

## ■ ARTICLES

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### **Federalism in the US and Europe\***

In this presentation I will discuss some facets of federalism. First, I will describe two kinds of federalism – one integrative, the other devolutive – and, in conjunction therewith, discuss some characteristics of federalization, as they appear in the political structure of existing nation-states (the United States of America, the Federal Republic of Germany, both completed federal states of the first kind, the Kingdom of Belgium and the United Kingdom, both examples of the second kind, the last a potential one 'under construction'). Then, I will deal with a few political concepts underlying and devices shaping federalism as a form of multi-layer government. In the course of my presentation, also some aspects of the political structure of the European Union will be dealt with as a possible (not by all recognized) form of federalism. In that respect, I will not discuss the question as to which form of governance the Union should take in the future (in all likelihood a form that is more federal than unitary and also more parliamentarian than presidential), an issue that I have discussed in depth in other publications.<sup>1</sup>

#### **I. KINDS AND CHARACTERISTICS OF FEDERALIZATION.**

Federalism is about multi-layer governance, that is a political system in which power is not only shared horizontally, that is at the same level of governance, between branches of government (mainly legislative, executive and judicial) but also vertically, that is across different upper (federal) and lower (national and local) levels of governance, a form of power sharing that is mainly created to provide cultural or ethnic groups, and/or socio-economic units, with own limited forms of governance). Broadly speaking, federalism comes in two kinds: either it has been created 'from below' through the consent of constituent units ("integrative federalism"), or it has been imposed 'from above' through the division of a unitary system into a system of (plus-minus) politically autonomous sub-units ("devolutive federalism").<sup>2</sup> Hereinafter, as mentioned, I will describe two states of the first category (the United States of America and the Federal

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1 W. van Gerven, *The European Union. A Polity of States and Peoples*, Stanford University Press and Hart Publishing Oxford, 2005, especially Chapter 7; also: "Which Form of Accountable Government for the European Union?" in *Netherlands Yearbook of International Law*, Volume XXXVI, T.M.C. Asser Press, 2005, 227-258.

2 See Koen Lenaerts, "Constitutionalism and the many faces of federalism", 38 *Am.J.Comp. L.*, 1990, 205-63.

Republic of Germany) and two (one possibly to be) of the second category (The Kingdom of Belgium and the United Kingdom). The focus will be on the border line between con-federal, federal and unitary political structures.

## A. The emergence of full-fledged federal States of the "integrative type".

### 1. The United States of America.

In 1776, thirteen English colonies signed the American Declaration of Independence, and ratified in 1781, after a peace treaty with England was signed, the Articles of Confederation under which they lived for seven years.<sup>3</sup> The *American Constitution* was written in 1787 "to form a more perfect Union," and was ratified in 1788. Two years later the Bill of Rights was added.<sup>4</sup> More than any other constitution, the American constitution is characterized by the principle of separation of powers. Not unlike Montesquieu, Madison thought that

"(i)n framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions."

According to Madison, those precautions can only be taken "by so contriving the interior structure of the government as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places."<sup>5</sup>

In the American constitution those grand ideas about separation of powers were given a much more concrete form than Montesquieu could have dreamt. Article I, Section 1, provides that all *legislative* powers "shall be vested in a Congress which shall consist of a Senate and House of Representatives."<sup>6</sup> Article II, Section 1 (1) provides that the *executive* power "shall be vested in a President of the United States of America" elected (together with the Vice President) for a term of four years.<sup>7</sup> Article III, Section 1, provides that the *judicial* power "shall be vested in one supreme Court, and in such inferior Courts as Congress may

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3 Subsequently, 37 other States were admitted as a result of purchases (Louisiana Purchase in 1803; Alaska in 1867), voluntary adherence (Texas in 1845; Hawai in 1959), and wars (Oregon in 1846, Zuidelijke staten na oorlog met Mexico in 1848).

4 See further Geoffrey R. Stone, Louis M. Seidman, Cass R. Sunstein & Mark V. Tushnet, *Constitutional Law*, third ed., Aspen Law & Business, 1996, 1-2.

5 The Federalist no. 51, reproduced in Geoffrey R. Stone, et al. (supra n. 4), 15-17.

6 But see Section 7 (2) U.S. Constitution with regard to the 'veto'-power of the President, which authorizes him to ask Congress to reconsider a law presented for his signature.

7 The President and Vice President, after being nominated as candidates by their party's convention, are elected on a ticket by Electors designated in accordance with Article II, section 1 (2) – (4) of the Constitution and Amendment XII (1804). Each State appoints Electors, who then vote for the candidate who obtains the most votes in their State ('winner takes all'). The election of the President therefore comes very close to a direct election by universal suffrage.

from time to time establish."<sup>8</sup> The Constitution further lays out a *federal structure*, which divides powers between the union and the states. The framers regarded this structure, together with the separation of powers within the federal government, as an essential component of a system of checks and balances, which was and is necessary to protect the liberty of citizens against abuse of power. Later on, in its 1803 judgment *Marbury v. Madison*, the Supreme court gave full content to this constitutional theory, by providing that acts of Congress that violate the Constitution are subject to judicial review.

To understand the U.S. Constitution of 1787, it is useful to have some understanding of the *Articles of Confederation* which the Constitution replaced. These Articles were made under the assumption that "each state retains its sovereignty, freedom, and independence, and every Power, Jurisdiction, and right, which is not by this confederation expressly delegated to the United States, in Congress assembled." Powers which were thus delegated included "the sole and exclusive right and power of determining on peace and war"; the authority to resolve disputes between the states; the power to regulate "the ally and value of coin struck by their own authority, or by that of the respective states"; and the authority to control dealings with Indian tribes, to establish or regulate post offices, and to appoint naval and other offices in federal service.<sup>9</sup> In the words of constitutional experts "(t)his structure contained, at least by modern standards, conspicuous gaps. Two of the most important powers of the modern national government were missing altogether – the power to tax and the power to regulate commerce. Moreover two of the three branches of the national government were absent. There was no executive authority. There was no general national judicial authority ..."<sup>10</sup> It is because of those gaps and deficiencies, and thus, as the preamble of the 1787 Constitution points out, "in Order to form a more perfect Union" that a more far-reaching Constitution came about. Among the most important changes were "the creation of an executive branch; the grant to Congress of the powers to tax and to regulate commerce; and the creation of a federal judiciary, including the Supreme Court and, if Congress chose, lower federal courts."<sup>11</sup>

The American Constitution was preceded by a vivid discussion among the *anti-federalists* and the *federalists*. The *anti-federalist* view relying on civic virtue was based on the republican argument that dialogue and discussion among the citizenry were the critical features in the governmental process. *Political participation* should be active and frequent and not limited to voting or other similar statements of preference. The model for government was the town meeting – a metaphor – and the government's first task was to ensure the flourishing of the necessary public-spiritedness. The anti-federalists thus

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8 The American Constitution itself has only seven Articles. Besides those mentioned in the text, Article IV contains the "full faith and credit" clause that requires States to enforce judgments and laws of the other states. Article V concerns the power of Congress to propose amendments to the Constitution, and Articles VI and VII concern the implementation and ratification of the Constitution.

9 Stone, et al., (supra n. 4) at 2.

10 Ibid.

11 Ibid., at 5.

believed in decentralization, for only in *small communities* would it be possible to find and develop the unselfishness and devotion to the public good on which genuine freedom depends. Thus, they were hostile to a dramatic expansion in the powers of the national government. The *federal* response to this was that small communities and homogeneity characteristic of these communities were fostering factions which led to the likelihood that self-interested private groups would be able to seize political power in order to distribute wealth or opportunities in their favour. Safeguards against this would be found in a *large republic* where the diversity of interests would reduce the risk that a common desire would be felt by sufficient numbers of people to oppress minorities. On this view *heterogeneity* was a positive good that would work against factionalism and parochialism. In that setting the principle of *representation* would serve as a substantial solution to the problem of faction: it would, in Madison's words, "refine and enlarge the public views by passing them through the medium of a chosen body of citizens whose wisdom may best discern the true interest of their country and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations". The representatives of the people, not the peoples themselves, would be free to engage in the process of discussion and debate from which the common good would emerge. In order to promote such deliberation the Constitution embodies a set of structural provisions designed to bring about public-spirited representation, to provide safeguards in the event that it is absent, and to ensure an important measure of popular control. The *various systems of representation* in the different branches of national government were designed to promote deliberation in government and to control possible abuses, recognizing that sovereignty lay in the people and that therefore no branch could speak with authority for the people themselves.<sup>12</sup>

This does not lead to a clear definition of federalism as compared with confederalism. To be sure, applied to a union of states, confederation is less binding in its character than a federation. "In principle, the states in a confederation would not lose their separate identity through confederation, and would retain the right of secession."<sup>13</sup> On the other hand, in the minds of the framers of the U.S. Constitution, it is essential for federalism that the Constitution was formed by action of the people ("We the People"), and their representatives, not by the state governments as in the case of a confederation.<sup>14</sup> The most essential differences however, would seem to be that in a federal state the higher level has the power, not necessarily exclusive, to impose taxes and regulate interstate commerce, and that it disposes of the three branches of government: the legislative, the executive and the judicial branch.<sup>15</sup> But even under these

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12 Ibid., in Note on *Madisonian Republicanism*, at 12-15.

13 *Oxford Concise Dictionary of Politics* (Iain McLean and Alistair McMillan, eds.), 2<sup>nd</sup> ed. 2003, vo. Confederation.

14 Thus Chief Justice Marshall in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

15 The main features components of American federalism are said to embrace the following elements: 1) a union of autonomous states, 2) the division of power between the federal government and the states, 3) the direct operation of each government, within its assigned sphere, on all within its territorial limits, 4) the provision of each government with the complete apparatus of law enforcement, and 5) federal supremacy over any conflicting assertion of state

conditions, the replacement of the term 'confederated states' by 'federal state' in descriptions of the American constitution would seem to have been sealed *only after* the Civil War (1861-65). The reasons for the terminological change was because of the negative connotation which the term 'confederacy' had obtained as a result of its appropriation in the war by the secessionist states of the South, *and* because of the positive connotation which the term received as a result of the growing power of the federal government.<sup>16</sup> However that be, it remains difficult to distinguish the looser form of confederation from the more binding form of federalism, as the example of the *Swiss Confederation* demonstrates.<sup>17</sup>

## 2. The Federal Republic of Germany.

The constitution of the *Federal Republic of Germany* is laid down in the *Basic Law* of May 23, 1949. Established in the immediate aftermath of World War II, it emphasizes the overarching importance of human dignity as well as the democratic and social nature of the State, and its federal structure, none of which can be changed by constitutional amendment.<sup>18</sup> In addition, the Basic Law contains a full list of basic rights that are binding upon the legislature, the executive, and the judiciary as directly enforceable law. Finally, the Basic Law deals with the difficult problem of delineating federal and national legislative and executive powers, and installs a constitutional court empowered to both adjudicate disputes concerning the interpretation or application of constitutional provisions, and to protect the basic rights of individuals.<sup>19</sup>

The Basic Law of 1949 and the underlying federal structure did not come out of thin air but has *deep roots* in German history. Already during the *Heiliges Römisches Reich Deutscher Nation* (born in the tenth century but thus named since approximately 1500) the political developments occurred on both the level

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power: Norman Redlich, John Attanasio and Joel K. Goldstein, *Understanding Constitutional Law*, LexisNexis, 2<sup>nd</sup> ed., 1999, at 47-50.

16 *Oxford Dictionary*, supra n. 13.

17 "Although the cantons in the Swiss confederation are designated as 'sovereign' and enjoy considerable decision-making autonomy, the powers of the federal government have grown overtime and succession would not seem to be a practical possibility": *ibid.* For a description of the Swiss system, see Otto Kaufman, "Swiss federalism" in *Forging Unity out of Diversity: The Approaches of eight nations* (Robert Goldwin, A. Kaufman, W. Schambra, eds), 1985; excerpts in Vicki C. Jackson & Mark Tushnet, *Comparative Constitutional Law*, University Casebooks Series, New York, 1999, 845-58. Typical for Swiss democracy are the special tools of referendums and popular initiatives: at 851-854.

18 The German Constitution is called the "Basic law" (*Grundgesetz*), allegedly because the draftsmen did not wish to use the term Constitution as long as East- and West-Germany were not united. See Christopher S. Allen in *European Politics in Transition* (Kesselman & Krieger, eds.) 287. Yet after unification in 1990, the term Basic Law has been retained because it associates the country with its longest and most successful experience of democracy: *id.*, at 303, fn. 3.

19 The German Basic law has been amended frequently. For a (not official) English translation of the consolidated text, up to and including the 50th Amendment of 2002, see Axel Tschentscher, *The Basic Law (Grundgesetz)*, Studien zu Jurisprudenz und Philosophie, 3.1 (Würzburg: Jurisprudentia Verlag, 2002). It can be found on Internet <[www.jurisprudentia.de](http://www.jurisprudentia.de)>

of the emperor ("Kaiser") and of the kings ("Kurfürsten") who were members of the Reichstag.<sup>20</sup> The latter – especially in the two rival countries Prussia and Austria – developed into absolute monarchs of their Land at the expense of the emperor's central power. Already at that time, there was an abundant literature discussing the legal status of the relationship between the *Reich* and the *Länder* and agreeing that the Reich was an "aus Staaten zusammengesetzter Staat", i.e., a confederation of States.<sup>21</sup>

After the liberation of the German states from, and the fall of, Napoleon (1813-1815) the confederal structure was maintained as the foundation of the *Deutsche Bund* (1815-1866) which was not a federal state but a union of states,<sup>22</sup> and it remained the basic concept underlying the *Deutsches Reich* founded by Bismarck between 1867 and 1871. During this whole period the constitutional development occurred mainly at the level of the States ("bottom up") where States constitutions were enacted that served as a model for constitutions at the upper level.<sup>23</sup> This was particularly true for the Frankfurter *Reichsverfassung* of 1849 which was the first constitution approved by a *popularly* elected assembly, but also for the *Verfassung des Deutschen Reiches* of 1871 which is deemed to be the first constitution for a *federal* state ("Bundesstaat") composed of 22 constitutional monarchies (without Austria but including Prussia) and three city republics (Hamburg, Bremen and Lübeck).<sup>24</sup> By virtue of the latter constitution the composing entities transferred part of their *sovereign powers* to the upper level where they were attributed to, and jointly exercised by, on the one hand, a *Bundesrat* composed of representatives of the "Verbündenen Fürsten" and, on the other end, a popularly elected *Reichstag*.<sup>25</sup>

After the transformation of the Empire into a *Republic*, as a result of the November 1918 revolution, a new constitution, providing in a parliamentary regime, was approved by a recently elected national assembly convened in Weimar in February 1919. In this new constitution the federal structure and the territorial division were preserved but the monarchy was abolished and replaced by a combination of parliamentary and presidential leadership as a form of *dual (semi-presidential) democracy*: both the *Reichstag* and the *Reichspräsident* were universally elected; in between stood the *Reichskanzler* and his ministers who were appointed, and could all be removed, by the president but also by a majority in the *Reichstag*.<sup>26</sup> In 1933 the constitution was set aside by the nazi regime – as was the autonomy of the *Länder* which, for all practical purposes,

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20 See further Hartmut Maurer, *Staatsrecht I*, Verlag C.H.Beck, 3<sup>rd</sup> ed., 2003, 36-38

21 Ibid., at 42.

22 Ibid., 45.

23 Ibid., 47 and 53-59.

24 Ibid. 58 and 62.

25 The constitution of 1871 being enacted when Germany was still an empire, the position of the *Kaiser* – initially conceived to be the president of the union – and his affiliate, the *Reichskanzler*, had to be taken into account. This resulted in important powers of appointment left with the emperor for which the *Kanzler*, self head of the executive, was accountable to parliament but not removable by it: *ibid.*, 63.

26 H. Maurer (*supra* n. 20) 67-68. The structure constitutes a semi-presidential form of government; on these forms, especially the system currently in effect in *France*, see W. van Gerven (*supra* n. 1), 315-317 and 322-324.

became provinces, thus doing away with the federal structure. Also in 1933, the nazi regime suspended the constitutional basic rights catalogue.<sup>27</sup> This tragic period came to an end in 1945 and was definitively terminated, as mentioned before, with the promulgation on 23 May 1949 of the Basic Law (*Grundgesetz*). Like earlier constitutions, the Basic law of 1949 was also drafted on the basis of *Länder* constitutions, in this case those enacted in 1946 and 1947 which by and large followed the example of the Weimar constitution but tried to correct the latter's deficiencies. Actually, the initiative for the Basic law was taken by the Western allies when it became clear that the unification of East and West Germany was impossible. Accordingly, and to underline its provisional character, the German authorities decided that the Law would not be approved by the people but by a Parliamentary Council composed of representatives of the *Landtagen*, and that it would not be named *Verfassung* but *Grundgesetz*.<sup>28</sup> When, after the fall of the Berlin wall on 9 November 1989, reunification with the former East-German DDR became a reality, the legal instrument of adhesion of the five *Länder* to the Basic law, as provided in (ex) Article 23 thereof, was preferred rather than to prepare and promulgate a new constitution, as provided in (ex) Article 146 of the Basic Law. To make reunification possible a treaty was concluded between the Federal Republic and the DDR on 31 August 1990, entering into force on 3 October 1990. From then on, the Federal Republic of Germany is composed of 16 *Länder*.<sup>29</sup>

Although the Federal Republic of Germany has a Federal Chancellor, rather than a Prime Minister, the current German constitutional structure strongly resembles the British parliamentary system.<sup>30</sup> Both the British Prime Minister and the German Chancellor are the leader, in name or in fact, of the political party that won the elections, and so have the ability to choose their cabinet, mainly from fellow members of Parliament. They also set general policy with the help of their cabinet and are, with their cabinet, accountable and politically responsible for governmental conduct towards Parliament. Both need the support of a majority in parliament and would have to step down, together with their cabinet, if they were to lose the confidence of parliament, that is, of the majority in Parliament that supports the government. Since in the United Kingdom, this majority is made up of members who belong to the Prime Minister's own political party, the British Prime Minister has de facto a more solid position than the German Chancellor whose majority is normally made up of members of Parliament of different political parties that have formed a coalition to support the incumbent government.

The impact of the latter difference is reduced, however, by the fact that Article 67 of the Basic Law provides in a so-called "constructive vote of no confidence" – according to which the *Bundestag* may express its lack of confidence in the Chancellor only by electing a successor with the majority of its

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27 Ibid., 69-71.

28 Ibid., 85-86.

29 Ibid., 108-111.

30 For a short overview of British constitutionalism, see W. van Gerven (supra n. 1), 313-14. For more thorough analyses, see Jackson & Tushnet (supra n. 17) 358-413, and Joel Krieger, in *European Politics in Transition* (supra n. 18) 39-132.

members. If no majority for such a constructive vote of no confidence can be found, the President may, upon the proposal of the incumbent Chancellor, dissolve the *Bundestag* within twenty-one days.<sup>31</sup> Obviously, the system reinforces the Chancellor's position considerably, as it is more difficult to bring together a positive majority to agree on the new chancellor, than to assemble a negative majority to oust the government.<sup>32</sup>

### 3. Comment.

Both the United States of America and the Federal Republic of Germany are examples of integrative federalism that is of polities where autonomous units have consented to institute an upper level of governance which they will have in common. That may seem wrong for the Federal Republic of Germany, however only when one takes the short term view of post-nazi Germany, and ignores the preceding long history of autonomous and strong entities (monarchies and city republics first, then state republics) united first in a confederation by a light form of central governance (the empire, later a more integrated republic) and then becoming a true federal republic. As mentioned, the nazi regime did away with a millennium of confederalism, sacrificing the autonomy of the *Länder* to a short lived dictatorial and highly centralized state.<sup>33</sup>

Both countries, the U.S. and Germany, show the reasons for integrative (or centripetal) federalism to come about. Those were, in the case of the US, external security ("to provide for the common defence", as expressed in the preamble to the 1789 Constitution) and economic benefits inherent in interstate commerce and a common market. Moreover, at least in the view of the federalists, the creation of a large and heterogeneous republic was to counter factions and abuses and to stimulate political discussion and participation. Also in the case of Germany, integrative federalism served the same purposes albeit at a much earlier stage, that is to ensure external security and economic strength, more particularly to avoid military wars or economic conflict between strong regional nation states, like Austria or Prussia, or to resist strong neighbouring countries, like France, Russia or the United Kingdom. In both instances, federalism was not deemed to be imperative because of the existence of important cultural or linguistic differences between the constituent states. Nevertheless, heterogeneity

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31 See Article 68 (1) of the Basic law.

32 See further Giovanni Sartori, *Comparative Constitutional Engineering. An Inquiry into Structures, Incentives and Outcomes*, second ed. (London: MacMillan Press, 1997) 106-107 where the British premiership system and the German *Kanzlerdemokratie* are further compared, at 104-108. The Federal Republic of Germany has had a history of generally strong chancellors: Konrad Adenauer, Willy Brandt, Helmut Schmidt and Helmut Kohl, to name the most prominent ones. See further C. Allen in Kesselman & Krieger (supra, n. 18) 290-293.

33 If the Nazi regime tells something about federalism then it is that power sharing at the vertical level as practised in federal states is clearly a device which is not favouring dictatorial regimes which are better served by strong centralisation. An illustration thereof is *Spain* where, after the Franco regime which tended to suppress or reduce cultural differences, federalisation was driven, from 1978 on, by the objective to abandon a strongly centralized authoritarian regime in favour of a desire to institutionally recognize social and cultural differences: see *Oxford Concise Dictionary of Politics* (supra n. 13) vo. Federalism, 195.

did play an important role, at least in the U.S., but then as an argument used by the federalists to work against factionalism and parochialism, and therefore understood as a *diversity of interests* which, according to the federalists, in a large republic – as opposed to small communities with little transfer of power to the national level, as the anti-federalists advocated – would reduce the risk that self-interested private groups would be enabled to seize political power in order to distribute wealth in their favour. In other words, heterogeneity was then not understood as *diversity of ethnicities* – an issue which in the US was not addressed until long after the secession war (1861-65), when the American civil society ceased to be a society composed only of WASPs (White Anglo-Saxon Protestants).

The preceding opens interesting perspectives for comparative political and social scientists. From a *European viewpoint* it may be recalled that the EU, now composed of 27 states, started with six countries (Belgium, France, Germany, Italy, Luxembourg, the Netherlands) with the signing in 1951 of the (now expired) European Coal and Steel Community Treaty (coming into effect in 1952), and of the European Economic and Euratom Treaties in 1957 (coming into effect in 1958). The main objective of the first was to prevent war between long time enemies by bringing the coal and steel sectors, essential for the arm producing industry, under a common management structure; and of the second to create a truly internal market, thus promoting peaceful economic competition and cooperation. These are the same objectives as those mentioned above for the integration of the US and Germany. Moreover, like in the US, also in Europe common defence and security, there against the communist regimes, was the most prominent objective, initially, of European integration with the signing, already in 1952, by the same six states of the European Defence Community Treaty, a Treaty that did not come into effect however when the French national assembly, wary of German remilitarisation, refused ratification. In a more recent perspective of European integration the American federalists' view according to which factionalism and parochialism may be contradicted by the heterogeneity of interests and opinions existing in a large republic, may be tested again in the European Union as an instrument to give birth to a European public space and a truly European citizenry (cf. *infra*, –), now in a context of a modern digital society.<sup>34</sup>

## **B. Unitary states turning into (yet uncompleted) federal States.**

### **1. The Belgian Federal State.**

The transformation of the Kingdom of Belgium from a strongly centralized unitary state, as it was founded in 1830, into a largely decentralized federal state (still a Kingdom) started in 1970. From that year and until 1993, the Belgian political system was the object of *five state reforms* which culminated in the

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34 On a digital republic, see Mark Bovens, *De digitale republiek, Democratie en rechtsstaat in de informatiemaatschappij*, Amsterdam University Press, 2003.

country being declared, in Article 1 of the new 1993 Constitution, to be: "a federal state made up of Communities and Regions." Because Belgium is probably the best illustration of centrifugal (or devolutionary) federalism, I will try to summarize its complicated federalizing process and structure.<sup>35</sup> The *first* constitutional reform (1970) created three cultural communities (the Flemish, the French and the small German-speaking Community), each with its own Council having exclusive legislative powers in cultural and educational matters, and three regions (the Flemish, Walloon and Brussels regions) however without legislative authority – thus creating a federal state composed of two types of member entities, communities and regions, that partly overlap territorially. The *second* reform (1980) increased the competences of the regions (adding environment, housing, regional aspects of economy and energy) and developed the autonomy of the communities (also becoming competent for person-related matters, such as health). The three communities (Flemish, French and German) and two of the three regions (the Flemish and Walloon) also acquired their own executive governments in addition to a parliament; however, the Flemish community and the Flemish region immediately merged their legislatures and executives into one, thus providing the Flemish community and region with a single Flemish parliament and a single Flemish government, and making the regionalisation asymmetric as a whole. Moreover at the federal level a court of arbitration was established with limited powers to review compliance of federal, regional and community legislation with the constitutional division of powers.

The *third* reform (1988-89) substantially extended the legislative powers of the communities (adding education) and the regions (adding public works, transport, ...), and provided the Brussels Capital region now also with its own parliament and government. Moreover a new financing system for the communities and regions was brought into existence, replacing grants by a system of 'shared' and 'joint taxes'. The jurisdiction of the Court of Arbitration was extended. The *fourth* reform (1993) further increased the powers of communities and regions, especially at the international level, and reformed the bicameral system at the federal level – only the House of Representatives exercising political control over the government and the Senate being converted into a debating chamber with limited legislative powers and acting as a forum for participation of the communities and regions at the federal level. Moreover, at the federal level, a 'stable legislature' parliament and a 'constructive vote of no-confidence' German style (*supra*) were introduced assuring greater stability of the federal parliament in between federal elections. The *fifth* reform (2001) entailed the transfer of significant additional financial resources from the federal level to the communities and extending the fiscal autonomy of the regions, however without implying a fundamental revision of the aforementioned system of 'shared' and 'joint taxes'. So far residuary powers remain with the federal legislature; that will change only when and if an exhaustive list of exclusive federal powers has been agreed on in accordance with a complicated co-decisional procedure set out in the Constitution (Article 35 of the Constitution). In the meantime the judicial review powers of

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35 The information is drawn mainly from Patrick Peeters, "The Fifth Belgian State Reform ('Lambermont'): a General Overview," 9 *European Public Law*, 2003, 1-12.

the Court of Arbitration had been extended further, and the Court has now (in 2007) be renamed to become a genuine Constitutional court.

The Belgian constitutional reform raises two important questions. One is how far the transfer of powers from the central level to the regional and community levels (hereinafter the sub-entities) *should go* to make those entities sufficiently autonomous – more autonomous than traditional local authorities, such as provinces, districts, municipalities<sup>36</sup> – in order to transform the once unitary state into a full fledged federal state. The other is how far this transfer *should not go* in order to preserve the federal state character of the country that is in order not to turn the state into a confederate union of separate member states (as the EU is for example).<sup>37</sup> Before answering these questions, I turn to the second example of potentially devolutive federalism, the U.K., which should enable us to put the above questions in a broader context.

## 2. Devolution in the U.K. (Scotland).

Devolution is the process of devolving power from the higher national level to the lower, sub-national level.<sup>38</sup> In contrast to a federal (and a con-federal) system it is in theory *institutionally reversible* at the upper level and the devolved institutions, are, at least in the UK under the doctrine of parliamentary sovereignty, *constitutionally subordinate* to the national (Westminster) Parliament. The legislative framework for devolution is set out in the Scotland Act 1998,<sup>39</sup> the Government of Wales Act 1998 and the Northern Ireland Act 1998, and is implemented in a non-legislative framework of concordats, agreements between government departments and the devolved institutions, under a Memorandum of Understanding.<sup>40</sup> The system is *asymmetric*, in that there are different levels of devolved responsibilities and no common pattern: the most developed system is the Scottish – the only one described hereinafter – which has a Parliament and an Executive along the Westminster model, which can act in areas other than

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36 Any state, also a unitary state is decentralized to a certain extent. To become a federal state, the sub-entities immediately under the upper level must have a certain autonomy by which is understood that they must possess, or take part in, some of the sovereign powers of the state, these are powers for which they have final authority (except for judicial review, eventually, on the part of a constitutional court). In the same vein U.S. Supreme Court Justice Kennedy (in *U.S. Term Limits v. Thornton*, 514 U.S. 779 (1995) described the U.S. Constitution to have "split the atom of sovereignty", creating a nation in which people saw themselves as citizens of both their state and of the larger nation of which the state was part: Vicki C. Jackson & Mark Tushnet (supra n.17) 789.

37 In the opinion of Jackson and Tushnet, *ibid.*, fn. a, "a confederation is a union of states that join together and assume mutual obligations towards each other but in which the central government does not have a direct relationship to the citizens of its component parts."

38 The following data are drawn from the *House of Commons Research Paper 03/84 of 17 November 2003* (Matthew Leeke et al., eds.),

39 The Scottish referendum on devolution took place on 11 September 1997. The turn-out of the electorate was 60.4 %; 74.3 % voters were in favour of a Scottish parliament. The first elections were held on 6 May 1999.

40 The concordats are intended to set out conventions governing areas such as exchange of information, representation in EU matters and development of common policy: *Research Paper* (supra n. 38), 8.

those reserved to Westminster. The Westminster Parliament can legislate in devolved areas but only if asked by the Scottish Parliament.<sup>41</sup> The asymmetric nature of UK devolution raises the so-called West Lothian question: "should 'Scottish' MP's be entitled to sit and vote at Westminster on 'English' matters while 'English' MP's are not able to participate on equivalent matters devolved to a 'Scottish' Parliament."<sup>42</sup> Until the creation of an English Parliament or regional assemblies is decided upon, the question will remain insoluble. In 2003, following the approval of the Regional Assemblies (Preparations) Bill on 8 May 2003, the question has led to the official organisation of awareness campaigns in four regions of England (North West, North East, Yorkshire and Humber) explaining what regional assemblies if created would be about, and how much they would cost.<sup>43</sup>

The Scotland Act 1998 determines lists of exclusive and devolved matters. Subjects *reserved to Westminster* include constitutional matters, including the crown, foreign policy, defence and relations with the EU, macro-economic policy and taxation (but see *infra*), overseas trade, employment legislation, social security, broadcasting.<sup>44</sup> Expenditure for devolved responsibilities is largely funded by block grants from the UK government, but Scotland is granted the power to vary the standard rate of income tax levied, thereby raising additional or less income.<sup>45</sup> The list of *devolved matters* for Scotland is well provided. It refers to health, education and training, local government, social work, housing, planning, tourism, economic development, some aspects of transport, law and home affairs, including criminal and civil law, prosecution and courts, police and firing services, environment, natural and built heritage, agriculture, forestry and fishing, sport and art, statistics, public registers and records.<sup>46</sup> The list shows that, even in a non-federal state as the U.K. still is, many responsibilities can be transferred without jeopardizing the *unitary* structure of a State – with the proviso however that, as mentioned above, devolved powers can, at least theoretically, be repealed or amended by the Westminster parliament. Let me just mention in passing that the list shows that in a *federal* state like Belgium, there might still be room for devolution without transforming the state into a union of states – an issue which will be examined below.

It has been stated that devolution in the U.K. has offered an opportunity for innovation allowing the creation of parliaments and assemblies, and procedures that are not purely replicas of the Westminster Parliament and Whitehall Government. Indeed, devolution has put into place a new tier of decentralized

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41 That is the so-called Sewel Convention (1998) mentioned in the *Research Paper* (referred to n. 38 above), at 14. For a description of how the Scottish institutional framework of devolution is bedding down regarding working methods of the Scottish Parliament, legislative procedure, intergovernmental relations, and judicial supervision, see Tom Mullen and Tony Prosser, "Scotland, Update on devolution" in 6 *European Public Law*, March 2000, 36-60. See also of the same authors, "Scotland. Devolution and Administrative Law", 4 *European Public Law*, December 1998, 479-485.

42 *Research Paper*, (supra n. 38) 11.

43 *Ibid.*, 31-33.

44 *Ibid.*, 13.

45 *Ibid.*, 9.

46 *Ibid.*, 21.

government and the adoption of *new and inventive* procedures. In the election process elements of proportional representation have been incorporated which has led in Scotland to coalition governments and consensus politics.<sup>47</sup>

### 3. Further Analysis.

Let's come back to the questions raised in connection with the *Belgian* situation, i.e., what kind of vertical power sharing between the national and the sub-national is needed to turn a unitary state into a federal state, and when does power sharing go from top to bottom so far that a federal state is transformed into a mere union of states. To answer these questions, the American and German situations should be able to give some guidance. They allow us to look at the questions from the opposite angle, namely as of which point a con-federal state becomes a federal state. Looking at the *German* situation, the answer is not self evident. The transition from a confederation of States into a federal state ("Bundesstaat") is deemed to have occurred with the constitution of 1871 establishing the *Deutsche Reich* (supra -). Allegedly, that transition, orchestrated by Bismarck, has not created a new state but is seen as an extension of the *Norddeutsche Bund* of 1867, and based on principles developed in earlier *Länder* constitutions; this time, however, approved by the people and by people representatives assemblies.<sup>48</sup> Accordingly, the underlying assumption seems to be that a confederation of states turns into a federal state by the mere – but crucial – fact that the central state's constitution *is*, like the constituent states' constitutions, approved by the people, or the peoples' representatives (in accordance, I assume, with similar constitutional procedures) *and*, by virtue of this approval, *establishes* a direct relationship between the citizens of the constituent states and the central state, just like the constituent states' constitutions establish a direct relationship between the citizens and the government of their own constituent state.<sup>49</sup> That assumption would seem to be in line with the fundamental principle of a federal polity, that sovereign powers that have not been transferred to the central government remain with the constituent states, as was the case with the constitution for the *Deutsche Reich*, because that is where people legitimacy is to be found "closest to the citizens".

Literally taken, that would imply that there is no further requirement as to the importance of the transfer of sovereign powers. That may be so literally, but practically it would seem more correct to hold that, for the transition from a confederation into a federal state to occur, the transferred powers need to have enough substance so as to warrant that the direct relationship between the central state and its citizens, i.e., those of the constituent states, can be made to be institutionally and substantively *effective* and thus to bear on subjects which are of "national", i.e., central importance. That would mean, as the *American*

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47 Ibid., 35.

48 H. Maurer (supra n. 20) 60-64.

49 Thus the authors, basing their opinion on U.S. law, quoted supra n. 37.

example shows, that the higher level needs to dispose of the three branches of government: the legislative, the executive and the judicial branch, and be enabled to regulate matters, such as interstate commerce, which are intrinsically "national"; that would also imply that the higher level has the power to impose taxes in order to establish its organisation and exercise its competences.

Applying the foregoing to *Belgium*, the question is whether the country, as a result of the successive state reforms, constitutes a truly *federal state*. The arguments in favour of an affirmative answer are: that the communities and entities have their own legislative and executive branches of government, each of these sub-entities with a popularly elected parliament, as well as their own exclusive competences equal in rank to the federal equally exclusive competences (to be watched over by the Court of Arbitration, now called the Constitutional court); furthermore, that each community and region has international jurisdiction within the area of its exclusive internal powers, subject however to a duty of information to the federal authority and a right of suspension on behalf of the latter if consultation between federated and federal governments fail to reach consensus (articles 167-169 Constitution). Other indications of federalism are: the participation of the sub-entities in the federal decision-making process through representation in the second federal parliamentary chamber, the Senate, and the duty of loyal cooperation. Important aspects of federalism which, however, have *not yet* been effected are the transfer of residual powers to the sub-entities – although, as mentioned above, a constitutional procedure has been provided for, albeit under a complicated co-decision procedure – and the attribution to the sub-entities of an autonomous power to raise taxes, the funding of the sub-entities currently still being effected mainly by transfers from federal taxation revenue.<sup>50</sup> All in all, the elements in favour of a positive answer would seem to weigh heavier than those against, albeit that the federal structure remains uncompleted.

That brings us to the second question: as of which point will a federal country like Belgium become a *union* of sub-states (short of complete separation), if the centrifugal forces continue to drive the two parts of the country apart?<sup>51</sup> The answer would seem to be as follows: when the transfer of competences, *either* to the EU (which already has taken over all Member States' monetary powers and the power to regulate inter-EU states commerce and trade with non-EU countries) *or* to the sub-state level, would have the effect of *striping* the upper level not

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50 For a concise but complete overview of the Belgian constitution, see A. Alen & R. Ergec, *Federal Belgium after the fourth State reform of 1993*, Ministry Foreign Affairs, Brussels, March 1994.

51 As in other multi-cultural states, the federalisation is driven in Belgium by the institutional recognition of social and cultural regional differences between the Dutch speaking Flemish population and the French speaking Walloon, and majority of Brussels, population. After World War II the rift became even more important because of the growing differences in the economic development of both parts of the country: in the North and the Centre the much wealthier Flemish and Brussels part with, in Flanders, a very low unemployment rate and in the South the much poorer Walloon part with a high unemployment rate. This economic discrepancy began after the war with the decline of the steel and coal sectors, mainly situated in Walloon country, and the growth of important foreign investments in the Flemish part, with the port of Antwerp as point of attraction, due to higher productivity rates and more disciplined workforces in the Flemish part.

only of residual powers (as is normal in a federal state) but *also* of the power to raise taxes, making the upper level completely dependent upon the lower levels of government, *and* of the power to decide employment, social security, transport and fiscal policies, constitutional interpretation and local police protection – leaving to the upper level only foreign and security policy, military and central police power, and representation in international and supranational European organisations. If that were to occur, it could well be argued that the relationship between the central government and the citizens has become so *indirect* that the upper structure no longer deserves the denomination of a federal state level.

As for the *United Kingdom*, even though the number and importance of devolved competences to *Scotland* seem to be as, if not more, important than the number of competences attributed to the communities and regions in Belgium, the fact that devolution is a *reversible* process, at least in theory, that is, remains at the discretion of the British parliament makes it impossible to qualify British devolution as a process that turns the UK, as yet, into a federal state, let alone an even looser confederation of autonomous states.

## II. CONDITIONS AND DEVICES FOR SHAPING FEDERALISM.

In a unitary state which has often, at least initially, a population that is homogeneous as regards ethnicity, religion, language and culture, the country's institutional framework, 'cratos' is rooted in a compound 'demos', *i.e.*, is made up of a citizenry which, as a group of politically united people, justifies and legitimates the states' power as it is described in that state's constitution, and turns the state, or other 'body politic' into a democratic polity entity.<sup>52</sup> Notwithstanding their multi-layer form of governance that applies also to federations of states in so far as they are made up of a group of citizens which are politically united across the borders of the constituent states. In all those instances, the fact that citizens do belong to ethnically, religiously, culturally and linguistically homogeneous groups, contributes much to the creation of a 'demos'. However, in our view and that of many others, even when such belonging has become weaker, or does not exist, a politically formed and/or emerging constitutionalist 'demos' may suffice, at least at the federal level, to justify and legitimate a polity's power structure (see under A). To strengthen such a constitutionalist polity structure function within multi-layer governance, some principles (subsidiarity and sincere cooperation), categories of competences (exclusive and power sharing) and devices (bicameralism) are particularly appropriate. They will be discussed hereinafter (under B and C).

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52 See on 'constitutional demos', J.H.H. "In defence of the status quo: Europe's constitutional *Sonderweg*" in *European Constitutionalism beyond the State* (J. Weiler and M. Wind, eds.), Cambridge University Press, 2003, 7-23, 8. For a systematic overview of demos in a broad context of European identity, see Jürgen Busch, "Existiert Europa? – Antworten der Verfassungstheorie" in *Reflexionen zum Internationalen Verfassungsrecht*, WUV-Universitätsverlag, Wien, 2005, 87-108.

## A. Nation- and Citizen-States.

### 1. *The decline of strong nation-states.*

Literally, a *nation state* is "a sovereign entity dominated by a single nation. [It is a] mythical and intellectual construct with a highly persuasive and powerful political force. It is the primary unit in the study of international relations... Its meaning is found in the coincidence of its two parent terms, ... 'State' refers to the political organization that displays sovereignty both within geographic borders and in relation to other sovereign entities... 'Nation' refers rather to the population within, sharing a common culture, language, and ethnicity with a strong historical continuity. This manifests itself in a sentiment of collective, communal identity. When the two concepts ... are combined, this creates an enormously compelling mixture of legitimacy and efficiency for governing elites."<sup>53</sup> In this definition of "nation-state" the word 'state' refers to the Westphalian concept of *statehood* as it is described in Article 1 of the Montevideo Convention of 1933 on Rights and Duties of States which stipulates that the "state as a person of international law should possess the following qualifications: (a) a permanent population; b) a defined territory; c) a government; and d) a capacity to enter into relations with other states".<sup>54</sup> In this conception Under that concept, multi-ethnic and multi-cultural countries, such as China or India, and multilingual countries like Belgium, Canada or Switzerland, are surely "states". They are also "nations" under the above definition, even in the absence of a "common language" because of the presence nevertheless of a "common culture", and "common ethnicity" in the broad sense, and/or of "a sentiment of collective, communal identity" and often "a strong historical continuity".

On the basis of the latter characteristics, it is possible to make a distinction between thin and thick "nations". Belgium, for one, is a *thin* nation, that is, one with a weak *national identity*<sup>55</sup> in the absence of a "common language", and because of an increasingly *weakening* "sentiment of collective communal identity" – with the result that, at the federal level where the country's statehood is situated, the components "state" and "nation" are coinciding less and less. In fact, and making abstraction of the small German speaking community, Belgium as a state encompasses two distinctly different nations, the Flemish and the Walloon nation, and constitutes on top of that a Belgian nation because of "(some) sentiment of collective communal identity" and "(a strong) historical continuity" – which nowadays has a thinner content than the two previous identities, especially than the Flemish which because of a long historic past, going

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53 *Oxford Concise Dictionary Politics* (supra n. 13 ), vo. nation-state.

54 "Population" is an ambiguous notion that refers to "some population linked to a specific piece of territory on a more or less permanent basis and who can be regarded in general parlance as its inhabitants." Thus M. Dixon, *Textbook on International Law*, Blackstone, 4th ed., 2000, 107-108. 'Population' in that sense is not a synonym for "nation", a concept that plays no role in the Westphalian definition.

55 Nation and national identity are used here as synonyms even though there may be a nuance: nation puts more emphasis on internal belonging ("community") whilst national identity refers more to external identity, in the sense that Europeans are said to be different from Americans.

back to the Middle Ages, and a high degree of language awareness has a strong feeling of identity, and therefore constitutes a thick nation which, moreover, currently in the Belgian federal context has international competence (cf. supra –) and uses it as an independent state. Interestingly enough, the example shows that national identities can be *cumulated*, meaning that one identity does not prevent a person from having (and being perceived as) having another or other ones as well. This is of crucial importance in the present context of steadily growing multi-ethnic and multi-cultural diversity as a result of important immigration waves from ethnicities other than European ones which, moreover, have a higher fertility rate than the local ethnicities – a development which applies to all European nation-states alike, unitary or federal, whether they are thin like Belgium, or thick like France or Germany.

This new diversity phenomenon implies that, in these European countries, traditional "nation-building" elements, such as culture, language and religion, ethnic origin and a strong historical continuity are no longer as decisive as they were in the past. It means that to keep a 'state people' together, there is a *need*, especially in thin nation-states, even more so when they are thin federal states with thick constituent components, for a substitute national identity-building element which is *civil integration* (to be distinguished from assimilation). That is a need to develop a sentiment of common belonging or awareness through which citizens or long term residents of a state will be able to identify themselves – without being entirely assimilated, that is without losing his or her identity of origin as a person or a group (see infra) – with the citizen-values of a democratic state, as they are worded in Article 6 (1) of the EU Treaty: "liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law". These are democratic values of which all EU member state parliaments have recognized that they are values which they have in *common* and which in each member state are, with related values, inscribed in constitutional documents and constitutionalist traditions, and applied and enforced accordingly. This commonality of constitutional(ist) values constitutes the foundation around which populations in each member state, and within the EU, have expressly or implicitly accepted to live and behave – values to be understood in combination with other factors of an ethnical, cultural and linguistic nature (the latter being important in order to live and communicate outside the family sphere in a local community) but, in specific cases, regardless of these other factors. It is also on this commonality of values that a common *European identity* is in the process of being built in which also non-European origin citizens and residents will be called to participate.

## **2. The rise of citizen-states.**

This brings us to the concept of *citizen state*. In a seminal article Jo Weiler distinguishes two ways of dealing with the alien.<sup>56</sup> One is to encourage aliens to assimilate themselves, 'to be one of us'. "But the 'be one of us', however well-intentioned, is often an invitation ... to be one of us, by being us. Vis-à-vis the

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56 "In defence of the status quo: Europe's constitutional *Sonderweg*" (supra n. 52), 19.

alien, it risks robbing him of his identity. Vis-à-vis oneself, it may be a subtle manifestation of both arrogance and belief in my superiority as well as intolerance." The alternative way "is to acknowledge the validity of certain forms of non-ethnic bounded identity but simultaneously to reach across boundaries. We acknowledge and respect difference, and what is special and unique about ourselves as individuals and groups; and yet we reach across differences in recognition of our essential humanity."<sup>57</sup> According to Weiler, the second vision corresponds to the European current constitutional architecture, encapsulated as it is in the meta-political objective in the preamble to the EC Treaty of 1959: "determined to lay the foundations of an ever closing union among the peoples of Europe." He writes: "No matter how close the Union, it is to remain a union among distinct peoples, distinct political identities, and distinct political communities".<sup>58</sup> As such it is in stark contrast with the words "*We the People of the United States*" in the preamble of the US Constitution of 1787. In the European vision human dignity for all is the corner stone framed within common democratic institutions and procedures which encourage and *ensure tolerance* regardless of nationality and origin, but *recognize the distinctness* of the other as an individual and a member of a group. This is then the essence of a citizen state: a political entity assembling citizens and long term residents around "civic institutions, with no exclusiveness towards any person or group willing to participate in them."<sup>59</sup> This is the foundation of a 'constitutional *demos*' which states that are part of the EU have in common and justifies and legitimates those states' – and the EU's – democratic political structure and power sharing and will, with time passing, enhance their democratic character when active self identification of citizens and residents – on a basis of equality – with these common political and societal values will be reached.

The foregoing applies to both the European member states and the EU and, if it may still appear as a target to be achieved for the EU, it is already a reality for most of the member states former which, with the years, have become less and less ethnically homogeneous, and whose policy of integration is now firmly based on assembling citizens, regardless of their origin, around common democratic values, norms and procedures. This makes / means that the traditional nation-states – especially thin nation-states, like Belgium, but also thicker nation-states – are gradually transformed into *mixed nation/citizen states* with a multicultural identity founded on political and democratic allegiance that is to be "inclusive", and not "exclusionary", "welcoming" and not "repulsive", "extrovert" and not "introvert", (European) "national" but not "nationalistic". In this context, the devolution of unitary states, like the U.K. but also France<sup>60</sup>, and the transformation of some into *federal states*, like Belgium but also Spain, can also be seen as a transformation of a nation-state into a citizen-state with (sub-) nation-state components. Paradoxically enough, in that respect nation-states with a thin content may develop a greater familiarity with the concept of citizen-state than

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57 Ibid.

58 Ibid., 19-20.

59 N. MacCormack, *Questioning Sovereignty*, Oxford University Press, 1999, 170.

60 See John Bell, "Devolution: French Style", 6 *European Public Law*, 2000, 139-145.

nation-states with a thick content, precisely because of the formers' lack of a strong nation-statehood, especially at the federal level, and therefore a greater susceptibility for citizen-statehood at that level.

Obviously, the propensity of states, unitary or federal, for citizen-statehood depends on historic factors. Nation-states, or parts thereof, with many centuries if not a millennium of statehood history will evolve less easily into a citizen-state and in federal states with components which have an equally long history, existing sub-states may have a strong commitment to nation-state behaviour. Thus, for example, in the Federal Republic of Germany where federal constitutions are based on values and norms that have evolved in *Länder* constitutions which, over the centuries, have witnessed the transition first from an authoritarian into a democratic monarchic form of government and then into a truly democratic peoples and citizen form of government (cf. supra). *Länder* like Bavaria in Germany or regions like Flanders in Belgium do still have strong sub-national, sometimes even separatist feelings. The matter deserves mentioning because it points to a remarkable difference with a federal state like the United States of America. As mentioned, from 1787 on the federal republic wanted to be a republic not of peoples but of *one people to be* – albeit, as mentioned above, in the narrow sense of a republic of white Anglo-Saxon Protestant males. And indeed, as of 1776 when the war of liberation was going on, American patriots worked to create a unified culture. Thus the lexicographer Noah Webster proclaimed: "Every engine should be employed to render the people of this country national ... and to inspire them with the pride of national character". For that purpose, Webster even proposed a new orthography, a national language, an American tongue.<sup>61</sup> As a result of these and later continuing efforts especially after the civil war (1861-65), the United States have succeeded in their grand 'one people' design and have applied it to all Americans, old and new, that is in wide diversity. There is surely no other country where, like in the United States, becoming a national is considered to be a person's greatest achievement in life. "Nation-state" is still a concept there; however not one of homogeneous but one of heterogeneous ethnicity, and of allegiance to common values, common institutions and common symbols and, in that sense, a "nation-state" turned into a "citizen-state".<sup>62</sup>

### **B. Principles and Competences in a federal context.**

Federalism is a form of two-level government that does not stop there; first, because, under the national level, there are often different levels of local government – which, however, do not take part in the split of sovereignty which

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61 Peter N. Carroll & David W. Noble, *The Free and the Unfree, A progressive history of the United States*, Penguin books, 3<sup>rd</sup> rev. ed., 2001, 127 ff.

62 This typically American allegiance to the national state and American identity (which includes a large component of religion) has even remained, it would seem, after the huge invasion of Hispano-Americans in Southern and Western States and, as a consequence thereof, the rebirth of multi-linguism and -culturalism particularly in those States.

is characteristic of federalism<sup>63</sup> – and, secondly, because federal states may, like unitary states, participate in the creation of higher levels of government which like the EU do have obtained some sovereign powers from the member states. The creation of such supra-national polities gives rise to the same features which are characteristic of a federal state and in Europe at least, these features of federalist government in national and supra-national polities are now often studied in conjunction with one another. This phenomenon has been strengthened with the drafting of a European constitution, which is now again prominent after the meeting of Head of State or Government of the 27 States held under German presidency on 21-23 June 2007. During that meeting it was decided that the formerly agreed (but not ratified) Treaty establishing a Constitution for Europe would be replaced by a Reform Treaty and a Treaty on the Functioning of the Union – which would preserve most of the content of the constitutional treaty.<sup>64</sup> To conclude, I will discuss in this section some of these common features: first two principles, then a typology of competences, and in the following section the device of bicameralism.

### **1. Two federalist principles.**

As mentioned above, Article 6 (1) of the EU Treaty names a number of "principles which are common to the Member States", on which the Union is founded. Specific reference is made to the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law. That does not preclude the existence of still other principles of constitutional law which the Members States *and* the Union have in common. Actually, besides those enumerated in Article 6 (1) EU which are of a substantive nature, there are some others of a procedural nature – amongst which there are two basic principles of federalism: subsidiarity and loyal cooperation.

a) *Subsidiarity* is used in Article 5 of the *EC Treaty*, in combination with the principle of proportionality, in order to limit the exercise of non-exclusive competences of the Community. Article 5, second paragraph specifies that "the Community shall take action ... only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community." In the *Protocol* on the application of the principles of subsidiarity and proportionality attached to the Amsterdam Treaty (1997), the Member States recognize that the principle of subsidiarity "provides a guide as to how those [non-exclusive] powers are to be exercised at the Community level. [It] is a dynamic concept ... [that] allows Community action within the limits of its powers to be extended where circumstances so require, and conversely, to be restricted or discontinued where it is no longer justified".<sup>65</sup> "Other things being equal, directives should be preferred to regulations and framework directives to

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63 Supra n. 36.

64 See *European Voice*, 28 June/4 July 2007, 2, 6-7, 8, 12 and 14.

65 At (3) of the Protocol.

detailed measures."<sup>66</sup> Moreover, "[w]ithout prejudice to its right of initiative, the Commission should: ... consult widely before proposing legislation and ... justify the relevance of its proposals..."<sup>67</sup> In the draft Treaty establishing a *Constitution for Europe* subsidiarity would be taken one step forward by providing that "National parliaments shall ensure compliance with (the) principle in accordance with the procedure set out in (a) Protocol" (the so-called "early warning" procedure).<sup>68</sup> That new protocol would also enable Member States and, under certain circumstances, the Committee of Regions to have recourse to the ECJ in case of violation of the duty of the Commission to motivate the use of its legislative right of initiative in light of subsidiarity.

The principle of subsidiarity is regarded as an application of the requirement, laid down in Article 1, second paragraph, of the EU Treaty, that decisions are to be taken "as closely as possible to the citizen." As such, it may have an even larger importance in a multilevel constitutional structure by giving preference, also within each Member State, to the lower level of government (*Länder* or regions). Moreover, in light of the 'closer to citizen' requirement, it may also be understood as an incentive for any level of government to refrain from legislation when *civil society* is better, or as well, qualified to take care of the matter which proposed legislation wishes to pursue.<sup>69</sup> However, in whatever context used, the problem with subsidiarity is that its application requires a difficult assessment of practical, political and economic circumstances, in order to know which authority, if not civil society, is best equipped to take action.<sup>70</sup> It is therefore understandable that the Court of Justice will not lightly overturn Community action on the ground that the latter does not comply with the principle,<sup>71</sup> and that some authors have even proposed to set up a non-judicial forum, composed of representatives of Member States' national and possibly regional parliaments, to control *a priori* whether proposed Community action is compatible with subsidiarity.<sup>72</sup> All in all,

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66 At (6).

67 At (9).

68 See further W. van Gerven (supra n.1) at 269-270. See also *European Voice* (supra n. 64) at 7, on the decision at the European summit of 21-23 June 07, to strengthen the role of national parliaments.

69 And indeed in the papal encyclical *Quadragesimo Anno* (1931) which is frequently held to be the most important source of the principle of subsidiarity, the principle was also meant to discourage public authorities of any kind from interfering with the freedom of individuals, and to encourage individuals, private associations and corporations to take matters in their own hands. See further W. van Gerven, "Toward a coherent constitutional system within the European Union", 2 *European Public Law*, 1996, 81-101.

70 See in that regard, Roger Van den Bergh, "The Subsidiarity Principle in European Community Law: Some Insights from Law and Economics", 1 *Maastricht Journal of European and Comparative Law*, 1994, 337-366.

71 P. Craig & G. De Búrca, at 137 with reference to case law; more recent K.Lenaerts and P. Van Nuffel, *Constitutional Law of the European Union* (R. Bray, ed.), 2<sup>nd</sup>. ed., Thomson, 2005, 106 with case law in n. 130; C.W.A. Timmermans, "Is het subsidiariteitsbeginsel vatbaar voor rechterlijke controle?", *SEW* 2007, 224-230.

72 As mentioned in K. Lenaerts and M. Desomer, "Bricks for a Constitutional Treaty of the European Union: values, objectives and means", 27 *E.L.Rev.*, 2002, 377-407, at 390-391. See Article I-11 (3) last sentence of the draft European Constitution Treaty with in attach a new protocol: see W. van Gerven (supra n. 1), 269-270.

the significance of subsidiarity is therefore primarily political and is used in the political arena to oblige the Community, mainly the Commission, to think twice before it takes action.<sup>73</sup>

Although *in the U.S.* "federalism (also) suggests a state of affairs in which political authority is both in law and in fact allocated between two or more levels of government", it is not understood, as the term subsidiarity implies, "as expressing a preference for any particular distribution of that power, much less dictating any particular inquiry into the implications of specific governmental action for that distribution."<sup>74</sup> Actually, in the US the term subsidiarity itself is foreign to the law and practice of federal legislation: "The working assumption [there] seems in fact to be that Congress, by virtue of its composition and mode of operation, will not act with needless disregards for the states' interest in regulatory autonomy."<sup>75</sup> The situation is at least partially different as regards the exercise of authority by *federal agencies*. In that respect the Executive "has attempted to introduce into the regulatory process certain considerations that bear directly on federalism and that at least in part reflect subsidiarity. Thus a series of executive orders calls upon the federal agencies not only to minimize the regulatory burdens imposed on the private sector, but also to refrain from regulating at all if action at the state or local level would satisfactorily accomplish the federal government's objectives."<sup>76</sup>

In his article George Bermann examines how the *difference between Europe and the US* can be explained. One reason is that the European Community system was imposing a new multi-layered system on a continent historically dominated by sovereign nation states, themselves mostly unitary in structure, a system therefore that needed a sense of continuity, and a semblance of balance, which was reinforced by a legislative principle such as subsidiarity. In the same vein, regional differences in the U.S have never been as large as the huge differences in culture, language, and social and political values which exist in Europe not only among the states *but also* among regions within the states. In such a context, subsidiarity "is a particularly apt instrument for a polity determined not merely to maintain a decent equilibrium in power between the federal government and the states, but to minimize the loss of political autonomy at the more local levels".<sup>77</sup> Furthermore, in the European Community – and in stark contrast to the U.S. where the federal authorities are prevented from "commandeering" the states in legislative matters – Member State authorities are required, under Article 10 EC (cf. *infra*), to *implement* Community legislation

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73 For an early and excellent analysis of subsidiarity in EU and USA law, see G. A. Bermann, "Taking Subsidiarity Seriously: Federalism in the European Community and the United States", 94 *Colum. L.Rev.*, 1994, 331. For the present presentation, I have used the excerpt from Bermann's article reproduced in V. Jackson and M. Tushnet (*supra* n. 17), 870-885, and the references made in the following notes are also to that excerpt.

74 G. Bermann, 877 (see preceding note).

75 *Ibid.*, 878.

76 *Ibid.* See also David Lazer and Viktor Mayer-Schoenberger, "Blueprints for Change: Devolution and Subsidiarity in the United States and the European Union", in *The Federal Vision* (Kalypso Nicolaidis and R. Howse, eds.), Oxford University Press, 2001, 118-143.

77 G. Bermann (*supra* n. 73), 881-882.

within their state at their own expense. In that context subsidiarity is used as a political safeguard against excessive federal legislation – in addition to, and more importantly, the guarantee that through the Council of Ministers (which is the most prominent component of the European legislature) all Member States participate in the *enactment* of federal legislation, and therefore can restrain the Union's legislative power at the very outset.<sup>78</sup>

b) *Sincere cooperation*. Article 10 EC Treaty obliges Member States to take all appropriate measures to ensure and facilitate the application of Community obligations and the achievement of Community tasks, and to refrain from any measure which could jeopardize the attainment of the objectives of the EC Treaty. Thus formulated in terms of a positive and a negative obligation, the provision expresses the *duty to cooperate in good faith*.<sup>79</sup> It has been interpreted in case law of the ECJ as a duty that is imposed on all Member State bodies and authorities – therefore as well on the legislature, the executive, the administration and the judiciary within each Member State and on all levels of government, national, regional, municipal, etc. In contrast with the wording of the Article, it is understood to also encompass action of the Community institutions which are required to cooperate with the Member States in all areas within their jurisdiction.<sup>80</sup> Furthermore, it has been extended to include cooperation between Member States,<sup>81</sup> and among Community institutions,<sup>82</sup> as well. The Article and related case law are of crucial importance to flesh out what has been called "loyalty not hierarchy as a paradigm" characterizing the relationship between the EU and national legal orders.<sup>83</sup>

Thanks to the principle of *loyal cooperation*, conflicts between legal orders existing within the EU are to be solved in the first place through mutual understanding and cooperation: the principle "has evolved from a unilaterally formulated duty of cooperation on the part of Member States to a multi-sided duty of loyalty and good faith in the relationships between the different levels of governance that make up the Union."<sup>84</sup> It is a prolongation of similar duties which exist in the constitutional legal orders of the Member States, especially in Member States which have a federal form of government. For example, in numerous judgments of the *German Constitutional Court* the principle of loyalty ("Bundestreue" or "Bundesfreundliches Verhalten") has been set out as a duty for the Federation and the *Länder* to preserve and restore the constitutional

78 Ibid. 883-884. On "no-commandeering" in the U.S. and commandeering in Europe, see W. van Gerven (supra n. 1), 20-21.

79 K. Lenaerts and P. Van Nuffel (supra n. 71), 115.

80 Thus ECJ, case C-2/88 *Imm. Zwartveld and others* [1990] ECR I-3365, paras 17-22; ECJ, case C-234/89 *Delimitis* [1991] ECR I-935, para 53. But see ECJ Case C-275/00 *Frist and Franex* [2002] ECR I-10943, para 49.

81 For instance to recognise each other's diplomas and evidence of professional qualifications; ECJ, case C-340/89 *Vlassopolou* [1991] ECR I-2357, para 14.

82 That is particularly true of decision-making processes based on inter-institutional dialogue: ECJ, case C-65/93 *European Parliament v. Council* [1995] ECR I-643, para 23.

83 A. Verhoeven, *The European Union in search of a Democratic and Constitutional Theory*, Kluwer Law International, 2002, 304.

84 Ibid., 306.

order in all its components and on all levels of the State, and to cooperate and assist one another whenever appropriate. The principle can impose concrete obligations – beyond those expressly enumerated in the Basic Law – upon the *Länder* against the Federation, and *vice versa*, just as it can impose limits on the exercise of competences by the Federation and the *Länder*.<sup>85</sup> In addition to other obligations it requires "financially strong Länder ... to give assistance within certain limits to financially weaker Länder" and requires any Land legislature to "show consideration for the interests of the Federation and the other Länder", thus, for instance in a concrete case, prohibiting the Federation from trying to 'divide and conquer', that is, from attempting to divide the *Länder*, to seek an agreement with only some of them, and then force the others to join".<sup>86</sup>

The principle is also inscribed in Article 143 §1 of the *Belgian Constitution* in the following terms: "In the exercise of their respective responsibilities, the Federal Government, the Communities, the regions ... act in the interests of federal loyalty, to prevent conflict of interests."<sup>87</sup> Thus, also in a federal State like Belgium where (as in the US: *supra* -), federal and national administrations implement their own legislator's laws – as opposed to Germany which applies the concept of "executive federalism" ("Vollzugsföderalismus"), i.e., that it is for the *Länder* to implement federal legislation in principle<sup>88</sup> – loyal cooperation remains an imperative for both levels of governance. An imperative which, moreover, in both constitutional legal orders has given rise to a large variety of *concrete forms of cooperation*, such as, apart from informal contacts, reciprocal representation in management and decision-making bodies, consultation procedures, inter-ministerial committees or conferences, cooperation agreements, etc.<sup>89</sup> Such devices of "cooperative federalism" are now also taking shape at the EU level in a context of the so-called *Open Method of Coordination*, mainly in areas where the EU institutions have merely supporting, coordinating or complementary powers.<sup>90</sup> The characteristics of the method based on voluntary cooperation between supranational, national and regional authorities, and eventually with the private sector, have been circumscribed at the European Council meeting held in Lisbon on 23/24 March 2000.<sup>91</sup>

85 BVerfGE, 12, 205, excerpts quoted in English translation by Jackson and Tushnet (*supra* n.17), 827-831.

86 *Ibid.*, 829-830. For a full presentation and more illustrations, see H. Maurer (*supra* n. 20), 318-321.

87 On the scope of the provision, see A. Alen, "De federale loyauté: ondanks alles, toch een bevoegdheidsverdelend concept?" in *La Loyauté. Mélanges offerts à E. Cerexhe*, De Boeck/Larcier, Brussels, 1997, 19-37.

88 See Article 83 Basic Law: "The Länder shall implement federal legislation in their own right in so far as this Basic Law does not provide or permit otherwise."

89 For Belgium, see Alen and Ergec (*supra* 50), 39; for Germany, see H. Maurer (*supra* 20) 322-327.

90 See W. van Gerven (*supra*, n. 1), 169-170 and 196-200.

91 <<http://www.europa.eu.int>>. For an extended use of the method to convergence of private laws between the Member States, see W. van Gerven, "Bringing (Private) Laws closer to each other at the European level" in *The Institutional Framework of European Private Law* (F. Cafaggi, ed.), Oxford University Press, 2006, 37-77, 60-65.

## 2. Competences in a federal context.

a) *Attribution of competences* – horizontally and vertically – is an issue that presents a major problem for any 'constitution-maker.' That is particularly so for those committed to drafting a constitution for a federal State – or for a union of States, like the EU – in which case the vertical division of powers between the federal/union and the state level, and the impact thereof on the horizontal balance of power, are of crucial importance. The point of departure in a federal system is that the federal authorities have only those powers which have been attributed to them, or conferred upon them, by the component states (*principle of attribution or of conferral*). That does not solve all questions, though. One is whether the conferral also includes so-called residual, *i.e.* not expressly enumerated powers, that is whether those powers lie with the component States, or rather with the federation. In federal States which are of an integrative nature (*i.e.* federal States that came about as a result of a unification effort on the parts of the participating states; *supra* –), the answer normally is that residual powers remain with the States and their peoples. The reason is because: that is where the democratic justification of power lies – as is often confirmed by constitutional provisions in those States: thus in Germany<sup>92</sup> and in the US.<sup>93</sup> That may be different in States which were unitary states at the outset but have been federalized later on in accordance with the decision making process prevailing in the then unitary states (*supra* –). For indeed, within the framework of devolution – for which democratic legitimacy lies with the unitary state, its institutions and people(s)' representatives – there may be a tendency, for principled or practical reasons, to leave the residual powers at the federal level, at least for the time being. Thus in Belgium, for instance, residual powers remain temporarily, with the Federation.<sup>94</sup>

Another issue to be resolved is the question of *Kompetenz-Kompetenz* – *i.e.*, the question as to where the ultimate authority lies to define the allocation of competence between the federal and State level. The necessity thereof will occur when competences have not been defined in a precise or a complete way or, if they are defined, whether they may include implied powers,<sup>95</sup> and, as mentioned above, where residual powers should be deemed to lie. Under

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92 See Article 30 of the Basic Law "Except as otherwise provided or permitted by this Basic law the exercise of governmental powers and the discharge of governmental functions shall be incumbent on the Länder".

93 See Amendment X [1791] to the Constitution: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people".

94 See Article 35, temporary provision, of the new 1993 Constitution. That remains so until the exclusive powers of the federal authority have been determined and a special law has been adopted by a qualified majority to determine the date as of which the residual powers will be with the communities and the regions.

95 A distinction is to be made between an implied competence and implied powers: the former provides the Community with an ancillary substantive basis for powers – where that is necessary in order to supplement an express competence; the latter refer to powers which the Community has available to it in connection with a particular substantive competence – where additional means are needed to attain the objectives of a particular competence. See further K. Lenaerts and P. Van Nuffel (*supra* n. 71), nrs. 5-015 and 5-016.

normal circumstances the authority to answer this question, called the "competence-competence" belongs to the constitutional legislature(s) and, for matters of interpretation, to the constitutional court(s). *In the EU* the issue is more delicate in the absence of a written constitution, or other constitutional arrangements, leaving it therefore to the Community and the Member State Supreme courts to resolve this important constitutional issue. In that regard, constitutional conflicts between Community and national courts continue to arise, even though the latter accept, as a principle, that Community law takes precedence over national law. But that does not prevent conflict from arising as to who possesses the competence to define competences in a specific case, more particularly, and more generally, whether the EU possesses the autonomy to define the limits of its own competence (as the ECJ believes it has by virtue of its general jurisdiction set out in Article 220 EC Treaty).<sup>96</sup>

b) *Typology of competences*. The issue of attribution of competences is even more complicated where it involves choices for the legislature or, in the absence of precise rules, for the supreme courts as to which competences are to be *exclusive*, or rather *shared* in which case the power which the federal level shares with the state level may be less or more limited. The issue calls for a typology, something which in some countries, like Germany, has received much attention, but not in others, such as the U.S.; it has now also come to the fore in EU law, more particularly in the draft Treaty establishing a Constitution for Europe (see the categories of competences referred to in Article I-12).<sup>97</sup> To define these categories of competences properly, two forms of federalism should be distinguished: dual and co-operative federalism. *Dual federalism* is based on the idea of equal sovereignty: the federal and the state government are regarded as co-equals; the idea rejects any hierarchical relationship between both. In such case, both levels of government operate independently in their respective and mutually exclusive spheres, that is, with no legislative power left for the other legislator, and therefore without power sharing in each sphere.<sup>98</sup> *Co-operative federalism*, on the other hand, is precisely based on a relationship of power-sharing between the two legislators, and must therefore be made subject to a number of constitutional devices – mainly some principle of supremacy (*infra*) – in order to coordinate and facilitate the co-existence and operation of the two sources of autonomous legislative power. Furthermore, in the latter case, power sharing, there are situations in which the federal legislator's competence comprises

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96 On the issue of *Kompetenz-Kompetenz* in EC law, and the question of supremacy of Community law, from the perspective of the ECJ and the Member State courts, see Craig and De Búrca (*supra* n. 71), 276-314; on the first issue, see also 284.

97 See the two recent contributions of Robert Schütze on "Co-operative federalism constitutionalised: the emergence of complementary competences in the EC legal order" 31 *E.L.Rev.*, 2006, 167-184 (hereinafter "Co-operative federalism"); and "Dual federalism constitutionalised: the emergence of exclusive competences in the EC legal order" 32 *E.L.Rev.*, 2007, 3-28 (hereinafter "Dual federalism").

98 "Dual federalism", at 4. The EC Treaty did not and does not contain verbal reference to the concept of exclusivity which is essentially a judicial creation: *ibid.* – where the evolution of exclusive powers in the Court's case law is analysed particularly in three areas: common commercial policy, at 6-10, conservation of biological resources of the sea, at 10-14, and external power ("a hybrid form of exclusivity"), at 14-15.

only a limited degree of intervention in view of expressly protecting the predominant legislative function of the lower legislative level.<sup>99</sup> These distinctions are properly reflected in the draft Constitution for Europe Treaty in which first a limited number of areas of *exclusive* competence for the Union are enumerated in Article I-13 – an application of dual federalism – and a longer (and not exhaustive) list of *shared* competences are enumerated in Article I-14 – an application of co-operative federalism – and where it is specified, in Article I-12 (2), that in those instances of shared competences Union legislation may pre-empt national legislation. Pre-emption means that, when the Union has acted, the Member States' power ceases to exist and the national rule must give way to the Community provision in so far there is a conflict.<sup>100</sup> It may then be for the ECJ to determine to what extent Community action in a particular area still leaves room for the Member States to legislate, which implies that future national legislation will only be valid if it is in conformity with the Community provision.<sup>101</sup> In Article I-17 some further areas are enumerated where the Union shall only share competence with the States to carry out supporting, coordinating or complementary action of the latter. Accordingly, these are areas for which the *Member States' predominant power* to legislate are constitutionally preserved and, therefore, cannot be superseded by Community legislation (Article I-12 (5)).<sup>102</sup> This category of shared powers may give rise to difficult constitutional questions as to whether Community action has any "pre-emptive" capacity at all. More specific questions follow: "Do those complementary competences prevent the Community legislature from ever laying down exhaustive standards with regard to a particular legislative measure?" or, "Alternatively, will the Community

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99 "Dual federalism", at 3-4 and "Co-operative federalism", at 167. For a full and thorough analysis of the variants of (constitutionally to be enshrined) co-operative federalism: *either* a mandate for the EC legislature to set minimum requirements only (allowing the national legislatures to adopt higher standards of protection), *or* a mandate to only complement or supplement national action – which may exclude all harmonisation of Member State laws in given area, see "Co-operative federalism" at 168-171.

100 Based on the supremacy of Community law doctrine as laid down by the ECJ in its 1964 *Costa v. ENEL* judgment: Case 6/64 [1964] *ECR*, 585. In that judgement, the Court proclaimed the principle purely from a perspective of Community law, that is without taking into account the implications which the principle could have from the perspective of the Member States. Although there is some truth in the proposition that "(t)he Court's aim in *Costa* ... was not to subdue the national legal systems to a hierarchically superior system of law, but rather to ensure that the goals of Community law could be achieved through an effective and uniform application of Community law in all Member States, (A. Verhoeven (supra n. 83) at 309-10), it cannot be denied that the judgment was hailed by many Community-minded lawyers (also myself) as a victory for the supremacy of Community law. As a consequence, it should not have been a surprise that – even although, in general, national courts have been very cooperative with the ECJ – the Member States' supreme courts, especially constitutional courts, have later on shown considerable reluctance to follow the ECJ's case law, more particularly when it appeared that precedence of Community law also meant precedence over constitutional provisions of the Member States where needed for the effectiveness of Community law. See for a full analysis, A Verhoeven (supra n. 83) 85-90.

101 K. Lenaerts and P. Van Nuffel (supra n. 71), 96-7.

102 The foregoing description of EU competences has much in common with the German situations as laid down in Articles 70-75 of the Basic Law. For an overview, see H. Maurer (supra n. 20), 547-554.

legislator be allowed to totally harmonise certain matters however without being able to totally prevent the national legislator from taking any action within the scope of the legislative competence?"<sup>103</sup>

### C. Bicameralism in a federal state.

While it is controversial whether bicameralism is necessary in a unitary state, it is as good as unavoidable in a federal state.<sup>104</sup>

a) *Bicameralism in a federal state.* Bicameralism refers to the view that a legislative chamber should be properly composed of two houses, in which case the *upper* house (often called the Senate) – 'upper' because further away from the people – has often a more restricted role than the *lower* house (called the house of representatives of the people or the general assembly). That is not the case, though, in the US where the two houses have broadly equivalent powers in the legislative process which, in case of conflict, will require a mechanism to resolve differences between them. Thus, for example, joint committees containing members of both houses will be set up to find legislative compromises involving sometimes substantial redrafting. Such committees may also have other tasks, though, thus for example to carry out parliamentary investigations.<sup>105</sup> In *federal systems* one of the two houses represents the units of the State and is composed of members from each State (thus in Germany: the *Bundesrat*), the other house represents the people and is composed of members elected by the people of the several states (in Germany: the *Bundestag*). There are however many variants: in the USA for example the members of the Senate, two for each state, are now elected by the people (Amendment XVII [1913]) and no longer by the State legislator (Article I, s. 3 [1]) whereas in Germany the members of the *Bundesrat* are still designated by the Land governments (Article 51 (1) GG). To quote another variant: Belgium, a former unitary state, has two federal houses of which the house of representatives is elected by the people (Article 61 Constitution) whilst the senate affords representation for the communities but is composed in a very hybrid way (Article 67).

Bicameralism in the *Federal Republic of Germany* is of particular importance as it may serve as a model for the composition and functioning of the EU legislature, and the legislative process as a whole. As mentioned, of the two federal houses, the *Bundestag* and the *Bundesrat*, the members of the first, the *Bundestag*, are elected by the people "in general, free, equal and secret elections. They shall be representatives of the whole people; they shall not be bound by any instructions, only by their conscience." (Article 38 (1) of the Basic law). The *Bundestag* has full legislative powers. Whereas the legislative powers of the *Bundesrat*, where they exist, must always be exercised jointly with the

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103 Thus in a somewhat different formulation: "Co-operative federalism", at 171 with tentative answers at 172-184.

104 The reason for upholding bicameralism in a unitary state are mainly to install a safety valve and not to concentrate all legislative power in one body: W. van Gerven (supra n.1), 332.

105 *Oxford Concise Dictionary of Politics* (supra n. 13), vis. Bicameralism and Joint committee.

Bundestag, that is not so for the latter which in matters for which the consent of the Bundesrat is not required may act alone. This being said, it is important to assess the role of the house representing the states because it allows to measure the thickness or thinness of the federal process. The more power for the house representing the component states, the less federal a state is for still being able to be run by not directly elected state representatives. It is therefore on the Bundesrat that we will focus in the following paragraphs and compare its composition and functioning with the EU Council of Ministers – of which it will be mentioned (cf. infra) that, as yet, it constitutes the most prominent part of the EU legislature, more prominent than the directly elected European Parliament.

As mentioned, the members of the *Bundesrat* "shall consist of members of the Land governments which appoint and recall them."<sup>106</sup> Other members of the Land governments may serve as alternates. Each Land in the Bundesrat has between three and six votes, depending on the size of its population. Each land may delegate as many members as it has votes, but the Basic Law prescribes that the votes of each Land "may be cast only as a block vote."<sup>107</sup> In exercising their rights to participate, take the floor and put questions forward, the members have the duty to act on behalf of their Land and its government, and to undertake action on its behalf.<sup>108</sup> Because members of the Bundesrat are representatives of the Land governments, they change along with the outcome of elections in each Land; such changes may alter the political majority in the Bundesrat. On each of these points, the Bundesrat bears a striking resemblance to the *EU Council of Ministers* when it legislates under the first pillar of the EU. The Council of Ministers is similarly composed of alternating representatives of the Member State governments, which change with the elections in each state. As in the Bundesrat, votes in the Council of Ministers are roughly weighted in accordance with the size of each state's population with a minimum for the smaller states. Votes in the Council of Ministers are also required to be cast as a block vote. Members of the Council of Ministers will, like the representatives of the Länder in the Bundesrat, defend the position of their state in the Council.

Furthermore, the *functioning* of the *Bundesrat* and the Council of Ministers is very similar. The work of the Bundesrat takes place in committees in which all Länder are represented and in which government ministers are normally represented by members of their administrations. These committees prepare the decisions for vote by the full Bundesrat.<sup>109</sup> Most importantly, Article 50 of the Basic law empowers the Bundesrat to participate in the legislative process of the federation on behalf of the Länder. Bills adopted by the Bundestag must be transmitted to the Bundesrat which in matters where its consent is required, and no agreement is reached, may demand for a bill to be referred to a committee composed of members of both houses.<sup>110</sup>

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106 Article 51 (1) GG.

107 Article 51 (2) and (3) GG.

108 Maurer (supra n.20) 515.

109 With the notable exception of the committee which deal with matters concerning the European Union which may make final decisions on behalf of the Bundesrat because of urgency.

110 See further W. van Gerven (supra n. 1), 335-336.

b) *Bicameralism from a European Union perspective.* Bicameralism is a feature that can take special importance in a certain view of the European Union. That view, which I will call the "federalist view", sees the relation between the European Parliament and the Council of Ministers as an elementary piece of the Union's future institutional structure. Those espousing this view favour the role of Parliament and advocate for a reduction in the currently predominant role of the Council of Ministers. As is well known, under the first pillar the Council still acts as the main legislative branch of the Community, however, in a growing number of matters, together and on a par with the European Parliament. But that is not so under the second and third pillars, where the European Parliament *and* the European Commission play a less prominent role than under the first pillar. In the *federalist vision* that situation should, at least in the long run and for the three pillars, be transformed into a bicameral system in which the directly elected Parliament would become the more influential parliamentary house and the Council of Ministers the less influential one, as the non-directly elected house often is in a federal (parliamentarian) state. The federalist vision is not to the liking of most, if not all, of the Member States, as they want to preserve, if not enhance, the Council's importance. Moreover, also in the view of *moderate federalists*, of which I am one, such a drastic change, if at all politically attainable, would not be desirable now, and probably not for many years to come. This is because the change would reduce the Member States' influence to a point that, rather than enhancing the Union's legitimacy *in* the Member States, it would diminish Member State support for the Union by concentrating too much power in the hands of the European Parliament and the European Commission. Furthermore, and by implication, it would also reduce the role of the national parliaments that are charged with controlling their government's representatives in the Council (even though they do not fulfil that function as well as they should).

In a full fledged federal state with a bicameral system like the US, both chambers participate in the *legislative process* on a par. As indicated above, even when Parliament and the Council were to be considered, following the "federalist" view, as two chambers of one legislature, that is not currently the case in the EU, not even under the first pillar. Apart from the crucial fact that, in the Union, the right of legislative initiative is with the Commission<sup>111</sup>, the legislative function of Council and Parliament is still very much asymmetric. Roughly speaking, there are six major types of legislative procedure of which only one, the co-decision procedure set out in Article 251, involves both Council and Parliament in a similar manner. In the five other procedures, Parliament is less involved, or not involved at all.<sup>112</sup> Under the co-decision procedure which is the most standard procedure, and will undoubtedly become even more so in the future, mutual decision-making among the three institutions, Commission, Council and Parliament, operates in a complicated manner, but has worked miraculously well.<sup>113</sup> Only when the

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111 On the Commission's right of initiative, see K. Lenaerts and P. Van Nuffel (supra n. 71) 577-84.

112 See Craig & De Búrca (supra n. 71) 139-50.

113 The procedure implies that legislation proposed by the Commission can only be adopted if approved by a majority in Parliament and by a qualified majority in the Council.

inequality in the five other procedures will have ceased to exist – preferably by replacing all of them by the standard co-decision procedure, thus doing away with what is called the 'democratic deficit' – will bicameralism in the EU place the states and peoples of the constituent states on a par, and will the Union fully deserve the denomination of "a polity of states and peoples."<sup>114</sup> But that will not yet make it a *fully* democratic federal state because that would suppose that the universally elected house is the most prominent house as it is in the Federal Republic in Germany. Surely, that is not the case in the US where the House of Representatives and the Senate have approximately equivalent powers (*supra*, –). However, that has not an impact on the democratic character of the legislative process because, since Amendment XVII [1913], the members of both houses are directly elected by the people.

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114 On this denomination, see W. van Gerven (*supra*, n. 1), 2, fn. 1.