

〈특집: 세계화시대의 유럽법과 동아시아 - 과제와 전망〉

European Union Law as the Constitutional Edifice of Europe*

-with additional remarks on its lessons and implications
for Northeast Asia-

KIM Dae Soon**

Abstract

Apparently the European Communities and the European Union seem to be all based on “ordinary” or “usual” treaties because the Treaties establishing, supplementing or amending the Communities and the Union fit very well the definition of a “treaty” by the 1969 “Vienna Convention on the Law of Treaties”. Nevertheless, the European Court (the highest judicial arm of the Union) refuses to treat them in that way: in the consecutive cases brought before it in the early 1960s, premising that the Community constitutes *a new legal order*, the Court has established two principles on which the Community/EU law stands: its direct effect and supremacy. This paper tried to show the hybrid features of the EC or EU law, together with comments on “The Treaty of Lisbon *Amending* the Treaty on European Union and the Treaty Establishing the European Community”, concluded in 2007 and going through country-by-country ratifications. And, finally, the writer thought about some lessons we could get from the experiences of the European integration.

key words: European Community, European Union, a new legal order, direct effect of EC law, primacy of EC law, Lisbon treaty, integration of Northeast Asia, integration through law, law as imagination, value-oriented Continent

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** Professor, College of Law, Yonsei University.

Some people say that “the three European Communities¹⁾ were replaced with a single European Community by the Merger Treaty of 1965²⁾ and then it was dissolved to build a European Union by the “Treaty on European Union”(TEU)³⁾ of 1992.” Regrettably, this is legally wrong despite the fact that actually the term “European Communities” or “European Community” is nowadays rarely to be seen on newspapers and non-legal books, and “European Union” took their places. So, I think, I need to start this paper by talking about these terms.

The latest creature in Community history, “European Union,” is the product of the above mentioned “Treaty on European Union”; this Treaty was then amended two times, -that is to say, by the 1997 “Treaty of Amsterdam” and then by the 2001 “Treaty of Nice”. Article 1, para. 2 of the Treaty on European Union, as it stands now, defines the Union as “the European Communities, supplemented by the policies and forms of cooperation established by this Treaty,” which indicates that the Union is not the same thing as the Communities and that the existing Communities have been placed under the common roof of the Union without the former being legally absorbed into the latter. For the expedience of explanation, it is generally said that the European Union is standing on three pillars, -to wit, the first pillar consisting of two European Communities (European Community⁴⁾ and European Atomic Energy Community),⁵⁾ the second pillar known as “the Common Foreign and Security Policy”, and the third pillar

1) That is, the European Coal and Steel Community, the European Economic Community, and the European Atomic Energy Community; the first one came into being in 1952 and the latter two in 1958 on the same date.

2) This was formally known as “Treaty Establishing a Single Council and a Single Commission of the European Communities”; it came into force in 1967; and it was repealed by Article 9 of the 1997 Amsterdam Treaty and its substantive provisions were transferred to the Treaties establishing European Communities.

3) commonly referred to as “Maastricht Treaty”, named after the place where it was signed.

4) Before the Treaty on European Union (commonly called “Maastricht Treaty) of 1992 came into force, this was called the “European Economic Community.”

5) The first pillar of the Union consisted originally of three Communities, but the first Community falling under the first pillar, -that is, the “European Coal and Steel Community”, died naturally in 2002 after its longevity of fifty years provided for in its establishment treaty was done.

called “Police and Judicial Cooperation in Criminal Matters.”⁶⁾ By contrast to the Communities,⁷⁾ the European Union as such has not yet expressly been endowed with legal personality;⁸⁾ and, the two pillars other than the first one are in kind inter-governmental.

With this in mind, this paper will glance at some unique features of the self-contained European Community with some concluding remarks about the lessons or impacts it could give us. In this paper, the talk about EU, Euratom or the defunct ECSC will be confined to the minimum extent necessary.

I. EC law as “A New Legal Order”

First, let me tell you about the identity of the European Community or the European Union in terms of how the European people themselves look at it.

⁶⁾ This was known as “Cooperation in the Fields of Justice and Home Affairs” until it has been renamed the present one by the Amsterdam Treaty.

⁷⁾ Article 281 (ex Article 210) EC provides that “[t]he Community shall have legal personality.”

⁸⁾ However, it is to be noted that Articles 24 and 38 of the Treaty on European Union, as amended by the Amsterdam Treaty, authorise the Council to conclude agreements with third countries or international organisations for the purposes of the second and third pillars respectively of the Union, which could be interpreted as indicating that the European Union as such has implied and limited personality. In fact, the European Union concluded, based on Article 24 TEU, an international agreement with the Federal Republic of Yugoslavia in 2001: Council Decision 2001/352/CFSP of 9 April, 2001, OJ 2001, L 125, p. 1. Subsequently, on 25 June 2003, there have been signed two agreements between the Union and the United States, this time based on Articles 24 and 38 TEU, -to wit, “the Agreement on extradition between the European Union and the United States of America” and “the Agreement on mutual legal assistance between the European Union and the United States of America” : Council Decision of 6 June 2003 concerning the signature of the Agreements between the European Union and the United States of America on extradition and mutual legal assistance in criminal matters (2003/516/EC), OJ 2003, L 181, p. 25. See also Trevor C. Hartley, *European Union Law in a Global Context* (Cambridge: Cambridge University Press, 2004), pp. 217, 219-220.

1. Definition by the European Court

In the eyes of international law, the European Communities and the European Union seem to be all based on “ordinary” or “usual” treaties because the Treaties establishing, supplementing or amending the Communities and the Union fit very well the definition of a “treaty” by the 1969 “Vienna Convention on the Law of Treaties”,⁹⁾ which provides in Article 2(1)(a) that “[f]or the purposes of the present Convention, [t]reaty means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.” Nevertheless, the European Court (the highest judicial arm of the Union) refuses to treat them in that way: to start with, it declared in a judgment of 1963 (*Van Gend en Loos case*)¹⁰⁾ that “the Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also nationals.” The phrase “a new legal order of international law” suggests that the Community legal order is a new one but that it still falls under the category of international law.

The Court made itself more clearly understood the next year: in *Costa v. Enel*,¹¹⁾ the Court stated as follows:

“By contrast with ordinary international treaties, the EEC Treaty has created its own legal system which, on the entry into force of the treaty, became an integral part of the legal systems of the Member States and which their courts are bound to apply.

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

⁹⁾ Adopted on 23 May 1969 in Vienna, and effective on 27 January 1980: UN Doc. A/CONF.39/27; 1155 UNTS 331.

¹⁰⁾ Case 26/62, [1963] ECR 1 at 12.

¹¹⁾ Case 6/64, *Costa v. Enel*, [1964] ECR 585 at 593.

of sovereignty or a transfer of powers from the states to the Community, the Member States have limited their sovereign rights and have thus created a body of law which binds both their nationals and themselves.

... ..

The *transfer* by the States from their domestic legal system to the Community legal system of the rights and obligations arising under the Treaty carries with it a *permanent* limitation of their sovereign rights.” (italics added)

In the eyes of the European Court, Member States transferred, not merely delegated, their sovereign rights, the effect of which is permanent or irreversible.

Further, in the decision for *Commission v. Luxembourg and Belgium*¹²⁾ which shortly followed the decision for *Costa v. Enel*, the European Court called the Community law simply “a new legal order”, dropping the term “international law”:

“... In [defendants’] view, since international law allows a party, injured by the failure of another party to perform its obligations, to withhold performance of its own, the Commission has lost the right to plead infringement of the Treaty. However this relationship between the obligations of parties cannot be recognized under Community law.

In fact the Treaty is not limited to creating reciprocal obligations between the different natural and legal persons to which it is applicable, but establishes a *new legal order* which governs the powers, rights and obligations of the said persons, as well as the necessary procedures for taking cognizance of and penalizing any breach of it.” (italics added)

“A new legal order” seems to be intended to indicate that the Community should be considered neither international law nor domestic (especially federal) law (of Member States).

¹²⁾ Case 90, 91/63, [1964] ECR 625 at 631.

2. Response on the part of national courts

How the European Court sees the Community legal system is one thing; how the domestic (national) courts of Member States respond on the domestic plane is another. Apparently, the domestic courts seem to well follow the logic of the European Court. For example, the Federal Constitutional Court of Germany stated early in a judgment of 1967¹³⁾ as follows:

“Die Verordnungen des Rates und der Kommission - so führte das Gericht nunmehr aus - sind Akte einer besonderen, durch den Vertrag geschaffenen, von der Staatsgewalt der Mitgliedstaaten deutlich geschiedenen *supranationalen* öffentlichen Gewalt. Die Organe der EWG üben Hoheitsrechte aus, deren sich die Mitgliedstaaten zugunsten der von ihnen gegründeten Gemeinschaft entäußert haben. Die Gemeinschaft selbst ist kein Staat, auch kein Bundesstaat. Sie ist eine im Prozeß fortschreitender Integration stehende Gemeinschaft eigener Art, eine *zwischenstaatliche Einrichtung* im Sinne des Art. 24 Abs. 1 GG, auf die die Bundesrepublik Deutschland - wie die übrigen Mitgliedstaaten - bestimmte Hoheitsrechte übertragen hat. Damit sei eine neue öffentliche Gewalt entstanden, die gegenüber der Staatsgewalt der einzelnen Mitgliedstaaten selbständig und unabhängig ist; ihre Akte brauchen daher von den Mitgliedstaaten weder bestätigt (ratifiziert) zu werden noch können sie von ihnen aufgehoben werden... *Die von den Gemeinschaftsorganen im Rahmen ihrer vertragsmäßigen Kompetenzen erlassenen Rechtsvorschriften... bilden eine eigene Rechtsordnung, deren Normen weder Völkerrecht, noch nationales Rechts der Mitgliedstaaten sind. Das Gemeinschaftsrecht und das innerstaatliche Recht der Mitgliedstaaten sind zwei selbständige, voneinander verschiedene Rechtsordnungen; das vom EWG-Vertrag geschaffene Recht fließt aus einer autonomen Rechtsquelle. ...*” (italics added)

On a similar line, in a recent case, *Brunner v. The European Union Treaty*,¹⁴⁾ the Federal Constitutional Court coined a new compound word “*Staatenverbund*”

¹³⁾ Decision of 18 October 1967, (1968) 3 *Europarecht* 134; BVerfGE 22, 293, available online at <http://www.servat.unibe.ch/law/dfr/bv022293.html>.

¹⁴⁾ *Maastricht-Entscheidung*, Decision of 12 October 1993, 89 BVerfGE 155 ; Paul Craig and Gráinne de Búrca, *EC Law: Text, Cases, and Materials* (Oxford: Clarendon Press, 1995), pp. 261-262 (containing partial translation into English).

(which could be translated as “an Association of States”) to describe the legal character of the European Community: EC or EU is neither “ein Staatenbund”(confederation) nor “ein Bundesstaat”(federal state).

But it is too early to say that the national courts share the point of view of the European Court to the full extent. In *Brunner* case above, the Federal Constitutional Court said that the Member States are still “Herren der Verträge” (Masters of the Treaties), which implies that, if they agree, Member States can unmake Communities and Union at any time because it is they who made them; when such a thing actually happens, even the European Court can do nothing about it. Similarly, the British Courts still stick to the concept of the basic norm of the British Constitution, that is, the Supremacy of Parliament. To cite a relatively recent case, Judge Sir John Laws stated in *Thoburn v. Sunderland City Council*¹⁵⁾ as follows:

“Thus there is nothing in the [European Community Act] which allows the [European Court], or any other institutions of the EU, to touch or qualify the conditions of Parliament’s legislative supremacy in the United Kingdom. Not because the legislature chose not to allow it; because by our law it could not allow it. That being so, the legislative and judicial institutions of the EU cannot intrude upon those conditions. The British Parliament has not the authority to authorise any such thing. Being sovereign, it cannot abandon its sovereignty. Accordingly, there are no circumstances in which the jurisprudence of the [European Court] can elevate Community law to a status within the corpus of English domestic law to which it could not aspire by any route of English law itself. This is, of course, the traditional doctrine of sovereignty. If it to be modified, it certainly cannot be done by the incorporation of external texts. The conditions of Parliament’s legislative supremacy in the United Kingdom necessarily remain in the United Kingdom’s hands.”

According to Judge Laws, the sovereignty of the British Parliament remains untouched or unqualified by her membership of the EU.¹⁶⁾ The law of the

¹⁵⁾ “*Metric Martyrs*” case, Queen’s Bench Division (Divisional Court), 18 February 2002, [2002] 1 CMLR 50.

European Community is law within UK because the sovereign of UK says so and only to that extent.

II. the European parliament: is it the legislature of the Community?

By legislature is usually meant the central or primary body authorised to make law. For example, “Queen in Parliament” is the legislature of the United Kingdom in this sense. Which institution is that of the Community? European Parliament?

“The tasks entrusted to the Community” are carried out by five “institutions”¹⁷⁾: a European Parliament, a Council, a Commission¹⁸⁾, a Court of Justice (commonly called “European Court”), and a Court of Auditors.¹⁹⁾ The first three institutions act alone²⁰⁾ or together in order to make Community law; the latter two institutions are not political ones. The European Central Bank which only belongs to the European Community has been endowed with some law-making power, but this is not an institution proper within the meaning of the Community law.

We sometimes see or hear people say that the Commission is the Executive of the EC/EU. Is this wholly correct? The Commission exercises diverse functions,²¹⁾ one of which is to “ensure that the provisions of this Treaty and

¹⁶⁾ Although the Communities still have separate personalities, the admission into the Communities is regulated in a uniform manner on the plane of the European Union: the Maastricht Treaty replaced the admittance into the Communities by one into the European Union. See Article 49 (ex Article O) of the Treaty on European Union

¹⁷⁾ The word “institution” can indicate an organisation as such or an organ thereof to act on its behalf. In Community law, it means the latter.

¹⁸⁾ This is commonly referred to as “European Commission” which, however, is not its official designation.

¹⁹⁾ Article 7 (ex Article 4) EC; Art 3 Euratom.

²⁰⁾ It should, however, be noted that, in contradistinction to the Council and the Commission, the Parliament still has not power to act alone to make law which could bind European citizens generally.

²¹⁾ Article 211 (ex Article 155) EC.

the measures taken by the institutions pursuant thereto are applied”, to which extent the Commission may be called so. Caveat. In this case as well, the Commission does not act in much the same way as the domestic Executive does: the laws of the Community are put into execution by way of domestic organs including courts and we cannot expect Commission officials to visit your homes, probably except only in the area of the competition law of the EC.

Other functions of the Commission are to initiate law-making procedure of the Community by presenting “proposals”(bills)²²⁾ and also to make law “in the capacity of delegatee or, although in rare cases, of original (non-delegated) legislature.”²³⁾ In *France, Italy and the United Kingdom v. Commission*²⁴⁾ which concerned a Commission directive,²⁵⁾ the UK argued that under the EEC regime,

22) This power of the Commission is called the “right of initiative”, which is in most cases exclusively invested in this institution. Therefore, but for the cooperation of the Commission, the principal law-making organ of the Community, the Council, whether acting alone or acting jointly with the European Parliament, cannot adopt acts it wishes to have.

23) Article 211 (ex Article 155) EC.

24) Cases 188-190/80, [1982] ECR 2545.

25) Binding acts made by the Community appear in one of three forms: regulations (similar in kind to federal laws), directives (similar in kind to treaties which tend to leave their implementation to domestic law) and decisions (roughly resembling individual administrative measures): Article 249 (ex 189) EC. However, the European Court said that the list of Community’s binding acts provided for in this Article is not exhaustive and that the so-called “acts *sui generis*” can be the object of judicial review: Case 22/70, *Commission v. Council (ERTA case)*, [1971] ECR 263 at 277. Recommendations and opinions are, by the above article, not binding, which rule as well, however, seems not absolute: in Case C-322/88, *Grimaldi v. Fonds des maladies professionnelles*, [1989] ECR 4407 which concerned a “true recommendation”, the Court stated as follows: “16 In these circumstances there is no reason to doubt that the measures in question are *true recommendations*, that is to say measures which, even as regards the persons to whom they are addressed, are not intended to produce binding effects. Consequently, they cannot create rights upon which individuals may rely before a national court.

17 In this regard, the fact that more than 25 years have elapsed since the first of the recommendations in question was adopted, without its having been implemented by all the Member States, cannot alter its legal effect.

18 However, in order to give a comprehensive reply to the question asked by the national court, it must be stressed that the measures in question cannot therefore be regarded as having no legal effect. The national courts are bound to take

as it stood then, the Council was the legislature of the Community, that the Commission was nothing but an executive, having “only power of surveillance and implementation”, and that therefore even in cases it was given original law-making power by the Treaty the Commission could not be put on the same level as the Council. This idea was flatly rejected by the Court, which stated as follows:

“5. ... according to the United Kingdom, ... Commission directives are not of the same nature as those adopted by the Council. Whereas the latter may contain general legislative provisions which may, where appropriate, impose new obligations on Member States, the aim of the former is merely to deal with a specific situation in one or more Member States. ...

6. There is, however, no basis for that argument in the Treaty governing the institutions. According to Article 4,²⁶⁾ the Commission is to participate in carrying out the tasks entrusted to the Community on the same basis as the other institutions, each acting within the limits of the powers conferred upon it by the Treaty. ...”

This suggests that only the ‘Council’ or the ‘Council and the European Parliament acting jointly’ is not the primary or original legislative organ of the Community: to the extent that the Treaty gives the Commission such power, it is also an original legislature thereof.

The term “European Parliament” gives laymen a wrong impression that it will be the legislature proper of the Community because the two words, parliament and legislature, are interchangeable in their meaning on the lexicon. When the so-called co-decision procedure is required to apply in making law, we can safely say that the European Parliament forms the legislature of the Community together with the Council; in other cases (that is, when either the consultation or

recommendations into consideration in order to decide disputes submitted to them, in particular where they cast light on the interpretation of national measures adopted in order to implement them or where they are designed to supplement binding Community provisions.” (italics added)

²⁶⁾ Presently, Article 7 EC.

the cooperation procedure applies), probably we can't.

III. European Court: the inventor of its own jurisdiction?

Article 7 (ex 4) EC provides that “each institution shall act within the limits of the powers conferred upon it by this Treaty.” The Court is, of course, required to act so because it is just one of the Community institutions. However, some people ask: “Is the Court not running wild?”

This judicial institution is sometimes criticised by academics because of the policy-oriented or activist approach²⁷⁾ it frequently takes too far in interpreting and applying the Community law. Although the Community also is standing on treaties concluded, supplemented and amended by Member States, I have not seen the European Court mention, or rely on, the relevant provisions of 1969 “Vienna Convention on the Law of Treaties” which provides international standards for the interpretation of treaties.²⁸⁾

“General principles of Community law” is a good example where the Court was very active to make a in-all-but-name new source; under this title, the Court introduced into the Community legal order a bundle of unwritten, quasi-constitutional principles, including respect for basic human rights,²⁹⁾ legal security³⁰⁾ (which covers prohibition of retroactivity,³¹⁾ protection of legitimate

²⁷⁾ According to Professor Hartley, “[b]y policy is meant the values and attitudes of the judges - the objectives they wish to promote” : T.C. Hartley, *The Foundations of European Community Law*, 4th ed (Oxford: Oxford University Press, 1998), p. 78. In this paper, the terms “policy” and “activism” of the Court are used interchangeably.

²⁸⁾ I.e. Articles 31 to 33 of the Vienna Convention.

²⁹⁾ See, especially, Case 29/62, *Stauder v. City of Ulm*, [1969] ECR 419 ; Case 11/70, *Internationales Handelsgesellschaft v. Einfuhr-und Vorratsstelle für Getreide und Futtermittel*, [1970] ECR 1125 ; Case 4/73, *Nold v. Commission*, [1974] ECR 491 ; Case C-159/90, *Society for the Protection of Unborn Children Ireland v. Grogan*, [1991] ECR I-4685 ; Case 5/58, *Hubert Wachauf v Bundesamt für Ernährung und Forstwirtschaft*, [1989] ECR 2609 ; Case C-260/89, *ERT v. DEP*, [1991] ECR I-2925.

³⁰⁾ See Case 70/83, *Kloppenburg v. Finanzamt Leer*, [1984] ECR 1075 at 1086 (para. 11).

expectation,³²⁾ and limitation of revocation or withdrawal³³⁾, equality and non-discrimination,³⁴⁾ proportionality,³⁵⁾ and rights of the defence³⁶⁾ (which covers right to a fair hearing³⁷⁾ and the legal professional privilege³⁸⁾). General principles of Community law form the corpus of rules of Administrative law of the Community; nobody doubts their existence, validity and quality.

The activist behaviour of the Court did not stop here: the Court has shown, if any, a tendency of exercising jurisdiction to the fullest extent possible. Today, I am going to introduce to you one amazing case, in which I think the Court blatantly escaped the bounds set by the Treaty: *Zwartveld and others* (I) case.³⁹⁾ What follows is the nutshell of the case.⁴⁰⁾ In 1988, a Dutch examining

³¹⁾ See e.g. Case 98/78, *Firma A. Racke v. Hauptzollamt Mainz*, [1979] ECR 69 at 86 (para. 20) ; Case 99/78, *Decker v. Hauptzollamt Landau*, [1979] ECR 101 at 111 (para. 8) ; Case 258/80, *SpA Metallurgica Rumi v. Commission*, [1982] ECR 487 at 503 (para. 11) ; Case 108/81, *Amylum v. Council*, [1982] ECR 3107 at 3130 (para. 4).

³²⁾ See e.g. Case 81/72, *Commission v. Council* (first *Staff Salaries* case), [1973] ECR 575 ; Case 2/75, *Einfuhr-und Vorratsstelle für Getreide und Futtermittel v. Mackprang*, [1975] ECRE 607 ; Case 78/77, *Firma Johann Lührs v. Hauptzollamt Hamburg-Jonas*, [1978] ECR 169 ; Case 112/77, *Töpfer v. Commission*, [1978] ECR 1019.

³³⁾ See e.g. Cases 42,49/59, *SNUPAT v. High Authority*, [1961] ECR 53 ; Cases 7/56, 3-7/57, *Algera v. Common Assembly*, [1957-58] ECR 39 ; Case 54/77, *Herpels v. Commission*, [1978] ECR 585 ; Cases 42,49/59, *SNUPAT v. High Authority*, [1961] ECR 53 ; Case 14/61, *Hoogovens v. High Authority*, [1962] ECR 253 ; Case 111/63, *Lemmerz-Werke v. High Authority*, [1965] ECR 677 ; Case 15/85, *Consortio Cooperative d'Abruzzo v. Commission*, [1987] ECR 1005.

³⁴⁾ See e.g. Case 1/72, *Rita Frilli v. Belgium*, [1972] ECR 457 ; Cases 117/76, 16/77, *Ruckdeschel v. Hauptzollamt Hamburg-St. Annen*, [1977] ECR 1753 ; Case 8/57, *Hauts Fourneaux et Aciéries Belges v. High Authority*, [1957-58] ECR 245 ; Cases 279, 280, 285, 286/84, *Walter Rau Lebensmittelwerke and Others v. Commission*, [1987] ECR 1069.

³⁵⁾ See e.g. 15/83, *Denkavit Nederland BV v. Hoofdproduktschap voor Akkerbouwprodukten*, [1984] ECR 2171 ; Case 114/76, *Bela-Mühle Josef Bergmann v. Grows-Farm* (one of the first *Skimmed-Milk Power* cases), [1977] ECR 1211.

³⁶⁾ See e.g. Case 322/81, *Michelin v. Commission*, [1983] ECR 3461.

³⁷⁾ See e.g. Case 17/74, *Transocean Marine Paint Association v. Commission*, [1974] ECR 1063.

³⁸⁾ See e.g. Case 155/79, *AM & S Europe Ltd. v. Commission*, [1982] ECR 1575.

³⁹⁾ Case C-2/88 *Imm, Criminal proceedings against Zwartveld and others*, [1990] ECR I-3365 (Order of the Court, 13, July 1990).

⁴⁰⁾ What follows below to explain this case was partially reprinted, with slight language

magistrate submitted a ‘request for judicial cooperation’ to the European Court. This request, however, was not to seek a preliminary ruling based upon Article 177 EEC, as it stood then:⁴¹⁾ no domestic proceeding has not yet started and therefore there were no parties in a technical sense; the magistrate was just doing a preliminary investigation about the charges that some members of the management of a fish market of a Dutch town were involved in forgery and the introduction of a black market, all against the Dutch penal code. In the course of investigation, the judge came to know that some fishing inspectors of the EEC in charge of the management of the Community Fisheries Policy had visited the Netherlands in 1983 and obtained information which might be helpful to his investigation. His repeated requests for gaining access to the inspection reports in question and for divulging the identity of, and take evidence from, the inspectors concerned were turned down by the Commission.

The Commission argued that the EEC Treaty set out exhaustively the Court’s jurisdiction and that the right of national courts to refer a case to the Court was only regulated by Article 177 EEC. The Dutch magistrate’s request did not concern the interpretation of a provision of the EEC law. The Commission relied, also, on Article 2 of the Protocol on the Privileges and Immunities of the European Communities, which provides that “the archives of the Communities shall be inviolable”, without mentioning any possibility that the Court may lift that inviolability.⁴²⁾

The objections submitted by the Commission were all rejected; the Court ordered it to send copies of the reports in question to the Dutch magistrate and also to authorise its officials to give evidence as witness before him. As is usually the case, the Court’s order was not unqualified: the Commission was allowed to submit to the Court “the imperative reasons relating to the need to

modification, from the writer’s own papers, entitled “Case Study in Judicial Activism of the European Court”, *The Journal of Contemporary European Studies*, Winter Issue (1999), pp. 164-192 and “The Activistic Behaviour of the European Court”, *The Journal of Korean Society of International Law*, Volume 44, Issue 2 (December, 1999), pp. 1-15.

⁴¹⁾ presently, Article 234 EC.

⁴²⁾ [1990] ECR I-3365 at 3369 (paras. 4-5).

avoid any interference with the functioning and independence of the Communities which justify the refusal” to produce the reports to the Dutch judge; the Court would rule at a later date on the request for production of the reports in respect of which the Commission relied on the said imperative reasons. Similarly, the Commission was also allowed to submit to the Court “the imperative reasons relating to the need to safeguard the interests of the Communities which justify the refusal of authorisation”; the Court would rule at a later date on the request concerning the officials whom the Commission refused to authorise to be examined as witness in reliance on the said imperative reasons. The Court justified its exercise of jurisdiction as follows:

“In this case, the request has been made by a national court which is hearing proceedings on the infringement of Community rules, and it seeks the production of information concerning the existence of the facts constituting those infringements. It is incumbent upon every Community institution to give its active assistance to such national legal proceedings, by producing documents to the national court and authorising its officials to give evidence in the national proceedings; that applies particularly to the Commission, to which Article 155⁴³⁾ of the EEC Treaty entrusts the task of ensuring that the provisions of the Treaty and the measures taken by the institutions pursuant thereto are applied.

The Court, which is responsible under Article 164⁴⁴⁾ of the EEC Treaty for ensuring that in the interpretation and application of the Treaty the law is observed, *must have* the power to review, at the request of a national judicial authority and by means of a legal procedure appropriate to the objective pursued by that authority, whether the duty of sincere cooperation, incumbent on the Commission in this case, has been complied with.

Consequently, the Court *has* jurisdiction to examine whether the Community institutions’ reliance on the Protocol in order to justify the refusal to cooperate sincerely with the national authorities is justified in view of the need to avoid any interference with the functioning and independence of the Communities.”⁴⁵⁾

43) presently, Article 211 EC.

44) presently, Article 220 EC.

45) [1990] ECR I-3365 at 3373 (paras. 22-24)

(italics added)

In short, the Court is of the opinion that as it “must have” it, it “has” the power. This case shows that national courts could request the European Court to order any Community institution, especially the Commission, to disclose data and that, for this purpose, what Article 234 (ex Article 177) EC expressly provides for could be ignored. However, the Court is just one of the Community institutions which the Court itself has emphasised should act within the limits set by the Treaty. Sir Neill QC expressed concern as follows:

“What gives cause for concern is the willingness of the ECJ to invent a new head of jurisdiction in order to respond to a novel request for judicial cooperation in such circumstances (and additionally to give itself power to decide when to uphold and when to disallow the inviolability of Community archives). Once Article 177 itself ceases to impose any restraint, what limits (if any) are there to the circumstances in which a court of a Member State may invoke the aid of the ECJ in any matter connected with Community law or the conduct of the institutions?”⁴⁶⁾

In *Zwartveld and others* (II),⁴⁷⁾ which soon followed, with regard to the reports and officials which, on the ground of imperative reasons, the Commission refused to produce and to allow to be examined as witness, the Commission failed to establish the imperative reasons which would justify its refusal and therefore the Court ordered it to produce to the Dutch judge the reports in question and to permit its officials to be called to witness.

Interestingly, the World Court (International Court of Justice) seems to have followed the similar line of thinking to that of the European Court in one case in connection with the binding force or otherwise of its provisional (interim) measures. As regards provisional measures, Article 41 of the Statute of the Court

⁴⁶⁾ Sir Patrick Neill QC (Warden, All Souls College, Oxford), “The European Court of Justice: A Case Study in Judicial Activism”, *European Policy Forum* (August 1995, Frankfurter Institut), p. 26

⁴⁷⁾ Case C-2/88 *Imm.*, [1990] ECR I-4405 (Order of the Court, 6 December 1990).

provides that “1. The Court shall have the power to *indicate*, if it considers that circumstances so require, any provisional measures which *ought* to be taken to preserve the respective rights of either party. 2. Pending the final decision, notice of the measure *suggested* shall forthwith be given to the parties and to the Security Council.” Scholarly opinions were divided on whether the provisional measures of the ICJ are binding or not until this question was publicly raised before this Court in *LaGrand* case.⁴⁸⁾ The USA against which the proceeding was filed argued that the above Article uses such terms as “indicate, ought and suggested” instead of “order, shall and ordered” respectively, which suggests that the provisional measures of the Court were intended to be non-binding. Rejecting this argument, the World Court concluded that provisional measures “should be” binding and therefore “have” binding force.⁴⁹⁾

IV. EC law moving close to federal law

The European Community (as well as the European Union, the European Atomic Energy Community and the gone European Coal and Steel Community) is a product of treaty, to which extent it is an international organisation. Nevertheless, it is commonly called a supranational⁵⁰⁾ organisation. Why is that so? In his textbook, concise but awakening beginners of international law, the late Professor Akehurst said that “the powers exercised by the Communities over the governments and nationals of the member-states are so extensive that

⁴⁸⁾ *Germany v. USA*, Judgment of 27 June 2001.

⁴⁹⁾ Para. 102 of the Judgment. The ambiguity of Article 41 of the Statute of the ICJ seems to have had direct impact on the drafting of the UN Convention on the Law of the Sea: according to Article 290 (1)(6) of the UN Convention as well as Article 25 of the Statute of the International Tribunal for the Law of the Sea, the Courts having compulsory jurisdiction under the UN Convention regime “may *prescribe* any provisional measures” and the parties of the case *shall comply* promptly with any provisional measures *prescribed*. (italics added)

⁵⁰⁾ By the term ‘supranational’ is generally meant “partial and incipient federalism” : Inis L. Claude, Jr., *Swords into Plowshares: The Problems and Progress of International Organization*, 3rd ed. (New York: Random House, 1964), pp. 101-102.

‘Community law’ is almost a hybrid between international law and federal law .”⁵¹⁾ Professor Hartley goes further to say that “[i]n the past, the word ‘supranational’ was used to describe [features of Community law]; today this term seems a little passé: they are simply referred to as being ‘federal’.”⁵²⁾

1. the Relationship between Community law and domestic/national law

The Community law appears supranational, quasi/near-federal or federal, among others, in its relationship with domestic law of Member States, which can be approached in two aspects: its direct effect on the domestic plane and its primacy over national law.

(1) Can the Community law be invoked by the parties before national courts of Member States?

It is said that EC law is federal or close to federal because it can be, as such, invoked and applied before domestic courts of Member States. This is the principle of direct effect of the Community law. Lord Mackenzie Stuart once stated that “[the] ... *novel and unique* feature of Community law is that commonly referred to as “direct effect,” that is to say the concept that Community law can in appropriate circumstances create rights in favour of individuals which national courts must protect.”⁵³⁾ But this is not wholly accurate. In light of the British law’s traditional “strict dualist” attitude towards treaties, the direct effect of EC law within the United Kingdom (of which he is a national) will be obviously something *novel and unique*. In the eyes of international law, it is not: although to varying degrees respectively, many states adopt monistic approach, whether by Constitutions or by case law, and guarantee

⁵¹⁾ Michael Akehurst, *A Modern Introduction to International Law*, 6th ed. (London: Allen & Unwin, 1987), pp. 73-74.

⁵²⁾ Hartley, *op. cit.*, p. 10.

⁵³⁾ Lord Mackenzie Stuart, *The European Community and the Rule of Law* (London: Stevens & Sons, 1977), p. 18.

internal direct effect of international law. Therefore, on the level of international law, what is *novel and unique* lies in not that EC law is directly effective, but that the European Court has showed activist behaviour to develop this principle and that it is accepted by national courts throughout the whole Community as an established principle of Community law.

Roughly speaking, when a treaty is incorporated or adopted into domestic law ‘automatically’, i.e. ‘without any legislative transformation’, it is said to be “directly applicable.” Further, when it is capable of creating private rights or duties, it is said to have “direct effect.” Direct effect contains three levels: ‘vertical’, ‘inverse vertical’, and ‘horizontal’. A treaty provision could be described as being vertically directly effective when it can be invoked before domestic courts by individuals who claim rights towards state authorities; it could be described as having inverse vertical direct effect when it can be invoked by state authorities which intend to impose burdens or duties on individuals; and it could be described as having horizontal direct effect when individuals are allowed to rely on it to claim rights towards other people. If a treaty is directly effective in both ways, that is, horizontally ‘and’ vertically, it could be described as having “all-round effects (Rundumwirkung).”⁵⁴⁾

Direct applicability or effect presupposes that the state in which the treaty in question is supposed to apply adopts the monistic view towards the relationship between international law and domestic (national) law. It is possible that a treaty provision has direct applicability but not direct effect. Direct applicability or otherwise is a matter reserved to the determination of the Constitution of each state, whereas direct effect is a matter of treaty interpretation by the national courts.⁵⁵⁾ The problem of direct applicability/effect or otherwise can be raised

⁵⁴⁾ See George Zdenkowski, “The International Covenant on Civil and Political Rights and Euthanasia”, (1997) 20 The University of New South Wales Law Journal 170 at 183-184.

⁵⁵⁾ Bengt Beutler, Roland Bieber, Jörn Pipkorn und Jochen Streichel, *Die Europäische Gemeinschaft: Rechtsordnung und Politik* (Baden-Baden: Nomos Verlagsgesellschaft, 1979), § 2.2.4.3. ; Francis G. Jacobs and Shelley Roberts (eds.), *The Effect of Treaties in Domestic Law* (London: Sweet & Maxwell, 1987), pp. xxiii-xxviii ; Hartley, *op. cit.*, p. 188; Henry G. Schermers (assisted by Denis Waelbroeck), *Judicial Protection*

with respect to international norms other than treaties, including the judgments or resolutions of international organs or organisations⁵⁶⁾ and customary international law. And the terms “direct applicability” and “direct effect” are not universally used: how to express the internal incorporation and effect of a treaty is a domestic affair, and therefore it can vary among states. For example, in the United States, the incorporation of treaty provisions into the domestic legal order is discussed under the designation of “self-execution” or “self-executing”, which covers either direct applicability, direct effect, or both, depending upon circumstances of each case.⁵⁷⁾

Getting back to the main subject, the sources of Community law include the Treaty establishing the European Community (as supplemented and amended), Community legislation, general principles of law, and international agreements concluded with third countries. Of these, it is only “regulations”, one form of Community legislation, that the Treaty imbues expressly with direct applicability: Article 249 (ex 189) EC provides that “[a regulation] shall be... directly applicable in all Member States.” Since direct effect is a consequence of direct applicability, Community regulations are held, in most (but not all) cases, to be

in the European Communities, 4th ed. (Deventer: Kluwer, 1987), § 241.

⁵⁶⁾ E.g. within the UN regime, judgments or resolutions adopted by the ICJ or the Security Council respectively.

⁵⁷⁾ Mr Roberts, Chief Justice of the Supreme Court of the United States, seems to have suggested this in the judgment of 25 March 2008, *Medellin v. Texas* : “The label “self-executing” has on occasion been used to convey different meanings. What we mean by “self-executing” is that the treaty has automatic domestic effect as federal law upon ratification. Conversely, a “non-self-executing” treaty does not by itself give rise to domestically enforceable federal law. Whether such a treaty has domestic effect depends upon implementing legislation passed by Congress. Even when treaties are self-executing in the sense that they create federal law, the background presumption is that “[i]nternational agreements, even those directly benefiting private persons, generally do not create private rights or provide for a private cause of action in domestic courts.” ... Accordingly, a number of the Courts of Appeals have presumed that treaties do not create privately enforceable rights in the absence of express language to the contrary. ...”(552 U.S.__(2008)(No. 06-984), p. 9 (fns. 2 & 3)) In this case, he concluded that “the *Avena* judgment [of the ICJ] is not automatically binding domestic law.”(*ibid.*, p. 10). In the dissenting opinion for this case, Judge Breyer used “direct judicial enforceability” as well as “self-executing” (dissenting, p. 15).

directly effective:⁵⁸⁾ the European Court confirmed, although not always, that Community regulations are directly effective, which means that they can be relied on by the parties and applied as an applicable norm of the case concerned by domestic courts.

The principle of direct effect has been extended to other sources of Community law⁵⁹⁾ by the Court under conditions peculiar to those respectively; now it lies at the core of the Community's "basic norm," that is to say, that Community law is "a new legal order."⁶⁰⁾

⁵⁸⁾ It is unclear whether the authors of the Community Treaties originally intended "directly applicable" to mean the same thing as "directly effective", so in early days of the Community life academics showed different opinions on the meaning of the direct applicability of a regulation: some scholars attempted to distinguish between its direct applicability and direct effect, according to which opinion there can be regulations which are directly applicable but not directly effective, and it is also possible that one and the same regulation can contain directly effective provisions and non-directly effective ones at the same time. This opinion, said to have been first suggested by Winter, gained support from some other academics and Advocate-Generals of the European Court: see J.A. Winter, "Direct Applicability and Direct Effect: Two Distinct and Different Concepts in Community Law," (1972) 9 C.M.L.Rev. 425 ; Schermers, *op. cit.*, §§ 219, 239, 253 ; *per* Advocate General Warner, in Case 31/74, *Fillipo Galli*, [1975] ECR 47 at 70 ; *per* Advocate General Reischl, in Case 148/78, *Pubblico Ministero v. Ratti*, [1979] ECR 1629 at 1650. The European Court's response was not so clear: in Case 83/78, *Pigs Marketing Board v. Redmond*, [1978] ECR 2347 at 2373 (paras. 66-67), the Court implied that direct applicability and direct effect of a regulation are of the same meaning; by contrast, in Case 9/70, *Grad v. Finanzamt Traunstein*, [1970] ECR 825 at 837 (para. 5) and Case 148/78, *Pubblico Ministero v. Ratti*, [1979] ECR 1629 at 1641 (para. 19), it insinuated that the direct effect of a regulation is a consequence of its direct applicability. Professor Hartley concludes that "the Court does not appear pay much attention to the wording of the Treaties on this point and seems to use the two expressions as meaning the same thing.": Hartley, *op. cit.*, p. 197. This suggests that direct effect and direct applicability are interchangeable in practice of the European Court. Actually, in most cases, what's raised as an issue before the European Court and national courts is direct effect, not direct applicability. Direct effect or otherwise of a Community provision is usually settled by way of the preliminary reference procedure, which requires a sincere cooperation between the European Court and national courts.

⁵⁹⁾ Herein included are provisions of the establishment Treaty, other forms of Community legislation (that is, directives and decisions) and agreements with third countries.

⁶⁰⁾ Although by now reduced to a minimal extent, rejection and resistance by national courts to this principle still exist, especially in connection with the question of how

- (2) In case Community law conflicts with national law of Member States, which of the two takes precedence?

In regard to this question, the European Court suggested a solution commonly called “the principle of supremacy (precedence or primacy) of EC law”⁶¹⁾ which demands that Community law provisions which are directly effective prevail over domestic law of Member States. This also is very federal in nature. The Court does not allow this principle to be affected by their respective sources: Community *legislation*, if it is valid under the Community Treaty, should prevail over even national *Constitution* (whether written or unwritten)⁶²⁾ in much the same way as a federal act which does not go against the federal Constitution prevails over state/province Constitution.⁶³⁾ The principle *lex posterior derogat*

far Community directives will be directly effective; the case law of the Court on this matter is very complicated, not laymen-friendly at all. On the issue of direct effect of Community directives, see a chain of cases, including Case 9/70, *Grad v. Finanzamt Traunstein*, [1970] ECR 825; Case 41/74, *Van Duyn v. Home Office*, [1974] ECR 1337; Case 148/78, *Pubblico Ministero v. Ratti*, [1979] ECR 1629; Case 14/83, *Von Colson and Kamann v. Land Nordrhein-Westfalen*, [1984] ECR 1891; Case 152/84, *Marshall v. Southampton and South West Hampshire Area Health Authority*, [1986] ECR 723 at 749; Case 80/86, *Kolpinghuis Nijmegen*, [1987] ECR 3969; Case 103/88, *Fratelli Costanzo SpA v. Comune di Milano*, [1989] ECR 1839; Case C-188/89, *Foster v. British Gas*, [1990] ECR I-3313; Case C-106/89, *Marleasing v. La Comercial*, [1990] ECR I-4135; and, Cases C-6,9/90, *Francovich v. Italy*, [1991] ECR I-5357.

- ⁶¹⁾ On this issue, see in general Gerhard Bebr, “How Supreme is Community Law in the National Court?”, (1974) 11 C.M.L.Rev. 3; Philip Raworth, “Article 177 of the Treaty of Rome and the Evolution of the Doctrine of the Supremacy of Community Law”, (1977) CYIL 276; Eric Stein, “Lawyers, Judges, and the Making of A Transnational Constitution”, (1981) 75 AJIL 1; Hans Kutcher, “Community Law and the National Judge”, (1973) 89 The Law Quarterly Review 487; J.P. Warner, *The Relationship between European Community Law and the National Laws of Member States*, (1977) 93 The Law Quarterly Review 349.
- ⁶²⁾ Case 11/70, *Internationale Handelsgesellschaft*, [1970] ECR 1125, in which the Court declared the primacy of a Community regulation over domestic Constitutions (in this case, the German one).
- ⁶³⁾ To cite a well-known example, Article VI, para. 2 of the Constitution of the United States provides that “[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws

priori does not apply, either: later domestic law is not allowed to prevail over earlier Community law provisions.⁶⁴⁾ How national courts react to this demand of the European Court is another thing, and great repugnance has intermittently erupted, especially when the European Court insinuated that the Community legislation could prevail over the fundamental value (to wit, respect for basic human rights) contained in the national Constitutions.⁶⁵⁾ Direct effect and primacy are thought of as two sides of the same coin: direct effect of Community law will be futile if it cannot enjoy primacy.⁶⁶⁾ Direct effect and primacy are two factors of “a new legal order.”

The concept of primacy of international law or treaties over national law is not new at all. For example, the Permanent Court of International Justice (the World Court prior to the present World Court, ICJ) stated in an advisory opinion⁶⁷⁾ that “a State cannot adduce as against another State its own Constitution with a view to evading obligations incumbent upon it under international law or treaties in force.”⁶⁸⁾ However, international law is not in a position to demand that it prevail over national law on the domestic plane: it is still left to the sovereignty of each state to determine the method and procedure

of any State to the Contrary notwithstanding.”

⁶⁴⁾ Case 106/77, *Italian Finance Administration v. Simmenthal*, [1978] ECR 629. To quote Sweeney and others, “The Simmenthal decision triggered in Great Britain a series of letters to the editor of the *The Times* in which the correspondents debated whether British courts were also under a duty to declare Acts of Parliament without effect insofar as they conflicted with Community law. Some of them were aghast at the idea...”: Joseph Modeste Sweeney, Covey T. Oliver and Noyes E. Leech, *Cases and Materials on the International Legal System*, 2nd. (New York: The Foundation Press, INC., 1981), p. 33.

⁶⁵⁾ For its representative case, see Germany, Federal Constitutional Court, *Internationale Handelsgesellschaft v. Einfuhr-und Vorratsstelle für Getreide und Futtermittel*, Decision of 29 May 1974, BVerfGE 37, 271; [1974] 2 CMLR 540.

⁶⁶⁾ Kutcher describes this as follows: “On establishing that a provision of Community law has direct effect, its capacity to oust a conflicting national law is affirmed simultaneously.”: Kutcher, “Community Law and the National Judge”, *op. cit.*, at 498.

⁶⁷⁾ *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory*, PCIJ (1932), Ser. A/B, No. 44, at p. 24.

⁶⁸⁾ This norm is embodied in Article 27 of the 1969 Vienna Convention on the Law of Treaties.

for incorporating outside law including international law or treaties. In short, what international law means by its primacy over domestic law is but that on the international plane.

Since Community law is technically a product of treaties among Member States, the opinion of the PCIJ will no doubt extend to the relationship between Community law and national law of Member States. However, this does not mean that there's no difference between primacy of international law and that of Community law. What is new in primacy of Community law?

The cases including *Van Gend en Loos*⁶⁹⁾ and *Costa v. Enel*,⁷⁰⁾ where the European Court clarified the concept of supremacy of Community law, imply two things: that the “transfer of (national) powers” to “a new legal order” has brought about “transfer of primacy”; and that Community law should prevail over national law on the domestic plane as well as on the international (Community) plane. In short, the relationship between Community law and the national law of Member States is not an issue concerning “conflict of laws”, and national judges should not treat Community law as a foreign law.⁷¹⁾

A word of caution against a misconception. Unlike supreme courts of many federal states, the European Court still has no power to declare ‘void’ national provisions which conflict with (directly effective) Community provisions: the utmost it can do is to say that such conflicting national provisions are “automatically inapplicable” or “precluded from being validly adopted”,⁷²⁾ or

⁶⁹⁾ Case 26/62, [1963] ECR 1 at 12.

⁷⁰⁾ Case 6/64, *Costa v. Enel*, [1964] ECR 585 at 593.

⁷¹⁾ Kutcher, “Community Law and the National Judge”, *op. cit.*, at 488.

⁷²⁾ In Case 106/77, *Italian Finance Administration v. Simmenthal*, [1978] ECR 629 at 643 (para. 17), the European Court stated: “...in accordance with the *principle of the precedence of Community law*, the relationship between provisions of the Treaty and directly applicable measures of the institutions on the one hand and the national law of the Member States on the other is such that those provisions and measures not only by their entry into force render *automatically inapplicable* any conflicting provision of current national law but -in so far as they are an integral part of, and take precedence in, the legal order applicable in the territory of each of the Member States- also *preclude the valid adoption of new legislative measures* to the extent to which they would be incompatible with Community provisions.” (italics added)

further that it is incumbent upon national authorities to “rescind” them.⁷³⁾ In this sense, the Community/national law relationship established by the European Court and accepted, although sometimes with hesitation, by national courts, seems to have created a third type of relationship: it does not exactly fit the traditional relationship between international law and national law, nor the one between federal law and state/province law; it stands somewhere between the two.⁷⁴⁾

2. the relationship between European Court and national courts of Member States: appeal or reference?

The fact that the Community legal order is federal or supranational means two things: that it can, as a legal norm, be applied on the domestic/national plane as well as on the Community plane (which has just been described above); and that questions concerning interpretation or validity of Community provisions which are raised before the domestic courts should be ultimately answered by the Court of the Community. Article 234 EC (the successor of Article 177 EEC) provides one way for this purpose: a national court can write the Court a letter at any time, asking questions concerning Community law to which answers it thinks it has to know to solve the case brought before it. However, the authors of the Treaties made the relationship between the Court and the national courts not one of “appeal” but that of what’s called “preliminary reference”: until the answer comes from the Court, the domestic proceeding in question before the national court which made the reference is suspended; after review, the Court must deliver answers to the questions of Community law which were referred to it; and, finally, when they come, the national court resumes the suspended

⁷³⁾ Case 6/60, *Humblet v. Belgium*, [1960] ECR 559 at 569; Case 167/73, *Commission v. France (French Merchant Seamen case)*, [1974] ECR 359 at 372 (para. 41) and 373 (para. 48).

⁷⁴⁾ See Wolfgang Freidmann, *The Changing Structure of International Law* (New York: Columbia University Press, 1966), pp. 110-111 ; Mauro Cappelletti, Monica Seccombe and Joseph Weiler (eds.), *Integration through Law: Europe and the American Federal Experience*, Volume 1: Methods, Tools and Institutions (3 books), Book 1: *A Political, Legal and Economic Overview* (Berlin: de Gruyter, 1985), p. 234.

proceeding and decides the case based on the Court's preliminary ruling. It is by this procedure that the European Court has been able to make the Community law "a new legal order" and develop the "direct effect and supremacy" thereof. This procedure is very hybrid: it is "a half-way house"⁷⁵⁾ lying somewhere between a federal house and an intergovernmental house.

V. European Union/Community remaining as an international/confederal organisation

As I mentioned above, the Union and the Communities are founded on their establishment "Treaties" which are, in the eyes of international law, "ordinary international treaties." This is also implied by, for example, Article 1 EC⁷⁶⁾ providing that "[b]y this Treaty, the *HIGH CONTRACTING PARTIES* establish among themselves a EUROPEAN COMMUNITY." It is not difficult to find intergovernmental elements from those "Treaties" other than this.

1. European Council

The above-mentioned five institutions (i.e. European Parliament, Council, Commission, European Court, and Court of Auditors) were originally intended to act for the Communities only and still belong to the Communities, not the European Union. But simply because an institution/organ belongs to one organisation does not necessarily mean that it can't act for another organisation. This is the very case of the Community institutions, which now act on behalf of the Union as well as of the Communities to the extent to which the Treaty on European Union provides. In other words, the European Union is "served by a *single institutional framework*."⁷⁷⁾ Article 5⁷⁸⁾ TEU says more clearly: "The

⁷⁵⁾ Hartley, *op. cit.*, p. 258.

⁷⁶⁾ Articles 1 TEU and Euratom respectively contain in fact identical provisions.

⁷⁷⁾ Article 3 (ex Article C) TEU.

⁷⁸⁾ ex Article E.

European Union, the Council, the Commission, the Court of Justice and the Court of Auditors shall exercise their powers under the conditions and for the purposes provided for, on the one hand, by the provisions of the Treaties establishing the European Communities and of the subsequent Treaties and Acts modifying and supplementing them and, on the other hand, by other provisions of this Treaty.”

The position of the European Council within the EU legal order is peculiar in certain aspects. First, the function and definition thereof is contained in Article 4⁷⁹⁾ of the “Treaty on European Union”, which implies that this belongs to the Union (not the Communities) and that this is the only institution belonging to the Union itself. Secondly, the European Council is a “European Summit” in the sense that “the Heads of State or Government of the Member States and the President of the Commission” are brought together.⁸⁰⁾ However, it does not exercise legislative functions: it simply provides the Union with the *necessary impetus for its development* and shall define the *general political guidelines* thereof.⁸¹⁾

2. Amendment of Treaties and the admission of new Member States

Originally both the amendment of the establishment Treaties⁸²⁾ and the admission of new Member States⁸³⁾ were regulated separately by the Communities respectively. But the Treaty on European Union of 1992 preempted these matters and now they are regulated on the level of the Union. In any case, their amendment is based on unanimity: each Member State has veto power.⁸⁴⁾ The

⁷⁹⁾ ex Article D.

⁸⁰⁾ Article 4 (ex Article D) TEU, second paragraph.

⁸¹⁾ Article 4 (ex Article D) TEU, first paragraph.

⁸²⁾ See Article 236 EEC, Article 204 Euratom, and Article 96 ECSC, as they stood before the Maastricht Treaty (TEU) of 1992 came into force.

⁸³⁾ See Article 237 EEC, Article 205 Euratom, and Article 98 ECSC, as they stood before the Maastricht Treaty of 1992 came into force.

⁸⁴⁾ Article 48 TEU (originally, Article N).

same applies to the admittance of new Member States.⁸⁵⁾

3. Withdrawal from the European Union

There is no provision which allows or prohibits the withdrawal of Member States from the European Communities or the European Union. As was mentioned above, the European Court seems to have shown, although in a roundabout way, its intention not to allow this by saying in *Costa v. Enel*,⁸⁶⁾ that “[t]he *transfer* by the States from their domestic legal system to the Community legal system of the rights and obligations arising under the Treaty carries with it a permanent limitation of their sovereign rights.”

However, under the law of treaties in international law, the “Masters” of a treaty can unmake or modify their “product” by unanimous agreement insofar as it does not conflict with the peremptory norm of general international law (commonly called “*jus cogens*”). This is confirmed by the 1969 “Vienna Convention on the Law of Treaties” which provides in Article 54 that “[t]he ... withdrawal of a party may take place ... at any time by consent of all the parties after consulting with the other contracting States.” Similarly, Article 39 of the Vienna Convention provides that “[a] treaty may be amended by agreement between the parties.” Actually, there is one case in which this happened in the Communities: Greenland⁸⁷⁾ which was part of the European Communities by belonging to Denmark wished to leave the Communities after it had been granted home rule (internal self-government) in 1978, and this was done by dint of “the Treaty amending, with respect to Greenland, the Treaties establishing the European Communities”; this treaty was concluded by the Member States on 13 March 1984 and came into force on 1 February 1985. It was a ‘partial’ ‘withdrawal’ in the sense that only a portion of a Member State’s territory was allowed to leave the Communities; technically, this case was approached and

⁸⁵⁾ Article 49 TEU (originally, Article O).

⁸⁶⁾ Case 6/64, *Costa v. Enel*, [1964] ECR 585 at 593.

⁸⁷⁾ <http://en.wikipedia.org/wiki/Greenland>.

solved in terms of amendment, not withdrawal, because Greenland as such was not a Member State. The “Treaty on European Union” hopefully to be amended by Lisbon Treaty allows “any Member State to withdraw from the Union” by concluding withdrawal agreement with the Council,⁸⁸⁾ which seems, in fact, to confirm the case of Greenland’s withdrawal. Such agreements fall under the category of the establishment Treaties (as supplemented and amended),⁸⁹⁾ and their “validity” cannot be reviewed by the European Court.⁹⁰⁾

VI. the 2007 Lisbon Treaty : what’s new in it?⁹¹⁾

“Convinced that, while remaining proud of their own national identities and history, the peoples of Europe are determined to transcend their former divisions and, united ever more closely, to forge a common destiny,”⁹²⁾ the representatives of States and Governments of the Union signed “the Treaty establishing a Constitution for Europe” (hereinafter referred to as “Constitution Treaty”) on 29th October 2004 which, however, received negative responses in the referendums of France and the Netherlands held in May and June 2005 respectively. As it was thought to be impossible to expect all Member States to ratify the Constitution Treaty, the Union leaders decided in a meeting of 23 July 2007 to abandon this Constitution Treaty and make a new treaty to replace it.⁹³⁾ Just around five months later, 12 December 2007, the European leaders got together at Lisbon and signed the Final Act containing “The Treaty of Lisbon *Amending* the Treaty

⁸⁸⁾ Article 49A (New Numbering 50), TEU, inserted by Article 1, 58), Lisbon Treaty.

⁸⁹⁾ See Hartley, *op. cit.*, p. 90 ff.

⁹⁰⁾ See Article 234 (ex Article 177) EC.

⁹¹⁾ For an overview of the Lisbon Treaty, see Paul Craig, “The Treaty of Lisbon, Process, Architecture and Substance”, (2008) 33 (2) E.L.Rev. 137-166; Michael Dougan, “The Treaty of Lisbon 2007: Winning Minds, not Heart”, (2008) 45 C.M.L.Rev. 617-703.

⁹²⁾ Preamble, third paragraph, of the “Treaty establishing a Constitution for Europe.”

⁹³⁾ http://www.eu2007.de/en/News/Press_Release/June/0623ER.html; http://ec.europa.eu/commission_barroso/president/focus/council_062007_en.htm (visited 25 June 2007).

on European Union and the Treaty Establishing the European Community.”⁹⁴⁾

The Lisbon Treaty, of course, must be ratified by all Member States in accordance with their respective constitutional requirements. If this happens by 1 January 2009, it comes into force that day; if not, it does on the first day of the month following the deposit of the last ratification.⁹⁵⁾ Alas, the Irish referendum of 12 June gave “no” vote, while most member states have finished ratification of the Lisbon Treaty before and even after the Irish vote. It seems that Ireland is being pushed to have another referendum only to say “yes” by other Member States including UK and France. How the situation will end remains to be seen, and for the purpose of today’s conference it will suffice to mention the basic difference in concept between the failed Constitution Treaty and the Lisbon Treaty.

The Constitution Treaty, Article IV-437 (1), attempted to establish a new European Union by stating that the Treaty ‘repeals’ the EC Treaty and the Treaty on European Union (as supplemented and amended), although the European Union established by this Treaty is supposed to be the successor to the existing Union (established by the Treaty on European Union) and to the European Community. By contrast, the Lisbon Treaty does not intend to repeal the existing Treaties: it just intends to “amend” them as their predecessors (Amsterdam and Nice Treaties) did.⁹⁶⁾ Under the Lisbon Treaty, although the European Union as it stands now continues to exist, some fundamental changes are anticipated to come in: first, the Union is expressly and generally endowed with “legal personality”;⁹⁷⁾ second, the Union “replaces and succeeds” the European Community, which means this Community will disappear from the earth;⁹⁸⁾ third, the Treaty establishing the European Community is renamed the

⁹⁴⁾ The British Prime Minister Gordon Brown was criticised for arriving, possibly intentionally, several hours late to sign the Lisbon Treaty separately and missing an official ceremony and group photograph: http://news.bbc.co.uk/2/hi/uk_news/politics/7144240.stm.

⁹⁵⁾ Article 6, Lisbon Treaty.

⁹⁶⁾ This becomes evident if you compare the formal titles of the three successive Treaties, all containing the expression “Amending.”

⁹⁷⁾ Article 46A (new numbering Article 47) TEU, newly inserted by Lisbon Treaty, Article 1, 55), states that: “[t]he Union shall have legal personality.”

“Treaty on the Functioning of the European Union”, which means that the failed attempt of the Constitution Treaty to combine the Treaty on European Union and the EC Treaty into one document is discarded and that the two Treaties remain separate in appearance; finally, the two constitutional instruments on which the Union is founded, -that is, “the Treaty on European Union” and “the Treaty on the Functioning of the European Union”, have the same legal value.⁹⁹⁾ Will the Lisbon Treaty be a “bridge over troubled waters”? People against the Lisbon Treaty are complaining that the Lisbon Treaty equals, in substance, the Constitution Treaty: their difference is by appearance, not in content. All in all I am of the same opinion.

VII. Lessons from Europe: in terms of possible integration of Northeast Asia

No doubt, the integration model of Europe is affecting thinkers, academics and political leaders of Asia. Actually, the ASEAN (Association of Southeast Asian Nations) adopted a “Charter” at its 13th Summit in November 2007.¹⁰⁰⁾ To become effective, it has to be ratified by all of the ten Member States; up to now seven Members have ratified; Indonesia, the Philippines and Thailand are putting off ratification, demanding that Myanmar give firmer commitments to democracy.¹⁰¹⁾ The Charter confers “legal personality” upon ASEAN, which will act as an “inter-governmental organisation.”¹⁰²⁾ The principles of ASEAN and its Member States proclaimed in the Charter include, among others, “adherence to the rule of law, good governance, the principles of democracy and constitutional government”, “respect for fundamental freedoms, the promotion and protection of human rights, and the promotion of social justice”, and “respect for the different

⁹⁸⁾ The Euratom remains intact, to which extent the word “Community” dies hard.

⁹⁹⁾ Article 1 (new numbering 1), para. 3, TEU, replaced by Article 1, 2)(b), Lisbon Treaty.

¹⁰⁰⁾ http://en.wikipedia.org/wiki/ASEAN_Charter; <http://www.aseansec.org/ASEAN-Charter.pdf>.

¹⁰¹⁾ http://en.wikipedia.org/wiki/ASEAN_Charter.

¹⁰²⁾ ASEAN Charter, Article 3 (legal personality of ASEAN).

cultures, languages and religions of the peoples of ASEAN, while emphasising their common values in the spirit of unity in diversity.”¹⁰³⁾ Is now not the time for North East Asia as well to be on the move? If we think so, what can we get from the experiences of the European integration?

1. law as imagination

According to the cyber-dictionary “wikipedia”, imagination is “the process of forming in the mind new images which have not been previously experienced, or at least only partially or in different combinations.” Law will be also an outcome of such imagination.¹⁰⁴⁾ For instance, the basic idea of the preliminary reference procedure was originally thought out by the late Sir Hersch Lauterpacht (one of the great international lawyers of the twentieth century) when he was a young lecturer in his twenties at London School of Economics.¹⁰⁵⁾

The idea that “Europe is one” could go back to old times before the medieval times, of which the discussion is beyond the scope of this paper. What I want to point out is that Europeans may be in the process of erecting more than millenium-old thinking of one Europe under the name of “a new legal order.”

2. Europe: value-oriented Continent

By “values” here I don’t mean personal values which may vary among individuals, but something common which is universally accepted by the members of a legal community. Article 6,¹⁰⁶⁾ paras. 1-2, TEU makes clear what the values are on which the European Union is based: “1. The Union is founded

¹⁰³⁾ The adoption of the Charter is a good job, but its substance is, all in all, limited to just institutional matters.

¹⁰⁴⁾ <http://en.wikipedia.org/wiki/Imagination>.

¹⁰⁵⁾ H. Lauterpacht, “Decisions of Municipal Courts as a Source of International Law”, (1929) 10 BYIL 65 at 94-95. Sir Hersch Lauterpacht (1897 – 1960) was a member of the United Nations International Law Commission from 1952 to 1954 and a Member (Judge) of the International Court of Justice from 1955 to 1960. His son Elihu Lauterpacht founded a center named after him, “Lauterpacht Centre for International Law”, at the University of Cambridge and was its first director. <http://en.wikipedia.org/wiki/Lauterpacht>.

¹⁰⁶⁾ ex Article F TEU.

on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States. 2. The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law.”

Article 6 TEU as it stands now is in fact split into two provisions, Articles 1a (new numbering 2) and 6 (new numbering 6) of TEU to be amended by the Lisbon Treaty; the former of the two provisions states that “The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. *These values are common to the Member States* in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail”; the latter concerns “the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007”¹⁰⁷⁾ and the compulsory accession of the Union to “the European Convention for the Protection of Human Rights and Fundamental Freedoms.”¹⁰⁸⁾

My question is this: Have we, who are living in Northeast Asia, agreed to what values we have in common? Do we share this question?

¹⁰⁷⁾ This Charter was initially adopted at Nice but as such lacked binding force. By the above provision to be amended by the Lisbon Treaty, this Charter “shall have the same legal value as the Treaty on [the European Union and the Treaty on the Functioning of the European Union].” See also “Declaration concerning the Charter of Fundamental Rights of the European Union.”

¹⁰⁸⁾ See also “Protocol relating to Article 6(2) of the Treaty on European Union on the Accession of the Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms.” For reference, the “European Convention for the Protection of Human Rights and Fundamental Freedoms” was concluded between Member States of the Council of Europe on 4 November 1950 and entered into force on 3 September 1953; the accession thereto is limited to Member States of the Council of Europe; and it has greatly contributed to the integration of Europe in terms of human rights.

3. Diversity of culture

The European integration, however, does not aim to weaken or wipe out the national identities or cultural diversity. On the contrary, para. 3 of the Article 6 TEU, as it stands now, provides that “[t]he Union shall respect the national identities of Member States.” Similarly, Article 3¹⁰⁹⁾ of TEU to be amended by Lisbon Treaty provides in para. 3 (4) that “[the Union] shall respect its rich cultural and linguistic diversity, and shall ensure that Europe’s cultural heritage is safeguarded and enhanced.” Speaking of diversity of languages, it is to be noted that, although belatedly, the Irish language became twenty-first official language of the Union as from 1 January 2007,¹¹⁰⁾ and that, as of present, 2008, the Union has got 23 official languages.¹¹¹⁾ This contrasts with the policy of the United States to keep just one language, English.¹¹²⁾

How about the South Korean society? Korean people tend to believe and even take pride in that their multi-millennium history has been formed based on their “unmixed” blood. Is it true and possible? Setting aside the past history, a recent statistics from the Korean Ministry of Justice tells us that more than one million aliens are residing in South Korea as of 31 March 2008.¹¹³⁾ We see commercial placards fluttering high in the sky on the country streets, saying that “brides from Vietnam don’t flee.” In fact, Korean rural communities are being “hybridized”, but we are reluctant to talk about the problems which may ensue therefrom. Do we not need to form a national policy concerning immigration

¹⁰⁹⁾ ex Article 2.

¹¹⁰⁾ Article 4, “Council Regulation (EC) No 920/2005 of 13 June 2005 amending Regulation No 1 of 15 April 1958 determining the language to be used by the European Economic Community and Regulation No 1 of 15 April 1958 determining the language to be used by the European Atomic Energy Community and introducing temporary derogation measures from those Regulations”, Official Journal of the European Union, 18.6.2005, L 156/3.

¹¹¹⁾ http://en.wikipedia.org/wiki/Languages_of_the_European_Union.

¹¹²⁾ However, at this juncture, one question occurs to me: “Will the European policy of diversity of culture not end in a sort of hybrid/mixed culture, just as the European integration based upon” a new legal order “has become a “hybrid” one?”

¹¹³⁾ Among them, 887,372 are legally residing; others are illegal residents. <http://www.igrant.or.kr>.

from outside? Do we not need to establish a separate “Ministry of Immigration”? Will the exportation of Korean culture, commonly called “Hallyu”, succeed without understanding foreign cultures?

4. EU/EC’s history: integration through law

One of the founding fathers of the European Communities, Jean Monnet,¹¹⁴⁾ left so many wise sayings for posterity, one of which is: “Nothing is possible without men; nothing is lasting without institutions.” The “institutions” he had in mind must have been those as governed and ruled by law. Institutionalised integration such as EU requires so many well-trained experts in law rather than political leaders who just enjoy talking big in company. The case of the European Council of the Union suggests that the role of political leaders should be limited to providing the “*necessary impetus for the development*” of the integration and defining the “*general political guidelines*” therefor.¹¹⁵⁾ To make them an actuality falls to the legal experts. Integration would become easier if a transboundary legal education system were introduced. If we share an ambition or plan of creating a European Union-typed Community in this region, I propose establishing a sort of “Asian school of law” open to students and academics of Northeast Asia would be good as one of its preliminary steps; Korean law school system which will be launched next year should be reviewed and evaluated in this context as well.

5. Is a crisis not already on us?

Last, but certainly not least, the Community legal order is just “a” new legal order as the European Court said: it is not “the only” new legal order at all. So, today I am going to ask all of you here: Are we truly determined to establish “another” new legal order in Northeast Asia? Are we? Jean Monnet said: “There is no real peace in Europe, if the states are reconstituted on a basis of national sovereignty. (···) They must have larger markets”; “Their prosperity

¹¹⁴⁾ Jean Omer Marie Gabriel Monnet (November 9, 1888 – March 16, 1979).

¹¹⁵⁾ See Article 4 (ex Article D) TEU, first paragraph.

is impossible, unless the States of Europe form themselves in a European Federation”; “There is no future for the people of Europe other than in union”; and, “People only accept change when they are faced with necessity, and only recognise necessity when a crisis is upon them.”¹¹⁶⁾ Are we prepared to listen to him? Are we?

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¹¹⁶⁾ http://en.wikipedia.org/wiki/Jean_Monnet; Jean Monnet, *Mémoires* (Paris, Fayard, 1976).

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<국문요약>

유럽의 헌법으로서의 EU법
— 동북아시아에 대한 교훈과 함의를 생각하며 —

金大淳*

외견상 유럽공동체들(European Communities)과 유럽연합(European Union)은 모두 보통의 국가간 조약에 기초하고 있다. 왜냐하면 이들을 설립, 보충, 개정하는 조약들은 1969년의 비엔나조약협약에 나타난 條約의 定義에 잘 부합하기 때문이다. 그럼에도 불구하고 EC/EU의 최고재판소인 유럽재판소는 이들 조약을 그렇게 다루기를 거절하고 있다. 즉, 1960년대 초반에 제기되어 온 일련의 사건에서 동 재판소는 유럽공동체는 “한 개의 새로운 법질서”를 구성한다고 전제한다. 여기서 두 개의 원칙(즉, 공동체법의 직접효력과 우위의 원칙)을 수립하였던 것이다. 이 논문은 유럽재판소에 의해 확립된 EC 혹은 EU 법의 이같은 혼혈적 특징을 개관하고, 더불어 2007년 리스본조약의 주요 내용에 대해서도 언급하였다. 그리고, 끝으로, 東北亞 국가들이 유럽의 통합경험으로부터 배울 수 있는 교훈에 뭔지에 대해서도 생각해 보았다.

주제어: 유럽공동체, 유럽연합, 한 개의 새로운 법질서, 유럽공동체법의 직접효력, 유럽공동체법의 우위, 리스본 조약, 동북아시아의 통합, 법을 통한 통합, 상상으로서의 법, 가치 지향적 대륙

* 연세대학교 법과대학 교수.