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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

[Link to publication](#)

**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].

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## 8. Representative Autonomy: A Drive for Action and a Vehicle for Change

In the introduction (Chapter 1), I recalled my surprise when learning about the *Lisbon Decision* of the German Federal Constitutional Court.<sup>1</sup> In 2009, this Court effectively disqualified the European Parliament as a representative body of *Union citizens*. At face value, its point is strong and compelling. However, it is *exclusively* based on the fact that the composition of the European Parliament is determined by a system of degressive proportionality. As the weight that is attached to the votes cast by Union citizen differs depending on their country of residence, ‘the European Parliament factually remains a representation of the peoples of Member States’.<sup>2</sup> On this definition, the European Parliament’s electorate is not a single, self-standing group. The relevance of the electoral system for the definition of whom Parliament represents cannot be denied. Yet, on the basis of ten years of experience as a member of the European Parliament, I sensed that the German judges left important rules out of the equation. They had been overly absolute in their conclusions. Some of the other rules, which have been formally adopted as well, define the electorate as ‘a whole’, and as separate from national structures. The decision by the European Parliament to structure its organisation along the lines of European political groups rather than national groups comes to mind in particular. Its Rules of Procedure, analysed in Chapter 7, prevent members from formally carrying out their mandates as representatives of *national peoples*. This is a good illustration of how the European Parliament has partly repaired the implication of the electoral rules by decisions that fall within its scope.

I undertook my research in an attempt to understand the co-existence of different sets of rules, and to shed light on their significance for the representative status of the European Parliament. The word ‘status’ refers to Parliament’s position as defined by *all* formal rules. I focussed on the content and development of four particularly relevant sets of rules: the electoral rules (Chapter 4), the immunity provisions (Chapter 5), the salary provisions (Chapter 6), and the aforementioned rules regarding European political groups (Chapter 7). I have explained my selection in Chapter 1, section 5.3. Each set of rules has an impact on how we should view the representative status of the European Parliament. In understanding how these rules

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

2 *Ibid* para 284.

evolved, and how they came to deviate from each other, I have focussed in particular on Parliament's own drive to bring about change.

In the course of writing this thesis, I have had to accept the sheer impossibility of defining the European Parliament's subject in absolute and unequivocal terms. Those scholars (or courts) who do so, necessarily present an incomplete picture. Their failure to deal with *all* of the facts is likely caused by the discomfort that many intuitively feel when confronted with diverging provisions. I hope that the concept of representative autonomy, which I presented in Chapter 2, contributes to relieving some of their uneasiness. This concept stresses that political representation is in part, but essentially, about redefining the polity through a permanent evolution of rules and practices. By their very nature, parliaments – as bodies of political representation – have the drive, one could even call it an obligation, to seek and test constitutional change. I have argued that parliaments even *ought* to have sufficient autonomy to do so. Many actions by the European Parliament, resulting in diverging provisions, can be viewed in this light. They are the result of typical *parliamentary behaviour*.

I will outline the four most important findings of this study below.

## **1. The European Parliament Defines Both Itself and Its Electorate**

The first conclusion is dominantly present in all chapters regarding rules (Chapter 4-7). From its inception, the European Parliament has undertaken consistent efforts to shape its own representative status. Restructuring itself and its electorate is an on-going process, expressed in decisions big and small. Along the way, Parliament has successfully developed its powers to take such decisions further. From debates and reports, it appears that Parliament considers this *appropriate* and befitting a parliament.

### *1.1. Exceptional Rule-Making Procedures*

The finding that the European Parliament seeks to increase its power to alter its representative status beyond the treaty texts can be no surprise for Parliament-watchers. The introduction of the institution in Chapter 3, on the basis of the work of other scholars, highlights that the same phenomenon occurs in the legislative process, in the budgetary process, and regarding the investiture of the European Commission.<sup>3</sup> The difference is that these other works focus on what Parliament *does*: on how it has developed its say over policy areas and other institutions. The current study analyses the development of Parliament's say over what it *is*: over what kind of representative body it is, and who it is that it represents.

Interestingly, the member states have recognised that the European Parliament *should* have a special involvement in precisely these rules. This explains why they have provided it with powers that can be regarded as unusual in comparison to Parliament's powers in other areas. As early as 1958, the European Parliament – then called the Assembly – was given the right of initiative to draw up proposals for

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3 Chapter 3, section 2.

organising direct elections by universal suffrage.<sup>4</sup> Prior to that, its members were asked to design a blueprint for a European Political Community.<sup>5</sup> And in 1997, Parliament was given the right of initiative for, and the final say in, laying down the rules regulating the conditions for the performance of the parliamentary mandate – such as salary provisions.<sup>6</sup> It shows that the decision-making on the provisions that define Parliament and its electorate are *hors catégorie*. The European Commission is withheld the right of initiative that it has regarding ordinary legislation, and an extra-ordinary role is reserved for national parliaments.<sup>7</sup> Apparently, the question of what the European Parliament *is*, and whom it represents, is a question that should be answered predominantly by citizens' representatives.

Initially, the role for the European Parliament in these exceptional decision-making procedures was *relatively* large. Meanwhile, the European Parliament has become a co-legislator in most areas. In the ordinary legislative procedure, it takes the final decisions together with the Council. In comparison, the power of the European Parliament as regards the electoral procedure in particular is now rather restricted. Its room for manoeuvre is limited by the involvement (and veto) of national parliaments. The reason for this is most likely that the representative status of a parliament carries the potential to redefine society (see section 2).

### 1.2. *Examples of Developed Powers*

Over the years, the European Parliament has extended its power to shape the studied sets of rules both *de facto* and *de jure*, thereby contributing to the evolution of the European constitution. It has inventively built on competences that were attributed for different purposes. In particular Parliament's right to decide its own Rules of Procedure has turned out to be a vital instrument for change.

Let me present the most striking example of this, which concerns the immunity of members of the European Parliament and forms the core of Chapter 5. The story is remarkable, as the immunity provisions are laid down in a Treaty Protocol that, legally, can only be changed by the member states.<sup>8</sup> Even though the European Parliament is virtually relegated to the side-lines as regards primary law, it has managed to amend the scope of the immunity offered to members nonetheless.

The provisions that govern the immunity of members of the European Parliament are laid down in the Protocol on the Privileges and Immunities of the European Union (PPI).<sup>9</sup> Article 8 PPI concerns protection against prosecution for actions undertaken in the exercise of duties.<sup>10</sup> For many years, it was evident to all that this 'non-liability' did not extend to acts undertaken outside Parliament's precincts. The latter were covered by Article 9 PPI. According to this, members enjoy the same immunity that members of their national parliament have for actions undertaken in

4 Chapter 4, section 2.2.

5 Chapter 3, section 1.2.

6 Chapter 6, section 2.2.

7 Chapter 4, section 1.2.

8 Chapter 5, section 2.4.

9 Chapter 5, section 2.1.

10 Chapter 5, section 2.2.

their home country, which means that their protection depends on their country of origin.<sup>11</sup> Only in relation to Article 9 PPI could the European Parliament exercise its right to waive or uphold the immunity of its members when there is fear for *fumus persecutionis*. Article 8 PPI is an absolute immunity that cannot be lifted. Whether it applies, is for the courts to decide.

For decades, the European Parliament has expressed its desire to end the difference in legal protection caused by Article 9 PPI, and to have the immunity rules of its members harmonised. The geographical criterion was increasingly regarded as unfitting. Firstly, because members can also perform core representative tasks outside parliamentary premises. This is for instance the case when they participate in television debates or give speeches at party conferences. Secondly, a European public space is in the process of emerging. Members occasionally, but increasingly, participate in cross-border political activities. Without uniform immunity provisions, some members of the European Parliament could face prosecution for certain statements, whilst others, for similar acts, would not.

To this day, the demand for equality has not been met. Nevertheless, the European Parliament has found a way to extend the Union immunity of its members captured in Article 8 PPI. It did so by relying on its right to regulate its own affairs, its right to waive immunity, and the treaty-enshrined principle of loyal cooperation.

First, Parliament has re-interpreted Article 8 PPI.<sup>12</sup> The modern interpretation has it that the protection of Article 8 covers all duty-related actions, even when they take place in a member's home country. Following this turn, Parliament found a manner to express itself on Article 8 cases, as well as to make its opinion heard to the courts. This was accomplished through amending its Rules of Procedure.<sup>13</sup> Currently, the rules enable members (or former members) to request that their immunity is defended, even when theirs is an Article 8 case. Parliament will vote on such requests, and present the relevant national courts with its advice. The European Court of Justice has confirmed that, by virtue of loyal cooperation between the institutions, national courts are bound to take this advice into account.<sup>14</sup> This means that even for actions undertaken in a member's home state, the national courts may be asked by the European Parliament to respect the protection of this member by virtue of Article 8 PPI. The case of *Patriciello* has demonstrated that the Union immunity of members has indeed been extended to actions outside Parliament's precincts. This has effectively reduced, albeit to a limited extent, the differences in legal protection of the members.<sup>15</sup>

This chain of decisions has thus slightly modified the representative status of the European Parliament. It presents the Parliament as a body with an own electorate. Moreover, the members are now in a better position to develop a relationship with this unitary electorate, in an emerging European public space. Members from

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11 Chapter 5, section 2.3.

12 Chapter 5, section 4.2.2.

13 Chapter 5, section 4.1.

14 Joined Cases C-200/07 and C-201/07 *Alfonso Luigi Marra v Eduardo De Gregorio and Antonio Clemente* [2008] ECR I-7929, para 42.

15 Chapter 5, section 4.2.2.

different European political parties and from different countries can now debate, participate in demonstrations, and engage in other political activities on an equal footing. Conversely, within one and the same country, the differences between the legal status of members of the national parliament and of members of the European Parliament from that country have increased.

The development of members' immunities is noteworthy. Yet, it is but one example of how the European Parliament exploits its powers beyond what they were intended for, how it presents its own readings of Treaty provisions, and how it seeks to have them altered *de jure* and *de facto*. The history of the European Parliament shows an evolution – which continues today – as a consequence of permanent interaction between Treaty texts and *faits accomplis*, helped by normative assumptions about the powers that a parliament ought to have (see next section).

Sometimes the bending of the rules was merely a matter of degree. That can be concluded from Chapter 4, describing Parliament's actions, in the period 1958-1976, to arrive at direct elections. In these early years, the European Parliament was given the right of initiative, but it lacked rule-making powers.<sup>16</sup> Nevertheless, Parliament found alternative ways to exercise influence after it had presented its proposals for legislation. It threatened the Council with legal action if it would not act upon Parliament's proposals, it pressured Council to engage in inter-institutional negotiations and its members introduced proposals in national parliaments as well.<sup>17</sup> Yet, it can be argued that these actions fall within the sphere of political interpretation of the right of initiative. It goes too far to conclude that Parliament acquired new competences, let alone qualify them as the result of an abuse of power.

The same cannot be said about some of Parliament's actions in bringing about a Union salary for all its members. As has been described in Chapter 6, Parliament's decisions went beyond the letter of the Treaties, and can even be seen as examples of *détournement de pouvoir*. The objective of the European Parliament was understandable: it wanted to end the situation in which members of the European Parliament were paid the equivalent of members of their respective national parliaments, causing considerable differences between members from different countries and violating the claim that Parliament is a unitary institution, representing a self-standing electorate.<sup>18</sup> However, until 1997, Parliament had no right of initiative, let alone any power to lay down the rules for a uniform statute for members.<sup>19</sup> In the absence of this, and in order to minimise the differences in pay *de facto*, Parliament's Bureau decided to set up different social arrangements that normally are part and parcel of a salary. These arrangements included an invalidity pension, a survivors' pension, a voluntary pension fund, and a transitional end-of-service allowance.<sup>20</sup> According to the Bureau, the legal basis for this can be found in Parliament's autonomy to regulate its own affairs and organisation. This stand can be contested though, not only

16 Chapter 4, section 1.2.

17 Chapter 4, sections 2 and 3.

18 Chapter 6, section 2.

19 Chapter 6, section 1.2.

20 Chapter 6, section 4.1.

on moral, but also on legal grounds.<sup>21</sup> Nonetheless, it should be recognised that the social security schemes contributed to one of Parliament's self-imposed goals: making the financial status of its members more equal. Most of the arrangements that were introduced by the Bureau, were later included in the European statute for members that was finally decided in 2005.<sup>22</sup> If one sets aside the personal incentives of members to provide themselves with a Union salary (and which no doubt were present), one can see the *institutional motives*. How could a Parliament, which in Article 14(2) TEU is composed of representatives of Union citizens, accept that its representatives were dependent on national structures for their indemnity? The battle for a single salary is just another element of a more encompassing effort to set national structures at a distance, and to turn the group of members of the European Parliament into a *whole*.

## **2. Representative Autonomy: The Concept**

The continuous actions, undertaken by the European Parliament with a view to changing the rules through which its representative status is defined, deserve a thorough explanation. One may be tempted to place the permanent manoeuvring in the light of a well-known reflex of institutions to forge their autonomy, and increase their staff and budget as much as possible.<sup>23</sup> However, such an explanation does not suffice. The European Parliament is not just 'any' bureaucracy: it is a *parliament*. It is an elected body, composed of members with free representative mandates. Therefore, the actions described above can better be studied in relation to Parliament's representative role. To enable this analysis, I have introduced – in Chapter 2 – the concept of *representative autonomy*. Come to the end of my thesis, we can conclude that this concept has proven its value. It has shown to be effective in explaining Parliament's drive and capacity to change the sets of rules studied here, where occasionally other approaches could not (see section 3). Additionally, it has provided a plausible explanation for why other actors accepted Parliament's interventions to some extent. The latter still deserves further research, however, as the present investigation only concerned the European Parliament itself.

### *2.1. The Electorate as a Construct*

In order to understand what Parliament's representative role requires in terms of liberty to define itself and its electorate, it was necessary to first develop a deeper understanding of what political representation is. An important part of Chapter 2 has been dedicated to this exercise. It shows that basic assumptions which used to dominate the literature on political representation, have since been questioned. For a long time, many scholars worked with models that presume the existence of an objectively defined electorate that mandates (or delegates) the representatives to act

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21 Chapter 6, section 4.2.

22 Chapter 6, section 5. See European Parliament Decision 2005/684/EC Euratom adopting the Statute for Members of the European Parliament [2005] OJ L262/1.

23 Chapter 2, section 4.2.

in their name.<sup>24</sup> This presumption makes it difficult, if not by definition impossible, to explain and justify the existence of rules that define the electorate in a different manner than the electoral provisions do. Therefore, my investigation would have ended here, if it were not for new theories that have been developed more recently.

In these new theories, political representation is described as a dynamic interactive process of *claim-making*, *claim-accepting* and *claim-adapting*.<sup>25</sup> It does not presuppose a homogeneous and static electorate, but instead a diverse and active one. This electorate consists of people with different characters, family situations, abilities, and views. They live in different geographical areas, make different choices in life, and are shaped by different histories. There are not two persons alike. To represent this diverse group, it is therefore necessary for a representative to make credible *claims*. Claims about who the voters actually are. Claims about what ties them together, what their views, interests, and perspectives are. And claims about the person of the representative him/herself, making him/her the most appropriate representative for this particular electorate. The essence of political representation is not to perfectly mirror the electorate. Political representation is about making credible claims that express politically relevant differences between citizens, and that offer constructs to overcome the individual particularities. Representatives can present their claims in parliamentary debates, in speeches, in interviews, through promotional material, etcetera. The implication of the claim-making theory is that any construct of the electorate is by definition contestable. The electorate cannot be objectively defined; its definition is a matter of actions. Therefore, the coming about of deviating claims about the same electorate is highly likely. This ramification is particularly well-elaborated by Saward in his book 'The Representative Claim'.<sup>26</sup>

'A might well represent B. What B is – what words or images are taken to characterise her or him (or it) – as an electoral or other potential construction, for example, is often highly debatable. A must portray B, and adjust himself or herself or itself to some selective version of B, an activity that goes to the heart of political representation.'<sup>27</sup>

The claim-making theory has offered elementary insights into how political representation takes place in practice. I have built on the findings of Saward and other political scientists in order to understand what liberty a parliament needs to undertake its representative task. Where they have studied claim-making in the actions of representation, I have instead turned to claim-making in relation to *formal rules*.

The multiple rules concerning a parliament and its members inevitably contain assumptions as well. They include definitions or premises about the unity that parliament represents (e.g., a nation state or a federation of states) and/or the diversity

24 Chapter 2, section 1.1.

25 Chapter 2, section 1.2.

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

27 Ibid 27. Chapter 2, section 1.2.

of its population (e.g., diversity along geographical or ideological lines). Contrary to what many believe – and what is comfortable to believe –, these claims are not objective or inevitable. They are matters of choice and circumstance. Therefore, the definition of whom it is that a parliament *formally* represents, is a question that concerns claim-making, and the answer can always be contested and developed.<sup>28</sup>

In substantive terms, political representation succeeds when it is recognised by the electorate.<sup>29</sup> This recognition may grow over time, and possibly remain partial, if it comes at all. The situation is different for formal political representation. Formal claims have a hundred percent authority. When they have a legal basis, and are adopted according to the right procedure, rules are by definition recognised – formally speaking. The acceptance of representative claims by a wider public are crucially important for the functioning of any parliament. In the present investigation, however, I leave this matter aside.

An important focus in this study is whom should be responsible for establishing formal rules containing representative claims. From understanding political representation as a process of claim-making and claim-adapting in combination with our adherence to the ideal of representative democracy, it follows that *parliaments* themselves ought to have a substantial role in the decision-making process when the rules can alter their representative status.<sup>30</sup> Should it be regarded as ideal that citizens are the ultimate rulers of themselves, the representatives of the people, and not any other institution, must lead the process of representative claim-making. In Chapter 2, section 3, it is outlined that this is indeed the reality in many countries. Most parliaments have a large say over the electoral provisions, forming one of the most important sets of rules concerned. Often, they also play a role in amending the constitution, in establishing the conditions under which the parliamentary mandate is exercised, in the rules regarding national political parties, etcetera.<sup>31</sup> They have a substantial level of, what I have called, *representative autonomy*. This is the liberty that a parliament has to define and to represent itself and its electorate.<sup>32</sup>

When we take a closer look at parliamentary representative autonomy, we see that it springs from two sources. The first source is the *free mandate* of parliament's elected members.<sup>33</sup> Having a free mandate entails that representatives are at liberty to make the representative claims that they deem most fitting. Formal rules can support or complement such representative claims. Of course, as decisions are generally taken by a majority in parliament and at different moments in time, it is conceivable

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28 Chapter 5, section 2.3.

29 Andrew Rehfeld, 'Towards a General Theory of Political Representation' (2006) 68 *Journal of Politics* 1, 4. Chapter 2, section 1.3.

30 Chapter 2, section 3. Rittberger has found that the ideal of representative democracy had a strong influence on the foundation of the European Parliament, and on subsequent decisions to attribute it with more powers. Berthold Rittberger, *Building Europe's Parliament: Democratic Representation Beyond the Nation-State* (Oxford University Press 2005); Berthold Rittberger, "No Integration Without Representation!" *European Integration, Parliamentary Democracy, and Two Forgotten Communities*' (2006) 13 *Journal of European Public Policy* 1211.

31 Chapter 2, section 3.1.

32 Chapter 2, section 4.1.

33 Chapter 5, section 3.2.

that formal claims may jeopardise the representative claims of individuals. We have seen this in relation to the organisation of the European Parliament into European political groups. Organising Parliament in this manner presents the picture of a single Union electorate that is especially divided along ideological lines. National differences between members (and their voters) are understated. For a majority of the members, this claim seems to be in accordance with or complementary to the claims that they wish to present to their electorates. For others, who wish to stress national differences, this arrangement is not supportive at all. The example shows that a parliament's representative autonomy guarantees (at least) a majority of its elected members that they can carry out their representative mandate as they deem fit.

The second source from which a parliament's representative autonomy emanates is the principle of *separation of powers and/or institutions*.<sup>34</sup> To uphold the appropriate institutional balance, each institution must be in the position to defend and foster its legitimacy. A strong relation, both in terms of substance and in form, with the electorate yields a larger autonomy. Conversely, unfitting claims can seriously undermine citizens' trust in parliament. Therefore, in order to avoid that other institutions would seek to advance their powers at the expense of that of the elected representatives, parliaments need to be a dominant player in the claim-making process, including regarding formal claims.

The liberty to posit claims involves more than simply having sufficient *rule-making powers*. Members must be in the position to make alternative choices at their own discretion. This can be labelled *substantive liberty*. It entails a certain freedom to re-construct their electorate. The capacity and implications of restructuring a polity can best be explained on the basis of the example of Cleisthenes. As outlined in Chapter 5, this Athenian leader fundamentally altered the organisation of the political representation of Athens in 510 BC. He replaced the representation along family lines with a representation on the basis of geographical background. Over time, the new structures have redefined how 'the people of Athens saw themselves in relation to each other and to the state'.<sup>35</sup> It shows that amending the rules on representation is part of a permanent constituting and re-constituting of our communities.<sup>36</sup>

It is evident that representative autonomy is worth pursuing for any parliament composed of elected members and operating in a representative democracy. It plays a crucial role in their developments. In the first place, representative autonomy is a drive for action. It is an important reason why a parliament demands more rule-making powers, for example regarding the electoral provisions, or seeks to increase its say over these rules by other means. Representative autonomy is also a vehicle for change. It enables parliament to take certain decisions as it deems fit. It provides the justification for parliament to make (new) claims in rules over which it has relatively much power, even when these claims deviate from those in other sets of rules over which its says is more limited.

The notion of representative autonomy provides an explanation for why parliaments behave the way that they do. The former can even help to predict the latter, for

34 Chapter 5, section 3.3.

35 Christopher W Blackwell, 'The Development of Athenian Democracy' 4.

36 Saward (n 26) 53.

it seems evident that a parliament composed of members holding free, representative mandates, but with only a limited representative autonomy, will naturally seek to develop this further. Therefore, also the development of the European Parliament, and consequently of the European constitution, can be better understood if the concept of representative autonomy is taken into account.

## 2.2. *The Added Value*

The new insights regarding political representation and the applicability of the now developed concept of representative autonomy are both relevant for the discussion of whom it is that the European Parliament represents. Far too long has this important debate been taken hostage by the belief that Parliament's subject can and must be captured in a clear-cut and unequivocal figure. Proponents of this view maintain that the European Parliament is the representative body of either national peoples, *or* Union citizens, and they often base this on a single set of rules. However, the understanding of (formal) political representation as a process of claim-making and permanent claim-adapting frees us from this paralysing choice. It clarifies that the representative status of the European Parliament (as of any parliament) does not depend on the precise formulations in the electoral law only. Representative claims are found in numerous provisions, including Rules of Procedures that structure the internal organisation of parliament, in constitutional provisions, in provisions regulating the legal and financial status of members, and in provisions regarding the verification of mandates. Each of these sets of rules presents certain pictures about the 'whole' (the unity) that is represented by the European Parliament, and/or about the main dividing lines (the diversity) within this unity. If one were to take only one set of rules into account for defining Parliament, it would result in a distorted picture. All these provisions together contribute to our definition of a parliament's representative status.<sup>37</sup>

The concept of representative autonomy also sheds light on *why* different sets of rules often contain diverging representative claims. Claim-containing rules influence the legitimacy and position of the European Parliament. As such, they also have an effect on the on-going balancing act between the different institutions in the European Union. The Council and the European Parliament simply don't have the same *interests* when shaping the rules. Additionally, they may have different *views* on what the most appropriate representative claims would be. Therefore, if an opportunity arises to influence these claims, they both will do so. And, considering their power differs depending on the pieces of legislation at hand, this may quite naturally lead to divergent provisions.

The reason why representative autonomy shows itself as a relevant driving force for change in relation to the European Parliament, and why it may be less apparent in the actions of most other, national, parliaments, is that autonomy always shows most when there is tension. The institutional architecture of the European Union

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<sup>37</sup> Seeking to establish the value of each set of rules for the definition of whom Parliament represents, is not part of this investigation. It is even likely that such a proportion cannot be established.

is still under construction. The decisions about how the unity of citizens is defined, and how their divides are organised, are therefore more controversial. National parliaments need less autonomous space as the institutional balance is generally well-established, and their main battles were fought a long time ago. The unity that they represent is generally uncontested – except in some countries, like Belgium, the United Kingdom, and Spain –, and the same holds true for how dividing lines are drawn. The European Parliament is relatively young. The unity that it represents is not yet firmly embedded in social reality, and the diversity that it needs to bridge is more wide-ranging and profound. It is in such strenuous situations that we are confronted, up-front, with the fact that political representation entails restructuring the community.

### **3. The European Direct Election: A Watershed**

Increasing its representative autonomy has always been an ambition of the European Parliament. However, since 1979, it has become crucial. That is the third conclusion of the present investigation: the first direct election formed a watershed. It increased Parliament's capacity as well as its need to define and to represent a self-standing electorate.

#### *3.1. Until 1979: Limited Authority, Limited Autonomy*

From the start, the European Parliament was a representative body of *citizens*.<sup>38</sup> Unlike many other international assemblies, it was not a gathering of delegates of national governments or of national parliaments. Members had an (implicit) free mandate, even though they were appointed from within national parliaments for almost three decades (1952-1979). As members of the European Parliament, the representatives had a different electorate and a different task than when they functioned as members of their national parliament. This followed from the fact that the European Parliament exercised authority at the European level, where it notably had the power of censure. This task alone, judging whether the European Commission had acted against the interest of the European community, required that the members took into account the interests and views of all member state citizens, and not only of those who had elected them.<sup>39</sup>

But members had a dual task. While having a responsibility for 'the whole' of the European communities' citizens, members were also entrusted to speak up and give a voice to a part of them.<sup>40</sup> This raised the question of how the parts should be defined. As we have seen before, representation by definition requires structuring and re-structuring: it is a permanent search for drawing the most relevant and appropriate dividing lines in a polity. In the post-World War II era, it was felt undesirable and counterproductive by the pioneering representatives to structure Parliament on the basis of nationality. Instead, the members chose to organise themselves along

38 Chapter 3, section 1.

39 Chapter 3, section 1.2.

40 Chapter 2, sections 2.1 and 2.2.

the lines of political affiliation, and set up European political groups. Since 1958, these European political groups are visible in the seating order in Parliament's plenary.<sup>41</sup> The decision to sit in this way can be read as a powerful claim, not only about the Parliament and its members, but above all about Parliament's electorate. It presents the electorate as citizens who are more divided over political issues than over matters related to their national background – at least in as far as relevant for the decision-making in the European Parliament. This claim may seem far-fetched, as the members of the European Parliament were appointed by national parliaments, and still described as 'the peoples of the member States of the Community'.<sup>42</sup> Nonetheless, in the political sphere, and on the basis of its right to regulate its own affairs, the European Parliament was at liberty to make it.<sup>43</sup>

### 3.2. *A Self-Standing Electorate*

By structuring itself in European political groups, the European Parliament exhibited its political character, which may well have added to the pressure (emanating from the ideal of representative democracy) to organise direct elections for its composition.<sup>44</sup> When this decision was finally taken, in the Direct Election Act of 1976, an untenable situation arose for the European Parliament. The Act raised Parliament's *need* for more representative autonomy, but failed to *regulate* this. Parliament's rule-making powers were not increased concurrently. The Act thus established a direct link between the members of the European Parliament and the electorate, entrusting the members explicitly with a free, representative mandate, but left Parliament with only limited means to amend the formal representative claims about itself and its electorate. Members continued to earn different (national) salaries, and were not empowered to change this. They still fell under different (national) immunity regimes, and had no say over the Protocol that governed this. They were elected on the basis of different (national) election systems, and had no competence to lay down a Europe-wide system. Still, the elections of 1979 have fundamentally altered the character of the European Parliament and of its electorate. Both became more 'European' through the elections alone.

From a theoretical perspective, the citizens of the European communities were already some kind of 'unity' prior to the Parliament's first direct election. After all, the European institutions exercised authority over these citizens – in some areas –, and the decisions by the European institutions affected them all alike.<sup>45</sup> Yet, the unity was weak, and rather abstract. In fact, many citizens may not even have been aware of it, which questions the very idea of this unity for the daily reality. Organising direct election changed this obscure situation. It attributed an active role to citizens in bringing about and confirming their unity. By going to the ballot box together,

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41 Chapter 7, section 3.

42 Chapter 3, section 1.2.

43 The right to regulate its own affairs was extended to the Common Assembly since 1952. Article 25 ECSC.

44 Chapter 7, section 3.2.

45 Chapter 2, section 2.2.



European voters underpinned Parliament's authority to exercise power over them. Their act stressed, as well as fortified, the fact that they formed a group. This new group of citizens, since 1979 positioned *to act* in a European capacity, constitutes Parliament's subject.

Even though the Direct Election Act was not accompanied by an increase in Parliament's rule-making powers to re-shape its representative status, it served as a strong incentive for Parliament to raise its representative autonomy *de facto*. Moreover, it increased Parliament's *liberty* to alter the rules in line with its own ideas. After all representing involves making own representative claims. Since the Election Act Parliament has the norm on its side which stipulates that parliaments in general ought to have a say over their representative status. This increased the European Parliament's capacity to act.

Each chapter of this research testifies that 1979 formed a vital turning point, a watershed, for Parliament's efforts to redefine itself and its electorate. In Chapters 5 and 6, we have seen that, since then, the European Parliament insisted on, and undertook action for, a Union statute for members, providing its members with an equal legal and financial status, different from that of members of national parliaments.<sup>46</sup> Chapter 7 shows how since 1979 the impact of European political groups on how members can carry out their representative mandate increased radically. The groups now determine the distribution of plenary speaking among their members as well as the attribution of committee seats.<sup>47</sup> This evolution of the tasks and position of European political groups has affected the representative claims of Parliament as a whole, but also of individual members. It is on the ticket of European political groups that members perform vital parliamentary tasks. Thereby, they are given an additional responsibility. When members speak or act in committee or in plenary, they can be regarded as representatives of their European political group (as well), and with that as representatives of a derived European electorate.<sup>48</sup>

All chapters testify to Parliament's efforts to distance itself (and its members) from national structures. This apparent objective can be explained as reflecting the representative claims that a majority of the members of the European Parliament each individually want to make. Importantly, there is also an institutional incentive to seek to develop a self-standing electorate and to construct itself as the most appropriate representative of it. It raises Parliament's legitimacy and is therefore a precondition for Parliament to become more authoritative and obtain a more powerful position amongst all the institution.<sup>49</sup> If the European Parliament continues to be seen as a representative body of national peoples instead, it faces serious competition from national parliaments, and even from the Council for exercising power. It is likely that these two institutions are recognised by the public as ensuring a better political representation of citizens. This is a highly undesirable position for the European Parliament. Firstly, it would jeopardise attempts to increase Parliament's powers and competences (at the expense of other institutions). Secondly, it would

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46 Chapter 5, section 3; Chapter 6, section 2.

47 Chapter 7, section 4.1 (speaking time) and section 4.2 (composition of committees).

48 Chapter 7, section 4.

49 Chapter 7, section 4.4.

negatively affect the liberty of members of the European Parliament to exercise their mandate as they deem fit in the areas where Parliament is competent to act. Were they to be regarded as second-best representatives of national citizens, members of the European Parliament could feel pressured to follow the decisions that were taken by the national parliaments or the Council.<sup>50</sup> The way out of this danger-zone is for the European Parliament to stress its responsibility to represent citizens in their *Union capacity*. In that respect, it has a unique position. Making claims about itself as a representative body of Union citizens, inter alia by strengthening of European political groups, thus contributes to Parliament's overall position in the institutional architecture.

Structuring the European Parliament in European political groups has also increased the relevance of the outcome of the European elections for the majorities in Parliament. At the same time, and due to importance that is attached to representative democracy, it has enabled Parliament to draw more authority from these elections for its own functioning. The latter showed itself particularly in the recent battle for more say over the nomination of the President of the European Commission, which was described in Chapter 3, section 2.3.

While the institutional consequences (and incentives) for changing the sets of rules discussed in this study now seem evident to me, let me confess that during my parliamentary mandate, I had not always viewed the matters in the light of institutional, let alone representative development. Reading the debates since 1952, one could deduce that I was not the only one. Only rarely did members argue that they wanted to change the rules 'in order to create a unique European relationship with a (emerging) European electorate'. Instead, they simply complained about the 'unfairness' that some members earned higher salaries than others; about the existence of 'first-class' and 'second-class citizens' as a result of the divergent immunity provisions; and about the 'inappropriateness' that the financial and legal situation of members depended on national legislation. The main argument given for the development of European political groups is that it would make the parliamentary work more 'efficient'. Only the amendment to the Rules of Procedures, forcing European political groups to be composed of members from several nationalities, was presented as deliberately having both an internal and an external effect.<sup>51</sup> The relevance for the electoral connection and Parliament's position in the Union architecture may have been intuitively understood by many, but it was often underdeveloped and understated in debates. The present study will hopefully contribute to a more explicit reflection, within the European Parliament as well as by other institutions, about the implication of changing the rules which affect Parliament's representative status.

#### **4. Parliament's Representative Status Is Essentially Ambiguous**

The ambition of the European Parliament to develop its representative autonomy is evidently an important motive for its actions. Moreover, it has led to important

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<sup>50</sup> Chapter 2, section 4.2.

<sup>51</sup> Chapter 7, section 5.4.

changes, and continues to do so. This leads to the fourth conclusion: the representative status of the European Parliament is, and continues to be, work in progress.

Parliament is still raising its profile as the representative body of Union citizens. There is a continuum from the initiation of European political groups in 1953 to the appointment of the Spitzenkandidaten for the Presidency of the European Commission by European political groups in 2014. In between these milestones, numerous decisions regarding primary law, secondary law, and other rules have been taken, with a greater or lesser involvement of the European Parliament. It has resulted in the current situation, in which the discordance between and *within* rules about who the European Parliament represents, is even more profound than was presented in Chapter 1. The examples of intrinsic ambiguity came to the fore in the preceding chapters. Members are paid a Union salary, yet member states may levy national taxation. Members now have a Union non-liability (for acts undertaken in the exercise of duty), yet their inviolability (for unrelated acts) continues to differ from country to country. Citizens are called to vote on the basis of their Union citizenship, yet the weight of their vote depends on their nationality. And finally, members are organised within European political groups, yet, within these groups, national delegations play a dominant role. The latter fact is particularly intriguing, as it shows that even when Parliament is fully autonomous in taking decisions, its members choose a structure in which nationality continues to be a relevant factor.

The European Parliament has always stressed the unity of Parliament and its electorate.<sup>52</sup> In its own words, it ‘rejects any interpretation and any action designed to limit or negate the unitary nature of the European Parliament’. At the same time, we have seen that Parliament accepts – or has been forced to accept – the continued relevance of nationality. These two positions can only be combined if nationality is seen as an important characteristic of citizens, and the members are not formally tied to national *structures* (such as national parliaments), and/or to national *entities* (such as national peoples), for the exercise of their mandate.

While the status of the European Parliament is not fully European, it is unquestionably presented (both to citizens as well as to other institutions) as a more *European* representative body than ever before by the sum of the different sets of rules discussed. The European Parliament has shifted the focus of its representation, its centre of gravity. In the past sixty years, the European Parliament has undergone a radical transformation. In a crucial twist, the amended status also (at least potentially) has an effect on the Parliament’s *electorate*. The on-going change may contribute to re-constructing the polity, just as happened once thousands of years ago in the Athens of Cleisthenes. Representative claims (both formal and substantive ones) can impact on the identity of citizens.<sup>53</sup> When formal provisions define the electorate as a group of Union citizens, this group of citizens exists by definition *in form*. However, when citizens recognise and endorse this claim, something else occurs: the group of citizens comes about *in substance*. The process of claim-making, claim-adapting, and claim-accepting then transforms them – to some extent. Until now, it seems

52 EP Resolution of 19 January 1994 on the Application of Rule 4 of Parliament’s Rules of Procedure [1994] OJ C44/88, para 6.

53 Chapter 2, sections 1.3 and 2.3.

that Parliament's claims to represent Union citizens finds more acceptance among the other institutions than among the public concerned.

Let us now, at the end of this journey, return to the *Lisbon Decision* of the German Federal Constitutional Court. In paragraph 280, it reads:

'Even in the new wording of Article 14.2 Lisbon TEU, and contrary to the claim that Article 10.1 Lisbon TEU seems to make according to its wording, the European Parliament is not a representative body of a sovereign European people. This is reflected in the fact that it is designed as a representation of peoples in the respective national continents of Members, not as a representation of Union citizens in unity without differentiation, according to the principle of electoral equality.'<sup>54</sup>

With hindsight, the paragraph has lost much of its compelling logic. First of all, it becomes apparent that the Court has itself introduced a new figure, only to subsequently deny its existence. Neither the Lisbon Treaty, nor any of the provisions in this study, refer to the emergence or existence of a 'European people'. The German judges ostensibly needed the invention in order to brush aside Article 14.2 TEU more convincingly than they otherwise could. In the second place, we now know that there is no *need* to polish away Article 14.2 TEU. The provision refers to 'Union citizens' as Parliament's subject. It is a claim that is laid down in primary law. It is thus complete-in-itself. It is by definition 100 per cent authoritative, and, at least formally, recognised. Clearly, it is hard to reconcile this with other claims, notably the one that can be found in the electoral system, which makes the weight of citizens' votes dependent on their place of residence. Yet, the divergence of these claims is no reason to pick and choose between them. Moreover, it is not a cause for concern. Rather, it gives an indication of where we can still expect political action and confrontation in the future.

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<sup>54</sup> *Judgment of the Second Senate of 30 June 2009* (n 1) [280].