differences concerning their implications for Parliament's *representative autonomy*. In this regard, the Dehousse Convention was more ambitious, or at least it was more explicit about them.

Patijn relinquished the idea of a transitional period. He wanted all representatives to the European Parliament to be directly elected at the same time. Like Dehousse, Patijn was convinced that the electoral provisions that he was designing would only apply to the *first* European election. The second election would have to be organised on the basis of a common procedure that was still to be agreed.⁶⁴ Patijn set the deadline for this future procedure at 1980. The real difference between the two reports lies in the question of who should decide on the new procedure. In the 1960 Draft Convention, the drafting and the adoption of the future system were both placed in the hands of the European Parliament. These were regarded as matters that ought to be decided by representatives and not by governments. The involvement of members of national parliaments was secured through the dual mandate of one-third of the members of the European Parliament. The 1975 Draft Convention foresees very different decision-making. It accepts a strong involvement of the Council and the member states, also for the period *after* the first direct election of the European Parliament. The European Parliament would keep the right of initiative but it remained for the Council to decide on any proposal and to recommend it to the

61 Draft Convention of 14 January 1975 on the election of Members of the European Parliament by direct universal suffrage (Draftsman: Schelto Patijn) (n 4).

62 Smith (n 23) 55. A similar conclusion is drawn by Tulli in Tulli (n 40).

63 See Articles 5(1) and 9 in the Draft Convention on the election of the European Parliament by direct universal suffrage (Draftsman: Fernand Dehousse) (n 4) 834; and Articles 3(1) and 7(2) of the Draft Convention of 14 January 1975 on the election of Members of the European Parliament by direct universal suffrage (Draftsman: Schelto Patijn) (n 4).

64 See Article 7 and 13 of the Draft Convention of 14 January 1975 on the election of Members of the European Parliament by direct universal suffrage (Draftsman: Schelto Patijn) (n 4). Article 13(1) states that the first elections shall be held no later than the first Sunday of May 1978. Article 7(1) regulates that the European Parliament shall draw up a proposal for a *uniform* electoral system by 1980 at the latest.

member states for approval in accordance with their constitutional requirements.⁶⁵ Parliament would thus renounce – at least for the time being – its ambition to have formal rule-making power on the electoral system. The reasons for this is probably that Parliament foresaw that in a future revision of the electoral provisions, there would be a power-shift after all.

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

‘[S]ince the direct election of the European Parliament is at issue here, it could be argued that the Council should have absolutely nothing to do with the electoral arrangements but that the power to make them should be vested exclusively in the European Parliament.’⁶⁶

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

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

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

65 Article 7 *ibid.*

66 Patijn Report (n 59) explanatory statement in reference to Article 14.

67 *Ibid.*

68 See Articles 2 and 9 Patijn Convention (n 4), in combination with Patijn Report (n 59), art 14.

69 See Patijn Report (n 59) explanatory note on Article 14, 29.

'If any action by the Community appears necessary to achieve, in the functioning of the Common Market, one of the aims of the Community in cases where this Treaty has not provided for the requisite powers of action, the Council, acting by means of a unanimous vote on a proposal of the Commission and after the Assembly has been consulted, shall enact the appropriate provisions.'

Conversely, Article 14 of the Draft Convention gave Parliament 'the right of codecision' on amendments or supplements to the treaties.⁷⁰ To claim that Article 235 and Article 14 correspond 'almost exactly' may be clever from a strategic point of view, but it deliberately understates the increase in Parliament's rule-making power that it would bring about.

'Should reference be made to the procedure laid down in this Article or should it appear that further measures are required to implement direct elections to the European Parliament in accordance with this convention and if the necessary powers are not provided, the Council shall, acting unanimously on a proposal from the European Parliament and *with its approval*, make the appropriate provisions. The Council shall consult the Commission before making its decision.' (italics added)⁷¹

For Patijn, it was 'particularly obvious that Parliament should have this right [of approval] in a matter that directly concerns Parliament'.⁷² It seems to be the case that Patijn could accept the strong rule-making power of the Council and the member states in the electoral procedure only because he simultaneously attempted to limit the scope of this power. Moreover, it is likely that he anticipated that this strong involvement would have a limited duration, and would end when the new procedure was in place – by 1980 at the latest.

3.2. The Council Decides, Parliament Triumphs

The period after the approval of the Patijn report by Parliament was marked by heated debates on the subject in national parliaments, and in official and unofficial Council meetings. The European Parliament continued to exert pressure.⁷³

70 Draft revised opinion of 13 December 1974 on the legal aspects of election of the Members of the European Parliament by direct universal suffrage (Draftsman: Hans Lautenschlager) (n 26) 8.

71 Article 14 Patijn Convention (n 4).

72 'Note on the State of Work in the Council on the Introduction of Elections to the European Parliament by Direct Universal Suffrage' (rapporteur: Schelto Patijn) (EP 1975, PE 42.455, A0-0368/74 0240) 4.

73 It adopted several resolutions. EP Resolution of 11 March 1976 on direct elections to the European Parliament, OJ C79/26; EP Resolution of 7 April 1976 on elections by direct universal suffrage to the European Parliament [1976] OJ C100/24; EP Resolution of 15 September 1976

Eurobarometer opinion polls showed that the population was strongly in favour of a directly elected European Parliament, making it harder for the Council not to deliver.⁷⁴ Yet, an agreement was far from certain. In his detailed account of this period, Anastassopoulos writes with a keen sense of drama:

[T]he President of the European Council and Prime Minister of Luxembourg Gaston Thorn had to 'lock up' his colleagues for whole week-ends in the Senningen Castle in order to reach an agreement.⁷⁵

Finally, on 20 September 1976, the Council formally adopted the Act concerning the election of the representatives of the Assembly by direct universal suffrage.⁷⁶ The Direct Election Act did not introduce a uniform electoral procedure. The disagreements between the member states on the details of such a procedure proved too profound. A uniform procedure remained the ultimate objective, but there was no deadline set to achieve this. Pending a uniform system, the members of the European Parliament would be elected through procedures that were governed by the different national provisions of each member state.⁷⁷ Several important aspects of Parliament's proposal were included in the final Act, such as the number of members (which increased to 410), the duration of their mandate (five years), and the fact that elections were to take place within the same few days across the Community.⁷⁸ However, in terms of increasing Parliament's rule-making power, the result was disappointing.

The Council and the member states remained responsible for deciding the electoral provisions and related provisions. Only a few months earlier, on 16 June 1976, the President-in-Office of the Council, Thorn, had announced in the European Parliament that '[i]t will be up to this elected Parliament to fix the number of Members to be elected the second time.'⁷⁹ Thorn must have referred to the co-decision powers that Parliament would gain through the backdoor as regulated in Article 14 of the Patijn Draft Convention (see above). However, the Council had been divided on the desirability of this backdoor, as can be read in an internal note of the Council secretariat.

on direct elections to the European Parliament by universal suffrage [1976] OJ C238/25. See for more Herman (n 47) 37.

74 Eurobarometer No 4, October-November 1975.

75 Anastassopoulos (n 8) 35.

76 Direct Election Act (n 3). The Act was attached to Council Decision 76/787/ECSC EEC Euratom of the representatives of the Member States meeting in the council relating to the Act concerning the election of the representatives of the Assembly by direct universal suffrage [1976] OJ L278/1.

77 Ibid art 7(2).

78 These were regulated in Articles 2, 3(1), and 9(1) respectively.

79 EP Debate of 16 October 1973 on amending rule 36 of the rules of procedure, OJ No 167 of October 1973 (in Dutch) Annex, 51.

'Si la plupart des délégations peuvent accepter les dispositions envisagées par l'Assemblée à l'article 14 de son projet de Convention, en revanche, de l'avis d'autres délégations, ces dispositions ne peuvent être retenues notamment du fait qu'elles instaurent la codécisions entre le Conseil et l'Assemblée.'⁸⁰

The final decision does include a flexibility mechanism. However, it was a far cry from what Parliament had envisaged in its own Article 14. The scope of the adopted provision was very limited. It only covered measures to *implement* that which was agreed in the Convention.⁸¹ Moreover, Parliament's role in the decision-making was marginalised. The European Parliament would be involved in negotiations on implementation measures, but it was the Council that would take the final decision. It was thus not up to the newly elected European Parliament to fix the number of members to be elected the second time. Moreover, Parliament was not attributed the right of approval on related matters, such as the legal and financial status of its members that it had demanded.

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

4. Conclusion

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

80 Travaux Du Groupe Ad Hoc Chargé de l'Examen Des Problèmes Relatifs Aux Élections Des Membres de l'Assemblée Au Suffrage Universel Direct' (Council 1975) Note R/2547/1/75 (ASS 613).

81 Article 13 Direct Election Act (n 3).

82 See Chapter 2, section 3.

electoral system.⁸³ Parliament was empowered to provide the substance for a uniform procedure; the final decision-making however remained – at least initially – in the hands of the Council and the member states. At the time, the members of the European Parliament only had an *implicit* free mandate, as they were *appointed* people’s representatives.⁸⁴ From sections 2 and 3, it becomes clear that the European Parliament accepted that this reduced its leverage. Parliament insisted on more rule-making powers regarding the electoral provisions once the free mandate of its members was *explicated* by the organisation of direct elections. The 1960 Draft Convention foresees that an elected European Parliament becomes the sole decision-maker for future legislation; the 1975 Draft Convention accepts a more modest role for the European Parliament to start with.

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

The relevance of representative autonomy for any parliament clarifies why the Council engaged in negotiations with the European Parliament over the election provisions.⁸⁵ This was not required from a *legal* point of view. However, it was vital from a *political* perspective. It was unthinkable not to engage Parliament. The different positions of the national delegations within the Council fall outside the scope of this thesis. They are however very meaningful in order to understand the full history of the Direct Election Act, as the Council blocked the decision-making on this Act for years. Whether Parliament’s need for more representative autonomy was openly discussed during these negotiations is an interesting subject for future research.

Parliament helped to solve the deadlock in the Council, by taking political actions (on the basis of its right to regulate its own affairs) and threatening to take legal action.⁸⁶ Moreover, it proposed a new, very moderate draft, at exactly the right moment in time.⁸⁷ In 1976, an agreement was finally reached, enabling the first European election to be organised in 1979. In the Direct Election Act, Parliament’s rule-making power regarding future electoral legislation was kept to a minimum. However, this was expected to change, since the Act was regarded as only a ‘provisional arrangement’.⁸⁸

83 Section 1.2.

84 Chapter 3, section 1.2.

85 Section 2.2.

86 Section 2.2.

87 Section 3.

88 Section 3.2.

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

'[t]he European Parliament shall draw up a proposal for elections by direct universal suffrage in accordance with a uniform procedure in all Member States *or in accordance with principles common to all Member States*'. (italics added)⁹⁰

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

89 Council Decision 2002/772/EC Euratom (n 3). Notably, it requires member states to organise the elections on the basis of proportional representation and abolishes the dual mandate for members of the European Parliament.

90 Article 223(1) TFEU.

91 EP Resolution of 11 November 2015 on the reform of the electoral law of the European Union [2015] P8_TA(2015)0395.