Max-Planck-Institut für
ausländisches öffentliches Recht und Völkerrecht

Beiträge zum ausländischen öffentlichen Recht und Völkerrecht 186

Philipp Dann · Michał Rynkowski (eds.)

The Unity of the European Constitution

Springer

Max-Planck-Institut für ausländisches
öffentliches Recht und Völkerrecht

Beiträge zum ausländischen öffentlichen Recht und Völkerrecht

Begründet von Viktor Bruns

Herausgegeben von
Armin von Bogdandy · Rüdiger Wolfrum

Band 186

Philipp Dann · Michał Rynkowski (eds.)

The Unity of the European Constitution

Springer
the language of science

ISSN 0172-4770
ISBN 3-540-35450-6 Springer Berlin · Heidelberg · New York

Bibliografische Information Der Deutschen Bibliothek

Die Deutsche Bibliothek verzeichnet diese Publikation in der Deutschen Nationalbibliografie; detaillierte bibliografische Daten sind im Internet über <http://dnb.ddb.de> abrufbar.

Printed in Germany

Satz: Reproduktionsfertige Vorlagen vom Autor
Druck- und Bindearbeiten: Strauss Offsetdruck, Mörlenbach
SPIN: 11780267 64/3153 – 5 4 3 2 1 0 – Gedruckt auf säurefreiem Papier

Preface

The law of the European Union is famous for its complexity, heterogeneity and diversity. It is also famous for its contested status. If a book is nevertheless called 'The Unity of the European Constitution', it should therefore raise some expectations. It might raise even more expectations, once the reader realizes that it presents a consequent binational discussion of such contentious issues.

The book contains the contributions to the 2nd German-Polish Seminar on the Constitutional Law of the European Union. The seminar was held from 11–15 May 2005 in Wrocław under the auspices of the Max Planck Institute for Public International Law and Comparative Law in Heidelberg, supported by its director, Professor von Bogdandy, the Faculty of Law, Administration and Economics of the University of Wrocław, especially Professor Wójtowicz and his Chair for International and European Law, and the Willy-Brandt-Center for German and European Studies in Wrocław. It was organized on the German side by Dr. Karen Kaiser, Dr. Jürgen Bast, Stephan Bitter and Dr. Philipp Dann, and on the Polish side by Dr. Robert Grzeszczak, Dr. Michał Rynkowski and others.

The seminar was the second of its kind. The first had taken place in Cracow in 2002, initiated by the former Director of the Max Planck Institute, Professor Frowein. The resounding success of the first was reason enough to organize a successor event. And the second seminar, which assembled new participants but also a good share of the participants of the first event, contributed to the original idea behind the initiative, which is to deepen and broaden the dialogue between the two countries and its young academics. However, it was to no small part the wonderful social program, which the colleagues from Wrocław organized, that contributed to the success of the seminar and the continued dialogue between the participants.

The seminar was again made possible by a generous grant of the Max Planck Society, Munich, the Foundation for German-Polish Coopera-

tion and the University of Wrocław. The editors are also grateful to the Directors of the Max Planck Institute for Public International Law and Comparative Law in Heidelberg for including this volume in the publication series of the *Beiträge zum ausländischen öffentlichen Recht und Völkerrecht*, as well as to Angelika Schmidt and Birgit Jacob in the editorial office of the MPI for their diligent and quick work on this volume. Most of the contributions to this volume have previously been published online, in a special issue of the German Law Journal (Vol. 6, Issue 11). Hence, we would also like to thank its editors, Russell Miller and Peer Zumbansen, as well as their staff for their tremendous help in editing these pieces.

Philipp Dann and Michał Rynkowski
Washington and Wrocław, March 2006

Table of Contents

European *Ungleichzeitigkeit*: Introductory Remarks on a Binational Discussion about Unity in the European Union

By Jürgen Bast and Philipp Dann

I.

The multitude and overlap of times is one of the somewhat unsettling yet characteristic features of modernity. Since the French Revolution, history has lost its exclusive meaning as measurement for the natural chronology of events, but took on a second meaning according to which periods in time are understood as eras and connected to specific sets of ideas.[1] Henceforth, otherwise overcome ideas could stay on, times and histories can superimpose each other. Ernst Bloch has termed the effects of this overlap of times as '*Ungleichzeitigkeit*' (non-synchronism).[2] The present, according to Bloch, can reflect simultaneously various and often discrepant histories, pre-histories and futures. Pasts can persist, futures can linger, different layers of time can coexist concomitantly.

The European Union and its perception in public and academic discourses are a curious manifestation of such *Ungleichzeitigkeit* and of the diversity it conveys. From its very beginning, the postwar reconstruction of Western Europe linked itself to the future by defining itself

---

[1] *R. Koselleck*, Vergangene Zukunft: Zur Semantik geschichtlicher Zeiten 130 (1989).

[2] *E. Bloch*, Erbschaft dieser Zeit, Gesammelte Werke, Vol. IV, 104, 116 (1977).

as a process, hence as the anticipation of something not yet existing.[3] Given also the contested status of its *finalité*, the European integration is a time-bound project, to be achieved only step-by-step and emerging from deadline to deadline, no matter whether missed or met. If so, the level once achieved is then a combination of regulations stemming from different times. But the result is not just a question of regulation but also of perception, and ventures of the past may prove less completed than assumed. In its perennially unfinished status, the EU is object to many different projections and ideas of its nature, of its current condition and of its future direction. Seemingly overcome ideas may persist or resurface. The idea of and discourse on Europe is thus full of *Ungleichzeitigkeit* – and the book in your hands is a fascinating document thereof.

This volume presents the papers of a conference of young Polish and German public law scholars, which took place in Wrocław (Poland) in May 2005 under the heading of 'The Unity of the European Constitution'. Its aim was to explore from different angles and in different fields the concept of unity and its (limited) realization in the primary/constitutional law of the European Union. The topic seemed expedient for several reasons. The contributors are nationals from two Member States, Poland and Germany, 'new' and 'old', who teach and research in four different European countries. The diversity of that group itself promised enriching perspectives on the given topic. At the same time, the conference was the continuation of an ongoing dialogue, started by a first conference in 2002.[4] Since then, Poland had joined the EU and been a Member State for more than a year. Hence, first experiences had been made and new insights were gained, ground perhaps for the assumption that German and Polish perceptions would resemble each other more and more. And finally, the debate on the Constitutional Treaty had added new layers of thinking and pondering of European issues on both sides, and the signature of the Constitutional Treaty, in October 2004, gave rise to the expectation that European constitutional law was about to enter into a new phase of unity.

As we know now, at least the last assumption found an abrupt rebuttal through the referenda in France and the Netherlands, only a few days

---

[3] Famously caught by *W. Hallstein*, Der unvollendete Bundesstaat: Europäische Erfahrungen und Erkenntnisse (1969).

[4] *A. Bodnar, M. Kowalski, K. Raible & F. Schorkopf* (eds.), The Emerging Constitutional Law of the European Union: German and Polish Perspectives (2003).

after the meeting in Wrocław. However, the conference resulted in a rich collection of articles on unity and diversity in European law, which are by no means outdated by these events. The present article tries to give an overview, and at the same time draws the attention to two general observations which seemed to us the most fascinating and not quite expected outcomes of the conference: the striking plurality of unity discourses (II.) and the forceful and meaningful *Ungleichzeitigkeit* in our perceptions of the EU (III.).

II.

The concept of 'unity' is a common *topos* in most domestic legal orders, and it lies at the heart of the idea of a written constitutional document. In the European Union and its constitutional law, however, assumedly due to its incremental evolution as well as to its heterogeneous constituencies, the concept of unity is a contested idea. This is already demonstrated by the various counterparts which the term evokes. On the one hand, there are 'plurality' and 'diversity', both representing valued principles of modern constitutional thought. On the other hand, there are 'fragmentation' and 'segmentation', which insinuate disorder and chaos, or at least indicate some kind of structural defect of the polity. Somewhere in the middle are the more neutral terms of 'differentiation' and 'variety', which can either mean a useful adaptation to a complex environment or a deviation from a given standard, depending on the context. But the dispute is not only about words and implied normative statements. The discussion about "unity and ..." in the context of the European Union refers to quite unequal sets of questions. This is richly documented by the plurality of unity discourses that the contributions to this book display. Five such discourses can be traced and distinguished.

A first discourse evolves around the question of coherence of the EU's constitutional structure. A number of contributions therefore ask to what extend the Constitutional Treaty would advance the overall project of bringing the Union closer to consonance with constitutional principles, such as democracy or the rule of law.

Jürgen Bast in his contribution *'The Constitutional Treaty as a Reflexive Constitution'* designs a theoretical framework for the, yes, coherent understanding of the Treaty. Bast observes a tension between Part I and II of the Constitutional Treaty, that define 'standard cases' of constitu-

tional arrangements, and its Part III, which represents various deviations from that standards, largely along sectoral lines. His concept of reflexive constitutionalism puts forward the idea that the explicit statement of a standard case is meant to serve as yardstick for legal construction and future constitutional reform, even after the failure of the Constitutional Treaty. The question of coherence is also the underlying focus in Philipp Dann's *'Thoughts on a Methodology of European Constitutional Law'*. He approaches the unity issue from the assumption that, in order to further develop the current treaties into a coherent body of constitutional law, legal scholarship must reflect on its methodological tools that can help to interpret coherently this specific normative material, and develops a set of pan-European methodological tools.

The topic of 'preserving unity through the adherence to general constitutional principles' runs through a number of further contributions. Niels Petersen's study on *'The Democracy Concept of the European Union'* develops normative requirements for democratic legitimacy in the European context. In applying his individualistic concept, he exposes remaining disparities between the general outline of the democracy concept in Part I of the Constitutional Treaty, and the Union's concrete institutional design. In a similar fashion, Christiane Trüe is concerned with *'The Plurality of the Legislative Process'*. She asks whether there is in the Constitutional Treaty "a systematic fit" between the legislative procedures and the relevant underlying competences. Although she rejects the idea that a uniform law-making procedure could be appropriate for all subject areas, the Constitutional Treaty fails, according to her evaluation, to systematically attribute procedures to competences. Alexander Türk from King's College London picks up on this and examines *'The Concept of the "Legislative" Act'*. For Türk, the language of the constitutional state which the Constitutional Treaty employs by using terms like 'European laws' remains "ambiguous". Measured against the expectations which the use of such notions raises, the Constitutional Treaty "falls short of unity". However, the continuation in the "language of the administrative state" in the current treaties seems equally dissatisfying to him. In Katharina Pabel's piece on *'The Right to an Effective Remedy'*, the reflexive structure of the Constitutional Treaty clearly comes to the fore. In her analysis, this guarantee stipulated in Part II of the Constitutional Treaty (formerly known as the Charter of Fundamental Rights) serves as a yardstick for a critical evaluation of the current regime of legal protection, which is by and large maintained in the provisions of Part III of the Constitutional Treaty.

In various sections of this book, in particular in contributions from the Polish side, a second and probably deeper rooted layer of discussion about the EU's constitutionality and unity surfaces. This discussion concerns the EU law's independence from ordinary public international law, which admittedly is one of the unquestioned assumptions in the above contributions. In this discourse, 'unity' is contested as a cipher for the alleged unique character of the Union and the autonomy of its legal order.

This becomes explicit in Roman Kwiecień's contribution on *'The Primacy of European Union Law Over National Law'*. Kwiecień challenges the concept of primacy which the ECJ had proclaimed in order to ensure the uniform application of Community law in all Member States. Kwiecień does not question the justification of the concept as such, but rather the axiomatic way in which the ECJ bases primacy on the alleged autonomy of the EU's legal order. As a counter proposal, he suggests to rest the primacy of EU law on general principles of public international law and the principle of *pacta sunt servanda* especially. In his comment, Franz Mayer from Berlin welcomes the "new round of reflection" on foundational issues such as primacy and sovereignty. But he avows himself a follower of the Court's conception and stresses on the distinction between the (hierarchical) concept of supremacy and the (non-hierarchical) concept of primacy.

However, a number of Polish comments underline their doubts concerning the autonomy of EU law and the various consequences that this might entail. Artur Kozłowski, in his comment on Dann's presentation on a methodology of European constitutional law, disputes the assumption that the law of the EU can be regarded as constitutional law at all, referring to the derivative nature of EU law and its lack of autonomy. Commenting on Petersen's piece, Robert Grzeszczak stresses that democracy can only be conceived in the context of a state, and thus denies the possibility to transfer the idea to a non-state or supranational entity. Following suit is Barbara Mielnik in her comment on Türk. She sees the term 'legislative act' for acts of the EU as a simple misnomer, since she regards the EU as an International Organization without the attributes to make 'laws'. Somewhat different is the reaction of Adam Bodnar in his comment on Pabel. He employs the concept of poly-centricity and highlights the positive impact on judicial protection in Poland that the Charter's guarantee of an effective remedy could have.

A third layer of the unity discourse, apparent mostly in the third part of this book, is dealing with 'unity versus differentiation', i.e. the horizontal, cross-sectoral homogeneity of European constitutional law. Two