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Governing Together in the New Europe: Division of Competences and Federal Models

Report of 'Governing Together in the New Europe' Conference
Robinson College, Cambridge, 12-13 April 2003

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Governing Together in the New Europe: divisions of competences and federal models – Report of the CONVEU--30 Workshop held at Robinson College, Cambridge on 12/13 April 2003

Is the EU a federation? A federal union of states? Or a federal state? Or a federation in the making? And what model(s) of governance is appropriate for the EU? These were some of the questions considered by participants at a conference on 'Governing Together in the New Europe: divisions of competences and federal models', held at Robinson College, Cambridge. Thanks go to the European Commission and the Foreign and Commonwealth Office for their generous support in this project on the future of the EU. The German Foreign Minister, Joschka Fischer, described the European Union as a 'European Federation' in 2000. How close to the truth was he? It seems from the discussions held at Robinson College that he can at most have been half-right. The EU has federal aspects, most notably in the sphere of the internal market, but is a long way off in its foreign and defence policy.

Initially, the Convention on the Future of Europe hoped to address delimitation of competences in the EU, an issue that will be critical for how far the EU moves towards a federalist system. Different federal models have provided a large array of options for the Convention to consider, four of which are discussed below. Although the idea of a catalogue of competences dropped off the agenda, it is still important for the EU to create a clear system of governance even if not quite so explicitly stated. The role of courts in a federal system is also crucial for determining who has *Kompetenz-Kompetenz* (who allocates the division of competencies), the centre, the subunits, the supreme court or indeed the constitution. By and large, the Convention's draft treaty has avoided these thorny issues, though there has been plenty of discussion in the working groups and plenary sessions.

What is the EU? Is it a federal state? A federation? A confederation? A federal union of states? Something else?

Opening the Saturday morning discussion, Professor Vernon Bogdanor (Brasenose College, Oxford), defined a federal state (after Dicey) as 'a political contrivance to reconcile national unity with state power', where 'national' refers to the federal level and 'state' to the component units. K C Wheare's definition of federalism requires that two governments be independent and co-ordinate within their own spheres, generally set out by the division of competences codified in a constitution, which is supreme. In

the EU, states' law-making powers are limited but the powers of the Union can be extended only by the European Council i. e. by member states acting jointly and unanimously. Residual rights do lie with the EU but there is no equivalent to the 10th Amendment of the US Constitution. The Commission can be seen as a federal institution because it is independent of the states, but, Bogdanor argued, the EU is not a federal state even though it exemplifies K C Wheare's federal principle. The principle alone is not sufficient. The Union might be an economic federation, but it does not even approximate to a confederation in the foreign and defence policy fields. In fact, the EU seems closer to the German Zollverein whose competences included competition, trade and an internal market; there was also a common currency alongside national currencies. The EU can be seen as a union of states, set up *by states*, in contrast to the US, which was established by the people. It is important to distinguish between a federation and a 3 federal union of states; in the latter component states delegate certain powers to a higher body, in order to make external relations into internal ones, especially regarding defence.

A confederation, unlike a federation, permits component states to have different forms of government, which is precisely what the EU has. Some are republics, some monarchies, some are parliamentary democracies, and others are semi-presidential. Is the EU moving towards a federal state? Bogdanor argued that an act of will was needed in order to create a federation, it would not just come about. Indeed, it is necessary for sentiments to favour union rather than national identity – such sentiment needs to be developed.

Making the President of the Commission directly responsible to the European Parliament would be a big step in that direction. Perhaps a single European consciousness could develop by way of confederation, as happened in Switzerland but so far, it was pointed out, 'The EU has gone ahead of the consciousness of European peoples'. In both Switzerland and the USA, coercion was necessary to create the federation, which is something that would obviously be unacceptable now. In any case, it is worth remembering that the Founding Fathers did not talk about setting up a federation but rather a 'system to solve problems'. For a federation to function, there needs to be the sense that a component unit is subordinate to the higher union, although it is possible for the federal level to build a nation from the top down. A stumbling block at present in the EU is small states' concerns at being

dominated by the large member states, which would not occur in a federation where states retain autonomy.

Traditional conceptions of federation do not fit the EU perfectly. Instead, the EU could be evolving towards something new. Weiler contends that the EU has the external appearance of a state but is not actually a state; maybe, it was suggested, the EU could be a new type of state. One only needs to see how the concept of state has evolved over time to see that it need not be a constant.

What about the relationship between economic and political unity? Economic unity is not necessarily a precondition for powerful political union. Could there be something in the nature of the internal market that has stifled impulses towards political unity at higher levels, Bogdanor wondered? Also, if a common foreign and security policy is a key feature of a federal state, why is the UK so in favour of creating a Council Presidency for continuity in the EU's CFSP? There is significant public support for CFSP, so maybe it is the elites rather than the people who are not yet ready for integration in this area.

Moreover, it was noted, there may be intergovernmental decision-making in non-Community policy areas, but even these relations are very different from intergovernmental relations between other states, especially in the fields of justice and home affairs. EU relations have a different quality and an institutional dimension not usually present in other intergovernmental negotiations.

Rather than considering the EU as a federal state, federation or federal union of states, perhaps it is better to view the EU as a system of multi-level governance, where sovereign rights are shared and divided between supranational, national, and subnational institutions.

The role of Courts in federal systems

Erin Delaney (Centre for International Studies, Cambridge) argued that one key element of a federation is the presence of a supreme judicial arbiter. Such a body interprets the constitution (N. B. only the federal court, not state courts, has the right to do this), monitors the division of competences between the states and centre, conducts judicial review, oversees a bill of rights; it may also exercise an integrative influence through monitoring the uniformity of the federation.

To date, the European Court of Justice (ECJ) has had an integrationist, even federalizing, influence on the European Union, but is it actually a federal court?

Member states and Community institutions have access to the ECJ, and, under Article 230 of the Amsterdam Treaty (formerly Article 173), so do individuals. Though this access for individuals is very limited, its provision moves away from the principles of public international law that governed the original Community legal system. Article 234, under which national courts request interpretations of Community law from the ECJ, is of central importance in creating a constitutional order from the Treaties, but it requires co-operation from the lower national courts. However, although the ECJ acts as an interpreter of Community law, it does not exactly monitor any division of competences, and judicial review is conducted by the national courts. If one of the hallmarks of a federation is attention to the people, the ECJ would seem to be too inaccessible to constitute a federal court in this respect as people have to go via national courts. On the other hand, Tanja Börzel points out, the ECJ enforces federal law by empowering domestic actors. That the ECJ does not equate to a federal court matters only if the EU wants to become a state, Delaney argued.

Divided (as opposed to shared) competences could lead to an adversarial relationship between the ECJ and national courts: when a disagreement arises, who has *Kompetenz-Kompetenz*? A delimitation of competence would change the nature of the European legal system, and it is not clear that the current procedures, namely Articles 234 and 230, will be enough to protect European interests as the co-operative relationship between the ECJ and national courts disintegrates, which Delaney believes is happening at present.

Can other examples of federalism provide lessons for examining the EU?

Opening the afternoon session, Tanja Börzel (University of Heidelberg) put the EU in comparative context, noting that the Union is a federal system, not a federal state but that it was on the way to being federal, even though a federal system need not become a federal state. She outlines two models in particular, the dual federalist or separation of powers model and co-operative federalism as practised in the United States and Germany respectively.

Separation of powers (dual federalism) as seen in the USA emphasises the institutional autonomy of different levels of government, aiming at a clear separation of powers between the union and the states. Competences are allocated according to policy sectors rather than policy functions.

Co-operative federalism as practised in Germany is based on a functional division of powers among different levels of government. The federal level makes the laws and the subunits implement them. Most competences are therefore shared, but to compensate the lower level of governance for its lack of 'self-determination', the units have strong participatory rights in decision-making at the federal level. Because the EU requires the consent of member states to legislate even in its areas of exclusive competence, ensuring that states retain significant leverage over the EU, the EU corresponds more closely to this model of federalism.

Wilfried Swenden (University of Leuven and Centre for European Studies, Harvard) then outlined the Belgian federal story. Belgium was transformed from a unitary to a federal state in order to accommodate ethno-linguistic cleavages between the Dutch-speaking majority and the French-speaking minority. There are two types of federated entities in Belgium: communities, determined by language (French, Dutch or German); and regions, which are territorially determined (Brussels is a region but not a community, whereas Flanders and Walloon are both regions and communities). The federal executive comprises equal numbers of French- and Dutch-speaking members, and takes decisions by consensus.

There is no hierarchy of laws in Belgium, federal and regional law have the same status, so the system can only work when competences rarely overlap, making this a dual federalist system albeit of a rather different nature from the US model. There is no separation of functions – the level that legislates also implements. The regions have foreign-policy capacity in the fields in which they have competence, and can sign treaties in those fields. However, the centre has powers in defence, justice, internal security and fiscal policy. Social security also remains almost totally at the federal level, thus allowing for redistribution of resources between regions. The primary responsibilities of the communities are education and pensions. Regions deal with *inter alia* employment policy, urban renewal, energy policy, agriculture and external trade. Belgian law contains a very detailed catalogue of competences. Constitutional reforms do not require the support of regional parliaments or the people in referenda.

Looking at the state to which the EU is so often compared, Paolo Dardanelli and Clive Church (University of Kent at Canterbury) outlined the development of the Swiss federation. Switzerland can be described as a confederation before 1848 and a federation afterwards. The last phase of the confederation (1815-1848) is quite

similar to what the EU is going through now, except that then the emphasis was on security, not economics.

The drive for political modernization and economic integration at that time led to pressure for federalization, although this was resisted by the smaller states, resulting in a brief civil war. After the 1848 Constitution, the cantons retained residual powers and a stake in federal decision-making. There are three types of competence in Switzerland – cantonal, joint and confederal. Confederal competence was explicitly spelled out in the constitution, especially regarding the creation of a single economic space. There then followed a slow but definite process of centralization concerning legislation; implementation and tax-raising ability largely remained with the cantons, which raise and spend more than the federation.

In Swiss federalism, institutions and not ethnicity provide the basis for national identity, which rests on a bottom-up view of the state. Direct democracy (through referenda) is an important part of Swiss political culture, which, possibly except for the acceptance of a new European constitution through a referendum, cannot realistically be applied to the EU, partly because a mature civil society is needed for referenda to work. Although one might argue that the EU is composed of 15 states each with mature civil societies, the issue is again, perhaps, one of no demos. As co-operative federalism tends to blur responsibilities, making it unclear where accountability lies, it may not be appropriate for the EU as a model when the 'democratic deficit' is so stark. The example of Switzerland shows that the *mechanisms* for permitting a transfer of competences from one level to another are more important than their initial distribution. States' constitutions are organic, and should not preclude amendment if that becomes appropriate. This theme would recur in MEP Andrew Duff's remarks on the European Convention.

Discussing Canada, Gerry Baier (St Thomas University, Canada) pointed out that Wheare had defined the 1867 British North America Act as 'quasi-federal' because it lacked the necessary guarantees of provincial autonomy for the units to play a co-ordinate rather than subordinate role. The early introduction of judicial review to act as umpire between the two levels of government allowed the practice, if not the theory, of Canadian federalism to abide by Wheare's requirement that two levels of government be independent and co-ordinate within their own spheres. Canada's constitution has two lists of competences, instead of the more common single list of competences with residual competences accruing to the other level. Most

competences are conceived as 'water-tight compartments': there is very little overlap, though co-operative federalism increased from the 1960s, thereby marginalizing the importance of federal judicial review (important in dual federalist systems).

Since the failure of constitutional change in 1992, governments have come to rely increasingly on intergovernmental agreements to co-ordinate initiatives and to demonstrate the responsiveness of the federal system. Enforceability of these agreements is a problem, so recent ones have comprised internal dispute resolution mechanisms, which emphasize compromise and co-operation. The 'creeping informalism' of Canadian federalism raises the issue of democratic accountability: it may be a pragmatic way to resolve disputes, but it is much more difficult for citizens to take the federal government to court for abusing its constitutional authority.

Looking specifically at the German Case, Börzel notes that the *Länder* enjoy strong representation at the *Bund* or federal level through the *Bundesrat*, the second chamber of the federal legislature. But the directly elected *Bundestag* (and the federal government) provides a counter-weight to this subunit representation, and also a focus for federation identity and political legitimacy. Neither the Commission nor the European Parliament, in contrast, effectively balances the Council of the European Union. Vertical party integration is strong in both German chambers, but is virtually non-existent in the EU, as is any effective transnational lobbying from top European industrial associations.

The EU suffers from a 'double legitimacy' trap, where weak input legitimacy (from restricted participation), which used to be compensated by output legitimacy (from efficiency), can no longer be so as member states are deprived of the ability to act in areas to do with the Internal Market (especially in macroeconomic stabilization), without those powers being conferred on the Union. It was argued that in order to escape this trap the EU needs to move closer to the co-operative federalism model of Germany. The Council of the EU would develop into a second chamber of the European Parliament (EP), and the EP would be placed on equal footing with the Council in the legislative process. The Commission would become the true European government with tax and spending capacities independent of the member states. Input legitimacy also needs to be strengthened by bringing European citizens closer to the decision-making process *before* decisions are made.

The Sunday morning session focused more directly on the progress made by the Convention to date. Opening this session, Angelika Hable (University of Vienna)

considered the theme 'visions on the reform of competences in the European Convention'.

Hable notes that the Amendment Procedure (currently under Article 48 TEU) of the Treaties is by ratification by the member states, and is unlikely to be changed significantly, despite the draft Constitutional Treaty's designation of residual competences as shared competences (which could allow a 'lighter' amendment procedure proposed for Part II of the new Treaty to apply also to the allocation of shared competences).

Who is the final arbiter of constitutionality if an act of secondary EU law conflicts with national constitutions? Member states should retain residual competence to control 'acts of secondary law that are manifestly *ultra vires* or seriously fall below the EU standard of fundamental rights protection' because the EU is not yet a state (Stefan Griller). Without this albeit reduced national judicial review authority, the ECJ would possess *Kompetenz-Kompetenz*, which requires statehood to make logical sense.

Giscard d'Estaing's Draft Constitution uses three 'classical' categories of competences, exclusive competence at the EU level, exclusive competence at the national level, and shared competence or supporting measures. There are also separate categories in the area of CFSP, co-ordination of economic policy, and other extra categories of shared competence. This results in the pillar system re-entering through the back door. Exclusive competences at EU-level should be limited to

- i) external trade in goods,
- ii) monetary policy with regard to members of EMU,
- iii) urgent actions to interrupt or reduce economic relations with third countries,
- iv) areas of implicit external competencies.

For clarity, it will be necessary to decide (which the current draft Constitution does not) whether to aim for a step towards federalism with a clearer separation of powers or to retain the present decision-making procedures adapted to the requirements of an EU of 25.

Andrew Duff (Liberal Democrat MEP for the East of England; Vice-President of the EP delegation to the Convention; Chair of the Caucus of Liberal Members on the Convention) outlined the achievements of the Convention so far. He notes that it had been agreed in the Convention that the three pillars need to be merged; that the executive and legislative functions of the EU need to be fully separated; that the

instruments for implementation and decision-making procedures need to be streamlined; and that a consensus has developed on the need for the Union to strengthen its capacity to act at home and abroad.

Duff argued during the conference that there is a need to retain flexibility in the system; creating something too rigid would be disastrous. Practitioners view all competences in the Union as shared, though some are more shared than others. It is important to flag this up for the average EU citizen, Duff argued. Perhaps social and employment policy should be more closely linked with economic policy, thereby moving towards a Union competence.

In order to fully separate the executive and legislative functions, a consensus must be found regarding the roles of the presidents of the Commission and the Council. However, at present there is no majority in favour of the current set-up. There is no majority for the Franco-German proposals because a team presidency and teams of ministers beneath it would be just as tricky to co-ordinate as the current system without making it simpler for third parties dealing with them. There is no support for the British idea of a 'super-president' of someone outside the European Council; nor is there discernible support for Andrew Duff's concept of an integrated presidency. Duff remained convinced, however, that there was a need to suppress the six-month presidency's programme, and instead focus on a multi-annual strategy proposed by the Commission, approved by the European Parliament, and devised in the Council. What is certain is that more time is needed to complete the Convention.

In a round-table discussion that looked at the controversial issues of tax harmonization, defence policy, social policy and internal security, Toomas Ilves (former Foreign Minister of Estonia) drew attention to the link between taxation and social policy. He pointed out, for instance, that the ageing populations of Europe will mean more older voters who will want to move freely about the EU, collecting their pensions wherever they happen to be resident. Although the new, small state of Estonia agrees with the old, large state of the UK on the need to defend the national prerogative in these sensitive areas, Ilves hinted that some compromise would be necessary given the nature of the Internal Market.

There has been very limited progress regarding internal security and defence in the Convention, Ilves claimed. However, the consequences of the Schengen regime at

the EU's borders and the free movement of people within the EU would nonetheless necessitate a European Police Force at some stage in the future. Ilves called defence the 'sine qua non' of integration, but he fears only a disaster will bring about the right conditions for political change in this area.

Reinhardt Rummel (Stiftung Wissenschaft und Politik) tackled the defence issue too, arguing that instead of a dichotomy between internal and external security, we should think of a continuum along which different issues fall. The EU should remain flexible in order to adapt to changing conditions. He was sceptical about whether the Europeans could deal with significant threats given their reluctance to pay for defence resources, and urged the EU to intertwine the non-military component (which it already has) with the military component of security, something the EU as yet lacks. The Europeans need to 'think big' – in terms of 25--30 members – in order to contribute their fair share to global security.

Geoffrey Edwards (Centre of International Studies, Cambridge) picked up on Rummel's insistence on flexibility, arguing that 'form should follow function'. By asking, 'What do we want from Europe?' Edwards presented the British approach to the Convention, emphasizing that the UK prefers a co-operation and co-ordination between sovereign states, whose governments remain the primary source of legitimacy of the EU.

Therefore, though the UK supports ending the pillar structure, it would still be necessary to keep CFSP and justice and home affairs intergovernmental. The Convention, Edwards felt, had come at the wrong time to look at these issues with clarity in the UK. The question of membership of the euro has yet to be resolved, and the Iraq crisis has cast a shadow on proceedings.

Mette Eilstrup-Sangiovanni (also CIS) pointed out that the debate in Denmark is in many ways similar to that in the UK. It has been 'held hostage' to the opt-out school versus the stay-in school argument. The government, using the slogan 'a slimmer but stronger EU', is insisting on clarification of the distribution of competences, and though in general Danes want to reduce EU-level actions, they are in favour of giving the EU enhanced competence in the internal security field.

The Danish are insisting on retaining the entire welfare sector exclusively at the state level, Eilstrup-Sangiovanni maintained, but there is a willingness to delegate some social policy. She suggests a set of common social criteria to protect workers in the

Internal Market. Given the strains of enlargement, institutional reform is necessary, but it is as yet unclear to the Danes why they also need constitutional reform.

In conclusion, lessons can be drawn from other federal systems and the means they employ to divide or share competences, provide for judicial review and allow individual citizens access to the centre when looking at the European Union.

However, the EU is a unique institution that combines a federal first pillar of Community competence with more intergovernmental second and third pillars, even if the formal pillar structure is removed. The issues being raised in the Convention refer to institutional reform and legal questions but avoid a full discussion of the structure of the Court of Justice. Perhaps the EU is destined to create a new type of political system that borrows federal principles in areas of international trade and the Common Market, but reserves more traditionally 'sovereign' issue areas for member-state competence.

Certainly, areas of defence and tax harmonisation in particular are cherished as state competences by a wide variety of states in the enlarged EU. What we have seen over the past fifty years, though, is a steady expansion of federal competence.

Whether the current *impasse* over foreign policy represents the ultimate stage of integration, or whether it is just another hurdle on the path of further federalization, remains to be seen.