
ARTICLES

Treaties Establishing the European Communities and the European Union – a European Constitution?

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1. Introduction

Even though the question of a European Constitution has been discussed ever since the establishment of the European Union, it has gained particular importance in parallel with European enlargement. In December 2000 in Nice, the European Council adopted the Declaration on the Future of Europe which initiated the process of reform of the EU to be accomplished by the Conference in 2004. This process provided to draft the European Convention by a special Convent, which was completed in July 2003. The present contribution aims at answering the question whether the non-existence of a single document named "Constitution" does not allow other existing documents, namely the treaties establishing the European Communities and European Union, to be considered as a Constitution.

In the Treaty of Amsterdam the Member States agreed to take further steps to advance European integration for ending the division of the European continent and create a firm bases for the future Europe.¹

Member States are ready to be integrated into a closer union. For this reason it is often said that the European Union is a step towards creating a United States of Europe.² The EU is not just an economic union of independent states. Rather it aims at creating an entity in which member states will draw back by one step and lose their own independence.³

The question of a European Constitution has risen in connection with the above mentioned problem of development and increasing integration of the EU.

In general, the concept of a constitution means a basic order of any arrangement, with a set of provisions defining the basic order of states⁴. According to classical doctrines, the existence of a state is the precondition for a constitution. The constitution must establish

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¹ Preamble of the EU Treaty.

² *Kirchhof, Paul*, Der deutsche Staat im Prozess der europaischen Integration, in: *Isensee, Josef/Kirchhof, Paul*, HdbStR VII, § 183, Rn. 4.

³ *Kirchhof, Paul*, Der deutsche Staat im Prozess der europaischen Integration, in: *Isensee, Josef/Kirchhof, Paul*, HdbStR VII, § 183, Rn.7.

⁴ *Hesse, Konrad*, Grundzuege des Verfassungsrechts der Bundesrepublik Deutschland, 20. Aufl., Heidelberg, 1995, § 1, Rn. 17.

the structure of already existing power and order in the form of text.⁵ There is no constitution as a legal category without a state. The latter is the subject and at the same time the precondition of a constitution.⁶ The state creates a constitution whereas the constitution is the key determinant of a state.⁷

However the concept of a constitution is differently defined in each Member State. For example, Great Britain does not have a written constitution as such, whereas the German Constitution is quite voluminous and comprehensive. This shows that the question of when to formally discuss the issue of existence of a constitution and whether a particular document is necessary for it is still open. However there is no single understanding of the scope of a constitution i.e. the material meaning of constitution. Not everyone defines the concept of constitution identically.⁸

Discussion about the European Constitution clearly shows that basically two different views dominate. According to the first concept the constitution should be applied only to states and not the European Communities, because constitutions are the legal basis of states. As for interstate entities such as, for example, the European Communities, their legal basis is the international treaties.⁹

In the second case a constitution applies to the treaties establishing international organisations¹⁰ since these treaties pave the way for the creation of a new subject of international law and they contain provisions about the structure of these organisations and the rights to adopt new legal acts.

As for the European Community as a supranational organisation, none of the above interpretations of the concept of constitution suit it. It is neither a state nor an "ordinary" international organisation. It is a supranational organisation. Due to the peculiarities of its legal nature the European Community does not fall within any concept.

Consequently, when establishing the concept of a European Constitution account should be taken of the peculiarities of the legal nature of the European Community. Its wording should comply with the special status of this organisation. Certainly such a constitution

⁵ *Kirchhof, Paul*, Handbuch des Staatsrechts, Band I – Grundlagen von Staat und Verfassung, Heidelberg, 1987, § 19, Rn. 18.

⁶ *Isensee, Josef*, Staat und Verfassung, in: *Isensee, Josef/Kirchhof, Paul*, Handbuch des Staatsrechts, Band I – Grundlagen von Staat und Verfassung, Heidelberg, 1987, § 13, Rn. 1.

⁷ *Isensee, Josef*, Staat und Verfassung, in: *Isensee, Josef/Kirchhof, Paul*, Handbuch des Staatsrechts, Band I – Grundlagen von Staat und Verfassung, Heidelberg, 1987, § 13, Rn. 3.

⁸ *Bieber, Roland/Schwarze, Jürgen*, Verfassungsentwicklung in der Europäischen Gemeinschaft, Mit einem Text des Vertragsentwurfs des Europäischen Parlaments zur Gründung einer Europäischen Union, 1. Aufl., Baden-Baden, 1984, 15.

⁹ *Grimm, Dieter*, Braucht Europa eine Verfassung?, in: JZ 1995, 581; *Nowak, Carsten*, Welche Verfassung für Europa?, DVBl. 2000, 326.

¹⁰ *Seidl-Hohenveldern, Ignaz/Loibl, Gerhard*, Das Recht der internationalen Organisationen einschließlich der supranationalen Organisationen, 6. Aufl., Köln/Berlin/Bonn/München 1996, Rn. 1501; see also: *Pernice, Ingolf*, Eine Grundrechte-Charta für die Europäische Union, DVBl. 2000, 847.

will not be similar to a state's constitution or regular international organisation's constitution. Thus, the establishment of the concept of constitution suitable for the supranational organisation is crucial.

A constitution does not need to be complete or perfect in terms of its provisions. However it should generally define what is important and needs regulation.¹¹ For example, state constitutions contain sets of provisions concerning the creation and scope of supreme authorities, the legal status of highly important state institutions and citizens in the state.¹² It should also provide the key provisions of legislative and executive activity and guarantees of certain values;¹³ On the other hand, treaties establishing international organisations provide similar provisions. There too can be found the provisions on the creation, powers and principles of the bodies. However, the bodies are not as many and comprehensive as states but at least such provisions are provided. In addition could be envisaged the basic provisions on lawmaking and implementation mechanisms, dispute settlement and procedures applicable thereto. For example, Articles 1 and 2 of the Charter of the United Nations define the purposes and principles of the UN. Article 7 of the Charter establishes the principal organs of the UN and if found necessary subsidiary organs. In addition the functions and powers of organs are regulated: for the General Assembly under Articles 10-17 of the Charter, for the Security Council under Articles 24-26 of the Charter, for the Economic and Social Council under Articles 62-66 of the Charter, for Trusteeship Council under Articles 87-88 of the Charter, for the International Court of Justice under Article 92 and for Secretariat under Article 98 of the Charter. International Court of Justice is the dispute settlement body. The organs make decisions and recommendations and insure their enforcement to a certain extent (Article 42 of the UN Charter). It is clear that the above mentioned general definition of a constitution, applied basically to states, fits with the charters and founding treaties (in this case treaties establishing the EU and the EC) of international organisations too.

However it is still questionable whether the existing provisions are enough for calling the set of these provisions a constitution.

2. Founding Treaties as Constitution

To call the treaties establishing the European Communities a constitution the concept of constitution should be applicable to founding treaties. Usually, it is applied to states. Its application to the European Communities is arguable.

¹¹ *Hesse, Konrad*, Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland, 20. Aufl., Heidelberg, 1995, § 1, Rn. 19, 21.

¹² *Köbler, Gerhard*, Juristisches Wörterbuch: fuer Studium und Ausbildung, 5. Auflage, 1991, 374.

¹³ *Bieber, Roland*, Verfassungsentwicklung und Verfassungsgebung in der Europäischen Gemeinschaft, in: *Wildenmann, Rudolf* (Hrsg.), Staatswerdung Europas? Optionen für eine Europäische Union, Baden-Baden, 1991, 393.

The argument is that the EC does not have the quality of statehood yet and international treaties concluded between the Member states are the documents establishing the Communities.¹⁴

This represents the situation where the concept of a constitution is associated with a state. Besides, there is an argument according to which it is believed that according to constitutional law, the application of concept of constitution to the *acquis* of a supranational community would be reasonable only if there was an aim pursued towards transforming the EU into one state.¹⁵ Thus, since this aim can not be achieved soon it would be wrong to use the concept “Union’s Constitution” for it causes disappointment to such expectations.¹⁶

Such a narrow interpretation of the concept of constitution is not proper. The European Court called the treaty establishing the European Economic Community (today – the EC Treaty) as community’s “constitutional document”¹⁷ and thus used the concept of constitution in relation with a supranational organisation. Since a constitution, being a legal order of some arrangement (entity), is not limited to the regulation of state life, it could also serve as grounds for non-state life.¹⁸

Moreover it should be mentioned that for the discussion it does not matter to use other term e.g. “basic statute”¹⁹ instead of “constitution”.

The concept of constitution may also be used in connection with the European Communities. Even on a national judicial level there is an opinion that the European Communities already have a Constitution, namely the founding treaty.²⁰ For example, the Constitutional Court of the Federal Republic of Germany considered the treaty establishing the European Economic Community as “the Community’s Constitution to a certain extent”²¹ and contended that although the Community is neither a state nor a federation, it is still a union, “interstate body” of a special nature being in the process of increasing integration to whom the member states should transfer certain instruments of supreme authority.

¹⁴ *Bieber, Roland*, Verfassungsentwicklung und Verfassungsgebung in der Europäischen Gemeinschaft, in: *Wildenmann, Rudolf* (Hrsg.), Staatswerdung Europas? Optionen für eine Europäische Union, Baden-Baden, 1991, 393.

¹⁵ *Isensee, Josef/Kirchhof, Paul*, Handbuch des Staatsrechts, Band I – Grundlagen von Staat und Verfassung, Heidelberg 1987, 591, Rn. 9ff.; *König, Christian*, Anmerkungen zur Grundordnung der Europäischen Union und ihrem fehlenden Verfassungsbedarf, in: NVwZ 1996, 559.

¹⁶ *Grimm, Dieter*, Braucht Europa eine Verfassung? in: JZ 1995, 581.

¹⁷ EuGHE, Rs. C-1/91, I-6079 (6102), Rs. 294/83, Slg. 1986, 1339, 1365.

¹⁸ *Hesse, Konrad*, Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland, 20. Aufl., Heidelberg 1995, § 1, Rn.18; *Hirsch, Günter*, EG: Kein Staat, aber eine Verfassung?, NJW 2000, 46; Foundation of the International Labour Organisation, which of course does not pretend to be a state, in 1919 by the adoption of the “Constitution” is a good example of this.

¹⁹ *König, Christian*, Ist die Europäische Union verfassungsfähig?, in: DÖV 1998, 268.

²⁰ *Iglesias, Gil Carlos*, Zur “Verfassung” der Europäischen Verfassung, in: EuGRZ 1996, 125; *Bieber, Roland/Schwarze, Jürgen*, Verfassungsentwicklung in der Europäischen Gemeinschaft, Mit einem Text des Vertragsentwurfs des Europäischen Parlaments zur Gründung einer Europäischen Union, Baden-Baden, 1984, 19.

²¹ BVerfGE 22, 293, 296.

The concept of constitution is also a sign of the fact that the European Community has to a certain extent reached the criteria of a federal state.²²

The founding treaties have some similarities with the constitutional system of the German Reich after 1871. The German Reich used to be considered as a union of states.²³ For instance, the Bundesrat used to be a governmental body uniting allied governments just as the EU Council represents the Member States governments. The Reichstag played the role of a body between the sovereignty of allied governments and the functions of representatives of people.²⁴ The role of the European Parliament should be looked for between the sovereignty of Member States and the Community's Representatives.

Whether the founding treaties are a European constitution or whether they create just grounds for the development of such constitution, and whether the Treaty of Amsterdam is one of the stages of development, depends on how the "European Constitution" is defined and what it consists of.

3. Concept of Constitution

Two different opinions about a European Constitution are observed in the literature. The first conception compares the development of a European constitution with some models of state constitutions and thus assesses how big the similarity is. The concept of constitution which is applied to ordinary states is explored at a European level.²⁵ Under the second conception the application of the standards of state structures should be rejected because the original nature of the Community requires the development of its criteria of assessment.²⁶

Arguments can be made against both models. For example the first model ignores the fact that states are most widespread but are not the only form of aggregation of political power and that states are not the only scope of political, social and economic organisation of people's cohabitation in a particular situation.²⁷ Besides, when applying a similar model, the constitutions of the Community and states should be compared either on the basis of one of the state's constitution (it is unclear namely whose) or the constitutions of all Member States should be compared with the Community's constitution. However, since the constitutions of Member States are significantly different, this method involves quite a number of complications.

²² *Bleckmann, Albert*, Anmerkungen zum EuGH-Gutachten 1/92, in: JZ 1992, 790, 793.

²³ *Oeter, Stefan*, Souveränität und Demokratie als Probleme in der "Verfassungsentwicklung" der Europäischen Union, in: ZaöRV 1995 (55), 659, 679.

²⁴ *Oeter, Stefan*, Souveränität und Demokratie als Probleme in der "Verfassungsentwicklung" der Europäischen Union, in: ZaöRV 1995 (55), 659, 681.

²⁵ *Heintzen, Markus*, Gemeineuropäisches Verfassungsrecht in der Europäischen Union, in: EuR 1997, 1 (2).

²⁶ *Bieber, Roland*, Verfassungsentwicklung und Verfassungsgebung in der Europäischen Gemeinschaft, in: *Wildenmann, Rudolf* (Hrsg.), Staatswerdung Europas? Optionen für eine Europäische Union, Baden-Baden 1991, 393, 395.

²⁷ *Bieber, Roland*, Verfassungsentwicklung und Verfassungsgebung in der Europäischen Gemeinschaft, in: *Wildenmann, Rudolf* (Hrsg.), Staatswerdung Europas? Optionen für eine Europäische Union, Baden-Baden, 1991, 393, 396.

With the second model, the recognition of new scopes of European constitution will remain limited if the term "Constitution" is applied because this concept is linked with specific scopes in terms of long history of its application.

Consequently, it is expedient to develop European constitutional doctrine based upon the constitutions of Member States and Community's legal system. European constitutional doctrine like this implies three functions. First, it should demonstrate the unity, on the other hand it must be able to interpret the existing law and fill the "white spots", and must be the model of the future political system of the EU.²⁸ This doctrine has a double effect - with European-oriented national states and with the special European creation established on a "higher", European level.²⁹

Such an approach allows us to link the two models. Consequently it is possible to apply the concept of constitution within the scope developed by the states and thus take the special nature of European Communities into account.

Comparison of the constitutions of Member states and the treaties upon which European Union is based allows one to distinguish common features. These treaties involve the features which formally characterise constitutions. They are reflected in special documents and are established over the long term^{30, 31} They too set purposes and powers and provide for the systems of legal protection and values.³² In addition, neither the organisation nor individual Member State may amend the treaties autonomously. Unless specially provided, they depend on frameworks and procedures stipulated under the treaties.³³ Formally a constitution is characterised with criteria provided for under the state law. Materially treaties also include provisions typical to constitutions. They regulate the rights and procedures of supreme authority of the Community and its organs, establish functions and purposes of the Community and ensure protection of individual rights and legal protection of EU citizens.³⁴ Thus, the structure of the European Community is definitely constitutional.³⁵

²⁸ *Heintzen, Markus*, Gemeineuropäisches Verfassungsrecht in der Europäischen Union, in: *EuR* 1997, 1, 5.

²⁹ *Häberle, Peter*, Verfassungsrechtliche Fragen im Prozeß der europäischen Einigung, in: *EuGRZ* 1992, 429, 430.

³⁰ The European Coal and Steel Community was founded for 50 years (Art. 97 of founding Treaty of ECSC) and the European Communities and the Euratom for indefinite period.

³¹ *Bieber, Roland/Schwarze, Jürgen*, Verfassungsentwicklung in der Europäischen Gemeinschaft, Mit einem Text des Vertragsentwurfs des Europäischen Parlaments zur Gründung einer Europäischen Union, Baden-Baden, 1984, 20.

³² *Bieber, Roland*, Verfassungsentwicklung und Verfassungsgebung in der Europäischen Gemeinschaft, in: *Wildenmann, Rudolf* (Hrsg.), Staatswerdung Europas? Optionen für eine Europäische Union, Baden-Baden, 1991, 393, 396.

³³ *Bieber, Roland/Schwarze, Jürgen*, Verfassungsentwicklung in der Europäischen Gemeinschaft, Mit einem Text des Vertragsentwurfs des Europäischen Parlaments zur Gründung einer Europäischen Union, Baden-Baden, 1984, 21.

³⁴ *Bieber, Roland/Schwarze, Jürgen*, Verfassungsentwicklung in der Europäischen Gemeinschaft, Mit einem Text des Vertragsentwurfs des Europäischen Parlaments zur Gründung einer Europäischen Union, Baden-Baden, 1984, 21.

³⁵ *Seidel, Martin*, Zur Verfassung der Europäischen Gemeinschaft nach Maastricht, in: *EuR* 1992, 125.

4. Other Aspects of a Constitution

4.1 Three Elements – Territory, People, Power

States' constitutions contain provisions on three basic elements of a state – state territory, state power and people. Often the latter is not mentioned unambiguously but is the carrier of sovereignty. Under the concept of people is meant the long-term union of persons settled on a state territory and over which supreme authority is exercised by the government. The minimum number of persons is not a determinant factor. What is important is that it should not concern cohabitation of communities or union created for the implementation of a number of common interests.³⁶ Consequently, in order to have a state as a subject matter, the full will of participant people is necessary.³⁷ Pursuant to this opinion the European Community does not carry the element of people.³⁸ There is no European people³⁹ or an European national self-consciousness⁴⁰. Although each Member State has its own people this is not an expression of common will of being “European people” in terms of statehood. The establishment of the European Communities aimed at the achievement of a common economic interest. Gradually other interests have joined. However, it still appears the will of implementation of limited scope of interests and not all of them. The European Communities are not claiming that they perfectly regulate and cope with all issues regarding Member States. Member States exercise essential state functions themselves.⁴¹

The Treaty of Amsterdam and the Treaty of Nice did not make any amendments with regard to this matter. For example Article 189 of the EC Treaty deals with peoples of states united in the European Community. Besides, although the first paragraph of Article 17 of the EU Treaty mentions the citizenship of Union, it still is the supplementary and not substituting institute of nationality because citizenship of union is linked with the citizenship of the Member State and it finds its content only in conjunction with the latter. It should also be mentioned that European people is not an essential precondition⁴² for the Community's constitution since the European Community is not a state and will not develop into a “European state” soon.

³⁶ *Isensee, Josef*, Staat und Verfassung, in: *Isensee, Josef/Kirchhof, Paul*, Handbuch des Staatsrechts, Band I – Grundlagen von Staat und Verfassung, Heidelberg, 1987, §13, Rn. 33.

³⁷ *Kirchhof, Paul*, Europäische Einigung und der Verfassungsstaat der Bundesrepublik Deutschland, in: *Kirchhof, Paul/Schäfer, Hermann/Tietmeyer, Hans*, Europa als politische Idee und als rechtliche Form, Berlin, 1993, 63, 85.

³⁸ *Violini, Lorenza*, Der gemeineuropäischer Bestand von Gegenständen mit Verfassungsrang, in: *Müller-Graff, Peter-Christian/Riedel, Eibe*, Gemeinsames Verfassungsrecht in der Europäischen Union, Baden-Baden, 1998, 33, 41.

³⁹ *Everling, Ulrich*, Überlegungen zur Struktur der Europäischen Union und zum neuen Europa-Artikel des Grundgesetzes, in: DVBl. 1993, 936, 942.

⁴⁰ *Iglesias, Gil Carlos*, Zur “Verfassung” der Europäischen Verfassung, in: EuGRZ 1996, 125, 131.

⁴¹ *Kirchhof, Paul*, Der deutsche Staat im Prozess der europäischen Integration, in: *Isensee, Josef/Kirchhof, Paul*, Handbuch des Staatsrechts, Band VII – Normativität und Schutz der Verfassung – Internationale Beziehungen, Heidelberg, 1992, § 183, Rn. 11.

⁴² *Iglesias, Gil Carlos*, Zur “Verfassung” der Europäischen Verfassung, in: EuGRZ 1996, 125, 131.

State territory is not given in its classical sense. State territory means some part of the earth's surface on which state authority is exercised.⁴³ Pursuant to this understanding there is no Community's territory. Even though the territory of the Communities is bordered and therefore definable, this territory is the sum of the territories of Member States⁴⁴ and their variation depends on the decisions of Member States.

Neither is there the Community's power. Power has two expressions which should allow efficient and organised power inside a country and legal independence outside the country, namely no subordination on legally higher authority.⁴⁵ None of this is available in the case of the European Communities. The monopoly of power is in the hands of Member States and the European Community depends entirely on the limits of process of lawmaking.⁴⁶

As a conclusion, even after enactment of the Treaty of Amsterdam all three classical elements of statehood are not as clear as in the case of states. However, asserting that founding treaties are not a constitution only by arguing that the European Union is not a state is groundless because these elements are the precondition for the existence of a state and not supranational organisation.

4.2 Provisions Concerning the EC Institutions

European Community has a special organisational form with six institutions: European Council, Council of the European Union, European Commission, European Parliament, Court of Justice of the European Union and European Court of Auditors.⁴⁷ These institutions have the right to act only within the competences granted under the founding treaties. The distribution of competences between the institutions is characterised by a system of so-called "checks and balances".⁴⁸ It is not the separation of powers in its classical understanding. However, actually, it is the system of double restriction which gives the effect similar to the separation of powers in terms of the controlling functions of the European Court of Justice.

Some institutions are not explicitly qualified as legislative or executive bodies. The exception is the European Court of Justice which could be qualified as a judicial authority.

⁴³ *Isensee, Josef*, Staat und Verfassung, in: *Isensee, Josef/Kirchhof, Paul*, Handbuch des Staatsrechts, Band I – Grundlagen von Staat und Verfassung, Heidelberg, 1987, § 13, Rn. 32.

⁴⁴ The same is indicated by Art. 299 of the EC founding treaty.

⁴⁵ *Isensee, Josef*, Staat und Verfassung, in: *Isensee, Josef/Kirchhof, Paul*, Handbuch des Staatsrechts, Band I – Grundlagen von Staat und Verfassung, Heidelberg 1987, § 13, Rn. 35.

⁴⁶ *Everling, Ulrich*, Überlegungen zur Struktur der Europäischen Union und zum neuen Europa-Artikel des Grundgesetzes, in: DVBl. 1993, 936, 942.

⁴⁷ *Thun-Hohenstein, Christoph*, Der Vertrag von Amsterdam: die neue Verfassung der EU; der neue EG-Vertrag, der neue EU-Vertrag; Erläuterungen der neuen Bestimmungen, 1. Aufl., Wien, 1997, 18.

⁴⁸ *Schweitzer, Michael/Hummer, Waldemar*, Europarecht: Das Recht der Europäischen Gemeinschaften (EGKS, EWG, EAG) – mit Schwerpunkt EWG, 4. Aufl., Berlin, 1993, 231.

The Council and the Commission have political as well as legislative and executive functions. The Parliament is involved in legislative activity but its role is not dominant in this process.⁴⁹ As the European Union is not a state it is not necessary to consider founding treaties as a constitution only after categorisation of institutions. *König*⁵⁰ opposes this opinion and believes that the concept of constitution can be applied only after meeting the above criteria. Against *König's* opinion we might argue that for the concept of constitution to be valid, it is necessary to establish via institutions the provisions needed for "state" governance and provide these institutions with particular rights and impose particular duties. This should be an institutional outline that is visible in the case of the EC institutions.

5. Conclusion

The lack of a single document called a European Constitution does not mean that European integration has no constitution. The Constitution is reflected in the treaties upon which the Member States have established the European Communities and the European Union. These treaties perform the major functions of the European Communities which are performed in the Member States under the Constitution.

⁴⁹ *König, Christian*, Ist die Europäische Union verfassungsfähig?, in: DÖV 1998, 268, 273.

⁵⁰ *König, Christian*, Ist die Europäische Union verfassungsfähig?, in: DÖV 1998, 268, 273.