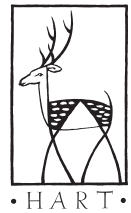
Comparative Federalism

Constitutional Arrangements and Case Law

Francesco Palermo and Karl Kössler



OXFORD AND PORTLAND, OREGON
2017

Hart Publishing
An imprint of Bloomsbury Publishing Plc

Hart Publishing Ltd
Kemp House
Chawley Park
Cumnor Hill
Oxford OX2 9PH
UK

Bloomsbury Publishing Plc
50 Bedford Square
London
WC1B 3DP
UK

www.hartpub.co.uk
www.bloomsbury.com

Published in North America (US and Canada) by
Hart Publishing
c/o International Specialized Book Services
920 NE 58th Avenue, Suite 300
Portland, OR 97213-3786
USA

www.isbs.com

First published 2017

British Library Cataloguing-in-Publication Data
A catalogue record for this book is available from the British Library.

ISBN: HB: 978-1-50990-149-4
ePDF: 978-1-50990-151-7
ePub: 978-1-50990-150-0

Library of Congress Cataloging-in-Publication Data

Names: Palermo, Francesco, author. | Kössler, Karl, 1979-, author.

Title: Comparative federalism : constitutional arrangements and case law / Francesco Palermo and Karl Kössler.

Description: Portland, Oregon : Hart Publishing, 2017. | Series: Hart studies in comparative public law ; volume 19 | Includes bibliographical references and index.

Identifiers: LCCN 2017025633 (print) | LCCN 2017027012 (ebook) | ISBN 9781509901500 (Epub) | ISBN 9781509901494 (hardback : alk. paper)

Subjects: LCSH: Federal government—Europe. | Constitutional law—Europe. | Regionalism—Europe. | Sovereignty—Europe. | International and municipal law—Europe.

Classification: LCC KJC5048 (ebook) | LCC KJC5048 .P35 2017 (print) | DDC 342.24/042—dc23

LC record available at https://lccn.loc.gov/2017025633

Typeset by Compuscript Ltd, Shannon
Printed and bound in Great Britain by CPI Group (UK) Ltd, Croydon CR0 4YY

To find out more about our authors and books visit www.hartpublishing.co.uk. Here you will find extracts, author information, details of forthcoming events and the option to sign up for our newsletters.

Contents

Table of Cases

Note that judgments presented in greater detail in the case law boxes are in bold.

Belgium

Constitutional Court

Bosnia and Herzegovina

Constitutional Court

Canada

Judicial Committee of the Privy Council (JCPC) and Supreme Court of Canada

France

Council of State

Germany

Federal Constitutional Court

India

Supreme Court of India

Italy

Constitutional Court

Malaysia

Judicial Committee of the Privy Council (JCPC) and Federal Court of Malaysia

Mexico

Supreme Court of Justice

Nigeria

Supreme Court of Nigeria

Russian Federation

Constitutional Court

South Africa

Constitutional Court

Spain

Constitutional Court

Switzerland

Federal Court

UK

House of Lords, High Court of Justice and Supreme Court of the United Kingdom

USA

Supreme Court of the United States

2

Manifestations

> Federalism is a natural constitution for a body of states which desire union and do not desire unity …[1]

… but, it could be added, the form such a 'natural' constitution takes is deeply influenced by the process that led to its formation.

As described in the previous chapter, federalism is a manifold concept which may have several institutional manifestations and often means different things to different people in different contexts. Nearly all states, with very few exceptions (usually the so-called micro-states) encompass some form of vertical division of powers.[2] At the same time, countless attempts have been made in literature to define the federal state as something opposed to other forms of vertical division of powers and functions. Daniel Elazar and Ronald Watts have tried to capture all these diverse manifestations by using, respectively, the broad umbrella terms 'varieties of federal arrangements' and 'federal political systems'. Both scholars list within these overarching categories different forms of organisation such as unions, federations, confederations, federacies, associated states, condominiums, leagues and joint functional authorities; plus—needless to say—hybrids, ie, combinations of two or more categories.[3] The fact that the manifestations of federalism are extremely diverse and difficult to distinguish was known long before the times of Elazar and Watts. Indeed, some scholars observed as early as 1940 that 'it is not always possible to draw clear and incontestable distinctions … alliance shades into league, league into confederation, confederation into federal state, federal state into unitary state.'[4] This chapter looks at how the toolkit of federalism can be used for very different constitutional purposes and shows that federal and regional states differ essentially in their historical origins, the former being the first manifestation of the federal principle, the latter representing a more recent way in which this principle is used to accommodate territorial pluralism. The historical turning point is represented by the nation state paradigm: when the creation of nation states was the overall trend in order to create bigger, militarily and economically more competitive countries, smaller sovereign

[1] AV Dicey, *Introduction to the Study of the Law of the Constitution*, 6th edn (London, Macmillan & Co, 1902) lxxv.

[2] See M Frenkel, *Federal Theory* (Canberra, Australian National University, 1986) 389.

[3] Beyond these manifestations mentioned by both authors, Elazar also lists consociations and Watts constitutionally decentralised unions. See DJ Elazar, *Federal Systems of the World: A Handbook of Federal, Confederal and Autonomy Arrangements* (Harlow, Essex, Longman, 1991) XVI; R Watts, *Comparing Federal Systems*, 3rd edn (Montréal, McGill–Queen's University Press, 2008) 8f.

[4] H Greaves, *Federal Union in Practice* (London, G Allen & Unwin, 1940) 10.

entities were pushed by historical and political circumstances to pool together in a bigger polity; conversely, when the age of nation states came to an end, the driving forces of federalism shifted from military and economic–industrial supremacy towards a more effective administration and/or accommodation of ethno-cultural or other kinds of differences, thus promoting decentralisation of existing countries.

Further, the chapter describes the most recurrent institutional forms of the vertical division of power. It explores the legally and historically most relevant manifestations of what is to be considered a common phenomenon (confederations, federal states, regional states), and it deals with other, less recurrent forms (associations of states, federacies, devolution), as well as with some important conceptual challenges (the legal meaning of autonomy, the nature of the European Union). Finally, it concludes by warning against simplistic or formalistic definitions of federalism and its manifestations.

2.1 CONFEDERATION

2.1.1 Definition

In times when federations were established by the coming-together of sovereign states, the first aggregative form was the confederation of states.[5] A confederation is a union of independent states that transfer only limited parts of their sovereignty (eg, some defence powers) to a government with an enumerated and rather limited scope of responsibilities. The limitation of scope, however, cannot go as far as to comprise only one goal; thus, it would not be appropriate, for example, to call a defence organisation, such as NATO, a confederation.

Three legal elements are needed for a confederation to exist. First, a confederation is a union of independent states ruled by international law rather than by constitutional law. Second, and consequently, fundamental decisions require unanimity, and each participating state thus has a veto power on every single decision of the confederation. Third, the confederation is financially dependent on funds transferred by the participating states, meaning that it lacks its own revenues. These fundamental elements of a confederation are generally uncontested, and for this reason there is no ambiguity in literature and in political practice as to the irrelevance of the *nomen iuris*: when these conditions are not met, there is no confederation regardless of the name of the polity. Conversely, even if Switzerland, for historical reasons, still calls itself a 'confederation' in Article 1 of its 1999 Constitution,[6] its status as a prototype of the federal state[7] is uncontested.

[5] See M Forsyth, *Unions of States: The Theory and Practice of Confederation* (Leicester, Leicester University Press, 1981). See GJ Ebers, *Die Lehre vom Staatenbunde* (Breslau, M&H Marcus, 1910).

[6] For example, as mentioned in box 0.B, similarly, Australia is still called a Commonwealth (Art 1 of the Constitution of 1901), but it is a federal state, as was the Soviet Union, at least nominally, in spite of being called a union.

[7] See ch 3.3.2.

One of the prototypes of modern confederations was the United States of America between independence in 1776 and the entry into force of its federal Constitution in 1789.[8] More precisely, after the independence of the 13 former colonies, the Articles of Confederation and Perpetual Union were drafted in 1777 and entered into force on 1 March 1781. For the eight years they were in force, the Articles of Confederation created a confederation of American states called the United States of America. The system of government was based on a permanent Congress of the Confederation, more formally called 'the United States in Congress assembled', in which each state had one vote. The Congress was in charge of a limited number of functions, including common defence, setting weights and measures (including currency) and serving as an arbitration court for disputes between states. When the Congress was not in session, a Committee of the States, based on the same principle of equal representation of each state with a rotating presidency, performed the functions of the Government.

2.A The Articles of Confederation

In the Articles of Confederation, the confederal nature clearly comes to the fore: Article 2 stated that '[e]ach state retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this confederation expressly delegated to the United States, in Congress assembled'. Moreover, any change in the Articles of Confederation required unanimity (Article 13). Article 3 further clarified the nature of the Union, affirming that the states formed a 'firm league of friendship with each other, for their common defense, the security of their liberties, and their mutual and general welfare, binding themselves to assist each other, against all force offered to, or attacks made upon them, or any of them, on account of religion, sovereignty, trade, or any other pretense whatever'. The Union was called upon to guarantee to the citizens of each state 'all privileges and immunities of free citizens in the several States; and the people of each State shall have free ingress and regress to and from any other State, and shall enjoy therein all the privileges of trade and commerce' (Article 4). The functions attributed to the Congress were limited to war powers, other important issues of foreign policy (Articles 6 and 9) and a few in the domestic arena (Article 4). Article 8 established that the common treasury had to be supplied by the states 'in proportion to the value of all land within each State', by taxes to be 'laid and levied by the authority and direction of the legislatures of the several States'.

2.1.2 Are Confederations Transitional?

The second most relevant historical example of a confederation, the Swiss confederation, was also eventually replaced by a federal constitution.[9] While its history was much longer as compared to the American case—the origins of the confederation date back to the 'eternal confederal compact' of 1291 among the original cantons as a military and trade alliance—it was nevertheless replaced by a federal constitution

[8] See on this transition, chs 3.2.2 and 3.3.1.
[9] See ch 3.2.1 and 3.3.2.

with a stronger national government in 1848 after the Civil War. The evolution of the two most relevant historical confederations towards a federal state[10] raises the question as to whether confederations are doomed to fail and will necessarily end up centralising in a federal setting that represents, using the terminology of the drafters of the US Constitution, 'a more perfect union'.

Such an approach, however, does not entirely explain confederations and their importance for the federal theory. Like most of the traditional readings of federalism, this approach is biased by the excessive attention paid to certain important historical experiences that tend to be generalised.[11] Following more careful observation, however, it must be noted that, first, no form of government is eternal (in spite of the terminology normally used by constitution drafters), and second, the 'inevitable evolution' from a confederation into a federation tends to be rather common when federal states come together through ever deeper integration of previously sovereign entities, such as in the case of the United States or Switzerland.

Furthermore, confederation is not a transitional step from an imperfect to a more perfect union when it is established as the consequence of the dissolution of a previously more unitary state. One could take the examples of the Commonwealth of Nations (previously known as the British Commonwealth) or of the Commonwealth of Independent States, which are loose and rather non-political associations of sovereign states originating from, respectively, the British Empire and the Soviet Union—although not all former members of these two entities participate in these organisations, and some members of the Commonwealth of Nations were never British colonies.[12] Another recent example is the evolution of Serbia and Montenegro, first established in 1992 as a federation called the Federal Republic of Yugoslavia following the break-up of Yugoslavia, then reconstituted in 2003 as a confederation. The State Union was a very loose confederation, even with separate currencies and economic policies (Montenegro adopted the euro, while Serbia kept the dinar as its currency). Strongly promoted by the EU in an attempt to stave off further conflict in the Balkans, this transitional stage was decided while waiting for a referendum on Montenegro's independence that would determine whether to finally establish two separate countries.[13] The referendum was held in 2006, with the majority of Montenegrin voters opting for independence, and the State Union officially came to an end with the formal declaration of independence of both Serbia and Montenegro that same year.

A counter-example is the European Union, which includes elements of a federation and others of a confederation.[14] While the EU has certainly developed the

[10] The trajectory of the Republic of the Seven United Netherlands was rather different for historical reasons, see ch 3.2.1.

[11] See A Gamper, 'A "Global Theory of Federalism": The Nature and Challenges of a Federal State' (2005) 6 *German Law Journal* 1297, 1297ff.

[12] See KC Wheare, *The Constitutional Structure of the Commonwealth* (Oxford, Clarendon Press, 1960).

[13] See M Suksi, 'On the Voluntary Re-definition of the Status of a Sub-state Entity: The Historical Example of Finland and the Modern Example of Serbia and Montenegro' (2004) 4 *Faroese Law Review* 33.

[14] On the nature of the EU, see section 2.4 below.

former in the course of its history, it has also clearly refused to become a fully-fledged federal state, as epitomised by the rejection of the Constitutional Treaty in 2005.

In sum, it would be misleading to see confederations as just a transitional step towards the establishment of federal states. Throughout history, this has been the case for some confederal experiences but clearly not for all of them. Like federal states, confederations also do not all look the same, nor did they originate in the same way, nor is their destiny predetermined. However, they generally carry little political weight vis-a-vis the individual countries and the international community and are often weak in terms of decision-making and effectiveness.[15]

2.2 FEDERAL STATE

2.2.1 The Compact as the Traditional Definition: The 'Federal Big Bang'

As mentioned earlier in this book, to define federalism in abstract terms is not only impossible but also futile. Every scholar tends to advocate a specific understanding of what constitutes a federal state, and nearly every constitutional or supreme court in countries that define themselves as federal has provided some definition of the essential elements of a federal state. Quite recently, the Canadian Supreme Court, for instance, provided a very much democracy-focused definition. The judges regarded as the essence of the federal state its function 'to enable citizens to participate concurrently in different collectivities and to pursue goals at both a provincial and a federal level'.[16] What many of the apex court definitions have in common is that they look at the domestic experience and, not unlike academic classifications, naturally tend to generalise the essential elements of one particular experience in order to subsume a general rule. This approach is reflected, for instance, in the definitions provided by the Indian Supreme Court and the Constitutional Court of Austria.

2.B India 1963–2001 and Austria 1952–88: Can Court Definitions of the Federal State be Generalised?

Since the adoption of its national Constitution in 1949, India has always been termed a federation and/or a union. For clarification, it is useful, in this regard, to go back to the explanations of terminology and concepts by BR Ambedkar, the Chairman of the Drafting Commission. In his words, 'India was to be a federation', but not one that the states had joined through an original act of union and could, therefore, leave in a reciprocal act of disunion. The term union was a deliberate choice to reflect a unitary penchant[17] and a specific *ratio essendi*: 'Though the country and the people may be divided into different States for convenience of administration the country is one integral whole, its people a

[15] See ch 3.2.1.

[16] *Reference Re Secession of Québec* [1998] 2 SCR 217, para 66. See box 4.E.

[17] This unitary penchant is reflected, for example, in the Indian Constitution's emergency clauses to the benefit of the national government, see ch 5.2.3.

single people living under a single *imperium* derived from a single source.'[18] Even though the Supreme Court, in its early jurisprudence, sometimes affirmed, in contrast to Ambedkar's definition, that India's Constitution 'is not truly federal in character',[19] it has in its more recent case law tended to recognise the country's federal nature more unequivocally. In 2001, it stated that the 'Indian Constitution is basically federal in form and is marked by the traditional characteristics of a federal system, namely, supremacy of the Constitution, division of power between the Union and States and existence of an independent judiciary. From Kashmir to Kanyakumari, the country is one and there is no intelligible differentia which distinguishes advocates practising within the State of Rajasthan and those practicing outside Rajasthan but within the territory of India.'[20]

By contrast, the Constitutional Court of Austria has provided a partially divergent definition. According to this court, elements of the federal state are the division of competences and the participation of the *Länder* in the federal legislative process,[21] the constitutional autonomy of the *Länder*[22] and the responsibility of the *Länder* for the implementation of national law, the so-called indirect federal administration.[23] It is evident that the definitions of the two courts emphasise beyond some commonalities certain country-specific elements, ie, in the Indian case, an independent judiciary and identical requirements for the exercise of a legal profession and, in the Austrian case, the indirect federal administration. But both these characteristics are far from typical of *all* federal states so that these court definitions may not serve as bases for a generally applicable definition.

However defined, the federal state presents some common elements, which can be described as necessary but not sufficient. In other words, they must exist in each federally organised state, but are not enough, alone, to identify a federal state as opposed to other, similar state organisations.[24] The 'skeleton' of a federal state is represented by: a) the division of state functions between at least two different orders of government both enjoying political autonomy; b) the supremacy of the federal/national constitution; and c) a system of cooperation among the levels, including the judicial adjudication of disputes between and among the entities over the respective constitutional powers. Put differently, federally organised states find (different) ways to divide public powers among different spheres of government, combine (in different ways) self-rule and shared rule and (in different ways) unite without merging and divide without separating.

As with federalism, the literature also often refers to federation in relation to the origins of the term *foedus* (compact) in order to consider that federal states are only those established by the coming-together of previously independent entities. Such an approach is too narrow and is inherently wrong, because it looks at only one of the origins of federalism. First, some states, whose federal nature is uncontested,

[18] Parliament of India, *Constituent Assembly Debates*, vol VII, 4 November 1948, 43.
[19] *State of West Bengal v Union of India*, 1963 AIR 1241.
[20] *Ganga Ram Moolchandani v State of Rajasthan*, 2001 AIR 2616.
[21] VfSlg 2455/1952.
[22] VfSlg 11669/1988.
[23] VfSlg 11403/1987. On the indirect federal administration, see ch 5.3.
[24] On the futility of a definition, see section 2.2.2 below.

have been formed by the transfer of powers from a previously unitary entity, such as in the case of Belgium and to some extent Austria, India, Nigeria and others. Second, and more importantly, the difference between 'coming-together', 'holding-together' and 'putting- or forced-together' federations[25] is only historical, not legal, in nature.

In coming-together federations, the member units were originally both historically and legally sovereign, while the federal government is historically derived. However, when the 'federal big bang' takes place, ie the federal constitution enters into force, the federal government becomes legally sovereign and the member units legally derived.[26] The federal big bang turns the original sovereignty of member units into autonomy, due to the primacy of the federal constitution. This is confirmed by the so-called homogeneity clauses included, not by chance, in all federal constitutions of coming-together federal states, such as Article 4, Clause 4 of the US Constitution (the Republican Clause), Articles 5 and 6 of the Swiss Constitution, Article 28 of the German Basic Law, etc.[27]

In some cases, the impact of the federal big bang is even more profound as it entrenches the federal system so firmly that it is even protected against the power of constitutional amendment. While several federal countries have declared the federation, in their constitutional texts[28] or jurisprudence,[29] as indissoluble, Germany's so-called 'eternity clause' is a particularly notable example. Article 79(3) of the Basic Law stipulates that amendments 'affecting the division of the federation into *Länder*' on principle in the legislative process' shall be inadmissible. Even if this provision does not guarantee the individual existence of each *Land*,[30] it entrenches both the country's territorial division as such into (at least two) *Länder* and their participation. Whereas the firm entrenchment of the federal system has been an integral part of Germany's constitutional order from its outset in 1949, a similar rule was belatedly introduced in India by the case law of the Supreme Court.

[25] This threefold distinction goes back to A Stepan, 'Federalism and Democracy: Beyond the US Model' (1999) 10 *Journal of Democracy* 19. While Alfred Stepan's term 'putting-together' was supposed to capture the unique character of federal states that were formed through coercion, Nancy Bermeo's similar term 'forced-together' aims to place particular emphasis on the influence of external actors and the element of system frailty. See N Bermeo, 'The Import of Institutions' (2002) 13 *Journal of Democracy* 96, 108.

[26] The expression 'federal big bang' to describe the entry into force of a supra-ordinated federal constitution is sometimes used in the discourse on European integration. See N Walker, 'The Shifting Foundations of the European Union Constitution' (2012) *University of Edinburgh, School of Law, Europa Working Papers* 2012/1. For a more contextual use in the theory of federalism, see R Toniatti, 'Federalismo e potere costituente' in *Regionalismo e federalismo in Europa* (Trento, Giunta della Provincia Autonoma di Trento, 1997) 171.

[27] See ch 5.1.2.

[28] For instance, Art 1 of the Brazilian Constitution states the federal republic is 'formed by the *indissoluble* union of the states and municipalities and of the federal district'. The Preamble to the Australian Constitution underscores explicitly that the people of the colonies 'have agreed to unite in *one indissoluble* Federal Commonwealth'.

[29] *Texas v White* 74 US (7 Wall) 700, 725 (1869). On this seminal ruling, see box 4.D.

[30] See box 6.F.

2.C India 1973: The Federal Character as Part of the Constitution's Basic Structure?

In 1970, the religious guru Sri Kesavananda Bharati challenged attempts of the state of Kerala to impose certain restrictions, under land reform acts of that state, on the management of his community's property. While in its ruling the Supreme Court overruled previous decisions implying that the right to property could not be restricted, the case is today more known for its development of the 'basic structure doctrine'. In their early jurisprudence after 1949, the judges had asserted that any provision of the Indian Constitution would be amendable, including fundamental rights (Part III) and the procedure of constitutional amendment itself (Article 368). Already in 1967, the Supreme Court had initiated a change of course in the *Golaknath* case.[31] In this decision it ruled that an act of amendment under Article 368 was also a 'law' within the meaning of Article 13(2) of the Constitution and thus, according to this provision, subject to constitutional fundamental rights.

In the *Kesavananda Bharati* judgment of 1973, the Court overruled the *Golaknath* decision, as it affirmed that a constitutional amendment was not a 'law' for the purposes of the above-mentioned Article 13(2), but at the same time established certain limits.[32] Confirming the constitutionality of the Twenty-Fourth, Twenty-Fifth and Twenty-Ninth Amendment, the Court famously held that an amendment could not damage, abrogate or alter what it called the 'basic structure' of the Constitution. The fact that the parliament only had the power to *amend* would indicate implied limits. Whereas changes would be admissible in order to adapt the Constitution to changing conditions, they would have to leave intact its very foundations and basic institutional pattern. Regarding the concrete elements of the Constitution's basic structure, there has been a certain ambiguity and flexibility from the beginning, as even several of the judges adopting the majority opinion laid them out separately. However, most of them shared the view that the federal character of the Constitution constitutes such an element which was reiterated in the *Bommai* ruling of 1993.[33] Although the Court introduced the basic structure doctrine in a 7–6 decision and has tended in subsequent judgments to determine elements on a case-by-case basis, the doctrine has gained broad acceptance. To a considerable extent, this is due to its role during the state of emergency declared by Indira Gandhi in 1975 based on Article 352(1) of the Constitution.[34] The basic structure doctrine was used by the Supreme Court to strike down the Thirty-Ninth Amendment,[35] which was supposed to prevent Indira Gandhi's prosecution, and is thus widely credited with restoring Indian democracy.[36]

It appears to be clear that the sovereignty debate, although key, cannot provide definite answers to the phenomenon of federal states. While in legal terms it seems incontestable that the prevalence of the federal constitution turns original subnational sovereignty into legal autonomy, in broader terms it seems that sovereignty

[31] *Golaknath v State of Punjab*, 1967 AIR 1643.
[32] *His Holiness Kesavananda Bharati Sripadagalvaru v State of Kerala*, 1973 AIR 1461.
[33] *SR Bommai v Union of India*, 1994 AIR 1918.
[34] On this provision, see ch 5.2.3.
[35] *Indira Nehru Gandhi v Raj Narain*, 1975 AIR 2299.
[36] Another seminal ruling that further developed this doctrine is *State of Bihar v Bal Mukund Sah*, 2000 AIR 1296.

simply does not explain the whole issue and remains the subject of controversial debates.[37] As Scottish scholar Neil MacCormick effectively put it, sovereignty is rather like 'virginity: something that can be lost by one without another's gaining it'.[38] In his view, sovereignty has been lost within the European Union by its Member States without the European level gaining it.[39]

While the supremacy of the national constitution legally strips sovereignty from the member units, the historical formation of federal states has, however, normative consequences for the institutional setting of each federal system. In coming-together federal countries, the reduction of sovereignty of member units into autonomy is compensated by the units' participation in the exercise of sovereign powers at the national level: this occurs especially by means of guaranteed representation in powerful second chambers, such as the US Senate, the Swiss Council of States (*Ständerat*) or the German Federal Council (*Bundesrat*) and by retaining some control over the constitutional amendment power, up to a veto right of each individual member unit as to some essential elements of the federal compact.[40] One may think of Article 5 of the US Constitution, which prescribes, inter alia, that 'no State, without its consent, shall be deprived of its equal suffrage in the Senate'.[41] In other words, before agreeing to the federal big bang, future member units must accept the predominance of the federal government in exchange for maintaining some influence on national policies (both collectively through the second chamber or other mechanisms of participation and, more rarely, individually).[42] Conversely, in holding-together federations, such institutional representation of member units is either non-existent or extremely weak: there is usually no strong involvement of member units in the procedure for amending the constitution, no veto right as to essential elements of it and usually the national government retains the power to legislate instead of the member units when legal or economic unity is at stake.[43]

2.2.2 Form Follows Function: The Role of History in Shaping Federal Manifestations

Federal states are created in different ways, and the origins usually influence the institutions of each federation and ultimately the understanding of federalism that is behind any attempt to define a federal state. From a historical perspective, it must be noted that the era of coming-together federations had momentum that lasted up to, roughly, World War I: before, basically all federations were created by

[37] See ch 4.1.

[38] N MacCormick, *Questioning Sovereignty: Law, State and Nation in the European Commonwealth* (Oxford, Oxford University Press, 1999) 126.

[39] For details regarding sovereignty in the EU context, see ch 4.1.3.

[40] See H Wechsler, 'The Political Safeguards of Federalism: The Role of States in the Composition and Selection of the National Government' (1954) 54 *Columbia Law Review* 543.

[41] For details, see ch 6.3.1.

[42] See ch 6.

[43] Examples of this are Art 120 of the Italian Constitution or Art 150(3) of the Spanish Constitution. For further details, see ch 5.2.3.

uniting previously sovereign entities, sometimes experimenting with a looser union (a confederation) during the process. One may think of the classical federations such as the USA, Switzerland and Germany.[44] Also other coming-together federations were established before World War I, although with some peculiarity from the legal point of view: formally, Canada and Australia obtained their (federal) constitutions, respectively, in 1867 and 1901 as acts of the British Parliament and acquired *de iure* sovereignty only with the Statute of Westminster of 1931. Yet, they can be considered coming-together federations in the material sense, since in both countries federations were established, in the Canadian case at least for the most part, on top of existing quasi-sovereign units.[45] The process of the establishment of coming-together federations is very much linked to nation state formation: especially during the nineteenth century, nation states represented the winning model, and countries that had not yet achieved this type of statehood were pushing for it. In some cases, for historical, political, ethnic/religious or other reasons, the formation of nation states was carried out by the coming-together of sovereign entities. At the same time, however, in some circumstances the federal state was created after the establishment of the nation state, like in the case of nearly all Latin American federations.

After World War I, especially due to the reconfiguration of the geopolitical landscape in Europe after the dissolution of the Habsburg Empire, as well as of the Russian and Ottoman Empires, the process towards the formation of nation states essentially came to an end. Some historically hybrid federations were created by reuniting, under a federal umbrella, entities that were previously parts (with different statuses) of bigger empires, as in the case of Austria, Czechoslovakia or even, *mutatis mutandis*, the Soviet Union. For all these federal experiences, it is debatable whether they represent coming-together or holding-together types of federations, and it is probably correct to consider them to be both. Certainly, the vast majority of all federal systems, however defined, established after the 1920s are holding-together federal systems that resulted from a transfer of power from a unitary state.[46] One may think of Belgium, Spain (both the constitutions of 1931 and 1978), Italy, the United Kingdom, and most recently Nepal, but, for the most part, also the cases of India[47] and Bosnia and Herzegovina. In other words, historical origins are indeed

[44] See ch 3.3.

[45] Having regard to the historical facts, the situation is of course more complex, as many states/provinces were formed by separation from existing entities. One may think, for example, of the establishment of the states of Victoria and Queensland in Australia in 1851 and 1859, respectively, whose territories were previously part of New South Wales. See ACV Melbourne, *Early Constitutional Development in Australia: New South Wales 1788–1886, Queensland 1859–1922*, RB Joyce (ed), 2nd edn (St Lucia, University of Queensland, 1963) esp 443f. What was before 1867 the United Province of Canada came to be split up at the founding of the federal state into the two separate provinces Ontario and Quebec. The provinces of Manitoba, Alberta and Saskatchewan and the territories of Yukon and Nunavut were over the years carved out from the vast Northwest Territories.

[46] In the few cases when federations were established according to the old system, they usually collapsed. One may think of the confederation (which never became a federation) of Senegambia (1982–89), of the federation of the West Indies (1958–62), of French West Africa (which started prior to World War I and formally ended in 1958) or of the Federation of Rhodesia and Nyasaland (1953–64), etc.

[47] India was established as a federal state by the Constitution of 1950 and cannot be considered a coming-together federal system, since the states and territories of the Indian Union were not fully-fledged

very relevant in shaping the constitutional features of federal states. History, however, should not be seen as the only defining element of a federal or regional state. Rather, it is important to identify historical cycles that have determined the ways of forming federations.

Such a clear shift in the historical formation of federal states has to do with the changing meaning of the *foedus*. In both the past and the present, the *foedus* has indicated nothing other than the will to be together. Such a will evolves over time and takes on different constitutional forms. Sometimes it is even imposed, by force (such as in the American Civil War) or by international pressure (such as in Bosnia and Herzegovina, where it has been largely replaced by the international community),[48] and its evolutions are part of the physiology of federalism. One may wonder, for instance, whether such a compact is still present in today's Belgium, even though, constitutionally, it clearly exists. For all these reasons, the historical perspective seems much more effective than the formalistic sovereignty approach in explaining the legal nature and the political dynamics of federalism in its various manifestations.

History and the political–societal functions to be achieved at the time of the establishment of the federal compact (both in terms of coming-together and holding-together) also define the intrinsic elements and the institutional character of the various federal states. Put differently, the form each federation takes and even its ideological underpinnings are determined by the historical and political motives behind each case. This is why several dichotomies are highlighted in the literature depending on such intrinsic and largely pre-institutional factors.

The first and perhaps most common distinction is the one between *mature* and *emergent* federal systems.[49] A distinction based essentially on time (mature federal countries are older, emergent ones are younger), but also on institutional features (only mature ones exhibit certain characteristics of many federations such as typically residual powers of subnational entities, a second chamber, etc) and on the

sovereign states but were more or less autonomous under British, French or Portuguese colonial rule, although most subnational entities were modelled according to the existing provinces established by the British Government of India Act of 1935. Moreover, at the time of independence, a huge number of more than 500 formally independent small territories remained out of the British Raj, and most of them subsequently voluntarily joined the Union (in the cases of Hyderabad and Jammu and Kashmir, they were annexed by force), and a few joined Pakistan. In sum, while not established by the coming-together of previously existing sovereign entities, the Indian Union is also partly the outcome of a union of provinces, states and territories. India should thus also be considered a hybrid federal system as to its origins. See G Austin, *The Indian Constitution: Cornerstone of a Nation* (Oxford, Clarendon Press, 1966) 186ff. Further, see B Ray, *Evolution of Federalism in India* (Calcutta, Progressive Publishers, 1967); and N Mukarji and B Arora (eds), *Federalism in India: Origins and Development* (New Delhi, Vikas Pub, 1992).

[48] The fact that the High Representative for Bosnia and Herzegovina, appointed by the international community, was granted in 1997 the power to impose constitutional amendments (see box 4.C on the 'Constituent Peoples Case') has arguably changed the role of this official 'from that of a supervisor of the peace implementation process to its main actor', J Woelk, 'Bosnia-Herzegovina: Trying to Build a Federal State on Paradoxes' in M Burgess and GA Tarr (eds), *Constitutional Dynamics in Federal Systems: Sub-national Perspectives* (Montreal, McGill–Queen's University Press, 2012) 119.

[49] See RL Watts, 'Typologies of Federalism' in J Loughlin et al (eds), *The Routledge Handbook of Regionalism and Federalism* (Abingdon, Routledge, 2013) 25; Watts, *Comparing Federal Systems* (2008) 24f, 29f.

'adaptability' over time of mature federal systems when facing changing conditions. For Watts, the United States (1789), Switzerland (1848), Canada (1867), Australia (1901), Austria (1945), Germany (1949) and India (1950) match the criteria and therefore are mature federations.[50] By contrast, emergent federal countries were created in the second half of the twentieth century, and are still looking for their equilibrium.[51] Further, they do not present all the characteristics of mature federal systems; Watts calls these 'quasi-federations'. Most emergent federal countries are then considered 'fragile',[52] because they experienced long periods of non-democratic regimes. Among them, Watts includes Spain (1978), Belgium (1993), Russia (1993), Bosnia and Herzegovina (1994), the Latin American federations (Brazil, Mexico, Venezuela, Argentina), Nigeria (1960), Ethiopia (1995), Pakistan (1973), as well as the ethno-federalisms of the Soviet era and four micro-federations (Comoros, Saint Kitts and Nevis, Micronesia, Belau). However, the category of 'emergent' federal systems especially lacks homogeneity: it is difficult to group Spain and Belgium together with Pakistan, Venezuela or the micro-federations since the former are consolidated multilevel democracies, whereas the latter's federal arrangements have mainly remained on paper. Furthermore, both Germany and Austria—two classic prototypes of mature federations—experienced a long period of authoritarian regime under Nazi rule. Finally, the classification does not take into account that the Latin American federations are vital and long-lasting and that Italy—a regional state that is surely 'quasi-federal'—has also proved to be long-lasting.

Precisely for the historical reasons mentioned above, the further distinction between *aggregative* (or integrative) and *devolutionary* federal systems also has a strong historical dimension. Aggregative systems are, as a matter of fact, older than devolutionary ones. The focus in this distinction is on the origin of the (federal) compact. Nicholas Aroney points out that aggregative federal countries are those in which the rationale was, at least predominantly, that 'previously independent political communities have been integrated into a federal system' (such as the United States,[53] Switzerland, Canada, Germany and Australia), whereas devolutionary ones are 'those in which a formerly unitary state has devolved governmental powers upon a number of regions within that state' (such as Spain, Belgium, Italy and South Africa and, for the most part, India).[54] In aggregative federal systems, pre-existing units must have been independent states (in the United States, Switzerland, Germany) or must have enjoyed a high degree of autonomy before their aggregation into the new federal structure, such as in Canada, Australia and Malaysia, dominions and

[50] See Watts (n 3) 25.

[51] ibid.

[52] See N Steytler and J de Visser, '"Fragile Federations" and the Dynamics of Devolution' in F Palermo and E Alber (eds), *Federalism as Decision-Making: Changes in Structures, Procedures and Policies* (Leiden, Brill–Nijhoff, 2015) 80.

[53] In fact, even in the United States only the original 13 states came together. The subsequent states were formed from territory originally governed by the federal government, which had to approve their formation into states.

[54] N Aroney, 'Formation, Representation and Amendment in Federal Constitutions' (2006) 54 *The American Journal of Comparative Law* 277, 282; N Aroney, *The Constitution of a Federal Commonwealth: The Making and Meaning of the Australian Constitution* (Cambridge, Cambridge University Press, 2009) 40f.

colonies enjoying autonomy and self-government within the former British Empire. Again, the distinction is helpful but not all-encompassing. It does not explain, for instance, why some devolutionary federal systems such as Spain and Belgium present structures that are similar to those of integrative federations, nor it can respond to the question as to how to classify borderline cases, such as Argentina and Austria. And some federations, such as Canada and Australia, while materially aggregative, were legally created by an act of the British Parliament. Be that as it may, the aggregative or devolutionary origin of a federal system may have 'a vital influence on the way in which a federal constitution can be interpreted'.[55]

When it comes to the institutional features of federal systems, a common distinction is made between *dual* and *cooperative* systems.[56] Dual federalism is typical of the oldest federations (such as the United States, Canada, Switzerland, Australia), which adopted a distribution of powers, often explicitly based on a divided model of sovereignty:[57] the powers allocated at different levels of government were separated as if they were watertight compartments.[58] Further, laws enacted by each government level are, according to the model of 'legislative federalism',[59] as a rule 'implemented and administered by their own separate civil services and departments of states'.[60] Such an approach was more frequent in older federations (with the notable exception of Germany), as it reflects the idea of two separate and parallel legal orders, while history has proven that this is practically impossible, as cooperation and coordination are inherent to federal structures. Even in the United States, initially dual federalism has given way to more entanglement between governments by becoming over time cooperative or, as some put it, rather coercive.[61] Dual federalism, famously described due to the distinct and separate layers (of government) also as 'layer cake' federalism, has been replaced since the New Deal era by 'marble cake' federalism.[62] Cooperative systems, on the contrary, are based on the institutional assumption that, in most areas, decision-making and implementation require action by both levels of government and thus their integration to a certain degree, in order to reduce conflicts, to increase efficiency and avoid duplication. At the same time, too much integration is likely to create confusion and reduce accountability, as well as 'competition and autonomous action and initiative of each level of government'.[63]

[55] See Aroney, *The Constitution* (2009) 40.
[56] For details, see ch 5.2.2.
[57] On divided sovereignty in the US and Switzerland, see ch 4.1.2.
[58] On the watertight compartments doctrine, see ch 5.2.1.
[59] See ch 5.3.
[60] TO Hueglin and A Fenna, *Comparative Federalism: A Systematic Inquiry* (Peterborough, Broadview Press, 2006); P de Vos and W Freedman (eds), *South African Constitutional Law in Context* (Oxford, Oxford University Press, 2014) 268.
[61] See J Kincaid, 'From Cooperative Federalism to Coercive Federalism' (1990) 509 *The Annals of the American Academy of Political and Social Science* 139.
[62] On these metaphors, see M Grodzins, 'The Federal System' in *Goals for Americans: The Report of the President's Commission on National Goals* (New York: Columbia University Press, 1960).
[63] Watts (n 3) 122. Critical approaches to cooperative federalism are discussed in RL Watts, 'Origins of Cooperative and Competitive Federalism' in SL Greer (ed), *Territory, Democracy and Justice: Regionalism and Federalism in Western Democracies* (London, Palgrave Macmillan, 2005) 121f.

A further distinction is occasionally made between *calm* and *restless* federations.[64] The rationale of this distinction is primarily sociological, as it indicates the attitude when it comes to the accommodation of ethnic groups. In general, federal states in the context of diverse societies are likely to be restless, whereas countries that are more homogeneous in terms of population tend to be calm(er). However, history and political considerations do play a fundamental role in this distinction too. It occurs, in fact, that long-lasting (therefore mature and thus older) federal systems are indeed calm even if they operate in the context of diverse societies, such as in the case of Switzerland or Canada, and it is difficult to determine whether this attitude depends on the fact that the federation is long-lasting or if the federation is long-lasting because of a generally calm, cooperative attitude. Furthermore, as most federal systems in the context of diverse societies have been established more recently, ie, after the Cold War,[65] and definitely after World War I, there is a certain historical overlap between these (as a rule, restless) systems and those that follow a devolutionary pattern.

The same also goes for the last recurrent distinction, ie, between *symmetrical* and *asymmetrical* federations which concerns differences between subnational entities in terms of institutional elements such as financial relations and representation in a second chamber. Having regard specifically to the element of the distribution of powers, symmetrical systems are those in which (legislative) powers are distributed uniformly, whereas asymmetry occurs when certain units are provided with more powers than the others.[66] In fact, the historical element largely also covers this distinction, as usually older, aggregative federal systems are based on the principle of the same powers for the subnational units, whereas younger, devolutionary federal countries often provide some specific areas with a different status in order to accommodate specific differences, be they ethno-cultural or territorial.[67]

2.2.3 Definition by Means of Institutional Elements

Many valuable attempts have been made in the literature to define the federal state (rather, according to the terminology adopted in this book, federal systems) based on institutional elements. The idea behind such an approach is simple and meaningful. While federalism always entails political and ideological elements and is thus also subjective,[68] federal systems are concrete, constitutional manifestations of the federal principle; thus, a comparative observation should make it possible to determine the common elements, those that are essential in order to identify a federal system.

[64] See G Poggeschi, *Language Rights and Duties in the Evolution of Public Law* (Baden-Baden, Nomos, 2013) 152.
[65] See ch 4.2.1.
[66] See ch 5.1.1.
[67] See R Agranoff (ed), *Accommodating Diversity: Asymmetry in Federal States* (Baden-Baden, Nomos, 1999).
[68] See chs 0.2 and 1.1.

2.D Institutional Definitions of Federal States (or Systems)

Such an approach has indeed inspired several attempts to define federal states (or systems) by means of institutional elements. Among the most convincing institutional definitions are those provided by Ronald Watts and Peter Pernthaler.

Watts proceeds from a political perspective and first distinguishes between federalism, federal political systems and federations. Federalism 'refers to the advocacy of multi-tiered government combining elements of shared rule and regional self-rule'.[69] 'Federal political systems' and 'federations' are instead descriptive terms: the former being broader and referring to a 'political system in which … there are two (or more) levels of government', thus encompassing the whole spectrum of non-unitary manifestations (confederations, federations, etc); the latter are a particular species of the genus 'in which neither the federal nor the constituent units are constitutionally subordinated to the other, ie each has sovereign powers derived from the constitution rather than another level of government, each is empowered to deal directly with its citizens in the exercise of the legislative, executive and taxing power and each is directly elected by its citizens'.[70] Based on this assumption, Watts lists six institutional elements that, in his view, are common to all federations: '1) two orders of government each acting directly on their citizens; 2) a formal constitutional distribution of legislative and executive authority and allocation of revenue resources between the two orders of government ensuring some areas of genuine autonomy for each order; 3) provision of the designated representation of distinct regional views within the federal policy-making institutions, usually provided by the particular form of the federal second chamber; 4) a supreme written constitution not unilaterally amendable and requiring the consent of a significant proportion of the constituent units; 5) an umpire (in the form of courts or provisions for referendums) to rule on disputes between governments; 6) processes and institutions to facilitate intergovernmental collaboration for those areas where governmental responsibilities are shared or inevitably overlap.'[71]

Pernthaler takes instead a more legal perspective, which handles concepts like sovereignty, citizenship and constitutional subordination more carefully.[72] For him, the institutional minimum common denominator includes four elements: 1) division of statehood (sovereignty) mirrored by a constitutionally guaranteed division of powers that can only be changed with the consent of the member units; within the respective competences, the federation and member units are independent and equally sovereign (dual government); 2) effective participation of subnational entities in the decision-making process at the central level, especially with regard to the procedure to amend the constitution, to adopt national laws and to be represented in common institutions, such as the constitutional court or in the election of the head of the state; 3) constitutional autonomy of the subnational entities, ie, their power to autonomously make their fundamental choices within the limits of the national constitution; 4) a federal financial arrangement, ie, a division of taxation and spending powers that corresponds to the division of competences and includes solidarity among all members of the federation. For Pernthaler, these four elements are of an existential, functional nature: if they are not given in a polity, the latter cannot be considered to be federal.

[69] Watts (n 3) 6.
[70] Watts (n 3) 7.
[71] Watts (n 3) 7. See also RL Watts, 'Comparative Conclusions' in A Majeed et al (eds), *Distribution of Powers and Responsibilities in Federal Countries* (Montreal, McGill–Queen's University Press, 2006).
[72] P Pernthaler, *Österreichisches Bundesstaatsrecht* (Wien, Verlag Österreich, 2004) 299ff.

All such definitions are extremely valuable and certainly useful from a comparative perspective as an orientation in the complex field of federal studies. From a comparative point of view, however, two aspects need to be considered as caveats against a possible all-encompassing institutional definition of a federal system.

First, each definition based on a comparative analysis presupposes the selection of case studies and thus strongly influences the outcome of the research. Put differently, if certain countries are pre-identified as federal and thus only their constitutions are analysed, this leads to a very different outcome than if other cases are included too. For example, Watts considered in 2008 that there were 25 fully fledged federations, and these were considered as a comparative basis for his analysis,[73] while Anderson listed 28 federations the year before.[74] Such an approach is rather amphibolic, as it is likely to prove that the countries matching the definition are precisely those taken as the basis for the analysis.

Second, federal constitutional arrangements are very peculiar to each and every country, while pursuing similar goals. Therefore, upon closer observation, each common element has in fact some exceptions. For example, the constitutional autonomy of subnational units is not given in some uncontested federations like Canada or Belgium and, except for Jammu and Kashmir, India, whose member units do not have their own codified constitutions in the sense of both formally and materially qualified acts of autonomous legislation.[75] Typical constitutional matters are then essentially regulated by the national constitution and/or by national special laws.[76] Conversely, in some regional states such as Italy, the regions adopt their own constitutions by means of entrenched laws. And in any case, the national constitution prevails over the constitutions of the subnational units.

Another example is the effective participation of the subnational units in the decision-making process at the national level, often considered as a main institutional indicator of federal statehood.[77] It is often argued, for example, that the adoption of the Seventeenth Amendment to the US Constitution, which mandated the popular election of senators in each state, transformed the representation from federal into democratic, de facto eliminating the genuine representation of the states.[78]

[73] Austria, Belgium, Germany, Russia, Spain and Switzerland in Europe; Canada, the Federation of Saint Kitts and Nevis, Mexico and the United States in North America; Argentina, Brazil and Venezuela in South America; the Union of the Comoros, Ethiopia, Nigeria and South Africa in Africa; India, Pakistan and Malaysia in Asia; the United Arab Emirates in the Middle East; Australia, Palau and the Federated States of Micronesia in Oceania. See Watts (n 3) 9.

[74] Argentina, Australia, Austria, Belau (Palau), Belgium, Bosnia and Herzegovina, Brazil, Canada, Comoros, the Democratic Republic of Congo, Ethiopia, Germany, India, Iraq, Malaysia, Mexico, Micronesia, Nigeria, Pakistan, Russia, St Kitts and Nevis, South Africa, Spain, Sudan, Switzerland, the United Arab Emirates, the United States of America and Venezuela. See G Anderson, *Federalism: An Introduction* (Oxford, Oxford University Press, 2007) 3.

[75] See chs 5.1.1 and 5.1.2.

[76] See C Saunders, 'The Relationship between National and Subnational Constitutions' in Konrad-Adenauer-Stiftung (ed), *Subnational Constitutional Governance* (Pretoria, KAS South Africa, 1999) 29.

[77] For this assumption, see M Moushkeli, *La théorie juridique de l'État fédéral* (Paris, Pedone, 1931) 229ff.

[78] See B Ackerman, 'The New Separation of Powers' (2000) 113 *Harvard Law Review* 633, and G Doria, 'The Paradox of Federal Bicameralism' (2006) 5 *European Diversity and Autonomy Papers* 1.

And while some established federations have experienced severe problems with the effectiveness of their second chambers, especially in terms of the representativeness of the subnational entities (Belgium, Canada, India, Mexico, Austria, etc—Venezuela even abolished the Senate in 1999), some regional states have developed more effective forums for the institutional representation of the subnational units via intergovernmental conferences (Spain, Italy, to some extent even France), which are common also to some classical federal states such as Canada.[79]

This means, in turn, that institutional definitions are also incomplete because they are related to, and determined by, the historical evolution of each country. Not only federalism[80] but also the federal system is a process, and any picture of it taken at a given moment cannot reflect the movement or the dynamic of the process. If federalism and the federal system were movies, any definition would be just a screenshot, thus inevitably partial and ultimately doomed to fail, although definitions are no doubt extremely useful for orientation and for knowing what the rule is in general. Definitions, in other words, only matter if they are taken critically, knowing that not only federalism, but also the federal state (and system), are abstract categories that should define very concrete phenomena. Thus, the only possible use of a definition is to provide a very general indication of what the phenomena entail.

2.3 REGIONAL STATE AND RELATED MANIFESTATIONS

2.3.1 Definition and Relation to the Federal State

A regional state can thus somehow be defined *a contrariis*: the easiest and probably most precise definition is that it is neither a unitary nor a federal state. To say precisely what a regional state is, however, is not that simple, and it is even more difficult to draw a clear line between federal and regional states.

In this respect, an effective description has been put forward by Peter Häberle. Noting that a difference exists between federal and regional states, although it is hardly possible to find decisive qualitative elements, he wrote that regionalism is the 'little brother' of federalism.[81] This expression makes clear that both typologies produce the same phenomenon: vertically dividing power according to the rules provided by the national constitution. At the same time, due to the different historical origins (at least between regional states and classical coming-together federations), the different aims and the different traditions of the two categories, they are not entirely the same, while sharing the same genes. 'Little brother' is to be understood not only in quantitative terms, but—in addition to Häberle's intuition—also in a time perspective: as a matter of principle, it is fair to say that subnational entities of regional states enjoy a lower degree of autonomy as compared to those of federal

[79] See ch 6.2.
[80] CJ Friedrich, *Trends of Federalism in Theory and Practice* (New York, Praeger, 1968).
[81] P Häberle, 'Föderalismus, Regionalismus und Kleinstaaten in Europa' in *Europäische Rechtskultur: Versuch einer Annäherung in zwölf Schritten* (Baden-Baden, Nomos, 1994) 257ff.

states, although, as always, there are significant exceptions: there is no doubt, for instance, that Spanish autonomous communities or (some of the) Italian regions enjoy many more powers than, for instance, subnational units in countries such as Mexico, Venezuela, Russia, Austria and others. And certainly, the regional state is a far more recent creation (younger brother) than the federal state.

In any event, whatever (if any) the difference between federal and regional states, in recent decades there has undoubtedly been a convergence between them: while federal states usually experience centripetal tendencies, with an increase in the power of the centre, in regional states the trend is towards further decentralisation.[82] As a matter of fact, the qualitative difference, if one exists, is also being considerably reduced.

2.E Italy 2007: Autonomy and Sovereignty of the Sardinian People?

It would be wrong to infer from the above that categories do not matter. An interesting example is provided by a judgment of the Italian Constitutional Court in 2007. In 2006, the regional Parliament of Sardinia initiated the procedure for the adoption of a new regional constitution, setting up a special commission called the Commission for Drafting the New Basic Law on Autonomy and Sovereignty of the Sardinian People. The name suggested, on the one hand, the existence of a Sardinian people as different from the Italian people. On the other hand, it indicated that the Sardinian people could enjoy 'sovereignty', ie, that the autonomy of the region does not derive from the constitution but from a free determination of the sovereign Sardinian people, which could also decide differently if they so wish. The terminology used was clearly aimed at provoking a debate.

As expected, the national government immediately challenged the Sardinian law, and the Constitutional Court found it in breach of the constitution.[83] The Court offered a formalistic definition of the qualitative difference between a federal and a regional system, pointing out that, in the latter, subnational entities are autonomous and not sovereign. Even the most significant degree of decentralisation does not alter the unity and indivisibility of sovereignty, which cannot but be vested in the state and in its unitary people. Definitions, thus, sometimes matter, even though it might be contended that in federal states there would have been the same outcome (although maybe not the same reasoning).

2.3.2 Rationale and Cases

Like the federal states, so-called regional states are also very difficult to define. Precisely like the federal state, the regional state is an umbrella term used to describe the same phenomenon with a different intensity.

From a historical perspective, the very idea of a regional state developed much later and to some extent in opposition to that of the federal state. When the age

[82] According to L Hooghe et al, *The Rise of Regional Authority: A Comparative Study of 42 Democracies (1950–2006)* (New York, Routledge, 2010), between 1970 and 2005 only two states became more centralised, while many experienced an increase in what the authors call 'regional authority'.

[83] Italian Constitutional Court No 365/2007.

of coming-together federations came to an end, after World War I, regionalisation processes started by means of the decentralisation of unitary polities. Such decentralisation, in the mind of its advocates, should precisely not go as far as to create a federation. Instead, it should help establish a polity in between the federation—which was considered too decentralised and was historically maybe no longer feasible—and the unitary state, which was far too centralised and could no longer accommodate the ethno-cultural, geographical, political, social and economic diversities. In most cases, such a middle ground between the unitary and the federal state was an experiment with the main aim of accommodating ethno-cultural differences, such as in the case of Spain and of (pre-federal) Belgium. In other cases, the accommodation of ethno-cultural differences was just one out of many other reasons for the establishment of a regional state, like in Italy. In any case, these countries, however defined, have experimented with 'innovative federal and quasi federal forms' that reflect different 'degrees of centralization or decentralization'.[84]

Spain is usually considered the main laboratory of the regional state. In fact, during the nineteenth century, several attempts were made to break the centralisation of the Napoleonic system. However, the prototype of a regional state, in between a federation and a unitary state, aimed in particular at guaranteeing ethno-cultural differences, was developed by the Republican Constitution of 1931. Then, the idea was that of an 'integral state' (this was the terminology of the Constitution), compatible with a substantial autonomy of municipalities and regions. The Constitution of 1931 was trumped by the Franco regime, which repressed all forms of autonomy, but it served as an essential precedent (together with the German and the Italian models) for the democratic Constitution of 1978, adopted after the death of Franco.

In response to the strong nationalistic movements in the Basque Country, Catalonia and Galicia, a form of so-called pre-autonomic regime was extended to the whole Spanish territory between 1977 and 1978. The Constitution of 1978 reached a difficult compromise between unitary and nationalistic instances, by defining a process but not a clear end: the process of decentralisation was left open, and only a procedural framework was established in which different forms of autonomy could be realised according to the needs and specificities of each territory.[85] While proclaiming the indissoluble unity of the nation, the constitution 'recognizes and guarantees the right to autonomy of the nationalities and regions' (Article 2 of the Spanish Constitution).

The regionalising process set up by the constitution moves from the bottom up and provides two procedures for achieving regional autonomy: Article 143 outlines the so-called 'slow track' to form regions (autonomous communities), by stating that neighbouring provinces with common historical, cultural and economic elements, the islands and the provinces of historical regional relevance can form autonomous communities. The 'fast track' outlined in Article 151 was instead

[84] Watts (n 3) 5.
[85] See JJ González Encinar, *El Estado unitario–federal* (Madrid, Tecnos, 1985).

reserved for the territories where historical nationalities were settled[86] and those, in fact only Andalusia, that completed a complex and lengthy procedure, including a referendum. These territories were allowed to proceed immediately to the establishment of autonomous communities. The difference between these autonomous communities and those on the slow track, lies not only in the procedure for their establishment, but also in the attribution of powers: fast-track autonomous communities could immediately seize from the centre all powers foreseen in Article 149 of the Spanish Constitution, while other autonomous communities were for the initial five years limited to the competences listed in Article 148. Such a strongly asymmetrical design of the Spanish regional state was progressively reduced, although the autonomous communities of the historical nationalities still enjoy wider powers than the others in several fields, including local policing and, for the Basque Country, financing.[87]

2.F Spain 1983: The State of Autonomies and the LOAPA Decision

Following the attempted coup in February 1981, the process of regionalisation was put under stricter control by means of a controversial Organic Law on the Harmonisation of the Autonomy Process (LOAPA). This law, based on Article 150(3) of the Spanish Constitution,[88] stipulated, inter alia, that the slower way of regionalisation was to be preferred, and it introduced strong elements of oversight by the central authorities. The law was scrutinised by the Constitutional Court in 1983, and the future development of the just-born state of autonomies (*Estado de las autonomías*) depended on the decision.

The ruling struck down significant parts of the LOAPA (14 out of 38 Articles) and affirmed that the law in fact did not achieve the goal of harmonising the autonomy process and that the national government is not allowed to unilaterally reshape the distribution of powers.[89] Among the provisions declared unconstitutional were those stipulating that the state's norms should take automatic precedence over those of the autonomous communities and that civil servants in the regions should be seconded by the state rather than being recruited locally. The ruling had the effect of setting the autonomy process in motion.

While decentralisation in Spain has gone as far as to suggest that it might already be a federal state, although a 'federation in disguise',[90] Italy is another classical example of a regional state.[91] Since the achievement of national unity, completed in

[86] According to the constitutional terminology, these were those territories 'which in the past approved by referendum their autonomy statutes and that at the time of entry into force of this constitution enjoy provisional autonomy regimes', Spanish Constitution, Transitional Provision No 2.

[87] See ch 7.1.3.

[88] On this provision, see ch 5.2.3.

[89] STC 76/1983.

[90] L Moreno, 'Federalization in Multinational Spain' in M Burgess and J Pinder (eds), *Multinational Federations* (London, Routledge, 2007) 86–107.

[91] For an overview, see F Palermo, 'Italy: A Federal Country without Federalism?' in Burgess and Tarr, *Constitutional Dynamics* (2012).

the 1860s, the Italian state has been modelled according to the French blueprint of a centralised and bureaucratic state. It was only with the Republican Constitution of 1948 that an innovative, but at the same time feeble, experiment with regionalisation was carried out. Not unlike Spain, but for different reasons, Italian regionalism is characterised by its asymmetrical design, both as a matter of constitutional law and in terms of the effective use of powers transferred to the regions. Despite the constitutional provisions for a general regional design for the whole country, at first, only five special, or autonomous, regions were established, all situated in the periphery (three in the Alpine arch in the north, with consistent minority groups, Aosta Valley, Trentino-South Tyrol, Friuli-Venezia Giulia, and the two main islands of Sicily and Sardinia). Their differentiated treatment was mainly a reaction to the complex problems of regional diversity: international obligations imposed by the peace treaty and fears regarding the secession of these peripheral areas. Each of them is guaranteed by a special statute, a basic law with constitutional rank.

As an innovative experiment, the regionalisation of the whole country, a third way between a federal and a unitary system, was aimed at avoiding too strong an asymmetry between the special regions and the rest of the territory. However, the regional design was only fully developed in the 1970s, when the ordinary regions were established and legislative powers effectively devolved. Since then, a permanent increase in the regional powers gradually narrowed the gap between ordinary and special regions. The path has been anything but straightforward, influenced by shifting political priorities and very much determined by constitutional adjudication. After a series of reforms in the 1980s and 1990s, two constitutional amendments were approved in 1999 and 2001 that considerably increased the powers of the (ordinary) regions. The first reform introduced the direct election of regional presidents in order to enhance political stability in the ordinary regions. It also strengthened their constitutional autonomy, as the regional basic laws are now to be adopted by the ordinary regions themselves in a special procedure (double approval and a possible referendum). The second reform of 2001 completely reshaped the constitutional provisions on relations between the state and the regions. It drastically changed the distribution of legislative and administrative powers between the state and the regions: Article 117 of the Italian Constitution now lists all legislative powers of the state, as well as the fields of concurrent legislation (ie, those in which the regions can legislate only within the framework of general guidelines determined by a national law). By contrast with the situation before, the residual powers lie with the regions according to classic federal schemes. Administrative powers are no longer connected with legislative ones but are distributed in a flexible manner according to the criteria of 'subsidiarity, differentiation and proportionality' (Article 118). The new provision on fiscal federalism provides for the partial financial autonomy of subnational entities (Article 119), and preventive state control over regional legislation was abolished, although the state retained the power to replace regional norms with a view to guaranteeing the legal and economic unity of the system (Article 120).

There are several other relevant examples of regional states, although, quite interestingly, nearly all of them are in Europe. Among them, some vest subnational units with legislative powers, and others only with (albeit broad) administrative

powers. The former include Belgium with subnational entities having had the power to enact (quasi)laws[92] even before 1993—when it officially became, by constitutional denomination, a federal state—and, to a more limited extent, Serbia (the autonomous province of Vojvodina can pass legislation). The latter range from the case of France after the constitutional reform of 2003, when the principle of the 'unitary decentralized state' was introduced in the Constitution (Article 1) and the regions were given very broad administrative powers, including in important fields that are usually regulated by law. Further, usually temperate examples of regional states are to be found in some Central, Eastern and South-eastern European countries.[93]

From a comparative perspective, some elements common to all regional states can be identified. First, power also historically proceeds from the centre and is gradually devolved to the periphery. Second, the distribution of powers and financial prerogatives among the regions is asymmetrical: such asymmetry may vary over the course of time but it remains a structural factor of regional states. Third, the regionalising process is often prompted by the need to accommodate ethno-cultural differences: while this is not the only reason for the regionalisation of a state, it is definitely one of the main ones. Other motives are linked with the complexity of modern governance and the factual impossibility for one single level of government to cope with such complexity. Fourth, being the regional state initially conceived as a compromise between two categories with longer traditions—the unitary and the federal state—it is more dynamic overall, and it undergoes processes of reform of the territorial setting more often. Fifth, from a terminological point of view, while many constitutions define the respective state as 'federal' (even when this is all but uncontested), no constitution defines itself as 'regional'.

2.3.3 Devolution

The term 'devolution' is becoming more commonly used in contemporary constitutional and political jargon. As a general phenomenon, it indicates the transfer of public functions from the centre to subnational elected authorities. However, it is also used especially in the peculiar context of the United Kingdom, where it has been part of the constitutional discourse since at least the 1970s. In the UK context, 'devolution' describes the process of the decentralisation of powers from the central government. According to the probably most cited definition provided by Vernon Bogdanor, devolution means 'the transfer of powers from a superior to an inferior political authority'[94] and it consists of three elements: a transfer to a subordinate but

[92] These acts of the subnational legislatures are called decrees and have the same legal force as laws passed by the federal parliament. Only in the case of the Brussels Parliament these acts are referred to as ordinances which have a slightly inferior legal status. The federal government may suspend ordinances if it regards them as compromising the role of Brussels as the capital of Belgium or its international role.

[93] See F Palermo and S Parolari (eds), *Regional Dynamics in Central and Eastern Europe: New Approaches to Decentralization* (Leiden, Brill–Nijhoff, 2013).

[94] V Bogdanor, *Devolution in the United Kingdom* (Oxford, Oxford University Press, 2001) 2—a definition that was provided for the process in the UK but would also suit the phenomenon in general.

elected body, a territorial/geographical basis and functions previously exercised by ministers and parliament. The parts of the UK covered by such a transfer of powers include Scotland, Northern Ireland and Wales, while attempts to extend devolution to England proper failed after a referendum in the north-east in 2004. This has sparked the still unanswered 'English question', which refers to the interrelated issues of England's place in the Union and of decentralisation within it.[95]

In the 1970s, the idea of devolution was developed by nationalists as an update of the nineteenth century's 'home rule all round', ie, a fully developed self-government.[96] Under the Labour Government of 1974–79, two bills were proposed (the Scotland Bill and the Wales Bill) but were rejected by referendums held in the affected areas. When Labour returned to power in 1997, devolution was an essential part of the electoral agenda, and in 1998 four bills were adopted by Westminster and confirmed in local referendums: the Scotland Act, the Government of Wales Act, the Northern Ireland Act and the Greater London Authority Act. Albeit with successive, significant amendments, these acts are still in force. In terms of the entrenchment of these acts, some scholars even assume that they could be repealed and amended only by a law supported by a referendum.[97]

While procedurally entrenched, devolution is legally speaking a reversible process: like any national law in the UK, in theory the Westminster Parliament could, at any time, withdraw it by simple majority. As unlikely as that would be, this is an essential element that distinguishes (British) devolution from other forms of the regional state. This aspect should, however, not be overestimated. It has to do mostly with the essential elements of British constitutionalism, which presupposes unlimited sovereignty of the parliament.[98] Yet, British courts have affirmed the existence of so-called 'constitutional statutes', among them the devolution acts.

2.G United Kingdom 2002: Devolution and Factual Limits on the Sovereignty of Parliament?

In *Thoburn v Sunderland City Council*, the Divisional Court advanced the existence of 'constitutional statutes'.[99] In particular, Lord Justice Laws writing for the Court identified the Magna Carta 1215, the Bill of Rights 1689, the Acts of Union 1707, the Reform Acts, the Human Rights Act 1998, the Scotland Act 1998, the Government of Wales Act 1998 and the European Communities Act 1972 as constitutional acts that are, because of their constitutional importance, to be protected from the implied repeal rule, according to which later acts of legislation take precedence over earlier acts and result in the conflicting

[95] See M Burch et al, 'Devolution, Change and European Union Policy-making in the UK' (2005) 39 *Regional Studies* 465; R Hazell (ed), *The English Question* (Manchester, Manchester University Press, 2005).

[96] See K Robbins, *Great Britain: Identities, Institutions and the Idea of Britishness since 1500 (The Present and the Past)* (London, Routledge, 1998) 206ff.

[97] See B Hadfield, 'Devolution: A National Conversation?' in J Jowell and D Oliver (eds), *The Changing Constitution* (Oxford, Oxford University Press, 2011) 218.

[98] See AV Dicey, *The Law of the Constitution*, 10th edn (London, Macmillan, 1965) 39.

[99] *Thoburn v Sunderland City Council* [2002] EWHC 195 (Admin), (Metric Martyrs case).

parts of the earlier act being repealed. In other words, 'constitutional statutes' can only be repealed explicitly.

What is uncontested, in any case, is the supremacy of the British institutions over the devolved ones. Since the establishment of the UK Supreme Court under the Constitutional Reform Act 2005 and the start of its work in 2009, this judicial body has the power to adjudicate conflicts regarding devolution.

Parliamentary sovereignty and devolution were also, in the context of so-called 'Brexit', an issue for the courts. The High Court ruled in November 2016 that the UK Secretary of State does not have power under the Crown's foreign affairs prerogative to formally notify the Council of the EU about the country's withdrawal (Article 50 of the Treaty on European Union), but required an authorising act by the sovereign UK Parliament, not by the devolved legislatures.[100] The Supreme Court upheld this judgment in January 2017, albeit with a partially different reasoning,[101] and after the adoption of the European Union (Notification of Withdrawal) Bill 2017 the United Kingdom eventually invoked Article 50 on 29 March 2017.

Another essential element of devolution is its inherent asymmetrical character: each affected area has its own institutional system, its own powers and its own cooperation procedures with the central government.[102] This depends on the very different reasons behind each individual devolution process. In the UK, Scottish devolution is the product of autonomous historical constitutional traditions that have never ceased to exist; Welsh devolution is the constitutional answer to ethnocultural claims; the devolution in Northern Ireland is an attempt to provide an institutional and constitutional answer to dramatic social and political cleavages; and even the 'quasi-devolution' of the Greater London Authority is aimed at providing solutions to complex governmental issues common to many big cities.[103] At the same time, asymmetry is largely compensated by the unity of the civil service: apart from in Northern Ireland, there is a single and unitary civil service in the UK, which guarantees uniformity in interpretation and implementation of the rules and, even more importantly, a unified administrative culture. This contributes significantly to the effectiveness of the system in spite of this being largely regulated by conventional rules, including in sensitive matters such as financial relations.

As to the relationship between devolution and other concepts, some authors consider devolution as a functional element and sometimes a prerequisite to

[100] *R (Miller) v Secretary of State for Exiting the European Union* [2016] EWHC 2768 (Admin).

[101] *R (on the application of Miller and Dos Santos) v Secretary of State for Exiting the European Union* [2017] UKSC 5.

[102] Bogdanor, *Devolution in the United Kingdom* (2001); J Bradbury and J Mawson (eds), *British Regionalism and Devolution: The Challenges of State Reform and European Integration* (London, Routledge, 1997).

[103] Greater London is, legally speaking, part of the local government and thus not included in devolution in the strict sense. The phenomenon, however, is similar and the debate as to whether the Greater London Authority (GLA) is to be considered part of devolution or not resembles the one as to whether federalism and regionalism are the same phenomenon or not. Interestingly, in 2011 the Greater Manchester Combined Authority (GMCA) was also established.

federalisation,[104] while others believe that devolution and federalisation are two antithetical constitutional processes.[105] From a comparative observation, it can be affirmed that devolution very much resembles the process of regionalisation. The 'devolutionary state' is in some way the British version of the regional state, especially because devolved powers are delegated powers. Devolution has been effectively described as 'the delegation of central government powers to subordinate units, these powers being exercised with some degree of autonomy though with ultimate power remaining with the central government'.[106]

Devolution is in sum an advanced form of territorial decentralisation, which nevertheless does not change the fundamental constitutional nature of the state. Especially in its most advanced Scottish form, devolution goes as far as possible without crossing the border of national sovereignty.[107]

2.3.4 Autonomy and Similar Manifestations

'It is fair to claim that no clear account of the concept of autonomy is available.'[108] Another slippery issue is the demarcation between regional/devolved states and autonomy. The latter is a very broad concept that appears in different branches of scholarship, not only in law and politics, but also in philosophy and the natural sciences. In law, Ruth Lapidoth identifies four conceptions of autonomy: a) the right to act upon one's own discretion in certain matters; b) a synonym of independence; c) a synonym of decentralisation; d) the exclusive power of legislation, administration and adjudication in specific areas of an autonomous entity.[109] Moreover, autonomy has different meanings if used with regard to constitutional law or international law or if attributed to territorial entities or to groups of people (territorial or personal autonomy).[110]

For our purposes, (territorial) autonomy (of a territorial entity) can be considered a synonym of decentralisation, ie:

> [G]ranting internal self-government to a region … thus recognizing a partial independence from the influence of the national or central government. This independence can be determined primarily by the degree of actual as well as formal independence enjoyed by the autonomous entity in its political decision-making process.[111]

[104] See J Kendle, *Federal Britain: A History* (London, Routledge, 1997).

[105] See MA Fazal, *A Federal Constitution for the United Kingdom: An Alternative to Devolution* (Aldershot, Dartmouth Publishing, 1997).

[106] P Norton, 'Devolution: A Threat to the UK? Or a Reinforcement?' in P Norton (ed), *The Constitution in Flux* (Oxford, Blackwell Publishers, 1982) 174.

[107] See C Himsworth and CR Munro, *The Scotland Act 1998* (Edinburgh, Sweet & Maxwell, 1999).

[108] M Wiberg, 'Political Autonomy: Ambiguities and Clarifications' in M Suksi (ed), *Autonomy: Applications and Implications* (The Hague, Kluwer Law International, 1998) 43.

[109] See R Lapidoth, 'Autonomy: Potential and Limitations' (1993) 1 *International Journal of Minority and Group Rights* 269, esp 277.

[110] See TH Malloy and F Palermo (eds), *Minority Accommodation through Territorial and Non-Territorial Autonomy* (Oxford, Oxford University Press, 2015).

[111] H-J Heintze, 'On the Legal Understanding of Autonomy' in Suksi, *Autonomy* (1998) 7.