

Introduction: European Constitutional Law

‘The life of the law has not been logic; it has been experience.’¹ But if it is the fate of the common law to ‘stumb[e] into wisdom’,² this should be less true of the civil law.³ For it is the task of legal codes to order experiences into a logical system of norms. Constitutional law is – more often than not – codified law.⁴ Most constitutional orders are based on a written constitution; and this written constitution is designed to establish a logical system of rules that provide the ‘grammar of politics’.⁵ Learning constitutional law is thus like learning a language. One cannot solely learn the words expressing different experiences, one also needs to study the grammatical system that binds these words together. Yet surely, constitutional law is not all about logical rules. As in a language, there may exist exceptions next to the rules, and next to the exceptions may exist absurdities. These exceptions and absurdities are not the result of logic, but of historical experience. Constitutional law will therefore always be about logic *and* experience. It is that part of the law where political theory meets historical reality.

The object of constitutional law is the ‘constitution’. But what is a ‘constitution’? From a purely ‘descriptive’ point of view, constitutions simply reflect the institutions and powers of government.⁶ From a ‘normative’ perspective, on the

¹ O. W. Holmes, *The Common Law* (Echo Library, 2007), 3.

² Cf. G. Radbruch, *Der Geist des Englischen Rechts und die Anglo-Amerikanische Jurisprudenz* (LIT, 2006), 97. Thanks go to my colleague and friend M. Bohlander for pointing me to this treasure.

³ For the ‘civil law’ tradition, see: J. H. Merryman, *The Civil Law Tradition: An Introduction to the Legal Systems of Europe and Latin America* (Stanford University Press, 2007).

⁴ The ‘unwritten’ constitution of the United Kingdom is indeed an exception. On its ‘exceptional’ nature, see: S. E. Finer (et al.), *Comparing Constitutions* (Clarendon Press, 1995), Chapter 3.

⁵ H. Laski, *A Grammar of Politics* (HarperCollins, 1967); and see also: T. Paine, *Rights of Man* (Kessinger, 1998), 44: ‘The American constitutions were to liberty what a grammar is to language: they define its parts of speech, and practically construct them into syntax.’

⁶ This ‘descriptive’ sense of ‘constitution’ can be found in Aristotle, *Politics* (translated: E. Baker (OUP, 1998)), Book III, §6–7, 97: ‘A constitution may be defined as the organization of the city, in respect of its offices generally, but especially in respect of that particular office which is sovereign in all issues. The civic body is everywhere the sovereign of the city; in fact the civic body is the constitution itself.’ In this ‘descriptive’ sense, there is indeed no distinction between the ‘government’ and the ‘constitution’ (cf. E. Zoller, *Droit Constitutionnel* (Presses Universitaires de France, 1998), 10). For the British tradition of the ‘descriptive’ or ‘political’ constitution, see: C. Turpin and A. Tomkins, *British Government and the Constitution* (Cambridge University Press, 2011), esp. Chapters 1 and 2.

other hand, constitutions are to 'order' societies according to particular political principles. Normative constitutions thus do not merely reflect the existing 'government', but prescribe its composition and actions. Yet in order to be able to set normative limits to a government, the constitution must be 'above' the government.⁷ The normative definition of 'constitution' therefore defines it as the 'highest' law within a society. The constitution has an elevated position above the ordinary law governing a society. (Its higher status is thereby achieved by prohibiting constitutional changes through simple legislation. Constitutions can only be amended by 'constitutional' amendment.⁸) Formally, then, a constitution is best defined as the collection of those norms that 'constitute' a society's highest laws. Within the last two hundred years, this formal definition has competed with a material understanding of what a constitution ought to be. This second definition links the concept of constitution to particular political principles. Following the 'liberal' principle, a constitution should thus establish the rule of law and a separation of powers.⁹ And according to the 'democratic' principle, a constitution should set up a 'government of the people, by the people, for the people'.¹⁰

Is there a European constitution? This question has plagued European law ever since its birth.¹¹ If we define a constitution as those foundational laws ordering society, then Europe undoubtedly has a constitution.¹² But if we – formally – limit the concept of 'constitution' by reference to the concept of the 'State',¹³ then Europe cannot have a constitution. For the European Union is not a State, it is a union of *States*. The state-centred definition of 'constitution' became fashionable in the nineteenth century; and it was partly the result of the state-centred structure of international law.¹⁴ The problem with this reductionist

⁷ Cf. Paine, *Rights of Man* (supra n. 5), 29: 'A Constitution is a thing antecedent to a government, and a government is only the creature of a constitution.'

⁸ The procedural requirements for constitutional amendments are more demanding than for legislative amendments of existing laws. On the amendment power in the United States and the European Union, see: Chapters 1 and 2 below.

⁹ Cf. 1789 Declaration of the Rights of Man and of the Citizen, whose Article 16 states: 'A society in which the observance of the law is not assured, nor the separation of powers defined, has no constitution at all.' On the connection between this constitutional 'ideal' and the rise of (bourgeois) liberalism, see: C. Schmitt, *Verfassungslehre* (Duncker & Humblot, 1993), 36.

¹⁰ A. Lincoln, 'Gettysburg Address, 1863' in H. S. Commager and M. Cantor (eds.), *Documents of American History* (Prentice Hall, 1988), vol. I, 428 at 429.

¹¹ The European legal order is not the only one suffering from this doubt. For the question whether the United Kingdom has a legal constitution, see: E. Barendt, 'Is there a United Kingdom Constitution?' [1997] 12 OJLS 137.

¹² The European Union not only has a 'government' in a descriptive sense. From a normative perspective, it is generally accepted that the Union institutions are the creation of the European Treaties, and that the European Treaties stand above European legislation. And since the European Treaties establish a democratic system in which the 'rule of law' is assured and a separation powers effected, it also has a material constitution. On all these aspects, see: Chapter 2 below.

¹³ On this traditional mistake of 'European' constitutionalism, see: Chapter 2 below.

¹⁴ M. Koskeniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge University Press, 2006).

definition of constitutional law is that it ignores most of the ‘constitutional’ experiences of humankind in the last two millennia.¹⁵ For did ancient Athens not have a ‘constitution’?¹⁶ And what about the ‘constitution’ of the Roman Republic?¹⁷ And did the ‘colonials’ who created the ‘United States of America’ not think that the document they had drafted was a ‘constitution’?¹⁸ When viewed in light of the broader historical tradition, the European Union has a constitution. And this view corresponds to the self-understanding of the European legal order. In the words of the Court of Justice of the European Union:

[T]he [EU] Treaty, albeit concluded in the form of an international agreement, none the less constitutes the constitutional charter of a [Union] based on the rule of law. As the Court of Justice has consistently held, the [European] Treaties established a new legal order for the benefit of which the States have limited their sovereign rights, in ever wider fields, and the subjects of which comprise not only Member States but also their nationals. The essential characteristics of the [Union] legal order which has thus been established are in particular its primacy over the law of the Member States and the direct effect of a whole series of provisions which are applicable to their nationals and to the Member States themselves.¹⁹

The European legal order thus insists that there ‘is’ a European constitution. Indeed, the ‘real’ problem of the European Union is not whether there is a European constitution, but that there is ‘[t]oo much constitutional law’.²⁰ For in comparison to the 34 articles and amendments that make up the written constitution of the United States, the European Treaties alone contain 413 articles.²¹ The European Treaties are thus – with regard to their length – ‘bad’ constitutional law. For it is the task of constitutions to define the very *principles* on which societies are based. Constitutions should be the ‘condensed’ – poetic – expression of a legal order.²² A constitution – as well as the constitutional lawyer – must aspire to be a ‘painter of modern life’ for they must be able ‘to extract from fashion whatever element it may contain of poetry within history,

¹⁵ Cf. C. McIlwain, *Constitutionalism: Ancient and Modern* (Liberty Fund, 2008).

¹⁶ Cf. Aristotle, *Constitution of Athens* (translated: K. von Fritz & E. Kapp (Hafner Press, 1974)).

¹⁷ C. A. Lintott, *The Constitution of the Roman Republic* (Oxford University Press, 2003).

¹⁸ On this point, see: Chapter 2 below.

¹⁹ Opinion 1/91 (European Economic Area), [1991] ECR I-6079, para. 21.

²⁰ For this excellent point – albeit in a specific context – see: B. de Witte, ‘Too Much Constitutional Law in the European Union’s Foreign Relations?’ in M. Cremona and B. de Witte (eds.), *EU Foreign Relations Law – Constitutional Fundamentals* (Hart, 2008), 3.

²¹ And this number is – dramatically – increased by the existence of numerous ‘Protocols’, which enjoy constitutional status. Why was this ‘Protocology’ (cf. Editorial Comments [2009] CML Rev 1785) necessary? Was there truly a need for a constitutional provision ‘concerning imports into the European Union of petroleum products refined in the Netherlands Antilles’ (Protocol No. 31)? Here we encounter the historical peculiarities – if not absurdities – of the European Constitution.

²² On poetry as the most concentrated form of verbal expression, see E. Pound, *ABC of Reading* (New Directions, 1960), 36: ‘Dichten = condensare’.

to distil the eternal from the transitory'.²³ Constitutional law must explain how transient governmental experiences 'fit' the constitutional logic of a society.

Length is – unfortunately – not the sole problem of the European constitution. For unlike other constitutional orders, the European constitutional order still struggles with its 'vocabulary'. This not only concerns the difference between 'Union' and 'Community',²⁴ but such elementary linguistic conventions as what constitutes 'European law'²⁵ and, within this body of law, 'secondary legislation'.²⁶ This terminological turmoil is the result of the constant evolution of the European Union. In the past fifty years, the Union hardly ever sat still. For the constitutional 'painter' it has not been a patient 'sitter'. For if constitutional law is about describing fixed – 'constituted' – structures and principles, the Union had often outgrown them before the portrait was finished. The European Union has indeed a *changing* constitution.²⁷ This constitutional change has come close to being 'revolutionary' with the Lisbon Treaty. The Lisbon Treaty – unlike any

²³ C. Baudelaire, *The Painter of Modern Life (and other Essays)* (translated and edited: J. Mayne (Phaidon Press, 1995)), 12.

²⁴ Students of the European Union will indeed first have to come to terms with the – confusing – terminology. Words and numbers seem in a process of constant change. The Merger Treaty had changed the terminology of the first European Community; the Maastricht Treaty changed the name of the European Economic Community into European Community and created the European Union; the Amsterdam Treaty renumbered all Treaty articles; and, with the Lisbon Treaty, the European Community has been re-baptised into the European Union and all Treaty articles have been renumbered again. The following study will use the term 'European Union' in its broadest sense, that is: as the all-embracing entity within which all European integration has taken place. Thus, even if much of the constitutional consolidation of Europe has historically taken place within the European Community, the book will refer to the constitutional evolution of the European Union. This is the official position after the Lisbon Treaty. For according to Article 1 TEU – third indent: 'The Union shall replace and succeed the European Community'. With the exception of Chapter 1, the book indeed avoids all references to the 'Community', and has tried to 'Lisbonise' all Treaty articles.

²⁵ The term 'European law' for European Union law still encounters criticism from purist quarters. But was not the 2004 Constitutional Treaty called 'Treaty establishing a Constitution for Europe'? And has the Council of Europe a better claim to be 'European law' in light of a membership that stretches beyond Europe? In the following study, European Union law will thus be referred to as 'European law'.

²⁶ The lack of a common vocabulary within the European legal order is, indeed, most striking with regard to what is meant by 'secondary legislation'. Even the most seasoned European lawyers – including the Court – continue to refer to acts adopted on the basis of the Treaties as 'secondary legislation', or worse: use 'primary' and 'secondary' legislation interchangeably. But this is – especially after the Lisbon Treaty – a serious mistake. For the European Treaties are not primary *Union legislation*. The Treaties are not acts that can be attributed to the Union, nor are they unilateral acts. The European Treaties are authored by the Member States; and, as such, they constitute multilateral treaties – albeit with 'constitutional' effects. For examples of the – wrong – use of 'secondary legislation', see: S. Douglas-Scott, *Constitutional Law of the European Union* (Longman, 2002), 208 and passim; D. Chalmers (et al.), *European Union Law* (Cambridge University Press, 2010), 98 and passim; P. Craig and G. de Búrca, *EU Law* (Oxford University Press, 2011), 180 and passim; A. Dashwood (et al.), *European Union Law* (Hart, 2011), 558 and passim. For the Court's linguistic insensitivity, see: Case C-61/94, *Commission v. Germany* (IDA), [1996] ECR I-3989, para. 52.

²⁷ On the British *changing* constitution, see: J. Jowell and D. Oliver, *The Changing Constitution* (Oxford University Press, 2011).

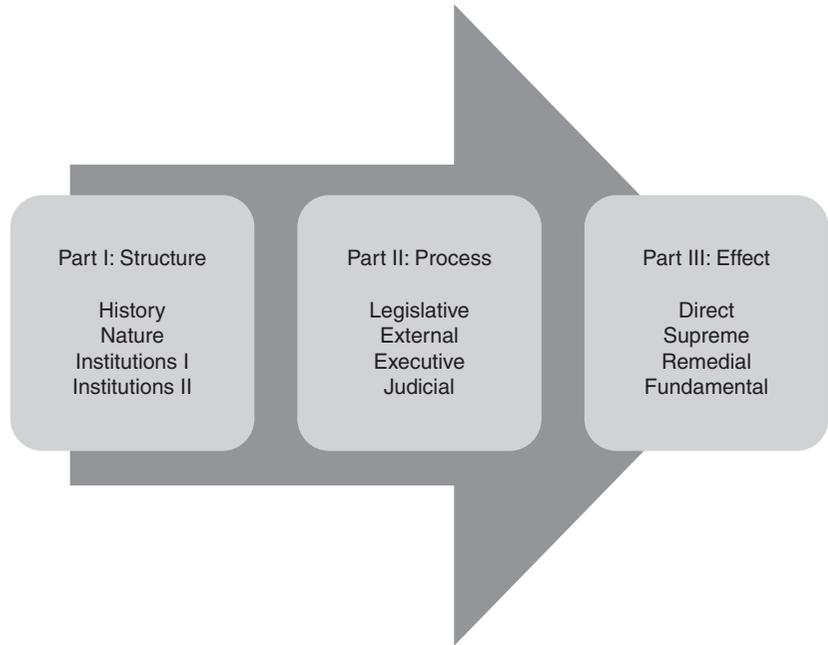


Figure 1 Structure of the Book

other amendment preceding it – has radically altered the constitutional structure of the Union. And it is hard to predict how this structure will be set in motion in the future. To that extent, any constitutional portrait of the Union requires more than a sober analytical eye; it helps to be a ‘clairvoyant’ or ‘seer’ to foresee the permanent in the transient.

What then is the structure of this book on European constitutional law? Its structure – significantly – departs from the way in which the European Union is commonly described.²⁸ It treats the Union as a ‘mature’ constitutional entity that follows ‘classic’ constitutional parameters. The book is thereby divided into three parts, which – roughly – correspond to the three ideas of ‘structure’, ‘process’, and ‘effect’.

Part I analyses the ‘structure’ of the Union. Chapter 1 here starts by looking at the historical evolution of this structure. The European Treaties are the result of 60 years of constitutional creation and amendment. Is the European Union a federal union; or, is the Union an ‘unidentified’ *sui generis* object? Chapter 2 attempts to describe the present constitutional structure of the European Union in comparative constitutional terms. It identifies the European Union as a federal union of States. Chapters 3 and 4 zoom in on the governmental structure

²⁸ It is striking that many good textbooks have hardly changed their essential structure – despite the fact that the European Union has significantly changed its structure in the last decades. For an illustration of this – detached – ‘traditionalism’, see: T. Hartley, *The Foundations of European Union Law* (Oxford University Press, 2010).

of the Union. They analyse each of the Union's 'institutions' as set up by the European Treaties.

The Union will typically discharge its governmental functions by combining various institutions in a 'process'. The 'joint' exercise of governmental powers thereby creates a system of checks and balances. Part II looks at this system by analysing the Union's governmental functions. Chapter 5 starts with the Union's legislative powers and procedures, while Chapter 6 specifically concentrates on its external powers. Chapters 7 and 8 examine – respectively – the executive and judicial branch of the Union.

The results of these processes will lead to European (secondary) law. The effects of this law will be discussed in Part III. We shall see there that European law establishes rights and obligations that directly affect individuals. The direct effects of European law in the national legal orders will be discussed in Chapter 9. Where a European norm is directly effective, it will also be 'supreme' over national law. The 'supremacy' of European law is the subject of Chapter 10. Yet in addition to demanding that conflicting national law be disapplied, how can individuals enforce their European rights? Chapter 11 looks at the availability of remedies that prevent or sanction violations of European law. And the last chapter, Chapter 12, looks – finally – at one particular category of European rights: fundamental rights as guaranteed by the European Constitution.

The book thus moves from the most 'abstract' to the most 'concrete' aspect of European constitutional law. And for those who think from the concrete to the abstract, it might – at first sight – be tempting to read the book from the end to the beginning. The perspective would be as follows: what are the *remedies* in a court examining the *compatibility of national legislation* with an *executive* Union act implementing European *legislation* adopted by the Union *institutions* whose *nature* has been shaped by the *history* of European integration? This perspective is nonetheless not recommended. For each of the chapters builds on its predecessors and for that reason one has to start at the beginning – even if that beginning is farther removed from the everyday experiences of the European citizen. But this 'remoteness' from the private experiences of citizens results from the nature of constitutional rules. For much constitutional law is not about 'primary rules', that is: rules directing individual conduct. It generally deals with 'secondary rules', that is: rules that determine the creation and use of primary rules.²⁹ In this respect constitutional rules indeed come close to establishing the 'grammar of politics'. For they establish the fundamental rules, which all legal rules within a society must obey.

²⁹ On the distinction between 'primary' and 'secondary' rules in a legal system, see: H. Hart, *The Concept of Law* (Clarendon Press, 1997).

Part I

History and Structure

The European Union has existed for more than half a century. It was originally created between six European States wishing to cooperate closer in the area of coal and steel. Since 1952, the European Union has grown both geographically and thematically. The Union today not only has twenty-seven Member States, it also acts within almost all areas of modern life. Its constitutional and institutional structures have thereby changed in parallel in the past six decades. This first Part looks at this – remarkable – constitutional evolution in Chapter 1. What type of legal ‘animal’ is the European Union? Can it be described as a ‘federal’ union? Chapter 2 analyses this question from a comparative constitutional perspective. Chapters 3 and 4 look at the governmental *architecture* of the European Union. Each Union institution will be – individually – presented. By contrast, the interplay between the institutions in discharging the Union’s governmental *functions* will be examined in Part II.

Chapter 1 – Constitutional History: From Paris to Lisbon

Chapter 2 – Constitutional Nature: A Federation of States

Chapter 3 – Governmental Structure: Institutions I

Chapter 4 – Governmental Structure: Institutions II

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Constitutional History: From Paris to Lisbon

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Introduction

The idea of European unification is as old as the European idea of the sovereign State.¹ Yet the spectacular rise of the latter overshadowed the idea of European

¹ R.H. Foerster, *Die Idee Europa 1300–1946, Quellen zur Geschichte der politischen Einigung* (Deutscher Taschenbuchverlag, 1963).

union for centuries. Within the twentieth century, two ruinous world wars and the social forces of globalisation have discredited the idea of the *sovereign* State. The decline of the monadic State found expression in the spread of inter-state cooperation.² And the rise of international cooperation caused a fundamental transformation in the substance and structure of international law. The changed reality of international relations necessitated a change in the theory of international law.³ The various efforts at European cooperation after the Second World War indeed formed part of this general transition from an international law of coexistence to an international law of cooperation.⁴ 'Europe was beginning to get organised.'⁵ This development began with three international organisations. First: the Organisation for European Economic Cooperation (1948), which had been created after the Second World War by sixteen European States to administer the international aid offered by the United States for European reconstruction.⁶ Second: the Western European Union (1948, 1954) that established a security alliance to prevent another war in Europe.⁷ Third: the Council of Europe (1949), which had inter alia been founded to protect human rights and fundamental freedoms in Europe.⁸

None of these grand international organisations was to lead to the European Union. The birth of the latter was to take place in a much humbler sector. The 1951 Treaty of Paris set up the European Coal and Steel Community (ECSC).⁹

² G. Schwarzenberger, *The Frontiers of International Law* (Stevens, 1962).

³ C. de Visscher, *Theory and Reality in Public International Law* (Princeton University Press, 1968).

⁴ W. G. Friedmann, *The Changing Structure of International Law* (Stevens, 1964).

⁵ A. H. Robertson, *European Institutions: Co-Operation, Integration, Unification* (Stevens & Sons, 1973), 17.

⁶ The 'European Recovery Programme', also known as the 'Marshall Plan', was named after the (then) Secretary of State of the United States, George C. Marshall. Article 1 of the OEEC Treaty stated: 'The Contracting Parties agree to work in close cooperation in their economic relations with one another. As their immediate task, they will undertake the elaboration and execution of a joint recovery programme.' In 1960, the OEEC was transformed into the thematically broader Organisation for Economic Cooperation and Development (OECD) with the United States and Canada becoming full members of that organisation.

⁷ Article IV of the 1948 Brussels Treaty stated: 'If any of the High Contracting Parties should be the object of an armed attack in Europe, the other High Contracting Parties will, in accordance with the provisions of Article 51 of the Charter of the United Nations, afford the party so attacked all the military and other aid and assistance in their power.'

⁸ According to Article 1 of the Statute of the Council of Europe, its aim 'is to achieve a greater unity between its Members for the purpose of safeguarding and realising the ideals and principles which are their common heritage and facilitating their economic and social progress' (*ibid.*, paragraph a). This aim was to be pursued through common organs 'by discussion of questions of common concern and by agreements and common action in economic, social, cultural, scientific, legal and administrative matters and in the maintenance and further realisation of human rights and fundamental freedoms' (*ibid.*, paragraph b). The most important expression of this second aim was the development of a common standard of human rights in the form of the European Convention on Human Rights (ECHR). The Convention was signed in 1950 and entered into force in 1953. The Convention established a European Court of Human Rights in Strasbourg (1959).

⁹ For a detailed discussion of the negotiations leading up to the signature of the ECSC Treaty, see: H. Mosler, 'Der Vertrag über die Europäische Gemeinschaft für Kohle und Stahl' [1951/2] 14 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 1.