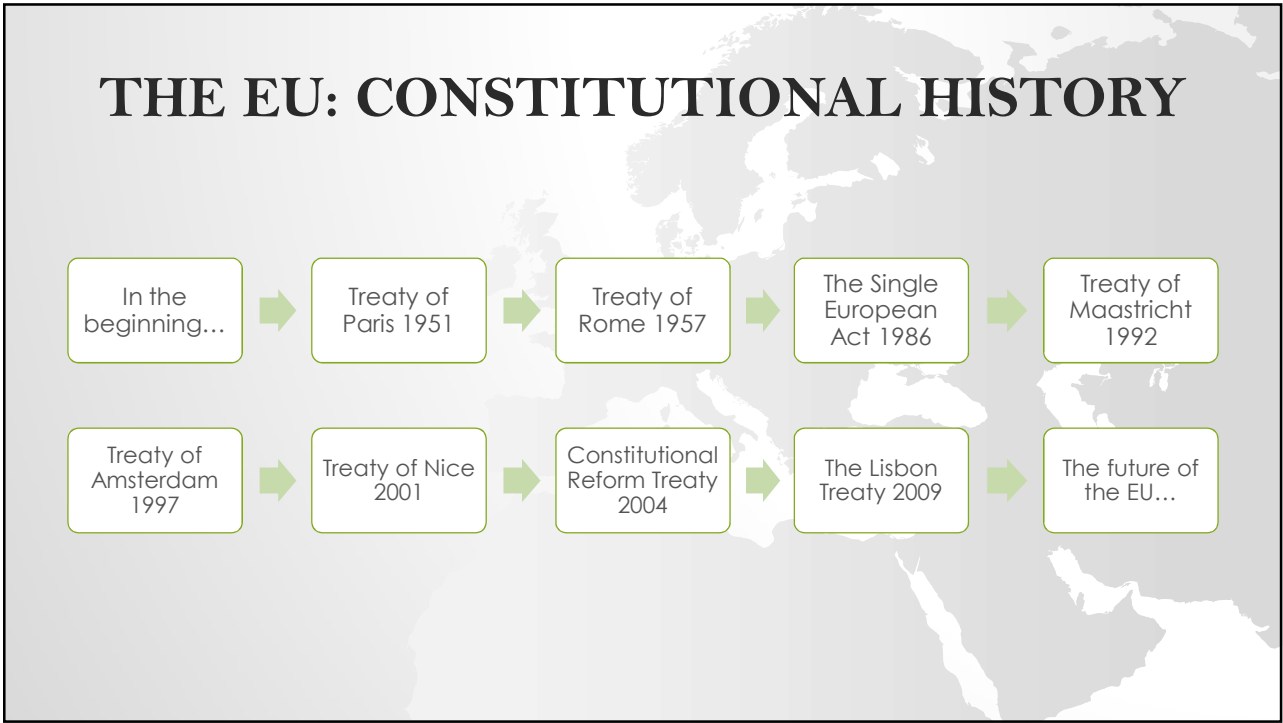


AN INTRODUCTION TO EUROPEAN LAW

Introduction
Constitutional History and Constitutional Nature

1



THE EU: CONSTITUTIONAL HISTORY

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graph LR; A[In the beginning...] --> B[Treaty of Paris 1951]; B --> C[Treaty of Rome 1957]; C --> D[The Single European Act 1986]; D --> E[Treaty of Maastricht 1992]; E --> F[Treaty of Amsterdam 1997]; F --> G[Treaty of Nice 2001]; G --> H[Constitutional Reform Treaty 2004]; H --> I[The Lisbon Treaty 2009]; I --> J[The future of the EU...]
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2

THE UNIFICATION OF EUROPE

"Europe will not be made all at once or according to a single plan. It will be built through concrete achievements which first create a de facto solidarity."

Robert Schuman, 1947

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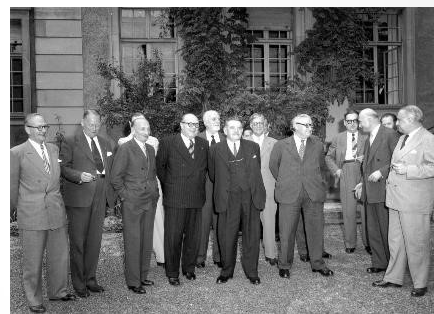
Why did Europe Unify?

- I. Globalisation being deemed more important than state sovereignty.
- II. Inter-state cooperation being sought to rebuild Europe following World War II.
- III. Organisation of Europe to strengthen bonds in order to act as a deterrent.

3

IN THE BEGINNING...

- Initially three institutions were established in close succession of each other:
 - I. Organisation for the European Economic Cooperation (1948)
 - II. Western European Union (1948/1954)
 - III. Council of Europe (1949)
- The only one of these institutions to still exist is the Council of Europe.




The first sitting of the Council of Europe took place on 10 August 1949. The aim of the Council 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." Article 1(a) of the Statute of the Council of Europe.

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THE TREATY OF PARIS 1951



- Set up the European Coal and Steel Community (ECSC).
- Established to integrate the industries and promote cross border communication and economic partnership.
- A court, council, parliament & commission was established (Art 7 & 9)
- A failed attempt was made to establish an European Defence Community.
- The community lacked physical powers but the normative powers it did have were the foundation of the supranational power of the EU today.

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ECSC: THE FOUNDATION OF THE EU

The Schuman Plan

- Sought to establish an economic friendship across member states.
- Deemed the ECSC to be the first step in the federation of Europe.

The ECSC

- The Commission: supranational heart of the ECSC and decisions made were binding in their entirety.
- The Parliament: advisory function no real powers. (Art 22)
- The Council: to harmonise governments with representatives from member states (Art 26/27)
- The Court: established with 7 judges to rule on interpretation of the treaty. (Art 31)

Supranationalism

- Decisions made by the Commission & Court were binding in their entirety.
- Established direct applicability.
- Departure from international ideal of sovereign equality.



Signatories of the Treaty of Paris on the on the 18th April 1951.

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TREATY OF ROME 1957

- Established the European Economic Community after the Spaak Report
- Created a common market with a customs union that was protected through the four freedoms (**Art 3**);

Free movement of goods
Free movement of persons
Free movement of services
Free movement of capital

- Enhanced supremacy through **Article 189** that introduced direct applicability of regulations & executive decisions.
- Instigated major constitutional change to the institutions of the Community.

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THE EUROPEAN ECONOMIC COMMUNITY

The rise in supremacy:

- *Van Gend En Loos* [1963] established direct effect, which extended the applicability of Community law.
- *Costa v ENEL* [1964]: The EEC created its own legal system; by introducing the concept that member states cannot introduce measures that are not in accordance with the **law, principles or objectives** of the EEC.

Decisional & Institutional Changes:

- Parliament replaced member state contributions with own resources and all members within had to be directly elected (Art 138 (3))
- The Council became the main decision-making body rather than the Commission (Art 145 EEC)
- Commission retained the power as the only body that could enact bills. (Initial period of unanimous majority required; Art 43 (2), this advanced to Qualified Majority Voting which resulted in a French boycott.)
- The Luxembourg Compromise; Introduced the shadow of a veto (Weiler) and the necessity for state interests to be heard.

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The Treaty of Rome signing ceremony on the 25th of March 1957.

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THE COMMON MARKET & THE SCHENGEN AGREEMENT.

- The journey towards the four freedoms was gradual, trade barriers were gradually eliminated, common policies regarding transportation, agriculture, and economic relations with were implemented.
- Labour and capital were eventually permitted to move freely within the boundaries of the community.
- Some European countries such as Britain declined to join the Common Market and formed the; **European Free Trade Association (EFTA)**. Britain joined the European Community formally in 1973.
- *Cassis de Dijon* [1979] The integration of the Common Market rules could be done **negatively**. If no national harmonisation had occurred in a member state, the member state could not impose their legislation on imports unless it met the common market rules/public interest requirements.
- The **European Monetary System** was established in 1979 outwith the EEC.
- The was made in 1985 to introduce **Schengen Agreement** ommon rules on visas, police & judicial co-operation (outwith the EC)

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THE SINGLE EUROPEAN ACT 1986

- Was the **first major** constitutional treaty reform since the EEC treaty in 1957.
- Sought to **complete** the Internal Market by 1992. (Art 13)
- It **did not succeed** in bringing everything under the supranational control of the EC; *foreign affairs, monetary systems and home affairs* were still separate.
- Formally recognised the **European Council** (Art 2) but it was not considered a Community institution.

Key Successes:

It expanded the supranational decision making of the Commission by adding a legal basis for **Qualified Majority Voting**.
Now **Art 114** (TFEU)

It introduced the **Co-operation procedure** into Legislation making.
(The Council, acting by a qualified majority on a proposal from the Commission and after obtaining the opinion of the European Parliament, shall adopt a common position. Art 252(a))
It was **Art 252 (TFEU)** now replaced by the co-decisional procedure.

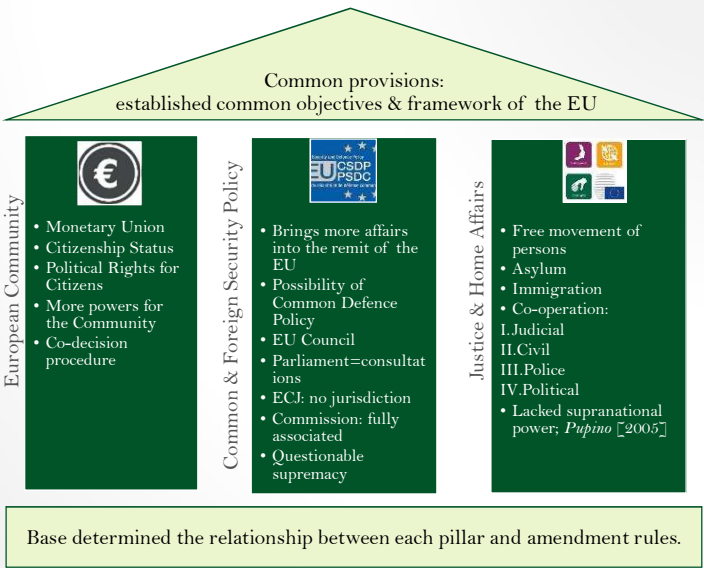
It created a **Court of First Instance** on the request of the Court of Justice designed to hear and determine at first instance certain classes of action or proceeding brought by natural or legal persons, subject to a right of appeal to the Court of Justice on points of law only.
Art 11 (SEA) now Art 168(a) of the EEC Treaty

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THE TREATY OF MAASTRICHT 1992

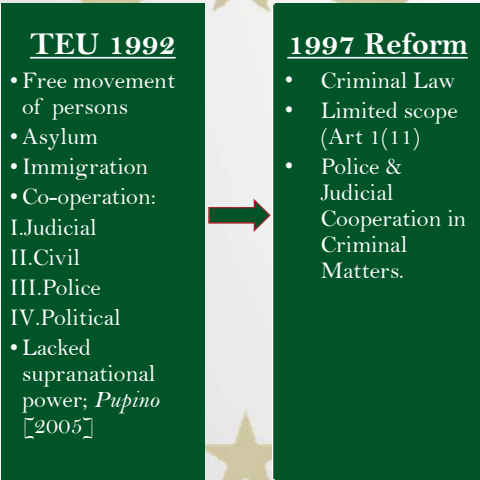
- The **Delors** conference in 1989 discussed the integration of economy and monetary matters into the Community.
- The **Treaty on The European Union 1992 (TEU)** was the result of this.
- Ratification was challenged by the Constitutional Court of Germany (The Maastricht Decision [1994] CMLR 57.
- Established **three pillars** of the European Union. (Temple Structure)
- According to Curtin (1993) created a, "Europe of bits and pieces."



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THE TREATY OF AMSTERDAM 1997

The key reform was splitting the Justice & Home Affairs pillar.



- The subject areas removed from the Justice & Home Affairs pillar were transferred to the Community pillar.
- A more supranational approach for areas such as immigration/asylum etc. was preferred. (Free movement of persons)
- Article 1(15) inserted new title III (a) into Part III of the European Community Treaty.
- ^ UK and Ireland opted out to ensure border controls remained in place.

What happened to the Schengen Agreement?

- Incorporation into the EU proved difficult because:
 - I. Non-participants of Schengen in EU
 - II. Non-EU members in Schengen
 - III. Schengen split due to third pillar split.
- Schengen Agreement; Title VI of TEU

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THE TREATY OF NICE 2001

- Limited institutional reform.
- A comprehensive review sought but not completed.
- Protocol for enlarging the EU established and new countries added to the Union.
- Provided minor changes to institutions of the EU (Council, Parliament, Commission, European Council, Court of Justice).
- Separate non-binding instrument established: **The Charter of Fundamental Rights.**
- Nice Declaration on the future of the EU; deadline set to address the need for a review.

“We cannot go on working like this!”

*Was apparently exclaimed by Tony Blair (former Prime Minister of Britain during Council debates regarding the Treaty of Nice.

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CONSTITUTIONAL REFORM TREATY 2004

- Many states held referendums regarding the ratification of the Reform Treaty.
- Majority vote of no from both France & The Netherlands; Treaty failed to be ratified.



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What did it seek to achieve?

- The purpose of the treaty was to repeal all former treaties
- Remove the Three Pillar Structure and have the EU operate under **one legal personality, one union, one treaty.**
- Consisted of four parts:
 - I. Values, objectives, competences, institutions, instruments.
 - II. Charter of Fundamental Rights
 - III. Internal/External Policies
 - IV. General/Final Provisions
- Complete simplification of the framework of the EU.

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THE LISBON TREATY 2009

Intergovernmental Conference in 2007 sought to amend existing treaties. The Lisbon Treaty is believed to abandon the form of the Failed 2004 treaty but keep its substance. Entered into force in 2009.

The Treaty completed the process that the Treaties of Amsterdam and Nice begun regarding the creation of supranationalism and removed the community/union base; Single European Union

Merged the Treaties of Maastricht and Rome together. A dual treaty base remained; New Treaty of the European Union (general provisions) and a Treaty on the Functioning of the European Union (specific provisions)

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Dual Treaty Framework

- Dual Democratic legitimacy; corresponds to federal nature of the EU.
- Increased Parliaments decision making.
- Abolished pillar system. (however second pillar established in the Maastricht Treaty can be considered as the TEU.)
- The third pillar as modified by the Treaty of Amsterdam is reunited with the rest of the Maastricht Treaty; Title V of Part 3 of TFEU.
- Widening of geographical and jurisdictional scope as well as deepening supranational power.

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TEU

- Democratic principles established in Article 10
- Majority of Reforms to this treaty involved changing of words etc.
- Contains the Common Foreign and Security Policy.
- Defence provisions

TFEU

- Specific provisions with regard to the institutions & policies of the EU.
- Simplified union instruments & Law Making processes
- Abolished Common Positions and Co-operation procedure
- Made a dramatic step towards a political union of the EU. (ART 10)
- Failed to categorise all the areas of union competences.

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Title I of Part I of the consolidated Treaty on the Functioning of the European Union (Competences)


Exclusive competence	Shared competence		Supporting competence
<i>"The Union has exclusive competence to make directives and conclude international agreements when provided for in a Union legislative act."</i>	<i>"Member States cannot exercise competence in areas where the Union has done so."</i>	<i>"Union exercise of competence shall not result in Member States being prevented from exercising theirs in" ...</i>	<i>"The Union can carry out actions to support, coordinate or supplement Member States' actions in" ...</i>
<ul style="list-style-type: none">the customs unionthe establishing of the competition rules necessary for the functioning of the internal marketmonetary policy for the Member States whose currency is the eurothe conservation of marine biological resources under the common fisheries policyCommon Commercial Policyconclusion of certain international agreements	<ul style="list-style-type: none">the internal marketsocial policy, for the aspects defined in this Treatyeconomic, social and territorial cohesionagriculture and fisheriesconsumer protectiontransporttrans-European networksenergythe area of freedom, security and justice (CFSP)common safety concerns in public health matters, for the aspects defined in this Treatyresearch, technological development and (outer) spacedevelopment cooperation, humanitarian aid		<ul style="list-style-type: none">the protection and improvement of human healthindustryculturetourismeducation, youth, sport and vocational trainingcivil protection (disaster prevention)administrative cooperation

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THE FUTURE OF THE EUROPEAN UNION?

- On March 29th Prime Minister of the United Kingdom (UK) Theresa May triggered article 50 of the Treaty on the European Union. (TEU) In order to withdraw the United Kingdom from the European Union (EU).
- The Five possible Post-Brexit Scenarios for the EU was proposed by President of the EU Jean-Claude Juncker in a white paper in 2017.
 - ‘Carrying on’** The European Union focuses on delivering its positive reform agenda.
 - ‘Nothing but the Single Market’** The European Union is gradually re-centered on the Single Market..
 - ‘Those who want more do more’** The European Union allows willing member states to do more together in specific areas.
 - ‘Doing less more efficiently’** The European Union focuses on delivering more and faster in selected policy areas, while doing less elsewhere.
 - ‘Doing much more together’** The European Union decides to do much more together across all policy areas.



An uncertain future for the constitution of the EU?

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THE EU: CONSTITUTIONAL NATURE

- How does the EU operate?
- The European Tradition
- The EU in light of the American tradition
- The *sui generis* theory
- The international law theory
- The three constitutional denials
- Democratic deficit?
- Conclusion

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HOW DOES THE EU OPERATE?

- International law historically operates on a voluntary and unenforceable basis; protecting the historical concept of absolute sovereignty.
- In accordance with the concept, no authority can be held to be above an individual state.
- *Is the EU a Confederation of States or a Federation of States?*



The European Union itself holds the belief that its constitutional framework is *sui generis*; incomparable to any other union due to its unique nature.

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FEDERALISM AS INTERNATIONAL LAW

The American Tradition

- The 1787 Constitution of the USA established federalism.
- Sought to consolidate the 1777 Constitution.
- Confederation of States v Federalism; the sovereignty battle.

What is federalism?

Federalism is a system of government in which entities such as states or provinces share power with a national government.

Madison; 3 Dimensions of Federalism

The Foundational Federalism; Origin and character of the constitution.


The Institutional Federalism; Composition of government institutions

The Functional Federalism; Scope and nature of federal powers.

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THE MIXED FEDERATION



“The sovereignty of the United States is shared between the Union and the States whilst in France it is undivided and compact.” Tocqueville (1954)

- The 1787 Constitution was an International Act; needed to be ratified by unanimous assent of the States. (voluntary act)
- **House of Representatives;** The States
- **The Senate;** International Organ (Federal Government)
- Central government had both national & international powers; hence a mixed government.
- Each state gave up some sovereignty whilst the national government remained incomplete;
- Concept of *dualism* created:
Dual government, dual sovereignty, dual citizenship

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THE EUROPEAN TRADITION



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History of Absolute Sovereignty

- According to *Dicey*, sovereignty of a state was indivisible and absolute.
- The European Union of States could only be a confederation or a federal state.
- ^ International Act; following voluntary nature of ordinary international law.

Confederation of States?

- Member states could only be the authors of the Unions suggestions (Jellinek)

Federal State?

- Higher, sovereign authority with unifying power.
- Member states lose all sovereignty.

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CRITICISMS OF THE EUROPEAN TRADITION

Kelsen (1920)

- Was loyal to the concept of indivisible sovereignty.
- Believed there was no difference between a confederation of states or a federal state.
- The concept that treaties and constitutions were mutually exclusive was wrong.
- The concept of sovereignty was a psychological one of social perception.
- Didn't agree with the tautological nature of federal Europe.

Schmitt (2003)

- Agreed with Kelsen regarding there being no difference between a confederation and a federal state.
- Both two species of federalism.
- Did not focus enough on defining what each species was.

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What is a federal union of states?

"A federal union was one that was a permanent union based on a voluntary agreement whose object is the political preservation of its members." Schmitt

The Federation is characterised by dualism;

"In each federal body, two kinds of political bodies co-exist: the existence of the whole federation and the individual existence of each federal member." Schutze

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THE EU IN LIGHT OF THE AMERICAN TRADITION

Foundational dimension;

- The European Union of States was formed by international treaties, they were ratified by the national legislators, (not the people.)
- The Treaties were elevated to a constitutional status due to societies perception of it.
- Non-contractual nature of EU law in *Commission v Luxembourg & Belgium* [1963]
- Article 9 of the TEU established European citizenship; members are citizens of two separate political orders.
- *Les Verts* [1986] The EU Treaties despite being formed as an International Agreement constitutes the constitutional charter of a Union based on article of law. (para. 23)



The EU is characterised by dualism; political dualist position, federal citizenship and national citizenship, as well as a balanced approach to legislation making.

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THE EU IN LIGHT OF THE AMERICAN TRADITION (cont.)

Institutional Dimension; Dual Basis of Democratic Legitimacy



The principle law makers of the European Union is the Parliament and the Council. The composition of the Parliament has changed over time to become a body of fully elected individuals, voted for by citizens of Europe making the law making process more national in nature.



The people of the EU are represented by the members of parliament and the majority voting procedure. (Art 231 TFEU) The international organ of the EU is the Council, which is formulated from national ministers representing their own governments. (Art 16(2) TEU)



To limit the effect on the sovereignty of the member states by the Council decisions, unanimous or qualified majority voting occurs. The Council operates as a middle ground between national/international interests providing a federal balance.

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THE EU IN LIGHT OF THE AMERICAN TRADITION (*cont.*)



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Functional dimension

- Europe has significant legislative powers however the scope of the EU government is limited by its incomplete nature.
- The European Court of Justice has extended the scope of EU legislation by introducing direct effect. (*Van Gend en Loos*)
- This limits the requirement of member states having to incorporate directives.
- Decentralised application of European law through supremacy; All institutions of a member state must disapply conflicting national law.
- European law largely follows the logic of state responsibility in public international law, (*Kadelbach 2002*) due to lack of enforcement options.

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THE EU IN LIGHT OF THE EUROPEAN TRADITION

Supranationalism;

Refers to a large amount of power given to an authority which in theory is placed higher than the state. (The EU)

Intergovernmentalism;

Focuses on the importance of member states in the process of creating EU-wide regulations.

Sui Generis Theory

Stems from the concept that the EU is a completely unique union and hence not comparable to a confederation or a federal state.



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THE SUI GENERIS THEORY

- Europe is incomparable as it cannot be fitted into the traditional categories of international or constitutional law.
- Sui Generis theory, in determining the European Union to be incomparable raises a number of issues;
 1. Fails to analyse the Union
 2. Only views the Union in negative terms.
 3. It provides no means to measure the EU evolution.
 4. Is historically unfounded as all previous Union of states lay between both international and national law.
- Based on undivided sovereignty which creates problems when examining the dual nature that characterises the EU.
- Europe's statist tradition insists that the EU is international in nature and not unique.



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THE INTERNATIONAL LAW THEORY

The Maastricht Decision

- The German Supreme Court contested that Europe's social structure would set limits on the constitutional structure of the EU.
- No equivalent to European national peoples so there would be a legal limit to integration.
- *"Union of States as an ever closer union of the peoples of Europe (organised as States,) and not a State based on the people of one European Union."*
- All legal authority of the EU derives from the Member States.
- EU laws can only have effect by virtue of the sovereign instruction that the law is applied.
- If an EU law goes beyond the national scope it will have no effect.
- The ultimate decider of the legitimacy of an EU law is sovereign supreme courts.
- European law is international law.

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THE THREE CONSTITUTIONAL DENIALS

The constitutional conflict over the Maastricht Treaty brought to light the statist tradition of the European Union.

No People

- Rise of nationalism; people's identified via their nation.
- National peoples can be viewed as mutually exclusive.
- European citizenship separate from national citizenship.

No Constitution

- *"It is inherent in a constitution in the full sense of the term that it goes back to an act take by or at least attributed to the people, in which they attribute political capacity to themselves."* (Zweig)
- Argument is that there is no source for Primary Union law
- European Union is given its constitution through third parties.

No Constitutionalism

- Citizens are needed to make a constitution and a constitution is needed for the establishment of constitutionalism.
- Europe's constitutional architecture has never been validated by a process of constitutional adoption by a European constitutional demos. (Weiler)
- With no constitutional demos, there can be no European constitutionalism.

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IS THE DEMOCRATIC DEFICIT A REAL PROBLEM?



- Democratic deficit exhibited in the decision making process of the Union?
- All legislative decisions are theoretically legitimised by one source the democratic nature of this is questionable.
- Federal polity; 2 arenas of democracy.
- Federation of Europe?
- The European Union is based on a dual structure of legitimacy;
 1. The totality of the Union's citizens
 2. The peoples of the European Union
- Elections provide two lines of democratic legitimacy.
- Duplex regimen=dual democracy.

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CONCLUSION

- The European Union has a mixed structure; it exists in a federal middle ground.
- The Sui Generis theory that populated EU law initially is not an accurate perspective from which to examine the purpose of the EU from.
- The European Union is both an international and national being.
- It is a federation of States and the uniqueness of this concept is partly the cause for the success of the European Union.
- The Union enjoys real powers stemming from a limitation on sovereignty (transfer of powers).



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