

# European Union Law: A Special Subsystem of International Law

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## I. A Political Process

The peace and prosperity of the peoples of the member states of the European Union are the constant guide of this process of political integration. From a historical-sociological and political perspective, both Community Law and International Law are imbued with the same philosophical conception: the concern for the common ultimate values that must orientate the international social horizon. The values they inspire and share are those of fomenting and assuring peaceful and just relations in the International Community.<sup>1</sup>

The three European Communities present themselves as a single process of political integration of states and of peoples through economic instruments whose elements are interrelated and condition its progress. Each Community has its own objectives and specific material spheres of action. The three Communities are, however, inseparably linked by the institutions which between 1957 and 1965 undertook a merger process and are, consequently, common, governed by principles of Law which are also common and inspired in a final horizon of an ever closer political union among the peoples of the Member States.

The unity of the process of integration has been clarified since the entering into force of the Treaty of the European Union adopted in Maastricht in 1992, including the three European Communities and the mechanisms of intergovernmental cooperation (common Foreign and Security Policy – CFSP – and Justice and Home affairs) in the idea of synthesis that the European Union represents. Furthermore, the European Communities, which were never just a common market, have – as I pointed out some

<sup>1</sup> In the words of Judge José María Ruda, to whom this book renders respect and admiration, referring to the evolution of internal and international society, this evolution is said to “have taken place because of the need to preserve values that are fundamental to any community, that is, peace, justice and safety” (“El principio del no uso de la fuerza en América”, in *La Escuela de Salamanca y el Derecho Internacional en América, Del pasado al futuro*, (Salamanca, 1993, p. 169).

time ago<sup>2</sup> – always subordinated entry and permanence in them to political conditions: pluralist democracy and respect for human rights.

The European Communities owe their birth to the existence of a common cultural identity and to old and constant internal political problems of coexistence between Europeans. The price to be paid by these peoples also was and is political: the partial surrender of their sovereignty, the exercising of which has been transferred, in the spheres regulated by the Treaties, to the institutions created in common. All the constitutions of the member states expressly recognise this conference of the exercise of sovereign rights and some of them (the French, Italian, German, Danish) confess that this sacrifice is for the sake of the peace and welfare of their peoples.

Deep down, the motives that have sustained the foundation of these new Communities are, then, political. Since their creation, their nature has been and is still political, although neither then nor now has a compromise been reached regarding the final destination or horizon. It was a question of leading the States into an economic and political process that was expected to be irreversible.

Versus the nationalist prejudice that in the 19th and 20th centuries and on the very threshold of the 21st have only given Europe more and more frontiers, full of the tragedy and misery of the cruellest wars that humanity has experienced, the pro-European spirit promotes the integration among the European peoples, with all their plurality, by means of the disappearance of frontiers and the affirming and strengthening of common cultural and political bonds. Versus the obsessive national identity and sovereignty of nationalisms, the Europe of the Community highlights common identity as a condition of peace and prosperity.

## II. Between International Regionalism and the Federalization of Functions

According to O. Jacot-Guillarmod, that Community Law and International Law are united in what could be called a *complementarity of ambitions*, given that both legislations tend to progressively remove international relations from the realm of politics to take them into the realm of Law.<sup>3</sup> It can also be seen that the existence of a parallel competence also reveals the *complementarity of interests* that unites the European Community and the International Community. Reference has also been made to a *normative complementarity* between one legislation and the other in the relationship of community rules with Agreements such as the European Convention on Human

<sup>2</sup> A. Mangas Martín, 'Unión Europea y Mercosur: perspectiva jurídico-institucional y política', (1996-1997) *Anuario Argentino de Derecho Internacional*, p. 78.

On the influence of democratic ideas on international society and on the European Union, see J. Roldán Barbero, *Democracia y Derecho internacional* (Madrid, 1994); "Democracia y Derecho Europeo" (1993), 1 *Revista de Instituciones Europeas*, p. 101; R. Toulemon, "Communauté, Union politique, Confédération. Diplomatie ou démocratie plurinationale?" (1991) 348, *RMC*, p.428.

<sup>3</sup> O. Jacot-Guillarmod, *Droit communautaire et droit international public*, (Genf, 1991), p.253.

Rights or some of the ILO agreements in whose sphere the Court of Justice has situated art. 119 of the EC Treaty – art. 141 after the renumbering of the Treaty of Amsterdam –,<sup>4</sup> or customs agreements or art. 110, which reflects, in his opinion, the concern of the authors of the EEC Treaty for assuring the complementarity of a regional objective (customs union) with world objectives (harmonious development of world trade, free trade, reduction of tariffs, etc.).

1. *The Conventional Origin of the European Communities and Community Law*

The origin of the European Communities and of Community Law in legal-conventional instruments is often pointed out. It is undeniable that the European Communities and their Law arose from international treaties. The foundational treaties and the dozen subsequent conventional rules which have revised and completed them are international treaties.

The European Communities are thus founded on international treaties, subjected to general and conventional International Law and regulate, among a plurality of legal relations, the relations between member states. To be exact, through these international instruments the sovereign states proceed to grant appreciable sectors of their sovereignty to Institutions, undoubtedly endowed with organic and functional autonomy, but also undeniably almost all influenced by the overwhelming political weight of the states. These member states, despite the transfer of sovereignty, remain sovereign.

The conception of sovereignty has varied drastically in contemporary International Law.<sup>5</sup> Sovereignty, understood as a legal absolute, is not only incompatible with the phenomena of integration, but also irreconcilable with the very existence of an international legal order.<sup>6</sup>

Sovereignty and independence are not a hindrance for forging new associative structures; on the contrary, it is the very sovereignty and independence of the member states that makes it possible for them to be members of an international organization such as the European Community. The conferment of the exercise of certain sovereign rights on the European Community does not diminish their essential characteristics as states nor does it blur their membership in the International Community. And respect for this sovereignty and independence is also the basis of the relationships between the member states of the European Communities and of the latter with their member states.

Therefore, the European Communities have not replaced or done away with the old rules of classical International Law between their members nor do they aim to replace or do without their member states. The European Communities, in spite of their uncompromising originality, are conditioned by their inter-state structure. The

<sup>4</sup> ECJ, judgment of 8.4.1976, *Defrenne*, 43/75.

<sup>5</sup> D. Obradovic, "Community Law and the Doctrine of Divisible Sovereignty", (1993) 1 *LIEI*, p. 1.

<sup>6</sup> E. Pérez Vera, "Algunas reflexiones sobre los procesos de integración regional", (1977) 3 *Rev. de Instituciones Europeas*, p. 673.

everyday life of the European Communities, specially with regard to the Commission, the Council and its infrastructure, as well as the European Council, show the undeniable characteristic of the Communities as *peculiar international organizations* with dynamics that are specially fluid but proper to international relations.<sup>7</sup> Despite other considerations that mark them as "original" (Community of peoples), the European Communities are a *Community of States*. In the classic expression in international conferences this is an "association of states" or in the expression of the German Constitutional Court they are a "union of sovereign states" (judgment of 12 October 1993).

In turn, however, it is also true that for many decades now International Law has not limited itself to ordering jurisdictions between states, especially spatial ones. Together with this normative model of classical inorganic relational International Law, from 1945 on there has been a consolidation of contemporary International Law which shows a progressive tendency towards the institutionalization of its functions.

It is now recognized that the concept of International Law is not a homogeneous category; on the contrary it includes a plurality of complex and diverse relations that ever increasingly affect matters of internal life of nations. Both International Law of Cooperation and Law of International Organizations have been the conveyors of the aspirations of the international community to advance towards transcending the classical forms of co-existence.

In our time sovereignty is not an abstract or formal concept, remote from ethical, social and democratic values; sovereignty as an absolute and formal value is only exalted (to the fanatic paroxysm that nationalism generates) by nationalist political and social groups of overlapping racist and xenophobic ideology, which have arisen again in Europe from the ashes of Naziism in new trappings at the end of this century, as well as among the newly independent states and, in general, the Third World states, as a way of dominating people.

The process of European integration implies the survival of the states: Although nothing can be prophesied in matters of international relations, there is nothing to make us think that the member states could one day cease to exist and the European Union turn into a Federal State. The member states have consented that first, the European Communities, and after 1993, the European Union should absorb an important part of the functions of state power, but without endangering their own survival as member states.

Furthermore, in the material fields not transferred to the European Union, its member states maintain relations among themselves that are governed by International Law in matters contributing to the achieving of the aims of integration as well as in spheres outside the Community, and they are subject to the procedures

<sup>7</sup> As J. Martín y Pérez de Nanclares points out, "we are, therefore, still before a category proper to International Public Law, certainly endowed with its own specificity, but under the conceptual mantle of the Theory of International Organizations" (in *El sistema de competencias de la Comunidad Europea*, Madrid, 1997, p.21.)

for resolving controversies foreseen in International Public Law in those areas not deemed common.

Even the wide acceptance of the Union's inclination towards federation (in spite of the disappearance of these terms from the Treaty of the European Union) and the taking on of federal type functions, such as the coming into force of the single currency, the Euro, as from 1999, do not give any inkling of the disappearance of the international individuality of the member states. With this perspective, the European Communities/European Union will have a basic element that differentiates them from a federal state and its internal set of laws.<sup>8</sup>

However, the fact that the European Communities/European Union are not being transformed into a federal State does not mean that they do not participate in the conception of some elements of its institutional structure, of its law and of its functions, of federalist legal techniques and inspiration, without this entailing the recognition of analogies to a state structure, not even federal or confederal.

In this sense, it has been pointed out that, although the European Communities are endowed with various attributes that characterize the federal state – immediacy of the legal system, domestic and not only international competence – at this stage of integration they do not totally attain this nature since, first, they are based on international treaties and not on formal constitutions; second, they are far from monopolizing the capacity of subjects of international law in detriment to its members and also because they are not invested with “competence over competence”, all of which would indicate acquiescence to the category of “federal”.<sup>9</sup>

## 2. *The Formal Condition of International Organizations*

By means of international treaties, the member states have founded three international organizations that respond, despite the specificity and originality of their objectives and means of action, to the characteristics of the broader phenomenon of *international regionalism*. The regional international organizations, and particularly the European Communities, intensify solidarity among small, semi-closed nuclei of states. They serve quite specific and innovating objectives, but these objectives are identified and accepted by consensus on the part of the member states and their attainment is pursued by the organization created. The European Communities are, then, like all international organizations, instruments at the service of the states.

It must also be recognized that the creators of these international organizations were aware that the European Communities would have difficulty fitting into the framework of Law of International Organizations. Because of their structure, functions, means and objectives, they distance themselves from all existing international orga-

<sup>8</sup> For a deeper look at the seed of international jurisprudence in the community system and the influence of the federal method, the excellent book by J. Martín y Pérez de Nanclares, *El sistema de competencias de la Comunidad Europea, op.cit.*, is invaluable.

<sup>9</sup> R. Kovar, “Communautés européennes”, *Jurisclasseur Europe*, Fasc. 110, pp.4-5.

nizations. Hence, Y. Daudet has said that, compared with other regional economic organizations, the European Communities nevertheless show such originality that the question is posed of knowing whether or not the relationships between universal International Law and regional International Law present specificity.<sup>10</sup>

However, as international organizations they are characterized by the principle of speciality that governs their activity, unlike state structures. Indeed, what distinguishes international organizations is their *function*: what M. Virally defines as specific activity orientated towards achieving a certain objective that is external to the one who performs it or a functional objective as opposed to the integral objective of the state.<sup>11</sup>

The same as other subjects with a functional basis, community institutions only have competence of attribution. The constitutive treaties produce a distribution of competences between the states and the institutions they create. The states endow each international organization with the structure suited to the characteristics of the functions assigned to it, as well as powers and competence to the extent necessary for the degree of cooperation or institutionalized integration required by the nature of the activity. Their competence is limited, unlike that of the states. The community institutions do not adopt acts simply because they consider them opportune; the institutions cannot exercise competence other than that vested them in the treaties, which always avoid making general attributions.

This lack of general functions and competence in the hands of the Institutions is a visible difference with respect to the national systems. Thus, if a community institution is characterised as executive or legislative, this description is the result of a detailed analysis of the treaties that, sector by sector, subject by subject, define the competence of each institution and every time that the institutions make use of their competence to adopt legal acts they must specify the cause or legal basis: the Treaty provision that gives them competence to adopt said act.

### III. Final Remarks

It must be admitted that many questions noted are twofold; they make it possible to consider links with International Public Law, and more specifically with Law of International Organizations, as can be underlined by the specificity and autonomy of the European Communities. These complex interweavings that occur in the European Communities allow some authors to affirm that the difference between the European Communities and other international organizations is only a matter of degree, and what characterizes the European Communities is the accumulation in their benefit of the most advanced techniques, which occur separately and with great moderation in the other international organizations.

<sup>10</sup> Y. Daudet, "Le droit international tire-t-il profit du droit communautaire?". *L'Europe et le Droit. Mélanges en hommage à Jean Boulouis*, (Paris, 1991), p.103.

<sup>11</sup> M. Virally, "La notion de fonction en la théorie de l'organisation internationale", *Mélanges offerts à Ch. Rousseau* (Paris, 1974), p. 281.

Y. Daudet has pointed out how Community Law, because of the weight and importance that it has attained, "has become a sort of engine" that favours the transformation of International Law (for example, it has profoundly renewed the question of *self executing* provisions and their even more frequent use in legal practice) and the insertion of International Law into domestic law. This was manifested in France by the *GISTI* and *Nicolo* decisions of the Council of State in 1990 which led the French high administrative jurisdiction to assume a control of conformity for which it was not previously competent.<sup>12</sup> Law in the United Kingdom is also experiencing some "upheaval", specially since the *Factortame* judgment in 1990 and the *Francovich* judgment in 1991<sup>13</sup> which led the House of Lords to make preliminary references to the Court of Justice and to accept for themselves a control of compatibility of the laws of Parliament with Community norms, ordering, in cases of disconformity, the general and abstract inapplication, apart from the interim relief concrete inapplication, of the law contrary to Community Law with *erga omnes* effects and liability consequences.<sup>14</sup>

In fact, the European Communities, as international organizations, have enriched the structure and functions of International Law and have meant an improvement in the technique of international relations,<sup>15</sup> although in many spheres they have gone beyond this to form a new category: intracommunity relations.

Likewise, the European Communities have carried out a fertile normative activity that has nomogenetic characteristics that are well differentiated, even from the derived or secondary law of other international organizations. They have thus contributed to the development of International Public Law by means of the creation of new compulsory legal norms, the strengthening of the judicial settlement of disputes to controversies and the influence of its content. Furthermore, they have been the centre of the stimulus and impulse for the creation of international legal norms between member states.

Still fully valid are the words of Pescatore when he said that Community Law had established the most advanced frontiers for the law of peaceful cooperation, to the extent that the introduction of the principles of solidarity and integration penetrate the frontiers of federalism, a sort of international federalism, but not of categories of public law.<sup>16</sup> And what makes it an international type of federalism is the fact that the members of the new union, besides being peoples of Europe, are states that have not renounced their political personality.

<sup>12</sup> *Loc. Cit.*, p. 100-105.

<sup>13</sup> EJC, cases of 19.6.1990, *Factortame*, C-213/89 and 19.11.91, *Francovich*, C-6 and C-9/90.

<sup>14</sup> House of Lords, *Regina v. Secretary of State for Employment* ("E.O.C."), 3.3.1994.

<sup>15</sup> P. VerLoren van Themaat, "The Interaction between European Community Law and Public International Law in the Light of the 'Declaration on the Progressive Development of Principles of Public International Law relating to a New International Economic Order' adopted at the 62nd Conference of the ILA", *Liber Amicorum Pierre Pescatore*, (Baden-Baden, 1987), pp. 759-779.

<sup>16</sup> Pescatore, P., "International Law and Community Law. A Comparative Analysis", (1970) *CMLR*, pp. 182-183.

Now all these aspects, which make it possible to build bridges between International Public Law and Community Law, are not, however, sufficient to explain the characteristics that distinguish the European Communities.

They do make it possible to understand the roots of their origin, part of the legal relations that they contemplate and their formal connection with Law of International Organizations. It is true that "it is more difficult to establish the independence of the Community in the face of International Law than in the face of domestic state law".<sup>17</sup> To be exact, one of the many differences that separate the European system of political-economical integration from the free trade zones or custom unions of America is that although the latter are mere economic entities, their legal-political analysts are constitutionalists and not experts in International Law, whose legal perspective is the most appropriate for analysing processes of political integration or economic cooperation. This fact, which European doctrine finds unusually surprising, seems to be timidly beginning to change and it seems that the most appropriately prepared doctrine, conceptually and methodologically, which is that of International Law, is beginning to take the scientific analysis of the free trade and custom unions in Latin America seriously.

Moreover, at this time when the Treaty of the European Union is revealing the doubts of the peoples of the Member States with respect to the extension and deepening of integration, and when the free trade areas seem to be very attractive because of their political asepsis, it seems to be confirmed that we are actually far from having crossed definitive legal thresholds.

Hence, the words of V. Constantinesco are very suggestive when he points out that the nature of the Communities seems to reveal a tension between internal federal order (the final destination of Community construction?) and international order (starting point – and perhaps destination – of that same construction).<sup>18</sup>

Certainly these connections between International Public Law and Community Law, that are easy to find, make it possible to understand and explain to a great extent the fact of the Community, but they do not fully justify the set of inter-institutional relations or the sense of balance of power, or the immediacy and compulsoriness of derived law, as well as primacy over national law and the direct effect of the Community norms for private citizens or the complex and effective system of judicial protection.

Because of this lack of definition of the European Community and its dependence on other legal phenomena, I share the view of the former Attorney-General Verloren van Themaat that "in order to remain faithful to its conception, the European Union must continue to be an international organization *sui generis*, cer-

<sup>17</sup> P. Dagtoglou, "Naturaleza jurídica de la Comunidad Europea" in *Treinta años de Derecho Comunitario*, Luxembourg, 1984, p. 36.

<sup>18</sup> V. Constantinesco, "L'article 5 CEE, de la bonne foi à la loyauté communautaire", in *Liber Amicorum Pierre Pescatore* (Baden-Baden, 1987), p. 97. Also see "¿Hacia la emergencia de un derecho constitucional europeo?" (1994) 8 *Cuadernos Constitucionales de la Cátedra Fadrique Furio Ceriol*, Universitat de Valencia, p. 5.



tainly with a "federal" structure and inspiration to some extent (as the jurisprudence of the Court of Justice shows), although without a true government (but with an efficacious and well legitimized executive), integrated in a system of organizations of an intercontinental and world nature and serving as a useful model for other international organizations, on the regional plane as well as on the intercontinental or world plane".<sup>19</sup>

<sup>19</sup> P. Verloren van Themaat, "Les défis de Maastricht: une nouvelle étape, mais vers quels horizons?" (1992) 352 *RMC*, p. 208.

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