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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 on 2 October 2009, a clear majority (about 67 per cent of the voters who took part) voted in favour of the Treaty. The Treaty

<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.

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entered into force following the final ratifications by Poland on 10 October and the Czech Republic on 3 November 2009.<sup>4</sup>

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 the Second World War 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.<sup>5</sup>

However, as will be explained in greater detail in chapter 2, the EU, especially as it emerges from the Treaties of Maastricht (1992), Amsterdam (1997), Nice (2001) and Lisbon (2007), differs in many respects from those 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 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

<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 supposed 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.

<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).

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>

That the EU continues to form a ‘moving target’ is illustrated by the fact that as this second revised edition goes to print—and despite the fact that the Treaty of Lisbon, when signed and ratified, was heralded as a solution which would last for many years—the unprecedented sovereign debt crisis affecting the EU and its Member States<sup>7</sup> has already prompted an amendment to the TFEU and would have led to a more comprehensive review of the provisions on economic governance but for the deployment by the UK of its veto.<sup>8</sup>

As early as 1986, the European Court of Justice (ECJ)<sup>9</sup> characterised the Community Treaties as a ‘constitutional charter based on the rule of law’.<sup>10</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>11</sup> as well as the ‘constitutional status’ of the general principles of Union law.<sup>12</sup> We are convinced that, while keeping in mind the

<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 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 et al, n 2 above, 261; K Tuori and S Sankari, *The Many Constitutions of Europe* (Farnham, Ashgate, 2010).

<sup>7</sup> See, eg J-C Piriš, *The Future of Europe: Towards a Two-Speed EU?* (Cambridge, Cambridge University Press, 2012) 1, 41–42.

<sup>8</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. See further chs 2, 8B and 14 below.

<sup>9</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>10</sup> Case 294/83 *Les Verts v Parliament* [1986] ECR 1365, para 23; *Opinion 1/91 Draft Treaty on the Establishment of the European Economic Area* [1991] ECR I-6102, para 21; Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation v Council and Commission* [2008] ECR I-6351, para 281.

<sup>11</sup> Joined Cases C-402/05 P and C-415/05 P *Kadi*, *ibid*, paras 285, 304 and 317. See also *Opinion 1/09 of 8 March 2011 Draft Agreement on the European and Community Patents Court nyr*, paras 65–67.

<sup>12</sup> Case C-101/08 *Audiolux and Others* [2009] ECR I-9823, para 63.

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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>13</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.

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 2) and which, while being based on Treaties concluded by states, has taken on some of the competences and powers of those states (chapter 3) giving them a life of their own (chapter 4).

A discussion of the system or hierarchy of norms, an element central to all constitutions, under any definition of that term, will follow (chapter 5). However, the manner in which these norms have ‘flowed into the estuaries and up the rivers’<sup>14</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 6).

Indeed, the decentralised nature of the integration regime cannot be over-emphasised. 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 7 identifies these various actors. Chapter 8 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 13). 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

<sup>13</sup> Nor are we the first commentators to think so: to cite but two 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). See also the references in n 6 above.

<sup>14</sup> This is a quote from a famous English judge, Lord Denning, in *HP Bulmer Ltd v J Bollinger SA* [1974] Ch 401, 418.

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 9) and the role of fundamental rights, including the principle of equal treatment, or non-discrimination, on the other (chapter 11).

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 10). 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 12). A separate chapter (13) on the internal market will certainly address economic integration, but the broader agenda is illustrated by the social and environmental dimensions which form an integral part of that market. A new chapter on economic governance as the next step to deeper integration has been added (chapter 14), although its content is, of course, largely inspired (if that term is appropriate) by the sovereign debt crisis affecting the EU Member States whose common currency is the euro. The chapter will focus on the institutional and procedural reforms to EU monetary and economic policy 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 15), 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>15</sup> the judges, including national judges (chapter 16). 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

<sup>15</sup> Art 19(1) TEU.

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to have called for a ‘good federative association’ (‘une bonne association fédérative’) in Europe.<sup>16</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 (17) to reflect on the soundness of the European construction and whether it resembles the supremacist 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.

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<sup>16</sup> A Rosas, ‘The European Union as a Federative Association’, *European Law Lecture 2003*, Durham European Law Institute (University of Durham, 2004) 1–3.