The Autonomy of Community Law

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The Autonomy of Community Law

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Editor-in-Chief Prof. Dr. K. J. M. Mortelmans

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'C'est bien de galoper sur la route de l'Europe, mais l'Europe restera longtemps encore très fragile.'

Georges Pompidou in a conversation with Helmut Kohl, 15 October 1973

(Eric Roussel, Georges Pompidou, Paris, Ed. J. C. Lattes, 1994, p. 656)

Foreword

This book is the English version of my 'De communautaire rechtsorde – over de autonomie van het gemeenschapsrecht', which was published by Kluwer, Deventer (the Netherlands) in 2000, in the series Europese Monografieën, No. 65. Where necessary I have updated the text by taking account of developments until the beginning of 2003.

My thanks are due to Susan Wright, Head of the English Translation Division of the Court of Justice EC, who looked after the text with her eagle-eyes.

Responsibility for all errors, infelicities of style, and views expressed, naturally remains my own.

René Barents
Luxembourg

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CHAPTER 1

In Search of the Special Nature of Community Law

1. Outline of the Inquiry

1.1 The Identity of Community Law

(**1**) The subject of this book is an inquiry into the 'special nature' of European Community law.[1] As will be set out in more detail in § 2.1, this expression, which finds its origin in the case law of the Court of Justice, constitutes the recognition that Community law possesses an identity of its own.[2] The identity of Community law results from its contents, i.e. its scope (material, personal, geographical, temporal), its subject-matter (objectives and means) and its legal effects on situations coming within its scope (validity, application and interpretation). According to the Court's case law, one of the main elements of this identity is the character of Community law as a 'legal order' or a 'legal system'.[3] Because of its identity, Community law distinguishes itself from other systems of law (national and international). This does not necessarily mean that Community law is totally independent from national or international law, but rather that it demonstrates certain properties which cannot be found in a similar form in these systems of law.[4]

(**2**) That a particular system of law has an identity of its own, is not self evident. To distinguish a body of legal rules and principles from other systems of law on the basis of a generally accepted criterion does not necessarily imply that this body of law also has an identity of its own. For example, it is possible to define Community law as economic law since its objective is to integrate national markets into a single market under a common management in the framework of an economic and monetary union or as international treaty law because of its source (the Community

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[1] In this book 'Community law' relates to the primary and secondary law of the Community treaties (cf. Case T-113/96 *Dubois et Fils v Council and Commission* [1998] ECR II-129, paragraph 41).

[2] See on the concept of 'identity' in general A. Mucchieli, *L'identité*, Paris, Presses Universitaires de France, 1986.

[3] As early as its first preliminary ruling the Court described Community law as a legal order, see Case 13/61 *De Geus en Uitdenbogerd v Bosch* [1962] ECR 92, 103.

[4] See H. G. Schermers and D. F. Waelbroeck, *Judicial Protection in the European Union*, 6th ed., The Hague, Kluwer Law Int., 2001, § 12 and § 268.

treaties[5]).[6] However, without further clarification such definitions are hardly suited to argue that Community law has an identity of its own. Instead, in the former case, Community law may be seen as part of the wider area of international economic law,[7] while in the latter it may be regarded as part of international law or of the law of international organisations.[8]

(**3**) For that reason, the proposition that Community law is characterised by its special nature, in the meaning described above, amounts to the formulation of a hypothesis. In order to establish the validity of this hypothesis it must be demonstrated that on the basis thereof it is possible to develop a coherent theory which explains the special nature of Community law.[9] This research constitutes the subject-matter of this book.

The hypothesis referred to above is worked out in greater detail in § 3. However, from a theoretical point of view the formulation of a mere hypothesis is not sufficient. It also needs to be explained on which grounds this particular hypothesis is chosen and by which methods its validity has to be examined. These two points constitute the subject-matter of this chapter.

1.2 The Relevance of the Hypothesis of the Special Nature of Community Law

(**4**) First of all, it may be asked if the hypothesis formulated above is relevant at all. From a number of indications it appears that this might actually be the case. To start with, it is generally accepted in academic writings that Community law has an identity of its own.[10] However, this is nothing more than an indication since there does not exist a generally accepted theory about the special features of Community

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[5] Treaty establishing the European Community (EC) and Treaty establishing the European Atomic Energy Community (EAEC). The Treaty establishing the European Coal and Steel Community (ECSC) expired on 23 July 2002.

[6] Cf. P. J. G. Kapteyn and P. VerLoren van Themaat, *Introduction to the Law of the European Communities*, 3d ed., London, Kluwer Law International, 1998, pp. 77, 109 et seq.

[7] See for example, P. VerLoren van Themaat, *The changing structure of international economic law*, The Hague, Kluwer Law International, 1979.

[8] Cf. the various editions of I. Seidl-Hohenveldern, *Das Recht der internationalen Organisationen einschl. der supranationalen Gemeinschaften* (6th ed., 1996).

[9] See on the function of a theoretical approach to Community law in particular U. Everling, *Überlegungen zur Struktur der Europäischen Union und zum neuen Europa-Artikel des Grundgesetzes*, Deutsches Verwaltungsblatt 1993, pp. 936, 941; A. von Bogdandy and M. Nettesheim, *Die Europäische Union: Ein einheitlicher Verband mit eigener Rechtsordnung*, Europarecht 1996, pp. 3, 4; K. Armstrong, *Legal Integration. Theorizing the Legal Dimension of European Integration*, Journal of Common Market Studies 1998, p. 151; A. von Bogdandy, *Beobachtungen zur Wissenschaft vom Europarecht. Strukturen, Debatten und Entwicklungsperspektiven der Grundlagenforschung zum Recht der Europäischen Union*, 40 Der Staat (2001), p. 3.

[10] See e.g. K. J. M. Mortelmans, *Community law: more than a functional area of law, less than a legal system*, Legal Issues of European Integration 1997, p. 23.

law and why, because of these properties, it has an identity of its own through which it distinguishes itself from other systems of law. Opinions about the relationship between Community law and other systems of law, in particular national law, are divided. For example, Community law may be regarded as a separate category of law (alongside international and national law) or as belonging to the field of international law. If the latter option is chosen, the question arises whether it constitutes 'ordinary' international (treaty) law or a body of international law with some specific features.[11] Inevitably, these diverging views lead to different answers on questions about the legal effects of Community law in the Member States. This is demonstrated for example by the principle that Community law prevails over conflicting national law. In spite of the fact that this principle is generally accepted, opinions about the legal effects of the primacy of Community law may differ considerably. Although the Court's case law leaves no doubt about the primacy of Community law over national constitutions,[12] this view is not at all accepted by several national constitutional courts. In the same way, opinions about the legal basis of the primacy of Community law over national law are strongly divided. Does this priority find its origin exclusively in the EC Treaty or is this principle embodied in, and thus dependent on, the national acts of ratification?[13]

(**5**) An indication for the relevance of the hypothesis mentioned above is also provided by the EC Treaty and the Treaty on European Union. Although express provisions about the nature of Community law are absent, some provisions seem to suppose that Community law is somewhat different from international law. For example, a very complicated protocol attached to the EC Treaty and to the Treaty on European Union lays down a special regime for Denmark on the application of Title IV EC (external aspects of the free movement of persons). This title does not apply to that Member State. If, nevertheless, it decides to implement a Community act adopted under this Title in its national law, this decision creates an international law obligation between Denmark and the other Member States.[14] It thus seems that according to this protocol Community law is different from international law, although the exact nature of this difference remains in the dark.

Another indication is constituted by Article 34(2) (b) and (c) TEU, which provides that framework decisions and decisions of the Council in the field of cooperation in criminal matters do not have direct effect. The intention of the draftsmen was obviously to preclude the Court of Justice from attributing direct effect to these

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[11] Cf. F. Rigaux, *Europees recht en volkenrecht*, Sociaal-Economische Wetgeving 1962, p. 629.

[12] See e.g. Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125; Case 44/79 *Hauer* [1979] ECR 3727; Case C-323/97 *Commission v Belgium* [1998] ECR 4281.

[13] See for example, the debate between P. H. Brouwers and H. Simonart, *Le conflit entre la constitution et le droit international conventionnel dans la jurisprudence de la Cour d'Arbitrage*, Cahiers de droit européen 1995, p. 7, and J-V. Louis, *La primauté, une valeur relative?*, ibidem, p. 23.

[14] Article 5(1) Protocol on the position of Denmark.

instruments in the same way it has done with respect to many Community law provisions. However, this means nothing more than that, in the absence of such a clause, the possible direct effect of these decisions could find its basis in the Treaty on European Union itself as otherwise there would be no need to preclude it beforehand. Implicitly, therefore, this treaty recognises that the direct effect of Community law is based on itself, which in turn could be interpreted as an implicit recognition of the EC Treaty as an independent source of law.[15] Although these examples concern only some specific details, they nevertheless seem to indicate that Community law cannot be defined as 'ordinary' international law.[16]

(**6**) Finally, several national constitutions demonstrate that Community law and even the other areas of European Union law can no longer be regarded as international law in the ordinary meaning of this term. In order to enable the ratification of the Treaty on European Union (including the amendments made by this treaty to the Community treaties), several Member States had to incorporate special 'Europe' clauses in their constitutions.[17] One of the reasons was the conviction that the traditional clauses on the ratification of international treaties were no longer appropriate to constitute a legal basis for the ratification of this treaty. This development demonstrates that even from a national perspective the European Union and the European Community are no longer regarded as 'traditional' international organisations.[18]

From these examples it appears that the hypothesis of the special nature of Community law cannot be excluded beforehand. However, it still needs to be demonstrated that this hypothesis finds a solid basis in Community law.

1.3 The Significance of the Court's Case Law

(**7**) The well known expression 'law is what judges do' confirms that case law is the soul of law. Equally, the ECHR ruled that in the field of written law, 'the 'law' is the text in force as the competent jurisdictions have interpreted it'.[19] It would therefore seem theoretically correct to argue that given the paramount significance of the Court's case law for Community law, this case law may provide an objective basis for the formulation and elaboration of the hypothesis (and not the premiss) of the special nature of Community law. Whether or not one agrees with this case law,

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[15] See for more details, R. Barents, *Het Verdrag van Amsterdam in werking*, Europese Monografieën No. 62, Kluwer, Deventer, 1999, Chapters 16 and 18.

[16] See also the second recital of the Single European Act: 'Resolved to implement this European Union on the basis, firstly, of the Communities operating *in accordance with their own rules* and, secondly . . .' [Emphasis added].

[17] Article 23 of the German Constitution; Article 88 of the French Constitution. See No. 83.

[18] See e.g. H. Lecheler, Der Rechtskarakter der 'Europäischen Union' in *Verfassungsrecht im Wandel. Wiedervereinigung Deutschlands. Deutschland in der Europäischen Union. Verfassungsstaat und Föderalismus*, Köln, Carl Heymans Verlag, 1995, pp. 383, 384.

[19] Judgment of 24 April 1990, *Huvig and Kruslin v France*, Series A, No. 176.