

§ 2 The European Union as an organisation

I. The legal nature of the European Union

1) The European Union as first representative of a new form of organisation

- a new, non-state but state-like form of organisation that has emerged as a result of numerous reforms and compromises in the process of European integration
- main features: sophisticated institutional system with federal and unitarian elements, far-reaching competences, comprehensive exercise of supranational public power, highly developed legal system with powerful court of justice, legal framework for a geo-regional internal market, own currency, own citizenship

2) The debate on the legal nature of the European Union: "compound of states", "compound of states and constitutions" or supranational union?

- the state-centred "Staatenverbund" doctrine of the German Federal Constitutional Court - Maastricht judgement of 1993 (BVerfGE 89, 155); Lisbon judgement of 2009 (BVerfGE 123, 267)
- the "unconventional" approach of some scholars: Union, states, Treaties and constitutions as a constitutional unity
- the union-centered approach of a general theory of the supranational union

II. The state as a member of the European Union

1) The unaffected sovereignty of the state

- no "shared sovereignty", since sovereignty is absolute and therefore indivisible
 - a DOCTRINAL DISPUTE in the 1990s and 2000s
- unlimited public power (including the legal power - not the right! - to break Union law)
- unlimited legal capacity at public international law
- ultimate control over all public power exercised on the state territory

2) The member states as the "masters of the treaties" ["Herren der Verträge"]

- the power of the member states *as collective* to impose any changes on the Union and its policies by amending the founding treaties

3) Important basic rights and duties of the member state

- the right to participate in the Union's institutions
- the *duty to respect, implement, execute and enforce Union law* (art. 4(3) sub-sect. 2 EU Treaty)
- the duty to evince *loyalty* towards the Union and the other member states (principle of sincere cooperation, art. 4(3) EU Treaty)
- the right to the *loyalty and solidarity* of the Union and the other member states
 - e.g. within the Common Foreign and Security Policy (cf. art. 32(1) EU Treaty)
 - e.g. in case of terrorist attacks (222 FEU Treaty)
 - e.g. in case of economic or financial emergency (ESM Treaty)
 - e.g. in case of mass influx of refugees and migrants (→ Greece 03.2020)
- the right to the *respect of the national constitutional identity* (art. 4(2) EU Treaty)
- the right to the respect of the *equality of the member states* (art. 4(2) EU Treaty)

4) Accession, secession and expulsion of member states

- high requirements and long, complicated procedure for accession (cf. art. 49 EU Treaty)
- right to secession (with option of secession agreement, art. 50 EU Treaty; example: Brexit 2020)
- risk to be expelled, as a last resort, in case of material breach of treaty (by termination of the Treaties by the other member states under art. 60(2) lit. a Vienna Convention on the Law of Treaties)

III. The institutional framework of the European Union

- see overview in art. 13 EU Treaty

1) The Union's institutions

- principle of mutual sincere cooperation (art. 13(2) EU Treaty)
- a) **European Council** (art. 15 EU Treaty, 235 et seq. FEU Treaty)
 - with **President of the European Council** (art. 15(5,6) EU Treaty)
 - the leading political institution
 - composition: heads of state or government, own President, President of Commission
 - decides usually by consensus
 - meets twice every six months
- b) **Council of the European Union** (art. 16 EU Treaty, 237 et seq. FEU Treaty)
 - the most powerful institution, esp. in legislation and budgeting (jointly with EP)
 - assisted by a General Secretariat and a Committee of Permanent Representatives of the governments of the member states
 - composition: one representative of each member state at ministerial level
 - decides usually by qualified majority (55 % of member states, representing 65 % of population)
- c) **European Parliament** (art. 14 EU Treaty, 223 et seq. FEU Treaty)
 - with **European Ombudsman** (art. 228 FEU Treaty)
 - the only directly democratically legitimized institution
 - important powers in legislation and budgeting (jointly with the Council) and of political control
 - degressively proportional representation of the citizens (art. 14(2) EU Treaty)
- d) **European Commission** (art. 17 EU Treaty, 244 et seq. FEU Treaty)
 - with **President of the European Commission**
 - with **High Representative for Foreign Affairs and Security Policy** (art. 18 EU Treaty)
 - promotes European public interest
 - takes initiatives, participates in legislative procedure, has own legislative and executive powers, executes budget, ensures member states' compliance with Union law
 - submitted to vote of consent and, possibly, motion of censure of European Parliament (art. 17(7, 8) EU Treaty)
- e) **Court of Justice of the European Union** (art. 19 EU Treaty, 251 et seq. FEU Treaty)
 - European Court of Justice (= ECJ) and General Court
 - ECJ composition: one judge from each member state plus 8 advocate-generals
 - mission: "*shall ensure that ... the law is observed*"
- f) **European Central Bank** (art. 282 et seq. FEU Treaty)
- g) **European Court of Auditors** (art. 285 et seq. FEU Treaty)

2) The advisory bodies

- a) **Economic and Social Committee** (art. 301 et seq. FEU Treaty)
- b) **Committee of the Regions** (art. 305 et seq. FEU Treaty)
 - represents the interests of regional and local governing entities

3) Other institutions, agencies and bodies

- include a **European Union Agency for Fundamental Rights**
 - limited to collecting & analysing data and supporting and advisory functions

4) The principle of institutional balance

- ECJ case 138/79, Roquette Frères / Isoglucose
- the equivalent to the principle of separation of powers in the state

IV. The competences of the European Union

- 1) **The principle of specific attribution of powers** [principle of conferral] (art. 5(1, 2) EU Treaty)
 - Union needs a specific legal basis for every measure
 - competences regulated in detail in Part Three FEU Treaty
 - principle in practice relativised by the often criticised generous interpretation of competence clauses and recognition of *implied powers* by the European Court of Justice
- 2) **The limitation of the exercise of the Union's competences by the principles of subsidiarity and proportionality** (art. 5(1, 3, 4) EU Treaty and special protocol)
 - principle of proportionality: limitation of use of competences to what is necessary (art. 5(4))
 - principle of subsidiarity only applies to non-exclusive competences
 - principle of subsidiarity not justiciable in practice
 - therefore focus on consultation and obligation to justify the use of competences
- 3) **The most important competences**
 - distinction between *exclusive competences*, *shared competences* and competences of support, coordination and supplementation of the actions of the member states
 - *supranational competences* in the fields of economic policy, monetary policy, commercial policy, agriculture policy, competition policy, consumer protection policy, environmental policy, cohesion policy, asylum policy and approximation of laws
 - competence to participate in and to coordinate the Common Foreign and Security Policy of the Union and the member states (→ intergovernmental cooperation)

V. The fundamental values of the European Union

- see for further studies special material from the course European Union law, Chişinău 2016, and conference material on problems of the EU as a community of shared values, Paris 2023 [in German only]

- 1) **The importance of common fundamental values in a supranational union**
 - the need for *homogeneity of value systems* as a basis for supranational integration
 - the need for effective rule of law in the Union and the member states (→ § 3 I)
 - the *essential function of the Union to ensure the realisation of the common fundamental values in times of globalisation*, when the individual member states can no longer
- 2) **The fundamental value clause** (art. 2 EU Treaty)

The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.
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- not a political proclamation but directly binding law that all EU institutions and member states must comply with
 - binding commitment to the political-philosophical concepts, not to a specific concretisation
 - the values of the free and democratic, rule of law-based constitutional state
 - rooted in the philosophy of the enlightenment and the French Revolution
 - influenced esp. by French and German constitutional theory but also by modern developments in civil society
- 3) **The individual fundamental values**
 - a) **Human dignity**
 - focusing on the *self-determination of all human beings, who are by nature free and equal and a value in themselves* and must never be subjected to inhuman or degrading treatment or demoted to an object

b) Human rights

- following the Western concept as expressed in the European human rights treaties
- in particular (but not only) *freedom rights, equality rights and minority rights* (also of sexual minorities)
- including pluralism, tolerance, non-discrimination and equality between women and men as *values in society*
- concretised for the Union level in the Charter of Fundamental Rights (→ § 5)

c) Democracy

- requires in particular free, equal and fair elections, respect for democratic freedoms and political neutrality of state media as a precondition for a democratic process
- no specific type of democracy required (parliamentary/presidential, direct/indirect democracy)
- vividly discussed for decades: the *democratic deficit* in the European Union

d) Rule of law

- complemented by *separation of powers*
- different manifestations in Europe
 - Rechtsstaatsprinzip (Germany), État de droit (France), rule of law (Britain), general principles of law (EU)
 - tendency of convergence in the course of European integration
- key elements:
 - primacy of the law
 - effective enforcement of the law
 - principle of statutory reservation
 - principle of proportionality
 - legal certainty and protection of legitimate expectations
 - effective legal protection
 - special principles in criminal and criminal procedure law
 - special principles of administrative procedure
 - state liability for illegal acts of public authorities

e) Solidarity

- a value going back to the French Revolution (→ fraternité)
- refers to social justice, social security and social cohesion
- implemented by *social rights* or a *social state principle* (Germany)

4) The defence of the common fundamental values against threats in the member states

- the defence mechanism under art. 7 EU Treaty:
 - step 1: Council determines (with 4/5 majority) clear risk of a serious breach
 - step 2: European Council determines (*unanimously*) existence of a serious and persistent breach
 - step 3: Council suspends (with qualified majority) certain rights of the member state (incl. access to internal market)
 - problem: thresholds for steps 1 and 2 unrealistically high...
 - note that art. 7 EU Treaty does not exclude, as a last resort, the suspension of the membership and, finally, the expulsion of the member state under art. 60(2) lit. a. 62 Vienna Convention on the Law of Treaties!
- the failure of the art. 7 mechanism in the fundamental value crisis in Hungary and Poland
 - serious steps towards dictatorship, neutralising the constit. court, eliminating judicial independence, weakening rule of law, converting public media to propaganda instruments and restricting democratic freedoms
 - several interventions of the European Court of Justice against these steps
 - art. 7 proceedings against both member states until 2024 without results
- helpful but not enough: "conditionality mechanism" (regulation 2020/2092)
 - a makeshift based on secondary law to circumvent the unanimity requirement under art. 7 EU Treaty
 - allows to withhold financial resources but no further steps against the rogue member state

VI. The citizen in the European Union

- see diagram 2