PART ONE: INTRODUCTION

Chapter 1: Foundations of the European Union's Constitution: the Treaties

Constitution of the European Union

1-1 Constitutions have been variously defined; but, for the purposes of this book, a relatively simple definition is adopted. A constitution is the collection of rules according to which a polity is governed: it is the legal basis for the exercise, by properly constituted institutions[1], of legislative, executive and judicial powers. It is not necessarily embodied in a single document; nor is it necessarily a codified set of rules. It is a collection of rules, whether in a single document or not and whether codified or not. It relates to a specific polity, which may be a unitary state, a federated state, a confederation or some looser association having a common government. It is based on the assumption that the main characteristic of government is the exercise of legislative, executive and judicial powers.

1-2 In the European Union, the collection of rules forming the constitution is to be found mainly in the constituent Treaties. Not all the provisions of the Treaties have a constitutional importance; and not all the rules making up the constitution are in the Treaties themselves, but may be in measures adopted in accordance with the Treaties or in judgments of the Court of Justice of the European Communities. But the Treaties are the basis of all the legal powers by which the European Union operates.[2]

The Treaties

1-3 Three groups of Treaties have played a part in the constitutional development of the European Union:
- the basic Treaties[3];
- the amending Treaties; and
- the Treaties of Accession.

The basic Treaties and most amending Treaties have themselves been extensively amended.

1-4 Four Treaties make up the first group:
- the Treaty establishing the European Coal and Steel Community (hereafter, the "ECSC Treaty"), signed in Paris in 1951 and coming into force on 25 July 1952[4];
- the Treaty establishing the European [Economic] Community (hereafter, the "EC Treaty"), signed in Rome in 1957 and coming into force on 1 January 1958[5];
- the Treaty establishing the European Atomic Energy Community (hereafter, the "EAEC Treaty"), also signed in Rome in 1957 and coming into force on 1 January 1958[6]; and
- the Treaty establishing the European Union (hereafter the "EU Treaty"), signed in Maastricht on 7 February 1992 and coming into force on 1 November 1993[7].

Some of the specific provisions of the first and third Treaties (the ECSC Treaty and the EAEC Treaty) are referred to in this book; but these two Treaties are not discussed in detail. Discussions of the other two Treaties (the EC Treaty and the EU Treaty) form the bulk of the book. The effect of

the four Treaties is to create three European Communities and a European Union. The relationship between the three Communities and the Union is discussed later in this book.[8]

1-5 Six Treaties make up the second group:

- the Treaty Establishing a Single Council and a Single Commission of the European Communities (the "Merger Treaty"), which came into force on 1 July 1967[9];
- two Budgetary Treaties, which were signed in 1970 and 1975 respectively[10];
- the Act of 20 September 1976 concerning the election of the representatives of the European Parliament by direct universal suffrage;[11]
- the Single European Act[12], which came into force on 1 July 1987; and
- the Treaty amending the Treaty on European Union, which was signed in Amsterdam in 1997 and came into force on 1May 1999.

Except where indicated, none of these Treaties is considered separately in this book, as the majority of their provisions have been repealed, superseded, re-enacted or incorporated in one or more of the basic Treaties.

1-6 Four Treaties make up the third Group:

- the Treaty of Accession of Denmark, Ireland and the United Kingdom, signed in 1972 and coming into force on 1 January 1973[13];
- the Treaty of Accession of Greece, signed in 1979 and coming into force on 1 January 1980[14];
- the Treaty of Accession of Spain and Portugal, signed in 1985 and coming into force on 1 January 1986[15]; and
- the Treaty of Accession of Austria, Finland and Sweden, signed in 1994 and coming into force on 1 January 1995.[16]

Although the Treaties of Accession have a legal status equivalent to that of the basic Treaties, and although they do contain substantive provisions, they are not discussed in detail in this book except, first, as part of a discussion of the general mechanism for accession to the European Union and, second, where specific provisions have a bearing on the constitutional development of the European Union. Treaties of Accession are between new Member States on the one hand and existing Member States on the other; the exception here is where new Member States accede to the ECSC Treaty, since the Treaties are then between new Member States and the European Coal and Steel Community.

1-7 As the result of the basic Treaties and the Treaties of Accession, the European Union comprises the following fifteen Member States. Listed first in English alphabetical order they are as follows: Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, The Netherlands, Portugal, Spain, Sweden and the United Kingdom. Listed in local alphabetical order, with their traditionally accepted abbreviations, they are as follows: Belgie / Belgique (B), Danemark (DK), Deutschland (D), Espana (E), France (F), Hellas (H), Ireland (IRL), Italia (I), Luxembourg (L), Nederlanden (NL), Oesterreich (A), Portogal (P), Suomi (SF), Sverige (S) and the United Kingdom.

1-8 The Treaties are recognised in international law as Treaties between sovereign states and are consistent with the provisions of the Vienna Convention on the Law of Treaties.[17] In accordance

with the usual practice under international law, the Treaties themselves contain provisions on ratification, coming into force, accession, termination, language and deposit.[18] Protocols and Annexes to the Treaties are binding; Declarations attached to the Treaties are not. Third parties may recognise the Treaties, but are not bound by them: *pacta tertiis nec nocent nec prosunt.*[19]

1-9 At the same time, the Treaties are distinctive. As the Court of Justice said, in its earliest decision on constitutional aspects of the EEC Treaty, "the objective of the EEC Treaty, which is to establish a common market, the functioning of which is of direct concern to interested parties in the Community, implies that this Treaty is more than an agreement which merely creates mutual obligations between the contracting states ... the preamble to the Treaty refers not only to governments but to peoples".[20] Expanding the latter point, the Court went on to say:

> ... Community law therefore not only imposes obligations on individuals but is also intended to confer on them rights which become part of their legal heritage. These rights arise not only where they are expressly granted by the Treaty but also by reason of obligations which the Treaty imposes in a clearly defined way on individuals as well as on Member States and on the institutions of the Community.

In a telling phrase, the Court said that the Community constituted "a new legal order of international law".

Legal effects of the Treaties

1-10 Within the European Union, the Treaties are binding; and the sole arbiter of the interpretation of the Treaties is the Court of Justice of the European Communities.[21] The Treaties cannot be amended by measures made under the powers conferred by the Treaties, nor by decisions of the Court of Justice: they can be amended only by later Treaties. Where any decision of the Court of Justice on the interpretation of the Treaties, or where any provision of any of the Treaties, has inconvenient, unworkable or anomalous consequences, the problem can be rectified only by a later Treaty.[22]

1-11 Not all the provisions of the Treaties are intended to have legal effects; and, of those which are intended to have legal effects, not all have "direct legal effect". This term, though not used in the Treaties themselves, has been used by the Court of Justice to describe the legal consequences of various provisions of the Treaties and, in particular, to describe provisions which "impose on Member States a precise obligation which does not require the adoption of any further measure on the part either of the Community institutions or of the Member States and which leaves them, in relation to its implementation, no discretionary power".[23] Provisions having direct legal effect create rights and obligations not only between Member States and individuals but also between individuals, whether natural or corporate.[24]

1-12 Some of the terms used by the Court of Justice, as well as by commentators, can be misleading. It would seem, for example, that provisions having direct legal effect (a phrase first used by the Court) are not necessarily the same as provisions which are "directly applicable" (a phrase used in the EC Treaty[25]). Again, it was the Court of Justice which first used the phrase, "the precedence of Community Law" (sometimes referred to as the "primacy" or "supremacy" of

Community law), a phrase having political implications and justifiable not solely by reference to jurisprudence.[26] The same is true *a fortiori* of observations by the Court of Justice on the question of national sovereignty.[27] How far Member States have ceded their sovereignty under the Treaties is a political as well as a constitutional matter and is discussed in that context in the final chapters of this book. It should also be emphasised that the question of sovereignty depends on a legal factor extraneous to the Treaties: namely, the manner in which national laws have provided for the reception, application or incorporation of Community law into their own constitutional systems. What the Member States have done, as the Court of Justice has fairly said in later cases involving a clash of national and Community law, is to agree to have matters of Community law settled by the Court of Justice; otherwise, any national measures incompatible with Community law would amount to a denial of Treaty obligations by Member States and "would thus imperil the foundations of the Community".[28]

1-13 Provisions of the Treaties having legal effects, whether direct or not, are conveniently referred to as "primary legislation". The phrase contrasts with the provisions of measures taken by an Institution[29] under the terms of the Treaties: these measures are conveniently referred to as "secondary legislation". Some secondary legislation is delegated legislation. This is the case where, for example, a provision of one of the Treaties confers legislative powers on the Council, and the Council confers some or all of those powers on the Commission.[30] In cases of this sort, the Commission cannot delegate legislative powers to another Institution or body: *delegatus non delegare potest.*[31] As already mentioned, secondary legislation cannot conflict with, much less override, the provisions of primary legislation. Nor can it override the decisions of the Court of Justice, though secondary legislation may repeat, amplify or take to its legislative conclusion some of the Court's substantive decisions.[32]

The European Union as a constitutional polity

1-14 At the beginning of this chapter, there is a reference to the "polity" to which a constitution relates. There is a great deal of confusion among members of the public, as well as among experts, legal and non-legal, about the identity and nature of the polity in question here. This book is about the European Union; but the Union, unlike the European Community, is not a legal entity.[33] Moreover, the European Union and the European Communities, though connected, are distinct. This is not the neatest of concepts. It might perhaps have been easier, from a drafting point of view, to merge the three Communities into the one Union or at least to elevate one or all of the European Communities into the European Union. But this was not done. Instead, the Union was established, with certain features of its own, but "founded" on the three Communities.[34] Thus the Union exists and the three Communities continue to exist; but they are far from being identical.

1-15 Another source of confusion among commentators is the relationship between the European Union, the European Communities and the "common market". Although there is no definition of the common market in the Treaties (not even in the Treaty establishing the European Coal and Steel Community, in which the expression first appeared[35]), the sense in which it is used suggests that it indicates the economic, as well as the geographic, framework created by the three original Treaties. The economic framework is evident from a number of provisions, still fully in force, in which

"compatibility with the common market" is a test of whether an action or practice is acceptable or prohibited under the economic provisions in question.[36] The geographic framework is implicit in the use of the phrase, "within a substantial part of the common market".[37] Three points about the common market are worth emphasising. First, neither the expression nor the concept has been superseded: both are alive and actively used. Second, the repeal of the provisions on the establishment of the common market since 1 May 1999 is no more than a reflection of the fact that the time-table envisaged in those provisions has long passed.[38] Thirdly, the expression is not synonymous with either the European Community or the European Union.

1-16 By contrast, the internal market is a geographic area with legal characteristics and has been more or less explicitly defined in the EC Treaty, as amended by the EU Treaty. It comprises an area without internal frontiers, in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties.[39] The original intention was that it should be progressively established over a period expiring on 31 December 1992[40]; but not all the measures designed to guarantee the four freedoms had been adopted or come into force by that date. Therefore, strictly speaking, the internal market has not yet been completed or fully established. By definition, the internal market does not include the external elements, or other internal elements, of the common market; and the co-existence of the two expressions is to be found in a provision under which derogations from the establishment of the internal market must cause the least possible disturbance to the functioning of the common market.[41] It should just be added that a third term, the single market, is not a legal term of art.

1-17 As a polity, the European Union is part of a larger association of states forming the European Economic Area (hereafter the "EEA").[42] The states which belong to the EEA, but not to the European Union, are the remaining members of the European Free Trade Association, other than Switzerland (that is, Iceland, Lichtenstein and Norway). They are not, however, integrated into a single legal and economic association, like the members of the European Union; and their "constitution" operates in parallel to the European Union's constitution. For example, the rules on competition under the EEA Treaty are identical with those under the EC Treaty; but they are enforced by a Supervisory Authority operating in parallel to the Commission of the European Communities.[43] Again, there is some confusion among members of the public about these relationships[44]; but this book is not primarily concerned with the EEA as such and, apart from some references in the context of relationships between the European Union and non-member states, is not considered further.

The process of Treaty-making

1-18 As already noted, the "primary legislation" on which the European Union is based is to be found in the various Treaties described above. Treaty-making is largely a matter of international law and is therefore external to the constitutional law of the European Union. However, there are internal provisions and procedures which affect the process. Moreover, for better or worse, a great deal of substantive legislation is enacted by virtue of provisions of the Treaties, so that many laws, constitutional or otherwise, within the European Union owe their origin to a process which does not relate closely to the internal legislative procedures designed to allow for some sort of democratic

control. Drafting is entrusted to officials; ratification by national Parliaments does not make provision for amendment of the draft. The European Parliament is represented in the inter-governmental conference by two members, but in the role of observers and not as participants.

1-19 Although the Treaty-making process follows the usual pattern under international law, according to which an inter-governmental conference is convened by the participating States, and a draft Treaty is prepared, signed and ratified, after which it comes into force, there are some Treaty provisions in the European Union which add to this pattern. For example, there are provisions, discussed later in the book, for setting in motion the process of amending the Treaties.[45] There are also provisions requiring the process to be set in motion by certain dates or in certain circumstances. The Treaty on European Union provided that "a conference of representatives of the governments of the Member States shall be convened in 1996 to examine those provisions of this Treaty for which revision is provided".[46] The Treaty amending the Treaty on European Union contained a conditional provision: "at least one year before the membership of the European Union exceeds twenty, a conference of representatives of the governments of the Member States shall be convened in order to carry out a comprehensive review of the provisions of the Treaties on the composition and functions of the institutions".[47]

1-20 Institutions and their composition and functions are to some extent determined by the size of the polity over which they have jurisdiction; and the provision, quoted in the foregoing paragraph, of the Treaty amending the Treaty on European Union recognises the fact that enlargement of the European Union is likely to call for changes in the institutional structure. The accession of new Member States already alters the composition of the institutions, since representatives of the new Member States have to have places found for them on the Council and Commission and in the European Parliament and Court of Justice. But there is a functional limit, in terms of operational efficiency, to the extent to which institutions can be enlarged *pari passu* the enlargement of the polity itself.[48]

1-21 Provisions of the Treaties are "entrenched" in the sense that they can be amended only by the unanimous agreement of all the Member States.[49] Treaties cannot bind later Treaties.

1-22 Provisions of the Treaties can be "codified" only by Treaty; not by secondary legislation. To some extent the Treaty amending the EU Treaty codified the provisions of earlier Treaties; but the codification was incomplete. There are political obstacles to full constitutional codification, in that it is, in practice, difficult to separate technical improvements from substantive changes.[50]

1. The institutions are discussed generally in Chapters 5 and 15. They are the subject of individual Chapters as follows:

The European Parliament:	Chapter 16
The Council:	Chapter 17
The Commission:	Chapter 18
The Court of Justice:	Chapter 19
The Court of Auditors:	Chapter 20

2. In Case 294/83, *Parti Ecologiste (les Verts) v European Parliament*, the Court of Justice described the EEC Treaty, as it then was, as the Community's "basic constitutional document".

3. Sometimes known as the "founding" or "constitutive" Treaties.

4. Texts of the Treaties Establishing the European Communities are published by the Publications Office of the European Communities, Luxembourg. Each of the Treaties in this group has been substantially amended, most extensively by the EU Treaty. It should be noted that the ECSC Treaty is due to expire on 24 July, 2002. The other basic Treaties have no expiry date.

5. See note 2 above. The Treaty originally established the European Economic Community (the EEC); but the word "Economic" was removed under Article 8 (formerly G) of the EU Treaty.

6. See note 2 above. The Treaty is sometimes known as the EAEC Treaty. Like the EC Treaty, it is also a "Treaty of Rome" (one of several reasons for not using the place-name for a Treaty).

7. Official Journal of the European Communities, C.224/92.

8. See, in particular, paragraphs 1-14 and 3-1.

9. Official Journal of the European Communities, 152 of 13 July 1967. The Assembly (later, European Parliament) and the Court of Justice respectively had already been merged with their corresponding institutions under the Convention on certain Institutions common to the European Communities, which came into force on the same date as the EEC and EAEC Treaties.

10. See note 2 above.

11. This Act applied with effect from the first subsequent date on which a new Parliament was due to take the place of the old. Previously the members of the European Parliament had been appointed, not elected. (At the time, it was the "Assembly": see paragraph 16-3.)

12. See note 2 above.

13. Treaty concerning the Accession of the Kingdom of Denmark, Ireland, the Kingdom of Norway and the United Kingdom of Great Britain and Northern Ireland to the European Communities, Official Journal of the European Communities, L.73/72. Norway did not ratify the Treaty.

14. Treaty concerning the Accession of the Hellenic Republic to the European Communities, Official Journal of the European Communities, L.291/79.

15. Treaty concerning the Accession of the Kingdom of Spain and the Portuguese Republic to the European Communities, Official Journal of the European Communities, L.302/85.

16. Treaty concerning the Accession of the Republic of Austria, the Republic of Finland, the Kingdom of Norway and the Kingdom of Sweden and the adjustment of the Treaties on which the European Union is founded, Official Journal C.241/94. Again, Norway failed to ratify the Treaty.

17. 1969, coming into force on January 1, 1980; 63 American Journal of International Law 875. Although the Convention does not have retroactive affect, it enshrines principles of international law subsisting before that date.

18. See chapters 9 and 24.

19. Article 34, Vienna Convention.

20. Case 26/62, *Van Gend en Loos v Nederlandse Administratie der Belastingen.* A phrase has been omitted from the beginning of the indented extract. This is: "Independently of the legislation of the Member States..." The phrase was at best questionable in the 1960s. It can no longer be sustained, since the validity of Community law is, in some Member States, dependent on national legislation.

21. Article 220 (formerly 164), EC Treaty. (Cf Article 211 (formerly 155), first indent, on the duty of the Commission to ensure that the provisions of the Treaty areapplied, and Articles 226 (formerly 169) et seq on the Commission's powers to take Member States and other Institutions to the Court of Justice).

22. The classic instance is Case 262/88, *Barber v Guardian Royal Exchange Assurance Group,* whose "inconvenient" consequences in terms of retroactive effect were corrected by what is now Protocol 17 to the EC Treaty (formerly printed as Protocol 2 to the EU Treaty).

23. Case 41/74, *Van Duyn v Home Office.*

24. Case 106/77, *Administrazione delle Finanze dello Stato v Simmenthal SpA (II).*

25. In relation to Regulations: Article 249 (formerly 189), second paragraph, EC Treaty.

26. Case 6/64, *Costa v Ente Nazionale per l'Energia Elettrica (ENEL).*

27. In both the *Van Gend* and *Costa* cases referred to in notes 16 and 22 above, the Court spoke of sovereignty in terms which it has wisely not used since.

28. See the *Simmenthal* case, referred to in note 23, above. National law may restrict the effects of Community law (for example, by applying periods of limitation), provided that the effectiveness of Community law is preserved: C-88/99, *Roquette Freres v Services Fiscaux du Pas-de-Calais.*

29. Notably, the Council, under many provisions of the Treaties, and the Commission under several provisions, such as Article 86(3) (formerly 90(3)), EC Treaty. However, the European Central Bank may also be responsible for secondary legislation under Article 110 (formerly 108a), EC Treaty.

30. For example, Council Regulation EEC/2821/71.

31. An early case under the ECSC Treaty relied, at least in part, on this principle, which tended for some time to inhibit the creation of special agencies: Case 9/56, *Meroni v High Authority*. More recently, the creation of special bodies or agencies has been in such a form as to raise no presumption of delegation. See, for example, the provisions of Council Regulation EC/40/94, creating inter alia an Office for Harmonisation in the Internal Market, and especially the eleventh recital. The language of the recital reflects and is designed to meet the type of problem encountered in the *Meroni* case.

32. For example, Article 7 of Council Directive EEC/104/89 reflects the Court's own language in Case 16/74, *Centrafarm BV v Winthrop BV*.

33. There is no provision in the EU Treaty corresponding to Article 281 (formerly 210), EC Treaty, which provides: "The Community shall have legal personality".

34. Article 1 (formerly A), EU Treaty.

35. Article 2, ECSC Treaty.

36. For example, in Article 87(2) (formerly 92(2), EC Treaty.

37. For example, in Article 82 (formerly 86), EC Treaty.

38. Old Article 7 of the EC Treaty was repealed under Article 6(I)(2) of the Treaty amending the Treaty on European Union.

39. Article 14 (formerly 7a), second paragraph, EC Treaty.

40. Ibid, first paragraph, EC Treaty.

41. Article 15 (formerly 7c), second paragraph, EC Treaty.

42. European Economic Area Treaty, 1993, which came into force on 1 January, 1994.

43. Article 51, EEA Treaty.

44. Those arriving at London's Heathrow airport will see a notice: "Nationals of the United Kingdom and other EU nationals and nationals of the EEA". This could be: "Nationals of Member States of the EEA".

45. Article 48, EU Treaty; see paragraphs 9-4 and 9-5 below.

46. Article O, paragraph 2, EU Treaty. This provision was repealed by the Treaty amending the Treaty on European Union, being *functus officio*.

47. Article 2, Protocol 11, Treaty amending the EU Treaty. This conference was convened in February, 2000, and is due to complete its work by December, 2000.

48. The first round of possible accessions covers Cyprus, the Czech Republic, Estonia, Hungary, Poland and Slovenia; the second round covers Bulgaria, Latvia, Lithuania, Malta, Rumania and Slovakia. Formal negotiations have begun with each of the twelve states. Turkey is recognised as an applicant; but formal negotiations with Turkey have been deferred.

49. Article 48, third paragraph, EU Treaty. As between the Member States, this overrides Article 40 of the Vienna Convention on the Law of Treaties, 1969.

50. Article 116 of the original version of the EEC Treaty was repealed by the EU Treaty, as a purely technical amendment. However, it was not an insignificant provision; and it was re-introduced, in a different form, under the Treaty amending the EU Treaty.