A "Global Theory of Federalism": The Nature and Challenges of a Federal State

By Anna Gamper[*]

A. Why a "Global Theory" is Lacking

Innumerable attempts have been made to explore the theoretical nature of federalism.[1] Due to the long history, worldwide existence and interdisciplinary character of federalism, a plethora of literature has been written on the topic. Yet, these endeavours have not even resulted in a clear and commonly used definition of the term. Surely, it is one of the great dilemmas of this field of research that despite so much discussion, there is no settled common denominator of 'federalism'.[2] Whereas practical studies and exchange of experience between the various federal systems offer a more conventional research arena, comparative theoretical approaches are much more seldom.[3] This is not the least because of the tremendous

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[1] See, *e.g.*, KENNETH C. WHEARE, FEDERAL GOVERNMENT 1 (1947); RONALD L. WATTS, COMPARING FEDERAL SYSTEMS 6 (2nd ed., 1999); exemplary for the Germanic law tradition: MARTIN USTERI, THEORIE DES BUNDESSTAATES 4 (1954); FRIED ESTERBAUER, KRITERIEN FÖDERATIVER UND KONFÖDERATIVER SYSTEME 175 (1976); Otto Kimminich, Der Bundesstaat, in HANDBUCH DES STAATSRECHTS DER BUNDESREPUBLIK DEUTSCHLAND, VOL. I: GRUNDLAGEN VON STAAT UND VERFASSUNG, 1113, 1115 (JOSEF ISENSEE/PAUL KIRCHHOF EDS., 1987); Karl Weber, Elemente eines umfassenden Föderalismusbegriffes, in AUF DEM WEG ZUR MENSCHENWÜRDE UND GERECHTIGKEIT, 1013, 1016 (LUDWIG ADAMOVICH/PETER PERNTHALER EDS., 1989); Peter Pernthaler, Österreichische Föderalismusbegriffe, in FESTSCHRIFT GUY HÉRAUD, 315, 318 (FRANZ HIERONYMUS RIEDL/THEODOR VEITER EDS., 1989); Peter Pernthaler, Zum Begriff von Föderalismus und Bundesstaat in Österreich, in FÖDERALISMUS UND PARLAMENTARISMUS IN ÖSTERREICH, 35, 38 (Herbert Schambeck ed., 1992); Ludger Helms, *Strukturelemente und Entwicklungsdynamik des deutschen Bundesstaates im internationalen Vergleich*, ZEITSCHRIFT FÜR POLITIK (ZfP) 125 (2002); ANNA GAMPER, DIE REGIONEN MIT GESETZGEBUNGSHOHEIT 16 (2004); Matthias Jestaedt, *Bundesstaat als Verfassungsprinzip*, in HANDBUCH DES STAATSRECHTS DER BUNDESREPUBLIK DEUTSCHLAND, VOL. II: VERFASSUNGSSTAAT, 785, 793 (JOSEF ISENSEE/PAUL KIRCHHOF EDS., 3rd ed., 2004).

[2] See, GAMPER, *supra,* note 1, 16.

[3] See, however, USTERI, *supra,* note 1; Friedrich Koja, *Der Bundesstaat als Rechtsbegriff*, in FÖDERATIVE ORDNUNG III: THEORIE UND PRAXIS DES BUNDESSTAATES, 61 (ERNST C. HELLBLING/THEO MAYER-MALY/HERBERT MIEHSLER EDS., 1974); PETER PERNTHALER, ALLGEMEINE STAATSLEHRE 294 (2nd ed., 1996); PETER PERNTHALER, ÖSTERREICHISCHES BUNDESSTAATSRECHT 297 (2004).

https://doi.org/10.1017/S2071832200014334 Published online by Cambridge University Press

semantic challenges of a comparative theoretical approach. At first glance, it is sometimes difficult to understand the terminology of federalism, the meaning of which differs according to the perspectives of constitutional law, political science or economics. Even more difficulty arises when the substance of federal theories is discussed. Again, differences between theories may be due to different academic approaches, particularly between understanding federalism as an overall principle or as a more concrete concept of a federal state and, in particular, whether the constituent units of a federal state are states, and, if states, whether they are sovereign.[4]

In the face of such academic hurdles, it must be remembered that the comparison of federal systems is an important method to develop the theory of federalism. Despite apparent differences, all theories of federalism are more or less based on a small number of historic prototypes that serve as model federal systems.[5] The analysis of the historic prototypes and their comparison to other, similar systems allows us to conceptualize the main characteristics of a federal system. Thus comparison is necessary in order to find out what the crucial elements of federal systems are and to be able to identify systems as federal systems. Moreover, comparative federalism is not just a method ancillary to the theory of federalism, but has become a subject is its own right.[6] International think-tanks on federalism, global networks and associations dealing with a wide range of matters related to federalism focus on comparison as their prime research goal.[7] Under the aegis of international conferences and projects, much comparative research has been published on this topic, particularly in the last 10 years.[8] Quite often, however, comparative research amounts to rather similar overviews of federal systems and their *practical* political problems. More *theoretical* works on federalism, for which in particular German theory has been famous, are somewhat supplanted by mainstream interna-

[4] See *infra* C.I.

[5] Reference has particularly been made to the United States, Switzerland and the German Empire. See, *e.g.*, *The Federalist Papers of 1787-88*; ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA (1835, 1840); WHEARE, *supra*, note 1; ALBERT V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 138 (10th ed., 1965). Watts, *supra,* note 1, 2 even refers to the ancient Israelite federal system, similarly, DANIEL J. ELAZAR, FEDERAL SYSTEMS OF THE WORLD XV (2nd ed., 1994).

[6] See Dietmar Braun, *Hat die vergleichende Föderalismusforschung eine Zukunft?*, in JAHRBUCH DES FÖDERALISMUS 2002, 97 (Europäisches Zentrum für Föderalismus-Forschung Tübingen ed., 2002).

[7] See, recently, the "Global Dialogue on Federalism" project of the Forum of Federations and the International Association of Centers for Federal Studies.

[8] See, most recently and comprehensively, HANDBOOK OF FEDERAL COUNTRIES, 2005 (Ann L. Griffiths ed., 2005) and CONSTITUTIONAL ORIGINS, STRUCTURE, AND CHANGE IN FEDERAL COUNTRIES (John Kincaid/G. Alan Tarr eds., 2005). Another very valuable source of information is the ANNUAL YEARBOOK ON FEDERALISM ("Jahrbuch des Föderalismus") published by the Europäisches Zentrum für Föderalismus-Forschung Tübingen (since 2000).

tional studies and rarely gain global attention. It is now imperative to develop a global theory of federalism that is based on the variety of federal systems worldwide, but that approaches these systems with in-depth knowledge and analysis rather than with journalistic compendiousness, and, above all, with a homogeneous terminology.

B. Searching for a Common Definition of Federalism

The lack of a common definition of federalism and altogether of a common terminology clearly lies at the bottom of the problem that a global theory is missing. Unanimously, definitions recognize the etymologic background of the Latin word "*foedus*" meaning "covenant".[9] All theories agree that federalism is a principle that applies to systems consisting of at least two constituent parts that are not wholly independent but together form the system as a whole. Federalism thus combines the principles of unity and diversity ("*concordantia discors*"). The constituent units must have powers of their own and they must be entitled to participate at the federal level. There seems to be consensus to the extent of this minimal definition.[10]

Definitions differ fundamentally as to whether "federalism" is a term used for all kinds of federal (multi-level) systems according to the "integrative" theory[11] of federalism or only for federal nation states. The term seems to be less clear in English than, for example, in German. Whereas the English terminology normally uses the term "federal" or "federalism" for both the abstract principle as such and for a federal state, the German terminology distinguishes between "*Föderalismus*" and "*Bundesstaatlichkeit*".[12] In many instances, definitions that seek to describe the abstract principle involve elements that solely belong to the definition of the federal state. The constituent units are subsumed as the constituent states, "*Länder*", provinces or regions. Their powers are conceived as competences that are distributed by a federal constitution. Their right to participate at the federal level is restricted to the narrower concept of representation via the federal chamber of a national par-

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[9] See, most recently John Kincaid, *Comparative Observations*, in CONSTITUTIONAL ORIGINS, STRUCTURE, AND CHANGE IN FEDERAL COUNTRIES, 409 (JOHN KINCAID/G. ALAN TARR EDS., 2005). The terminological history is reflected by ERNST DEUERLEIN, FÖDERALISMUS 11 (1972).

[10] For summary, see, Gamper, *supra,* note 1, 44.

[11] On the works of Pierre Joseph Proudhon and, in particular, Alexandre Marc, see, *e.g.*, Ferdinand Kinsky, *Le fédéralisme integral*, in LE FÉDÉRALISME ET ALEXANDRE MARC, 70 (Centre de Recherches Européennes ed., 1974).

[12] See, however, the distinction made by Watts, *supra,* note 1, 6.

liament. A first step towards terminological clarification and homogenization therefore must avoid overlapping definitions.

Even on a more abstract level, doubts remain as to whether there are any other indispensable elements than those already mentioned. Some have suggested the principles of co-ordination, co-operation and subsidiarity.[13] Clearly, the first two principles are required if a federal system is to work efficiently and to remain stable. They may therefore be considered ancillary to the aforementioned requirements; participation at the federal level naturally presupposes some co-operation and co-ordination, and the same might be said for the sharing of powers between the central and the constituent units. As regards the third principle, of subsidiarity,[14] which is strongly based on Althusian ideas and developed by the Encyclical *Quadragesimo Anno*, it does not seem to be indispensable, although it is certainly linked to the theory of federalism. Surely, subsidiarity gives an additional value to the principle of federalism in so far as powers should not be just shared between various levels, but be shared according to the criteria of efficiency, suitability and interest. A lower tier should not be responsible for exercising powers simply because the power was attributed to its level, but because it is in the interest of that tier to exercise it, and because the best and most efficient exercise of this power is guaranteed by this tier. However, if the empowered tier is not the best suited to manage particular power according to the aforementioned criteria, this would not have an immediate effect for the very existence or recognition of the federal system.

On the other hand, federalism should not be reduced to "one of those good echo words that ... may mean all things to all men ... We see the term applied to almost any form of pluralism and cooperation within and among nations."[15] Written in 1970, this statement is today perhaps truer than ever. Again, it is incoherent and vague terminology that causes the problem. In response to this persistent dilemma, Max Frenkel[16] stipulated that researchers on federalism could only be reasonably

[13] See, *e.g.*, Weber, *supra,* note 1, and PERNTHALER, ALLGEMEINE STAATSLEHRE, *supra,*note 3, 290.

[14] See, *e.g.*, JOSEF ISENSEE, SUBSIDIARITÄTSPRINZIP UND VERFASSUNGSRECHT (2nd ed., 2001); KNUT W. NÖRR/THOMAS OPPERMANN EDS., SUBSIDIARITÄT: IDEE UND WIRKLICHKEIT (1997), Christian Calliess, SUBSIDIARITÄTS- UND SOLIDARITÄTSPRINZIP IN DER EUROPÄISCHEN UNION (2nd ed., 1999); PETER BLICKLE/THOMAS O. HÜGLIN/DIETER WYDUCKEL EDS., SUBSIDIARITÄT ALS RECHTLICHES UND POLITISCHES ORDNUNGSPRINZIP IN KIRCHE, STAAT UND GESELLSCHAFT (2002).

[15] IVO DUCHACEK, COMPARATIVE FEDERALISM 190 (1970). See also Hans Maier, *Der Föderalismus - Ursprünge und Wandlungen*, Archiv des öffentlichen Rechts (AÖR) 213, 215 (1990) and Neil Walker, *Beyond the Unitary Conception of the United Kingdom Constitution?*, PUBLIC LAW 384, 390 (2000).

[16] See MAX FRENKEL, FÖDERALISMUS UND BUNDESSTAAT, VOL. 1: FÖDERALISMUS 76 (1984). Even more radically, Anthony H. Birch, *Approaches to the Study of Federalism*, 14 POLITICAL STUDIES 15 (1966): The

expected to clarify their own individual understanding of federalism and to observe a certain "terminological economy", i.e. not to use different terms for the same matter. Although even this standard is not observed by all, it nevertheless seems to demand too little. The aim of scholarship on comparative federalism should not primarily be to create a variety of "autonomous" definitions, but to use terminology that is compatible with existing - and also future - scholarly research in this arena.

C. Theoretical Approaches to Defining a Federal State

I. The Relevance of Sovereignty and Statehood

Despite the heterogeneity of terms, federalism as an abstract, universal principle is in truth much more undisputed than federalism as an applied principle that concretely underlies a federal state. This is partly due to the fact that a different focus is set by the relevant academic disciplines, in particular political science and constitutional law, so that more emphasis is put either on the political practice or on the legal norms that establish the federal system. Even within the respective disciplines, however, no unanimity exists as to what the essentials of a federal state are. Usually, federal states may be defined in two different ways, namely on an abstract level that deals with qualities such as hierarchical composition, statehood and sovereignty and on a more concrete level that explores the institutional elements of federal states. In particular, the Germanic[17] tradition of federal theory has considerably elaborated the criteria of statehood and sovereignty. Especially in the 19th and 20th century, a serious dispute arose between those that believed that the constituent parts of a federal state were states themselves (dualistic theories) and those that attributed this quality only to the state as a whole (monistic theories).[18] Fewer scholars adhered to the concept of the so-called "three-circle-federalism",[19] with the federation and the constituent units (and their respective constitutions) on an equal level, beneath the state as a whole (or the overall constitution of the federal state).

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meaning of federalism "in any particular study is defined by the student in a manner which is determined by the approach which he wishes to make to his material".

[17] Within this context, the Germanic tradition roughly comprises the German, Austrian and Swiss theory of federalism.

[18] See, with more detail, PERNTHALER, ALLGEMEINE STAATSLEHRE, *supra,* note 3, 294; Koja, *supra,* note 3; Gamper, *supra,* note 1, 50; KARL WEBER, KRITERIEN DES BUNDESSTAATES 65 (1980).

[19] Above all, HANS KELSEN, DIE BUNDESEXEKUTION (1927) and HANS NAWIASKY, ALLGEMEINE STAATSLEHRE, part 3 159 (1956).

Statehood, however, was conceived differently by the various theories, sometimes confused with sovereignty, sometimes even deprived of any significance.[20]

Clearly, the concept of federalism requires a distinction between the statehood of federal states (the state as a whole) and the statehood of the constituent units (or the central state), as this would otherwise create a confederal system. The constituent units exercise state power, without which they could not exercise their competences through their own authorities, but only within the limits set by the federal constitution. If, however, state power is identified with sovereignty, as has been done by many, and most of them with a slightly different understanding of sovereignty,[21] then, of course, problems will arise particularly as to the difference between "external" and "internal" sovereignty.[22] In a federal system, no constituent unit may enjoy full external sovereignty, which is a characteristic of an independent state under international law, whereas limited external powers are compatible with federalism. As regards internal sovereignty, a distinction must again be made between the internal self-determination of a constituent unit and state power as delegated by the federal constitution. The first meaning refers to the traditional genesis of federal systems, namely that of combining various independent units to a federal system (*i.e.* a process of centralisation), whereas a federal system that emerges from decentralising a former unitary state is not based on the previous self-determination of a constituent unit. Again, however, if a constituent state retains full self-determination, this would be incompatible with the supremacy of the federal constitution and on the whole amount to confederalism. The second meaning of internal sovereignty also relies on a concept of limited sovereignty, since it is inherent in the delegation of state power by the federal constitution that this delegated power is subject to the limits drawn by the federal constitution itself.

Due to this variety of meanings, sovereignty is another issue of severe academic dispute. Whereas some of those that believe the constituent units to be states also believe them (as well as the federal state itself) to be sovereign,[23] others acknowl-

[20] The most radical approach was perhaps taken by the Viennese School of Legal Positivism that found the term "state" obsolete and replaced it by "legal system" (see infra note 26).

[21] See the attitudes of GEORG WAITZ, GRUNDZÜGE DER POLITIK (1862) and HANS NAWIASKY, DER BUNDESSTAAT ALS RECHTSBEGRIFF 48 (1920), discussed by Koja, *supra,* note 3, 68 and Gamper, *supra,* note 1, 52.

[22] See, most recently, Albrecht Randelzhofer, *Staatsgewalt und Souveränität*, in HANDBUCH DES STAATSRECHTS DER BUNDESREPUBLIK DEUTSCHLAND, VOL. II: VERFASSUNGSSTAAT, 143 (JOSEF ISENSEE/PAUL KIRCHHOF EDS., 3rd ed., 2004) and UTZ SCHLIESKY, SOUVERÄNITÄT UND LEGITIMITÄT VON HERRSCHAFTSGEWALT (2004).

[23] Following de Tocqueville see, *e.g.*, Waitz, *supra,* note 21, 153; *id.*, *Das Wesen des Bundesstaates*, Allgemeine Monatsschrift für Wissenschaft und Literatur 494 (1853).

edge their statehood, but not their sovereignty.[24] In the latter case, only the federal state as a whole is believed to be sovereign, because sovereignty is considered to be indivisible and typical only of independent states as international law subjects. The "constitutional compact theory",[25] in its turn, regarded only the constituent units, and not the federal state, as the true bearers of sovereignty which approaches the concept of confederalism rather than federalism. According to the monistic "decentralisation theory" of the Viennese School of Legal Positivism,[26] the constituent units are neither states nor sovereign, but just decentralized units on a scale that makes no qualitative difference between local government and a constituent unit of a federal system. Federalism is thus not seen as a distinct principle of its own, but as a mere emanation of the principle of decentralisation that may either create a federal system or a unitary state with only administrative regions or local government. The same theory emphasizes the normative character of a state that is identified – and thereby reduced, as it seems – with a legal system. According to this concept of "pure" normativism, a federal state is nothing but a legal system establishing this state, whereas the historical foundation or political practice of the federal state are considered to be of no significance. The School of Legal Positivism was founded by Hans Kelsen[27] who together with Hans Nawiasky,[28] is the most prominent representative of the theory of "three-circle-federalism". Nevertheless, Kelsen's "three-circle"theory slightly differs from "decentralisation theory", as Kelsen does not only recognize the legal orders of the central and constituent units, but also the legal order of the state as a whole. The three circles cannot, however, be applied to a unitary state with only a central and a local level.

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[24] See GEORG MEYER, STAATSRECHTLICHE ERÖRTERUNGEN ÜBER DIE DEUTSCHE REICHSVERFASSUNG (1872); GEORG JELLINEK, ALLGEMEINE STAATSLEHRE 751 (2nd ed., 1905); SIEGFRIED BRIE, THEORIE DER STAATENVERBINDUNGEN 112 (1886); PAUL LABAND, DAS STAATSRECHT DES DEUTSCHEN REICHES, VOL. I, 62 (5th ed., 1911).

[25] See THE WORKS OF JOHN C. CALHOUN, VOL. 1 (Richard K. Crallé ed., 1858); Max v. Seydel, *Der Bundesstaatsbegriff*, ZEITSCHRIFT FÜR DIE GESAMTE STAATSWISSENSCHAFT 185 (1872).

[26] Adolf J. Merkl, *Zum rechtstechnischen Problem der bundesstaatlichen Kompetenzverteilung*, 2 ZÖR 336 (1921); *id.*, *Zur deutsch-österreichischen Verfassung*, Zeitschrift für Verwaltung 28 (1921); HANS KELSEN, DAS PROBLEM DER SOUVERÄNITÄT UND DIE THEORIE DES VÖLKERRECHTS 287 (1928); *id.*, REINE RECHTSLEHRE 315 (reprint 2000); ROBERT WALTER, ÖSTERREICHISCHES BUNDESVERFASSUNGSRECHT 108 (1972); Rudolf Thienel, *Ein „komplexer" oder normativer Bundesstaatsbegriff?*, 42 Austrian Journal of Public and International Law (AJPIL) 215 (1991); *id.*, Der Bundesstaatsbegriff der Reinen Rechtslehre, in SCHWERPUNKTE DER REINEN RECHTSLEHRE, 123 (Robert Walter ed., 1992); similarly, Koja, *supra,* note 1,91; *id.*, ALLGEMEINE STAATSLEHRE 346 (1993).

[27] See, within this context, particularly Kelsen, *supra,* note 19; *id.*, ALLGEMEINE STAATSLEHRE 199 and 208 (1925).

[28] HANS NAWIASKY, DIE GRUNDGEDANKEN DES GRUNDGESETZES FÜR DIE BUNDESREPUBLIK DEUTSCHLAND 35 (1950); *id.*, *supra*, note 19, 159

Kelsen's theory seems to achieve a compromise between the monistic and dualistic theories and evades the criteria of statehood and sovereignty that are not crucial to the theory of the three circles. What makes this theory less convincing, however, is the lack of evidence of the existence of the third circle, *i.e.* the "overall constitution". Kelsen argued that the procedures for creating overall constitutional law were identical with those of creating federal constitutional law and that the legislative organs involved in the procedures of creating overall constitutional law were identical with those involved in the creation of federal constitutional law. This goes hand in hand with the fact that "overall constitutions", in contrast to federal constitutions, are usually unknown to federal states, and that, therefore, partial identity of overall and federal constitution seems to be a highly fictitious suggestion. Due to their overlapping nature, provisions regarding the distribution of powers or joint bodies of the federation and the constituent units materially belong to the sphere of overall constitutional rather than to federal constitutional law. There are only rare instances, where overall constitutional law may be formally detected within the framework of federal constitutional law, e.g. if joint constitutional laws of the federation and the constituent units are necessary for certain amendment procedures.[29]

The classical (dualistic) theories of federalism conceive a federal state as a dual system that consists of the federation and the states. The local level, although regularly present in all federal states and multi-tier-systems and sometimes enshrined even by the federal constitution,[30] does not constitute the federal state and is thus not regarded as a theoretical precondition of a federal system. By the decentralisation theory, the difference between a federal state and local government within a unitary state is only one of degree. This notion is incompatible with the classical theories of federalism that distinguish between the quality of a constituent unit and, for instance, a municipality. However, federalism very much affects local government, both legally and politically. The impetus for this seems to stem from fiscal federalism that regularly affects and involves local government, the federation and the constituent units, but also from asymmetric federalism where some municipalities, such as large towns or capitals, are at the same time recognized as constituent units. Nevertheless, municipalities cannot generally become equal "third" partners[31] within the federal system. Even if statehood and sovereignty - factors that munici-

[29] See, e.g., Art 3 of the Austrian Federal Constitutional Act (*Bundes-Verfassungsgesetz*), which stipulates that certain territorial changes need the joint enactment of a federal constitutional act and constitutional acts of the concerned *Länder*.

[30] See Kincaid, *supra,* note 9, 438.

[31] See, most recently, Karl Weber, *Zwei- oder dreigliedriger Bundesstaat? Bemerkungen zur Stellung der Gemeinden in einer möglichen künftigen Bundesverfassung*, in VOM VERFASSUNGSSTAAT AM SCHEIDEWEG, 413 (*id.*/NORBERT WIMMER EDS., 2005).

palities clearly are deficient of - are not regarded as essential preconditions of a federal system, municipalities - except those large agglomerations that are constituent units at the same time - lack legislative competences which are indispensable 'threshold criteria' for the constituent units of a federal system. Administrative units, such as municipalities, districts or, in some countries, even regions, do not partake in legislative power-sharing which is essential to the policy-making power of the constituent units of a federal system.

II. Institutional Definitions

1. Relevant Elements

The hey-day of theoretical disputes on statehood and sovereignty is over, and a dualistic approach seems to be prevailing worldwide.[32] Definitions of federalism nowadays attempt to use more concrete and more institutional criteria.[33] All of them seek to describe the essential elements of a federal state. Comparative federalism is an indispensable method to find out which institutional elements are crucial to all federal systems and which are peculiar only to some of them. These elements need to reflect the abstract criteria - that are applicable for *any* federal system - at the concrete level of a federal state. One of the reasons why, even within this context, no common definition has been established, is that abstract criteria of federalism and concrete criteria of federal states are frequently used without distinction, or that emphasis is put only on some of them, whereas others are neglected. Quite paradoxically, there exists hardly any acknowledged definition of the institutional criteria of a federal state in the international arena, although the extract of many definitions reveals a common standard with only marginal differences.[34] According to this common institutional standard, the distribution of powers between the central and the constituent units, the participation of the constituent units at the central level of legislation, the constitutional autonomy of the constituent units, fiscal equalisation as well as intergovernmental instruments are inherent in every federal state.[35]

Taking a closer look at these elements, it appears, however, as if some of them could finally be subsumed under others and as if the distribution of powers and the

[32] As for Germany, see, in particular, the famous judgment of the *Bundesverfassungsgericht* (BVerfGE 13, 54) and, for a summary, see Jestaedt, *supra,* note 1, 794.

[33] See, *e.g.*, Weber, *supra,* note 18, 87; Gamper, *supra,* note 1, 60.

[34] See, for a summary, Gamper, *supra,* note 1, 62.

[35] See Watts, *supra,* note 1, 7; PERNTHALER, ÖSTERREICHISCHES BUNDESSTAATSRECHT, *supra,* note 3, 299.

participation of the constituent units at the central level of legislation are the two most essential elements of a federal state.[36] Constitutional autonomy as well as autonomous taxation rights of the constituent units form part of the distribution of powers, that, in a wide sense, is also connected with intergovernmental instruments of co-operation and co-ordination needed for the prevention and solution of competence conflicts. In addition, the participation of the constituent units at the central level of legislation involves these latter two elements, since it is usually a second chamber of the central parliament that represents the constituent units and their interests in central policy-making.

2. Federalism and Regionalism

In the following, the institutional elements of federal states shall be elaborated by using a comparative method. Currently, there are about thirty federal states, including the United States, Canada, Switzerland, Germany, Austria, Belgium, Australia, South Africa, Nigeria, India, Indonesia, Malaysia, Mexico, Argentina and Brazil.[37] It is not possible to determine an exact number, since some countries that are frequently numbered as federal states lack the political requirements that would be needed if federalism is to work effectively, even though the (federal) constitution seems to provide a federal system. In other cases, federalism is a more or less embryonic principle underlying either states that have been decentralised[38] or confederacies that step by step turn into a federacy[39]. In recent years, many European states have gone through a process of strong decentralisation ("regionalisation"), without being generally admitted to the classification as federal states.[40] In some cases, due to the lack of a representative chamber or to the lack of legislative competences of the constituent units, the classical distinction between a federal state and a regional state is still adequate, whereas in other cases the only reason for denying classification as a federal system seems to lie in its historical develop-

[36] See Anna Gamper, *"Arithmetische" und "geometrische" Gleichheit im Bundesstaat*, in DER VERFASSUNGSSTAAT AM SCHEIDEWEG, 143, 147 (KARL WEBER/NORBERT WIMMER EDS., 2005).

[37] See the most recent list made by THOMAS FLEINER/LIDIJA R. BASTA FLEINER, ALLGEMEINE STAATSLEHRE (3rd ed., 2004) 554.

[38] See, *e.g.*, in Europe particularly Spain and Italy, to a much lesser degree the United Kingdom and France.

[39] The most prominent example is the European Union, at least with a view to the Treaty Establishing a Constitution for Europe which, however, is unlikely to enter into force (see *infra,* note 80).

[40] See, *e.g.*, Peter Häberle, *Föderalismus und Regionalismus in Europa,* 10 ERPL 299 (1998); with many further references, Gamper, *supra,* note 1 and Dian Schefold, *Zur Gestalt der Region*, in EUROPA UND SEINE VERFASSUNG, 288 (CHARLOTTE GAITANIDES ET ALII EDS., 2005).

ment.[41] Much emphasis has been put on the foundation act of a federal state that, according to the classical theory, was based on the agreement of the hitherto independent constituent units that joined the new state which was given a federal constitution.[42] If, however, the state was originally founded as a unitary state it is often treated as a merely "regionalized" system, even though the constitution has meanwhile been strongly decentralized, adopting the same institutional characteristics that are peculiar to federal states.

This article suggests focusing on the process of decentralisation even if this might neglect the historical foundation act. If all institutional elements of a federal state are henceforth provided by the decentralized constitution *and* if it is granted that these elements must not be amended or abolished without the (direct or indirect) consent of the constituent units, the distinction between a federal and a strongly regionalized state will then seem to be highly artificial and even obsolete. The decision whether to classify states as either "regionalized" or "federal" should therefore be taken more carefully. There is no need to abstain at all from using the term "regional(ism)", but it should be used distinctly and complementarily, not brought into a misleading, overlapping context with federalism.

3. The Distribution of Competences

a) The Separation of Powers

Whereas in unitary systems powers are solely attributed to the central level, in federal systems powers are divided between the central unit and the constituent units. Other kinds of subnational units, such as municipalities, do not partake in the distribution of competences, but derive their responsibilities from either the central unit or the constituent units. This does not mean that the distribution of powers must be a uniform and single system. Asymmetric[43] federal systems usually provide more than one distribution system, since there are several kinds of constituent units not all of which are vested with the same powers. In principle, all kinds of

[41] Belgium is now generally admitted to the arena of federal states, although it took some time to recognize it as such, which may be due to the long and various stages of its decentralisation process.

[42] The traditional idea was that a federal state was created by the voluntary agreement of independent states (constitutional compact) which, however, raises questions as to the states' right of secession (see, with references, Kincaid, *supra,* note 9, 442).

[43] See, from a comparative perspective, Peter Pernthaler, *Asymmetric Federalism as a Comprehensive Framework of Regional Autonomy*, in HANDBOOK OF FEDERAL COUNTRIES, 2002, 472 (Ann L. Griffiths ed., 2002); Roland Sturm, *Aktuelle Entwicklungen und Schwerpunkte in der internationalen Föderalismus- und Regionalismusforschung*, in JAHRBUCH DES FÖDERALISMUS 2000, 29, 31 (Europäisches Zentrum für Föderalismus-Forschung Tübingen ed., 2000); Watts, *supra,* note 1, 63.

powers – i.e. legislative, administrative and judiciary powers – may be distributed between the central unit and the constituent units, which creates a "vertical separation of powers" across the lines of the "horizontal separation of powers".

Clearly, legislative and administrative powers of the constituent units are indispensable for a federal system. Without legislative powers, the constituent units would lack policy-making power of their own,[44] and administrative powers are needed to implement their policies or, additionally, to execute administrative matters that fall into the federal legislative sphere either as their own administrative responsibility ("decentralised administration") or on behalf of the central unit ("indirect federal administration").[45] In both cases, the attribution of powers goes hand in hand with a certain institutional structure that ensures that the constituent units may exercise their powers through their own authorities. They need parliaments of their own in order to exercise their legislative powers, and they require administrative authorities for their executive tasks. The federal constitution may either set up their institutional structure in detail or empower their own (constitutional) legislation[46] to provide for these bodies that are indispensable and inseparably linked to the distribution of powers. Judiciary powers, however, may be centralised at the federal level without affecting the federal state. Indeed, comparison shows that the constituent units very often do not have their own judiciary.[47]

b) Methods of Enumeration and Residual Competence

Generally speaking, there are two methods of distributing powers: Enumeration of powers and residual competence. A residual competence is necessary for systematic reasons, since all powers should be attributed to either the one or the other level without leaving matters that fall under no competence at all. Only one kind of tier – i.e. either the central unit or the constituent units – may hold the residual competence, although it is not excluded that both tiers are vested with enumerated powers, which then adds to one unit's residual competence. Usually, the constitu-

[44] See, with more analysis, Gamper, *supra,* note 1.

[45] See Kincaid, *supra,* note 9, 424.

[46] See *infra* C.II.3.c.

[47] As regards supreme or constitutional courts, which regularly also serve as umpires for conflicts between the central unit and the constituent units, it is often provided that the constituent units may take some influence, *e.g.* on the nomination of judges. See Watts, *supra,* note 1, 100 and Kincaid, *supra,* note 9, 431.

ent states hold the residual competence.[48] This is often seen as a symbolic token of the historic sovereignty of the constituent units whose original competence remains even though reduced by those powers that were attributed to the central level.

According to some,[49] the residual competence of the constituent states is due to the principle of subsidiarity that they believe to be a principle underlying all federal systems. Whether or not one shares the opinion that the principle of subsidiarity is inherent in federalism in general, it is surely wrong to relate the residual competence to the principle of subsidiarity which demands that all subject-matters that are in the interest of and exercised most adequately by the lower tier should be their competence. However, the quantity and quality of matters falling into the residual clause totally depends on which competences are enumerated in favour of the other tier.[50] It *may* be that powers falling under the residual clause of the constituent units are those that should be attributed to them according to the principle of subsidiarity, but there is no logical need for such coincidence. The residual competence is merely an instrument for accommodating powers irrespective of their content, whereas subsidiarity is a principle that accommodates powers according to certain values and substantive criteria. It is possible and not infrequent that powers that should belong to the lower tier according to the principle of subsidiarity are enumerated as federal matters. The same is possible vice versa. There is also no convincing practical evidence that would argue for the principle of subsidiarity as an indispensable element of all federal states. Due to the very abstract definition of lower-tier powers which the principle undertakes to give one cannot even deduce which concrete matters should fall under the constituent units' residual competence in individual cases. It simply depends on factors such as size, population, economy and political system, whether a certain matter should best be performed by the constituent unit or rather by the central state in a concrete state. Since the dimensions of constituent units may vary enormously from state to state, the same matter may be adequate as a competence for the lower tier in one case, but not in the other.

It is not surprising, therefore, that comparing the powers of constituent units in federal systems worldwide, they are all but identical.[51] The central unit is usually

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[48] See Heinz Schäffer, *Die Kompetenzverteilung im Bundesstaat*, in BUNDESSTAAT UND BUNDESRAT IN ÖSTERREICH, 65, 68 (Herbert Schambeck ed., 1997). However, the residual power is a central power in Canada, India, South Africa and Belgium (see Kincaid, *supra,* note 9, 424; Watts, *supra,* note 1, 39).

[49] See *supra*, note 13. Sceptically, MARKUS KENNTNER, JUSTITIABLER FÖDERALISMUS 20 (2000); Gamper, *supra,* note 1, 102.

[50] Similarly, Kincaid, *supra,* note 9 425; Watts, *supra,* note 1, 39.

[51] See also Kincaid, *supra,* note 9, 422. Even a comparison between the three classical European federal states - Germany, Switzerland and Austria - shows that the kind and number of the constituent units' subject-matters vary considerably between them.

competent for matters such as foreign affairs,[52] internal security, defence or immigration, but in many cases the list of enumerated federal powers is much longer, concerning e.g. civil and criminal law, industry and economy, health, environmental and social matters as well as transportation.[53] The residual powers of the constituent units vary accordingly. It would seem as if certain matters regarding nature and environment, agriculture, welfare matters and local government would regularly fall into the competence of the constituent units.[54] However, there are also exceptions to this rule, where these subject-matters are shared between the central unit and the constituent units. There might even be cases where the constituent units are vested with powers that they ought not to have following the principle of subsidiarity, but which nevertheless make them stronger than without them. The idea of federalism is not necessarily that of accommodating powers most adequately and efficiently, but rather that of not leaving the constituent units deprived of powers of their own. The residual competence of the constituent units, though this may in some cases evoke reminiscences of their former sovereignty, neither implies a wide range of important powers nor the historical creation of the federal state through the voluntary union of formerly independent units. Proof of this is given in those ex-post-decentralised states that have or have not approached the status of federal states, but whose constitutions nevertheless provide a residual competence of the lower tier.[55]

The relationship between enumerated and residual powers is complex. Several kinds of distribution systems exist: Competences may be split between the legislation and execution of a matter, which means that either the constituent units perform the execution of a matter that falls into the legislative power of the central unit or vice versa. Quite often, legislative matters are divided between central and constituent units, enabling the first to enact framework legislation to be implemented by legislative acts of the latter. This is regularly accompanied by rules that provide for at least transitional transfer of powers if the implementing entity is delayed. Much more difficulty arises if both tiers share the identical subject-matter (concurrent competence) under certain clauses, such as the central unit's competence to enact legislation instead of the constituent units that would normally be responsible if there is "need" for uniformity, or the constituent units' competence to enact legis-

[52] Foreign affairs may sometimes be a shared power: From a comparative perspective, see Watts, *supra,* note 1, 40; Kincaid, *supra,* note 9, 434, and the comparative chapters in DIRITTO PUBBLICO COMPARATO ED EUROPEO, issue II, 2004.

[53] See, *e.g.*, Watts, *supra,* note 1, 40 and Kincaid, *supra,* note 9, 422.

[54] See also the examples listed by Watts, *supra,* note 1, 40.

[55] See, for instance, Art 117 para 4 of the Italian Constitution; without prejudice to the UK parliament's sovereignty, Art 29 of the Scotland Act 1998.

lation as long as the central unit has not exercised its concurrent power to do so. Furthermore, both tiers may be responsible for different aspects of the same subject-matter. Although the competence itself is not the same, its exercise strongly affects that of the related competence so that harmonized legislation is needed. Such harmonisation rules frequently result from the jurisdiction of constitutional courts,[56] but must not deprive an entity of exercising its power unless it would excessively undermine the other entity's policies. In some cases, even ancillary rules in order to support the legislation of the other tier are permitted, although the competence for enacting these rules lies with the other entity.[57] The main problem with shared competences, however, is that abstract subject-matters may be too vaguely formulated so that a legislature remains in doubt whether a provision falls under its own power or rather under that of the other tier. Such cases may often be referred to constitutional courts or other umpires that decide what a subject-matter comprises in detail, thereby often applying (or inventing, which may be methodically questionable) subtle and highly sophisticated interpretation rules. Some federal constitutions empower the courts to pre-enactment scrutiny of drafted laws, whereas others only provide for the retroactive repeal of laws that were enacted.[58]

The practical importance of regional powers also depends on whether the central unit takes influence on the constituent units' law-making process and even administrative acts. Although the distribution of powers is not formally affected if a central unit is granted participatory or supervisory rights, such as pre-legislative scrutiny over bills passed by the regional parliaments, veto rights etc, this may seriously challenge the exercise of power by the constituent units.[59] The real extent of power is therefore not only a methodical question of distributing and interpreting powers, but also of the way that they are exercised.

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[56] From a comparative perspective, JENS WOELK, KONFLIKTREGELUNG UND KOOPERATION IM ITALIENISCHEN UND DEUTSCHEN VERFASSUNGSRECHT (1999); *id.*, *Die Verpflichtung zur Treue bzw Loyalität als inhärentes Prinzip dezentralisierter Systeme?*, 52 Zeitschrift für öffentliches Recht (ZÖR) 527 (1997); HARTMUT BAUER, DIE BUNDESTREUE (1992). However, distinction must be drawn between the principle of mutual consideration, based on the co-operation and co-ordination of both central and constituent units - as expressed, for instance, by the Austrian Constitutional Court (see, *e.g.*, cases VfSlg 10.292/1984; 15.552/1999) - and the unilateral principle of "federal loyalty" („*Bundestreue*").

[57] See, lately, PERNTHALER, ÖSTERREICHISCHES BUNDESSTAATSRECHT, *supra,* note 3, 344. See also the doctrine according to which ancillary law of another legislature is not outside competence if it is necessary to give effect to the purpose of the provisions enacted by the competent legislature (See, *e. g.*, Part I Schedule 4 to the Scotland Act 1998).

[58] See, from a comparative perspective, Kenntner, *supra,* note 48.

[59] Vice versa, the constituent units are represented at the federal level (see *infra*, C.II.4), but this is inherent in a federal system, whereas strong (and unilateral) federal supervision is much more typical of non-federal decentralized systems (see the distinction made by PERNTHALER, ÖSTERREICHISCHES BUNDESSTAATSRECHT, *supra,* note 3, 483).

c) Constitutional Autonomy

A particular kind of legislative competence is the constitutional autonomy of the constituent units. From a formal perspective, constitutional autonomy means that the constituent units are allowed to enact constitutional laws with a qualified quorum, majority or other formal quality that distinguishes them from ordinary laws. As regards content, constitutional autonomy is not just *any* legislative competence but the power to legislate in the constitutional arena of the constituent unit, i.e. namely its organisation (parliament, executive, other bodies), legislative procedure, local government, supervision and control, fundamental rights etc.[60] Constitutional autonomy, therefore, is of particular importance to the policy-making power of the constituent units. As the federal constitution is the supreme norm, however, the constitutions of the constituent units must be in conformity with the federal constitution. Their constitutional autonomy may therefore be more or less limited by the federal constitution,[61] either being restricted to legislate in certain enumerated fields or in all fields that do not affect federal constitutional law. The essence of constitutional autonomy does not amount merely to the repetition or detailed implementation of the federal constitution, but to create solutions of its own that are not provided by the federal constitution and to legislate in fields that are neglected by the federal constitution. In some cases, however, it is easier to evade violating the explicit text of a federal constitution rather than certain immanent federal constitutional principles that are to be observed by the constituent units in spite of their hidden nature.[62]

d) Fiscal Federalism

Fiscal federalism describes the financial relations between all tiers of a federal state and consequently the distribution of competences. This distribution involves the following key questions: Which tier is competent to adopt legislation on fiscal equalisation? May the other tiers participate in the (pre)legislative process? Which tier may levy taxes, receive revenues and finance certain matters?

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[60] See, e.g., Kincaid, *supra,* note 9, 437; FRIEDRICH KOJA, DAS VERFASSUNGSRECHT DER ÖSTERREICHISCHEN BUNDESLÄNDER (2nd ed., 1988); lately, Gamper, *supra,* note 1, 91.

[61] See Kincaid, *supra,* note 9, 437. The constitutional autonomy of the constituent units is particularly restricted in Brazil, Mexico, South Africa and Belgium.

[62] See, *e.g.*, the restrictive case law of the Austrian Constitutional Court (Anna Gamper, *The Principle of Homogeneity and Democracy in Austrian Federalism: The Constitutional Court's Ruling on Direct Democracy in Vorarlberg*, in PUBLIUS – THE JOURNAL OF FEDERALISM 45 [2003]).

Political economy of federalism and fiscal federalism have become one of the most extensive and difficult interdisciplinary fields of research on federalism, where the concepts of asymmetry, competition and co-operation play an important role.[63] It is also the field where lower tiers that do not normally participate in the federal system, such as municipalities, are exceptionally admitted to enter the arena of federalism as "third partners".[64] Clearly, the financial relationship between the central unit and the lower tiers are of paramount importance to the federal system as a whole. Financial stability and equalisation as well as co-operation between the tiers are the basis for an effective federal system. The distribution of competences is not complete if it lacks rules that divide financial powers between the central and constituent units. If the constituent units that need resources to finance their responsibilities gain them mainly from subsidies that are allotted to them by the central unit (which may be accompanied by certain conditions that restrict their spending-power) the fiscal arrangement will resemble a decentralised non-federal system more than a federal state that theoretically presupposes some degree of financial autonomy of the constituent units, *i.e*. the power to raise taxes and spend revenues of their own.[65]

e) Intergovernmental Relations

Instruments of intergovernmental co-operation and co-ordination smooth out conflicts that may follow from the distribution of powers.[66] In particular, these conflicts may be due to incoherent legislation, abuse of powers, excessive supervisory rights of the central unit or financial inequality. Among the most important instruments of co-operation and co-ordination, federal constitutions provide for formal, legally binding concordats or at least informal agreements between the central unit and the constituent units or between the constituent units themselves, joint meetings and bodies as well as principles of mutual consideration and loyalty. In a wider sense, also constitutional courts or other bodies responsible for deciding conflicts between the tiers, thereby being obliged to take the attitude of a neutral arbiter towards both of them, contribute to a co-ordinate system of federalism.

[63] See Sturm, *supra,* note 43, 34.

[64] See *supra*, C.I.

[65] See PERNTHALER, ÖSTERREICHISCHES BUNDESSTAATSRECHT, *supra,* note 3, 391.

[66] See Kincaid, *supra,* note 9, 432; Watts, *supra,* note 1, 57; PERNTHALER, ÖSTERREICHISCHES BUNDESSTAATSRECHT, *supra,* note 3, 433.

4. Participation at the Federal Legislative Level

Apart from having their own competences and institutional structure, the constituent units also need to participate at the federal level. Participation is indispensable for every federal system, since the two tiers would otherwise constitute isolated systems of their own. In a compounded federal system, the constituent units must have some influence on federal policy-making in general, and essentially when federal policy-making affects the federal constitution and therefore the future status of constituents. Vice versa, it could be argued that the central unit should also participate in the sphere of the constituent units. However, another difference between a federal and a regional state is that in the first case central participation at the lower level ought to be as restricted as possible, whereas extensive and unilateral supervisory rights of the central unit are typical of regional systems.[67] If, in a federal state, the central unit may, for instance, regularly veto drafted laws of the constituent units, this will not formally affect the federal arrangement. However, it will undermine the distribution of powers and challenge the federal system as a whole, since the exercise of legislative power, though formally remaining in the sphere of the constituent unit, is subject to the assent of the central unit.

Generally, there are two possible ways for the constituent units' participation at the federal level, namely direct or representative participation.[68] Although there may be instances where executive acts of federal bodies need the approval of the constituent units, participatory rights mainly relate to the level of federal legislation. Direct participation would allow the constituent units to take part in the federal legislative process through their own bodies, *i.e.* parliaments and executives. This is highly unusual. Clearly, direct participation would create extremely cumbersome procedures and not at all lead to a less separate, more integrated federal system. The usual option, therefore, is the constituent units' representation through a second chamber of the federal parliament. The federal second chamber,[69] though be-

[67] See *supra,* note 59.

[68] See, lately, Gamper, *supra,* note 36, 153.

[69] See Watts, *supra,* note 1, 92; ROLE AND FUNCTION OF THE SECOND CHAMBER (Ulrich Karpen ed., 1999); DER BUNDESRAT IN DEUTSCHLAND UND ÖSTERREICH (Detlef Merten ed., 2001); Herbert Schambeck, *Zur Bedeutung des parlamentarischen Zweikammernsystems – eine rechtsvergleichende Analyse des „Bikameralismus"*, Journal für Rechtspolitik (JRP) 87 (2003); Senates: Bicameralism in the Contemporary World (Samuel C. Patterson/Anthony Mughan eds., 1999); Gisela Riescher/Sabine Ruß/Christoph Haas, Zweite Kammern (2000); Gisela Riescher, *Do Second Chambers matter? Fragen und Ergebnisse zum internationalen Vergleich bikameraler Systeme,* in JAHRBUCH DES FÖDERALISMUS 2001 (Europäisches Zentrum für Föderalismus-Forschung Tübingen ed., 2001) 87; Nicholas D. J. Baldwin/Donald Shell, Second Chambers (2001); Gamper, *supra,* note 36, 153; Gamper, *Demokratische Legitimation und gewaltenteilende Funktion Zweiter Kammern in der „gemischten" Verfassung*, in Reflexionen zum

longing to the federal parliament, ideally represents the interests of the constituent units in the process of federal law-making. There is a wide range of types of federal chambers, which vary both from an organisational and a functional view. A main difference is that between "perfect" and "imperfect" bicameralism which means that in some federal states the federal chamber has the same powers as the first (national) chamber, whereas in other states the national chamber has superior powers in comparison to the federal chamber. "Imperfect" bicameralism is more usual in federal states, although at least two classical prototypes of a federal system – the United States[70] and Switzerland[71] – stand for a system of "perfect" bicameralism. The advantage of the latter system is that the federal chambers are as strong as the first chambers, whereas one could argue that federal chambers should only be vested with specific powers that relate to their function of representing the constituent units.

Whereas the US Senate and the Swiss *Ständerat* are strong second chambers with more or less the same powers as the respective first chamber, other federal chambers differ from them considerably. Both the Senate and the *Ständerat* are elected directly by the people of the constituent units,[72] and favour a system of symmetric ("arithmetic") representation[73], whereas the members of other federal chambers are not always elected directly, but by the parliaments or governments of the constituent units or by a mixed selection method.[74] Asymmetric ("geometric") representation, where the number of delegates differs according to the number of inhabitants of the constituent units, is common. The historic reason for the "arithmetic" solution in the United States was highly pragmatic and political,[75] but certainly inspires

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Internationalen Verfassungsrecht – Tagungsband zum 1st Vienna Workshop on International Constitutional Law (Harald Eberhard/Konrad Lachmayer/Gerhard Thallinger eds., 2005) 63.

[70] See, *e.g.*, G. Alan Tarr, *United States of America*, in CONSTITUTIONAL ORIGINS, STRUCTURE, AND CHANGE IN FEDERAL COUNTRIES, 381 (JOHN KINCAID/G. ALAN TARR EDS., 2005).

[71] See, e.g., Nicolas Schmitt, Swiss *Confederation*, in CONSTITUTIONAL ORIGINS, STRUCTURE, AND CHANGE IN FEDERAL COUNTRIES, 347 (JOHN KINCAID/G. ALAN TARR EDS., 2005).

[72] In the case of the USA, direct elections of Senators were introduced by amendment XVII (1913), whereas Art 150 of the Swiss Constitution empowers the cantons to decide on the election system (which is regularly a system of direct election).

[73] In the Swiss case an exception is made insofar as the cantons Obwalden, Nidwalden, Basel-Stadt, Basel-Landschaft, Appenzell Ausserrhoden and Appenzell Innerrhoden are represented by just one (instead of two) delegates.

[74] See Watts, *supra,* note 1, 93.

[75] See James Madison in no. 62 of the "*Federalist Papers*" (1788): "But it is superfluous to try, by the standard of theory, a part of the Constitution which is allowed on all hands to be the result, not of

the theoretical argument that all constituent units have to be absolutely equal, irrespective of size or number of population. The supporters of "geometric" representation argue instead that democracy demands proportional representation of all (federal) citizens, although this is usually already granted by the election of the first chamber.[76]

As regards the functions of parliamentary chambers, these are above all legislative powers, but also include certain administrative and even judicial functions. As regards legislative powers, federal constitutions differ as to whether the federal chamber may draft and initiate laws, whether the legislative process may start at the federal chamber or whether the federal chamber has a suspensive or absolute veto. On the whole, the most important power to be exercised by a federal chamber is that of blocking laws, in particular if they would violate the constituent units' interests. In a "perfectly" bicameral system, each chamber would be entitled to assent to a law or, in other words, no chamber could overrule the veto of the other. In an "imperfectly" bicameral system the federal chamber usually has an inferior position to that of the first chamber, which means that at least regarding some kinds of laws the federal chamber's veto may be overruled. An absolute veto, however, may be granted to a federal chamber regarding federal constitutional laws or any kind of law that is of impact to the constituent units' interests. The political behaviour of the federal chamber may even add to a weak representation, as the example of the Austrian *Bundesrat* (Federal Council) shows.[77] Although an absolute veto is granted to the *Bundesrat* in a few cases, the second chamber has never made use of any of these rights, due to the fact that the same predominant political parties whose members vote for a law in the first chamber are represented in the *Bundesrat* and want their members to support the law, even though this may be detrimental to the constituent units' interests. This is one example of how much influence the political system and partisan politics of the political parties may take on shaping the federal system of a country.

On the whole, lack of strong legal powers, political inefficiency and high costs increasingly challenge federal chambers and render reform necessary.[78] It is not sur-

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theory, but 'of a spirit of amity, and that mutual deference and concession which the peculiarity of our political situation rendered indispensable'."

[76] See, with more detail on the equality of the constituent units, Gamper, *supra,* note 36 and MARCUS C. F. PLEYER, FÖDERATIVE GLEICHHEIT (2005).

[77] See, *e.g.*, BUNDESSTAAT UND BUNDESRAT IN ÖSTERREICH (Herbert Schambeck ed., 1997); Heinz Schäffer, *The Austrian Bundesrat: Constitutional Law – Political Reality – Reform Ideas,* in ROLE AND FUNCTION OF THE SECOND CHAMBER, 25 (Ulrich Karpen ed., 1999); DIE ZUKUNFT DER MITWIRKUNG DER LÄNDER AN DER BUNDESGESETZGEBUNG (Peter Bußjäger/Jürgen Weiss eds., 2004).

[78] See Kincaid, *supra,* note 9, 430.

prising, therefore, that the reform of the second chamber is on the political agenda of many states worldwide.[79]

D. Conclusion

A "global theory" of federalism remains absent, although many individual attempts have been made to explore its theoretical nature. Based particularly on the early works of Althusius and Bodin, together with the concept of the prototypical US federal system as expressed in the "Federalist Papers", the 19th and early 20th century may be seen as the hey-day of theoretical analysis of federalism within the German constitutional law tradition. The dialogue on federalism has developed new dyanamics as a result of an increasing global discourse on the subject. Clearly, single-chapter volumes on different federal systems will not suffice for the development of a globally recognized theory, although the knowledge and comparison of individual federal systems is an essential basis for a synoptic view on federalism. The problem is that comparison of concrete federal states does not adequately address highly controversial theoretical questions such as statehood and sovereignty of the constituent units. Rather, such concrete comparison elaborates the institutional criteria that are common to all federal states. The distribution of powers, vesting the constituent units with both legislative and administrative powers, and their participation at the federal legislative level stand out as the two fundamental elements of federal states. In detail, however, federal states vary considerably so that it is hardly possible to identify an in-depth institutional standard unless one recognizes the historic prototype of US or maybe also Swiss federalism.

Apart from the traditional academic challenges, new developments further enrich the complexity of federalism. Nation states increasingly lose sovereignty in favour of international and supranational organisations such as the European Union,[80] which to some extent already displays features peculiar to federal states. This leads back to the initial distinction between federalism as a nation state phenomenon and other kinds of federal systems. Both supra- and sub-national organisations may bear the characteristics of a federal system so that the presence of the two quintessential institutional elements of a federalist structure indicates whether supranational organisations or regionalized states may be classified as federal systems.

[79] See, *e.g.* in Europe, the reform discussion on the second chambers in Italy, Spain, Belgium, Austria, Germany und the UK.

[80] After the unsuccessful referendum in France and the Netherlands, however, a ratification of the Treaty Establishing a Constitution of Europe *(Official Journal C 310 of 16 December 2004)* seems unlikely. A brilliant view on the background and contents of a possible European constitution is given by PETER HÄBERLE, EUROPÄISCHE VERFASSUNGSLEHRE (3rd ed., 2005).

There are, of course, additional substantive criteria to consider. Eclipsing the criteria of sovereignty and statehood, power-sharing and participation are much better suited for benchmarking federal systems. Elaborating these criteria and developing a common understanding of their meanings would provide the crucial foundation for a global theory of federalism.