

ROBERT GRZESZCZAK
University of Warsaw

A EUROPEAN FEDERATION — FORESEEING THE UNFORESEEABLE

INTRODUCTION¹

Creating a federal system has been the political goal of the uniting Europe from the very beginning of its existence. The European Coal and Steel Community (1951), which pursued the modest aim of establishing a centralised control over the previously national coal and steel industries of its Member States, was declared to be “a first step in the federation of Europe.”² Thus, it can be argued that a federative ending to the integration processes seemed to appeal even to the founders of the Communities. At that time, due to the temporal distance, it stirred fewer emotions than the current debate about the systemic future of the European Union. Indeed, since the attempt to include a reference to the federal system of the European Union in the Treaty of Maastricht all following efforts to this end have consistently been rejected. However, this does not mean that the European Union system (hereinafter: EU), to which many people refer in Latin as *compositum mixtum* or *sui generis* (which does not explain much), has not developed any features of a federation. To the contrary, each of the great reforms of the European Union added some federal substance to it. The same applies to the Treaty of Lisbon (hereinafter: TL), the last amendment to the constitutional basis of the EU, which came into force in December 2009.

¹ Special thanks to Mister Maciej Zgondek, who has made language correction.

² “The pooling of coal and steel production should immediately provide for the setting up of common foundations for economic development as a first step in the federation of Europe, and will change the destinies of those regions which have long been devoted to the manufacture of munitions of war, of which they have been the most constant victims,” see: Schuman’s Declaration of 9 May 1950 in: European Commission, http://europa.eu/abc/symbols/9-may/decl_en.htm, Retrieved 5 September 2007.

AREAS OF FEDERAL NATURE

Undoubtedly, it is the common market where the strongest federal features can be found. In the future, mainly thanks to the TL, it will become an element that will federalise the EU, its internal security and its foreign policy under the leadership of the High Representative for the Foreign Policy. Furthermore, the monetary policy is another area which carries a strong “federal load” (with regard to the states of the Eurozone). Other federal areas of the EU can be found in the competence of the European Commission and that of the Council. Competition, which is a characteristic feature of both institutions, will bring one of them to a decline.³

As will be argued later, in the context of the phenomena presented in this paper, it seems that this fate will befall the EU Council. However, the issue is far from settled. It seems that, in the face of the current feeling about the integration, the optimal feasible solution would consist in a direct election of the Council’s president. Although the idea itself was rejected; the office was created, thus leaving a clear “federal stamp” on the structure of the reformed EU.

ACADEMIC BACKGROUND

As much as there is a general agreement among Western European scholars that the power relations and the division of competence within the European Union are federalised, in Polish literature this subject is treated with great caution. In Germany and the Benelux countries, the European (EU) federalism⁴ has for many years been written about directly. In the course of the integration processes, some experts started expressing the view that we could claim the existence of not only the European law, but also the European constitutional law.⁵

³ R. Grzeszczak, *Federalisation of the European Union*, [in:] Piontek E., Karasiewicz K. (eds.), *Quo vadis Europa III?*, Warsaw 2009, p. 153.

⁴ Compare, inter alia, H.P. Ipsen, *Europäisches Gemeinschaftsrecht*, Tübingen 1972, p. 170 et seq.

⁵ The change in the nomenclature is significant. We are observing a departure from the use of the term “law” towards the “law of the European Union” and there is a Western trend to describe the integration law as the “European law.” And so academic units dealing with this law are called accordingly: *Europarecht* (German), *Il diritto europeo* (Italian) or *European Law*. The above-mentioned fact is also present in Poland, although this process is slower, e.g. A. Wyrozumska is now head of the Chair of the European Law at the University of Łódź. To find out more about the consolidation of the term “European constitutional law” compare K. Lenaerts, *Constitutional Law of the European Union*, London 1999; A. Bodnar, M. Kowalski, K. Raible, F. Schorkopf (eds.), *The Emerging Constitutional Law of the European Union*, “Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht” 163, Heidelberg 2003; P. Karolewski, *Konstytucjonalizacja Unii Europejskiej: Funkcje i motywacje*, [in:] R. Grzeszczak (ed.), *Europa na rozdrożu*, Wrocław 2006; D. Curtin, A.E. Kellermann, S. Blockmans (eds.), *The EU Constitution: The Best Way Forward?*, The Hague

When focusing on academic circles, one cannot help but notice that voices about federalisation can be heard even in states that are far from supporting the concepts of federalism. In Poland, due to a strong attachment to the idea of a national state and a traditional approach to the essence of democracy, any research concerning this sphere stirs many emotions.⁶

POLITICAL BACKGROUND

Despite the fact that there were proposals of a radical institutional change in the EU, expressed e.g. by Joschka Fischer in his speech at the Humboldt University,⁷ they remained in the sphere of intellectual provocation rather than became reform projects to be considered seriously. Now, looking from the point of view of politicians (which makes it possible to attribute some approaches to the Member States), in Germany, Belgium and Luxembourg there is no resistance to the “notion” of the EU federalisation, even if the term is not used in the same way as in the case of a state, i.e. the federalisation of the EU is not identified with its nationalisation.⁸ In recent years, the Netherlands have become more nationalist, whereas Denmark has been rejecting the concept of the EU federalisation completely and consistently from the very beginning. In Great Britain, there is a strong general social resistance to the notion of federalisation. This is why British political elites do not include it in their agendas. The French have a problem with the term “federation,” which was demonstrated during the debate between Joschka Fischer and Jean-Pierre Chevenement in 2001.⁹

What has been discussed so far proves that the federalisation of the integration project will not lead to the collapse of national states and that the EU decision-making system is being unnecessarily reduced to a test of national standards.

2005; E. Piontek, *Konstytucja dla Unii Europejskiej*, “Zeszyty Naukowe Podyplomowego Studium Prawa Europejskiego” 1, Warsaw 2003.

⁶ In Polish literature, it is mainly political scientists who write about the federalisation of the EU, compare, inter alia, P.J. Borkowski, *Federalizm a budowanie jedności Europy*, “Studia Europejskie” 2, 2006, p. 90 et seq.; E. Piontek, op. cit.; J.W. Tkaczyński, *Między unitaryzmem a federalizmem. Unia Europejska w świetle doświadczeń ustrojowych Republiki Federalnej Niemiec*, Kraków 1998; idem, *Ustrój federalny Niemiec a system decyzyjny Unii Europejskiej*, Kraków 2005; I.P. Karolewski, *Teorie integracji europejskiej na przykładzie Niemiec*, Warsaw 1999; W. Bokajło (ed.), *Federalizm. Teorie i koncepcje*, Wrocław 1998; S. Konopacki, *Dylematy federalizmu europejskiego*, „Studia Europejskie” 4, 1998, p. 77 et seq.

⁷ J. Fischer, *Vom Staatenbund zur Föderation. Gedanken über die Finalität der europäischen Union*, a speech held at the Walter Hallstein Institute for European Constitutional Law at the Humboldt University in Berlin, 12 May 2000, Forum Constitutionis Europae, Berlin 2000.

⁸ Compare the 1974 judgement of the German Federal Constitutional Court “Solange I.”

⁹ To find out more, compare the analysis of “old EU” politicians’ positions by E. Piontek, op. cit., pp. 5–16.

In compliance with the Monnet doctrine, federalisation of the EU is based on punctual reforms. It takes the form of a federal package that will emerge as a result of integration rather than lie at its foundations.¹⁰

EUROPEAN CONSTITUTIONAL LAW

As far as the Member States are concerned, the features of their political systems can be learned from their constitutions (mainly codified ones). In the case of the EU, this issue is much more complex. One must take into consideration a number of provisions of systemic nature included in the founding Treaties, rules of the constitutional traditions common to the Member States and the case law of the Court of Justice (hereinafter: the Court or ECJ). However, even after considering the above-mentioned elements, it seems that the situation is still difficult or even impossible to define.

AN IN-BETWEEN

Questions about the ending of the integration processes and about the emerging political system of the European Union are confronted with criteria based on international and national laws. Any analysis conducted in this way most often results in the creation of a “catalogue of EU peculiarities,” and then these peculiarities aspire to be considered characteristic of the EU. Therefore, little help is offered by the achievements of the constitutional and international law scholars. When analysing the political system of the EU, one must be aware of the fact that they approach a structure of legal and systemic nature and that it is easier to say what it is not than what it is. After all, the EU is not a classical international organisation, but it has not yet become a federal state either.

REDEFINING FEDERALISM

At the moment, in response to the globalisation processes, federalism as a systemic principle is undergoing a peculiar revival, both in Europe and globally. I am referring here not only to federalism in the narrow sense, that is federalism with regard to the territorial structures of states and the division of powers in them. The problem is much wider and more complex. Therefore, it would be advisable to draw from the work of political scientists or legal theorists and to extend the

¹⁰ R. Grzeszczak, *op. cit.*, p. 156.

catalogue of political systems considered to be federal so that it contains a different understanding of federalism.¹¹

According to R. Watts, “federalism” is a normative political theory which focuses on a vertical distribution of powers (centre–regions) and on an effective model of state structures,¹² whereas a “federal political system” is a descriptive term that refers to a broad genus of arrangements consisting of two or more levels of authority.¹³ The author distinguishes between several federal types. These are, among others, centralised and decentralised unions, federations, confederations, associated states, condominiums and leagues. He mentions the European Union among hybrids, i.e. systems which possess the features of several types.¹⁴

HISTORICAL PERSPECTIVE

Another fundamental piece of advice for research purposes is found in the work of M. Forsyth, who makes us realise that any analysis of the European integration should be comprehensive rather than punctual, based only on the present state and concrete proposals of reforms.¹⁵ After adopting such a wide perspective of integration processes, I cannot help but refer to the concepts of functionalism and federalism, which have been present from the very beginning of these processes.

Already at the very beginning of its existence (I am referring to the time when the Communities were formed, i.e. in the fifties of the previous century), the structure of the EU included a number of federal elements. Since then, many of them have been strongly consolidated and extended in the subsequent revisions. They were expressed in all important political and legal documents that created the European Union (the Schuman Plan, the Spaak Report, the Treaties of Rome, the Single European Act, the Treaty of Maastricht, the Treaty of Amsterdam).¹⁶ The ideology of federalisation was particularly embraced by the European Convention and, in consequence, by the Treaty Establishing a Constitution for Europe. Everything seems to confirm the existence of Walter Hallstein’s “unfulfilled federation” in the European integration processes.¹⁷

¹¹ Compare e.g. P. Buras, *Dyskusja o finalité politique Unii Europejskiej. Przegląd stanowisk, Ekspertyza dla Komisji Spraw Zagranicznych i Integracji Europejskiej* Senatu RP, Center for International Relations, Warsaw 2001.

¹² R. Watts, *Comparing Federal Systems in the 1990's*, Ontario 1996, pp. 6–7.

¹³ Compare also R.L. Watts, *Federalism, Federal Political Systems, and Federations Institute of Intergovernmental Relations*, “Annual Review of Political Science” 1, 1998, pp. 117–137, www.arjournals.annualreviews.org — FU Berlin on 12/09/08.

¹⁴ A. Balicki, *Czy Unia Europejska jest federacją?*, “Rubikon” 3 (10), 2000, p. 2 et seq.

¹⁵ M. Forsyth, *The political theory of federalism. The relevance of classical approaches*, [in:] V. Wringht (ed.), *Federalising Europe*, Oxford 1996, p. 25.

¹⁶ *Ibid.*, p. 28.

¹⁷ According to F. Kinsky, *Federalizm: model ogólnoeuropejski*, Kraków 1999, p. 47 et seq.

It is remarkable that the original wording of the Treaty of Maastricht, which was written during Denmark's presidency, referred directly to a "Union with a federal goal." Under pressure from the British government, this expression was struck out. According to Forsyth, however, this trend is still present in the European integration despite the fact that it is often disguised in technical language.¹⁸

TRUE COLOURS OF THE TL

Forsyth's remark is fundamental for the understanding of the Treaty of Lisbon. It may seem that the TL strongly suppressed the federal ardour of the integration project. However, one should not be misled by the cosmetic technical and linguistic changes which, in my view, do not preclude a federal view of the UE referred to in the title of this paper.

REDEFINING THE EU

Thus, one should look for the right definition of the European Union, i.e. a new definition. It does not mean that the popular notions, typologies and characteristics of political and systemic institutions, which are in part quoted here, should be abandoned. It seems, however, that it is worthwhile to start from the beginnings of the European integration in order to understand its topicality and to be able to discuss its future and political finale in a realistic way.

According to the Monnet method, at the beginning there was nothing else but integration, i.e. taking small steps. Through specific projects and specific reforms, which did not necessarily have pompous names (vide: A Constitution for Europe), solid results were achieved in the field of integration. It was in this way that the Single European Market, the foundation of successful economic integration, was created.

FIGHTING STAGNATION

In the face of systemic stagnation of the state at the beginning of the 21st century, Germany often referred to the need of daring reforms (German: *handlungsfähiger Föderalismus erfordert mutige Reformen*). Now, the same situation is repeating itself in the face of "systemic stagnation" of the European Union. Has the Treaty of Lisbon met the expectations? It is typical of compromises that

¹⁸ A. Balicki, op. cit., p. 3.

none of the parties is really satisfied. Indeed, neither are the supporters of daring systemic reforms, nor those who opted for reinforcement of the Union's economic character.

The Treaty of Lisbon promised to modernise the European institutions, strengthen the democratic legitimacy of the European Union and introduce the EU catalogue of fundamental rights. Will it have the chance to become a foundation of the European Union? Time will tell. The spectre of the negative Irish referendum in which the consent to the ratification was refused has been haunting the entire reform project. It seems that the European Union is going through a sort of *déjà vu*. In the past, however, the Union was able to surmount similar obstacles. The Treaty of Maastricht and the Treaty of Nice were rejected in the first referendum by Denmark and Ireland respectively.

Nevertheless, the reforms begun in the Treaty of Lisbon will soon reappear on the agenda, possibly collected in a new treaty and perhaps changed as to some details. This is inevitable if the Union wants to remain globally competitive, democratic and efficient, stable and modern. The reforms included in the Reform Treaty comprise solutions adopted in the course of several years of negotiations, even during the time of the European Convention, which constituted a common denominator of the Member States' views as to the scope of the EU systemic reform.¹⁹

SMALL STEPS TOWARDS FEDERALISM

Now, a little bit provocatively and getting ahead of the further course of this analysis, I would like to start answering the questions asked in the title. The Lisbon reform does federalise the EU, but it does so through individual solutions and evolution, i.e. by taking the above-mentioned "small steps" as envisaged by Monnet. A federation is introduced in the top-down way, as opposed to the Constitution for Europe, which was closer to Spinelli's theory of integration according to which federalisation was to constitute the foundation of reforms and not their result. Therefore, we can say that the idea of the EU which emerges from the Treaty of Lisbon brings it closer to Monnet's model of integration,²⁰ i.e. the model of a federal pact. At the same time, federalism is here not a method of integration but its final result.

¹⁹ Compare B. Donnelly, *Constitutionalisation without a constitution*, „Federal Trust Policy Commentary” January 2008; F. C. Mayer, *Die Rückkehr der Europäischen Verfassung?: ein Leitfaden zum Vertrag von Lissabon*, „Zeitschrift für ausländisches öffentliches Recht und Völkerrecht” 67, 2007, pp. 1141–1217; E. Piontek, *op. cit.*, p. 50.

²⁰ Compare Schuman Declaration of 1950, written by no other but Monnet, where it is said that “Europe will not be made at once, nor according to a single master plan of construction. It will be built by concrete achievements, which create de facto [common European — author's note] dependence.”

The above-mentioned view seems to be confirmed by the fact that the TL builds strong supranational institutions whose operations are based on civil servants and, to a smaller extent, on the engagement of politicians.

FEDERALISING FACTORS

The European Union, in its shape presented by the Treaty of Nice and all the more so in its Lisbon shape, shows some features of a federal system (division of powers, financing the policies, especially in terms of the so called redistribution policies such as the Common Agricultural Policy or the regional policy). Due to the fact that the European Union is a peculiar yet still federal political system with a broad range of subsystems that, in turn, have at least two levels of authority, we must consider which of the reforms strengthen its federal character.

Among the federal elements of the EU system I include the principles of decision-making by a majority vote in the Council. Also the procedure of adopting the budget demonstrates a strong federal nature. Just as Bundestag and Bundesrat operate jointly in Germany, so do the Council and the European Parliament in the EU. This is the first thoroughly federal form of two decision-making chambers (the bicameral system) in the EU. The picture is completed by the EU own financial system, that is the EU budget with a defined own income.

Certainly, the next element that would federalise the EU in this respect is the introduction of a European tax, the fifth source of funds for the budget of the European Union. The role of the European Commission, which has successively been strengthened (including its key authority to impose financial penalties on the Member States), should not be underestimated.

Finally, taking into account the very character of the EU law, the flagship feature of which is its primacy over national law, it is hard not to notice the similarity to federal legal systems. Further in my analysis, I will prove that the institution of EU citizenship, even though it still has a framework character, received more substance in the TL through, *inter alia*, the introduction of the fundamental rights system (CFR) and a stronger link between economic rights and EU citizenship.

The division of powers, which has been newly defined in the TL, and the reinforcement of the political subsidiarity principle constitute a federalising factor for the EU system. The common currency, the euro, shifting the monetary policy from the national level to the EBC level, which, in fact, is the EU level, is an example otherwise known from federal systems.

The EU has strong central institutions, for instance through direct elections to the EP, the independence of officials in the Commission or the proactive role of the ECJ which settles competence disputes between the EU institutions or the EU institutions and the Member States (as well as generates rulings that are powerful in their political consequences). This brings to mind the federal government of Switzerland.

Also the role of the Committee of Regions, which will grow under the TL, has become an inseparable part of the federalisation trend because it is bringing the Union towards a federal model in which all components of the system are politically involved. In addition, strengthening the national and local parliaments is aligned with the implementation of the federal model of the political system, i.e. the above-mentioned participation principle. There are many other elements that have a federal origin. I will just name a few examples: EU agencies, including the Europol and the Eurojust, and above all the change of opinion on internal extradition expressed through the implementation of the European Arrest Warrant.

FEDERALISATION IN PROGRESS

The European Union as well as its Member States are now in a phase in which they need to redefine the role and the significance of many legal institutions such as the national standing of constitutional courts and the duties of common courts, the legitimisation of decision-making processes in the EU, the changing role of national representative bodies or the particular role of the executive embedded in the EU structure and, finally, the consolidation of the European legal space, in which an important role will be played by the entry into force of the CFR.

The structure of the European Union, especially in the context of the reforms that have been proposed since the nineties (including those in the form of the Treaty of Lisbon), is undergoing the federalisation process which has been visible since its establishment, i.e. the execution of the Treaty of Maastricht in 1992. Never before had this process been as strong as in the case of the Constitutional Treaty and later the slightly “subdued” Lisbon Treaty. Although there was no literal announcement to this end, it resulted from the character of EU reforms (subsidiary division of powers, new institutions such as the President of the European Council, the High Representative for the Common Foreign and Security Policy, the role of national parliaments as guardians of the subsidiarity principle, the adoption of the Charter of Fundamental Rights).²¹

In addition, as a result of unifying the EU system, a clear shift of power from lower to higher levels can be observed. Without going into a detailed analysis of this broad issue, it can be argued that, as a consequence of this process, a system is being developed that is becoming more and more similar to the so called cooperative federalism. It has been discussed in literature that in a cooperative federal system a high level of political activity among governments of the Member States (or among federal units in federations) supports the development of the so called

²¹ To find out more compare R. Grzeszczak, *Legitymacja demokratyczna UE. (Ewolucja procesu legislacyjnego i rola parlamentów narodowych)*, [in:] J. Kranz (ed.), *Suwerenność i ponadnarodowość a integracja europejska*, Warsaw 2006, p. 225 et seq.

joint decision federalism and conditions a high degree of participation in politics of the centre (here: in European politics).

CONCLUSION

The Treaty of Lisbon, just like previously the Constitution for Europe, can be said to have been created to the best of the present consensus possibilities in relations between the 27 members of the European Union. One must hope that the process in connection with the adoption of the Treaty of Lisbon will not upset the very idea of European integration and further extension of the European Union (with regard to Turkey or Croatia). Is it going to happen? Is the European integration going to develop towards a consistent and effective form — a federation or possibly a confederation? The future will show. And the future depends on decisions taken by governments and parliaments as well as the outcomes of referenda and parliamentary elections, that is on the citizens of the European Union themselves.

I am convinced that the systemic model of the European Union, even though it is still in a self-definition phase, that is even though it is still developing concepts and institutions characteristic of itself, as opposed to those borrowed from either international legal orders or from the Member States, will consecutively become federalised and at the same time push out the confederative elements. This process will certainly lead to a structural transformation of the European executive. Thus, it will put an end to the double legislative and executive power on the EU level. This double character of the two EU powers is a potential source of conflicts.

The European Union is not a federation. Is it going to become one? It is difficult to assess that. On balance, the systemic reforms of the Treaty of Lisbon prove that a path towards further reform process has been embarked on and not abandoned. This does not mean that the results achieved so far are insignificant. They are everything that could be achieved for now, which means that in the present economic and political conditions they constitute the maximum level of what is socially acceptable.