EUROPEAN PARLIAMENT

Directorate-General for Research

Working Paper

ATTRIBUTION OF POWERS AND DISPUTE RESOLUTION IN SELECTED FEDERAL SYSTEMS

Constitutional Affairs Series

AFCO 103 EN

This study was requested by the European Parliament's Task Force for the Convention on the Future of Europe.

This paper is published in EN only.

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Manuscript completed on 21 July 2002.

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Luxembourg, European Parliament, 2002
ISBN: 92-823-1698-X

Executive Summary

This study is intended to be a resource text for Members of the EP Delegation to the European Convention and for Parliament's participants in some of the Working Groups established by the Convention. It provides a succinct comparative description and evaluation of the attribution of powers and the resolution of disputes in four selected federal systems, with some very short comments on the European Union's own system of multi-level governance.

Classical models of federalism regulate the division of competencies either by general principles (such as "appropriateness") or by listings of competencies allocated to the different levels of government. The following types of lists can be found in existing federal systems:

- catalogue of competencies for the federal level;
- catalogue of competencies for the federated units;
- catalogue of frame-competencies;
- catalogue of concurring competencies.

Yet, these different types of catalogues do not exist in a pure form in reality. Instead, catalogues are combined, and - e.g. in the German model - there is a structural element added to the catalogue-system.

Most federal systems include a catalogue of exclusive competencies for the federal (central) legislator. Generally, those competencies are characterised as being of "national" interest or related to the sovereignty of the federation: foreign relations, defence, measures related to a common internal market (currency, transport, interstate commerce, postal services). This attribution of responsibilities to the federal power enumerated in a catalogue is usually backed by either another list (of concurring or framework-competencies) or a structural principle of competence delimitation.

Reserved sub-federal rights usually protect the cultural and institutional identity of the component entities (e.g., education, cultural policy, the shape of the component unit's internal political and administrative institutions and procedures). Sometimes, historically evolved economic and social institutions are also preserved.

In the ***United States***, the Constitution defines the competencies of Congress in Article 1, Section 8. The 10th Amendment underlines that everything else is attributed to the competencies of the states. This clear scheme is somewhat reduced in its simplicity by a number of concurring competencies. Moreover, the Supreme Court has contributed to a significant enlargement of federal competencies. The doctrine of dual federalism failed in practice as it turned out to be impossible to draw a line between a single economic policy and the political autonomy of the states: it broke down when the expansion and growing interdependence of government activity at both levels made the search for clear lines of demarcation between federal and state areas of responsibility increasingly difficult.

In ***Germany***, the Constitution enumerates the exclusive competencies of the federal legislator in Article 73. In addition, there is a catalogue of concurring competencies and frame competencies, and, in addition to those enumerations in catalogues, there is a structural principle laid down in Article 72 of the *Grundgesetz*. The catalogue of concurring

competencies has to be read together with the rule that federal law overrules state law. "Frame" competencies allow the federal power to decide upon the principles, the states legislate about the details.

Switzerland offers an interesting variation: the list of exclusive competencies of the component units is quite short, and the system puts an accent on concurring competencies with some procedural rules. In the Swiss system, federal competencies include concurring competencies that are limited to principles, concurring competencies without limits, and competencies that allow parallel cantonal competencies. The constitution is relatively easy to modify (and was revisited two years ago), thus a severe conflict in the field of competencies can be solved by a modification of the constitution.

All legislative powers in ***Belgium*** are exclusive, those of the Belgian Parliament, the Regional Councils and the Community Councils. The Senate has a responsibility to make decisions on conflicts arising out of the complex Belgian federal arrangement. Such decisions require a majority of both linguistic groups in the Senate, and a two-thirds majority of the total, and the majority of each linguistic group must take part in the vote. There is also a Court of Arbitration whose role is to resolve the conflicts between laws that the complex federal arrangement permits. Finally, there is a special committee to evaluate the division and distribution of powers with respect to safeguarding national unity.

Comparative analysis of these four cases leads to the conclusion that concurring and parallel competencies emphasise a dual structure and enhance intergovernmental collaboration, as long as there is no strict superiority rule that declares the law of the federal unit superior to the law of the lower units. Catalogues seem to offer the advantage of appearing clearer and more fixed than structural principles. There are, however, two problems with lists:

(1) Federalism is by definition an incomplete process because many issues can be neither foreseen nor immediately solved. With its seemingly precise and elaborate articles defining the way in which authority is divided between the two or more sets of different jurisdiction, a federal constitution is somewhat misleading: like any other political system it creates an impression of finality and accuracy in a context that leaves many issues to future improvisations.

(2) Catalogues are subject to interpretation and exist in a particular political environment, which determines their robustness and transparency. Existing federal systems like the U.S. and Germany prove the power of a centripetal pull, especially if there is mainly a catalogue of responsibilities for the central power, and the competencies for the other units are simply the left-overs of that list. This is somewhat contradictory to a word by word interpretation of the constitutional texts, which give the component units all powers not attributed to the centre. Therefore, the functional approach adopted by the European Treaties, which list objectives and do not seek to translate them into impermeable lists of legislative competencies, seems quite appropriate for a dynamic multi-level policy. Material lists retain, however, symbolic attraction, and there is a multitude of draft EU constitutions containing such lists.

Even exclusive competencies are usually not strictly separated compartments. In practice, respect of a principle of mutual 'Union loyalty', comparable to the German *Bundestreue* and an obligation of both central and peripheral levels to choose mutually acceptable means when

performing their governmental functions at each level is a necessary condition for a proper functioning of the federal structure.

With respect to judicial control of the division of powers, there is a tendency of judicial review by constitutional courts towards protecting and sometimes even extending the enumerated powers of the central government. According to recent developments in the doctrine, competing jurisdictional claims should be judged with a view not only to their substantive justification, but also to the manner in which powers are exercised[1].

The paper concludes with a brief evaluation of the comparison of certain features of federal systems and with some comments on likely EU constitutional developments in the framework of the ongoing constitutional debate.

[1] Cf. the recent contribution by the Commission to the Convention's working group on complementary competencies (working document WG V - WD 4, of 5 July 2002: "Division of competencies: a question of implementation intensity").

Contents

1 Introduction

1.1 Scope

The debate in the European Convention has recently entered a new stage. Several working groups were established and have started to work on matters which touch upon the division of powers between the European Union and its Member States. This paper aims at providing background information for the EP members of some of these groups, e.g. those on complementary competencies, the hierarchy of norms and subsidiarity. Since the EU system is portrayed only cursorily in this study, it is recalled that a previous Working Document analysed the evolution of the balance of powers between the EU and its Member States from the 1950s to the 1980s, with particular attention given to the jurisprudence of the Court of Justice[2].

The paper will not present models for the future legal or institutional architecture of the European Union. The singular character of the Union has been spelled out in so many ways (*sui generis*, for instance, or, less elegantly, "the thing") that it is considered expedient to refrain from making shortcuts between existing federal systems and the European construction. In any event, it is not intended to insinuate that the European Union is a federal system, although federal experiences have certainly contributed to shape its design[3].

Rather, the working document should be seen as a resource text. It proceeds in what legal and political science sometimes call a "modular" approach: in giving a brief account of the most important institutional and procedural aspects of selected federal systems at a medium level of analytical precision, it could be useful to those who will make decisions on which of these elements may be suitable to be transferred - in an adapted form - to the European framework. The study focuses on one particular issue: how is the division of powers defined and controlled and how are conflicts of responsibility unravelled. The vertical division of responsibilities between federations and their component units is at the centre of the analysis, while horizontal problems of the division of powers between branches of the central government or among component entities are not dealt with. It follows, therefore, that the conclusions that may be drawn from the comparative analysis mostly concern the relationship between the Union/the Communities and the Member States, much less the relations between Community institutions.

A few words on the selection of the four case studies (United States, Switzerland, Germany and Belgium): the choice of these countries does not, of course, imply that they are the only federal systems worth considering. Spain and, to a certain extent, Italy, can now also be considered multi-level political systems whose development and constitutional evolutions it would have been interesting to analyse. Canada, Australia and Austria spring to mind, too, but

[2] "The Division of Competencies in the European Union", EP DG IV Working Document, *Political Series W-26*, March 1997.

[3] In a recent paper, Börzel, T.A. and Hosli, M.O., list eight features that give the EU a federal shape ("Brussels between Bern and Berlin: Comparative Federalism meets the European Union", *Constitutionalism Web-Papers*, no. 2/2002, p. 8 (http://les1.man.ac.uk/conweb).

seem to have great similarities to some of the systems discussed here. The U.S., Germany and Switzerland belong to three different types of federal systems, which are often taken as archetypal cases in the literature[4]. Belgium, although similar to the German system in some respects, has evolved in an even more decentralised way in the 1980s and thus merits a separate chapter.

It did seem worthwhile to consider the United States – the federal state which "serves as the eternal bogey or template, depending on the viewpoint, in the debate about a future federal Europe"[5], not least because of the ebb and tide of devolutionary and integrative tendencies over the past 150 years. Switzerland has particular appeal because of its multilingual people and the strong autonomy of its cantons, elements that make it more akin to the EU than many other federations. As to the EU Member States, Germany and Belgium are probably uncontested as the most typical federal states, especially if we take into account the strong role of their component entities in the Council.

1.2 The attraction of federalism

Few legal-political concepts have attracted more interest than "federalism". For many political leaders and scholars a federal state is almost tantamount to a democratic and efficient state[6]. Only federalism, it is claimed, solves the eternal problems of centripetal and centrifugal energies in a given political entity, of the appropriate balance of powers between the federation and its component entities and of assuring proximity between citizens and public authorities in political decision-making. On the other hand, many years of federalism research have not succeeded in determining necessary or sufficient conditions for the creation of durable federations. The singular aspects of a given historical and geographical situation seem to exert at least as much influence as normative ideas and political programs[7]. In the words of a distinguished scholar of comparative federalism:

> "The truth of the matter is - and experience has been the teacher - that some 'federal' systems fail, some do not; some inhibit economic growth, some do not; some promote a great measure of civil liberty, some do not; some are highly adaptive, some are not - whatever their condition at any one time; it is rarely clear that it is so because of their federalness, or the particular character of their federal institutions, or the special way they practice federalism, or in spite of their federalness."[8]

Nevertheless, there is little doubt that federalist elements are found in the constitutional set-up of an ever-increasing group of modern democracies. Countries such as Belgium, Spain or the United Kingdom are recent examples of the power of federalist or devolutionary concepts in the political and legal-administrative debate. For the purpose of this paper, however, it is

[4] See, for instance, a table annexed to Simon Hix's recent paper "A Constitution for the European Union: a Comparative Political Science Approach", *Collegium* no. 23, spring 2002.
[5] Liisberg, J.B., "Does the EU Charter of Fundamental Rights Threaten the Supremacy of Community Law?" *Harvard Jean Monnet Working Paper* 04/01, p. 34.
[6] Cf. Lenaerts, K., "Constitutionalism and the Many Faces of Federalism", p. 205: As a system of divided powers, federalism proceeds from the very essence of constitutionalism, which is limited government operating under the rule of law.
[7] "For a compact history of federal systems", see McKay, D.H., 2001.
[8] Rufus Davis, S., *The Federal Principle*; University of California Press, Berkeley 1978; pp. 211-212.

useful to stress that there is no unitary model of federalism. Federations differ on at least one important dimension: there are examples of ***integrative federalism***, a political order which, over time, aims at stronger unity among previously independent political communities, and there is ***devolutionary federalism***, aiming at a redistribution of the powers of a previously unitary state. The current debate in some national contexts (particularly Belgium and the UK), but also at the European level, seems to swing the pendulum towards devolutionary federalism. Although the European Convention has so far refused to even approach an outright devolution of Community powers, the debates on the subsidiarity principle and the control of its application carry the mark of devolutionary ideas.

The European Parliament has recently elaborated its position on questions related to the division of competencies in the EU system[9]. As regards the definition of ***shared powers***, by far the largest and most important group in the European context, the resolution proposes to group them into three categories:

- those which complement the ***single market*** and where the Union lays down ***general rules***: consumer protection, agriculture, fisheries, regional policy, transport, transeuropean networks, environment, research and technological development, energy, social and employment policy, immigration policy and other policies relating to the free movement of people, the promotion of equality between men and women, the association of overseas countries and territories, development co-operation and single market taxation. This list would also include the transnational dimension of the implementation of foreign policy, including defence and security, both domestic and external. In all these areas, Community legislation would only be justified where European interests are at stake. In such cases the Union should lay down the principles and objectives while the Member States would be responsible for detailed transposition into their domestic legal systems;
- fields where the Union can only intervene to ***complement action taken by the Member States***, who retain the power to enact ordinary law: education, training, youth, civil protection, culture, sport, health, industry, tourism and civil and commercial contracts;
- acts necessary for the ***compulsory co-ordination*** of policies which basically remain within the national sphere of competence: budgetary and fiscal policies under EMU and employment policy). All Community institutions should be involved in these co-ordination processes.

1.3 Criteria for an analysis of dispute resolution

There is a large body of comparative federalism research which is trying to build a normative theory on how policy competencies should be allocated in multi-level political systems. Until quite recently, this research has not had much influence on the EU debate on institutional reform, subsidiarity and related issues[10]. The general "allocation" problem can probably not be addressed without making political choices at the outset: should there by a clear-cut

[9] Resolution of 16 May 2002, on the distribution of competencies between the European Union and the Member States (Texts Adopted, provisional edition, PE318.651/I); based on a report drawn up by Mr Alain Lamassoure, on behalf of the Committee on Constitutional Affairs (A5-0133/2002).

[10] This has considerably changed since Joschka Fischer's Humboldt University speech ("From Confederacy to Federation: Thoughts on the Finality of European Integration", speech at the Humboldt University, Berlin, 12 May 2000).

separation of federal and sub-federal/regional powers, or should they be closely integrated? Furthermore, what could be criteria and methods to examine and resolve competence disputes? Should it be done judicially or politically? Each federal or multi-level society has its own culture of conflict management. That culture will have a subtle but significant impact upon the operation of conflict management systems, and thus upon the answers given to the questions asked above.

The two main philosophies in this respect can be summarised as belonging to either ***dual*** or ***co-operative federalism***. While the first gives considerable importance to jurisdictional separation (or even competition), the latter stresses the participation of sub-national units in the definition and implementation of homogeneous federal rules, with a view to efficiency in the "production" of policies. The United States are often described as an example of dual federalism, while Germany is probably the classic case of co-operative federalism.

Another important dimension is the representation of ***geographical*** vs. ***functional*** interests: increasing procedural legitimacy normally means keeping an adequate place for even small sub-national units (in the EU context, small Member States or even regions). Increasing the efficiency of policy-making, however, usually creates pressures towards a central representation of social and economic interests such as employers, trade unions or NGOs. It is here that the evolution of the institutional system of the EU faces particular challenges. Some of the following case studies offer suggestions on how to tackle this difficulty.

Finally, from an institutional perspective, four broad attitudes to ***conflict management*** may be discerned:

- formal (predominantly judicial) dispute resolution;
- informal (predominantly political) dispute resolution;
- dispute avoidance;
- popular dispute resolution (for instance, through referenda).

It has been generally maintained in the federalism literature that federal constitutions are characterised by a predominance of the judiciary, which may in part be due to a preference for formal conflict resolution. The adoption of doctrines such as the supremacy and direct effect of European Union law by the European Court of Justice, its judicial review of Member State legislation, and the granting of the *locus standi* to European Union nationals to enforce European Union obligations against Member States and other individuals, has ensured the autonomous development of European Union law in a manner similar to federal systems. The impact of the Court's decisions upon the legal systems of Member States may still be limited and uneven, but the potential is beyond argument. The Court provides an instructive example of the extent to which a formal dispute resolution process may contribute to the development of a constitutional culture to a degree which is disproportionate to the number and significance of disputes actually resolved.

On the other hand, expense, delay and publicity are recognised shortcomings of formal dispute resolution procedures. Loss of control of a contentious issue, once it becomes the subject of judicial determination, is another factor which may deter governments from recourse to these procedures. Thus attention is given in most multi-level systems to the possibility of utilising alternative dispute resolution techniques for conflict management in federal systems. The following case studies will present a number of examples.

While it is convenient to identify approaches to federal dispute resolution in categories such as formal, informal, avoidance and popular, it is necessary to keep in mind that the lines of demarcation between these categories are indistinct. All federal and multi-level systems rely on informal networks and techniques to perform the task of conflict management. Consequently, one of the objectives of this study is to describe the practical application and the transformation, over time, of such techniques. Three questions will guide the presentation:

- How significant are written formal rules, such as constitutions, in influencing the division of powers, compared to on-going procedural controls, such as judicial supervision or "umpiring"[11]?
- What is the relative weight of parliaments and other political institutions, on the one hand, and courts, on the other, in the resolution of disputes?
- How is the internal balance of powers reflected in the Council and in the control and implementation of EU legislation?

[11] Lenaerts, K., op.cit., uses this term.

2 The U.S. Federal System

2.1 Historical background

After having gained their independence, the thirteen former colonies of America had a strong resentment against the highly centralised character of the British rule, and an important desire to preserve and enhance their local identities. Their first Constitution, the Articles of Confederation (1781), therefore, vested very little powers in the national Congress and failed to establish a federal executive or judiciary. While Congress was given the power to declare war, and to raise an army and navy, it depended on subventions from the state legislatures to finance the armed forces. The states could also issue their own money and raise barriers to trade with each other – and did so in practice.

As it was felt that these arrangements greatly restricted the new country's ability to generate wealth and to protect itself from foreign powers, the primary task of the Framers of the U.S. Constitution, in 1787, was to create a government for the United States with sufficient authority over the states in economic and security matters, such as foreign policy, defence, foreign trade and commerce between the states. At the same time, however, they also wanted to limit this authority - or to balance it - so as to guarantee that the rights and freedoms of the individual states and citizens would remain sufficiently protected[12].

2.2 The constitutional division of powers

2.2.1 Principles

Although the concept of federalism lay at the very centre of the debate preceding and following the adoption of the new U.S. Constitution, the document itself in fact does not explicitly refer to the U.S. as a “federal" state.

2.2.1.1 Attribution (10th amendment)

In its original form, the Constitution of 1787 did not establish clearly which level of government would have the power to legislate in fields not explicitly specified. However, this question arose as an acute issue in the debate between the supporters and opponents of the Constitution - the Federalists and the Antifederalists. As a result, the relevant rule was laid down as part of the ten amendments - the Bill of Rights that was added to the Constitution in 1791.

According to the 10th amendment "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." Thus, there is an assumption of states' competence, while the federal level can only have powers specially delegated to it by the Constitution (see further below).

[12] Cf. McKay, D.H., op.cit., p. 23-24.

2.2.1.2 Supremacy (Article VI)

Clause 2 of Article VI of the Constitution provides:

> "This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land..."

This provision is usually called ***the supremacy clause*** and establishes the supremacy of federal law over states' legislation. In other words, according to this clause no local or state government may make or enforce any law that conflicts with the Constitution, acts of Congress, treaties or other rules and regulations issued by the executive branch of the federal government. If a state or local law conflicts with national legislation, the latter one prevails.

2.2.2 The distribution of powers

The Constitution does not provide any systematic division of governmental authority between the national and state governments. Instead, the document sets out different types of powers that can be classified as (1) the powers of the federal government, (2) the powers of the states, (3) concurrent powers and (4) prohibited powers.

2.2.2.1 Federal powers

Most of the powers ***expressly reserved for the federal government*** are set out in Article I, Section 8 of the U.S. Constitution ("The Congress shall have power..."). They are the following:

- to levy and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defence and general welfare of the United States;
- to borrow money on the credit of the United States;
- to regulate commerce with foreign nations, and among the several states, and with the Indian tribes;
- to establish a uniform rule of naturalisation, and uniform laws on the subject of bankruptcies throughout the United States;
- to coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures;
- to provide for the punishment of counterfeiting the securities and current coin of the United States;
- to establish post offices and post roads;
- to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries;
- to constitute tribunals inferior to the supreme court;
- to define and punish piracies and felonies committed on the high seas, and offences against the law of nations;
- to declare war, grant letters of marque and reprisal, and make rules concerning captures on *land* and water;

- to raise and support armies, but no appropriation of money to that use shall be for a longer term than two years;
- to provide and maintain a navy;
- to make rules for the government and regulation of the land and naval forces;
- to provide for calling forth the militia to execute the laws of the union, suppress insurrections and repel invasions;
- to provide for organising, arming, and disciplining, the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the states respectively, the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress;
- to exercise exclusive legislation in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular states, and the acceptance of Congress, become the seat of the government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings;
- to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof;

The third and the last (18th) clause deserve special attention.

Clause 3 – called the ***commerce clause*** - will be discussed in the next chapter, because of its importance for the U.S. federal system. Most conflicts of competencies between the federal and state levels have actually hinged on the interpretation of this clause and the case law of the Supreme Court concerning the matter is still evolving.

The 18th clause is also called the "***necessary and proper***" clause or elastic clause - because of the flexibility it provides. As the scope of this clause it not strictly defined, its practical implications have often been subject to the Supreme Court's jurisprudence. The case of *McCulloch v. Maryland*[13], which is vital for the interpretation of the necessary and proper clause, will be discussed below.

In addition to the powers the federal government has been given under the above-mentioned clauses, it has also been recognised to have some ***inherent powers***. American constitutional experts argue that the federal government has such powers due to the fact that the United States is a sovereign power among nations and, therefore, its federal government must be the only government that deals with other nations. According to this argument, international law assumes an *inherent right* of all nation-states, regardless of their size or power, to ensure their own survival. To do this, each nation must have the ability to act in its own interest - waging war, seeking trade, and acquiring territory. For this reason the federal government is supposed to have these powers, whether they have been enumerated in the Constitution or not.

[13] 17 U.S. (Wheaton) 316 (1819).

2.2.2.2 States' powers

As, according to the 10th amendment, states have all powers not attributed to the federal government, it is not possible to provide an exhaustive list of their competencies. In general, however, the states' competencies have been held to include, for example, the following:

- to regulate intrastate commerce;
- to conduct elections;
- to provide for public health, safety, and morals;
- to establish local governments;
- to ratify amendments to the federal Constitution;
- to establish a state militia.

The states also have ***police power*** - derived from the authority to legislate for the protection of the health, morals, safety, and welfare of the people. This police power enables states to pass laws governing, for example, crimes, marriage, contracts, education, traffic laws, and land use.

The ambiguity of the 10th amendment has allowed the reserved powers of the states to be defined differently at different times in history. Thus, at the times of support for increased regulation by the federal government, the 10th amendment has tended to recede to the background. Otherwise the 10th amendment has been resurrected to strengthen arguments supporting increased rights for the states.

2.2.2.3 Concurrent powers

Besides exclusive competencies, the federal government also has some powers that are concurrent with the states' competencies. In some areas both the federal government and the states have the right to legislate. However, the states can legislate only to the extent that the federal government has not regulated a matter. As soon as the federal government does so, its legislation prevails over the states' law.

Most concurrent powers are not explicitly stated in the Constitution. They include, for example, the rights of both levels of government:

- to borrow money;
- to establish state courts;
- to charter banks and corporations;
- to levy and collect taxes;
- to make and enforce laws;
- to provide for general welfare.

2.2.2.4 Prohibited powers

The Constitution also denies expressly a number of powers to the national and states government.

Thus, the federal government is prohibited: to tax articles exported from any state; to violate the Bill of Rights; to change state boundaries; to suspend the right of *habeas corpus;* to make *ex post facto* laws; and to subject officeholders to a religious test.

The state governments are prohibited: to tax imports or exports; to coin money; to enter into treaties; to impair the obligations of contracts; and to abridge the privileges or immunities of citizens or deny due process and equal protection of the laws.

Both, the federal government and state governments are prohibited: to grant titles of nobility; to permit slavery and to deny citizens the right to vote because of race, colour, previous servitude or gender[14].

2.3 The Supreme Court's role in defining the federal balance

2.3.1 Institutional setting

Article III of the Constitution deals with the judicial branch of the government but offers only a partial guide to the role of the Supreme Court. It simply states that "the judicial power of the United States shall be vested in one Supreme Court". Moreover, it does not refer specifically to the Supreme Court's power of judicial review. The court has been explicitly recognised to have this power only since its ruling in *Marbury v. Madison* (1803).

As the Constitution limits the Supreme Court to dealing with "cases" and "controversies", it does not give advisory opinions; rather, its function is limited to deciding specific cases related to the interpretation of constitutional provisions. If the Supreme Court rules on a constitutional issue, its decision can be altered only by the rarely used procedure of constitutional amendment or by a new ruling of the Court. In practice, however, there are a few cases, in which Congress has modulated the Court's decisions. For example, Congress can consent to state legislation that the federal judiciary has held to be incompatible with the "negative implications of the commerce clause"[15].

The Supreme Court is composed of nine members - eight associate justices and one chief justice. According to the Anglo-American tradition of a signed judgement pronounced by an individual judge for the court, and of separate concurring or dissenting opinions, the individual judges of the Supreme Court and their statements often have a special role the nation's intellectual history. Different eras in the Supreme Court's history have become identified with particular justices who phrased them and gave them currency.

[14] U.S. Constitution, Article I, Section 9-10.

[15] E.g. because it discriminates against out-of-state business. The question of the final say of either the Supreme Court or Congress has also risen as a controversial issue under Section 5 of the 14th amendment. Cf. Lenaerts, K., op.cit., p. 258-262.

2.3.2 Defining the division of competencies

One of the most important judges in the history of the Supreme Court was Chief Justice Marshall who led the court from 1801 to 1835. Advocating a strong central government, he is praised by some scholars as the true architect of the American constitutional system. Beyond the famous ruling in *Marbury v. Madison*, he also played a significant role in defining the division of competencies between the federal government and the states. Two cases decided by Chief Justice Marshall - *McCulloch v. Maryland* (see above) and *Gibbons v. Ogden*[16], concerning the necessary and proper clause and the commerce clause, are considered milestones in this respect.

2.3.2.1 The "necessary and proper" clause

McCulloch v. Maryland concerned the establishment of national banks by the Congress - a matter not explicitly dealt with in the U.S. Constitution. Congress had chartered two banks, the First and Second Bank of the United States, and the government of Maryland imposed a tax on the Second Bank's Baltimore branch in an attempt to put that branch out of business. As the branch's cashier, James William McCulloch, refused to pay the Maryland tax, he was taken to the state court - where he lost. The federal government, therefore, appealed to the Supreme Court.

Two main questions were considered in this case: (1) whether Congress may, under the Constitution, establish a national bank and (2) whether a state may impose tax on it.

Chief Justice Marshall, when considering the first question, generously interpreted the necessary and proper clause:

> "To employ the means necessary to an end, is generally understood as employing any means calculated to produce the end, and not as being confined to those single means, without which the end would be entirely unattainable. (...) The subject is the execution of those great powers on which the welfare of a nation essentially depends. It must have been the intention of those who gave these powers, to insure, so far as human prudence could insure, their beneficial execution. This could not be done, by confiding the choice of means to such narrow limits as not to leave it in the power of congress to adopt any which might be appropriate, and which were conductive to the end"[17].

After finding that the establishment of a national bank was constitutional, Chief Justice Marshall went on inquiring, whether the state of Maryland could tax the bank's branch:

> "The sovereignty of a state extends to everything which exists by its own authority, or is introduced by its permission; but does it extend to those means which are employed by congress to carry into execution powers conferred on that body by the people of the United States? We think it demonstrable, that it does not.

[16] 22 U.S. (Wheaton) 1 (1824).
[17] 17 U.S. (Wheaton) 316, p. 414.

> Those powers are not given by the people of a single state. They are given by the people of the United States, to a government whose laws, made in pursuance of the Constitution, are declared to be supreme. Consequently, the people of a single state cannot confer a sovereignty which will extend over them"[18].

The Supreme Court thus ruled that Maryland had no powers to tax the Second Bank's Baltimore branch.

This decision of the Supreme Court enabled the federal government to expand its competencies beyond those enumerated in the Constitution. Today, practically every power of the federal government explicitly established by the Constitution has been expanded by use of the necessary and proper clause.

2.3.2.2 The commerce clause

The main problem with the commerce clause at the beginning of the 19th century was how to define commerce. *Gibbons v. Ogden* hence concerns the scope of the commerce clause. The decision was a major step forward in this respect. The case concerned steam navigation on the waters of New York State. Two men, Robert Fulton and Robert Livingston, had obtained a monopoly on it. They licensed a third person, Aaron Ogden, to operate steam-powered ferryboats between New York and New Jersey. At the same time, the U.S. government licensed Thomas Gibbons to operate boats in interstate waters. As Gibbons decided to compete with Ogden without New York's permission, he was sued. After having lost in the New York State courts, he appealed to the Supreme Court.

The main question in this case was whether the notion commerce also applies to navigation and transport of people.

Chief Justice Marshall argued as follows:

> "The counsel for the appellee would limit it (commerce) to traffic, to buying and selling, or the interchange of commodities, and do not admit that it comprehends navigation. This would restrict a general term, applicable to many objects, to one of its significations. Commerce, undoubtedly, is traffic, but it is something more: it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse. The mind can scarcely conceive a system for regulating commerce between nations, which shall exclude all laws concerning navigation, which shall be silent on the admission of the vessels of the one nation into the ports of the other, and be confined to prescribing rules for the conduct of individuals in the actual employment of buying and selling or of barter"[19].

Marshall's expansive interpretation of the commerce clause allowed the federal government to exercise increased authority over all areas of economic affairs. In the 1930s and subsequent decades the clause was extensively used to limit the states' legislation that had effects beyond

[18] ibid., p. 429.
[19] 22 U.S. (Wheaton) 1 (1924), p. 189.

their frontiers and it became, indeed, the primary constitutional basis for federal government regulation.

2.3.3 Political and judicial trends in the resolution of conflicts

Although the decisions of Chief Justice Marshall had a major impact on the interpretation of the necessary and proper clause and the commerce clause, they could, of course, not solve all problems concerning the division of powers. Marshall himself stated in *McCulloch* that

> "(...) the question respecting the extent of the powers actually granted, is perpetually arising, and will probably continue to arise, so long as our system shall exist"[20].

The American debate about the division of powers can be viewed as progressing through three stages after the Civil War: dual federalism, co-operative federalism, and "new federalism". However, these different forms of power balance are not following each other strictly; elements of co-operative federalism can also be found in the 1980's, for instance.

2.3.3.1 Dual federalism

The doctrine of dual federalism emphasises a distinction between the federal and state spheres of government authority. It treats state governments and the federal government as separate entities, each remaining supreme in its domain. According to this doctrine the nation and the state are coequal sovereign powers and the acts of states within their reserved powers are legitimate limitations on the powers of the federal government.

Dual federalism characterised American political life particularly in the decades following the Civil War. The states exercised their police powers to regulate affairs within their borders, such as intrastate commerce, and the federal government stayed out of purely local affairs. The courts tended to support the states' rights to exercise their police powers and concurrent powers with respect to the regulation of intrastate activities. A good example of how the Supreme Court balanced federal and states' powers at the time is its ruling in *Hammer v. Dagenhart*.

Hammer v. Dagenhart[21]

In this case the Supreme Court decided that a 1916 federal law banning child labour was unconstitutional, because it attempted to regulate a local problem. The court argued, in particular, that:

> "The manufacture of goods is not commerce, nor do the facts that they are intended for, and are afterwards shipped in, interstate commerce make their production a part of that commerce subject to the control of Congress.

[20] McCulloch v. Maryland, 17 U.S. (Wheaton) 316 (1819), p. 405.
[21] 247 U.S. 251 (1918).

> The power to regulate interstate commerce was not intended as a means of enabling Congress to equalise the economic conditions in the states for the prevention of unfair competition among them by forbidding the interstate transportation of goods made under conditions which Congress deems productive of unfairness.
>
> It was not intended as an authority to Congress to control the states in the exercise of their police power over local trade and manufacture, always existing and expressly reserved to them by the Tenth Amendment"[22].

The doctrine of dual federalism influenced the division of powers in the United States up to the early 1930s, when the country began to look for ways out of the Great Depression. Although the federal government was expected to act upon the country's deep economic crisis, for the first three years of the Great Depression very little was achieved. That changed with the newly elected Democratic administration's "New Deal" programme, which included many government spending and welfare programs, as well as voluminous regulations relating to economic activity.

2.3.3.2 Co-operative federalism

Beginning in 1937, the balance between the states and Washington is characterised by political scientists as co-operative federalism, in which the two levels co-operate in solving common problems. In practice, the federal government offered grants to the states to help them to pay for public works projects. The states, in return, were required to implement the relevant programs and to pay for some of the costs involved.

Hence, the late 1930s marked the beginning of an era of federal dominance, in which the power of the states was consistently diminished. This was due to the fact that, with its grants-in-aid, the federal government was able to exercise substantial control over the matters that traditionally fell under the purview of state governments. A more recent example of how the federal government used its financial aid for wider political purposes dates from the times of the Reagan administration (1981-1989): Reagan threatened to withhold federal highway funds, unless the states raised the minimum drinking age to twenty-one years.

At the same time, Chief Justice Marshall's broad interpretation of the commerce clause came to be widely exploited. For instance, in 1942 the Supreme Court held that an individual farmer's wheat production, which was intended wholly for consumption on his own farm, was subject to federal regulation - because the home consumption of wheat reduced the demand for wheat and thus could have a substantial effect on interstate commerce[23]. In *United States v. Darby* the Supreme Court also overruled its child labour judgement from 1918.

[22] Syllabus, p. 252.
[23] Wickard v. Filbrun, 317 U.S. 111 (1942).

United States v. Darby[24]

The court had to decide whether the Fair Labour Standards Act of 1938, fixing minimal wages and a limit on working hours for industry employees producing goods for interstate commerce, was applicable for the manufacturing of goods under substandard labour conditions in a state based company.

The court stated as follows:

> "While manufacture is not of itself interstate commerce, the shipment of manufactured goods interstate is such commerce, and the prohibition of such shipment by Congress is a regulation of interstate commerce"[25].

and

> "The power of Congress over interstate commerce extends to those intrastate activities which so affect interstate commerce or the exercise of the power of Congress over it as to make their regulation an appropriate means to the attainment of a legitimate end – the exercise of the granted power of Congress to regulate interstate commerce"[26].

On this basis the court also pronounced that its *Hammer v. Dagenhart* judgement from 1918 was overruled. It is hence a very good example of how different political concepts can lead to different court judgements in similar cases.

2.3.3.3 The new federalism

A third model of federalism was labelled "new federalism" by President Richard Nixon (1969-1974). Nixon's aim was to restore to the states some of the powers that had been exercised by the federal government since the 1930s. This was partly done by giving the states so-called "block grants" which grouped a number of specific grants under one broad objective. This way, state governments were given the possibility to decide more flexibly how federal funds were spent.

In the process of restoring some of their powers to the states the Supreme Court also played an important role. Many of its judgements pronounced during the 1990s show how it has interpreted the concept of new federalism.

United States v. Lopez

In this case, a 12th grade student brought a handgun to school. He was then charged with violating the Gun-Free School Zones Act of 1990 that forbids any individual from carrying firearms in school zones. The district court denied the student's motion to dismiss the indictment, concluding that the Act was a constitutional exercise of Congress' power to regulate activities in and affecting commerce. The Court of Appeals, however, held that the

[24] 312 U.S. 100 (1941).
[25] Syllabus, p. 113.
[26] Ibid., p. 118.

Act went beyond Congress' power under the commerce clause; hence, the case was brought to the Supreme Court.

The Supreme Court argued as follows:

> "The Government admits, under its 'costs of crime' reasoning, that Congress could regulate not only all violent crime, but all activities that might lead to violent crime, regardless of how tenuously they relate to interstate commerce. Similarly, under the Government's 'national productivity' reasoning, Congress could regulate any activity that it found was related to the economic productivity of individual citizens: family law (including marriage, divorce, and child custody), for example. Under the theories that the Government presents in support of (the Act), it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education, where states historically have been sovereign. Thus, if we were to accept the Government's arguments, we are hard-pressed to posit any activity by an individual that Congress is without power to regulate"[27].

The Supreme Court thus declared the Gun-Free School Zones act unconstitutional on the grounds that the federal government had attempted to regulate an area that had "nothing to do with commerce, or any sort of economic enterprise". This marked the first time in sixty years that the Supreme Court had placed a limit on the federal government's authority under the commerce clause.

2.4 Power sharing in foreign relations

2.4.1 General federal powers

Article II, Section 2, Clause 1 of the Constitution provides that the president "shall have power, by and with the advice and consent of the Senate, to make treaties, provided two thirds of the senators present concur".

The effect of this provision is twofold. First, the federal government has unrestrained power to enter into a full range of international agreements. Indeed, the Constitution does not expressly impose any general prohibitions or prescribe limits on the national treaty power, nor does it imply that there are any.

Secondly, however, the Constitution introduces into the treaty-making process an indispensable element of legislative control in the form of a positive Senate vote. Because the Senate is by constitutional definition a "states' house", the requirement for its concurrence may be understood as imposing some restraint upon the central government's use of its treaty-making power, in the interests of federalism.

It should be noted in this context that in addition to the Article II procedure the President, under its general executive power, has the possibility to enter into "executive agreements" without the consent of the Senate. Furthermore, treaties can be made through the so-called

[27] 514 U.S. 549 (1995), opinion by Justice Rehnquist, p. 15.

Congress-executive agreement process, which only requires a simple majority in the Senate[28]. Therefore, in practice, the Senate is fully involved only in the ratification of particularly important treaties[29].

2.4.2 The powers of the states

With a view to ending the anarchy that prevailed in U.S. external affairs under the Articles of Confederation, the Constitution provided, in Article 1, Section 10, Clause 1, that the states are prohibited to enter into any treaty, alliance or confederation. However, in Clause 3 of the same section, lower-level external relations are permitted: a state may, with the consent of Congress, enter into an "agreement or compact" with a foreign state.

No reliable distinction between different types of treaties has emerged so far. There is no clear-cut rule which agreements states can make. It can only be presumed that the Framers of the Constitution sought to prevent agreements likely to impinge on the interests of other states or of the nation, such as agreements of alliance or confederation, war, peace, or cession of territory. Whatever the distinction the Framers contemplated, the constitutional treatment of the two categories of agreement has nowadays lost all practical significance, since Congress never withholds consent to a state forming an agreement on the purely formal basis of calling it a treaty. The effect of the two provisions can hence be understood to be that the Constitution permits "non-political" external relations by a state, subject to the supervision of the Congress.

2.4.3 The balance of powers in fields of competence of the states

Although the Constitution attributes the power to enter into international treaties on behalf the U.S. to the federal authorities, and not the states, the latter have sometimes seen an interest in asserting limitations on the treaty power of the federal level. Basically, their argument was that treaties could not deal with matters reserved to the states, internally, under the Tenth Amendment. The states raised the issue repeatedly, until it was conclusively addressed in a Supreme Court landmark decision:

Missouri v. Holland[30]

The case dealt with the validity of an act of Congress implementing a treaty between the United States and Canada that sought to protect migratory birds. The act was contentious, because Congress had tried once before to adopt it through the ordinary legislative process. Two lower courts had found it invalid on grounds that it fell outside the enumerated powers of Congress. As an alternative means to reach the same end, the government then concluded the

[28] This process, under which Congress passes (by simple majorities in both Houses) a joint resolution or a law, authorising or approving the conclusion of an international agreement by the President, is often used for trade agreements.
[29] Indeed, between 1932 and 1982 only 608 treaties were ratified after getting the consent of a two-thirds majority of the Senate in the U.S., while 9548 executive agreements were entered into, either by way of sole presidential action, or by agreement with the Congress.
[30] 252 U.S. 416 (1920).

treaty and Congress enacted the act under its power to do what is "necessary and proper" to implement the treaty.

Taking the case to the Supreme Court, the State of Missouri argued that the treaty and, above all, the act in question had to be considered invalid, as they concerned the powers reserved to the states under the Tenth Amendment.

Writing for the Court, Justice Holmes argued:

> "It is obvious that there may be matters of the sharpest exigency for the national well-being that an act of Congress could not deal with, but that a treaty followed by such an act could; and it is not lightly to be assumed that, in matters requiring national action [this power] is not to be found. ... The treaty in question does not contravene any prohibitory words to be found in the Constitution. The only question is whether it is forbidden by some invisible radiation from the general terms of the Tenth Amendment. We must consider what this country has become in deciding what that Amendment has reserved."[31]

Maintaining that the Constitutional Fathers could not have foreseen all possible implications of their different constitutional provisions, Justice Holmes upheld the act on migratory birds in a clear affirmation of the validity of treaty provisions that deal with matters otherwise within the scope of the powers of the states.

Therefore, U.S. treaty making power is a delegation to the federal level which is additional to and independent of the delegations to Congress seen above. For the purpose of domestic legislation, local or regional subject matters may be “reserved to the states”, when they fall outside the scope of the enumerated powers of Congress. However, in the context of foreign affairs these distinctions fall away and the federal state has treaty-powers that cover all states competencies.

[31] Opinion, p. 432-34.

3 The German Federal System

3.1 Historical background

Institutional arrangements of a federal type have been a feature among the German peoples for centuries, given, on the one hand, their common language and culture and, on the other, their political fragmentation. Thus, until unification and the establishment of Bismarck's *Reich* in 1871 - a federal state -, the more than 20 German states and city states had already entered into a variety of co-operative arrangements, mainly with regard to public law and economic affairs. Following World War I, federal arrangements were also adopted in the Weimar Republic, which, however, became increasingly unitary during the 1920s, given the great potential left to the federal government for the centralisation of authority. Interestingly, even after the advent of the Third Reich a federal institutional framework was partly retained, in so far as the Länder remained important administrative units for the implementation of the policies of the central government.

After the abuse of central power experienced during the Nazi period, the Allies insisted on a genuine federal structure for Germany to prevent future abuse as far as possible. In addition, federal arrangements would eventually allow German unification[32]. The German Basic Law *(Grundgesetz,* hereinafter *GG)* – unlike the American Constitution - explicitly stipulates in Article 20 that "the Federal Republic of Germany is a democratic and social federal state." Moreover, Article 79 (3) GG forbids, *inter alia*, any changes to the country's federal structure.

3.2 The constitutional division of powers

In contrast to the American Constitution, the German Basic Law systematically deals with the constitutional division of powers between the federal state and the Länder, and provides for a relevant catalogue of competencies.

3.2.1 The principles

3.2.1.1 Attribution (Article 30, 70)

The question of attributed and residual powers is regulated in Article 30 GG, which provides that "except as otherwise provided or permitted by this Basic Law, the exercise of state powers and the discharge of state functions is a matter of the Länder". Thus there is an assumption of pre-emptive Länder authority.

Article 70 (1) also provides that "The Länder have the right to legislate insofar as (the) Constitution does not confer legislative power on the federation".

[32] cf. Michalowski, S., Woods, L., *German Constitutional Law: the Protection of Civil Liberties*, Aldershot, Ashgate/Dartmouth, 1999, p. 31.

3.2.1.2 Supremacy (Article 31)

Article 31 GG is similar to the supremacy clause found in the American Constitution. It also provides the priority of the federal law over the Länder law. Accordingly, in the areas in which the federal state has the right to legislate, its laws take precedence over the relevant Länder legislation.

3.2.2 The distribution of powers

Extensive catalogues of Bund and Länder powers are provided in Chapter VII of the Basic Law. In particular, the German Constitution defines (1) exclusive legislative competencies of the federal state, (2) concurrent legislative competencies of the federal state and the Länder, and (3) areas, in which the federal state has the power to pass framework legislation.

3.2.2.1 Exclusive legislative powers of the federal state

The areas which, according to the Basic Law, require federal legislation are listed in Article 73 GG:

- foreign affairs and defence,
- citizenship in the Federation,
- freedom of movement, passports, immigration, emigration and extradition,
- currency, money and coinage, weights and measures, as well as standard time,
- unity of the customs and trading area, treaties of commerce and navigation, free movement of goods, as well as international trade and payments including customs and border protection,
- air transport,
- the operation of federal railways, the construction, maintenance and operation of tracks of the federal railways as well as rates charged for the use of tracks,
- postal and telecommunications services,
- the legal status of persons employed by the Federation and federal public corporations,
- industrial property rights, copyright and publishing,
- co-operation between the Federation and the Länder in: criminal police work, safeguarding the free democratic basic order and existence of the Federation or a *Land*, measures to counter activities of federal territory which through preparations for or the use of force jeopardise the external interests of the Federal Republic of Germany, as well as the establishment of a Federal Criminal Police Office and international action to combat crime,
- statistics for federal purposes.

According to Article 71 GG, "in matters within the exclusive legislative power of the federation, the Länder have power to legislate only where and to the extent that they are given such explicit authorisation by a federal statute".

3.2.2.2 Concurrent legislative powers

The meaning of concurrent legislative power is that both the federation and the Länder have the power to legislate in these areas. The Länder can legislate only "as long as and to the extent that the federation does not exercise its right to legislate by statute"[33]. The federal authorities in turn can only legislate on these matters

- if it is necessary for the establishment of equal living conditions in the federal territory or
- if the preservation of legal and economic unity necessitates, in the interest of the state at large, a federal regulation.

The use of concurrent powers by the federal state is also subject to the thorough control of the German Federal Constitutional Court (see below).

The areas in which the federation and the Länder have concurrent legislative powers are set out in Article 74 GG:

- civil law, criminal law and penal measures, court organisation and procedure, the legal profession, notarial and legal advice services,
- registration of births, deaths and marriages,
- association and assembly, foreigners' residence and establishment,
- weapons and explosives,
- measures to prevent the transfer of German cultural property abroad,
- refugees and expellees,
- public welfare,
- citizenship in the Länder,
- war damage and restitution,
- pensions for war-disabled persons and dependants of war victims as well as assistance for former prisoners of war,
- war graces and graves of other victims of war and despotism,
- economic affairs (mining, industry, energy, crafts and trades, commerce, banking, the stock exchange system and private insurance),
- production and utilisation of nuclear energy for peaceful purposes, construction and operation of facilities serving such purposes, protection against hazards arising from the release of nuclear energy or from ionising radiation, and disposal of radioactive substances,
- labour relations including works Constitution, industrial safety, labour placement, as well as social security including unemployment insurance,
- educational and training grants and promotion of research,
- expropriation where applicable to the matters enumerated in Article 73 and 74,
- transfer of land, natural resources and means of production to public ownership or other forms of public enterprise,
- measures to prevent abuse of economic power,
- promotion of agricultural production and forestry, food security, import and export of agricultural and forestry products, deep-sea and coastal fishing and coastal preservation,

[33] Article 72 (2) GG.

- real property transactions, land law and agriculture lease, as well as housing and land settlement,
- measures to combat communicable human and animal diseases that constitute a danger to public health, admission to the medical or ancillary professions, as well as trade in drugs, medicines, narcotics and poisons,
- economic viability of hospitals and regulation of hospital charges,
- protective measures in connection with the marketing of food, drink and tobacco, essential commodities, foodstuffs, agricultural and forest seed and seedlings, protection of plants against diseases and pests, as well as protection of animals,
- ocean and coastal shipping, as well as sea-marks, inland navigation, meteorological services, sea routes and inland waterways used for general traffic,
- road traffic, motor transport, construction and maintenance of roads for long-distance traffic as well as the collection of tools for the use of public highways and allocation of the revenue,
- non-federal rail-bound systems, except mountain railways,
- waste disposal, air pollution control and noise abatement,
- concurrent legislation also extends to the pay scales and pensions of members of the public service, whose status, service and loyalty are governed by public law in so far as the Federation does not have exclusive powers to legislate pursuant to Article 73 (8).

3.2.2.3 The Bund's framework laws for Land legislation

In certain fields the federation has so-called framework legislative power. This power authorises it - under the conditions laid down in Article 72 - to enact general provisions of law on specified subjects that have traditionally stayed within the Länder's sphere of influence. However, it must leave the Länder room for the enactment of specific provisions.

The areas in which the federation has the power to pass framework legislation are set out in Article 75 GG as follows:

- the status of persons in the public service of the Länder, municipalities or other public corporations in so far as Article 74 a does not provide otherwise,
- the general principles of higher education,
- the general legal status of the press and the film industry,
- hunting, nature conservation and landscape management,
- land distribution, regional planning and water management,
- registration of residence or domicile, as well as identity documents.

3.2.2.4 Joint tasks of the federal state and the Länder

Generally speaking, the constitutional set-up established after the war did not change significantly. Probably the biggest modification was the introduction, in 1969, of the new Articles 91a and 91b GG, which define tasks to be dealt with in close co-operation between Bund and Länder ("joint tasks" or *Gemeinschaftsaufgaben*). Thus, under Article 91a (1) GG, the federal government "participates ... in the discharge of responsibilities of the Länder,

provided that such responsibilities are important to society as a whole and that federal participation is necessary for the improvement of living conditions".

The areas of co-operation between the federal state and the Länder cover, in particular:

- the building and extension of institutions of higher education including university clinics,
- the improvement of regional economic structures, and
- the improvement of agricultural structure and coastal preservation.

3.2.2.5 Exclusive Länder competencies

The spheres of competence not explicitly mentioned in the Constitution are, according to Articles 30 and 70 GG, under the exclusive authority of the Länder. In these fields, the Länder can make bilateral treaties and co-operate with each other without involving the federal government. They are basically limited to cultural matters, education, police and local affairs.

In addition, according to the principle of ***executive federalism***, the Länder have all executive powers, as long as the Basic Law does not provide otherwise. Thus, the Länder not only administer and implement statutes enacted by the respective Land parliaments, but also implement and execute federal statutes[34].

3.3 The Constitutional Court's role in defining the federal balance

3.3.1 Institutional setting

The body responsible for constitutional review is the Federal Constitutional Court[35]. The Court is not part of any of the five-judiciary structures known in German law, but an independent body placed at the top of the legal hierarchy. Its jurisdiction is exclusively concerned with constitutional questions. According to Article 93 (1), (2), (3) and (4) GG it decides, *inter alia*, on conflicts between the federation and the Länder (or between different Länder), regarding their respective rights and duties, and on the compatibility of federal laws with the conditions laid down in Article 72 (2).

The norm control proceedings in the Federal Constitutional Court fall into two categories:

- **Specific** norm control proceedings: cases, in which judges consider a law, which is central to the case before them, unconstitutional and submit a question as to its constitutionality to the Federal Constitutional Court.

[34] See Articles 83-85 GG. For matters falling under direct administration by the federation see, in particular, Article 87 GG. On the role and "philosophy" concerning executive federalism (Vollzugsföderalismus) in Switzerland, the United States and the EU , see, e.g. Lenaerts, K., p. 230-233 and 237, and Fleiner, T., p. 72-74.
[35] In German, *Bundesverfassungsgericht*.

- **Abstract** norm control proceedings: these are initiated only to challenge the constitutionality of a statute as such; such requests can be submitted by the federal government, a *Land* government or by one third of the members of the Bundestag[36].

When ruling on the compatibility of statutes with the Basic Law - under the Code of Constitutional Procedure - the Federal Constitutional Court's decisions are legally binding for all public authorities, including democratically elected legislative bodies. This follows from the German principle of rule of law, which requires that all state organs, including the Bundestag and Bundesrat, are bound by the Basic Law.

3.3.2 Defining the division of competencies

Although the lists of competencies are more recent and more detailed in the German Basic Law than, for instance, in the U.S. Constitution, the Federal Constitutional Court has, nevertheless, an important role in defining some key principles influencing the division of competencies between the federation and the Länder.

3.3.2.1 The "relation" competence

This principle provides that the Bund may regulate not only matters within its explicit sphere of competence, but also questions directly related to them. It should be noted, however, that the Court interprets this clause narrowly: the related competence must be necessary to enable the federal government to fulfil its constitutional obligations. This necessity exists only if there is no other way for the federal state to regulate the matter within the limits of its constitutional powers.

Opinion of 16 June 1954[37]

In this case, the Court was asked to decide whether the federal government was constitutionally authorised to introduce a general building law. The federal authorities tried to derive such competence from Article 74 (18) GG: "real property transactions, land law and agriculture lease, as well as housing and land settlement".

The Court rejected this argumentation by saying that:

> "Just a remark that it would be reasonable to regulate a matter which is related to the domain of the federal authority is not enough to justify an extension of federal powers. The so called *relation* may justify such extension, if the exercise of the exclusive federal power would logically not be possible without a regulation in a related field"[38].

The Court rejected the federal government's attempt to extend its powers in this particular case; however, at the same time, it opened the door for further growth of federal competencies

[36] Article 93 (1)(2). In case of differences of opinion on the compatibility of federal law with Article 72 (2), the request can also be made by the Bundesrat or a Land parliament.
[37] BVerfGE 3, p. 407.
[38] p. 421.

at the expense of the Länder, by defining the criteria for a **justified** extension of powers over related fields.

3.3.2.2 The "annex" competence

This clause has also allowed for an increase of federal powers. But, unlike the relation clause, it does not "widen" but "deepen" federal competencies. "Annex" is to be understood, for instance, as empirical evidence (e.g., statistics) concerning a subject area if it is needed to prepare relevant legislation. The following decision illustrates this reasoning.

Decision of 30 July 1958[39]

In this case, the Court declared invalid a Hamburg law of 9 May 1958, on a referendum to be held on the use and placement of nuclear weapons. The same reasoning was applied to a similar law passed in Bremen, on 20 May 1958. The court explained its decision as follows:

> "The power of the federal government to regulate certain matters exclusively will not only be affected if the Länder start to regulate on it directly but also if they attempt to exercise pressure over federal authorities in order to change their decisions, by organising a referendum"[40].
>
> "The laws of Hamburg and Bremen obtain their constitutional meaning only considered together with the matters they are affecting; they can not be seen as independent acts in the context of the constitutional division of powers. It is not about the referendum itself, it is much more about the merit of the referendum, and whether the question asked by the referendum lies within the domain of the Länder"[41].

The Federal Constitutional Court thus arrived at the conclusion that a referendum concerning nuclear weapons has to be seen as an *annex* to federal defence policy and, therefore, belongs to the exclusive competence of the Bund.

3.3.3 Resolution of conflicts

Although both the relation and the annex competence somewhat clarified the division of powers in Germany, they could not avoid further conflicts because both clauses allowed for a considerable increase of the powers of the federal government. The latter has fully used them to take over new competencies at the expense of the Länder. This tendency has caused the parliaments of the Länder to call for a shift back of some of these powers to the Länder, mostly through the Bundesrat, the representation of the Länder at the federal level. The number of disputes as to powers and responsibilities between Bund and Länder is, however, relatively small, due to the fact that legislation having an effect on the Länder (e.g., their financial resources) requires a double majority in both the Bundesrat and the Bundestag. Moreover, the elaborate procedure called *Vermittlungsverfahren* (conciliation procedure),

[39] BVerfGE 8, p. 104 ff.
[40] p. 104,105.
[41] p. 118.

which influenced Article 251 TEC (codecision), is a continuous obligation to have a debate and to find compromises between Bund and Länder.

Nevertheless, the resolution of conflicts of power remains a sensitive task for the Court. It usually examines the origins of different competencies and their links with other related powers. For example, the Court decided that a regulation concerning press torts is more closely connected to press law than to criminal law, thus putting it under federal authority to pass framework legislation (Article 72 GG)[42].

Germany is hence another example of how a federal system cannot operate without permanent scrutiny of the division of competencies between the federal government and the sub-federal entities.

3.4 The balance of powers in foreign and European affairs

3.4.1 General federal powers

Like the U.S. Constitution, the Basic Law contains a series of explicit provisions concerning external relations. Article 32 (1) GG establishes that the federation conducts relations with foreign states. This position is reinforced by Article 73 GG, which places the subject of foreign affairs and defence in the list of exclusive federal powers, and Article 59 (1) GG, which establishes that the President signs treaties with foreign states on behalf of the federation.

In analogy to the American system, the exercise of federal power is, however, limited by parliamentary control. Article 59 (2) GG establishes that treaties "which concern the political relations of the federation"[43] or "relate to matters of federal legislation" require the consent or participation, in the form of a federal law, of the bodies competent in any specific case for such federal legislation[44]. Legislative implementation of such treaties requires, *inter alia*, the participation of the Bundesrat.

The technical nature of this participation varies according to the subject matter of the treaty concerned. It is rare that a veto similar to that of the U.S. Senate is an option. Indeed, in many cases the Bundestag may override the Bundesrat's opinion. But at the very least, the Bundesrat can object to a law, requiring a second reading in the Bundestag. If state matters are concerned, such as certain taxation or fiscal policies, the Bundesrat has the right of assent.

Contrary to the U.S. Constitution, the Basic Law contains a provision which obliges the federal level to consult the Länder before concluding a treaty that affects their "special circumstances" (Article 32 (2) GG).

[42] BVerfGE 7, 39.
[43] E.g. peace treaties, military pacts, non-aggression pacts, and treaties concerning such issues as disarmament, neutrality and political relations between the federation and other countries.
[44] Treaties which "relate to matters of Federal legislation" include those where legislation would otherwise be required to change the law in the manner required by the treaty. Hence, if the executive could implement a treaty without legislation, then it is not bound to seek the consent of the legislature to enter into that treaty. If, however, the law must be changed or enacted to implement the treaty, then it is necessary to seek legislative approval.

3.4.2 The powers of the Länder

Article 32 (3) GG stipulates that "insofar as the Länder have power to legislate, they may, with the consent of the federal government, conclude treaties with foreign states". In practice, after a *Land* and its foreign partner have finished negotiations, the *Land* has to ask for the federal government's consent. If the latter does not agree to the treaty, its validity under international law is not affected but, in domestic law, the *Land* is obliged to take measures so as to ensure that the treaty has no effect.

With respect to relations between the Länder and their foreign counterparts below the national level, they have the right to communicate directly with foreign regions, provinces or autonomous communities. This was established in one of the first decisions of the Federal Constitutional Court[45].

3.4.3 The field of Länder competencies

The Basic Law remains somewhat opaque as to the respective rights of the Bund and the Länder to sign treaties in areas in which Länder competencies are involved. Indeed, Article 32 (3) GG, which deals with the treaty powers of the Länder, is open to interpretation. As a result, like in the U.S., treaties covering Länder competencies became a controversial issue. More particularly, while the Bund claimed a general right to conclude international treaties due to its competence in the field of foreign relations, the Länder, for their part, demanded the right to sign treaties in the spheres of their competence. The Länder maintained that, in these cases, they were in a position to implement the treaty's provisions, since they were responsible for execution and administration. They thus denied the existence of any "transformation rights" like those that accrue to the U.S. federal government by signing a treaty.

The principle of ***federal comity*** makes it highly unlikely that the federal government would try to commit the Länder to administering a treaty they did not approve of. The so-called Lindau Agreement, of 14 November 1957, constituted a compromise between Bund and Länder on this issue which is still applicable today. The Federal Constitutional Court has never been called upon to settle the dispute judicially.

The Lindau agreement

The text's general approach is that the Bund signs international treaties in all areas, including those that are partly or wholly within Länder competence. However, in those areas where the competencies or interests of the Länder are concerned, it has to take into account their views. The technical details are laid down in paragraph 3 and 4 of the agreement:

- When the ***exclusive competencies*** of the Länder are concerned, the federation has to seek their participation in the preparation of the relevant treaties "as early as possible, but

[45] BVerfGE, 1, 299 (315); see also Leonardy, U., "Federation and Länder in German foreign relations: power-sharing in treaty-making and European affairs", in: Hocking, B., 1993, p. 239.

certainly before final agreement is reached on the text of the treaty". All the Länder must give their assent to a treaty before the obligations created by it achieve validity under international law.

- When ***essential interests*** of the Länder are concerned, they must once again be informed "as early as possible about the proposed conclusion of such treaties so that they can voice their demands in due time". However, the federal government is only obliged to take into account the position of the Länder as far as it can, under the principle of federal comity.

As a result, a Permanent Treaty Commission was formed, which consists of Länder representatives and has the remit to examine whether draft treaties negotiated by the federal government fall under one of the above categories of the Lindau agreement. The ratification process does usually not start before the commission's deliberations have come to an end. In the field of exclusive Länder competencies, the consent of all *Land* governments is required.

3.4.4 The division of powers in European affairs

Article 24 (1) GG stipulates that "the federation may by legislation transfer sovereign powers to international institutions". It was drafted with a view to the political aim of "a united Europe", laid down in the preamble to the Basic Law, and the Bund used it to transfer to the European Communities both federal and Länder powers ever since the Treaty of Rome was signed in 1957.

Although this interpretation of Article 24 (1) GG has never been disputed in the course of European integration, the Länder increasingly regarded the federal powers under this article as "an open flank of the federal order" leading to a steady erosion of their competencies. In order to guard this open flank, they started to demand more extensive rights of participation in matters concerning the EU, on the grounds that the EU cannot be regarded any more as a traditional field of "foreign policy". As a result, they gradually extended these rights and improved legal guarantees for their respect. In 1993, on the occasion of the ratification of the Maastricht Treaty, these guarantees were incorporated in the *Grundgesetz*. Thus, the newly drafted Article 23 GG[46] establishes a special regime for Länder participation in European affairs, Article 24 remaining applicable to all other international organisations.

3.4.4.1 Primary EU legislation

Article 23 (1) GG establishes that only the Bund has the power to delegate sovereign powers to the European Union. However, in doing so, the federal level has to obtain the Bundesrat's consent. Any changes in EU primary law and comparable regulations which modify the content of the Basic Law have to be approved by two thirds of the members of the Bundesrat. In addition, paragraph 2 of Article 23 GG stipulates that "the Bundestag and the Länder, through their representation in the Bundesrat, participate in matters of the European Union". This provision is reinforced by Article 50 GG, which establishes in a general manner that the Länder participate in European matters through the Bundesrat.

[46] The previous version had become obsolete after German unification.

Four main aspects distinguish the treatment of primary EU legislation from the participation of the Länder in the treaty-making process under the Lindau agreement:

- The function of the Permanent Treaty Commission, which is not part of the federal structure, has been entirely incorporated into the Bundesrat structure.
- The participation of the Länder in the adoption of basic EU legislation is guaranteed without any reference to the domestic division of powers. The Länder cannot only participate to the extent that their competencies (or essential interests) are concerned, but enjoy a general right of assent.
- Contrary to international treaties, the Länder do not have an individual veto right. Even where their exclusive competencies are concerned, majority voting is used within the Bundesrat.
- Since the adoption of the Maastricht Treaty, the Länder have participated in the intergovernmental conferences leading to the revisited EU/EC treaties (Amsterdam and Nice).

3.4.4.2 Secondary EU legislation

The rights of the Länder to participate in the adoption of EU secondary legislation were first given a legal basis in the ratification law concerning the Single European Act. In 1993, they have been incorporated in the Basic Law (see above). Article 23 (4) GG stipulates that the Bundesrat has to be able to make a statement before the federal government takes part in drafting EU laws in all cases where the Bundesrat would have to participate in a domestic legal act or where the Länder would be accountable.

Paragraphs 5 and 6 of Article 23 GG specify the terms for the participation of the Länder in the EU legislative process by providing that:

- if a matter is within the exclusive legislative competence of the federal level but the interests of the Länder are involved (and in all other cases in which the Bund has legislative competence), the government has to consider the statement of the Bundesrat (Art. 23 (5.1));
- if legislative competencies of the Länder, the functioning of their agencies or their procedures are directly affected, the opinion of the Bundesrat has to be considered as decisive for the federation's deliberations (Art. 23 (5.2));
- if exclusive legislative competencies of the Länder are centrally affected, the Bund has to delegate the exercise of the rights of Germany as a member state of the EU to a representative of the Länder, appointed by the Bundesrat. In other words, it is a representative of the Länder who participates in Council meetings at different levels. However, the participation of and co-ordination with the federal government has to be respected (Art. 23 (6)).

Further details to the application of paragraphs 4-6 of Article 23 GG are given in the Law of 12 March 1993, concerning the co-operation between Bund and Länder in EU affairs. The Bund-Länder Agreement of 29 October 1993 is an additional implementation of this law.

3.4.4.3 Implementation of EU legislation

As concerns the implementation of EU law, the powers attributed to the federal state do not authorise the Bundestag to implement the provisions of all treaties. Implementation rather depends on the subject matter. If a directive concerns, for example, a field of exclusive competencies of the Länder, the latter have the competence - which is also exclusive - to transpose the directive in question in the legal order of the *Land*.

If a *Land* or several Länder do not comply with their obligations to implement EU law, the federal government, under Article 37 GG, can use "federal coercion" (*Bundeszwang*). For this purpose, the government or its responsible minister have the right, pursuant to paragraph 2 of Article 37 GG, to give binding instructions to the Länder and their authorities. However, the Bundesrat's consent is required (Art. 37 (1) GG).

4 The Swiss Federal System

4.1 Introduction

4.1.1 The unique character of Swiss Federalism

"Either Switzerland has to exist as a federal state or it will not exist at all"[47] – this is the rationale guiding the Swiss political system. The country has to accommodate two main religions and four national languages, three of which are official. Switzerland is also unique because of its geography: the difficulties of transport between regions had a major impact on the development of certain parts of today's confederation. Differences in the extent to which urban infrastructures existed in the cantons have also had a major influence. Despite its relatively small population of about 7 million inhabitants, the country is divided into 23 cantons (three of which are divided in two half-cantons). While the smallest canton - Appenzell-Innerrhoden - has about 15000 inhabitants, the largest one – Zurich – has about 1,2 million.

Geographical separation and economic discrepancies have caused the Swiss people to identify with the "smaller unit" rather than with the confederation. This is why Swiss federalism is much about preserving local differences and protecting the authority of the cantons from being taken over by the confederation. This is also why the role of municipalities – the third level of the Swiss political system – is crucial.

Although the existence of municipalities with own powers is certainly not a Swiss invention, municipal influence is far greater in Switzerland than in the United States, Germany or Belgium. 2800 out of 3000 Swiss municipalities have a population of less then 5000 people. Most of them have their own government, administration and assembly, the larger ones even a parliament. These political structures in "micro-scale" make it easy for citizens to get involved, which is why they are often called "schools of democracy". Most of the canton and confederation politicians actually begin their careers at the municipal level. They may continue to work for their municipality at a later stage of their career, too.

4.1.2 Historical background

As in Germany, co-operation arrangements between the communities and what later became the cantons are centuries old. They were motivated in Switzerland by the wish to improve common security. The origins of the present legal order of the Confederation are to be sought, however, in the Constitution of 1848, with which the cantons decided for the first time to give up some of their sovereignty and adopt a federal model inspired by the U.S. Constitution.

Since 1848 the Constitution has undergone many revisions and changes, some of which were total and some only partial. The first total revision of the Constitution in 1874 extended the

[47] Kägi, W., "Vom Sinn des Föderalismus", in: *Neue Helvetische Gesellschaft (Hrsg.): Die Schweiz*, 1944, p. 44, or Starck, D., "Föderalismus in der Schweiz: Darstellung der Strukturen und der praktischen Erfahrungen"*, Neue Speyerer Arbeitshefte* 126, 1999, p. 1.

powers of the confederation, the use of direct democracy, certain freedoms and the competencies of the Federal Supreme Court. It was followed by almost one hundred and fifty partial revisions, mainly because of the need to adjust the federal powers to new objectives and in response to national referenda.

As these numerous revisions had a negative influence on the Constitution's coherence and transparency, the National Assembly decided, on 3 June 1987, to revise it completely with the goal to clarify and systematise what has been achieved[48]. The new draft Constitution was first presented in 1995 and adopted by the National Assembly in December 1998. On 18 April 1999, it was approved by national referendum with 59% of the population and 13 cantons in favour. The new Constitution entered into force on 1 January 2000.

4.2 The constitutional division of powers

As part of the effort to improve the drafting of the Constitution, all articles dealing with the powers of the cantons and the confederation - scattered around in the version of 1874 - were grouped together in Chapter 2 of the Third Title of the new Constitution.

4.2.1 The principles

4.2.1.1 Attribution (Articles 3, 42)

The principle of the distribution of competencies between confederation and cantons is defined in Article 3 of the Constitution, which provides that “the cantons are sovereign insofar as their sovereignty is not limited by the Federal Constitution; they exercise all rights which are not transferred to the confederation”. Thus, there is a presumption of cantons' competence, while the confederation can only have powers specially attributed to it.

This idea is further stressed in Article 42 (1), according to which "the confederation shall accomplish the tasks which are attributed to it by the Constitution”. As a new element, however, Article 42 (2) also provides that the confederation "shall assume the tasks that require uniform legislation".

4.2.1.2 Supremacy (Article 49)

The supremacy of federal legislation over cantonal law is established in Article 49 of the Constitution, which provides that "federal law takes precedence over contrary cantonal law".

[48] "Der Entwurf wird das geltende geschriebene und ungeschriebene Verfassungsrecht nachführen, es verständlich darstellen, systematisch ordnen sowie Dichte und Sprache vereinheitlichen". *Bundesblatt der Schweizerischen Eidgenossenschaft (BBl.)*, 1987 II, p. 963.

4.2.2 The distribution of powers

Being adopted at different times, the constitutional provisions dealing with the distribution of competencies have not followed a coherent classification system or terminology. While the last revision regrouped the relevant articles, it does still not provide articles with lists of federal and cantonal powers. Therefore, the underlying categories have been developed by legal doctrine and vary to some extent. As can be seen below, the articles mentioning specific spheres of responsibility are still quite dispersed.

4.2.2.1 Exclusive competencies of the confederation

In this category, the cantons have no normative power. The Constitution simply labels these powers as areas that "are a federal matter"[49].

Competencies of this type are, for example:

- foreign relations (Article 54);
- military matters (Article 60-61);
- rail and other means of traffic (Article 87);
- nuclear energy (Article 90);
- postal and telecommunication services (Article 92);
- radio and television (Article 93);
- civil law and civil procedure (Article 122);
- criminal law and criminal procedure (Article 123);
- customs duties (Article 133).

It should be noted, however, that reference to "exclusive competencies" of the confederation has sometimes been questioned, insofar as it implies a kind of monopoly of regulation of the confederation. In some areas falling in the category of "exclusive" powers (like customs) the cantons play an important role in the implementation of federal rules. In yet other fields, like national defence and civil protection, the confederation regularly uses the possibility to delegate its powers to the cantons.

4.2.2.2 Concurrent federal competencies I

A second group of federal competencies is that of concurrent federal competencies "not limited to principles". In those areas the cantons can continue to legislate to the extent that the federal level has not made use of its powers in the relevant fields. In other words, if the confederation provides only a partial set of rules, the cantonal regulations may continue to exist for those aspects not regulated by federal legislation. However, the confederation can also provide a comprehensive and exhaustive set of rules, in which case the cantons lose the possibility to regulate the matter[50].

[49] In French, "relèvent de la compétence de la Confédération".
[50] For the latter reason this category of competencies has also been called "potentially exclusive".

The Constitution uses the phrase "the confederation shall legislate..." or "may legislate..." to characterise this type of concurrent federal competencies not limited to principles[51]. The sectors concerned are, for example:

- professional education (Article 63);
- sport (Article 68);
- cinema (Article 71);
- protection of the environment (Article 74);
- water protection (Article 76);
- protection of animal and plant life (Article 78);
- protection of animals (Article 80);
- road traffic (Article 82);
- use of energy (Article 89);
- transportation of electricity (Article 91);
- exercise of private economic activity (Article 95);
- banking and insurance (Article 98).

Whether the aim or effect of some federal legislation is to regulate a matter completely and exhaustively is a matter of interpretation. This often implies a thorough study of the norms under scrutiny. In some spheres of responsibility - like atomic energy, national road planning or aerial navigation - doctrine and case law have indeed come to the conclusion that federal legislation has to be considered exhaustive.

4.2.2.3 Concurrent federal competencies II

In other sectors the federal Constitution prohibits explicitly to legislate completely and exhaustively, so as to guarantee the cantons some margin of manoeuvre. In this category, the confederation must hence limit itself to issuing framework laws ("establishes principles"[52]), while the competence to adopt detailed rules remains with the cantons.

This technique, also known in the German system and in EC law, is applied with regard to:

- area planning (Article 75);
- preservation and use of water reserves (Article 76);
- protection of forests (Article 77);
- footpaths and hiking trails (Article 88);
- efficient energy use (Article 89);
- harmonisation of taxes (Article 129).

In other matters, like naturalisation of foreigners (Article 38), the same idea appears when the Constitution gives the confederation the power to "set minimum requirements"[53].

[51] In French, "la Confédération légifère..." or "peut légiférer...". Cf. Knapp, B., p. 460, who stresses the difference between these two possibilities which imply, respectively, the confederation's **obligation** or **right** to regulate the fields in question.
[52] In French, "fixe les principes".
[53] In French, "édicter des dispositions minimales".

4.2.2.4 Parallel competencies of the confederation and the cantons

These competencies also pertain to both levels of government. However, the fact that the confederation uses its powers does not prevent the cantons from exercising the same competence at their own level. In other words, the powers of the cantons are autonomous - neither the attribution of a responsibility to the confederation nor its implementation through federal laws can, in principle, have any effect on them.

This frequently applies to the organisation of public institutions and taxation matters, for example:

- creating technical universities (Article 63);
- promoting scientific research (Article 64);
- raising taxes on the income of natural persons or the profit of legal entities (Article 128).

4.2.2.5 Exclusive competencies of the cantons

The Constitution does not enumerate the competencies of the cantons. Due to their residual powers, the cantons are supposed to be able to exercise exclusive competencies in any field in which the confederation has no powers (i.e., responsibilities not mentioned in the Constitution). Despite this general principle, however, the Constitution does indicate some cantons' competencies.

It defines, for instance, how the cantons have to exercise their competencies in:

- the organisation of primary education (Article 62);
- the objectives of area planning (Article 75);
- conciliation procedures for certain consumer protection cases (Article 97).

Sometimes it mentions the competencies of the cantons to protect them against an extensive interpretation of federal competencies and to better assure that the cantons and the general public would accept them. This technique is used, for example, in case of:

- the protection of nature and cultural heritage (Article 78);
- the organisation of the judiciary and civil justice (Article 122);
- the organisation of criminal justice and the execution of criminal penalties and other law enforcement measures (Article 123).

Finally, there are a few policies for which the Constitution prohibits the cantons to legislate, mostly with a view to guaranteeing a particular freedom. For example, derogations from the principle of economic freedom are allowed only if provided for by the Constitution or if based on cantonal monopolies (Article 94).

4.3 The Federal Supreme Court's role in defining the federal balance

4.3.1 Institutional setting

Historically, the Swiss Federal Supreme Court was mainly responsible for a coherent application of federal law in the cantons[54]. Therefore, apart from being a constitutional court, its main role today is to decide on appeals against judgements of the cantonal courts of last instance in matters involving federal law, and this in all branches: civil, criminal, administrative and constitutional. Article 189 (1) of the Constitution establishes, *inter alia*, that the Federal Supreme Court has jurisdiction over public law disputes between the confederation and the cantons, or between cantons.

In case of conflicts of competence between the confederation and one or several cantons the Court decides in the first instance. However, the court accepts the relevant "charges under public law"[55] only if all other available legal remedies (e.g. administrative measures) have been exhausted. An action may be brought to the Court by the federal government (Bundesrat), a cantonal government or the public authority that claims to have the competence under scrutiny.

Disputes submitted to the Court may concern the formal separation of powers or the way in which they are exercised. They can be related to acts that have already been adopted and to those that are being prepared. However, a major limitation is that the cantons cannot present a case against federal laws *(Bundesgesetze)*, federal decrees subject to referendum *(referendumspflichtige Bundesbeschlüsse),* or international treaties approved by the parliament *(Staatsverträge)* – even if they have encroached on cantonal powers. This is because of the general rule according to which the Federal Supreme Court cannot declare federal laws void, even if they breach the Constitution[56]. Only orders and regulations of the federal government are liable to the ruling of the Court.

The limited constitutional jurisdiction of the Court is part of the Swiss tradition of parliamentary supremacy and direct democracy which was introduced in 1874. It has been argued that Swiss constitutionalists did not want judges to scrutinise laws which a majority of the people had already accepted (see below)[57].

4.3.2 Defining the division of competencies

As in the United States and Germany, the doctrine and case law of the constitutional court have recognised the legitimate existence of certain competencies of the federation, even if they have not been expressly attributed to it in the Constitution. Due to the incorporation of

[54] Hartmann, J., *Gewaltteilung – aus der Sicht der Verfassungsgerichtsbarkeit*, National report of the 10th Conference of the European Constitutional Courts Switzerland, 1996, p. 8.
[55] In German *Staatsrechtliche Klagen*, in French *réclamations de droit public*.
[56] By contrast, the Confederation may question the legality of any regulatory act of the cantons.
[57] The philosophy of self-governance may sometimes appear almost to turn against the principle of the rule of law: cf. Article 173i of the constitution, according to which the federal parliament (*Bundesversammlung*) decides conflicts of jurisdiction between the highest federal authorities in Switzerland.

many such powers in the text of the 1999 Constitution, the importance of case law is smaller today than, for instance, in the U.S.

4.3.2.1 Implicit competencies

The confederation has long been considered to have some powers closely related to its explicit responsibilities if they are necessary (or indispensable) for their implementation.

For example, Article 8a of the 1874 Constitution gave the confederation only the right to declare war and to sign treaties. Implicitly, however, this provision was held to give the federal authorities a **general** competence in the sphere of foreign relations. In particular, they were deemed responsible for the recognition of foreign governments and the diplomatic relations of the country. Today, Article 54 of the Constitution explicitly stipulates that foreign relations are a federal matter, without prejudice to the powers of the cantons in this field.

4.3.2.2 Customary competencies

In fields of activity where the Constitution does not contain any explicit provisions, but where the confederation has been exercising its powers for a long time and where those powers are indispensable for the country's coherence, the confederation enjoys *customary* competencies. Although such responsibilities might be considered as in breach of Article 3 of the Constitution, if they restrict a competence of the cantons, the confederation has been recognised to have them in order to supplemented the activities of the cantons.

Even though the 1874 Constitution did not contain, for example, provisions in the field of culture, and such provisions were rejected by referenda in 1986 and 1994, the confederation continues to grant aid to certain cultural activities (National Museum, *Pro Helvetia* Foundation, National Library).

Today, this limited competence of the confederation in the field of culture has been incorporated in Article 69 (2) of the 1999 Constitution.

4.3.2.3 Inherent competencies

Thirdly, the confederation has certain inherent competencies, that is, powers justified only by the existence of the federal state. For example, the confederation has the power to decide upon the emblems of sovereignty of the country, such as the coat of arms and the national flag. In its important judgement of 29 May 1991, the Federal Supreme Court also explicitly recognised that the confederation had an inherent competence in the area of the external and internal security of the state.

The Canton of Geneva v. the Confederation[58]

This case concerned an order related to security matters adopted by the federal government, even though the 1874 Constitution did not give it competence to enact rules in the field of the security of the state. Under this regulation, only the confederation had the right to decide whether security relevant documents it had prepared could be released to the general public. A previous Geneva law had established that the Geneva police had to give access to *any* files to the persons whose personal data they contained. Hence, the canton of Geneva brought an action to the Federal Supreme Court, claiming that the federal government, by issuing the order, had encroached upon its residual powers under Article 3 of the Constitution.

The Federal Supreme Court argued as follows:

> "(T)he legal acts that attribute competencies cannot only be interpreted literally, they have to be interpreted according to commonly used methods. In particular, it is not necessary that all competencies be explicitly attributed to the confederation, insofar as it has also certain "tacit" competencies. (...)
>
> The doctrine recognises as a general rule that the confederation has certain so-called inherent powers related to its sovereignty. In fact, the existence of a state as such presupposes that it should be able to defend itself against the threats that could undermine its existence. Also, it is natural that the confederation should be responsible for its external and internal security."

The Court thus concluded that the confederation had an inherent competence in the field of internal and external security that excluded a residual competence of the cantons in this field[59]. However, the cantons, due to their sovereignty, had the obligation to assure security on their territory, too, and had thus their own parallel competencies in police matters.

Consequently, Article 57 of the 1999 Constitution now provides that the confederation as well as the cantons, within the framework of their respective powers, ensure the security of the country and its population. In addition, they have to co-ordinate their efforts in the field of internal security.

4.3.3 Resolution of conflicts

4.3.3.1 Balances at the political level

The lack of constitutional control of federal legal acts mentioned above creates a certain asymmetry in the judicial of confederation and cantons' rights. It exposes the cantons to the risk that the integrity of their constitutional powers could be undermined. It is argued that the Swiss system works due to the country's consensual political culture, in which conflicts are disputed and resolved within the traditional political forums and arenas. Indeed, the

[58] Judgement of the Supreme Federal Court of 29 May 1991; ATF, 117 Ia 221, 228.
[59] Yet it upheld that this inherent confederation competence implied that the federal government could regulate public access to the information it had gathered in view of assuring its security.

Constitution establishes in Article 44 (3) that "disputes between cantons, or between cantons and the confederation, shall, to the extent possible, be resolved through negotiation or mediation".

In addition, the weakness of judicial review is thought to be compensated by the cantons' prominent role in political decision-making at the confederation level:

- In the federal parliament (*Bundesversammlung*), a legislative act requires the approval of the absolute majority of the representatives taking part in the vote in both houses (*Nationalrat* and *Ständerat*)[60].
- This oversight mechanism is strengthened by the possibility for 50 000 citizens or eight cantons to submit the proposed national legislation to a referendum. A qualified minority of cantons may thus try to use this vote against the majority of cantons that went along with it in the *Ständerat*.
- Finally, Swiss political parties are decentralised: cantons constitute the constituencies for the election of the *Nationalrat* (National Council). Therefore, members of the National Council need the support of their canton's party for re-election[61].

Many responsibilities that were once cantonal have been transferred to the federal government during the last hundred years. Nevertheless, most observers would argue that, due to Switzerland's decentralised political system, the cantons have kept more political power than sub-national units of other federal states. The federal government seeks their consent before proposing new legislation and tries to avoid making political decisions against the cantons.

4.3.3.2 Recent discussions

After having already been studied in the 1970s, the issue of reinforcing judicial review of the constitutionality of federal laws was again raised and widely discussed in the course of the latest constitutional reforms. The Bundesrat (Federal Council, i.e. federal government), for instance, pleaded for a more vigorous judicial control of federal legislation[62].

Referring to an imbalance in the judicial control of the division of competencies, the Bundesrat supported its proposals with the following reasoning:

- When the decision to restrict the jurisdiction of the Federal Supreme Court was made in 1874, the confederation's responsibilities were very limited and respect of citizens' rights was threatened by the powerful cantons.
- For a long time, it was feared that the Federal Supreme Court might become too powerful. Experience with judicial control of cantonal laws has shown, however, that the Supreme Court contributed substantially to the development of individual freedoms.

[60] The *Ständerat* (Council of States) has 46 Members: each canton delegates 2 and each half-canton 1 representative. Hence a majority of the cantons must at all times be in favour of any proposed national legislation.
[61] In Germany, e.g., the party system is much more centralised.
[62] Conseil Fédéral de la Suisse, Message relatif à une nouvelle constitution fédérale, 20 novembre 1996, Feuille fédérale 1997 I 1; p. 513-522.

- The European Convention of Human Rights (ECHR), in force since 1974, guarantees fundamental rights largely similar to those in the Swiss constitution. As the Strasbourg Court can hence examine the conformity of Swiss federal law with the ECHR, paradoxically, it has more powers than the Supreme Federal Court in this sphere.
- Judicial review of national laws as to their conformity with the constitution exists in most democratic countries.
- The Court's case law contains already some elements of control of the constitutionality of federal legislation. The court considers, for instance, that the constitution obliges it to *apply* federal laws, but does not entirely prohibit it from controlling them. Moreover, it interprets them in conformity with the constitution and scrutinises discrepancies in federal legislation. The Court has also started to examine the conformity of federal legislation with the ECHR (and thus, indirectly, with the constitution).

According to the federal government's proposal, only actions concerning a violation of constitutional rights could have been brought to the Federal Supreme Court. The cantons would have obtained the right to bring actions examining the compatibility of federal laws with the constitutional division of powers. In both cases only special norm control proceedings were envisaged[63]. Finally, the Federal Supreme Court would have been given a formal right to control the conformity of federal laws with international public law having direct effect.

After lively parliamentary debates, the Council of the States voted in favour of the introduction of constitutional review of federal laws by a narrow majority, while the National Council (lower house) opposed it. A compromise, which dropped the additional rights of the cantons, was then originally approved by both chambers, while the National Council surprisingly reverted to its former position in autumn 1999. As a result, the issue was finally put to national referendum on 12 March 2000, which rejected the federal government's proposal.

Recently, the question has again been raised in the parliament. However, the Committee on Legal Affairs of the *Nationalrat* has not adopted any legislative proposals, on the grounds that - in the light of the referendum - it would be too early to come back to the issue[64].

[63] The idea of an **abstract** control of federal laws was clearly rejected as being incompatible with the Swiss system of national referenda. In case of complaints concerning the division of competencies, however, the federal government rather sought to avoid the Federal Supreme Court from becoming an arbiter between the confederation and the cantons.

[64] See, most notably, the parliamentary initiative of the federal councillor M. Zwygart and the petition of M. Studer (Conseil National de la Suisse, Rapport 99-455 de la Commission des affaires juridiques sur le contrôle de la constitutionnalité des lois (CAJ-CN), du 3 juillet 2000, and Conseil National de la Suisse, Rapport de la Commission des affaires juridiques 00-201, sur le même sujet, du 21 novembre 2000).

4.4 The balance of powers in foreign affairs

4.4.1 Powers of the confederation

Pursuant to Article 54 (1) of the 1999 constitution, the confederation has general competence in the field of external relations. Paragraphs 1 and 2 of Article 184 further state that the federal government conducts the foreign relations of Switzerland, signs treaties on its behalf and ratifies them.

Under Article 166 of the constitution, the federal parliament has to approve international treaties. Hence parliament expresses its opinion on a treaty after it was signed, but previous to its ratification by the federal government; its consent corresponds to an authorisation to ratify the treaty.

Since both houses of the parliament are involved in the process, the cantons can protect sub-federal interests through the upper chamber of the parliament (the Council of States). However, for treaties which by statute or international treaty are within the exclusive powers of the federal government no parliamentary approval is required (Article 166 (3))[65].

In addition, cantons can also protect their interests through referendums. Article 141 (1)(d) lays down that eight cantons can initiate a referendum to approve or reject international treaties, which

- are of unlimited duration and may not be terminated;
- provide for entry into an international organisation; or
- involve a multilateral standardisation of law[66].

Moreover, the confederation must protect the interests of the cantons, under Article 54 (3) of the Constitution, when exercising its competence in the field of foreign relations (see below).

4.4.2 Powers of the cantons

The relations between cantons and foreign countries are regulated in Article 56 of the Constitution. According to paragraph 1, the cantons may sign treaties with foreign countries in all areas within the scope of their powers. However, the exercise of this power is subject to three limitations:

- the cantons have this competence only to the extent that the confederation has not made any treaties in the matter concerned;
- the treaties signed by the cantons may not be contrary to the law or the interests of the confederation, nor to the laws of other cantons;
- before signing a treaty, the cantons must inform the confederation.

[65] Only slightly more than one third of all treaties are submitted to parliament for approval.
[66] Under Article 141 (2) the federal parliament may submit international treaties to an optional referendum. Under Article 140 (1)(b) a referendum is obligatory in case of Switzerland's adherence to organisations for collective security or to supranational communities.

Contrary to the U.S. and the German system, the cantons do not have a general obligation to ask for the confederation's consent to the treaties they sign. However, according to Article 186 (3) of the Constitution, the federal government may raise objections against treaties between cantons and foreign countries. Should the federal government (or another canton) do that, the federal parliament decides whether to approve the treaty in question (Article 172 (3)).

More generally, Article 156 (3) stipulates that the confederation is responsible for the cantons' official relations with foreign countries; the cantons may only deal directly with sub-national foreign authorities.

4.4.3 Federal powers in the field of cantons' powers

The confederation's powers in foreign policy have long been understood to imply that it can make treaties in all fields which, internally, are under the competence of the cantons. This principle applied for the 1874 Constitution as well as in course of the various revisions it underwent.

A major change was made in the 1999 Constitution with respect to the co-operation between the confederation and the cantons in cases where the domestic powers of the cantons are involved. Under the old constitution, the cantons already participated in foreign policy decision-making. The new Article 54 (3), however, spells out that, when exercising its competence in foreign relations, the confederation must take into account the powers of the cantons and protect their interests. Article 55 confirms this tendency:

- paragraph 1 gives the cantons constitutional assurance to participate in the preparation of foreign policy decisions which concern their powers or essential interests;
- paragraph 2 lays down that the confederation has to inform cantons timely and fully, and to consult them;
- pursuant to paragraph 3, the position of the cantons has particular weight (without binding the confederation legally), if their powers are concerned; they can participate in international negotiations in an appropriate way (i.e., unless it is impossible for practical reasons).

These provisions of the 1999 Constitution have been regarded as a clear move from dual federalism to co-operative federalism in the field of international relations.

5 The Belgian Federal System

5.1 Historical background

The Belgian state came into being in 1830 as a unitary structure, in which French was the official language. As a result of a rebellion in the Dutch part of the country against this language regime, in the 1850s, several laws promoting Dutch were enacted from the end of that century onwards; in 1963 Belgium was officially divided into four linguistic areas (Dutch, French, German and bilingual Brussels) – with administrative and legal matters in each of them carried out in the respective language(s). In parallel, for economic reasons, the Walloon Brabant region started to move towards the creation of its own independent structures in the 1960s.

These double tensions - linguistic and economic - subsequently led to four constitutional and (broader) institutional reforms that gradually transformed Belgium from a unitary state to a complex federal system:

- in 1970, the country was divided into three communities (Flemish, French and German) and three regions (Flanders, Walloon and Brussels-Capital), the spheres of responsibility of the communities were defined and they obtained a legislative council;
- in 1980, the fields of responsibility of the communities were extended and they obtained a government, the spheres of activity of the regions were defined and they were also provided with separate political institutions (except Brussels);
- in 1988/89, the responsibilities of the communities and regions were extended and the political institutions in the Brussels-Capital region were created;
- in 1993, direct elections to all community and regional legislatures were introduced and the federal nature of Belgium was constitutionally enshrined.

5.2 The division of powers

The division of powers between the federal government, the communities and the regions is laid down in the constitution and in several institutional reform acts, most notably the Special Law of 8 August 1980, on the institutional reforms of the State.

5.2.1 The principles

5.2.1.1 Attribution (Article 35)

Due to the logic of the development of Belgian federal structures, the vertical division of competencies has been based on the principle of residual competencies of the federation and attributed powers of the regions and communities.

The 1993 reforms brought about a radical change of perspective. Article 35 of the Constitution, as it stands today, provides that "the federal authority only has power in the matters that are formally attributed to it by the Constitution and the laws carried out pursuant to the Constitution" and that "the communities and the regions, each in its own field of

responsibility, have power for the other matters, under the conditions and in the terms stipulated by law". However, it also establishes that the new principles will only come into force after an article has been inserted in the Constitution, which determines the exclusive powers of the federal authority. In the absence of such an article, Article 35 has not yet come into force.

5.2.1.2 Exclusiveness

Exclusiveness is based on the understanding that the more the respective competencies of the federal, community and regional authorities are dissociated, the smaller the likelihood that conflicts of competencies occur. Thus, it is considered that the competencies of the federal government, the communities and the regions should be exclusive. There is no separate category of concurrent powers as there is in other federal systems like Germany or Switzerland. No legislator can, in principle, reproduce or supplement the norms that have been enacted by and belong to the field of competence of another jurisdiction.

It is to be noted that there are no specific rules to determine the order or pre-eminence of action of different federal or sub-federal entities in certain (shared) responsibilities. For example, the principle of subsidiarity, as best known in the EU, is not applied in Belgium, except in a few cases. In addition, no rule such as "*Bundesrecht bricht Landesrecht*" (Article 31 GG) exists. The regions and communities enjoy extensive autonomy, since - unless provided otherwise - the rules they adopt have the same legal weight as federal norms.

5.2.1.3 Externality (Article 167)

Article 167 of the Constitution establishes the general rule that the King is responsible for international relations and signs international treaties. However, the communities and regions are not subordinated to the federal authority in this area. According to the principle of externality, defined in paragraph 3 of Article 167, the autonomy given to the federal level is reflected at the international level. The communities and regions have the exclusive power to sign international treaties in all areas of their (domestic) competence[67].

5.2.2 The division of powers

5.2.2.1 Federal powers

Since the federal level has residual powers, the limits to its fields of activity cannot be set out. In general, it has competencies in the areas that have not been devolved, as well as some reserved powers in fields in which competencies belong partly (or mainly) to the regions or communities.

[67] The question of "mixed treaties", involving several jurisdictions, has been regulated by the co-operation agreement of 8 March 1994.

In general, the federal level is competent for:

- external relations (without prejudice to the rights of the communities and regions);
- defence;
- the gendarmerie;
- justice (the courts system, prisons, etc.);
- social security and pensions;
- public health;
- public debt;
- public services administration;
- Economic and Monetary Union.

Economic and Monetary Union, a term borrowed from the EC, deserves special attention because it goes beyond a residual or reserve power. Its legal foundations were laid by the Special Law of 8 August 1980. The federal authorities are required actively to safeguard the unity of the Belgian economic and monetary space, as well as to guarantee the application of EC laws and norms. With a view to put these objectives into operation, the federal authorities retain the right to set general rules concerning public supply and works contracts, consumer protection, organisation of the economy and the upper limits of aid granted to firms. In addition, the federal authority retains exclusive competence for twelve key economic areas:

- internal and external monetary policy;
- financial policy (banks and credit policy);
- prices and incomes policy;
- competition policy (except local norms);
- commercial and company law;
- access to professions;
- industrial and intellectual property (except artistic property);
- foreign trade licences and quotas (but not trade promotion);
- weights and measures standardisation;
- statistics;
- the *Société Nationale de Crédit à l'Industrie* (large-scale investment);
- labour law and social security.

Concerning the federal reserved powers at the community level, these include:

- school-leaving age, minimum (but no other) conditions for certain professional qualifications, teaching staff, or pensions;
- the right to broadcast government statements on radio and television, national cultural bodies, some professional retraining;
- basic legislation on health care, on the handicapped, on the rehabilitation of prisoners, on youth policy.

The federal reserved powers at the regional level include:

- environmental norms;
- basic norms for distribution of water and treatment of used water;
- animal conservation;

- the national electricity grid;
- the nuclear fuel cycle;
- energy pricing;
- limited reserve competence on employment policy;
- national infrastructure and transport, civil and military defence, the Brussels national airport, protection of the environment in territorial waters, access to the professions;
- administrative supervision of the two provinces of Brabant;
- special measures arising from the international role of Brussels.

Scientific research constitutes a special case for which both communities and regions have powers[68]. The federal authorities also retain reserved powers which are necessary for exercising its own competencies. In addition, they may intervene in the communities' and regions' responsibilities if international agreements are involved or if the matter extends beyond the interests of one community or region[69].

5.2.2.2 Powers of the communities

The competencies of the communities are defined in Articles 24 and 127-130 of the constitution and in the Special Law of 8 August 1980. Apart from scientific research, the communities have responsibilities in three broad areas:

- *Education*: all educational policies, including higher education;
- *Cultural matters*: cultural policy, subsidies to cultural organisations, libraries; language policy; all aspects of broadcasting, advertising, and support for the written media;
- *Matters of immediate concern to citizens*: health-care policy, including nursing, health education, and preventive medicine; welfare, including family policy, social assistance, the reception and integration of immigrants, policies regarding the disabled and the aged, youth protection, and social assistance for prisoners.

Pursuant to Article 139 of the Constitution, the Walloon region can transfer certain competencies to the German community. The latter can thus also exercise certain regional powers.

5.2.2.3 Powers of the regions

As the regions were created to take into account differences in economic development, their competencies are mainly related to economic matters and to policies having economic implications. In addition, regions are competent for the so-called 'localisable' matters (e.g. environmental policy, regional planning).

[68] The competencies of the communities and regions also include research conducted under international or supranational agreements. See Article 6 bis of Special Law of 8 August 1980.

[69] In the latter case, the federal authority has to hear the opinion of the Federal Council of Scientific Policy and each community or region can refuse to co-operate. Taking into account the particularities of the field, scientific research has been classified both as a 'parallel' or even an (exceptional) concurrent power.

Unlike the communities, the powers of the regions are not enumerated in the Constitution, which mentions only that those competencies have to be indicated in a law voted by a special majority. This was done by the above-mentioned Special Law of 8 August 1980. The law lists the following substance matters:

- town and country planning;
- environmental and water management policy, including environmental protection, waste policy, control of dangerous, unhealthy and undesirable premises, production and distribution of water;
- rural development and nature conservation, including reallocation of rural property, forestry, hunting, fishing, non-navigable waterways, coastal drainage;
- housing, including public health aspects;
- agricultural policy (without prejudice to federal powers in the field);
- economy, including economic policy, regional aspects of loans policy, marketing and export policy and natural resources (also subject to limitations resulting from important federal reserved powers in the field);
- the regional aspects of energy policy, including distribution and local transmission of electricity and gas;
- the financing, organisation and supervision of the provinces and municipalities (except the Brabant province and the municipalities of the Fourons, Comines and the German-language area);
- employment policy, including programmes to promote employment, implementation of rules on the use of foreign workers;
- transport and public works, including all transport except Zaventem airport, infrastructure policy;
- rules on access to the professions;
- scientific research in the field of regional competencies (see above).

According to Article 138 of the constitution, the French community can transfer certain competencies to the Walloon region and the Brussels-Capital region.

5.3 Co-operation, prevention and resolution of conflicts of competence

5.3.1 Co-operation

As the Belgian Constitution does not contain the principle of federal supremacy, special importance is attached to co-ordination and co-operation between the various levels of public authority. The mechanisms of co-operation developed in this context avoid that problems might become exceedingly conflict-ridden. They enable the authorities to harmonise their policies on similar issues and thus achieve better efficiency.

5.3.1.1 Procedural co-operation

The mechanisms of procedural co-operation between the federal authorities, the communities and the regions have been laid down in Articles 39, 127 (1), 128 (1), 130 and 136 of the constitution and in various laws based on them. They do not always have clearly defined legal

procedures. However, according to the degree of co-operation involved, they can be roughly classified as follows[70]:

- provision of information;
- exchange of prior advice;
- participation, requiring a certain continuity in co-operation and organising a dialogue between the responsible authorities;
- consultation implying joint deliberation, even if the responsible authority is not bound by its results;
- agreement: one of the parties involved can block the decision in question; there are different versions of this procedure, under different terms, e.g. mutual agreement, unanimous advice, approval.

These co-operation mechanisms are regarded as substantial formal requirements in the Belgian legal system. If they have not been complied with, the legislative section of the Council of State can refuse to examine the text in question, on the basis of the understanding that its application would be "premature". Once adopted, either the Court of Arbitration or the Council of State can annul the acts in question (see below).

5.3.1.2 Co-operation agreements

According to Article 92 bis of the Special Law of 8 August 1980, the federal state, the communities and the regions may enter into co-operation agreements. Such agreements may concern, among others, the common establishment and management of services and institutions, the collective exercise of autonomous powers, and other common initiatives. The federal component entities are only limited by the requirement that the division of powers, as established by the Constitution and the legislation adopted on its basis, must be respected.

In certain cases, co-operation agreements are compulsory. A list of those matters is provided in the Special Law of 8 August 1980. The fields involved are, for example, the management of waterways and ports, public transport and telecommunication networks – if they go beyond the borders of one region –, as well as several matters related to international relations.

For the settlement of conflicts arising from obligatory co-operation agreements, the Special Law of 8 August 1980 and the Law of 29 January 1989 provide that the parties involved have to set up an *ad hoc* co-operation court, whose decision cannot be appealed. Such courts can also be established for voluntary agreements.

5.3.2 Conflicts of interest

Conflicts of interest arise if an authority, in implementing its policy, remains within the limits of its powers but threatens to encroach seriously on the interests of another jurisdiction. The concept is closely related to the principle of federal loyalty that was incorporated in the constitution during the institutional reform of 1993. According to Article 143 (1), “in the

[70] See Senelle, R., p. 101-106.

exercise of their respective responsibilities, the federal government, the communities, the regions and the common Community Commission act in the interests of federal loyalty, in order to prevent conflicts of interests."

The central body responsible for the prevention and settlement of conflicts of interest is the Concertation Committee[71], established in 1981. It is composed of 12 members of the federal, community and regional governments. The legislative as well as the executive branch may submit a matter to the Committee, if they deem their interests seriously harmed by another parliament or government:

- If a legislative assembly submits the matter to the Concertation Committee, the examination of the contested proposal or draft is suspended for 60 days (the so-called "cooling-off period"), during which concertation may take place between the assemblies in an effort to reach a compromise. If the procedure fails, the Senate must communicate its reasoned opinion to the Concertation Committee within 30 days; the latter then still has 30 days to take a final decision[72].
- If the head of a government submits the matter to the Concertation Committee, the disputed decision or its implementation is suspended for 60 days, during which the Concertation Committee takes a decision.

The Concertation Committee has to reach a consensus and there is no possibility of appeal. If a decision is made, it is politically binding but has no legal force. In case of disagreement, the party whose act was contested can adopt it or continue its implementation.

In addition to the settlement of conflicts of interests, the Concertation Committee is competent:

- to verify, if asked by the Prime Minister or the President of a government, whether all necessary co-operation procedures have been followed in the course of the adoption of a piece of legislation or administrative norm;
- to ask the legislative section of the Council of State to give a reasoned opinion whether a conflict of competence exists;
- to give its opinion in 40 days, if the legislative section of the Council of State considers that there is an excess (but not a conflict) of competence involved (see below).

5.3.3 Conflicts of competence

Two institutions – the Council of State and the Court of Arbitration[73] – are responsible for preventing and settling conflicts of competencies.

[71] In French, *Conseil de concertation*.
[72] If the procedure concerns the interests of the Chamber of Representatives or the Senate, the issue is immediately submitted to the Concertation Committee, which then has 60 days to take a decision.
[73] In French, *Conseil d'Etat* and *Cour d'Arbitrage*.

5.3.3.1 The role of the Council of State

The Council of State (*Conseil d'État*), Belgium's supreme administrative jurisdiction, is responsible for the resolution of conflicts of competencies and has two divisions: the **legislative** division has an important role in preventing such conflicts by giving its opinion on draft laws, decrees, if

- a complaint raises problems of competence, the Council delivers its reasoned opinion in a joint session; the opinion is not legally binding, however, for the governments or legislative assemblies to which it is addressed;
- should a text appear to exceed the powers of the authority that drafted it, the issue is referred back to the Concertation Committee for a reasoned opinion (see above).

The **administrative** division of the Council of State has the power, *inter alia*, to annul administrative acts exceeding the powers of the authority concerned or having been adopted without respecting the obligatory co-operation procedures (see 5.3.1).

5.3.3.2 The role of the Court of Arbitration

The Court of Arbitration was established in 1983 to resolve conflicts of competence created by legislative acts. Although it has later been given some responsibilities related to the interpretation of the constitution[74], in practice this role is still limited. Therefore, the Court is a speciality of the Belgian political structure which is not quite comparable to the constitutional courts of other countries.

The Court of Arbitration can annul, entirely or in part, a law, decree or order violating the distribution of powers as established by or on the basis of the constitution (Article 142 of the constitution and Special Law of 6 January 1989). An action for annulment may be brought to the Court by governments, legislative assemblies (at the request of two-thirds of their members), as well as by any individual or legal entity demonstrating a legitimate interest.

In addition to settling conflicts, the Court of Arbitration has the power to give preliminary rulings on questions of competence raised by ordinary courts in relation to a particular dispute. In this case the ruling of the court is binding on the court concerned as well as other courts taking a decision in the matter, but the court has no power to overturn an unconstitutional provision.

In case of non-compliance with co-operation procedures, the Court of Arbitration can also annul legislative acts.

[74] E.g., Articles 10, 11 and 24 of the Constitution, but also other articles to be defined in a law to be adopted by a special majority.

5.3.4 The definition of the division of competencies by the courts

5.3.4.1 The general scope of competencies

Like in other federal systems, inconsistencies and ambiguities of legislative acts have been a matter to be defined and interpreted by the judiciary. One of the earliest tasks of the Court of Arbitration was to decide how the scope of the powers of the federal government, regions and communities should be interpreted.

Taking the principle of the autonomy of the communities and regions as a starting point, the court reasoned that the competencies attributed to the sub-federal entities should be given an extensive interpretation. With respect to community matters such as broadcasting, television and retirement policies, or regional matters, such as the production and distribution of water, the court confirmed that

> "the Constitution and special laws, to the extent that they do not establish to the contrary, have attributed to the communities and regions *all the competence* to enact rules concerning the matters that have been transferred to them, without prejudice to their recourse, if need be, to Article 10 of the Special Law of 8 August 1980"[75].

The Court hence established that - subject to the exceptions provided in federal law - "the whole matter concerned" should be considered to have been attributed to the communities and regions. They are competent to adopt all provisions that they consider necessary to carry out policies concerning this field of activity.

As a corollary to this interpretation, the Court also declared, in its ruling of 20 December 1985, that "all exceptions [concerning attributed powers] have to be interpreted narrowly"[76].

5.3.4.2 Implicit competencies

Article 10 of the Special Law of 8 August 1980 stipulates that the communities and regions have certain implicit powers. Their decrees may contain legal provisions concerning matters for which they are not competent "to the extent that these provisions are necessary for the exercise of their competencies".

In many of its early rulings the Court of Arbitration upheld that these provisions allow the communities and regions to regulate both matters that are a residual competence of the federal state or a competence explicitly reserved to it. In later decisions both the Court of Arbitration and the Council of State, while maintaining this general principle, have given Article 10 a rather restrictive interpretation. Both allow the use of such powers only under two main conditions:

[75] Court of Arbitration, no 25/86, 26.6.1986; see also decisions no 27/86, 22.10.1986, and no 31/97, 20.1.1987.
[76] No 8/86, 22.1.1986.

- It must be legally possible for the communities and regions to implement the matter for which the federal legislator is responsible in a different way[77].
- Encroachment on the field of competence of the other federal entity can only be marginal and should not limit its possibility to exercise this power in a substantial way[78].

The Council of State has ruled, for example, that the Walloon council can - because of implicit powers - give the regional government the responsibility to lay down rules on housing fees in senior citizens' homes, although price setting policy is an exclusive competence of the federal government.

5.3.4.3 Economic and Monetary Union

This principle is established in Article 6 of the Special Law of 8 August 1980, as amended in August 1988 and interpreted by the Court of Arbitration[79]. A groundbreaking ruling in this respect was the following judgement.

Judgement no. 47 of 25 February 1988[80]

Economic competition between the regions in the 1980s led the Walloon region to impose a tax on its water deliveries to the Flemish and Brussels-Capital regions (a payment not related to the actual production costs). Walloon Brabant based its case on its taxing power and its power to regulate the environment and the water industry. As it was felt that the implications of the tax amounted to those of an "export duty", the Court of Arbitration was called upon to decide on the issue.

In its ruling, the Court of Arbitration upheld that

> "the exercise by a community or region of competencies in the field of taxation can... pass the limits that are inherent in the general concept of state that follows from the constitutional revisions of 1970 and 1980 and the Special and Ordinary Laws of 8 and 9 August 1980."

According to the Court, one of these limits was specified in Article 6 of the Special Law of 8 August 1980, which it held to reflect the wish of the legislator to maintain a uniform legal set-up for an integrated market.

The Court thus ruled against the water tax, insofar as it seemed to have an effect equivalent to that of an internal customs duty, inhibiting the free movement of goods in Belgium. At the

[77] Court of Arbitration, no 6/96, 18.1.1996. This is not the case, for example, in the field of public tenders. Because of European directives the public authorities cannot go against the rule according to which they have to award a contract to the bidder who has made the lowest offer.
[78] Court of Arbitration, no 68/96, 28.11.1996; Council of State, L. 21.216/9, 14.10.1991.
[79] It is commonly held that the legislator was inspired by the rulings of the Court of Arbitration when it wrote the rule in the Special Law of 8 August 1980, in its amended form of 1988.
[80] For another ruling of the Court of Arbitration on the existence of a Belgian economic and monetary union, albeit in a much more limited setting, see its judgement of 25 February 1986.

same time, it also asserted that the principle of economic and monetary union took precedence over the autonomy of the regions.

5.3.4.4 The principle of proportionality

This principle was developed by the Court of Arbitration to maintain that the powers of the regions and the communities have certain limits. Whenever conflicts arise due to an overlap of federal and regional (or community) powers, the principle of proportionality can be used to solve them.

The Court expressed this rule most notably in its judgement no. 54 of 24 May 1988, in which it recognised that an important power had been attributed, without any exceptions, to the regions in town and country planning. They can thus decide on granting permits for the building of nuclear power stations and facilities for the treatment of radioactive waste, although these fields fall under the purview of the federal government. At the same time, however, the Court ruled that the regions' competence in town and country planning has limits: the regions cannot interpret these powers "so as to make it impossible for the state to carry out an efficient policy in its field of competence".

In its judgement no. 15 of 15 May 1996, the Court gave another example. It had to examine the question whether regions can restrict, "in the economic or other sectors", the freedom of commerce and industry laid down in the constitution. More specifically, can a region block ongoing construction works in order to protect the environment and fight against noise? According to the court, the regions do not have the right to face construction firms with the choice to either stop work or be fined. Such an important interference would affect freedom of commerce and industry "in disproportion to the objective sought".

5.3.5 Resolution of conflicts

The Belgian system is characterised by several particularities as compared to the other ones tackled in this paper. On the one hand, the autonomy of the communities and regions is more significant – in all areas of competence their acts have the same legal weight as federal legislation. On the other hand, the scope of their powers is more restricted, because the federal government has residual competencies, for the moment (see 5.2.1.1).

The Court of Arbitration affirmed in many of its early rulings that the autonomy of communities and regions is the rule. In line with the political doctrine of the late 1980s the Court stressed the principle of autonomy of all federal entities, e.g. in asserting that they should have all means necessary to carry out their tasks. At the same time, however, the Court of Arbitration - like the Council of State - has forcefully ruled against attempts to question the unity of the country and has systematically subjected the exercise of regional and community powers to the principle of proportionality.

Hence, the Belgian judiciary, just as Belgian society as a whole, have been exploring a new federal balance and seeking to arrive at an "idea of the Belgian state" that would suit the country's needs. While ruling against obvious excesses in the use of power by the federated component entities, it has otherwise kept to low key solutions and has followed rather than led

the political debate about the future of Belgian federalism. As this political debate is still evolving, it can be expected that the discussion about the vertical division of competencies will continue.

5.4 The balance of powers in foreign and European affairs

5.4.1 The principle of externality

Article 167 (1) of the Belgian Constitution establishes that "the King is responsible for international relations, without prejudice to the ability of communities and regions to engage in international co-operation ... for matters within their responsibilities." Paragraphs 2 and 3 of the Article, read together, stipulate that "the King signs treaties", with the exception of those "regarding matters that fall under the responsibility of [the community and regional councils]".

Although these provisions remain somewhat ambiguous as to their practical effect, the intention of the constitution clearly is to endow the federated entities with extensive powers in external affairs, from sending representatives abroad to signing international agreements. Indeed, Belgian courts and legal doctrine refer to the principle of externality in the Belgian federal system, according to which the autonomy given to the component entities internally is reflected at the international level (cf. 5.2.1.3). Accordingly, the communities and regions have exclusive power to sign international treaties in all areas of their domestic competence. All treaties dealing with regional or community matters are signed by the respective governments and approved by the respective assemblies, without any interference of the federal level.

This advanced autonomy of the regions and communities in international affairs, comparable to that found in confederations, is only tempered by the need to co-ordinate their activities, especially with regard to treaties and international organisations that touch upon competencies of different levels of government ("mixed competencies"). The latter are governed by special co-operation techniques co-ordinated by the Interministerial Committee on Foreign Relations, which assembles representatives of the federal, regional and community governments.

5.4.2 Co-operation arrangements governing "mixed treaties"

Pursuant to Article 167 (4) of the constitution, a special law has to specify the terms for signing "mixed treaties", that is, treaties "not exclusively concerned with issues within the competence of regions or communities". The Special Law of 8 August 1980 obliged the federal and sub-federal authorities to provide for "a co-operation agreement" to regulate this matter. On 8 March 1994, such an agreement was signed by the federal government, the communities and the regions.

According to this agreement, a treaty can be qualified as mixed by the Interministerial Committee of Foreign Policy, under the control of the Council of State and the Court of

Arbitration. In practice, a Working Group on Mixed Treaties was formed to support the Committee in its task to determine whether a treaty has a mixed character[81].

Under Articles 1 and 2 of the agreement, each party has to inform the Interministerial Committee before starting bilateral or multilateral negotiations. The terms for the negotiation and signature of treaties and the relevant assent and ratification procedures are specified on this occasion. All parties involved negotiate on an equal footing (Art. 5 (1)).

Mixed treaties are then signed by the Minister of Foreign Affairs and by the Minister appointed by the government of the regions and/or the communities concerned (or by their representatives, Art. 8(1)). All parliamentary assemblies concerned (and their respective governments) have to give their assent to the treaty. According to case law of the Council of State, the King cannot ratify a mixed treaty unless all legislative assemblies involved have given their consent.

5.4.3 The division of powers in European affairs

Article 167 of the Constitution regulates external relations in general – there is no derogatory regime for European affairs (as in Germany), although there are special arrangements for secondary legislation adopted in the EU legislative process. Due to the principle of externality and to the fact that federalisation started only in the 1970s, the process of strengthening the rights of sub-federal units in EU decision-making has been less contentious in Belgium than in Germany.

5.4.3.1 Primary legislation

As we have seen above, Article 167 of the Constitution provides that sub-federal entities have full competence to sign treaties. To the extent that their spheres of competence are involved, they have direct and immediate access to international negotiations, including the signature and ratification of treaties. Representatives of the Belgian regions and communities have thus participated in EU intergovernmental conferences after the devolution of competencies that occurred in the 1970s and 1980s.

To ensure some coherence in external affairs, Article 168 lays down that "the Houses [of Parliament] are informed when negotiations are launched concerning any revision of the treaties establishing the European Community and the treaties and acts which may have modified or completed them". The Houses must also be "aware of the planned treaty prior to signature".

During negotiations, all governments, federal as well as sub-federal, are directly involved in the revision of European treaties, according to their competencies:

[81] This working group is also composed of representatives of federal, regional and community authorities, but, unlike the Interministerial Committee, it also comprises civil servants.

- if, exceptionally, a treaty contains only provisions concerning exclusive federal competencies (e.g. justice or police), the federal government signs it in the name of the Kingdom of Belgium;
- if the treaty comprises only provisions concerning exclusive regional or community competencies (e.g. audio-visual policies or environment), the sub-federal governments are involved; it is the federal government that finally signs the treaty, but it is clearly stipulated in the domestic law that this signature is binding for the community or regional governments concerned;
- if a treaty is mixed, all governments negotiate to the extent that their competencies are involved; an explicit reference is, again, made that the treaty is binding for to all governments[82].

All assemblies whose responsibilities are concerned have to give their assent during the transposal of a treaty into Belgian law. In other words, unlike the German system, the opposition of only one sub-federal authority may paralyse the whole process[83].

5.4.3.2 Secondary legislation

With respect to the drafting of secondary legislation, the Belgian system follows arrangements largely similar to those concerning primary legislation: the ministers of the regions and communities participate in EU Council meetings to the extent that the matters dealt with are within their competencies. The exact terms for Belgium's representation in the Council were established by the Co-operation Agreement of 8 March 1994. This text distinguishes four types of participation in Council meetings:

- if the draft agenda of the meeting contains questions that are within the exclusive competence of the federal state (foreign affairs, economic and monetary affairs, budget, justice, telecommunications, consumer affairs, development, civil protection, or fisheries), representation is exclusively federal;
- if it comprises only questions that are within the competencies of the communities or regions (culture, education, tourism, youth, housing, or territorial planning), participation is exclusively at sub-federal level;
- if there are questions of mixed competencies on the draft agenda which have an essentially federal character (agriculture, public health, environment, transport, or social affairs), participation is federal but accompanied by a sub-federal representative;
- if the agenda of the meeting contains matters of mixed competencies, but of an essentially regional or community character (e.g., research and industry), participation is sub-federal but accompanied by a federal representative.

[82] This was the case, for instance, with the accession treaties of Austria, Finland and Sweden and with the Amsterdam Treaty.

[83] For example, in the case of the Amsterdam Treaty, eight approvals were needed – those of the federal state, the three communities, the two regions and the two Brussels community commissions.

5.4.3.3 Implementation

As in Germany, the communities and regions have the obligation to apply EU legislation in the fields of their exclusive competencies. A monitoring mechanism is established to check compliance with these obligations, which is, however, different from what we have seen in the German system.

Article 169 of the Constitution provides that "in order to ensure respect of international or supranational obligations, [the federal authorities] may, within the limits established by [a special law], temporarily substitute themselves for [the community and regional authorities]". The relevant limits are laid down in the Special Law of 8 August 1980, as amended in 1988. According to Article 16 (3), the federal government may substitute the legislation of the communities and regions if they fail to comply with their obligations and if this has led to a ruling against Belgium for infringement of inter-/supranational law pronounced by an international or supranational court.

In addition, the following conditions have to be fulfilled:

- the community or region concerned has to be informed at least three months in advance by a reasoned royal decree, to be adopted by the Belgian Council of Ministers;
- the community or region concerned was involved in the entire process of solving the dispute, particularly during proceedings before the international or supranational court;
- the measures adopted by the federal government cease to have their effect as soon as the community or region is in conformity with the decision of the international or supranational court.

6 Conclusion

6.1 Brief evaluation of the four case studies

We have seen that in most fields of activity, with the exception of classical federal powers such as defence, foreign relations or monetary matters, the four systems presented here strike a different balance of influence and control between federal and federated bodies. While some systems rely more heavily on the precision of constitutional texts, others depend more on an active interpreting role of the courts, case by case. General principles and enumerative lists of specific powers are both used, to different degrees, in these systems. Consequently, differences are more in intensity than in quality.

Perhaps the most important conclusion to draw is that all systems have undergone significant fluctuations according to the political climate, swinging either towards a centralising trend (as in the U.S. during the 1930s) or a clear-cut devolution (as in Belgium for the past 20 years). It could be considered a mark of quality of any constitutional arrangement if it provides the technical flexibility for such changes to take place without quasi-revolutionary modifications to the basic texts defining the constitutional order. There are, albeit rare, examples of constitutions that have to be amended several times per year[84]. Beyond the constitutional language and construction of federal systems, there are aspects that influence the functioning of multi-level political systems enormously but are not visible in the constitutional texts. As Weiler has noted,

> "the very nature of language of law, and of legal interpretation, suggests that practically no language in a constitutional document can guarantee a truly fundamental boundary between, say, the central power and that of the constituent units. The extent to which a system will veer towards one pole or another depends much more on the political and legal ethos which animates those who exercise legislative competencies and those who control it"[85].

Hence it comes as no surprise that conflicts over federal powers often hide other political conflicts, for instance on the distribution of economic resources. This aspect is quite recognisable in the recent movement for more autonomy by the self-proclaimed "regions with legislative powers". Most of these regions are more prosperous and sometimes more populated than the average of the other component units within their federal state.

A further aspect concerns the degree of mutual exclusiveness of the federal and the federated spheres. The classical school of thought of American "dual federalism" maintains an almost perfect separation between the powers allocated to the federal and the state governments (a model that has theoretical merit but does not reflect American political reality), not least because state governments saw it as a guarantee not to be made politically responsible for

[84] One case, the constitution of Alabama, was recently studied by *The Economist* (14 March 2002): this constitution is not quite unworkable but it can be made to work only with some difficulty; at well over 300,000 words, it is 40 times the length of the US constitution. The 1901 document itself accounts for only about a tenth of this. The rest comes from some 700 amendments, which are appearing with increasing frequency (52 in 2000 alone). Most other states in the South have amended their constitutions less than 100 times.

[85] EP DG IV Working document, *Political Series, W-26*, op.cit., p. 4.

legislation imposed on them by the federal government. The European federal systems, including Belgium, are examples of "co-operative federalism": there is such an amount of legal and administrative relationships between all the components of the system that concertation and compromise are indispensable.

In this context, ***foreign relations*** stand out as an example of a wide range of co-operation arrangements and participation rights of the regions which are not always reflected in the constitutions themselves, although they are more "dualistic" as to the division of powers than most other policies. Indeed, in the United States and Germany, courts have had to fix some basic principles concerning the respective rights of the federal government and sub-federal entities. Switzerland offers a different example of how a constitutional text has been recently amended to better reflect political reality.

As concerns the substance of federal arrangements in foreign relations, we have seen that the four countries studied above limit the federal treaty-making powers to prevent abuses, such as those dealt with in *Missouri v. Holland*. While, in the case of traditional foreign relations, such mechanisms most commonly involve either some kind of participation of the upper chamber of the federal parliament or regions' implementation rights, the role of the regions is much more extensive in European affairs. Belgium, in particular, offers an interesting illustration of how far a federal state can go under current EU legislation in improving - through its own national regulations - the sub-federal entities' access to EU decision-making.

A more general observation resulting from the above chapters concerns the strong role of ***constitutional courts***. As conflicts over the division of powers often concern branches of government at the same hierarchical level (e.g., Bundestag and Bundesrat), it is logical and probably inevitable that it is very often the task of courts to decide. Otherwise, institutional deadlock would be a likely result of many such confrontations. But even the strategies adopted by courts are different and change from one era to another. Not only can interpretations of one general principle change (as the U.S. Supreme Court's decisions on the commerce clause aptly demonstrate), but the whole philosophy of the delimitation of competencies can differ from one court to another. If the German *Bundesverfassungsgericht* can often be said to apply an almost Kelsenian system of different categories of responsibilities, the Court of Justice of the European Communities has adopted a different approach (certainly as a result of the less than helpful drafting of the Treaties in this respect): it does normally not pronounce itself on the division of powers between the Community and the Member States

> "by way of a simple definition of the powers granted to the Community as opposed to those which remain for the Member States. Its jurisprudence should rather be characterised as a *continuum* delineating the specific powers of the Community and possibly the implied powers linked to them, the non-specific powers of the Community and, finally, as a "left-over" category, the residual powers of the Member States[…]"[86].

The obvious differences between ***constitutions*** in the way they define - or do not define - the powers attributed to the federation and the federated regions are probably a result of the historical situation at the time of their drafting. However, many lawyers and political leaders

[86] Lenaerts, K., op.cit., p. 216/217.

involved in this drafting advocated the advantages of general principles over enumerative lists. The latter carry a risk of causing more frequent amendments, caused by technical, social or economic developments in the society. In addition, experience shows that the entity that enjoys enumerated powers, be it at the federal or the federated level, tends to interpret them more and more extensively.

A further observation concerns the equilibrium of devolutionary and integrative federalism. It seems to follow from the above case studies that general principles such as the proportionality principle or the commerce clause lend themselves to a slow and sometimes surreptitious extension of federal powers over time. One reason for this is perhaps that central constitutional courts tend to favour central institutions over sub-national units. On the other hand, even constitutions with detailed catalogues of competencies, like the German *Grundgesetz*, are seemingly not an effective remedy against such an extension. Modern constitutional theory asserts in the light of this experience that the interests of the component entities of a federation are more effectively protected by procedural safeguards inherent in the structure of the system than by judicially created limitations on federal power. Moreover, decisions made by the judiciary tend to have much less popular legitimacy than those made by political bodies, particularly if long and transparent debates have paved the way towards a political decision.

6.2 Final remarks with respect to the debate on the Future of Europe

As long as the European Union keeps essential characteristics of an international system, the central governments of its Member States will continue to enjoy special prerogatives stemming from their privileged role in diplomacy and international affairs. This can be seen in an exemplary way in the German system: while residual competencies are attributed to the Länder and while these enjoy all powers not expressly attributed to the Bund in the domestic order, the contrary principle applies in international affairs. In fact, the centralisation of powers in external affairs is mostly seen as the most important difference between federations and confederations. It often leads, however, to a slow extension of this centralising trend to the internal order of the federation. Could similar developments be expected once the EU decided to develop a common foreign policy, one of the political priorities most often expressed by European citizens?

For the moment, however, the EU lacks a number of essential federal features:

- EU member states remain the “masters of the treaties", in terms of holding the exclusive power to amend or change the constitutive treaties of the EU on the basis of unanimity (and domestic ratification);
- there is no area in which the member states have completely ceded sovereignty to the EU's central level; even in the very small area of exclusive competencies[87], the EU cannot legislate without the consent of the member states (as represented in the Council of the EU);

[87] See Convention document CONV 47/02, of 15 May 2002, for an overview of the EU's and the Member States' powers.

- in the area of policy execution, the EU depends on the Member States for the implementation of its policies, as it only has a very small administrative machinery of its own;
- the EU has no real tax and spending capacity;
- the EU does not have a general scheme of socio-economic redistribution;
- the EU's executive is not elected by the citizens, either directly, through the election of a president, or indirectly (i.e. by the EP);
- members of the institutions that represent functional and European rather than territorial interests (Commission, EP, and the ECJ) are appointed, or elected, on the basis of territorial membership; most prominently, the President of the Commission is nominated by Member State governments – despite the EP's recent strengthening of leverage in the approval of the Commission as a whole;
- many proposals for increasing the democratic legitimacy of the EU seem to concentrate on an enhanced role of national parliaments, an organisational set-up not found in most federations (only Belgium's system has some minor elements going in this direction).

However, should the EU in the future choose to move on towards a more federal structure, there are basically two development paths it could follow[88]:

(1) the Union could move towards the German (and, in part, Belgian) model of co-operative federalism. The Council of the EU would develop into something like a second chamber, and the EP would be set on an equal footing with it in legislation (co-decision and qualified majority voting in the Council would constitute the default procedure). The European Commission would turn into a European government, with its President being elected either directly by the European citizens or by the EP. Later on, the EU would possibly acquire economic stabilisation and redistribution competencies. These would presuppose an EU capacity to generate financial revenue. A move towards co-operative federalism would require some additional balancing of territorial interests through the effective representation of functional interests at the EU level, preferably by means of an integrated European party system or a working structure of European interest representation[89].

(2) The EU may move towards the Swiss (or, in part, American) model of dual federalism. This would also entail a further transfer of policy competencies to the European level, but such a centralisation would partially be balanced by allowing for a considerable extent of "competition among jurisdictions". Member States would keep significant autonomy in exercising their competencies and would essentially retain their power to tax. Regulatory competition might increase policy efficiency at the Member State level. This type of inter-jurisdictional competition is probably envisaged by the proponents of the Open Method of Co-ordination. It would require the EU to move more towards a model of dual federalism. Its current structures of co-operative federalism favours European regulations that leave little room for true competition. As long as Europeans have a preference for maintaining the high level of social regulation and socio-economic redistribution that characterises the (continental) European welfare state, Member State governments have strong incentives to

[88] See Börzel, T.A., and Hosli, M.O. (2002), cited above, for a more detailed analysis.
[89] In a recent paper, Simon Hix gives an interesting account of how the internal organisation of national political parties and their rules of candidate selection influence the way functional interests can be represented at different levels of the Union ("A Constitution for the EU? A Comparative Political Science Perspective"; *Collegium* no. 23, Spring 2002, pp. 33/34).

harmonise national standards at the EU level in order to avoid competitive disadvantages for their industry (e.g., "tax dumping").

Dual federalism would leave the Member States more fiscal and regulatory autonomy, but would probably lead to a weaker representation at the EU level, for example through a directly elected "Senate". However, the idea of a second chamber of the EP in which each Member State would be represented by an equal number of directly elected representatives has found little support. Governments can hardly be expected to favour the Senate model, which would largely deprive them of their current political influence in the EU legislation process. Nor do the Member States seem to be able to agree on a clear delimitation of policy competencies, which would help disentangle EU and national responsibilities and might give each level more autonomy in exercising them. The call of the German Länder for a *Kompetenzkatalog* system, which would once and for all clarify the distribution of power between the EU and the Member States, conflicts with a political structure in which competencies are shared rather than divided.

In summary, if the Convention and the ensuing IGC decided to add more federal elements to the EU's multi-level construction, it would probably be elements of co-operative federalism. The logic of market integration, paralleled by a strong preference for preserving the welfare state, in principle favours increasing centralisation of previously national policy competencies at the EU level. As a compensation for this loss in sovereign decision making powers, EU Member States will want to retain strong co-decision powers in European policy-making, to be exercised by their governments or, possibly, selected Members of their national Parliaments. The introduction of EU-wide referenda – frequently proposed by academics in order to increase EU citizens' opportunities for political participation at EU level and to make European elections more interesting – appears to have little chances for success at the moment.

Detailed contents

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Annex: Forms of multi-level arrangements

Arrangement	Principal characteristics
Union	Clearly bounded territorial constituent units retain quasi-"municipal" powers only while sharing regulatory power concentrated in the central government
Consociation	Non-territorial constituent units share power concentrated in a common overarching government
Federation	Strong self-government constituent units linked within strong but limited overarching government
Federacy	Asymmetrical permanent linkage between two self-government units with the larger having specific powers within the smaller in exchange for specific privileges
Condominium	Joint rule or control by two units over a third or over some common territory or enterprise
Confederation	Strong self-governing constituent units permanently linked by a loose, limited purpose common government
League	Loose but permanent linkage for limited purposes without a common government but with some joint body or secretariat
Inter-jurisdictional functional authorities	Joint or common entities organised by the constituting units to undertake special tasks

Source: Daniel J. Elazar, "Extending the Covenant: Federalism and Constitutionalism in a Global Era"; Paper prepared for the Consultation on Abraham Kuyper at Princeton Theological Seminary, February 1998.