

KLUWER LAW INTERNATIONAL

The European Union Legal Order after Lisbon

Edited by
**Patrick Birkinshaw
and Mike Varney**

70

EUROPEAN MONOGRAPHS



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Law & Business

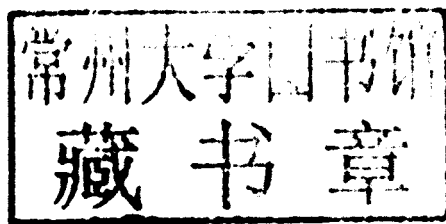
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The European Union Legal Order after Lisbon

EUROPEAN MONOGRAPHS

Editor-in-chief Professor David O'Keeffe

In this series *European Monographs* this book *The European Union Legal Order after Lisbon* is the seventieth title. *The titles published in this series are listed at the end of this volume.*

List of Abbreviations

AFSJ	Area of Freedom, Security and Justice
ANEC	Body Representing European Consumer Voice in Standardization
API	Applications Programming Interface
AVMS	Audiovisual Media Services
CAS	Conditional Access System
CAT	Competition Appeal Tribunal
CEAS	Common European Asylum System
CEN	Committee for Standardization
CENELEC	European Committee for Electrotechnical Standardization
CESR	Committee of European Securities Regulators
CFI	Court of First Instance
CFR	Charter of Fundamental Rights
CFSP	Common Foreign and Security Policy
CLWP	Commission's Legislative and Work Programme
CPMP	Committee for Proprietary Medicinal Products
EAL	European Administrative Law
EAP	European Asylum Policy
EAR	European Agency for Reconstruction
EASA	European Aviation Safety Agency
EBA	European Banking Authority
ECB	European Central Bank
ECDC	European Centre for Disease Prevention and Control
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECN	European Competition Network
ECSC	European Coal and Steel Community

List of Abbreviations

EctHR	European Court of Human Rights
EDC	European Defence Community
EDPS	European Data Protection Supervisor
EEC	European Economic Community
EFTA	European Free Trade Association
EIOPA	European Insurance and Occupational Pensions Authority
EMA	European Agency for the Evaluation of Medicinal Products
EP	European Parliament
EPG	Electronic Programme Guide
ESC	European Securities Committee
ESDP	European Security and Defence Policy
ESFS	European System of Financial Supervisors
ESMA	European Sales and Marketing Association
ESRB	European Systemic Risk Board
ETSI	European Telecommunications Standards Institute
EU	European Union
EUMC	European Union Monitoring Centre
FIM	Financial Integration Monitor
FSAP	Financial Services Action Plan
FSU	Finnish Seaman's Union
GAL	Global Administrative Law
GATT	General Agreement on Tariffs and Trade
GDP	Gross Domestic Product
HRA	Human Rights Act (UK)
IA	Impact Assessment
IGC	Inter Governmental Conference
IOSCO	International Organization of Securities Commissions
MEP	Member of the European Parliament
MiFiD	Markets in Financial Instruments Directive
MS	Member State
MTF	Multilateral Trading Facility
NATO	North Atlantic Treaty Organization
NCA	National Competition Authority
NRF	New Regulatory Framework
NTL	National Transcommunications Limited
OFT	Office of Fair Trading
OHIM	Office of Harmonization for the Internal Market
PSB	Public Service Broadcasting
SLC	Substantial Lessening of Competition
TEC	Treaty on European Community
TEU	Treaty on European Union

List of Abbreviations

TFEU	Treaty on the Functioning of the European Union
TVWF	Directive on Television Without Frontiers
UCITS	Undertakings for Collective Investment in Transferable Securities
WTO	World Trade Organization

Introduction

Planning for a conference under the auspices of the Institute of European Public Law of the University of Hull began in June 2008. The theme of the conference held in June 2009 was 'The End of the 1992 European Legal Order?' The title was prompted by several factors. The summer of 2008 was an unusually troubled time for the EU. The Irish had rejected the Lisbon Treaty. This was a treaty that had sought to play down any constitutional dimension which allegedly had caused such anxiety among the French and Dutch voters leading to their rejection of the Constitutional Treaty in 2005. Within weeks, the other major development saw the banking crisis threaten to destroy world economies and financial systems. Governments and central banks behaved initially like terrified passengers on a sinking ship when the order 'each for themselves' had been declared. The instability seemed to threaten the basic freedoms of the Union and to undermine the future of the common market as protectionism reared its terrified head and nationalization and massive state support for the national banking sector became panaceas for the global financial drama. There were dramatic scenes of industrial unrest in the UK as workers protested under the banner of 'Jobs for UK Workers' against foreign imported labour from other Member States. And in the UK, the increasing likelihood of a Conservative victory in the 2010 general election brought with it the prospect of an anti-European UK government determined to extirpate European influence in our political, legal and economic life. The Conservative party's *bête noire*, the UK Human Rights Act implementing much of the European Convention on Human Rights (ECHR), would be first for the chopping block, David Cameron promised. Several of the essays included in this collection have been

critical of the approach the UK adopted toward human rights protection. At the end of the introduction, we say something about this.

And so the title ‘The End of the Post 1992 European Legal Order?’ seemed appropriate and not overstretched. The idea was not to officiate at a burial service but rather to assess what had been achieved in the EU Legal Order and what the future held for that order given local tensions and global uncertainty. Not all was gloom. There had been a heightened sensitivity by the European Court of Justice (ECJ) to human rights protection albeit that this protection was qualified by market freedoms. A common approach was emerging on how to respond to the financial crisis. The seismic shock waves were abating. By the time the revised papers were presented for publication in the autumn of 2009, and Ireland had overwhelmingly voted ‘Yes’ to Lisbon and the Polish ratification of Lisbon had been finalized, a more appropriate theme appeared: ‘The European Union Legal Order after Lisbon’. As we write, the President of the Czech Republic, Mr Václav Klaus, decided to end his opposition to ratification of Lisbon until a variety of domestic concerns were addressed. His signature is now appended to the Treaty immediately following a ruling from the Czech Constitutional Court that the Treaty was consistent with the Czech constitution. By the time this book is printed, the Treaty of Lisbon will most likely be in force. And the Treaty will be in force before a change of government in the UK, meaning that the Conservative promise of holding a referendum on the Treaty in the event of non-ratification will now be pointless. Once again, Europe seems poised to be a stumbling block for the Conservative party.

The conference set as its objectives the appraisal of major challenges facing the process of ‘Europeanization’ at a time of considerable challenge for the European Union and its legal order. The organizers sought to facilitate dialogue and encourage the development of a research network to enhance European legal research on these issues. In order to facilitate this objective, the Institute assembled a range of experts in relevant fields to offer papers and present their ideas. The core objectives of the conference – to examine the present state of development of different areas of European law and to reflect on the future for these areas in the light of the present impasse on constitutional and legal reform and their eventual resolution, should prove to be highly relevant to the present and future debates in this area and should be of considerable interest to scholars in law, politics, and allied fields.

The following essays are varied in style and approach. Some are wide and theoretical – others more specific and orthodox. All, we believe, offer interesting perspectives on the chosen themes.

This book is divided into four parts. Each part examines a theme which was central to future development in the EU order.

Part One examines the future of the European Union legal and political order in wide-ranging essays. The papers examine the future of European Public law (Schwarze), the future of the European order from the viewpoint of a political scientist (Fossum), the EU and global administrative law (Auby), and the dilemma of European law between constitutionalism and governance and the differences between Laeken and Lisbon (Menendez).

Part Two covers the future of regulation. In this part there is an examination of legal control of regulatory bodies – principle, policy and teleology (Craig), reforms in financial and banking regulation taking us from harmonization to EU federal financial law (Tridimas), the state, competition and public services (Bovis), and regulating media markets and the need for subsidiarity and clarity of purpose (Feintuck and Varney).

Part Three deals with citizenship and human rights. Here the chapters cover the EU human rights regime and post-national constitutionalism and *Kadi's* global setting (Anthony), citizenship and European democracy between the European constitution and Lisbon (La Torre), the European asylum policy – between myth and reality (Galetta), and transparency and access to documents (Birkinshaw).

Finally, Part Four examines constitutional and legal principles in an uncertain order. The essays here study multi-level governance and executive federalism in a comparison of Germany and the EU covering accountability, separation of powers and federalism (Ziller), the role of European judges in an era of uncertainty (Bell), and finally, an analysis of the esoteric dimension of constitutional pluralism and the EU's internal constitutional sub-units – the multi-dimensional aspect of constitutions and constitutionalism in the EU (Kombos).

Doubtless, there will be criticism of omissions. It was hoped to include in Part Four a chapter on the future of the common market but that did not prove possible. The major provisions of the treaties are well known among the audience interested in a book on our chosen theme. There is no substantive discussion of the two treaties themselves because these subjects have been comprehensively reviewed.¹ However, many central features of the treaties are referred to in the papers herein. Also not covered is the relationship between national Parliaments and the EP. Readers will identify their own areas of omission. The editors would have wished for more on the rule of law, social and economic rights, freedom, security and justice (on which the UK together with Ireland adopted a special position), and other subjects such as external relations. Instead, we had to be selective in our coverage.

The British approach to the Charter of Fundamental Rights (CFR) has been widely criticized. This book contains some criticisms. Come what may, we are left with the provision in the Protocol for the UK and Poland that nothing in Title IV of the CFRs concerning 'solidarity' 'creates justiciable rights . . . except in so far as the UK has provided for such rights in its national law'. There are qualifications on the scope and extent of the Charter itself. The latter seeks to give assurance that the Charter does not extend the ability of the ECJ or national courts or tribunals to find that the laws, regulations or administrative provisions, practices, or actions of the UK are inconsistent with the fundamental rights, freedoms and principles which it [the Charter] reaffirms. As the Protocol 'is without prejudice to other obligations devolving upon the UK under the Treaty of Lisbon' and 'Union law generally', it has no effect on judgments involving EU law or general principles of Union law,

1. The House of Lords European Union Committee in its Tenth Report *The Treaty of Lisbon: An Impact Assessment* (2007–2008).

including human rights protection. It will have no effect on national courts and their interpretation of human rights under the HRA or the fundamental common law of human rights as influenced by international norms, not least those of the European Convention. Last of all, under Article 2 of the Protocol, where a reference is made in a provision in the CFR to national laws and practices, it shall only apply to the UK to the extent that the laws and practices that it contains are recognized in the law or practices of the UK. Again, this is only with reference to the Charter. It will have no reference to other human rights developments. In setting its sights on one target, the UK has failed to seize the significance of the multi-dimensional advance on human rights protection. It has also failed to understand that areas of law cannot be neatly compartmentalized and isolated. As we believe this book shows, legal development now moves on a wide front.

As we write, it looks clear that there is a real prospect of a Conservative government in the UK by the Spring of 2010, although we would not wish to anticipate its majority. That party has made itself increasingly hostile towards Europe as it has faced pressure from right-wing and vehemently anti-European parties vying for supporters. In reality, the party has few options on the Treaty of Lisbon other than withdrawal from the Union, which is not a part of its agenda, although withdrawal is now possible under Lisbon. Powers on social policy and employment will be clawed back, Cameron claims! The UK has ratified Lisbon. Can the light be switched on over the fact that it is a legal *fait accompli*? The official line of the Conservative leadership after the Czech ratification was to abandon the promise of a Lisbon referendum but to place a guarantee of a national referendum on future transfer of power to the EU and to assert the overall sovereignty of UK laws over EU laws in legislation. It is not clear what the latter means. The *overall* sovereignty of Parliament has been judicially recognized in England because it was given by the common law² – and that sovereignty itself may well have been modified as the common law develops.³ Elsewhere, the German Constitutional Court has famously pronounced on the sovereignty of the German constitution vis-à-vis EU treaties.⁴ Other constitutional courts have made similar rulings in relation to their own constitutions. The *modus operandi* is the primacy of EU law in its field of competence unless the EU institutions decide to do something rather awful and repugnant, that is, *unconstitutional*, through, under, or in interpreting the treaties, or to otherwise act in a blatant *ultra vires* manner. It is a scenario for a tutorial, not for reality. At the present time it is unlikely that the British public would agree by majority in a referendum to a future EU treaty. It is also not clear whether the promise would cover reforms to the Lisbon Treaty under one of its procedures allowing for an increase in competences. But the next treaty on EU reform is likely to be many years, perhaps a generation, away. Undoubtedly

2. *Thoburn v. Sunderland City Council* [2002] 4 All ER 156 at 183 and 187–188 per Laws LJ.

3. *R (Jackson) v. Att Gen* [2005] UKHL 56.

4. Most recently: J. Ziller, *European Public Law* (2010), forthcoming, Zitierung: BVerfG, 2 BvE 2/08 vom 30 Jun. 2009, Absatz-Nr. (1–421), <www.bverfg.de/entscheidungen/es20090630_2bve000208en.html>.

the historical context will be very different from today's. And clearly context is almost everything.

A real problem may emerge with the repeal of the Human Rights Act. Apart from the desire to replace the Act with something 'British', it is not at all clear what is intended to replace it. Something will have to replace it to prevent the UK becoming a pariah state in the protection of human rights. The obvious specific guarantee for human rights protection would be the ECHR. Norman Tebbit has suggested that the UK should terminate its membership of the Convention as a logical development after repealing the Human Rights Act. Repeal of the Human Rights Act and its replacement by a weaker measure would be a tragedy. The UK would be left with the common law and its uncertain and unpredictable, albeit durable, scope. We say nothing about the implications for our existing human rights obligations under the TEU Article 6, as well as those under Lisbon Article 6 and the possibility of suspension of EU rights under Article 7; or EU accession to the ECHR under Article 6.2 ToL. The Human Rights Act has its critics, but it has provided vital protection for citizens and aliens alike. There is no doubt the Human Rights Act could be fortified. And nothing prevents an Act that would incorporate the substance of currently protected areas into UK law; the Convention rights are after all built on common law traditions but given positive and emphatic, and not residuary, expression. The inclusion of additional rights in a bill of rights such as access to information, access to justice, rights to jury trial, and limits on executive detention guaranteed in law would all be welcome. Too often governments are not in the business of giving citizens and others greater rights against government. And certain features of the ECHR have been despised by British governmental culture.

So much is a British preoccupation. This book is about European Union law and its future and future influence. The present and the future are challenging. The following chapters offer some insights into those challenges which we expect will assist in formulating appropriate responses.

We would like to thank Kluwer Law International and Karel van der Linde for their generous support for the conference in Hull, Mike Feintuck, Director of the Hull Law School, for warmly supporting the conference, and the Faculty of Arts and Social Sciences at the University of Hull for its financial support.

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Institute of European Public Law
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November 2009

Summary of Contents

List of Abbreviations	xvii
Introduction	xxi
PART I	
The Future of the European Union Legal and Political Order	1
Chapter 1	
The Future of the European Public Law	3
<i>Prof. Dr Jürgen Schwarze</i>	
Chapter 2	
The Future of the European Order	33
<i>John Erik Fossum</i>	
Chapter 3	
The EU and Global Administrative Law	57
<i>Jean-Bernard Auby</i>	
Chapter 4	
Governance and Constitutionalism in the European Order	65
<i>Agustín José Menéndez</i>	

PART II	
The Future of Regulation	91
Chapter 5	
Legal Control of Regulatory Bodies: Principle, Policy, and Teleology	93
<i>Paul Craig</i>	
Chapter 6	
EU Financial Regulation: From Harmonization to the Birth of EU Federal Financial Law	117
<i>Takis Tridimas</i>	
Chapter 7	
The State, Competition and Public Services	137
<i>Chris Bovis</i>	
Chapter 8	
Regulating Media Markets: The Need for Subsidiarity and Clarity of Principle	155
<i>Mike Feintuck and Mike Varney</i>	
PART III	
Citizenship and Human Rights	177
Chapter 9	
EU Law's Fundamental Rights Regime and Post-National Constitutionalism: <i>Kadi's</i> Global Setting	179
<i>Gordon Anthony</i>	
Chapter 10	
Citizenship and European Democracy: European Constitution and Treaty of Lisbon	197
<i>Massimo La Torre</i>	
Chapter 11	
The European Asylum Policy: Myth and Reality	213
<i>Diana-Urania Galetta</i>	
Chapter 12	
Transparency and Access to Documents	229
<i>Patrick Birkinshaw</i>	

PART IV

Constitutional and Legal Principles in an Uncertain Order	255
--	------------

Chapter 13

Multilevel Governance and Executive Federalism: Comparing Germany and the European Union	257
---	------------

Jacques Ziller

Chapter 14

The Role of European Judges in an Era of Uncertainty	277
---	------------

John Bell

Chapter 15

The Esoteric Dimension of Constitutional Pluralism: EU's Internal Constitutional Sub-units and the Non-symbolic Cumulative Constitution	291
--	------------

Constantinos Kombos

Bibliography	325
---------------------	------------

Table of Cases	349
-----------------------	------------

Table of Legislations	359
------------------------------	------------

Index	363
--------------	------------

Table of Contents

List of Abbreviation	xvii
Introduction	xxi
PART I	
The Future of the European Union Legal and Political Order	1
Chapter 1	
The Future of the European Public Law	3
<i>Prof. Dr Jürgen Schwarze</i>	
1. Introduction: From National to European Public Law	3
2. Elements, Structure, and Frame of European Public Law	4
3. Survey of Recent Developments	6
3.1. Germany	6
3.2. France	10
3.3. United Kingdom	15
3.4. Southern European Countries	19
3.5. Central and Eastern European Countries	20
3.6. Europe	22
4. Conclusion	29