

# Book Reviews

**Constitutional Law of the EU's Common Foreign and Security Policy: Competence and Institutions in External Relations**, by Graham Butler, (Oxford: Hart Publishing, 2019), 376pp. inc. index, hardback, £80.00.

Exactly 20 years after the publication of the first monograph on the legal aspects of the EU's Common Foreign and Security Policy (R. Wessel, *The European Union's Foreign and Security Policy: A Legal Institutional Perspective*, Kluwer Law International, 1999), a worthy successor saw the light of day. Of course, Graham Butler's book is not the only legal study in this field that was written over the last two decades, but it certainly is the most general and comprehensive monograph on this topic. Other books that come to mind include Martin Trybus's *European Union Law and Defence Integration* (Oxford: Hart Publishing, 2005), Panos Koutrakos' study on *The EU's Common Security and Defence Policy* (Oxford: Oxford University Press, 2013), and more recently Steven Blockmans and Panos Koutrakos (eds), *Research Handbook on the EU's Common Foreign and Security Policy* (Cheltenham: Edward Elgar, 2019).

Even today, to some it may not be self-evident to discuss legal questions in the context of the EU's Common Foreign and Security Policy (CFSP). In early studies in particular, CFSP was perceived and presented as "political" rather than "legal". Yet, the "normalisation" of CFSP has been analysed quite extensively over the past years, and has pointed to a shift away from intergovernmentalism, even in a sensitive policy domain such as the Common Security and Defence Policy (CSDP). Its further integration into the Union's legal order has brought about new questions related to the legality of the acts adopted under CFSP, as well as to their legal basis. These analyses highlighted the consolidation of EU foreign policy, its constitutionalisation as part of the Union's legal order, as well as institutional adaptations and have put the distinction between CFSP and other external Union policy areas into perspective.

Hence, in the present era, it is more and more accepted that "CFSP matters are a legalised field", as clearly indicated by Butler (p.5). This statement is supported by recent case law of the Court of Justice of the European Union, revealing a principled effort "to further embed the CFSP into the EU legal order", to quote another author (T. Verellen, "Pirates of the Gulf of Aden: The Sequel, or How the CJEU Further Embeds the CFSP into the EU Legal Order", *European Law Blog*, 23 August 2016). The main consequence of the further "legalisation" of CFSP is that questions of legality have become more prominent in that area, and that "[t]here is a constitutional significance to the choice of legal basis for foreign policy and external relations acts of the Union" (p.1). While accepting that CFSP remains "an exceptional policy in the EU legal order" (p.1), the book under review here breathes the integration of this policy field into the constitutionalised order of the EU. This implies that CFSP cannot be approached or studied in isolation, but that its, admittedly, still different decision-making procedures and instruments are to be interpreted within the larger context of, not only EU external relations law, but of the overall constitutional structure of the Union. It has indeed become increasingly difficult to clearly separate CFSP from other external action or to link external objectives to certain specific EU competences. The need to combine CFSP and other issues in single decisions or international agreements has become more apparent.

This notion returns in virtually every chapter of the book. A key question concerns the choice of the correct legal basis (now that art.40 TEU no longer displays a preference for a non-CFSP legal basis) and the implications of this choice in terms of decision-making procedures, instruments used and actors involved. In that sense, Butler rightly notices the relatively larger role of the Council in CFSP matters than in other policy areas. At the same time, he suggests that "more EU-centred decision-making" should imply a move away from decision-making merely within the Council (p.71). Yes, it remains a truism that the other institutions have a different, and indeed a lesser, role to play in CFSP. At the same time, it is

worth mentioning that CFSP is a *Union* competence—as clearly stated in the Treaties in various provisions—and not a Member State competence. And, as the Council is a key Union institution, one would not necessarily have to agree with the idea that CFSP “looks as intergovernmental in its orientation as it was when it was inserted into treaties” (p.71). While the book’s aim is to underline the constitutional basis of CFSP, it also finds it difficult to fully accept its integration and, further, the application of, for instance, key Union principles to this policy area.

Subsequent chapters of the book deal with the role of the European Parliament and the Court. The role of the EP is traditionally different, mainly because of the exclusion of the legislative procedure in CFSP matters. At the same time, it is well known that the EP belongs to the world’s most active parliaments in foreign policy. “With a little help of the Court”, the European Parliament succeeded in strengthening its role and acquiring more legal competences. The book analyses this development in depth, by not only addressing the many possibilities for parliamentary scrutiny and influence, but also by pointing to the case law that underlines the legal role of the EP in relation to the conclusion of international agreements. The Court’s role in these, as well as other, matters has indeed been essential, and Butler shows that “[w]here the treaties fall short on providing a particular level of institutional guidance, the Court, when asked, ensures that the treaties and the Court’s own jurisprudence on the EU legal order as a whole is adhered to” (p.145). It could perhaps even have been stressed more that, what the Court does is not so much “stretching its competence” to go beyond what the treaty legislator intended (as is sometimes argued), but that it simply applies key Union principles irrespective of a possible foreign policy context. The chapter on the Court’s role in CFSP is enlightening indeed, and addresses the various cases in which the Court did exactly that: it argued that staff matters, public procurement measures, or even preliminary questions can be dealt with by the Court, irrespective of a possible CFSP context, simply because the Court has the duty to provide in principle the full review of Union decisions. The book therefore rightfully links recent cases, such as *Rosneft*, to earlier ones, such as in particular *Les Verts* to underline this point. Yet, one can agree with the observation that “[t]he EU cannot be a real constitutional order if it lacks basic characteristics such as full judicial review on legal matters” (p.222). Many ideas are offered in this chapter to continue the discussion on how to reach that objective.

The conclusion drawn at the end of the book does not come as a surprise: “the legal distinction that exists in EU external relations law—between CFSP matters and non-CFSP matters—needs to be abolished” (p.255). How this could be done is analysed in the final chapter, which boldly addresses options to turn to QMV, or to abandon the specific CFSP legal basis. This chapter, perhaps even more than the previous ones, reflects the author’s struggle with what should be the case (even on the basis of legal arguments) and what will be possible. It is acknowledged that CFSP is a special area and that the introduction of QMV or full review by the Court may not lead to a better functioning CFSP. Indeed, the treaty rules merely foresee an obligation to *try* to formulate a common policy, and not to reach one by definition. CFSP only saw the light of day because Member States were reassured that not reaching a result would also remain an option and that not being able or willing to implement a certain foreign policy would not imply ending up in court. The main question for the future is indeed whether “the law will have to catch up” (p.290) in acknowledging that CFSP is part and parcel of the EU constitutionalised order, or that we have simply reached the limits of what can be done in terms of foreign policy integration. Whatever the answers, the book by Butler will be essential for many years to come to guide this discussion.

**Ramses A. Wesse**  
University of Groningen