

# EUROPE'S FEDERALISM

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*SUMÁRIO: Este estudo aborda de forma resumida o eterno debate sobre o federalismo na União Europeia. Coloca os “porquês” da questão (nomeadamente, a interrogação sobre a natureza da União Europeia), discute criticamente os problemas associados (em particular, a pretensa inexistência de um povo comum base de uma Constituição e a pluralidade e heterogeneidade presente a manter) e perspectiva modelos de federalismo que se poderiam seguir (contrapondo sinteticamente os modelos federais alemão e norte-americano).*

## I – Scope of the work. Introduction

The issue chosen for this paper, and which became its title, was “Europe’s Federalism”. Because one may think there’s some ambiguity or ambivalence to it, I’ll start by explaining my choice. During the research for this essay I came across a number of texts taking the federalist legal theory or philosophy as the one to which the European Union current framework most resembles with. Although sometimes lacking unanimity in the way they present it or prefer to see it, the great majority of authors will often recur to federalism to try and explain the nature of the EU and the functioning of its structure. Despite this, it is important to remember that short slogan about such nature: the European Union as an Unidentified Political Object (UPO). Even if federalism helps to explain the EU, it doesn’t do all the work, and everyone immediately asserts that we are before a “quasi-federal” reality, something that even if comparable to federalism (and to specific aspects of it) isn’t quite actually the federalism we can observe for instance in the organization of the United States of America. Therefore, my title selection becomes very easy to make clear: if the European Union is more closely linked to federalism than to confederalism, but if it isn’t nor a federal state nor the classic federalist reality to which we can judge it

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against, we must probably have to opt to affirm a specific brand of federalism<sup>1</sup>, something unique and exclusive to the EU<sup>2</sup>, where maybe the word “federalism” is used more for pedagogical purposes than with a scientific or technical criteria ( and paying attention too to the expression “multi-level governance”).

So in this work I’ll try to explain first the basic concepts attached to federalism, going on through the evolution of the political integration process and mechanisms used to achieve it and trying to demonstrate why the debate of a federalist European Union arose. Secondly, I’ll aim for expressing the several conceptual approaches to the nature of the European Union in what concerns the discussion around federalism and of which federal model most suits the current status. Finally, we’ll put our eyes on the future, highlighting some perspectives about what institutional reform or framework is most desirable, attempting, as a last point, to hint our personal perspective, which taking in consideration my own private aspirations and expectations as a European citizen (who feels as such) might turn out to be a bit philosophical or abstract, but I think there’s no harm in it (action is just a facet of dream, or as Churchill puts it: “The peoples have only to will it and all will achieve their hearts' desire”).

## II – Starting Point

The idea of Federalism for Europe isn’t new at all, and has been an ongoing discussion since the first steps of its creation. With impact let’s evoke Winston Churchill and his speech in Zurich on the 19<sup>th</sup> of September 1946 where he called for the creation of a “United States of Europe” that would become the road for peace, safety and freedom. It’s not difficult to imagine the sensation such an idea must have caused back at that time where the nation state and its anchors were still deeply rooted

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<sup>1</sup> See Vivien Schmidt, “Federalism and State Governance in the European Union and the United States: An Institutional Perspective”, in *The Federal Vision: Legitimacy and Levels of Governance in the United States and the European Union*, edited by Kalypso Nicolaidis and Robert Howse, Oxford, Oxford University Press, 2001, pages 335 to 344 in particular.

<sup>2</sup> See Nicholas Aroney, *Federal Constitutionalism/ European Constitutionalism in Comparative Perspective*, page 17, <http://ssrn.com/abstract=890789>.

and visible, where the intense globalized or networked world we have today (and that mitigates the reality we called nation-state<sup>3</sup>, which in an individual perspective is more of an illusion we can only with difficulty hold on to if trying to be understood in the light of a 19<sup>th</sup> or early 20<sup>th</sup> century concept) wasn’t an undeniable fact. That demand for such a radical change of institutional settings and political organization (in a well divided and statist continent such as Europe) couldn’t be received other than with awkwardness, meaning that in 2008 there’s no United States of Europe (yet), the discussion of the topic generates exacerbated emotional-personal heat for the citizens willing to debate it and even just the idea continues to be felt more as alien than as possibility. Maybe that’s why it turns out to be just as interesting.

More recently, in 2000, it was the occasion of Joschka Fischer, German Foreign Minister at the time, to bring the issue back to the stage in a speech at Humboldt University in Berlin, talking about an “European Federation”, with some precise traits, namely the objective of maintaining the nation-state and its importance within such a framework, as opposing to the creation of a supra federal state replacing them. This intervention caused quite a commotion as well, and a number of academic articles were written because of it, not only making a critical evaluation but also embracing it and proposing ways of better operationalizing it<sup>4</sup>. Earlier, also Jacques Delors had alluded to a Federation of Nation States.

For these reasons, the issue remains plenty of actuality, especially if we bear in mind that considering the European political background as it is configured there are still identity barriers needing to be defeated, meaning there is a long journey ahead until national identities and attachments stop constituting obstacles to deeper integration and obstructions to see the European Union as friendly, desirable and profitable (economically, socially and culturally). This goal can evidently only be accomplished if the peoples of Europe clearly understand it, which doesn’t seem to be the case now with the constant accusations of the EU being excessively bureaucratic,

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<sup>3</sup> See John Loughin, “‘Europe of the Regions’ and the Federalization of Europe”, in *Publius*, Fall 1996, page 159 and Börzel and Risse, Who is afraid of a European Federation?, in *Jean Monnet Working Paper No.7/00, Symposium: Responses to Joschka Fischer*, Harvard Law School, <http://www.jeanmonnetprogram.org/papers/00/symp.html>, page 5, “scholars increasingly talk about the ‘co-operative state’, the ‘negotiating state’ or ‘policy networks’”.

<sup>4</sup> See *Jean Monnet Working Paper No.7/00, Symposium: Responses to Joschka Fischer*, Harvard Law School, <http://www.jeanmonnetprogram.org/papers/00/symp.html>.

directorial and distant from the citizens it is supposed to serve. Consequently, it shouldn’t cause a strange sensation the remark of Weiler when says that for national courts “to protect national sovereignty is passé; to protect national identity by insisting on constitutional specificity is à la mode”<sup>5</sup> Here, as we will notice, comes into play Federalism as also a problem-solver. A better or at least a defined organizational frame to help the EU reach the Europeans.

### III – Brief Historical Approach to Statism and Federalism

One of the most important state theories and theorists is Statism of Jean Bodin. From the aristotelic concept of *politheia* we could use to describe the form of political organization in the Medieval times (several centers of power, functionally interrelated in a sort of web that provided *equilibrium*) we evolved to a reified state, with an observable all powerful ruler representing a certain territory and people<sup>6</sup> with origins in France, Spain and England in particular. To understand Bodin we turn to his major concepts regarding the State and sovereignty: a sovereign power (and therefore ruler and State) integrates both an internal competence and an external competence. The internal competence being that inside the state no other entity or actor superimposes itself to the exercise of authority over the territory by the ruler (formally there were no limitations to his powers, even though the limitation effect of religion and tradition is recognized). The external competence stands for the fact that the ruler represents the state externally, in an equal status or parity with other States, none of them being allowed to intervene in internal/domestic affairs. So, the keywords to Bodin and its theory are: one “single sovereign, a highly centralized state, striving for state homogeneity and state self-sufficiency”<sup>7</sup>. Statism triumphed overall.

To this theory we can confront that of Althusius and Federalism. Althusius developed his ideas in the direction of giving legal or philosophical support to

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<sup>5</sup> J.H.H. Weiler, “Federalism and Constitutionalism: Europe’s Sonderweg”, *New York University School of Law Jean Monnet Center*, <http://www.jeanmonnetprogram.org/papers/00/001001.html>, 2000.

<sup>6</sup> See Daniel Elazar, “The United States and the European Union: Models for Their Epochs”, in *The Federal Vision: Legitimacy and Levels...*, pages 32-35.

<sup>7</sup> See Elazar, “The United...”, page 34.

communities that wanted to reject the divine right of single rulers so as to have power-sharing among polities of different composition and function, especially bearing in mind a model of organization for Protestant republican polities. As a result he seeks a “compound political association” based on consent (covenant) by its citizens<sup>8</sup>. Federalism, thus, as a political philosophy that embraces voluntary citizen associations and different political institutions, corporations and territorial units. His keywords were to divide powers, prevent the reified state of Bodin and hunt for delegation of powers.

These, we can say, are core ideas we can still today attach to federalism as we know it for example in the United States, Canada or Germany. State organization with comprehensive ends, so that the constituent states transfer their sovereignty to the federal level (at least in terms of losing it within the international legal order – conduction of foreign affairs and matters of national security), but that always tries to emphasize not only the liberties of the federated polities but also of the individuals that are part of it. Other notes are obviously a vertical division of powers and a constitutional basis for the organization<sup>9</sup>. This constitution, according to the majority understanding, presupposes then a single *pouvoir constituant*, even though such a requisite is a juridical one (in terms of social or factic reality the constituent power doesn’t have to be one considered as homogeneous<sup>10</sup>, which if true would contradict at some point certain purposes of federalism, as we know that it is sometimes a solution for states with an heterogeneous population). This question of constitutional law, the appearance of a constitution emanating from a constituent *demos*, from a political community, was object of interesting observations by Nicholas Aroney<sup>11</sup> since the European Union is based on treaties, posing the doubt of knowing if we can give the step from a treaty-based to a federalist Europe and whether the fact of not having a single European *demos* would automatically invalidate such an aspiration. We expect to return to this discussion later on this work.

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<sup>8</sup> Elazar, “The United...”, page 33.

<sup>9</sup> See Vivien Schmidt, “Federalism and State...”, page 337.

<sup>10</sup> J.H.H. Weiler, “Federalism and Constitutionalism, Europe’s Sonderweg”, page 3.

<sup>11</sup> *Federal Constitutionalism...*

#### IV – Brief Political Integration Evolution Process in the European Union (from Functionalism to Constitutionalism)

Since its very first beginning that the European project wasn’t solely about economics. Whether in the form of the three European Communities instituted by the Treaties of Paris (1951) and Rome (1957) – European Coal and Steel Community, Euratom and European Economic Community – or in the form of today’s European Union with “constitutional treaties” always on the agenda, political cooperation and integration was at all times on the horizon. If the idea of a unified Europe emerges to prevent further war and catastrophes of that kind, so that the continent doesn’t have to go through the devastation and suffering of a world war one more time, and peace, security and freedom are the “flag words”, subsequently the objective is mostly political<sup>12</sup>.

What concerns us now here, if economics were never an end in itself but more of a mean (Walter Hallstein: “We are not just integrating economies, we are integrating politics”<sup>13</sup>) is the path chosen to realize that united, peaceful and cooperating Europe.

The “Monnet method” shaped EU’s political integration evolution. Because a United States of Europe was too radical, the way followed was that of *functionalism*. What we observe is integration function by function, a successive allocation of particular economic powers to European institutions which detained only those competences the states had consented abdicating of. It’s important to note that this pooling of powers restricts at the time (even if eventually has political consequences) to an economical domain (starting with coal and steel, heading after towards the European Economic Community). This economic integration (gradual or progressive) would be the way to reach higher political unification. As Michael Burgess tells us this would first generate a *de facto* solidarity (important, we think, for a sense of community allowing political unity) and, according to Monnet’s thought was the right

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<sup>12</sup> See Ludger Kühnhardt, *European Integration: Challenge and Response*, discussion paper, Center for European Integrated Studies, pages 8-9: “It is plausible to say that ‘1957’ was the answer to ‘1945’” or “the Treaties of Rome and the creation of the European Economic Community in 1957 became the definite European response to the end of World War II”.

<sup>13</sup> See Derek Urwin, *The Community of Europe: A History of European Integration since 1945*, London, Longman, 1991, page. 76 *apud* Michael Burgess, “Introduction: Federalism and Building the European Union”, in *Publius*, Fall 1996, page 3.

way to open the doors to more intense forms of political integration<sup>14</sup>. The words of Monnet are explicit enough: this tactic of economic integration has “an essential political objective: to make a breach in the ramparts of national sovereignty which will be narrow enough to secure consent, but deep enough to open the way toward the unity that is essential to peace”. This functionalist approach was particularly appreciated by the States who wished to retain the maximum independence and sovereignty possible. The method allowed them to transfer only when they want to, abdicating by consent<sup>15</sup>. Even though today we talk about the “spill over” phenomenon (certain impossibility to define the limits of European institutions’ competences), such a progressive integration has an important effect that Elazar notes: causes a lacking sense of completeness.

Returning to the “Monnet method”, while very effective for the economic purposes sought, politically had no significant impact we could venerate<sup>16</sup>, meaning that, as Burgess puts it, “quantitative economic achievements” didn’t translate into “qualitative political arrangements” and the desire of Monnet that “European unity would, because of its method, seem natural to Europeans” didn’t quite come true in the way he probably expected<sup>17</sup>. The problem was that the European Community political center continued fragile, powerless or incapable of giving steps forward and advance towards new forms of political deepening while remaining unable to go beyond what existed and having difficulty in dealing with new problems or forces it encountered<sup>18</sup>.

Then it was the time of an important move by the European Parliament mobilized by Spinelli who strived for the shift from functionalism to constitutionalism. Believing that the institutional framework of the community still favored national solutions to European problems and assuming the need for reform, Spinelli was one of the driving forces behind the draft treaty on the European Union presented by the

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<sup>14</sup> Michael Burgess, “Introduction...”, page 2.

<sup>15</sup> See Elazar, “The United States and...”, page 38.

<sup>16</sup> Joschka Fischer, *From Confederacy to Federation: Thoughts on the Finality of European Integration*, speech at Humboldt University, 12<sup>th</sup> May 2000, Berlin: “Successful as it was in that scenario [economic integration of a small group of countries], this approach has proved to be of only limited use for the political integration and democratization of Europe.”.

<sup>17</sup> Michael Burgess, “Introduction...”, page 3.

<sup>18</sup> Michael Burgess, “Introduction...”, page 4.

European Parliament in 1984 (The European Union Treaty, EUT). The proposals revised competences of the European institutions, introduced the co-decision process, the president of the Commission was to be vested by the European Parliament, but albeit all this and its impetus the intergovernmental dimension of the E.C. was to remain largely preserved (for instance, foreign, security and defense policies were kept in the sphere of responsibility of member states). Although never ratified, this document can be considered of a certain importance, an “embryo” for political changes, for a new European political direction<sup>19</sup>.

A significant transformation came with the Single Europe Act (SEA, 1987) and the commitment to create the Single European Market (SEM). This marks the time where we can indicate the gradual move to a constitutional Europe<sup>20</sup>. We should focus on the foundation of the Single European Market: it requires a high degree of centralization to be efficient; the freedom of national governments to determine macro and micro-level economic policies is curtailed; opens the door to regulation and intervention; exposed the democratic deficit in E.C.’s decision-making process (as the E.C. competences enlarge national executives and their accountability are under pressure); increased qualified majority voting in the SEM matters; strengthened the European Parliament’s role in the issues of future enlargement and trade association agreements (posing the question of that same empowerment of the EP in other areas). Besides these political consequences other questions arose: common foreign policy, security issues, environmental policy, European citizenship and social dimension of the community<sup>21</sup>.

Finally, it was the moment for the fundamental Treaty of the European Union (Maastricht, 1992). To the existing European Community this treaty added two other arms to the European project: Common Foreign and Security Policy and Justice and Home Affairs. Now we are already reaching the heart of sovereign powers, especially the external relations one<sup>22</sup>. Focal to the treaty was as well the commitment to adopt a

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<sup>19</sup> Michael Burgess, “Introduction...”, page 6.

<sup>20</sup> Michael Burgess, “Introduction...”, page 7: “The gradual shift toward constitutionalism has gathered peace since the ratification of the SEA”.

<sup>21</sup> Michael Burgess, “Introduction...”, page 8 and 9. See page 10 for the persisting inadequacies of the institutional setting at the time.

<sup>22</sup> See Charles Leben, “A Federation of Nation-States or a Federal State?”, in *Jean Monnet Working Paper No.7/00, Symposium: Responses to Joschka Fischer*, Harvard Law School.

common currency (European Monetary Union) which is seen as a federalist step<sup>23</sup> since the EU has exclusive jurisdiction over it. For instance, Tanja Börzel and Thomas Risse appoint it as a federalist characteristic<sup>24</sup>. For all of this, Michael Burgess states that: “In retrospect we can look on the Maastricht experience as representing yet another building block in the struggle to make the goal of the European union a ‘federal union’”<sup>25</sup>. Even though he acknowledges that the treaty didn’t endow the EU with federal institutions, he prefers to draw his attention to the new competences attributed to the community and the addition of procedural elements and formal commitments to move forward and deepen the European project.

Besides all this it is important not to forget that the active European Court of Justice has constitutionalized the treaties upon which the community is based, by declaring that they established a “new legal order” and a “constitutional charter of a Community based on the rule of law”<sup>26</sup>.

## V – Current Status and Perspectives

As I had the opportunity to refer before, the debate around the nature of EU usually ends with the catchword of “Unidentified Political Object” (UPO). However, for a scientific analysis my research indicates that for a conceptualization of the EU today most of the authors turn to Federalism to make their theoretical approaches. What I plan on doing in the following parts of the paper is exposing different thoughts and views about the EU, why it resembles a federalist reality and why it doesn’t as well as putting forward some specific questions, namely the lack of a common people of Europe (or said differently, taking into account that the Treaty of Rome points toward

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<sup>23</sup> David Buchan, “A Heath Robinson Design for Europe”, *Financial Times* (12 December 1991), p. 16: that reality of a single currency and a central bank gives the European Union economic power to become “a European Union of federal type”.

<sup>24</sup> Tanja Börzel and Thomas Risse, “Who is afraid of a European Federation?...”, page 10.

<sup>25</sup> Michael Burgess, “Introduction...”, page 14.

<sup>26</sup> See *Van Gend en Loos v Nederlandse Administratie Der Belastingen* [1963] ECR 1; [1963] CMLR 105, para [12]; *Partie Ecologiste ‘Les Verts’ v European Parliament* [1986] ECR 1339, 1365; [1987] 2 CMLR 343, para [23].

a union of the peoples of Europe, and not the formation of one single political community) which has effect on the basis that, as the majority views it, a constitution for a European federal state would juridically presuppose a single constituent power (one “We the People of Europe”) that doesn’t seem to exist now.

Starting with Daniel Elazar, he prefers to see the EU more as a complete confederation<sup>27</sup>, although a “new style of confederation” to which no reasonable explanatory theory has yet been developed. He argues that upon the foundation of the European Community the objective was never to form a federal state comparable to the United States, based on a constitution and with comprehensive ends. On the contrary, history shows that the functionalist approach pursued and that translated into a “specific confederation based on the union of specific economic functions” had always the objective of minimizing the threat to Member States sovereignty as well as maintaining the fact the different constituent polities are separate countries with many elements in common and not a single nationhood. So his view accentuates an intergovernmental perspective of the EU.

Vivien Schmidt understands the EU as “more federal than unitary” but with no constitutional balance of powers, exhibiting, instead, a dynamic confusion powers<sup>28</sup>. She draws attention to the fact that in the EU the constituent Member States are largely in control of the legislation but disagrees with a strict intergovernmentalist perspective because, in her opinion, leaves in the shadow the intervention of other institutional actors (at a supranational, subnational or national level) that “makes the EU institutional structure more akin to a federal system”<sup>29</sup>. Concerning the confusion of powers it holds to the aspects of a weak European Parliament (that should be the primary legislative body), an executive made up states representative that has a major legislative role, a bureaucracy exercising mostly executive functions, and a judiciary

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<sup>27</sup> Daniel Elazar, “The United States and...”, page 38.

<sup>28</sup> Vivien Schmidt, “European ‘Federalism’ and its Encroachments on National Institutions”, *Publius*, Winter 1999, page 19.

<sup>29</sup> Vivien Schmidt, “Federalism and State Governance...”, page 337.

with a militant posture overlapping with both the executive and the legislative<sup>30</sup>. The keyword for this author is quasi-federal.

Before continuing the discussion and in order to expand this federal understanding of the EU, let’s specify which federal characteristics are usually identified: system of governance based on two legal orders (community and national); the treaties define the jurisdiction and resources for each of the institutions of those orders; there’s shared competency in some areas between EU institutions and Member States; community law has supremacy or precedence over national law (even though in what regards constitutional law it’s a discussed question); majority decision on the EU level is increasingly the default procedure; the European Court of Justice serves as referee to solve issues between Member States, Member States and EU Institutions, ensuring as well the uniform interpretation and enforcement of community law; a directly elected Parliament with ever rising powers; finally, now a common currency (in what used to be a core element of sovereignty) in the frame of the European Monetary Union, the EU having the exclusive jurisdiction over it<sup>31</sup>.

It seems to me then that there are enough arguments to portray the European Union resorting to federalism theory in order to draw the comparison, as a substitute for the confederal theory. If we turn to the general definition of confederation, a main element is that of its members maintaining their sovereignty untouched. In the EU of today the Member States also remain sovereign but all the historical steps have been given in a way of strengthening the community and the integration, of going always further. The confederation theory doesn’t seem to fit and frame all the aspirations and the vision of the project of a united Europe, it seems to be always a pace behind. Somehow translates to me an idea of stagnation, of a pact between states that doesn’t actually have an evolving vision. On the contrary, in the EU, the states if are still mainly the legislators and the masters of the treaties and are on the bottom

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<sup>30</sup> Vivien Schmidt, “European ‘Federalism’ and its Encroachments on National Institutions”, *Publius*, Winter 1999, page 20.

<sup>31</sup> For all see Tanja Börzel and Madeleine Hosli, “Brussels between Berlin and Bonn: Comparative Federalism meets the European Union”, *Webpapers on Constitutionalism and Governance beyond the State*, [www.bath.ac.uk/esml/conWEB](http://www.bath.ac.uk/esml/conWEB), page 8.

(foundation) of the EU setting providing “normative authority” and “real power” (to use the words of Weiler<sup>32</sup>) they have already though allocated significant powers to the European level (one could ask if while still principally being in control of the decision-making process it is possible to return to the nation-state that hadn’t abdicated from certain functions developed at a domestic level, to put them in the European stage, and the answer seems clearly no) at the same time that the European Union and its battalion of legislation reaches crucial aspects of ordinary life. This to say that the European Union seems to have gained independence or a particular distance from each and every particular state (maybe self-sufficiency or self-ruling or governing), making it an identity which in certain situations may impose itself against the interests of Member States. This way, in my opinion, federalism theory captures more of the essence of the present union (acceptance of a supra-order), other than going “back” to confederation and putting the lights just on the States.

## VI – Federalism and Models of Federalism for Europe

In his speech<sup>33</sup> Joschka Fischer affirms that the European integration process “is now being called into question by many people; it is viewed as a bureaucratic affair run by a faceless, soulless Eurocracy in Brussels—at best boring, at worst dangerous”. This is definitely one of the main concerns today: how to endow the European Union with a strong capacity to act, not only institutionally speaking but also at the level of reaching the Europeans, being “understandable” by the citizens and not a closed, remote and “rule-emanator” abstract body. The faceless or soulless Eurocracy Fischer alludes to is comprehensible if we bear in mind the democratic deficit of the union and the fact that the citizens are the first not to know where power resides in the European Union, to whom they should address their worries, fears or apprehensions or more strongly their complaints (the accountability that should come with the exercise of power no one seems to know where it stops). I actually remember, just to give an example, during this recent fishermen crisis because of the rise of oil prices, a

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<sup>32</sup> J.H.H. Weiler, “Federalism and...”, page 2.

<sup>33</sup> Joschka Fischer, *From Confederacy to Federation: Thoughts on the Finality of European Integration*, speech at Humboldt University, 12<sup>th</sup> May 2000, Berlin.

journalist announcing on TV that the fishermen having a manifestation in Brussels weren’t able to know to whom they should be directing their speech, and were lost in the myriad of the EU different institutions without recognizing which one has the responsibility for their area and would be capable of giving them a response.

Then, Federalism comes into mind also as a problem solver. A federalist organization of the European Union so as to define competences, responsibilities, capable key centralized institutions: a clear framework, and not the confusion of powers of today. A federalist organization of the EU to face the demanding challenges of enlargement and appear in a delineated way in the face of its citizens. More, an agile, democratic, representative, open and embracing EU. This was the vision of Joschka Fischer when, confronted with the major tasks of today (enlargement and capacity to act), saw this solution: “very simple answer: the transition from a union of states to a full parliamentarisation as a European Federation” (based on a constitution or as some like to put it a “constitutional treaty”). Well, even if the answer is simple, the “transition” doesn’t certainly follow the same equation.

Backing to federalism theory, besides its two-level structure and the divided model of sovereignty, one of the main aspects is that it should be based on a Constitution. A constitution emanates from *one* people (juridically speaking). Even if there is real or social heterogeneity that cannot impede a sense of being a common constituent power: this is, “we the people” even though different socially or culturally are one and the same for the purpose of determining our basic law, the principles in which our state is founded and share the common destiny we want to have from here forward because we are acting together as one in this political self-determination. This sense of unity for the primary political purpose of “different but under one state” appears not to be observable in Europe. While there are many elements that equalize Europeans and a collective history that cannot be ignored, the nation-state (see point III) shaped the European continent and the political communities in this area feel as one and only, attached to their territory, to their origins as a single people with an exclusive identity that differentiates them from all the rest, many of them have centuries of particular national tradition and backgrounds, and feel as Portuguese, Spanish, French or German, not so much as Europeans, as part of the bigger image. The situation is obviously changing and already has been transformed a lot, but I’m focusing here on the purpose of all these peoples being able to be considered or

consider themselves as a single *demos* jointly taking the sovereign decision of emanating a constitution. For most of the authors that doesn’t exist: there are different political communities, different political identities that the Treaty of Rome and the European project is supposed to preserve. This is way Covey Oliver or E. Stein refer themselves to a “partial federation” or “federative arrangement” (Oliver) and to an “incipient federal structure” based upon international treaties and not one people (Stein), posing in addition the question of knowing if federations come into existence through treaties, if there’s such thing as a “treaty-based federation”<sup>34</sup>.

This is one of the main objections to the federal theory, developed by a “third way”<sup>35</sup> and that ultimately translates into a future Europe as a “mixed commonwealth”<sup>36</sup>. For this perspective, no single European *demos* means no federal state. Then, the way is to recognize the mixture of political agents and principles that the future of the European must necessarily embody<sup>37</sup>, going on to say that the basis will be that of a “constitutional demoi-cracy” respecting the distinct peoplehoods<sup>38</sup> and, for instance, in the person of Weiler, highlighting the very special traits that give to the union its unique character (traits to be conserved), its special brand of federalism, like the Principle of Constitutional Tolerance, which trying to be faithful to the author we can summarize this way: as the strategy of the European integration and even in the enlargement process is not following a homogenization strive (“come be one of us”, being or transforming into one of us with our characteristics) but rather the idea of maintaining the “alienship”, sharing diversity, “according the other dignity” for he will be able to be himself and retain to individualizes him<sup>39</sup>. This must be the source of European union. In my perspective this last conception has the merit of not only acknowledging the empirical situation of today’s Europe (evident diversity, attachment to sovereignty) but also of avoiding confrontation between the EU reality and that of its Members, the nation-states and its peoples. Perhaps the

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<sup>34</sup> Nicholas Aroney, *Federal Constitutionalism...*, page 6.

<sup>35</sup> J.H.H. Weiler, “Federalism and...”.

<sup>36</sup> Richard Bellamy and Dario Castiglione, “Building The Union: The Nature of Sovereignty in the Political Architecture of Europe”, *Law and Philosophy*, Vol. 16, No. 4, Constructing Legal Systems: “European Union” in Legal Theory, July 1997, page 441.

<sup>37</sup> Bellamy and Castiglione, “Building the Union...”, page 444.

<sup>38</sup> Nicholas Aroney, *Federal Constitutionalism...*, page 10.

<sup>39</sup> J.H.H. Weiler, “Federalism and...”, page 10.

there’s still a need for some time to *interiorize* the strong EU dynamic and the legitimacy of its top to bottom rules, instead of aiming for the higher/supra-state that no one can really be sure of how it would work and what the balance of powers would be; imagining it today, I would say, is pushing the constitutional tolerance of Weiler to a break point.

Nonetheless, there is something in this view I can’t convey with and I would make two critics: (1) in my standpoint is a transitory/temporary way in/for European Integration; (2) it doesn’t seem to offer any concrete optional framework to deal with the institutional problems of today’s EU pushing it forward to more efficiency, effective decision-making process and democratic accountability. Besides, federalism isn’t the boogeyman (who is afraid of being European?). Concerning the first point, in a tied and webbed community, the characteristics that one starts with are not going to be the same after years of common living. The idea of “alienship” that Weiler uses and the constant reference to different cultures and identities tends in my opinion to dilute itself as the time inside the European Union goes by. I don’t mean that in a few years we are all going to be the same or be perfectly homogeneous, but while I believe distinct traits will ever individualize each of the different composing European communities, that, with progressive integration and as time passes, won’t be enough to establish a difference between one and another, it will just be normal diversity of cultural backgrounds that can’t affirm an opposition. The idea is that of a future resemblance by mutual recognition that gradually we are basically the same, with the same core aspirations inside the union, thus not being enough to really make a contrast among peoples, which now still exists and grounds that recurring attachment to the nation-state, to sovereignty, to a direct and near government that (at least in appearance) conducts our affairs. Even Weiler recognizes in his article this dilution of “otherness” among Europeans with the “praxis” of his principle of constitutional tolerance when he says: “immigration officials [...] learning to examine the passport of Community nationals in the same form, the same line, with the same scrutiny of their own nationals”; “many policies in the public realm can no longer be adopted without examining their consonance with the interest of others, the interest of Europe”<sup>40</sup>. In my view, then, there will be a time when the other will stop being “other” to start being like me, and since that’s the frame we’re dealing with, to be just

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<sup>40</sup> J.H.H. Weiler, “Federalism and...”, page 12 and 13.

as I am European. As a result, what at first sight looks as if it was threatened and needed protection (“otherness” and “alienship” from the supra-federal state that wants to homogenize everyone, absorbing one’s identity instead of preserving it) will eventually, I think, develop into *non-opposing* specific traits of a people, ultimately meaning no invalidation for juridical purposes of a single European People and, to use the cliché, we will be equals within difference. Concerning the second point, since this theory is mostly worried about what I just explained, some interstate tone is put in the discourse and one can’t really see the institutional reform this third way proposes for addressing today’s issues. It’s very much focused on sociological integration with the described legal structure consequences (role of the nation-state) and open to the future and day-to-day developments<sup>41</sup>. So, there’s space for federalism and for a one juridical European people.

Concerning the possibility of coming into federalism through international treaties and the argument that the difference between them and a federal constitution is overly exaggerated, as this work is already becoming too long and that question is one of constitutional and international law that I don’t see any relevance in exposing and discussing here, I’ll just send the reader to the article of Nicholas Aroney (*Federal Constitutionalism...*). I’ll make one simple comment anyway: if one has abdicated of national currency and jurisdiction over monetary issues for the European Union and that through treaties, I can’t really see the harm in constructing the federal Europe by increasing democracy among its institutions and electing directly some of its representatives (for instance, turn the European Parliament into the primary legislator and elect the President of the Commission) through treaties as well.

Now to the models of federalism that could be an option for the EU. We will concentrate on the German model of federalism (because of the dimension of representation of territorial interests that it allows) and then in the proposals of Joschka Fischer. Before it is important to retain that typically two main attributes are said to be missing in the EU in order for it to be a federal state: “tax and spending” power, since the EU relies solely on the budget provided by the Member states having no tax capacity nor, consequently, a redistributive policy of self-income; then the fact

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<sup>41</sup> See Bellamy and Castiglione, “Building the Union...”, pages 443 to 445.

the Member states remain the “Masters of the Treaties”<sup>42</sup>. To this we can add a weak common foreign policy, weak common security policy and no elected EU executive body for democratic control by citizens to name a few.

Traditionally we have two models of federalism: dual federalism and cooperative federalism<sup>43</sup>. As the first consists of a division of responsibilities, emphasizing the autonomy of each level with duplication of government machinery (federal and state), implying a clear vertical separation of powers and having as a consequence a not so stronger representation of the States at the federal level because it works in accordance to the Senate principle (States representatives do not represent the executive of the State but rather are the choice of the electorate and are generally in parity with all the other members of the federation), the example being the United States of America, this would probably be the model firstly rejected on this Europe of nation-states since they would try to maintain their influence in the federal level as much as they could. Aiming for this federalism is affronting today’s reality and even in the future is wanting to turn the states to foremost sub-units of the federal level and not so much active participants of it.

The other option is to focus on cooperative federalism as known in Germany. Actually, there are opinions indicating that the European Union develops according to this type of federalism<sup>44</sup>. The main features of this type of federalism can be summarized as follows: division of labor between the federal level and the states; the federation makes the laws, the states implement them; this leads to, instead of “divided” competences, “shared” competences (that’s what happens in the EU); requires a strong representation of states at the federal level to ensure the effective implementation of the policies and to avoid turning the States into bureaucratic and mere administrative units (let’s not forget the predominance of territorial interests in the EU decision making process) which has in impact in terms of the second chamber of parliament being organized according to the *Bundesrat* principle<sup>45</sup>.

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<sup>42</sup> Tanja Börzel and Thomas Risse, “Who is afraid of a European Federation?...”, page 2.

<sup>43</sup> Tanja Börzel and Madeleine Hosli, “Brussels between Berlin and Bonn: Comparative Federalism meets the European Union...”, page 5.

<sup>44</sup> Tanja Börzel and Madeleine Hosli, “Brussels between...”, page 11.

<sup>45</sup> Tanja Börzel and Madeleine Hosli, “Brussels between...”, page 5 and 6.

As a result of all of this let’s look into concrete possible frameworks according to this cooperative style, this is, how does it translate into the European institution setting. One possible model could be: the European Parliament would be formed by two chambers (the second one being the Council of the European Union); co-decision and qualified majority would be the default procedures of decision thus equalizing both the EP and the Council of EU; the Commission would evolve into a true European government (directly elected or indirectly by the EP); the EU would have to have tax power in order to generate its own revenue, manage and have a redistributive capacity as well. This seems a fair proposal in order to move the European Union towards a more powerful (influential) position but also more democratic and directly related to the citizens.

Other thing I propose now is since we’ve been talking about Joschka Fischer from the very beginning describe his own personal vision as well. So in the speech we have been citing his model is this: there will have to be a base constituent treaty; the nation-states must be understood as important parts of the project and so their institutions cannot be “devaluated”; the model must be understood as a “division of sovereignty” between the Member States and the EU (so, not the only the EU is not supposed to absorb the states as they continue to have a key role). Consequently, the European Parliament must be able to represent both the citizens and the states, being divided into two chambers (one for elected members that are members of their national parliaments as well; another following the Senate or the Bundesrat Principle. Concerning the European executive or the European Council develops into a European Government or the Commission is given more far-reaching powers and its President is directly elected.

As I’m already in the final part of this essay I don’t want to go too deep into a critique of these views. There’s one comment though I have to formulate: when Joschka Fischer refers to the European Parliament with two chambers, the composition he presents for each seem to this student pretty much the same. The objective is to have a representation of the states but as well from the citizens, I can’t really discover how having one chamber for national parliamentary people and another (possibly) for state representatives (Bundesrat principle) will make any improvement in the democratic representation of the EU. I’m able to draw as example the case of Portugal: the majority in the Parliament is the party from which the

Government gets his support from; the Prime Minister comes from the party that has the most votes for the legislative elections. If in this proposal of former Minister of Foreign Affairs of Germany, the Member State Portugal as not only the opportunity to be represented in one chamber by his own representatives and then get in the other also parliamentarians that are from the same party as the government in power, the question is: what’s the real European representation of citizens? Additional observations could certainly be made.

## VII – Conclusions

As a sum up of this essay that is far longer than expected by now the main idea that in the end I think can be extracted from all the text is that even though we don’t have a federal (strictly or scientifically speaking) European Union, no supra federal-state, no Member States as sub-units, there seems to be little that can oppose to that *finalité* if political effort (and certainly compromise) is put into it. We’ve seen from the historical foundations of Statism that European countries and European peoples are attached to their nation-state, are connected to an exclusive exercise of power and probably feel suspicious when some supra-organization that can’t even be defined very well comes and imposes rules. History of state evolution is able to serve as one contribute to harden the path towards intense political unity in Europe. In any case, federalism has been a latent idea since the very creation of the dream of “one Europe” and it doesn’t seem likely that it will disappear. Is it good, is it bad? Is it beneficial or detrimental? Only further discussion can tell, maybe even only trying to achieve it to see if the outcome is positive or a disaster. Is Europe in the best shape today? No. Can federalism and further political integration help? From this essay I think so if it involves the people of Europe in order to gain his commitment to this project. Therefore everything must be explained and told in a transparent and legitimate way. What I perceive as needing to be ultimately avoided is this growing power or growing competences of Europe with also a proportional increase in suspicion and distance in the way Europeans see the structure of Europe.

Therefore, a serious discussion of federalism for Europe should be put on the table, maybe the time isn’t the right one but it will come; and as Stuart Mill said, the most important property of truth is not that it always overcomes in a certain given moment

the lie, but that even though the truth might be overlapped by the lie for years or centuries she's always latent, expecting a special moment to regain her light and find the accurate interlocutors that will eventually promote her widespreading. I feel the same about federalism: the need for discussion will always be present.

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