The European Parliament: A Genuine Co-legislator?

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MEG WALTERS, APR 23 2021

The European Parliament (EP), previously known as the Assembly[1], has evolved from a body with no role whatsoever in the European Union's (EU) legislative procedure, to being an identifiable part of the institutional, law-making triangle[2]. This evolution was driven by the democratic deficit complained of in the EU, and achieved through the introduction of several legislative procedures which gradually increased parliamentary participation in the law-making process[3]. However, to say that the EP has evolved into a *genuine* co-legislator with the Council as a result of these changes would be an overstatement. Absolute equality can only be achieved when the ordinary legislative procedure (OLP) is made applicable to all areas of Union law, and Parliament is given a direct right of initiative. Until such reform is implemented, the EP shall remain in a state of subordination to the Council. Consequently, the democratic deficit shall linger in the EU as its institutions and their decision-making procedures remain undemocratic, and apathy towards the EU grows amongst ordinary citizens.

Consultation

Prior to the introduction of the consultation procedure by the Treaty of Rome, the EP had no role whatsoever in the adoption of legislation[4]. Therefore, the consultation procedure was the Community's first attempt[5] at furthering Parliament's participation in the legislative process and reducing the democratic deficit present in the Community. The procedure compels the Council to obtain Parliament's opinion on legislative proposals prior to their adoption[6], and renders legislation which lacks the requisite consultation void[7].

The procedure, when considered in comparison to Parliament's former absence in the legislative process, must be regarded as a milestone in Parliament's legislative journey as it is the first time that they have been welcomed as 'informed participants in the legislating process'[8]. Such procedure must too be considered a victory for democracy as the ordinary citizen's interests could now be voiced by their representatives, and consequently considered in the adoption of legislation. It is important to note that even though European citizens could not directly vote for Members of the EP (MEPs) until 1979[9], they were always represented by the EP since the Assembly was composed of members appointed by and from national parliaments[10]. Therefore, the EP's movement from an outcast to an 'informed participant'[11] in the adoption of Community legislation can be regarded as a democratic success as representation is now being afforded to states by the Council, and to citizens by the EP.

However, to judge the consultation procedure on the basis of what came before it poses the risk of overstating the procedure's merit. Any procedure which afforded the EP some form of legislative role or powers could be considered a triumph when compared to Parliament's previous absence in the legislating procedure. Consequently, the consultation procedure must be considered in isolation of Parliament's preceding role.

The procedure itself does little for institutional equality and democracy since Parliament are not involved in the legislating process in any meaningful sense. Their role is limited to merely providing an opinion, which is 'neither binding on the Council nor influential on Council's decision making process'[12]. Therefore, the Council are still free to adopt legislation which the EP are in disagreement with, providing that they are in receipt of the EP's disagreeing opinion. This renders Parliament's inclusion into the law-making procedure futile since the Council effectively remains the sole legislator, and the opinions of ordinary citizens – voiced by the EP – are failing to have any impact.

In some areas of Union law, such as competition policy, the consultation procedure still applies[13]. This prevents the EP from fulfilling a *genuine* co-legislator role since the Council effectively remains the sole legislator in these areas.

Assent/consent

Since the consultation procedure failed to pacify those who complained of the democratic deficit in the EU, further institutional reform was needed. Such reform came in the adoption of the *Single European Act (SEA)*[14]which introduced the consent procedure, previously known as the assent procedure. This procedure makes the EP's opinions on a legislative proposal binding on the Council where the opinion has an absolute majority vote in the EP[15].

The consent procedure goes considerably further than the consultation procedure in establishing institutional equality and democracy. In terms of institutional equality, the consent procedure is somewhat suggestive of a co-legislator relationship[16] since both the EP and Council must be in agreement before legislation can be adopted. This can be contrasted with the consultation procedure which afforded the Council with legislative supremacy over the EP. In terms of democracy, the consent procedure ensures that the interests of ordinary citizens, which are represented in the EP's opinions, are binding on the Council. This means that the EP, and the people whom they represent, are capable of influencing which laws are to be enacted.

Despite the consent procedure's increased efforts to safeguard democracy, the procedure's impact on the reduction of the democratic deficit is arguably minimal. This is because, in order for Parliament's opinion to be binding on the Council, an absolute majority of votes is required. In its present configuration of 705 MEPS, the threshold for an absolute majority is 353 votes[17]. Therefore, a considerable obstacle needs to be overcome before the EP, and the people whom they represent, are able to influence the adoption of EU law.

Even if the 'absolute majority' hurdle is overcome by the EP, the advancements made by the consent procedure by no means provides the EP with a *genuine* co-legislator role. Unlike the Council, the EP is afforded no powers to amend legislative proposals under the consent procedure. Instead, Parliament is simply granted a right to veto the proposal[18]. This prohibits the Parliament from playing an effective role in the legislative process[19] and retains their subordinate position to the Council.

Similarly to the consultation procedure, the consent procedure still applies to some areas of Union law, including instances where a Member State wishes to withdraw from the EU[20]. Its continued existence is preventing the EP from becoming a *genuine* co-legislator since Parliament still remain in a state of subordination to the Council in the legislative areas that the procedure applies to.

Cooperation

As well as the consent procedure, the *SEA**[21]* alsointroduced a further legislative procedure – known as the cooperation procedure – in a bid to increase the legislative participation of the EP and inject some much needed democracy into the Community. This procedure has since been abolished by the Lisbon Treaty, but nonetheless deserves discussion since it has been regarded as an important stepping stone in the development of Parliament's power.[22]

The cooperation procedure permitted the EP to give its initial opinion on a legislative proposal made by the Commission, and a further opportunity to approve, reject or amend the Council 'common position' on the Commission's proposals at its second reading[23]. The introduction of parliamentary consultation on more than one occasion, and an opportunity for the EP to propose amendments under the cooperation procedure sets it apart from previous procedures. Furthermore, these advancements arguably allowed the EP to become involved in the legislative process in a much more meaningful capacity.

However, the impact of these advancements should not be overstated. Whilst the EP were entitled to reject and amend legislative proposals under the cooperation procedure, such rejections or amendments could be ignored by

the Council when acting unanimously[24]. Therefore, the cooperation could be regarded as a mere sub-species of the consultation procedure since the Council still has the option to ignore the opinions of the EP, and those whom they represent. Although this perspective should be treated with caution since unanimity is an extremely high threshold to meet, meaning that it is highly unlikely that parliamentary rejection or amendments would be disregarded.

Since the cooperation procedure no longer exists in the current legal framework of the EU, the procedure cannot be regarded as a major success. However, the procedure introduced concepts – such as opportunities for parliamentary amendments of a legislative proposal – which can be found in the main legislative procedure used nowadays, the OLP. This suggests that the cooperation procedure paved the way for the OLP, which can be regarded as the most democratic legislative procedure the Union has ever seen. However, this is not to say that the cooperation procedure itself democratised the Union nor did it make the EP a *genuine* co-legislator.

Right of initiative

The right of initiative, introduced under the Maastricht Treaty[25], is a slightly different means of legislative participation compared to the procedures previously considered. In its original form, the right allowed the EP, when acting by a majority of its members, to request the Commission to submit any appropriate proposal on matters on which it considers that a Community act is required for the purpose of implementing the Treaty[26]. Since its introduction, the right has been retained and developed by subsequent Treaties. In its current form, the right has been developed to include an obligation on the Commission to provide the EP with their reasoning for choosing not to submit their proposals[27].

Whilst the right of initiative has been developed over the years, it has not been expanded to the extent of granting the EP with a direct legislative agenda-setting power. Instead, the EP possesses merely an indirect initiative right. This is an unfamiliar concept to most national constitutions since the democratically accountable legislator is typically the body that has a virtual monopoly on initiating legislation[28]. Therefore, as the only directly elected body in the EU, the EP is an 'anomaly among legislative assemblies of democratic systems'.[29]

This anomalous position has arguably contributed, rather than reduced, the democratic deficit since ordinary citizens of the EU cannot relate to the EU's institutions and law-making procedures. Namely because they are so different from their own. Consequently, the EP has begun to be perceived as a "weak" institution which does not meet the definitions of an "ordinary" or a "real" parliament[30]. This lack of faith in the EP, combined with a lack of understanding of the system, has resulted widespread apathy for the Union. Such apathy is evident in low voting turnouts[31] and the United Kingdom's withdrawal from the EU.

Not only has the introduction of this right caused a widespread apathy amongst citizens for the Union, it has also done very little for the progression of the EP's legislative role. The right in itself is grossly limited, affording Parliament only an opportunity to submit proposals to the Commission. The success of such proposals are then entirely dependent upon support within the Commission, and action being taken by the Commission within the set time limit. As a result of this, the Commission effectively 'retains its almost exclusive right to initiate Community legislation'[32].

The right of initiative, even with its current developments, has done very little for furthering the EP's legislative role. Furthermore, the driving force behind its introduction – namely, the democratic deficit – has arguably been accelerated rather than reduced. However, there is an element of hope on the horizon. The President of the Commission, Ursula von der Leyen, has declared her support for a direct right of legislative initiative for Parliament [33]. If such declaration were to come to fruition, the EP may finally be considered a *genuine* co-legislator, and the Union would likely appear more relatable to ordinary citizens. This, in turn, would have the effect of significantly remedying the democratic deficit.

Co-decision/Ordinary legislative procedure

The co-decision procedure, subsequently developed to create the OLP, has been regarded as the legislative

procedure which made the EP and Council 'a classic two chamber legislature: in which the Council represents the states and the EP represents the citizens'[34].

The co-decision procedure was introduced under *Article 189(b)* of the Maastricht Treaty[35]. In its original form, the procedure shared similarities with the cooperation procedure. However, the co-decision procedure possessed some crucial differences which further supported parliamentary progression and democracy.

Firstly, parliamentary rejection of the common position ended the legislative process unless the Council could persuade the EP to change its mind at a Conciliation Committee meeting[36]. On the surface, this feature of the co-decision procedure appeared to afford the EP with a degree of authority over the Council since it was the EP who had a veto power over the common position. However, this parliamentary authority was considerably undermined by the Council's ability to question, and discourage, rejection of the common position.

Secondly, where Parliament amended the common position and the Council chose not to accept all the amendments or rejected the text outright, a Conciliation Committee would meet and establish a compromise text. This joint text would then need to be approved by a qualified majority of the Council and by a simple majority of votes cast in Parliament before it became law. If the text failed to get the required approval, the legislative process would end[37]. This element of the co-decision procedure clearly respected Parliament's legislative role since their amendments had to be considered during the formation of a joint text at a Conciliation Committee, and such joint text had to receive the approval of the EP. Thus, it could be argued that this element of the procedure was suggestive of a co-legislative relationship.

Thirdly, should the Conciliation Committee fail to agree on a joint text, the legislative process would similarly be brought to an end unless the Council confirmed its common position, with or without the inclusion of parliamentary amendments. The EP would then have the opportunity to reject this common position anew by an absolute majority of MEPs, failing which it would become law[38]. This feature of the co-decision procedure was highly problematic since it not only made it possible for the Council to confirm its original common position, but also made it relatively easy for them to do so. Namely because voting down the Council's confirmed common position required a very high majority in the EP. This meant that the Council retained a degree of superiority over the EP, which in turn, called into question the democratic legitimacy of the co-decision procedure[39].

Fourthly, the 'product' of the co-decision procedure was an act adopted jointly by the EP and the Council[40]. This differs from acts which are adopted under the consultation or co-operation procedure since they are regarded as merely acts of the Council. The 'product' of the co-decision procedure is symbolically suggestive of a co-legislative relationship between the EP and Council. However, such symbolism does not mean that the co-decision procedure equated to a co-legislative relationship. On the contrary, the Council maintained its supremacy over the EP in several aspects of the procedure – as seen from the discussion above.

Since the Maastricht Treaty[41], the co-decision procedure has been developed through the adoption of subsequent Treaties. The Treaty of Amsterdam[42] allowed for legislation to be agreed upon in its first reading in order to enable the Council to accept the EP's first reading amendments without having to firstly adopt a formal Council position.[43] This differed from the Maastricht Treaty which consisted of a maximum of three readings and only allowed conclusion to take place at second or third readings[44]. The Treaty of Amsterdam[45] also removed the Council's ability to confirm its original common position if conciliation should fail. In this case, the legislative procedure would end.[46] Furthermore, the Treaty of Amsterdam, Nice and Lisbon all extended the scope of the co-decision procedure to apply to further areas of Union law[47]. The Treaty of Lisbon went further and re-branded the procedure as the OLP[48].

The OLP in its current form, contained in *Article 294* of the Treaty on the Functioning of the European Union (TFEU), has allowed the European Parliament to play a *genuine* role in the European law-making process[49]. Parliament now have the ability to offer amendments which now carry authority, to negotiate freely at Conciliation Committees and to end the legislation process when they do not agree with the proposal in question. For this reason, such procedure significantly contributes to the reduction of the democratic deficit.

Despite the successes of the OLP, it still only applies to the *majority* of legislation. This means that, in some instances, the Council remains the sole legislator and the 'product' of the process equates to merely an act of the Council[50]. Consequently, the EP simply cannot be considered a *genuine* co-legislator because the Council retains its supremacy over the EP in some areas.

Whilst it may be that only a minority of matters involve the Council acting as the sole legislator, many of the matters excluded from the OLP have far-reaching implications covering areas such as taxation, passport provisions and accession of new Member States[51]. This is highly problematic for the democratic deficit because the EP, and the ordinary citizens whom they represent, are having no meaningful input into the adoption of laws which directly affects them. Therefore, it cannot be said that the introduction of the OLP has satisfied the driving force behind Parliament's changing role because a democratic deficit still exists within the Union.

For the democratic deficit to be remedied, and for the EP to become a *genuine* co-legislator with the Council, the ordinary legislative procedure must apply to all areas of EU law.

Conclusion

The EP is still a young parliament but has developed its role and powers considerably in its lifetime[52]. However, the EP has not quite yet obtained the role and powers of a *genuine* co-legislator. For this, the OLP would need to apply to the adoption of all Union legislation, and the EP would need to be afforded a direct right of initiative. Until such reforms are made, the Council shall remain the sole legislator for legislative areas where the consent and consultation procedures apply, and the Commission shall continue having a virtual monopoly on initiating legislation. Whilst these powers remain in place, the EP will never be afforded a *genuine* co-legislator role and, as a result, the democratic deficit will remain in the Union.

Notes

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[2] Richard Corbett, Francis Jacobs and Michael Shackleton, *The European Parliament* (8th edn London: John Harper Publishing 2011) p.271

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[5] Zainab Batul Naqvi, 'A Critical Discussion of the European Parliament's Evolution as an Institution of the EU' (2013) 3 Birmingham Journal for Europe 1, 5

[6] Richard Corbett, Francis Jacobs and Michael Shackleton, *The European Parliament* (8th edn London: John Harper Publishing 2011) p.3

[7] Case 138/79 Roquette Freres v Council (Isoglucose) [1980] ECR 3333, para 37

[8] Richard Corbett, Francis Jacobs and Michael Shackleton, *The European Parliament* (3rd edn London: Cartermill Publishing 1995) p.5

[9] Act concerning the election of the representatives of the European Parliament by direct universal suffrage [1976] OJ L 35/15

[10] 'The European Elections in 1979' (*European Parliament*) <https://www.europarl.europa.eu/unitedkingdom/en/european-elections/european_elections/previous_election_results/7-june-1979.html> accessed 30 December 2020

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[12] Hans-Joachim Glaesner, 'The Single European Act: An Attempt At An Appraisal' (1986) 10 Fordham International Law Journal 446, 468

[13] Consolidated version of the Treaty on the Functioning of the European Union [2016] OJ C 202/89, art 103

[14] Single European Act [1987] *OJ L 169/1*

[15] 'Special Legislative Procedure' (*Access to European Law)* <https://eur-lex.europa.eu/summary/glossary/special_legislative_procedure.html> accessed 16 December 2020

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[17] 'Ordinary Legislative Procedure' *(European Parliament)* < https://www.europarl.europa.eu/olp/en/ordinary-legislative-procedure/overview> accessed 4 January 2021

[18] Philip Raworth, 'A timid step forwards: Maastricht and the democratisation of the European Community' (1994) 19(1) European Law Review 16, 25

[19] Philip Raworth, 'A timid step forwards: Maastricht and the democratisation of the European Community' (1994) 19(1) European Law Review 16, 25

[20] Consolidated version of the Treaty on European Union [2012] OJ C 326/1, art 50

[21] Single European Act [1987] *OJ L 169/1*

[22] Richard Corbett, Francis Jacobs and Michael Shackleton, *The European Parliament* (8th edn London: John Harper Publishing 2011) p.263

[23] Kathryn Good, 'Institutional Reform Under The Single European Act' (1988) 3(1) American University International Law Review 299, 311

[24] Zainab Batul Naqvi, 'A Critical Discussion of the European Parliament's Evolution as an Institution of the EU' (2013) 3 Birmingham Journal for Europe 1, 6

[25] Treaty on the European Union [1992] *OJ C 191/1*

[26] Treaty on the European Union [1992] *OJ C 191/1*

[27] Consolidated Version of the Treaty on the Functioning of the European Union [2016] OJ C 202/47

[28] Christopher Vajda, 'Democracy in the European Union: what has the Court of Justice to say?' (2015) 14(2) Cambridge Journal of International and Comparative Law 226, 232

[29] Andreas Maurer, Jean Monnet and Michael C. Wolf, 'The European Parliament's Right of Initiative' *(European Parliament*, 2 December 2020) < https://www.europarl.europa.eu/committees/en/presentation-of-the-study-the-european-p/product-details/20201203EOT05081> accessed 28 December

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[36] Treaty on the European Union [1992] *OJ C 191/1*

[37] Treaty on the European Union [1992] *OJ C 191/1*

[38] Treaty on the European Union [1992] *OJ C 191/1*

[39] Philip Raworth, 'A timid step forwards: Maastricht and the democratisation of the European Community' (1994) 19(1) European Law Review 16, 25

[40] Treaty on the European Union [1992] *OJ C 191/1*

[41] Treaty on the European Union [1992] *OJ C 191/1*

[42] Treaty of Amsterdam amending the Treaty On European Union, the Treaties Establishing the European Communities and Certain Related Acts [1997] OJ C 340/1

[43] Maja Kluger Dionigi and Anne Rasmussen, 'The Ordinary Legislative Procedure' (2019) *Oxford Research Encyclopaedia of Politics* <https://oxfordre.com/politics/view/10.1093/acrefore/9780190228637.001.0001/acrefore-9780190228637-e-1044> *accessed 1 January 2021*

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[51] Christopher Vajda, 'Democracy in the European Union: what has the Court of Justice to say?' (2015) 14(2) Cambridge Journal of International and Comparative Law 226, 231

[52] Richard Corbett, Francis Jacobs and Michael Shackleton, *The European Parliament* (8th edn London: John Harper Publishing 2011) p.2