From Dual to Cooperative Federalism

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Robert Schütze. *From Dual to Cooperative Federalism: The Changing Structure of European Law* (Oxford University Press 2009), 391 p., ISBN 978-0-19-923-8583

'What is the structure of European law?' This is the main question underpinning the excellent work of Schütze. More specifically, the writer is mainly interested in showing how the federal philosophy underlying the structure of EU law has changed over time. Although the thesis advanced in the book is more nuanced, admittedly, the 'book serves the answer [to this question] on the silver plate of its title' [8]. In order to prove the transition of Europe from a – predominantly – dual federal paradigm to a – predominantly – cooperative one, the writer focuses on the actual exercise of legislative power by the EU rather than merely analysing the distribution of competences between the Union and its member states. This analysis takes place in the four chapters of the Special Part of the book, which is preceded by the two chapters of the General Part on *Federalism in America and Europe*.

If there is an undeniable quality of this timely and relevant contribution to the never-ending debate on the federal nature of the European project, it is definitely that it provides a much-needed clarity to a fair number of notions that are used and abused *ad nauseam* in the EU studies discourse. This is particularly apparent in the short introductory chapter and the first chapter of this book. In the former, the writer stresses the differences between the dual and cooperative federalism, going beyond the schematic and rather banal comparison between the American and German federal systems [5, 237].

According to Schütze, while dual federalism is based on the idea of dual 'sovereignty', in cooperative federalism 'sovereignty' is shared. In the former the federal government and the State governments operate independently in their spheres, while in the latter they are mutually complementary parts [5]. Although there is nothing particularly original in those definitions, in replying to the question which of the two philosophies inspires the European Union, the writer admittedly takes

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'the road less travelled.' Rather than focusing on the misleading institutional and/or functional dimension of a compound polity, the decisive factor for his distinction between dual and cooperative federalism is the legislative function of the given system. So, in the case of the Union, for example the constitutional choice to 'recruit the member states administrations for the execution of European law will not *as such* signify a cooperative federal arrangement' [8].

More importantly – for the purposes of his book – in the first chapter of the General Part on the *General Tradition(s) and the European Union,* Schütze provides for a fascinating account of the federal principle's 'journey through time in quest of a meaning' [14]. In order to do that, he refers to the three federal traditions that have emerged in the modern era. During the 17th century the federal principle signified international and contractual relations between sovereign states. Those (con)federal Unions of States were based on a *foedus* – international treaty – that safeguarded the sovereignty of their member states [16-22]. However, the emergence of the United States of America at the end of the 18th century triggered 'the greatest semantic revolution in the history of the federal principle' [69]. According to this second tradition, federalism came to represent the 'middle ground' between international and national organisational principles. In other words, the federal principle was identified with a mixed structure between a national and international organisation [22-30]. In the course of the 19th century, though, the European tradition of indivisible sovereignty pressed the novel idea to a third model which insisted on a national and constitutional meaning of federalism. 'Federation' became identified with the federal state, while – ironically enough – the term 'confederation' became the carrier of the classic tradition of the federal principle [30-40].

The question remains, however. What is the relation between the federal idea and the European Union? Schütze convincingly argues that the EU is an '(inter) national phenomenon that stands on – federal – middle ground' [73]. It is a federation of states and as such it may even 'represent the best manifestation of "true" federalism that presently exists in positive law' [73]. In order to reach this conclusion the author deconstructs the *sui generis* and the international law theses [41-47 and 58-68]. At the same time, he builds his argument on the three analytical dimensions of sovereignty according to the American tradition, i.e., the foundational, the institutional and the functional dimension [47-58]. He concludes that the Union is based on a conception of divided sovereignty and that its structure is 'in strictness neither a national nor a[n] international Constitution, but a composition of both' [58].[1]

[1] Citing A. Hamilton et al., in T. Ball (ed.), *The Federalist with The Letters of 'Brutus'* (Cambridge University Press 2003).

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Once he has replied to the question on the relationship between federalism and the EU the author then analyses what type of federation the Union is. But in order to understand the structure of European law, Schütze chooses to compare it with the structure of American law. Although, there is already significant literature both in constitutional law and in political science on the comparison between the EU and the US,[2] the author seems very aware of the foreseeable criticism against his strategic choice according to which the EU and the American Union are incomparable because the former is not a state. He circumvents it, however, from the very beginning of the book by extensively analysing the 1787 constitutional compromise that placed the United States '"in between" an international and a national structure' [23].

Thus, chapter two on the *Federal Philosophies and the Structure of American Law* plays a pivotal role in the book. Divided into three sections, each corresponding to a relevant chapter of the Special Part on the structure of the EU law, it offers a clear picture of US federalism while at the same time it allows the author to show in the following part that Europe has followed, *mutatis mutandis*, the American evolution from dual to cooperative federalism. The first two sections of the chapter describe the shift away from dual federalism that took place during the 1930s following the 'New Deal' [80-108]. This shift was realised through the expansion of federal power –notably of the Commerce Clause – [80-94] but also through the development of a modern pre-emption doctrine which acknowledged the possibility that both federal and state governments could have regulatory jurisdiction over the same subject [94-108]. The principal exception to this shift is the area of foreign affairs, which remains a redoubt of dual federalism [108-122].

Moving to the first chapter of the Special Part, the author analyses what he calls the decline of constitutional exclusivity both on the member state level and on the EU level. Following the structure of his argument in the first part of the second chapter, Schütze examines the expansion of the Union's exclusive competences mainly through the case law of the Court of Justice on Europe's 'necessary and proper clause', i.e., ex Article 308 EC [133-143] and on the EU's 'Commerce Clause' [143-156], i.e., ex Articles 94 and 95. His argument is that the institutions have used both clauses so extensively that it could be supported that the Union legal order has still not committed itself to constitutionally safeguarding a 'nucleus of sovereignty that the Member States can invoke, as such, against the Com-

[2] *See* e.g., S. Fabbrini, *Compound Democracies: Why the United States and Europe Are Becoming Similar* (Oxford University Press 2007); K. Lenaerts, *Le juge et la constitution aux États Unis d' Amérique et dans l'ordre juridique européen* (Bruylant 1988); A. Menin and M.A. Schain, *Comparative Federalism: The European Union and the United States in Comparative Perspective* (Oxford University Press 2007); K. Nicolaidis and R. Howse *The Federal Vision: Legitimacy and Levels of Governance in the United States and the European Union* (Oxford University Press 2001).

munity' [185].[3] With regard to the use of the former, Opinion 2/94[4] might suggest certain constitutional limits [141-143] while with *Tobacco Advertising*[5] the ECJ appears to accept some constitutional restraints on the then-Community's 'Commerce Clause' [144-149].

Schütze seems aware that the reduction of the states' exclusive sphere of powers by judicial means, which he calls 'small revisions', goes hand in hand with the amendment of the Treaties, to which he refers as 'big revisions'. The structure of this chapter, however, somehow undermines the significance of the latter. For example, in times of financial turmoil, it is striking how little reference is made to the addition through a Treaty amendment of monetary policy as one of the exclusive competences of the Union .

In the following section of the chapter the author moves to the second part of his argument, according to which, apart from the gradual reduction of the member states' exclusive sphere, a similar process has taken place with regard to the Union one. He analyses two constitutional devices that the Court has developed in order to relativise the then-Community's exclusive sphere. According to the first strategy, the Court has restrictively constructed the scope of exclusive competences. Here, the author focuses *inter alia* on Opinion 1/94.[6] He also points to a second strategy according to which the Court generally recognised the possibility of delegating the exercise of federal exclusive powers to states [173-184].[7]

After focusing on the decline of constitutional exclusivity on the part of the member states and the EU, the second line of Schütze's argument extends his investigation to the decline of legislative exclusivity. As we have already mentioned, the author has clarified from the very beginning of the book that the presence of shared competences within a federal order will not *per se* signify a choice in favour of cooperative federalism [9]. The critical question for the fourth chapter is what kind of a pre-emption doctrine the Court of Justice has developed – a question that has also occupied the author in the second part of chapter two with regard to American federalism.

In order to test his theory about the Union's federal philosophy, he chooses to focus on two emblematic areas of European policy: the Community's harmonisation policy with regard to free movement of goods [192-214] and the common

[3] Citing K. Lenaerts, 'Constitutionalism and the Many Faces of Federalism', 38 *American Journal of Comparative Law* (1990) p. 205 at at p. 220.

[4] Opinion 2/94 (*Accession by the European Community to the European Convention of Human Rights*) [1996] *ECR* I-1759.

[5] Case C-376/98 *German* v. *Parliament and Council (Tobacco Advertising) ECR* I-8419.

[6] Opinion 1/94 (*Competence of the Community to conclude international agreements concerning services and the protection of intellectual property*) *ECR* I-5267.

[7] *Case* 41/76 *Donckerwolke* v. *Procureur de la République* [1976] *ECR* 1921; Case 174/84 *Bulk Oil (Zug) AG* v. *Sun International Limited and Sun Oil Trading Company* [1986] *ECR* 559; C-804/79 *Commission* v. *UK* [1981] *ECR* I-1045; C-265/01, *Pansard and Others* [2003] *ECR* I-683.

agricultural policy [215-237]. As far as it concerns the first, he identifies the move from dual to cooperative federalism with the shift of Community's policy from total harmonisation and field pre-emption to minimum harmonisation and softer forms of pre-emption. According to Schütze, minimum harmonisation – as a general harmonisation method – that allows legislative differentiation within the internal market after the Community had established common European standards, marks the move towards a cooperative model of federalism. But even in CAP, an area where traditionally the Union had employed an aggressive pre-emption criterion, the author speculates that the current reform of its regulatory architecture, and especially its shift from vertical to horizontal legislation, brings the CAP closer to the philosophy of cooperative federalism.

However, still, the most remarkable evidence of the shift towards a cooperative federal paradigm is its elevation to a constitutional commitment. And it is in chapter five, where the author focuses on the principle of subsidiarity and the complementary competences, that we can appreciate the political choice of the Union to safeguard a move towards cooperative federalism. With regard to subsidiarity, as a political safeguard of European federalism, the author, after spelling out the actual meaning of the principle [247-253], focuses on certain 'loopholes' in the ECJ case-law [253-261]. In this part of the chapter, he points to the fact that the Court has 'deferred to the political safeguards of federalism by granting a wide margin of discretion to the European legislator' [285] but he also welcomes the developments brought by the Lisbon Protocol on subsidiarity speculating on the future stance of the Court. In the following section he examines the constitutional choice of the Union for legislative cooperation in the fourteen Community policy areas that fall under the category of complementary competences [265-284]. Although, as he mentions, the Court of Justice has not spelled out yet the constitutional regime governing complementary competences, one still has to point out that such a strategic choice is another example of this shift away from dual federalism.

As we mentioned before, the last part of chapter two was referring to the foreign affairs exception in American federalism, which still remains an enclave of dual federalism. The book suggests that the situation in the Union's foreign affairs is similar albeit more nuanced and indeed a result of different political and constitutional choices. In fact, Schütze sustains that the doctrine of parallelism as spelled out in *ERTA*,[8] Opinion 1/76[9] and Opinion 1/94[10] [291-305] – each one of those transforming a parallel external competence into an exclusive power – is the main reason why the member states have been deprived of their competence to conclude

[8] C-22/70 *Commission* v. *Council* (*ERTA case*) [1971] *ECR* 263.
[9] Opinion 1/76 (*re: Inland Waterways*) [1977] *ECR* 741.
[10] Opinion 1/94 (*re: WTO*) [1994] *ECR* I-5267.

international treaties for matters falling within the internal sphere of the then-Community. He goes a step further by reading the mixed agreements as a facet of dual federalism since they signify the coordinated equality of the two governments [305-311].

The second part of the final chapter of the Special Part of the book, however, offers a more nuanced picture of the 'foreign affairs exception'. Schütze argues that the reason why the Union favoured a dual federalist rationale in the external sphere may be found in the 'ambivalent normative relationship between European law and the international powers retained by the Member States' [341]. Constitutional questions like the hierarchical value of *inter se* agreements concluded by all member states or about the status of international agreements concluded by member states with third parties were largely unresolved [311-329]. At present, though, Union law has imposed its authority onto the international powers of the member states. Thus, it has become possible for the Court to create a softer pre-emption doctrine. Opinion 1/2003[11] provides certain evidence for such claim given that the Court essentially refined the *ERTA* doctrine to the effect that 'the Member States will only be prevented from exercising their shared external powers, where such an exercise would create substantive normative conflicts with Community legislation' [342]. This development might signify a slight shift away from dual federalism.

This brief analysis reveals on the one hand that Schütze's work is a *tour de force* that manages to depict clearly this fundamental move in the federal culture of the Union. However, the reader might be left wondering about some issues on which the author does not prove quite successful at shedding light. First, one has to point out that in the narrative that Schütze constructs with regard to the shift from dual to cooperative federalism, the role of 'small revisions' overshadows the significance of the formal Treaty amendments. It is difficult to overestimate the role of the European judiciary, especially during the years of the political *stasis,* but one can only wonder whether the role of the 'big revisions' is not more important than the author tends to suggest, especially during the last twenty years. Chapter 5 on the principle of subsidiarity and the complementary competences points in this direction but, still, the Treaty amendment procedure has also played a pivotal role in other areas that are part of this research, not least as a way to codify the jurisprudence of the Court.

On the other hand, Schütze refers to Popper in order to remind us that history is not teleology [16]. However, he fails to explain why the EU has followed, *mutatis mutandis*, the American evolution from dual to cooperative federalism. Surely, a detailed account of the historical, political, economic and constitutional reasons that led to this development goes beyond the scope of this important

[11] Opinion 1/2003 (*re: Lugano Convention*) *ECR* I-1145.

contribution. Yet again, by not even speculating on them, it seems like it is almost teleological for any federation of states to shift away from a dual federal paradigm toward a cooperative one, as time goes by. And it is exactly in this respect that a more comparative analysis that would entail reference to European federal paradigms might have benefited the book. Probably the chapter on German federalism – which the author informs us he has dropped – would have helped us understand better why the EU has gradually adopted a more cooperative federal model.

Having said that, although part of the argument has been published in a number of important pieces,[12] this is both a timely and relevant contribution that provides for a totally enjoyable and inspiring read and helps us better understand the changing structure of European law. As such, we could only agree with the preface of the book: that the whole is much greater than its parts.

[12] *See*, e.g., R. Schütze, 'Organised Change towards an "Ever Closer Union": Article 308 EC and the limits to the Community's Legislative Competence', 22 *Yearbook of European Law* (2003) p. 79; R. Schütze, 'Parallel External Powers in the European Community: From "Cubist" Perspectives towards "Naturalist" Constitutional Principles?', 23 *Yearbook of European Law* (2004) p. 225; R. Schütze, 'Supremacy without Pre-emption? The Very Slowly Emergent Doctrine of Community Pre-emption', 43 *Common Market Law Review* (2006) p. 1023; R. Schütze, 'The Morphology of Legislative Power in the European Community: Legal Instruments and the Federal Division of Powers', 25 *Yearbook of European Law* (2005) p. 91.