

The development of the European Union from a common market to a political union

Jürgen SCHWARZE *

I.

The history of the European Union (EU) has been characterized by two outstanding elements: the creation of a common market without internal frontiers between the participating member states and beyond this economic integration endeavours also towards a political union. My contribution is concentrated on the decisive steps and the main features of the process of European integration in the frame of the EU which today consists of 25 Member States. I will start with some observations concerning the concept of European integration and then continue with some remarks on the different stages of European integration and the progress which has been reached so far. I will conclude with some thoughts on the actual status of the EU and the perspectives for its further constitutional development, in particular I will address the chances of a constitutional reform.

II.

The beginning of European integration more than 50 years ago was focused on the creation of a common market. The creation of a common market should eventually bring about a political unification—this idea has been expressed by the term of “functional approach” in the process of European integration. Instead of drafting an all-embracing constitution for Europe, the intention was to first undertake concrete steps in the economic field in order to support the broader political aim. This concept is clearly expressed in the preamble of the first of the European Treaties, creating the European Coal and Steel Community (ECSC) (1952-2002). There it states:

“RECOGNIZING that Europe can be built only through practical achievements which will first of all create real solidarity, and through the establishment of common bases for economic development . . . RESOLVED . . . to create . . . by establishing an

* Professor of European and International Law, University of Freiburg in Germany. This article is supported by the Japan Society for the Promotion of Science (B) Nr. 17330021.

economic community, the basis for a broader and deeper community among peoples.”

Thus the creation of the (later) three Communities was based on a practical approach. Instead of following high-flying European concepts — of which there had been many in the continent’s history, but that regularly were not able to generate any progress in Europe’s unification — this time a factual connection on the economic field should be established first, in order to prepare the ground for a political unification of Europe. Among the “*réalizations concrètes*” (concrete realizations) of which *Jean Monnet*, one of the spiritual fathers of European integration, talked, the creation of a common market is a central issue.

In the words of the European Court of Justice the concept of the common market “involves the elimination of all obstacles to intra-community trade in order to merge the national markets into a single market bringing about conditions as close as possible to those of a genuine internal market.”

III.

To enable a political unification in Europe the member state’s constitutions provide special provisions to transfer sovereign rights to the newly created European Communities. Art. 24 I of the German Grundgesetz for instance enabled the Federal Republic to transfer sovereign rights to intergovernmental institutions. In its further development the Grundgesetz kept up this line with Art. 23 I, which is applying specifically to the European Union. According to this provision Germany participates in the development of the European Union in order to create a united Europe and therefore transfers further sovereign rights to the Union’s organs, whenever that is necessary to reach this aim. With these innovations in constitutional law, the Federal Republic wanted to “widely open the doors towards a newly structured supranational world”, as *Carlo Schmid*, a prominent member of the “Parlamentarischer Rat”, the constitutional assembly that drafted the Grundgesetz, has said it. The possibility to transfer sovereign rights to intergovernmental institutions, previously only stated in Art. 24 I of the Grundgesetz, turned out to be the vehicle of European integration.

The member states brought in their own sovereign rights to be exercised collectively, thereby creating a lawmaking and administrating organisation, which — due to its boarder crossing competencies — was able to effect something that the member states could not accomplish on their own (*W. von Simson*). In this way, a supranational law making power has emerged, which is able to legislate within the areas mentioned in the European community treaties. These legislative acts generally enjoy primacy vis-à-vis the member states legislative acts, and provide directly enforceable rights not only for the member states but also for the citizens.

IV.

The internal market still is the fundamental basis and core of European integration. Art. 14 II of the European Community's Treaty (EC) defines the European internal market as "an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured." Since it was not possible to create a common market entirely until January, 1st 1970, as it had been stated in the Treaty originally, the EC undertook this second attempt in the "Single European Act" of 1987. Up to the end of 1992 the now so-called "internal market"—instead of the previously used term "common market"—should be completed. This second attempt brought significant progress to the realization of a common market. However, it has been realized increasingly, that the internal market is not a final state that will be reached at a certain point of time, but which is rather a continuing task for the EC. Among the basic elements of the European internal market are the free movement of goods, the free movement of workers, the freedom of establishment, the freedom to provide services and the free movement of capital and payments which are granted to the citizens and companies of the community, as well as the enforcement of a common European competition law. The economic constitution of the EU is based on the principle of an open market economy with free competition (Art. 4 I EC).

V.

The choice of words of the Maastricht Treaty, which was signed in 1992 also made clear, that the European Economic Community (EEC), which originally had been focused on economic integration, meanwhile had changed to a Union also focused on political integration. In the Maastricht Treaty the creation of a European Union (EU) and a European Community (EC) was agreed upon. Besides the introduction of the European Monetary Union, this Treaty brought about significant political innovations, e.g. the introduction of an EU-citizenship for every citizen of a member state which complements but not replaces the national citizenship (Art. 17 EC) as well as mainly intergovernmental cooperation among the member states in the area of Foreign- and Security-Policy (Common Foreign and Security Policy—CFSP) and Justice and Home Affairs (JHA). (This led to the so called pillar structure of the EU Treaty). This line towards a stronger political orientation of the EU later was confirmed by the Treaties of Amsterdam (1997) and Nice (2000).

VI.

Regarding the structure of the EU and the EC it has been agreed on for quite a period of time, that the Community Treaties as far as their contents and their function are concerned, are of a constitutional character. For the EU the Treaties established an independent institutional decision-making structure. This consists amongst others of an independent executive (Commission) that is only committed to the community's interest, a community legislation that today is mainly exercised in the way of cooperation between the Council and the European Parliament (Art. 251 EC), and a special community jurisdiction that mainly acts as a constitutional court and as a court for legal protection in the field of administrative law issues within the Union.

Even though the EU still has a special institutional structure and is neither a state nor a federal state, it—being a supranational organisation of its own kind—is still bound by the principle of democracy and the rule of law. Like the member states the EU grants fundamental rights (Art. 6 II EU) itself, thereby following a common European constitutional tradition. This—as I will show later—led to the formulation of a European Charta of Fundamental Rights. The division of competencies between the EU and the member states still follows the principle of conferred powers, meaning that all community action must be founded upon a legal basis laid down in the Treaty and may only be carried out with the instruments mentioned in the Community Treaties (Art. 5 I, 7 I 2 EC). When exercising the community powers the principle of subsidiarity must be respected. This principle allows the community in areas which do not fall within its exclusive competence as for example the common commercial policy (Art. 133 EC), to take action “only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the member states and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community” (Art. 5 II EC).

Since the law is the common basis and also the crucial instrument of European integration, judicial control plays an important role within the community system. It is the function of the European Court of Justice and the Court of First Instance of the EC, to ensure that in the interpretation and application of the Treaty the law is observed (Art. 220 EC). In contrast to traditional international jurisdiction which leaves it to the discretion of the states to expressly submit themselves to this international jurisdiction the community's jurisdiction is obligatory, meaning that the member states have submitted themselves to it in a binding manner by signing the Community Treaties. Again in contrast to a traditional principle in public international law, citizens of the member states themselves are able to submit their cases directly to this jurisdiction. The European Court of Justice cannot only act upon direct actions of states and individuals. It can also give preliminary rulings if a question about the interpretation of community law is brought

before it by a court of a member state (Art. 234 EC).

VII.

Over the years not only the policy fields of the EU grew beyond the original area of economic law. Also the number of member states grew consistently. Since the last major round of enlargement of 10 states mainly from Eastern and Central Europe on 1st May 2004 the EU today consists of 25 member states. Compared to its number of founding member states (Belgium, Netherlands, Luxembourg, Italy, France and Germany) it now is more than four times bigger. The considerably increased number of member states on its own requires reforms of the institutional system and the decision-making process of the EU. The reforms have only been realized insufficiently through the current Treaty of Nice (that was signed in December 2002 and entered into force in February 2003). At least some fundamental institutional changes were accomplished by the Nice Treaty: First a new composition of the European Parliament, secondly a new weighting of votes in the Council since 1st January 2005 and thirdly a restructured Commission since 2005 (each member state now only has one Commissioner). It was also agreed to facilitate the enhanced cooperation of a group of member states, enabling a form of “avant-garde” to progress faster than the rest of the community.

VIII.

At the European Council of Nice in December 2000 it already became clear that the reforms agreed on were insufficient to provide an appropriate shape and structure for a Union that would be enlarged to 25 member states. Therefore the European Council already decided in Nice to convoke another Council in 2004, in order to achieve the following four reform issues :

1. How to establish, and then maintain, a more precise division of responsibilities between the Union and the Member States, in accordance with the principle of subsidiarity ?
2. What status to be given to the Charter of Fundamental Rights proclaimed in Nice ?
3. How to simplify the Treaties in order to make them clearer and better understood without changing their meaning ?
4. What role should the national parliaments have in the European architecture ?

It was also agreed on a fundamental change of procedure. Whereas up to that day reforms of the European Community Treaties were elaborated and decided on in classical Intergovernmental Conferences, the future Intergovernmental Conference should be prepared by a convention mainly consisting of members of the national parliaments and the

European parliament. Such a constitutional convention then assembled, chaired by the former French president *Giscard d'Estaing* and presented after a deliberation period of one and a half years a draft of a Treaty establishing a Constitution for Europe in July 2003. The European Union therewith used the so called convention method a second time, since it had been already used to draft the Charter of Fundamental Rights of the Union. At that time a convention chaired by the former German president *Roman Herzog* had developed a European Charter of Fundamental Rights.

IX.

The draft of a Treaty establishing a Constitution for Europe, has been approved by the Intergovernmental Conference (IGC) on 29th October 2004, after some modifications. Its name, “Treaty, establishing a Constitution”, consisting of two elements—treaty and constitution—on the one hand shows that it, regarding its content, wants to create a fundamental order, the very Constitution for Europe, but on the other hand the wording makes it quite clear that the realisation of this Constitution is dependent on the agreement of the member states, expressed by „a treaty”. In fact the existing Community Treaties have already established a constitutional order for the EU. But this existing constitutional order gets a new structure, it will be improved as regarding its content and is explicitly named a “Constitution” by the Treaty. The Treaty consists of four parts: a first part dealing with the objectives and principles of the Union, a second part implementing the slightly modified Charter of Fundamental Rights of the Union that has been written earlier, a third part basically implementing the law of the hitherto existing Community Treaties and a fourth part containing general and final provisions. Apart from the incorporation of the Charter of Fundamental Rights and a system of more precise separation of competencies the Treaty particularly accomplishes improvements in the institutional field: a full time president shall give stability and continuity to the Union, a European foreign minister shall facilitate a more uniform appearance of the Union in the area of foreign relations. Furthermore the European Parliament shall be strengthened in the election process of the Commission as well as in its legislative powers and budgetary rights. Besides this, national parliaments shall be involved as early as possible in the EC’s decision-making process and shall particularly control the compliance with the principle of subsidiarity. Apart from that, the influence of a citizen’s vote shall be as equal as possible and the equality of the member states shall be respected, advancing the principle of a double majority, that already is included in the Nice Treaty in a rudimental way. The double majority requires qualified majority decisions of the European Council or the Council of Ministers to consist of at least 55 % of the council’s members made up of 15 member states, as long as at least 65 % of the population of the Union are represented by these member states. Concerning the connection of a common market and a political

union the Treaty in the field of the economic constitution at least changed the wording of the Union's objective. For the first time the Treaty (Art. I-3 III) expressly states, that the EU feels obliged to follow a social market system. In an overall view of the draft Treaty one can agree with the assessment of *Giscard d'Estaing*, the chairman of the convention : "not perfect indeed, but better than expected." Despite some deficiencies the draft Treaty altogether was able to realise its own motto "united in diversity" in an acceptable manner. The draft Treaty is a pragmatic further development of the Treaties, not an entirely new great step. It does not substitute the constitutions of the member states at all, but rather stands beside them, causing a close connection of European law and the member states constitutional laws, that thereby influence each other interactively. The draft Treaty thereby accommodates the idea, that nowadays constitutional law is overarched by common European constitutional principles.

X.

Though being a pragmatic draft and not an entirely new European constitutional concept, the draft Treaty did not get everybody's approval as you all may know. The draft Treaty, despite its content, still changes the existing Community Treaties and is therefore bound to the approval of all member states. According to Art. 48 III of the Treaty of the European Union (EU) the changes agreed on only become effective after they have been ratified by all member states following their own constitutional provisions. After the negative outcome of the referenda in France and in the Netherlands the European Council in Brussels on 16th/17th June 2005 agreed on a period of reflection in order to think about the further process. It was decided that the process of ratification should not be cancelled entirely but rather the period of time for the ratification process should be extended, especially since the draft Treaty has been ratified successfully in ten of the member states (including Germany). According to the declaration by the heads of state or government of the member states on the ratification of the Treaty establishing a Constitution for Europe, given at the council meeting in Brussels it was consent "to come back in the first half of 2006 to make an overall assessment of the national debates and agree on how to proceed."

XI.

At this moment it is difficult to pre-estimate, whether the Treaty establishing a Constitution for Europe, despite the two Nos in the founding member states France and the Netherlands, still has a chance. Certainly, there are reasons to be pessimistic. In the history of the process of European integration, however, there have been set backs again and again, which later have been overcome step by step by pragmatic approach. There seems to be at least some hope that this could now happen again. However one should

not be mistaken, that this crisis is deep and that fundamental differences among the concepts of how to continue the process of European integration have become visible. What are now the potential options or perspectives of the European constitutional developments? Besides not adopting the Treaty at all or adopting it surprisingly at a later point, it is also a potential development to adopt a modified version or only parts of the Treaty. This could mean to reduce the Treaty to its very constitutional parts (parts I, II and IV), that also might be condensed. It is also imaginable that only single elements of the Treaty, especially the European Charter of Fundamental Rights on which's purpose and function exists a widespread consent, might be put into force. Apart from that, it is conceivable that particular constitutional changes will be undertaken using the traditional treaty changing procedure. Finally, it should not be ignored, that singular elements of the Treaty establishing a Constitution for Europe could have an *ex ante* effect, even though not being ratified. We were able to experience this with the European Charter of Fundamental Rights as so far as the Court of first instance in Luxembourg as well as some advocate generals in their reasoned submissions (Art. 222 II EC) already referred to the Charter, even though it is not yet legally binding, but only proclaimed in a solemn manner. After the ratification of the Treaty establishing a Constitution for Europe in Germany for example it is imaginable that the national parliaments demand their rights to participate in the European decision-finding process as granted by the Treaty in any case. For this purpose national parliaments could rely on the principal of democratic control of any governments activity also at European Union's level — which may produce legal effects in the internal area of the member states.

XII.

Coming to a conclusion, I want to state that the EU already today is not only a common market but also a political union —albeit one with a limited effectiveness and without a sufficient constitutional basis.

I think that a Treaty establishing a Constitution for Europe —if necessary in a modified version, reduced to the very constitutional provisions—should be welcomed because a single member state today can only persist as a part of a wider European system. By becoming part of such a system a single member state is able to partially regain the political and economic influence, which has been lost through globalization. At the same time such a Treaty establishing a Constitution will enable the EU itself to better meet the expectations put upon it as an international actor, from a solid constitutional basis.