

# EU Constitutional Law

An Introduction

Third Edition

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# 1

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## What Constitution? A Rose by Any Other Name

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The reference in the title of this book to ‘EU constitutional law’ needs some explanation. It is not free from controversy, as some would still prefer to view the European Union (EU) as an intergovernmental organisation governed by public international law which does not have a constitution in the proper sense of the word and which thus renders the notion of EU constitutional law less (or even in-)appropriate.

The doubts and outright opposition to the idea of an EU Constitution were brought sharply into focus by the fate of the Treaty establishing a Constitution for Europe (signed on 29 October 2004, hereinafter Constitutional Treaty of 2004).<sup>1</sup> While the Treaty was ratified by many of the Member States, including on the basis of referendums in Spain and Luxembourg, referendums in France and then the Netherlands produced negative results.<sup>2</sup> The ratification process was halted and the idea of establishing a ‘Constitution for Europe’ was abandoned. Instead, on 13 December 2007 the Member States signed the Treaty of Lisbon.<sup>3</sup>

The ratification and eventual entry into force on 1 December 2009 of the Treaty of Lisbon also encountered problems, in particular when an Irish referendum in June 2008 produced a negative outcome. The result of this referendum led not only Ireland but also two other Member States, Poland and the Czech Republic, to postpone their decision concerning ratification. However, in a second Irish referendum held in October 2009, a clear majority voted in favour of the Treaty. The Treaty entered into force following the final ratifications by Poland and the Czech Republic.<sup>4</sup>

<sup>1</sup> [2004] OJ C310/1. See, eg J-C Piris, *The Constitution for Europe: A Legal Analysis* (Cambridge, Cambridge University Press, 2006); G Amato and J Ziller, *The European Constitution: Cases and Materials in EU and Member States’ Law* (Cheltenham, Edward Elgar, 2007).

<sup>2</sup> A Albi and J Ziller (eds), *The European Constitution and National Constitutions: Ratification and Beyond* (Alphen aan den Rijn, Kluwer Law International, 2007); J Ziller, ‘The End of Europe: A Flavour of Déjà-Vu. Reflections on the French Referendum and Its Aftermath’ in J Wouters, L Verhey and P Kiiver (eds), *European Constitutionalism beyond Lisbon* (Antwerp, Intersentia, 2009) 17; P Bursens and M Meijer, ‘Beyond First Order Versus Second Order Explanations of European Referendum Outcomes: Understanding the Dutch “Neen” and the Luxembourg “Jo” in ibid, 33.

<sup>3</sup> Treaty on European Union and the Treaty on the Functioning of the European Union, as they result from the amendments introduced by the Treaty of Lisbon, [2008] OJ C115/1. See also J-C Piris, *The Lisbon Treaty: A Legal and Political Analysis* (Cambridge, Cambridge University Press, 2010) 15 et seq; T Blanchet, ‘The Treaty of Lisbon: A Story in History or the Making of a Treaty’ (2011) 34 *Fordham International Law Journal* 1217.

<sup>4</sup> Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, [2010] OJ C83/1. According to Art 6 of the Treaty of Lisbon, the Treaty was to enter into force on 1 January 2009, provided that all the instruments of ratification had been deposited, or, failing that, on the first day of the month following the deposit of the last instrument of ratification.

That the passage was not smooth was perhaps to be expected. There is no denying that, in substance, the Lisbon Treaty incorporates important parts of the abortive Constitutional Treaty of 2004. The technique used is less heraldic, providing for amendments to the existing Treaty on European Union (TEU) and the Treaty establishing the European Community (TEC), renamed the Treaty on the Functioning of the European Union (TFEU). And the grandiose symbols are gone; no mention is made of the (supra)national anthem or the European flag. But does changing the title consign all talk of a 'Constitution' to the history books, or does a rose by any other name smell as sweet?

Historically, the modern-day process of European integration may be said to have begun when the aftermath of World War II saw the establishment of the Council of Europe (1949). That body has become a general forum for intergovernmental cooperation possessing some supranational features mainly in the field of human rights. Beyond Europe, other international organisations of a predominantly intergovernmental nature proliferated: for example, the United Nations (UN) and the wider 'UN family' with a number of Specialized Agencies as well as what is now the World Trade Organization. The notion of 'constitutionalisation' has even been used to refer to institutional and normative changes in the global legal order more generally.<sup>5</sup>

However, as will be explained in greater detail in chapter two, the EU, especially as it emerges from the Treaties of Maastricht (1992), Amsterdam (1997), Nice (2001) and Lisbon (2007), differs in many respects from these more traditional international organisations; it goes much further than global or public international law in providing for not only coordination and cooperation but also integration and supranational institutions.

This process of 'deeper' integration, involving stronger supranational features, was initiated by the establishment, in 1951, of the European Coal and Steel Community and, in 1957, of the European Economic Community (EEC) and the European Atomic Energy Community (Euratom). While the initial form of these supranational organisations, which counted only six founding Members, more or less confined them to economic integration, a much broader integration process, including a stronger political dimension, has become apparent through the Single European Act of 1986 and the Treaties of Maastricht, Amsterdam, Nice and Lisbon referred to above. The EEC became simply the European Community (EC), and even that no longer exists since the Treaty of Lisbon brought the whole edifice under the heading of European Union, launched already as an umbrella concept by the Treaty of Maastricht.

That European integration is a process (and thus constantly evolving) is beyond doubt: the founding texts have proclaimed this since the very beginning, each subsequent Treaty marking 'a new stage in the process of creating an ever closer union among the peoples of Europe' (Article 1 TEU). That the 'end' of that process is not fixed forms the ideological and teleological basis for a study of the EU and what may be referred to as its 'constitutionalisation'.<sup>6</sup>

<sup>5</sup> See, eg J Klabbers, A Peters and G Ulfstein, *The Constitutionalization of International Law* (Oxford, Oxford University Press, 2009). See also J Habermas, *Zur Verfassung Europas. Ein Essay* (Berlin, Suhrkamp Verlag, 2011).

<sup>6</sup> See, eg J Gerkrath, *L'émergence d'un droit constitutionnel pour l'Europe* (Brussels, Éditions de L'université de Bruxelles, 1997); A Peters, *Elemente einer Theorie der Verfassung Europas* (Berlin, Duncker & Humblot, 2001); CWA Timmermans 'The Constitutionalization of the European Union' (2001–02) 21 *Yearbook of European Law* 1; C Barnard, 'Introduction: The Constitutional Treaty, the Constitutional Debate and the Constitutional Process' in

This integration process has progressively covered ever more areas and implied increased recourse to supranational mechanisms. But, perhaps paradoxically, it has also come to involve an ever greater number of European states, either as Member States or as closely associated neighbouring countries. As this third edition goes to print, the Union has grown from the initial six Members to 28 Member States with several associated States aspiring to become full Members.

This remarkable enlargement of the Union seemed inexorable. Until, that is, the decision of the United Kingdom (UK), based on a referendum in June 2016, to make use of the procedure provided for in Article 50 TEU: on 29 March 2017, the UK notified the EU of its intention to withdraw from the Union (commonly referred to as 'Brexit').<sup>7</sup> As provided for in Article 50(2), negotiations with the UK were initiated with a view to concluding an agreement, 'setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union'. According to Article 50(2), EU law shall cease to apply to the UK from the date of the entry into force of the withdrawal agreement or, failing any agreement, two years after the notification referred to above (that is, on 29 March 2019), unless it is decided to extend this period.<sup>8</sup> As this edition goes to print, it is too early to predict the outcome of these negotiations or even the exact timetable of the withdrawal. Indeed, the only thing that is clear is the complexity of the process.

What is, on the other hand, easier to predict, is that Brexit will not halt the European integration process. It is, we suggest, not controversial to note that the UK was something of a recalcitrant Member State: indeed, it was the stated opinion of the government of the time that it was only able to campaign for a vote to remain a member of the EU in the referendum referred to above, if a 'new settlement for the UK' was negotiated in order to supplement existing UK opt-outs from EU rules, with a view to placating British concerns about the direction and pace of European integration.<sup>9</sup> Often hesitant to continue down the path to deeper integration, many initiatives to develop primary or secondary EU law fell by the wayside because of British opposition. Most recently, for instance, the unprecedented euro and sovereign debt crisis affecting the EU and its Member States around 2008–2012<sup>10</sup> would have led to a far more comprehensive review of the provisions on economic governance than was in the end the case but for the deployment by the United Kingdom of its veto

C Barnard (ed), *The Fundamentals of EU Law Revisited: Assessing the Impact of the Constitutional Debate* (Oxford, Oxford University Press, 2007) 1; LFM Besselink, 'The Notion and Nature of the European Constitution after the Lisbon Treaty' in Wouters, Verhey and Kiiver, n 2 above, 261; K Tuori and S Sankari, *The Many Constitutions of Europe* (Farnham, Ashgate, 2010).

<sup>7</sup> In the referendum of June 2016, 51.9% voted in favour of Brexit. Brexit has already provoked an abundance of legal and political literature and commentary. We will limit ourselves to mentioning a special issue of the (2016) 41 *European Law Review*, No 4, August 2016, 'Brexit: What Next?', and M Dougan (ed), *The UK after Brexit: Legal and Policy Challenges* (Cambridge, Intersentia, 2017).

<sup>8</sup> A decision to extend the two-year period requires unanimity in the European Council (consisting of the Heads of State and Government of the 27 remaining Member States) and an agreement with the UK, see Art 50(3) TEU.

<sup>9</sup> See, eg A Duff, 'Britain's Special Status in Europe: A Comprehensive Assessment of the UK-EU Deal and Its Consequences', *Policy Network Paper*, March 2016, [www.policy-network.net](http://www.policy-network.net) (accessed on 14 September 2017). The settlement never became binding EU law, as it was conditional on the UK deciding to remain a Member of the Union.

<sup>10</sup> See, eg J-C Piris, *The Future of Europe: Towards a Two-Speed EU?* (Cambridge, Cambridge University Press, 2012) 1, 41–42. See further ch 14 in particular.

concerning the proposed amendment to the TFEU.<sup>11</sup> As this edition goes to print, there are a number of ideas and initiatives to take the integration process further, including in the areas of economic and monetary policy, asylum and immigration and military defence<sup>12</sup> and at least as far as primary law is concerned, it is not to be excluded that such amendments will be rendered less difficult to accomplish in a post-Brexit Union.

Be that as it may, and in apparent contrast to the current feeling of ambivalence towards the integration process, the dynamic nature and constitutional character of the EU legal order is increasingly emphasised by the judges in Luxembourg. We say ‘*apparent* contrast’ because the quite remarkable achievements that have taken place in the name of that integration process do not make the headlines in the same way as lines of migrants queuing up for access to the Union. As early as 1986, the European Court of Justice (ECJ)<sup>13</sup> characterised the Community Treaties as a ‘constitutional charter based on the rule of law’.<sup>14</sup> More recently, the Court has also referred to the ‘constitutional principles of the EC Treaty’ and the ‘very foundations of the Community legal order’, which is ‘internal and autonomous’<sup>15</sup> as well as the ‘constitutional status’ of the general principles of Union law.<sup>16</sup> In Opinion 2/13, the ECJ observed that the EU ‘has a new kind of legal order, the nature of which is peculiar to EU, its own constitutional framework and founding principles, a particularly sophisticated institutional structure and a full set of legal rules to ensure its operation’.<sup>17</sup> We are convinced that, while keeping in mind the highly dynamic character of the EU legal order, it is today both appropriate and useful to speak of an EU constitutional order and of EU constitutional law.<sup>18</sup>

One of the basic objectives of this book is therefore to illustrate and discuss the specific features of the EU and notably those which make it different from both intergovernmental organisations and independent states in the traditional sense. This implies an emphasis on the EU as a distinct and quite exceptional legal and constitutional order.

<sup>11</sup> See the European Council Decision of 25 March 2011 amending Article 136 TFEU with regard to a stability mechanism for Member States whose currency is the euro, [2011] OJ L91/1. In the face of UK opposition to further Treaty amendment, the decision to prepare an intergovernmental agreement on stability, coordination and governance in the economic and monetary union was taken by the Euro Area Heads of State or Government on 9 December 2011; the agreement was signed on 2 March 2012 and entered into force on 1 January 2013. See further chs 2, 8(II) and 14 below.

<sup>12</sup> See, eg the State of the Union Address by the President of the European Commission, Jean-Claude Juncker, before the European Parliament of 13 September 2017, [http://europa.eu/rapid/press-release\\_SPEECH-17-3165\\_en.htm](http://europa.eu/rapid/press-release_SPEECH-17-3165_en.htm) (accessed on 14 September 2017).

<sup>13</sup> According to Art 19 TEU, as amended by the Treaty of Lisbon, the full name of the EU judicial institution is the ‘Court of Justice of the European Union’. This institution includes the Court of Justice (hereinafter ECJ), the General Court (the former Court of First Instance) and specialised courts.

<sup>14</sup> Case 294/83 *Les Verts v Parliament* EU:C:1986:166, para 23; Opinion 1/91 (*Draft Treaty on the Establishment of the European Economic Area*) EU:C:1991:490, para 21; Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakat International Foundation v Council and Commission* EU:C:2008:461, para 281.

<sup>15</sup> Joined Cases C-402/05 P and C-415/05 P *Kadi*, n 14 above, paras 285, 304 and 317. See also Opinion 1/09 of 8 March 2011 *Draft Agreement on the European and Community Patents Court* EU:C:2011:123, paras 65–67.

<sup>16</sup> Case C-101/08 *Audiolux and Others* EU:C:2009:626, para 63.

<sup>17</sup> Opinion 2/13 (*Draft Agreement on the Accession of the EU to the European Convention on Human Rights*) EU:C:2014:2454, para 158.

<sup>18</sup> Nor are we the first commentators to think so: to cite but three grand *oeuvres*: K Lenaerts and P Van Nuffel, *Constitutional Law of the European Union*, 2nd edn (London, Sweet & Maxwell, 2005) (although the third edition (2011) is entitled *European Union Law*); A von Bogdandy and J Bast (eds), *Principles of European Constitutional Law*, 2nd edn (Oxford, Hart Publishing/Munich, Verlag CH Beck, 2010); R Schütze, *European Constitutional Law* (Cambridge, Cambridge University Press, 2012). See also the references in n 6 above.

The ambiguities and divergent opinions relating to the concept of an EU constitution stem from the hybrid nature of the EU, which is situated somewhere between nation states and intergovernmental organisations (chapter two) and which, while being based on Treaties concluded by states, has taken on some of the competences and powers of those states (chapter three) giving them a life of their own (chapter four).

A discussion of the system or hierarchy of norms, an element central to all constitutions, under any definition of that term, will follow (chapter five). However, the manner in which these norms have ‘flowed into the estuaries and up the rivers’<sup>19</sup> to permeate the domestic legal order, notably via the principles of primacy, direct application and direct effect, will serve to explain more fully the unique nature of the EU as a legal and constitutional order (chapter six).

Indeed, the decentralised nature of the integration regime cannot be overemphasised. Not only is EU law implemented primarily at the level of Member States rather than that of EU institutions, but it also addresses itself to an increasing extent directly to various sub-components of the Member States, such as national parliaments, courts and administrative authorities. Chapter seven identifies these various actors. Chapter eight will address another striking feature of the EU, often described as ‘differentiation’ or ‘variable geometry’. This notion refers to different territorial ‘circles’ or regimes of integration which are to be found inside the EU (for instance, the common currency which, as this edition goes to print, applies to 17 Member States) but which may also be applied externally, in its relations with what Article 8 TEU calls ‘neighbouring countries’ with which the Union is instructed to develop ‘a special relationship’.

As the present book is not an introduction to EU law but to EU *constitutional* law, substantive EU law (such as the economic freedoms or EU environmental law) will be considered only to the extent that this is necessary for an understanding of the constitutional structure (and therefore appears mainly in chapter thirteen). Furthermore, an attempt will be made to spare the reader from institutional and procedural ‘nitty gritty’. The focus will instead be on structural issues. Thus, in addition to the general values, principles and objectives or apparently more technical rules on competence and power-sharing dealt with in the early chapters, we will also address the issue of democracy and the perceived deficit from which the EU suffers on the one hand (chapter nine) and the role of fundamental rights, including the principle of equal treatment, or non-discrimination, on the other (chapter eleven).

The creation in 1992 of the EU, and perhaps in response to the expanding powers of the organisation and the increasing allegations of democratic deficit referred to above, brought with it a new perspective on the ‘peoples of Europe’ and introduced the notion of the European Union citizen (chapter ten). That the focus of the Union is less and less ‘economic’ is demonstrated in particular by the move beyond the internal market to the broader agenda of an area of liberty, security and justice, which includes issues such as immigration and asylum policy, and cooperation in criminal law matters (chapter twelve). A separate chapter (thirteen) on the internal market will certainly address economic integration, but the broader agenda is illustrated by the social and environmental dimensions

<sup>19</sup> This is a quote from a famous English judge, Lord Denning, in *HP Bulmer Ltd v J Bollinger SA* [1974] Ch 401, 418.

which form an integral part of that market. And a separate chapter on economic governance as the next step to deeper integration was added already to the second edition (chapter fourteen). The chapter focuses on the institutional and procedural reforms to EU monetary and economic policy, including the banking union, some of which have been introduced lately including, as already noted above, an amendment to the TFEU and the drafting of an intergovernmental agreement in the field, these reforms being of particular interest from a constitutional point of view.

Attention will then turn to EU external relations, including an emerging common defence policy (chapter fifteen), not as an exercise for its own sake but because we believe that understanding the basic tenets of EU external relations means understanding a great deal about the EU itself, and why it sits uncomfortably with the dichotomy of states/international organisations. Indeed, the hybrid nature of the EU, referred to above, is exemplified by the parallel existence of international agreements concluded by the EU alone, so-called mixed agreements concluded by the EU and its Member States, and agreements concluded solely by the Member States but which may be of relevance for Union law. The complex legal matrices which exist as a result of these three categories tell us a great deal about what the EU is, or is not, in a more general sense.

Finally, the key element of any constitution, that it is respected and how that respect is secured, will be addressed mainly through the eyes of those who must ensure that ‘in the interpretation and application of the Treaties the law is observed’:<sup>20</sup> the judges, including national judges (chapter sixteen). This chapter will also look at some non-judicial mechanisms to enhance implementation and enforcement of Union law.

The French political philosopher Jean-Jacques Rousseau (1712–78) is reported to have called for a ‘good federative association’ (*une bonne association fédérative*) in Europe.<sup>21</sup> The EU does present elements of a federative association, but it is another question whether it is a good association. While this book cannot give any definitive answer to this question, we hope that it will provide some insight and food for thought intended to help the reader form his or her own opinion in this regard. And as Europe enters a new chapter of what continues to be a ‘work in progress’, we will use our final chapter (seventeen) to reflect on the soundness of the European construction and whether it resembles the suprematist composition of our front cover or is built on a constitutional order which is, or at least has the potential to become, simpler and more straightforward.

<sup>20</sup> Art 19(1) TEU.

<sup>21</sup> A Rosas, ‘The European Union as a Federative Association’, *European Law Lecture 2003*, Durham European Law Institute (University of Durham, 2004) 1–3.