CLASSIFICATORY CONFLICTS IN TIMES OF CONSTITUTIONAL CRISIS: THE NATURE OF THE EUROPEAN UNION

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1. Introduction

The ruling of the *Bundesverfassungsgericht* (BVerfG) on the compatibility of the Treaty of Lisbon with the German Constitution has sparked off a fundamental debate about the nature of the European Union [1]. In its verdict, known as the *Lissabon-Urteil*, the Federal Constitutional Court of Germany identifies the EU as a *Staatenverbund*, an association of sovereign states [2]. Apart from the practical consequences which result from the verdict [3], the Court's conclusion on the identity of the EU raises serious theoretical questions [4]. The purpose of this article is to investigate whether the Treaty of Lisbon [5] — which should put an end to the elongated period of constitutional crisis in the wake of the defeat of the Constitutional Treaty by separate referenda in France and the Netherlands four years ago — does not allow for another conclusion than that the EU should be classified as a Union of States.

2. The ruling

At first glance, the verdict of the BVerfG seems to be rather straightforward. The Court rules that the Treaty of Lisbon is compatible with the Basic Law of the Federal Republic but stipulates that a number of national regulations with respect to the democratic exercise of the transfer of sovereignty to the EU must be made more explicit. As the German government has addressed these matters in line with the requirements of the Court [6], all that ends well seems to be well [7].

In reaching this conclusion, however, the Court elaborates its view that the European Union must be regarded as a *Staatenverbund*, an association of sovereign states [8]. This term constitutes a neologism that has been introduced by the BVerfG in its 1993 Brunner judgment on constitutionality of the Treaty of Maastricht [9]. It has been created in order to distinguish the European Union from the concepts of *Staatenbund* (confederation) on the one hand and that of the *Bundesstaat* (federal state) on the other. The BVerfG grasps the opportunity of the present ruling to clarify its concept of *Staatenverbund* by giving a detailed definition. In the English translation of the decision, which has been generously provided for by the Court, this definition reads as follows:

> The concept of Verbund covers a close long-term association of states which remain sovereign, an association which exercises public authority on the basis of a treaty, whose fundamental order is, however, subject to the disposal of the Member States alone and in which the peoples of their Member States, i. e. the citizens of the states, remain the subjects of democratic legitimisation [10].

3. The context

The *Bundesverfassungsgericht* deserves great respect for its effort to name and define the EU. So far, the EU's own institutions have failed to do so. The European Council has been locked for decades in a debate about the *finalité* of the project of European integration. The heads of state and of government are unable to agree whether the ultimate aim of the European Union should be to become a federal state, a United States of Europe, or a confederation [11]. As the prevailing system of public international law does not leave room for any other option (an entity holding the middle ground between an independent and sovereign state and a classic international organisation), most political leaders, commentators, analysts and academics have contented themselves with the tacit agreement that the EU is a *constructio sui generis* [12]. Against this background it should not come as a surprise that even the President of the European Commission, José Manuel Barroso, has endorsed the definition of the EU as an UPO, an 'Unidentified Political Object'. In using the contested abbreviation, he followed in the footsteps of his illustrious predecessor Jacques Delors, who referred to the European Union as an UPO [13]. At a press conference in July 2007, during which Barroso dwelled extensively on the subject [14], Margot Walström, one of the Commission's Vice-Presidents, even compared the EU to a football club, called 'Solutions United'. The lack of vision and leadership which had been castigated almost a decade earlier, could hardly have been exemplified in a more explicit manner. The whole concept of the EU as a *sui generis* phenomenon, or an Unidentified Political Object, is untenable.

> First of all, it lacks explanatory value for it is based on a conceptual tautology. Worse, the *sui generis* theory 'not only fails to analyse but in fact asserts that no analysis is possible or

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worthwhile, it is in fact an "unsatisfying shrug"'. Secondly, it only views the Union in *negative* terms — it is *neither* international organization *nor* Federal State — and thus indirectly perpetuates the conceptual foundations of the European tradition. Thirdly, in not providing any external standard, the sui generis formula cannot detect, let alone measure, the European Union's evolution. Thus, even where the European Community lost some of its 'supranational' features — as occurred in the transition from ECSC to the EEC — *both* would be described as *sui generis*. But worst of all, the *sui generis* 'theory' is historically unfounded. All previously existing Unions of States lay between international and national law. More concretely: the power to adopt legislative norms binding on individuals — this acclaimed *sui generis* feature of the European Union — cannot be the basis of its claim to specificity. The same lack of 'uniqueness' holds true for other normative or institutional features of the European Union [15].

In his book *Europe as Empire*, Jan Zielonka argues that the term UPO gives the impression of something 'quite mysterious and largely unexplainable' [16]. In a period in which the need to connect the citizens with the project of European integration is more urgent than ever, the term UPO may only serve to further alienate the citizens. The main purpose of Zielonka's study is to demonstrate that the enlargement of the European Union with ten new member states in 2004 'renders the rise of a European state impossible' [17]. In his analysis, the EU will look more like a kind of medieval empire than a Westphalian type of state with fixed borders, one centre of authority and a given territory. Although it may be doubted whether the comparison of the EU to a medieval empire will do more to reconcile the citizens with 'their' Union than the UPO of Delors and Barroso, Zielonka convincingly argues that the European Union can no longer be explained in terms of the prevailing Westphalian system of statehood and international relations.

4. The exercise of public authority

The conclusion that the mere existence of the European Union forms a challenge to the concept of the Westphalian state has been drawn by various authors from different countries. Michael Burgess has summarised the conceptual problems in the aphorism that the EU works in practice, but not in theory [18]. Dieter Grimm has argued that the outdated dualism between states and international organisations must be overcome [19]. Deirdre Curtin has made a passionate plea for a new political theory of the EU [20] and has argued that 'the EU is best analysed as an evolving political system in its own right, as something that can be compared to (aspects of) national political systems and not merely as an order external to the national domestic order' [21]. The criticism has not been limited to academic circles only. In its opinion about the Treaty establishing a Constitution for Europe, the Dutch Council of State advised the government that it had become impossible to classify the European Union any longer in the existing categories of federations and confederations [22]. In line with this opinion, Walter van Gerven has suggested to identify the EU on the basis of the Constitution as a 'polity of states and peoples' [23].

Amidst this confusion, the BVerfG seems to offer a viable alternative by describing the EU as a *Staatenverbund*. The most distinctive hallmark of this new type of intergovernmental organisation is singled out in the second clause of the definition, in which the EU is described as an 'association of states, which exercises public authority on the basis of a treaty' [24]. This formula is intended to mark the difference between the EU and confederations on the one hand and between the Union and federal states on the other. In a federal state public authority is exercised by national institutions on the basis of a constitution, whereas unions of states are generally not empowered to take decisions which have a direct bearing on the citizens of the member states. For this reason the European Union is portrayed by some authors as a phenomenon with a 'hybrid character', while others accentuate the 'betweenness' of the EU as it hovers between diplomacy and politics, between the international and the domestic, between states and markets and between government and governance [25].

It is interesting to compare this part of the *Bundesverfassungsgericht's* ruling with the phrase used by the Court of Justice of the European Communities in the landmark cases of *Van Gend en Loos* and *Costa v. ENEL* [26]. In its *Van Gend en Loos* judgment, the ECJ started its reasoning by underlining that the EEC Treaty is 'more than an agreement which merely creates mutual obligations between the contracting states'. Translated into theoretical terms, the ECJ thus began its ruling by stating unequivocally that the Community is more than a confederation or union of states. The main difference between the EEC on the one hand and regular confederations on the other lies in the involvement of the citizens in the functioning of the organisation. This principle was confirmed by the ECJ in a following sentence in which it pointed to 'the establishment of institutions endowed with sovereign rights, the exercise of which affects Member States and also their citizens'. This phrase, which was coined already in 1963, appears to have been reflected in the verdict of the BVerfG inasmuch as it stipulates that the organs of the Union are entrusted with the exercise of public authority [27].

5. A new legal order

While the ECJ and the BVerfG seem to agree upon the question as to what is new about the project of European integration, they hold different views with respect to the theoretical implications thereof. In describing and assessing the legal situation that has been brought about by the Treaty of Rome, the

ECJ does not give in to the 'Westphalian' demand that the Community, if it can't be described as a union of states, must be a federal state. Instead, the ECJ in *Van Gend en Loos* and *Costa v. ENEL* notes with precision that the transfer of sovereignty by the contracting parties to the Community has been 'limited (...), 'albeit within limited fields'. This description of the legal facts in front of it, interpreted in the light of the resolve of the member states 'to lay the foundation for an ever closer union among the peoples of Europe', leads the ECJ to the conclusion that the member states have not had the intention to found a federal state or *Bundesstaat* in the Westphalian sense of the word, but have rather created 'a new legal order of international law' [28].

From a theoretical point of view, the terms used by the ECJ to describe the EEC and its successors do not leave room for any ambiguity. The EEC, EC and EU cannot be classified in the realm of national law and/or nation-states. As they can neither be described in terms of a traditional union of states, they form a new phenomenon in international law that has its own dynamics and needs a proper vocabulary. This conclusion has been drawn already in 1974 by Pierre Pescatore in his groundbreaking treatise on the law of integration [29].

The legal philosophy of the ECJ may be summarised as follows: the originality of the Community and its successors lies in the fact that they embody a new system of international law. The new order differs from the previous Westphalian system inasmuch as it is not only composed of states, but of citizens as well. In the Westphalian system, which itself was preceded by the feudal system of medieval states and empires, the notion and implementation of citizenship was confined to states. International organisations (even those *avant la lettre*, like the Order of the Golden Fleece at the end of the Middle Ages) [30] did not stand in a direct relationship to citizens other than the heads of state. The EU deliberately breaks with this pattern. The Treaty of Maastricht formalised and articulated the new legal order by attributing citizenship of the Union to the citizens of the member states (Article 8(1) (now 17) TEC). A decade later, these citizens received the Charter of Fundamental Rights of the EU and if and when the Treaty of Lisbon will enter into force, the Charter will obtain the same legal value as the constituent treaties of the EU (Article 6(1) TEU). In the meantime, the ECJ has already ruled that the status of EU citizenship must be regarded as 'the fundamental status of nationals of the Member States, enabling those who find themselves in the same situation to enjoy the same treatment in law irrespective of their nationality' [31]. EU citizenship therefore forms an essential and integral part of the construction of the Union.

6. The EU as Staatenverbund

Contrary to the open-minded approach of the ECJ, the BVerfG endeavours to find a classification of the nature of the European Union *within* the boundaries of the Westphalian system of international relations/law. To this end the BVerfG refines the existing typology of modes of cooperation between states as can be found in Carl Schmitt's *Verfassungslehre*, first published in 1928 [32]. Schmitt distinguished three different sets of relations between states, namely *Bundnis von Staaten* (alliance of states), *Staatenbund* (association of states) and *Bundesstaat* (federal state). In its rulings on the Treaties of Maastricht and Lisbon, the BVerfG adds a fourth type, which it describes as a *Staatenverbund* (an 'association of sovereign national states'). While it may be noted that the linguistic difference between *Staatenbund* and *Staatenverbund* is so subtle that it almost evaporates in translation, the distinction demonstrates that the BVerfG takes its Archimedian point firmly within the Westphalian system. As a consequence, the BVerfG leaves the traditional distinction between states and international organisations fully intact and operational.

The thesis that the BVerfG remains within the realm of the Westphalian system is further illustrated by the fact that it arrives at its conclusions by creating an opposition between the Federal Republic of Germany as a sovereign state and the EU as a federal European state in the making. The Court argues that Article 23 of the German Constitution allows for the participation of Germany in an EU that is perceived as a *Staatenverbund*, but that it does not authorise the German authorities to irrevocably transfer sovereignty. Such an act is said to be reserved to the 'directly declared will of the German people alone', probably by means of a new constitution [33].

7. Consequences of the verdict

The consequences of the theoretical assumptions made by the BVerfG become apparent in the course of the verdict. In line with the Westphalian principles, the EU is primarily regarded as a union of states. Although the Union may be entrusted with the exercise of public authority, its fundamental order remains subject to the disposal of the member states alone. Sovereignty in the Union rests entirely with the peoples of the participating States (*Staatsvölker*). Consequently, democratic legitimacy is produced only by the national parliamentary control over the actions of the EU institutions [34].

This theoretical approach allows the BVerfG to draw a number of far-reaching conclusions. First, in conformity with the prevailing theories on Unions of States, the rules and regulations of the EU only have legal effect in the member states through the national legislation of these states. The European Court of Justice is not the highest judicial body to consider the laws applied in these states. It is therefore up to the BVerfG itself to conduct an effective *ultra vires* review of instruments of European origin in the area of application, i. e. in the Federal Republic of Germany [35]. In last instance the BVerfG may be forced to order the

authorities of the FRG to withdraw Germany's membership from the Union and to resume full national sovereignty [36].

Second, just like any other union of states, the EU cannot have truly democratic structures. The principle of equality of states, on which the EU is founded, is incompatible with the notion of democratic rule. Consequently, the European Parliament is unable to represent the expression of the will of the citizens of the EU. In the absence of a European people, a European *demos*, it is neither capable of filling the democratic deficit of the Union. The European Parliament is merely a collection of national representatives, chosen in accordance with national electoral procedures [37]. In the same vein, citizenship of the EU is not a real status, but primarily a derivative from the nationalities of the participating member states [38].

8. Conceptual deficiencies

The theory of the BVerfG on the nature of the EU as a *Staatenverbund* leaves a number of the special characteristics of the EU and its legal order largely unexplained. Some of these qualities, which give the EU its special social and legal character, are mentioned here.

i. EU law undeniably addresses both the member states and their citizens directly. The law on EU citizenship cannot be explained within the confines of the concept of *Staatenverbund*. After all, the theory of confederations does not allow for legal ties to be established between an association of states and the citizens of the participating states. It would be unthinkable in a union of states that citizens of one member state should have active and passive voting rights at municipal elections in another member state.

ii. The ECJ is entrusted with the task to give preliminary rulings concerning the interpretation of the Treaty and the validity of acts of the EU institutions. In cases in which there is no further judicial remedy at the national level, the courts of the member states are even obliged to refer relevant questions of interpretation and validity to the ECJ. This system of remedies, which seeks to ensure the uniformity of interpretation of the acquis, would be rendered meaningless if national courts were to retain the last say about the applicability of Community law in their country.

iii. Apart from the theoretical discussion as to whether it is possible or not for the European Parliament to express the will of the European people, the existence and execution of competences of the European Parliament cannot be denied. The BVerfG explicitly acknowledges that the Treaty of Lisbon will even increase the EP's competences in the EU decision-making processes, while the existence and functioning of a directly elected European Parliament is incompatible with the very concept of unions of states within the theory of confederations.

iv. It is essential for unions of states that decisions are taken with unanimity. Member states have the right to veto decisions. Contrary to this principle, the Council of the EU is deciding by qualified majorities in an increasing number of fields. The approach of the BVerfG is likely to undermine the system of qualified majority voting in the Council as it may prod the member states which have been overruled to address their national courts with a request to declare the contested decision illegal.

v. Suspension of rights deriving from membership is at variance with the concept of confederations. Yet, Article 7 TEU gives the Council the right to decide with a qualified majority to suspend (voting) rights deriving from the Treaty in case of a serious and persistent breach of the values of the Union.

vi. Finally, the BVerfG completely disregards the role of the European Union in the field of international relations, notably its capacity to enter into legally binding international agreements with third parties, thereby also binding the member states. Consequently, the BVerfG appears to deny the existence of the EU as an autonomous subject of international law.

Although this list of arguments is far from exhaustive, it may provide sufficient evidence for the conclusion that the German Constitutional Court's theory of the European Union as a *Staatenverbund* fails to account for the existing social and legal realities of the EU and to conceptualise them.

9. The Treaty of Lisbon

As the EU has not been established and developed with a view to function as a *Staatenverbund* or compound of states, the question must be addressed whether the Treaty of Lisbon contains any indication with respect to the definition of the nature of the EU. It should be underlined at this juncture that, following the disastrous results of the referenda concerning the instruments of governance of the EU that have been held since 1992 in various member states, the political leaders assembled in the European Council cannot justifiably return to their worn out compromise to describe the EU as a *constructio sui generis*. It has become imperative for them to say in plain and simple terms what the European Union is and what its objectives and tasks are.

The preambles of the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU), as adopted at Lisbon, refer both to the original resolve of the member states 'to lay the foundations for an ever closer union among the peoples of Europe'. As has been demonstrated above, the ECJ used this formula in reaching the conclusion that the then Communities

formed a new legal order of international law. The Treaty of Lisbon gives meaning and content to this concept by strengthening the position of the citizens on the one hand and that of the member states on the other. Possibly in reaction to the rejection of the 'EU Constitution', the Treaty of Lisbon uses each opportunity to underline the sovereignty of the member states: Article 1 TEU makes it abundantly clear that it is the member states which confer competences on the Union instead of the other way around. Moreover, article 4(1) TEU stresses that competences not conferred on the EU remain with the member states. This principle is elaborated in article 4(2) TEU, in which the obligation of the Union to respect the national identities and the essential state functions of the member states is enshrined. Article 5(1) TEU stipulates that the use of Union competences is limited by the principle of conferral. Finally, the Declaration concerning the legal personality of the European Union, which has been attached to the Treaties, confirms almost superfluously that the fact that the European Union has a legal personality will not in any way authorise the Union to legislate or to act beyond the competences conferred upon it by the member states in the treaties. In theoretical terms, the Lisbon Treaty almost overemphasizes the independence and sovereignty of the member states. This conclusion is supported by Article 50 TEU, which in itself prevents the EU from being identified as a federal state. The article explicitly grants member states the right of voluntary withdrawal from the Union. Theory and practice of federations demonstrate that unilateral secession is incompatible with the very concept of federal states, as indeed with international law [39].

This brief examination of the Treaty of Lisbon does not provide evidence to substantiate the claim that the ratification of the treaty may result in the creation of a federal European state in the shorter or longer run. The BVerfG could have used the detailed provisions of the Treaty of Lisbon to dispel allegations of this nature in a convincing manner [40].

10. The EU as a Union of citizens and member states

At the same time as ensuring that the EU is not a federal state or a federal state in the making, the Treaty of Lisbon also puts beyond doubt that the European Union is not a confederation either. The drafters of the Lisbon Treaty have woven the Charter of Fundamental Rights of the EU into the treaties in such a manner that the Charter will have the same legal value as the founding treaties. As it has been demonstrated above that the concept of citizenship is principally irreconcilable with that of confederations, it must be concluded that the European Union can no longer be explained in terms of the existing categories of federations and confederations. Burgess' aphorism that the EU works in practice, but not in theory still seems to be applicable.

Yet, the judgments of the ECJ in *Van Gend en Loos* and *Costa v. ENEL* seem to suggest that it ought to be possible to transcend the Westphalian system of international relations. If the EU and its predecessors indeed form a new legal order within the system of international relations, then this new order may be compared to the existing one. It has been established in the foregoing, that the European Union cannot be regarded as a federal state, because it consists of a number of sovereign states. On the other hand, the EU does not meet the criteria of a confederation, since it is not only composed of states, but also of citizens. Consequently, if the EU is not a confederation because of its citizens and neither a federation because of its member states, there may thus be good reason to suggest that the European Union is a highly sophisticated international organisation, a union of citizens *and* member states [41].

This hypothesis enables observers to describe the EU without constraints of paradigm. In doing so, the main characteristics of the Union may be summarised as follows:

i. the member states are transferring the exercise of certain powers to the Union;

ii. the Union disposes of its own organs for legislation, administration and jurisdiction, including a directly elected parliament;

iii. the member states are deciding by majorities in a greater or smaller number of fields;

iv. the law of the Union may have direct effect and, in case of conflict, takes precedence over national law; and

v. the citizens enjoy the freedom of movement and establishment in all member states and are not impeded by the EU (as, indeed, the member states) in exercising their rights as enshrined in the Charter of Fundamental Rights, including active and passive voting rights.

On the basis of this analysis, one may conclude that the European Union can be defined as a union of sovereign states, in which the citizens of the member states are also citizens of the Union and in which the governance of the Union is not only bound by the rule of law but is also required to meet democratic standards which are similar to those required of the governance of its member states.

[1] As, indeed, about the place of Germany in the EU decision-making and — by consequence — integration process. See the contributions to the Special Section of the *German Law Journal*, Vol. 10, No. 8 (2009), pp. 1201—1308, and in particular that by F. Schorkopf, 'The European Union as An Association of Sovereign States: Karlsruhe's Ruling on the Treaty of Lisbon', 10 *GLJ* (2009), pp. 1219—1240.

[2] BVerfG, 2 BvE 2/08 from 30 June 2009, Absatz-Nr. (1-421), available at <http://www.bverfg.de/entscheidungen/es20090630_2bve000208.html> (in German) and <http://www.bverfg.de/entscheidungen/es20090630_2bve000208en.html> (English translation).

[3] I. e. a stricter control (*ex ante* and *ex post*) of the German government's participation in the EU decision-making process. For control *ex ante*, see *infra*, note 6. A stricter control *ex post* seems likely now that the BVerfG has re-confirmed its self-endowed right to decide ultimately on the application (and validity) of EU law in the German legal order. These issues pose questions about how efficiently Germany — 'Europe's engine' — will be able to spur EU decision-making in the future.

[4] For a short overview and analysis of both practical and theoretical sticking points, see Editorial Comments, 'Karlsruhe has spoken: "Yes" to the Lisbon Treaty, but...', 46 *CML Rev.* (2009), pp. 1023—1033.

[5] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007, *OJ* 2007 C 306; consolidated version in *OJ* 2008 C 115.

[6] The Bavarian CSU faction of the Christian Democrat party had wanted to bind the government more tightly to seek backing from the German parliament, the *Bundestag*, and the federal government, the *Bundesrat*, before agreeing deals on new legislation in Brussels ('control' *ex ante*). But in the end the CSU gave in to a softer position, under which the German government must hear parliament but is not bound by its opinion. Under the new agreement, the government must also inform parliament about the details of any EU-level international trade negotiations. As reported by L. Kirk, 'German political parties agree Lisbon Treaty law', *EU Observer*, 23 August 2009. The *Bundestag* passed a legislative package comprising four laws on 5 September. The *Bundesrat* did so on 18 September, before passing it for final signature by the German President.

[7] Especially now that a large majority of the Irish voters (67 %), in a second referendum held on 2 October 2009, has supported the ratification of the Lisbon Treaty. At the time of writing, only the Czech President still had to complete ratification but had said to await a positive ruling of the Constitutional Court's second evaluation of the Lisbon Treaty before putting pen to paper. Ironically, the main question which the Czech Constitutional Court has been asked to answer is whether the Lisbon Treaty and other EU treaties infringe Czech sovereignty and create a European federal super-state. In its first ruling of 26 November 2008, the Court had rejected an appeal challenging the Lisbon Treaty on the basis that parts of it violated the Czech Constitution. See Pl. ÚS 19/08, available at <http://angl.concourt.cz/angl_verze/doc/pl-19-08.php>. Subsequently, the Lisbon Treaty was approved by the Czech Chamber of Deputies (on 18 February 2009) and the Senate (on 6 May 2009).

[8] See, in particular, para. 229 of the *Lissabon-Urteil*: 'Die geltende Verfassung weist einen anderen Weg: Sie erstrebt die gleichberechtigte Eingliederung Deutschlands in Staatensysteme gegenseitiger Sicherheit wie das der Vereinten Nationen oder der Nordatlantikorganisation (NATO) und die Beteiligung an der europäischen Vereinigung. Art. 23 Abs. 1 GG unterstreicht ebenso wie Art. 24 Abs. 1 GG, dass die Bundesrepublik Deutschland an der Entwicklung einer als Staatenverbund konzipierten Europäischen Union mitwirkt, auf die Hoheitsrechte übertragen werden'.

[9] BVerfG E 89, 155, 12 October 1993 (English translation: BVerfG, 33 ILM 388 (1994) and CMLR (1994) 57). For analysis and comments, see M. Herdegen, 'Maastricht and the German Constitutional Court: constitutional restraints for an "even-closer union"', 31 CML Rev. (1994), pp. 235—249. For a more stern reaction, see J. H. H. Weiler, 'The State "über alles" — Demos, Telos and the German Maastricht Decision', EUI Working Papers 95/19 (1995).

[10] Para. 229. The term is repeated in paras. 233, 272 and 287.

[11] The Council has been criticised for its lack of leadership. See, e.g., B. Laffan, R. O'Donnell and M. Smith, *Europe's Experimental Union: Rethinking Integration* (London, Routledge, 1999), p. 164: 'Europe's leaders lack any sense of where the system is going or the kind of system that is desirable. They even lack a language to describe adequately and explain to their electorates the essence of the collective project and their involvement in it.' There are, of course, notable examples of politicians who do take a firm position on the desired final identity of the EU. See, e.g., 'From Confederacy to Federation — Thoughts on the finality of European integration', Speech by Joschka Fischer (then German Minister of Foreign Affairs) at the Humboldt University in Berlin, 12 May 2000, available at <http://www.auswaertiges-amt.de/diplo/en/Infoservice/Presse/Reden/Archiv/2000/000512-FromConfederacyto.html>.

[12] Walter Hallstein, the first Commission President, would use the term, but then add that 'this would not contradict it being the seed of an incipient federation' and '[e]very federation is *sui generis*'. See W. Hallstein, *Die Europäische Gemeinschaft* (Düsseldorf, Econ 1973), p. 365.

[13] In a series of speeches delivered in the US between 26 March and 4 April 2001 under the title 'Where is the European Union heading?', Jacques Delors, without wishing to give his views on the 'lurid presentation' of the outcome of the major debate being conducted about the future of the European Union, proposed the establishment of an open vanguard of countries, with its own institutions, in the form of a Federation of Nation States. See <http://www.notre-europe.asso.fr/IMG/pdf/DiscoursIV01-en.pdf>.

[14] Comments by J.M. Barroso in response to the question 'What will the European Union be in the future?', asked at a press conference at the European Parliament in Strasbourg on 10 July 2007. See EUXTV: The Europe Channel, available at <http://www.youtube.com/watch?v=-I8M1T-GgRU>.

[15] R. Schütze, 'On 'Federal' Ground: the European Union as an (inter)national phenomenon', 46 *CML Rev.* (2009), pp. 1069—1105, at p. 1091, with further references to literature.

[16] See J. Zielonka, Europe as Empire: The Nature of the Enlarged European Union (Oxford, OUP 2006), p. 4.

[17] Ibid., p. 9

[18] See M. Burgess, *Comparative Federalism: Theory and Practice* (London, Routledge 2006), p. 245.

[19] See D. Grimm, 'Treaty or Constitution: the legal basis of the European Union after Maastricht', in E.O. Erikson, J.E. Fossum, A.J. Menéndez and M. Kumm (eds.), *Developing a Constitution for Europe* (London, Routledge 2004), pp. 69-87. See also his classic 'Does Europe need a Constitution', 1 ELJ (1995), pp. 282—302, in combination with J. Habermas, 'Comment on the Paper by Dieter Grimm: "Does Europe Need a Constitution?"', 1 *ELJ* (1995), pp. 303—307.

[20] See D. Curtin, *Postnational Democracy: The European Union in Search of a Political Philosophy* (The Hague, Kluwer Law International 1997).

[21] D. Curtin, *Executive Power of the European Union: Law, Practices, and the Living Constitution* (Oxford, OUP 2009), p. 20. See also S. Hix, The Political System of the European Union, 2nd edn. (Basingstoke, Palgrave Macmillan 2005). Schütze, *loc. cit.*, at p. 1105 defends the view that the EU represents an (inter)national phenomenon that stands on — federal — middle ground: 'The European Union is indeed based on a conception of divided sovereignty and in strictness neither international nor national, "but a composition of both". (...) [T]he European Union is a federation of States. It even represents the best manifestation of 'true' federalism in positive law. Once this idea is accepted, it is possible — in a third step — to ask what type of federation the European Union is.' With references to, *inter alia*, A. Dashwood, 'The Relationship between the Member States and the European Union/Community', 41 *CML Rev.* (2004), p. 356

[22] Kamerstukken II, 2004/05, 30 025 (R 1783), No. 4, p. 5.

[23] W. van Gerven, *The European Union: A Polity of States and Peoples* (Oxford, Hart Publishing 2005).

[24] Para. 229.

[25] See Laffan, O'Donnell and Smith, op. cit., at p. 193.

[26] Case 26/62, *Van Gend en Loos* [1963] ECR 1; and Case 6/64, *Flaminio Costa* v. ENEL [1964] ECR 585.

[27] Para. 229.

[28] Case 26/62, *Van Gend en Loos* [1963] ECR 1, confirmed in Case 6/64, *Flaminio Costa* v. ENEL [1964] ECR 585. See also the ECJ's Opinion 1/91 [1991] ECR 6079, para. 21: '[T]he EC Treaty, albeit concluded in the form of an international agreement, none the less constitutes the constitutional character of a Community based on a rule of law (...)'. See also Case 294/83, *Les Verts v. Parliament* [1986] ECR 1339, para. 23: 'basic constitutional charter'.
[29] See P. Pescatore, *The Law of Integration: Emergence of a New Phenomenon in International Relations Based on the Experience of the European Communities* (Leiden, Sijthoff 1974).
[30] See, e.g., E. Mira and A. Delva, 'Preambles: Genesis, Contents and Development', in E. Mira and A. Delva (eds.), *A La Búsqueda del Toisón de Oro: La Europa de los Príncipes, La Europa de las Ciudades* (Valencia, Generalitat 2007), pp. 463—464.
[31] ECJ, Case C-184/99 Grzelczyk, [ECR] 2001, I-6193, para. 31: 'subject to such exceptions as are expressly provided for'. See further Directive 2004/38/EC of the European parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, OJ 2004, L 158/77.
[32] See C. Schmitt, *Verfassungslehre* (Munich, Dunker und Humbolt 2003, first published in 1928).
[33] Para. 228.
[34] Paras. 230—233.
[35] Para. 235—241 and 338. This was already announced by the BVerfG in the *Brunner* judgment, at 188. The decision of the BVerfG to assume ultimate authority with respect to the applicability of the law on German territory, including EU law, implies the end of the uniformity of the interpretation of the Treaties, which has been ensured until now by the ECJ. As constitutional courts in other member states may feel encouraged to lay claim to similar competences, it may result in the emergence of a variety of interpretations of EU law.
[36] Para. 236.
[37] Paras. 244—272 and 279.
[38] Paras. 346—350.
[39] It remains unclear, however, what happens if no qualified majority can be found to conclude the withdrawal agreement (Art. 50, paras. 2 and 3). Hypothetically, the parting state would then remain bound by the obligations deriving from the Treaty and it could be held to account for alleged breach by (some of) the Member States before an international adjudicator, if all would accept jurisdiction of that court. The concept of 'voluntary withdrawal' does therefore not equate with the term 'unilateral secession'.
[40] The determination with which the BVerfG has proceeded in this respect is all the more remarkable in view of the guarded, if not critical reception of the concept of *Staatenverbund* in German academic circles. See, e.g., U. Everling, 'The European Union between Community and National Policies and Legal Orders', in A. von Bogdandy and J. Bast (eds.), *Principles of European Constitutional Law* (Oxford, Hart Publishing 2006), pp. 677—725.
[41] See J. Hoeksma, *De Uitvinding van Europa: de Europese Unie als Nieuw Verschijnsel in het Volkenrecht* (Assen, Van Gorcum 2007); P. Magnette, *What is the European Union? Nature and Prospects* (Basingstoke, Palgrave 2005), p. viii; and I. Dekker and R.A. Wessel, 'Governance by International Organisations: rethinking the normative force of international decisions', in I. Dekker and W. Werner (eds.), *Governance and International Legal Theory* (Dordrecht, Martinus Nijhoff 2004), pp. 215—236, insofar as the 'toolbox of governance instruments [is concerned] to steer, stimulate or enforce the cooperation between Member States and to get a grip on the actions of their citizens'.

«Classificatory Conflicts in Times of Constitutional Crisis: the Nature of The European Union» (Steven Blockmans)

The EU's institutions have failed to name and define the EU. There exists a tacit agreement that the EU is a constructio sui generis. Some define the EU as an UPO, an 'Unidentified Political Object'. The conclusion that the mere existence of the European Union forms a challenge to the concept of the Westphalian state has been drawn by various authors from different countries. The purpose of the article is to investigate if it is possible to establish and clarify the nature of the EU.

The Federal Constitutional Court of Germany (BVerfG, Bundesverfassungsgericht) in its verdict, known as the Lissabon-Urteil, identifies the EU as a Staatenverbund, an association of sovereign states. The most distinctive hallmark of this new type of intergovernmental organisation is singled out in the second clause of the definition, in which the EU is described as an 'association of states, which exercises public authority on the basis of a treaty'.

The Court of Justice of the European Communities in the landmark cases of Van Gend en Loos and Costa v. ENEL interpreted resolution of states 'to lay the foundation for an ever closer union among the peoples of Europe' to the effect that the member states have not had the intention to found a federal state or Bundesstaat in the Westphalian sense of the word, but have rather created 'a new legal order of international law'.

While the ECJ and the BVerfG seem to agree upon the question as to what is new about the project of European integration, they hold different views with respect to the theoretical implications thereof. The theory of the BVerfG on the nature of the EU as a Staatenverbund leaves a number of the special characteristics of the EU and its legal order largely unexplained.

Examination of the Treaty of Lisbon does not provide evidence to substantiate the claim that the ratification of the treaty may result in the creation of a federal European state. The European Union can be defined as a union of sovereign states, in which the citizens of the member states are also citizens of the Union and in which the governance of the Union is not only bound by the rule of law but is also required to meet democratic standards which are similar to those required of the governance of its member states.

«Квалификационные конфликты в период конституционного кризиса: природа Европейского союза» (Стивен Блокманс)

Имеется «молчаливое» соглашение, что ЕС представляет собой constructio sui generis. Некоторые определяют ЕС как НПО — неопознанный политический объект. Вывод о том, что сам факт существования Европейского союза представляет собой вызов вестфальской концепции государства, был сделан многими авторами из различных стран. Цель настоящей статьи состоит в исследовании и, если возможно, установлении и выяснении природы ЕС.

Федеральный конституционный суд Германии (BVerfG) в своем решении, известном как Lissabon-Urteil, определяет ЕС как Staatenverbund — ассоциацию суверенных государств. Отличительная черта этого нового типа межправительственных организаций выделена во второй части определения, согласно которому ЕС описывается как «ассоциация государств, осуществляющая публичную власть на основе договора».

Суд Европейских Сообществ в определяющих делах Van Gend en Loos и Costa v. ENEL истолковал намерение государств «заложить основу для все более тесного союза народов Европы» в пользу того, что государства-участники не имели намерения основать федеральное государство или Bundesstaat в вестфальской терминологии, но скорее создали «новый правовой порядок международного права».

В то время как Суд ЕС и BVerfG, похоже, соглашаются по вопросу о том, что является новым в проекте европейской интеграции, их взгляды различаются в отношении теоретических выводов из этого. Теория BVerfG о природе ЕС как Staatenverbund в значительной мере не объясняет ряд особых характеристик ЕС и его правового порядка.

Изучение Лиссабонского договора 2007 г. не предоставляет свидетельств для обоснования заявления, что ратификация договора может привести к созданию федерального европейского государства.

Европейский союз можно определить как союз суверенных государств, в котором граждане государств — участников Союза также являются гражданами Союза и в котором руководство Союза не только связано принципом верховенства права, но также должно отвечать демократическим стандартам по аналогии с требуемыми от руководства его государств-участников.

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