

Representation of Citizens by the EP

Jörg Gerkrath*

Articles EC 189; Draco I-19, I-45 and III-232 et seq.¹

REPRESENTATIVE DEMOCRACY AT THE UNION'S LEVEL

As it is obviously impossible for the modern '*demos*' to assemble in order to take political decisions, democratic representation is an inevitable tool in large democracies. Representatives have to stand for and to act for the people as a whole. Accordingly, the principle of representative or parliamentary democracy is a fundamental constitutional principle shared by all the Member States of the Union. Democracy doubtlessly works on the national level; the Member States' decisional powers, however, are fading with the constant transfer of competences towards the European level. This leads to a system of European 'multi-level governance' with wide consequences for the linkage between the represented peoples of the Member States and their representatives on both national and European levels.

The German *Bundesverfassungsgericht* stated in its well-known 'Maastricht decision' that democratic legitimacy of the Union's actions is an essential condition for Germany's membership.² According to the Court, the Union's public authority is mainly derived from the peoples of the Member States via their Parliaments. As a result, this indirect democratic legitimisation derived from national parliaments restricts the powers of the European Union, with the consequence that substantial powers must be retained by the *Bundestag*. And yet the *Bundesverfassungsgericht* acknowledged that democratic legitimisation through the European Parliament is becoming increasingly important in view of the constant development of the Union.

* Professor of Public Law at the University of Avignon and member of the Advisory Board of the European Constitutional Law Review.

¹ All references in the text are to the Convention's Draft Constitution of 18 July 2003 (here Draco) unless identified otherwise. The Constitution's provisions have been renumbered upon its conclusion. The final numbering was not yet established at the time of printing.

² Cases 2 BvR 2134/92 and 2159/92, *Manfred Brunner et al v. The European Union Treaty*, 12 October 1993, BVerfGE Vol. 89, p. 155, 1 CMLR [1994], p. 57.

European Constitutional Law Review, 1: 73–78, 2005

© 2005 T.M.C.ASSER PRESS and Contributors

DOI: 10.1017/S1574019605000738

In Community law, too, the democratic principle takes the appearance of representative democracy. Though it had not been explicitly enshrined in the founding treaties, the Court of Justice made it clear in the 'Isoglucose' judgments from 1980 that 'the effective participation of the Parliament in the legislative process of the Community (...) reflects the fundamental democratic principle that the people should take part in the exercise of power through the intermediary of a representative assembly'.³

After a first timid reference to democracy in the preamble of the Single European Act, the Treaty on European Union, as modified by the Amsterdam Treaty, confirms the attachment of the Member States to democracy and establishes the democratic principle in Article 6 as one of the founding principles of the Union.

The constitutional treaty continues this progression. From its very beginning (Article I-1), it underlines the dual legitimacy of the Union, which is said to be established 'reflecting the will of the citizens and States of Europe to build a common future'. Furthermore, Article I-45 indicates that 'the working of the Union shall be founded on representative democracy'. Subsequently, 'citizens are directly represented at Union level in the European Parliament' while Member States are represented in the European Council and in the Council. This apparently new approach of the constitution, which focuses on the Union's citizens rather than on the peoples of the Member States, will not yet answer all the questions raised in the field of direct parliamentary representation concerning the composition of the European Parliament, its functions and the remaining deficiencies in the process of representation.

REPRESENTATION OF CITIZENS

At present, according to Article 189 EC, the European Parliament consists of 'representatives of the peoples of the States brought together in the Community'. Thus, it represents the peoples of the Member States and not an imaginary 'European people'. In agreement with Articles I-1 and I-45, the wording of Article I-19(2) introduces a new significance of the institutional representation by the European Parliament, which 'shall be composed, of representatives of the Union's citizens'. Replacing the plurality of distinct peoples ('*Staatsvölker*') by a more generic reference to the Union's citizens considered as one more or less homogenous group, this formulation clearly intends to strengthen the linkage between the representatives and their electorate. It also seems to be a logical consequence of the establishment of the Union's citizenship that, following the

³ Case 138/79, *Roquette Frères v. Council*, 29 October 1980, [1980] ECR 3333, para. 33.

case-law of the Court of justice, is ‘destined to be the fundamental status of nationals of the Member States’.

To consider the European Parliament as the representative of about 450 million citizens also permits circumvention of the so-called ‘no demos thesis’: in absence of a single people, there cannot be ‘real’ democracy at the European level. Why not consider the ‘collective’ of European citizens as the potential European *demos*, although an individual consciousness of belonging to this collective is still to be deepened?

The French *Conseil constitutionnel* recently took a position that sustains the angle adopted by Article I-19. In a decision from 3 April 2003,⁴ it held that the building of constituencies for the elections of the members of the European Parliament in France was not contrary to the principles of indivisibility of the Republic and unity of the French people. Remarkably enough, it considers the French MEPs as elected ‘representatives of the citizens of the European Union residing in France’.

The German *Bundesverfassungsgericht* also recognises the potential function of Union citizenship, defining it as ‘the legal expression of the essential connection among nationals of all Member States granting a legally binding expression to the existing amount of community’. At the same time, the court stresses the extra-legal conditions for democracy: a common European public opinion, the transparency of the political aims of the Union, the possibility for every citizen of the Union to communicate in his native tongue with any public authority to which he/she is subject, and finally the central role played by intermediaries like political parties and the media.

It must be left to further investigation to what extent the European citizenship will effectively contribute to create a single European citizenry, able to replace the people as the traditional basis of parliamentary representation.

FAIR REPRESENTATION?

The distribution of seats between the Member States has been subject to ultimate negotiations between Member States. The IGC finally decided to raise the maximum number of seats in the Parliament to 750. These seats will be allocated according to the principle of ‘digressive proportionality’, with a minimum of six and a maximum of ninety-six seats. The precise number of seats attributed to each Member State will have to be established by a European decision adopted before the European elections in 2009.

⁴ Décision No. 2003-468 DC (*Loi relative à l'élection des conseillers régionaux et des représentants au Parlement européen ainsi qu'à l'aide publique aux parties politiques*).

Article I-19 retains a standard of a representation, which is said to be 'digressively proportional'. Though it is breaking with the tradition of enshrining in the treaties the detailed breakdown of seats between the Member States, this formula is not innovating but is simply describing the existing system. In other words, the number of citizens represented by each elected representative depends on the overall size of a Member States' population. The bigger the Member State, the higher is the number of citizens represented by a single MEP.

This leads inevitably to distortion in representation. Citizens residing in small Member States are over-represented, whereas citizens living in large Member States are under-represented. The resulting 'representation gap' is far from being minor. Presently, a German MEP represents more than 800.000 citizens while a MEP from Luxembourg stands for less than 80.000 citizens. The basic rules fixed by Article I-19 maintain and even accentuate a situation which might theoretically allow MEPs from small Member States to build a parliamentary majority which would be far from representing the majority of the Union's population.

As far as fairness of representation is concerned, meaning that an equal number of citizens should have an equal number of representatives, there seems to be some kind of inconsistency between Articles I-19 and I-44. The latter proclaims indeed a principle of democratic equality requiring the Union to observe the equality of citizens in all its activities. As long as citizens are represented differently according to their Member State of residence, it will be difficult to speak of a single European citizenry. Nevertheless, it is hard to imagine a system of representation, which grants a fair representation of the citizens as well as an appropriate representation of each Member State, without endangering the effectiveness of a Parliament, which is almost certainly the largest Assembly of the world.

'Digressive proportionality' constitutes a compromise between equal representation of the Union's citizens and appropriate representation of the peoples of the Member States. Some of the deficiencies suffered by the process of parliamentary representation within the Union also reflect the difficulties in combining these two sources of its legitimacy.

PROCEDURAL DEFICIENCIES OF DIRECT DEMOCRATIC REPRESENTATION THROUGH THE EUROPEAN PARLIAMENT

Though Article I-45(2) indicates that 'citizens are directly represented at Union level in the European Parliament', there are several elements which hinder the process of direct representation. First of all, elections to the European Parliament take place in the Member States within constituencies designed by each

State. The creation of European constituencies with cross-border lists has been debated at the Convention. A proposal made by the European Parliament, which stipulates that 10% of the total number of seats should be allotted following a transnational list system relating to a single constituency comprising the whole territory of the Union, drew only marginal attention.

The lacking of an authentic ‘uniform electoral procedure’ constitutes a second imperfection. Article I-19(2a) merely disposes that the members of the EP ‘shall be elected for a term of five years by direct universal suffrage in a free and secret ballot’. The establishment of an election procedure, which could be ‘uniform’ but will more likely persist to be based on ‘principles common to all Member States’, is left to a European law or framework law. Thus, Article III-232(1) of the Constitution does not alter the situation governed at present by Article 190 EC as well as by the Council decision of 25 June and of 23 September 2002,⁵ which still has to be adopted by the Member States in accordance with their constitutional requirements.

A third problem with regard to European parliamentary representation relates to the modest role played by European political parties as vehicles of democratic representation. Compared with Article 191 EC, Articles I-45(4) and III-233 of the Constitution do not change the legal context. The first recognises that ‘political parties at European level contribute to forming political awareness and to expressing the will of Union citizens’, whereas the second provides for the adoption of regulations governing them and in particular their funding. The recent regulation on status and funding of European political parties from November 2003 might encourage their development and institutionalisation.⁶ However, with campaigns being almost exclusively fought about national issues, the connection between the voting public and parties at European level will remain weak.

It is striking to see that the overall electoral turnout has declined continuously at every election since 1979, falling from 63% in 1979 to 49.4 % in 1999 and less than 43% in 2004, whereas at the same time the European Parliament’s powers have increased. Obviously, elections to the European Parliament still appear as ‘second order’ elections, most of the citizens being highly convinced of the irrelevance of the European Parliament.

⁵ 2002/772/EC, Euratom: Council Decision of 25 June 2002 and 23 September 2002 amending the Act concerning the election of the representatives of the European Parliament by direct universal suffrage, annexed to Decision 76/787/ECSC, EEC, Euratom, Official Journal L 283, 21 October 2002.

⁶ Regulation (EC) No. 2004/2003 of the European Parliament and of the Council of 4 November 2003 on the regulations governing political parties at European level and the rules regarding their funding, Official Journal L 297, 15 November 2003.

THE SUBSTANCE OF PARLIAMENTARY REPRESENTATION IN THE UNION:

Effective representation not only means ‘standing for’ but also ‘acting for’. It requires a Parliament with significant law-making and control powers. As a matter of fact the Parliament’s role in the Union’s decision-making procedure has been enhanced with each reform of the treaties. Hence, in 1999 the European Court of Human Rights found ‘that the European Parliament is sufficiently involved in the specific legislative processes leading to the passage of legislation’ and ‘in the general democratic supervision of the activities of the European Community, to constitute part of the “legislature” (of Gibraltar) for the purposes of Article 3 of Protocol No. 1’.⁷

The functions of the Parliament are laid down in Article I-19(1). It shall ‘jointly with the Council exercise legislative and budgetary functions. It shall exercise functions of political control and consultation’ and it shall ‘elect the President of the Commission’. As the co-decision procedure, re-baptised as the ‘ordinary legislative procedure’, applies to a large number of articles, the Parliament will become a genuine co-legislator in most of the cases. Thus, one might assess that the Union’s system of parliamentary representation scores high for the development of a parliament with considerable attributions but still scores low in terms of representational and electoral connection.

THE EUROPEAN UNION: AN ‘UNFINISHED’ DEMOCRACY?

Democracy is by definition a dynamic concept and open-ended process. It is in constant evolution and will always remain, in practice, a sort of ‘unfinished business’. This is particularly true within the European Union, which remains designed as a political system in process. Although it is based on some of the most traditional concepts of representative democracy, the Union’s political system requires improvement. Is it possible to constitutionalize the EU as a dynamic, evolutionary and executive dominated political system according to the classical principles of democracy? The political institutions created by the constitutional treaty will hopefully induce – little by little – the construction of a European *demos* by means of democratic routine.



⁷ European Court of Human Rights (ECHR) in *Matthews v. United Kingdom* (18 February 1999) 28 ECHR 361.