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Philipp Dann, Parlamente im Exekutivföderalismus. Eine Studie zum Verhältnis von föderaler Ordnung und parlamentarischer Demokratie in der Europäischen Union

Summary

Parliaments in Executive Federalism. A Study of the Interplay between Federal Order and Parliamentary Democracy in the European Union

The study presented here tackles one of the central and still unsolved problems of European integration, that is the question of democratic legitimacy in the European Union. Despite ongoing reforms in past years, despite enlargement and deepening in other fields of integration and despite an extensive public debate, the problem of how to ensure legitimacy of a supranational polity has not been solved yet. In the centre of this debate is the role of parliaments. It seems evident that only some form of representative democracy could convincingly ensure legitimacy in the Union. But how this could be achieved has not been answered yet.

This study takes an institutional and comparative approach to the problem of parliaments and democracy in the EU. It embeds the problem of parliaments in an analysis of their institutional environment. The pivotal characteristic of this environment, so the underlying thesis goes, is its federal or multi-level structure. It is thus a study about the interplay of parliamentary democracy and federal order in the European Union. This federal order, however, is distinct in the sense that it is characterised or dominated by intensive co-operation of executives, institutionally expressed in the Council of Ministers. Because of this fundamental characteristic, the European federal order is named here an 'executive federalism'. This said, the title of this book becomes intelligible: it is a book about parliaments in an executive federalism, it is a

study of the interplay between parliamentary democracy and federal order in the European Union.

In the following brief summary, I will try to outline the main ideas and results of the study. It is obvious that this can only be a mere skeleton of the argument and hint to further reading¹. However, the summary will follow the structure of the argument as developed in the book. It starts with the concept of executive federalism, a term that has been hitherto employed, but not in such extensive way and never before with regard to its impact on the question of parliamentary democracy in the EU (1). The consequences of this federal system for the national parliaments (2) and for the European Parliament (3) will then be described.

1.

It is the basic idea of this study to understand and conceptualise the institutional order of the EU as an executive federalism, and to tackle the problem of parliamentary democracy as a question of parliaments within an executive federalism, and especially of parliaments dealing with the institutional expression of that federal system, the Council of Ministers.

The concept of executive federalism is developed out of a comparison that might surprise at first. It is the comparison between the federal order in the EU with that of the Federal Republic of Germany and with the federal order of the German Reich of 1871. All three of them, that is the idea, had to face an identical question, which is the question of how to square the sovereignty of member states with their common will to integrate and co-operate in a common polity. Moreover, all three of them found a structurally comparable solution: This is first based on a structure of interwoven competencies for law-making and implementation of those laws, giving the centre the power to make law, but the member states the competence to implement them. And it is, secondly, based on the integration of the executives of the member states into the process of law-making of the centre, institutionalised in a federal chamber comprised of member state governments, called the Council in the EU or the *Bundesrat* in the German orders. A necessary element of that integration of member state governments into the lawmaking of the centre is a consensual method of finding solutions, a culture of co-

¹ An extensive summary in English has been published as Jean Monnet Working Paper, see: Ph. Dann, Looking through the federal lens: The semi-parliamentary democracy of the European Union, Jean Monnet Working Paper 5/2002 - <http://www.jeanmonnetprogram.org/papers/02/020501.html>.

operation and compromise to mediate between and to square the heterogeneous interest of the member states.

The first part of the book presents this comparison between the European and the German federal order and analyses carefully the structure of competencies (Part 1 C I) and the way the Council is organised to fulfil its mission as a place of mediation and compromise (Part 1 C II).

But what is gained by this analysis of the federal order for the question of democratic legitimacy and the parliaments? The last chapter of Part 1 gives a first answer as it describes an old and ongoing debate in Germany about how to square the federal order with parliamentary democracy (Part 1 D). Since the first appearance of executive federalism with the foundation of the German Reich in 1871 there has been a tradition of thinking whether a federal system, that is dominated by the cooperation of governments, can be combined with a parliamentary democracy, and if yes, how that can be accomplished. In the old Reich, the German constitutional lawyer *Erich Kaufmann* argued that both concepts are incompatible, using the motives of *Otto von Bismarck*, the founder of the Reich, as his arguments. Later, in the Federal Republic, judges of the Federal Constitutional Court like *Konrad Hesse* and *Ernst-Wolfgang Böckenförde*, to name only two, have contributed to the discussion.

An especially original contribution to this discussion has been made by the political scientist *Gerhard Lehmbruch* who used the perspective and tools of democratic theory to analyse the problem. *Lehmbruch* does not argue that executive federalism and parliamentary democracy are ultimately incompatible, but he nevertheless put forward the thesis of a structural cleavage between parliamentarism and federalism. This cleavage, so he argues, is based on two fundamentally different methods of decision-making in the federal and the parliamentary system. While federalism is based on the mediation between heterogeneous interests and compromise, parliamentarism, according to *Lehmbruch*, is based on antagonistic competition of political parties and majority rule, hence the direct opposite of mediation and compromise. Both patterns of decision-making can conflict, so *Lehmbruch* argues, in case that the federal pattern of consensual decision-making and parliamentary pattern of majority-rule decisions collide in the same process.

The old discussion about the interplay of executive federalism and parliamentary democracy in Germany thus asks exactly, what this study wants to examine with regard to the situation of parliaments in the European Union. The question is how parliaments, that are necessary

to add democratic legitimacy to the political process, can cope with the structure and consensual patterns of executive federalism.

2.

Putting this question before the *national parliaments* and their chances to exercise influence in the European executive federalism, points to a structural problem of the member states' parliaments: National parliaments have almost only indirect influence on European matters; their main task is to control their national governments as these are acting in the Council of Ministers, but not to act themselves. Parliaments hardly have any direct powers when it comes to EU affairs.

After outlining the legal position of national parliaments in EU law (Part 2 B I) and after describing how national parliamentary law and organisation has changed in order to enable the parliaments to fulfil this task of control (Part 2 B II), Part Two of the study analyses four central problems that resort from the structure of executive federalism (Part 2 C). It describes the way, in which mediated actors as the national parliaments try to control their governments, while these are acting in processes that are mostly not open to the public, that are characterised by co-operation between different actors and that are built on the need for compromises.

In these structures and mechanisms of executive federalism, national parliaments face a serious dilemma: They can either try to intensify their powers of control over their respective government – and thus curb the effectiveness of consensual European procedures. Or they can accept the need for effective procedures and thus put aside their demand for control and direct influence. The result, however, is clear: National parliamentary control and effective procedures in the EU contradict each other. Or to put it in the language of democratic theory: Input-legitimacy and output-legitimacy contradict each other.

3.

Since the perspectives of national parliaments to contribute to the democratic legitimacy of the EU prove to be bleak, it is the *European Parliament* that might be the more promising actor and contributor. It has to be asked therefore, how the EP fits into the institutional set up of European executive federalism.

This study employs a comparative approach to answer the question. The EP is analysed in Part III of the book in comparison to two different models or ideal types of parliaments, on the one hand the 'debating parliament' and on the other hand the 'working parliament'. The debating parliament, to summarise briefly what is explained in Part 3 B,

finds its centre in the plenary and its debates there. It is characterised by a close alliance between the parliamentary majority and the government. It is the traditional type in a parliamentary system as we know it from the United Kingdom and its House of Commons. The other type, the working parliament, is centred around its committees. It is also shaped by a strict separation between government and parliament, expressed in a rule of incompatibility. The pre-eminent example of this type is the US Congress.

What results from a comparison between the EP and these two types of parliaments? Put very briefly, the EP is less a weak but rather a misunderstood parliament, because it is often measured against the wrong role model. In Part 3 C, this study examines three main functions of the EP - creation, control and lawmaking - and compares step by step which type of parliament the EP resembles most. The outcome of this comparative analysis is clear: Its dominant character as a working parliament shines through each of these three functions. This is especially apparent in the analysis of the committees and of the EP's separation from the government. In effect, the study goes to show that the EP as a working parliament is a comparatively strong legislator and parliament.

The analysis also demonstrates, how well the EP, understood as a working parliament, blends into the structure of executive federalism and its consensual mode of decision-making. Its character as a heterogeneous institution, divided by a large number of party groups and of represented nations, renders it necessarily an institution that is operating with compromise and consensus. Majority rule, which is classically the pattern of decision-making in parliamentary systems, is useless in such a heterogeneous institution where no majority party or coalition can easily trump other positions. In that respect it plays well into the pattern that is typical for the Council of Ministers too. In contrast to the national parliaments, the EP therefore fits well into the structure of executive federalism and is able to co-operate with the Council.

This study on parliamentary democracy in the executive federalism of the European Union thus results in a clear direction. First of all, it underlines the importance of the specific federal character of the institutional arrangement in the Union. But taking that into account, does not rule out a system of parliamentary democracy. On the contrary, parliamentary democracy can surely present a perspective for democracy in the Union. However, it has to be modelled not along the traditional model of parliamentary democracy as known from the UK, but more along the lines of a system like it exists in the American constitution.

In the European model, as proposed here, democratic legitimacy stems mainly from the EP and only to a minor extent from national parliaments as member state parliaments. The latter surely have important functions in controlling their respective governments, in ensuring the implementation of EU law and in serving as safety valves. It makes perfect sense, therefore, to give them the option to voice their opinion but not to be a regular actor in the procedures or a veto power.

The main actor has to be and can be the EP. Conceptualising it as a working parliament demonstrates, that its organisational form around strong committees and separated from supporting one government render it a strong institutional actor. Against the background of the consensual patterns in the Council, the EP also appears as an especially compatible and able partner to the Council in lawmaking. While it surely is not, as the US Congress perhaps is, a policy-making legislator, the EP can nevertheless be regarded as a policy-shaping legislator and as such as a main contributor of democratic legitimacy.