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The European Union and global constitutionalism

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Abstract

This chapter examines narratives of constitutionalism and the ebb and flow of constitutional ideas and practices within and across the European Union and its Member States from the inception of the treaties to the present day. It seeks to establish to what extent the European Union manifests a ‘constitutional’ legal and political order. It focuses on the contribution of legal rules to developing constitutional structures, as well as the role of ideas in relation to legal rules. The original objectives of the so-called ‘founding fathers’ of European integration concerned the promotion of peace, prosperity and a form of non-nationalist supranationalism. In many respects, the EU has been remarkably successful, given the history of the European continent right through to the middle of the twentieth century. The ‘constitutionalised treaties’ have been at the heart of that success. But now we must pay attention to recent challenges, resulting from the financial crisis, the travails of the Eurozone, problems in the EU’s near abroad, and the arrival of large numbers of refugees at and beyond the external borders of the EU. In an era of national reactions against neo-liberalism and globalisation, the role of the EU and specifically of the Court of Justice of the EU is increasingly under question.

Keywords

Constitutionalism, European Union, European integration, integration through law, Court of Justice of the European Union

Introduction

This chapter examines narratives of constitutionalism and the ebb and flow of constitutional ideas and practices within and across the European Union and its Member States from the inception of the treaties to the present day. The underlying question is this: to what extent does the European Union manifest a ‘constitutional’ legal and political order? Alongside that question is the one that inevitably arises in the context of a dynamic regional integration project such as the EU, which is the question of change. Is the EU changing in terms of its engagement with constitutional ideas and practices, and if so is it to be understood as becoming more, or less, constitutional over time?

Methodologically, of course, this raises extremely difficult questions: how do we evaluate and ‘measure’ the ‘level’ of constitutionalism within a polity, especially one that is not a state? This chapter adopts a normative approach, in the sense that it assesses above all the role of legal rules in underpinning the content of a constitutional framework, and it gives priority to the treaties and to the role of the Court of Justice of the European Union (CJEU). However, it does not deny the social content of constitutionalism, especially issues of legitimacy. Consequently, we also need to take into account the context of the ebbs and flows of legal rules. What types of changes to the (economic, political and geopolitical) environment in which the EU and the Member States operate have made most difference to the constitutional dimension of European integration?

To answer these questions, we need a definition of ‘constitutionalism’. This chapter adopts the terms set by the introduction to this *Handbook*. We can assess issues of constitutionalism across the dimensions of the rule of law, the balance or separation of powers, and the notion of a constituent power. As we shall see in the conclusion, the choice of these elements of focus for global constitutionalism is highly consequent for the European Union. For the EU as a legal and political order has long reflected its constituent Member States’ highly ambivalent engagement with many aspects of popular sovereignty in the postwar period, as a reaction to the totalitarian past. This had led, in the view of Müller (2016), to a preference for the fragmentation of power and a suspicion of populist politics that has spilled over into expectations about what the EU is, and what it should do. We will return to this theme at the end of this chapter. As we shall see, in many ways nothing has changed. And yet everything has.

A handbook on constitutionalism written twenty to thirty years ago would have been unlikely to feature the European Union (i.e. what was then the ‘European Communities’) as one of its case studies. It would have focused on *national* case studies, and perhaps the migration of constitutional ideas across state borders. Only a narrow cadre of scholars of European Community law might have pressed the argument that European integration was, from the beginning, to be understood as more than ‘just’ an international pact about trade and that this ‘project’ was well on the way, by the 1980s, to evincing distinctive constitutional features stemming from its supranational legal order. More generally, of course, the very idea of *global* constitutionalism was at best a marginal concept in the 1980s, and even well into the

1990s. But in the second decade of the 21st century, the world looks – especially from an institutional perspective – very different, with many global and regional international institutions that are based on legal frameworks with quasi-constitutional characteristics and functions and supported by the discourses of ‘rule of law’, ‘human rights’ and ‘separation of powers’, even whilst the status and effectiveness of such institutions, such as the International Criminal Court, continue to be contested.

In that context, the European Union lies at the very heart of a radically changed institutional and normative landscape, which has sometimes been characterised, perhaps prematurely, as a ‘postnational’ world. This chapter examines the evolution of this landscape, moving forward from well-trodden ‘historical’ terrain towards more recent, and less well-understood developments. In the conclusion, we return to the question of ‘what type of EU constitutionalism in what type of world’, applying a brief critique of the utility of the idea of ‘postnationalism’ in the context of rising tides of populist politics and politicians, in the EU, in the EU’s neighbourhood and elsewhere in the world.

An ever-changing union with shifting narratives of constitutionalism

Despite the relatively recent emergence of a formal narrative of constitutionalism into the public discourse of the European Union and its institutions, in fact many of the ‘constitutional’ features of the EU have been well established as legal doctrines since the 1960s and 1970s. This can be attributed to decades of fairly consistent activism based on a teleological approach to the interpretation of legal texts on the part of the CJEU when it came to the shaping of the core features of the European Union’s legal order in view of its often implicit and sometimes explicit understanding of the ‘project’ of European integration. This is what we should term the ‘constitutionalisation of the treaties’.

The CJEU handed down a series of formative judgments¹ that put in place key legal concepts such as the direct effect, direct applicability and the primacy of EU law. Together these established what came to be seen, from the perspective of EU law, as a hierarchy between national law and EU law, with the latter taking precedence over the former and being directly enforceable within domestic legal systems. Over time, this case law became well known not just amongst lawyers, but also across a wider circle of specialists on European integration, although it rarely if ever received much public attention. As a result prevailing national myths about what the EU was or is, and what is was not or is not have tended to dominate public discourse at the national level.

One of the *leitmotifs* of this constitutionalisation process was the emphasis on the uniform application of (what is now) European Union law within and across the Member States, and the role of national courts and national institutions in enforcing the law in a multi-level constitutional system (Tridimas 2015). The possibility and – in some circumstances – the requirement for national courts to refer questions of European Union law which arose in cases before them to the CJEU for a ruling on interpretation (or where appropriate a ruling on the validity of EU law measures) has been a crucial connection between the two systems. Originally Article 177 EEC, this reference procedure is now to be found in Article 267 TFEU. To put it another way, an embryonic European Community constitutional structure was heavily dependent upon a central legal core based on a uniform conception of supranational law enforceable by national courts as well as by the CJEU. This is a phenomenon that political scientists often termed ‘legal integration’. In addition, the CJEU also worked through concepts of fundamental rights and ‘legal basis’ (i.e. the scope of EU

¹ Case 26/62 *Van Gend en Loos* ECLI:EU:C:1963:1; Case 6/64 *Costa v. ENEL* ECLI:EU:C:1964:66.

competences) in order to develop the autonomy of the EU legal order, and to strengthen the claim that it is based on the rule of law and human rights. The Court was not afraid of the idea of constitutionalism; in the 1986 case of *Les Verts*,² it described the treaties as the European Community's 'constitutional charter'.

Many have argued that the CJEU, in this case law, was channelling the spirit of 'ever closer union among the peoples of Europe' as one of the original aims of the European integration process, owing much to the intention of the original functionalist framers of the treaties, such as Jean Monnet, Robert Schumann and Walter Hallstein. This phrase was contained in the Treaty of Rome 1957, and has survived into the current Treaty on European Union which now underpins the EU, at least until its durability and cohesive spirit was called into question by the UK's so-called renegotiation of its terms of membership, prior to the UK EU Referendum of June 2016. In fact, the CJEU rarely mentioned this phrase, but tended to use instead formalist justifications based on the notion of a community 'under law'.³ Moreover, the CJEU's position was never legally and constitutionally unassailed, especially on the part of the constitutional courts of (some of) the Member States. Since the legal framework underpinning European integration is a multilevel system incorporating both a 'supranational' and a 'national' level, the role of the Member States needs to be taken into account. The German Federal Constitutional Court in particular has been noticeable for adopting a position that accords on a conditional 'primacy' to EU law, based on its understanding of the primary reference point for its work being those parts of the German constitutional framework which sustain the nature of Germany as a sovereign state. These claims are incompatible with the claims made by the CJEU

² Case 294/83 *Parti écologiste "Les Verts" v. European Parliament* ECLI:EU:C:1986:166.

³ Opinion 1/91 *Draft EEA Agreement* ECLI:EU:C:1991:490.

about the character and primacy of EU law, but for decades the two courts have avoided coming directly into conflict with each other (Pernice 2014).

Yet in parallel with these legal developments, the political dimension of the European integration process in other spheres seemed to lurch from crisis to crisis, with the Member States and European institutions seemingly making little substantive progress on core tasks such as the completion of the single market, let alone the creation of a common commercial policy, the establishment of a common external border, the removal of passport controls and identity checks at internal frontiers, or the creation of a single currency and a monetary union. While to some extent the problems could be put down to exogenous factors such as the oil crises of the 1970s and the widespread recession in the global economy in the 1980s, in general the diagnosis given for the paralysis was that there were too many intergovernmental blockages in the legislative process so that the European Community was, for the most part, not working as intended. These blockages were only partially offset by supranational judicial developments guaranteeing the effectiveness of the Treaty-based market freedoms. To put it another way, negative integration (i.e. the application of those parts of the Treaty prohibiting certain types of national barriers or restrictions, e.g. on goods or services) did not fully compensate for the absence of positive integration, in the form of, say, common standards for the goods and services to be traded across borders within the so-called ‘common market’. It was sometimes said at the time that the European Communities seemed to be in last chance saloon by the middle of the 1980s.

It was at this point that a group of heads of state and government predominantly from centre right parties joined forces with a Commission President from the centre left (Jacques Delors) to agree upon the political necessity of

completing what came to be known as the ‘single market’ (essentially the common market, with an additional political spin). The main selling points concerned the benefits for citizens from enhanced economic integration; politicians rarely highlighted the possibility of offering enhanced guarantees of ‘social Europe’ (e.g. more secure and effective employment protection) through measures taken at the EU level.

To give effect to this political impulse, the Member States negotiated the Single European Act, as the first treaty substantially to amend the treaties of the 1950s. It was intended to kick start the completion of the single market, the creation of a frontier-free Europe and the finalisation of the common external border for goods in particular. It led the Member States, with baby steps initially, along the road towards greater cooperation across borders in the areas of justice and home affairs and foreign and security policy. One significant change was the development of a legislative procedure which required only a qualified majority in the Council of Ministers and which gave greater powers to the European Parliament. After some tweaking in subsequent treaties, this procedure has emerged as the ‘ordinary legislative procedure’, installing the European Parliament as co-legislator alongside the Council for many fields of EU law. It now covers not only core market matters including state aid, regulated markets and competition law, but also many important flanking policies such as environmental policy and regional policy, and has been introduced to an ever greater extent even in more sensitive areas such as Justice and Home Affairs and social policy.

The Single European Act (SEA), which entered into force in 1986, was only the first in a rash of new treaties, which have incrementally redesigned what we now call the European Union in such a way as to make it more closely resemble, in

approach and activities, the federal or confederal level in a federal state or a confederation rather than an international organisation. There was a gradual accretion of competences at the EU level, alongside an increased willingness to exercise those competences. This has meant a *de facto* alignment of the EU and many constitutional ideas and a fair amount of litigation that has tested the scope of both internal and external competences. In addition, from 1989 onwards it became apparent that the EU was going to need to adjust rapidly to profoundly changed geopolitical circumstances in Europe and Eurasia, with enlargement policies and a new neighbourhood policy (both policies still incomplete) now on the agenda. But as we shall see, the impulse to enhance European integration through treaty change has not gone unchallenged at the national level.

First came the Treaty of Maastricht, which entered into force in 1993 after initial rejection by the Danish electorate in a referendum followed by subsequent approval. Reassuring noises on issues that concerned Denmark and its citizens were made by the other Member States in the form of a non-binding Declaration, some elements of which were built into subsequent treaties. The Maastricht Treaty introduced the notion of 'European Union', creating a 'pillar structure' to draw out distinctions between 'core matters' managed according to the so-called 'community method' (involving the European Parliament) and areas of intergovernmental cooperation in the fields of justice and home affairs and foreign and security policy, and created the legal framework for the introduction of the euro as a single currency. The concept of 'subsidiarity', intended to ensure that decisions are taken as closely as possible to the citizen, was introduced by this Treaty, as well as the legal figure of the 'citizen of the Union'. As a legal concept, EU citizenship is based on the national citizenship laws of the Member States, as only nationals of the Member States are EU citizens.

The Treaty of Maastricht presented a dilemma for the EU institutions and the Member State governments. On the one hand, it represented an important political step away from a primarily utilitarian and economistic justification for European integration, based on trade and markets. On the other hand, it was the first European treaty to be rejected in a popular referendum (although an earlier ‘political’ treaty in the area of defence cooperation in the 1950s had failed a parliamentary ratification hurdle in France). This raised the spectre and possibility that the citizens of the Member States might not actually want ‘more Europe’, even though steps such as the removal of internal borders (Schengen) and the creation of the euro currency (at least initially) were popular. This was a new equation for political elites to try to figure out, and it remains unsolved more than 20 years later. From that time onwards, Eurosceptic tropes arguing that the EU has a ‘democratic deficit’, that there is a gulf between the Union and its institutions and ordinary citizens, and that Union has been illegitimately eroding the national sovereignty of its Member States have never been far below the surface of the ongoing debate about the trajectory of the EU. However, the primary response of the Union institutions and the Member States has in fact been to press on with treaty development intensively for most of the two following decades, adding many features to the EU as a political and legal structure that could be viewed as more ‘constitutional’ in nature. The political rationale for doing so was that such changes also made it easier for the Union to act in what was seen to be the best interests of citizens – in terms of promoting their security, their prosperity and their capacity to live peacefully together. In terms of the legitimacy of the EU and its rule-making, this raises many complexities. In the search to do more and better at the EU level, the Member States have not always paid attention to how arguments about democratic legitimation in a multi-level polity can mesh effectively. That is to say

that in many respects the argument that the process of EU rule-making enjoys a double democratic legitimation through the role of the (nationally elected and legitimated) Council of Ministers and the (supranationally elected) European Parliament gains little traction with ‘ordinary’ voters who find it opaque and intransparent.

In addition, Member States buttressed these formal developments with important extra-legal changes, notably the introduction of the so-called ‘Copenhagen criteria’, which determine whether or not a candidate Member State qualifies for membership of the Union. For our purposes, the most important of these criteria are the political ones: respect for democracy, human rights, rule of law and protection of and respect for national minorities. Eventually, these criteria were incorporated in the treaties, and now appear as foundational values of the EU in Article 2 of the Treaty on European Union (TEU) and are referenced in Article 49 TEU concerned with the accession of new Member States.

The second of the major revising treaties was the Treaty of Amsterdam, which entered into force in 1999. This treaty, negotiated at a point in the political cycle when the EU had a majority of centre left governments, strengthened and mainstreamed cooperation in justice and home affairs, and social policy, and enhanced the EU treaty provisions on fundamental rights and the right to non-discrimination. Following very rapidly on the heels of the Treaty of Amsterdam came the Treaty of Nice. Signed already in early 2001, the entry into force of the Treaty of Nice was delayed until 2003 by the need to hold a second referendum in Ireland. This treaty was intended to prepare the EU for a ‘big bang’ post-1989 enlargement. In fact, it was more of a tidying up exercise that recognised the increasing importance of flexibility within the EU system and introduced a new provision that could allow the Union as a whole to

sanction a Member State that stepped significantly out of line in relation to matters of democracy, the rule of law, or fundamental rights.

Most recently, we have the Treaty of Lisbon, which entered into force in 2009. This treaty was once more rejected and then later approved by Irish voters in two referendums. It revised and reviewed the overall structure of the treaties so that the basis for primary EU law is now the Treaty on European Union and the Treaty on the Functioning of the European Union, removing the historic ‘community’ and ‘union’ ‘pillar’ distinction between the more supranational and more intergovernmental aspects of the EU’s work. It introduced significant changes in the area of external policy (both commercial policy and foreign and security policy) and completed the process of mainstreaming most areas of justice and home affairs cooperation, under the ordinary legislative procedure. The treaty also established that the EU’s Charter of Fundamental Rights, originally adopted in a non-treaty and non-legally binding format in 2000 (‘solemnly proclaimed’), had the same legal value as the treaties. This has resulted in the CJEU making more substantial use of the rights contained in the Charter in its case law, notwithstanding the efforts of the Member States to ringfence the scope of the Charter by reference to the scope of EU law.

In fact, the roots of the Lisbon Treaty can also be traced to the beginning of the 2000s when the Member States started preparing for what became known as the Constitutional Treaty. The Constitutional Treaty does not appear on the list of amending treaties, as it never came into force. Like the Charter of Rights, it was originally negotiated in a Convention, which comprised representatives not only of Member State governments, but also of national parliaments, the European Parliament, and the European Commission. Empowered by the Laeken Declaration of the European Council, the Convention worked via plenary deliberation, the

circulation of papers and drafts, along with working groups with focused tasks. Much of the work of the Convention was in public, eschewing in large part the ‘behind-closed-doors negotiation-amongst-diplomats’ style of an intergovernmental conference (IGC). That said, it was widely regarded as working ‘under the shadow’ of the IGC – in other words, it did not enjoy a free hand, regardless of the likely wishes of the Member States. On that which was politically feasible could be included in the Constitutional Treaty – or so the argument went.

The Constitutional Treaty finalised by the Convention in 2003 was largely adopted in unchanged form by the governments of the Member States and formally adopted and signed in an IGC in 2004. Despite having been subjected to the political sense-test of an IGC, it did not prove congenial to voters. It was decisively rejected in referendums held in France and the Netherlands in 2005. As a result, ratification was never completed and the treaty was set aside. The results in these referendums gave rise to a further crisis of confidence about the trajectory and sustainability of the EU as an evolving polity, but this did not deter the Member States from picking up much of the material contained in the Constitutional Treaty and putting it into the Treaty of Lisbon under a different form just two years later. However, although it had much of the same content and achieved most of the same legal effects, the Treaty of Lisbon as presented for national ratification was a text shorn of the symbols of proto-statehood to which the Constitutional Treaty referred (flag, anthem, motto). The ‘constitution’ moniker was dropped. While the discourse of constitutionalism had become well established in scholarship about the EU, after the demise of the Constitutional Treaty, the term has largely disappeared from official discourse. On the contrary, the only constitutional requirements and traditions to which the Treaty of Lisbon refers are those of the Member States.

One can summarise these ebbs and flows as follows: the post-Lisbon treaty basis for the European Union looks quite different to the post-SEA European Community, which contained only a separate ‘leg’ of tentative intergovernmental European political cooperation in the foreign policy sphere. Now foreign and security policy is more completely mainstreamed, even if still incomplete. And yet the basic institutional structure – although more complex than it was in the 1980s – is still recognisably the same one, rooted in the idea of a European Commission (as an embryonic European executive), the European Parliament (directly elected since 1979), the Council of Ministers (with much of its work prepared by the Committee of Permanent Representatives) and the Court of Justice of the European Union. The regular meetings of the heads of state or government, which have taken place since the early 1970s, have been institutionalised as the European Council, which now has its own President elected by the leaders and accountable essentially to them. Meanwhile the President of the Commission remains politically accountable to the European Parliament, and in 2014 the Parliament unilaterally implemented the so-called ‘leading candidates’ (*Spitzenkandidaten*) scheme. That is, the European political parties each chose their candidates for Commission President and indicated to the heads of state or government in the European Council that they in turn should choose the candidate for the party which came first in the EP elections, rather than any other candidate. This was how Jean-Claude Juncker came to be President of the Commission, with a mandate directly stemming from the success of the European People’s Party in the 2014 EP elections. He was not *a priori* choice of most of the members of the European Council, and indeed they somewhat reluctantly accepted the *fait accompli* (or did not accept it, in the case of UK Prime Minister David Cameron). There also remains a ‘national’ presidency circulating amongst the

Member States on a six monthly basis, but its importance in preparing the legislative work of the European Union or acting as a symbolic political reference point is much downgraded compared to the capacity of the presidency between the 1980s and the 2000s to act as a catalyst for change (or conversely a brake on new developments). Finally, to form a bridge between the Commission and the European Council, the Member States have created the position of High Representative of the Union for Foreign Affairs and Security Policy.

The territorial scope of the EU has also changed dramatically since the 1980s. Much of this change can be attributed to the effects of the fall of the Berlin wall in 1989, the reunification of Germany in 1990 (which effected an internal enlargement to absorb East Germany) and the break up of the Soviet Union (in 1991) and Yugoslavia (from 1992 onwards). As with Greece, Spain and Portugal, as they emerged into the arena of liberal democracy, so the new democracies of central and eastern Europe and – to a lesser extent – south-east Europe have been brought into the fold of the EU. There are now 28 Member States (with only Croatia joining since the last treaty revision entered into force), and there have been numerous referendums on membership since the 1970s, with only Norway, in 1972, opting not to join after signing an accession treaty. In particular in the Western Balkans, there are a large number of prospective new Member States, with Serbia and Montenegro at the head of the queue. Enlargement talks with Turkey have foundered. Although Iceland flirted briefly with membership in the wake of the chaos wrought by the financial crisis and the failure of its banks in the late 2000s, this has not been taken further. Nor have Switzerland's periodic flirtations with membership amounted to anything substantial. However, Norway, Iceland and Liechtenstein are firmly linked to the EU through the European Economic Area agreement, which creates a framework for single-market-

like cooperation between those states (which are members of the European Free Trade Association); Switzerland, meanwhile, maintains a close bilateral relationship with the EU based on a complex and often contested network of treaties.

As of 2016, the EU has been facing its most serious existential crisis yet, in the wake of the UK's referendum vote by 52% to 48% to leave the EU on 23 June 2016. At the time of writing the form of the UK's future relationship with the EU and its Member States (to be concluded under Article 217 TFEU) was wholly unclear and Article 50 TEU, which lays down the process for a Member State to leave, had not even been triggered by the UK Government. The position is complicated by the UK's own internal territorial complexities: Scotland and Northern Ireland voted 'remain', while Wales and England (much the largest part of the union state) voted to leave. Within England, London – the capital – voted to remain. The UK's referendum vote is just one amongst a number of signals of a growing malaise amongst the populations of the Member States about the idea of the EU as a constitutional and continental destiny for the cooperation between states in Europe. Euroscepticism, in various guises, is present in every Member State, and especially publicly visible amongst the substantial numbers of Members of the European Parliament elected every five years who represent Eurosceptic parties.

In policy terms, the EU is also much changed. It engages with a wider range of policy areas, which are intended to foster closer integration between the Member States; these extend into the monetary, security, justice, and home affairs areas as well as the traditional trade domains. Beyond the focus on trade in goods, which was the main emphasis of the Single European Market, there have been increasing attempts to create better conditions for the cross border mobility of services. It has also stepped further into political domains closer to the core of Member State sovereignty with the

Charter of Fundamental Rights, now enshrined in the treaties, and the establishment of a concept of European citizenship, dating back to the Treaty of Maastricht, but given additional substance of a number of key rulings of the CJEU during the 2010s. But at the same time, the introduction and implementation of new competences has gone hand in hand with greater differentiation (in particular for the Eurozone, as discussed below) and systematic use of opt-outs. This applies to the arrangements for the removal of internal frontiers (Schengen), for the UK and Ireland, and to various other aspects of Justice and Home Affairs for the UK, Ireland and – in its own way – Denmark. In addition, enlargement has led to enhanced differentiation, so that some states cannot yet, for example, join Schengen, even though they may wish to do so (Bulgaria, Romania, Croatia).

Things have not always gone smoothly for the EU. The Eurozone was established on 1 January 1999, and now comprises 19 of the 28 Member States. Yet it is widely accepted that (a) the Eurozone was not established with an appropriate framework to enable it effectively to withstand asymmetric shocks or serious sovereign debt crises facing one or more Member States and (b) shortcuts were taken with the original entry criteria, as a result of which several states, most notably but not only Greece, entered the Eurozone under conditions in which its public finances were not in sufficiently robust order to resist the type of crisis that occurred from 2008 onwards. These asymmetries could be said to represent the EU's true 'crisis' (Kumm 2013). Consequently, there have been further treaty developments in this domain, to cope with the problems that have arisen, but none of them have involved all of the Member States. These are the Treaty Establishing the European Stability Mechanism, amongst the 19 Eurozone members, which has been set up as a permanent source of financial assistance for those members, which experience difficulties. Another

separate intergovernmental mechanism, which includes some but not all of the non-Eurozone EU Member States (the UK, the Czech Republic and Croatia did not participate) is the European Fiscal Compact Treaty, intended to operate as a more effective version of the stability and growth pact which fosters fiscal self discipline amongst the Eurozone members and those other EU Member States that have chosen to opt in. Such treaties, which bind only those states that participate, do not amend the existing treaty structure, but they necessarily cast a shadow upon the wider treaty framework in terms of their clear preference to defend the integrity of the euro as a currency in a robust manner. Indeed the choice of treaty (as opposed to legislative) mechanisms operates as an important signal of the seriousness with which the contracting states regard such matters.

So where do we now stand with the EU and constitutionalism?

It is clear that the early part of the 2000s saw an optimism that the EU was moving into a new ‘constitutional’ era, supported not only by the abundant scholarly writing exploring the applicability of constitutional ideas and practices in the context of the EU, but also by the willingness of political elites to invoke the ‘c’ word. This came during what we can call the ‘future of the Union’ period. This is the rather brief interregnum between the Laeken Declaration of 2000 and the referendums in France and the Netherlands in 2005, which saw rejection of the Constitutional Treaty. What underpinned this constitutional high water mark was a widely held elite commitment to the principle that, notwithstanding the concerns raised by the Danish referendum on the Treaty of Maastricht and the Irish electorate on the Treaty of Nice, not to mention the wariness of national judicial actors including the German Federal Constitutional Court, the progress towards a more highly institutionalised European Union taking on an ever larger range of political, societal and economic challenge was the correct path

to follow. This phase seems to be marked by a touching faith in the power of institutions to institute not just a formal but also a substantive sense of the EU as a constitutional project. But the 2005 referendums represented an important turning point, signalling that citizens across more than one Member State were no longer heavily invested in the notion that the EU should adopt an expressly constitutional form and raising some doubts about the very future of the European integration project, which have been amplified since that time.

Indeed in the last decade, life has not become simpler for those seeking to argue that the European integration process – in its current form – represents an important ‘constitutionalised’ supplement to the liberal democratic constitutional frameworks of the Member States. The challenges facing the EU have multiplied in scope and character. They stem from both internal and external sources. We have seen a substantial retrenchment towards ‘the national’ and the rejection of supranational solutions in many areas. This has occurred even though it continues to be widely acknowledged in political spheres that these same challenges require at least in part solutions extending beyond national borders. In almost all cases, the EU Member States have struggled to find common solutions and to place these within effective rule-bound frames at the EU level. Thus we have seen the global financial crisis that spiralled into a sovereign debt crisis, and the associated global economic slowdown. We have seen the rise of Russia as a regional power, exercising destabilising power in the EU’s near abroad, especially in Ukraine. Russia in turn may become more of an existential threat to the territorial integrity of the Member States if the US – under President Trump – withdraws from its transatlantic NATO guarantees. This places additional demands in the area of defence upon the EU. Meanwhile the war in Syria, along with the continuing fall out from US-led military actions in Iraq, Afghanistan

and Libya, have all contributed to exacerbating the longstanding global crisis of refugees and displaced persons. This crisis has moved, in recent years, across the external frontiers of the Member States and into the heart of the EU, with the resulting mass population movements challenging the sustainability of frontier free travel and mobility. Another security challenge has emerged as a result of a larger number of terrorist attacks within the Member States, some of them involving people of migrant background, but often involving those who are citizens of the country in which the attack have taken place. Close to home, there are other types of internal challenge: the UK Brexit vote and the anticipated withdrawal negotiations under Article 50 TEU, the rise of populist and often far right anti-immigrant politicians in a number of Member States, some of whom stand on the brink of power, and the challenges posed to constitutional orders, democracy, the rule of law and the authority of EU by the anti-liberal governments in Poland and Hungary. There remain, too, other longstanding challenges, such as the general lack of vitality in the economies of many of the Member States (often giving rise to high levels of (especially youth) unemployment, and the problems of climate change and global warming that demand a global response.

These challenges can and have demanded responses, which draw upon the institutional capacities of the EU to imagine and deliver shared action. While the overt ‘Big C’ constitutional language has disappeared from the EU lexicon, the task for observers and interpreters of what the EU now does, and how it does it, has been to readjust their lenses in order make sense of what might be termed a new phase of constitutional disassembling. Just because the language of formal constitutionalism has been rejected at the EU level does not mean that it does not make sense still to use lenses of constitutionalism – in relation to the rule of law, the balance of competences

and the notion of constituent power, as postulated in the introduction to this volume. In other words, is ‘Small C’, as witnessed since the 1960s, still operating in the context of the EU? I would argue that this question is to be answered in the affirmative, with some qualifications related to the new conditions in which the CJEU now finds itself.

What has been noticeable about recent developments in many of the contested policy arenas noted above is that so far as there has been EU action it has tended to be dominated by executive branches of the Member States, operating in concert in the Council of Ministers and the European Council (Dawson and de Witte 2016). Parliaments at all levels (regional, national and European) have often been bypassed during the urgent search for monetary stability in the wake of the financial crisis, or in response to the humanitarian crisis produced by influx of refugees. Especially in the context of actions taken in relation to challenges to the viability of the Eurozone, the EU institutions have often acted in concert with other intergovernmental actors such as the International Monetary Fund or the so-called Troika, that lack democratic legitimacy. Some have termed this a ‘turn’ towards a ‘new intergovernmentalism’, which has challenged many of the orthodoxies of scholarship on European integration, in particular that the institutions are ‘hardwired’ to pursue an ‘ever closer union’ (Bickerton, et al, 2015a and 2015b). In that context, as Cardwell and Hervey have argued, the use of law has often offered a formal and sometimes problematic veneer of legitimacy to many of the steps taken at the international level, which have challenged democratic choices made by electorates at the national level (e.g. through the replacement of democratically elected governments with governments of technocrats, as in Italy) (Cardwell and Hervey 2015).

And yet despite this there has been relatively little change in the way that the CJEU goes about its business. Its case law demonstrates that it remains concerned about protecting the systemic coherence of EU law as system. This is evident, for example, in the Opinion which it gave on the draft international agreement providing for the accession of the EU to the European Convention on Human Rights, which it argued – notwithstanding there being a specific competence in the treaties to effect just this legal outcome – was not compatible with the scope and competences conferred by the treaties in their present form. The point is made very clearly in the judgment:⁴ “The fact that the EU has a new kind of legal order, the nature of which is peculiar to the EU, its own constitutional framework and founding principles, a particularly sophisticated institutional structure and a full set of legal rules to ensure its operation, has consequences as regards the procedure for and conditions of accession to the ECHR.”

In similar terms, the CJEU struck down an EU regulation transposing a UN Security Council sanctions resolution imposing an asset freeze on an individual suspected of connections with the financing of terrorist activities, on the grounds that it was not compatible with the human rights standards applicable within the Union.⁵ In both cases, it resisted the importation of external elements into the EU legal order. The CJEU might give a similar response if asked to evaluate the potential UK/EU agreements both on withdrawal under Article 50 TEU and on post-withdrawal ‘association’. In both cases, the CJEU would be likely to police sharply the limits of the EU’s capacity to conclude external agreements, in order to ensure the autonomy and integrity of the internal legal order.

⁴ Opinion 2/13 *Draft ECHR Agreement* ECLI:EU:C:2014:2454, para. 158.

⁵ Joined cases C-402/05 P and C-415/05 P *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities* ECLI:EU:C:2008:461.

In the face of a much more extensive treaty framework than in the early years, it has harder to find grounds to accuse the CJEU of the greedy accretion of new competences in the name of ‘ever closer Union’. Indeed, it rarely invokes that mantra, although it famously did so in *Pupino*, during the interregnum between the creation of the so-called third pillar for justice and home affairs competences and the full scale ‘mainstreaming’ of these competences into the core of the treaties through the Treaty of Amsterdam and the Treaty of Lisbon.⁶ Moreover, in *Pupino*, the CJEU tendentiously suggested that such ‘third pillar law’ had more in common with classic ‘European Community law’ than perhaps the framers of the so-called pillar structure had originally intended.

The CJEU has also had to consider what to make of measures taken by the Union, and specifically by the European Central Bank, to deal with circumstances in the wake of the international financial crisis that threatened the very stability and existence of the Eurozone. It has had to decide two controversial cases referred by the highest courts of two Member States under Article 267 TFEU. In the *Pringle* case,⁷ the CJEU confirmed the competence of the EU to conclude the ESM Treaty, and in the *Gauweiler* case, the first ever reference made by the German Federal Constitutional Court, the CJEU confirmed the legality of so-called ‘Outright Monetary Transactions’ (OMTs), a form of defence for the euro devised by the ECB, but never actually used.⁸ Notably in *Gauweiler*, the German Federal Constitutional Court had previously expressed the view (by a majority) before making the reference that the OMTs fell outside the competences of the EU (Fabbrini 2015 and 2016). Yet when the case returned to the national court for a final ruling, it was able to avoid an outright conflict with the CJEU by repeating – in abstract terms – its strictures about

⁶ Case C-105/03 *Pupino* ECLI:EU:C:2005:386..

⁷ Case C-370/12 *Pringle* ECLI:EU:C:2012:756.

⁸ Case C-62/14 *Gauweiler* ECLI:EU:C:2015:400..

its competence to scrutinize *ultra vires* EU level measures which impinge upon German constitutional integrity, while holding off from taking any practical measures because the scope and character of the OMT instrument as interpreted by the CJEU did not *manifestly* exceed the competences of the EU. The national court also stated that any future hypothetical use of the OMT instrument would be under its supervision. None of this is intended to suggest that the fundamental economic and political issues which are raised by the crisis which remains embedded within Europe's monetary system have been solved, but at least the immediate prospect of constitutional conflict has been headed off.

Finally, in this short review of the status quo of constitutionalism in the EU, we should turn briefly to some new challenges in the arenas of citizenship and fundamental rights. One might reasonably expect the concept of 'citizenship', as political membership, to have a core role to play within any constitutional system. One of the primary incidents of 'European citizenship' is the right to vote in European Parliament elections. Yet participation in these elections has continued to decline with each new election, until that decline was arrested, (but not reversed) in 2014 in many Member States. What sort of 'citizenship' is there if citizens do not really participate? In the judicial sphere, the CJEU was faced in *Delvigne* with the question whether a French restriction on the right to vote in EP elections of prisoners fell within the scope of EU law. Answering in the affirmative, it provided a rather narrow interpretation of 'citizenship' for the purposes of EU law, invoking the universal suffrage provisions of the treaties and of the Charter of Rights, but insisting that these have a narrow application within, and only within the scope of EU competences, i.e. in the case of

European Parliament elections alone.⁹ Such a case does not open the gates to establishing a more ‘federal’ and autonomous type of European citizenship. Citizenship in the EU is dependent both on the scope of EU competences and upon the underpinning role of national citizenship: only citizens of the Member States are EU citizens.

This all suggests that we have something like ‘business as usual’ with EU constitutionalism, notwithstanding all of the challenges faced. However, I would suggest that this surface impression is in fact misleading and that this conclusion needs to be contested. In fact, all is not well in Europe’s legal landscape. Some threats are just too powerful to be faced down with the power of liberal legalism.

Conclusion

The liberal ‘legalised’ form of constitutionalism, which has served the European Union so well for more than forty years is under threat. It may not survive the backlash of populist politics. It is no longer about the Big C or the small c, but about survival altogether. By the end of 2016, EU constitutionalism was standing at a crossroads. There remains a distinct possibility that the EU may collapse as a result of existential challenges such as Brexit and the claims articulated by a number of populist politicians who stand on the threshold of power, such as Le Pen (France), Hofer (Austria), Wilders (the Netherlands), even Grillo (Italy) that further referendums on the euro and on membership should be held in other Member States. All of this suggests that the era of ‘postnationalism’, if it ever began, is now over for the EU.

But so long as these are risks not realities, it is worth observing that the old ‘order’ has largely survived the challenges posed by the financial crisis and austerity

⁹ C-650/13 *Delvigne v. Commune de Lesparre Médoc and Préfet de la Gironde* ECLI:EU:C:2015:648.

measures unscathed, as the previous paragraphs have shown. On the whole the EU has benefited from what Grimm (2012) has called ‘overconstitutionalisation’ – namely the rendering into primary law (and thus the buttressing of a high level of unamendability) of many elements of socio-economic choice that in most national systems are the subject of ordinary politics, not constitutional politics. This has created a degree of stability, at the same time as opening the EU to the charge that it is not capable of reacting effectively to changed external or internal circumstances (Grimm 2015). One example of this phenomenon, in the view of some, is the rigidity of the EU’s commitment to free movement of persons as an element of the single market. And yet what other approach is feasible for a legal edifice constructed on a framework of economic integration and a justiciable principle of non-discrimination? Even if the EU were to do what some have counselled, which is to revert to the pre-Maastricht ‘state of innocence’, in practice this would not change this particular dilemma, in which free movement of persons has come to be seen as one of the problems that the EU causes, as well as being one of its most valued contributions to the lives of its citizens.

Returning to the elements of constitutionalism identified in the introduction, it is clear that internally EU has been strongest in relation to the defence of the rule of law, and less capable of articulating a sophisticated defence of a model of constitutionalism based on the separation of powers or an effective notion of a constituent power. And yet that too is under threat, with defiance of the EU rule of law now rife as we see a resurgence of authoritarianism threatening constitutionalism in various parts of central and Eastern Europe in particular, but also a populist discourse in the UK that suggests that non-state courts are very much part of the problem, from the perspective of popular acceptance or rejection of European

integration, rather than part of the solution, which was arguably the happy role that the CJEU was able to claim in the early years. This can be seen also in opposition – in Wallonia but also elsewhere in the EU – to the inclusion of various forms of supranational judicial decision-making in the external agreements that the EU is seeking to make with third countries, such as the Comprehensive Economic and Trade Agreement between Canada and the EU, in order to protect the interests of investors and traders. The legitimacy of such tribunals is in question.

The original objectives of the so-called ‘founding fathers’ of European integration concerned the promotion of peace, prosperity and a form of non-nationalist supranationalism. In many respects, the EU has been remarkably successful, given the history of the European continent right through to the middle of the twentieth century. The ‘constitutionalised treaties’ have been at the heart of that success, but in the era of national reactions against neo-liberalism and globalisation, the role of the EU and specifically of the CJEU is increasingly under question. It appears that the conviction that law represents an effective mechanism for buttressing the external commitments of states is waning away. It would seem fair to suggest that if the EU is to feature in a future handbook on constitutionalism beyond the state or global constitutionalism in twenty years time, then a degree of reinvention and reconsideration is going to be needed.

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