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Integration in the Supranational Union

The European model of organisation for process-oriented, geo-regional integration, and its concomitant legal and theoretical implications

(Integration in der Supranationalen Union. Das europäische Organisationsmodell einer prozeßhaften geo-regionalen Integration und seine rechtlichen und staatstheoretischen Implikationen, Nomos Verlagsgesellschaft, Baden-Baden 2001)

Summary

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Chapter 1: Issues

1. *A.* The world order of the twentieth century, to which the twenty-first century refers, rests upon the *principle of the territorial state*, a fundamental formal principle which is valid in every corner of the globe and is nowhere called seriously into question. Humanity is not united: it is divided into approximately 200 distinct communities (peoples). These form legally and politically recognized governing entities [Herrschaftsverbände] which are independent (sovereign) and which are known as states. Each state is allocated a delimited portion of the earth's surface (state territory), over which it has exclusive power to rule (state power [Staatsgewalt]), but to which its power is generally restricted. In this world order, the concept of rule by virtue of higher law (sovereign power/public power[1] [Hoheitsgewalt/öffentliche Gewalt]) refers essentially to the rule of a sovereign governing entity over the territory over which it has control, which is to say the rule exercised by a state over its state territory. Within this world order, a sovereign public power - which is to say a power which is original, rather than derived, and which is not dependent - cannot be obtained by authorities other than states.

2. Every state may determine its own organisation and may exercise its public power as it likes, subject only to those minor restrictions imposed by public international law. Each of the approximately 200 discrete communities into which the human race is organised is free to follow its own political and ideological principles, giving effect to its own cultural characteristics within its own state order (*right to self-*

1 The synonymous terms "sovereign power" and "public power" stand for all power exercised by public authority. In order to avoid misunderstandings caused by the ambiguous word "sovereign", the term "sovereign power" will not be used in the following. - The function of the exercise of public power is usually described with the term "government".

determination). This can mean that those who disagree (or who no longer agree) with the current state of affairs may form a new, independent community (a new people), establishing a new sovereign governing entity. The world order of states provides for the division of the earth's surface into states, but it does not specify their number or identity.[2]

3. The overwhelming majority of states see themselves as nation-states - as the governing entities of distinct, homogenous communities, or nations, which can be identified by historical, ethnic, cultural or linguistic criteria. At the heart of this self-image lies the theory of the nation, a doctrine which has been influential since the end of the 18th century. The principle of the formation of nation-states, which derives from that doctrine, has influenced the 20th century world order quite as significantly as the principle of the territorial state;[3] thus, it is appropriate to refer to a *world order of nation-states*. For a great many decades, that world order was characterised not only by the Earth's subdivision into nation-states, but also by a *mindset which centred on the nation-state*, a common way of thinking to which an understanding of the individual nation-state as the sole focus for law, politics and scholarship was key. Responsible co-operation with other nation-states hence developed only sluggishly. On closer examination, it is evident that this mindset is a blend of three different ways of thinking which chanced to flourish simultaneously: a general orientation towards the nation, towards the state as a political institution and towards the individual state.[4]

4. The decades following the Second World War saw escalating upheaval in the world order of nation-states. No one nation-state was equal to the tasks and dangers which developed, and the magnitude of the challenges which states face has increased continuously. Today, an increasing *globalisation and geo-regionalisation* of individual problems is evident. The nation-state is increasingly out of its depth in a growing number of areas.[5]

5. Initially, the creation of a great (Western) European federal state - a "United States of Europe", following the American model - was seen as the only adequate response to these challenges. In the end, however, Western Europe's nation-states sought other solutions. They co-operated increasingly through treaties and international organisations. And they founded *supranational institutions*, bodies and organisations under public international law to which they transferred sovereign rights [Hoheitsrechte], thereby enabling these institutions to exercise public power directly over citizens and public authorities in member states without the assistance of domestic authorities. It was difficult to reconcile even this development with the traditional biased orientation towards the nation-state. Three related supranational organisations, the European Communities, were also designed to serve the general integration of their member states. They were reformed several times. The Treaty of Maastricht transformed the Communities into the European Union, adding two further "pillars" of intergovernmental co-operation.[6]

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2 1-A.I.1.
3 1-A.I.1.
4 1-A.I.2.
5 1-A.II.
6 1-A.III.

6. *B.* The ensuing *European Union* is the interim result of a continuous process of unification which is *not guided by any particular historical example*. While parallels with many historical organisations are present, each historical organisation also demonstrates significant differences. Thus, for example, the European Union and the Holy Roman Empire show surprising institutional similarities. Unlike the structure of the Empire, however, the Union's structure reflects a rational design, so that it can be analysed logically and systematically with the tools of legal reasoning. The supranational governing entity known as the European Union is a specifically European development of our age; indeed, it is one of the greatest innovations in twentieth-century European history.[7]

7. The European Union is a peculiar creation which clearly has yet to attain its final form. Attempts to grapple with it within the traditional framework provided by public international law, constitutional law and political theory [Allgemeine Staatslehre / Staatstheorie][8] can fairly be said to have caused the confusion and uncertainty which characterise both the political and the scholarly discourse. There is as yet no consensus on the name of the genus to which the Union belongs. The literature contains numerous circumlocutions, most of which are overly vague. The most common terms are "association of states" ["Staatenverbund", sometimes translated as "compound of states"], which is the term adopted by the Federal Constitutional Court, "organisation sui generis", "community of states", "supranational community" and "supranational union". The *genus is here termed* a *supranational union*, since that description recalls both an origin in a supranational organisation (the ECSC) and the particularly close relationship between participating states, and has not yet been coloured by use in the context of the three European Communities. It can, moreover, be translated into other languages without fear of corruption.[9]

8. The lack of accepted terminology is symptomatic of the lack of clarity which besets the fundamental institutional, structural and legal context of the European Union. There has been a failure to reach consensus even on basic issues involving the construction of the European Union, its legal nature and its international legal personality. Many fundamental questions still lie open - for example, the way in which democracy should be realised in the Union, member states' sovereignty, the relative priority of supranational and national law, and the resolution of conflicts of competence in the final instance. Answering these questions is made much more difficult by the dynamics of the European organisation of integration [Integrationsverband], by its complicated structure and by the plurality of sources from which its legal basis derives.[10]

9. A *tendency towards skewed or one-eyed approaches* also influences perceptions of the European Union. Issues and problems are often misjudged or taken out of context: scholars have let themselves be guided all too readily by the customary explanations delivered by traditional political theory. Where national and supranational law collide, there is a temptation to conceive of the problem as purely bilateral, ignoring the fact that the European Union comprises fourteen other states besides the

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7 1-B.II.

8 Political philosophy and general state theory (= general theory of the state), including general theory of associations of states (and of the supranational union) and constitutional theory.

9 1-B.III.1; French: Union supranationale, German: Supranationale Union; Spanish: Unión supranacional.

10 1-B.III.2.

one affected, so that a solution which took only the needs of the affected state into consideration would be highly likely to give rise to problems in other member states. Problematic, too, is the fact that academic discussion has tended to take place in closed circles, segregated not only by nationality and language but by discipline (law, sociology, political science), and, indeed, frequently by sub-discipline (European law, constitutional law/political theory, public international law).[11]

10. *C.* Today, the use of public power is vertically differentiated to an extent that would have been unthinkable in the old order of nation-states. Modern government is split vertically, specialised, constrained and interwoven: there is a greater number of levels, types and interlocking instances of public power than has been the case in the past. This raises questions of fundamental importance: is this a plurality of discrete public powers? Or is it a question, instead, of component parts of a single public power which together comprise a single system? Does this system have a fulcrum (Archimedian point), and, if so, at which level might it be located? Can it shift? What consequences will the answers to these questions have for the relationship between national, European and international law? Indeed, this raises another *fundamental question*: *what is the residual significance of the state in today's world?* The increasing integration of the state into international and supranational structures has changed its role. As borders open and cross-border mobility increases, as policies of national governments are synchronised and economic areas are amalgamated, the contours of the state begin to blur. Again and again, discussion of how best to redefine the position of the state centres on the concept of sovereignty.[12]

11. *D.* In the 1990s, radical change to the world order of nation-states, the rise of a supranational entity in Europe, increasing differentiation of public power and the change of the role of the state have provoked increasing calls for a strengthened, revitalised nation-state. These calls reflect concern not so much for the nation-state itself as for the legacy of historical concepts beyond the concept of the nation-state. The concern is for the future, ongoing complete implementation of those guiding philosophical and political ideas which, deeply rooted in the Western philosophical and constitutional tradition, mould national systems of government and constitute the *fundamental values* [Grundwerte] *and* (other) *fundamental ideas* [Leitideen] of the contemporary modern state. Using constitutional law and the ordinary law of the land, nation-states had developed institutions which implemented and protected those values and ideas. But these institutions have declined in effectiveness - or are in danger of being sidelined. Measures taken at the supranational level have not generally inspired confidence that they will make that good.[13]

12. The primary focus of concern is for *democracy*. That concern has been triggered by a decline in the influence which the peoples of individual member states are able to exercise, and by the way in which the system as a whole has become increasingly governmental, but much less parliamentary in nature. There is concern, too, for *basic rights*, for supranationality has lessened the importance of basic rights in national constitutions, and has weakened the measures adopted there for their protection, since both basic rights and their protection are increasingly displaced by su-

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11 1-B.III.3.

12 1-C.

13 1-D.

pranational law. The interpretation given by the European Court of Justice to norms which grant competences has been decidedly lopsided, favouring the Communities. This has given rise to concerns for the *rule of law*. These concerns have been intensified by the German Federal Constitutional Court's threat to act as a domestic court of review of final instance, treaty provisions notwithstanding. Concerns for the future of the *social state* [Sozialstaat] are essentially political: the European internal market, competition, and participation in the single currency are bringing changes in their wake, but do not yet jeopardise the social state qua fundamental value of political theory. There is concern, too, for the *fate of federalism*, as is evident above all from warnings that the competences of the German Länder may be undermined. However, since the Länder use bilateral contacts at the senior political level, formal representation in Brussels and the Committee of the Regions to lobby on their behalf, some critics have warned that the federal level of government may be weakened because of the concomitant challenge to the Federal Government's status as the sole representative of German interests. In some unitary states, similar developments have led to fears for the *future of the unitary state*. Finally, concern for *national and regional identity* is evident in warnings regarding a potential loss of national statehood, in resistance to the levelling of cultural differences and in reservations concerning the phenomenon that principles and institutions of domestic administrative law, which underpin the rule of law, are overridden and overlaid by the law of the Union (the "Europeanisation of administrative law")[14]. - If public acceptance of European integration is not to decline, convincing solutions to these challenges will need to be found.

Chapter 2: A New Form of Organisation: the Supranational Union

13. *A.* With the European Union - and even earlier, with the late European Communities - European integration has produced a European model for a new form of community. *Four phases of development* can be identified, beginning with a specialised supranational organisation which controlled the coal and steel economy (1952). During the second phase, a limited, institutionalised Western European community of states developed (1958 - 1967). Limited to specific areas, it consisted of three supranational organisations which formed an integrated unit of activity and influence. During the third phase, this community was intensified and enlarged several times, growing beyond the concept of restriction to individual economic areas and becoming a general organisation of integration (1967 - 1987). The specialised organisation [Zweckverband] had given rise to an expandable institutional framework from which continuous, all-encompassing integration could proceed. The fourth phase (since the entry into force of the European Single Act in 1987) has been a phase of consolidation and further development of the general organisation of integration [Integrationsverband]. The importance of that organisation is not diminished by the existence of other European institutions, or of institutions to which European states belong (the Council of Europe, the OSCE and the EEA).[15]

14. The European Union is a *single, coherent unit with a plural institutional and legal basis*. It should not be understood as a simple grouping of discrete units on the

14 1-D.I-VI.

15 2-A.I.

basis of substantive law [materiell-rechtlicher Verbund], as a unitary organisation whose component units have fused and become one, or as a structure resting upon different pillars. Rather, it is a composite organisation, represented by various actors, or, more specifically, by compounds of actors (the Communities, with the plurality of their organs) and by individual institutions acting directly for the whole (the organs to which the TEU entrusts particular tasks). The Communities are components of the Union; their founding treaties are part of a single, coherent legal order. As do some of its component parts - the EC, EURATOM and the ECSC - the Union has *international legal personality.*[16]

15. *Particular characteristics* distinguish the European Union *as* a *governing entity*. These characteristics enable a new category to be developed within the existing taxonomy. The most important characteristic is the Union's status as a supranational organisation whose purpose is integration [supranationaler Integrationsverband]. Selected partners have come together in a long-term, all-embracing union, recognising that the union has a value in and of itself with regard to the common future they envisage. That future goes well beyond fulfilling the tasks which the Union has been assigned. The Union performs its integrative function primarily by carrying out tasks in the public sphere through the exercise of supranational public power. It also provides the institutional (organisational) framework for formalised and institutionalised intergovernmental co-operation, however, and it provides a territory for the substantive law through which integration is carried out. As a general organisation of integration, the Union also provides an adequate conceptual framework for tasks of all kinds from any political sphere. The Union's dynamic quality distinguishes it both from traditional kinds of international organisation and from the state. [17]

16. The European Union's particular characteristics place it so far beyond the conventional supranational organisation that analysis of the latter is only partly applicable to the former. The Union should, then, be classified under a new kind of state community, which it is appropriate to call a *supranational union*, and which can be *defined* as follows: a supranational union is an international organisation founded by several states for the purpose of integration which tends to evolve continuously, which is conceptually open for tasks of every kind, and which accomplishes its integrative function primarily by carrying out a wide variety of tasks in the public sphere itself, by exercising public power in its member states.[18]

17. *B.* Having established that the European Union represents a new form of organisation, we must now determine its status and legal nature. A supranational union embodies the characteristics of both a supranational organisation and of a confederation of states, yet it is even more than this. It is thus more than merely an international or supranational organisation, more than a confederation, and more than a mere combination of these forms of organisation.[19] Some of the European Union's characteristics are reminiscent of a particular kind of federal state. Yet the European Union is not a state, and it cannot become a state without leaving the organisational

16 2-A.II.1.b.
17 2-A.II.1.a/c-e.
18 2-A.II.2/3.
19 2-B.I/II.

form of the supranational union behind. The European Union is a novel, *independent*, legally distinct *form of organisation on the basis of public international law*.[20]

18. Public international law mandates the distinction between non-state organisations and states. Based on the principle of the territorial state, the right to self-determination and the legal concept of sovereignty, public international law requires that it be possible conclusively to identify those "natural" units of accountability ["natürliche" völkerrechtliche Zurechnungseinheiten] (states, in other words) which ipso facto enjoy recognition and all legal positions deriving from that status at public international law. Many vertically interconnected governing entities may co-exist on different geographic scales (local, regional, national, geo-regional, global), but only one may claim statehood at any one time. Only this one will enjoy the advantages which statehood confers: the protection of its existence by public international law, sovereignty, and the power deriving from sovereignty to control all public power exercised on its territory.[21] At present, international law does not allow hybrid forms between state and non-state entities; nor will it recognise divided statehood.[22] In this strict, predefined scheme of classification, the supranational union should be counted as an international entity. It cannot, therefore, be understood as a state. In contrast to the federal state, the supranational union is based upon the continued voluntary participation and co-operation of the governing entities which it comprises.[23] But clear parallels between a supranational union and a state are evident, and these parallels will strengthen as any given union develops. The supranational union's dual nature as an *entity which is not a state but resembles a state* has manifold consequences in the fields of law and political theory.[24]

19. The supranational union has developed as a *specific form of organisation designed for the transition from the nation-state to the civilisation state [Kulturkreis-Staat]*.[25] Viewed objectively, this form of organisation is designed to bring nation-states, which are increasingly overwhelmed by globalisation and geo-regionalisation, together, integrating them through a process of integration into a federal unification state [Vereinigungs-Bundesstaat]. This objective purpose does not, however, mean that the supranational union cannot fail. Nonetheless, the supranational union's dynamism precludes long periods of stagnation.[26]

20. The role of the supranational union does not only consist in fulfilling particular tasks. It is also responsible for bringing its member states together gently and incrementally and, later, for preparing for the the foundation of the unification state, relying on the experience gained during the integration process and alert to the problems which may accompany such a step.[27] Yet, while it may lay the groundwork for statehood, the union cannot itself survive that transition. The transition presupposes that every participating state make a declaration valid at public international law con-

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20 2-B.III/IV.1.

21 2-B.III.1.b.

22 2-B.III.1.

23 2-B.III.2.b.

24 2-B.IV.3.

25 This new form of organisation evolved on its own, rather than being deliberately developed by European states: see 2-B.IV.2.

26 2-B.IV.4.a/b.

27 2-B.IV.4.c.

cerning the transfer of statehood.[28] The rule of law would also require, in the case of most member states, that new constitutions first be enacted. If, like the European Union, a supranational union followed the rule of law, its organs would be obliged to take steps to counter any tendencies among its member states to ignore domestic constitutional provisions. Fears of a "slippery slope" towards a federal European state are groundless for this reason alone.[29]

21. *C. (I.-V.)* Two central tenets describe *the status of the state in a supranational union*. First, the state has *basic duties of membership* that follow directly and necessarily from its participation in a close political community bent upon a common future. These duties exist, then, and must be elaborated by courts and academics, even if they have not been regulated explicitly, clearly and completely in the treaty of union. Some of them may only be regulated on an abstract level via a general principle of loyalty within the union [Unionstreue] (in the case of the European Union, see arts. 10 EC Treaty, 192 EURATOM Treaty, and 86 ECSC Treaty). Specifically, these basic duties of membership include the duty to respect primary and secondary union law, to co-operate with other member states and with the union's organs, to participate in those organs, and to evince loyalty and solidarity towards the union and other member states.[30]

22. The second key tenet states that state sovereignty is unaffected until such time, if any, as the union is transformed into a geo-regional unification state. Sovereignty is absolute; as conceived by international law, it is inseparable from statehood. It can, therefore, only be transferred as a whole, and as part of a parcel along with statehood, and then only if the transfer is accompanied by member states' abovementioned declaration concerning a transfer of statehood. With that declaration, member states cease to be states in terms of public international law, and their organisation of integration loses the quality of a supranational union. *Unaffected state sovereignty* is, then, a necessary consequence of two coincident factors: first, the retention by fundamental public international law of the basic concept of the exclusively sovereign territorial state; second, the concept of non-statehood which governs supranational union as a form of organisation designed for transition.[31]

23. The state's unaffected sovereignty means that it retains *unlimited public power* notwithstanding any "transfer" of sovereign rights. As a "natural" unit of accountability at international law, the state is not - indeed, cannot be - deprived of its control of every kind of public power exercised on its territory.[32] Thus, investing the union with sovereign rights can refer neither to a genuine transfer of sovereign rights from the states to the union, nor to a real restriction on member states' sovereign rights. It is impossible to conceive of any way in which such a scenario could come to pass without challenging the concept of sovereignty. Since sovereignty is the lynchpin of the self-determination of peoples in territorial states, any challenge to this basic concept would challenge the foundations of public international law themselves. While a member state does not have the right to retake all public power on its territory in defiance of the treaty of union, or to allocate that public power anew, it certainly

28 2-B.III.1.c.
29 2-B.III.2.c.
30 2-C.I.
31 2-C.II.
32 2-B.III.1.b.cc.

has the legal power [Rechtsmacht] to do so. Sovereign acts undertaken by a member state which breach the treaty of union are legally valid; sovereign acts of the union which, in breach of the treaty, a member state declares null and void lose their validity on that member state's territory.[33]

24. The state's unaffected sovereignty also means that it enjoys *unlimited legal capacity at public international law*, even in those areas which the treaty of union reserves to common or community foreign and defence policy. Notwithstanding the process of integration, then, a member state is still - potentially - an interesting partner for third parties.[34] A state also retains *an unlimited legal capacity to determine its own organisation*. Viewed through the lens of traditional constitutional theory, this means that a state's pouvoir constituant remains unlimited even in an integrated state. Constitutional law is still valid even where it contravenes union law, and can be validly implemented and enforced. Admittedly, its interpretation must accord as far as possible with union law, and its application can be overridden by countervailing union law. In a non-state supranational union with (sovereign) member organisations, however, *no conclusive (absolute) primacy of union law* can exist, even where conflict is at its most extreme. Nor can any such primacy be validly established in the founding treaty.[35]

25. Despite the process of integration, *ultimate responsibility* [Letztverantwortung][36] rests with the state. Like any states, the member states of a supranational union must provide their citizens with the certainty that freedom, security and aid in case of need are provided for. Political theory postulates these demands on the states as the converse of the sovereignty they enjoy. In an integrated state, fulfilling that ultimate responsibility is increasingly restricted: the state no longer fulfills certain tasks itself, but delegates them to the union and to other international institutions, confining itself to participation in those entities' organs. However, a significant residual component of the state's ultimate responsibility lies in deciding how and to what extent it will integrate into international and supranational structures, and with whom it might enter into a supranational union. A state must always be able to justify these decisions to its citizens. It is accountable not only for those steps of integration which it has already carried out, but also for those from which it has refrained, and for any resulting failure to cope with the challenges of globalisation and geo-regionalisation. Thus, the ultimate responsibility of the state can also be manifest in the state's decision to leave one supranational union for another which promises more favourable development, or to found a new supranational union with other states, some of whom may well have been its integration partners in the previous union. This important aspect of ultimate responsibility finds no echo whatsoever in the opinion, currently widespread in Europe, that there can only be one European supranational union, which will end up taking all European states within its compass, and which any European state will have to take as it is for want of alternatives.[37]

26. From the point of view of political theory, every member state has the *right to share in the decision-making process where any fundamental change to the union is*

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33 2-C.II.1; further 2-D.III.

34 2-C.II.2.

35 2-C.II.3.

36 Defined 1-A.I.3.d.

37 2-C.III.

concerned. It is right, therefore, to continue to require unanimous agreement both for changes to the treaty of union and for the question whether to accept new members, even where the law of treaties would permit other approaches.[38] From the point of view of political theory, the union also needs to be designed according to the the *principle of the equality of member states* [Grundsatz der mitgliedschaftlichen Gleichheit]. That principle takes substantive (material) equality of member states as its goal, and reflects those states‘ recognition of each other as equal partners in the process of integration. Calls for a right of veto for large member states, or for those states which contribute more to the union financially than they receive in return, should thus be rejected. Unequal representation in the union's organs, or an unequal weighting of votes are justifiable, however, on the basis of the principle of the equality of union citizens.[39]

27. *(VI.)* Two of the most delicate problems surrounding the figure of the supranational union involve the *secession and expulsion* of member states. Addressing these issues at all is a tacit admission that the process of integration is likely to involve not only pleasantness as countries draw closer, but also disappointment and conflict. From the point of view of political theory, solutions are required which enable a legally straightforward, minimally burdensome separation. It is clear from the principle that integration always be voluntary that states must be able to leave the union. The fact that sustainable, long-term integration is predicated upon a sustainable, long-term commitment from every member state points to the same conclusion, as that commitment must be frequently reaffirmed or renewed in a ceaseless, free political process. Moreover, ultimate state responsibility presupposes that a state be able to leave a supranational union. In any case, it would be impossible, from a pragmatic point of view, to keep a state which intends to leave, since that state would be able to use the legal power deriving from its sovereignty to ensure that its membership of the union became imperceptible on its state territory from that point on. - Expulsion must be possible as an extreme measure, used to prevent serious violations of union law within a member state from damaging the union's credibility as a legal community or, indeed, its efficiency as a governing entity, since damage of that kind would destroy the union's legitimacy. A community of integration must be able to react, too, if one of its partners turns away from the community's common fundamental values and ideas. As a sanction, expulsion provides the necessary counterpart to unaffected state sovereignty.[40]

28. While secession by treaty is a legally straightforward solution, it is scarcely likely to be practicable, requiring as it does a unanimous agreement among member states. It is advisable, therefore, for the modalities of secession and expulsion (notice period, form, procedure, political basis, appeals procedure) to be regulated in the treaty of union. The right to leave the union should be guaranteed explicitly, and the competence to expel should be restricted to two instances: a frequent or continuous material breach of the treaty of union, and the departure of one member state from the community's shared values.[41]

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38 2-C.IV.

39 2-C.V.

40 2-C.VI.1/2.a/3.a.

41 2-C.VI.2.b/3.b.

29. The founding treaties of the European Union do not address these issues. The Union is stated to be valid "for an unlimited period" (arts. 51 TEU, 312 EC Treaty, 208 EURATOM Treaty), but this should be understood to mean, not "forever", but "for an indeterminate period of time". The treaties' silence does not offer grounds to infer that their signatories intended to preclude member states from leaving the Union. Instead, the treaties should be interpreted with reference to the general law of treaties. That law is applicable notwithstanding the issue of subsidiarity because the founding treaties make no provision regarding the issues at hand. Technically, secession is equivalent to denunciation of the founding treaty. Expulsion can only be realised as the collective exercise of a right to denounce the founding treaty between the remaining member states and the defaulting state. The Union has no competence to expel members: that competence would need to be explicitly provided for by treaty.[42]

30. The law of treaties offers several possible grounds on which a member state might leave a supranational union. A right of secession on the basis of a material breach of treaty by other member states (art. 60(2) lit. a of the Vienna Convention on the Law of Treaties) is unlikely to be of practical relevance, since member states have recourse only to those measures for which the treaty of union provides (art. 60(4) Vienna Convention, and, for the EU, arts. 292 EC Treaty, 193 EURATOM Treaty and 87 ECSC Treaty). It is possible, nonetheless, to imagine circumstances under which a state might make use of that right. If, for example, the other member states and the union's organs collectively committed fundamental violations of the treaty, then a dissenting member state might, after fruitless recourse to the prescribed remedies, make use of the right - for example, where the union's organs, with the other member states' approval, "compensated" a refusal to accede to new union competences by what was clearly a deliberately "over-generous" interpretation of existing competence provisions. A right of secession on the basis of a fundamental change of circumstances (art. 62 Vienna Convention) will normally fail on the basis that the purpose for which the supranational union was created was to enable a joint response to unforeseen developments like economic crises. If, however, the membership of the union changes unexpectedly (or if expected changes fail to occur) - for example, if a state with which a member state has a particularly close relationship secedes, or is refused membership in defiance of prior expectations -, then a right of secession on the basis of a fundamental change of circumstances may be present. - Generally, however, there will be no need for a state to have recourse to such extraordinary grounds: if the treaty of union does not explicitly restrict secession, a *free right of secession follows from the nature of the treaty as a treaty of integration (art. 56(1) lit. b Vienna Convention)*. The goal of a treaty of integration is not the short-sighted defence at any price of the level of integration which has been achieved. Rather, the goal is sustainable, long-term integration, and voluntary participation in every phase of the integration process is an indispensable prerequisite if that goal is to be reached.[43]

31. The expulsion of a member state is a measure of last resort. The law of treaties permits expulsion where a fundamental change in circumstances (art. 62 Vienna Convention) or a material breach of treaty (ibid., art. 60(2) lit. a) has occurred . It is only possible to conceive of a relevant fundamental change in circumstances (art. 62) where a member state *turns away from the shared values on which integration is to be based* - provided that those values have not been laid down in compulsory treaty pro-

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42 2-C.VI.2.b-c/3.b-c.

43 2-C.VI.2.c.aa-cc.

visions, as laid down for the European Union by art. 6(1) TEU; if so, it would be appropriate to apply art. 60(2) lit. a Vienna Convention. Expulsion is to be reckoned with, then, if a dictatorship is established in one of the member states of a free and democratic supranational union.

32. *Expulsion for material breach of treaty* requires that the breach be significant, although not necessarily extremely grave ("material breach", not "fundamental breach"). A material breach is given, in essence, where a member state fails to carry out a duty of membership, or is grossly negligent in fulfilling it. This is the case, for example, where a member state uses tactics tantamount to blackmail to block the work of the union's organs over a long period, or causes significant damage to the union's foreign affairs by illicit activities which run counter to the union's common foreign and defence policy, or where a member state fails to implement, execute or enforce significant parts of union law within its jurisdiction. As a penultimate step before expulsion, one further measure, which goes beyond the treaty itself, should be considered: the suspension of the treaty of union, which art. 60(2) lit. a Vienna Convention permits under conditions identical to those outlined here for expulsion.[44]

33. The *persistent refusal to implement or execute individual union acts of secondary law* is a special case. By refusing to take the necessary domestic measures even where the court of justice of the union has held that it must do so, a member state deliberately departs from the framework of the treaty of union and calls its own readiness to fulfil its duties of membership seriously into question. Even where a single directive or regulation is concerned, then, a breach of the treaty will be sufficiently grave to fulfil the requirements of art. 60(2) of the Vienna Convention. Since the judgment of the union's court is binding on member states, a state cannot justify its refusal to implement or execute union law by claiming that a particular provision is unlawful. Apart from the refusal to implement or carry out secondary union law, disregarding the judgment would have another, equally serious consequence: *contempt of the Union's jurisdiction*. The uniform validity and application of union law throughout the union is one of the fundamental pillars upon which the existence and efficiency of the union as a supranational governing entity and organisation of integration rests. Except for cases in which the limits of what domestic constitutional law permits to be transferred to the union have been exceeded, the duty to respect the union's jurisdiction ceases only where a decision is so obviously and so materially in error that it can only be regarded as arbitrary. The duty to respect and abide by the union's jurisdiction is valid across the board for all of the organs of a member state. If a domestic court - for example, a constitutional court - arrogates to itself the competence to act as a final instance for questions of union law, the other domestic organs will need to obviate the imminent danger of a material breach of treaty by taking the necessary legislative steps to neutralise the court's usurpatory decision. In such a case, even a constitutional amendment may be necessary. Aberrations or undesirable trends in the jurisprudence of the union's court should be corrected by amending the treaty of union to clarify the issues in question, and, if necessary, by including restrictive guidelines for future jurisprudence in that treaty.[45]

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44 2-C.VI.3.c.aa/bb.

45 2-C.VI.3.c.cc.

34. *D.* A *supranational union's public power* is no different from that possessed by a traditional supranational organisation. It is a public power which is exercised within a geo-regional jurisdiction that comprises the territory of several states. It is a single power, exercised by a single public authority under conditions which are identical everywhere in the union's territory. It follow, then, that it is an independent power, inhering in the supranational authority and existing in addition to the public power exercised by each member state. A supranational union's public power is subject only to those specific conditions for which its own legal order provides. It is not a "supra-state" power in any hierarchical sense. In contrast to the public power of a state, it is necessarily limited. Its existence, extent and basic direction are not autonomous. It is, however, exercised autonomously in each individual case. Even the member states can exercise control over the supranational public power only in their function as "masters of the treaties" ["Herren der Verträge"], which is to say collectively), by the lengthy procedures necessary for treaty amendments. As a new, additional power, the supranational union's public power is not in any real sense "derived". Yet, since others have created it, it cannot properly be termed "original", either. - Other constructions are conceivable, but they would not fall within the meaning of supranationality.[46]

35. Supranational public power evolves in a two-step process. First, a supranational public authority is created. The founding states act collectively, in their capacity as "masters of the treaties". No single state can create supranational public power, nor may it sustain or extinguish such a power. The second step in the process falls within the purview of domestic public law; its nature is such that each member state must complete the step by itself. Under the authority of existing public international law, in a global legal order which centres on the concept of sovereignty, state sovereignty is the source of all public power. No public power can exist, then, if it does not flow from a state's act of will. If supranational public power is to evolve, therefore, it requires not only the establishment of a supranational public authority, but a *national act which directly and generally vest all its measures with binding force at the domestic level* [innerstaatliche Bindungsanordnung] in at least two member states. This domestic legal act is part of national compliance with the founding treaty. It is a formative legal act [rechtsgestaltender Akt], from which putatively sovereign supranational acts first acquire the legal status of sovereign acts which are valid within the domestic jurisdiction of an individual member state. The "order to apply supranational law" ["Rechtsanwendungsbefehl"], to which reference is frequently made, is really only a complementary measure intended to ensure that the sovereign quality of supranational acts is respected in practice.[47]

Chapter 3: Homogeneity in the Supranational Union

36. *A.* The concept of homogeneity is the key to understanding how the supranational union, as an entity which is not a state yet resembles a state, and which has wide-ranging tasks but no actual instruments of power, can carry out its duties. The notion of homogeneity denotes a material similarity between member entities and the encompassing entity; there must be substantial coherence from the point of view of

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46 2-D.

47 2-D.II.

the whole. Homogeneity has long been one of the central concepts on which theories of federalism rest: it is necessary both in order to safeguard the collective integrity of the federal unit by precluding and limiting potential conflict and in order to ensure that a functioning vertical separation of powers is possible in practice. These rationales also seem necessary - if not, of course, to the same degree - in the context of those federal units which are governed by public international law.[48]

37. There are two respects in which the notion of homogeneity requires clarification. First, the homogeneity needed in a federal state or supranational union is homogeneity within a union (federal homogeneity), not the more stringent homogeneity of populace (national homogeneity [C. SCHMITT] or social homogeneity [HELLER]) of the kind frequently mentioned as a prerequisite for democracy. The latter form of homogeneity may become an issue for a democratic union, but this is is a question, not for the form of organisation, but for democratic theory. Secondly, homogeneity refers to resemblance, not to uniformity, to relatedness, not identity of character, and to similar, but not to identical conditions. Homogeneity is located on a *continuum between the heterogeneous and the uniform*, and needs to be distinguished from both extremes. A minimum, not a maximum requirement, homogeneity need not be "optimised", and the degree to which it must be present depends on a variety of factors. It is precisely this *relative nature of the homogeneity requirement* which guards against isolating or absolutist tendencies being read into the homogeneity principle. Thus, for example, states may be accepted into a supranational union even where an otherwise insufficient degree of homogeneity is present provided that the union's member states can muster the political will and willingness to deal with the concomitant difficulties.[49]

38. *B.* Since the reasons for requiring homogeneity (and hence also the requirements themselves) will vary, the question of homogeneity needs to be investigated anew for every form of organisation. Four reasons why homogeneity is essential and four criteria for homogeneity can be postulated for the supranational union. In all cases, there is a risk of destructive conflict if the requirements are not met.

39. First, homogeneity is a *prerequisite for the stability* of the union as a single, integrated area where citizens live and work together. The free flow of capital, goods and human beings must not be allowed to cause a serious crisis in a member state such as a slump, a monetary crisis, mass emigration or immigration or social tension. *Homogeneity of living conditions,* which is to say homogeneity in terms of civilisation, of economic conditions and of social conditions in all member states, is therefore essential. The European Union's enlargement to the east might pose grave problems in this respect. To secure homogeneity, a redistribution of funds from older to newer member states would need to accompany this step.[50]

40. Secondly, homogeneity is a *prerequisite for the union's ability to function* as a multipolar political system.[51] If friction is to be minimised and the union and its member states are to be able to act as a coherent whole, *homogeneity of behavioural norms and patterns of public authorities* will need to be demonstrated. As with

48 3-A.I.
49 3-A.II/III.
50 3-B.I.
51 3-B.II.

homogeneity of value systems (infra), the issue here is one of legal and constitutional homogeneity. In this context, however, more important than the letter of the law is the way in which legal norms are implemented and dealt with in practice, which is to say the general legal culture in the union and its member states.

41. Thirdly, homogeneity is a *prerequisite for integration*. If integration is to be successful, it will need to rest on a solid foundation of common fundamental values and ideas, as one of the purposes of the supranational union makes clear: being a larger and more powerful entity than the nation-state, the supranational union is intended to ensure that visions of the purpose and raison d'être of political community to which nation-states gave effect are also realised under the cirumstances of globalisation and geo-regionalisation. Naturally, this will only be possible where those visions actually correspond. Controversies regarding the general orientation of the union would otherwise be likely, too. A community as close as the supranational union would be unlikely to survive conflict of that kind.

42. *Homogeneity of value systems* [Homogenität der Wertordnungen] is given where the philosophical and political values and ideas which mould political systems in the member states and the supranational union are in fundamental accord. In determining whether sufficient homogeneity is in evidence, the first line of inquiry is not directed at the institutions and principles of constitutional or primary law formed by the domestic legal tradition, however. Rather, the focus is on the underlying, more abstract, basic concepts of political theory. These basic ideas need to be identical (or similar, at least), and they need to have been put into practice to a comparable extent in every member state. The focus must be on the values as lived in practice, not on the ideals as set down on paper; this is the practice of the Council of Europe, which, notwithstanding a shared commitment to human rights, does not rescind the membership of states which are frequently guilty of serious violations of human rights. Thus, despite its status as a member state of the Council of Europe, Turkey cannot be considered for membership of the European Union while current conditions prevail.[52]

43. Fourthly homogeneity is a *prerequisite for a union's individual charisma*, and is thus a prerequisite for the union's ability to secure not only rational allegiance, but also emotional loyalty. Citizens need to perceive the supranational union as "their" place to live, as "their" home [Heimat]. Being part of the union must be a part of citizens' identity: they must identify with the union without ceasing to identify with their own nation-state (multiple identification). Each supranational union must, therefore, evolve specific characteristics which make it seem interesting and attractive to its own citizens. Philosophical and political fundamental values and ideals will not suffice for that: since they are universal, they are realised elsewhere.What matters are, instead, cultural factors (in the widest sense) - and thus a *homogeneity of cultures* [Homogenität der Kulturen] within the supranational union.

44. Homogeneity of cultures implies compatibility of cultures. There must be a minimum fundamental correspondence which allows people who were raised in one culture to cope - and feel at home - in an area moulded by another. Moreover, a distinct cultural identity must be able to evolve for the union as a whole, without being forced; it must appeal to citizens of every member state. As a general rule, this degree of homogeneity will only be evident within the same civilisation [Kulturkreis], and

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52 3-B.III.

the membership of a state which falls outside the civilisation in question will only be possible in limited and exceptional cases.[53]

45. For the European Union, there is the question of the *limits of the enlargement to the east.* Turkey has declared its interest in membership. Yet, since Turkey belongs to the Islamic civilisation, any real interpenetration of national societies of the kind that integration would involve is bound to fail. The prospective membership of certain Eastern European states is not without difficulty, either. The Christian tradition which has exercised such influence on Europe has actually done so within two distinct civilisations, the Latin and Orthodox traditions. Differences between these two civilisations are still evident today, as the different development of post-communist Eastern European states shows. Thus far, the European Union - and its law - have been wholly anchored within Latin Christian civilisation, and there is no evidence of any evolution towards a union which embraces both European civilisations under the pan-European cultural umbrella, with all the consequences that would involve. As the Greek example makes clear, the European Union will remain within the Latin tradition - in other words, within the Western European tradition. If it expands to the east, its enlargement will be purely geographic, requiring member states rooted in the Orthodox Christian civilisation to adapt unilaterally to Western European values and practices, particularly in respect of western legal and administrative culture.[54]

46. *C. Homogeneity is secured* first and foremost by an enlargement policy which centres on the concept of homogeneity; there are, moreover, various instruments which might be incorporated in the treaty of union. Thus, for example, homogeneity of living conditions can be protected if the union's organs and member states are required to respect the needs of homogeneity in the policies they follow (cf. the European Community's cross-section policy under art. 159 sub-sect. 1 phrase 2 EC Treaty). As a more potent instrument, the treaty of union can prescribe a *policy for the active protection of homogeneity* (cf. art. 158 sub-sect.1 EC Treaty, whose goals, it should be noted, go beyond the minimum necessary to secure homogeneity) and provide for the necessary fiscal supply (cf. art. 159 sub-sect. 1 phrase 3 EC Treaty). A system of abstract, horizontal *fiscal equalisation* of the kind that is common in federal states is out of the question at the beginning of the process of integration, but, to a lesser extent, becomes relevant in the final years before the transition to a federal state. Finally, a financial or economic crisis in individual member states may make *emergency measures of assistance* on the part of the union appropriate in order to avert imminent disastrous ill-effects on social or economic homogeneity. Measures of this kind impose a considerable burden on other member states; that should be taken into account when new applications for membership are considered.[55]

47. Anchoring common fundamental values and ideas in a *homogeneity clause* in the treaty of union is the most important step that can be taken to secure homogeneity of value systems. A hard legal norm must be placed in a prominent place in the chapter of the treaty which deals with the union's foundations. A proclamation in the preamble would be inappropriate. The European supranational union's member states did not take the necessary steps until the Treaty of Amsterdam (sc. art. 6(1) TEU; for ear-

53 3-B.IV.1/2.

54 3-B.IV.3.b.

55 3-C.I/II.1.

lier measures whose ambit was restricted to democracy as a basic value, see art. F(1) TEU). To do justice to the plurality of legal orders which arise from the dual existence of member states and the union, only the basic concepts, as presented by political theory, should be incorporated into the treaty: it would be inappropriate to stipulate how they should be put into practice. A reference to basic legal principles, as designed in the same legal system, of the kind found in homogeneity clauses in the constitutions of federal states (e.g. art. 28(1) phrase 1 of the German Basic Law: "within the meaning of this Basic Law") may not, therefore, be included. - Further steps towards homogeneity would be a thorough implementation of common fundamental values and ideas in union law and *sanctions* against member states for serious violations, as arts. 7 TEU, 309 EC Treaty, 204 EURATOM Treaty, 96 ECSC Treaty now make possible for the European Union. The expulsion of a member state remains as a measure of last resort.[56]

Chapter 4: The Constitution of the Supranational Union

48. *A.* Parallels between a constitution and the European Communities' founding treaties were noted very early on, and the interpretation of those treaties was coloured accordingly. OPHÜLS stressed that the Communities' treaties contained a basic order, a closed system which governed Community law in the same way that a domestic constitution governs national law. With regard to the further steps towards integration set for the future, he spoke of "planning constitutions" ["Planungsverfassungen"]. Later, after several amendments had been made to the treaties, IPSEN referred to them as "changing constitutions" ["Wandelverfassungen"]. The 1980s saw an increasing tendency to characterise the treaties as constitutions, particularly in light of the fact that the material regulated by the treaties and the functions which they served were typically constitutional. That view certainly saw the treaties as having a normative constitutional character within the meaning generally understood by constitutional theory. Today, this view is supported by the overwhelming majority of commentators on European law. Moreover, initiatives taken by the European Parliament in 1984 and 1994 have triggered debate on whether a new constitution should be formally adopted.[57]

49. The European Court of Justice has consistently supported a constitutional interpretation of treaty law. Its jurisprudence echoed both strong parallels with those parts of domestic law which implement the principle of the rule of law and a preoccupation with the construction of a discrete jurisprudential system. In recent years, the 1986 Les Verts judgment and, in 1991, the Court's First Opinion on the European Economic Area Agreement have underlined (if not explained or justified) the Court's acquiescence in the constitutional interpretation of the founding treaties. The Federal Constitutional Court has referred to a "Community constitution" on several occasions. It has not used the phrase in any technical sense, however, nor has it expressed an opinion on how the treaties should properly be classified by constitutional theory. A constitutional interpretation of the treaties has been overwhelmingly rejected by commentators writing in the fields of national constitutional law and general state

56 3-C.II.2.

57 4-A.I.1.

theory (political theory [Allgemeine Staatslehre])[58], however, primarily with the justification, drawn from various standard concepts of the nature of a (domestic) constitution, that only a state can have a constitution. According to a second objection, only a European people comprising the European Union's citizens as a whole would be capable of issuing a European constitution, but the peoples of Europe have not yet coalesced to a point where they can properly be described as a "European people". More rarely, it is claimed that only a European nation could issue a European constitution. In the meantime, a *dispute* has broken out *over the constitution of the European Union*. It does not only concern concepts and definitions, but also the importance of national constitutional law on the one hand and primary Union law on the other. It is effectively a debate about the importance of state and union als political institutions.[59]

50. Europe already faces one unavoidable consequence of integration, which has lent the debate over a constitution for the European Union particular significance: since there are forces at play within member states which are not directly regulated by domestic constitutions, those constitutions function less effectively as a guiding framework than would otherwise be the case. Furthermore, the authority which domestic constitutions exercise over those subject to their jurisdiction has been intermittently interrupted by directives from another legal order which deviate from domestic constitutional norms. The *reduced significance of domestic constitutions* is particularly clear in the area of basic rights, but it is also evident in material constitutional principles, and it can even be detected in respect of special features of national constitutions which are not in and of themselves related to any of the Union's fields of activity. One of the purposes of a constitution is integration, and integration is a function which has been particularly significant for constitutional states in the second half of the twentieth century. Yet the reduced significance of domestic constitutions reduces their ability to perform that integrative function. If the political system of which the Union is a part is to be able to ensure what, in the member states, was once a given, the functional deficiencies which are becoming evident in domestic constitutions will need to be balanced by a counterpart at the Union level. The question of a new constitution is particularly relevant in this context, since the European Union's current treaties fail to meet the standard required.[60]

51. *B. (I.)* The central issue in the discussion about a European constitution is whether the present European governing entity is capable of having a constitution at all in its current form - whether, that is, it meets the requirements for *constitutional capacity [Verfassungsfähigkeit]* established by constitutional theory. Since the constitution was conceived and realised as a distinct, legal institution in the era of nation-states, it is traditionally linked to the state as a form of organisation. Constitutional theory was developed within the context of the nation-state; the historical adoptions of constitutions which served as points of reference for constitutional theory all occurred in states. Nowadays, the supranational union offers a form of organisation based on public international law which resembles a state, but it is not clear whether that resemblance alone is enough to justify applying the concept of a constitution. Like a state, a union needs a securely anchored framework, that allows but delimits

58 The term is glossed above, no. 7, footnote 8.

59 4-A.I.2/3.

60 4-A.II/III.

development, giving, in effect, the basic security which characterises the constitutional state. Yet a union constitution would lag behind a state constitution both in terms of its legitimacy (since it cannot be traced to a state people) and its normative effect (since it would only be a complementary constitution, and since its norms would not enjoy primacy over member states' domestic law within the meaning of a hierarchy of norms).[61]

52. Every conceivable solution to the problem of constitutional capacity brings fresh problems in its wake. Accepting the possibility of a union constitution places the "constitution", used as a term of art, in danger of dilution, and thus places the concept of a constitution in danger of progressive devaluation. Ruling out the possibility of a union constitution would mean, depending on the way in which the member states, in their capacity as "masters of the treaties", responded to the situation, (i) temporary stagnation in the pace of integration, followed by a trend towards centralism; or (ii) a premature and insufficiently prepared transition to a geo-regional unification state; or (iii) a gradual emasculation of the primacy of the constitution through ever-larger "constitution-free zones"; or (iv) an increase in the supranational union's complexity as a result of the introduction of a legal institution which resembles a constitution but whose potential consequences would be difficult to predict in advance. Constitutional theory stands at a crossroads, and choosing its future path is not a simple matter. The choice can be described as a *constitutional dilemma of supranational integration*.[62]

53. The *cautious inclusion of certain non-state forms of organisation in constitutional theory* is suggested here as a solution to the constitutional dilemma described above. It is necessary to distinguish between the usual forms of non-state organisation (which, for several reasons, are incapable of a constitution) and those forms where a pronounced similarity to a state justifies the adoption of the concept of a constitution, concomitant difficulties notwithstanding. This solution makes it possible to pursue constitutional theory's central preoccupation (providing for a reliable, basic political order and for the moderation, and general orientation, of public power) even in the era of less significant, integrated statehood, without modifying its core postulate (the basic idea that any holder of power in a political community should be subject to higher law). This solution is thus a continuation of constitutional theory, not a falsification of its tenets. It permits the subjection of public power to higher law to the greatest possible extent, even in the face of globalisation and geo-regionalisation. Moreover, it recognises the need for a multicultural organisation of integration to gather pre-state constitutional experience which could provide the basis for the drafting of a state constitution at a later date. It avoids the negative consequences which would arise if integration were pursued in the absence of a constitution, but it does not fail to heed the danger of relaxing the tenets of constitutional theory. It is the least disadvantageous solution to the constitutional dilemma.[63]

54. From a dogmatic point of view, non-state organisations can be included in constitutional theory by distinguishing between *different types of constitution* [Verfassungstypen] within a more broadly defined concept of constitution. On the basis of the form of organisation in question, three types of constitution need to be distinguished thus far: the (sovereign) state constitution, the federated state

61 4-B.I.1.

62 4-B.I.2.

63 4-B.I.3.a/b.

constitution, as common in federations, and - potentially - the union constitution. While the essential tenets of constitutional theory apply to each of these kinds of constitution, other constitutional precepts are valid only for a particular sort, and require considerable adaptation before they can be applied - if, indeed, they can be applied at all - to other constitutional types. Including organisations which resemble states within constitutional theory does not imply, then, that any conceivable union constitution would be equivalent to the constitution of a state.[64]

55. Constitutional theory has seen no debate as yet over the *conceptual preconditions for constitutional capacity*, since the concept of constitutional capacity has not yet been introduced. Thus, constitutional theory is only able to address the general meaning and purpose of a constitution, and to examine those qualities of a state which are most significant from that point of view. As indicated above, the central preoccupation and core postulate of constitutional theory must dominate any such investigation. The first requirement is an organisation (in other words, a corporate body). A constitution is restricted to one specific organisation in any case [Verbandsspezifität], although that organisation can be a composite, encompassing others. It is not, then, possible to speak of a "European Constitution" which is related to a specific territory, or which unites the legally independent European organisations of the EU, the Council of Europe and the OSCE within a single constitutional order. Since a constitution is only relevant to highly developed organisations which carry political weight, further conceptual preconditions are a high degree of organisation and far-reaching competences. The organisation must, further, reflect a (general) political union: the institution of the constitution has been designed to establish the legal order of human political communities, not to serve as a steering mechanism for specialised organisations. The organisation must also enjoy significant *autonomy in fulfilling the tasks assigned to it*, since the institution of the constitution is designed to allow independent power structures to hold themselves in check, not to enable the supervision of functionaries who merely receive and carry out instructions. This means that organisations based on international law will need to develop an *autonomous political will*, independent of the individual political wills of member states and their governments. A significant proportion of important decisions must, therefore, fall to the organisation's unitary organs or be subject to the majority principle. Thus, if the 1966 Luxembourg Compromise were understood as legally binding, it would be impossible to recognise the European Communities' constitutional capacity until the late 1980s. Finally, since a constitution is also a fundamental legal document which guarantees individual citizens the support and protection of the community, constitutional capacity requires that an organisation draw upon a close community of responsibility and solidarity which resembles the community of common destiny ["Schicksalsgemeinschaft"] evident in the state. - As a general rule, the supranational union fulfils these requirements. In individual cases, however, constitutional capacity may be denied because the founding treaty gives member states' governments such far-reaching control that reference to the autonomous fulfilment of duties becomes inappropriate.[65]

56. *(II.)* Value judgments play as significant a role in defining the *conceptual preconditions for a constitution* as they do in establishing the preconditions for constitutional capacity, or, indeed, in resolving many other constitutional questions. Stringently accurate statements are impossible, since the issues involved cannot be re-

64 4-B.I.3.c.

65 4-B.I.3.d.

solved by logic alone. According to the theory proposed here, it must be possible to identify the characteristics on which the effectiveness of the *constitution as a legal institution* depends. These characteristics are predominantly formal, but it is possible to identify certain material characteristics among them. Since a wholly formal (or wholly material) constitution cannot exist, a great deal of what has been termed a "constitution" in European constitutional debate is not really a constitution within the terms of constitutional theory at all.

57. There are only five formal requirements for a union constitution. First, it must be possible to identify a set of norms enacted by a single, general normative act: the constitution may not develop gradually or emerge as the product of judge-made law. Secondly, the constitution must exist in written form. It must, thirdly, have the status of superior law; a union constitution, therefore, can only be a constitutional treaty. Fourthly, specific procedures must be established for constitutional amendment. Fifthly, the constitution must self-identify as a constitution. A union constitution has four material preconditions. First, the union must be equipped with organs and organisational law. Secondly, the relationship between the union and its member states must be regulated exhaustively. This may include provisions foreseeing sanctions for a crisis situation where a member state breaks out of the constitutional framework. Thirdly, the appropriate organisational steps must have been taken to provide for the requirements necessary at union level for the creation of supranational public power. Finally, the union's philosophical and political compass must be clear.[66]

58. *(III.)* In a supranational union, the *creation of a constitution* poses a particular problem. For one thing, the constituent authority (the creator of the constitution and holder of constituent power [Verfassunggeber]) is to be determined quite differently from the way it would be determined in a state. As a general rule, the institution of the constitution is not restricted to a particular circle of users: whoever succeeds in establishing and enforcing a set of norms which enjoy the authority of a constitution (in the normative sense) is the constituent authority. Where the state is concerned, our value system points to the people as the appropriate holder of constituent power, but a constitution can, in fact, be established by anyone in power. In the supranational union, by contrast, *constituent power* is *reserved to the member states*: as the superior source of law in a constitutional organisation which is itself based on public international law, the constitution must be contained in the founding treaty, which has to be designed as a constitutional treaty [Verfassungsvertrag]. According to public international law, only states are invested with the legal power to create such treaties. States may opt to include others in the treaty-making process, but the act of adopting a constitution - the conclusion of the treaty, which is the act giving rise to constitutional norms - is theirs, and theirs alone. Popular constituent power within the meaning of that term in democratic constitutional theory does not and cannot exist in a constitutional organisation which is itself based on international law.[67]

59. None of this should be understood to mean that there is no place for popular participation in the process of adopting a constitution. From the perspective of democratic constitutional theory, the legitimacy of the union's constitution needs to approximate that of a constitution based on popular constituent power as closely as possible. In addition, from the point of view of political theory, the union constitution

66 4-B.II.

67 4-B.III.1.

must have a significant power of integration, since it needs to complement the weakened integrative power of member states' constitutions effectively (supra). It would be useful, in light of these criteria, to adopt a parallel procedure in which the conclusion of the treaty is accompanied by specific measures which ensure legitimacy and integrative power. One step of that parallel procedure would be a *double referendum* in which citizens are asked both for their approval of the union constitution in their capacity as citizens of the union and, in their capacity as citizens of a member state, whether that state should ratify the constitutional treaty. From the point of view of democratic theory, the referendum's participants are acting as members of two peoples: the national people of the state [Staatsvolk] and the *people of the union* [Unionsvolk] which, while it is not a people of a state, is nonetheless a general political community, and therefore fully able to secure its governing entity democratic legitimacy. In another step, a *preparatory constitutional assembly* must be called into being. Its work must be accompanied and supported by a broad public discussion. *Supportive measures* must be taken *to ensure that a public constitutional discussion is held throughout the union.* In light of these steps, a preparatory treaty is advisable to deal with the modalities of the adoption of a constitution.[68]

60. *Constitutional amendments* represent a further specific problem. At first glance, the distinction between constituent power and amending power seems to pose difficulties for a supranational union. International treaties like a constitutional treaty of union are usually altered by their signatories (the member states) in the same way that they were concluded, and they may generally be amended as the signatories see fit. But the law of treaties does envisage other procedures by which treaties may be changed (sc. art. 40(1) Vienna Convention) - amendment by a qualified majority of signatories, for example, or an autonomous amendment to the treaty provisions by the union's organs. In this context, the distinction between constituent and amending power is free of difficulty, since the power to amend the treaty is restricted, and derives from the treaty itself. Three different procedures for constitutional amendment are suggested here. They vary according to the magnitude of change envisaged, but each of them foresees the participation of the people of the union or its representatives. According to this suggestion, insignificant amendments could be made without member states' unanimous consent.

61. Since the member states are "masters of the treaty", they can ignore the provisions made in the constitutional treaty regarding the amendment procedure. Equally, they can ignore the (written and unwritten) limits to constitutional amendment. By virtue of their sovereignty, member states enjoy the power to conclude treaties, and that power is not limited where a union's founding treaty has been designed as a constitutional treaty. A treaty of amendment set outside the framework of the constitutional treaty would, therefore, be valid at public international law. Nonetheless, it would imply a complete break with the old constitutional order, and hence also at least a tacit repeal of the constitution, or, indeed, the adoption of a new constitution. The democratic legitimacy obtained from the lengthy parallel procedure for the old constitution (for the treaty of union qua constitutional treaty, in other words) would thereby be lost.[69]

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68 4-B.III.2.

69 4-B.III.3.

62. *C. The European Union's founding treaties do not have constitutional status*, even though they would easily fulfil most of the requirements for a constitution. Until the penalty payment mechanism was introduced (art. 171(2) [today 228(2)] EC Treaty, 143(2) EURATOM Treaty), no sanctions were in place with which member states who were committing grave breaches of treaty could be compelled to return to the conventional constitutional order. The lack of sanctions left unanswered questions which were integral to the proper functioning of the community as a whole. Nor, until the Amsterdam reforms, were the Union's fundamental values and ideas encapsulated in written form (cf. now art. 6(1) TEU). Only one necessary characteristic of a constitution is still absent today: nowhere do the Union's founding documents acknowledge their own constitutional character. The effect of *self-identifying as a constitution* in this way should not be underestimated: it reflects member states' readiness to accept a constitution for their organisation of integration, and hence to accept the increased political import which would accrue to the organisation once such a step had been taken. Thus far, that readiness has been lacking.[70]

63. *D.* One of the greatest challenges of the current decade will be the creation of a European Union constitution. It is timely, then, to establish *criteria for the constitution of a supranational union.*

64. *(I.)* A general constitutional theory of the supranational union will focus on conceptual and drafting requirements. A union's constitution will need to fulfil the same functions as the constitution of a state (except those functions which are directly linked to the status of the constituted entity as a state). It must also provide a framework within which the union's own dynamic nature can evolve, reconciling continuity with change while respecting its own nature as an international treaty subject to public international law. All of this needs to be accomplished in several languages simultaneously: the treaty's versions must, as nearly as possible, be identical, while remaining clear and comprehensible. This is more than would be required of a state constitution. The emphasis should thus be, not on adopting a constitution as quickly as possible, but on ensuring that the constitution which is eventually adopted has been thoroughly thought through.

65. *Transparency* is an important criterion. A supranational union is necessarily a complicated affair, but its constitution should not be permitted to complicate matters further. There should only be a single, readily comprehensible constitutional document for a single governing entity with a single legal personality and a coherent comprehensible set of organs. Provision should be made for a limited number of structurally simple decision-making procedures; if necessary, a certain degree of efficiency may need to be sacrificed to that goal. Since supranational unions are dynamic, a union constitution is a "changing constitution" [Wandelverfassung] which must be more frequently adapted to changing problems and perspectives than the constitution of a state. Its design should thus follow a technical concept which facilitates alterations. A union constitution should have a *consistent modular structure* in which regulations of similar or related issues are concentrated in closed sets of norms as far as practicable. It would be useful, for example, to concentrate important procedural norms in a single module.

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70 4-C.

66. It is important, too, that the constitution be *comprehensible*. Constitutions, whether national or supranational, are not the domain of specialists. Rather, they speak to *all* jurists, who will need to respect constitutional norms in creating, applying and elaborating other law, and they also speak to the citizens within their area of application. The structure of the union constitution and its provisions should thus be as straightforward as possible. Like national constitutions, a union constitution should make generous use of open norms, refraining as far as possible from bureaucratic details. The *linguistic style* employed in the constitution *should invite its addressees to identify* with it: a constitution is not just a body of regulations, but a political manifesto whose content should invite individuals to identify with the community.

67. In their current form, the European Union's founding treaties fall so far short of these requirements that transforming and collating them into a constitutional treaty without far-reaching reform seems a questionable goal. If a European constitution were adopted, a significant part of the Union's primary law would need to be reformulated. Part three of the EC Treaty, which regulates the coummunity policies, does, however, give partial effect to the criterion that the constitution of a supranational union should have a modular structure.[71]

68. From the point of view of a general constitutional theory for the supranational union, requirements governing the subject-matter of a constitution also obtain. The first of these is the requirement, discussed above, for a homogeneity clause. Certain *fundamental matters must also be regulated* (for example the question of the union's legal personality, basic duties of membership, the issue of mutual loyalty within the union and the basics of the allocation of competences). But the union's constitution should also address fundamental matters in the strict sense: it should contain those legal norms which are a sine qua non if the union is to be able to function as a supranational organisation of integration. The European Communities and the European Union have had to resolve most of these issues incrementally on the basis of judge-made law. A constitution would need, therefore, to address the direct validity of union law at the domestic level, the independence of the national and supranational legal orders and the primacy of union law. It would also need to contain measures with which union law could, if necessary, be enforced: it would need to include *sanctions*. These could certainly go beyond those already in place in the European Union. Further, the constitution should contain *preventive measures with which union law could be enforced on a day-to-day basis*. For example, the constitution might provide for the direct application of union directives once a certain period has elapsed, or for strict state liability by union law. Finally, the constitution of a supranational union must also regulate the accession, secession and expulsion of member states, establishing substantive and procedural norms. - By contrast, the dynamic nature of the union makes it impracticable to establish general criteria for the system of competences. Drafting competence norms requires care in order to ensure that they are not subjected to overly generous interpretation. The principle of subsidiarity is essentially useful as a principle of political theory in order to allocate and distribute competences.[72]

69. *(II.)* Special requirements for the constitution of a free and democratic supranational union are considered here only in overview, with attention given to general

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71 4-D.I.1.

72 4-D.I.2.

approaches and certain particular aspects. If organisational union law is to be able to give effect to the principle of democracy at the union level, it will need to ensure that democratic legitimacy is accomplished first and foremost through the people of the union and that people's representatives, while the additional, more distant and thus lesser legitimacy deriving from the peoples of member states and their representative parliaments is merely complementary (*primacy of democratic legitimacy through the people of the union*). As integration progresses, the political centre will eventually need to shift from the council, which is a federal organ, to the union's parliament, and, to some extent, to other organs of the union which are elected (or at least indirectly legitimated) by the people of the union. From the perspective of democratic theory, however, the additional legitimacy provided by state peoples through their governments in the council makes a relatively long transition period acceptable, with the proviso that significant measures cannot be taken during this period without the consent of the union's parliament. Since the union's parliament must be suitable for that task, the European Parliament will need to be altered so that it no longer comprises representatives "of the peoples of the States brought together in the Community" (art. 189 EC Treaty, 107 EURATOM Treaty, 20 ECSC Treaty), but "of the people of the Union". Furthermore, the *unequal allocation of seats to the member states* - unequal because it is disproportional to the populations of the member states - *must be reduced* as progress is made towards integration.[73]

70. In order to implement the fundamental value of human rights / human dignity, the union's constitution must guarantee basic rights and ensure their effective protection. The constitution will thus need a *comprehensive article addressing basic rights*. That article should not merely content itself with ensuring that the appropriate legal mechanisms are in place: its wording should also invite those who read it to identify with the union, as the constitution's integrative function requires. By contrast, an elaborate *catalogue of basic rights* will only be appropriate if it is the result of an intensive process of exploration and consolidation of the union's identity, widely and actively supported by the public. The White Papers produced by the Convention instituted by the European Council should not, therefore, automatically result in the enactment of a catalogue of basic rights. Rather, they should serve as the basis for a European discussion of basic rights. The practice of signing international conventions on human rights is not called into question, however, since it provides additional protection for human rights. In particular, it is no less appropriate for the European Union to ratify the *European Convention on Human Rights in complement* to its own basic rights system than it is for its member states to do so.

71. To ensure that the rule of law governs the application of competence norms, the constitution of a free and democratic supranational union should not contain subsidiary supplementary competence norms which follow the example of arts. 235 (now art. 308) EC Treaty, 203 EURATOM Treaty, 95 ECSC Treaty. If norms of that kind are included, they should, at the very least, be tied to restrictive material and formal criteria, so that their effect is mitigated by the rule of law. It would also be worth considering introducing an *extraordinary right of appeal for member states in questions of competence*, according to which the Court of Justice would be required to re-hear a competence question in a special procedure, sitting with an extended bench (with judges drawn from member states' supreme or constitutional courts, for example). Implementing the ideal of the social state as a fundamental value of the union will

73 4-D.II.2.a.

require that the constitution contain either a general principle of social justice and welfare or social basic rights, in order to counterbalance the effect of those structural principles of economic policy and those basic rights and freedoms which are directed towards free economic activity. Appropriate competences and financing instruments must also be provided for. However, social pressure is a significant element of the defence of social justice and welfare in supranational union and state alike. A supranational union's constitution can play only a supporting role - for example, by emphasising the socio-political role played by unionwide interest groups like trade unions, employers' federations, professional groups, etc, in the way that Art. 191 EC Treaty already does for political parties. [74]

72. In the following work, a picture of a new form of organisation emerges. It is a complicated and unusual form of organisation. Again and again, it demands a high degree of intellectual effort from anyone trying to come to grips with it. Yet Europeans wanted the strength of a geo-regional community in response to the challenges of geo-regionalisation and globalisation, but refused to question their fundamental values or forfeit national idiosyncrasies. They have found a solution which largely achieves the former without sacrificing the latter**,** opening the prospect of a gentle transition to a federal European state. The corollorary is, however, that politics, practice and scholarship will need to keep rising to the challenges posed by the exigencies of transfer and innovation, breaking up, adapting and extending traditional, closed conceptions of legal science and political theory. But how could anyone expect such a solution to be easy?

(Dr. Thomas Schmitz, Göttingen, 02/2001)

74 4-D.II.2.b-d.