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† As this volume was going to press, news came of the sudden death of Dr Geoffrey Marston of Sidney Sussex College, Cambridge, a regular contributor to the Yearbook since 1978. A memorial to his life and work will be published in the next volume.

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INTERNATIONAL LAW AND THE LAW OF THE EUROPEAN UNION—A REASSESSMENT

By TREVOR C HARTLEY*

The purpose of this article is to consider the relationship between international law, a system originally derived from custom, and the law of the European Union,[1] a system entirely based on a set of treaties.[2] We will not be concerned with comparing the characteristics of the two systems,[3] but with analysing the ways in which they interact.[4] The first question we will investigate is the legal foundation of EU law: does it derive its validity from international law, or does it have an independent legal foundation? The second question—often confused with the first but conceptually

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[1] Looked at from one point of view, the problem might seem to concern the relationship between international law and the legal systems of each of the two Communities (EC and Euratom); from a more general point of view, however, it is legitimate to consider the law of the entire European Union as a single system. This latter approach will be taken in the discussion that follows; nevertheless, there will be some instances in which it will be more appropriate to refer to Community law or EC law.

[2] In referring to Articles in the EC Treaty and the Treaty on European Union, the old numbering will be given in square brackets.

[3] This has been done elsewhere: see Denza, 'Two Legal Orders: Divergent or Convergent?' (1999) 48 *ICLQ* p. 257.

[4] Earlier studies on this question seem to have come in two waves. The first died down in the early 1980s. It included: Pescatore, 'International Law and Community Law—A Comparative Analysis' (1970) 7 *CMLRev.* p. 167 (for earlier items, see ibid., p. 168, n. 5); Ganshof van der Meersch, 'L'ordre juridique des Communautés européennes et le droit international' (1975) 148 *Recueil des Cours*, V, 1 (Hague Academy of International Law); Meessen, 'The Application of Rules of Public International Law within Community Law' (1976) 13 *CMLRev.* p. 485; Jacot-Guillarmod, *Droit communautaire et droit international* (1979); Wyatt, 'New Legal Order, or Old?' (1982) 7 *ELRev.* p. 147; Plender, 'The European Court as an International Tribunal' [1983] *CLJ* p. 279; Jacobs, *European Community Law and Public International Law—Two Different Legal Orders?* (Institut für Internationales Recht an der Universität Kiel: Schücking Lecture, 1983); Groux and Manin, *The European Communities in the International Order* (Luxembourg, EC Commission, *European Perspectives* Series, 1984). The second wave began in the late 1990s and seems to be still continuing. It includes: Berman, 'Community Law and International Law: How Far Does Either Belong to the Other?' in B. S. Markesinis (ed.), *The Clifford Chance Lectures, Volume 1: Bridging the Channel* (1996), p. 241; Pellet, 'Les fondements juridiques internationaux du droit communautaire' (1997) 5 *Collected Courses of the Academy of European Law, Book 2*, p. 193; Lysén, 'The European Community as a Self-Contained Regime' (1999) 2 *Europarättslig Tidskrift* p. 128; Denza, above n. 3; Spiermann, 'The Other Side of the Story: An Unpopular Essay on the Making of the European Community Legal Order' (1999) 10 *EJIL* p. 763; Klein, 'La Cour de justice des Communautés européennes et le droit international—De quelques incohérences' in M. Dony and A. de Walsche (eds), *Mélanges en Hommage à Michel Waelbroeck* (1999), p. 3. At the risk of oversimplification, one might say that the first wave tended to emphasize the distinctiveness of Community law (though there are exceptions), while the second was more intent on seeking common ground with international law. For earlier attempts by the present author to tackle some aspects of the problem, see Hartley, *Constitutional Problems of the European Union* (1999), chaps. 7–9 (on sovereignty) and Hartley, 'The Constitutional Foundations of the European Union' (2001) 117 *LQR* p. 225.

a set of international treaties. These treaties created the Communities and the European Union. They set up the institutions of the Community and gave them their powers.[9] The legislative organs of the Community—the Council and the European Parliament—were created by the treaties, and the treaties gave them their legislative powers. The European Court was created by the treaties, and the treaties gave it its judicial powers. The validity of all law made by the European Union is derived from the treaties; and the treaties themselves derive their validity from international law. It thus seems that the answer to the question posed above is that Community law derives its legal validity from international law.

All this may seem indisputable; however, we have not yet taken account of the theory of 'constitutionalization'. While conceding (perhaps) that the Community treaties started life as treaties under international law, some theorists maintain that they have changed their nature: they have become 'constitutionalized'.[10] In order to determine whether this supposed metamorphosis has any significance for our own particular problem, we must try to determine what exactly it means, a task which is by no means easy, since most of its proponents prefer to avoid clear-cut definitions.[11]

The Theory of Constitutionalization

In 1986, the European Court declared that the EEC Treaty (now the EC Treaty) was the 'basic constitutional charter' of the European Community.[12] This could be regarded as support for the theory of constitutionalization. But what does it mean to say that a treaty is the constitution of the Community? The problem is that, in English at least, there is an ambiguity in the word 'constitution'. Most English-speakers would say that a constitution is a legal instrument that creates a body and gives it its powers. In this basic usage, the word is not limited to the constitution of a State but could also include the constitution of some corporate or unincorporated body such as a political party, a trade union, or a scientific association. In international law, it can also apply to the

[9] See Arts 189 [137] ff. EC.

[10] This theory seems first to have been put forward in an article published in the United States: Stein, 'Lawyers, Judges and the Making of a Transnational Constitution' (1981) 75 *AJIL* p. 1.

[11] See, for example, Weiler, 'The Reformation of European Constitutionalism' (1997) 35 *JCMS* p. 97, where different meanings are discussed, but many questions left unanswered. A succinct statement of Weiler's position may be found in Weiler and Haltern, 'Response: The Autonomy of the Community Legal Order—Through the Looking Glass' (1996) 37 *Harv. J. Int'l Law* p. 411, especially at 419–23, though this is so hedged about with disclaimers and qualifications that one cannot be quite sure where the authors stand.

[12] Case 294/83, *Parti Ecologiste 'Les Verts'* v. *European Parliament* [1986] ECR 1339; [1987] 2 CMLR 343 (para. 23 of the judgment). See also Opinion 1/91, *First EEA Case* [1991] ECR 6079 (para. 21 of the judgment) where the Court repeated this statement but added 'albeit concluded in the form of an international agreement'.

treaty that sets up an international organization.[13] Used in this sense, the word 'constitution' is clearly apt to describe the basic treaties of the European Union, though it in no way precludes their being international agreements that derive their validity from international law. If this was all the European Court meant, it was merely stating the obvious.

There is, however, another sense of the word, which might be the normal meaning in some other languages. This would add to the above definition the further element that a constitution is always self-sustaining—that is, that it does not derive its validity from any other rule of law. In this sense, the word would normally be restricted to the constitution of an independent State. If this is what the European Court meant, it would have the most profound—one could justifiably say 'revolutionary'—consequences, since it would deny that the Community treaties derive their validity from international law. It is only in this sense that the concept of constitutionalization has any significance for our inquiry. To understand its implications, we must look more carefully at the ways in which a legal system may obtain validity.

The Theory of the Grundnorm

If one takes a rule of law—for example, a provision prohibiting anyone from parking a car in a specified place—and asks why it is legally valid, one is usually referred to another legal rule. If one then asks why that rule is legally valid, one may be referred to yet another rule. Sooner or later, however, one will be referred to a rule the validity of which is not derived from any other rule of law. Usually that rule will be a provision in the constitution of the State in question. If we ask why that rule is legally valid—why, for example, the constitution is binding—we will be given an explanation of a non-legal nature. Such a rule would then be a *Grundnorm*, which may be defined as a legal rule from which other legal rules derive their validity but which is not itself dependent for its validity on any other legal rule.[14] In a country with a written constitution—for example, the United States—the Constitution is the *Grundnorm* (some

[13] For example, in one of the best known definitions, that originally proposed by Sir Gerald Fitzmaurice in his report on the Law of Treaties presented to the International Law Commission in March 1956, an international organization is defined as 'a collectivity of States established by treaty, with a *constitution* and common organs, having a personality distinct from that of its member-States, and being a subject of international law with treaty-making capacity' (italics added): see [1956] II *Yearbook of the International Law Commission* p. 104 at 108. Another example is the official title of the treaty establishing the International Labour Organization, which is the 'Constitution of the International Labour Organization'. This was adopted in April 1919 by the Paris/Versailles Peace Conference convened after the First World War. The same usage applies in French: the French text of the definition quoted above of an international organization uses the word '*constitution*' ((1956-II) *Annuaire de la Commission du droit international* at 106) and the official French name for the treaty establishing the ILO is '*Constitution de l'Organisation Internationale du Travail*'.

[14] The term *Grundnorm* is taken from the writings of Hans Kelsen; however, its use here is not intended to import into our discussion all Kelsen's ideas.

might prefer to say that the *Grundnorm* is the rule that the Constitution is valid law). The US Constitution does not derive its validity from any other rule of law, such as a rule of international law or the law of the American colonies in colonial times. Any explanation of its validity must be based on historical events and political considerations. Put in different language, the United States legal system is *self-sustaining*: its legal validity does not depend on any other legal system. The question we must consider is whether EU law is self-sustaining in the same way, or whether it is still true to say that it derives its validity from international law.

A change of *Grundnorm*, or the creation of a new *Grundnorm*, is usually the result of a shift in power relationships. We regard the United States Constitution as a *Grundnorm* only because the American Revolution was successful and Britain was defeated; if the Confederacy had won the Civil War, a new *Grundnorm* would have been established in the South. The same is true of the constitutions established after the French, Russian, and Iranian Revolutions, as well as those that came into being after the civil wars in Spain, China, and Vietnam.

The last time the *Grundnorm* changed in England was after the 'Glorious Revolution' of 1688.[15] Before that, the lawful Sovereign was James II; however, he had unacceptably absolutist ideas which led him into conflict with Parliament. In 1688, he dissolved Parliament and subsequently fled the country. Elections were held and the new Parliament offered the Crown jointly to the Dutchman, William, Prince of Orange, and his wife, Mary, a daughter of James II. The Bill of Rights, 1689, then declared that William and Mary were King and Queen.[16] The problem with this arrangement was that, under the (largely unwritten) English Constitution, a statute was valid only if it was consented to by the Sovereign. However, William and Mary were not King and Queen unless and until the Bill of Rights was valid law, and the Bill of Rights was not valid law unless and until the Sovereign had consented to it. James II did not consent to it. Nor is it any good saying (as was said in the Bill of Rights) that he had abdicated, since his heir did not consent either. Under the old *Grundnorm*, the Bill of Rights was invalid; William and Mary never became King and Queen, and all subsequent Acts of Parliament have been null and void.[17] It is only by postulating a change of *Grundnorm* that this consequence can be avoided, a conclusion that is legitimate since it reflects the actual power relationships in England at the time: William and Mary were able to rule successfully, while James II never succeeded in regaining the throne.[18]

[15] Die-hard Jacobites might dispute that it changed.

[16] See F. W. Maitland, *Constitutional History of England* (1908), pp. 283–85; T. P. Taswell-Langmead's *English Constitutional History* (11th edn., 1960), pp. 445–59.

[17] This was not the only problem: the newly elected Parliament had been irregularly summoned, and this defect could not be cured simply by Parliament's asserting (as it did) that it was Parliament.

[18] He invaded Ireland with French troops in 1690, but was defeated in the Battle of the Boyne.

Are the Community Treaties a new Grundnorm *?*

We have seen that a new *Grundnorm* can come into existence: what was previously invalid can become valid by a process that cannot be explained in purely legal terms. Has this occurred in the case of the Community treaties? Was there some moment when they ceased to owe their validity to the fact that they were treaties under international law? Did they then become an independent *Grundnorm*—a new constitution, dependent for its validity on no other legal system? This is the assertion we are examining and it is only this version of the theory of constitutionalization that concerns us.

In considering whether this theory is correct, two preliminary points must be made. First of all, it must be emphasized that the establishment of a new *Grundnorm* is not an every-day occurrence that can take place just because the idea appeals to a few scholars, or because it furthers a certain idea of the fitness of things. A change of *Grundnorm* is—from the legal point of view—a cataclysmic event that results from changes in the basic political structure, changes of such magnitude that they fracture the foundations of the existing legal order. Since it is an affront to the principle of legality and a denial of the rule of law, a change of *Grundnorm* should not be regarded as occurring without the strongest possible reasons.

The second preliminary point is that, in most instances when a change of *Grundnorm* has occurred, the new constitution would have been invalid under the pre-existing legal order. So, if one wanted to maintain that the new constitution was valid, this could be done only by arguing that the *Grundnorm* had changed. In the case of the European Union, on the other hand, the basic treaties were and are perfectly valid under international law. There is no need to assert a change of *Grundnorm* to explain why they are applied. This makes a change of *Grundnorm* harder to justify, though it cannot be ruled out on this ground alone, since there are historical precedents for such a change.

Canada may constitute one such example—though only a hypothetical one, since the matter has never been put to the test. In its original form, the Canadian Constitution was a schedule to a British Act of Parliament, the Canada Act 1982. In terms of the old *Grundnorm*, it obtained its legal validity from British law. It is, however, likely that, if the issue ever arose, the Canadian courts would hold that there has been a shift of *Grundnorm*, and the Canadian Constitution is now self-sustaining: this would be justifiable in view of the fact that Canada is an independent State, over which Britain no longer has any power.[19]

[19] The issue would arise only if the UK Parliament sought to alter the Canadian Constitution or otherwise to legislate for Canada—an unlikely event. The Canada Act expressly said that this would not happen; however, under orthodox British constitutional theory, any attempt by Parliament to limit its future powers is ineffective.

The Irish Constitution is in some ways a clearer example, though in other ways it is ambiguous. Until 1922, Ireland was part of the United Kingdom. The British Government had agreed that it would be independent, and a constitution, the Constitution of the Irish Free State, was drawn up in Dublin. The framers of this Constitution regarded themselves as a Constituent Assembly: they maintained that they were adopting the Constitution 'in the exercise of undoubted right'.[20] The British Government, however, considered that United Kingdom law applied in Ireland, and that only a British statute could establish a new constitution. The British Parliament, therefore, passed the Irish Free State Constitution Act 1922, which purported to give legal effect to the Constitution drawn up in Dublin. Thus the British and Irish were in agreement that the new Constitution was in force, but disagreed as to the basis on which it obtained legal validity, a disagreement which was reflected in legal decisions in the two countries.[21]

This difference of view continued until 1937, when Ireland adopted a new constitution, the Constitution of Eire. This was done in such a way as to leave no doubt that a new *Grundnorm* had been established: the *Dáil* (Irish Parliament) approved the new Constitution, but did not adopt it. It was then submitted to the people in a referendum, and its approval was deemed to constitute enactment. The new Constitution was clearly invalid under the pre-existing legal order; so its validity could be explained only on the assumption that a new *Grundnorm* had come into existence. Even if the 1922 Constitution was based on British law, the new one was indisputably Irish.

These examples illustrate the complexity of the question and the wide variety of circumstances in which a change of *Grundnorm* can occur. Nevertheless, there are compelling reasons why the Community treaties cannot be regarded as a new *Grundnorm*. The first concerns their form. In every respect, each of the Community treaties is in the standard form of a treaty under international law. They open with a reference to the Heads of State of the contracting parties, beginning with 'His Majesty the King of the Belgians'; then, after a short preamble setting out the objectives of the treaty, they name their plenipotentiaries (in most cases, the ministers for foreign affairs and for finance) and state that the plenipotentiaries, having exchanged their full powers and found them in good and due form, 'agreed as follows'. The provisions of the treaty are then set out. At the end, the treaty is signed by the plenipotentiaries. There is not the slightest suggestion anywhere that they are making a

[20] See the Constitution of the Irish Free State (*Saorstat Eireann*) Act 1922. The Constitution was a schedule to this Act.

[21] Compare the judgment of the Supreme Court of the Irish Free State in *The State (Ryan)* v. *Lennon* [1935] IR 170 at 203 with that of the Privy Council in *Moore* v. *The Attorney-General for the Irish Free State* [1935] AC 484 at 497.

constitution.[22] What they purport to be doing is making a treaty under international law. This is just as true for recent treaties, such as the Treaty of Nice 2000, as for the earliest treaty, the ECSC Treaty of 1951 (now expired).

The second reason is that the procedure under which the treaties were negotiated, signed, and ratified is absolutely standard for international agreements. These two facts together suggest that it was the intention of the Member States, both at the time of the earliest treaty and ever since, to enter into treaties under international law, not to establish a new *Grundnorm*. Nor can there be any doubt that this was in fact their intention. It seems hard to believe that a legal instrument could constitute a new *Grundnorm* if this was not the intention of those responsible for it.

The third reason is more political. It was said above that a change of *Grundnorm* reflects a shift in political power. If one thinks in terms of power politics rather than legal rules, there can be no doubt that power lies with the Member States, not with the European Union. The EU exists only because the Member States permit it to exist. The EU is totally lacking in military or police power. There are no EU soldiers or police officers. It is doubtful whether there is a single gun in the hands of any Community official. The EU is totally unable to secure the physical enforcement of any of its decisions. There are no marshals, bailiffs, or sheriffs to carry out the orders of the European Court. If it rules that John Doe must pay the Community €100, it cannot itself enforce that judgment. If he refuses to pay, the judgment must be sent to the national courts of the Member State in which he is to be found, and they must be asked to enforce it.[23] The EU also lacks power directly to collect taxes. Even in the case of its much vaunted 'own resources', the money is received by Member-State officials and passed over to the Community. This state of affairs suggests that it would be totally unrealistic to talk of a change of *Grundnorm*.

The fourth reason concerns democracy. To some extent, a change of *Grundnorm* may be thought to reflect a shift in public opinion; it may be said to reflect the 'national will'. In the Community, there can be no doubt that the primary loyalty of almost the entire population of every Member State is to their own country, not the European Union. People consider themselves Frenchmen, Germans, or Italians first, and Europeans second. They support the Community, but as a free association of States based on the continuing consent of its members, not as something imposed on them in the form of a new *Grundnorm*. They think of their countries as retaining their independence despite membership of the EU, something that would not be compatible with a change of *Grundnorm*.

[22] Contrast the well-known words of the US Constitution: 'We the People of the United States . . . do ordain and establish this Constitution for the United States of America.'

[23] See Arts 244 [187] and 256 [192] EC.

Finally, there are the views of the national courts, especially the national supreme courts. Their views are important since *de facto* power rests, as we have seen, with the Member States. As far as is known, there is not the slightest suggestion in any of their judgments that there has been a change of *Grundnorm*. Though they are concerned with the effect of the treaties in the national (municipal) legal system, they start from the premise that they are *treaties*—that their validity at the international (or Community) level is derived from international law.[24]

In view of this, what are we to make of the *dicta* of the European Court? Since the term 'constitution' is normally applied by international lawyers to the constitutive treaty of an international organization without any implication of a change of *Grundnorm*,[25] the Court's statement that the treaties are the 'constitutional charter' of the Community need not be understood as meaning that the *Grundnorm* has changed; nor would it be legitimate to draw this conclusion from the ambiguous statement in *Costa* v. *ENEL*,[26] that the EEC Treaty 'has created its own legal system' or that in *Commission* v. *Luxembourg and Belgium*,[27] that the treaty establishes 'a new legal order'. These statements (which will be examined further below)[28] constitute too slender a basis from which to derive so far-reaching a conclusion. If the European Court had intended to make such a momentous pronouncement, surely it would have done so with clarity. It should also be remembered that the European Court is a court of limited jurisdiction: it has jurisdiction to interpret the treaties, but not to determine their validity. Any statement as to the basis on which the treaties obtain their validity must of necessity be outside its jurisdiction. In any event, a change of *Grundnorm*, being by definition something

[24] This is clearest in the case of Germany and Denmark. For Germany, see the decision of the Federal Constitutional Court (*Bundesverfassungsgericht*) in *Brunner* v. *European Union Treaty* (German *Maastricht* case), decision of 12 October 1993, 89 BVerfGE 155; 20 EuGRZ 429; [1993] NJW 3047; English translations in [1994] 1 CMLR 57; (1994) 33 ILM 388. For Denmark, see the decision of the Danish Supreme Court (*Højesteret*) in *Carlsen* v. *Rasmussen*, judgment of 6 April 1998, [1999] 3 CMLR 854 (English translation). For leading cases in other Member States, see the decisions of the French *Conseil Constitutionnel* in *Maastricht I*, Decision 92–308 DC, 9 April 1992, *Recueil*, 55; [1993] 3 CMLR 345 (English translation) and *Amsterdam*, Decision 97–394 DC, 31 December 1997, JORF No. 2 of 3 January 1998; the decision of the House of Lords in *R* v. *Secretary of State, ex parte Factortame (No. 2)* [1991] AC 603; the decisions of the Italian Constitutional Court (*Corte Costituzionale*) in *Frontini*, Decision No. 183 of 27 December 1973, [1974] RDI 154; [1974] 2 CMLR 372 (English translation); *Fragd, Corte Costituzionale*, Decision No. 168 of 21 April 1989, [1990] I Foro Italiano 1855 (English translation in Oppenheimer (ed.), *The Relationship between European Community Law and National Law—The Cases* (1994), 653); and the decisions of the Greek Council of State in *Vagias* v. *DI KATSA*, Decision No. 2808/1997 of 8 July 1997, discussed in Maganaris, 'The Principle of Supremacy of Community Law—The Greek Challenge' (1998) 23 *ELRev.* p. 179 and 'The Principle of Supremacy of Community Law in Greece—From Direct Challenge to Non-Application' (1999) 24 *ELRev.* p. 426. For a general survey, see A.-M. Slaughter, A. Stone Sweet, and J. H. H. Weiler, *The European Courts and National Courts—Doctrine and Jurisprudence* (1998).

[25] See above n. 13.

[26] Case 6/64 [1964] ECR 585 at 593.

[27] Cases 90, 91/63 [1964] ECR 631.

[28] See text to nn. 34–38 below.

dependent on non-legal considerations, cannot be conclusively determined by any court.

Conclusions

One can conclude from the above that the Community treaties retain their character as treaties under international law. Their validity is still derived from international law: they do not constitute a new *Grundnorm*.[29] If the theory of constitutionalization asserts the contrary, it is incorrect. In the past, this theory might have seemed to have had a sort of prospective validity since many people imagined that the Community was on the road to becoming a federal State; today, however, this possibility seems more remote. In any event, it is not justifiable to assert a shift of *Grundnorm* before a change in political structure has taken place.

Finally, it must be emphasized that 'constitutionalization' could have many other meanings besides those explored above. For example, it might be argued that the Community treaties have acquired a constitutional character within the national (municipal) legal systems of the Member States by virtue of the constitutional law of the State in question. There is no need to consider this possibility, however, since it would not affect the status of the treaties on the international (or Community) plane.

Is European Law a Separate Legal System?

We have now established that the Community treaties owe their validity to international law, a proposition we shall for convenience call the theory of 'internationalization'. This has important consequences, but before we discuss them, we must consider the second question posed at the beginning of this article: is the legal system of the European Union separate from international law?[30] This is not the same question as that just discussed, since a legal system may obtain its validity from another, and yet constitute a separate legal system according to the criteria set out previously.[31] If we had decided that EU law did not owe its validity to international law, that would also have provided the answer to the second

[29] See, further, Deliège-Sequaris, 'Révision des traités européens en dehors des procédures prévues' [1980] *CDE* p. 539 at 541–2; Pellet 'Les fondements juridiques internationaux du droit communautaire' (1997) 5 *Collected Courses of the Academy of European Law*, Book 2, 193 at 211–14.

[30] See the items cited above in n. 4, in particular Pellet, 'Les fondements juridiques internationaux du droit communautaire' at pp. 245–67.

[31] See text to nn. 5–8 above. Some legal philosophers—for example, Hans Kelsen—would take a different view, since they would define a legal system as consisting of all norms derived from a given *Grundnorm*. However, the usage we have adopted is more in accord with the way the term is normally used by lawyers.