



The European Parliament's Quest for Representative Autonomy
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Summary

Part I. Representation and Autonomy: The Frame

Chapter 1. Whom Does the European Parliament Represent?

On June 30, 2009, the German Federal Constitutional Court defined the European Parliament in its so-called *Lisbon Decision* as a representative body of *national peoples*. This qualification triggered this thesis. The Court based its judgment exclusively on the electoral system in which the weight per vote depends on where it is cast. The Court thereby attributes no significant value to either Article 14(2) TEU, stipulating that the European Parliament represents *Union citizens*, or to the fact that members of the European Parliament exercise their representative mandate in European political groups. The decision to ignore these other, deviating formal rules is unsatisfying because they have a legal basis and validity, and are thus, by definition, authoritative. In this thesis, I aim to provide a better understanding of how and why deviations come about between the different sets of rules which together shape Parliament's representative status. The focus of my research lies in the amendment of its representative status by the European Parliament itself. Parliament hereby contributes to constitutional change, even though it is not authorised to do so in all cases and it is generally thought that constitutional change is a matter for the member states alone. The research question is as follows: how has the European Parliament gained its liberty to define whom it represents, and how should this liberty be understood in terms of representation? By this means I will also answer the question of whom it is that the European Parliament actually – formally – represents.

Chapter 2. The Concept of Representative Autonomy

This chapter contains the theoretical framework of my thesis. I map which rules contribute to the formal representative status of a parliament and whom – in a represented democracy – should be entitled to establish them. The existence of a norm, or a constitutional necessity, about the involvement of a parliament with these rules could explain which role the European Parliament takes upon itself and the level of acceptance for this by other institutions.

In recent years, insights have emerged that provide a new perspective on the concept of political representation and the electorate. The represented have long been considered an objectively definable group. It is however better to consider the definition of the electorate, of what it binds and the sub-groups in which it can be divided, as claims. A claim is *artificial*, by definition *imperfect*, and subject to *change*. Citizens are the object of representative claims, but they also judge them. If insufficient citizens recognize themselves in a *representative claim*, a representative will probably adjust the claim, or else run the risk of not being (re-)elected. Political representation is, as is well put by Michael Saward, a dynamic and interactive process of claim-making, claim-rejecting and claim-adjusting. This new approach to political representation is important for political scientists, and their study of the actions of representatives. However, as I show in this thesis, it also touches on formal representation of a parliament. It offers a new perspective on how the representative status of a parliament should be determined.

It is often thought that the definition of whom a parliament represents follows linearly from that which is written about it in electoral law and the constitution. In the latter, the unity of a represented population is often emphasised, whereas the electoral law often underlines the differences between citizens on the basis of political ideals and/or geographical origins. We now observe that the formation of such regional or political electorates actually present *claims*, which can be also changed. Other lines can have been drawn instead, for example, on the basis of religion or gender, leading to a different definition of the electorate. The new perspective shows moreover that the representative status of a parliament is determined by more than just the above rules. For example, immunity and salary conditions, and even the internal rules of the parliament also include claims about whom the elected members represent (see Chapters 5-7). Because these provisions are not always decided at the same time and by the same actors, they can contain conflicting claims. That is no reason to ignore some of these rules when defining whom a parliament represents. The deviations between them only confirm the dynamic nature of representation.

Whether citizens perceive the claims as appropriate and legitimate is important for the functioning of a parliament, but is beyond the scope of this thesis. I use an internal perspective and just analyse the constructing of claims by the European Parliament.

Claims can result from an existing situation but they can also redefine society. In case they are accepted by the electorate, they can even change the latter's identity. Claims have *creative power*. This raises the question of who, in modern representative democracies, should be responsible for the claim-holding rules. Although the level of autonomy therein depends on the constitutional setting, it is clear that an elected parliament is due a large role. The necessity thereof follows firstly from the free mandate of members. Intrinsic to a free mandate is that elected members are at liberty to define their electorate. Formal rules can support, but also undermine, this claim. Thereby, they impact on the representation in practice. Parliamentary involvement is also important to prevent that the balance of powers is disrupted. A misplaced formal representative claim may undermine the legitimacy of a parliament, and lead to other branches, such as the executive, gaining power at the expense of the elected parliament.

I shall call the liberty of a parliament to shape whom it represents and in what manner *representative autonomy*. This parliamentary representative autonomy involves systematically making decisions based on own preferences, to amend (or confirm) its representative status. The relevance of this standard for the evolution of the representative status of the European Parliament is substantiated in Chapters 4-7.

Chapter 3. The European Parliament: Potential, Powers and Structure

This chapter introduces the European Parliament. It shows how the European Parliament was given *and* won budgetary, legislative and supervisory powers in a permanent dynamic between treaty texts and political action. The treaties were continuously adjusted to how the power of Parliament had developed *de facto*, after which they again served as a springboard for further change. The right of parliament to establish its own Rules of Procedure, proved to be a relevant instrument in the expansion of its position. Since 1979, the members of the European Parliament are elected directly. From the establishment of the Common Assembly in 1952, members may have had a free mandate, but it was obtained indirectly and implicit. Their direct election led to a different, more self-aware attitude of the representatives. This already showed in the first months after the first direct election, when the European Parliament rejected a budget for the first time. The elections also had an impact on other institutions, which found it more difficult to set aside decisions of the European Parliament. As a result, the Parliament gained more control over the legislative process and the composition of the European Commission. The direct election of its members has strengthened the formal legitimacy of Parliament, and thereby fostered an expansion of its powers. The dynamic development of the European Parliament is described by many scholars in terms of evolving competences and power. In this dissertation, I analyse a different evolution: that of the *representative status* of Parliament. The direct elections have also had a big impact on that. A directly elected Parliament *ought to be* involved in its own status (see Chapter 2). At the same time, this conflicts with the idea that the constitutional development of the European Union is a matter of the member states. The question is how the European Parliament has made its own formal representative claims nonetheless.

Part II. Representation and Autonomy: The Practice

Chapter 4. Electoral Legislation in an Intergovernmental Context

In this chapter, I describe how and why the European Parliament has tried to increase its say in electoral law: a crucial law for the definition of the electorate and of Parliament as its representative body. In 1958, the European Parliament gained the right to initiate legislation for a uniform electoral procedure. Generally, this initiating right is the prerogative of the European Commission. The exceptional privilege that Parliament gained in this respect, confirms the existence of a *norm* that representative claims ought to be made by representatives. The ultimate say was still (until the Maastricht Treaty) for the Council and the member states. This could be explained by the predominantly intergovernmental character of the European collaboration at the time. In the period 1958-1976, the European Parliament twice presented a legislative proposal. Therein, Parliament proposed that it would be given more (or even full) rule-making powers to lay down electoral legislation *after* its members had gained a direct mandate. This can again be seen as proof of a shared belief that a free mandate ought to increase the representative autonomy. The Council recognised that even a non-elected parliament, in which the members only held an implicit free mandate,

ought to be able to put their own mark on electoral law. It therefore negotiated with Parliament on the electoral law, even though it was not legally obliged to do so. In 1976, the Direct Election Act was finally adopted. It was seen as a first step towards a uniform procedure. The Act did not increase Parliament's rule-making power. However, the direct link that was established between the European Parliament and a self-standing electorate was in itself a crucial change. It proved to be a driving force for the strengthening of Parliament's position – ultimately also in relation to the electoral law and other claim-containing provisions.

Chapter 5. Immunity and the Liberty to Represent

Despite the direct mandate and the self-standing electorate, the legal and financial status of members remained tied to national structures (see Chapter 5 and 6 respectively), and they had no competence to amend this. Their representative autonomy remained limited (at least initially). As regard immunities, that is still predominantly the case.

Immunity provisions define the arena in which, and against whom, representatives are protected to carry out their tasks freely. The legal position of members of the European Parliament is governed by the Protocol on the Privileges and Immunities of the European Union (PPI). Parliament can not amend this, because it concerns primary law: amendment necessitates approval of the member states. By virtue of the PPI, members enjoy the same protection in their home country as is also granted to members of the national parliament by national legislation. In the European Parliament itself, and in other member states, members are protected by Union immunity. A result of this arrangement, which dates from 1965, the legal status of members of the European Parliament differs as soon as they leave Parliament's premises. In practical terms it means that members are not equally protected when engaging in extra-parliamentary European activities. In terms of claim-making, it undermines the unity of the institution and it presents the European Parliament as the representation of *national peoples*. Representing all Union citizens would require a uniform legal status, something that the European Parliament itself has long been calling for.

In the absence of uniform rules, the European Parliament has tried to make the legal status of members more similar nonetheless. In order to achieve this, Parliament built on its right to establish its own Rules of Procedures, its right to waive or uphold immunities at its own discretion and the treaty-enshrined principle of loyal cooperation, as a result of which national courts have to take notice of Parliament's position when a member risks prosecution. Because of Parliament's decisions, members can now count on a type of European protection for political activities outside Parliament. Hence, European Parliament has, through alternative means, increased the difference in legal status between national and European delegates, and decreased the difference among European delegates. The representative status of the European Parliament has thereby shifted (to a certain extent) in the direction of a representation of Union citizens.

Chapter 6. Indemnity and Dependency on National Structures

The introduction of direct elections initially did not lead to amendment of the salary provisions of members. Until 2005, members received the same salary as members of national parliaments in their member state. Salaries were additionally paid out of the national treasuries of the member states. This situation presented the European Parliament as an assembly representing national peoples. Since 1979, the European Parliament has strived for a member statute including a uniform salary for all members. This would not only be 'fairer' for members, but also be fitting for a representative body for Union citizens. As a directly elected representative body, Parliament also demanded to decide on the salaries of its members itself. Even though a legal basis for a uniform statute was missing from the Treaties, Parliament has submitted proposals thereto since 1979. The other institutions *de facto* accepted the right of initiative of Parliament. For a long time, no result was achieved however.

In the absence of a uniform statute, Parliament's Bureau created a web of financial benefits that made the financial status of members more similar. Members could receive – from the EU budget – an additional pension, a survivor's pension, an invalidity pension and an end-of-service allowance. This was a contested self-enrichment. However, the Bureau presented the measures as building blocks for a future uniform statute. From that perspective, Parliament's actions can be perceived as the expansion of its liberty to shape itself (and its electorate): claim-making. The legal basis for the measures lay in Parliament's right to establish its own Rules of Procedure. However, this time, the Council challenged the legality thereof.

In 1997, Parliament obtained the right of initiative *and* the right to lay down a statute for members, after the approval of the Council. After years of negotiations, a statute for members was finally agreed in

2005, which entered into force in 2009. It incorporated most measures devised by the Bureau. Nowadays, members receive the same salary, which could be seen as a claim that Parliament represents Union citizens. However, on a number of key issues (including taxation) the Council has been obstructive and devalued the completeness of the claim. The fact that the Council was so successful in the negotiations seems to originate in the fact that it presented itself (and was recognised) as a better representative of the electorate in this regard. This increased its leverage. The example shows that the European Parliament can only increase its representative autonomy, when another institution – the Council – is not perceived as a more appropriate representative of its electorate.

Chapter 7. European Political Groups – Channels of Representation

In this last substantive chapter, the internal rules of the European Parliament are focused on. Parliament decides on these independently. Therefore, they are revealing of which representative claim Parliament wants to make in liberty. Almost from the beginning, the European Parliament denied its members the possibility to formally speak on behalf of a national electorate. Members could request the floor in an individual capacity, and (initially loosely) coordinated their work in European political groups. Since 1976, the moment that direct elections for the European Parliament were definitively decided on, the role of the European political groups has been expanded. Since then, speaking time is allocated to political groups, which then internally decide who should speak. On account of this construction, members not only speak in their own right, but they, to a certain extent formally, represent *also* their groups and – concurrently – the electorate of their colleagues. The committee seats were already divided along the lines of European political groups, whereby members fulfilled multiple representative roles within the parliamentary committees. Since 1979, the European political groups increased their ‘ownership’ over these seats and members may no longer appoint their own substitutes. In conjunction with this development, the criteria for the formation of European political groups have changed. Over the years, the minimum amount of members a group should have, has been (relatively) reduced. It is seen as more important that groups are sufficiently *European*, and therefore include members from at least seven different member states. In addition, these members must have shared ideological views. Under the surface, nationality and national delegations continue to play an (even increasingly) important role. Thusly is evident from analysing the Rules of Procedure of the European political groups that important posts are divided along the lines of national delegations. However, the relevance of nationality does not show at the level of the plenary meeting.

The internal rules of the European Parliament ‘reconstruct’ the electorate. In the (most visible) representation, more significance is attributed to ideological differences between citizens than nationality. Individual members can of course construe their own claims, but the formal claim by the European Parliament inevitably colours their actions. Earlier, I argued that representative claims can contribute to changing the identity of the electorate. That happens when a new claim is acknowledged as appropriate. The organisation of the European Parliament makes possible that citizens increasingly *identify* themselves as Union citizens. But if this happens depends to an important extent on whether Parliament will in fact be able to expand and strengthen its connection with this self-standing electorate.

Part III. Representative Autonomy: The Case of the European Parliament

Chapter 8. Representative Autonomy: A Driver for Action and a Vehicle for Change

It is notable that the provisions that contain claims about the electorate of the European Parliament all are established by special decision-making procedures. From the beginning, the European Parliament was expected to initiate and design *formal representative claims*. This was even the case in the period that members were appointed, and Parliament overall had limited power. Initially, Parliament’s role in changing its own representative status was thus *relatively* large. Nowadays, Parliament is a co-legislator in most areas. In comparison to the ordinary legislative procedure, Parliament’s say over its representative status is now *relatively* limited. It is notable for example that, in respect to electoral law, European Parliament shares its power with the Council *and* the member states. The fact that electoral laws define a polity, and have the potential to redefine it, may explain why national parliaments are given a relatively large role at the expense of that of the European Parliament.

In this study, I have shown that the European Parliament has actively tried, partially successfully, to change its representative status, even if it was not always authorised to do so. It contributed to its own constitutional change. The right of Parliament to adopt its own Rules of Procedure was crucial in this

regard. But its actions, and that of others, were also strongly influenced by the norm, explicated in the present study, that parliaments need a significant level of representative autonomy.

This explains why the year 1979 forms a watershed for Parliament. In that year, the members of the European Parliament obtained an explicit free mandate. Although it was not formally given more rule-making powers regarding its own status, its substantive liberty to take decisions according to its own discretion was increased. Since 1979, the European Parliament – formally – has a direct link with a self-standing electorate. This representative task *demand*s that Parliament offers this electorate representative claims (see Chapter 2). In areas where Parliament had this capability, it has over the years increasingly structured itself as the representative body of Union citizens (see internal organisation – Chapter 7); in other areas, it has managed to do so to a lesser extent. This explains the diverging claims in formal rules.

What answer can we now give to the question of whom the European Parliament actually represents? Analysis of the formal rules shows an intrinsically ambiguous picture. Members earn a Union salary, but pay (depending on the country involved) national taxation; they all have immunity when they act in the exercise of their duties, but beyond that, their legal status differs; they function (also) on behalf of their European political group, but national delegations determine, to a large extent, the terms within these groups; and finally, citizens have the right to vote in European elections on the basis of their Union membership, but there is no equal weight attached to their votes. The European Parliament is in the middle of a transformation in which it increasingly manifests itself – and is defined – as a body representing Union citizens, but to these citizens, nationality (still) continues to be very important. The ambiguous nature of the European Parliament is not a cause for concern. The process of claim-making and seeking recognition is in full swing. The divergent claims do however offer an indication of where we can expect tension, political action and change in the near future.

At any rate, it is certain that it is incorrect to define the European Parliament as a representative body only representing national peoples.