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Course: *Law of the European Union*

[2] Sources of the EC/ EU Law

The European Communities and the European Union are „something" between international organisation and federation.

Therefore, their law must be hybrid of international and national (state, municipal) laws.

Experts often speak and write about the third type of law: supranational law. Nevertheless, this aproach can deviate our attention to similarities and differences with and to both national and international laws.

Therefore, let us start with discussion about features of both national laws and international law!

National (state) laws

National laws are adressed to individuals, i. e. natural persons (human beings) and legal entities under state jurisdiction.

Key source of law is an act - i. e. written document adopted by legislator. Names for these acts differ, thus indicating features of legislative process in particular countries. There are **laws, codes, decrees, regulations** etc.

Legislator creates law which is binding for entire population. Population itself has not participated at all in monarchies or tyrannies or participated only indirectly with their representatives on legislative process in representative democracies (democratic republics and monarchies). Law-making directly involving whole population (referenda, plebiscites) is exceptional only.

There must be a **legislative autority**: monarch or parliament, for example.

Everybody, including individuals which have oppose legislation adopted by legislative autority, is expected to respect it and is sanctioned if fails to do it.

Consensus cannot be achieved, if millions of individuals should be involved and expected to agree in law-making. Social contract theory (John Locke) shall not be absolutized to include consent of every individual.

National laws of a modern countries are hierarchical. There is pyramid of legislation: constitution, ordinary laws, decrees and by-laws of regional and local governments.

In federations, primacy of federal law, if adopted within federal competences, shall be taken into considreation.

National laws are enforced by state authorities. Coercion of individuals if they do not comply voluntarily is quite usualo.

There are many states (approximately 200 in contemporary world). Therefore, there are many national laws. Sub-national laws shall be regarded as component of particular national law.

International law

International law, on the other hand, is adressed to countries (states).

The key source of international law are **international treaties** (conventions, agreements).

International treaties are binding only for contracting parties (countries which have agreed with them). Therefore, there is no homogenous international law. Contemporary international law is a mixture of bilateral, plurilateral and multirateral treaties.

Only basic principles of international law necessary for peaceful co-existence of nations are mandatory for every country.

An additional Important source until today is **international custom**.

International law has no mechanism of its own central enforcement. There is no universal government in contemporary world.

Therefore, it is enforced by pressure of countries and – in the most serious case – by international community in general. We can speak about decentralized mode of enforcement.

Compliance with international law is based mainly on **reciprocity**. Mutual compliance is preferred if compared with absence of rules for countries in most situations.

Supranational law of the European Communities and the European Union

Law of the the European Union and of the European Community(-es) shares features of both national laws and international law.

Sources of this law are combined. There are both international treaties and legislative acts in European law.

Enforcement is based on member states only. Nevertheless, ties among member states and supranational authorities are significantly stronger.

Hierarchy of European Law

Primary law are Treaties agreed and ratified by member states (and candidate states in cases of treaties of accession).

Secondary law are legislative acts of institutions of the EC / EU.

There are also subsidiary law (other treaties among member states)

external law (treaties with the third countries)

and fundamental rights relevant to practice of

Primary law

Primary law of the European Community and of the European Union are an offspring of international law.

There are several founding treaties, treaties – amendments and treaties of accession as special type of treaties amending older ones.

All these treaties are to be adopted by the states involved in integration process (founder, member, candidate states).

These treaties are to be concluded (adopted) by the highest state executive officials, i. e. by heads of state or heads of government and by ministers, ministers at intergovernmental conferences („summits"). Nevertheless, these treaties need to be ratified. They shall be approved as international obligation of particular states according to its own constitutional provisions or practice. Ratification – made usually by state head of state include assent of parliaments and - in case of primary law of the EC / EU – referenda.

Crucial founding treaties are:

Treaty establishing the European Community (EC Treaty) was adopted in 1957 in Rome. Therefore it is labelled „Treaty of Rome". It sets principles, institutions, secondary law, procedures, economic freedoms and specific economic policies (1st pillar).

Treaty on the European Union (EU Treaty) was adopted in 1992 in Maastricht. Therefore, it is labelled „Treaty of Maastricht". It provides rules for non-economic integration, common foreign and security policy, justice and internal matters (2nd and 3rd pillars).

Treaty of Accession („Big eastern" enlargement) was adopted in 2003 in Athens. It creates legal base for membership of the Czech Republic in the European Union and the European Communities.

„European Constitution" (Treaty establishing a Constitution for Europe) was intended to replace almost all recent treaties. It was adopted in 2004. Nevertheless, seven member states failed to ratify it due to negative results of referenda in two countries and expectations of similar results and lack of political will in additional five ones. It was no real constitution, but „Treaty establishing a Constitution for Europe" (Constitutional Treaty).

„Lisbon Treaty" was in December 2007. There is only political agreement on its content. It is expected to replace existing founding treaties insead of „European Constitution". Nevertheless, Ireland fails to ratify it due to results of referendum.

The Treaty expects profound reorganisation of primary law. Treaty on the European Union shall be short and general treaty. Treaty establishing the European Community shall be transformed into Treaty on Functioning of the European Union.

(Both „European Constitution“ and „Lisbon Treaty“ expect merger of the European Community and of the European Union into unified European Union vested with legal personality).

Supremacy of EC Treaty rules and lack of it in 2nd and 3rd pillar

Naturally, only self-executing rules of the Treaty establishing the European Community enjoy direct effent in legal practice of member states. These rules are expected and required to be applied by executive authorities and by judiciary of all member states of the European Communities.

Therefore, they establish rights and – to lesser extent - duties for individuals.

These rules enjoy priority. If member state law does not comply, its application shall be set aside. Nevertheless, formal abrogation is not required.

The priority is absolute. EC law enjoys priority even vis-a-vis state constitution including basic rights set by them!

Both principles were established by case-law of the Court of Justice: judgements *van Gend en Loos* (direct effect), *Costa/Enel* (primacy) and *Internationale Handelsgesselshaft* (primacy even towards constitution).

That approach of the European Community is different if compared with international law. International treaties in general are binding for contracting parties - i. e. for states (countries) and international organizations only. This approach is called „dualism“.

These states decide whether at all and, if yes, to which extent individuals under their jurisdiction can claim benefits resulting of them as rights before their administrative authorities and courts.

Thereby, case-law of the Court of Justice switched from prevalent dualist practice of states to international obligations to monism proposed by several jurists (theorists) of international law.

There is, however, reluctance to accept these principles by authorities of member states in all situations.

Court and administrative authorities have accepted this supremacy only gradually – for several decades - and with objections and reservations.

In reality, supremacy is not evident and obvious in all aspects of legal life of member states until now.

On the other hand, primary law of the second and the third pillars – i. e. significant part of Treaty on the European Union – is not expected to be applied by authorities of member states directly towards individuals.

Both „European Constitution“ and Lisbon Treaty expect removal of pillar structure. Thus, supranational approach shall be extended to both foreign and security policy and to judicial and administrative cooperation in criminal matters.

Secondary law

Regulations are adressed to everybody – i. e. all natural persons and legal entities - under jurisdiction of the member states.

Direct effect and priority are expected by wording of EC Treaty.

Regulations are used if single European Community - wide rules are needed and unity shall be apparent to individuals and entities regulated of them.

Regulations are used as main legislative tool in excessive numbers in common agricultural policy, regional (cohesion) policy and common transportation policy. They are also used for coordination of social security systems and cooperation of civil judiciary of member states.

Regulations usually expect to be accompanied by institutions, sanctions and procedures set by national law of member states.

„European Constitution“ expected new label for regulations. They should be „European laws“. Nevertheless, the Lisbon Treaty declined this change.

Directives are adressed to member states.

The Member states are required to introduce or maintain their standards in their national law. The process is often labelled as transposition or implementation.

Instrument of state law can be selected by these member states. New acts, amendments of existing laws, decrees, by-laws can be adopted.

Certainly, it must be law. Extralegal transposition is not regarded as sufficient.

Thereby, individuals under jurisdiction of member states are adressed by national law based on directives.

Member states are responsible if they fail to transpose correctly until deadline set by the directive.

Judgements of the Court of Justice condemning member states for failure to transpose directives are frequent.

Directives are used for tax, labour, environmental and regulatory affairs. Their standards set often frameworks only. Member states are expected to choose standards within these frameworks.

The Court of Justice has developed the doctrine of direct effect if directive is not transposed in due time. Individuals can claim directly applicable rules towards state (widely understood) or be saved from application of rules of domestic law which shall cease to exist due to directive (judgements *Ratti* and *Marshall*).

On the other hand, direct effect is not expected if relations among individuals shall be affected (judgement *Faccini-Dori*). Member states cannot impose duties on individuals based on directives only (judgement *Kolpinghuis*).

Administrative authorities and court of member states are expected to interpret their national law with aid of directives, thus acknowledging their indirect effect (judgement *Marleasing*).

„European Constitution" tried to rebaptize directives „European framework laws". Lisbon Treaty does not adopt this change.

Decisions are binding for states or individuals adressed to them. They often provide legislative standards similar to these set by regulations.

Recommendations, opinions are not binding. They can enjoy, however, indirect legal effects.

Acts of the 2nd and the 3rd pillars are many different documents established by EU Treaty. There are joint positions, joint actions and joint strategies for common foreign and security policy. There are decisions and framework decisions for cooperation of member states in criminal affairs. These acts are binding for member states.

The Lisbon Treaty expects new sources of legislation for both agendas.

Subsidiary law

There are several treaties concluded by member states (sometimes not by all of them, sometimes also by non-member states) for enforced integration or cooperation. Several treaties were subsequently integrated in the European Communities and the European Union.

External law

There are numerous treaties concluded by the European Communities or by both the European Community and their members states with non-member states or other international organisations.

Fundamental rights and freedoms

The European Communities and the European Union has not its own catalogue of fundamental rights. Therefore, it gradually accepted standards of international law, especially European Convention of Human Rights of the Council of Europe as understood by its European Court of Human Rights.

„European Constitution" however, included Charter of Fundamental Rights and Freedoms of the European Union, adopted earlier as politically binding declaration. Lisbon Treaty declares the Charter applicable too.

Linguistic regime of the European law

Primary law written in twenty-three authentic language versions.

Same number of official languages is used for formulation and publication of regulations, directives and other acts.

Translation is, however, often imperfect. Sometimes, there is no ideal translation. Mistakes and errors cannot be also excluded.

How to resolve dissonances of various linguistic versions? The Court of Justice calls for comparison of language versions.

Publication of the European law

Official Journal of the European Union

The Journal is official source. Publication is condition of validity

EURLex

Worldwide accessible Internet legal service of the European Union and of the Euroepan Community

See *http://europa.eu.int/eur-lex/lex/en/index.htm*

Celex numbers for identification of documents