

§ 3 III Landmarks of Constitutional Theory

1) 1787/88: The Federalists: The Federalist Papers

- a series of 85 essays by JAMES MADISON; ALEXANDER HAMILTON; JOHN JAY
- foundation of the theory of the federal state
- special focus on separation of powers (checks and balances) and democratic issues

2) 1789: Emmanuel Joseph Sieyès: Qu'est-ce que le Tiers-État? [What is the Third Estate?]

- a pioneer of democratic constitutionalism, based on the sovereignty of the people, and representative democracy

3) 1892: Georg Jellinek: System der subjektiven öffentlichen Rechte [The System of Subjective Public Rights]

1900: Georg Jellinek: Allgemeine Staatslehre [General Theory of State]

- systematic categorisation of human and fundamental rights (see § 8 III)
- Three Elements Doctrine on the criteria of statehood

4) 1928: Carl Schmitt: Verfassungslehre [Constitutional Theory]

- most controversial German constitutionalist who later supported the national-socialist totalitarian regime
- constitution as decision; sovereignty lies with the one who decides on the state of emergency
- need of homogeneity in the state
- immutability of the core of the constitution (→ limits for constitutional amendment)

5) 1928: Rudolf Smend: Verfassung und Verfassungsrecht [Constitution and Constitutional Law]

- the state as a dynamic organisation of integration
- the role of the constitution to support the process of integration

6) 1934: Hermann Heller: Staatslehre [Theory of State]

- democratic constitutional theory

7) 1934: Hans Kelsen: Reine Rechtslehre [Pure Theory of Law]

- legal positivism, denial of idea of natural law, separation of law and morals
- hierarchy of laws, starting from a basic norm (Grundnorm), with primacy of public international law over all national law, including the constitution
- influential in some countries but rejected in most others

8) Since 1945: Strong development of democratic constitutional theory in Europe and North America

- in particular in the U.S.A., Germany and France
- prominent role of the *Venice Commission* of the Council of Europe
- strong promotion by the intensive *debate on a European Constitution* in the 1990s and 2000s