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**Looking through the federal lens:  
The Semi-parliamentary Democracy of the EU**

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# Looking through the federal lens: The Semi-parliamentary Democracy of the EU

By Philipp Dann <sup>±</sup>

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## **Abstract:**

This paper will reconsider the question of parliamentary democracy in the EU. Yet, it will approach this already intensely debated problem from a specific perspective: full understanding of the parliamentary system in the EU, so it argues, is enhanced if the specific federal structure of the EU is taken into account. This structure, named and described here as executive federalism, renders the EU a system of intensive executive cooperation and of consensual decision-making.

With regard to the national parliaments (NP), this system has dramatic consequences. Even after considerable changes in the scrutiny systems of the NP as seen in the 1990s in most member states, the present paper argues that understanding the federal conditions of parliamentary democracy in the EU basically rules out intergovernmentalist approaches to European democracy, or proposals like a second chamber of the EP composed of NP.

In the center of this paper will therefore stand the analysis of the EP. It proposes to reconsider its structure as legislature in a setting of separated institutions sharing powers, dwelling again on the consequences of the executive federalism and on a comparison with the US system. The EP and its main functions will be analyzed along two ideal types of legislatures: the working parliament, on one side, as a legislature separated from the executive and centered around strong committees (exemplified in the US Congress), and the debating parliament, on the other side, as a legislature characterized by a fusion of parliamentary majority and government as well as a mainly debating, not policy-making plenary (exemplified in the British House of Commons). Comparing the EP step by step, or function by function with these two types, the EP can be identified basically as working parliament, more specifically as a ‘controlling parliament’. The present paper thus suggests to re-think our understanding of the EP, beyond the typically European model of debating parliaments and closer to the American example.

These parliamentary aspects of the EU are, so it will finally be proposed, sufficiently prominent and distinct to characterize the EU system generally as a semi-parliamentary system.

## I. Introduction

The question of parliamentary democracy in the European Union is often presented as a dichotomous choice: either the EU is understood as an intergovernmental structure and the main part of its legitimacy has thus to stem from national parliaments (NP); or, the EU is perceived as a supranational entity from which is inferred that the European Parliament (EP) shall contribute the major share of democratic legitimacy<sup>1</sup>. Much less noticed but equally fundamental is another dichotomous perspective on European democracy: Vernon Bogdanor described its future in a seminal article in 1986 along an either parliamentary or presidential path<sup>2</sup>. The parliamentary model is contrasted here with a system in which the Commission is directly elected, thus resembling a presidential system.

Yet, the development of European democracy is hardly a deliberate choice of which path to follow, or which political preference to pick. Quite the opposite: the European political and institutional system seems to be such distinct a system that the problem has rather been how to fit parliaments into its very specific design, if at all<sup>3</sup>.

This article will reconsider the problem of European parliamentary democracy, starting with a look at this distinct political system. As one of its main characteristics stands out the federal<sup>4</sup> or multi-layered structure of the EU. This federal system turns out to be a coherent structure which renders the EU a system of intensive executive cooperation and of consensual decision-making. As such it becomes of salient importance for the functioning of parliaments within the EU institutional setting. Looking at the parliaments through the lens of executive federalism, as I will call the federal system, and with the different avenues of democracy, sketched out above, serving as guideposts and as inspiration, this paper will present a concept of European democracy which is centered around the EP as a strong and policy-shaping legislature, only marginally assisted by the NP.

As to the NP and the intergovernmental avenue, this approach first of all teaches us why it is a fallacy to expect a main part of democratic legitimacy in the EU from member state parliaments. Even after considerable changes in the scrutiny systems of the NP as seen in the 1990s in most member states, this paper argues that understanding the federal conditions of parliamentary

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<sup>1</sup> Wessels & Diederichs, *The European Parliament and European legitimacy* (in: Bachoff & Smith (eds.), *Legitimacy and the European Union*, London 1999), pp. 135-138; Kaufmann, *Europäische Integration und Demokratieprinzip* (Baden-Baden 1997), pp. 229, 347.

<sup>2</sup> Bogdanor, *The Future of the EC: Two models of Democracy, Government and Opposition* 21 (1986), pp. 161.

<sup>3</sup> At least rhetorically beyond a parliamentary choice: Andersen & Burns, *The EU and the Erosion of Parliamentary Democracy: A study of Post-parliamentary governance* (in: Andersen & Eliassen (eds.), *The EU: How democratic is it?*, London 1996), pp. 227. As to another dichotomy, contrasting parliamentary and technocratic avenues: Dehousse, *European Institutional Architecture after Amsterdam*, *CML Rev.* 35 (1998), pp. 595; also Majone, *Europe's 'Democratic Deficit': The Question of Standards*, *E.L. Journal* 4 (1998), pp. 5. Finally, above these choices: Weiler, *European models: Polity, People and System* (in: Craig & Harlow (eds.), *Lawmaking in the European Union*, London 1998 [hereinafter: Craig & Harlow, *Lawmaking*]), pp. 3 (more to this approach below Part II B 3).

<sup>4</sup> It should be underlined that using the phrase 'federal' does not necessarily imply a state-like construct. I use it as a term for a multi-layer structure of governance, not with an implicit reference to a federalist approach to European integration. Federalism is generally regarded as a general principle of organizing multi-layered structures of governance, be they in a national, supranational or international sphere (see Elazar, *Exploring Federalism* (Tuscaloosa 1987), pp. 34); v. Bogdandy, *The European Union as a Supranational Federation: A conceptual attempt in the light of the Amsterdam Treaty*, *Columbia Journal of European Law*, 6 (2000), pp. 51/52.

democracy in the EU basically rules out intergovernmentalist approaches to European democracy, or proposals like the creation of a second chamber of the EP composed of NP<sup>5</sup>.

With regard to the EP, especially Bogdanor's description inspires a new idea of how to conceptualize this already excessively described institution. This paper suggests a reconsideration of the EP as legislature not quite in a presidential system, but in a setting of separated institutions sharing powers, based on the federal setting. Dwelling on the comparison with the US Congress and analyzing the way it functions along two abstract types of legislatures, the EP can be conceptualized as a 'controlling parliament'. As such it is characterized here by its separation from the executive branch and the way it acts more through its powers to control and prevent than to independently achieve, and by being centered less around debates in its plenary than around its influential committees. These features render it a strong, policy-shaping institution<sup>6</sup>.

But European parliamentary democracy seen through the federal lens is not a question of either EP or NP. Especially with regard to treaty revisions and constitutional matters, the position of parliaments in an executive federalism is best served by a combination of parliamentary efforts. It is here that the EP and the NP can work together and where the involvement of NP makes practically and theoretically the most sense<sup>7</sup>.

By reconsidering the role of parliaments along these lines, this paper addresses another central dilemma of parliamentary democracy in the EU, which is how to square the parliamentary and majoritarian understanding of democracy with the consensual, non-majoritarian, or as it could be also named: federal nature of the EU<sup>8</sup>. Instructed by the comparison with a legislature in a non-parliamentarian democracy (mainly the US Congress), this paper presents the picture of a non-majoritarian system with strong federal legislature. Yet, it is neither a truly parliamentary nor a presidential system. Instead, it is a system based on a negative parliamentary power to determine the executive and a consensual method of decision-making. I will finally call it hence with a new term, a 'semi-parliamentary democracy'<sup>9</sup>.

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<sup>5</sup> See below, Part III.

<sup>6</sup> See below, Part IV.

<sup>7</sup> See below, Part IV 3 c.

<sup>8</sup> Dehousse, *Constitutional Reform in the European Community: Are there Alternatives to the Majoritarian Avenue?*, *Western European Politics* 18 (1995), pp. 118, 125, 129; Kohler-Koch, *Evolution and Transformation of European Governance*, pp. 2-18 (1998); Benz & Esslinger, *Compounded Representation in EU Multilevel Governance* (in: Auel, Benz and Esslinger, *Democratic Governance in the EU*, *Arbeitspapiere der Fernuniversität Hagen*, 48/2000), pp. 3.

<sup>9</sup> This instigates a short remark on a terminological problem: The notion of a parliamentary system is normally reserved to a system as it is to be found in the United Kingdom or in continental parliamentary systems, where the government is depending on and recruited from the majority in parliament (also called the Westminster Model). This is normally contrasted with the model of a presidential system where the executive is directly elected, is independent from the parliament and heads the government (see generally Sartori, *Comparative Constitutional Engineering* (2<sup>nd</sup> ed., New York 1997), pp. 84, 101).

The terminological problem now arises from the fact that even these presidential systems obviously have a legislating representative assembly, be it called a parliament, an assembly or a legislature (e.g. France, USA). It even happens that these assemblies are considered stronger than their counterparts in a parliamentary system, especially in the US Congress. A central claim in this paper will be that the EU does not and will not have a parliamentary system like the UK, but that nonetheless the EU has a strong parliament or legislature, which contributes a substantial part to its democratic legitimacy. Now, how shall this parliamentary part of a system be called in which the executive branch is not closely linked to the parliament but this is still influential and policy-shaping, like in the US and presumably in the EU?

The argument will be developed in four steps: A first one will briefly sketch out the distinctive features of what is here called executive federalism (part II). The second step will describe how the federal setting affects the NP and their way of contributing to democratic legitimacy of EU governance. It also explains why only a fundamental change of the federal structure could remedy their problems (part III). Step three will reconsider the role of the EP. Along its major functions of election, control, lawmaking and representation, and in constant comparison with two analytical models of legislatures it will conceptualize the main features of the EP as a controlling parliament in a separated system of legitimacy (part IV). Finally, conclusions will be drawn and a model of parliamentary democracy and the EU as semi-parliamentary system will be described.

## **II. The federal framework of parliamentary democracy: The EU as executive federalism**

Parliaments work in an institutional environment. They interact with other institutions and actors in a vertical as well as in a horizontal dimension. Parliaments in general can therefore only be understood by reflecting on the overall political system in which they are set<sup>10</sup>. This is especially true for the role of parliaments in the EU, for several reasons<sup>11</sup>, most importantly the one which in a nutshell contains a central idea of this paper: the federal system of the EU as executive federalism is a specific structure which triggers a certain institutional dynamic and forms a coherent, non-majoritarian system. It is this framework into which the parliaments have to somehow fit<sup>12</sup>. Thus, only an understanding of the peculiar federal surrounding will enable us to adequately understand the problems and perspectives of parliaments in the EU.

Yet, the approach chosen in this paper should not be mistaken. Executive federalism is not another theory of integration or a comprehensive approach to the gestalt question of the EU. Rather the opposite: executive federalism is not singular or original to the EU but instead a general pattern of federal organization, to be found in other federal systems too<sup>13</sup>. This paper is

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It is also on these grounds that I will finally label the European system as a semi-parliamentary democracy. Yet, so far it should be kept in mind that the term 'parliamentary system' might not only describe political systems like the UK and is thus not as precise as perhaps expected.

<sup>10</sup> Hennis, *Die Rolle des Parlamentes*, p. 75 (in: Hennis, *Die missverstandene Demokratie*, Freiburg 1973). This insight or approach is also reflected in the comparative literature on legislatures, see Jean Blondel, *Comparative legislatures*, pp. 29 (1973); or Davidson & Thaysen (eds.), *The US Congress and the German Bundestag* (Bolder 1990).

<sup>11</sup> First perhaps, European parliamentary democracy is a dual, double-layered system in the sense that both, parliaments in the Member states and the EP, contribute to the democratic legitimacy of European governance. Only a reflection of their interplay and their relation to the federal structure may therefore grasp their situation. Also, secondly, European democracy is a supranational democracy. Whatever this might mean in detail, it surely implies that its democratic design as such is sensitively linked to the specific fate and gestalt (finalité) of the supranational project. Approaches to the EP are therefore often distinguished along the general stance taken towards European integration and its implied federal structure (see literature in supra note 1, also v. Bogdandy, *Das Leitbild der dualistischen Legitimation für die europäische Verfassungsentwicklung*, *Kritische Vierteljahresschrift* 2000, pp. 284.).

<sup>12</sup> Path-breaking in explaining how parliamentary and federal modes can conflict, Lehbruch, *Parteienwettbewerb im Bundesstaat* (2<sup>nd</sup> ed., Opladen 1998).

<sup>13</sup> More below, Part II C.

hence more concerned with understanding the existing (and for all probability: lasting) institutional set up of the EU<sup>14</sup>.

### A. Three elements of executive federalism

The specific structure of executive federalism in the EU can be described along three characteristic elements: the system of competencies, the Council as its institutional core and a certain, consensual mode of decision-making. This description obviously does not aim to give a comprehensive account of the federal system. More humbly, it hopes to demonstrate the particularity of the structure and especially, how its different elements are almost logically connected and cohesively intertwined, triggering their specific institutional dynamic.

#### 1. An interwoven structure of competencies

The concept of executive federalism is, most fundamentally, rooted in an interwoven structure of competencies. This means, quite simply, that making laws is the domain of the federal (in the EU: supranational) level but implementing that same law is the domain of the state (or here: national or even subnational) level. And on the other side, both layers cooperate in the use of their powers, thus states help to make federal law and the federal level helps to implement it. Both layers of the federal system are thus knit together in the creation as well as the implementation of law. This structure can most clearly be contrasted with the American model of a dual federalism, where every level is autonomously organizing its lawmaking and its implementation, the federal level and the state level<sup>15</sup>.

Within the constitutional order of the EU, this interwoven structure is based on Art. 10 Treaty on the European Communities (TEC) which places on member states the duty to “take all appropriate measures to ensure the fulfillment of the obligations arising from the treaties” and entails a principle of loyal cooperation<sup>16</sup>. This is underlined by the principle of subsidiarity in Art. 5 TEC. In effect it means that the EU has (with some specific exceptions) no original competencies to implement EU law, but the member states have<sup>17</sup>.

A brief example might demonstrate this structure and some of its consequences. Let’s take the EC regulation on the supervision and control of shipments of waste within the European

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<sup>14</sup> The concept of ‘executive federalism’ is close to the concept of cooperative federalism but is nevertheless distinctly different in crucial aspects. The former is distinguished, first, as being confined to only *vertical* relations in the federal system, thus not covering the complex world of inter-state cooperation. It also is, secondly, an institutional approach, concentrating on the federal cooperation *as organized in the federal chamber*. Closest to the concept here see Lenaerts, Constitutionalism and the many Faces of Federalism, *American Journal of Comparative Law* 38 (1990), pp. 230-233; not distinguishing Kewenig, *Kooperativer Föderalismus und bundesstaatliche Ordnung*, *Archiv des Öffentlichen Rechts* 93 (1968), pp. 433; Franz Lhener, *The political Economy of Interlocked Federalism: A Comparative View of Germany and Switzerland*, (in: Loyd Brown-John (ed.), *Centralising and Decentralising trends in Federal States*, 1988), pp. 207.

<sup>15</sup> Lenaerts, *supra* note 14, p. 231; Vile, *Structure of American Federalism* (Oxford 1961), pp. 64; Elazar, *The American Partnership* (Chicago 1962).

<sup>16</sup> ECJ, Case C-476/93, *Nutril v. Commission* [1995] E.C.R. I-4125, para. 14; Lenaerts & Van Nuffel, *Constitutional Law of the European Union* (London 1999), par. 8-010, also 11-042.

<sup>17</sup> Exceptions are, understandably, in the field of internal organization (Art. 274 TEC) and most prominently (although intensely discussed) in the field of competition law (Art. 81, 82, 86 III TEC), see Suerbaum, *Kompetenzverteilung im Verwaltungsvollzug* (Berlin 1998), pp. 110.



Community<sup>18</sup>. Art. 130r TEC (now Art. 174 TEC) obliges the EU to contribute to the pursuit of an environmental policy within the Union, of which the treatment of waste is a part. Art. 130s (now Art. 175 TEC) attributes the power to act upon this obligation to the Council (now together with the EP), on a proposal which has to be made by the Commission. Thus, it was the Council as an institution of the EU, which in interplay with the Commission and the EP enacted our waste regulation in 1993. Yet, when it comes to the question of who is actually going to organize and control, hence implement the waste transportation in accordance to this European regulation, it is the public authorities of the Member states (often supported, though, by the Commission). According to Art. 3 and 4 of the Regulation, for example, every transport has to be notified, not to the European Commission but to the competent authorities in the concerned member states, who then act procedurally in accordance with the regulation and the national laws in place in the concerned member states (e.g. Art. 3 par. 7). The transport later on takes place only after the notifier receives permission from the national authority, again not the Commission (Art. 5, par. 1). This system of national authorities acting on behalf of European law characterizes the whole implementation process.

Imagining now, how this regulation was drafted and how it is implemented, demonstrates the consequence of the interwoven competencies: if the Commission wants to unify a policy, e.g. the shipment of waste, perhaps on request of a national government or the EP, it has to unify and accommodate 15 different laws and governments, because: every member state, most probably, already has rules regulating this question, or, most definitely, has distinct opinions and interests. Thus, detailed communication, negotiation and finally cooperation between both levels of the federal system is necessary to adjust the European proposal to the already existing legal and administrative system of the member states that regulate the concerned question.

This kind of cooperation is organized and harbored in a special institution which shall be regarded as the second central element of the concept of executive federalism: the Council.

## 2. The Council: institutional counterpart to the interwoven competencies

The Council is the congenial institutional counterpart to the specific division of competencies in the EU. Its composition, organization and powers offer what the interwoven competencies require, that is, a meeting point for actors from the national and supranational level<sup>19</sup>, a meeting point for politicians and bureaucrats, a place to negotiate, legislate and implement. As such it becomes an absolutely central institution of this federal system<sup>20</sup>.

The Council's special role derives, first, from its composition. The Council "consists of a representative of each Member State at ministerial level" (Art. 203 TEC). Thus, its members are not directly elected but sent in their function as members of national governments. As such they

<sup>18</sup> Council Regulation (EEC) No 259/93 of February 1<sup>st</sup>, 1993 on the supervision and control of shipments of waste within, into and out of the European Community (OJ 1996, L-030, p. 1).

<sup>19</sup> Of course, in federal Member states like Germany or Spain, also the sub-national level (the Bundesländer or the Region) have to be involved. But this makes just one further layer, not a qualitatively new system.

<sup>20</sup> The literature on the Council has grown immensely. The best overview give Hayes-Renshaw & Wallace, *The Council of Ministers* (New York 1997) and Westlake, *The Council of the European Union* (2<sup>nd</sup> ed., London 1999). It should perhaps be underlined that the Council is here generally understood as a federal, not as an intergovernmental institution. Of course, it has an intergovernmental role and obviously there are more than one perspective, but here stressed is its role as an institution in a federal system.

are either elected in their national elections, or (even more often) only appointed or nominated by their Prime minister. As such, it forms a sharp contrast to most other federal chambers, who are organized for example as the US Senate<sup>21</sup>.

Specific to the nature of the Council is also the mandate of its members and their self-understanding. US Senators are elected politicians, chosen to act in the Senate, free to take any position they want. Council members, in contrast, are representatives of their home government, they are “authorized to commit the government of the Member State” (Art. 203 TEC). Thus, they have to follow the guidelines agreed upon in their cabinet or given by the Prime Minister, and have to negotiate within these margins<sup>22</sup>.

Yet, the Council is much more than just the round of national ministers. They form only the top of a complex system, best described as a pyramid of groups, in which national politicians and bureaucrats convene and negotiate. This pyramid (or rather: funnel) has mainly three tiers: the Council as meeting of the ministers, the Committee of Permanent Representatives (COREPER<sup>23</sup>) and the Working groups. Their composition and functioning shall briefly be explained by tracing the negotiations on a new bill because it demonstrates the procedural logic evolving from the interwoven competencies. That is the logic of executive cooperation:

It is the sole right of the Commission to introduce bills. Yet its first<sup>24</sup> and most important reality test comes when it is first discussed in a Council Working group, composed of national civil servants from each member state who are responsible for the specific matter<sup>25</sup>. They discuss the proposal and check out how it fits into the administrative and legal systems of their respective state. This can often take a long time, but it also clears most of the often very technical complications coming along with a bill which has to be implemented in fifteen different legal systems. A proposal then goes to the COREPER, which consists of the national ambassadors to the EU, thus career diplomats who stay for long terms in Bruxelles. Whereas Working Groups are put together flexibly to discuss one specific proposal and are then dissolved, the COREPER is a permanent body.

The COREPER, which is often seen as the most powerful part of the EU, serves as a clearing point: it checks every proposal, and negotiates those issues which rest unresolved in the working groups<sup>26</sup>. Since it is not split up in specialized groups<sup>27</sup> for every proposal, it gathers a supreme

<sup>21</sup> Löwenberg & Patterson, *Comparing Legislatures* (Boston 1979), pp. 121 [hereinafter: Löwenberg & Patterson, *Legislatures*]; Hanf, *Bundesstaat ohne Bundesrat*, pp. 31 (Baden-Baden 1999); v. Beyme, *Die Funktionen des Bundesrates*, pp. 386 (in: *Der Bundesrat als Verfassungsorgan*, Darmstadt 1974); Sartori, *supra* note 9, pp. 185.

<sup>22</sup> v. Bogdandy, *Information und Kommunikation in der Europäischen Union* (in: Hoffmann-Riem & Schmidt-Aßmann (eds.), *Verwaltungsrecht in der Informationsgesellschaft*, Baden-Baden 2000), p. 168; Spence, *Negotiations, coalitions and the resolution of inter-state conflicts* (in: Westlake, *Council*), pp. 369, 372.

<sup>23</sup> It is this French acronym which is most commonly used to name this committee. COREPER stands for *Comité des représentants permanents*.

<sup>24</sup> Not even counting that these proposals are often prepared in close cooperation with national experts and bureaucrats, see Wessels, *Dynamics of Administrative Interaction*, (in: W. Wallace (ed.), *The dynamics of European Integration*, London 1990), pp. 229.

<sup>25</sup> There are roughly 250 groups, see Westlake, *Council*, pp. 303.

<sup>26</sup> Literature on the COREPER: Fiona Hayes-Renshaw et al., *The permanent representation of the members states*, *CML Rev.* 28 (1989), pp. 2; Westlake, *Council*, pp. 276; Röhl, *Die Beteiligung der Bundesrepublik an der Rechtsetzung im Ministerrat der Europäischen Union*, *Europarecht* 1994, pp. 409.

<sup>27</sup> This is, of course, a simplification. The COREPER convenes in two formations, Coreper II being composed of the permanent representatives themselves and being responsible for the more crucial foreign and financial matters, Coreper I being composed of deputies from the permanent representations dealing with most of the more technical legislation (Röhl, *supra* note, pp. 420). And then there are other Committees, like the Political Committee or the K4

overview of what is going on in different fields. It also accumulates immense expertise. Last but not least it is this aspect, which allows its members to strike more deals and settle political issues than the Working Groups<sup>28</sup>. Only what is highly political and not negotiable, stays undecided here and finally has to be negotiated by the national ministers at the top of the pyramid<sup>29</sup>.

Now, one more important characteristic has to be added: the Council has no plenary. The ministers convene in accordance with their field of responsibility, as Ministers of Finance, as Ministers of the Environment, etc<sup>30</sup>. As a consequence there is no place for general discussion but only for sectorial negotiation. It is an extremely complex system of negotiating groups, with barely any hierarchy and most difficult to control by any party or country<sup>31</sup>. It is thus distinctly different from a parliament.

Although this composition and internal organization is of salient importance, it is finally the powers which render the Council the central institution in the EU. And it is this aspect which renders it also a highly characteristic feature of the executive federalism in the EU because the Council's powers are spread from legislative to executive areas, thus defying any sort of traditional separation of power scheme but serving the structure of interwoven competencies.

With regard to lawmaking, especially regular or secondary decision-making, the Council of Ministers plays a dominant role, although it is not as often falsely portrait the lone center of it. Despite the important influence of both Commission<sup>32</sup> and European Parliament<sup>33</sup>, the Council is majorly involved in all procedures, Art. 250 et seq. TEC. Next to these legislative functions, the Council has a major role with regard to the executive functions. It is, first of all, involved in the taking of implementing decision, based legally on Art. 202, third indent and the Comitology decision EC/468/99 regulating the procedures<sup>34</sup>. The Council also has quasi-governmental functions, such as directing the EU and giving political input and guidance.

It is crucial to realize that these powers and the broad involvement flow from interwoven competencies. The Council has to participate in lawmaking (and facilitates executive tasks) because it is national authorities which finally implement and administer these policies. The early as well as influential involvement of national actors is thus entrenched in the interwoven structure of competencies, in the system of executive federalism.

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committee, which act beside the Coreper (Westlake, Council, pp. 299). However, the concentration of knowledge and overview in the Coreper is doubtlessly much more intense than in the sectorially composed Councils.

<sup>28</sup> The best account of the negotiating methods within the Council hierarchy is given by David Spence, supra note 22, pp. 364.

<sup>29</sup> Neither COREPER nor working groups have the competence to formally decide a matter. Yet, about 80 % of the matters are already materially decided before the ministers convene. These points are decided as so-called A points without any further negotiation in the Council.

<sup>30</sup> This leads to around 22 council formations, which partly develop their own institutional culture and habits. Between these Councils there is almost no formal hierarchy. The attempt to make the Council of Ministers for Foreign Affairs as a General Council responsible, did not succeed in the hoped way. Instead, two other institution serve as buckle to fasten the Council system: the rotating presidency and the Secretariat. See Westlake, Council, pp. 165, 317.

<sup>31</sup> V. Bogdandy, supra note, 4, pp. 41-44; see generally also Curtin, *The Constitution of the Union: A Europe of Bits and Pieces*, CML Rev. 30 (1993), pp. 26.

<sup>32</sup> The Commission is a major lawmaker. As new figures of a study directed by Armin von Bogdandy show, it is roughly a third of all laws, which are enacted directly by the Commission. (v. Bogdandy et al., *Strukturen des abgeleiteten Unionsrechts*, forthcoming 2002).

<sup>33</sup> The role of the EP grew in the past decade and will be more closely described later on, see below.

<sup>34</sup> Lenaerts & Verhoeven, *Towards a legal framework for Executive rulemaking in the EU? The contribution of the new Comitology Decision*, CML Rev. 37 (2000), pp. 645.

The structure of competencies thus depends on an institution in which these interwoven powers are handled and used. The Council provides exactly that. Yet, it is a third element that complements the system of executive federalism and renders it workable: the specific decision-making method.

### 3. Consensus method in the Council and the EU as consensus democracy

It has often been highlighted as specific to the supranational nature of the EU that the Council as one of its major decision-making bodies does not act by unanimity, but by majority rule, hence distinguishing the EU from any form of international organization<sup>35</sup>. Yet, it is evenly well-known, that this is not the full truth. Despite an often applicable majority rule<sup>36</sup>, the Council mostly acts according to a decision-making method, which has been described as consensus or just Community method<sup>37</sup>. Here, solutions are sought through ongoing negotiations, openness to compromise and the incorporation of as many parties as possible (if not all). This method is based on mutual trust and the expectation of gaining more by giving in to a certain extent, and being re-paid in another round. And it is in no minor part, based on the secrecy and confidentiality of the negotiations in the Council<sup>38</sup>. In a sense, the Council thus adheres to two rules: behind the formal majority rule there is an informal consensus method<sup>39</sup>.

Now, looking at the EU through the lens of executive federalism, the Council seems to be almost necessarily a non-majoritarian system<sup>40</sup>. Put differently, as long as the EU has interwoven competencies and a Council structure as just described (i.e. an executive federalism), the Council has to work on a consensual basis. The consensus mode seems to be both enhanced by and necessary for executive federalism. There are mainly three reasons for this connection:

(1) There is, first of all, the federal heterogeneity of the EU, which seems to simply require an inclusive, consensus-based decision-making method to function as a political system. It has been the great achievement of the theory of consensus democracy to show that culturally, religiously, linguistically or otherwise divided societies developed an original mode of decision-making which enables them to find a peaceful way of dealing with cleavages and conflicts<sup>41</sup>. This

<sup>35</sup> Ipsen, *Europäisches Gemeinschaftsrecht*, § 2/ 44 (Tübingen 1972).

<sup>36</sup> There are different forms of majority votes in the Council, see Westlake, *Council*, pp. 88. As to the impact of the Treaty of Nice on the rules of majority vote (a triple majority) Yataganas, *The Treaty of Nice: The Sharing of Power and the Institutional Balance*, Jean Monnet Working Paper 1/2001 (<http://www.jeanmonnetprogram.org/papers/01/010101.html>), chap. B.1; Bradley, *Institutional Design in the Treaty of Nice*, *CML Rev.* 38 (2001), pp. 1107-1113.

<sup>37</sup> Thus referring to the name of the EC as first and most integrated or supranational pillar of the Union, Wallace & Renshaw, *Council*, pp. 254; a detailed account of the methods employed gives Spence, *supra* note 22, pp. 364; an account of early periods of the consensus mode in Krislov, Ehlermann and Weiler, *The Political Organs and the Decision-Making Process in the United States and the European Community* (in: Cappelletti, Seccombe and Weiler (eds.), *Integration through Law*, Vol. 1, Book 2, Baden-Baden 1986), pp. 37-50.

<sup>38</sup> C. f. Arts. 5 and 6 Rules of Procedure of the Council which proscribe that the meetings are closed to the public and that participants have to stay silent about the content of the negotiations, c.f. Westlake, *Council*, pp. 146; Sobotta, *Transparenz in den Rechtsetzungsverfahren der EU* (Baden-Baden 2001), pp. 63.

<sup>39</sup> Actually, these two are intertwined: decision-making in consensus is facilitated by the possibility of a dispute-settling majority decision. This has been called decision-making “under the shadow of the vote” (Weiler, *The transformation of Europe* (in: Weiler, *The Constitution of Europe*, Cambridge 1999), pp. 72); also Hartley, *The Foundations of European Community Law* (4<sup>th</sup> ed., Oxford 1998), pp. 19.

<sup>40</sup> Similar Dehousse, *supra* note 8, p. 125.

<sup>41</sup> This has been mainly the achievement of two comparative researchers, the Dutchman Arend Lijphart (*The Politics of Accommodation. Pluralism and Democracy in the Netherlands*, 1968) and the German Gerhard Lehmbruch

method is based generally on inclusion, i.e. on consensus and compromise in decision-making and on the proportionate accommodation of all parties in responsible offices of government. Thus, it forms a contrast to competition and exclusion, which shape systems organized by majority rule.

It needs no further explication, that the EU is a deeply plural and heterogeneous mix of cultures, languages, religions, simply: quite proud nations. Thus, the mere fact of the existence of these cleavages in the EU makes a consensus method (at least to a certain extent) necessary<sup>42</sup>.

(2) If consensus method in the Council is required by the diversity of interests, it is facilitated, on the other side, by the similarity of the Council's members. As described above, negotiations in the Council are mostly a deliberation of national and supranational civil servants. Despite linguistic, political or other differences, these civil servants very often share a common education (law, political science), a common professional background (national administrations) and grow closer over their ongoing contact. It is this common habit that creates a certain Club spirit, as it is called (or *Esprit du Corps* or *Fachbruderschaft*) that facilitates compromise and consensus<sup>43</sup>.

(3) Finally, a third point explains why the consensus method is entrenched in the structure of executive federalism. That is the issue of implementation. It is an obvious observation, that a solution is more acceptable, if the different parties agree on it. In the EU, as we saw, the implementation of EU norms rests on the member states, their legislatures as well as their bureaucracies. Thus, to return to our example, the EC regulation on waste shipment will have a greater chance of being properly implemented by the national bureaucracies, if it was decided in consensus<sup>44</sup>. The consensual method enhances the implementation and thus the efficiency of European law<sup>45</sup>.

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(Proportordemokratie. Politisches System und politische Kultur in der Schweiz und in Österreich, Tübingen 1967). The story of these two researchers who almost simultaneously discovered a different way of decision-making in divided or federal societies is per se remarkable. Even more remarkable is the fact that the laurels for this achievement seem to go nearly exclusively to one of them (Lijphart). C.f. their own accounts in Daalder (ed.), *Comparative European Politics* (London 1997), pp. 197-199, 248-250.

<sup>42</sup> It might be added, though, that this method often prevails even for long times after these cleavages are gone. The best example is the Federal Republic of Germany. Although formally still a federal state, the homogeneity of culture, wealth, religions and otherwise is very high, yet the consensus method which has a long tradition is still highly venerable (see Abromeit, *Der verkappte Einheitsstaat* (Opladen 1992); Elazar, *supra* note 4, p. 66).

<sup>43</sup> The master in the studies of bureaucracies, Max Weber, has called this phenomenon of colleagues interacting and making deals "*Kompromisskollegialität*", Weber, *Wirtschaft und Gesellschaft*, p. 164 (5<sup>th</sup> ed., Tübingen 1972). See Wessels, *Die Öffnung des Staates*, (Opladen 2000) pp. 224; Siedentopf & Hausschild, *Europäische Integration und die öffentliche Verwaltung der Mitgliedstaaten*, *Die Öffentlich Verwaltung* 1990, p. 449; also Chrysoochou, *The Consociational Dimension of European Integration* (Athens 1994), p. 26.

<sup>44</sup> Schwarze et al., *Die Implementation von Gemeinschaftsrecht* (Baden-Baden 1993), pp. 13; Krislov et al., *supra* note 37, p. 63; Nugent, *The Government and Politics of the European Community* (3<sup>rd</sup> ed., London 1994), pp. 145.

<sup>45</sup> The notion of implementation should be clarified here because it has a broader meaning in the European context than perhaps in a regular national one. The implementation of EU law does not only cover the actual adjudication of EU regulations or decisions by local authorities. Implementation also and especially covers legislative actions taken by the Member States to adjust the European laws to the respective national system; this applies not only to directives but also to regulations (see Lenaerts & Nuffel, *Constitutional Law of the European Union* (London 1999), par. 11-042). It follows from this aspect that the national civil servants who are travelling to Bruxelles to cooperate in the Working Groups are only exceptionally civil servants who actually adjudicate a rule but mostly those who are responsible for drafting the implementing legislation in their national systems (I thank Jürgen Bast for this insight). However, the system of executive federalism and the involvement of member state bureaucrats in the drafting and making of supranational law is still crucially depending on these national actors since they bring along the precise knowledge about the functioning and problems of their respective system. This point is made especially clear by Helen Wallace (Wallace, *The Institutions of the EU* (W. Wallace & H. Wallace (eds.), *Policy-Making in the EU* (3<sup>rd</sup> ed. Oxford 1996), p. 59).

With regard to these observations, the consensus method can be regarded as a third complementary element of executive federalism, as such being not only existent but being necessarily evolving (and remaining) in this setting of executive federalism.

This point can be taken even further. The EU can be characterized generally as a consensus democracy<sup>46</sup>. Of course, as always in social science, there are several approaches to define what a consensus (or consociational<sup>47</sup>) democracy entails. Already the two founders of consensus theory, Lijphart and Lehmbruch, differ partly in their approaches. Lijphart uses a set of institutional and legal patterns to determine whether a polity qualifies as consensus model<sup>48</sup>. Lehmbruch is more focused on the specific form of conflict regulation, exemplified best in the institute of the *amicabilis compositio*, and the proportionate accommodation of groups in public offices<sup>49</sup>. Whatever approach is chosen, the baseline is that the model of consensus democracy is an inclusive system based on non-majoritarian and consensual decision-making<sup>50</sup>.

Looking now at the EU, the consensus method is prominent in all layers and forms of Council decision-making. Even the most important version of the majority rule in the Council, the qualified majority, is a highly sophisticated super-majority which could in fact be classified already as a consensus<sup>51</sup>. But what's more important: the method in the Council has a spill-over effect on decision-making procedures in other organs as well, even and especially in the EP<sup>52</sup>. It is for this effect<sup>53</sup>, that the system of executive federalism and the EU can be qualified as consensus democracy.

Yet, it was none other than Joseph Weiler who argued that the EU has three different modes of governance and decision-making, best characterized thus by three different models of democracy. The consociational method, so he argues, is confined to the intergovernmental layer of the European polity, whereas the supranational layer of governance follows a Schumpeterian model of competitive elitism and the infranational level is democratically characterized by a neo-corporatist, or in more recent terminology: deliberative mode<sup>54</sup>. This idea of a trilogy of

<sup>46</sup> Lijphart, *Patterns of democracy. Government Forms and Performance in thirty-six countries* (New Haven 1999), pp. 42-47; Chrysochoou, *The Consociational dimension of European Integration* (Athens 1994); Kohler-Koch, *The Evolution and Transformation of European Governance* (Vienna 1998), p. 12.

<sup>47</sup> These two terms are used synonymously. Thinking of all struggling non-native speakers (like me), I prefer the easier term of consensus democracy.

<sup>48</sup> He employs altogether nine parameters, ranging from executive power-sharing in broad coalition cabinets or strong bicameralism over multi-party systems and proportional representation to independent counterweights like judicial review or central banks (c.f. Lijphart, *supra* note 46, pp. 34-41).

<sup>49</sup> C.f. Lehmbruch, *Konkordanzdemokratie* (in: M. Schmidt (ed.), *Die westlichen Länder. Lexikon der Politik* Vol. 3, München 1992), pp. 206-211.

<sup>50</sup> This is also the approach of Dimitris Chrysochoou who prominently applied consociational theory to European integration and focused (like Lehmbruch) more on cooperative subcultures achieving a balance of advantages and costs through the principle of consensuality (Chrysochoou, *supra* note 46, p. 5).

<sup>51</sup> A qualified majority requires roughly 71 % of the votes in the Council. The Treaty of Nice further burdens the quest for a majority. Then a triply secured majority will be necessary, first of votes, second of population and third of member states, Art. 3 of the Protocoll on the Enlargement (c.f. Yatanagas, *supra* note 36, chap. B.2; Hatje, *Die institutionelle Reform der Europäischen Union, Europarecht* 2001, pp. 158; in broader perspective Wessels, *Nice Results: The Millenium IGC in the EU's evolution*, JCM St 39 (2001), pp. 197).

<sup>52</sup> See *infra* Part IV B 3 b.

<sup>53</sup> And we could add another aspect, which is important in the consensus model, that is the proportionate accommodation of offices. Looking at the EU again, it is not difficult to find also this principle applied to most European organs, including the composition of the Commission and of the Council (c.f. Lijphart, *supra* note 46, p. 42)

<sup>54</sup> Weiler, *supra* note 3, pp. 17-22..

democratic models is a highly intriguing approach since it liberates the discussion from an often hampering and rather forced attempt to find *the one* fitting label. Instead, it acknowledges differences and their simultaneous existence. However, I want to make two cheeky arguments against Weiler's tryptichon and in favor of one picture, describing the EU generally as a consensus model: First of all, I would claim that there is a strong stream of consensus decision-making even in the EP, which is considered a main actor in the supranational layer of Weiler's trilogy. Weiler ascribes to this layer a Schumpeterian elites model of democracy. Yet I think, it would be too easy to qualify that as Schumpeterian competition of elites, since it is exactly the exchange of elites which is crucial in Schumpeter's (or Weber's)<sup>55</sup> approach but does not take place in the EU. And secondly, I wonder how far apart the in these times fashionable deliberative approach, which Weiler ascribes to the third layer of governance, is from the (admittedly slightly worn off) consensual method<sup>56</sup>. Surely, consensus theory lacks the fancy Habermasian philosophical background. But beyond the fact that there might be different actors (cabinet members here, civil servants and lobbies there) is the cooperative search for compromise that much different from the (presumably) free deliberation of equals?

### **B. Comparative coda: systemic coherence and institutional dynamic of executive federalism, lessons from the German experience**

In sum, the concept of executive federalism is an institutional setting with three characteristic elements: a structure of interwoven competencies between the federal layers, a Council as federal chamber and institutional core, harboring the necessary processes of cooperation and, thirdly, a consensus method facilitating the accommodation of the diverse interests. Overlooking these elements, the comparativistically instructed reader might spontaneously be reminded of the German system of federalism. In fact, it is fascinating to notice that these elements are not unique to the EU but resemble not only partly national forms of federalism<sup>57</sup>, but are very similar to the federal structure in Germany<sup>58</sup>:

The German system is based on the same sort of interwoven competencies (Art. 30, 83 Grundgesetz), knitting together the two federal layers. The Bundesrat as a federal chamber is to its very details of organization and structure like the Council<sup>59</sup>. And we even find the consensus

<sup>55</sup> Schumpeter, *Capitalism, Socialism and Democracy* (3<sup>rd</sup> ed., New York), pp. 269, esp. 272; C.f. Weale, *Democracy* (New York 1999), pp. 34, 98; Held, *Models of Democracy* (Stanford 1987), pp. 164.

<sup>56</sup> Weiler, *supra* note 3, pp. 21/22. As to this approach see Eriksen & Fossum (eds.), *Democracy in the European Union. Integration through deliberation?* (London 2000); Curtin, *Postnational Democracy* (The Hague 1997), pp. 53-59.

<sup>57</sup> Smiley, *Canada in Question: Federalism in the Eighties* (3<sup>rd</sup> ed., Toronto 1980).

<sup>58</sup> As to the German system see most comprehensively Rudolf, *Kooperation im Bundesstaat* (in: Isensee & Kirchhof (eds.), *Handbuch des Staatsrechts*, Vol. IV, Heidelberg 1990); already a classic Hesse, *Unitarischer Bundesstaat* (Karlsruhe 1962); in a comparative perspective Frowein, *Integration and the federal experience in Germany and Switzerland*, (in: Cappelletti, Seccombe and Weiler (eds.), *Integration through Law*, Vol. 1, Book 1, Baden-Baden 1986) pp. 573.

<sup>59</sup> M.R. Lepsius, *Nationalstaat oder Nationalitätenstaat als Modell für die Weiterentwicklung der Europäischen Union?* (in: Wildenman (ed.), *Staatswerdung Europas?*, Baden-Baden 1991), pp. 20; Oeter, *Souveränität und Demokratie als Problem der 'Verfassungsentwicklung' der Europäischen Union*, *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 1995, pp. 688; extensively in Dann, *Parlamente im Exekutivföderalismus* (forthcoming 2002), pp. 33.

It should be added that I do not intend to simply equate Bundesrat and Council of Ministers. The German Bundesrat has, of course, a less central position in the German institutional system and with regard to lawmaking than the

method as dominant decision-making mode there<sup>60</sup>. Thus, in a fascinating way the German system echoes the features just described in the EU<sup>61</sup>.

It is from this comparative perspective now that the coherent nature of the concept of executive federalism and its inherent institutional dynamic become especially apparent. Comparing these two systems, we realize that these elements of executive federalism are not unique to the EU or due to its intergovernmental structure but form an ideal type of federalism in the Weberian sense that can be contrasted to other federal structures<sup>62</sup>. Its elements are deeply interlocked, condition each other and, what becomes most important, trigger a specific institutional dynamic<sup>63</sup>. The interwoven structure of competencies not only entails, but demands enhanced cooperation between the layers of the federal system. Weaving together legislation and implementation, this structure also demands the prominence of executive actors in the law-making procedure of the federal level since only the bureaucracy of the sub-level has the knowledge, resources and power to render the common legislation workable. Looking at the diversity of interests and the peculiarity of harmonizing the legal system, it finally becomes quite obvious that only a consensus method can render this intertwined and cooperative system workable and produce results, turning the whole system into a consociational system of governance. It is this logic that we find in the European just as well as in the German system<sup>64</sup>.

Pondering on this analogy, we can now imagine why this structure is highly important for the functioning of parliamentary democracy. This is so quite generally in two ways: first of all, the coherence of the system entails that single aspects of it (transparency of the Council, for example) are not easily changeable. And secondly, since they are so deeply embedded in the institutional and even sociological structure of the EU, new institutions (as the parliaments in the EU system still are) have to somehow fit into the pre-existing logic. This means especially, that parliaments have to fit into the consensual mode of institutional communication.

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Council and is also much more than the Council dominated by party politics. However, the similarities are striking and especially the domination of party politics in the Bundesrat should not be overstated (see esp. the literature in the following footnote).

<sup>60</sup> Herzog, *Stellung des Bundesrates im demokratischen Bundesstaat* (in: Isenses & Kirchhof, *Handbuch des Staatsrechts*, Vol. II, Heidelberg 1987), § 44, par. 48; still riveting Neunreither, *Der Bundesrat zwischen Politik und Verwaltung* (Heidelberg 1959).

<sup>61</sup> This comparison has been drawn before, see Scharpf, *Joint-decision trap: Lessons from German Federalism and European Integration*, *Public Administration* 1988, p. 239-268; Lenaerts, *supra* note 14, p. 203; most often, naturally, in the German literature, see especially Everling, *Zur föderalen Struktur der Europäischen Gemeinschaft* (in: Haylbrunner (ed.), *Festschrift für Karl Doehring*, Berlin 1989), pp. 179;

This similarity might not be such a surprise, considering the roots of the German system. They reach back to Bismarck's foundation of the German Reich in 1866/71. Bismarck's motives at that time were mainly twofold: First of all, he aimed to preserve the sovereignty of the (mostly monarchical) states joining the new Bund. But secondly he had clearly anti-parliamentarian interests. The creation especially of the Bundesrat, which is structurally identical to the Council, was intended to impede the parliamentarization of the Reich.

The historical continuities in the German federalism since the Reich of 1871 have nowhere been better described as in Lehbruch, *supra* note 12; also Boldt, *Federalism in Germany* (in: Jarvad (ed.), *The Diversity of Federalism*, 1994), pp. 9-38; as to the similarity between the Bundesrat of the Reich and the Council of the EU Oeter, *supra* note 59, pp. 659.

<sup>62</sup> Schultze, *Stichwort Föderalismus* (in: Nohlen (ed.), *Wörterbuch Staat und Politik*, Zürich 1991), pp. 139.

<sup>63</sup> This understanding of (executive) federalism as triggering a certain institutional dynamic, or even logic is also expressed by Lenaerts & Verhoeven, *CML Rev.* 37 (2000), pp. 681, or Dehousse, *supra* note 8, p. 129. Also Chryssochou, *supra* note 46, p. 26.

<sup>64</sup> In the German literature it has been conceived differently, partly positive (esp. Hesse, *Unitarischer Bundesstaat*, Karlsruhe 1962), more often though negative (esp. Scharpf et al., *Politikverflechtungstheorie*, Königsstein 1976).



It is also in this respect that the German example might help to identify recurring problems of parliaments in the structure of executive federalism. Most obvious are the problems of member state parliaments in that system. We will examine those now.

### III. The Dilemma of National Parliaments in the EU

National parliaments are supposed to infuse democratic legitimacy to European governance by controlling the national governments as they are acting in the Council of Ministers. They are also considered to be the sovereign actors in constitutional matters as ratifying treaty reforms or the accession of new members, in theory<sup>65</sup>. But in practice their supposed influence is dramatically undercut. Although this is well-known, it is much less well-explained. Building on the structure and institutional logic of executive federalism in the EU, I will argue that it is this structure which explains most coherently and comprehensively their problems and the underlying dilemma.

After a brief overview of the NP's role in the EU system, I will therefore concentrate on describing why the federal logic impedes the NP from effectively controlling their governments and – inferring from that analysis – why only a fundamental change of the federal system would alter their situation.

#### A. A brief overview: The NP's involvement in EU affairs on the European and national level

There is not enough space here to describe the role formally ascribed to the member state parliaments. Also, this has been done elsewhere in length and in a critical manner<sup>66</sup>. Yet, two short remarks shall characterize their formal position, considered on a European and a national level:

(1) NP are only at the very outset part of the Union's legal and political system and its decision-making procedures<sup>67</sup>. They are neither organs of the Union nor mentioned in the core treaties. Only in a declaration added to the Treaty of Maastricht, and in Protocol No. 23 of the Treaty of Amsterdam does their role seem to have been discovered more than firmly acknowledged. The Amsterdam Protocol basically obliges the Commission to hand over information to the NP. Also,

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<sup>65</sup> This approach influenced deeply the case-law of the German Constitutional Court (Maastricht decision, in: *Entscheidungen des Bundesverfassungsgerichts* Vol. 89, pp. 155). It has been spelled out comprehensively by Kaufmann, *supra* note 1, pp. 337-403.

<sup>66</sup> As a short selection: Pernice, *The Role of National Parliaments in the EU* (Working Paper Walter-Hallstein Institut No. 5/2001, <http://www.whi-berlin.de/>); Einvind Smith (ed.), *National Parliaments as cornerstones of European Integration*, 1996; Philip Norton, *Where to from here?*, pp. 209-222 (in: Craig & Harlow, *Lawmaking*); Weber-Panariello, *Nationale Parlamente in der Europäischen Union* (Baden-Baden 1998); Lenaerts & Nuffel, *supra* note 45, par. 8-005 / 009. A more optimistic account gives David Judge, *Western European Politics* 1995, pp. 79-100.

<sup>67</sup> Smismans, *The Role of National Parliaments in the European Decision-making Process: addressing the problem at the European Level?*, *ELSA SPELL* 1998, pp. 49-76; Zuleeg, *National parliamentary control and European Integration* (in: Heukels et al (eds.), *The European Union after Amsterdam*, 1998), pp. 295.

it encourages the cooperation of the NP in the COSAC<sup>68</sup> and grants it the possibility to submitting opinions. Yet, these rules are weak and without binding force<sup>69</sup>.

A more substantial role is played by the NP in constitutional matters such as treaty reform, Art. 48 TEU, or the accession of new member states, Art. 49 TEU<sup>70</sup>. But practically, this is not a very influential position, since they are confronted with a take-it-or-leave-it decision with only minor informal involvement during treaty negotiations and Intergovernmental Conferences (IGCs). Criticizing or even obstructing the government's agreement in the IGC, when it is voted on in the NP, also runs counter to the logic of parliamentary systems in most member states. Another role for the NP could be seen in the implementation of EU directives. But beyond the fact, that directives are mostly so detailed that they leave little room for national influence, this task is in most member states ascribed to the government<sup>71</sup>.

(2) National parliamentary control of European affairs has instead been dealt with primarily in national constitutional or specific parliamentary law<sup>72</sup>, both in procedural and in organizational ways<sup>73</sup>. In procedural perspective, the parliaments have set up regimes to obtain information about European affairs in due time and make their governments report about them. They also partly created systems to bind their governments on prior parliamentary approval<sup>74</sup>. On an organizational level, all EU member state parliaments have created committees on European affairs<sup>75</sup>. These committees either use the before-mentioned instruments themselves, or they serve as principal interlocutor and organizer for specialized parliamentary committees which from time to time deal with European matters.

The committees on European affairs together form the COSAC which is an increasingly active meeting point of national parliamentarians. Convening twice a year, it is used to exchange experiences and to promote the case of national parliaments in treaty reforms<sup>76</sup>.

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<sup>68</sup> This the handy French acronym for Conference des Organes spécialisés sur les affaires communautaires, which is the conference of committees in the NP specialized on European affairs. See generally Neunreither, *The democratic deficit: Towards closer cooperation between the European Parliament and the national parliaments*, Government and Opposition 29 (1994), pp. 299; also Pöhle, *Das Demokratiedefizit der Europäischen Union und die nationalen Parlamente*, Zeitschrift für Parlamentsfragen 1998, pp. 77.

<sup>69</sup> Smismans, *supra* note 67, p. 72; Dehousse, *supra* note 3, pp. 595, 607.

<sup>70</sup> "The amendments (to the treaty, P.D.) shall enter into force after being ratified by all the Member States in accordance with their respective constitutional requirements," Art. 48 pr. 3 TEU; "This agreement shall be submitted for ratification by all the contracting states in accordance with their respective constitutional requirements," Art. 49 TEU. As apparent, these provisions do not explicitly mention the parliaments but it is nevertheless the national parliaments which have to act to fulfil "the respective constitutional requirements".

<sup>71</sup> Lenaerts & Nuffel, *supra* note 45, par. 8-010.

<sup>72</sup> Pernice, *Multilevel Constitutionalism and the Treaty of Amsterdam*, CML Rev. 36 (1999), pp. 711.

<sup>73</sup> The 1990s have seen an immensely grown awareness of national parliamentarians about European affairs. Whereas before the treaty of Maastricht only a vanguard especially of the 1972 members (UK, Ireland and Denmark) had installed parliamentary scrutiny systems, in the 1990s all other parliaments caught up and created mainly similar systems. Thus, the similarity of national systems throughout the EU is a quite striking and definitely helpful aspect (Weber-Panariello, *supra* note 66, p. 306).

<sup>74</sup> Most prominent is perhaps the British system of scrutiny, c.f. Birkinshaw & Ashiagbor, *National Participation in Community Affairs: Democracy, the UK Parliament and the EU*, CML Rev. 33 (1996), pp. 499-529. Most eager is definitely the Austrian provision Griller, *Zur demokratischen Legitimation der Rechtsetzung in der EU*, JRP 1995, p. 167; Fitzmaurice, *National parliamentary control* (in: Westlake, Council), pp. 340.

<sup>75</sup> Most prominent in this respect is the Danish parliament, the Folketing, see Jarvard, *The Committee of European Affairs of the Danish Parliament (Folketing)*, (in: Craig & Harlow, *Lawmaking* (*supra* note 3), pp. 223-235; Arter, *The Folketing and Denmark's 'European Policy': The Case of an 'Authorizing Assembly'?*, *Journal of Legislative Studies* 60 (1995), pp. 110.

<sup>76</sup> Informative (next to the sources cited above, *supra* note 68) is also its website <http://www.cosac.org>.

## **B. Hunting the hedgehog, or: Why the logic of executive federalism hinders the national parliaments from being democratically effective**

Despite these efforts of NP to get involved, the structure of executive federalism seems to undercut their ability to effectively control their governments and thereby contribute to the parliamentary legitimacy of European governance. There are four major problems that arise from the federal structure:

(1) First and most fundamentally, this structure renders the member state parliaments mediated actors in European affairs. It is not national parliaments but national governments that are involved in the regular procedures of supranational lawmaking. And what's worse: seen through the lens of executive federalism, it makes perfect sense to organize it this way. Through this lens we see interwoven competencies which demand actors in the lawmaking process that can provide the administrative knowledge, the bureaucratic resources and finally the political thrust to negotiate and to enforce a supranational law. Thus, it makes perfect sense to involve the member state governments and their bureaucracies since they are the ones who finally have to implement the supranational law<sup>77</sup>.

In consequence, NP have to watch European procedures from the outside. Even if the Commission and the respective government provide them with information in due time, they are not at the negotiating table and thus lack detailed insight information and closeness<sup>78</sup>. Also, the timetable of European lawmaking is not geared towards the working rhythm of NPs. Very often, therefore, they miss crucial aspects or are still fighting with a bulk of information instead of deciding<sup>79</sup>. And finally: often national parliamentarians lack in-depth expertise on European matters, knowing and seeing only their national system and being much less informed about the workings of other systems. Bureaucrats, on the other side, often work much longer and are more focused in one specific area, and are therefore able to acquire greater expertise<sup>80</sup>.

Thus, the mediation of national parliaments in European affairs, which follows from the structure of executive federalism, dramatically increases their problems in performing an informed and timely control of their respective governments.

(2) Executive federalism also entails especially complex lawmaking procedures, characterized by intensive inter-institutional communication. These aspects aggravate the basic problems of national parliaments, such as the just described lack of information, time pressure and missing expertise. As shown above, the preparation of supranational law in a system of interwoven competencies requires intense negotiations between the fifteen member states and between the Commission, the Council, and to a growing extent also the EP. Due to this specific structure these negotiations often take place in informal meetings, arranged at short-notice and without any formalized or published documents at hand. Besides, fundamental positioning is often done in very early stages of negotiations and especially with regard to these early, more-whispered-

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<sup>77</sup> As to the notion of implementation in the EU, covering the adjudication but also and especially the implementing legislation of the Member States, see above FN 45.

<sup>78</sup> These problems have been described most profoundly by Andrew Moravcsik, *Why the European Community strengthens the state: domestic politics and international cooperation*, Harvard Working Paper Series No. 52 (1994).

<sup>79</sup> Most crucial is therefore what Baroness Serota in the British House of Lords observed: "Timing is the essence of our scrutiny system" (according to Weber-Panariello, *supra* note 66, p. 313).

<sup>80</sup> With empirical material Töller, *Europapolitik im Bundestag* (Frankfurt 1995), pp. 100; as to the exceptional Danish case where highly specialized parliamentarians collaborate with government ministers Fitzmaurice, *supra* note 74, pp. 338.

than-drafted stages, the chances for parliaments to be informed are bleak<sup>81</sup>. These very fluid, flexible and multi-sided negotiations which characterize European lawmaking, are especially difficult to control for outside actors like the NP<sup>82</sup>.

(3) Executive federalism has another problematic consequence, already indicated above: the inter-institutional and multi-sided decision-making process is often based on confidential negotiations between governments and bureaucracies. It is quite obvious that this poses another major problem for control through the NP<sup>83</sup>. Again, this confidentiality is not just a nasty trick of governments but a necessary ingredient of the institutional setting in executive federalism. Especially Lehbruch's works on consensus democracy have demonstrated, how compromise and consensus are based not only on mutual trust but on the freedom of the actors to strike deals and not being too confined by the constant control of their constituencies<sup>84</sup>. Thus, the urge of parliaments to publicly discuss and control collides with the confidentiality of EU negotiations.

(4) And finally, executive federalism works to a great extent by consensus. This aspect adds another two problems for national parliamentary control.

First of all, the consensus method is based on fairly unbound actors. In order to reach agreements, every party has to be free to make a compromise, to give up on certain aspects or to combine aspects in a package deal. If consensus is to work, then parties cannot be bound to an especially rigid mandate from their constituency. This applies also to governments in the Council. Now, parliaments, on the other side, will aim to give a mandate or set more or less stringent margins for their governments in order to actually influence the behavior in negotiations. Otherwise, they would just listen and agree. Thus, parliamentary mandates collide with governmental freedom to negotiate.

Secondly and more fundamentally, consensus is based on compromise, on combining different approaches. Compromises thus are gray, they are neither of two clear cut options but their gray middle. The logic of parliamentary politics, on the other side, is based on a majoritarian and mainly binary mode<sup>85</sup>. Parliaments display the contrast of government and opposition, of two contrasting policy options and of winner and loser in concrete votes. Each party in parliament stresses and contrasts its own position against those of other parties. National parliaments, which want to control what their governments do in Bruxelles, have to deal with a lot of consensual gray. This is especially difficult<sup>86</sup>. Consensus mode in the Council collides with the habit of parliamentary contrasting in national parliaments.

In sum, national parliaments trying to control their national governments and especially the thousands of national civil servants who travel to Bruxelles for various Working Group negotiations, are like the fairytale rabbit hunting the hedgehog: whenever the national parliamentarians seem to get a grip on a matter, the multi-layered and multi-faceted Council seems to have already moved to the next stage, presenting an already fixed agreement at the next corner and leaving the national parliamentarians looking on from behind.

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<sup>81</sup> Lenaerts & Nuffel, *supra* note 45, par. 8-007.

<sup>82</sup> Norton, *supra* note 66, p. 220.

<sup>83</sup> See a British and a German voice: Birkinshaw & Ashiagbor, *supra* note 74, , p. 521; Oeter, *supra* note 59, pp. 695, 703.

<sup>84</sup> Lehbruch, *supra* note 12, pp. 19; Miller & Ware, *Journal of Legislative Studies* 1996, p. 186.

<sup>85</sup> See again Dehousse, *supra* note 8, p. 125; Lehbruch, *supra* note 12, pp. 19.

<sup>86</sup> Weber-Panariello, *supra* note 66, p. 310.

### **C. And why only a fundamental change of the federal system would alter the NP's situation**

It could be argued now that if the NP cannot effectively control and thereby legitimize European governance so far, then their means have to be improved. And a lot has been done in the 1990s as parliaments have built up or improved their scrutiny systems and created special committees for European affairs. Also, the EU itself has acknowledged the importance of NPs being involved in European developments<sup>87</sup>. Nevertheless, the business of NPs is still excruciating and laborious, not the effective control envisaged.

To overcome this dilemma, there are mainly three routes along which a qualitative improvement of the involvement of the NPs is discussed today. There is, firstly, the proposal to create a European organ composed of national parliamentarians, be it in form of a re-birth of the pre-1979 EP<sup>88</sup>, be it as a third chamber next to the Council and EP<sup>89</sup>, or be it the replacement of government actors through parliamentarians in the Council when it acts as legislature<sup>90</sup>. All these proposals have in common the goal to end the mediation of the NPs by introducing them directly into the institutional scheme of the EU.

A second path recommended is the strengthening of inter-parliamentary cooperation, especially in the frame of the COSAC. This, so it is argued, would remedy their lack of information or expertise and simply improve their standing in fundamental European matters. Especially scholars, who picture the EU as a form of deliberative democracy have interpreted the COSAC as strong enhancement of parliamentary deliberation<sup>91</sup>.

Finally, there is hope to restore national parliamentary influence in treaty reforms. The NP's position here, as mentioned above, is rather bleak. But the newly created and praised Convention method (as used for the drafting of the Human Rights Charter) seems to promise a greater and in fact serious involvement of national parliamentarians in the constitutional decision-making of the Union. This involvement is sufficient, yes even especially appropriate, so it is argued, because the NP should act only where the fundamentals of European integration (and their supposed sovereignty, I would add) are concerned<sup>92</sup>.

But whatever plan is effectuated, at the end of the day the NPs still face a dilemma: national parliamentary control and the efficiency and already minimal transparency of European procedures contradict each other. The more the rights and instruments of the NP are enhanced, or even a new organ is created, the more the efficiency and transparency of European procedures will be diminished. Especially executive federalism entails an institutional setting in which the

<sup>87</sup> See Norton, *supra* note 66, pp. 209.

<sup>88</sup> That means that the EP would be composed of national parliamentarians who have a double mandate (as it was before the introduction of direct elections in 1979). This is the proposal of the German Foreign minister (speaking as European citizen) Fischer, *Integration* 2000, 154.

<sup>89</sup> Brittan, *Law Making in the European Union*, *Journal of Legislative Studies* 1995, pp. 23; European Constitutional Group, *A Proposal for European Constitution*, p. 8 (c.f. Neunreither, *supra* note 68, p. 307).

<sup>90</sup> Zürn, *Über den Staat und die Demokratie im europäischen Mehrebenensystem*, *Politische Vierteljahresschrift* 37 (1996), pp. 50-52; similar Pernice, *Maastricht, Staat und Demokratie*, *Die Verwaltung* 1993, p. 468.

<sup>91</sup> See Blichner, *The anonymous hand of public reason: interparliamentary discourse and the quest for legitimacy* (in: Eriksen & Fossum (eds.), *supra* note 56), pp. 141.

<sup>92</sup> For a discussion of this new method and the NP's role see below IV B 3 c).

national governments are deeply involved in the making and implementation of European laws, thus the simple strengthening of instruments of the NP is not a sufficient solution.

From this assumption an even more fundamental problem follows: It has been said that the features of executive federalism form a coherent system, creating their own institutional dynamic. Since a greater involvement of the NP collides with this very logic, it follows that only a fundamental change of this system could solve the dilemma of NP. But such a change would have to start with decartelizing the interwoven competencies because this is the basis of the system and the starting point for its institutional dynamic. Thus, perhaps only a kind of dual federalism, as known from early American federalism, could soften the logic.

But if the position of NP can be helped only if the structure of interwoven competencies is changed, then the prospects are really bleak. Despite all vigorous debate about the division of competencies in the EU and between EU and member states, such a proposal has never been made and, for various reasons, would be without too much of a chance of success<sup>93</sup>.

#### **IV. The Option of the EP as controlling parliament**

Looking now at the EP through the lens of executive federalism presents a different picture. While the NP are enmeshed in the institutional logic of executive federalism and are hardly able to contribute to the legitimacy of European governance, the EP seems to profit from the institutional setting. This thesis follows from a new approach to the analysis of this parliament. Taking into account the federally shaped institutional frame and comparing the EP to different types of parliaments, this paper will conceptualize the EP as a ‘controlling parliament’, inspired by a comparison with the US Congress<sup>94</sup>. It is the attempt to think outside the box of European parliamentary systems, which somehow seems to transcend all analyses of parliamentary system in the EU to this point. Instead, this paper dwells on the model of legislatures in non-parliamentary systems.

Reconsidering the EP as parliament in an executive federalism will take two steps. The first step will lay out considerations that lead to the new matrix for the analysis of the EP. The second part will then apply the matrix and examine the powers of the EP, thereby spelling out how it can be understood as controlling parliament.

##### **A. Drawing a comparative framework for the analysis of the EP**

The analysis of the EP in the context of executive federalism is based on two considerations. The first one employs a comparison between the European and the US American constitutional

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<sup>93</sup> Pernice, Rethinking the Methods of Dividing and Controlling the Powers of the Union, Walter-Hallstein Institut Working Paper 6/2001; v. Bogdandy & Bast, Die vertikale Kompetenzordnung der Europäischen Union, Europäische Grundrechte Zeitschrift 2001, pp. 441-458.

<sup>94</sup> It is surprising how little this comparison has been used so far. Even where the comparative effort has been made, the research often lacks the thrust or distance to draw systematic conclusions. As exceptions see Shapiro, The Politics of information: US Congress and EP (in: Craig & Harlow, Lawmaking), pp. 187-208; more eclectically Corbett et al., The European Parliament (4<sup>th</sup> ed., London 2000), pp. 7, 213 [hereinafter: Corbett et al, Parliament]; early steps in Grabitz, Wessels et al., Demokratisierung und Direktwahl (Bonn 1989), pp. 52-54.

system, concerning the relation between institutions and its consequences for the position of parliaments.

1. Executive federalism and the system of separated institutions sharing powers

It is an almost proverbial characteristic of the US Constitution to be based on a separation of powers principle<sup>95</sup>. Yet, it is nearly equally well-known that this is only half of the truth. As the doyen of American political science, Richard E. Neustadt, noted long ago, the American system is rather a system of 'separated institutions sharing powers' than a system of separated powers<sup>96</sup>. It would be a rather steep uphill battle to argue that the European constitutional system follows a principle of separated powers - quite the opposite<sup>97</sup>. But instead, the EU can quite precisely be described along Neustadt's dictum. The European institutions are deeply intertwined when using their powers but accurately separated with respect to their election, their respective source of legitimacy and their personnel: Whereas the EP is based on the peoples of the EU and direct European elections (Art. 190 TEC), the Council is based on national governments and their respective national elections (Art. 203 TEC). The Commission is based on both strands together (Art. 214 TEC)<sup>98</sup>. The membership in all of these institutions is mutually exclusive. Although of course different in many other respects, in this structure the EU resembles the US Constitution where both Houses of Congress and the President are also based on different sources, elected by individual procedures and personally separated institutions<sup>99</sup>.

What links this observation to the foregoing analysis is the fact that in the EU this structure is grounded in the system of executive federalism. It is especially the Council as institutional core of this federal system which has a unique and separated procedure of election. It is furthermore the Council's influence on the appointment of the Commission that impedes most fundamentally a unitary system and a close fusion between Commission and EP<sup>100</sup>. Hence it is the executive federalism in the EU which entails this system of separated institutions sharing powers.

Turning now to the position of parliaments in such systems, this structure has an immense influence on the inter-institutional position as well as the powers and working methods of Congress in the US system. Especially in comparison to legislatures in unitary systems where the

<sup>95</sup> The Federalist Papers No. 47 (Madison); the US Supreme Court in concurring opinion per Frankfurter, in *Youngstown Sheet & Tube Company v. Sawyer (Steel Seizure Case)*, 343 U.S. 579, 593 (1952).

<sup>96</sup> Richard E. Neustadt, *Presidential power and the modern presidents* (New York 1990 (1959)), p. 29.

<sup>97</sup> Lenaerts, *Some Reflections on the Separation of Powers in the European Community*, CML Rev. 28 (1991), pp. 13.

<sup>98</sup> This point has to be clarified since the law will change considerably between the current situation and the one which will be in effect with the Treaty of Nice and which has been used here already. Under the Treaty of Amsterdam, it is not the Council but the governments of the Member States who nominate and appoint the members of the Commission. When the Treaty of Nice will take effect, however, it will be the European Council that nominates the President of the Commission and the Council that finally appoints the whole Commission.

As to the changes through the Treaty of Nice see Hatje, *supra* note 51, pp. 153. As to the general institutional setting and the interplay of institutions, see Lenaerts, *ibid.* Also: De Burca, *The institutional development of the EU: A constitutional Analysis* (in: Craig & De Burca (eds.), *The Evolution of EU Law*, Oxford 1999), pp. 55.

<sup>99</sup> C.f. Art. I Sec. 2-4, II Sec. 1, Par. 2 US Constitution. As to the American system as one of separated powers Charles O. Jones, *The Constitutional Balance*, pp. 3 (in: *Separate but Equal Branches*, Chatham, N.J. 1995). Also Louis Fisher, *The Politics of Shared Powers* (Texas A&M University Press 1998).

Generally to the separation between executive and legislative branch as defining aspect of a political system Sartori, *supra* note 9, p. 84.

<sup>100</sup> More to that point *infra* Part IV B 1 c (1).

majority party in the parliament forms the government, Congress as parliament in a separated setting has genuinely different features.

This observation leads to a quite simple follow-up question: If this separate setting has such an effect on Congress, what effect has it on the EP and how can it be used for its analysis? To discover, how the EP has to be understood as a parliament in a system of separated institutions, will be the exercise in the rest of this paper. This exercise will be instructed, though, by a broader typology of parliaments which shall be developed now in the second consideration<sup>101</sup>.

## 2. Two analytical types of parliaments as comparative matrixes for the EP

Instigated by the comparison with the US Congress, two contrasting ideal types of parliaments can be described which shall serve as comparative matrix for the EP. These two types of parliaments shall be named as *debating parliaments* and *working parliaments*<sup>102</sup>.

### a) The debating parliament

The *debating parliament* is what in continental Europe is often perceived as the ideal parliament: it is centered around its plenary which serves as the forum of the nation and draws its importance from mirroring different opinions in society within the parliament. This type is mostly found in parliamentary systems where the majority party in parliament forms the government, where there is, in the words of Walter Bagehot, a fusion of majority party and government. The political opposition uses the plenary of the parliament to attack the steps of the government as well as to lay out its own proposals. To cut it short: debate is the center of parliamentary life. The British House of Commons is the preeminent example<sup>103</sup>.

### b) The working parliament

The *working parliament*, on the other side, receives its character and power from being fairly separated from the government and from operating as a counter-weight to it. Not the fusion of majority party and government but the institutional combat between legislature and executive

<sup>101</sup> As to the terminology: I will use the term '*parliaments*' although I am aware of the fact that the American term and that used in most of the (American) comparative literature would be that of a '*legislature*'. The term parliament, though, is more rooted in the European language and chosen by the EP as its name, perhaps two arguments that are of dubious validity in a comparative study. Yet, a truly general term would only be the unhandy term 'representative assembly' since the functions and ingredients otherwise differ quite starkly. 'Parliament' therefore seems to be a justified choice.

<sup>102</sup> These specific notions are based on the studies of Max Weber and the comparative research of Winfried Steffani who call them 'Redeparlament' and 'Arbeitsparlament' (Weber, *Parlament und Regierung im neugeordneten Deutschland* (in: Weber, *Gesammelte politische Schriften* (3<sup>rd</sup> ed., Tübingen 1971), p. 350; Steffani, *Amerikanischer Kongreß und Deutscher Bundestag* (in: Steffani, *Parlamentarische und präsidentielle Demokratie*, Opladen 1979), pp. 333). But both types are (with different labels) recurrent models in most of the comparative literature on legislatures. See for example the distinction between 'active' and 'reactive' legislatures in the comprehensive study by Michael L. Mezey (*Comparative Legislatures*, Duke University Press, North Carolina 1979, table 2.1., at p. 36) or especially Nelson Polsby's 'transformative' and 'arena' legislatures in his text "Legislatures" in *Handbook of Political Science* (1975). Emil Hübner and Heinrich Oberreuter in their study "Parlament und Regierung. Ein Vergleich dreier Regierungssysteme" (1977), to name a third comparative study, follow Steffani and Weber in their categories, as they are described here.

These two types have popped up in the literature on European integration (see Lord, *Democracy in the European Union* (Sheffield 1998), p. 65; Corbett et al., *Parliament*, p. 7) but have never been spelled out and systematically used to analyze the EP. This is the aim here.

<sup>103</sup> The classic account of this model is, of course, Walter Bagehot's, *The English Constitution* (Sussex 1997 (1865)).



characterizes the system and thereby the legislature. Moreover, an incompatibility rule, which forbids members of the executive from sitting in the legislature, prevents public debates between government and opposition on the floor. It is more the strong and specialized committees and less the floor which functions as the main locus in working parliaments. These committees acquire expertise and power to control the bureaucracy and heavily shape law making. In sum: Working committees are at the heart of parliamentary life here. The US Congress is the classic example of this type of parliament<sup>104</sup>.

These two types differ remarkably in their use of powers and their organization. They form thus a multi-faceted background to compare the EP with. It should be added and stressed though that these two types are, of course, ideal types, primarily heuristic devices to analyze the EP and to highlight certain features. Even the House of Commons and the US Congress which were mentioned as examples above, are naturally not merely these clear cut models, but are caught here only in a central characteristic.

However, two skeptical questions must arise from these small sketches above. First of all, it might seem as if debating and working parliament are just other terms for parliaments in parliamentary or presidential systems, which might mean that we are using incomparable material for the analysis of the EP. But is it correct to assume an easy equation between parliament model and political system, is a debating parliament necessarily linked to a unitary system and a working parliament conceivable only in a separated system?

I think, this would be too easy an equation. Surely, all parliaments are formed by the political system around them, but not entirely. Two (very brief) examples may demonstrate that every parliament is shaped by different elements: There is first the German parliament, the Bundestag. The German Constitution erects a parliamentary system. But the Bundestag is surely not a plain debating parliament. Instead, its behavior and organization reflects strong federal elements, especially towards the federal chamber, the Bundesrat. Coping with that the German institutional system (a bit like the EU system) is rather a triangle and the Bundestag has sometimes be called a “debating working parliament” - pointing to its hybrid character<sup>105</sup>.

Another hybrid is the French parliament as second example. The French political system is, as is well-known, a semi-presidential system, combining a directly elected president with a parliament-based prime minister in a dual executive<sup>106</sup>. Yet, in a curious way the *Assemblée Nationale* seems to combine the worst of both worlds, being neither a debating parliament, electing the government and drawing public attention to the political debate between government and opposition, nor a working parliament, combating fiercely and often effectively the executive branch. As a legislature in a semi-presidential system, the French parliament lacks influence on lawmaking as well as on the election of the executive branch.

<sup>104</sup> The classic text here is Woodrow Wilson's, *Congressional Government* (Cleveland 1956 (1885)). Both types of parliaments are spelled out in Steffani, *Amerikanischer Kongress und Deutscher Bundestag* (in: Steffani, *Parlamentarische und präsidentielle Demokratie*, Opladen 1979), pp. 327-345.

<sup>105</sup> Steffani, *Parties and Committees in the Bundestag* (in: Thaysen & Davidson & Livingston (eds.), *The US Congress and the German Bundestag*, Boulder 1990), pp. 275-278; also v. Beyme, *The Legislator. German Parliament as a centre of Political Decision-Making* (Aldershot 1998), pp. 69-75, 95-102.

<sup>106</sup> Sartori, *supra* note 9, pp. 121-125; Safran, *The French Polity* (4<sup>th</sup> ed., White Plains 1995), pp. 203-233.

This leads to a second skeptical question of how to evaluate the two types, thus the question of standards. In the abridged form in which they are presented above, both parliamentary types seem to be both, quite rigid and therefore artificial. But both types can be distinguished and described more precisely along a number of formal and empirical standards. These standards will be explained and used in the following paragraphs, where the powers and functions of the EP are examined in comparison with these two types.

### 3. A third type of legislature: the EP as a controlling parliament ?

One more preliminary remark is necessary. In a first glance comparison between the EP and both of these types, it seems that many similarities can be found between the EP and the type of a working parliament. Thus, on this first take, the EP can basically be regarded as a working parliament. Nevertheless, it should already be mentioned here that certain features of it seem to be quite original to the EP. These features justify that we consider a third type, which can be seen as a sub-category of the working parliament. This type shall be named more precisely as a 'controlling parliament'. As such it employs basically the same instruments as a working parliament (such as the US Congress), but its powers are generally more of a negative, controlling and preventing nature than an autonomously creating one. In that respect the term 'controlling parliament' is more appropriate<sup>107</sup>.

#### **B. The EP as controlling parliament, or: Why the EU will not be a parliamentary system but the EP already is a strong parliament**

Having set the frame, it is now time to analyze the EP directly and in that frame. For that purpose, the EP shall be examined along its different powers or functions. Four of them will be discussed here: the elective, the oversight, the lawmaking as well as the representation function<sup>108</sup>. Along each of these four we will compare the EP's use of its powers with the way the two parliamentary types sketched out above use them. Going through one function after another we will spell out the type of a controlling parliament as a distinct sub-category of working parliaments.

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<sup>107</sup> It is in many respects startling, how close the resemblance of the EP to the German Reichstag in the German Reich of 1871 is. On the other side, this is perhaps not too surprising since the German model, erected first in the Reich, is also an executive federalism (see supra Part III C; esp. Boldt, supra note 61).

<sup>108</sup> Grabitz, Wessels et al. (supra note 94) in their comprehensive analysis of the EP after the first direct elections set up a specific set of functions, geared especially towards the EP as an evolving parliament in a dynamic institutional setting. However, fourteen years since the publication of their study have revolutionized the position and design of the EP. It is for this dramatic change that I use here the traditional approach towards parliamentary functions. Today, that is the claim, the EP can be regarded as a complete institution. This does, of course, not imply that further changes are precluded, but they will range within the lines already drawn.

As to the budgetary powers of the EP, which I have to leave out for reasons of space, see Corbett et al., Parliament, pp. 216-232.

## 1. The EP and its elective function: a negative competence

### a) Two types of parliaments in their approach to election and standards of their evaluation

The elective function highlights a first characteristic difference between the two types of parliaments described above. The *working parliament* is not involved in the election of the executive branch; both branches are keenly separated in their way of election and their personnel. On the other side, it is the pivotal right of a *debating parliament* in a unitary system to have the power to elect as well as to censure the government. Moreover, its majority faction is personally merged with the government. Thinking of the US Congress and the House of Commons with respect to their appointment powers easily demonstrates this point<sup>109</sup>.

Yet, the elective function follows not a simple yes-or-no pattern, but has a gradual shape. Three aspects contribute to this function. First and most basically, there is the right to dismiss the government, which has a formal as well as a practical side, since it does not suffice to only formally have the right, but also to have a party system which can bring about the necessary majorities to do it. Secondly, there is the power of parliament to elect the government<sup>110</sup>. Finally, the grade of personal fusion between majority party in parliament and government marks a third difference between both types. This recruitment aspect of the elective function can be evaluated empirically by the number of cabinet members acting also as members of the parliament. It also has a legal side, since in separated systems there often exists a formal incompatibility rule which prohibits a combination of the mandate in the legislature and a seat in the government.

### b) Towards a parliamentary system ?

Looking now at the elective function of the EP along these aspects, it might seem at first sight that the EP is developing into a debating parliament and the EU into a parliamentary system. There is, first of all, the right to censure the Commission that the EP possessed since the inception of the Communities (Art. 144 TEC, old version, now 201). Although often considered as a practically useless ‘nuclear bomb’, in January 1999 the EP actually used this right successfully for the first time when it caused the Santer Commission to resign<sup>111</sup>. Even more importantly, the EP greatly increased its influence on the appointment of the European executive branch, if one regards the Commission as at least a kind of executive of the EU (Art. 214

<sup>109</sup> A comprehensive comparison between the House and Congress is given in Bradshaw & Pring, *Parliament and Congress* (Austin 1972), which will serve here as constant source.

Congress’ impeachment powers, that should be added, are not considered as regular political power of dismissal. Instead, these constitute rather a legal emergency break (see Tribe, *American Constitutional Law*, Vol. One (3<sup>rd</sup> ed., New York 2000), pp. 152).

<sup>110</sup> This power also has a formal and a more political side. In some parliamentary systems, where the government is not formally elected by parliament but appointed by the Head of State (like in the UK or in Germany), it is nevertheless, politically no question that the leader of the majority faction will be the new leader of the government (c.f. Ludger Helms, *Executive Leadership in Parliamentary systems: The British Prime Minister and the German Chancellor compared*, *German Politics* 5 (1996), pp. 101).

<sup>111</sup> It was formally not a vote of the EP which put the Commission out of office but a *Group des Sages* which recommended it, a public outcry which demanded it and finally the deliberate step of the Commission itself. Nevertheless, it was the Parliament which was the driving force behind the whole development (see the precise account given by Ott, *Die Kontrollfunktion des Europäischen Parlaments gegenüber der Kommission*, *Zeus* 1999, pp. 238).

TEC)<sup>112</sup>. During all three of the last treaty revisions, the EP's powers to approve or veto a new Commission or its president have been enhanced considerably.

Thus, looking at the first two standards it can be (and has been) argued that soon the EP will be the decisive actor in appointing the Commission and is moving steadily into a parliamentary direction<sup>113</sup>, even though it might be decorated with some specific, delicately supranational features<sup>114</sup>.

c) Arguments against, inferred from the structure of executive federalism

Nevertheless, this paper argues the other way round. It contends that the parliamentarization of the EU is the most unlikely development, because the institutional structure, rooted mainly in the executive federalism, substantially impedes such a development<sup>115</sup>. Instead, the position (and prospects) of the EP are much better characterized by its primarily negative competence to prevent or chase away a Commission, - a feature which finally leads to a new label for the EU. Four arguments support this position here:

(1) First, it is not only the EP but also the Council that appoints the Commission and even more importantly, the European Council that previously selects and nominates the President of the Commission<sup>116</sup>. This role of the Councils as intergovernmental bodies forms a major and lasting impediment against a parliamentarization. Despite all undisputed progress in the EP's influence on the appointment of the Commission, the European Council is still the dominating because proposing actor in the process. And even if this proposing element would vanish, the formal power to appoint rests with the Council of Ministers and is very unlikely to be given up. Thus, the EP will for the foreseeable future have to share its elective powers.

The Council's influence has been interpreted as based mainly on the intergovernmental nature of the appointment of the Commission<sup>117</sup>. Although that might be true, it fits at the same time quite naturally into the structure of executive federalism where the Council is a central partner of the Commission in lawmaking as well as executive functions.

(2) The parliament's appointment powers suffer another major setback with respect to the Council, this taken now as an object of the appointment powers of the EP. It is the basic idea and rationale of the elective powers to contribute to the accountability of the executive<sup>118</sup>. Now, as

<sup>112</sup> Corbett et al., *Parliament*, pp. 234; Noel, *New Institutional Balance*, pp. 20/21; Westlake, *The European Parliament's emerging powers of appointment*, JCMSt 36 (1998), pp. 431 (who also stresses that the EP enhanced its powers to influence the appointment of members of other institutions, such as the Court of Auditors and the European Central Bank).

<sup>113</sup> Noel, *Reflections on the Maastricht Treaty*, *Government & Opposition*, 27 (1992), pp. 2; Nentwich & Falkner, *The treaty of Amsterdam: Towards an Institutional Balance*, *European Integration online Papers (EIoP)* Vol. 1 (1997), No. 15, p. 4 (<http://eiop.or.at/eiop/texte/1997-015a.htm>); Dehousse, *supra* note 3, pp. 624/625.

<sup>114</sup> This is the approach of the highly interesting article by Paul Magnette (*Appointing and Censuring the European Commission*, *European Law Journal* 7 (2001), pp. 292-310) who interprets the newly developed appointment and censure powers as basically in accordance with a parliamentary model, but also showing some specific intergovernmental and technocratic aspects.

<sup>115</sup> There are various arguments against a parliamentarization of the EU. This paper uses a distinct approach, arguing from a specifically institutional perspective, mainly inferred from the structure of executive federalism. As to other argumentation see for example the very interesting argument that was made by Simon Hix, based on the European party logic (Hix, *Executive Selection in the European Union: Does the Commission President Investiture Procedure Reduce the Democratic Deficit?* *European Integration online Papers (EIoP)* Vol. 1 (1997) No. 21).

<sup>116</sup> C.f. Art. 214 in the version of the Treaty of Nice. See also below FN 98.

<sup>117</sup> Magnette, *supra* note 114, pp. 297/8 (who also stresses that the Council is central as to the actual selection of Commissioners, a stage in the process, in which the EP has almost no influence).

<sup>118</sup> V. Beyme, *Die parlamentarische Demokratie* (Opladen 1999), p. 255 et seq.

described above, the Council forms a part of the Union's dual executive, evolving from the structure of executive federalism<sup>119</sup>. Yet, this part of the executive is beyond the reach of the EP's appointment powers. The Council's composition is not at all influenced by the EP. Therefore, even if the EP had complete appointment and dismissal powers with regard to the Commission, the Council which is neither elected nor dismissable by the EP, would leave a considerable cleavage in these powers<sup>120</sup>.

(3) A third argument against the parliamentarization of the EU and against the EP as a debating parliament derives from the way in which the EP conducts the approval procedure of a new Commission. It would be the 'natural' behavior in a debating parliament that the majority party (or a coalition) would elect the government without further discussion. In the EP, instead, there is no majority which perceives itself as a loyal parliamentarian base of the Commission. What's more, especially in the hearings of the candidates which the EP conducts before it approves of a new Commission, it becomes apparent that the EP regards itself rather as a prickly and critical counter-weight than as a loyal supporter of the Commission<sup>121</sup>.

Paul Magnette has interpreted this aspect as a technocratic (and therefore distinctly European) part of the appointment procedure<sup>122</sup>. Yet, it would be new (and little convincing) to interpret the EP as a technocratic institution of the EU. Instead, this behavior fits perfectly well into the self-understanding of a parliament as institution in the separated system of an executive federalism. The parliament here is not an ally of the government but a separate actor. It cannot autonomously elect and therefore tries to control the Commission. From this perspective, it is not surprising that the role model for the hearings in the EP was the Senate of the US Congress<sup>123</sup>. Here again, we find a system of separated institutions in which the Senate uses its approval competencies to critically check the president's nominees. Both, the EP and the Senate, do not comply to the logic of parliamentary systems but of separated systems.

(4) The final argument against a parliamentary system in the EU concerns the fusion between EP and Commission, or the EP's role as recruitment pool. This has been mentioned as a third indicator for a debating parliament. There is little argument as to the empirical evidence: there is no fusion between both institutions and even the role of *former* Members of the European Parliaments (MEPs) in the Commission is rather minor<sup>124</sup>. Instead, the Commission is composed of politicians who served in national political arenas, be it governments, parliaments or parties. This can be explained with the influence of the intergovernmental bodies (European Council and Council of Ministers) on the appointment process. Since this is composed of members of the national governments, it proposes national politicians<sup>125</sup>.

<sup>119</sup> Above, Part II B 2. Also Lenaerts, *supra* note 97, pp. 17/18.

<sup>120</sup> The NP are, of course, mainly responsible for this kind of parliamentary accountability of the Council. But, first of all, each NP elects and controls only one government, thus the Council as whole is not accountable in the sense that it could be dismissed. And secondly, we have just seen that the NP do not fulfil this role practically, last but not least because European Affairs play only a minor role in national politics (with the exception of the UK). The Council as a supranational organ is therefore not dismissable by any parliament (Part III).

<sup>121</sup> Hix & Lord, *The making of a president, Government and Opposition* 31 (1996), pp. 62; Maurer, *Das Europäische Parlament und das Investiturverfahren der Kommission, Integration* 1995, pp. 88-97.

<sup>122</sup> Magnette, *supra* note 114, p. 298/9.

<sup>123</sup> Maurer, *What next for the European Parliament?* (London 1999), p. 50; as to the American procedure Davidson & Oleszek, *Congress and its members* (6<sup>th</sup> ed., Washington 1998), pp. 148.

<sup>124</sup> Corbett et al., *Parliament*, p. 250; Magnette, *supra* note 114, p. 298.

<sup>125</sup> Magnette, *supra* note 114, pp. 297/8.

Yet, an additional and much simpler explanation has been often overlooked: there is a formal incompatibility rule between a mandate in the EP and a seat in the Commission. Art. 6 I, second indent of the Act concerning the election of the representatives of the Assembly by direct universal suffrage formally prohibits the appointment of MEPs to the Commission<sup>126</sup>. Of course, historically this has a root in the technocratic origins of the Commission. But, with the role of the EP in the EU changing dramatically in the past twenty years, it seems to be better explained today as fitting into the separate system, just as in the US system. Here, there is a divide not between the political parliament and the technocratic Commission but between the legislature and the executive branch of separated institutions.

d) The elective function of a controlling parliament and the problem of accountability

Rebutting the possibility of a parliamentarization of the EU and now returning to the question of which type of parliament the EP represents, it seems evident that the EP does not fit into the category of a debating parliament. Hence it must be a working parliament? Well, there are also certain aspects which distinguish it from a classical working parliament, most of all its negative competence to veto or even dismiss a Commission. From the perspective of comparative studies, this is a crucial difference, changing the balance and dynamics of institutional relations. Therefore it is consequent to argue in a third direction, conceptualizing the EP as a distinct type, which shall be called here as a ‘controlling parliament’. As such it has a crucial power to prevent a Commission, but cannot autonomously elect it. Thus, it functions as a negative force. This power, by the way, makes perfect sense in the specific institutional and political setting of the EU. First of all, possessing this negative competence might ensure at least a basic standards of democratic accountability. More importantly from the perspective of the overall system, an increased influence on the election of the Commission would also require a stable party coalition in the EP to carry this Commission. This is not only very difficult to achieve (or maintain!) but would endanger the federal diversity of the party system in the EP. Thus, the current position of the EP as controlling parliament might not only describe it adequately, but also seems to fit normatively into the broader political system of the EU.

However, this interpretation of the EP’s elective powers is fine but should not obscure a deep flaw in the elective system of executive federalism. This is the question of accountability. It is one of the central principles of democratic government that the people shall have a say in who is governing. Democratic government is self-government or, as Abraham Lincoln put it, “government *of* the people”. But looking at the elective function in the EU, this principle is obviously violated. Here, the executive, located in the Commission and to some extent in the Council, is not elected by the EP but appointed by the EP and the Council together. The Council, on the other side, is composed of national governments, thus elected separately by the respective national parliaments and their elections. In a nutshell: European elections do not result in a certain composition of the executive. There is no direct and clear connection between the European citizen’s right to vote (on the European and on national level) and the governing

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<sup>126</sup> OJ 1976, L-278, p. 5. This provision is backed by Art. 213 II TEC, which does not explicitly mentions an incompatibility but prohibits that “members of the Commission engage in other paid activities” and is interpreted as incompatibility rule (Answer to parliamentary inquiry No. 2752/94 of MEP Hermann, OJ 1994, C-88, p. 38).

personnel<sup>127</sup>. Instead, every vote given is manifold counterbalanced and dispersed by other elections, at other times and in other places. It is a vote without consequences<sup>128</sup>.

But if a parliamentarization is prevented by the structure of executive federalism, as just argued, would then the direct election of the president of the Commission remedy the problem? This can well be argued. Surely, the introduction of a direct election would enhance the transparency of the system and strengthen a clear line of responsibility<sup>129</sup>.

Yet, the problem of accountability in the EU lies deeper. It is rooted in the federally shaped institutional structure which necessarily demands the cooperation between the federal levels and different governments. Even a directly elected president of the Commission would have to bargain and make compromises with the national governments in the Council. It lies in the nature of executive federalism to entail this murky and nontransparent situation. What is a gross violation of democratic principles on one side, turns out to be the life insurance of the federal system on the other side.

The best example for the problem is Germany. There exists a full fledged parliamentary regime with a Chancellor on top who is elected and dismissable by the parliament and who is often in its institutional strength even compared to the British prime minister. Nonetheless, Germany is used to a permanent discussion and dissatisfaction about gridlock and the blockage of necessary reforms, caused by a federal system which is structurally identical to the European one. It was Ernst-Wolfgang Böckenförde, who baptized the awkward and murky situation an 'Allparteienbundesstaat' or all-party-federalism which defies the principle of changing governments and thus accountability<sup>130</sup>.

This comparative hint does not soften the problem, of course, or excuse it. Accountability in executive federalism remains a sad topic. But the comparative note might underline that these problems are due to the very basic structure of executive federalism. The EU will keep these problems, despite all institutional reforms, unless it changes the system of interwoven competencies as its fundament. The problem of accountability and the federal structure of the EU are too deeply intertwined.

The elective powers of the EP, however, make the best of an overall problematic institutional setting. It uses its approval powers to critically scan the prospective commissioners, thereby contributing greatly to the public perception and thus control of the Commission. And its right to censure is at least an emergency break in the event that public distrust soars. The EP as controlling parliament thereby ensures at least a minimum of accountability.

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<sup>127</sup> Weiler, To be a European citizen (in: Weiler, supra note 39), p. 350.

<sup>128</sup> Making this point especially clear Neunreither, Governance without Opposition, Government and Opposition 33 (1998), pp. 419.

<sup>129</sup> Lord, supra note 102, pp. 131.

<sup>130</sup> Böckenförde, Sozialer Bundesstaat und parlamentarische Demokratie (in: Jekewitz (ed.), Politik als gelebte Verfassung. Festschrift für Friedrich Schaefer, Opladen 1980), pp. 188; Moellers, Der parlamentarische Bundesstaat (in: Aulehner (ed.), Föderalismus – Auflösung oder Zukunft der Staatlichkeit?, Stuttgart 1997), pp. 81; as to the relation between Bundestag and Bundesrat also von Beyme, supra note 105, pp. 95-102.

## 2. The EP's oversight function and its internal organization

### a) Again: two types, their approaches and standards of evaluation

Against this background, the oversight or control<sup>131</sup> of the executive, a prominent task of any parliament, becomes an even more important task of the EP. The approaches towards the control function are very different, however, in the two types of parliaments that we use for the analysis of the EP: the *debating parliament* scrutinizes the government foremost in public debate, via question time and interrogation of the government on the floor and in front of TV cameras. The *working parliament* does it more in detailed control of government proposals, exercised by specialized committees, which question, block, and amend<sup>132</sup>. The place of action here is in the committees, not the plenary<sup>133</sup>.

As to the evaluation of both types, again a number of standards have to be employed and again, legal as well as empirical aspects have to be taken into account<sup>134</sup>: a first group of parameters concerns the formal existence of interrogative powers and their empirical use (questions, oral or written; specific use of question time) as well as the use of the plenary as common battle ground for political discussions (evaluated by the number of days or hours, reserved for plenary session in the parliamentary schedule) or as forum for major political announcements. A second aspect having highly crucial importance with regard to the control function (and beyond) is the committee structure of a parliament. Only parliaments with a strong committee structure can use them as means of scrutiny – and thus be working parliaments. Standards of evaluation here are their size and leadership structure, the tenure of their members, or their powers in legislative procedures. Finally, another aspect of parliamentary organization sheds light on the oversight function and that is the staff organization. The staff's number, its degree of specialization, and degree of loyalty contribute significantly to the ability of a parliament to act as a working parliament (or not).

### b) Oversight via public debate ? The debating parliament approach and the EP

Looking at the first group of parameters and first from a formal standpoint, the EP could easily be qualified as a debating parliament. It has the right to interrogate the Commission, orally as well as in written form (Art. 197 III TEC, Art. 42, 44 Rules of Procedure of EP<sup>135</sup>). It can set question times (Art. 43 RoP-EP), in which the Commission has to react on the floor, or it can conduct urgent debates to give the political groups an opportunity to lay out their current positions (Art. 50 RoP-EP). The EP also has the right to discuss reports which are delivered by

<sup>131</sup> I will use the notion of oversight which is more common in the American than in the European literature which uses the term control. I do so mainly to avoid a confusion between the general label 'controlling parliament' which is based on the evaluation of all four functions of the EP, and the specific function of control or oversight.

<sup>132</sup> Exemplifying this Bradshaw & Pring, *supra* note 109, at pp. 355; Löwenberg & Patterson, *Legislatures*, pp. 148.

<sup>133</sup> To a certain extent, both approaches have a basis in the above mentioned incompatibility rule. This rule forecloses in a separated system that government members sit in the legislature. Public scrutiny of the government on the floor is hence much less possible, because the government is just not a natural part of this organ. In parliamentary systems, on the other side, the responsible head of the government sits not only in the plenary, but is often even the head of the majority faction. Therefore, the most likely place to attack him is the plenary debate where he presents his policy.

<sup>134</sup> Most parliaments combine both approaches but one of them tends to be more effective.

<sup>135</sup> In the following text abbreviated as RoP-EP. See Corbett et al., *Parliament*, pp. 248; Beckedorf, *Das Untersuchungsrecht des Europäischen Parlaments* (Berlin 1995), pp. 126.



the Commission (Art. 200 TEC)<sup>136</sup>. All these are instruments to be used in plenary. Thus, from a formal standpoint the EP could easily be counted as debating parliament.

But how are these rights actually used? The interrogation powers are undoubtedly popular and frequently employed<sup>137</sup>. Yet, on a closer look, it turns out that their usage has relatively shrunk. Especially since the EP has gained legislative powers in the 1990s, its interrogative powers have lost importance<sup>138</sup>. Also, the vast majority of the questions are written questions<sup>139</sup>. They hence serve as a source of information for the MEPs, much less to instigate public discussion in the plenary. Even the Question Times, which form the core of parliamentary life in the British parliament as a classical debating parliament<sup>140</sup>, are often less sharp and more tedious than to be expected<sup>141</sup>.

A telling example of the EP's fate as debating parliament is the story of the presentation of the annual general report of the Commission. Planned so as to initiate an annual major policy debate (similar to national budgetary debates), Art. 200 TEC requires the whole EP to discuss this annual report of the Commission. Yet, this was the practice only until the mid-1970s. Then, in a silent shift, the EP decided to refer the discussion directly to the Committees to make it more effective<sup>142</sup>. Not that there was no formal chance to debate; rather it became obvious that the discussion of the report was more fruitful when done in the more specialized committees than on the floor<sup>143</sup>.

In sum: despite all formal rights the EP hardly thrives as a debating parliament. It is true that the EP and Commission try to vitalize the importance of the plenary<sup>144</sup>. But the conclusion so far is quite stable: although the EP has the formal powers to scrutinize via public questions and debate, these powers do not add up to be the really living part of EP procedures. This result is underlined by a brief look at the overall time, scheduled for plenary discussions in the EP. This works normally along a four-week rhythm, out of which one is reserved for the parliamentarian's work in their constituencies, two for the Committees to convene, yet only one is actually spent in the plenary<sup>145</sup>. Comparing this ratio to a debating parliament reveals once more, how little the EP fits into this model.

<sup>136</sup> The Commission faces a long list of report obligations, c.f. Bieber, Article 43, Par. 7 (in: Groeben, Thiesing and Ehlermann (eds.), *Kommentar zum EG-/EU-Vertrag*, Vol. 4, 5<sup>th</sup> ed., Baden-Baden 1997).

<sup>137</sup> In the fourth legislature (1994-1999), the Commission had to answer not less than 21.096 parliamentary questions (Corbett et al., *Parliament*, p. 250). For regular updates on these numbers see the annual reports of the Commission and Bradley, *Legal developments in the EP, YEL* (since 1982). An early and colorful account by Cohen, *The Development of the Question time in the EP*, *CML Rev.* 16 (1979), 46 (who especially examines how the new British members, stemming from a debating parliament, changed the scene).

<sup>138</sup> Maurer, *supra* note 123, p. 54.

<sup>139</sup> The ratio is 1:4 between oral questions (including questions during question time) and written questions, see Corbett et al., *Parliament*, p. 250; also EP report, *Co-Governing after Maastricht: the EP's institutional performance 1994-1999*, PE, p. 49 / graph 21 (DG IV studies, POLI 104).

<sup>140</sup> It comes with little surprise therefore to learn that the instrument of question times was introduced after the first enlargement in 1972 which brought countries into the Community with great parliamentary traditions, the UK, Ireland and Denmark (c.f. Bieber, 140, par. 9 (in: Groeben et al. (eds.), *supra* note 136); to the English tradition Franklin & Norton (eds.), *Parliamentary Questions*, Oxford 1993).

<sup>141</sup> Corbett et al., *Parliament*, p. 249.

<sup>142</sup> Art. 45 RoP EP. C.f. Bieber, Art. 143, par. 4 (in: Groeben et al. (eds.), *supra* note 136).

<sup>143</sup> Another perspective is offered by Bieber, who explains this shift to the Committees as attempt to move towards a accompanying control, not just a posteriori control (see Bieber, in: Groeben et al. (eds.), *supra* note 136).

<sup>144</sup> Corbett et al., *Parliament*, pp. 247/8.

<sup>145</sup> Corbett et al., *Parliament*, p. 32 (interesting is also that the Committees don't meet at the seat of the EP in Strassbourg but in Bruxelles where the other institutions sit).

It is not to the plenary but to the committees that one must look to realize where the oversight powers of the EP lie.

c) Oversight via organization: committees, staff and the working parliament approach in the EP

Looking at the other type of oversight, the working parliament approach is heavily based on certain organizational pre-conditions, namely, an effective committee structure<sup>146</sup>. This is again exemplified in the US Congress, as a legislature whose special strength is mainly based on highly powerful committees<sup>147</sup>. In a classical debating parliament, such as the House of Commons on the other side, the committees play a minor role<sup>148</sup>. How does the EP fare in this respect?

In a recent article, the committees of the EP have been characterized as the “backbones keeping the institution upright”<sup>149</sup>. I would add, that they are also the EP’s brain and voice. Or to put it less physically: the committees are of paramount importance for the work of the EP in an organizational as well as a procedural sense<sup>150</sup>. There is not enough space here to precisely describe their role. However, two aspects shall highlight their central position:

First, their role in acquiring information, discussing and analyzing it, and finally formulating the political positions of the EP is absolutely central. The committees have the right to interrogate the Commission (Art. 164 RoP-EP) and (also of salient importance) to hold hearings with special experts (Art. 166 II RoP EP). Building on these instruments, the committees can (and do) acquire specific expertise in their fields<sup>151</sup>. On this basis, it is their task to file reports for the plenary, thereby pre-formulating and determining most of the final outcomes. These powers, now, are a sword with two sharp sides: they, firstly, facilitate the EP’s role in legislative procedures<sup>152</sup>. But

<sup>146</sup> An in-depth analysis of committee structures in several parliaments and a good account of methods of how to analyze them is Strom, *Parliamentary Committees in European Democracies* (in: Longley & Davidson (eds.), *The new role of parliamentary committees* (London 1998), pp. 21-59).

<sup>147</sup> Famous is the description by Woodrow Wilson (“Congress in session is Congress on public exhibition, whilst Congress in its committee rooms is Congress at work”, Wilson, *supra* note 104, p. 79). Today’s comprehensive study of the committee system in the US Congress is Deering & Smith, *Committees in Congress* (Washington, 3<sup>rd</sup> ed. 1997). A riveting comparative account between US Congress and EP gives Martin Shapiro, *Politics of Information* (in: Craig & Harlow, *Lawmaking*), pp. 187-198.

<sup>148</sup> Traditionally, the House of Commons had an extremely weak committee system. This was reformed in 1979. A nutshell characterization of this reform gives Philip Norton: “In comparative perspective, the changes are modest. In historical perspective, they are dramatic” (Norton, *Nascent Institutionalism: Committees in the British Parliament* (in: Longley & Davidson (eds.), *supra* note 146), p. 146). Generally to the committees in the House of Commons Drewry (ed), *The new select committees* (2<sup>nd</sup> ed., Oxford 1989).

The French parliament is an example of a parliament in separated system which has no committees and is thus very weak (c.f. Safran, *supra* note 106, pp. 206-210)

<sup>149</sup> Neuhold, *The “legislative backbone” keeping the Institution upright? The Role of European Parliament Committees in the EU Policy-Making Process*, *EIoP Vol. 5* (2001), No. 10.

<sup>150</sup> It is remarkable, that the research on the committees is not very extensive. Next to the just mentioned article by Christine Neuhold see Corbett et al., *Parliament*, pp. 105-129; Nugent, *supra* note 44, pp. 200; Bowler & Farrel, *The Organizing of the European Parliament: Committees, Specialization and Co-ordination*, *British Journal of Political Science* 25 (1995), pp. 226; Collins, Burn & Warleigh, *Policy Entrepreneurs: The Role of European Parliament Committees in the Making of EU Policy*, *Statute Law Review* 19 (1998), pp. 1-11 (as an account from the inside of the most important committee).

<sup>151</sup> See the inside report by Collins et al., *supra* note 150, pp. 9/10; and esp. Bowler & Farrel, *supra* note 150, pp. 226-235 (measuring the time spent in one committee and the acquired expertise, and concluding that “the EP has developed specializations which typically enable legislatures to challenge executive power”, p. 235).

<sup>152</sup> See below, Part IV B 3 b.

they also contribute to the EP's ability to competently scrutinize the executive, especially when it comes to the implementation<sup>153</sup>.

But there is a second aspect which renders the committees such a pivotal part of the institution: their internal structure. They are not only small, but also specialized and oriented in their scope towards the division of subject matters in the Commission. Of salient importance is their special leadership structure. This consists not only of a chairman but also of a rapporteur<sup>154</sup>. The latter is responsible for presenting a matter to the committee, drafting the report for the committee and arguing it in plenary and with other institutions. Therefore a highly influential figure, he is chosen in a complicated and (due to its importance) hotly contested procedure<sup>155</sup>. Besides, this position creates clear responsibilities, giving the committee a distinct voice to communicate to the inside (between the different committees and between the party groups) as well as to the outside (other institutions). It renders the committee especially suited to negotiate with other institutions through an expertise representative. It also contributes to the EP's chances to fit into the consensus system of the EU, where different institutions have to constantly negotiate.

A final aspect that will be of some importance later on shall be mentioned here. Committees in the EP convene and negotiate in public, Art. 171 III RoP EP. This aspect and their often used right to organize hearings with the specialized public, enhance their role as windows of the parliament<sup>156</sup>.

In sum: the committees have prominent rights and are well-structured. They provide the infrastructure that qualifies the EP as a working parliament, able to seriously scrutinize the executive.

As a fourth parameter to qualify a parliament as working or debating type, we named above the size and organization of its staff. This marks another characteristic difference between both types of parliaments: whereas the *working parliament* can acquire its expertise and its level of scrupulous scrutiny of the executive only because of the support of an extensive staff, the *debating parliament* traditionally has very little of it. Its approach is based more on the rhetorical skill of the single parliamentarian to surprise the government and disclose its weakness in debate than on counterweighing governmental bureaucracies.

Looking at the EP, the staff is yet another factor which underlines its basic nature as a working parliament. Compared to the US Congress, of course, it looks petty. But compared to all national

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<sup>153</sup> As to the comitology issue see next chapter, below Part IV B 2d. Another important facet of the EP's scrutiny system are the Committees of Inquiry (Art. 193 TEC) that can be set up for special purposes and for a limited time. There is not enough space to explore their structure and importance here (see Shackleton, *The European Parliament's New Committees of Inquiry*, JCM St. 36 (1998), pp. 115-130; Beckedorf, *Das Untersuchungsrecht des EP* (Berlin 1995); Chambers, *The BSE Crisis and the European Parliament* (in: Joerges & Vos (eds.), *EU Committees* (Oxford 1999)), pp. 95-106.

<sup>154</sup> Art. 157 RoP EP. Despite its special importance in the context of the EP, the origins and working of this office is little known yet. Most hints are to be found in Nugent, *supra* note 44, pp. 202/3; Corbett et al., *Parliament*, pp. 117-120; Bowler & Farrel, *supra* note 150, pp. 242/3; Neuhold, *supra* note 149, p. 6.

The institution of a rapporteur is known to parliamentary law and practice in the Benelux-states and in Italy. The German law knows it (§ 65 Rules of Procedure of the Bundestag) but it does not influence parliamentary practice. It is alien though to the Anglo-American system of parliaments.

<sup>155</sup> C.f. Art. 159 RoP EP. To the practice of this procedure Neuhold, *supra* note 149, p. 7; Corbett et al., *Parliament*, pp. 117/8.

<sup>156</sup> Neuhold, *supra* note 149, pp. 8/9; Corbett et al., *Parliament*, pp. 272/3.

parliaments in Europe, it has one of the largest staffs<sup>157</sup>. The EP staff is organized on different levels: on an individual level, every MEP has at least one full time assistant which she can freely employ. On a party level, every party group in the EP is ascribed a number of assistants in accordance to their size and the number of languages spoken. Finally, there is the General Secretariat of the EP in Luxembourg which provides further assistance for the parliamentarians. Altogether, the staff of the EP sums up to 4100 persons<sup>158</sup>.

Martin Shapiro, comparing the staff structure in the US Congress and the EP, has made the argument that the EP staff is not as loyal and committed as it would be in the interest of the parliament because the staff (especially in the Secretariat) is recruited as regular civil servants, not as politically rigorous and loyal short-term staff. Shapiro thereby points to a delicate aspect of staff in working parliaments. They have to strike a balance between the necessary short-term, political staff and the equally important need for long-term and general staff to counter at least in part the resources of the executive branch<sup>159</sup>.

Regardless of this last aspect, the staff of the EP displays once again the basic character of the EP as a working parliament.

#### d) A peculiar question: comitology and the EP

A final aspect of the EP's scrutiny system shall be treated separately because it concerns an especially peculiar (and especially European) aspect and needs further explanation. That is the issue of comitology. 'Comitology' is a cue for the highly complex system of committees, that are legally based on a Council or a Commission Act to implement EU policies (Art. 202 third indent TEC)<sup>160</sup>. These committees are composed of European bureaucrats and joined by national civil servants and/or experts<sup>161</sup>. The comitology system is considered to be a central part of EU policy governance, quantitatively as to the sheer number of committees and of regulated areas, qualitatively as to the importance of the decisions taken there<sup>162</sup> and conceptually as a distinct 'infranational' form of European governance<sup>163</sup>.

Through the lens of executive federalism this comitology structure seems to come with a certain necessity. The interwoven competencies require close executive cooperation, and especially in

<sup>157</sup> The most concise account of the EP's staff is given by Shapiro, *supra* note 94, pp. 199-207; also Corbett et al., *Parliament*, pp. 166-176. In a broader comparative perspective Löwenberg & Patterson, *Legislatures*, pp. 159-164; also Bradshaw & Pring, *supra* note 109, pp. 244-247.

<sup>158</sup> 1200 of which are actually translators. Nevertheless, there are even more sources: the EP has adopted a network concept to use external research institutions for European matters (the so-called STOA, Scientific and Technical Options Assessment, see Corbett et al., *Parliament*, p. 252). Moreover, there is the legal service of the EP which provides valuable support not only in judicial proceedings in front of the ECJ but also legal expertise in the lawmaking activities of the parliament.

<sup>159</sup> Shapiro remains tacit, though, about the fact that the number of political, i.e. short-term recruitments for the MEPs and political groups is growing much stronger than the number of Secretariat staff (c.f. Corbett et al., *Parliament*, p. 172).

<sup>160</sup> See Vos, *The rise of Committees*, *European L. J.* 3 (1997), pp. 210-229 and as overview the articles in the excellent book by Joerges & Vos (eds.), *EU Committees* (Oxford 1999).

<sup>161</sup> As to the different sorts of committees, their legal basis, functions and composition see Vos, *EU Committees: the Evolution of Unforeseen Institutional Actors in European Product Regulation* (in: Joerges & Vos (eds.), *supra* note 160), pp. 21/22.

<sup>162</sup> The BSE crisis which was centered around one of these committees (the Standing Veterinary Committee) demonstrated that dramatically.

<sup>163</sup> This dimension is best described in the writings of Joseph Weiler, *The transformation of Europe* (in: Weiler, *supra* note 39), pp. 96-99; ders., *supra* note 3, pp. 9-17.

the area of implementation the intense exchange between national and European civil servants seems to even serve a greater good<sup>164</sup>. Yet, this cozy system has a serious downside: the parliament's role in that complex world of comitology was traditionally seen as bleak and as a major source of annoyance for the EP. The parliament considered the creation of these committees, starting as early as the 1960s, as evasion of its own scrutiny rights which are targeted at the Commission, traditionally not at the Council, which gained decisive influence on the implementation of EU law via these committees. And quite accurately its influence was minor, with barely any access to sufficient information, not to speak of own rights of decision or review<sup>165</sup>. Especially since the Maastricht Treaty, the EP argued that it is now in the position of a co-legislator with the Council and therefore should have equal rights as the Council.

This situation has considerably changed (and from the EP's point of view improved) with the Comitology decision taken by the Council in June 1999<sup>166</sup>. This decision introduced mainly two new aspects with respect to the role of the EP: First, the EP gains a formal right to be informed about the committee proceedings, including agendas, draft measures, the results of voting records and the participants (Art. 7 III of the Decision). And secondly, Art. 8 of the Decision gives the EP a right of review concerning certain implementing measures proposed by the Commission.

Nevertheless, the new Comitology regime does not put the EP on an equal footing with the Council. There are, from the perspective of the EP, a number of flaws in the decision<sup>167</sup>. Mainly two seem to stand out: First of all, the new rights apply in their strong version only where the act was adopted under Co-decision. Broad subject areas, agriculture for example, are therefore not covered and leave the EP with much less information. And secondly, the right to review as granted in Art. 8 of the Decision is not binding for the Commission (or the Council), and only forces it to re-examine its decision. The EP has no final say and still less influence than the Council.

Yet, both flaws don't seem to be as grave on a second look. As to the limited scope of the information rights, it is realistic to assume that the scope of the co-decision procedure will be extended in future treaty reforms. Considering how this procedure has been extended in the past treaty reforms, it can be expected that the mentioned flaw will fade in future. More fundamental is the second aspect. What good is the right to review if the Commission can simply overturn it? Three counter-arguments can be made here<sup>168</sup>: first, parliamentary control generally is and has to be something different than parliamentary decision-making. There is no need for a parliament to get itself involved in the actual decision taking of implementing measure. Sufficient information

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<sup>164</sup> See esp. Joerges & Neyer, *From intergovernmental bargaining to Deliberative Political Processes: The Constitutionalization of Comitology*, E.L. Journal 1997, pp. 273-291.

<sup>165</sup> As extensive account of the struggle of the EP Kieran Bradley, *The European Parliament and Comitology: On the Road to Nowhere?*, E.L.J. 3 (1997), pp. 230-254; Hix, *Parliamentary oversight of executive power: what role for the EP in comitology* (in: Christiansen (ed.), *Europe in change* (Manchester 2000)), pp. 62-78; also Sauter & Vos, *Harmonisation under Community Law: The Comitology issue* (in: Craig & Harlow, *Lawmaking*), pp. 177-180.

<sup>166</sup> Council Decision 99/468/EC, O.J. 1999, L 184/23. Reflecting this decision Lenaerts & Verhoeven, *supra* note 34, pp. 645; Neuhold, *supra* note 149, pp. 14-18; also Corbett et al., *Parliament*, pp. 255-261. See also the judgment of the Court of First Instance, T-188/97, *Rothmans International BV vs. Commission* (judgement of July 19, 1999).

<sup>167</sup> Practical as well as legal matters, see Lenaerts & Verhoeven, *supra* note 34, p. 681; Corbett et al., *Parliament*, pp. 260-261.

<sup>168</sup> I follow here the analysis and critique of Lenaerts & Verhoeven, *supra* note 34, pp. 680.

in due time and the right to be heard are appropriate instruments<sup>169</sup>. Second, it should be kept in mind that this right to review applies, where a measure has been adopted under co-decision. Thus, it concerns policies which have been negotiated and decided by the EP already. And third, there is again the structure of executive federalism. The fact that the Council has more influence on the taking and review of implementing decisions evolves consequently from this federal structure because the member state executives are supposed to be central implementing actors. But beyond these two points, another aspect seems to contain the biggest problem and that are the mere resources of the EP simply to cover all of the numerous committees, to actually digest the information it gets from them and to competently react to their results. It is on this very practical level where the EP faces its most serious problem<sup>170</sup>.

Looking back on the oversight function in general now, the EP qualifies quite clearly as a working or controlling parliament here too, and not as a debating parliament<sup>171</sup>. Although it has the formal instruments, its actual use of the powers shows that it controls more, and more effectively via its committees and detailed policy scrutiny than by public debate. Its rather tedious plenary style finds in the model of the working parliament an explanation and in its stress on committee work a remedy. With regard to the control of the implementation of EU policies and thus the comitology issue, it has to be stressed that only the elements, which render the EP a controlling parliament, might provide the means for the EP to effectively oversee this aspect of governance. Thus only a working parliament, if at all, can keep up with something like the EU's comitology system.

### 3. The EP and its law-making function

#### a) Two types of parliamentary involvement in lawmaking

The law-making function shows on yet another level how different both types of parliaments approach their functions: *Debating parliaments* tend to be rubber-stamp parliaments. They discuss legislative proposals, but since its majority is loyal and closely linked to the government, it doesn't change the bills which mostly stem from the government's own offices. *Working parliaments*, on the other hand, are prickly partners. They are not so much controlled by the government (or party discipline) but vigilantly scrutinize and amend what comes from them,

<sup>169</sup> To the problems of parliaments in respect to policy implementation see conceptually Grimm, *Zukunft der Verfassung* (2<sup>nd</sup> ed., Frankfurt 1994); empirically for the German case: v. Beyme, *supra* note 105, pp. 114-122, and for the American case: Fisher, *Politics of Shared Powers* (4<sup>th</sup> ed., Texas 1999), pp. 106.

<sup>170</sup> See for a first empirical assessment of how the EP is using the its new rights, Neuhold, *supra* note 149, p. 18.

<sup>171</sup> One other aspect of the control powers of the EP has remained unmentioned so far: EP's powers to scrutinize the Council. Actually, the EP has nearly equivalent powers to interrogate and scrutinize the Council as it has towards the Commission (c.f. Corbett et al., *Parliament*, pp. 247; Beckedorf, *supra* note 135, pp. 157; Lodge, *The European Parliament* (in: Andersen & Eliassen (eds.), *supra* note 3), pp. 198). There is not enough space here to dig deeper, but it should be mentioned that although this does not fit into the picture of a parliamentary system (since it would be highly unusual for a bicameral system that one chamber should be allowed to scrutinize the other), it does fit perfectly well into the picture of the EU as executive federalism. Herein the council has a double function (executive and legislative) and thus forms together with the Commission a dual executive (Lenaerts, *supra* note 97, pp. 17/18). To control the Council in this respect, seems to be a perfectly legitimate task for the EP.

especially in their committees<sup>172</sup>. Law-making in these legislatures is a long, often cumbersome process, very much based on bargaining and compromises. Gridlock is as common a phenomenon as is the softening of slightly radical bill proposals<sup>173</sup>.

The evaluation of these two types dwells partly on parameters which were already described above: Of major influence is, first of all, the question of how closely the ‘government’ is linked to and supported by a parliamentary majority. Only a government which has a tight grip on a parliamentary majority can dominate the legislature. Thus, party bonds and group coherence play a major role. Also relevant is the extent to which bicameralism shapes the lawmaking procedure<sup>174</sup>. The more two chambers have to cooperate before a bill is enacted, the higher are the chances that a bill is amended or torn in pieces. A strong parliamentary influence on legislation, which is typical for working parliaments, is finally based on their internal organization. The aspects of committee structure and staff organization, mentioned above, hence have a considerable effect here too.

Against this analytical background, the lawmaking powers of the EP will now be analyzed in two steps. These follow two different levels of lawmaking which have been pointedly phrased as ‘policy-making’ and ‘history-making’<sup>175</sup>. The first will examine the EP’s role in the regular process of secondary legislation. Apart from that the EP has a considerably different position in the second level which concerns the treaty reform and constitutional level of decision-making.

#### b) Policy-making decisions: EP as cooperative actor in consensual procedures

It is an often-told story how the EP acquired serious influence on rule-making in the Communities and then in the Union only step by step<sup>176</sup>. It was not before the Single European Act in 1987 and especially the Maastricht Treaty that it actually attained a relevant and formally recognized saying in different law-making procedures. And only after Amsterdam it can be called an equal partner of the Council in the main law-making procedure, the Co-decision procedure (Art. 251 TEC)<sup>177</sup>. But how can its approach be characterized now in respect to the just described types of parliamentary involvement<sup>178</sup>?

<sup>172</sup> Demonstrating the differences again Bradshaw & Pring, *supra* note 109, pp. 292-293 (“So while in Britain the business of legislation is largely processional and predictable, in the US it is creative and emergent: until a bill has been moulded and shaped by a committee, its nature will not be known”, *ibid.* 293.)

<sup>173</sup> This aspect of working parliaments is well expressed in Polsby’s notion of “transformative” legislatures. He discerns in their capacity to amend and transform legislation their salient characteristic. See also Löwenberg & Patterson, *Legislatures*, pp. 263-268.

<sup>174</sup> Lijphart, *supra* note 46, pp. 203-211, 45.

<sup>175</sup> Shackleton, *The European Parliament* (in: Peterson & Shackleton (eds.), *The Institutions of the European Union*, Oxford 2002), pp. 103-108.

<sup>176</sup> See (to name only a few) Earnshaw & Judge, *From cooperation to co-decision*, (in: Richardson (ed.), *EU, power and policy-making*, London 1996); Pinder (ed.), *Foundations of Democracy in the European Union* (London 1999); Suski, *Das Europäische Parlament* (Berlin 1996).

<sup>177</sup> As to the recent changes after the treaties of Amsterdam and Nice Dashwood, *European Law Review* 2001, pp. 215; Maurer, *Entscheidungseffizienz und Handlungsfähigkeit nach Nizza*, *Integration* 2001, pp. 133-145. As brief overview over the current legislative procedures Lenaerts & Van Nuffel, *supra* note 16, pp. 442-454; an empirical and conceptual assessment in Craig, *Democracy and rulemaking within the EC* (in: Craig & Harlow, *Lawmaking*), pp. 33. Finally, Crombez, *The Co-Decision Procedure in the European Union*, *Legislative Studies Quarterly* 22 (1997), pp. 119 and Crombez, *Codecision: Towards a Bicameral European Union*, *European Union Studies* 2000, pp. 363-68.

<sup>178</sup> To step yet a little backwards, it could be asked whether it is correct to regard the co-decision procedure as the normal law-making procedure, since there are various procedures in which the parliament still has very little influence. Although that is true, the Co-decision has risen to be not the only but the standard procedure, in a

As to the first parameter, the party link between the ‘government’ and a majority in parliament, it is a famous characteristic of the EU system, that legislation here has to be initiated by the Commission. Neither the EP nor the Council have an autonomous right to introduce bills<sup>179</sup>. The Commission therefore has (at least formally) a strong position in putting forward its policy-proposals. But at the same time it has no steady parliamentary basis<sup>180</sup>. It is not elected by a parliamentary majority, but appointed by the Council<sup>181</sup> and only approved by the EP. It is, more importantly, composed and regarded as a politically (and nationally) balanced institution. Hence there is no party coalition in the EP which would support the Commission and loyally carry its legislative program through. Instead, a new supporting coalition has to be built up for every bill. The first pre-condition for a smooth government-lead legislation in a debating parliament is therefore missing.

As to the second parameter, the procedure of Art. 251 TEC is based on a strictly bicameral approach, as the notion ‘co-decision’ already suggests. If the initiative is a privilege of the Commission, it is EP and Council who actually decide upon the legislation<sup>182</sup>. Through two readings in EP and Council, and possibly even a conciliation committee in the end, law-making is a rather complicated, sometimes cumbersome, and often long bargaining process<sup>183</sup>. Its participants are not only EP and Council, who finally decide, but also the Commission who acts as a broker between both. Thus it is a triangular game. The whole process is facilitated and actually characterized by a wide range of informal meetings between the institutions, dialogues or trialogues, using package deals and other tactics to actually broker compromises<sup>184</sup>. Thus blocking, amending or checking are normal tactics. Lawmaking generally can therefore be described as a highly consensual process<sup>185</sup>.

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quantitative as well as qualitative perspective (see Shackleton, *supra* note 175, p. 104; Corbett et al., *Parliament*, p. 191). It can even better be argued that the future will bring most probably a further broadening of this procedure’s scope. Therefore it is here used as the standard procedure for the further analysis.

<sup>179</sup> C.f. Art. 250 par. 1, 251 par. 2, 252 a TEC. It is, of course, true that it is to a great extent the Council to instigates legislation. The formal privilege of the commission might therefore be just a facade (Edwards & Spence, *The Commission in Perspective* (in: Edwards & Spence (eds.), *The European Commission*, 2<sup>nd</sup> ed., London 1997), pp. 9). This does not change though the point I tried to make here: There is no (party based) link between an actor introducing legislation and a sufficient majority in the institution finally deciding. Thus, the model of a rubber-stamp institution does not work (as to the Commission’s privilege and its future perspective see Craig, *supra* note 177, pp. 37-39).

Martin Westlake also highlights the influence of the EP on the legislative agenda in a planning stages, Westlake, *The Commission and the Parliament: Partners and Rivals in the European Policy-Making Process* (London 1994), pp. 19-21; see also Tsebelis, *The power of the EP as a conditional agenda-setter*, *American Political Science Review* 88 (1994), pp. 128-142.

<sup>180</sup> Dehousse, *supra* note 8, pp. 126; Hix & Lord, *Political Parties in the European Union* (New York 1997), pp. 178; also Wallace, *supra* note 45, pp. 57.

<sup>181</sup> C.f. above FN 98.

<sup>182</sup> As to this procedure generally Craig & De Burca, *EU Law. Text, Cases and Materials* (Oxford 2<sup>nd</sup> ed. 1998), pp. 135-137; Lenaerts & Van Nuffel, *supra* note 16, par. 11-026.

<sup>183</sup> To the conciliation committees Foster, *The New Conciliation Committee under Article 189 b, E.L. Rev.* 19 (1994), pp. 185-194; also Corbett et al., *Parliament*, 196-200.

<sup>184</sup> Garman & Hilditch, *Behind the scenes: an examination of the importance of the informal processes at work in conciliation*, *JEPP* 5 (1998), pp. 271-284; Maurer, *supra* note 123, p. 37; Corbett et al., *Parliament*, pp. 201-203. Extensively now Farrell & Héritier, *Formal and Informal Institutions under Codecision: Continuous Constitution Building in Europe*, *EIoP Vol. 6* (2002), No 3, pp. 7.

<sup>185</sup> Sophie Boyron compared this process even stronger to a mediation process, where the Commission acts as mediator between EP and Council as opposed parties (Boyron, *The Co-decision procedure: Rethinking the constitutional fundamentals* (in: Craig & Harlow, *Lawmaking*), pp. 147-168).



In this environment, the EP has to be a working parliament to be effective – and it is. Even more: not only does it fit into this kind of environment, it is actually especially well-equipped for such a consensual system<sup>186</sup>: There are first of all its committees which play a highly important role. They serve as small, specialized forums for negotiations between the different party groups as well as with the other institutions<sup>187</sup>. Also, the specific leadership structure of the committees enables them to serve as competent interlocutors with other institutions, Commission and Council<sup>188</sup>. Rapporteurs and chairman are common partners in the inter-institutional negotiations and transmitter into the parliamentary world. Finally, the EP in general has a leadership structure which provides it with a competent system to act in a consensual setting<sup>189</sup>.

One other point adds to the observation that the EP is itself a dominantly consensual actor: The party structure in the EP is especially diverse. At the moment, there are eight party groups, and even the two biggest together hardly form an absolute majority<sup>190</sup>. To reach an agreement in this diverse system already requires the high art of compromise. What's more, the majority rules in the EP set particularly high standards for reaching agreement (Art. 198, 251 II b, c TEC). Both aspects force the EP to develop negotiating and compromise techniques already for its interior arrangements, facilitating them also to thrive in the broader inter-institutional process<sup>191</sup>. It is this diverse and thus consensual character of the EP that explains why a parliamentary and majoritarian logic never conflicts with the federal and consensual structure of the institutional process in the EU. From this perspective, the political deficit of the EP, as Renaud Dehousse has called it<sup>192</sup>, turns out to be the efficient secret of the decision-making procedures in the institutional setting of the EU.

Evaluating the EP in the policy-making procedures, we see obviously a prickly partner and working parliament rather than a smooth supporting ally of the government. Yet, the EP can again be more specifically characterized as a controlling parliament. There are two aspects: First, it was mentioned that the EP has no power to initiate legislation. Instead its influence is principally an amending or blocking, not an initiating one<sup>193</sup>. This does not, however, qualify it as a weak or incomplete parliament. In 'normal' parliamentary systems today it is nearly exclusively the government, which introduces bills. Compared to that, the EP has developed quite an active agenda setting behavior. Nonetheless, its general position is less that of a policy-making legislature as it is the US Congress. It could rather be called a policy-*shaping* legislature. A second aspect becomes relevant (which at the same time points to a considerable flaw of the EP<sup>194</sup>): the co-decision procedure applies only to a limited area. There are major policy fields (like agriculture, taxes, or trade) that are not covered from it. In the other procedures applicable

<sup>186</sup> See also Farrel & Heritier, supra note 184, pp. 7.

<sup>187</sup> The Commission is a regular participant of EP committee sessions, presenting and defending its proposals. Also the Council (represented by the minister of the incumbent presidency) is more and more often to be seen in these meetings to path the way for later agreements. This position has been legalized in Art. 66 I, 76 II, V RoP EP.

See Neuhold, supra note 149, pp. 10; Collins et al., supra note 150, pp. 6.

<sup>188</sup> See supra, Part IV B 2 c.

<sup>189</sup> Important are especially the President, Vice-Presidents and the Conference of Presidents Corbett et al., Parliament, pp. 94-102.

<sup>190</sup> Hix & Lord, supra note 180, pp. 77, 156 (table 6.7).

<sup>191</sup> Corbett et al., Parliament, p. 152.

<sup>192</sup> Dehousse, supra note 8, pp. 124.

<sup>193</sup> As to its right to request that the Commission submits a proposal, Art. 192 TEC, this has been used only very in a very limited way, see Corbett et al., p. 209/210; see also Westlake, The Commission and the parliament (in: Edwards & Spence (eds.), supra note 179), pp. 244/5.

<sup>194</sup> But see above FN 178.

there, the EP is even more a reactive legislature, checking instead of mapping and autonomously policy-making<sup>195</sup>.

After the blocking or negative power of the EP in the elective function we therefore find here a second central aspect to characterize the EP as controlling parliament and thus a subcategory of a working parliament, its restrained legislative powers.

c) History-making decisions: EP and treaty reform

If the EP has so far been described as a controlling parliament and thus as a comparatively strong and influential legislature<sup>196</sup>, then this picture suffers a severe blow when it comes to the field of so-called history-making or constitutional questions. As such can be regarded treaty reforms (Art. 48 TEU), accession of new members (Art. 49 TEU) and the budgetary fundamentals of the Union as organized in the system of own resources (Art. 269 TEC)<sup>197</sup>. Especially with regard to treaty reforms, the EP is weak as it is formally not involved, because it is the governments of the Member States factually deciding and the national parliaments ratifying (Art. 48 TEU). And also informally, the EP is only weakly represented in the preparational process<sup>198</sup>. Therefore, in the procedure which is theoretically the most fundamental one and has been also practically (at least in the past two decades) most important, the EP is equipped with only informal and fairly weak influence. Nearly the same is true for the budgetary question. Here the EP has to be consulted but it is yet again the Council which is acting the Member States that are finally deciding. The position of the EP concerning the accession of new members (Art. 49 TEU) is stronger though. In this case the EP has to give its assent to the accession, thus has again a negative, controlling power.<sup>199</sup>

But how are these procedures in constitutional matters related to our typology of parliaments and their respective characterization? This question poses a considerable problem. First of all, these categories do not seem to really fit. There is no natural working or debating parliament approach to constitution-making. Instead, these types are geared more towards the regular policy process, not to the rather exceptional constitutional amendment process<sup>200</sup>. Also, parliamentary involvement in these procedures is generally very different from country to country. And finally, if we would try to extend the typology to history-making decisions, the EP would fit in neither. Since it is formally and informally without power, it wouldn't be any case at all.

Yet, two considerations might lighten the picture, or complete it: First, there is a lot of motion in the area of history-making. Namely the newly invented, although not yet legalized convention

<sup>195</sup> In the agricultural questions, for example, the EP is only consulted but has no decisive powers, Art. 37 II TEC.

<sup>196</sup> It should not be forgotten that most national parliaments in the EU tend the rather weak side of debating parliaments.

<sup>197</sup> This list is different to the one which Michael Shackleton used to describe history-making decisions (see above FN 175). He includes the approval of the President of the Commission which I would consider more a regular decision. However, in substance there is no real difference: the EP's powers in these areas are seriously limited in any count.

<sup>198</sup> See to the procedure and the involvement of the EP Corbett et al., *Parliament*, pp. 295; Westlake, *A Modern Guide to the European Parliament* (London 1994), pp. 56, 217. Apparently with a different result Hix, *Constitutional Agenda-Setting through Discretion in Rule Interpretation: Why the European Parliament Won at Amsterdam*, *British Journal of Political Science* (forthcoming 2002).

<sup>199</sup> C.f. Shackleton, *supra* note 175, p. 104.

<sup>200</sup> If we think of the two countries, with which the two models were exemplified so far (the US and the UK), the situation becomes obvious. The US knows only very rare constitutional amendments (27 in 215 years) and the UK doesn't even have a formal constitution.

procedure seems to fundamentally alter the picture. This procedure was tried for the first time to draft the Charter of Fundamental Rights<sup>201</sup>. And it is now again used in preparation for the IGC in 2004<sup>202</sup>. Bringing together not only the representatives of the Council and the Commission, but also and prominently representatives of the national parliaments and the EP, this procedure seems to offer a remedy for two problems: the rather symbolic than influential involvement of the NP and the only informal role of the EP. As to the EP, this provides one quarter of the participants, is involved in the negotiating process and has a decisive say in the decision-taking stage. Altogether its influence is much stronger than before. For EP and NP together this procedure seems to offer a normatively and empirically convincing case for the cooperation of both parliamentary levels; something that cannot be said for their cooperation in the regular decision-making process<sup>203</sup>.

Of course, there are various uncertainties about the procedure. Questions about who is actually doing the drafting, who is getting how much staff and support, what relation has the Convention result to the IGC, and how it is related to the procedure provided for in the treaty have to be answered and might undermine the overall success of the new procedure. But so far it has developed such a dynamic already, that it might only be a question of time for these issues to be resolved.

It could be asked now, as a second consideration, whether it would mean a deficit for the EP if it would not gain the dominant say in constitution making procedure. Yet, I don't think. Rather, a procedure combining Council, Commission, NP and EP in constitution making would be a natural state of constitution making in federal structures. Casting a first glance at other federal systems<sup>204</sup>, a combined procedure is regarded as the best way to ensure a federal balance, rather than being left to the central parliament, which would warp the federal balance. With the convention procedure, the EU seems to be on its way to a 'normal' federal form of constitutional decision-taking.

Assessing the character of the EP with regard to the two types of parliaments and their approaches towards lawmaking, we find the EP again on the side of the working parliament. In the regular policy process it is a comparatively strong legislature, based on the involvement of its committees that contribute expertise and constructivity to the process. Being not bound to support a government, the EP is a controlling parliament, free to negotiate every bill anew, and at the same time forced to always find compromises in a very diverse institution. The political deficit, due to this murky situation of ongoing compromises, turns out to be the efficient secret of the EP in inter-institutional decision-making procedures. In history-making decisions, on the other side, it has been a weak protagonist, hardly to qualify as one type or the other.

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<sup>201</sup> Lijdsberg, Does the EU Charter of Fundamental Rights threaten the Supremacy of EU Law?, Jean Monnet Working Paper 4/2001, chap. 1.3. (<http://www.jeanmonnetprogram.org/papers/01/010401.html>) ; also Dix, Grundrechtscharta und Konvent – auf dem Weg zur Reform der EU?, integration 2001, pp. 34-41.

<sup>202</sup> See the current website of the Convention (<http://european-convention.eu.int/default.asp?lang=EN&Content=>).

<sup>203</sup> It has been the topic of some debate how the relation between EP and NP should be designed. Inferring from the analysis of the position of NP in an executive federalism, I regard any sort of stronger formal involvement of the NP in the institutional structure as a dangerous and finally fruitless undertaking. The communicative exchange between both levels and between MPs and MEPs seems to be the much more convincing way (see Lodge, supra note 171, pp. 201-204; Blichner, supra note 91, pp. 143; Bieber, Demokratische Legitimation in Europa: Das Spannungsverhältnis zwischen den Funktionen von Europäischem Parlament und nationalen Parlamenten, ZeuS 1999, pp. 141).

<sup>204</sup> C.f. Art. 5 US Constitution; Art. 123 Swiss Constitution; Art. 76 III German Grundgesetz.

#### 4. Representation in the EP: misunderstandings and flaws of a controlling parliament

Finally, there is a fourth function of parliaments which forms a sort of background or basis for the ones analyzed before. That is representation. This function shall not be analyzed here in its formal aspects, say the number of seats per country in the EP<sup>205</sup>. Instead, we look at its more basic communicative facet which has to do with the public perception of an institution and its ability to be responsive to citizens<sup>206</sup>. In that sense, representation demands that a parliament shall reflect and respond to political opinions which are held in the people, that it should form a link between the government and the people<sup>207</sup>. As such, the function of representation is much less easily broken down in concrete powers or numbers in which it could be measured.

However, there are two dimensions of representation which together reflect major aspects of it. They can be termed the 'where' and the 'who' of representation, the first asking whether the parliament serves as a place for political debate (as a public forum), the second asking who is the agent of representation, parties or rather single parliamentarians. Along these two aspects we will now address the representation function in the EP.

##### a) The public forum aspect of representation and the EP

A central aspect of this representational function is that parliaments are meant to serve as a public forum for society, mirroring public opinions and instigating public debates<sup>208</sup>. Parliaments are sounding boards for society. This aspect has traditionally been regarded as a specific problem of the EP, especially prominent being the reproach that the EP will for the foreseeable future not be able to serve as European forum because it lacks a common language and a common civil society<sup>209</sup>. Also, the dramatically low turn-out at elections to the EP has been interpreted as the sign of a very low interest and trust of European citizens in their parliament, thus its inability to be regarded as proper representation of European citizens<sup>210</sup>.

However, analyzing the EP along the two types of parliaments sheds new light on the European situation. These types (and their real life cousins) show that the public forum function can be

<sup>205</sup> The representativity of seats in the EP forms a specific problem though, see Shackleton, *supra* note 175, p. 110; as to this question as a major quarrel during the negotiations in Nice, Yataganas, *supra* note 36, par. A.3.b /B.4. (also see Lord, *supra* note 102, pp. 44; similar, Lenaerts & de Smijter, *The Question of Democratic Representation*, (in: Winter & Curtin (eds.), *Reforming the Treaty on European Union*, The Hague 1996), pp. 173)

<sup>206</sup> Löwenberg & Patterson, *Legislatures*, pp. 44-51 (who call it more profanely just 'linkage'); Böckenförde, *Demokratie und Repräsentation*, pp. 379 (in: Böckenförde, *Staat, Verfassung, Demokratie*, Frankfurt 1992 (1983)). This aspect plays a major role also in the theory of deliberative democracy and its approach to European integration, see Blichner, *supra* note 91, p.148; Schlesinger & Kevin, *Can the European Union become a sphere of publics* (in: Eriksen & Fossum (eds.), *supra* note 56), pp. 206-230.

<sup>207</sup> Joseph Weiler has given a versatile picture of this function and its problematic with respect to the European democracy, see Weiler, Haltern & Mayer, *Five uneasy pieces: European Democracy and its critique*, *Western European Politics* 18 (1995), pp. 6-9; see also his distinction between formal legal legitimacy (powers) and social legitimacy to stress what is mostly needed in the EP, Weiler, *The transformation of Europe* (*supra* note 39), pp. 80-86.

<sup>208</sup> Bagehot, *supra* note 103, pp. 73/74; Löwenberg & Patterson, *Legislatures*, pp. 182.

<sup>209</sup> This argument has been particularly strong in the German discussion Grimm, *Does Europe need a Constitution?*, *European L. J.* 3 (1995), pp. 292-297; Kirchhof, *Der deutsche Staat im Prozeß der europäischen Integration* (in: Kirchhof & Isensee (eds.), *Handbuch des Staatsrechts*, Vol. VII, Heidelberg 1992), § 183. Also Weiler et al., *supra* note 207, pp. 12.

<sup>210</sup> Especially interesting the study by Blondel, Sinnott and Svensson, *People and Parliament in the European Union* (Oxford 1998).

performed very differently, and that even national parliaments with a proper civil society have different levels of success in doing so. For the *debating parliament*, the public discussion, the argumentative battle between the government (as head of the majority party) and the opposition is the core of parliamentary life<sup>211</sup>. The plenary debates are a part of public life and effectively the stage of political discussion. The *working parliament*, in contrast, is structurally weak on this side. Or at least, it has a different approach<sup>212</sup>: Since the battle between government and opposition in parliament is at the outset prevented by the incompatibility rule which forbids ministers to sit in parliament, it is, thus, not the plenary, but the Committees which serve as public fora. They form close links to the specialized public, they succeed in giving voice to opinions held in the public. Last but not least, their hearings are prominent. This approach might be less fascinating and generally perceived, but it nevertheless provides links to the public.

Conceptualizing the EP as such a working parliament helps to better understand its representational function and what it can accomplish (and what not). Some of the reproaches lose their strength when thought over in the context of a working parliament. Acknowledging the EP's character as a working parliament entails, for example, that it 'naturally' has not such a vivid plenary culture as some debating parliaments. This might be a deficiency but it is less a European one but a deficiency common to working parliaments. Looking at the committee culture in the EP easily underlines this point. It is the committees which attract most of the public attention. They work openly, and they have won public recognition by pooling expertise and involving the interested public via hearings<sup>213</sup>.

A second aspect gains weight: lobbies love strong parliaments. They always look for agents of their interests. The EP as working parliament is a strong, policy-shaping parliament with real influence, not just a rubber stamp institution. Lobbies and civil society will naturally grow around a parliament with such influence<sup>214</sup>. Thus, the powers of the EP pull civil society into being.

However, these arguments shall not obscure the flaws of the EP. Conceptualizing it as working parliament might explain some aspects, but does not render it a stainless organ of representation. Thinking further, rather the contrary is true: the situation of the EP as working parliament appears worse because certain makeshift structures, which in other political systems help to remedy the weaknesses of such parliaments, are missing here. Turning from the 'where' of representation to the 'who', we find these problems rooted in the representational role of parties and/or single parliamentarians.

#### b) MEPs, European parties and their representational effect

If the plenary as a sounding board is mute and the committees reach out but only to a specialized public, then there are normally specific agents of representation in a political system with a

<sup>211</sup> Adonis, *Parliament today* (2<sup>nd</sup> ed. Manchester 1993), pp. 130.

<sup>212</sup> A comparison in Steffani, *supra* note 102, pp. 333; Bradshaw & Pring, *supra* note 109, pp. 360-362.

<sup>213</sup> To the committees see above, Part IV B 2 c. To the hearings and the committees as public window of the EP Neuhold, *supra* note 149, p. 9; Corbett et al., *Parliament*, pp. 7, 272.

<sup>214</sup> A sign of this process is the need to have a Code of Conduct for lobbyists in the EP (see Art. 9 II RoP and annex IX to the Rules of Procedure; also Corbett et al., *Parliament*, pp. 289/90). As to the increased attractiveness of the EP for lobbies Greenwood, *Representing Interests in the EU* (New York 1997), pp. 43-48; Wessels, *EP and interest groups* (in: Katz & Wessels (eds.), *The EP, the NP and European Integration*, Oxford 1999).

working parliament<sup>215</sup>. These agents respond to political opinions held in society and represent them in the political system. Mainly two models can be distinguished:

First, political parties can serve as ‘representative agencies’. Parties can offer a clear and coherent national program, taking on and responding to opinions held in the public. This program can then be evaluated by the voters. Thus, even if we don’t see them argue in the parliament itself, parties are present enough to communicate a clear profile and are thereby responsive to the preferences of the electorate<sup>216</sup>.

The second model (let’s call it ‘delegate model’) is built on the single parliamentarian, not on parties<sup>217</sup>. In this model parties might be loose and decentralized organizations, providing little orientation for the voter, but the single parliamentarians are considered to be delegates of a specific constituency. They are guided by and responsive to the voters in the constituency who track their delegate’s behavior via roll calls and direct contact in the constituency. This model has been especially used to explain representation in the US Congress<sup>218</sup>.

But do these models of representation apply to the EU? Are European parties or single MEPs agents of representation in the EU? Looking first at the parties as ‘representative agencies’ in the EP we encounter severe problems: First of all, there are no coherent and disciplined European parties in the EU. The political groups in the EP are either based on permanent but rather loose party federations or composed of national factions forming alliances only for the work in the EP<sup>219</sup>. As such they are built on common ideological roots but don’t form especially coherent blocks. They especially fail to provide a clear European program for election campaigns which would reflect opinions held in a European public and give orientation for the voter. Instead, the influence of national parties is much stronger<sup>220</sup>. These present clear political profiles but primarily reflect the interests and topics of their respective national debates more than European concerns<sup>221</sup>.

When we then ask, whether the political groups in the EP represent the electorate (in the sense that they offer a program in response to the voter’s opinion and can be held accountable for serving this program) we make an interesting observation - and encounter another problem<sup>222</sup>: With regard to questions which can be measured on a right-left continuum, the parties in the EP react to the electorate and actually tend to represent quite accurately. Here, the common ideological roots bridge the national diversity of the groups. But when it comes to specific EU matters (like common currency, border control or the further deepening of integration), party

<sup>215</sup> These two models overlap with the aspect of the public forum. The aspect of who is the agent of representation can not be completely divided from the where.

<sup>216</sup> See Müller, Political parties in parliamentary democracies, *European Journal of Political Research* 37 (2000), pp. 309-333; Mair, Political parties, popular legitimacy and public privilege, *Western European Politics* 1995, pp. 40-57.

<sup>217</sup> Marsh & Norris, *European Journal of Political Research* 32 (1997), pp. 153-164; c.f. to both models also Löwenberg & Patterson, *Legislatures*, pp. 167-170.

<sup>218</sup> Path-breaking the American study Miller & Stokes, *Constituency influence in the US Congress*, *American Political Science Review* 57 (1963), pp. 45-56.

<sup>219</sup> To the history and current composition of the groups in the EP, Hix & Lord, *supra* note 180, pp. 54; also Corbett et al., *Parliament*, pp. 59.

<sup>220</sup> This is, last but not least, due to the electoral system, in which the national parties nominate the EP candidates, so that these have to follow a national party line and discipline (see Hix & Lord, *supra* note 180, pp. 84).

<sup>221</sup> Reif & Schmitt, *Nine second-order elections*, *European Journal of Political Research* 8 (1980), pp. 3-44; Van der Eijk & Franklin, *Choosing Europe?* (Ann Arbor 1996), pp. 367.

<sup>222</sup> See Thomassen & Schmitt, *Policy Representation*, *European Journal of Political Research* 32 (1997), pp. 165-184; see also Lord, *supra* note 102, pp. 67.

groups in the EP are much more-integrationist than the population in their home states<sup>223</sup>. Thus, they are much less responsive to the opinions held in the electorate.

Pondering these problems with the parties, the alternative model of the single parliamentarian as accessible and responsible representative might therefore be the more promising way. It is especially in the US Congress where this model works well. There, Washington might be far away, but the representative is very close to her constituency, available for as well as accountable to her group of voters<sup>224</sup>.

However, looking at the European situation, the problems of this model are again fundamental, for one simple reason: the size of the constituency<sup>225</sup>. Most of the member states have electoral systems which provide for only one national constituency in the elections for the EP. That rules out (at least legally) any local basis of the parliamentarians, or a precise constituency which could perceive one parliamentarian as their representative in Bruxelles<sup>226</sup>. And even if there are regional constituencies for European elections (as in Belgium, Italy, Ireland, UK and partly Germany), then these are still huge. In effect, MEPs are hardly known in their constituencies<sup>227</sup>. Thus, the model of parliamentarians being deeply entrenched in one region and thereby triggering feedback and accountability, is already structurally hampered in the EU.

Tested again empirically, the actual responsiveness of MEPs to their ‘constituency’ then tends to point to the same problematic direction as observed with the party groups in the EP<sup>228</sup>: Michael Marsh and Bernhard Wessels observed that MEPs are more vehemently pro-European than most of their constituency. Especially in respect to European matters they are more integrationist than their voters. All in all, congruence between MEPs and the European electorate is considerably lower at the European level than on a comparative national one. This result has different amplitudes in the different member states, depending mainly on the differences in the party and the electoral system, Marsh and Wessels suggest. But even a genuine European system, party- and election-wise, would have an ambiguous result: it would “make the MEPs more representative, but almost certainly less integrationist”<sup>229</sup>.

In sum, none of the agency models to provide representation works properly in the European context. The EP, even understood as working parliament with its different and perhaps less prominent style, has a major flaw with respect to its representational function. This flaw is mainly due to the missing intermediating and representing work of parties and parliamentarians. With this final piece of the puzzle, we can now turn to an overall assessment.

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<sup>223</sup> Thomassen & Schmitt, *supra* note 222, p. 181.

<sup>224</sup> Generally Davidson & Olezek, *Congress and its Members* (Washington 6<sup>th</sup> ed. 1998), pp. 132; a classic Fenno, *Home Style: House Members in their Districts* (Boston 1978).

<sup>225</sup> There are a range of problems, as is well-known. But in respect to the representation we focus here on the responsiveness of the MEPs.

<sup>226</sup> Corbett et al., *Parliament*, pp. 12/13. C.f. Haag & Bieber, Art. 138, par. 42 (in: Groeben et al. (eds.), *supra* note 136).

<sup>227</sup> An interesting account of MEPs trying to reach out to their constituency is given by Schöndube, 4 von 518. *Blick hinter die Kulissen des Europäischen Parlaments*, Bonn 1993, and in: Plumb, Tongue and Wijzenbeek, *Shaping Europe*, London 2000.

<sup>228</sup> Marsh & Wessels, *Territorial representation*, *European Journal of Political Research* 32 (1997), pp. 227-241.

<sup>229</sup> *Ibid.*, p. 227.

## **V. Conclusion: Executive federalism, parliaments and the semi-parliamentary democracy of the EU**

### **A. The pieces put together: A model of parliamentary democracy in the executive federalism of the EU**

Finally putting the pieces together, we realize that European parliamentary democracy is neither of the dichotomous choices presented at the very outset of this paper. Instead, it is an original mixture which is deeply embedded in the federal system. Parliamentary democracy in the EU is democracy in the structure of executive federalism. It is thus the first claim of this paper, that a comprehensive understanding of parliamentary democracy in the EU has to start with a comprehension of the peculiar federal system. This system of an executive federalism, shaped most fundamentally by its interwoven competencies, entails a need for executive cooperation and consensual decision-making. To recognize these features is of salient importance if one attempts to understand the functioning of parliamentary institutions in the EU.

The federal system, first of all, renders the NP in the least favorable position to contribute legitimacy to European governance. They are mediated actors in a highly complex system, due to the interwoven competencies. Or to put it more bluntly: they have to be mediated actors because this system requires the national governments as heads of the national administration, not the national parliaments to take part in the making and implementation of European law. From this mediated position the NP not only fail to appropriately control their governments, they moreover face a peculiar dilemma: if they tighten their control, they ultimately interfere with the efficiency and dynamic of a system, which is crucially based on executive cooperation. Acknowledging this situation, their position could only be made effective, if the system of competencies would be changed. Since that is highly unlikely for several reasons, the focus must turn to the EP.

The EP, on the other side, profits from the institutional structure of the executive federalism. This entails a system of separated institutions sharing powers, very similar in that respect to the institutional system in the US Constitution. Instigated by this comparison, this paper took a comparative approach to analyze the EP. It aimed to contrast the EP with two ideal types of parliaments, the working parliament, on one side, which is characterized by its separation from the executive and its strong, committee-based influence in the oversight and law-making function (exemplified in the US Congress), and the debating parliament, on the other side, shaped by the fusion of its majority with the government and a vivid plenary culture as the only place where the opposition and minority can effectively attack the government (exemplified in the British House of Commons). Learning from the comparison with these two types, this paper suggests that the EP can be most comprehensively understood and conceptualized as a controlling parliament which is a distinct sub-category of a working parliament. The EP as controlling parliament is separated from the executive, and not involved in the parliamentary logic of supporting a government. Instead, it gains autonomous standing with respect to its oversight and law-making function, typical aspects of a working parliament. It is a prickly partner which finds in its committees the central places of parliamentary work and influence. Moreover, the committees provide what the system of separated institutions sharing powers and its heterogeneity demand, that is places for negotiations between the party groups and with other institutions. Being itself a heterogeneous body it is a parliament which does not work along a



majoritarian logic but is especially well equipped to blend into the general consensus mode of the inter-institutional procedures in the executive federalism. What has been called the political deficit (Renaud Dehousse), the consensual gray of compromise and diversity, turns out to be the 'efficient secret' of the ideologically scattered EP. In sum, however, the EP shows fundamental characteristics of a working parliament.

Yet, there are two aspects which distinguish it from this type of parliament and vindicate to name it more specifically a controlling parliament: First of all, its power is mainly based on controlling competencies. The EP can chase away a Commission, it can amend or prevent most legislation, it has powerful instruments to scrutinize closely the executive branch. But it has, especially in the central law-making function and in contrast to the US Congress, not the initiating and autonomous standing to positively make policies. It is therefore not a weak but a rather controlling actor, it is a *policy-shaping* not a *policy-making* legislature. A second and basic difference follows from its standing in the elective function; it has a veto power with respect to the government. This does not render it a debating parliament (not even in future perspective) but more distinctly underlines its controlling role in the institutional setting of the EU.

However, the EP faces a most disturbing flaw in the representation function. Taking into account the structure of executive federalism might explain that these flaws are less a European problem or supranational legacy, but inherent in its character as controlling parliament. Yet, certain structures which could remedy the representational weakness of a controlling parliament (and do so in national political systems), are missing in the EU. Neither political parties nor single parliamentarians serve as responsive representatives. This leaves the EP with a serious weakness as to its public perception.

A dilemma for both, EP and NP, is the decision-making in constitutional matters. Neither of them have been influential in treaty revisions so far. A new chance for the NP as well as for the EP lies therefore in the Convention procedure as used for drafting the Human Rights Charter. Even more important perhaps, this new procedure might offer conceptually a perhaps convincing and practicable case of cooperation between the EP and the NP. Inferring from the analysis of the position of NP in the executive federalism, plans to enhance the standing of NP in the EU system seem to be either mere symbolic rhetoric, or (if really meant seriously) embody a peculiar danger for the transparency of the institutional setting. There is no federal system in which the member state parliaments are prominently involved in the regular decision-making processes. Yet, there is also seldom a federal system in which the member state parliaments are not part of the constitutional decision-making. The cooperation and co-decision of EP and NP in constitutional matters thus seems to be a (empirically and normatively) promising perspective.

## **B. A new label: The EU as semi-parliamentary democracy**

Describing this parliamentary model leads to one last consideration. As mentioned in the beginning, studies of parliamentary democracy in the EU face a terminological problem. Speaking of a 'parliamentary system' is often misunderstood as meaning a parliamentary system as known from the UK or continental democracies. Yet, the EU surely is not a parliamentary system in this sense. But it is neither a presidential system. What is it then, this system based on federal thus consensual grounds, but with a strong legislature which is not dominating but nonetheless stamping the system?

I propose to call it a semi-parliamentary democracy<sup>230</sup>. Looking at how political systems are labeled in comparative studies, the relation between the executive and the legislative branch generally serves as a central mark of distinction<sup>231</sup>. Applying this yardstick to the EU, we find that the EU has neither a directly elected presidential nor a parliamentary elected executive. Thus, the EU seems to be an undefined tertium. Looking closer, though, we find its characteristic: the negative appointment power of the EP as a controlling parliament. As explained above, the EP participates in the appointment of the Commission, but shares this power with the Council and is not a loyal supporter of any given government. It is hence not enough to call it a parliamentary system. But the negative power, on the other side, a sort of veto power in the appointment process and an emergency break in the running term, gives the parliament a decisive say and the system a characteristic feature. From this perspective the EU, having an executive which is in negative terms dependent on the EP, is best described as a semi-parliamentary system.

European democracy is semi-parliamentary also for another reason – the effect of its executive federalism on the composition of the executive. Due to this federal structure, even correctly elected parliamentary governments in the member states are bound together in the European Council which has major governmental tasks but as such cannot be parliamentarily dismissed, rendering elections an event without consequences<sup>232</sup>. This murky situation, ultimately rooted in the structure of interwoven competencies, crucially undercuts the principle of accountability and is at the same time the essence and life insurance of the consensual federal policy. This odd but very distinct feature again finds an appropriate label in the term of a semi-parliamentary democracy.

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<sup>230</sup> This term has, to my knowledge, been used so far only by Paul Maignette, *supra* note 114, p. 302.

<sup>231</sup> Sartori, *supra* note 9, pp. 84, 101, 131; Lijphart, *supra* note 46, pp. 116.

<sup>232</sup> It is this aspect on which Paul Maignette rests his qualification of the EU as semi-parliamentary democracy, see above.

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