THE EU CONSTITUTIONAL ORDER

Allan Rosas
Institute for European Studies, Brussels
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THE EU LEGAL ORDER IS INCREASINGLY SEEN AS A CONSTITUTIONAL ONE


“By creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the States to the Community, the Member States have limited their sovereign rights, albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves.”
The EU legal order should be considered a constitutional one, mainly because of the following reasons:

- it has an internal hierarchy of norms consisting of several hierarchical levels, including a distinction between primary and secondary law; written primary law lays down a system for amending this law which partly departs from a treaty-making procedure under public international law

- it defines its own status in the national legal orders of the Member States (primacy, direct applicability and direct effect), excludes or limits the competence of the Member States to act in certain areas and includes rules addressed directly to sub-components of the Member States rather than limiting itself to laying down obligations for the Member States as such

- it regulates, and provides for a wide (and sometimes exclusive) competence to develop, the Union’s relations with third States and international organisations

- allocates legislative, executive and judicial powers between different Union and Member States’ institutions and provides for a comprehensive and generally effective system of enforcement and legal controls, including a judicial system (checks and balances)
INTERNAL NORM HIERARCHY
(NON-EXHAUSTIVE LIST)

- The value foundations of the EU legal order (Article 2 TEU); joined cases C-402/05 P And C-415/05 P Kadi [2008] ECR I-6351, paras 282 and 304.

- General principles of Union law, including fundamental rights/ written primary law, notably the Treaty on the European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU), with Protocols

- International agreements binding on the EU/general international law

- Secondary law in the form of legislative acts

- Commission legal acts adopted on the basis of delegated powers (delegated acts)

- Commission, and as the case may be, Council legal acts adopted on the basis of implementing powers (implementing acts)

- Measures of national law necessary to implement Union law
AMENDMENTS TO THE BASIC TREATIES: ARTICLE 48

- Ordinary revision procedure (intergovernmental treaty-making but with involvement also of Union institutions including, as a general rule, a Convention composed of representatives of the national parliaments, of the Heads of State and Government, of the European Parliament and of the Commission)

- Simplified revision procedure concerning Part III TFEU (decision of the European Council, must be "approved" by the Member States); pending case C-370/12 Pringle (amendment by simplified revision procedure of Article 136 TFEU to provide an explicit legal basis for the European Stability Mechanism ESM)

- Simplified revision procedure for passing from unanimity to qualified majority in the Council or from a special legislative procedure to the ordinary legislative procedure (decision of the European Council, with veto powers for each national parliament)

- Other simplified procedures, such as the ordinary legislative procedure to amend Protocol No 3 on the Statute of the ECJ annexed to the TEU and the TFEU
UNION LAW IN THE NATIONAL LEGAL ORDERS

Declaration No 17 concerning primacy annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon

“The Conference recalls that, in accordance with well settled case law of the Court of Justice of the European Union, the Treaties and the law adopted by the Union on the basis of the Treaties have primacy over the law of Member States, under the conditions laid down by the said case law.”
The Conference has also decided to attach as an Annex to this Final Act the Opinion of the Council Legal Service on the primacy of EC law as set out in 11197/07 (JUR 260):

‘Opinion of the Council Legal Service of 22 June 2007

It results from the case-law of the Court of Justice that primacy of EC law is a cornerstone principle of Community law. According to the Court, this principle is inherent to the specific nature of the European Community. At the time of the first judgment of this established case law (Costa/ENEL, 15 July 1964, Case 6/64(1)) there was no mention of primacy in the treaty. It is still the case today. The fact that the principle of primacy will not be included in the future treaty shall not in any way change the existence of the principle and the existing case-law of the Court of Justice.

(1)“It follows (…) that the law stemming from the treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question.”
Direct applicability and direct effect is to a large extent based on judge-made law (but see Article 288(2) TFEU: a regulation "shall be binding and directly applicable in all Member States")

Exclusive competence (Article 3 TFEU)

Shared competence but Member States prevented from exercising their competence to the extent that Union has exercised its competence (principle of pre-emption) (Article 2(2) TFEU)
Union law in many ways may be directly addressed to organs and other sub-components of a Member State rather to the Member State as such.

Examples:
- the members of the European Council and of the Council are fixed (Heads of State or Government, and government ministers, respectively)
- different tasks attributed to national parliaments, including control of respect for the principle of subsidiarity
- The role of national courts as EU courts; Article 19(1) TEU (see below); Article 267 TFEU (preliminary ruling procedure)
- sometimes Union law requires a special administrative authority to be designated and regulates to some extent its status and functions (for instance, criteria relating to its independence)

Union law may also recognise the autonomy of sub-federal states or regions; example: state aid law (an economic advantage provided by an autonomous region to its undertakings may on certain conditions be considered not to be selective and thus not state aid).
EXTERNAL RELATIONS

Article 21 TEU (general provisions on the Union's external action)

High Representative and European External Action Service (EEAS)

Exclusive competences, including for the conclusion of an international agreement "when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope" (Article 3(2) TFEU)

Article 216 TFEU (large competence to conclude international agreements, including multilateral "law-making" conventions such as the UN Convention on the Law of the Sea); cf treaty-making competence of intergovernmental organisations

Union agreements, mixed agreements (both the Union and one or more Member States), Member States' agreements

Shared competence but principle of pre-emption (Article 2(2) TFEU)
INSTITUTIONAL BALANCE

Articles 13 – 19 TEU

Article 14(1): "The European Parliament shall, jointly with the Council, exercise legislative and budgetary functions. It shall exercise functions of political control and consultation as laid down in the Treaties."

Article 15(1): "The European Council shall provide the Union with the necessary impetus for its development and shall define the general political directions and priorities thereof. It shall not exercise legislative functions."

Article 16(1): The Council shall, jointly with the European Parliament, exercise legislative and budgetary functions. It shall carry out policy-making and coordinating functions as laid down in the Treaties."
Article 17(1):
The Commission shall promote the general interest of the Union and take appropriate initiatives to that end. It shall ensure the application of the Treaties, and of measures adopted by the institutions pursuant to them. It shall oversee the application of Union law under the control of the Court of Justice of the European Union. It shall execute the budget and manage programmes. It shall exercise coordinating, executive and management functions, as laid down in the Treaties. With the exception of the common foreign and security policy, and other cases provided for in the Treaties, it shall ensure the Union’s external representation. It shall initiate the Union’s annual and multiannual programming with a view to achieving interinstitutional agreements.
Article 19(1):
"The Court of Justice of the European Union shall include the Court of Justice, the General Court and specialised courts. It shall ensure that in the interpretation and application of the Treaties the law shall be observed.

Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law."

On the role of Member States' courts see also Article 267 TFEU preliminary ruling procedure) and Opinion 1/09 of 8 March 2011 (Compatibility with the Treaties of the draft agreement on the creation of a unified patent litigation system)
It should also be observed that the Member States are obliged, by reason, inter alia, of the principle of sincere cooperation, set out in the first subparagraph of Article 4(3) TEU, to ensure, in their respective territories, the application of and respect for European Union law (see, to that effect, Case C-298/96 Oelmühle and Schmidt Söhne [1998] ECR I-4767, paragraph 23). Further, pursuant to the second subparagraph of Article 4(3) TEU, the Member States are to take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the European Union. In that context, it is for the national courts and tribunals and for the Court of Justice to ensure the full application of European Union law in all Member States and to ensure judicial protection of an individual’s rights under that law (see, to that effect, Case C-432/05 Unibet [2007] ECR I-2271, paragraph 38 and case-law cited).

The national court, in collaboration with the Court of Justice, fulfils a duty entrusted to them both of ensuring that in the interpretation and application of the Treaties the law is observed (see Case 244/80 Foglia [1981] ECR 3045, paragraph 16, and Joined Cases C-422/93 to C-424/93 Zabala Erasun and Others [1995] ECR I-1567, paragraph 15).
FEDERATION OR CONFEDERATION?

- "Federation of Nation-States"?
- Federative union (or association)
- Jean-Jacques Rousseau: "Une bonne association fédérative"