

RETHINKING THE BINARY FEDERAL THEORY: A SEARCH FOR THE EU'S AND ASEAN'S PLACE IN THE CONFEDERAL-FEDERAL DICHOTOMY

Fran Marko Stojković*

Abstract: This paper argues that the traditional binary federal theory, which distinguishes between concepts of confederation and federation, is not adequate for explaining the legal nature of various unions of states. In reaching such a conclusion, the paper first defines the traditional federal theory. It presents how both the concepts of a federation and a confederation, with all their associated characteristics, derive from the old absolute understanding of sovereignty. The unitary constitutional theory, which is the only constitutional theory compatible with this notion of federalism, is also explained. Afterwards, the legal structures of two very different integrational projects, the EU and ASEAN, are examined in the light of the traditional federal theory with the aim of concluding whether these entities are confederations or federations. It is suggested how and why ASEAN easily fits into the confederal category, while the EU defies both the federal and confederal box. From the results of such an analysis, a conclusion is drawn on why the theory is inadequate to explain the legal nature of certain unions, such as the EU. It is claimed that the theory, which is based on the idea of absolute sovereignty, has failed to readapt itself to the existence of unions of states in which absolute sovereignty is wholly absent. The paper concludes with a brief discussion on how the theory should be reformed to better fit the legal reality. It is suggested that a more spectral view on federalism is needed, either some brand-new one or the one conceptualised by James Madison back in the 18th century.

Keywords: sovereignty, confederation, federation, federal theory, European Union, Association of Southeast Asian Nations.

1 Introduction

During my studies at the University of Zagreb, I came across the concepts of 'federation' and 'confederation' on multiple occasions. These concepts were taught in three of my mandatory classes (General Theory of Law, Constitutional Law, and Public International Law),¹ each time in

* Fran Marko Stojković, MJur, Faculty of Law, University of Zagreb, fran.m.stojkovic@gmail.com. ORCID iD: 0000-0002-3122-8978. I am indebted to Nika Bačić Selanec for her help and advice in the writing of this paper. I am also grateful to my colleagues Helena Kumpar

quite a similar manner.² The class textbooks mostly revolved around two central points. First, that any union of states is either a confederation or federation, depending on whether its basis is an international agreement or a constitution. Second, that there are certain sets of characteristics which confederations and federations usually possess.

However, this settled confederal-federal way of teaching faces a challenge with regards to the European Union. The characteristics of the legal structure of the EU diverge from those traditionally prescribed for confederations or federations, making it hard to categorise it within the confederal-federal dichotomy. The legal textbooks, used during the course of my studies, reconciled these peculiar EU characteristics with the traditional federal teaching in various ways. While some proclaimed that the EU still falls into the confederal category,³ others just stated that the EU represents a unique entity, without questioning the confederal-federal distinction as a whole.⁴

The lack of a single answer to what the EU is from the federal standpoint is a reflection of the general lack of consensus regarding the legal nature of the EU, a topic which legal scholars have been arguing over since the very creation of the European Coal and Steel Community. Over the years, this debate has taken many different forms. From the 1960s to the 1980s it mostly revolved around the question of whether or not EU law⁵ is a subspecies of the law of international organisations.⁶ In the 1980s the debate shifted to the founding treaties and the question of whether the treaties are of a constitutional nature.⁷ Regardless of the sub question on which the debate is centred, the contrasting views on the legal nature of the EU have remained today as they were at the beginning of the integration. This paper aims to make a small contribution to the course of this everlasting debate by observing the EU's legal nature from the federal standpoint. However, in contrast to the above-mentioned

Zidanić, Dimitris Nikolaidis, and Petar Zubić as well as to two anonymous reviewers for their comments that have greatly improved the original draft. All errors remain mine. DOI: 10.3935/cyelp.16.2020.378.

¹ The textbook used for my General Theory of Law class was Berislav Perić, *Država i pravni sustav* (Informator 1994), for my Constitutional Law class it was Branko Smerdel, *Ustavno uređenje europske Hrvatske* (Narodne novine 2013) and the textbook for my Public International Law class was Juraj Andrassy and others, *Međunarodno parvo 1* (Školska knjiga 2010).

² An alternative view on federalism is presented in Smerdel (n 1) 215-219. However, it is clear that the author favours the traditional federal theory over an alternative one.

³ Juraj Andrassy and others, *Međunarodno pravo 2* (Školska knjiga 2012).

⁴ Smerdel (n 1) 204-206.

⁵ Back then known as Community law.

⁶ Jacques Ziller 'The Nature of European Union Law' (2011) 5 <<https://ssrn.com/abstract=1919481>> accessed 26 July 2020.

⁷ *ibid.*, 6.

textbooks, which only try to find the EU's place in the confederal-federal dichotomy, aim of this paper is to take a step back and focus on another frequently asked question: is this traditional federal theory suitable for observing the legal nature of any union of states in the first place.

The paper argues that the traditional federal theory is not sufficient to explain the legal nature of either the EU or any other similar legal entity, and that, as such, it needs to be reformed.

The importance of this argument is that it could constitute the cornerstone of a more appropriate framework for examining the phenomena of interstate integration. Detailed assessment of the shortcomings of the traditional federal theory is a suitable base for building a new understanding of federalism, one that can better explain the legal nature of the EU or any other union of states, past, present, or future, which falls outside the traditional confederal or federal boxes. The new understanding can also help resolve (or at least help us understand) conflicts, such as the contested question of the supremacy of EU law,⁸ which are, in my opinion, the direct consequence of observing the European legal order from an inadequate traditional federal standpoint.

The conclusion that the traditional federal theory is not sufficient to explain the legal nature of certain legal entities is here reached by examining and comparing the legal structure of two very different regional integration projects: the EU and the Association of Southeast Asian Nations (hereinafter: ASEAN).

There are two main reasons why the conclusion is pursued by comparing the EU to ASEAN and not to any other union of states. The first is comparability. Since, according to the traditional federal theory, the EU falls into the confederal category, another confederation was chosen over any federal state to make the comparison easier, clearer, and more accessible. This choice excluded unions such as the Federal Republic of Germany or the United States of America. The second reason is confederal dissimilarity. From all the possible confederations, ASEAN was selected because its confederal structure is very different from that of the EU.⁹ The comparison between the two clearly highlights certain absurdities resulting from labelling both ASEAN and the EU as confederations.

The paper is divided into three further sections. Section 2 gives a brief overview of the traditional federal theory and the unitary constitutional theory which together are key for understanding the traditional

⁸ This conflict is discussed in detail in the third section of this paper.

⁹ ASEAN is not the only appropriate confederation for this analysis. The conclusion presented in this article can also be reached by comparing the EU to legal entities such as the African Union or the Southern African Development Community.

notion of federalism. This section shows how the concepts of federations and confederations, together with all the attributed traditional characteristics, are rooted in the old understanding of sovereignty as an absolute and indivisible power. In the third section, the legal structures of ASEAN and the EU are analysed from the traditional federal standpoint. From this analysis two things are evident. Firstly, ASEAN easily fits into the confederal category since it is constructed on the idea of the absolute sovereignty of the member states, much like the concept of confederation itself. Secondly, the finding that the EU's place in the confederal-federal dichotomy is more difficult because absolute sovereignty, the concept on which the whole traditional federal theory is based, is wholly absent from European reality. The paper concludes that four parts of the traditional federal theory (its base, the confederal-federal dichotomy, understanding of the legal structure and constitutionalism) are in a crisis, primarily because the theory has failed to readapt itself to the existence of unions, such as the EU, which are not based on the idea of absolute sovereignty. Different suggestions are proposed as possible solutions to this crisis, such as the idea that the theory should be reformed by either accepting Madison's conception of federalism or by creating some other new non-binary classification.

2 The world from the traditional federal standpoint

The concept of federalism can be used to advocate diametrically opposite purposes depending on the political and historical context. In Catalonia today, the federalisation of Spain is favoured by those campaigning for greater autonomy of the region.¹⁰ In contrast, in Yugoslavia, federalism was an instrument for bringing and keeping a culturally and nationally diverse populace under one central power.¹¹ Regardless of the purpose of the concept, federalism is a phenomenon that has existed from as early as Ancient Greece¹² and has always implied the existence of (at least) two levels of government. However, how we perceive and understand this phenomenon largely depends on which standpoint we observe it from. The aim of this section is to give a clear picture of the federal standpoint that originated in 16th century Europe. This traditional standpoint has shaped the legal minds of European scholars (and

¹⁰ Francesco Violi, 'Our Proposal for Catalonia: Federal Spain' (*My Country Europe*, 1 October 2017) <<https://mycountryeurope.com/opinions/catalonia-federal-spain/>> accessed 22 December 2019.

¹¹ For more information on the federalism in the early days of Yugoslavia, see Joseph Frankel, 'Federalism in Yugoslavia' (1955) 49 *The American Political Science Review* 416.

¹² On federalism in Ancient Greece, see Hans Beck and Peter Funke (eds), *Federalism in Greek Antiquity* (1st edn, CUP 2015).

scholars originating from countries previously colonised by Europeans) for centuries and continues to do so today.

Traditional federal theory has its roots in conceptual definitions which 'precede and prevail over any empirical legal analysis (of the existing unions)'.¹³ The most important conceptual definition for the theory concerns the principle of sovereignty. Jean Bodin, a French political philosopher, was the first to define sovereignty in his *Les Six livres de la République* in 1576 as 'an absolute, indivisible and perpetual power of giving law and issuing commands to all in general and to each in particular'.¹⁴ In France, which back then was an absolute monarchy, such power could only reside within one institution – the king.¹⁵ From Bodin's initial conception, the principle later evolved in two directions. In continental Europe it mutated into the principle of popular sovereignty, well-elaborated by the social contract philosophers Jean-Jacques Rousseau and Thomas Hobbes.¹⁶ According to popular sovereignty, the people are sovereign, not the ruler. By establishing a state, people either transfer their sovereignty to the ruler (Hobbes's variation) or retain their sovereignty, giving the ruler only a mandate to exercise that supreme power on their behalf (Rousseau's variation).¹⁷ On the other side of La Manche, however, Bodin's principle mutated into the principle of parliamentary sovereignty. The parliament, as an institution, was seen as the 'virtual approximation of the people and in that capacity entitled to supreme power'.¹⁸

Although these three conceptions of sovereignty diverge on the question of where in society this supreme power is located (in the ruler, the parliament, or the people), they all converge in the perception of sovereignty in indivisible and absolute terms. Indivisibility entails that sovereignty can only lie within one institution and that it cannot be shared or divided. Absoluteness, on the other hand, refers to 'the scope of matters

¹³ Robert Schütze, *From Dual to Cooperative Federalism: The Changing Structure of European Law* (OUP 2009) 32.

¹⁴ Tina Oršolić Dalessio, 'The Issue of Sovereignty in an Ever-Closer Union' (2014) *Croatian Yearbook of European Law & Policy* 67, 69.

¹⁵ Although Bodin gave primarily a depiction of 'monarchical sovereignty', he claimed that his theory of sovereignty could also be applied to any other forms of regime. For a more detailed overview of his theory, see Richard Bourke and Quentin Skinner (eds), *Popular Sovereignty in Historical Perspective* (CUP 2016) 1-14, 115-142. Furthermore, certain scholars have criticised his depiction of sovereignty for being more prescriptive than descriptive, serving rather the political purpose of strengthening the French monarchy in the time of wars of religion than giving a true picture of the distribution of power in France: Oršolić Dalessio (n 14) 69.

¹⁶ Oršolić Dalessio (n 14) 70-71.

¹⁷ *ibid.*

¹⁸ Bourke (n 15) 8.

over which a holder of authority is sovereign'.¹⁹ For an institution or a state to be absolutely sovereign, its authority must extend to all matters within the territory, unconditionally.²⁰

Relying on such understanding of sovereignty, George Jellinek, a German scholar from the late 19th century, in his '*Die Lehre von den Staatenverbindungen*', presented the following conclusion regarding the locus of sovereignty in federal structures. Since sovereignty is absolute and indivisible, in any union only one level of government (federal or national) can be sovereign – a third possibility cannot exist.²¹ Sovereignty can reside either within the member states, in which case the union is a confederation, or it can reside within the union, in which case the union is a federal state.²² From this line of reasoning, the backbone of European federal thought was created: a binary distinction between confederations and federations/federal states.²³ Both George Jellinek's and Johann Blunthschill's²⁴ 19th century depictions of this binary distinction still play predominant roles in traditional federal theory today.²⁵

Before discussing the concepts of federations and confederations any further, it is important to stress that the term 'confederation' has fallen out of use. Today, scholars are keen to use only the (wider) term 'international organisation' to also describe legal entities that have confederal characteristics. For example, ASEAN, which, according to my analysis, is a textbook example of confederation, is predominantly referred to as 'a regional international organisation'. The reason probably lies in the fact that the term 'confederation' bears the stigma of weakness and instability which derives from historical examples of confederations²⁶ and

¹⁹ Daniel Philpott, 'Sovereignty' *Stanford Encyclopedia of Philosophy* (2020) <<https://plato.stanford.edu/entries/sovereignty/>> accessed 26 July 2020.

²⁰ *ibid.*

²¹ Nicholas Aroney, 'The Influence of German State-Theory on the Design of the Australian Constitution' (2010) 59 *International and Comparative Law Quarterly* 682-683.

²² Robert Schütze, *European Constitutional Law* (2nd edn, CUP 2016) 50.

²³ It is important to stress that the concepts of confederation and federal state were not developed simultaneously. In the beginning, the traditional federal theory only differentiated between confederations and unitary states. It was only after the American federal theory came to life that the theory developed the concept of federal state as well. For a more detailed evolution of these concepts, see Schütze (n 13) 15-40.

²⁴ For more information on Johann Blunthschill's federal theory, see Aroney (n 21) 675-681.

²⁵ Johan Blunthschill's understanding of confederations and federations partly differs from Jellinek's understanding. Unlike Jellinek, who puts sovereignty at the forefront of the theory, for Blunthschill sovereignty does not have a decisive role in distinguishing between federations and confederations. A key distinction lies in the nature and reach of federal organs of government. For a more detailed overview of differences in their approach, see Aroney (n 21) 675-685.

²⁶ Bruno de Witte 'EU Law: Is It International Law?' in Catherine Barnard and Steve Peers (eds), *European Law* (2nd edn, OUP 2017) 191.

the fact that there was a sudden increase in the number of international organisations in the 20th century.²⁷ However, for the sake of consistency, only the term 'confederation' will be used in this paper.

Confederations are seen as a purely international phenomenon. They are created on the basis of an ordinary international treaty²⁸ between several sovereign states for the purpose of achieving a certain common goal.²⁹ Since the basis of a confederation is an international treaty, the states retain their sovereignty, while the confederation itself does not become a state – it is a mere international union between several sovereign states.³⁰

There are five characteristics that the theory traditionally associates with confederations. Each one of these characteristics directly or indirectly reflects the premise that states remain absolutely sovereign over their national territory. First, since an absolutely sovereign state cannot be bound unconditionally or permanently (because then it would lose part of its authority), the states in a confederation retain the right to nullification and secession.³¹ Second, a confederal treaty establishes a shared institution which is comprised of an equal number of delegates from each state, representing their respective governments.³² Any different composition of a shared institution would either negate the fact that national governments remain sovereign over their territory (eg if the delegates were representing the citizens of the confederation) or the fact that each state is equally sovereign within the confederation (eg if one state could send more delegates than other states). Third, because obliging a state without its consent would negate its absolute authority, the shared institution adopts all its decisions on the basis of unanimity. In cases where decisions are not adopted unanimously, those decisions are not binding on the member states which opposed their adoption. Fourth, in a confederation there is no legal relation between the shared institution and the citizens of each state – a relationship only exists between the shared institution and the governments of each state.³³ Giving any

²⁷ Andrassy (n 1) 126.

²⁸ The traditional federal theory of the 17th century distinguishes between temporary and permanent international treaties. Only the latter establishes a confederation by delegating powers of common interest to a 'council' comprised of representatives from each state. See Schütze (n 13) 18.

²⁹ Andrassy (n 1) 126.

³⁰ Schütze (n 22) 51.

³¹ *ibid.*

³² Pavlos Eleftheriadis, 'Federalism and Jurisdiction' in Elke Cloots, Geert De Baere and Stefan Sottiaux (eds), *Federalism in the European Union* (Hart Publishing 2012) 46.

³³ Ronald Watts, 'Federalism, Federal Political System, and Federations' (1998) *Annual Review of Political Science* 121.

executive powers to the shared institution directly would undermine the states' authority to enforce laws on their citizens. Consequently, all the decisions of the shared institution oblige/create rights for citizens only if and when they are transposed into the national legal systems.³⁴ All law enacted at a confederal level is nothing more than an international law. Finally, since the international law did not originally know of any other legal subjects beside states, the confederation is not considered to be a subject of that law.³⁵

Some prominent examples of confederations in the European legal literature are the United Provinces of the Netherlands (from 1580 to 1795), the Old Swiss Confederacy (from 1291 to 1798), and the American Confederation (from 1778 to 1787).³⁶

While confederations are seen as purely international phenomena, the European federal theorists understand federations as a purely national phenomenon. Federations are created on the basis of a federal constitution.³⁷ By enacting a federal constitution, the states lose all their sovereignty and are re-established as member states of that federation.³⁸ The federal level, however, becomes sovereign and the federation is perceived as one state – the federal state.³⁹ Such a 'federal state' is, in theory, as sovereign as a unitary state.

The question that naturally arises from this line of reasoning is, if member states have lost all their sovereignty and the federal state is perceived to be sovereign as a unitary state, what is then the difference between member states in a federal state on the one hand, and administrative units in a unitary state on the other?⁴⁰ According to Watts, the key difference is that in federal states there is 'the constitutional guarantee of autonomy for the member states' governments in responsibilities they perform'.⁴¹ In other words, on the basis of a federal constitution, member states' governments retain certain powers which federal level cannot exercise. These powers are usually referred to as 'exclusive legislative powers'.⁴² However, the existence of such powers can be compatible with the idea of absolute sovereignty (on which this whole distinction

³⁴ Smerdel (n 1) 205.

³⁵ Schütze (n 13) 32.

³⁶ Andrassy (n 1) 126.

³⁷ Smerdel (n 1) 204.

³⁸ Schütze (n 13) 33.

³⁹ *ibid.*

⁴⁰ *ibid.*, 34.

⁴¹ Watts (n 33) 124.

⁴² Schütze (n 13) 33.

between federations and confederations is based) only if the federal level, which is sovereign, is able to amend its federal constitution and change the scope of member states' 'exclusive' powers. If the federal level did not have authority to do that, it would not really be absolutely sovereign. To stay true to its concept of sovereignty, the traditional federal theory in the end claims that 'all powers are ultimately derived from the federal state'⁴³ and that the federal level has the power to change its constitution and transform itself even into a unitary state (it possesses *kompetenz-kompetenz*).⁴⁴

In line with the above, traditional federal characteristics do not differ much from those of a unitary state. These characteristics again, as is the case with the confederal characteristics presented above, directly or indirectly reflect the concept of absolute sovereignty. First, since member states have lost their sovereignty, there is no possibility for secession from the federal state.⁴⁵ Second, a constitution establishes federal institutions, whose members directly represent the citizens of the federal state (who together make one polity).⁴⁶ Third, decisions at a federal level are usually adopted by some form of majority voting, not by unanimity. While in a confederation unanimity serves to protect the absolute sovereignty of every member state, in a federation such a need does not exist. Federal decisions can oblige the citizens of a certain member state even when all of their representatives in federal institutions have voted against. Fourth, federal institutions can, within the scope of the competences given to them by the federal constitution, directly regulate relations between the citizens and enforce enacted laws and other decisions.⁴⁷ Since federal institutions are the ones possessing absolute authority, a direct link can exist between them and individuals.⁴⁸ Finally, since the federation is perceived as a state, it is also a subject of international law. It can conclude international agreements and represent itself in international relations.⁴⁹ Some prominent examples of federal states include Indonesia, Myanmar and the Federal Republic of Germany.⁵⁰

This binary model of federalism, where all existing unions are either confederations or federal states, goes hand in hand with the concepts of

⁴³ *ibid.*, 35.

⁴⁴ *ibid.*

⁴⁵ *ibid.*, 32.

⁴⁶ Aroney (n 21) 683.

⁴⁷ Smerdel (n 1) 205 and Aroney (n 18) 679.

⁴⁸ Eleftheriadis (n 32) 46.

⁴⁹ Smerdel (n 1) 206.

⁵⁰ Andrassy (n 1) 127.

formal and democratic unitary constitutionalism.⁵¹ According to formal unitary constitutionalism, every legal system can have only one supreme source of law: a single constitution. That constitution can consist of multiple parts (for example: three different legal documents) but 'these parts must all be put together into a single coherent legal whole'.⁵² Every single legal claim inside that legal system must be traceable back to that 'coherent legal whole'.⁵³

Democratic unitary constitutionalism, on the other hand, demands that 'one people must form one State on the basis of one constitution'.⁵⁴ The concept is based on a theory of popular sovereignty according to which people are those that are really sovereign. Since they are sovereign, only they can (acting as one) create a constitution directly (through referenda) or indirectly (by electing a special assembly which then adopts the constitution on their behalf). By creating a constitution in such a manner, that people constitute one (sovereign) state.⁵⁵ There can never be more peoples constituting one state.

In a unitary state, as the name already suggests, it is easy to envisage how these concepts function: there is one constitution created directly or indirectly by the people of that state. That constitution stands at the apex of the legal hierarchy and all the other laws must be in accordance with it. The more interesting question is whether the concepts of confederations and federal states represent any challenge to these concepts of unitary constitutionalism. The short answer is – no, they do not.

In confederations, the states remain sovereign. Each state has its own legal system with a constitution at the top, which was created directly or indirectly by the people of that state alone. Since a confederation is regarded as a purely international phenomenon, all law enacted by the confederal institution is, in its essence, an international law. That international law is valid in the states' legal systems under the conditions set out by both the international treaty which created the confederation, and the national constitutions. To be compatible with the concept of formal unitary constitutionalism, confederal law must always reside below the constitution in the legal hierarchy of the states.

⁵¹ 'Constitutionalism is the set of ideas that defines what constitution is or ought to be'. See Robert Schütze, 'Constitutionalism and the European Union' in Catherine Barnard and Steve Peers (eds), *European Law* (2nd edn, OUP 2017) 71.

⁵² Daniel Halberstam "'A People for Certain Purposes": On the History and Philosophy of Federalism(s) in the United States and Europe' (2018) 619 *Michigan Public Law Research Paper* 1, 3-4.

⁵³ Halberstam (n 52) 8.

⁵⁴ Schütze (n 51) 79.

⁵⁵ *ibid.*, 78.

Unlike in confederations, in federations there is usually more than one constitution: the federal constitution and the constitutions of the member states. Although it may seem paradoxical, this situation does not pose a problem for the idea of unitary constitutionalism. This is because federations are understood as types of decentralised unitary states (where decentralisation is not performed by the national law, but by the federal constitution itself).⁵⁶ Federation is created by federal demos enacting the federal constitution, which then stands at the apex of the legal hierarchy. That federal constitution creates not only the federal government, but also member states' governments, giving them a degree of autonomy from the central government. It enables each of the member states to put their operating rules in a document which is called a constitution, but which is not a supreme source of law in the federal state.⁵⁷ Those member states' constitutions do not stand at the apex of the legal order and they must be in accordance with the supreme federal constitution. Their validity and existence depend entirely on the federal constitution.⁵⁸ They are also not created by the people of the federation representing a single unit, but only by a part of that one people. Consequently, these documents are constitutions only nominally, while only the federal constitution is the constitution *per se* in the sense of formal and democratic unitary constitutionalism. Daniel Halberstam calls this system 'the system of nested constitution' because 'the federal constitution completely envelopes states' constitutions'.⁵⁹

In short, these are the central features of the traditional federal theory and the theory of unitary constitutionalism. If we were to summarise these theories in one short claim, it could be phrased as following: since sovereignty is absolute and indivisible, it is always located at either the level of the member states, in which case we have a confederation, or at the federal level, in which case we have a federal state, and a formal/democratic constitution always accompanies that locus of sovereignty.

3 ASEAN and the EU from the traditional federal standpoint

If we now try to observe the characteristics of ASEAN and the EU to conclude whether these legal entities are confederations or federal states, we are left with some mixed results. ASEAN fits easily into the confederal category, as if it were modelled after it. It can be used to explain every confederal characteristic mentioned in the previous section. It is the per-

⁵⁶ Halberstam (n 52) 10.

⁵⁷ *ibid.*, 9.

⁵⁸ *ibid.*, 11.

⁵⁹ *ibid.*, 12.

fect confederal child. On the other hand, the EU does not fit well anywhere. It defies both the confederal and federal category. It is a problematic teenager that leaves us questioning whether this confederal-federal distinction is perhaps missing something? But let us start our analysis with the unproblematic one.

3.1 The perfect confederal child (ASEAN)

ASEAN represents a textbook example of a confederation. It has all the traditional confederal characteristics presented above. The cause behind the purely confederal nature of ASEAN is the same that created the distinction between confederations and federations in the first place: insistence on the concept of absolute and indivisible sovereignty. The aim of this section is to firstly provide a detailed picture of the Southeast Asian understanding of that concept of sovereignty and afterwards to show how member states, abiding by this concept, necessarily created a purely confederal structure of ASEAN. To do this, we need to travel back more than 400 years into the past.

The idea of absolute and indivisible sovereignty came to Southeast Asia in the 16th and the 17th century on board French, Dutch, British, Portuguese and Spanish ships, but it did not perish with the disappearance of the colonists. Newly created states embraced the concept. When establishing ASEAN in 1967, the member states proclaimed that the fundamental principles of this new 'international organisation' are sovereignty and the sovereign equality of all the member states.⁶⁰ They structured ASEAN's institutions in a way that effectively ensures that 'sovereignty remains firmly located at the national level'.⁶¹ Sovereignty was understood in absolute terms, similarly to how Bodin understood it in the 16th century. Such understanding entailed that any transfer of the state's authority to the supranational level was strictly prohibited. States must always retain full authority over their respective national territories.⁶²

Although the European understanding of sovereignty has slightly changed over the years, moving away from this absolute concept to a more fluid model,⁶³ Southeast Asian understanding remains the same today. There are four main reasons why this is so. First, there is the colo-

⁶⁰ Alan Collins, 'Forming a Security Community: Lessons from ASEAN' (2007) 7 *International Relations of the Asia-Pacific* 203, 212.

⁶¹ *ibid.*

⁶² Shaun Narine, 'State Sovereignty, Political Legitimacy and Regional Institutionalism in the Asia-Pacific' (2004) 17 *The Pacific Review* 429.

⁶³ Oršolić Dalessio (n 14) 72-76.

nial experience of all ASEAN member states except Thailand. After years spent under foreign powers, member states' governments are reluctant to give away any part of their newly acquired authority.⁶⁴ Second, such understanding of sovereignty is compatible with the political regimes of certain member states. The political systems both of Brunei (an absolute monarchy) and Thailand (a military dictatorship) are based on the idea of concentration of power, which is hardly compatible with any transfer of authority.⁶⁵ Third, although there were certain military conflicts between ASEAN member states before 1967, there has not been a type 'of total war that Europe experienced over a number of centuries'.⁶⁶ Consequently, 'the need to reduce the areas of national sovereignties as the price to be paid for future peace, has not been felt'.⁶⁷ Finally, ASEAN member states are still preoccupied with the process of state building. To a certain degree, every government is still trying to establish domestic political legitimacy: 'the belief in the rightfulness of a state, in its authority to issue commands, so that the commands are obeyed [...] because they are believed to have moral authority [...]'.⁶⁸ The transfer of any authority is widely seen as being at least inconvenient for achieving this goal.⁶⁹

Insistence on the described concept of the states' sovereignty, from the beginning of integration until today, led to the creation of the two ever-present characteristics of ASEAN: the principle of non-intervention and the purely confederal structure of the shared institutions.

The former prohibits any violent or non-violent intervention of one member state in the internal affairs of another. Even commenting verbally on any internal issue of another member state is perceived as a breach of that state's sovereignty. One of the best recent examples of this principle in action is the predominant silence of ASEAN member states and ASEAN institutions in the wake of the potential genocide against the Rohingya Muslim community in 2018 in Myanmar.⁷⁰

⁶⁴ David Camroux, 'The European Union and ASEAN: Two to Tango?' (2008) *Notre Europe* 1, 20.

⁶⁵ Tomasso Visone, 'The "ASEAN Way": A Decolonial Path Beyond "Asian Values"' (2017) 9 *Perspectives on Federalism* 1, 7.

⁶⁶ Camroux (n 64) 20.

⁶⁷ *ibid.*

⁶⁸ Narine (n 62) 427.

⁶⁹ *ibid.*, 444.

⁷⁰ Angshuman Choudhury, 'Why Are Myanmar's Neighbours Ignoring the Rohingya Crisis?' (*The Diplomat*, 25 September 2018) <<https://thediplomat.com/2018/09/why-are-myanmars-neighbors-ignoring-the-rohingya-crisis/>> accessed 22 December 2019.

The second ever-present characteristic of ASEAN, its purely confederal structure, means that ASEAN has assumed all the traditional confederal characteristics under traditional federal theory which were presented in the previous section. The following paragraphs aim to prove this by examining ASEAN's structure.

Firstly, as is always the case in confederations, the basis for the current institutional structure of ASEAN is a binding international legal agreement, ratified by all member states in 2008: the ASEAN Charter.⁷¹

The ASEAN Charter prescribes not one but nine shared institutions of ASEAN.⁷² For ASEAN to be of a confederal structure, the decision-making shared institutions must be composed of an equal number of delegates from each state, all representing their respective governments. This is exactly the case here. The ASEAN Summit which constitutes the 'supreme policy-making body'⁷³ empowered to 'deliberate, provide policy guidance and take decisions on key (ASEAN) issues'⁷⁴ is composed of heads of states or governments who assemble twice a year for deliberation.⁷⁵ The ASEAN Summit can delegate some of its tasks to the ASEAN Coordinating Council which is composed of Foreign Ministers who again meet twice a year.⁷⁶ Of other institutions not mentioned here, the only ones that are not composed of an equal number of government representatives and are not accountable to the national governments are the Secretary General of ASEAN and the ASEAN Secretariat. However, these institutions primarily serve as administrative support for the organisation and consequently do not change the overall confederal composition of the ASEAN decision-making institutional structure.⁷⁷ Although the Secretary General is formally given important tasks of monitoring the implementation of ASEAN agreements and decisions by member states, in reality he or she is unable to perform these duties due to the low financial and human resources⁷⁸ and the lack of any power to start a

⁷¹ Atena Feraru 'Four Years On: Testing Commitment to ASEAN Charter' (2012) 1 <www.researchgate.net/publication/326463901_Four_years_on_testing_commitment_to_ASEAN_Charter> accessed 22 December 2019.

⁷² I will not describe each institution individually. However, for a complete overview of ASEAN's legal structure, see Pattharapong Rattanaseevee, 'Towards Institutionalized Regionalism: The Role of Institutions and Prospects for Institutionalization in ASEAN' (2014) 4 <www.ncbi.nlm.nih.gov/pmc/articles/PMC4182320/> accessed 22 December 2019.

⁷³ Article 7(2a) of the Charter of the Association of Southeast Asian Nations (2007) <www.refworld.org/docid/4948c4842.html> accessed 24 December 2019.

⁷⁴ Article 7(2b) of the ASEAN Charter 2007 (n 73).

⁷⁵ *ibid.*

⁷⁶ Article 88 of the ASEAN Charter 2007 (n 73).

⁷⁷ Rattanaseevee (n 72) 4.

⁷⁸ Feraru (n 71) 4.

procedure against a state which would not transpose those documents into its national system.⁷⁹

Regarding decision-making, in confederations decisions should be enacted unanimously. However, in ASEAN, decision-making is based on consultations and consensus.⁸⁰ Asian scholars emphasise that consensus does not necessary imply unanimity. While unanimity is reached when all actors explicitly agree on a certain proposal, consensus is also reached when the majority of actors support the proposal, and when those who have some misgivings about it do not feel so strongly about the issue to block (veto) action on it.⁸¹ Even if we understand consensus in that slightly different sense, this institute still does not undermine the states' authority: any state can block an action that is contrary to its national interests. In other words, the confederal nature of decision-making is well preserved. Nevertheless, there is one situation where ASEAN institutions can deviate from consensus-based decision-making, but, in my opinion, it does not pose a threat to the idea of the states' absolute sovereignty, either. According to Article 20(2) of the ASEAN Charter, the ASEAN Summit has the discretion to determine how a specific decision will be made in the absence of consensus.⁸² However, the Summit's decision again needs to be adopted by consensus. This gives the possibility to any member state to block non-consensus decision-making and protect its absolute sovereignty.

In ASEAN, there is also no legal relation between the shared institution and its decisions, on one hand, and the citizens of the member states, on the other. All ASEAN agreements and decisions have to be transposed into the national legal systems in accordance with the constitutional structure of each member state. Only after that can they create rights and obligations for individuals. Moreover, no effective sanction exists for member states which abstain from doing so. As already mentioned, the ASEAN secretariat, as an institution assigned with the task to monitor the implementation of the decisions of ASEAN institutions, lacks both the legal mechanisms and human and material resources to do so. Thus, it is of no surprise that one study in 2008 found that 'during the preceding forty years only 30% of ASEAN agreements and initiatives were actually implemented'.⁸³

⁷⁹ Article 11(2) of the ASEAN Charter 2007 (n 73).

⁸⁰ Article 20(1) of the ASEAN Charter 2007 (n 73).

⁸¹ Feraru (n 71) 5.

⁸² Article 20(2) of the ASEAN Charter 2007 (n 73).

⁸³ Rattanaseevee (n 72) 6.

There is, however, one characteristic of ASEAN which at first glance deviates from traditional confederal characteristics. According to traditional federal theory, confederations cannot be the subjects of international law. However, Article 3 of the Charter confers legal personality on ASEAN which is therefore considered a subject of international law.⁸⁴ ASEAN can enter into relations with other states and conclude international agreements.⁸⁵ What is even more problematic is that the ASEAN Secretary General, a function which departs from the traditional confederal structure, is in practice entrusted with the task of concluding them.⁸⁶ There are, however, two reasons why I do not find these deviations from the confederal standard at all troublesome. First, the idea that confederations cannot be subjects of international law is based on outdated idea that only states should be considered as such. This idea was already abandoned in international legal theory with the exponential growth of the number of international organisations and should be abandoned in federal theory, as well.⁸⁷ Second, the Secretary General does not have any power to significantly oblige the member states by concluding international agreements. He or she, in practice, is only allowed to conclude 'non-sensitive' agreements, such as the Memorandum of Understanding on Cultural Cooperation which was concluded with China in 2005.⁸⁸ It is highly unlikely that the ASEAN Summit would entrust the Secretary General with the task of concluding anything more comprehensive, such as Free Trade Agreements.

Regardless of this last apparent deviation, it is safe to claim that the legal structure of ASEAN is of a purely confederal nature. This conclusion is further reinforced by observing ASEAN under the concept of formal unitary constitutionalism. As is the case with confederations under this concept, each ASEAN member state has its own distinct legal system with some form of formal constitution at the top, while law enacted by ASEAN institutions is valid in those systems only if member states decide to transpose it.⁸⁹ All in all, ASEAN is indeed a perfect confederal child.

⁸⁴ Article 3 of the ASEAN Charter 2007 (n 73).

⁸⁵ Daniel Seah 'The ASEAN Charter' (2009) 58 *International and Comparative Law Quarterly* 197, 203.

⁸⁶ *ibid.*, 9.

⁸⁷ Andrassy (n 1) 77.

⁸⁸ Seah (n 85) 9.

⁸⁹ I will refrain from analysing ASEAN in the light of democratic unitary constitutionalism since some member states do not even have democratic institutions.

3.2 *The problematic teenager (the EU)*

While finding ASEAN's place in the binary distinction between federations and confederations is an easy task, doing the same with the EU is nothing of the sort. As mentioned in the introduction of this paper, the legal nature of the EU is the subject of a long and complex debate. Numerous papers written on the topic have not produced a single solution regarding how the EU should be conceptualised. This section aims to present why it is hard to find the EU's place in the federal-confederal dichotomy. As in the previous section, this will be done by analysing whether the EU has confederal or federal characteristics and by identifying the locus of the formal constitution. However, unlike in the case of ASEAN, such an analysis will leave us with far more questions than answers.

At first glance, some EU characteristics point to the conclusion that the EU is a confederation. The EU is not based on a federal constitution, but on a mere international agreement between several sovereign states: at the moment, the Lisbon treaty.⁹⁰ Since it is created on the basis of an international agreement, the EU is not a sovereign state but a mere institutional relation between several sovereign Member States that retain full authority over their respective territories.⁹¹ This claim is further supported by the fact that the Member States can, as seen in the case of Brexit,⁹² leave the EU at any time they want.⁹³ Leaving the EU would be absolutely prohibited if it were a sovereign federal state. So far, so confederal.

However, if we look deeper into the characteristics of this treaty-created system, the purely traditional confederal characteristics seem to fade away and some kind of mixture between confederal and federal characteristics emerges.

The internal composition of decision-making institutions is neither completely federal nor confederal. On the one hand, there are institutions such as the European Council and the Council of Ministers, composed of head of states or governments and acting national ministers, respectively, which are more of a confederal nature.⁹⁴ On the other hand, there is the European Parliament and the European Commission which are more of a federal nature. The European Parliament is composed of

⁹⁰ Consolidated Version of the Treaty on European Union [2008] OJ C115/13; Consolidate Version of the Treaty on the Functioning of the European Union [2008] OJ C326/13.

⁹¹ Schütze (n 13) 32.

⁹² For more on Brexit, see Steve Peers and Darren Harvey, 'Brexit: The Legal Dimension' in Catherine Barnard and Steve Peers (eds), *European Law* (2nd edn, OUP 2017) 815.

⁹³ Article 50 of Consolidated Version of the Treaty on European Union [2008] OJ C115/13.

⁹⁴ Schütze (n 22) 169, 173, 174.

representatives directly elected by the European citizens, in a similar way to how national parliamentary representatives in unitary states are elected by national citizens.⁹⁵ The European Commission, although appointed in a process in which both the national governments and the European Council have a significant role, is not accountable to those institutions but to the European Parliament, and through the parliament, indirectly, to the European citizens themselves.⁹⁶ However, not only is it that this institutional structure as a whole is of a dual nature, but in every individual shared institution there is also a certain mixture of federal and confederal elements. For example, the principle of 'degressive proportionality' in the distribution of seats in the European Parliament adds a confederal element to its structure,⁹⁷ while the system of 'double majority' adds a federal element to the structure of the Council.⁹⁸

Decision-making has, at least formally, moved away from the confederal principle of unanimity. The treaties prescribe that most of the legislative acts are to be adopted in the so-called 'ordinary legislative procedure', consisting of majority voting in both the European Parliament and the Council.⁹⁹ Unanimity is only retained in some 'special legislative procedures' to ensure the protection of national interests in sensitive policy areas.¹⁰⁰ For example, measures concerning social security and social protection, or measures regarding family law with cross-border implications, are enacted in a special legislative procedure in which the Council must adopt the legislative act by unanimous vote.¹⁰¹

However, in practice, consensual decision-making in the Council is still predominantly the norm regardless of the formal rules stipulating majority voting.¹⁰² Between 1994 and 2006, around 80% of all Council decisions were adopted consensually.¹⁰³ In cases where a decision was

⁹⁵ *ibid.*, 154.

⁹⁶ *ibid.*, 186-187.

⁹⁷ *ibid.*, 156.

⁹⁸ *ibid.*, 180.

⁹⁹ Kieran St C Bradley, 'Legislating in the European Union' in Catherine Barnard and Steve Peers (eds), *European Law* (2nd edn, OUP 2017) 97, 120-123.

¹⁰⁰ *ibid.*, 123.

¹⁰¹ *ibid.*

¹⁰² Dorothee Heisenberg 'The Institution of "Consensus" in the European Union: Formal Versus Informal Decision-making in the Council' (2005) 44 *European Journal of Political Research* 66.

¹⁰³ Frank Hage, 'Decisions Made by Consensus in the Council of the European Union Emerge from the Coalition-Building Behaviour of Individual Governments' (*The London School of Economics and Political Science*, 11 June 2013) <<https://blogs.lse.ac.uk/europpblog/2013/06/11/decisions-made-by-consensus-in-the-council-of-the-european-union-emerge-from-the-coalition-building-behaviour-of-individual-governments/>> accessed on 28 November 2020.

not reached by consensus, usually not more than one country abstained from voting or voted against the proposal.¹⁰⁴ There are cases where multiple countries explicitly voted against a certain decision, but these are extremely rare. One of the more prominent examples is the decision on the relocation of refugees enacted in 2015, with Hungary, Czechia, Romania, and Slovakia voting against.¹⁰⁵ The subsequent total non-implementation of this decision by the Hungarian, Polish and Slovakian governments surely brings into question the efficiency of a decision enacted by majority voting.¹⁰⁶

All in all, it can be concluded that decision-making is formally of a mixed confederal-federal nature, while in practice it still leans towards the confederal pole.

The legal relation between shared institutions and citizens of the Member States is also of a mixed nature. The two main forms of EU legislative acts are regulations and directives.¹⁰⁷ Regulations are of a federal character because they are directly applicable in all Member States: they directly regulate relations between individuals. Member States do not and must not transpose regulations, and individuals can (in principle) rely on them before national institutions.¹⁰⁸ Directives, on the other hand, are of a confederal character: they are not addressed to individuals, but to the Member States which are required to transpose them into their national legal systems.¹⁰⁹ However, the Court of Justice of the European Union (hereinafter: the CJEU) did alter their confederal nature by proclaiming in *Van Duyn* and subsequent case law that a directive can have a direct effect under certain conditions.¹¹⁰

Regarding the enforcement of the above-mentioned EU acts, the EU institutions do not have their own institution for this purpose. Consequently, they rely on the national institutions of the Member States with the help of principles of supremacy, pre-emption and direct effect.¹¹¹ However, in the case where national institutions fail or refuse to enforce EU

¹⁰⁴ Heidenberg (n 102) 73.

¹⁰⁵ Frank Heber, 'The Council of the EU: How Consensus Is(n't) Reached' (*The New Federalist*, 30 August 2020).

¹⁰⁶ One could argue that this decision was successfully enacted since the Commission later won an infringement procedure against the countries that did not implement it. However, that judgment, issued five years after the decision was enacted, brings little comfort to either the Member States of the first entry or to the migrants residing on their territory.

¹⁰⁷ Bradley (n 99) 99.

¹⁰⁸ *ibid.*

¹⁰⁹ *ibid.*, 100.

¹¹⁰ Michael Bobek, 'The Effects of EU Law in the National Legal Systems' in Catherine Barnard and Steve Peers (eds), *European Law* (2nd edn, OUP 2017) 143, 153.

¹¹¹ Schütze (n 22) 61.

law the only way for the EU to enforce that law is to initiate an infringement procedure against the Member State in which the institutions did not comply.¹¹² Consequently, the system of enforcement also seems to lie somewhere between traditional federal and confederal characteristics.

As though trying to conclude whether the EU constitutes a federation or a confederation on the basis of this federal-confederal mixture is not challenging enough, let us try to do the same by locating the formal constitution. According to formal unitary constitutionalism, the supreme source of law or the formal constitution must be located either at the level of the EU or at the level of the Member States. If it is located at the EU level (within the founding treaties), the EU is a federal state; if it is located at the Member State level (within 27 national constitutions), it is a confederation. However, when we pose the question whether the former or the latter is the case here, we are left with contradictory answers depending on who we ask.

On the one hand, there is the standpoint of the CJEU. In some of its earliest judgments, *Costa v ENEL* and *Internationale Handelsgesellschaft*, the CJEU proclaimed the principle of the absolute supremacy of EU law over national law.¹¹³ According to the CJEU, EU law in its entirety must prevail over the whole of national law, including the constitutional law of the Member States.¹¹⁴ Any other relation between national and EU law could lead to various applications of EU law from one Member State to another which would jeopardise the attainment of the Treaty objectives and give rise to discrimination between EU citizens.¹¹⁵ In the words of formal unitary constitutionalism, this view means that the supreme source of law is located at the EU level (more precisely within the Lisbon treaty) and that the Member States' constitutions are only nominal constitutions which have to be in accordance with the higher EU norms.¹¹⁶

¹¹² *ibid.*, 62.

¹¹³ Schütze (n 51) 74.

¹¹⁴ *ibid.*

¹¹⁵ Case 6/64 *Costa* ECLI:EU:C:1964:66.

¹¹⁶ Regarding the question from where exactly the treaties draw this supreme authority (the governments of Member States, one EU people or multiple peoples of Europe), the CJEU did not provide a clear answer. In its early *Van Gend en Loos* judgment, the CJEU stated that the treaties created the new legal order of international law (hinting that the authority comes from the Member States) but in later judgments the word 'international' was thrown out and the CJEU continued to talk only about the new legal order (without elaborating whether it is national, international or something in between). Moreover, in *Van Gend en Loos*, the CJEU also stated that the Treaties are more than just an arrangement that creates mutual obligations between Member States and that this is supported by the fact that the preamble of the Treaties refers not only to the governments but also to the peoples of Europe. There the CJEU hinted that the source of authority is neither governments nor the one people of Europe, but rather both the multiple peoples of Europe and the governments: a concept that cannot be understood under the democratic unitary constitutional theory.

Unsurprisingly, national constitutional courts do not share the standpoint of the CJEU. They only accept the relative supremacy of EU law. This means that EU law prevails over some national law, but not over national constitutions.¹¹⁷ National constitutions remain the supreme source of law in the sense of formal unitary constitutionalism. This standpoint is well elaborated in the *Maastricht* and *Lisbon* judgments of the German Federal Constitutional Court (hereinafter: the BVerfG), one of more influential national constitutional courts in the EU. The BVerfG reasoning there relies heavily on democratic unitary constitutional theory. In a nutshell, the BVerfG claims that the German constitution remains the supreme source of law until German citizens together with other EU citizens democratically create a federal EU constitution. In other words, in order for a formal constitution to be established at the EU level, and consequently for the absolute supremacy of EU law to be achieved, the preconditions of democratic unitary constitutionalism first need to be fulfilled. According to the BVerfG, this has not yet happened.¹¹⁸

Therefore, the question of supremacy, and with it the location of the formal constitution in the EU, remains contested. Neither the CJEU on the one hand nor the national constitutional courts led by the BVerfG on the other are willing to withdraw from their standpoints. Since the CJEU's first judgment on absolute supremacy, these two sides have been waging some form of cold war on this issue. During this conflict, two specific legal questions have been raised: fundamental rights and *ultra vires* control.

First in line were fundamental rights. Answering a preliminary question raised by the German national court in *Internationale Handelsgesellschaft* judgment, the CJEU, in line with its absolute supremacy standpoint, claimed that EU law trumps fundamental rights contained in the national constitution. When the same case came before the BVerfG, the German court disagreed. In its famous *Solange I* judgment, the BVerfG established its relative supremacy theory and by relying on that theory proclaimed that for as long as the European legal order does not develop an adequate standard of fundamental rights protection, the BVerfG will 'disapply EU law conflicting with fundamental rights guaranteed by the German constitution'.¹¹⁹ However, this has never happened, since the CJEU subsequently developed a significant level of protection in the form

¹¹⁷ Schütze (n 51) 74.

¹¹⁸ Daniel Thym, 'In the Name of Sovereign Statehood: A Critical Introduction to the *Lisbon* Judgment of the German Constitutional Court' (2009) *Common Market Law Review* 1797-1802.

¹¹⁹ Schütze (n 22) 129.

of general principles of law.¹²⁰ This led to the second judgment of BVerfG, *Solange II*, in which the court reversed its standpoint: the BVerfG now claimed that for as long as there is an effective protection of fundamental rights at the EU level similar to the level of protection under the German constitution, the BVerfG will not exercise its jurisdiction to decide whether EU law is in accordance with constitutional fundamental rights guarantees.¹²¹ In this way, the BVerfG reaffirmed its relative supremacy standpoint but withdrew from going further into open conflict with the CJEU. There was no need to start an armed battle with the CJEU (by striking down EU legislation), since the BVerfG effectively got what it wanted (a higher protection of fundamental rights at the EU level). However, the question of supremacy was left hanging in the air.

The conflict resurfaced years later with the adoption of the Maastricht Treaty which significantly extended the scope of EU competences.¹²² This time, it revolved around the question of which court, the CJEU or the national constitutional court, has the final word in determining whether a certain EU act goes beyond the scope of conferred competences. In line with its absolute supremacy doctrine, the CJEU claimed that its decision must be final. Not only is the CJEU alone competent to rule on the validity of EU acts, but giving national (constitutional) courts such a possibility could also lead to divergence between courts of the Member States which would jeopardise the unity of the EU legal order.¹²³ The CJEU's interpretation of the scope of EU competences must reign supreme. The BVerfG again disagreed. In its *Maastricht* judgment and *Honeywell* decision, the BVerfG established its *ultra vires* review doctrine.¹²⁴ Since the German constitution, in line with the relative supremacy doctrine, was still the supreme source of law, the BVerfG must have the power to evaluate whether an EU act remains within the limit of conferred competence. If the BVerfG were not able to do that, the German constitution would not really be supreme and the CJEU would possess kompetenz-kompetenz: the power to unilaterally extend the EU's competences.¹²⁵

¹²⁰ For a more detail overview on how fundamental rights came to be protected as a general principle of law in the jurisprudence of the CJEU, see Eleanor Spaventa, 'Fundamental Rights in the European Union' in Catherine Barnard and Steve Peers (eds), *European Law* (2nd edn, OUP 2017) 227.

¹²¹ Schütze (n 22) 130-131.

¹²² For a detail overview of the Maastricht Treaty, see Paul Craig, 'Development of the EU' in Catherine Barnard and Steve Peers (eds), *European Law* (2nd edn, OUP 2017) 20-22.

¹²³ Court of Justice of the EU, 'Press release following the judgment of the German Constitutional Court of 5 May 2020' (2020).

¹²⁴ For a detailed overview of the *Maastricht* judgment, see Kevin Makowski, 'Solange III: The German Federal Constitutional Court's Decision on Accession to the Maastricht Treaty on European Union' (2014) *University of Pennsylvania Journal of International Law* 155.

¹²⁵ Daniel Sarmiento, 'Requiem for Judicial Dialogue: The German Federal Constitutional Court's Judgment in the Weiss Case and Its European Implications' (2020) *16 EU Law Live* 10.

This time the dispute did not end with both sides just proclaiming their opposite views, as was the case with fundamental rights. Most recently, on 5 May 2020, the BVerfG fired its first shots toward the CJEU. In its *Weiss* judgment, the BVerfG declared both the decision by the European Central Bank and the judgment of the CJEU on whether that decision is within the scope of EU competences *ultra vires*.¹²⁶ The CJEU was fast to fire back by issuing a press release in which, although it did not comment on the BVerfG's judgment directly, it did reaffirm its position on the absolute supremacy of EU law.¹²⁷ Moreover, it seems that the CJEU also received support from a powerful ally: the European Commission. Ursula von der Leyen stated that the Commission would analyse the German court's ruling and look into possible steps to take, which could include the option of infringement proceedings.¹²⁸ Time will tell how this conflict will be resolved. It will probably either be watered down through judicial dialogue and the gradual elimination of conflicting questions, or further inflamed by other *ultra vires* declarations from both sides.

This whole supremacy saga represents clear peril for the concept of unitary constitutionalism. The existence of two conflicting supremacy claims within the single EU legal system is incompatible with its core notion of 'unitarity'. Unitary constitutionalism requires a hierarchical structure with a single supreme point. However, the EU legal system has functioned for the last 60 years without giving a final answer to the locus of that supreme point and, judging by the recent development, neither side is willing to back down on its claims any time soon. The parallel existence of two supreme points is not something unitary constitutionalism can explain. The only way to give an answer to whether the EU constitutes a federation or a confederation under this concept would require either siding with the CJEU or with the BVerfG and putting the idea of the simultaneous existence of two supreme points out of the question.

So, what should we conclude from the above presented mix of confederal and federal characteristics and lack of consensus on the locus of the formal constitution? Is the EU a federal state or a confederation? How can it be a confederation if it has federal characteristics which are not compatible with the principle of absolute and indivisible sovereignty?

¹²⁶ However, this is not the first time that a national supreme or constitutional court within the EU has proclaimed that a decision of the CJEU is *ultra vires*. The same was done by the Czech Constitutional court in the *Landtova* judgment and by the Danish Supreme Court in the *Ajos* judgment. See Sarmiento (n 125) 13, 14.

¹²⁷ Court of Justice of the EU (n 123).

¹²⁸ Joana Gill, "Von der Leyen: "The Final Word on EU Law Is Always Spoken in Luxembourg"" (*euronews*, 1 May 2020) <<https://www.euronews.com/2020/05/08/eu-s-top-court-fires-back-over-german-ecb-ruling-as-primacy-of-eu-law-comes-into-play>> accessed 28 July 2020.

How can it be a federal state if it is based on an international agreement and does not have a common constitution? Is it, then, something else, something in between? If so, what? As already mentioned, European scholars have not provided a single answer to these questions. While some try to stay true to the European federal theory by shoving the EU into our well-known confederal-federal dichotomy, others point out that the EU is something entirely new: a *sui generis* entity which cannot be defined as either confederation or federation.

Those scholars who remain faithful to the traditional federal theory claim that the EU is a confederation.¹²⁹ For them, the EU cannot be a federal state because it is still based on an ordinary international treaty between several sovereign states. For as long as the people of Europe do not adopt a federal constitution in accordance with the principles of democratic constitutionalism, the EU will remain only an international union of 27 sovereign Member States.¹³⁰ Each Member State has its own legal system with a formal constitution at the top. EU law is nothing but an international law that forms part of those systems in accordance with the regime set out in the founding treaties and national constitutions. This view, unsurprisingly, dismisses from the start the claim of the CJEU about the absolute supremacy of EU law. EU law can only be relatively supreme: it cannot stand above the national constitutions which are still the supreme source of law in the Member States. It can become absolutely supreme once the EU turns into a federal state, but the predispositions for the EU to develop into one have just not happened yet.

However, claiming that the EU is a confederation necessarily implies that the EU then has all the elements which European federal theory prescribes for confederations. Firstly, that absolute and indivisible sovereignty is located at the level of the Member States. Secondly, that the structure of the EU has traditional confederal characteristics. The problem is that in the EU neither of these elements exists. Therefore, the advocates of the idea that the EU is a confederation had to adjust the traditional federal theory to fit this new legal reality. They started from the question of sovereignty.

If absolute sovereignty resided at the national level, that would imply that the Member States have absolute authority over their territory. However, in the EU this is not the case. EU institutions can enact bind-

¹²⁹ This group consists of numerous constitutional court judges and international law professors. Some of the legal scholars advocating that the EU is still a confederation are Pavlos Eleftheriadis (who agrees that the EU is not a federal state and disregards the idea of a possible pluralist legal system. See Eleftheriadis (n 32) 45) and Paul Reuter (who claims that EU law is a part of public international law. See Ziller (n 5) 5).

¹³⁰ Schütze (n 51) 78.

ing rules that are directly applicable in the national systems regardless of whether a certain number of Member States oppose them (for example when a Member State is outvoted in the Council during the ordinary legislative procedure concerning a certain regulation). Absolute and indivisible sovereignty is ‘entirely absent from the political and legal setting of the European Union’.¹³¹

Since the old concept of sovereignty is non-existent in the EU, scholars had to redefine it. The understanding of sovereignty, which was presented in the analysis of ASEAN earlier, that any decision of a confederation which is enacted without the consent of one member state is in a breach of that member state’s sovereignty, had to be abandoned. The principle had to be arranged in a way that the exercise of state-like powers by the EU, even against the will of a Member State, does not constitute a breach of the states’ sovereignty.

The need to redefine the concept of sovereignty was especially urgent in European judicial practice. With Treaty amendments rapidly expanding the scope of EU competences at the end of the 20th century, questions were being raised in front of constitutional courts regarding the compatibility of such transfers of competences with national constitutions and the principle of sovereignty inscribed in them. Insistence on absolute sovereignty of the state in answering those question would have rendered the whole EU integration unconstitutional.¹³²

Therefore, a new concept of sovereignty was born: non-absolute sovereignty. Sovereignty still remains located at the national level until the EU becomes a federal state, but the transfer of some ‘sovereign power’ (state-like power) to the EU level is not incompatible with the principle.¹³³ As long as the transfer is voluntary and revocable, the Member States can engage in the far-reaching transfer of sovereign powers to the EU without losing their sovereignty.¹³⁴ As the Czech constitutional court explains:

¹³¹ Oršolić Dalessio (n 14) 73.

¹³² The compatibility of the transfer of competence to the EU with a national constitution was a subject of the *Crotty v An Taoiseach* judgment by the Irish Supreme Court, the *Maas-tricht I* judgment by the French Constitutional Court and many other judgments. For a more detail overview of all the relevant judgments, see Oršolić Dalessio (n 14) 76-80.

¹³³ de Witte (n 26) 182.

¹³⁴ As MacCormick wrote when discussing the *Factortame* judgment of the CJEU, ‘the European Community situation is one in which (the UK) Parliament has delegated power to the Community’s law-making organs, hence the commands they (the EU institutions) issue are binding on UK citizens in virtue of their pre-adoption by the sovereign body. [...] [This] does not weaken the view that Parliament remains a sovereign whose commands are the ultimate source of law, since this is what Parliament has commanded – that all subsequent commands be read as calling for obedience only so far as is compatible with (continuingly commanded) Community rights and obligations’. See Neil MacCormick ‘Beyond the Sovereign State’ (1993) 56 *The Modern Law Review* 1.

a transfer of state competences at the EU level does not represent a conceptual weakening of state sovereignty. [...] [I]t can lead to its strengthening, so long as such a transfer of powers is based on the sovereign's free will and is conditioned by the sovereign's participation in the integration in a manner previously agreed upon and that is reviewable.¹³⁵

When we shift our understanding of sovereignty in that direction, it is easy to justify why the EU's legal structure does not have traditional confederal characteristics. Whether confederations have more federal or more confederal traditional characteristics does not even matter anymore. The flexibility of the new understanding of sovereignty allows the Member States to create a confederation with whichever legal structure they see fit. As long as there is no constitutional moment where sovereignty is transferred to the union, that legal entity is to remain the confederation.

Thus, a commonly used dichotomy for distinguishing between ASEAN and the EU emerges – the difference between two types of confederations. On the one hand, we have more confederal confederations which are defined as 'intergovernmental organisations', and, on the other hand, we have more federal confederations which are called 'supranational organisations'.¹³⁶ According to these scholars, the EU is an excellent example of the later.¹³⁷

However, the second group of scholars does not share the same view on the legal nature of the EU.¹³⁸ They agree that the EU is not yet a federal state, but they also claim that it is not a confederation anymore. The characteristics of EU law (such as the broad nature of EU competences, common citizenship, the already-mentioned decision-making regime, etc) are so far from the general characteristics of confederations that calling the EU that way would be like trying 'to push the toothpaste back

¹³⁵ Oršolić Dalessio (n 14) 79.

¹³⁶ Numerous papers comparing ASEAN and the EU state that the EU, as opposed to ASEAN which is an intergovernmental international organisation, is more of a supranational entity. For example, David Camroux states that '[...] ASEAN remains basically only an intergovernmental organisation while the European Union is also, on another level, a supranational entity' (Camroux (n 64) 7). Yeo Lay Hwee, Director of the European Union Centre in Singapore, states that the EU is a 'far more legalistic entity with supranational institutions' while ASEAN is 'a more consensus-driven collaborative enterprise' (Yeo Lay Hwee, 'ASEAN's Cooperation with the European Union – ASEM and Beyond' (2017) *Panorama ASEAN* at 50: A Look at External Relations 81, 84).

¹³⁷ de Witte (n 26) 180.

¹³⁸ Some scholars who claim that the EU is not a confederation anymore are Robert Shütze (who claims that it is a federal union, as understood in the light of American federal tradition), Daniel Halberstam (who considers that we should move from sovereignty talk to understanding the EU (n 52)) and the current president of the CJEU, Koen Lenaerts.

in the tube'.¹³⁹ The EU lies 'somewhere in between these (confederal and federal) poles'.¹⁴⁰

Because there is no entity in the world that even closely resembles the EU and there is no realistic prospect for there to be one anytime soon, some scholars from this second group decided to proclaim that the EU is a *sui generis* legal phenomenon.¹⁴¹ *Sui generis* literally means 'of its own kind'.¹⁴² The EU is unique and cannot be defined by references to either confederations or federal states, although it has characteristics of both of these categories. It is a class by itself. In this way, they have singled out the EU from all of the federations and confederations that have ever existed and ever will.

4 Conclusion

If we put the *sui generis* theory aside for now, what can we conclude about the legal nature of the EU and ASEAN from the analysis presented above?

It is noticeable that ASEAN has purely confederal characteristics while the EU has some kind of mix of confederal and federal ones. These characteristics reflect the distribution of authority between the national and confederal level in those two entities. ASEAN has confederal characteristics because it is structured in a way which ensures that member states retain absolute authority over their territories without any interference from the confederal level. The EU has mixed characteristics because it is constructed in a way which allows the authority to either be shared (eg the ordinary legislative procedure) or divided (eg the infringement procedure or special legislative procedures) between the national and EU level. In other words, these characteristics display how differently these two entities function. They are also the cause of labelling ASEAN as an 'intergovernmental' and the EU as a 'supranational' organisation. Because of these characteristics, one could easily argue that ASEAN and the EU are of a completely different legal nature.

However, confederal and federal characteristics seem to be of secondary importance, if not completely unimportant, to the traditional federal theory. The primary focus of the theory is on the locus of sovereignty and the binary distinction that comes with it. Legal entities in which sovereignty is located at the national level are considered confederations,

¹³⁹ de Witte (n 26) 185, 186.

¹⁴⁰ *ibid*, 178.

¹⁴¹ Schütze (n 22) 63.

¹⁴² Legal Information Institute <www.law.cornell.edu/wex/sui_generis> accessed on 22 December 2019.

while those in which sovereignty is located at the union level are considered federations, regardless of whether they have more federal or confederal characteristics. Consequently, according to the theory, both ASEAN and the EU are just two slightly different confederations. The differences, such as on one hand that the EU institutions can enact laws regardless of the will of the national governments, which are then directly binding on EU citizens, and on the other hand that ASEAN institutions can only enact laws with the consent of all governments, which are only binding on national citizens if these governments decide to transpose them, do not matter at all.

The key to understanding why the traditional federal theory overlooks the characteristics of the legal structure lies in its above-presented historical evolution. The theory was always based on the concept of sovereignty. When sovereignty was only conceived in absolute and indivisible terms, everything functioned perfectly. As seen in the analysis of ASEAN, in a union based on absolute sovereignty the theory can presuppose and explain both the characteristics of the union's legal structure and the hierarchy of law. However, in Europe the idea of absolute sovereignty was cast aside after the Second World War. Already in the early days of European integration the Member States limited their absolute authority by transferring their power to regulate coal and steel production to the High Authority. The traditional federal theory had to be adapted to fit this new reality. This was done simply by replacing the old understanding of sovereignty for a new, non-absolute one. However, instead of creating a new classification based on this new understanding of sovereignty, the binary confederal–federal dichotomy that was based on the old concept of absolute sovereignty was retained. This resulted in both the federal and confederal box being stripped of any associated characteristics. The new non-absolute understanding of sovereignty 'allowed' for the existence of confederations with purely federal characteristics, and vice versa. The nature of the legal structure was pushed aside completely.

This brings us back to the question posed at the beginning of this paper: is this federal theory, which emphasises the locus of sovereignty and disregards the characteristics of the legal structure, really the best way to explain and categorise the EU, ASEAN, or any other existing union of states? There are four main reasons why I believe it is not.

First, the basis of the theory, the principle of sovereignty, is very ambiguous. Although both scholars and legal practitioners agree that sovereignty can no longer be conceived in absolute terms, there is a considerable number of different interpretations on how it should be perceived.¹⁴³

¹⁴³ For a detailed overview of this debate, see Neil Walker, 'Late Sovereignty in the European Union' in Neil Walker (ed), *Sovereignty in Transition* (1st edn, Hart Publishing 2003) 3.

These discrepancies in interpretation raise the question of whether we should ground our whole understanding of federalism on such a principle, or if we should rather come up with a different basis.¹⁴⁴ As Oršolić Dalessio explains vividly: ‘The principle of sovereignty [...] remains a phantom chameleon straddling the territories of legal doctrine and constitutional practice. While this does not *per se* render it dangerous, it does put into question the role, strength and credibility of this curious creature’.¹⁴⁵

Second, insistence on the binary confederal–federal dichotomy is illogical from today’s perspective. This binary distinction was almost entirely built on the basis of one component of the old understanding of sovereignty: its absoluteness.¹⁴⁶ This idea that absolute authority could only be located either within the member states or within the union is what gave this distinction both meaning and content (confederal and federal characteristics). Since this element of absoluteness was removed from the equation due to the fact that it did not correspond to reality, we should not stick with the distinction it created. If the traditional federal theory still needs to be based on the principle of sovereignty, there should at least be a new non-binary classification that corresponds to the fact that authority can be shared in various ways between the national and union level.

Third, because of its preoccupation with the locus of sovereignty, the theory completely neglects the similarities between the legal structures of certain unions. For example, if member states, by concluding an international agreement, create a union with predominantly traditional federal characteristics, such a union would still be considered a confederation under this theory. The same is true in the opposite direction: if the federal constitution creates a union with mostly confederal elements, such a union would still be considered a federal state. It does not matter to the theory that these unions would have more in common with those in which the question of the locus of sovereignty is answered differently. As long as sovereignty is not located at the same level, such unions are incomparable.

¹⁴⁴ One could argue that other principles of liberal constitutionalism, such as the rule of law or equality, are also vague and indetermined but that they nevertheless form the basis of liberal democracies. However, in my opinion, there is a big difference between them and the principle of sovereignty. In the case of the principle of sovereignty, there are numerous contrasting views regarding the core content of that principle, while in the case of a principle such as the rule of law disagreements mostly revolve around the question of its scope while the core content is uncontested.

¹⁴⁵ Oršolić Dalessio (n 14) 87.

¹⁴⁶ The other component on the basis of which the distinction was created is the indivisibility of sovereignty. However, absoluteness played the predominant role in shaping both the confederal and the federal box.

Finally, unitary constitutional theory (which is the only compatible constitutional theory with this notion of federalism) fails to explain the existence of two contradictory claims regarding the *locus* of the formal constitution within one union. As seen in the analysis of the EU, the theory only functions if it sides with one of the two existing supremacy claims. Consequently, the theory is more prescriptive than descriptive: it shows how the EU should function, not how it really does. However, the existence of two contradictory supremacy claims is not unique to the EU. According to Schütze, the notion of unitarity has 'never lived up to the constitutional practice of federal orders'.¹⁴⁷ In many federal unions, both the union and the member states can have their own constitutional claims which may come into conflict. There is a theory to explain such situations called 'constitutional pluralism'. It centres on the premise that in a union of states there can exist multiple constitutional orders which interact in a heterarchical way.¹⁴⁸ However, such a theory is incompatible with the European federal theory because of the very different understanding of the notion of sovereignty.¹⁴⁹

In my opinion the presented arguments show that every aspect of the traditional federal theory, including its base, the confederal-federal dichotomy, and understanding of the legal structure and constitutionalism, is in some form of crisis. The underlying cause of all these crises is that the theory, which was first created on the fiction that sovereignty must always remain absolute, failed to adequately adapt to the reality that unions with shared or divided authority exist. Therefore, there is an urgent need to readapt it to better suit this legal reality, but how exactly should we do that?

First, this should not be done by opting for the presented *sui generis* theory. There are multiple problems with this theory, the most significant being that it is not a theory at all: it just singles out the EU as something special without creating any standard under which similar entities should be measured. Even if the EU is presumably the first of its kind, this itself does not make it unique. If ASEAN were to adopt a similar structure to the EU in the future that would be the end of this theory.¹⁵⁰

Second, while readapting the theory it should also be borne in mind that, despite all its problems, the traditional federal theory still operates relatively smoothly in situations where authority is completely located at

¹⁴⁷ Schütze (n 51) 76.

¹⁴⁸ *ibid.*, 77.

¹⁴⁹ For a detailed overview of the constitutional pluralism theory, see Miguel Poiarés Maduro 'Three Claims of Constitutional Pluralism' in Matej Avbelj and Jan Komarek (eds), *Constitutional Pluralism in the European Union and Beyond* (Hart Publishing 2012) 67.

¹⁵⁰ For a more detailed criticism of the *sui generis* theory, see Schütze (n 22) 63.

either the federal or national level. Parts of the theory that are not broken do not need fixing and can be a good starting point for revision.

Alfred Kinsey, an American sexologist, thought the same back in 1948 when he delivered a report that revolutionised sexual orientation theory. Up until then, sexual orientation was regarded through the binary homosexual-heterosexual model. Kinsey thought that such a model, although not entirely wrong, was incomplete. Beside there being completely homosexual and completely heterosexual people in the world, there was a whole spectrum of people that could not be identified as either. Together with his team, Kinsey created the so-called Kinsey scale: the seven-point heterosexual-homosexual rating scale.¹⁵¹ This marked a shift from the binary to the spectral understanding of sexuality. Soon after, such spectral understanding spilled over into many other areas of science dealing with human identity, such as gender or kink theory. Spectrum proved to be a superior tool in understanding human identity because it represents every possible gender, sexuality, attraction, and expression. It does not push people into boxes to which they do not feel they belong.¹⁵²

What is federalism but a search for a union's identity? Unions of states are of a complex legal structure which consists of various elements. One union is distinguishable from another not only because the sovereignty question is answered differently, but also because between them there is a different allocation of authority, various scope of the union's competences, a different constitutional structure, etc. Each of these elements can be measured separately in a spectral manner to gain a better understanding of the union's true legal nature. As we have seen, the allocation of authority can vary from the absolute authority of the member states to the absolute authority of the union, while the constitutional structure can go from being hierarchical with the federal constitution at the top, over two parallel heterarchical legal orders, to a hierarchical structure with the member states' constitutions at the top. In the end, a combination of these elements is what constitutes the union's identity.

However, the traditional federal theory focuses only on one element which it still understands in a binary manner: the principle of sovereignty. Every other element, such as the question of authority, is either disregarded or is a direct binary consequence of the locus of sovereignty,

¹⁵¹ Kinsey Institute <<https://kinseyinstitute.org/research/publications/kinsey-scale.php>> accessed 28 June 2020.

¹⁵² Hannah Rimm 'We Know Sexuality Is a Spectrum: Here's What That Looks Like & What It Means' (*sheknows*, 15 June 2020) <www.sheknows.com/health-and-wellness/articles/1141180/sexuality-is-spectrum/> accessed 28 July 2020.

such as the constitutional structure. I believe that the theory needs to look beyond this element if it wants to create a better understanding of unions and it needs to do this spectrally. The whole idea that sovereignty, a principle surrounded by much ambiguity, must define the legal nature of the union should be abandoned. The gap that it leaves behind must not be filled with some other element instead. Rather, the multiple defining elements of unions should first be identified (eg the distribution of authority or the hierarchy of law). Then, for each element a spectrum should be created and correlations between different spectrums should be explored. Only after all of this is done should a new non-binary classification, one that is not preoccupied with the principle of sovereignty, be forged.

Needless to say, this 'spectral concept' is only an idea on how we should approach the task of reforming a traditional federal theory, it is not a theory itself. Much more research and work are needed to see if this idea could turn into a functional federal theory.¹⁵³ The aim of this paper was primarily to give a critique of a traditional federal theory, while conceptualising how exactly the theory should be reformed is left for another one. However, the idea to rethink traditional federal theory in a non-binary manner is not a new idea. Back in the 18th century, James Madison already gave rise to a new federal theory by rejecting a settled binary confederal-federal distinction.

In his famous 'Federalist No 39', James Madison examined the legal nature of the United States of America based on the 1787 Constitution by refusing to concentrate on the question of sovereignty. Instead, he chose an analytic approach by examining whether the origin and character of the Constitution, the composition of shared institutions and the scope and nature of the union's powers are more of a national (federal) or international (confederal) character. He concluded that those elements were neither completely national nor international, but rather a mixture of both.¹⁵⁴ Consequently, he proclaimed that the United States of America, based on the 1787 Constitution, was neither a confederation nor a federal state, but rather a third entity that lies between these two poles.¹⁵⁵

¹⁵³ It was brought to my attention, by the anonymous reviewer of this article, that Olivier Beaud, a French expert in constitutional theory and theory of law, introduced in the book *Théorie de la Fédération* his federal theory that encompasses some of the ideas presented here regarding the way the traditional federal theory should be reformed. Beaud presents his theory in great detail and by using many historical references. For more, see Olivier Beaud, *Théorie de la Fédération* (1st edn, Presses Universitaires de France 2007). I am grateful to the anonymous reviewer for providing this valuable source of information.

¹⁵⁴ James Madison, 'Federalist No. 39' (first published 1787, New York).

¹⁵⁵ *ibid.*

Such an entity was later named 'Federal Union' by Tocqueville.¹⁵⁶ In the light of this Madison way of thinking, the EU would be a perfect example of one.¹⁵⁷

Regardless of whether one sides with Madison's view on federalism or starts one's own odyssey to find a more appropriate federal theory, spectral or not, the starting point for a better understanding of federalism stays the same. The chains of sovereignty that kept us down for years must be burst open.



This work is licensed under the *Creative Commons Attribution – Non-Commercial – No Derivatives 4.0 International License*.

Suggested citation: FM Stojković, 'Rethinking the Binary Federal Theory: A Search for the EU's and ASEAN's Place in the Confederal-Federal Dichotomy' (2020) 16 CYELP 61.

¹⁵⁶ Schütze (n 13) 27.

¹⁵⁷ This conclusion was reached by Schütze after he analysed the legal structure of the EU in light of the American federal tradition. *ibid* 47-58.