# THE EUROPEAN UNION - A CONFEDERATION OR ALREADY A STATE?

*Konstantine Kublashvili*

*Dedicated to my teacher, a great scientist, Academician Levan Alexidze*

## ABSTRACT

Integration into the Union of European states - European Union - is one of the principle current goals for Georgia. Consequently, analysing political and legal status of the European Union in view of International Law and Constitutional Law is of paramount importance to establish whether the European Union is still a confederation or has already turned into a federal state. The article addresses this very matter by analysing the International law and Constitutional law form of the European Union as of a subject of International Law from the moment of its establishment to the current days. The article first briefly outlines the history of establishment and development of the European communities; the main part of the present piece analyses the confederation and federation models of states. Deriving from the analysis, comparing the earlier and current powers of the European Union with the legal form of these models' principles and characteristics the contemporary statues of the European Union is assessed. At the same time, the article considers one of the episodes of the contemporary history of Georgia, which is related to the attempts of the establishment of the special status of Abkhazia within Georgia based on the constitutional principles of a federal state.

**Key words:** European Union; Confederation; Fedaration; attempts to establish a special status of Abkhazia within Georgia

## INTRODUCTION

There are dates in the history of the world, which usher in great changes, reforms, "turning points" and new eras. There are many such dates in the history of Europe. March 25, 1957 marked the beginning of the new, modern Europe. On that day, European states signed an agreement in Rome, which paved the way for greater European integration. After centuries of devastating religious or national-state wars and catastrophes caused by two world wars, the Europeans finally decided to cooperate peacefully and with the Treaty of Rome created a solid foundation for a closer union of the peoples of Europe. Under this treaty[1], six European states[2] established the European Economic Community (EEC), which for the next 60 years (in parallel with the development and transformation of the union itself) ensured the economic revival, stability and unprecedented political and economic integration first of Western Europe and then of most of Europe.

[1] "Treaty on the Functioning of the European Union", entered into force on January 1, 1958.

[2] France, Germany, Italy, Belgium, The Netherlands, Luxembourg.

Under the Maastricht Treaty[3] of 1992, the European Economic Union was transformed into the European Union[4] (EU), already consisting of 15 members, and in fact became a political union. The next step was the Lisbon Treaty[5] of 2007, which made the European Union a full-fledged subject of international law and European states (27 member states now (after "Brexit")) reached an even higher level of political integration. At that point, but even starting as early as with the Maastricht Treaty, questions are being asked and discussions held about the future of the European Union: Where is Europe heading? What is the legal nature of the union? Is it just a confederation or even more - a formation leading to a federation? These questions are interesting not only for the Europeans themselves, but also for Georgia. It has been a long time ago that the majority of the population of our country has chosen[6] that Georgia should become a full member of European institutions and organizations, including the European Union. This choice was made official, most particularly, by signing the Association Agreement between the European Union and Georgia[7], and in the Constitution of Georgia that obliges all constitutional bodies of the state to *"take all measures to ensure Georgia's full integration into the European Union and the North Atlantic Treaty Organization."*[8] Therefore, this paper attempts to analyze the legal nature of the European Union and to determine whether it is a model of a confederation or already a subject of international law with all the makings of a state from the constitutional-legal perspective, and at the same time to familiarize the population of Georgia with the legal nature of the entity that Georgia is going to join.

## ANALYSIS

With the establishment of the European Economic Community, differing views were expressed on the future political integration of European states. Part of the politicians and scholars considered the model of the so-called "supranational" subject or of federal relations to be desirable for Europe, while the other part considered only the model of a confederation as expedient. Over the years, the European Union has achieved a high level of integration, its goals and functions being much broader and more comprehensive than the original concept of ensuring the free movement of goods, labor, services and capital by removing internal frontiers. That is why the discussion about the final legal model of a united Europe is still ongoing. This is also the case because it is very difficult to define the form of the current political-legal organization of the European Union unequivocally and

[3] "Treaty on European Union", entered into force on November 1, 1993. This Treaty, along with the Treaty on the Functioning of the European Union, is considered to be the founding document of the modern European Union.

[4] Hereinafter, author will use the term commonly used in Georgia - "EU" instead of "European Union".

[5] The Treaty entered into force on February 1, 2009.

[6] See the results of the January 5, 2008 plebiscite – 77% of the participants (total number of participants in the plebiscite - 1,760,271 citizens) answered in the affirmative to the question: "Do you support Georgia's accession to the North Atlantic Treaty Organization (NATO)?" For the official data see - https://cesko.ge/res/old/other/6/6775.pdf [accessed 07.07/2020]. Nevertheless, the plebiscite only concerned NATO, the results (taking into account the results of various polls, including, survey conducted by the Caucasus Research Resource Center (CRRC) (published December 24, 2011), 88% of respondents were in favor of Georgia's EU membership) expresses the aspiration of the population towards the European structures.

[7] "Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Georgia, of the other part", signed on June 27, 2014.

[8] Constitution of Georgia, Article 78.

precisely. It seems to be a unique entity acting internationally, distinguished from others, with signs of an independent, complex state structure. Therefore, to answer the above questions, it would be best to consider the hallmarks of the confederal and federal models of states and compare them with the current legal structure of the European Union.

1. Some scholars and experts consider the European Union to be an entity created and acting today based on the principles of a confederation of states. Moreover, many of them consider the organizational-legal form of the European Union to be the best example of a confederation. The term *"confederacie"* itself refers to an agreement between two or more persons, groups of persons or states for a specific purpose. The "Confederate States of America" created by the South American States in 1861-1865 may be the first state formation officially known by this name. However, it could also be argued that even earlier the United States of America, according to the "Articles of Confederation"[9] of 1777; the German Union (Deutsche Bund) [10] established in 1815; and Switzerland in 1815-1848 [11], were such entities.

Today, a confederation is defined as a union of states, united for the purpose of common action to cooperate in certain areas. Such a union of states has several distinct signs. First and foremost, a confederation is not a state as a subject of international law with its own state sovereignty. It is true that it participates in international relations, but in a limited way, because decisions are made by the independent states that created it. It is the essence of a confederation that it is established not in the constitutional-legal manner, on the basis of the founding will of the "people of the state", but by sovereign states according to an international-legal process. Consequently, the source of legitimacy of the confederation is not the Constitution and the will of the people, but the will of the governments of the participating States and the relevant treaty. The states within the Union of States only transfer certain powers in specific areas and only partially to the "supranational" union. At the same time, the Confederate government does not have the ability to enforce its will, as it does not have real "sovereign power" and, consequently, superior state power, which means the right to use legitimate force against citizens. In addition, the confederate government has no direct legal connection with citizens, because it does not have its own people endowed with founding powers (the so-called "people of the state" as one of the hallmarks of a sovereign state). This makes perfect sense since unions of states are consisting not of citizens but of states. Therefore, there is no unified (confederation) citizenship in a confederation. Another sign is its lack of a "state budget", because the confederation's budget consists only of contributions from its member states. Finally, since a confederation is the voluntary union of states whose legitimacy is based not on the will of the people but on an international legal agreement, it is entirely possible under international law for member states to separate from the union by a specific procedure.

[9] Based on the "Declaration of Independence" (1776), the former 13 colonies of Great Britain began to establish relations by discussing the "Articles of Confederation", the founding document of the new union.

[10] In German, this state formation can be called not "union" but "federation", because the word "Bund" is mainly used in this sense. In fact, this entity was really a confederation, with very weak authority. It was disbanded in 1866.

[11] According to the 1848 Constitution, Switzerland (officially called the "Swiss Confederation") was eventually established as a federal state.

2. Federalism is a complex political structure and territorial arrangement of states, according to which power is separated not only horizontally, but also vertically. Briefly, it can be interpreted as the principle of a political organization in which, to a certain extent, independent member state units are united into a higher, internationally ranked state unit. Furthermore, the federal state is a form of state organization that is established by constitutional-legal means, i.e., by the adoption of a Constitution. The establishment/formation of a state, in this way, is usually carried out by a national congress[12] with the authority to adopt the constitution, which in turn legitimizes the state which is based on the founding will of the majority of the people.[13] In other words, *a federal state is created not by the will of its member units on the basis of a specific treaty, but by the constitutional founding power of the people of that state as a whole.* Consequently, since the "unified", i.e. federal state is established and legitimized by the people as a whole, there exists a citizenship of the federation and not of the member state units, and it is constitutionally and legally impossible and inadmissible for member state units to separate from the federation.

The most important feature of federal states and the essence of federalism is the *separation of state sovereignty into two.* Consequently, in such states the center and its members have their own state sovereignty, where the "center", i.e. the federation, is an independent state, a subject of international law, and its "members" while not independent subjects of international law, have state markings, have their own legitimacy, and tasks, and represent the so-called "member states". The federation and its member states form a political system, where federal states internally are characterized by cooperation with equal and independent partners - the "member states". Within the powers conferred on them by the constitution of the federal state, member states may give expression to their own political will, rely on their own sources of legitimacy, i.e., have immediate and direct relations with citizens, and have the right to make final decisions within their area of authority. This is how "separation of sovereignty" is expressed - they have sovereign power (so-called "internal sovereignty") and make decisions independently within the areas of authority delegated to them. To that end, they have the political institutions of representative democracy - parliament, government-administration, and the judiciary. The sovereign power of the state is exercised by the federation (the so-called "whole state") which is therefore a subject of international law.

It may be interesting at this juncture to recall an event from the recent history of Georgia, which relates to the establishment of federal relations with Abkhazia in Georgia. The issue became relevant with the presentation by the UN Special Representative of the Secretary-General in Georgia, Dieter Boden[14], on November 20, 2001, of a document (later known

[12] A good example of the establishment of a state in this way (regardless of the federal or unitary form) is the creation of the Democratic Republic of Georgia by the National Council of Georgia on May 26, 1918 and the declaration of an independent state. National Council of Georgia was a representative body of political parties and public organizations acting in Georgia, elected at the Georgian National Congress on November 19-23, 1917. It united almost all political or public organizations acting in Georgia and expressed the will of the vast majority of the population of Georgia.

[13] Examples of this are the formation of the United States of America under 1789 Constitution and Federal Republic of Germany under Basic Law of 1949.

[14] Dieter Boden - German diplomat, UN Special Representative of the Secretary-General for Georgia in 1999-2002.

as the "Boden Document") entitled "The Principles for Division of Competences between Tbilisi and Sokhumi"[15]. It was evident from the very first paragraphs of that document that the UN Representative proposed to regulate relations based on the concept of federalism. According to the first paragraph, Georgia was recognized as a "*sovereign nation*"[16] based on the rule of law, and according to the second paragraph, Abkhazia was referred to as a "*sovereign entity within the state of Georgia*",[17] based on the rule of law. According to the same paragraph, "*Abkhazia has a special status within the state of Georgia, which is based on a Federal Agreement*",[18] which in turn establishes "*broad powers*". The Federal Agreement, which has the "power of a constitutional law"[19] separates the powers of the sovereign entity of Abkhazia and the sovereign state of Georgia and is an integral part of the Constitution (paras. 3, 4).

All norms[20] set forth in the "Boden Document" were based on the constitutional-legal principles of federalism, and federal states, and provided a valid basis for intensive negotiations between the parties. However, both parties reacted negatively to this initiative. On the Georgian side, the negative attitude was probably caused by the model of federal relations with Abkhazia (the majority of the population at that time was still expecting a "lesser status" return of Abkhazia), especially the word "sovereign" used in relation to Abkhazia[21]. As mentioned earlier, the word in itself is not dangerous, and in federal states is commonly understood by member states as being limited to the powers delegated to them. Accordingly, the Georgian side could have entered negotiations without hesitation and relied on the principles set out in the document. Unfortunately, this did not happen. Later a group of scientists and experts formulated their opinions on the status of Abkhazia in Georgia, presenting a model typical of federal relations.[22] According to that document, and in accordance with the provisions of the "Boden Document":

*a) It relies on universal, free, direct and equal elections throughout territory of the country, as well as a referendum, as a result of which the state of Georgia is legitimized by the will of the majority of the founding power of the people of Georgia ("state people"). Georgia is a sovereign state, a subject of international law. The Constitution establishes the Georgian citizenship of the "whole state" and considers it inadmissible to separate its constituent "member state" from a unified state.*

*b) The state of Georgia consists of the sovereign entity of Abkhazia, which acts as an equal and independent partner in relations with the highest state government (center, federation). Abkhazia has the state marks, holds its own (limited) sovereignty and is an integral member unit of the Georgian State.*

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[15] Draft document – "Basic principles for the distribution of competences between Tbilisi and Sokhumi."
[16] "Sovereign state".
[17] Draft document – "Basic principles for the distribution of competences between Tbilisi and Sokhumi."
[18] Ibid.
[19] "Federal Agreement ... will have the power of the Constitutional Law."
[20] "Boden Document": http://www.iccn.ge/files/boden_document_2002.pdf [accessed 09.07.2020].
[21] It is noteworthy that the document referred to Abkhazia as a "sovereign entity" and not more emphatically as a "sovereign state entity" or even more strongly as a "member state".
[22] "Opinions on the special status of Abkhazia in the state of Georgia", Newspaper "24 Hours", 2004, N153 (702).

*c) The separation of powers is exercised by a Constitutional Agreement which has the power of constitutional law. The state and its constituent state unit have the right to make a final decision in the areas within their special powers. Consequently, Abkhazia (its government) makes sovereign decisions within its powers and has the ability to form and implement its own political will. At the same time, Abkhazia, as an entity with state marks, exercises powers by parliament, government, and courts.*

Thus, the "Opinions" document offered everyone a concrete, substantiated model, as a subject for a wide-ranging public discussion, which would help to establish a unified and strong position shared by the Georgian state and society as a whole on the future status of Abkhazia. Nevertheless, for many reasons, subsequent events turned out differently and negotiations were not conducted in line with the "Boden Document" and the "Opinions" paper.

Reverting to the main topic of the paper, and having analyzed the main features of confederal and federal systems of states, the form of the current legal organization of the European Union can be compared to the classical constitutional-legal and political principles of both a federal state and a union of States (confederation), as described above. It is clearly beyond doubt that the European Union bears the hallmarks of both models of legal relations between states so distinctly that it appears to be an inherently unique subject of international law, different from all existing state formations. The beginnings of this difference can be traced to the 1963 ruling of the European Court of Justice (ECJ), which emphasized that the founding treaties of the European Union created a completely new, *sui generis* rule of international law that is binding for all.[23] Much time has passed since then, and subsequent developments within the European Union have added even more "uniqueness" and "difference" to it, which are being discussed below.

a) When referring to the EU's "uniqueness" from an international legal point of view, the following characteristics of a confederation can be identified first and foremost: It is a union of sovereign states established on the basis of an international treaty. Although it became a subject of international law after the Treaty of Lisbon and, in order to achieve common goals and objectives, member states have delegated to it certain powers of "supreme state power" under the founding treaties, it is important in this regard that the EU does not have its own "state people" (one of the essential hallmarks of the modern state) and that it was created not by the founding power of the people but by the will of the member states. Consequently, the EU does not have "supreme state power", full sovereignty over its citizens and does not have a so-called "European national identity", which characterizes sovereign states (as indicated by the Treaty on the European Union, according to which the Union respects both the equality of member states and their national identity[24]). This was also confirmed by the German Federal Constitutional Court when considering the 1993 Maastricht Treaty. The Court noted that the European Union is so called supranational

[23] "Van Gend en Loos v Nederlandse Administratie Belastingen", European Court of Justice, N26/62, February 5, 1963; See also G. Gabrichidze, European Union Law, 2012, 23-24; The decision established for the first time that the provisions of the treaties have direct effect for their use by citizens in the Member States.

[24] "Treaty on European Union", Article. 4, para. 2: "The Union shall respect the equality of Member States before the Treaties as well as their national identities…".

compound of States (Staatenverbund) with a particular structure and functions, however it does not have unified "nationally constituted legal community", therefore it can not be a state.[25] This is one of the main obstacles to the formation of the EU as a federal state, as different languages are spoken in European countries, people identify themselves with their home countries, which indicates insufficient cultural uniformity (which, in turn, is necessary in a federal state). This can be easily confirmed by asking people in different EU countries: Who are you? (Where are you from?). Most likely no one will answer "I am European", but people will say: "I am Polish", "I am Spanish", or "I am Austrian". The very well-known phrase in Georgia - "I am Georgian, therefore I am European" - is based first on national identity and only then refers to a common European identity.[26]

The fact that the European Union does not have a constitution, nor a basic law with supreme power, which would have been adopted by the "European people" is another characteristic of a confederation. Although the European Court of Justice referred[27] to the Treaty establishing the European Community as a "constitutional charter", and the German Constitutional Court did the same, in calling it a "constitution of the community", this does not change anything. The essence of a constitution, as the founding document of a sovereign state, adopted by a majority of the people with supreme legal force, is not being met by the founding treaty of the EU because it is not an act adopted by the "European people". That is why, in the same decision, the German Constitutional Court also stated that the Community itself is "neither a state nor a federal state", but a special "interstate formation" to which the member states have delegated certain rights of supreme power. This "created a new public government" that is "original and independent" in the face of the "state power" of the member states. In this reasoning it is clear that the Court referred to a confederate model of the community, but also underlined its nature as a new, distinct public authority.[28] In this connection, we should recall the events associated with the attempt to create an EU constitution at the beginning of the 21st century. The member states of the European Union tried to create a so-called "Constitutional Treaty", which included the goals, objectives and institutional provisions of the European Union, as well as a Charter of Fundamental Rights and the areas of the EU's own powers. A "Treaty on a European Constitution" was even drafted in 2003, but in the 2005 referendums in France and the Netherlands, a majority (55% and 61%, respectively) voted against the document. Eventually, this attempt ended with the adoption of the Lisbon Treaty (2009), which no longer includes such terms as "Constitution", "flag", "anthem", "European law", etc., and the official title of the treaty is "Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community".[29] Thus, two treaties remain the founding documents of the European Union, namely: "The Treaty on European Union" and

[25] BverfGE 89, 155 – Maastricht.

[26] Phrase from the speech of the Speaker of the Parliament of Georgia, Mr. Zurab Zhvania, delivered at the Parliamentary Assembly of the Council of Europe in Strasbourg, in 1999, regarding Georgia's accession to this organization.

[27] See the opinion of the European Court of Justice 1/91, December 14, 1991, para. 21.

[28] BVerfGE 22, 293 – EWG-Verordnungen.

[29] See the official text of the agreement on https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:12007L/TXT&from=EN [accessed 07.07.2020]; See also G. Gabrichidze, European Union Law, 2012, 16-19, 83-84.

"The Treaty on the Functioning of the European Union". This historic account proves once again that the importance of nation-states in Europe is still very high and that because of the national identity of the population, it is still not feasible to put into practice the idea of a united "European people" with all the consequences.

Another sign of the European Union of being a confederation is the power of member states to withdraw from the Union. The Treaty on European Union (art. 50) sets out the relevant procedures for a sovereign state to withdraw from the Union in accordance with specific rules. This is a classic sign of a confederation, as it is considered to be a voluntary union of states (not a state created by the people) where each member should have the right to change its earlier decision to form a union and to leave it. Naturally, such a procedure cannot exist in federal states, because of the principles described above that guide their establishment.

b) Despite the classic confederate characteristics of the European Union as it stands today, it cannot be considered to be a typical confederation. Even a cursory glance at the founding treaties of the European Union is enough to prove that statement. This became especially apparent after the entry into force of the Lisbon Treaty, although we should not forget the Maastricht Treaty, which removed the word "economic" from the name of the union and effectively created the "European Union" as a subject with not only economic but also political objectives. In addition, the Maastricht Treaty introduced the "Citizenship of the Union", which allowed citizens of member states to run in local elections (as well as in European Parliament elections) based on their place of residence. This gave citizens political rights under European law, including the EU Charter of Fundamental Rights. Such a so-called principle of "unified citizenship" applies in federal states and is considered a characteristic feature of them.

Another federal characteristic of the EU as a special entity with its own independent rule of law is that European Union law prevails over the law of the Member States. This relationship between the norms of law was established by decisions[30] of the European Court of Justice, when the authority of the European Union (then the European Community) to issue its own legal acts (regulations, directives) was recognized, as well as their immediate and direct effect on all citizens of the Union. The Court then ruled that EU law prevails over the domestic law of Member States, and later instructed the Union's state agencies to enforce the Union's rules even when they were issued before the adoption of national norms (i.e. conflict of norms). Such a relationship between the norms of law is typical for federal states. At the same time, the above shows the binding legal force of the decisions of the European Court of Justice, which implies their necessary enforcement.

Federal state characteristics are visible in a number of other EU powers, including the further delimitation of the EU's single jurisdiction through the establishment of the Schengen system and the abolition of internal border controls, the introduction of a single European currency, the euro, in this area, as well as a strengthening of the functions and powers of the European Parliament, which includes, for example, the mandatory consent of Parliament for approval of the "Executive Power" - the Commission and the President -, which is a classic legislative power of a sovereign state (federal or unitary). At this point,

[30] "Van Gend en Loos v Nederlandse Administratie Belastingen", European Court of Justice, N26/62, February 5, 1963; Costa v Enel, N6/64, July 15, 1964; Amministrazione delle Finanze v Simmenthal SpA, N106/77, March 9, 1978.

the Commission and Parliament act and make decisions independently as bodies of state power. The same can be said of the "EU rule of special competences", in which Member States are not allowed to adopt rules governing specific areas, even when the EU itself does not adopt such regulations. Noteworthy is the classic federal principle of action in the areas of shared competences, which allows member states to legislate in those areas only until the EU adopts its own legislation and determines its own specific issues.

After discussing and comparing federal and confederal "signs", one conclusion is, in the opinion of the author, inevitable: The European Union is not a state. Moreover, the EU cannot become a state in the foreseeable future. It is not difficult to draw that conclusion, but it is exceedingly difficult to say with certainty what kind of legal form it has. Here again we have to refer to the decision[31] of the European Court of Justice, by which the EU, then still the European Economic Community, and its powers in international law were assessed as a completely new, autonomous (*sui generis*) order, which established a binding "space" for all members. We may also recall here the clarification[32] of the German Constitutional Court, according to which the union is a special "interstate formation", to which member states delegated certain rights of supreme power and thus "formed a new public authority" which is "original and independent" with due regard to the "state power" of the member states." All the above shows the uniqueness of the European Union; it does not look like any other entity defined internationally or constitutionally, which makes it difficult to clearly define its legal nature. Nevertheless, based on the analysis of its history and ensuing features, it is possible to relatively accurately delineate the legal status of the EU: it is a subject of international law established and acting on the basis of the principles of a confederation as an inter-state "supranational" union, but in the process of integration has partially moved beyond that framework and exists today as a special unit with highest public authority, and powers typical of a federal state.

## CONCLUSION

The future development of the European Union from confederation to federation will largely depend on the political processes taking place in the member states. While "Brexit" and the rise of nationalist tendencies are not conducive to greater integration, Britain's exit from the EU, which failed to fully integrate with continental Europe, could also be the beginning of greater ties among and between the rest of member states on the continent. Notwithstanding, it is unlikely that the necessary uniformity of a sovereign state will be achieved in the EU, because diversity and differences still abound, which will be further exacerbated by the accession of new members. Thus, uniformity should not be the ultimate goal. Free, democratic, constitutional states should remain the basis of the Union and its confederate structure should not be completely changed. Several federal elements may be added to the union (for example, a bicameral parliament), but the ultimate goal should be to strengthen democratic and legal, human rights-based societies in a nation-state, rather than striving for full integration.

[31] "Van Gend en Loos v Nederlandse Administratie Belastingen", European Court of Justice, N26/62, February 5, 1963.
[32] BVerfGE 22, 293 – EWG-Verordnungen.