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Observing the UPOs

The conception of the European Union as a supranational federal polity

(Die Konzeption der Europäischen Union als supranationaler föderaler Verband)

Contents

<i>Abstract – Zusammenfassung – Összefoglalás</i>	2
I. Preface: The dream of a European Federation	3
1. Introduction: Flying saucers and European Integration	3
2. The theoretical basis: federalism and federation	4
II. Analysing the federal elements in the Treaty establishing a Constitution for Europe.	5
1. The federal idea (being different but united) in the Preamble	5
2. Constituting the Union Art I-1. (cf. Art 1. TEU/TEC)	6
3. Status of the Union	7
4. Status of the member states	8
5. The ultimate decision-making power	10
6. <i>Excursus: One single union</i>	11
III. The nature of the Union	12
1. The classical approaches	12
a) <i>The EU as a federation</i>	12
b) <i>A European Confederation</i>	13
2. The “ <i>in-between</i> ” theories	14
a) <i>The EU between a confederation and a federation</i>	14
b) <i>The EU between an international organisation and a federation</i>	15
3. The “ <i>sui generis</i> ” theories	16
IV. Conclusion: <i>Flying Saucers</i>	17
Bibliography	18

Abstract

Has the new Treaty establishing a Constitution for Europe made the final great step towards a European Federation? By analysing the constitutional text this essay tries to find an answer for this question, and examines the federal elements in the recently signed document. While drawing the consequences, we briefly look through the three main groups of concepts, concerning the (legal) nature of the EU, i.e. through the classical, the “in between”, and the “sui generis” theories. As this short examination suggests, the Constitutional Treaty has made a great step, to deepen the federal characteristics of the EU, but still has not established a European Federation. The EU may well be federal, without being a clear-cut federation, in the classical sense. The Union may still remain for the near future, as it was described by Michel Emerson, a *UPO* – an unidentifiable *political* object.

Zusammenfassung

Hat der neue Vertrag über eine Verfassung für Europa den letzten Schritt zur Gründung einer Europäischen Föderation gemacht? Dieses Referat versucht die Antwort mit der Analyse des neuen Dokumentes zu finden, und zwar mit der Untersuchung der föderalen Elemente in dem Verfassungsvertrag (Gründung und Stellung der Union, Stellung der Mitgliedstaaten, das Recht zur Verfassungsänderung usw.). Während wir die Konsequenzen ziehen, überprüfen wir die drei Hauptansichten über die (Rechts)natur der EU, d. h. die klassische, die „zwischen-“, und schließlich die „sui generis“-Theoriegruppen. Als Schlussfolgerung gehen wir davon aus, dass die neue Verfassung, obwohl sie die föderale Merkmale der Union sehr verstärkt, keine europäische Föderation gründet. Die EU ist zwar *föederal*, sie ist aber keine *Föderation* im klassischen Sinn. Dieses kompliziertes System ist schwer mit unseren gewöhnlichen wissenschaftlichen Kategorien zu erklären. Für die nahe Zukunft bleibt die EU wahrscheinlich, wie Michael Emerson sie beschrieben hat, immer noch ein *UPO* – ein unidentifizierbares *politisches* Objekt.

Összefoglalás

Vajon megtette-e az európai alkotmány létrehozásáról szóló szerződés a végső lépést egy európai föderáció megalapítása felé? Ebben a dolgozatban a fenti kérdésre keressük a választ, miközben megvizsgáljuk az új dokumentum leglényegesebb föderális sajátosságait. (Az Unió megalapítása és jogállása, a tagállamok jogállása, az alkotmánymódosítás joga stb.) A következtetések levonásakor vázlatosan áttekintjük a EU (jogi) természetéről, mibenlétéről alkotott elméletek három főbb csoportját, vagyis a klasszikus, a „köztes” és a „sui generis” felfogásokat. A rövid elemzés végkövetkeztetése szerint, az alkotmányos szerződés ugyan felerősítette az Unió föderális jellemzőit, ám az ettől még nem vált szövetségi állammá. Bár az EU szerkezete valóban *föderális*, ez nem jelenti szükségszerűen azt, hogy az Unió egyben a klasszikus értelemben vett *föderáció* is lenne. Ezt a bonyolult szerkezetet nehéz a szokásos tudományos kategóriák valamelyikébe besorolni. Az EU a közeljövőben valószínűleg továbbra is, amint Michel Emerson az ufókra utalva jellemezte, egy *UPO* marad – egy azonosíthatatlan *politikai* tárgy.

I. Preface: The dream of a European Federation

1. Introduction: Flying saucers and European integration

„The European Union is a success story. For over half a century now, Europe has been at peace,¹ and “for the first time ever in European history, most states on the European continent are freely committed to designing, by consent, a nonhegemonic order for most of Europe. The one small remaining problem is How?”²

To sum up briefly, this was the question on which the Laeken European Council sought for answer, when it called together the European Convention. By the beginning of the 21st century the problem arose, how to plan “[b]earing in mind the experience of half a century of Europe as a Community, and bearing in mind ... [the] new situations [of deepening, widening and democratising the integration] ... a large-scale European organisation that will enable some thirty States to act together, effectively and democratically, in exercising the full range of powers envisaged by the present Treaties?”³ The Convention and the IGC had thus the task to find a model for the European Union, which enables the member states and the community institutions to carry on together the project of a united Europe.

To find a compromise between the double desires of being united and remaining different was always a central problem in constituting a federal polity, and from the beginning of the European project the federal idea has been suggested several times as a solution for the problems of the continent. Yet, it has been never followed by the Union in its pure form. It is quite clear, that the “European Community has many federal features already,”⁴ but up to now the EU has not corresponded fully to the classical structures of a federation. Since the beginning of the latest debate on the *finalité* of the integration however, the idea has appeared again, as a „transition from a union of states to full parliamentarization as a European Federation ... [which] will have to be based on a constituent treaty.”⁵

Well, this constituent treaty has been already signed. The EU has gained much of those elements, that were considered as the “missing” federal features of the Union. Does this

¹ Laeken Declaration on the future of Europe, p. 1 (details in the bibliography).

² Timothy Garton Ash: The European Orchestra, In: Hoover Digest – 2001/3, At: <http://www.hooverdigest.org/013/ash.html>.

³ Alain Lamassoure: The European Union: four possible models CONV235/02, p. 2 (details in the bibliography).

⁴ Ernst Wistrich: The United States of Europe, Routledge, London-New York, 1991. p. 104.

⁵ Joschka Fischer: From Confederacy to Federation, p. 7 (details in the bibliography).

mean that the dream of a European Federation has been finally achieved? Has the treaty made the great step towards the establishment of a European federal state?

The aim of the present essay is to find an answer for this by analysing the constitutional text. In part II we first identify the federal elements of it, then in part III we briefly draw the possible consequences, that is what kind of polity these features establish. As this short examination suggests, the Constitutional Treaty has made a great step, to develop further the European integration and to deepen the federal characteristics of the EU. But not to establish a European Federation. The treaty provided a great possibility for Europe to continue its way forward, but has put no point at the end of this route. What it has rather put, as its many predecessors before, is something else: a question mark. The Union may still remain for the near future, as it was described by Michel Emerson, a *UPO* – an unidentifiable political object.⁶

2. The theoretical basis: federalism and federation

Before examining the present constitution of Europe, hunting for federal elements in it, we should clarify first, what exactly we are searching for. It is important to note, that several different federal elements could constitute a federation and thus building different forms with different characteristics. It is even more important however to note, that federal elements not always constitute a federation, as the two notions, although closely connected, are not the same. Briefly, there can be no federation without federalism, but there can be federalism, which does not establish a federation.

Federalism (*Föderalismus*) conceived as a “political *principle*, has to do with the constitutional diffusion of power, so that the ... elements in a federal agreement share the processes of common policy-making and administration by right, while the activities of the common government are conducted in such a way as to maintain ... [the] respective integrities”⁷ of its constituent parts. Federalism seeks “to achieve both political integration and political freedom by combining shared rule ... with self-rule.”⁸ It offers both a

⁶ Quoted in Géza Mezei: *Helyreállított Európa (Europe Restored)*, Osiris Kiadó, Budapest, 2001. p. 19.

⁷ *Federal systems of the world: a handbook of federal, confederal, and autonomy arrangements*; Compiled and edited by Daniel J. Elazar and the staff of the Jerusalem Center for Public Affairs, Longman Group UK Limited, 1991. p. xv. Italics by myself.

⁸ Bertus De Villiers (ed.): *Evaluating federal systems*, Juta and Co. Ltd.-Martinus Nyhoff Publishers, Dordrecht-Boston-London, 1994. p. 8.

participation in a broader political community, and a possibility to care “a certain degree of autonomy”⁹ in the same time.

On the other hand a federation (*Föderation*) “is a polity with strong overarching general government whose constitution is recognised as the supreme law of the land and which is able to relate directly to the individuals who are dual citizens of both the federation and their constituent units. The position and the autonomy of the latter is constitutionally protected.” It is “an institutional arrangement taking the form of a sovereign state,”¹⁰ which “incorporates regional units in its decision procedure on some constitutionally entrenched basis”¹¹.

The core question of federalism is thus a relationship between the two parties, usually a community and its members, and their position to each other. It is an agreement, providing for both levels some kind of autonomy and regulating their relationship by the principles of mutual respect and cooperation. When this agreement however, takes the form of a constitution and gives the common level the position of a sovereign state, it is then an establishment of a federation, or with other words a federal state (*Bundesstaat*). Our analysis of the Constitution focuses thus on elements, which regulate generally the relationship between the Union and the member states.

II. Analysing the federal elements in the Treaty establishing a Constitution for Europe.

1. The federal idea (being different but united) in the Preamble

When the heads of states of Europe was “[c]onvinced that, while remaining proud of their own national identities and history, the peoples of Europe are determined to transcend their former divisions and, united ever more closely, to forge a common destiny”, they actually expressed the essence of any federal agreement: to conduct a common future, while maintaining their own one. Such an explicit and clear expression of this idea of *united in diversity* cannot be found in the preambles of the Treaty on the European Union (TEU) or of the Treaty establishing the European Community (TEC). Besides the statement on an “ever closer union” and a desire “to deepen the solidarity between their peoples while respecting

⁹ Rudolf Hrbek: *Föderalismus sui generis*: - der Beitrag des Konvents zur Verfassungsstruktur der erweiterten EU, In: Zeitschrift für Staats und Europawissenschaften, 3/2003. p. 435.

¹⁰ Preston King: *Federalism and Federation*. Quoted by Michael Burgess: *Federalism and federation, A Reappraisal*, In: Michael Burgess-Alain-G. Gagnon (eds.): *Comparative federalism and federation: competing traditions and future directions*, Harvester Wheatsneaf, New York etc, 1993. p. 4.

¹¹ *Ibid.*

their history, their culture and their traditions” there is no declaration, which would express at the same place the desire of being united and of remaining different. The new formulation however, provides a clear articulation of the will of the founders, committed to this principle.

2. Constituting the Union Art I-1. (cf. Art 1. TEU/TEC)

“The foundations of the European Communities and the organisation of the Union [*Unionsverband*] lay in a contractual conciliation of the will of the member states,”¹² as inter/supranational organisations (such as the original European Communities¹³) are usually established by an international treaty. A federal polity however, being not only a mere frame of common policy-making, but a new level of political action, is constituted by a constitutional act, expressing the will of its people. The document, which has been designed to be the new foundation of the EU is combining the two, although with significant emphasis on the contractual nature. It is thus a *treaty*, still a “contractual conciliation of the will of the member states”, although it establishes a *constitution* for Europe. Similarly it establishes a constitution *for* and not *of* Europe, which makes clear the origin of the *pouvoir constituant*.

The wording of article I-1. of the treaty itself, is thus a bit blurred, as it says: “Reflecting the will of the citizens and States of Europe to build a common future, *this Constitution establishes* the European Union, on which the Member States confer competences to attain objectives they have in common.” Here, the dominant position of member states is hidden behind the “*pouvoir constituant* of the constitution”, which establishes the EU by itself. This constitution is however an act of the member states, this fact can be also observed in the second part of the sentence, where the competences of the Union are delegated by them.

That also means, that the constituent parts of the Union remain to be sovereign, and so competences and not sovereignty are delegated to the common level. The EU thus, can exercise public power [*Hoheitsgewalt*], but that does not mean, that it is a sovereign entity. Rather the Union acts *on behalf* of the member states, “using” their sovereignty to fulfil its tasks. So the “sovereignty” of the Union can be best conceived as a sum of the sovereignty of

¹² Matthias Herdegen: *Europarecht*, Verlag C. H. Beck, München, 2003. p. 71.

¹³ See the founding texts, e.g.: “By this Treaty, the HIGH CONTRACTING PARTIES establish among themselves a EUROPEAN COMMUNITY.” (Art. 1. TEC – similarly Art. 1 TEU.)

the member states, put together at the community level, and “managed” by the EU (i.e. the exercise of public power), but still remaining a “property” of the member states¹⁴.

From this derives also the legitimacy of the Union. Unlike almost all federal constitutions¹⁵, the EU is not established by the will of the people (because it is established by that of the member states), but only “reflects” on it. The people thus legitimate the Union only indirectly, through its constituent states, and although it is able to connect directly to its citizens¹⁶, it does not get its authority from them.

3. Status of the Union

What makes then this highly dependent Union an autonomous political entity? How could it act even contrary to the member states if it is so contingent upon them? Actually in the day-to-day business, the EU is quite independent of its constitutive parts, as it is not its functioning, but its constitution, which is a subject of the will of its member countries. The autonomous position of the Union is guaranteed by several principles in the new constitution.

Art. I-6. of the text explicitly states perhaps the most important principle of any federal (or supranational) order: “The Constitution and law adopted by the institutions of the Union in exercising competences conferred on it shall have primacy over the law of the Member States.” The primacy of the community law [*Vorrang des Gemeinschaftsrechts*] is so far not regulated in the existing treaties, and has been developed gradually by the European Court of Justice (ECJ). Besides giving the principle a constitutional rank, another significant change, that it concerns not only the community law, but also the union law as a whole¹⁷.

An even more important provision of the constitution is Art. I-7., which states: “The Union shall have legal personality.” That enables the EU as a whole to participate fully in the international relation as a subject of the international law. The alteration is also a consequence of the abolishment of the European Community, as otherwise this would leave the entire level of European integration without legal representation¹⁸. It gives however, legal personality also to the fields of the police and judicial cooperation and the common foreign and security

¹⁴ See e.g. the new wording of the Hungarian constitution (Art. 2/A) “The Hungarian Republic ... can exercise its certain competences, derived from the constitution, together with the other member states, this can be realised independently by ... institutions of the European Union as well.”

¹⁵ Probably the only exception is the constitution of the German Empire of 1871, which has established a federation, but (at least in its wording) was constituted by the will of its member states, represented by their ruling princes, without any reference to the people. See the documents.

¹⁶ See the definition of Elazar above.

¹⁷ As the distinction between the EC and the EU itself will disappear.

¹⁸ Except the small field of the Euratom-Treaty.

policy (CFSP) – the latter would help the Union much to act with “one voice” in the international politics and so to act on behalf of the member states in the area of the CFSP too.

Concerning also the legal position of the EU, we can observe significant privileges towards the member states, which – together with its own (and to a great extent independent) institutions -, enables its to deliver its tasks autonomously. These tasks however, are determined by the member states, at least according to Art. I-11, which states: “The limits of Union competences are governed by the principle of conferral [*Einzelermächtigung*]”. This would mean, that the EU is allowed to act only there, where it is explicitly authorised by the constitution, having thus no *Kompetenz-Kompetenz*. Art I-18 however, does not seem to correspond to this. The existing Art. 308. of TEC permits the Council to act even without explicit authorisation if it is necessary for the realisation of the *common market*, and so gives the EU a possibility to *exceptionally* break the principle of conferral. This limitation is however missing in Art-18, permitting the EU *generally* to disregard it. Still, although theoretically this could mean a *Kompetenz-Kompetenz* for the Union, *actually* it is a subject of the member states, as the decision requires unanimity in the Council, and so implying the tacit consent of all members.

The position of the EU is strengthened however by the existence of the citizenship of the union, regulated in Art I-10., enabling the EU to have a (though restricted) direct contact to its people. Besides the remaining principles of direct effect [*unmittelbare Wirkung*] and direct applicability [*unmittelbare Anwendbarkeit*] of the community law, several newly introduced provisions (such as a public initiative) reinforce this connection in the constitution.

4. Status of the member states

“The term “federal” is derived from the Latin *foedus* which, like the Hebrew term *brit*, means covenant. In essence, a federal agreement is one of partnership, established and regulated by a covenant, ... one that both recognises the integrity of each partner and seeks to foster a special kind of unity among them.”¹⁹ This “mutual loyalty ... covers the entire field not only of federal-state, but also of state-state relations, and it governs not only the substance but also the style of conduct.”²⁰ This federal loyalty [*Bundestreue*] thus can be observed in

¹⁹Elazar: Op. Cit. p. xv. Italics by Elazar.

²⁰Uwe Leonardy: The political dimension; German practice and the European perspective, In: Joachim Jens Hesse-Vincent Wright (eds.): Federalising Europe? The Costs, Benefits, and Preconditions of Federal Political Systems, Oxford University Press, Oxford-New York, 1996. p. 86-87.

three relationships: from the union to its members, from the members to the union and between the member states themselves.

The ties connecting the EU and its members are regulated in the constitution by article I-5, which collects together the so far scattered provisions of the treaties. It takes care – as the current Art 6 (3) TEU – of the different identities of the member states, but says much more. On the one hand “[t]he Union shall respect the ... fundamental structures [of the member states], political and constitutional, inclusive of regional and local self-government”, which for the first time recognises officially the sub-national units as an integral part of European integration. Furthermore it declares the respect of “essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security”, hereby guaranteeing the members not only their autonomous position, but also their legal status as states.

State competences are cared by the remaining principle of subsidiarity of Art I-11, specified in protocol 2. The existing regulations however, are amended by a new procedure, involving national parliaments into the system, and giving them a possibility to control, independently of their national governments, the observation of the principle. Furthermore Art. 8. of the Protocol gives also the Committee of the Regions a right to file an action at the ECJ, whenever its consultation is required in the decision-making process. These provisions not only strengthen the democratic legitimacy and transparency of the EU, but involve sub-national units, and domestic political actors directly in the policy-making system of the Union.

Similarly to Art. 10 of the current TEC, the constitution states the obligation of the member states too, to “take any appropriate measure, ... to ensure fulfilment of the obligations arising out of the Constitution or resulting from the acts of the institutions of the Union. The Member States [furthermore] shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives.”

This mutual respect applies in state-state relations too, with the newly introduced solidarity clause in Art I-43. This ensures for a member state, if it becomes “the object of a terrorist attack or the victim of a natural or man-made disaster” the help of both the Union and the other members of the community, acting “jointly in a spirit of solidarity”, and so fostering a “special kind of unity among them”²¹.

These provisions altogether go far beyond the mere principle of *pacta sunt servanda*, which would normally arise from an international treaty, and establish a complete network of

²¹Elazar, see footnote 19.

mutual loyalty, something which corresponds fairly well to the principle of federal loyalty [Bundestreue], essential in every federation.

5. The ultimate decision-making power

“The extent to which national sentiment and state patriotism respectively predominated under a federal system may be conjured from the nature of the authority which had the right to modify the constitution.”²² Ultimate decision-making power in this context, means the right to determine the “participants” and the “rules” of the political process. Anybody in a federal system, who is capable to decide on the modification of the constitution on the one hand, and on the membership of certain states on the other hand, has the “last word” in every decision-making.

So far the question has not arose, as the Communities and the Union have their legal basis currently in “normal” international treaties and so their alteration is currently the exclusive competence of the member states²³. In a federal constitution however it is quite normal to introduce at least a “qualified” procedure or even to place the power of amendment “so to speak, outside the constitution”²⁴ as it is the case in the US. The aim of this is to hinder both the federal level and the member states to change unilaterally the “conditions of the contract”.

In this sense the regulation of the constitution in articles IV.-443-445 is a definitely a significant step. Although it still leaves the right on the final decision in the hands of the member states, they do not control any more the proposal. Introducing the Convention-method namely means, that member states can decide only on a proposal made by a group of parliamentary and government delegates, that is a Convention. The “Conference of the representatives of the governments of the member states” *theoretically* has the right to completely re-write the proposal, made by the Convention; still *actually* it is unimaginable to completely ignore it. We can state thus, that although member states still control the key aspect of the modification process, they do not have exclusive supervision.

Concerning the really last mean, that is to decide if somebody wants to be rather in or rather out, the new articles of I-1, I-58 and I-60 clarify the so far quite blurred picture. The membership in the Union is regulated in Art I-58 as it was previously governed by Art. 49

²²Albert Venn Dicey: Introduction into the study of the law of the constitution, Macmillan & Co. Ltd. – St. Martin’s Press, London-New York, 1959. p. 148.

²³See Art. 48. of the TEU: Parliament and the Commission have to be consulted only.

²⁴Dicey: Op. cit. Ibid.

TEU, that is the “Union shall be open to all European States which respect the values referred to in Article I-2, and are committed to promoting them together.” The important is the newly introduced regulation of the secession from the Union, as in conventional federations there is no right to leave the community by individual decision, and even by international treaties a unilateral abrogation is not accepted. Art I-60. however, gives the right for the member states to leave the union after a two years transition period. By making the so far blurred and doubtful regulations now unambiguous, gives the countries a far clearer and probably easier way out, then they previously had.

6. *Excursus: One single union?*

So far the simultaneous existence of four treaties²⁵, and the complex structure of the European Union, based on the European Community, which actually consisted of three treaties merged together, and in 1992 amended by the two intergovernmental pillars, has put the question if the EU is actually one single organisation or just a conglomerate of separate international institutions more or less connected to each other. Strictly understanding the texts the explanation could also arise, that the EU is an international organisation, where the founding states are a member *together with* the European Communities.²⁶ The constitution now is to solve this problem by replacing the founding treaties of both of the EC and the EU, still the Euratom-Treaty would continue to exist. The institutions will be EU-institutions, and the policies would belong to one single European framework, thereby put an end of the question.

The problem however, which we could manage to send out at the door, seems to come back through the window – although at this time as a rather political and not legal issue. As both the territorial and the political scope of the integration grows, a new type of fragmentation has begun. “Various systems exist alongside each other. The system for the internal market, the system the ‘Schengen Area’, the system for ‘Euro Area’, and the common foreign and security policy. EU Members do not all belong to the same systems.”²⁷ Moreover, to make things a bit more complicated not only EU-members belong to these systems: ignoring now the various association agreements, and the agreement on the European

²⁵ Since 2002 the ECSC does not exist any more, currently there are also three treaties.

²⁶ Oliver Dörr: Zur Rechtsnatur der Europäischen Union, In: *Europarecht*, 1995. p. 347.

²⁷ Rainer Lepsius: The European Union as a Sovereignty Association of a special Nature, In: Christian Joerges-Yves Mény-J. H. H. Weiler (eds.): *What kind of constitution for what kind of polity? - Responses to Joschka Fischer*; The Robert Schuman Center for Advanced Studies, European University Institute, 2000. p. 219. (Electronic version at: <http://www.jeanmonnetprogram.org/papers/00/symp.html>.)

Economic Area, the Schengen aquis also includes e.g. Norway, the single market e.g. Monaco, the monetary union e.g. the Vatican City – none of them being a member of the European Union as such. Although there are examples, even in clear-cut federations, to allow an opt-out clause in several policy fields (the right, that Quebec has in Canada), but it is quite unusual, that membership and procedural rules vary in almost every policy area.

III. The nature of the Union

As a preliminary conclusion we can state, that the new EU-constitution is a proper document “to achieve both political integration and political freedom”²⁸ and includes suitable elements to set up a political community with (at least) two autonomous levels, each of them respecting the integrity of the other, and “in full mutual respect, assist each other in carrying out tasks which flow from the Constitution.”²⁹ But what do these elements altogether constitute? What kind of form of political organisation (if any) the Union belongs to? One could try to categorise the Union according to the conventional categories, or could declare that the EU is something new, or even totally unique.

1. The classical approaches

a) The EU as a federation

Concerning the strong position of federal elements, discussed above, it has much reason to state, that “[n]ot only has the EU developed into a political community with comprehensive regulatory powers and a proper mechanism of territorially defined exclusion and inclusion (Union citizenship). It shares most features of what the literature defines as a *federation*”³⁰, including two levels of government with shared competences, and resources, the application of majority decisions, the supremacy of community law, the role of the ECJ and a directly elected parliament. Is the EU already a federation?

Taking into account our definition of a federation, despite all these elements above, the Union still lacks, even after the constitution, key features of a federation. No doubt that the document sets up two levels of government. (One could say, that it even goes further with establishing a three-level-federalism, concerning the new role of the regions.) These two

²⁸De Villiers: Op. cit. See footnote 8.

²⁹Art I-5. Para 2.

³⁰Tanja A. Börzel-Thomas Risse: Who is Afraid of a European Federation? How to Constitutionalise a Multi-Level Governance System, In: Joerges-Mény-Weiler: Op. cit. From the electronic version: Part IV. Yet even the authors themselves do not categorise the Union as a federal state, see part III-2. a) of the present paper.

levels however, are not in the same position. On the one hand, as we stated above, the Union still lacks a *Kompetenz-Kompetenz*, that is *independent* of its member states. Even more significant however, that the EU simply does not have a coherent structure of competences, but a system, where the rights and procedures of the community level are different in every single policy area. Even the so-called “co-operative federalism, [like Germany] despite its high decentralisation, means a single institutional, policy, and decision-making construction”.³¹

On the other hand, the legitimacy of the EU by the people is still not complete. Although in some sense it “is able to relate directly to the individuals who are dual citizens of both the federation and their constituent units”³², as there is a European citizenship, with certain rights, facilitating political participation as well (e.g. EP-elections, citizens’ initiative in the constitution), and the EU can make laws, which directly bind individuals. However, the implementation of that law already requires member state actions, because there is almost no EU public administration. Secondly, contrary to almost all federal constitutions³³, the people do not act as a constituting power in the Union, which gains thus its competences from member state governments and so remains dependent on them.

The reason for these all is ultimately that the EU does not have sovereignty. A federation or federal *state* (Föderation bzw. Bundesstaat) is *per definitionem* an independent sovereign entity. As even in Art I-1. of the Constitution, just competences and not sovereignty are delegated to the EU, the latter still lies at the member states, which can be observed through many individual provisions, discussed above. The EU is a federal polity, without being a federation, described by Murray Forsyth as “being a federal union, that is to say a permanent linking together of states to form a corporate entity with a distinct boundary *vis-à-vis* the outside world, and possessed of two coexistent structures of government, one at the centre, and one at the level of the Member States.”³⁴

b) A European Confederation

For such situation however, there is a proper solution to describe a political community, where members do care their full sovereignty, but they establish a common political order. The concept of confederation (*Staatenbund bzw. Konföderation*) describes a

³¹Tibor Navrasics: *Európai belpolitika* (European Inner Politics), Korona Kiadó, Budapest, 1998. p. 265.

³² See the definition of Elazar above

³³E.g. „We the people of the United States ... do ordain and establish this Constitution for the United States of America“ - similarly the German, the Mexican, the Swiss constitution. Even the latter, being whatever decentralized, emerging by the „Swiss people and the cantons“. (See the documents) See however footnote 15.

³⁴ Murray Forsyth: *The Political Theory of Federalism, The Relevance of Classical Approaches*, In: Hesse-Wright: *Op. cit.* p. 40.

form, where “[s]everal pre-existing polities joined together to form a common government for strictly limited purposes, ..., which remains dependent upon its constituent polities in crucial ways and must work through them,” however “it is not about the effective fulfilment of certain special tasks through administrative co-ordination, ... but about forming a new political community, which – although differently as the federal state [*Bundesstaat*] – has an orientation towards federalism. [*Föderalismus*]”³⁵ There is also much reason to define the EU as a very intensive confederation.

Yet the EU is actually a too intensive confederation. Several elements of the Union are so far beyond that degree of integration, that the confederative model is at best insufficient to describe the Union. A parliament, directly elected by European *citizens*, having a legislative power, supremacy of the directly applicable community law, qualified majority voting – to name but few – simply break the barriers of a confederation, moreover some key features of the Union are even atypical to the whole conceptual framework. The confederative model is thus either insufficient or even unsuitable to define the EU. It seems that we have to leave the traditional categories.

2. The “in-between” theories

That the European integration and also the Union is a dynamic process, is no scientific opinion, or observation, but law, as the Maastricht Treaty explicitly states the desire to “continue the *process* of ... an ever closer union among the peoples of Europe.” It is thus can be rightly declared, that the EU is somewhere “in between”: moving either form a confederation, or from an international organisation to a federation. Both opinions however, include actually more concepts.

a) The EU between a confederation and a federation

As we have seen above that the Union has many elements, which are common to clear-cut federations, it is quite convincing to say, that “the European Union today looks like a federal system, it works in a similar manner to a federal system, so why not call it an emerging federation,”³⁶ which *is* not a federal state, but a *becoming* one. There are some developments, which support, that the EU “moves between the bank of the international

³⁵ Thomas Schmitz: Integration in der Supranationalen Union, Das europäische Organisationsmodell einer prozesshaften geo-regionalen Integration und seine rechtlichen und staatsrechtlichen Implikationen, Nomos Verlag, Baden-Baden, 2001. p. 173.

³⁶ Börzel-Risse: Op. cit. Part IV.

organisation, that it has left long ago, and the bank of the stateness, that it has not yet achieved.”³⁷ One could also describe the EU as a mix of a federation and a confederation, put differently as a “federation of nation states”³⁸ too.

Although with other emphasises this “transitional” characteristic of the Union was described by the Federal Constitutional Court of Germany as well in its Maastricht decision. The court has defined the EU as a compound of states [*Staatenverbund*],³⁹ which made clear, that the court does not consider the EU as a sovereign entity, but only as a special cooperation of independent states. Yet “what this [term] actually means, was left open”⁴⁰ by the court. No one would argue, that the EU is not a cooperation of independent states; many say however that it is not only the states that play a significant role in the Union. The term is very probably suitable for the EU, the question is rather if it is also sufficient - and to answer this one would clarify, what the phrase “*Verbund*” could actually mean.⁴¹

A less traditional approach describes however the EU as not (or not only) a compound of *states*, but of constitutions [*Verfassungsverbund bzw. Staaten- und Verfassungsverbund*], thereby presupposing the emergence of constitutional orders without a state. That means also that “a constitutional law has arose at the European level that is in its contents in a compound with the constitutional orders of the member states,”⁴² functioning with mutual effect and influence on each other. This let us to interpret the state-like features of the EU, without declaring, that it is itself a state.

b) The EU between an international organisation and a federation

As at the beginning of the process, the three European Communities *were* international organisations, it is justifiable to say, that the integration is developing from an international organisation towards a federation. One way to describe the specialities of the Union in this way is to use the still traditional category of a supranational organisation. This concept arguably can explain many core features of the EU, e.g. the supremacy of community law, and the exercise of public power [*Hoheitsrechte*]. The Union has however some

³⁷ Christian Calliess - Mathias Ruffert (eds.): *Kommentar des Vertrages über die Europäische Union und des Vertrages zur Gründung der Europäischen Gemeinschaft - EUV / EGV* -, Hermann Luchterhand Verlag GmbH, Neuwied-Kriftel, 2002. p. 5. Article by Calliess.

³⁸ See *inter alia*: Fischer: *Op. cit.*

³⁹ *Entscheidungen des Bundesverfassungsgericht (Decisions of the Federal Constitutional Court)*: 89, p. 155 and following pages. See *inter alia* Hrbek: *Op. cit.* p. 440; and Michael Schweitzer: *Staatsrecht III. (Staatsrecht, Völkerrecht, Europarecht)*, C. F. Müller Verlag, Heidelberg, 2000. p. 9

⁴⁰ Schweitzer: *Ibid.*

⁴¹ For references on further discussion about the phrase „Staatenverbund“ see Schmitz: *Op. cit.* footnote 41. at p. 71.

⁴² Calliess Ruffert *Op. cit.* p. 14.

characteristics, being not so significant, but not corresponding to the model of a supranational organisation, e.g. the different rights of the people, a Charter of Fundamental Rights, role of national parliaments etc, and support that the EU does provides a polity of a different or more intensive kind.

Being a more intensive cooperation than a simple supranational organisation, but being less than a fully developed state, the EU can be described as a supranational union as well.⁴³ This “is an international organisation founded by several states for the purpose of integration which tends to evolve continuously, which is conceptually open for tasks of every kind, and which accomplishes its integrative function primarily by carrying out a wide variety of tasks in the public sphere itself, by exercising public power over its member states.”⁴⁴ The concept, although emphasising the leading role of the states in the construction of the Union, recognises a specially intensive connection among the member states, thereby developing into a new form of organisation between a supranational organisation and a (federal) state⁴⁵. This supranational union, although it is based on sovereign states, has an autonomous political field, with its own institutions. The clear advantage of the concept, which establishes a new category for the EU, is able to handle the unique characteristics of the EU, without completely breaking the traditional logic of legal and political science.

3. The “sui generis” theories

There are however opinions, that the EU *does* break the logic of traditional categories and forms a political community outside that framework, having a nature of a *sui generis* polity, emerging from itself [*aus sich entstehend*]. One approach is to state, that the EU is a completely unique form of organisation and it is not comparable to any other existing or historical form. Its advantage to cope with actually all special features of the Union, but for the same reason it makes further analysis is, at best, complicated.

One other way however, to say a “qualified sui generis approach” is, to state, that to explain the Union one should apply “both the theoretical toolbox of international relations and of comparative political science.”⁴⁶ That is because the classical terminology is designed for states and the Union is not a state and quite probably never to become one, but the first

⁴³ This term was introduced into the centre of the discussion mainly by Armin von Bogdandy; for specific references see Schmitz: Op. cit. p. 165-167. and footnote 68, p. 74.

⁴⁴ Schmitz: Op.cit. p. 168.

⁴⁵ Bogdandy considers the supranational union as the final form of the integration, while Schmitz sees it as a step in a possible further development. Ibid. p. 167-168.

⁴⁶ Navrasics: Op.cit. p. 255.

“postmodern international institution,”⁴⁷ being a possible “pioneer of global political organisations of the future.”⁴⁸ That means also to presuppose, that “the Westphalian state system is now giving way to a more complex system of governance (at least in Europe)”⁴⁹, to say to a neo-medievalism, a departure from the clear world of the exclusive role of sovereign states. There are arguably some signs that, “[p]erhaps the time is ripe for the enunciation of new concepts of universal political organisation which would show how Wales, the United Kingdom and the European Community could each have some world political status while non laid to claim to exclusive sovereignty.”⁵⁰ Concerning the origins of the European integration it is also considerable, that “[i]t would be more than ironic, if a polity set up as a means to counter the excesses of statism ended up coming round full circle and transforming itself into a (super)state.”⁵¹ In this context the EU would continue to develop in its own special way, establishing in the special environment of the continent a special European political structure.

IV. Conclusion: *Flying Saucers*

“Consider the United States. Imagine that everything West of the Mississippi is one country, whose population speaks Russian. All other states are fully independent and speak their own language, with a few exceptions. Massachusettsian is also spoken in Connecticut; two languages are spoken in both Georgia and Tennessee; and in Maryland three languages exist – Pennsylvanish, Virginian, and New Jersic. ... Europe is like that,”⁵² and arguably the unique nature of the European integration has much to do with this uniqueness and rich diversity of Europe – as the EU itself was developed so far by uniting many different form of political organisations – supra-, trans-, intra- and international, to name but few, and many different traditions, federalism included. It can happen very easily, that this complexity cannot be described by one, but only by several different models, it is even a question if the *legal nature* [*Rechtsnatur*] of the Union can give a correct picture about the *nature* of the EU.

⁴⁷ Andrew Moravcsik, quoted in Mezei: Op. cit. p. 18.

⁴⁸ Moravcsik in Ibid.

⁴⁹ Peter van Ham: European Integration and the Postmodern Condition; Governance, Democracy, Identity; Routledge, London-New York, 2001. p. 113

⁵⁰ Hedley Bull, quoted in Tim Dunne: Inventing International Society, A history of the English School, Macmillan Press Ltd – St Martin Press Ltd, 1998. p. 181.

⁵¹ Joseph Weiler, quoted by Jan Zielonka: Should Europe Become a State? A Neo-Medieval Solution; In: Dick Leonard –Mark Leonard (eds.): The Pro-European Reader, Palgrave, 2002. p. 185.

⁵² Hans Slomp: European Politics into the 21st century, Integration and Division, Praeger, Westport, Connecticut –London, 2000. p. 1.

As it has discussed so far, the EU can be classified as a federal polity, as the key and core principles of federalism can be found in its. The Constitutional Treaty strengthens these elements, but it has not yet transformed the EU to a federation. Once, it may become one. It may never. It may even should not. Concerning the future the only thing that is certain is the uncertainty. Currently we have to live with our *UPOs*. But describing this *unidentifiable political object*, Emerson also added: “so far, it flies.”⁵³

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⁵³ Mezei: Op. Cit. p. 19. See footnote 6.

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