

## DEVELOPMENTS

### ***Book Review - Philipp Dann's Parlamente im Exekutivföderalismus (2004)***

*By Alexander Türk\**

**Philipp Dann, *Parlamente im Exekutivföderalismus*, Springer, Berlin 2004, ISBN 3-540-20743-0, pp. 474**

Philipp Dann's book discusses the role of parliaments in a particular type of federal constitutional system, namely, that of executive federalism. He argues the European Union's multilayered system constitutes a system of executive federalism, in which competences are interwoven between the national and European level, therefore requiring extensive co-operation between the two levels. This co-operation finds its institutional expression in the Council of Ministers where national executives engage in a consensual form of decision-making. National parliaments, according to Philipp Dann's thesis, are sidelined in this system and can, at best, only provide a complementary form of democratic control. The main beneficiary of the system is the European Parliament, which, due to its independent position in the European institutional system, is best equipped to exercise democratic control.

The book's theoretical foundations are based on three different comparisons. The first comparison is between various types of federal systems, and more specifically between the three constitutional systems in which the interlinked competences constitute a system of executive federalism, namely the German Constitutions of 1871 and 1949, and the European Union. The comparison is designed to highlight the linkage of competences between the levels and the executive nature of the federal institution as general characteristics of a model of executive federalism. Second, the book analyses the differences between the model of consensual democracy, generally found in federal states and in particular in the EU, and the model of majoritarian democracy, present in systems with parliamentary

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governments. Third, the book shows the similarities between the European Parliament and the U.S. Congress as working parliaments, in contrast to the House of Commons in the U.K. as debating parliament. Dann argues that working parliaments thrive where their source of legitimacy and membership is distinct from the executive, resulting in a need to co-operate between the institutions.

The book is a study in the institutional organisation of parliamentary democracy within the federal constitutional order of the EU. The central claim of the book is that the structure of executive federalism of the EU, institutionalised in the Council of Ministers, is of fundamental importance for the functioning of parliamentary democracy in the EU and is detrimental to the national parliaments while beneficial for the European Parliament. The book's author makes clear that he does not want to contribute to the, already extensive, debate on the socio-structural problems of European democracy. Rather, he seeks to provide an analysis of the organisational foundations of the European constitutional order, which determine how the relevant EU institutions develop and exercise their powers.

The book has three parts. Part 1 develops the model of executive federalism by comparing it with other types of federal systems. It presents the structure of the European federal system and the Council of Ministers as its institutional core. This part also contains a discussion of texts relevant for the understanding of the relationship between federalism and parliamentary democracy. Part 2 demonstrates the underprivileged role of national parliaments in the EU's executive federalism and demonstrates the structural incompatibility between the operation of national parliaments and executive federalism. Part 3 shows the positive role that the European Parliament is able to play within this system. This, for many, may be a surprising conclusion. The book argues that, within a dualist system, that is, a system where both Council and European Parliament are based on separate sources of legitimacy and in which membership is incompatible with that of other institutions, the European Parliament is ideally placed to exercise strong influence as a working parliament.

The different federal systems presented in Part 1 are distinguished on the ground of their functional allocation of competences, into those that separate the competences (see at least initially the USA) and those where competences are interwoven between the central and member state level. A second characteristic of federal systems consists in the participation of the constituent members of the system, which can follow the senate model of the USA or the representation of executives as in Germany. And in the Swiss model the people themselves can be involved in the decision-making process at a central level. Accordingly, Dann sets out three (ideal) types of federal systems: the dual federalism of the USA, the executive federalism of Germany, and the direct democracy of Switzerland which operates within an

interlinked system of competences. The comparison leads Dann to the conclusion that the EU constitutes a system of executive federalism. The functional allocation of competences within the EU provides the EU with considerable competences to make laws while their implementation is largely for the Member States. As considerable co-operation is required within the system, the Council of Ministers becomes the core institutional feature of this system. The Council with its governmental/administrative structure is ideally placed to provide an efficient interface between the central and Member State levels. The exercise of legislative powers by the Council of Ministers and its organisation and structural make-up as an executive body, in which governmental as well as administrative elements can be found, creates a tension which is characteristic for executive federalism. Dann argues that the diversity amongst the national systems represented by their executives and the requirement of inter-institutional co-operation allow only for a consensual approach to decision-making. This also explains why, despite the considerable expansion of areas in which qualified majority is to apply, the decision-making process still largely has maintained its consensual nature.<sup>1</sup> The consensual approach to decision-making also points to the prevalence of a consensual model of democracy within the EU. The structural problems of executive federalism have profound implications for the exercise of parliamentary democracy within the EU. Dann's version of executive federalism can be clearly distinguished from other attempts to characterise the co-operation within federal systems. The characteristic of the system of executive federalism follows, by necessity, from the interwoven nature of the competences between the central and member state level requiring a specific need for co-ordination between the levels that can best be satisfied in an executive chamber at a central level. Even though other authors have highlighted the difficulties for parliamentary democracy in a federal system, none has examined the phenomenon on the basis of Dann's particular concept of executive federalism and in particular how the EU's system of executive federalism impacts on national parliaments and the European Parliament, which forms the content, respectively, of Part 2 and Part 3 of his book.

In Part 2, Dann makes it clear from the outset that he considers the position of the German *Bundesverfassungsgericht* (Federal Constitutional Court), which argued that national parliaments provide the main legitimacy for the European Union, as untenable. He finds that the weak position of the national parliaments in the European Union results from their indirect participation in the EU's decision-making process. On the basis of a wide notion of control, he analyses in detail how

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<sup>1</sup> See Christine Neuhold & Elissaveta Radulova, *The involvement of administrative players in the EU decision making process*, in *EU ADMINISTRATIVE GOVERNANCE* 44 (Herwig H.C. Hofmann & Alexander H. Türk eds., 2006).

national parliaments can exercise parliamentary control over their governments in EU matters. In particular, he examines how national parliaments can obtain and evaluate relevant information, what impact they have on procedure, how they are able to create a public forum and which formal decision-making competences they have in the process. He concludes that the legal position of national parliaments under EU law is peripheral. Even though their position under national law is stronger, in particular since the Maastricht Treaty, the specific form of executive federalism creates structural problems for national parliaments to exercise control effectively. First, the fact that national parliaments are not directly involved in the EU's decision-making process leads to a lack of information, which is often exchanged informally at the European level, time pressure when assessing the information, the necessity to catch up with the knowledge of the executive and an ineffective procedural participation of national parliaments. Second, the inter-institutional linkage at the European level increases the problem of obtaining information considerably, as the Council is involved at an early stage and often informally in the work of the Commission and also the European Parliament. Third, despite recent attempts to open the Council to the public when it acts in its legislative capacity,<sup>2</sup> the need for co-operation, which is structurally imbedded in the working method of the Council, often requires negotiations to take place behind closed doors. Fourth, the consensual approach which, by necessity, permeates negotiations in the Council creates difficulties for the control by national parliaments. The successful completion of negotiations in the Council requires a flexible attitude of the national executives in the Council. The attempt by some Member States to allow their national parliaments to impose binding mandates on their governments undermines the consensual decision-making process in the Council. Dann makes the point that the more competences national parliaments are given to control their governments, the more the efficiency of the decision-making process at the EU level will suffer. Dann sees this dilemma as structurally determined in the system of executive federalism and concludes that effective legitimation through national parliaments and the efficient exercise of European authority are incompatible.

Dann sees greater promise in the provision of legitimacy of EU action by the European Parliament in the EU's system of executive federalism, which forms the topic of discussion in Part 3 of the book. The European Parliament constitutes the second strand of parliamentary democracy in the EU. Dann's achievement consists in finding a realistic institutional model for the European Parliament by comparing it with other types of parliaments, namely the debating parliament, exemplified in

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<sup>2</sup> See MARTIN WESTLAKE & DAVID GALLOWAY, *THE COUNCIL OF THE EUROPEAN UNION* chapter 20 of (2004) (which provides a more optimistic picture of the current state of transparency in the Council).

the House of Commons in the U.K., and the working parliament, best represented by the U.S. Congress. The British constitutional system is characterized by a functional unity of parliamentary majority and government. While it requires a working majority in the House of Commons, the government dominates the latter due to its privileged access to bureaucratic expertise, its command of party loyalty and the personal linkage between government and parliament. As it has little influence over the legislative process in parliament and its committees, the opposition focuses on the public debate in the plenary of the House of Commons, which thereby becomes "the centre of parliamentary life."<sup>3</sup> In contrast, in the U.S. Constitution the executive and the legislature are institutionally separate in their creation and exercise of their powers. Congress's work as legislature is dominated by the laborious process of drafting and reviewing legislative acts in depth. This work can best be carried out in specialized committees having at their disposal considerable staff resources. This makes the committees the focal point of Congress characterized as working parliament.

Dann's characterization of the European Parliament as working parliament similar to the U.S. Congress considerably furthers our institutional understanding of what kind of parliamentary democracy the EU constitutes and how the European Parliament can provide an effective role within this system. Dann argues that the system of executive federalism creates a system in which the formation of the European Parliament in direct elections is separate from that of the Council and in which its membership is incompatible with that of other EU institutions. This dual system of separated powers, sharing law-making powers, allows the European Parliament to play an active role in the participation of the appointment of the Commission, the control of the executive and in the process of law-making. The role of the European Parliament in the appointment of the Commission is not the creation of a parliamentary government, but the exercise of a negative control over the appointment process, in which the Council plays a decisive role. Philipp Dann is therefore skeptical that the EU will develop into a parliamentary government, as the Council will retain a decisive role in the appointment of the Commission. Moreover, the European Parliament will not be able to control the executive functions of the Council. Furthermore, the hearings in the European Parliament demonstrate a self-understanding within the European Parliament that is characterized by a critical evaluation of the future members of the Commission rather than a pledge for loyal support by a parliamentary majority. Finally, EU law contains a statutory basis for the incompatibility of membership in the Commission and the European Parliament. Likewise, the control function of the European

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<sup>3</sup> P. Dann, *European Parliament and Executive Federalism: Approaching a Parliament in a Semi-Parliamentary Democracy*, 9(5) EUROPEAN LAW JOURNAL 549, 556 (2003).

Parliament is best explained if one is to consider the European Parliament as a working parliament. This is not to say that the European Parliament does not have instruments at its disposal that resemble those of a debating parliament with its emphasis on a lively debate in plenary, but that it is most effective when it uses its well-developed and generously staffed committees for the exercise of control. Committees are best placed to gather information and expertise and thereby form the backbone of the European Parliament. Finally, in the exercise of its law-making function the European Parliament also operates more as a working parliament. The party-political loyalty that is characteristic for debating parliaments is conspicuously absent in the European Parliament. The high thresholds for effective participation in the co-decision procedure force the multitude of parties in the European Parliament to co-operate in order to provide an effective counterweight in discussions with the Council. And here, again, the European Parliament's committees are best placed to provide the necessary will-formation in the law-making process. Dann argues from this that the EU's dual system of separated powers favours a European Parliament as a working parliament with negative appointment powers, organized in committees, and as an independent actor in a co-operative law-making system.

Dann's conclusion is that parliamentary democracy in the EU is a parliamentary democracy within a system of executive federalism. He finds that the parliamentary system of the EU cannot be considered separately from its federal foundations. The functional linkage of competences, the central position of the Council and its consensual approach creates a dynamic of decision-making with which parliaments need to learn to live. Parliamentary democracy in executive federalism is based on two pillars: the European Parliament as a working parliament is the central institution and acts as co-legislator, control organ of the executive, and exercises negative control over the appointment of the Commission. The national parliaments exercise only complementary functions in the implementation of EU law. Both levels of parliamentary democracy complement each other. The European Parliament and the national parliaments therefore constitute a parliamentary constitutional order.

Philipp Dann's book offers the reader a highly innovative approach to the question of parliamentary democracy within the EU's system of governance. Instead of the usual discussions about *demos*, citizenship and constitution, the reader will find a book that is full of valuable insights of how the EU as federal system can successfully organise parliamentary democracy within its institutional design. In particular, the comparative parts of the book should be required reading for every student of comparative constitutional law.