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«Federalism, Democracy and Citizenship — The Limits of the (N*a*t*i*o*n*a*l)* State within the European Union. A new Janus myth?»

João Relvão Caetano **

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* As *estrelas* simbolizam as vicissitudes singulares do processo de integração Europeia, e foram buscadas, por homologia, à bandeira da União Europeia. O seu número (sete) simboliza, por sua vez, o destino incerto do projecto e, ao mesmo tempo, a sua natureza indelével e mesmo sagrada, apresentando-se ao serviço e em respeito pela diversdade dos Povos e Culturas Europeias.

** Assistente do Departamento de Organização e Gestão de Empresas da Universidade Aberta
O presente texto reproduz, sem alterações, o relatório apresentado, em Junho de 1996, na disciplina de *Comparative Constitutional Law of the European Union*, na Faculdade de Direito da Universidade Católica do Brabante (Tilburg, Holanda), no seu *Curso Internacional de Direito Comparado*, sob a orientação da Professora S. C. van Bijterveld.

> «There is also a doubt as to what is to be the supreme power in the state: — *Is it the multitude? Or the wealthy?* Or the good? Or the one best man? Or the tyrant? Any of these alternatives seems to involve unpleasant consequences».
>
> (Aristotle, *Politics:* book 3, chapter *10, emphasis added)*

> «(...) This Treaty marks a new stage in the process of *creating an ever closer union among the peoples of Europe*, in which *decisions are taken as closely as possible to the citizen.* (...) Its task shall be to organise in a manner demonstrating *consistency* and *solidarity*, relations between the Member States and between their peoples»
>
> *(Maastricht Treaty,* Art. A, *emphasis added)*

PARTE – LIMITS OF THE CONTEMPORANEOUS STATE. METHODOLOGY. MAIN CONCEPTS

1. Beyond the limits. Method of analysis

1.1 This paper intends to be a personal reflection, rather than a gloss. In many aspects, it is an epistemological and methodological approach before being an immediate and exclusive analysis of the positive organizational law. However, for its own nature of time and space this paper is nothing more than a possible beginning...

1.2 It's my first objective to describe the federal and confederal characteristics of the European Community. And, by using the comparative methodology, I shall test the European experience within lhe European Union (E.U.) by referring it to a consolidated example of federalism in Europe: the Germany.

However, from my point of view, it doesn't make *enough* sense if I don't consider in the analysis either some other fundamental juridical and ideological concepts or some economic and sociological realities. Most of them can only be

viewed within a dynamic process of its own surplus. Because of this, I can say that is possibly not a mistake to begin this paper by referring the *ostensible* signals or elements of federalism within the E.U.: v.g., the existence since 1970.4.21, of a proper financing Community system; the existence of common policies, which spectrum has been enlarged since the adoption of the European Single Act (E.S.A., 1986) and of the Treaty on European Union (T.E.U. or Maastricht Treaty, 1993) including a common foreign and security policy [1] [2]; States are bound by compulsory rules of co-ordination on economic policics [3]; the institution of the intergovernmental co-operation on justice and home affairs (Art. B of the T.E.U.) [4]; the enlargement of

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[1] Which in fact is a not economic issue. Before it, at least since the Luxembourg Report of 1970, it existed a system of European Political Co-operation, and Article 30 of the S.E.A was no more than a codification of an *existing* practice developed in several *European Councils*. See David O'Keeffe and Patrick Twomey, *Legal Issues of the Maastricht Treaty*, London 1994, p. 215 and. f.. (Ch. 14, «Common Foreign and Security Policy»). This remains the typical example of a concurrent policy, *national-dominated* as it was proved by the conflict in the ex-Yugoslavia, with different national positions within the E.U.. Likely, the *possible* as much as *wished* E. U.'s common defence policy, as it is stated down in Art. B of the T.E.U. became not yet effective: the French nuclear tests in the South Pacific, in Muroroa Islands, are enough evidence.

[2] Also other issues became common policies with Maastricht. In fact, through the introduction of new titles that meant legal amendments either of the original Treaty or the E.S.A., or which have been newly inserted into the Treaty of Rome, the European integration/co-operation *contract* turned up. I refer two quite different examples:

1. Title IX (*Culture*, Art. 128): in order to improve the respect for the *national* and *regional diver sity* of the cultures of the Member States (within a *common cultural heritage)*, and spread *the culture of the European peoples*, the Council of Ministers, on a proposal from the Commission, *unanimously* shall adopt recommendations and other incentive measures *excluding* any harmonisation of the laws and regulations of the Member States;

2. Title XVI *(Environment*, Arts. 130R and 130S): in a context where a very set of principles are defined into the Treaty itself (v.g, the *precautionary*, the *preventive action* and the *polluter pay principles);* in such an area of policy-making which sharing of competencies between the Community and the States is devised under the criterion of the Union's official interpretation of *what* are or can be «the potential benefits and costs of action or lack of action» (Art. 130R/3/Par.3), the institutions of the Union are endowed with large powers, including v.g. the negotiation and conclusion of international agreements between the Union and third parties binding to the States.

[3] See Arts. 3A/1, 2 and 3 and 102A and following of the Treaty of Rome, as introduced by the Art. G-B-4 of the T.E.U..

[4] It is not a *complete* federal element, but at least it is nearer of having such a capacity. Of course, there is not a general duty of mutual information and consultation among States (see v.g. Art. 5), and when the States establish agreements on these matters, they hold up *intergovernmental* and not *Community* agreements. Differently of the national defence questions, justice and home affairs lead more easily to agreements, because of the interconnection to the completion of the internal market: it's the case of the Schengen Agreement (1995), which however doesn't involve all national sovereignities. For a general overview, see O'Keeffe *et alii*, *op. cit.*, p. 261 anf f.

the majoritarian system of voting, in the Council of Ministers [5], in matters related to the achievement of the Internal Market; the creation of a Monetary and Economic Union, by the step-by-step process of implementation either a European System of Central Banks (the ESCB), a European Central Bank (the ECB) [6] and a single currency unit; the European Citizenship [7]; the direct election of the European Parliament (E.P.) since 1979; the E.P. deputies' organisation in European political parties [8]; Community institutions have binding legislative powers [9]; the existence of a central Court, which decisions on Community Law are binding and definitive [10]. In such a *predominantly* European Community, there is not a European Army, but there is not (yet?) a European Single Income Tax on individuals and enterprises as well...

Besides, we can observe confederal elements: v.g., the different formations of the Council of Ministers are constituted by representatives *(rectius:* members) of the national Governments [11], and the European Councils are formed by the States' Ministers of Foreign Affairs, joined together with the Heads of Government and *of State* (in the French case). Are they characteristics? *Not* necessarily, because

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[5] According to Arts. 138-B, 148 and 163, there are different forms of decision-making. Naturally, in the case, only provisions on the E.P. and the Council of Ministers are available. In fact, the central European Commission members, acting in the *general interest of the Community* (Art. 157/2), and the European Commission as a whole, according to Art. 155, have not relevant *final* or *deliberative* decision-making powers, but instead an *indispensable initiative power* and the overall duty of *administrative implementation of legislative measures.* The European Council, by defining the principles and giving general guidelines for action (T.E.U., Art. J.8), is the very *political* indicator of how the process can or cannot go through. See v.g. the British non co-operation retaliation — because of the prohibition of selling its national beef inside E.U. — in the European Council of Florence (June 1996) and its partners' feeling of fear of utmost consequences.

[6] See Arts. 2 and 4B of the Treaty of Rome as amended respectively by Arts. G(2) and G(7) of the T.E.U.

[7] See Arts. 8 and 8B of the Treaty of Rome, Part Two: «Citizenship of the Union», provisions introduced *ex novo* by the T.U.E..

[8] On their importance as a factor to the European integration, and because the political parties «contribute to forming a European awareness and to expressing the political will of the citizens of the Union», see Art. 138A of the Traty of Rome as it was inserted by Art. G(41) T.E.U..

[9] The Council of Ministers and the European Parliament by heterodox processes of *division* of the legislative power (in some circumstances there are *two independent legislative powers* and two *quite different* legitimacies) rather than competencies. See *infra.*

[10] See Arts. 164 to 188. There is also a *First Instance Court* that was created by a Decision of the Council of Ministers of 1988.10.24, after the S.E.A. Art. 11, by introducing the Art. 168A into the Treaty, made it possible.

[11] See Arts. 145 and 146 of the Treaty of Rome, according to the redaction given by the S.E.A.

a *characteristic* is an object *permanent feature* or *quality,* as in its Latin ethimological origin. Or as we can read in one good dictionary of English language [12]: a characteristic is the *intrinsic* or *internal* side of a reality and because of this it is both a relational process of combination and differentiation (a combination of qualities, a capacity) and organised structure.

1.3 I also pay attention to the model of State *the process of European integration*, as an (the major) independent variable to my search, can lead to. And it is important to point out two central aspects: first, that the history of economic integration and the structure of the central state are closely related, and in this sense *federalism* is an aspect of the positive state «that seeks to create a more efficient use of resources than can private markets» [13] [14]. Second, that it limits

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[12] See *The American Heritage Dictionary of the English Language,* New York 1969, p. 226, on the words *character* and *characteristic.*

[13] See Thomas Heller and Jacques Pelkmans, *The Federal Economy: Law and Economic Integration and the Positive State — The U.S.A. and Europe Compared in an Economic Perspective,* in «Integration Through Law», vol. 1 «Methods, Tools and Institutions», Book 1 «A Political, Legal and Economic Overview», Cappelletti, Seccombe and Weiler eds., Berlin 1986, p. 245-412 (p. 261).

[14] See also the very interesting study of Murray Forsyth, *Unions of States, The Theory and Practice of Confederation,* New York 1981. In fact, through his conceptual rigor, Forsyth stresses the distinction between *federalism, federal Union* and *Federal State.* I complement his definitions by offering my own perspective: the Federal State dues its own nature to a deliberate «federal Government of interdependent *parts»,* as it exists for example in the U.S.A., Germany, Austria, Switzerland, Canada, Brazil or Australia. I.e. it is a phenomenon that must observe two cumulative conditions: a. be a particular form of geographical division (not *material separation*, although it may also be a *substantial division*) of powers between central (not necessarily national) and infra-central authorities; and: b. there shall exist specific provisions — usually within a constitution — that *recognise* rather than *attribute* the *sovereign* powers and the original autonomy of the territorial granter entities. The mere devolution of powers by the central Government to the periphery can also take place within an unitary form of State and it is not a federal measure. One State is federal in the way its own territorial structure is given widepowers of self-determination. Sometimes, as in the German case, the States' powers lay on both the regional and national instances of decision-making, and they are also *national* powers (v.g., by exercising the legislative function together with the National Assembly (the *Bundestag*) the Federal Council (the *Bundesrat*) represents the *national* interests of the local authorities, *as acting as* regional governments' representatives). We need to avoid radical formulas intended to include in the definition of *Federal State* the existence v.g. of legislative and judicial powers — because it is possible a regional authority have legislative powers, and it is not enough condition to be considered, because of that, a part of a federal state (or all distributions of competencies among the centre and the periphery would be arbitrary). Nor is impossible to conceive forms of *co-operative federalism* which fundamentally reserve *administrative powers* to the federated

the *modern* State structure as it emerged in early modern Europe, was theorized under the concept of *sovereign* State [15] [16], and «became universal through the development of a competitive international state that has encompassed the entire globe» [17]. But nevertheless the adopted model or principle of State itself exercises such a strong power on the *form* of State: the minimalist «night watchman State», also in West European countries, is over since long time ago. However even the Social Rights State [18] is in crisis and many *social* Authors claim for a new stage of full citizenship by recognising the *Social Law State of the Fundamental Rights* [19].

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entities. I think the last is the case of many joint activities in Germany that are taken on by the Federal Government and the *Länder* under Articles 83 to 91b of the *Grundgesetz* (including the officially called joint tasks of articles 91a and 91b).

Rather the federal State principle is fulfilled by a deeper and self-designated principle that I qualify by *the three-pillar* principle: *mutual consent — total representation — original freedom of self-determination* (*maxime*, the right of secession, and not exactly the right of withdrawal).

But it is possible to create an other form of federalism — federal is not the State anymore, but the outcome of an *intergovernmental agreement of adhesion to some basic common principles of regulation of social life*. There is a common Government founded upon a treaty between independent and not autonomous States. The heart of the agreement lays down upon its forthcoming consequences, by putting attention on the structure of the more or less (by its *not original* but instead *derivative*, that's to say, *functional* set of competencies) limited Government. The means must always be *necessary* even when they are *sufficient*. Necessity is adequacy — *the minimal* adequacy (the «minimum *adequationis*» or *proportionality*). See *infra*.

[15] On the concept of sovereign State or sovereignty as it was firstly developed by Jean Bodin *(Six Books of a Commonweal*, 1576) and meaning the *highest* and final power *generally* enactable and enforceable in the internal order by an *independent* (from others) territorial entity, see, v.g., A. V. Dicey, *Introduction to the Study of the Law of the Constitution*, 10th ed., London, 1959, p. 10 and f.

[16] See v.g. Maurice Croisat, *Le fédéralisme dans les démocraties contemporaines*, Montchrestien, 1992, where the concepts of *federalism* and *sovereignty* are not sought as opposite. Neither *federalism* leads as a necessary consequence to a super-transnational-State, nor the national Governments loose «in toto» sovereign powers by assuming *co-operative* and supranational duties, nor the federalism is a defined and rigid concept. Differently, it means a set of *possible creative interactions* which reflect both cultural and market (civilizational) tensions. In the same way that there are different types of federalism and that a new federal political system for Europe will only survive by the settlement of the principles of mutual recognition, respect and toleration (the idea of social pluralism), see Michael Burgess, *Nationalism, Federalism and European Integration*, in «Nationalisme, Federalisme en Democratie», Groningen 1993, p. 25-33.

[17] See Fred Block, *The Roles of the State in the Economy*, in «The Handbook of Economic Sociology», Smelser and Swedberg, Eds., New York 1994, p. 691-710 (p. 691).

[18] The *Rechtsstaat* of the German Authors.

[19] The fundamental rights (i.e. specific structures of individual autonomy) logically precede the State. See, v.g., the *civic integration model of identical rights and liberties* of John Rawls as it is defended in his *A Theory of Justice* (1991), and in his more recent book *Political Liberalism* (1993). Stressing the major importance of the *contractual constitutional consensus* as it shall define both the

Some decades ago the *Sozialrechtsstaat* allowed the devolution of strong action powers to the central national State that was endowed with a large spectrum of functions (the Welfare State) [20]. Now, both the liberal and the democratic principles of State organisation take developed meanings [21]. Not only in Europe. Also in U.S.A., where the three main lines of constitutional liberalism — atomists (or liberals *tout court*), libertarians and communitarians (also called authoritarians) — propose quite different solutions at the level of guidance on practical politics: how to regulate from a *centre* the individuals and the States' interactions on the grounds of respect their ownselves particularisms, and at the same time promoting the public effectiveness and the private efficiency? How to arrange and organise the relationship between the liberal democratic state and particularistic cultural

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requirements for/of public intervention and the *limits* of the State (the respect for the original position, i.e. the respect by the way of the state neutrality/promotion for the individual basic liberties, like the personal freedom — v.g. freedom of thought and liberty of conscience — and political autonomy — v.g. the preservation of the groups religious, ethnic, linguistic whatever peculiarities).

In my interpretation, he establishes *gnoseological (not ontological)* constraints to the structure of the Government and of the State. In fact, by defending the two categorial assumptions of *rationality* and *reasonableness*, he only provides us with Kantian devices: he doesn't say v.g. what is the desirable form of a federal State, but quite differently he says, through formal concepts, what the State and the government shall be. The individuals are able to choose the interests of themselves, namely in transferring or delegating their defence to the State (or central/local Governments) as ends of their own which they seek to advance. The same note is observed in *federations* when different autonomies seek to promote *together* the interests they represent. But the ends of the States must be pursued according fair processes of mutual co-operation *(procedural structures)* and by the acceptance of the burdens of disagreement. It's a *consequentialist* perspective. However, the disagreement is acceptable/reasonable only on the grounds of the original autonomy of the Sates and not because of local selfish interests (majority principle of democracy as a necessary device).

[20] *Sozialrechtsstaat* and Welfare State are different concepts, in spite of being related in material terms and in time, and as much they indeed reflect the *superfluity* of the liberal *Rechtsstaat*. The first means a state based on law and recognises some fundamental prerogatives to the individuals on the State itself. The second is not directly linked to the constitutional organisation of the State as much to specific forms of government in which the State through legislation takes on the responsibility of protecting and promoting the basic well-being of all its members. The first gives guaranties; the second makes effective *some* of the guaranties or programmatic objectives. For both concepts see respectively D. Held *et alii, States and Societies*, Oxford 1983, p. 102 ff., and I.Gough, *The Political Economy of the Welfare State*, London 1979.

[21] For the U.S. case see Susan-Rose-Ackerman, *Rethinking the Progressive Agenda, The Reform of the American Regulatory State*, Macmillan, New York 1992. New problems — unknown just 30 years ago — are arising and asking for changes in the *substantive* law (v.g. environmental anti-pollution measures, safety and health in the work place, protection in the consumers home) and *subsequently* for reforms of the Government processes, namely *by adapting competencies* in all branches of the Government *(Ch. One, The New Progressivism*, p. 5-14).

communities? [22] How can we arrive at legitimate principles to regulate such kind of interactions given the scenarios of diversity of contemporary societies and of apparent irreversibility of transnational and multiple processes of integration? At this level of analysis — State (Federation, Confederation)/ (States) / citizens and enterprises —, what kind of structures should we apply for, firstly: material/ normative structures as v.g. an unified law? Organisational structures of separation and division of powers? Well defined procedural structures of decision-making?

In few words, I can say this discussion is plenty of practical consequences in constitutional law [23]. In the judicial field, the renewed interpretation of the Section 8 of Article I of the U.S.A. Constitution, which gives the Congress the power, according to par. 3, «to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes», i.e., the basic power to legislate on economic matters [24], is perhaps the most significative example of how, within a federal structure of state, or in any case the existence of a «supranational» Court with large powers of constitutional review, is not politically neutral.

In fact, the methods of interpretation used by the judges are not meaningless: they reflect personal interpretations on the manner the *competencies* — essentially the legislative powers — shall be *divided* between the federal and the States' Governments [25]. And, expressly, they underline different conceptions of *citizenship* and *economic freedom*. That is not strange if we remember that the U. S. Supreme

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[22] See Moore, *Political Liberalism and Political Diversity, in* «Canadian Journal of Law and Jurisprudence», vol. VIII, No. 2, July 1995, p. 297-310 (p. 298-299).

[23] This idea is shared by *all* the theorists of all competitive views. See, as an example, Michael Sandel (he himself a communitarian), *The Politics of Community: Robert Kennedy versus Ronald Reagan, Theory and Practice, in* «The Responsive Community, RR», vol. 6, Issue 2, Spring 1996, p.14-28., and *Democracy's Discontent, America in Search of a Public Philosophy*, H.U.P., New York 1996.

[24] See the recent cases *U.S. v. Lopez* (case no. 93-1260, April 26, 1995) and *Suminola v. Florida* (case no. 94-12, March 27, 1996).

[25] For a comparative and optimistic view on the limits and different methodology used in the processes of constitutional review, and on the principles of interpretation (v.g. *the means-oriented principle of necessity or rationality,* and the *ends-oriented principle of proportionality or consistency*), see David Beatty, *Law and Politics,* in «The American Journal of Comparative Law», vol . 44, no. 1, Winter 1996, p. 131-150.

Court's [26] judges are chosen by the Executive (by the President) in response to their own liberal or conservative beliefs, and many times when they are in favour of the Executive policies, they are against some intents of the *only* legislative branch (the Congress) that, at least last years, reflected different majorities [27] from the Executive.

In truth, while the liberals *tout court* stress the importance of the idea of the *national community,* the necessity of the national assumption of the problems of welfare of the entire country, and thus usually reinforce the *necessity* of a strong federal power as an *instrument of freedom,* and as the aptest manner of protecting the basic civil and economic rights of all people, and guarantee the national social, economic and political *cohesion* [28]*;* at the same time, the libertarians have a *wilful conception of freedom,* defend the minimal State, and reject a powerful federal State, basically for reasons of economic reasoning [29]; and the communitarians, quite differently, blame for a *national ethic* as it was the *original intent* of the Founding Fathers of the U.S.A.. The *moral rights* of citizenry shall be

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[26] See Art. II, Section 2, Par. 2, and on the organisation of the Judiciary, see Art. III, both articles of the U.S. Constitution.

[27] Ronald Reagan and George Bush faced democratic majorities in the Congress, and one year after his 1992 election, Bill Clinton began to live together a republican one. This takes place because of the all two-year process of election of the members of the House of Representatives (Art. I, Second I, par. 1 of U. S. Constitution). Differently, because all the time there is a scarce (liberal or conservative) *majority* in the Supreme Court, and because during his/her mandate the President needs to renew partially the organ, it becomes easier (of course, *to the Executive)* having «political control» over the Supreme Court.

[28] In the sixties, we can say, the liberal side (politically they are *democrats)* putting a partial end on its struggle of 30 years, began speaking, by the main voice of Robert Kennedy (then a candidate to the Presidency), in the *civic dimension of freedom,* or the *power of deliberation,* through a *deliberative democracy.* Without forgetting the necessity of a strong centre, the ideal of national community seemed to be achieved only by the protection of the *meaningful values of self-government, neighbourhood, civic pride* and *friendship.* Following this new perspective that then arose, new theoretical approaches and a new paradigm of State flourished: the *civic model.* For further details, see Amy Gutmann, *The Power of Deliberation,* in «The Responsive Community, Rights and Responsibilities», vol. 6, Issue 2, Spring 1996, p. 8 and ff..

[29] It's a typical economic-juridical approach, defended v.g. by the Authors of the Economic Analysis of Law of the *Chicago Law School* like Ronald Coase and Posner. Still by others: Brennan, Buchanan... For example for Buchanan, the Constitution shall be short, define the *property rights* borders and remove any State interference in economy. See James Buchanan and Richard Wagner, *Democracy in Deficit: The Political Legacy of Lord Keynes,* New York 1977, p. 7 and f..

promoted from the Constitution and if necessary, enforced coercively. They defend *organic* forms of state, as they explore the idea of personal self-integration *inside and through* the natural groups of pertainship. They also sustain the local privileges of the States against the federal power [30].

2. The Basic Concepts

According to K. C. Wheare [31], federalism is a typical modern concept: it was a new political formula invented by the the Founding Fathers of the U.S.A., and firstly developed into the U.S. federal Constitution (1789) [32]. By adopting the traditional American assumptions theory of modern constitutional Government [33], Richard Nathan [34] describes the main characteristics of what he calls the «functioning federal system», which is a *positive* concept. In fact, there is a practicable federal system *if and only if:*

a. There is a valid social contract (freedom to contract);

b. And by the contract itself the signatory parties — previously independent states that thereinafter remains the first sovereigns — shall establish a *democratic and pluralist* system (freedom from contract) [35].

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[30] For just an example see Amitai Etzioni, *Parental Filters*, in «The Responsive Community...» *cit.*, p. 11-13 .

[31] See K. C. Wheare, *Federal Government*, 4th ed., New York 1964. See also R. Nathan, *The Oxford Companion to Politics of the World*, Oxford University Press, New York 1993, p. 296-299, word «federalism».

[32] A formal definition of *political Constitution* as «a code of rules which aspire to regulate the allocation of functions, powers and duties among the various agencies and offices of Government and define the relationships between these and the public» is given by S. E. Finer, in his *Five Constitutions*, The Harvester Press, New Jersey 1979, p. 15.

[33] See George Fletcher, *The separation of powers: a critique of some utilitarian justifications*, in «Nomos XX, Constitutionalism», New York 1979, p. 299-324.

[34] See *art. cit.*, p. 297.

[35] For further information about the distinction between the concepts of *freedom to contract* and *freedom from contract*, both as forms of the freedom of contract, see Randy Barnett, *The Function of Several Property and Freedom of Contract*, in «Economic Rights», Cambridge University Press, New York 1992, p. 62 f..

According to Barnett's epistemological approach [36], I suggest, by using the same metaphor of the «functional explanation of the window» (p. 63), that the discussion on the federal or/and confederal characteristics of the European Union (E. U.) is better *perceived* in a two stages process of analysis of two *independent* but materially related issues: the *nature* of the E. U. political structure, and the *nature* and the *political/spatial consequences* of the International Public (in some circumstances, also the Private) Law itself of the European Community system of primary [37] and secondary law [38]. With this aim, I'm trying to explore

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[36] See the previous footnote.

[37] The Community primary law itself emerges from international or intergovernmental instruments that are *in nature* instruments of International Public Law. If the primary law — at least *all* the provisions laid down in the Treaty of Rome with its successive revisions — may correctly be considered as international law, and not as *supranational* or/and *federal* law, I must say that I have serious doubts: it depends, in my opinion, of what, direct or indirect, consequences they have or may be *interpreted* in order to have. Do they differently have not a consequentialist or teleological substance? Do they attempt mainly to establish the basic organisational and procedural/normative framework, that's to say, the pre-conditions of existing, functioning and decision-making of any organizations?

I give two quite expressive examples: in Article 4 of the Treaty of Rome, the expressly so-called *High Contracting Parties* (see art. 1) decided to establish some institutions endowed with the duty of carrying out *some* tasks that *were* entrusted to the sole Community; by articles 137 and following, the *Parties* contracted the number of its national representatives/members in each institution (v.g. the Member States' *number* of representatives in the European Parliament, according to art. 138/b); alsc *unanimously* they accorded on a rather *specific* separation of powers between the institutions therr selves. But notice that they don't represent their own peoples or national democratic instances « power in all of them (v.g. *within* the Commission, art. 157/1 and 2, and *within* the E.P., because i constituents, in spite of being *representatives of the peoples of the States* (Art. 137), they are als *members* of «parties at European level», which is an important «factor for integration within the Union» (Art. 138A, as amended by the Maastricht Treaty); altogether in the cases it is the rule, the national appointed members act in behalf of their national Governments (v.g in the Council of Ministers, according to Articles 145 to 154 of the Treaty of Rome: «The Council shall consist of *a representative of each Member State* at ministerial level, *authorized* to commit the government of that Member State — Art. 146, 1 par.). Even when the States *jointly* agreed upon the different procedures of common decision-making; or on the definition of the relative weight of each State, or on matters of individual competencies (v.g. the Commissioners) or on the institutional advisory bodies role; about the admissible instruments, their practical force and the ways of their free or coercive enforcement (see, to a part of the discussion, Articles 189 and f. as they were renewed by Article G (60, 61 and 62) of the TEU). In short, the set of *checks* and *balances* concerning all the decision making actors. Also the grounds of plain co-operation goals that were established side-to-side with the integration objectives. In this case, the enacted material law is still international *natured* (see Art. B, par. 4, of the T.E.U. concerning co-operation on matters of justice and home affairs).

Perhaps assuming different *scope*, the rules that define both *a programme of common action* — by concrete and detailed devices, or at least as likely mandatory orders to the ordinary legislator —, and what I call the *Government normative rules* of public policy: the orientation/implementation/ interpretation/enforcement rules. The former are given by the *material* rules that eliminate the personal, technical, fiscal and economic borders (the internal frontiers, according v. g. to Arts. 48 and f.), or guarantee several kinds of Community economic funds and social training (the economic and social cohesion of the parts of the entire Community, in accordance to Arts. 130A to 13OE), or

a double hypothesis: that the former is not and cannot possibly repeat the *classic* or *modern* system of Government, and that the latter is mainly federal «in substance» and acts as a procedural device or *principle of federalisation,* (in far-reaching others but *not necessarily* economic issues, or even others *necessarily* non economic developments).

Furthermore, I suggest that such kind of analysis shall take place within a specific framework that is the emergence of a *not completely defined* and/or *not*

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that do establish a single and exclusive currency, a European System of Central Banks and a European Central Bank (a Monetary and Economic Union as the highest level of *social and economic integration:* Arts. 4A, 4B, 102A and f.). And also by the *typical structures* of rules that enshrine the general goals of approximation and harmonisation of laws of Arts. 100 and f. Please note that I'm thinking about the structure's *design* or *aptitude* for co-ordination, and the way of adequacy and material opportunity as they are likely used to the fulfilment of specific ends, and not looking for their own typical or formal requirements of validity as defined under Arts. 189, 190, 191 and 192 of the Treaty (See for all the cases the fundamental Art. B introduced by the T.E.U.).

The latter are essentially epistemological and methodological devices, but constitute, in my view, a main point of the primary law, with the first singularity that they are directed to the institutions and organs that *directly emerge from the Treaty — having an internal and persuasive effectiveness upon the way they shall conceive the European Union's process of achievement; and with the two-sided second characteristic of being mere orientation and very open formulas, from which arise a space of vital* discretion as it is *defined* and *interpreted* by the Union's competent organs. I'm thinking on the dynamic principles of CONSISTENCY, CONTINUITY, SOLIDARITY and SUBSIDIARITY (v.g., under Arts. A, B, C and 3B of the Treaty of Rome, after the revision of Maastricht) that shall indicate to each present moment the best adequacy of the exercise of powers, by whom *(territorial allocation)* and to what extension *(concrete material definition).* Everything in order to a common project of further efficiency in the action and justice in the distribution of the overall outcome of a permanently enlarged (in spite of still *sectorial)* scope of space unification.

[38] They are not *identical* concepts, because the ambit of the International (European) Public Law, at least *in origine,* comes *also* from different instruments, with other members that are not necessarily members of the European Union, and not necessarily including (in spite of usually including) the E.U. Members, or the E.U. itself as an International Law entity. For example, concerning the democratic and constitutional rights of citizenry which are protected under national and international provisions that don't belong to the primary and secondary Community Law. However, the Member States and therefore the E.U. authorities themselves feel obliged *to respect* the fundamental rights and freedoms of citizens as guaranteed by the *European Convention for the Protection of Human Rights and Fundamental Freedoms* of the 4th November 1950, the *constitutional traditions common to the member States,* as much as *the Member States national identities and systems of Government* supposed they are founded on the principles of democracy (T.E.U., Art. F/1,2 and 3). In this sense, the E.U. respects and carries out as *its own* objectives and through its policies these *European values* which it officially identifies by the category of «general principles of Community law» (see Maastricht Treaty, art. F/2, *in fine*). Quite uncertain still remain the way *how,* by what «necessary means», and *to what extent* may (must?) such a provision be enforced: by the European Court of Justice? Is it a task entrusted to the Community that therefore shall be carried out by all European institutions, according to Art. 4 of the Treaty of Rome, as amended by Art. G(6) T.E.U.? Do these rights belong or are included within the concept of the *Citizenship of the Union*? (i.e., the rights the citizens of the Union hold up and shall enjoy because they are conferred by the Treaty itself, according to Art. 8/2 T.U.E., on Citizenship of the Union). Is it defensible to see an other States' deliberate intention with the approval of the Treaty of Maastricht on 92.11.1, when these provisions were newly introduced and became effective one year later?

completed process of European integration — because it is an «open process» according to the States' will, as established in the Treaties, *maxime* by the European Single Act (E.S.A., 1986), and by the Treaty on European Union (T.E.U., 1992). By other words, it's important to study the of the Treaty of Rome provisions carefully because nothing in the Treaty is meaningless or of empty value: v.g. the attribution to the institutions of the European Community of a very wide range of powers in order to comply with the several States' will of common policy [39], and by the definition of very general and open objectives (see articles 2 to 5 of the Treaty of Rome). It is related to problems of *national* public interest that don't *directly* [40] intend a specific or theoretical allocation of Governmental and

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[39] Nevertheless, this is expression of *the* real E.U.'s political innovation: the *co-existence* of several types of material subconjuncts that build up new horizontal relationships, rather than the traditional vertical links of supra-infra-organization. Because it is depending from *completely* new actors, the «alive Europe» is forming its strenghtenth in democracy and in federalism. This is the idea developed by Dusan Sidjanski, in *L'Avenir fédéraliste de l'Europe*, P.U.F., Paris, p. 144.

[40] Of course, there is an allocation of powers within the European Union, which is a fruit of the national States' will and consensus. And, *at least at the beginning*, it is under their own control. However, what I mean is that such a delegation of powers is not wanted *per se* in order to build a *(completely) new* form of State — although wished in respecting some principles of mutual control among several institutions and get along traditional and innovative forms —, but is, characteristically in its innovations, a set of personal and organisational means within an *atypical* — not yet recognised or defined as a definitive model — new form of public *sociability*. In fact, the *Constitution of the economic integration* differs basically from the traditional national or multinational Constitutions that were established according some fundamental *objective* reasons (the same language, ethnical unity or religion) or *subjective* (the deep conscience of a common historical life together or «destiny communities») — as the concepts are used by Edgar Morin in his *Penser l'Europe* (1987) — to unify people. In fact, nowadays, I can say, the countries who form the European Union are becoming more and more unified because of the common acceptance of a same capitalist ethics which needs more and more *space* to achieve its own ends of liberal self-interest, in such an age in which the economic rationalization of the economic actors is world spaced.

With an other major consequence, if I'm not wrong. It's possible the *co-existence* of a federal economy *within* a confederal structure of State. Even when such a confederal structure is wanted by the majority. And even whether the process of *factual* federalisation is promoted by an *autocratic* form of Government that is rejected by the same majority. The economic outcome of the federalisation is not necessarily rejected, and can remain *common*, upholding further developments. I.e. the rights of citizenry are both liberal and democratic rights, and the territorial autonomy, because of the questions related to trade or general economic life (the economic most efficient decisions) and to cultural identity, belongs to both. So, when the system of Government is not able to create and promote the cultural diversity, logically the form of State itself breaks down, even in the case of people speaking the same language and being ethnically the same. It's the example of the *Seventeen Provinces of the Netherlands* under the ruling of Charles V, in the 16th century, and the collapse of the union with the Belgians, even the Flemish speakers, in 1830. In fact, while Charles V unified economically (under a political confederal structure) the seventeen largely autonomous Provinces, William I, King of the North and South Netherlands, didn't consent in the South's autonomy — as one of the main reasons for secession — to organize its own system of primary and secondary schools.

territorial powers as a such an ideal-type system for an unified people, but rather differently by stressing the cultural peculiarities of the European peoples, through an *indirect set* of substantive, organisational and procedural devices, it is being assumed as a practical and gradual problem of knowledge.

As Barnett states, this first problem of knowledge is a problem of social order, and in such a liberal society (what model of economic and political liberalism does the project of the European Union prospect? What model of federal economy does it privilege? With which consequences?) with its own *system of values,* the normative (juridical) system seeks to co-ordinate and to enforce the actions and interests both of citizens and enterprises, with equity and efficiency.

This is the «economic problem of society» which is not a question of how allocating «given» resources, but rather a problem of how «to secure the best use of resources known to any of the members of society, for ends whose relative importance only those individual know» (Barnett, *art. cit.*, p. 66). However, this reasoning can apply for different models and methods of public regulation. In few words, we can realise both centralised or decentralised, national and federal models [41].

Both the *democratic* and the *pluralist* principles are intended to preserve the (American national) idea of political liberalism: the *cultural diversity* [42], which operates through a double process of horizontal separation of *powers*, among different branches in *each one* and in *all* levels of Government, and vertical

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In short, I argue that the democratic side is as important as the liberal; and the reasons for economic and cultural autonomy are changeable: in different times, and, at the same, time in different spaces, that thereinafter shall remain as *independent* as they need to preserve any (deeper) grounds of unity.

41 For further information on the normative liberal theory models of politics and Government, and on the structure and regulative, protective and corrective functions of the State, see Peter Self, *Government by the market? The Politics of Public Choice,* Macmillan, London 1993, especially p. 158 f. and 252 f.. Namely, when Self transcribes the Sartori's criticism (1987) concerning the *necessary*, but many times forgotten, differentiation between political liberalism and economic liberalism (the latter is «liberism» in Sartori's word): because «political liberty occupies a *different* and *socially prior* terrain to market freedom» (p. 254, emphasis added).

This is another central point of my paper: because I also argue there is no a *necessary* or «particular relationship between political liberty and the *size or functions of the state*» (p. 255, italics are mine), rather it must be an official objective to increase democracy and possibly to diffuse power within the market system.

42 See, not only for the American case, Margaret Moore, *Political Liberalism and Cultural Diversity,* in «Canadian Journal of Law and Jurisprudence», vol. VIII, no. 2, July 1995, p. 310.

sharing or division of *competencies* among territorial (nation and states) levels of Government or jurisdictions.

Within such kind of model of state, the federal structure of Government is always a *posterius:* the legitimacy of the federal Government [43] is based, necessarily, «from a grant made by the states or from a grant of authority coming ultimately from the people» [44].

This system presents a set of several consequences, and I would like to point out two of them: on the one hand, the federal horizontal separation of powers faces a particular and changeable sub-national division of competencies among territorial unities, which, in principle, may recover the same nature (v.g. legislative and judicial) but that may not recover the same *material* space of regulation (v.g. concerning the legislative competencies: concurring legislative competencies, according some criteria of normative precedence [45], pre-existence [46], adaptation [47]/ separate competencies).

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[43] It's represented by the holders of the different *functions* or *powers* of the *national* state: legislative executive and judicial. As we will see, by giving evidence of the particularism of the *federalis* phenomena within the European Union, the political structure itself can be supranational, being federal some organisational, economic and normative structures (intensity of the federalism).

[44] Fletcher, *op. cit.*, p. 300. See also the U.S. Constitution, Amendment X: «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» (italics are mine).

[45] Particularly in the case of exclusive competencies of the Federation; what concerns the principle of supremacy of Community law and its corollary of direct effect — which depends on a «constitutional» rather than international law interpretation —, by seeking the «practical effectiveness among the Member States», that resembles a signal of supranationalism, see Paul Craig and Gráinne de Búrga, *EC Law, Text, Cases, & Materials*, Clarendon Press, Oxford 1995, particularly ch. 6 «The Relationship Between EC Law and National Law: Supremacy», p. 240 f.. I know that, in theory, I'm dealing with *two* problems, and I stress the scientifical distinction between the two concepts: the *normative precedence of competencies* arises as an issue of horizontal (inter-organs, at the same level) or vertical (among different territorial entities in different levels of public authority) organisational distribution of power, and is an absolute condition throughout time and space; the *material supremacy, prominence* or *prevalence* of the Community law is a *relative* and *indeterminate* concept, and, because of these two characteristics, within a dynamic analysis (basically a *functional* analysis), it is able of becoming a stronger *element* or *factor* of federalisation (by meaning that the supranational law takes *material* precedence over the national rules on same or related matters, it depends on the former at a first moment, in the sense that whether an organ or entity is *unable or unpowered* in order to enact a specific set of rules, the latter are forcefulness). Anyway but attention: this issue arises — at least in the final — at the *locus interpretationis*, that usually is a supranational Court that gives the official interpretation. Depending on both the way the supranational and national attributions are defined

On the other hand, depending on the structure and nature of the material competencies *separately* hold up either by the national Governments or by the Federal Rulers, we shall reflect upon two main issues:

a. Does an institutional arrangement have *formal* federal motives? why? *(direct* political or institutional level of analysis)

b. (Or) what are the *factors* that more closely promote *(sufficient federalism)* or that are more efficiently directed *(necessary federalism)* towards a federal structure of Government? (economic/political level of analysis, with *indirect* institutional consequences).

Paradoxically, in the sense that is an original and can become a very innovative formula within (and beyond) the modern theory of federalism, I argue that the answer found to the second question takes functional and material precedence upon the first; and this is a *necessary* but not a *sufficient* response to the problems of the E.U.'s federal structure of Government and to the structure of the national States [48]. With this first suggestion: the «E.U. model» shows us that the *national structure*

(by *immediate meaningful concepts* or through *open-ended and scope concepts*) and the methodology that's used to interpret such provisions (v.g. a teleological or a more literalist one), the two problems may become one-sided, in acting pro-federation or pro-states interests.

[46] That is the case when only the *time* and not the *space* is an absolute condition: the federal regulation *only* prevails upon the national/state legislative regulation if it is enacted before by the federal competent organs. However, that is still not completely evident. See *infra* for the federal German case.

[47] It's the way I conceive the Maastricht principle of subsidiarity laid down on the article A, considered together with Art.3b of the Treaty of Rome, that was introduced by the T.E.U. of 1992.2.7. See *infra*.

[48] Logically, a third question remains possible: what are the consequences of the integration process to the political structure of each State *itself*? I mean the consequences to the *infra-national levels of political decision:* and very new examples are arising in Europe, v.g. in Italy (a not federal country) and in Germany. The former where the ultra-liberal *Lega Nord* seeks now the independence of the rich North (the so called *Padania)* on the end of its own political struggle for an internal process of *political* federalisation; and the latter where new forms of *co-operative federalism* enlarge the admi-nistrative competencies of the *Länder*, after these ones had been — essentially because of the process of European integration itself — kept off their traditional legislative powers. On the other side, the assumption that the national Governments don't represent efficiently all the interests and points of view of the society lead to the formal institution of advisory bodies before the Council and the Commission, like the Committee of the Regions that joined, in 1992 (Maastricht Treaty), the Economic and Social Committee. See art. 4/2 T.U.E.

of the State, because of some fundamental political issues (v.g. national defence, internal and external affairs, justice), still preserve itself, and, by the way, it precisely impeaches the achievement of the traditional first forms of federal Government.

3. Autonomy, Centralism and State Formation [49]. An example

Only a few lines of personal reflection on the *possible* federal factors of political, economic and social *integration* of different areas with different juridical and cultural traditions. By the example of the *Seventeen United Provinces of the Netherlands* in the 16th century, under the Burgundian-Habsburg rulings [50], and by referring it to what I call the *factors of development* (the appearing of quite *original* and *consistent* capitalist structures), I try to draw the *nature* of any useful, democratic and peaceful *principle of federalism*; and that is a framework of *flexible* and *creative* contents, both in the organisation of the public life (administrative and political territorial autonomy), and in the definition of Law (a general and unified set of innovative and not rigid or fragmentary principles). What seems to work as a method of *adaptation*, in the way it deals with the *management of the borders of the State itself* — because it touches *not only* its economic/social/ political functions and prerogatives (i.e., both its functional or positive borders of action and its territorial or sovereign borders of power), but shall also affect the negative State and the non-State borders.

The negative State means the *limits,* and because of them the tasks endowed to a *up-to-date* State (v.g. the definition and the protection of the private contractual autonomy, by enacting forward forms of *co-operation* among privates and among

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[49] This title is inspired in the article of Leo Noordegraaf, *Internal Trade and Internal Trade Conflicts in the Northern Netherlands: Autonomy, Centralism and State Formation in the Pre-Industrial Era,* in «State and Trade. Government and the Economy in Britain and the Netherlands since the Middle Ages», Simon Groenveld, Michael Wintle eds., Zutphen 1992, p. 12-23.

[50] For integral developments, see Noordegraaf, *op. cit.*

privates and public authorities); and the concept of non-State borders stresses the ambit of personal *positive* liberty that *immediately* implies a constitutional regime of State non-interference: *beyond* the economic freedom of the individuals, the political and personal liberty of the citizens shall be effective (that's the emergence of the *fundamental rights*, as v.g. the rights of freedom of conscience, of public participation and, *in limine*, of integral self-determination, what works as an original, empirical and not *juridical* power, because that is an ontological *prius*: the State *recognises* the rights) [51].

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Holding up indeed a *personal* and *separated* [52] lordship over the Seventeen Provinces since 1543 [53], in every case under constitutional constraints, Charles V got up truly State structures [54], that afterwards became fundamental to the *possible* political emergence of two independent countries, according to the paradigm of State so forcefulness: the (North) Netherlands and Belgium. I cite some of them:

a. The legal education: several Law schools raised up, and this created effective possibilities of students' exchanges between the Provinces and

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[51] Of course this is not a pacific position. See, for a very opposed normativistic interpretation — whilst both the individual and the territorial rights are *formal* rights, i.e. *juridical State attributions* — one of the classic Hans Kelsen's books, the *General Theory of Law and State* (English translation), H.U.P., Cambridge, Mass. 1945.

[52] Each Province *de per se* held up an *individual contract of acceptance* of her ruler's lordship. The most important Provincial Constitution of rights and duties bounding the signatory parties, and that became paradigmatic in the way it was sought to define the rulers' *different* relationships with the other territorial sovereignties, was *La joyeuse entreé*, the Charter of Privileges of Brabant. See H. K. Koenigsberger, *The Beginnings of the States General of the Netherlands*, in «Parliaments, Estates and Representatives», vol. 8, no. 2, Dec. 1988, p. 101-114.

[53] When Charles V conquered Guelders-Zutphen (until then they were under one publicly recognized *Charter*).

[54] The «idea of the Netherlands», in Hugo de Schepper's statement. See Hugo de Schepper, *The Burgundian-Habsburg Netherlands*, in T. Brady, H. Oberman, J. Tracy eds., «Handbook of European History 1400-1600. Late Middle Ages, Renaissance and Reformation» (vol. I: «Structures and Assertations»), Leiden 1994, p. 499-527 (p. 504).

reinforced the ideals of political unity (a *spirit* for a closer Union). On the turn, those jurists, embodied by the spirit of obedience, were main actors in the processes of political rationalisation commanded from the centre(s) — Brussels and the Provincial levels of administration;

b. Judicial and administrative bodies were vested with newly *permanent* and *hierarchical* features, and the Prince then nominated most officials as *agents* [55] of the integral *res publica*. Examples: the *Grand Council;* the *Council of Justice*, with jurisdiction over all the Netherlands, and functioning as the last instance of appeal (in Mechelen), while the most important affairs were endowed to three independent «collateral councils»: the *Council of State*, the *Privy Council* and the *Council of Finance*;

c. Rules of competence were established;

d. The unification of Law: it was an *atypical* «king-judge» *(rex iudex)* and not the *modern* «king as source of law» *(rex lex)* [56], who introduced new and very up-to-date juridical institutions and techniques — which propitiated the birth of the Dutch commercial capitalism, and its ulterior great developments into forms of international trade and finance. In fact, through the adoption of common regulations, not only the legal *uniformity* arose as a public *constitutional* value and factor of integration; also the *certainty* of solutions (it was learned law) and the *flexibility* of the system allowed organisational progresses in the structure of the State. The legislative function came indeed shared between the Prince and the communes [57], but *structures of co-ordination* were previewed; and, meanwhile, the uniform interpretation of the law, by eliminating (almost)

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[55] *Idem et ibidem*, p. 507-8.
[56] *Idem et ibidem*, p. 509.
[57] This is a fact. However, as de Schepper notes (*art. cit.*, p. 515) the principle of the ruler as the *supreme* and *sole legislator* (76% of all legislative acts in the 16th century, essentially in economic affairs, as tax affairs, monetary policy and maintenance of dikes, dunes, bridges and roads) turned effective. The Provinces and the cities had, nevertheless, large-wide powers of execution. It perhaps was the *core* of the process of free trade that increased beyond the traditional cities.

totally the Customary Courts and Law. The existence of public forms of registration and the means of an almost complete written common law developed the *political* functions of the centre and of the periphery, by creating the idea of «general well-being» [58] and utmost federal characteristics from an original confederal form of State.

4. Functional Analysis. Teleological approach to Law

It's the methological approach that is mainly followed by the instances of political decision and judicial control within the E.U.. The central idea that dominates the debates is the idea of *progression* or *convergence.* The functionalist element promotes the emergence and the spread of specific legal arrangements, which are chosen because of their own capacity to fulfil goals of practical life [59].

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My analysis is normative and institutional, because I investigate the existence of means/ends or instrumental relationships that are able to ask for the appropriateness or lack of appropriateness between the nature of the objectives of the E. U. and the legal order that serves it, i.e. the ways of political commitment in order to achieve those objectives.

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[58] De Schepper, *art. cit.*, p.510.

[59] For further informations, see R. Mangabeira Unger, *What Should Legal Analysis Become?,* London 1996, p.123 and f.

PART II — EUROPEAN UNION: STATE OF NECESSITY OR NECESSITY OF STATE? INSIGHTS OF THE GERMAN FEDERAL EXPERIENCE

1. *(Precedence of the federal law):* «Federal law shall take precedence over Land Law», Art. 31 of the *Grundgesetz (GG)*

2. *(Basic principles of state order, right to resist):*

«1. (...) Germany shall be a democratic and social state».

«2. All state authority shall emanate from the people. It shall be exercised by the people through elections and voting and by specific organs of the legislature, the executive power, and the judiciary».

«4. All Germans shall have the right to resist any person seeking to abolish the constitutional order (...)», Art. 20 GG.

3. *(Protection of human dignity)*

(...) «3. The following basic rights shall bind the legislature, the executive and the judiciary as directly enforceable law», Art. 1 GG.

I analyse the *actual* stage of institutional, organisational and material development of the E. U. — i.e. different levels that may reveal (con)federal features — by comparing it with the German example of federalism, and by referring both to five nuclear types of structures (Governmental and State structures): the ideological, organisational, normative, procedural and guaranty structures. Besides, I reorganise such kind of structures in order to include them into four ambits of political existence: the material, organisational, functional and control ambits.

1. Material ambit

1.1 Ideological structures: by this expression, I mean the basic or whole range of ideas (and their historical contingency) that informs the two specific political systems.

1.1.1 Type and structure of the founder agreements. The German unification of 1871, following the experience of the customs union of 1840 (the *Zollverein*), took place through a *Constitution* that was adopted by all the adherents territorial entities (States or *Länder*), which then chose the federal form of State (jointly with a parliamentarian system), as the best way of preserving their disparate administrative and political structures [60]. With the Weimar Constitution (1919), in order to counteract strong local particularisms that had remained [61], the powers of the Federation *vis-à-vis* the *Länder* were enlarged. And once against the Hitlerian central State (that became a *reversion* of the previous system), the West German *Grundgesetz* of 1949 strengthened the federal principle of State organisation. It's interesting to note that it doesn't begin by the definition of the form of State. Paradigmatically, it dedicates Arts. 1 to 19 to the foundation of the signals of one *free democratic order* (see, as well, Arts. 20, 21, 25 and 28 GG); and these ones constitute, side-by-side with the federal form of regime [62], the principles of the *State order*. But the form of State seems to have been wanted as a *consequence* of the *necessary* material existence of the free democratic order, i.e. the indispensable *institutional guaranty*: v.g. in Art. 1/1, *in fine*: «To respect it (the dignity of human beings) shall be the duty of all State authority»; Art. 18: the *functional* theory of forfeiture of basic rights for *combating* the free democratic order; Art. 21/2: shall be unconstitutional the political parties that seek to endanger both the constitutional order *or* (not *and*) the federal system; Art. 25: Public international law (also on fundamental rights) is *directly* enforceable in the *federal order* as federal law [63];

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[60] See Tony Burkett, *The Ambivalent Role of the Bundesrat in the West German Federation*, in «Federalism and Federation in Western Europe», ed. Michael Burgess, London 1986, Part two, no. 10, p. 204-219 (204-5).

[61] *Idem et ibidem*, p. 205.

[62] See Articles 20 to 37 that regulate the relations between the Federation and the States (Part II).

[63] I.e. not only the *institutional* federal element, but also the *material* federal element shall preserve the constitutional order: v.g. the federal law takes precedence over the Land law (Art. 31 GG) and shall define the *statute of federal citizenship*; the Constitution itself defines the general principles of *non discrimination* and *mutual assistance*, respectively in Arts. 33 and 35. See also Arts. 3, 4, 5, 72, 73/2 and 74/8 GG.

according to Art. 28/3 is a federal duty «to ensure that the constitutional order of the *Länder* conforms to the basic rights» recognised by the GG, because they constitute the structure of the *Rechtsstaat* (principles of a republican, democratic and social State — Art. 28/1); and such objectives, depending upon the federal structure at a first moment, shall constraint the relationship between different levels of Government in a second time: v.g. when the Federal Government has the duty (with the *consent* of the Federal Council) [64] to enforce, by federal coercion, the *federal* obligations of the States, by a process of *organisational* supra-infra-ordination (by giving instructions), according to Art. 37/1 and 2.

Differently, the Treaty of Rome, as it is valid nowadays and depended of *successive intergovernmental acts,* is intended to perform an «ever closer Union among the peoples of Europe» (Title I, Art. A of the T.E.U.), but applies for *stricter* and anyway different objectives, like the *promotion of economic and social progress*; the *creation of an area without internal frontiers* (Art. B of the T.E.U.); the respect for the *national identities* and the *national and democratic systems of Government* (Art. F. of T.E.U.), holding up the principles of an *open market economy with free competition* (Art. 3 A/1, T.E.U.).

The citizenship of the Union shall be *limited.* Systematically, the primacy shall be given to the statute of economic freedom within a sole territory without economic or *related* borders [65].

1.1.2 Ambit of application. The GG sought for a specific (federal) form of State and distributes all the powers within the State, which subsequently may delegate them in international or supranational authorities.

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[64] In fact, the *Bundesrat* is a confederal structure that, simultaneously and jointly, under national procedures, takes care of the interests of the *Länder*. See *infra*.
[65] See Arts. 7A, 7B and 7C of the Treaty.

The idea of *completion* [66] of the State is not present in the Community Treaties. The competencies of the Union are referred [67], even so before the objectives and competencies of each institution are defined [68]. The GG doesn't define anywhere the competencies of the *federal* State; rather too it says what are the competencies of the different (federal and local) levels of Government.

1.2 Normative structures — I mean some fundamental principles and criteria with specific, direct or indirect, policy contents (proper *federal* devices of States' integration), and not merely ideological or programmatic ones. According to the functional method, I don't see the instruments *per se*, in their formal elements of validity, but on the contrary I look at their material *consequences*.

Thus, I intend to refer some *energetic* principles, not necessarily present in the primary or secondary Community law, but anyway that were developed *inside* (the limits of) the European Union by its institutions. Besides, I consider the unified and harmonised positive Law.

1.2.1 Objectives of the Constitution/Treaty: the GG, in Art. 107, disciplines the concrete forms of apportionment of tax revenue among the Federation and the *Länder*, pursuing a financial *equalisation* goal; the E.U's legislator, in her task of organising an *open market economy with free competition* (limited tasks: Art. 3A),

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[66] Is that an *original* or *derivative* power of the State?: in fact, when the powers are delegated — because they are *delegated* in order to *limited* goals —, they are all the time recoverable.

The idea of completion, as I understand it, still fulfils the possibilities of a *complete principle of democratic representation within the State:* the institutions with deliberative powers (final legislative competencies) are federal and not confederal institutions: v.g. national Governments or the national Assemblies, which depend for their proposals on the direct vote of the electorate. They are entitled to exercise such powers *because of* (not *in spite of*, as the European Parliament) the legitimacy they hold up. (See Arts 28, 37, 70 and f. of the GG). The *Bundesrat*, that has an indirect popular legitimacy — although *divides* the legislative power with the *Bundestag* and the Federal Government —, and because of this, likely the Federal Government has only *negative legislative powers* (Art. 77 GG on the legislative procedure), or *restricted powers of legislative initiative* (Art. 76/1 and 2 GG).

[67] It's an ambit of formal and restricted delegations.

[68] The systematic element helps us in understanding this idea: the provisions governing the institutions are laid down in Arts. 137 and f., just after the attributions of the Union are referred.

shall act «in a manner demonstrating *consistency, solidarity* (Art. A, T.E.U.) and *continuity*» (Art. C, T.E.U.). Because of this, *inter alia*, there were established some mechanisms on specific manners of *approximation* and *harmonisation* of laws, regulations or administrative provisions of the Member States (Arts. 100 and 100A, T.E.U.): v.g. for the harmonisation of legislation concerning turnover taxes, excise duties and other forms of indirect taxation «to the extent that such harmonisation is *necessary* to ensure the establishment and the functioning of the internal market» (Art. 99 and 7A, italics are mine); or the official purpose of establishing an *economic and monetary Union* and a *single currency* (Art. B, T.E.U.) that is fully developed in Art-102A and f.; also the other common policies: v.g. the free movement of Persons, Services and Capital (Arts. 48 and f., T.E.U.); Transport policy (Arts. 74 and f.), etc.

1.2.2 Instruments. Levels of effectiveness: according to Art. 189 of the T.E.U., all the Community instruments (regulations, directives and decisions) have one *characteristic* in common: they are *binding* upon their receivers, both public authorities (regulations and directives) and private people (decisions). It's a broad *principle of territorial force and enforceability.* The official recommendations and opinions (Art. 189, last par.) give the single exception. The Treaty itself (Art. 189, par. 2) establishes the direct effect, *at least* [69] for regulations: i.e. their contents create immediate rights (and duties) to the States, enterprises and citizens, who *may* rely upon them, and consequently may see those rules enforced before the Community and the national Courts, even whether Community law needs to be transformed into national law (if it isn't in useful time).

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[69] On the evolution of the understanding of what direct applicability *and/or* (for some Authors they are different concepts indeed) direct effect mean, and to the extent of its (their) ambit of application in order to include *directives*, see Alan Campbell, *Common Market Law*, vol. I, Oceana, London 1969, p. 40 and ff. («Enforceability of Community Law in National Courts»), and P. Kapteyn and P. Verloren van Themaat, *Introduction to the Law of the European Communities*, Kluwer, Deventer 1989, p. 330-348.

Because of this provision, in late sixties, strong controversies arose before the German Courts; they were concerned about the question of the possibility (and, in case of an affirmative answer, *on what extension*) could supranational organs (thus, out of the *federal* sphere of competencies) rule in matters of sovereign rights.

The German Judiciary was not alien to the *teleological* arguments of the E.C. Court of Justice (v.g the *necessity* of the creation of a Common Market with well suited means, because its functioning should directly affect the enterprises and the citizens of the *whole Community*; the *necessity* of an unified law; and the urgency of unified criteria of interpretation).

1.2.3 Material supremacy: the Community law applies in all the Community States; besides, on the matters it takes care of, it is *the* law of one single market and territory. So, it takes *continuous* material and hierarchical precedence upon any national contrary sources of law. It's the logical consequence of the *territorial principle of effectiveness* (i.e. it emerges from the Treaties as «a new, distinctive legal order») [70].

2. Organisational ambit. In this ambit, we deal with two types of *organisational* problems. The first question is *static*: it is the definition of the political-institutional structures or set of organs of decision-making. The second is *dynamic* and two-sided, because we must attempt on the principles and rules of distribution of competence [71] among *different* levels of decision-making (central and local), and in *each* level the distribution among the different institutions and organs of Government.

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[70] See Captain and van Thumbed, *op. cit.*, p. 38-39. The *prominence* of the Community law over the national laws was primarily defined by the two classic cases-law *Van Gend en Loos* (case 26/62, 1963, ECR 1 at 12), and *Costa/ENEL* (case 6/64, 1964, ECR, 585 at 593).

[71] What depends of the kind of matters in question. In E. U. they basically are *concurrent* competencies. See the text.

2.1 Institutions. Organs typology: the Treaty of Rome (Arts. 4, 137 and following) previews the existence of seven institutions: a European Parliament, a Council (of Ministers), a European Commission, a Court of Justice, a Court of Auditors, an Economic and Social Committee and a Committee of the Regions [72]. The order is not meaningful in *real* terms, in spite of having a theoretical background, namely in Federal States, where, at least, there is a *symbolic* [73] relation between the direct representativity of an institution and its effective power [74].

In Germany, there are four main federal instances of power: the *Bundestag* or Federal Parliament, the *Bundesrat* or Federal Council, the Federal President and the Federal Government, as respectively laid down in Parts III, IV, V and VI of the *Grundgesetz.*

Both the German and the European political systems reveal their own not *unitary* nature. More precisely: their organs aren't always, nor necessarily *federal*; or, in the case of the E.U, its organs are not organs of a *federal State.*

In fact, the *Bundesrat* is not federal — instead it is a confederal structure [75] that represents the Governments of the *Länder* (Art.51/1 GG) [76] —, nor has the E.U. any Head of State.

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[72] As amended by Art. G(6) T.E.U.. The original redaction, in 1957, foresaw only five institutions: the Assembly, the Council of Ministers, the Commission and the Court of Justice, with principal functions, and the Economic and Social Committee acting as an advisory entity. Since 1975.7.22 there's an operational Court of Auditors. The Assembly is called European Parliament since 1986 by the E.S.A., and the Maastricht Treaty added an other institution with advisory capacity: the Committee of the Regions. Art. 2 of the S.E.A. still considers (briefly) the existence of the European Council (See also Art. J.8 of the T.E.U.).

[73] It's the case of the Germany: in spite of being a parliamentarian system, the *Bundestag*, while is important, is not the most prominent entity within the integral political system. In Presidential systems, with more rigid devices of separation of powers among branches, the panorama is not necessarily very different. See G. Smith, *Politics in Western Europe*, 5th ed., 1989, p. 125-153.

[74] At least, we must take into account their *reserved* and *permanent* constitutional powers of control and their *political* dominance: v.g. the Parliaments, in the Western democracies, in spite of being loosing broad general competencies on legislation (many times the national Parliaments only approve or give legislative authorizations to the Governments), the Governments «still» remain responsible before them. See G. Smith, *op. cit.*, 125 and f..

[75] See Tony Burkett, *art. cit.*, p. 207.

[76] Besides, the *Länder* have different amounts of votes, and their different number of votes are *only* cast as a block (Art. 51/3 GG). There is a reason: alike the local Governments they represent (note:

2.2 Competencies

2.2.1 Exclusive competencies

2.2.1.1 Administrative competencies: in Germany, the administrative powers of execution of legislative acts are *exclusively* concerned to the States [77], with an exception: the matters of direct federal administration (Art. 86 GG). The execution of the Federation legislative acts is always its own responsibility (Art. 83 GG, *a contrario sensu*); in principle, the federal statutes enacted by the federal instances belong to it as well (Art.83 GG).

However, the Federal Government itself may issue *general administrative rules* [78], and exercise *powers of supervision* over the *Länder*, by sending commissioners (Art. 84/3 GG) or by giving particular instructions to them (Art. 84/5 GG). Anyhow, the former needs all the time the consent of the *Bundesrat*, because it is a constitutional competence of the *Länder*. And pay attention: the Federal Government acts *in nomine* of the national interest, so then, the *Bundesrat* (the majority of the votes in the *Bundesrat*, which represents *all* the *Länder)* decides on all the matters, even whether they're possibly linked to an only State. By other words: it is not an individual right of *each* local authority [79].

Within the E.U., the executive competencies belong — as a main rule — to the European Commission (Art. 155 Treaty of Rome) [80], but they do also belong to the national States (Art. 5 Treaty of Rome, in which it is established for the States a positive and negative general duty of co-operation with the institutions of the Union).

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they *don't* represent the local Assemblies), the legitimacy of the *Bundesrat* is indirect, i.e. its members represent *organic* interests at the national level. Unlikely, the members of the *Bundestag* are not bound by any orders and instructions (Art. 38 GG).

[77] Note: the States as a *whole* — but it is not an *absolute* prerogative of each Land *per se*, because there is a central exception. See the text.

[78] Take notice: *not* individual administrative acts.

[79] For example, it is not the concerned State local Assembly who is constitutionally entitled to give the consent.

[80] This was reinforced by the Maastricht Treaty. See, v.g., Art. C.

2.2.1.2 Legislative competencies. This is the main point. In matters of *exclusive* competence lays down one of the most important differences on the issue of the real State existence and on the form of State. In fact, in the Treaty of Rome do not exist any provisions like Arts. 30 and 70 of the GG that respectively state: «Except as otherwise provided or permitted (...), the *exercise* of governmental powers and the *discharge* of governmental functions shall be incumbent on the *Länder*» (italics are mine), and «the *Länder* shall have the right to legislate insofar as this Basic Law does not confer legislative power on the Federation» (no. 1). This is only a question of *exercise* of competencies; not of *access* to. By virtue of what I called the principle of the *completion* of the state, this is a *vertical* distribution of *all* powers of the State. And, *because of this*, Germany is a State, and E.U. is not. So, *federal* and *unitary* forms are much more closely related: both are *forms of State.*

The Treaty of Rome doesn't establish *residual* powers (as *exclusive* powers) to the Member States [81], because it doesn't distribute a totality (nor a derivative or accorded among States totality) of powers. On the contrary, in accordance with it, the Member States *exercise* some powers together, but they're still *original* and *independent* fields which *access* is reserved to the national independence. Any exclusive competencies *(rectius:* powers), of the E.U. or the Member States, are *vertically* shared in the Treaty of Rome. Only the exclusive *attributions* of the E. U. are distributed, but always in a horizontal way (among the Institutions of the Union) [82].

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[81] The Art. 36 of the Treaty doesn't infirm my interpretation. That's true that v.g. in the cases *Commission v. Germany* (case 153/78, 1979, ECR 2555 at 2564) and *Pubblico Ministero v. Ratti* (case 148/78, 1979, ECR 1629) there are some *exceptional* powers recognised to the States; however, they don't never allow them to take unilateral measures prohibited by the Treaty — and this is not a recognition of residual powers of or to the Member States. They are exclusive powers of the states *vis-à-vis* exclusive powers conferred by the Treaty to the E. U., and the powers of the E.U. «in toto» are limited.

[82] Of course, I mean legislative (*not* executive) competencies. Directives do not constitute a special case: there are no shared legislative competencies, because according to Article 189 of the Treaty and the Community judicial and effectively *decisive* interpretation, directives have direct effect and «the choice of form and methods» (Art. 189, 3rd par.), that are left to the national authorities, don't allow the States to create any innovative contents. See Andrew Evans, *The Law of the European Community*, Kluwer, Deventer 1994, p. 102 and f..

Look at some of the *exclusive* competencies of the Federal State in Germany (v.g. Arts. 31, 32, 33 and 73 of the *Grundgesetz*): foreign affairs, defence, full citizenship, etc. At the federal level, the Federation holds up certain competencies quite similar to the other States' (of the European Union) [83]; those ones the latter, *et pour cause*, didn't (yet) delegate to the Union. They preserve the idea of *sufficient* State (the main prerogatives of independence or sovereignty). Certainly, they're not anymore old ideas or concerns of State: some economic prerogatives that still remain as federal rights of the German Federation (Art. 73/4, 5 and 6 GG: on currency, money and coinage), are nowadays, and almost perfectly indeed, elements of the *Constitution of the economic integration,* and they became *exclusive* [84] powers of regulation of the E. U.'s agents.

2.2.2 Concurrent competencies [85]

There are matters on which both the Community and the Member States don't enjoy exclusive powers. I try to define the borders of the concept of these *concurrent competencies,* because it is relevant to understand the useful meaning of the *principle of subsidiarity.*

Nicholas Emiliou [86], applying for the federal *State* model of sharing of powers among the Federation and the Member States — which one he accepts as valid to our case of concerning —, concludes on the *extension* of the Member States' concurrent competencies: because the Community powers were *not* exercised, or were *exercised* in an *incomplete* way, or because the Member States are *expressly* allowed in their action *to exercise Community competencies* [87].

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[83] Most of them holding up unitary forms of State.

[84] Not *concurrent* (Community and national) competencies!

[85] This number and the next are intended to be a personal reflection. Thus, I've decided not to develop some (very important) theoretical discussions.

[86] See Nicolas Emiliou, *Subsidiarity: Panacea or Fig Leaf?,* in «Legal Issues of the Maastricht Treaty», *cit.,* Chapter 5, 65-83.

[87] G. Finer (*op. cit.,* p. 221), in his annotation of Art. 72 GG, criticizes the usual (after the unification amendments, the German official) English translation of the German *Konkurrierende* for *concurrent*

I think the model he uses is not apt to capture the structure of the problem; but, not the least, it gives the central idea: the concurrent competencies of the *States* are *always* weaker than the E.U.'s. By other words: they are all the time *subordinated* to a particular and discreet judgement of *material opportunity* given by the E.U.'s institutions themselves; its main criterion is the central *necessity* (rationality) of the *European* process of economic integration. We're dealing with the E.U.'s (implicit or explicit) fields of attributions, even if we aren't with its *specific* competencies. In fact, the concurrent competencies are not exclusive competencies of the E.U. — note: *only* in the sense that specific common policies and/or their concrete means were not sufficiently specified into the Treaty. But it cannot mean simple formal devices of *vertical delegation* or *formal distribution of competencies*, because they don't exist in the Treaty [88]. In such a way (with

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competencies. He suggests «competing» or «alternative» (at page 25, he stresses only «alternative»). I do agree. It also touches the European case (see *infra*). Truly, in both situations, there are no equal rights to legislate, but *unequal* — who holds the stronger *capacity* to act (namely in order to determine the *relative* importance of the matters), puts aside the *weaker* competitor and therefore there remains *only* one alternative and one sole legislator.

[88] This concept of concurrent competencies is neither defined, nor (at least directly) referred in the Treaty. It is just an intended concept as it is stated down in Art. 3B, par. 2: the Community itself is allowed to act on matters that don't «fall within its exclusive competence». What matters?: all the other (public or States') matters? Even the matters of «exclusive competence» of the States? (If possible, are they still conceivable as exclusive matters?). More: any States' «exclusive competencies» are defined in the «European Constitution» as well. Why? Because the «Constitution» is limited. Or as Art. 3B, last par., points out, because «Any action by the Community shall not go *beyond* what is *necessary* to achieve the *objectives* of (the) Treaty» (my italics). A superficial reading of the provision is meaningless. Do there exist two structural — not only one — constitutional constraints to the Community action.

The first works *inside* the objectives the Community is entitled to pursue in partnership with the Member States, and it is two-sided, because it implies the prohibition of the Community central institutions to use excessive means to achieve the pre-established ends (the objectives of the Treaty); and because the objectives can always and sufficiently be achieved by a lower level (in principle, the Member States, but not necessarily), and the Community shall abstain itself of taking any actions (positive constraint as it results from Art. B, par. 2, *a contrario sensu).*

This concerns the *concurrent competencies* and is also relevant to the determination of the principle of subsidiarity ambit of meaning. Truly, we can observe three sub-elements linked to any action the Communities are allowed to take away on the fields of their concurrent powers, and that operate *successively:*

1.Rationality (adequacy *to the* ends = positive constraint);

2.Proportionality (*means* shall be *limited* to the minimal possible *quantum* = «minimum adequationis» = negative constraint);

discretion) of determining the attributions (perhaps open goals, sometimes mere ideological objectives) of the Community, even if «in necessitatibus», it goes beyond the set of established competencies.

2.2.3 Principle of Subsidiarity

The Art. 3B of the Treaty (as amended by the Maastricht Treaty) gives particular insights on the diseussion: its first paragraph illustrates the *limited* nature of the E.U.'s objectives: «The Community shall act *within the limits of the powers conferred upon this Treaty* and of the *objectives* assigned to it therein», italics are mine). Because the objectives pointed out to the European project of integration, as we saw before, deal with broad and dynamic (basically) economic realities, in the case («if»), and as much as («in so far as») «the objectives of the proposed action cannot be sufficiently achieved by the Member States» for economic reasons, the Community although has not «exclusive competence (...) shall take action» (cf Art. 3A, second par.). There is a limitation: not a territorial, but instead a *material* one, that is given by the principle of necessity (Art. 3B, third par.) [89].

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3. If concrete measures (that belong to the project of European integration) can *equally* be achieved at the national and at the Community level, they shall be given to the States (national sufficiency = national preference = ambit of subsidiarity = positive constraint to the project of integration, in spite of negative to the Community activity).

If the principle of necessity is the principal *criterium* for the determination of the opportunity means of action and for the *scales* of action (if there is *equal* adequacy in means, the lower level of action shall be preferred), the necessity of the existing adequacy is defined by the Union itself and may exclusively operate *inside* the basic framework of objectives (these ones constitute an energetic and positive index of deeper integration, and include both the Community and the States' interventions as an ambit of integration, or a positive ambit of discreet necessity).

The objectives are defined in the Treaty, but they're uncertain (so they need concrete determi nations by the institutions). Altough they establish the limits of the public action, they don't define the limits of the necessity. These are the only foreseen limits of the Union, which are FORMAL: a. the necessity of the actions and the proportionality of the means; b. the sufficiency of equal means at a lower level; in an order of horizontal relationships, the Union cannot go beyond the *objectives* of the Treaty (Art. 3B, 3 par., «The *limits* of the powers (in order to the objectives) conferred upon it by the Treaty», Art. 3B, 1 par. 1, italic is mine).

[89] About the question of knowing if this power of discretion is proper of judicial review, see the very interesting articles of A. G. Tooth, *Is Subsidiarity Justiciable?*, in European Law Review, 1994, p. 268-285, and *A Legal Analysis of Subsidiarity*, in «Legal Issues of the Maastricht Treaty», *cit.*, Ch. 3. p. 37-48.

The GG previews a similar device (Art. 72), which became the central instrument of absorbing the almost totality of significative *legislative* powers inside the federal sphere (the loss of constitutional powers by the *Länder, Kompetenz verluste*) [90]. In fact, Art. 74 GG precises a large catalogue of concurrent matters, and Art. 74/1 GG assures the States' competencies *conditionally:* they have such powers «(...) as long and as to the extent that the Federation does not exercise *its* right to legislate « (my italic). Those matters, essentially economic matters [91], are a reservation of the Federation; in principle, only *in time*, i.e. when the Federation acts first. However, *if* and *as much* a federal interest exists, it prevails («need for regulation», Art. 72/2 GG), as reported by some criteria: because a matter cannot *effectively* be regulated by the *Länder* [92], or may harm the interests of other *Länder* or of the whole national body, or because of the reasons of *legal* or *economic unity,* or for keeping up the *uniformity* of living conditions beyond the sole territory of one State, the Federation has the right to overrule Land legislation *(territorial effectiveness* and *material precedence of federal Law).*

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I think the problems of subsidiarity relate a central issue of adaptation, as it is a major problem of organization; and before being a defined solution it is a «conscious, deliberate, purposeful» [93] process of co-operation: in the sense, it intends a rational but only limited process, because it is being performed by a bounded rationality that is a condition of limited cognitive competence «to receive,

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[90] See Michael Burgess and Franz Gress, *The quest for a Federal Future: German Unity and European Union*, in M.Burgess/A. G. Gagnon, «Comparative Federalism and Federation: Competing Traditions and Future Directions», Hertfordshire 1993, p. 168-183.

[91] But not only: *vide* Art. 74, no. 1 to 6, and 8 to 10a.

[92] Why is it not an exclusive matter of the Federation field of competencies? Because the legislator is not omniscient, and new matters, needing for regulation, may appear, and it is a *function* of the federal instances to decide on their *relative* importance.

[93] For further details about the theory of the organisation and for the citation, see Chester Barnard, *The Functions of the Executive*, H.V.P., Cambridge-Mass. 1962, p. 4.

store, retrieve, and process information» [94]; and because it is a consequence of the scope of the Treaty, it is essentially conditioned by the economic logic of integration. What does the principle of sufficiency of the States (any State) mean and therefore shall ensure? That it doesn't possibly demand more effort or cause more difficulty (in economic terms) to the States *not* to fulfil a task than the Community does. Or because it shall still be (under Art. 3B) the outcome of a particular institutional arrangement, i.e. a contractual relation between economic entities that defines the way in which they co-operate and/or compete.

3. Functional Ambit. The structures of decision-making (procedural structures)

As stated by Art. 189 *(Provisions Common to Several Institutions)* of the Treaty of Rome, in order to carry out their task in accordance with the Treaty, the E.P. joined together with the Council, the Council and the Commission, following different procedures (Arts. 189A, 189B and 189C of the Treaty of Rome), are the institutions entitled to participate in the decision making-process. Each particular provisions on the different issues indicates the right procedure.

In short, I can stress: the still minor importance of the E.P. [95], in spite of being directly elected — not withstanding the last efforts of the S.E.A. and the T.E.U., which introduced the processes of cooperation and co-decision; the central role of both the European Commission and the Council of Ministers that respectively hold up the powers of initiating and of finishing the legislative process.

According to Art. 189A, the Council decides upon a Commission proposal, and only can change it in acting by unanimity *(permanent characteristic)*. The Commission, a *supranational* or *quasi-federal* organ, assumes a central role, that is

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[94] See Oliver Williamson, *Transaction Cost Economics and Organization Theory*, in «The Handbook of Economic Sociology», *cit.*, p. 77-107 (p. 102).

[95] See, however, *inter alia*, the innovations of Arts. 138B, 138C, 138D and 138E as they were added by Art. E(41) of the T.E.U..

reinforced by its members' guaranties of independence (they don't receive orders or instructions, and shall pursue the sole general interest of the E.U.: Art. 157/2 Treaty of Rome) [96].

According to Art. 189B, the European Commission has the power to make proposals, but the E.P. must be informed *(general duty of information)* on its contents, and the Council before deciding shall hear the E.P. again (Art. 189B/2). A common position adopted by the *majority* (a federal element linked to a confederal organ) within the Council may nevertheless be rejected by the E.P *(an absolute majority of its members,* Art. 189B/2, c) and the Commission may give a negative opinion (Art. 189B/3). The European Council needs to approve the amendments proposed by the E.P. (if necessary applying for a *Conciliation Committee)* or otherwise the Act doesn't pass (Art. 189B/6, *in fine*). The negative opinion of the Commission may only be denied when the Council acts by unanimity.

According to Art. 189C, the positions both of the E.P. and of the Commission are even stronger. The E.P.'s, because the Council acting by unanimity may only deny its proposed amendments. Of course, unanimity here is not a reinforcement of the countries' positions, but instead a bigger difficulty to counteract the will of an organ with federal characteristics. Besides, if the Commission (also a *quasi-federal* Government: it is not because their members are designated by an intergovernmental agreement, and it has not general competencies) [97] doesn't accept the different version for its proposal given by the E.P., and modifies it, the Council may only change it in acting by unanimity as well (the Commission has a stronger position than the E.P).

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[96] See also Art. 158 of the Treaty for the general process of nomination of both the President of the Commission and the Commissioners.

[97] One important innovation introduced by Maastricht is laid down into the Art. 158/2, last par.. The President and the other members of the Commission shall be subject as a body to a vote of approval by the E.P.. Only after this requirement is fulfilled, their members may be *appointed* by common accord of the national Governments.

The German legislative procedure (Art. 77 *Grundgesetz)* shows some common material and formal features to the E.U.'s process of decision-making [98]: first, because tensions and conflicts of interests among different institutions, which share the legislative function (also in different stages), are possible and usual. Second, because there remain rules of mutual information and consent (Art. 74 GG). Third, because similar mechanisms of eliminating disparate positions (v.g. the *Committees for joint consideration of bills,* Arts. 77/2 and 53a GG) are previewed. Besides, the disputes emerge from two organs (may be three organs [99]) with different structures and natures: both the *Bundestag* and the Federal Government are typical federal organs, while the *Bundesrat* has a confederal structure, and all the three *divide* the legislative powers (Arts.43 and 50 GG); the principal (i.e., final) legislative role is left to an institution with popular legitimation (the *Bundestag),* which is not the case of the European *confederal* Council of Ministers. The Federal Government has an initial power in order to submit proposals, like the European Commission, but has a much more *direct* legitimacy. That's true that the E.P. has the power to reject the European *Executive* (Art. 158 Treaty of Rome), but it can't appoint the Chief of the Government as the *Bundestag* does (Art. 63/1 GG); and while the Ministers of the German Cabinet are chosen by the Chancellor (Art. 64 GG), the Commissioners are indicated by the national Governments [100]. The *Bundesrat* seems much more the E.P. in its attributions than the confederal Council of Ministers: it has powers of proposing amendments to the Government and to the *Bundestag*'s bills (Arts. 77/1 and 76/2 GG); it also has (minor) powers of obstruction: if it rejects or makes objections, the bill that has been proposed can only pass in the *Bundestag* with such kind of majority (simple absolute or

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[98] That's the most related model to the E.U.; see Murray Forsyth, *op. cit.*, ch. 7 «The emergence of Economic Union as a Distinct Category», p. 160-187.

[99] In fact, since the Federal Government is allowed to introduce bills in the Bundestag, naturally problems may arise between them. However, because the Federal Government depends *directly* from the *Bundestag*, problems don't occur often.

[100] By a *common* agreement of the States, but *outside* the European institutions. Who decides? The independent States themselves, not a *confederal* structure of them.

two-thirds majority, Art. 77/4 GG). Alike the European Commission, but differently from the E.P., the *Bundesrat* has powers of initiative (Art. 76/1 GG), and has quite large administrative *federal* powers (Art. 50 GG). Like the Council, the *Bundesrat* represents the States' Governments (Art. 51/1 GG), which have different number of votes depending on their relative populations (but relatively favouring the smaller States, Art. 51/2 GG [101]), but decide by simple absolute majorities (Art. 52/3 GG). The members of the *Bundesrat* are not bound by instructions *only* when they take part in the *Committees for joint consideration of bills* (Arts. 51/1 and 77/2 GG).

4. Ambit of control. Guaranty structures

The existence of a Community Court of Justice is indeed a *federal-related* element. But for the same reasons the E.U. is not a State, the Court of Justice *is not* a federal court: it *only* «shall ensure that in the interpretation and application of (the) Treaty the law is observed» (Art. 164 of the Treaty) [102]. Quite differently, the Federal Constitutional Court has large powers of constitutional review, including the fundamental rights (Art.93/4a GG).

However, taking in account the attributions of the European Union, the Court of Justice exercises a *full* jurisdiction over all the actors (Arts. 169, 170 and 171, Treaty of Rome), and on all matters (Arts. 177 and f., especially Art. 177, which *inter alia* previews the important mechanism of the pre-judicial ruling, in par. 2 [103]).

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[101] Similarly, Art. 148/2 of Treaty of Rome, with a difference that is *not:* in the European Council of Ministers, all the States have the same number of representatives; however they have different *weight* when they vote. In the *Bundesrat* the States have different number of representatives, but the characteristic is other: representatives behave «in nomine» of the Governments — so «the votes of each Land may be cast only as a block» (Art. 51/3 GG).

[102] See Murray Forsyth, *Unions* of *States. The Theory and Practice* of *Confederation, cit..* As this Author states down, the Court of Justice must be conceived as in keeping with the predominant confederal character of the Community; because the E.U. essentially implies the establishment of a «supremacy» or law-making power, it needs to imply as well «the establishment of some kind of judicial machinery to ensure that when this new law-making power acts within its proper treaty-based competence its laws are uniformly observed» (p. 186).

[103] When a question, depending on the Community law interpretation, is raised before a national court, and there is no possibility under national law to apply from the decision, the national court or tribunal is still obliged (it is not a mere possibility anymore) to bring the matter before the Court of Justice (Art. 177, last par.).

PART III — CONCLUSIONS

Only three very short remarks:

1. I assumed the question under analysis is basically a question of knowledge — what kind of phenomena are behind the political structure of the E.U.? This is the independent variable: and they are very dynamic processes.

2. On the question of the federal or confederal characteristics of the E. U. *vis-à-vis* the German case, I defend that it is the actual notion of State that needs to be studied. The constraints of the State are both to the federal and national (and different) forms of State. Here, is notable that the most powerful characteristics reveal a confederal form of independent States. However, in its innovations, a new type of (horizontal) relationships emerges and constitutes the substract of a new model not yet completely defined (there are States that want to pursue some policies together, more and more increased). The confederal character of the Council of Ministers with its growing of flexibility in deciding by majority, but at the same time representing all the national interests, is an important element [104] among others.

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[104] Just to give an example: in the middle of June of 1996, joined in the Luxembourg, the Council of Ministers of Culture and Audiovisual of the Member States refused one proposal of amendment, made by the E.P. and concerning the new directive *Television without Borders*, which intended to oblige the national televisions to have at least 51 % of European productions (essentially movies and series). One of the reasons that was given (afterwards it took place a process of conciliation among the E.P. and the Council representatives, with the presence of the competent European Commissioner), is the necessity of promoting the development of the European industries in the sector, and partially avoid the American dominance. The majority of the Ministers didn't accept such an alteration (only France was completely in favour, *et pour cause)*, and on the contrary defended the televisions shall be left free to choose. The reasons were different: in some countries, it was said, because the public must be entitled to choose without constraints; but for example to Portugal and Spain it is unacceptable for a diferent and stronger reason than any danger coming from the powerful American cinema industry. In both countries indeed within the most popular television programs are the Mexican/Venezuelan and Brazilian soap plots (the «novelas»), which are very appreciated by people who only understand the mother language.

3. There are some important elements, already present in the Treaty, but not immediately promoted by the Community as its first objectives, that will take advance in the next future: the question of the fundamental rights, which influences the model of State itself. Within this point I stress the necessity to include the cultural signals of different complementarity as national rights of citizenry. What about the future: A new myth of Janus?

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