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INTRODUCTION

Between Consensus and Conflict: Law-Making Processes in Germany

SIMONE BURKHART and MATTHIAS LEHNERT

Germany is routinely considered a consensus democracy.¹ Its federal structure, strong bicameralism, corporatism and a powerful constitutional court demand cooperative action on the part of all actors involved in legislative decision-making. It is therefore hardly surprising that research on German law-making has stressed the impact of parliamentary and non-parliamentary institutions which reduce conflicts and promote cooperative behaviour.² However, as one takes a closer look, the consensual nature of the German political system becomes questionable.

The dichotomy of government and opposition which is the hallmark of majoritarian democracy and comes with strong party political conflict is also dominant in German politics.³ Moreover, minority cabinets or oversized coalitions, which favour political cooperation in the Scandinavian democracies or the Low Countries, are uncommon in Germany where the federal government is generally supported by a strong and cohesive majority in the first chamber, the Bundestag.

The emphasis on consensual politics and policy outcomes sometimes obscures the fact that consensus and cooperation are *conditional*: although most policy outcomes are highly consensual, the road to achieving such outcomes is often paved with severe conflicts arising, for example, from inter- and intra-party competition, struggles between government and opposition or between the two parliamentary chambers. While *institutionally* Germany might rank among consensus democracies, its *politics and behavioural patterns* often seem to deviate from the consensus ideal.

In his seminal study, Gerhard Lehmbruch pointed out that the German political system combines the logic of party competition with the principle of federal cooperation. The combination of the bargaining mode in the party arena and the cooperative mode in the federal arena, Lehmbruch argues, can paralyse legislative decision-making. It is in the legislative arena where the opposing principles of party competition and consensual behaviour are most likely to clash: On the one hand, party competition is likely to be carried into the second chamber, the Bundesrat, which can wield strong veto power. This hampers considerably the government's capacity to act whenever the opposition controls a majority in the Bundesrat, as was usually the case in recent decades. On the other hand, the need to accommodate a majority in the Bundesrat will blur the boundary between government and opposition, thus diluting party competition. Lehmbruch's argument, often referred to as

Strukturbruch (structural rupture), rests on a meticulous historical account and engages a wide range of anecdotal evidence.

Nonetheless, Lehbruch does not provide a systematic empirical analysis of his argument. In addition, the high analytical potential of his work has inspired the theoretical foundations of parliamentary research only in a rudimentary manner. Only recently has the peculiar tension between the need for consensus and the ever-present potential for conflict been addressed at all.⁴ As has been noted repeatedly, German parliamentary research lags far behind its Anglo-American counterpart with regard to both theoretical and empirical sophistication.⁵ Suzanne Schüttemeyer, for instance, observes that theoretical concepts are lacking. While scholars have recognised that systematic theorising is crucial, to date only few promising advances have been made in that direction.⁶ True, a growing number of German scholars have taken up recent theoretical developments in research on US legislative decision-making,⁷ the bulk of the literature, however, is still rather atheoretical. We agree with Schüttemeyer that this is especially true for formal, spatial and game-theoretic models which have proven fruitful in approaches to both the US Congress and legislatures in parliamentary systems.⁸

Furthermore, we perceive a gap between two strands of research, one focusing on parliamentary *institutions* and the other on parliamentary *behaviour*. The former largely adheres to the 'old institutionalist' paradigm of describing and typologising institutional arrangements while it largely ignores political behaviour. Functionalist arguments are still prominent, postulating 'a purpose without a purposive actor'.⁹ The latter, in contrast, centres on the behaviour, attitudes, roles and orientations of parliamentary actors while mostly neglecting institutional context. The link between the two strands is still underdeveloped. This is very unfortunate since, as Huber has noted with regard to parliamentary research in general, we 'have little understanding of how legislative institutional arrangements . . . interact with legislators' preferences to influence political behaviour'.¹⁰

A similar picture emerges with regard to the breadth and depth of empirical research: comprehensive quantitative analyses of parliamentary decision-making processes or policy outcomes are largely absent from the literature on German law-making. Previous research has been dominated by qualitative case studies but does not take the broader context into account. We are aware of only two major exceptions.¹¹ For the first time, Thomas König and Thomas Bräuninger produced a comprehensive empirical dataset of all legislative activity between 1976 and 2002.¹² They transformed the so-called GESTA data, which comprises rich information on various aspects of every bill introduced into parliament, into machine-readable format and merged it with information on the party-political majority situation in the Bundesrat and party-political positions using data from the Comparative Manifestos Project.¹³ Klaus von Beyme analyses various aspects of the decision-making process for 150 key decisions (*Schlüsselentscheidungen*) – for example processes around agenda setting and initiation of a bill, the role of committees, interest groups, media, the opposition or courts in decision-making.¹⁴ Empirically, von Beyme's study is based on quantitative and qualitative data gathered from the GESTA data, minutes of parliamentary debates and committee meetings, parliamentary printed papers, interviews or newspaper reports. However, from our point of view the

two contributions suffer from complementary deficiencies: the former focuses narrowly on bicameral conflict and ignores interactions in the Bundestag, whereas the latter concentrates on decision-making in the Bundestag and largely neglects the role of bicameralism. Moreover, von Beyme's study is a prime example of the type of comprehensively descriptive work which dominates German legislative research. In our opinion, it suffers from a lack of theory. König and Bräuninger, in contrast, refer to a host of theories which they do not support themselves.

Due to these gaps in both theoretical and empirical research, we still have insufficient knowledge of the *mechanisms* by which legislative institutions function and thereby shape legislative output. This volume is meant to contribute to filling that gap. To this end, we suggest combining theorising at an accessible level of sophistication and a broad empirical outlook.

With regard to theory, all contributors to this collection subscribe to the neo-institutional approach and focus on how political actors respond to institutional incentives and challenges. Moreover, all contributions share a distinct 'rational choice flavour' but do not formalise their arguments. We agree with Philip Manow and Steffen Ganghof in that the hallmark of rational choice is not so much its emphasis on rational actors but rather its 'focus on analytically definable mechanisms and systematic effects of institutions'.¹⁵ We want to lay open such mechanisms, specify their observable implications and compare them to empirical findings.

Two characteristics of this volume follow from that purpose: first, all contributions concentrate on rather small sections of the entire legislative process. It is not our goal to provide comprehensive explanations of these sections but rather to identify – both theoretically and empirically – causal relationships between certain aspects of the respective phenomena and processes. Second, we concentrate on recurring aspects of legislative decision-making rather than on singular events or individual bills. Rather than applying a single 'grand theory', the authors rely on different theoretical tools geared towards their specific research questions. Becher and Sieberer, for instance, adapt theories on party unity to their analysis of legislators' explanations of their voting behaviour. Lehnert, Linhart and Shikano turn to recent approaches to the presidential veto in US law-making, whereas Miller and Stecker build on different accounts for decision-making in parliamentary committees.

While all contributions focus on different aspects of the law-making process, the distinction between consensual and conflictual patterns of behaviour is at the centre of all of them. All contributors analyse strategies and behaviour of policy-makers in the legislative arena. While in the past parliamentary research has often focused on policy *outcomes*, the articles aim at a deeper understanding of the political *processes* in general and the behaviour and strategies of crucial actors in particular. It not only reveals deeper insights into the functioning of Germany's parliamentary system but also helps to arrive at conclusions about policy results.

The analysis of political processes is more conducive to 'large-N research' building on comprehensive data than is the analysis of policy results. It is important to note that the generally poor state of affairs regarding large-N legislative research is not due to missing data on legislative processes or parliamentary procedures. The Bundestag and its associated institutions such as the scientific service (*Wissenschaftlicher Dienst*) produce, archive, and publish an overwhelming amount of data. Central in

this regard is the data handbook of the Bundestag compiled by Peter Schindler (and later continued by Michael Feldkamp), comprising far more than 4,000 pages, which keeps a record of, for example, the history, the organisation, the working structure and the composition of the parliament and the government.¹⁶ However, most political scientists only replicate summary statistics and few have so far used it as a starting point for broader empirical analyses.

Another treasure trove for empirical analyses of various aspects of the legislative process is the already mentioned GESTA data. From 1972 onward, the Bundestag and the Bundesrat have published detailed bibliographical information on every federal legislative initiative.¹⁷ This data, starting from 1976, can be also found on the Internet.¹⁸ GESTA contains information on the initiator, the content, the requirements for Bundesrat approval, the policy area, possible European references, and the involved ministries and parliamentary committees of every initiative introduced into parliament. Furthermore GESTA includes a detailed synopsis of the legislative processes and results, with the respective dates for all important stages of law-making. Until the pioneer work of König and Bräuninger, this valuable resource was used only rudimentarily by referring to aggregate statistics provided by GESTA for single legislative periods, e.g. the number of adopted or failed bills. More comprehensive analyses are hampered mainly by the fact that GESTA is stored on a mainframe computer without the possibility to analyse it using standard statistical applications.

With regard to empirical analysis, nearly all contributions to this volume make use of these valuable data sources in some way. To the best of our knowledge, the analyses build on the most comprehensive and detailed stock of data ever used in German parliamentary research. The backbone of most analyses is data distilled from the data handbook of the Bundesrat or GESTA; hence, all essays use large datasets which comprise several hundreds or even thousands of observations. Becher and Sieberer, for example, investigate individual voting behaviour of parliament members using explanations of votes (*Erklärungen zur Abstimmung*). They retrieved all explanations of votes using Schindler's data handbook and coded, in a second step, the content and the initiator of over 1,600 such explanations between 1983 and 1994. The majority of all essays are based on GESTA data which has only recently been made available by several researchers independently of each other. With a total of more than 6,000 legislative proposals, covering a period from 1976 to 2005, a common objection against analysing GESTA is its huge content. Without a selection of important bills or at the least a weighting of bills in empirical analysis, many sceptics argue that it is of no value.

The contributions to this volume react to this common criticism of large-N studies in different ways. First, not a single essay analyses every bill ever introduced into parliament. Instead all authors rely on sub-samples of the GESTA database according to their specific research questions. Second, the value of the GESTA data is increased considerably by matching it with additional information pertaining to the different objectives of the individual contributions. For example, Brunner and Debus investigate the agenda-setter role of the Bundesrat. Therefore, they extract all bills that were introduced by the federal states via the Bundesrat. In addition, they add to the GESTA data information on positions of all political parties in Germany at federal and state level. Lehnert challenges the perceived view that in the conference committee

(*Vermittlungsausschuss*), party-political differences are rather irrelevant. In doing so, he uses GESTA to identify bills in which the conference committee was called upon and matches this data with party-political majority constellations within the conference committee. In this case, as also in many other contributions to this volume, the inclusion of additional information to the GESTA database proves highly fruitful.

THE CONTRIBUTIONS

The present volume consists of four major parts which are organised roughly according to the legislative process: initiative, proceedings in the Bundestag, intercameral process, and the finalisation stage.

In the first section, Martin Brunner and Marc Debus shed light on the processes by which the Bundesrat as a collective player makes decisions on legislative proposals. The existing literature mostly ignores this aspect and assumes that all bills emanate from the federal government. Building on the classical median voter model, Brunner and Debus argue that the partisan composition of a state government affects the probability with which its proposals find majority support in both the Bundesrat and Bundestag. In their empirical analysis, they find that the policy distance between the initiating state government and the median government in the Bundesrat decreases the likelihood of a proposal to become an official Bundesrat initiative. In contrast, the chance that a Bundesrat initiative will eventually become law hinges on whether the partisan composition of the initiating state government conforms to that of the federal government.

Wenke Seemann also studies initiatives but concentrates on the federal government and the parliamentary parties which support it. She picks up the common complaint about the paralysing effects of ‘permanent campaigning’ (*Dauerwahlkampf*) in the German federal system which to date has not been addressed either theoretically or empirically. Seemann asks whether state elections affect the legislative behaviour of the federal government and argues that the federal government might be inclined to postpone unpopular legislation in order not to risk losses in state elections. Such losses would be particularly painful if they affected the majority constellation in the second chamber, thus making governing more difficult. Studying GESTA data, Seemann finds that counter to conventional wisdom the government initiates *more* bills shortly before state elections than after. However, the reverse is true for the Bundestag’s adoption activity: Prior to upcoming state elections, fewer bills are voted into law than in the same time period following such an election. Likewise, Seemann’s results refute the popular view that upcoming state elections lead to partisan bickering at the federal level. Rather, bills are less likely to ignite partisan conflict prior to state elections than at other points in time.

The second part of this volume centres on proceedings in the Bundestag. André Bächtiger, Dominik Hangartner, Pia Hess, and Céline Fraefel focus on the quality of discourse in both the Bundestag plenary and committees. They argue that the dichotomy of government and opposition which dominates in German law-making negatively affects discourse quality in legislative debates. Bächtiger *et al.* concentrate on levels of respect as a crucial dimension of discourse and compare the German legislative process to its Swiss counterpart. Studying almost 1,800 statements from 97

committee and plenary debates on various topics, they find that in spite of institutional pressures to compromise, the dichotomy of government and opposition in the German Bundestag significantly decreases the quality of political discourse. However, this effect is less pronounced in private committee meetings than in public plenary debates. In contrast to institutional and partisan factors, political culture does not significantly affect the quality of parliamentary discourse.

Focusing exclusively on decision-making in Bundestag committees, Bernhard Miller and Christian Stecker argue that interaction patterns in committees vary with context. They point out that while parliamentary parties have a tight grip on committee proceedings, this does not necessarily imply that interactions are majoritarian and conflictual. Miller and Stecker posit that majority constellations in the Bundesrat should affect committee negotiations. When the opposition commands a majority in the second chamber and can thus veto an important part of the government's legislative agenda (the so-called consent laws or *Zustimmungsgesetze*), the federal government has an incentive to reach a compromise with the opposition in the Bundestag committees. This way, it can avoid the cumbersome conference procedure. By contrast, if the federal government has a majority in both chambers, such incentives are largely absent so that committee interactions should be more conflictual. Studying committee decision-making on bills covered by GESTA, Miller and Stecker find that opposition control of the Bundesrat significantly increases the likelihood of consensus in committee. Their results support the view that divided control of the two parliamentary chambers has an impact on legislative decision-making in Germany.

Moving from committees to plenary proceedings, Michael Becher and Ulrich Sieberer ask what accounts for the likelihood of defections from the party line in Bundestag votes. In the past, it has proven difficult to discern whether observed party unity in the Bundestag as well as other parliamentary democracies results from preference homogeneity or from the party leadership's successfully keeping members in line. Becher and Sieberer identify legislators' explanations of their voting behaviour as a means neglected to date for empirically testing the two competing explanations. They analyse all explanations delivered from 1983 to 1994 and find that party unity in the Bundestag at least partly results from discipline rather than shared preferences. More specifically, legislators in executive or parliamentary office are less likely than backbenchers to defect. Moreover, the probability for members of governing parties to defect is lower than that of opposition MPs.

The third part of the volume sheds light on inter-cameral relations. German bicameralism includes a conference committee in order to resolve inter-cameral conflict. While conference interactions are usually considered to be highly consensual, Matthias Lehnert holds that the committee's partisan composition affects conference proceedings and outcomes. He develops a simple spatial model and argues that the likelihood of the conference committee confirming the original bill is higher if the federal government commands a majority in that institution than if it does not. Likewise, we should observe more proposals to annul the bill if the committee is dominated by the opposition. Finally, if there is a standoff between government and opposition, conference negotiations should be more likely to fail than if either side controls a majority. Lehnert studies all bills covered by GESTA which were subject to a conference procedure and finds support for these hypotheses. His results question the dominant

understanding of conference interactions as bipartisan attempts to reach broadly accepted compromises. In contrast, the style of negotiations seems to depend on the majority constellations in the conference committee.

Susumu Shikano studies decision-making in the Bundesrat. The German Länder are often said to pursue both partisan and state-specific interests. However, the two sets of goals are said to be of different importance for voting decisions in the Bundesrat. While most authors stress the dominance of party interests, nobody denies the importance of state-specific interests. However, previous assessments have usually been based on anecdotal evidence. Using novel roll-call data and advanced statistical methods, Shikano provides a systematic empirical study of the subject. He examines the dimensionality of the policy preference constellation in the Bundesrat and finds that in the 1950s both partisan goals and state-specific interests had considerable impact on voting patterns in roll-calls. After German reunification, however, the state-specific dimension lost most of its importance. This finding supports the view that interactions in the second chamber have become more partisan during recent decades.

The fourth part of this volume concentrates on the very last stages of law-making. Philip Manow and Simone Burkhart investigate the duration of the law-making process. In particular, divided government situations are perceived to lengthen the decision-making process and thereby hamper the government's ability to meet social and economic challenges efficiently. Manow and Burkhart specify, discuss and test the theoretical arguments underlying such claims. By analysing duration data for all bills adopted by the Bundestag, they show that divided government delays the adoption of bills, although to a lesser extent than often assumed. Instead, the opposition's threat to delay a bill is anticipated by the government, and translates into governmental self-restraint. Interestingly, these anticipating effects during divided government are particularly important for objection laws (*Einspruchsgesetze*) which an opposition cannot influence otherwise.

Matthias Lehnert, Eric Linhart and Susumu Shikano focus on failed legislation. While legislative failure is rare, it sometimes does occur. The existing literature on German law-making does not provide a satisfactory explanation for this phenomenon. According to standard spatial theory, bills should never fail because rational political actors in such models anticipate failure and behave accordingly. Therefore, Lehnert, Linhart and Shikano turn to two approaches from research on US legislative decision-making, namely incomplete information and blame games. If actors are either informed about each other incompletely, or if they are not interested exclusively in policy content, failure becomes a possible outcome of the legislative game. The two approaches lead to conflicting hypotheses about when failure should be most likely to occur. It is thus possible to test which of the two accounts better explains the German record of bill failure. To this end, Lehnert *et al.* focus on all bills which the Bundestag adopted during the period covered by GESTA. Using advanced statistical methods, they show that the blame game model accounts better for the observed pattern of legislative failure. This finding supports the idea that rational political actors let bills fail deliberately in order to send signals to the wider public and reap potential electoral benefits.

Finally we would like to note that many of the articles in this volume were prepared for and presented at the workshop on 'Legislative Data Analysis' at the Max Planck Institute

for the Study of Societies in October 2007. We are grateful for the administrative and financial support granted by the Institute.

NOTES

1. A. Lijphart, *Patterns of Democracy: Government Forms and Performance in Thirty-six Countries* (New Haven and London: Yale University Press, 1999); S. Ganghof, 'Normative Modelle, institutionelle Typen und beobachtbare Verhaltensmuster: Ein Vorschlag zum Vergleich parlamentarischer Demokratien', *Politische Vierteljahresschrift* 46/3 (2005), pp.406–31.
2. U. Sieberer, 'Agenda Setting in the German Bundestag: A Weak Government in a Consensus Democracy', *German Politics* 15/1 (2006), pp.49–72; P. Manow and S. Burkhart, 'Legislative Self-Restraint Under Divided Government in Germany, 1976–2002', *Legislative Studies Quarterly* 32/2 (2007), pp.167–91; G. Vanberg, 'Abstract Judicial Review, Legislative Bargaining, and Policy Compromise', *Journal of Theoretical Politics* 10/3 (1998), pp.299–326.
3. G. Lehmbruch, *Parteienwettbewerb im Bundesstaat. Regelsysteme und Spannungslagen im politischen System der Bundesrepublik Deutschland* (Wiesbaden: Westdeutscher Verlag, 2000); M.G. Schmidt, *Political Institutions in the Federal Republic of Germany* (Oxford: Oxford University Press, 2003). For a long time, from the early 1960s to the early 1980s, parliamentary opposition consisted of only one party. Even after the Greens entered the Bundestag in 1983, the German party system was clearly bipolar. And still today, after the party system was shaken up following the emergence of the left-wing party 'Die Linke', party competition centres on the dichotomy of two major parties, the Christian Democrats and Social Democrats.
4. A notable exception is, for example, the collection of articles edited by E. Holtmann and H. Voelzkow (eds.), *Zwischen Wettbewerbs- und Verhandlungsdemokratie. Analysen zum Regierungssystem der Bundesrepublik Deutschland* (Wiesbaden: Westdeutscher Verlag, 2000). The contributions to their volume do not, however, engage in comprehensive empirical testing.
5. For an overview of the state of the art of German parliamentary research see S. Schüttemeyer, 'Vergleichende Parlamentarismusforschung', in D. Berg-Schlosser and F. Müller-Rommel (eds.), *Vergleichende Politikwissenschaft*, 3rd rev. edn (Opladen: Leske and Budrich, 1997), pp.191–206, as well as W.J. Patzelt, 'Parlamentarismus', in L. Helms and U. Jun (eds.), *Politische Theorie und Regierungsllehre: Eine Einführung in die politikwissenschaftliche Institutionenforschung* (Frankfurt a. Main/ New York: Campus, 2004), pp.97–129.
6. P. Manow and S. Ganghof, 'Mechanismen deutscher Politik', in S. Ganghof and P. Manow (eds.), *Mechanismen der Politik: Strategische Interaktion im deutschen Regierungssystem* (Frankfurt a. Main/New York: Campus, 2005), pp.9–33.
7. T. Bräuninger and T. König, 'The Checks and Balances of Party Federalism: German Federal Government in a Divided Legislature', *European Journal of Political Research* 36/2 (1999), pp.207–34; Manow and Burkhart, 'Legislative Self-Restraint'; U. Sieberer, 'Party Unity in Parliamentary Democracies: A Comparative Analysis', *Journal of Legislative Studies* 12/2 (2005), pp.150–78.
8. J. Huber, *Rationalizing Parliament: Legislative Institutions and Party Politics in France* (Cambridge: Cambridge University Press, 1996); G. Tsebelis and J. Money, *Bicameralism* (Cambridge: Cambridge University Press, 1997); L. Martin, 'The Government Agenda in Parliamentary Democracies', *American Journal of Political Science* 48/3 (2005), pp.445–61.
9. J. Elster, 'Rational Choice History: A Case of Excessive Ambition', *American Political Science Review* 94/3 (2000), pp.685–95; see, for instance: W.J. Patzelt (ed.), *Parlamente und ihre Funktionen: Institutionelle Mechanismen und institutionelles Lernen im Vergleich* (Wiesbaden: Westdeutscher Verlag, 2003).
10. Huber *Rationalizing Parliament*, p.13.
11. One might also include two studies with a narrower empirical focus: T. Saalfeld, *Parteisoldaten und Rebellen: eine Untersuchung zur Geschlossenheit der Fraktionen im Deutschen Bundestag (1949–1990)* (Opladen: Leske and Budrich, 1995) provides a comprehensive analysis of roll-call votes while M. Sebaldt, *Die Thematisierungsfunktion der Opposition: die parlamentarische Minderheit des deutschen Bundestags als innovative Kraft im politischen System der Bundesrepublik Deutschland* (Frankfurt a. Main: Lang, 1991), studies successful opposition initiatives.
12. T. König and T. Bräuninger, *Gesetzgebung im Föderalismus* (Speyer: Speyerer Forschungsberichte, 2005). According to the authors, an extension of the data set (also covering the 1950s and 1960s) is in process.
13. I. Budge *et al.*, *Mapping Policy Preferences. Estimates for Parties, Electors, and Governments 1945–1998* (Oxford: Oxford University Press, 2001). The GESTA information system (updates on federal

- legislation), comprising detailed information on every federal bill can be found online at <http://dip.bundestag.de>.
14. K. von Beyme, *Der Gesetzgeber. Der Bundestag als Entscheidungszentrum* (Opladen: Westdeutscher Verlag, 1997).
 15. Manow and Ganghof, *Mechanismen deutscher Politik*, p.11; authors' translation.
 16. P. Schindler, *Datenhandbuch zur Geschichte des Deutschen Bundestages 1949 bis 1999* (Baden-Baden: Nomos, 1999), M.F. Feldkamp, *Datenhandbuch zur Geschichte des Deutschen Bundestages 1994 bis 2003* (Baden-Baden: Nomos, 2005).
 17. For example, Deutscher Bundestag und Bundesrat, *Stand der Gesetzgebung des Bundes. Verkündete Gesetze und nicht Gesetz gewordene Entwürfe. Abschlussband der 14. Wahlperiode 1998–2002* (Baden-Baden: Nomos, 2003).
 18. See <http://dip.bundestag.de>.