

Rechtsgeschichte Legal History

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<http://www.rg-rechtsgeschichte.de/rg32>
Zitiervorschlag: Rechtsgeschichte – Legal History Rg 32 (2024)
<http://dx.doi.org/10.12946/rg32/260-261>

Rg **32** 2024 260–261

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Constitution – Which Constitution?

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Constitution – Which Constitution?*

This book examines the constitutional history of the European Union (EU). According to its author, Frank Schorkopf, Professor of Public Law and European Law at the University of Göttingen, it even presents the »first academic overview of the constitutional history of organised Europe for the second half of the 20th century« (19). Schorkopf chooses the slightly unusual term of »organised Europe« to bring into view developments that otherwise might not be considered in a constitutional history of the EU, including the Council of Europe, its European Convention of Human Rights, and European political cooperation in foreign policy. More difficult to explain is the ambition of writing a constitutional history of the EU in the first place, given that there is no clearly identifiable text qualifying as a constitution. Moreover, attempts to develop and codify a constitution for the EU and its predecessor organisations have failed three times, in 1954, 1984 and 2005. For Schorkopf, however, the possibility of a constitution and the reality of a constitutional discourse beyond these moments of failure provide the point of departure for analysing »the EU's political order« through »a substantive and evolutionary« constitutional lens (19).

The core argument of the book, reflected in its main title – »an undecided power« – is that the EU's political order has left it open if constitutional authority as a specific form of power *remains* with member states or *has moved* to the European level (16). Schorkopf argues that the ambivalence of the EU's political order results from the coexistence of three schools of thought, each of which mobilises their own reading of European integration over time to support their claims. *Constitutionalists* view European integration as the formation of an independent political community based on a constitution that has not yet fully materialised. In contrast, proponents of *intergovernmentalism* regard European integration as executive governance

with strictly limited democratic participation; and they underscore supranational administrative cooperation. Most importantly, those in the inter-governmental camp do not share the constitutionalists' emphasis on the desirability of a parliamentary system of government. *Pragmatists*, in turn, take an in-between position and a functional view of European integration that emphasises shared problem solving by a club of sovereign member states on the basis of the treaties. The analysis returns to the three schools of thought throughout, but it does not tie the ideational frameworks of constitutionalism, intergovernmentalism and pragmatism systematically to historical actors and agency.

The book is arranged in three parts, combining a chronological with a thematic approach and starting with the struggle for supranationality in the period 1948–1969. Political historians of European integration will be familiar with the developments covered here, ranging from the 1948 Hague Congress, the Schuman Plan and the initiatives for the European political and defence communities, to the move to horizontal market integration and the early operation of the European communities. At the same time, the text is also well worth reading for political historians, first because it successfully synthesises selected archival sources and recent works on the development of the EU's political order, most of which are scattered in academic journals. Second, Schorkopf introduces a distinctly legal perspective to familiar episodes, presenting them in a compact and accessible way, for example, in chapter 2 on sectoral integration in coal and steel, when he contextualises the debate on the legal nature of the newly established community within wider international law debates (52–53). The final chapter (6) of this part of the book moves from different initiatives aiming at European integration based on international treaties to the European Court of Justice (ECJ). It

* FRANK SCHORKOPF, Die unentschiedene Macht. Verfassungsgeschichte der Europäischen Union, 1948–2007, Göttingen: Vandenhoeck & Ruprecht 2023, 381 p., ISBN 978-3-525-30219-4

argues that the ECJ's »Van-Gend-Costa-doctrine« not only established the autonomy of European law vis-à-vis national law but also provided »a new foundational narrative for supranational integration« (121).

The book's second part, on the search for European identity, covers the period from the Hague summit in 1969 to the 1984 European Parliament's (EP) draft treaty establishing the European Union. The 1970s are characterised as a key decade in the constitutional history of the EU, with examples including the establishment of the European Council, the introduction of direct elections to the EP, and the increasing significance attached to protecting fundamental rights, not least in order to enhance the legitimacy of European institutions vis-à-vis European citizens. A separate chapter (11) is devoted to the »community of law«. The term, introduced into the Community by Commission President Walter Hallstein in the 1960s, became a source of inspiration for the ECJ's activism in the 1970s and 80s.

Arguably, the sophistication of depicting the Court's jurisprudence as »upgrading [...] to a functional constitutional law for the Communities« (200) is not matched by placing these core legal and constitutional developments in a politico-economic context. The reader does not get a sense, for example, of how the choice for common market creation underpinning the case law was driven by the inability of member state governments to mitigate the impact of recurring crises in the 1970s and Europe's initial »shock of the global«, to reference Niall Ferguson, Erez Manela and Daniel Sargent's book of the same title (2011).

Under the heading »leaping into union«, 1985–2007, the final part of the book charts new territory not previously covered by archive-based approaches to European integration history. This observation applies especially to the post-Maastricht period that culminated in the rejection of the constitutional treaty in referenda in France and the Netherlands in 2005. At the same time, the

analysis places the development of leading concepts such as political union, complementarity, coherence, and subsidiarity within a wider temporal framework, which supports the book's argument that »in organised Europe, no idea for integration nor draft text is forgotten« (279) but recycled and repurposed later.

From this perspective, it would have been interesting to discuss how the analysis of the EU's political order through a substantive and evolutionary constitutional lens relates to the notion of »constitutional practice«. This concept was promoted by recent historical scholarship to capture how the ECJ and pro-integrationist lawyers and European institutions and universities deliberately used constitutional terminology to advance European integration. But the concept also functioned as a starting point for revisiting EU constitutionalisation based on empirical research. In the *European Law Journal*, Morten Rasmussen and Dorte Sindbjerg (2018) have argued that member states were reluctant to accept the Court's constitutional practice, at least before the development of the single market from the mid-1980s, and have cast Maastricht as a continuation of a long-standing trend of resisting a European constitution.

Overall, Schorkopf has presented a very readable constitutional history of the EU going beyond doctrinal questions of European law. For historians, the book's added benefit is in introducing legal perspectives into the political development of European integration, be this in the case of the legal nature of the coal and steel community or the analysis of the concept of the community of law. Other examples could be added here. With its focus on European institutions, the work can bridge the gap to those political historians of European integration who are new to its legal dimension. Likewise, the discussion of legal issues in political context has the potential to introduce lawyers to a broader political history of European integration.

