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# Introduction: A Directly Elected European Parliament

Leonard Besselink<sup>1</sup>

The direct election of the European Parliament entailed a constitutional shift in the institutional make-up of democracy in Europe. Taking stock of what this has meant, in order to understand the present nature of democratic governance in the European Union and the challenges it faces, is the ultimate aim of the contributions in this rich collection of papers.

The papers are organized around three themes: firstly, the Parliament's place within the Union as a federative liberal democracy; secondly, the Parliament and a number of crises that Europe has to confront, in particular the various aspects involved in the challenges of populism, the rule of law and democracy, and thirdly, the Parliament and EU policies, in particular cooperation in criminal matters, asylum, and economic and monetary governance.

By way of introduction, I offer some reflections on some of the underlying issues that concern the nature of the European Parliament as a directly elected representative body within the scheme of governance of the European Union.

## 1. REPRESENTATION AND AGGREGATION

Within political communities, authorities that exercise authority over subjects or citizens have classically justified their legitimacy by reference to what they represent.<sup>2</sup> Monarchs and others claiming authority have legitimized their function and office of exercising authority in terms of their representation of some form of transcendent divinity or divine wisdom. More modern versions are the immanentized notion of the people or nation as fount of all public authority, which is mediated through representative assemblies towards executive powers. The executives thus

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2. For a further analysis of this issue along historical lines in the context of the European Parliament, see the chapter by Didier Blanc below.

legitimize their claim of power through their indirect representation of the people, nation or *demos*; whereas directly elected heads of state or government claim to be themselves a direct representation of the *demos*, and in a sense stand in a dynamic relation to other directly elected representative bodies, who hold a similar claim.

In Europe, for the most part, we have predominantly parliamentary systems of government and parliaments therefore mainly fulfil a role of intermediary between the electorate and those who actually exercise power over subjects and citizens in practice. In many ways, the legislative function can be said to have the same intermediary nature: the laws are overall of a general nature and need to be applied concretely in practice, which is the role of the executive. Parliaments have as a consequence an 'in-between' character.

This 'in-between' character is increased in the context of the European Union for the European Parliament, notwithstanding the Parliament being directly elected since 1979. Various elements underline this. One element is the fact that, although main points concerning its election are Europeanized, crucial elements of its election are based on, and remain a matter of national constitutional law.<sup>3</sup> Although a European institution, the European Parliament is effectively constituted through the application of national rules rooted in national constitutional law. The electoral law applicable to European elections has been and is thoroughly and utterly 'composite' in nature.

The shift to direct elections did not formally change the representative nature of the European Parliament until thirty years after they were introduced. For the first thirty years the Parliament remained, as the Treaties said as of 1952, 'the representatives of the peoples of the States brought together in the Community/Union'.<sup>4</sup> Only under the Lisbon Treaty it was said to be composed of 'representatives of the Union's citizens'<sup>5</sup>; 'citizens are directly represented at Union level in the European Parliament'.<sup>6</sup> In the Treaty provision on the democratic nature of the Union, this is contrasted with the member states, which are represented in the European Council and in the Council.

This might suggest that the European Parliament has gained an independence from the member states which it – at least in terms of its formal representative nature – did not have previously. This, however, is not quite the full story, and saying this, is not merely looking at how in

3. See the contribution by Andrea Antonuzza and Nicola Lupo below.

4. Art. 20 ECSC Treaty and art. 189 EC as it read until 2009.

5. Art. 14(2) TEU.

6. Art. 10(2) TEU.

parliamentary practice the members of the EP still find national groups to be points of reference. In terms of representation, MEPs are elected within national constituencies, which coincide with member states in as much as seats are apportioned per member state. Clearly, this in itself does not make them into member state representatives, even though they are elected in those constituencies on the basis of that constituency's law. The deeper root of the complex nature of representation through the European Parliament is in the fact that politically, citizens do not have an exclusively European identity. They are identified as European citizens because they are member state citizens.<sup>7</sup> There is a doubling of citizenship in the member state and in the Union. This has a twofold consequence: firstly, the citizen's democratic representation in the national parliament is not exhausted, in as much as the citizen, by virtue of his national citizenship is *also* a European citizen (with all the rights and duties that go with it); and secondly, the democratic representation of a citizen as a European citizen in the European Parliament does not exhaust his citizenship in as much as that European citizen is *also* a national citizen (with all the rights and duties that go with that). As citizens we are therefore not able to shed our other political identities, whether they be European or national, or indeed regional or local.

In a sense, therefore, the various layers of our citizenship are practically matters of level of aggregation: certain political functions are organized at local or regional level, some at national, and others at European level. The aggregation of responsibility is therefore also differentiated. This differentiation does not, however, abolish the tension that may be caused by the fact that citizenship comprises a set of political identities with the various levels in which citizens participate politically. And as the policies that are formulated within the sphere of competence of these different political levels in many, if not most, cases interlock in practical terms – e.g. European policies may be decided at EU level but need to be applied and enforced locally in member states – we can expect there always to remain some form of political debate on what one should do at what level, even if it at some stage the question 'who does what' is a settled matter. Although the maxim *quod omnes tangit, ab omnibus approbari debet* seems to provide a key to understanding the levels at which political responsibility, and therefore democracy, is to be aggregated, the *omnes* in this maxim being complex, multilayered creatures.

Some of the challenges that face the world, are clearly a matter for European action: the climate challenge, the challenge of health pandemics and epidemics, the aftermath of the banking and euro-crises in monetary, fiscal and economic terms, not to mention the economic, financial, fiscal

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7. Art. 20(1) TEU.

and monetary consequences of the corona pandemic. It may be desirable for such action to be decided at European level, but its execution will certainly take place in member states, regionally and locally, and will affect each of us citizens – and democratically speaking, it will require our own duties and rights in acting and abstaining from action as appropriate. At the European level it is important, then, that the parliamentary representation of the European citizens is based on a direct mandate from the electorate. After all, at that level we do not want to be represented exclusively in terms of our national, regional or local identity, we want to be represented also as true European citizens.

## 2. THE POLITICAL PARLIAMENTARY FUNCTION IN THE EUROPEAN CONTEXT

Parliaments are legislatures, and that is the case also for the European Parliament. As a legislature it does not have exclusive legislative powers. Not only does its legislative power require the positive input of other institutions, the Commission and Council in particular, for its legislative power to issue into actual legislative acts. Also, it still, in relatively rare – but important – cases, does not have legislative power. This is when the Council is the main legislature and the European Parliament cannot block it (consultation procedure)<sup>8</sup>, as in internal market exemptions and competition law, as well as financial matters and certain aspects of intellectual property and administrative issues. Significantly, this is also the procedure applicable to Union legislation concerning the right to vote and stand for election in local elections in another member state, and diplomatic and consular protection provided by another member state.<sup>9</sup> That on these issues it is the Council that is sole legislature, is again a reflection of the state of European political integration. The European Parliament may represent the Union's citizens, and their European citizenship may be contingent on their member state citizenship, but when the Union's citizens cross into the sphere that is otherwise reserved to member state citizens, it is the representatives of the member states, not the representatives of the Union's citizens that decide. So we may say that these exceptional limitations of the Parliament's legislative power reflect a balance between member state and Union representation that is slanted in favour of the member states precisely where the political nature of European citizenship is at play.

The balance between member state representation (the Council and European Council) and citizens representation is also at issue in the design

8. Art. 289(2) TFEU.

9. Artt. 21(3), 22, and 23, second paragraph.

and operation of the political system of government of the Union. The rules in the books seem clear: the Commission is accountable to the Parliament collectively but the European Council designates the president of the Commission (taking into account the results of the parliamentary election results), and the Council proposes the other members of the Commission; only collectively the Commission can be sent home, and individual forced resignation is only at the request of its President.

Just as in most parliaments in Europe, the rules may provide the outer limits of the political dynamics, but it is the practice that establishes their meaning. The laws in action may diverge from those in the books, due to the establishing of conventions in practice and practices with a perhaps even stronger legal force. As in the development of parliamentary systems of government in many member states, historically it is the practice that was decisive in determining the form of government, parliamentary or otherwise. This is also the path that the European Parliament has followed. Most clearly this is evident in the practice that individual members of the Commission have to gain the Parliament's trust before the Parliament will allow them to be inaugurated; and it is *not* the collective of the Commission as a body that is subject to the consent of Parliament, as Article 17(7) third paragraph suggests, but each individual commissioner that needs the consent of Parliament.

The issue of the designation of the President of the Commission is a delicate issue. We thought that the success of the *Spitzenkandidaten*-procedure after the 2014 elections was a definitive turn towards a more strictly parliamentary system of government. It was indeed then the Parliament which, as a result of the elections, determined who was to be the President of the Commission, and that was accepted – not without resistance by some – by the required majority of the European Council. But the events surrounding the appointment of the Von der Leyen Commission showed the precariousness of political conventions as determinants of the nature of the system of government. It is a moot point what the events of 2019 mean for the nature of the system of government of the Union. Even if it may seem a step back from a truly parliamentary form of government towards a more *rationalized* parliamentary system, or even a semi-presidential system given the role and representative nature of the European Council – as is plausible – the 2019 appointment of the Commission may equally well be within the parameters of a system that may be considered to be parliamentary in form.<sup>10</sup> No doubt, the increased fragmentation in the Parliament as a consequence of shifts resulting in the fragmentation of electoral preferences contributed to

10. The latter has been argued by Nicola Lupo, La forma di governo dell'Unione, dopo le elezioni europee del maggio 2019, in: *Liber Amicorum per Pasquale Costanzo*, Consulta Online 9 March 2020, <<http://www.giurcost.org/studi/index.html>> (last accessed June 2020).

this course of events. Such fragmentation had not previously occurred in the context of the Parliament, which may perhaps be a surprise for a parliament based in principle on proportional representation. For this result there are explanations, such as the mitigated proportionality that is the effect of elections within closed constituencies, both in terms of electorate and of the candidates, as there are no transnational lists or candidates.

However that may be, both in law and in practice we see again the inter-institutional relations in a unique way combined in a delicate balance between competing representative claims of the European Council/Council and the European Parliament in the context of the political make-up of the system of government; the former representing the member states and having a national democratic mandate, and the latter the European citizens and having a European democratic mandate.

### **3. EXECUTIVE DOMINANCE AND 'HORIZONTAL' TRANSNATIONAL COOPERATION**

It is in the context of the Parliament's elections and the composition of the Commission that the theme of executive dominance enters into the picture. Executive dominance is not a feature of the Union alone, it is a truly European political phenomenon. Perhaps from the outset of French revolutionary ideas of popular sovereignty, executive dominance needed the normative counter-weight of democracy embodied in directly elected parliaments. This is of particular importance in the context of European integration, which takes the form of 'horizontal' cooperation between member states. This took prominent shape in the 'intergovernmental pillars' after the Maastricht Treaty, which in the meantime have become integrated more fully into the Union framework since the Lisbon Treaty entered into force. Notably, this concerned the Area of Freedom, Security and Justice (AFSJ), which extended the ideas of mutual recognition and mutual trust from the field of the free movement of goods to the sphere of cooperation in criminal and civil law, and aspects of migration law.

In the period between Maastricht and Lisbon, only national parliaments could provide parliamentary legitimacy to the decision-making in this field. National parliaments tried their best, but one of the difficulties in practice was that parliaments tend structurally to support their governments; after all, governments are democratically legitimated to the extent that they depend on parliamentary majorities. So national parliamentary

scrutiny, however intense it may have been at least potentially,<sup>11</sup> often did not provide the clout at the European level to change the legislative decisions of the Council in any significant respect. It is precisely here that the directly elected European Parliament can fill the gap.<sup>12</sup>

Another area that may be considered to come within this 'horizontal' transnational cooperation in the framework of the Union is that of economic policy. In principle we see the same phenomenon as in the context of decision-making on instruments of mutual recognition in the period between Maastricht and Lisbon. This became dramatically visible in the period of the banking and euro-crises, when economic and fiscal governance was required at European level beyond mere coordination, but where national parliaments replicated their governments' stances on the desirability of the various courses of action that were open in this field (and, of course also the other way round, national governments replicating the stances of their respective parliamentary majorities).

At the time of finalizing this introduction, we see this playing out in the context of coping with the economic, fiscal and social outfall of the corona-crisis. Differently from the AFSJ, in the economic field the powers of the Union are weak and mainly reserved for the member states. That also means it is hard to find a democratic parliamentary legitimation at the European level for the measures to be taken in these various crises, and as the crises from 2008 to 2014 make clear, they had to be based on the cobbling together of demanding intergovernmental compromises, which needed partly to be based on *ad hoc* non-EU instruments (of which we had seen precedents in the Schengen and Prüm agreements related to the AFSJ). That there is an increased sense that also such arrangements need some form of coordinated democratic legitimacy at the European level, is borne out by the fact that equally *ad hoc* parliamentary arrangements were created, mostly on the basis of national parliamentary representation.<sup>13</sup> Nevertheless, precisely the need for coordination at the European

11. The Netherlands parliament, for instance, obtained a veto right with regard to the Netherlands representatives' votes in the Council on 'third pillar' decisions that affect the rights of citizens; this was dropped after the Lisbon Treaty entered into force on the basis of the – erroneous – idea (very strongly put forward by the then minister for European Affairs Frans Timmermans, who expressed a great dislike for national parliaments' involvement once he became minister), that once the European Parliament acquired competence in this field, there is no longer a role for national parliaments to play.

12. See the contribution by Tony Marguery below, and as regards the Common European Asylum System the contribution by Salvatore F. Nicolosi.

13. This tendency is so strong that also the T-Dem project of others found it useful to create yet another parliamentary assembly in their plan for European economic government, see S. Hennette, T. Piketty, G. Sacriste, A. Vauchez, Draft Treaty on the Democratisation of the Governance of the Euro Area (« T-Dem ») and its explanatory statement, March 2017, as available at [www.piketty.pse.ens.fr](http://www.piketty.pse.ens.fr) (last accessed June 2020).

level, also in a situation of a monetary semi-divergence between Eurozone and non-Eurozone member states, draws us into considering the role that a directly elected European Parliament should, can, and does play in providing the democratic legitimacy needed for solutions with far-reaching social, financial, and economic consequences.<sup>14</sup>

## 4. CONCLUSION

The European Parliament should, can and does play a role in mediating the preferences of the European citizens that form its electorate. It is not entirely exclusive in its representative claim, but its direct election provides it with a unique legitimacy within the complex of Europe's composite constitutional order. This provides a unique opportunity for the European Parliament within the equally unique political experiment of government in Europe. The subsequent chapters of this book bear witness to this.

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14. See the contributions by Ton van den Brink and of François Barviaux below.