

# § 6 The struggle for a constitution for the European Union

## I. The European Union as first representative of a new, non-state but state-like form of organisation

- a new form of organisation which has emerged in the process of European integration
  - a special form of organisation *for supranational geo-regional integration*
  - more than a traditional international organisation, supranational organisation or confederation but not yet a federal state
- main features:
  - comprehensive exercise of *supranational public power* (directly binding in the member states)
  - far-reaching competences in numerous fields of politics and law
  - sophisticated institutional system with federal and unitarian elements
  - highly developed legal system with powerful court of justice
  - legal framework for a geo-regional internal market, own currency
  - own citizenship with special rights (in particular transnational economic fundamental freedoms) for the citizen
- the debate on the legal nature of the European Union: "compound of states" ["Staatenverbund"], "compound of states and constitutions" or *supranational union*?

## II. The constitutional dispute between the scholars of European Union and constitutional law

- the biggest controversy among public law scholars in the last decades
- 1) **The classification of the existing founding treaties of the European Union as a constitution by most European Law scholars**
    - because of the functional and substantial similarities between the EU founding treaties and the constitution of a state (political character, function as basic legal order of the organisation with primacy in validity over other law of the organisation, function to constitute and to regulate the cooperation between the organisation's institutions)
    - the theories of a European multilevel constitutionalism, a European "constitutional compound" ["Verfassungsverbund"] (INGOLF PERNICE), or a European "compound of states and constitutions" ["Staaten- und Verfassungsverbund"] (CHRISTIAN CALLIESS)
  - 2) **The resistance to the constitutional perspective on the part of the constitutionalists**
    - still prevailing opinion at the beginning of the 21<sup>st</sup> century
    - main reasoning: only a state can have a constitution (JOSEF ISENSEE, PAUL KIRCHHOF)
    - 2<sup>nd</sup> reasoning: only a European people can give the EU a constitution (DIETER GRIMM)
    - 3<sup>rd</sup> reasoning (nowadays rare): only a European nation (in the cultural sense) can be the basis of a European constitution

## III. The possible but still missing European constitution

- basic idea: we must adapt the notion of "constitution" carefully to the reality of the 21<sup>st</sup> century without diluting (and, thus, depreciating) it
- central issue: the requirements for the *constitutional capacity* ["Verfassungsfähigkeit"] of an organisation
  - OWN OPINION: not only states but *also state-like forms of organisation* can have a constitution (generally acknowledged example: the federated states within a federal state); this also applies to the European Union as a supranational union

- however, as any *constitution*, a Constitution of the European Union cannot "emerge" in a decades-long process but *must be given in a solemn formal act*, which is, legally, a revolution (this has not yet happened), and *must clearly self-identify as a constitution* (this is *not* the case with the existing treaties)
- YOUR OPINION ON THIS QUESTION: \_\_\_\_\_  
YOUR REASONING: \_\_\_\_\_

#### **IV. The failed Treaty establishing a Constitution for Europe of 2004**

- the first example in world history of a constitution for an organisation based on public international law; surprisingly, little resistance by the constitutionalists
- drafted 2002/03 by the EUROPEAN CONVENTION, a pluralistic parliamentarian-governmental assembly, with broad participation of the public, in particular hearing of civil society organisations, but considerably modified in the intergovernmental conference which decided on it
- signed in 2004 but failed in the ratification process because of rejection in national referenda in France and the Netherlands in 2005
- all primary law of the European Union (including the integrated Charter of Fundamental Rights) fundamentally reformed and consolidated in one comprehensive constitutional treaty which would have the legal nature of both, an international treaty and a constitution
- many innovations have later been adopted by the Reform Treaty of Lisbon
- rejected in the referenda not because the French and Dutch did not want to have a European constitution but because they did not accept *this* constitution, which was still a *bureaucratic monster* of 480 pages with 448 often long articles and 36 attached protocols

#### **V. The enactment of a European constitution as a pivotal challenge of the 2020s**

- as a state-like organisation of integration, EU needs a legal basis that performs all functions of a constitution (see *supra*, § 2 II), in particular appeals to the lawyers with the authority of a constitution and appeals to the citizen and causes him to trust and to identify with the Union
- EU needs a real constitution, written in the style of a constitution, not of a technocratic international treaty, declaring itself a constitution and enacted in one solemn formal act, which will, legally, be a revolution for Europe
- the need of double referenda (in the EU as a whole and in the member states) for a democratic ratification of a democratic Union constitution and the decision of each member state to join the European multilevel constitutionalism