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National Origins of European Law: Towards An Autonomous System of European Law?

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„National Origins of European Law: Towards an autonomous system of European Law?“•

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I) The Nature of European Law

The prevaling understanding of the nature of European Law within the European Community is based on a ruling of the European Court of Justice. In 1964 in the Costa ./. ENEL-case the Court ruled that „the Treaty establishing the European Economic Community has created its own legal system which, on 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 .... because of its special and original nature .... (it) could no be overriden by domestic legal provisions, however framed, without being deprived of ist character as Community law without the legal basis of the Community itself being called into question“[1]. The Court added that „the transfer by the States from their domestic legal system of the rights and obligations arising under the Treaty carries with it a permanent limitation of their sovereign rights, against which a subsequent unilataral act incompatible with the concept of the Community cannot prevail.“

Two conclusions can be drawn from impressive definition of the Courts of the nature of the legal system of the European Community´s. On the first hand, one can deduce from this defintion that by its origin as well as by its nature Community Law quite obviously differs

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♦ Der Verfasser, Rechtsanwalt in Bonn, ehemaliger langjähriger Bevollmächtigter der Bundesregierung in Verfahren vor dem Europäischen Gerichtshof und später Mitglied der deutschen Delegation der Maastrichter Konferenz über die Wirtschafts- und Währungsunion, u. a. Mitglied des Vorstands der Wissenschaftlichen Gesellschaft für Europarecht, Mitglied des Wissenschaftlichen Direktoriums des Instituts für Europäische Politik, Berlin, lehrt als früherer Angehöriger des Bundesministeriums für Wirtschaft Europarecht an der Westfälischen Wilhelms-Universität, Münster, europäisches Währungs- und Wirtschaftsrecht an der Donau-Universität in Krems an der Donau sowie Subventionsrecht der EU an der Universität des Saarlandes und ist am Zentrum für Europäische Integrationsforschung an der Universität Bonn als Forschungsprofessor sowie als Lehrbeauftragter für das Recht der Wirtschafts- und Währungsunion der EU tätig.•

from international law, and this notwithstanding the fact that the two Treaties of Rome and the foregoing Treaty of Paris, by which the European Community was created, are clearly to be qualified as international treaties. International law is commonly defined as being first a body of rules which govern relations between states or with international organisations. It is secondly to be understood as a body of rules which are set up by states as bearers of rights and duties, and which regard individuals as subjects of their rules only in exceptional situation. Of cours Member States when creating the European Economic Community which was to be endowed with legislative, administrative and jurisdictional power and was to have ist own legal system, Member States counld have called for a „constitutional assembly" consisting of their people. Such a „constitutional assembly" would have had as its task the negotiation and drafting of a constitution to be adopted later by the national Parliamnets as well as by the people. In this case the „European Economic Community" would have been structured along the lines of a federal state. But, since a „European Nation" or „European Citizenry" did not exist, Member States did not have any choice other than to refer to an international treaty. As they were entitled to do under international law, they simply used the international treaty as the only existing legal instrument for their purpose, i. e. the creation of the European Economic Community as a first step to further integration of their peoples and their states. The Treaty of Rome does not restrict itself to setting in place classic rules of international law, it has set up an international organisation of ist own to serve as a framework for the integration of the economies, of the people and of ist Member States. The Treaty of Rome, understood by the European Court as the „constitution" of the European Economic Community, created an organisation which, in order to fulfil some quasi state functions, has been endowed with adequate legislative, administrative and jurisdictional powers the exercise of which allows for the development of a seperate special legal order with precedence over the legal systems of the Member States. Even those legal rules like the anti-trust law, which are embodied in the Treaty itself can not to be regarded as international law. These rules are to be regarded as the emanation of the first legislative activity of the newly created supernational legislative authority of the Community. They were not adopted by the the Member States under internationale law but issued by the legislative power of the Community quasi one second after this power had been created. If one did not take this standpoint one would have difficulties in explaining convincingly that national law is preceded not only by so-called secondary or derivative law but also by contractual law. If these rules were made only in accordance with international law they would not take precedence over national law.

[1] Judgement of the European Court of Justice of July 15th, 1964, ECR 584 at 593

After a period of doubts and uncertainty this view now seems to be shared by the guild of European Law scholars. The Treaty of Rome and all the following Treties, the accession Tretaties included, are all characterised by the fact that they permanently create new power to which Member States are subordinated, this is particularily true of the Treaty of Maastricht, which altered the European Econmomic Union to an Economic and Monetary Union, as well as the Treaty of Amsterdam, which politically completed the European Union.

Qualifying the Community´s legal system as differing from the classical international law does not mean that it does not contain elements of the international law system. But, the nature of Community Law as an autonomous legal system has as its consequence that methods of interpreting international law do not apply to European Law, at least not when its purports and special aims are jeopardized, i. e. as in the cases of further integration of the peoples and of the Member States, and above all, in the case of the proper functioning of its legal and constitutional system.

Secondly, it follows from the commonly accepted understanding by the Court of the nature of European Law that Community Law can be regarded neither as part of the legal systems of the Member States nor as a new „national law system“ of ts own. The legal orders of the Member Staates being classical „national“ law systems, emanate from the legislative, administrative and jurisdictional powers of the Member States. Member States are sovereign states and therby capable to any changing, altering and disposing of their law individually and autonomously. Although according to the wording of the Court´s judgement forming part of the Member States´ legal systems, Community Law cannot be autonomously altered by any individual Member State. It only can be changed by the Community´s legislator or, if it is part of the contractual Community Law, in the process of an International Governmental Conference.

Community Law cannot be qualified as a new „national law system“ itself, i. e. as a law system of the Community comparable to the law systems of the Member States. The European Union is not a federation or a federally structured state. Notwithstanding of its partial federal structure, the European Union, by its very nature, is an association or confederation of states. This evaluation of its character particulary applies to its „first pillar“, the former „European Economic Community“ which has been renamed to „European Community“ and altered to an „Economic and Monteray Union“ during the conference of

Maastricht. This „pillar“ of the European Union is much more federally structured than the two other „pillars“, i. e. the Common Foreign and Security Policy and the Police and Judicial Cooperation in Criminal Matters. The basically confederative structure results from the fact that the sovereignty which the European Union enjoys is derived, in terms of both of its origin and legitimation, not from a „European nation“ or from the „citizenry of the Union“ but from the Member States. The authority to exercise Communtiy sovereignty rests solely with the Member States. It is to them that the Member States are ultimately accountable for all decisions and acts that emanate from the Community.

The confederal structure of the Community and, respectively, of the European Union is further reflected in the fact that the power to legislate in the Community rests not with Parliament but with the Council, where the Member States are represented by members of their governments. The European Parliament`s part in the legislative and political decision-making process is confined to the right to be consulted and to take part in this process by means of the cooperation procedure since 1987, in defined areas of action, and by means of the the socalled co-decision procedure since 1993, as defined by the Treaty of Maatricht and expanded by the Treaty of Amsterdam.

Even the European Parliament reflects the the confederal structure of the Community as a mere conferation of staates. Unlike a naional Parliament, the European Parliament is not representative of a European „nation“, i. e. of the peoples of the European Union taken as a single electorate or of all citizens of the Union. In the terms of the legal definition contained in Article 189 (former 137) of the EC-Treaty, the European Parliament represents the peoples of states brought together in the Union. Members of European Parliament, although directly elected since 1979, are representatives of the people of each Member State, rather than of Union citizens as a whole, in other words of all nationals of the Member States, seen as a community with a common will and destiny. And although the seats in the Parlimant are apportioned so that the larger Member States have more Members of Parliament, the smaller Member States are overe-represented for the size of their electorates. An important basic democratic principle which is implemented in all Member States – i. e. equality in terms of the vote – is not guaranteed in the European Union. In some cases the votes of electors in the larger Member States count for considerably less than those of electors in the smaller Member States. Depending on where Union citizens choose to reside, they can increase the weight of their vote by two, three or even by eleven times. The way in which the members of the

Commission, of the European Court of Justice and of the direcorate of the European Central Bank are appointed also reflects the Community´s basic structure as that of an association of states. Last not least, by the Treaty of Maastricht monetary sovereignty has been transferred from the Member States not to an supranational structured European Central Bank but to an „European System of Central Banks“ which, as in the case of the European Union itself, is structured as a mere intergovernmental institution. All members of the organs of the European Union derive their legitimacy from the Memeber States notwithstanding their obligation to „safeguard the Community´s interest“.

By ist very nature, national law covers and governs all the activities of a society, i. e. a group of people living under the powers of a government within a defined area. European law on the one hand only covers certain activities of economic and political life. It applies in certain limited sectors of economic and political life according to the constitutional system of the Union which says that only specific rights and limited powers have been transferred and are transferable from Member States to the European Union. Furthermore the European Community does not have any territorial power which is essential for the national state and the working of its legal system. The Community´s legal order can only be enforced by use of the territorial power of the Member States. European law may develop towards a real supranational law system, comparable to national law as discussed in this context, if the European Union were to be restructured from a confederation of staates into a federal structured state.

Concluding one can argue that, as far as its relation to the law of the Member States is concerned, the law system of the European Union is not quite autonomous. It can neither be implemented nor enforced by a territorial power of its own acting outside the territorial powers of the Member States. European law has to rely on the territorial power Member States and can enforce itself only via the national legal and jurisdictional systems.

II) The Power to shape the European Law System

Community law consists of three components, namely of contractual law, of derivative law, i. e. rules which are set by the Council and European Parliament as legislator of the European Community and, thirdly of jurisdictional law.

One might assume that the conception and the basic rules of European law emanate from contractual law and from the activities of the Union´s legislator. But there is no other legal order to be seen on earth which is shaped by the jurisdiction of a supreme Copurt to such an extent as the European law is shaped by the jurisdiction of the European Court.

The main structural characteristics of the legal system of the European Community derive from the rulings of the Court. This applies to the precedence given to Community law over Member-State law, to the restrictions imposed by guarantees of fundamental freedoms on the sovereign law-making power ot the European Community, and particularly to the special quality of Community law bindung on Member States, directives included which, under certain specified conditions, have direct effect to the benefit of private individuals.

Of course the precedence of European Law over Member-State law cannot derive from the fact that the Community has a federal state structure with a superior state sovereingnty. The basic structure of the European Community is that of a communitiy of states. Where it speaks to the Member States on the basis of superiority as a law-maker or as holder of power of administration or jurisdiction, it may represent a para-state structure; moreover to the extent that its law-making and policy-making does not have to derive from the Member States, the Community may come close to being a union of states. But, in view of the lack of democratic control and legitimation the lawmaking power of the European Union necessarily represents a joint responsibility of the Member States.

Therefore, the precedence of the legal system of the European Union and especially the precedence of the rulings of the Court of Justice can only be justified by the function of Community law. Its function is to reflect the degree of integration, which must be protected from unilateral challenges by individual Member States. The appropriate means protecting the Community´s legal order from beeing individually jeopardized by a Member State is the precedence and the priority rule; if Community law did not have precedence over member-state law, every member-state legislator evoking the lex posterior rule could place the current status of integration in question by independently changing Community legislation.

The fact that the European Union does not have the qualitiy of a demoratically legitimised, federally structured state and that it lacks a federal constitution has as a logical consequence that the claims to precedence for Community law meet with acceptibility problems. In the Federal Republic of Germany, for example, the Federal Constitutional Court still refuses to recognise the claims to precedence of Community law to a certain extent. The highest German Court regards itself as competent to controle the legislation of the European Community as to ist conformity with the basic freedoms and fundamental rights guaranteed by Germany´s Basic Law and, secondly, accordinmg to the ruling of October 12th, 1993 concerning the Treaty of Maatsricht, as to ist conformity with the limits and scopes of the legislative powers transferred to the European Union.
The second basic element of the Community´s legal system, likewise due to the rulings by the European Court of Justice, is that the law.making of the Community is subject to the limitations imposed by guarantees of basic freedoms and fundamental rights. The Court bases its rulings on the common principles of the constitutions of the Member States and the Strasbourg Convention from 1952 for the Protection of Human Rights and Fundamental Freedoms.

According to current doctrine, the basic freedoms and fundamental rights, as embodied in the legal system of the European Union have a limiting effect only on the Community. The Member States are bound by the basic freedoms and by the fundamental rights of the Community´s legal order only insofar as they implement Community law and Community policy. In any case, unlike in a federally structured state, according to current doctrine on such rights, the Community´s basic rights cannot apply to the Member States where they are working within their remainig competences. For example, an expropriation of a factory by a Member State can be challenged on the basis of property rights contained in the context of the relevant national jurisdiction, but, if such an expropriation does not discriminate the owner as an EU-foreigner, not by reference to the basic rights of the Community before the Community courts, and particularily before the European Court of Justice. Even the partially and restricted binding force of the European Union´s basic rights on Member States seems not to be known and accepted generally. One can hope that the „Convent on the Charter on Basic Rights“ under the chairmanship of the former President of the Federal Republic of Germany, Professor Roman Herzog, which was convened by the Eurepean Council last year and which at present time is drafting this charter for adoption by the European Council´s meeting in Nice

this year clarifies the situation by explicitly including Member States as being bound to the European Union´s basic freedoms and fundamental rights when acting within the scope of Community law.

The third structural element of the Community´s legal system, the so-called direct effect to the benefit of private individuals of Community law binding on Member States, rests also – like the precedence of and the limitation to Community sovereignty deriving from the basic rights – exclusively on rulings of the Court of Justice.

Initially, the doctrine of direct effect to the benefit of private individuals was not fully accepted by all Member States, especially not by all of their courts.
The Court´s original formula was that an individual can defend himself before a national court against Member-State law if, by maintaining this national law, the Memeber State violates a sufficiently specific Community requirement that it refrain from action. The characteristic element of the direct effect is the imposition on the individual of a right to resort to Community law in the case when a Member State violates a specific and clear cut requirement under Community law to refrain from action. The claim of defence under Community law, emanating from the direct effect, however, can only be evoked by the individual before the national courts, and not in the first instance before the administration of the Member State.

When extending this ruling in 1970 to a decision aimed at the Member States, but particularily when extending it later to the directives, the Court immendiately laid itself open to the accusation that it was thus making the directive equal to the regulation, despite the differing legal definitions in Article 249 (former Article 189) of the EC-Treaty. This accusation was based on the realisation that by extending the ruling of the direct effect of reqirements to refrain from action to decisions and especially to directives, the Court was necessarily taking over functions of the national upper courts. As a consequence of this ruling, the entire national implementimng legislation to Community law, for example in the field of tax harmonisation, can now be placed before the European Court. It is no longer up to the highest national court but to the European Court of Justice, at last instance, to decide in taxation cases, labour cases and in other cases having a real or alledged Community law aspect. In order to appeal to the Court of Justice, it is necassary merely to claim that the national implementing legislation is not in line with the directive or decision and the petition against the application of national implementimng legislation can then be heard.

Irrespective of the still continuing lack of clarity about the limits of the direct effect and the constitutional implications described, the ruling of the Court on the direct effect to the benefit of private individuals has to be welcomed. It alone ensures that Community law adopted in two stages is implemented and applied uniformly within the Member States. The direct effect grants rights of defence and petition for the individual, wich are denied to him by the legal supervision procedure as stipulated in Article 226 ff (former Article 169 ff) of the EC-Treaty. According to this Article, the right to take a Member State to court is limited to the Commission and to other Member States when the matter relates to the application of Community law. Since Member States hardly ever take action against each other and since the Commission is not reqired to act in any case, i. e. the so called principle of legality embodied in national law is not part of Community law, the rights of petition granted to the individual by the rulings on the direct effect of Community law are highly welcome as a happy addition to the system of redress.

The question still remains open as to whether and to which extend the rulings on the direct effect of Community law can also be used by the Member States themselves against the Community and in particular against the individual. Above all, the said jurisdiction also poses problems with regard to the way in which it can be used by an individual against other individuals, that is to say whether it can draw new lines between the rights and interests of private individuals. If the jurisdiction of the Court were to be extended to the latter field it would have law setting functions and effects in the field of private law, i. e. within a field which Member States still regard as their proper domain.

Taking into consideration all aspects, one cannot argue that the the Court of Justice by its jurisdiction on direct effect diminishes the conceptional borders between „regulations“ and „directives“. By their definition within the Treaty „directives“ (contrary to „regulations“ which are directly binding) may only be binding on Member Staes and, in order to give effect to individuals, have to be implemented by the national legislator.

III) The Legal Systems of the Member States as Resources of Community Law

The Community´s legal system is by no means free of being influenced of the legal systems of the Member States. It evidenly uses the legal systems of the Member States without further

reflection in cases where there are identical rules and principles enbodied in the legal systems of the Member States. The European Court has done so when judging on basic feedoms and fundamental rights.

The European legislator follows the same way. It is, to a wide extent, still bound to the unanimity rule, and it even uses the method of comming to a consensus in cases where the maiority ruling is provided for. The unanimity rule and the above mentioned method assure that the legal interests of the Member States are mostly taken into consideration. But, the legislator does not exclusivly look at common legislation of the Member States. In cases where there is a demand for restriction in the production of goods or services by setting standards in order to protect the consumer of goods from danegers emanating from these goods, the European Parliament and the Council, as the Community´s combined legislator, do not hesitate to set aside common national law and to legislate in a way which conforms more closely and corresponds better to the needs of the larger Common Market of the European Community rather than the internal markets of the Member States. The legislator of the European Community especially has in mind the needs arising from the greater distances between suppliers of goods and services on the one side and their consumers on the other within the Common Marfket of the European Cmmunity. The standards of protection of laid down in Community legislation for consumers and workers seem to be generally higher than the national ones, especially the averaged standards of the national legislations.

Under the conditions of the Common Market of the European Union and especially under the conditions of Economic and Monetary Union many rules which are completely unknown to national law, have become part of the Community´s legal system. To mention some most important ones which one would not find in the Member States´ legal systems:

To mention the most important rules of European law which one does not find in the Member States´ legal systems:

The legal systems of the Member States, especially the law systems of federally structured Member States like Germany, do not provide sufficient mechanisms for controlling the susidising of their economy. On the level of the European Community Article 87 ff (former Article 92 ff) EC-Treaty provides for the right of the European Community to controle the subsidisation of their economy by the Member States. The supervising function of the

Commission on the activities of Member States in the field of subsidising regions for the purpose of their better economic developement or of sectors of industry for economic or any other necassary purposes is a necassary component of the Community´s legal system governing the Common Market. The Common Market form part of an Economic Union which is characterised by the constitutional situation that Member States are primarily responsible for economic policy. This being so, Member States cannot be completely prohibited from subsidising their economy for whatever reason. The supervisory function of the Community, although it does not have its source within the national legal systems, not only completes the Community´s legal order but, and at the same time, the competition law systems of its Member States. The controle of Member States subsidisation ot the economy as an institution of law makes evident that the delopement of European law in addidition to the national law systems as basic point of orientation follows legal and constitutional purposes of its own and does not hesitate to go ahead of the national legal systems in cases where the interests of the Community demand such emancipatory steps.

This kind of emancipation from national law is true to the legal prescription of the Treaty of Rome which indirectly stipulates that public enterprises in general shall be treated under the rules of the Common Market and under the competion law not differently from private enterprises (Article 86 , former Article 90 EC-Treaty). Any special and privileged treatment of public enterprises, very common within Member States, is restricted to specified reasens and has to be justified by the Member States, in the last instance before the Court of Justice. The Court decides according to the priority rule with precedens over any national decision.

A third very important innovation to national law has been introduced into the Community´s legal system and thereby implicitly into the Member States´ legal systems in the Treaty of Maastricht. The rule in question says that any direct and indirect financing of public budgets by means of loans of the central banks or by means having the same effect as direct loans from central banks are strictly prohibited. Up until the Conference of Maastricht, Member States´ legal and constitutional systems did not know a comparable explicit prohibition of the so-called monetarian financing of public bugets. This important new rule can be brought before the Court of Justice of the Community according to the normal procedures which are provided for cases that Member States do not comply with Community law rules. In this context the right to take action before the Court of Justice has to be kept in mind since, unfortunately, it does not exist to the same extent and in the same way in cases tin which other

rules of Economic and Monetary Union are not respected, especially not in the case of Member States´ not complying with another and likewise important rule, namely the obligation to ensure „convergence“ of their economic and budgetarian policy and to avoid budget deficits. The importance of the strict interdiction of direct and indirect monetarian financing of public budget lies in the fact that otherwise prices and the stability of the common currency are not sufficiently ensured. Maintaining stability of prices and avoiding inflation is not only an aim of economic policy but, above all, an aim of social policy. Inflation leads to a loss of income in certain groups in the society and a corresponding increase of the income in other groups in the society, especially in the income of the state. Monetary stability assures that this process of redistribution of income, with would result from inflation, does not take place.

The three examples cited demonstrate that the contractual as well as the derivative legislator of the Community not only feel exclusively bound to the societal and legal values of the politics and of the law systems of the Member States; they are also eager to give these values a special expression even to the extent of introducing them in a progressive way into the Communities´ and, thus, into the legal and constitutional sytems of the Member States.

But there is at least one other developement of Commnunity law which does not fit into this pattern. The Conference of Maastricht has created an Economic and Monetary Union which is characterised by constitutional weaknesses, unknown within the national law and constitutional systems. Economic and monetary policy are a unit in that within a federal state or within a confederation of states. Both can efficiently be conducted more effectively or can only be conducted at all if the resonsibilities concerned are not split off to different levels but rest on the same level. The Conference of Maastricht did create an Economic and Monetary Union which is characterised by the fact that whereas the monetary sovereignty has been transferred from Member States to the Community, the competences and responsibilities of the Member States for economic policy have not been equally touched. Transferring the competences and the responsibilty for the economic policy to the European Union, of course, would have meant that the European Union had to be altered from an association of states into a federally structured state. Since economic policy measures either consists in lowering taxes or in spending money, the European Union, in order to conduct a common economic policy, would need a „dominant budget“ i. e. powers to tax and corresponding powers to spend money. Up till now there has been no political will to restructure the European Union into a federally structured state. At the conference of Maastricht the price for failing to go further

towards politically unifying Europe was the splitting up of the competences in the field of monetary and economic policy in a way which could prove to be a step backward. Another constitutional weakness of the Monetary Union is that the issuing of bank notes is not centralised with the European Central Bank but also a right of the national central banks. Experts share the view that such rights of the national central banks to issue bank notes could jepardize the proper conduct of t monetary policy and, thus, the stability of European money.

The Court of Justice quite evidently has the same attitude towards the values of the legal and constitutional systems of the Member States as has the legislator. If there are common principles within the legal and constitutional systems of the Member States, the Court does not hesitate to use them as the basis and legitimation of its jurisdiction. But the Court traditionally feels that its jurisdiction has not only to contribute to the developement of the legal system of the Community but also, beyond this, to the developement of the integraton process as such. The European Court is commonly seen and called the „motor of integration“ or the substitute of the Community´s legislator. A well known example for the Courts attitude of using its juridiction for stabilising and developing the Community´s legal order is the so-called principle of „effet util“. This principle means that the rules of Community law, notwithstanding their wording and even notwithstanding the evident intention of the legislator, have to be intepreted in a way that their effective functioning within the Member States is ensured. Among other parts of ist jurisdiction the previously cited court ruling which says that rights to the benefit of individuals can result from state obligations and directives is based on the theory of „effet util“. Another well known and even more controversial jurisdiction based on the „effet util“-theory is the Court´s ruling on the financial liability of Member States to the benefit of individuals in the case of Member States who do not comply with Community law.

Basic decisions of the Court are mostly taken within preliminary ruling procedures under Article 234 (former Article 177) EC-Treaty. In these procedures all Member States´ governments have the unconditional right to intervene by written statements and within the oral proceedings by pleading. This right, wich is granted to the Commission and, under certain conditions to the Council and to European Parliament, too, offers Member States the opportunity of taking part in the law making process which results from the Court´s jurisdiction in the preliminary ruling procedures. The status of Member States in preliminary procedures is, of cours, not comparable to their status in the law making process within the

Council as the main legislator of the European Community. In the law making process every Member State even has the power of veto in cases which are decided by unanimity. But one should not underestimate the possibilities of influencing the rulings of the Court which result from the rights of the Member States to present themselves in preliminary procedures. Unfortunately the governments of the Member States do not use these rights gegnerally, i. e. in all preliminary ruling procedures, they also do not make use of their rights in that they coordinate their opinions for being present before the Court with common views. It would be difficult for the Court to rule in a way which does not take care of Member States´ common legal interests if governments were generally to be present before the Court and, especially, if they were to present coordinated opinions. Traditionally Member States´ governments mostly make use of their rights only in cases in which the validity and lawfulness under Community law of a national rule or an administrative act is at stake. The lack of a thoroughgoing „intervention“ pratice of every Member State and especially the lack of a combined „intervention policy“ of the Member States has considerably strengthened the Commission´s ability and power to take influenceon the Court´s jurisdiction. Contrary to the policy of the Member States the Commssion is permanently present in all preliminary ruling procedures with both written statements of opinion and with pleadings in the oral proceedings.

IV) Function and Values of European Law

It follows from what has been said that, due to the way it comes into existence, the law of the European Community, or respectively of the European Union generally reflects the common values of the legal systems of the Member States and their societal policy. But, the legal system of the European Union only reflects common legal values and common rules of the legal orders of the Member States as far and as long as its function is not required to deviate from them and to rule in a appropriate way.

The first special function of the Community´s law system consists in ensuring the Common Market of the European Community. As far as this aspect of Community law is concerned, which still is the core of the Community´s legal system, the two most important values which the Communty´s legal and constitutional system share with the Member States´ legal systems are the rule of law and the competition-based market economy system.

The rule of law is reflected in that on the one hand, according to the principle of limited authorisation, the competences of the European Union are more or less clearly divided from the remaining competences of the Member States while, on the other, the powers of the European Union themselves are divided in such a way that the legislative power which is more or less combined with the administrative power is attributed to the Council, and to the European Parliament respectively, and the jurisdictional power is attributed to an independent Court of Justice.

The Court of Justice is endowed with the power of judicial review so that it can overturn legislative and administrative acts of the Community at any time. The rule of law is furthermore upheld in that the European law grants fundamental rights and freedoms to individuals which, to a great extend, limit not only the the Community´s use of their legislative and administrative powers but also the use by Member States of their power in cases where they administer Community law. The Court of Justice controls the activities of the other organs of the Communty, the European Parliament included; the Court twice ruled that European Parliament had not complied with Community Law when it adopted the Community´s yearly budget and declared the adoption of the budget for null and void. In controlling the lawfulness and validity of Community law the Court has a monopoly. The courts of the Member states are not entitled to judge on the validity or lawfulness of Community law. If te courts of the Member States have doubts whether a legislative or administrative act of the Community is compatible with heigher ranking Community law they have to refer the question to the European Court by means of a preliminary ruling procedure. Above all, the Court of Justice controls the adherence of the Member States to Community law, but as far as the controlling of national law is concerned, with respect of its compatibility to Community law, the Court shares its function with the national courts.

All national Courts function as Community Courts in cases where they apply Community law. National Courts are entitled and authorised by Community law to judge on the basis of the priority rule and to set aside national law in the case of conflict with Community law. The principle of „effet util“ requires that they can set aside national law clearly conflicting with Community law autonomously; thex are neither obliged to present the case to the European Court by means of a preliminary procedure nor do they have to present the case to the highes national Court if national law should require this.

The judicial review of legislative and administrative acts of other organs, as it is exercised by the European Court, does not exist in all Member States. It exists, for example, in Germany, in Italy, in Spain, in Portugal and in Greece but does not exist, at least not to the same extent, in France and not at all in the United Kingdom.

The judicial review of the Commnuity´s legal system is one of the obvious examples that Community law „overshoots“ the national law systems for the purpose of ensuring ist functions.

Yet, the judicial system of the Commnuity seems to have a grave shortcoming. The basic freedoms and the fandumental rights which are granted to the individuals are only indirectly protected. Until now, a general right to appeal to the Court of Justice has not existed. If individuals feel that their basic freedoms or their fundamental rights are infringed they have to appeal to national courts. A direct appeal to the European Court is admissible only in certain exceptional cases, namely if individuals are touched by a legislative or administrative act of the European Union directly and „personally“ in a way that others are not siminarly touched. If individuals feel that their basic freedoms or fundamental rights are infringed by national acts implementing Community law they cannot appeal to the Court at all. This being so, the protection of basic rights and fundamental freeoms can only be guaranteed by the European Court by means of preliminary ruling procedures. Thusy, it is left to the national legislation whether individuals can force national courts to introduce preliminary ruling procedures or else the transferral of their cases to the European Court is left to the decretion of the national court. This unsufficient protection of the basic freedoms and fundamental rights results from the fact that the European Union is still a confederation of states which by its structure basically does not directly encompass its functions. The 1952 European Convention on Human Rights and Fundamental Freedoms ratified by the Council of Europe provides for a direct appeal to the Commision and the Court for Human rights under the Strasbourg convention, even if only under the condition that national possibilities for appeal have been exhausted. This provision can be a model for a strengthening of the jurisdictional system of the Community. Such an improvement would be in conformity with the value which the Community´s law system attaches to the basic rights and fundamental freedoms.

The system of market economy is legally embodied within the Community´s legal system as well as in the legal systems of the Member States since the European Economic Community

came into existence in 1958, but explicitly since the Treaty of Maastricht ((Articles 4 (ex 3 a), 98 (102 a) EC-Treaty)). It means that, on the basis on the fundamental rights and basic freedoms such as protection of private property, freedom of movement, freedom to choose professional activities, every body can freely produce and demand goods and services. Competion has the function to transfer individual interest in common interest and has to be guaranteed by the Community and by the Member States. Freedom of production and freedom of consumption are limited only by regulations the aim of which are to protect and ensure non-economic purporses, such as the protection of consumers or employers from dangers emanating from goods. Examples are regulations on pharmaceuticals or foodstaffs or dangerous technical goods. A stability-orientated monetary policy also forms part of the market economic system and therefore is guaranteed by the institutions which have been set up in Maastricht.

The market economy system as guaranteed by Community law is more stringent than the national systems. It comprises banking and insurance activities as well as air traffic and the transport sector and furthermore to a wide extent the provision of so-called public goods such as water and electricity. All these sectors which are covered by the Community´s competition law system are more or less priveleged under nartional competition law. The competition-based market economy system as institutionalised by the Community is an outstanding value the European law.

Social policy is not a competence and responsibility of the European Union but still left to the Member States. Therefore Community law can not be blamed because it does not provide for an additional system of distribution of income via public budgets. The Community´s policy of economic and social coherance functions as a system of transferring fiancial resources from the more wealthy to the less wealthy Member States but does not release Member States of their responsibilty for an adeiquate social policy.

V) Final remarks

The legal system of the European Community is an autonomous and at the same time a legal order which strongly depends on the national legal systems. It has developeds on the basis of the national legal orders and at their expense. The European legal system has the function of replacing the national legal system in so far as the substitution is required by the tasks of the European Union. At present one can recognise that there are sectors like agricultural law,

rules on public procurement or foreign trade law which are substituted by Community law to a greater degree and to a larger extent than others have. The decisive point is that the developement of European law is a purely pragmatic process; behind or underlying this process there is no philosophy or conception to be seen.

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