Limiting EU Powers

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Articles I-9 Draco[1]

One of the central issues arising during each of the Intergovernmental Conferences which has taken place since that of Maastricht, which inscribed the notion of limited conferred competences for the first time in the EC Treaty, has been the attempt to establish clear limits to the powers of the European Community and Union. The 'delimitation of competences' was placed on the initial post-Nice agenda of 2000 alongside only three other issues, and the 'division and definition of competence' was listed as the first of the pressing 'challenges and reforms' of the Laeken Declaration of 2001. No surprise, then, that this question was once again amongst the key questions for debate during the Convention on the Future of Europe, occupying the attention of at least two working groups (those on complementary competences and subsidiarity), and surfacing in many other political and academic debates on the proposed Constitution.

Seen in the light of the recurrence and prevalence of this concern, the results of the Constitution agreed in July 2003 and subsequently amended and signed by the heads of government in June 2004, are rather underwhelming. The main changes are the express listing of 'categories' of competence in part I, the slight rewording of the controversial Article 308 EC 'residual powers' provision, and – insofar as the exercise of competences is seen to be linked to the question of their existence – the new provisions of the protocol on subsidiarity and proportionality.

There are also a number of changes in the terms of the constitutional provision (Article I-9 of the July 2003 draft) which expresses the idea of the EU's limited and derived powers, but these changes seem to be more of symbolic

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[1] All references in the text are to the Convention's Draft Constitution of 18 July 2003 (here Draco) unless identified otherwise. The Constitution's provisions have been renumbered upon its conclusion. The final numbering was not yet established at the time of printing.

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than of practical effect. Firstly, the notion of conferred powers is expressed in a form which is different from that currently in Article 5 of the EC Treaty. Most notably, it is for the first time expressly described in terms of a 'principle of conferral' (rather than simply being a factual statement that powers are conferred). Secondly the competences (rather than 'powers') of the EU are described as being conferred '*by the Member States* in the constitution' rather than being conferred by the treaty (or in this case, by the constitution) itself, as was hitherto the case. Thirdly it is expressly stated that the competences not conferred on the EU remain with the Member States. These changes, even if ultimately cosmetic and not heralding any actual change in the practice of EU federalism, none the less indicate the deep symbolic importance to the Member States of the image of a limited European Union, whose powers are derived from a grant by the States and which possesses neither residual powers, nor (arguably) political *kompetenz-kompetenz*.

As noted by Franz Mayer in a recent comment on the 2003 Draft Constitution,[2] the main focus of the competences discussion during the Convention was on the *legislative* powers of the EU and their control, even though the actual or potential abuse of EU legislative power has not in fact been a truly significant factor behind the constant preoccupation with (de)limiting the EU's powers. Instead, in his view, the topic of competences and the conferral and delimitation of EU powers, has functioned as a cipher for a much broader set of questions concerning the power of the EU and its legitimacy. He identifies some of the more pressing anxieties underpinning the competences debate as being (a) the exercise by the Commission of its steering powers in certain areas (in particular the unfolding of the implications of regional state aids policy), (b) the spread of new co-ordination processes such as the open method of co-ordination (OMC) which increasingly take place outside of the treaties, and (c) the activism of the Court of Justice.[3] None of these three concerns however was really addressed in a direct way by the Draft Constitution or the Convention process.

These observations, interesting as they are in themselves, prompt a number of further questions and observations.

First, why is it that the Convention and the Draft Constitution did not actually address the 'real concerns' behind the competences debate? Were the real

[2] Franz Mayer, 'Competences Reloaded: The vertical division of powers in the EU after the new European Constitution' <http://www.jeanmonnetprogram.org/conference_JMC_Princeton/NYU_Princeton_Mayer.pdf>.

[3] Ibid., part IV.

sources of concern not recognized, or were they too sensitive?[4] In the case of the new constitution, one answer might be that they were in fact indirectly addressed. The Commission could be said, overall, to have been weakened *vis-à-vis* the Council of Ministers and the European Council; secondly, a certain reform of the procedure for appointing judges to the ECJ was agreed in Article III-262 (although apparently because of anxiety about the nomination of judges from the new Member States rather than any real attempt to 'rein in' the current court), and in the case of the OMC, the majority of Member State governments may have wanted to continue their political control over the gradual and low-key spread of such co-ordination processes without constitutional constraints of a positive or negative kind. Nonetheless, if any of these changes was in fact an attempt to address the 'real' concerns behind the creeping competences discourse, they were very obliquely and half-heartedly done.

Secondly, when looked at in comparative perspective, the question of the division and exercise of powers in any federal system – i.e., the source of the competences granted, the degree of policy autonomy left to the constituent states and the degree of authority conferred on the 'central' government – although inevitably a matter of great political and constitutional import, is rarely determined by the constitutional settlement. In other words, the principle of conferral and the listing of competences may point in a particular direction and may express a particular symbolic commitment, but they cannot determine whether or how that direction will be followed. Instead, the legal or constitutional provisions which purport to regulate these questions provide the starting point (albeit an important starting point) for addressing the matter, but the actual nature of the federal system in question emerges through the institutional practice over time. In that sense, the result of the EU's constitutional treaty is not surprising, since the expression of the conferral principle and the articulation of categories of competences – demonstrating that the EU has very few exclusive powers but a reasonably large number of shared and overlapping powers – do not in themselves reveal much about the nature of the EU's federal system, and looks relatively uncontroversial even to the Eurosceptic observer.

Thirdly, and closely related to the previous point, a key finding of a number of studies on comparative federal systems is the *dynamic* nature of federal systems.

[4] The apparent paradox of Member States' vocal concern over the growth of creeping competences on the one hand, and yet their continued failure to address the significant reasons for or to curb such growth on the other hand, is a question I addressed three years ago: 'Setting Constitutional Limits to EU Competence', Francisco Lucas Pires Working Papers Series, Universidade Nova de Lisboa, 2001 <http://www.fd.unl.pt/je/wpflp02a.doc>, but which is worth revisiting in the wake of the new constitutional treaty.

This dynamism is inherent not in the choice of constitutional language but in the way in which the political branches (usually the central government) exercise and expand (or otherwise) their power over time, and the way in which the adjudicative organ controls (or otherwise) the exercise of those powers. Comparative analyses of the patterns of federalism in the US and Europe[5] reveal how the patterns of federalism change over time within particular political systems. The US provides a particularly interesting study in this regard, given the different varieties of federalism it has exhibited without any formal constitutional amendment. These include the period of so-called dual federalism from the mid 19th century until the 1930s, through a more co-operative form of federalism thereafter, to a period of greater centralization in the 1960s, followed by the 'new federalisms' under Nixon, Reagan and then the Rehnquist court. Although the categories of 'dual' and 'co-operative' federalism are obviously not so clearly distinct and opposed in reality, they nonetheless provide models of federal systems which differ in their emphasis and priority.[6] Broadly speaking, dual federalism refers to the existence of two distinct and separate sovereignties, each of which exercises a broad array of governmental functions within its own sphere, and where powers are often divided sectorally. Co-operative federalism on the other hand refers to the sharing of a broad array of powers between two levels of government, and in which powers are often defined functionally.

How then should the EU's federal framework be categorized? In terms of either its treaty or constitutional framework, the system cannot easily be described either as one of dual or co-operative federalism, in that its constitutional provisions in fact exhibit aspects of both. It can be described as 'dual' in the sense that there are two distinct levels of government (and two sovereign authorities, if the EU is conceded to be sovereign, although this is something which the constitutional treaty leaves open) each of which exercises a broad array of governmental functions within its particular domain. It can be described as 'co-operative' in the sense that many of the important powers are functionally defined (e.g., to establish an internal market) and are mostly shared in complex ways between the levels of government rather than divided neatly between them. The provisions of the new constitutional treaty do not alter this mixed model, but instead articulate aspects of each. On the one hand the EU is said to

[5] See, e.g., M. Pollack 'The Growth and Retreat of Federal Competence in the EU' , in R. Howse and K. Nicolaidis, *The Federal Vision* (OUP, 2001), F. Scharpf, 'The joint-decision trap: lessons from German Federalism and European Integration' (1988) Public Administration 66, and T. Boerzel and M. Hosli 'Brussels between Berlin and Bern: Comparative federalism meets the EU' at <http://politicologie.scw.vu.nl/wpps/web022002.pdf>.

[6] 'Fiscal federalism' is a descriptive category which is not normally used in relation to the EU, given the lack of taxing power of the central government and despite a degree of disbursement of regional and structural funds.

have limited powers conferred by the states, and yet on the other hand the largest category of powers is those which are complexly shared between the states and the EU rather than belonging exclusively to one or the other. Most importantly, the constitutional treaty does not change the fundamental factor that many of the most significant powers of the EU remain primarily functionally defined.

Fourthly, since as noted above, the character of federal systems appears to be dynamic, and to emerge not from the framework constitutional provisions alone, but rather through the practice of the political and judicial institutions, in what sense has the EU's federal system been dynamic?

Insofar as the amendments to the framework provisions are concerned, all of the changes made to the treaties (the EU's *de facto* constitutional framework until the new constitutional treaty) since the 1950s have expanded the powers of the centre and gradually added new competences and functions. In this sense, the dynamic has largely been a one-way dynamic. Only with the Maastricht Treaty was this expansive tendency accompanied by certain restrictive provisions (although no existing powers were reduced or curtailed). In the first place, the notion of conferred competence was formally expressed for the first time, secondly the principle of subsidiarity was written into the treaty, and thirdly some of the new competences added were limited in particular ways so that, e.g., no harmonizing measures could be adopted. Conflicting tendencies appeared then, for the first time, in the Maastricht Treaty, with expansion and caution being evident in almost equal measure.

Insofar as the institutional and political practice is concerned, how has the dynamic nature of federalism manifested itself in the EU? Some studies have attempted to appraise this issue in quantitative terms, looking at the overall volume of EU legislation, and noting a reduction in legislative output since the Maastricht Treaty. But quantitative analyses give only a crude and not necessarily accurate indicator of the strength and influence of the central government, and if we look instead at whether, for example, the newer and more sensitive policy competences agreed in the Amsterdam Treaty have been used, the answer is clearly a resounding yes. The area of 'justice and home affairs' is one of the biggest growth areas in terms of legislative output in recent years. To ascertain whether the Commission has significantly changed its practice and whether it has 'retreated' from its governing functions would require careful methodological study across policy sectors. But in the absence of careful empirical evidence of this kind, there has been no obvious sign of such withdrawal on the Commission's part, despite its regular reports on 'better lawmaking', 'simplification' and governance reform, and it has continued to pursue significant

projects in reasonably high profile and not uncontroversial areas such as the area of services liberalization in the internal market and in external trade. The role of the Court is equally difficult to assess, and is also varied across issue areas, but none of the studies which have been carried out suggest that the ECJ has significantly reduced its own powers of creative interpretation nor adopted a consistently 'pro-state' role in cases which touch on questions of the depth and scope of integration, nor has it – apart from the now famous tobacco advertising case – ever seriously curbed the activity of the EU legislature.

Insofar as the nature of EU federalism is dynamic, therefore, it seems that it has fairly consistently been in terms of the empowerment and strengthening of the federal level of government and of the project and policies of Europeanization and integration.

Fifthly, this in turn raises some interesting research questions, in particular if the experience of other federations (like the US) is seen as supporting a pendulum theory of federalism: a swing back and forth from centralization of the exercise of power in the central government to a re-empowerment of the states, through the actions either of the federal government and/or of the Court. Does the EU experience support a pendulum theory of federalism?

From the brief outline above, the answer would clearly be no. Despite some of the cautionary provisions added at the time of the Maastricht Treaty, and despite the symbolic changes in the 'principle of conferral' clause of Article I-9 of the new constitutional treaty, there has not yet, in the course of European integration, been a swing back in favour of the powers of the states. One answer to this might be that it is clear that the pendulum nature of federalism in a political system like the US can be explained by political and ideological swings: with a Republican government and a conservative court largely favouring states' rights, while Democratic government and a liberal court tends to favour the federal legislature and its programs (although the picture is indeed more complex as the current tendency of the republican government to centralized authority in anti-terrorist and abortion policies, for example). But since politics in the EU's complex, multi-level and institutionally intertwined system has never mapped easily onto right-left, conservative-socialist cleavages (and since, for example, the promoters of closer European integration and co-ordination include both market-economy supporters and proponents of a stronger 'social model'), a swing in the patterns of federalism along left-right or similar ideological lines would obviously not be expected.

However, the pendulum pattern of federalism can be seen also in other political systems for reasons which are different from those explained by the swings of US politics. In certain developing countries such as Brazil and Indo-

nesia, for example, which pursued projects of centralization from the mid 20th century on, there has recently been quite a marked shift away from this to radical forms of decentralization instead. In the case of these countries, it has been under the influence of the World Bank that the move towards decentralization has taken place, but the move reflects a belief (at least on the part of the Bank) that this is a better and more effective system of economic and political government than a very centralized one.

An interesting research question might therefore be to examine the 'pattern(s) of federalism' in the EU to date, and to try to provide a careful, systematic and considered account of why, despite the repeated concerns articulated by certain governments, both national and regional, about the creeping competences of the EU and the growth of its central powers at the expense of statal and regional capacity, the trend – both in terms of the constitutional/treaty framework through its many amendments, culminating in the current constitutional treaty, as well as in terms of the practice of its institutions – has been mostly in one direction so far.

Finally, many commentators have drawn attention to the problems of (in)capacity and the growing interdependence of states under conditions of economic globalization, and the emergence of newer or experimental forms of Europeanization – including those such as the open method of co-ordination – are suggestive of attempts by the Member States of the EU to reconcile their concerns about policy autonomy and sovereignty on the one hand, with the pull towards co-ordination and the search for common solutions on the other. Do these reflect a change in the EU's pattern of federalism? Are they an instance of further centralization? Are they in reality ways of protecting the Member States' powers while giving the appearance of seeking common solutions? Or do they reflect a third way, neither strongly centralized nor decentralized, which is consistent with a co-operative form of federalism, and where the categories of 'conferred', 'limited' or 'divided' competences have less relevance?

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