Comment on Timo Tohidipur

By Sylwia Majkowska[*]

> *"But he has nothing at all on!" at last cried out all the people. The Emperor was vexed, for he knew that the people were right; but he thought the procession must go on now! And the lords of the bedchamber took greater pains than ever, to appear to be holding up a train, although, in reality, there was no train to hold."*[**]

A. Does the Emperor have New Clothes?

The ECB presentation provides a good opportunity to develop some reflections on the unity of the European Constitutional Treaty. In a helpful introduction to the article, its author affirms that taking a look at the ECB of today means rethinking the emperor's idea to a certain extent. In fact the ECB is so independent that it seems untouchable.[1] The author provides a very useful survey of *de lega* lata, pursuant to which, the institutional standing of the ECB becomes very clear. The most important change is that the Constitutional Treaty includes the ECB among the institutions of the European Union. At the same time we may not forget that the ECB is already considered a Community institution under the ECJ case law. Consequently, the example of ECB justifies a statement that the constitutional legal order of the EU was re-examined and worked out in the Constitutional Treaty.[2] The reference to the fairy tale "The Emperor's New Clothes" may serve as a good source of reflections not only on the ECB, but also on the European Union and its Constitution in general.

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[**] *See* HANS CHRISTIAN ANDERSEN, THE COMPLETE FAIRY TALES AND STORIES 77 (1983).

[1] *See* Paul Magnette, *Towards "Accountable Independence"? Parliamentary Controls of the European Central Bank and the Rise of a New Democratic Model*, 6 EUROPEAN LAW JOURNAL 326, 327 (2000).

[2] *See* JOSEPH H. H. WEILER, THE CONSTITUTION FOR EUROPE, "DO THE NEW CLOTHES HAVE AN EMPEROR?" AND OTHER ESSAYS ON EUROPEAN INTEGRATION 8-9 (1999).

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B. Is the Emperor Wearing Anything at All?

I. Autonomisation of European Integration Law

In order to analyze the constitutional legal order of the EU, it is necessary to define the concept of European law. The Constitutional Treaty declares the transformation of the two European Communities into a unitary governing structure that is the European Union. Is it already justified to consider law of European integration an autonomous legal order? At present, there are mainly two approaches to defining the law of European Communities. One of them is represented by those authors who consider EC law an autonomous legal order that differs both from international law and from legal orders of Member States although exhibiting some of the characteristics found in both legal orders in question. The other approach is represented by so called internationalist lawyers who are of the opinion that the community law should be classified as international law or simply as its part.

On one hand, following the doctrine of the peculiarity of the community law, the European Community has its own institutional apparatus based on the principle of the institutional balance. Decision rules applied within the Community assume that decisions are made by a majority of votes, and not solely by unanimity. The Community also has its own system of legal sources and a specific hierarchy of norms. Legality control is available not only for Member States and Community institutions but also for individuals. Specific methods are used for the interpretation of the founding treaties. On the other hand, one can mention two options describing the legal nature of the European Community. The first one applies to "supranationality" of the EC law. The second applies to the identification of the EC law as the "law of integration."[3]

However, according to the "trivial understanding thesis," European Communities "remain" within other international organizations. The reason for this is the conventional form of the founding treaties of European Communities as well as international requirements associated with their change. It is worth mentioning that international institutions occupy the central place in the institutional European Communities system. Moreover, the procedure of the amendment of the founding treaties results in requirements of international kind.[4] The significance of the principle of competence division between the Community and Member States, together with the subsidiarity principle, proves the international character of the

[3] *See* ZDZISŁAW BRODECKI, PRAWO INTEGRACJI Z EUROPEJSKIEJ PERSPEKTYWY 9 (2005).

[4] Denys Simon, *Les fondements de l'autonomie du droit communautaire*, *in* Science Conference General Report: International and Community Law Present Perspectives, 5-6 (1999).

European Community law. In the internationalists' opinion, the decentralized application of law is very characteristic of international law. Finally, they emphasize the use (particularly by the ECJ) of the interpretative methods outlined by Arts. 31 and 32 of the Vienna Convention while interpreting the law of the treaties. In the opinion of some of the internationalists, mechanisms perceived as describing peculiarity of the EC law-- for instance limitation of reciprocity principle, direct effect, or primacy, were the foundations of the present international law.

This is not about the reconciliation between the two above mentioned theses in the spirit of ecumenism. This is about the real understanding – even more - real comprehension of the change which took place between the "rise" of Treaties of Rome and the present condition of the European integration. The time is "the master" of the new look at the legal landscape which came into being from the founding treaties.[5] This means that the real progress of the European integration law is undisputed. The development of the three Communities into a unitary governing structure and the evolution of its law into a unitary legal order should be reflected in a uniform act such as the European Constitutional Treaty.[6]

Trends of this real progress lead us to the settlement of its autonomy. It is possible only by proving the existence of "the law of the internal composition in one piece" in which different law elements are connected according to their own logic.[7] Founding treaties are the proper law (*droit propre*) of the European Community. This "builds" the statement that the EC law system is so distinct from other systems of laws.

We can define this system "the integrity in which elements are not connected with each other accidentally but they form a special "order" in the way they are connected with each other using particular connectors. It is important to understand that we must not take into account only one element and analyze it, while at the same time not taking into consideration its environment.[8] According to "Kelsen logic" unity and autonomy of the legal order results from the fact that all of the legal rules which form particular system may be "referred" ("*zurückgeführt*") to

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[5] *Id*. at 7.

[6] *See* Armin von Bogdandy, *A Bird's Eye View on the Science of European Law: Structures, Debates and Development*, 6 EUROPEAN LAW JOURNAL 208, 230 (2000).

[7] Simon, *supra* note 4, at 9.

[8] Jean Combacau, *Le droit international, bric-à-bras au système?*, 31 ARCHIVES DE PHILOSOPHIE DU DROIT 85, 86 (1986).

the basic norm. This basic norm makes it legally valid and very compact.[9] It is obvious that the recognition of the existence of some fundamental norm does not imply that the given system is not in relation with other legal systems.[10]

Taking into account all that is mentioned above, whatever the extent of the autonomy of the community legal order is going to be, the legal order itself will never be "waterproof in its international environment". This is a very significant conclusion as taking over or borrowing of some principles or techniques from the international law is sometimes perceived as the actual lack of autonomy of the community law. For this reason, the theory of the autonomy leads to accepting the "hermetic nature" of the community legal system in relation to ideas derived from the international law. Additionally, the autonomy of the community law is not an indication of the system being neither self-sufficient nor authentic.[11]

One should ask the question: why should the community law be treated in a specific manner so different from the one guaranteed for the international law in the internal constitutional rules? The Constitutional Treaty declares that powers are conferred by Member States and the EU will exercise those powers in the communitarian way. Theoretical proofs of the autonomy of the community law are to be searched for in the "communitarists" doctrine, as shown above, but also, and first of all, in the judgments of the ECJ.[12]

Neither the Treaty of Paris nor the Treaties of Rome include such terms as "a new legal order" or anything similar. They are not included in the Maastricht Treaty, the Amsterdam Treaty or the Nice Treaty either. However, the theory of the European Community as "the new specific legal order" has been confirmed in the case law of the ECJ. The analysis of the ECJ's position on community law autonomy leads to a conclusion of "an autonomy gaining process" of the European construction. In 1963 the ECJ held in 26/62 Van Gend & Loos v. Nederlandese Administratie der Belastingen[13] that the European Community constitutes a new specific legal order of international law (or: a new specific international-legal order), for the benefit of which Member States limited a part of their sovereign rights, and the subjects of

[9] Hans Kelsen, *Les rapports de système entre le droit interne et le droit international public*, IV RECUEIL DES COURS DE L'ACADÉMIE DE DROIT INTERNATIONAL 227, 264 (1926).

[10] Simon, *supra* note 4, at 8-10.

[11] *Id*. at 10-11.

[12] *Id*. at 12.

[13] CASE 26/62, N. V. Algemene Transport – en Expeditie Onderneming Van Gend & Loos v. Nederlandese Administratie der Belastungen, 1963 E.C.R. 1.

which comprise not only Member States and community institutions but also their nationals. While following strictly Kelsen's doctrine of law and his classical definition of legal order, it should be concluded that community law either constitutes the new legal order or is integrated with the international legal order. Therefore, from the theoretical point of view the solution adopted by the ECJ in 26/62 Van Gend & Loos v. Nederlandese Administratie der Belastingen seems inadmissible. Perhaps the above ruling resulted from the compromise worked out at any secret session. On the other hand, perhaps it illustrates the jurisdiction strategy aiming at the gradual extension of community law.[14] From the perspective of the year 2005, the answer to the second question seems to be obvious. In the course of time, the ECJ has omitted the word before the last one in the following term: "the new specific order of international law". The necessity to confirm the specific nature of community law by the ECJ arose together with the application of community law directly to individuals since the jurisdiction of the ECJ covers the whole community law, including the legal provisions having direct effect on legal situation of individuals. In other words, confirmation of the specific nature of community law was on the one hand necessary to enable a community judge *sensu stricto* to decide on European subjects under its jurisdiction, including citizens of Member States. On the other hand though, it was necessary to enable individuals to invoke community law before a domestic judge.

The next stage of the development of European integration law, considered as breaking the link, previously connecting community law and international law, completely,[15] was the ECJ's ruling in the 6/64 Flaminio Costa v/ E.N.E.L.[16] case where the Court held clearly and unequivocally: "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."[17] In this way the ECJ validated the birth of an autonomous legal order. Since that time the „magical" formula has created a real myth concerning the European construction. It is certain that proclamation of the specific nature of community law is one thing and proving and justifying it is another one. Together with the increasing role of community law in individuals' lives, the ECJ found more and more extensive justification for the

[14] Simon, *supra* note 4, at 13-14.

[15] *Id*. at 15.

[16] Case 6/64, Flaminio Costa v. E.N.E.L., 1964 E.C.R. 1141.

[17] Case 6/64, *Flaminio Costa v. E.N.E.L.*, 1964 E.C.R. 1141, *in* PRAWO WSPÓLNOT EUROPEJSKICH – ORZECZNICTWO, 119 (WŁADYSŁAW CZAPLIŃSKI, RUDOLF OSTRICHANSKY, PRZEMYSŁAW SAGANEK, ANNA WYROZUMSKA EDS., 2001).

specific nature of European integration law and confirmed it in its case law as having an impact on development of the new legal order in question.

One of the ways of proving the autonomy of community law is the indication of the process of the common market progress towards the single market or the process of the completion of the monetary union. The achievement of the above objectives was possible due to introduction of common regulations.

The uniformity of law applied in the community economic zone has become the necessity. Otherwise, the lack of common rules applied in a uniform way would expose the single market to unfair competition, breach of trade, or lack of location of economic or financial activities. That would undoubtedly cause reconstruction of market barriers and consequently "disintegration" of the Communities. Therefore, even the economic dimension of the European construction itself requires the preferential position of community law in the internal legal order. Moreover, the specific nature of community law is manifested by the requirement of equality and solidarity of the Member States. These features impose an obligation of the direct, uniform, integrated and effective application of the European integration law over the whole territory of the European Union under threat of being "excavated" down to the foundations of the community legal order.[18] What is meant here is certainly the principle of the Member States' liability for failure to fulfill obligations under the treaty, established under the case law of the ECJ.

II. Constitutionalisation of European Integration Law

One of the ways of manifesting the specific nature of community law is the analysis of the "constitutionalisation process". This process covers the gradual recognition of the constitutional dimension of the European construction. In 1972 the ECJ held in the case 48/71 Commission v. Italy[19], that the transfer of rights and powers, reflecting the provisions of the treaty to the Community results in definite limitation of sovereign rights of the Member States. It is not possible to invoke any provisions whatsoever of national law to override this limitation. The ECJ went even further in 294/83 Parti Écologiste "Les Verts" v. Parliament.[20] The European construction may be described to a substantial extent with the application of vocabulary characteristic for constitutional law. It is confirmed by attempts to distinguish constitutional authorities (the principle of institutional balance).[21]

[18] Simon, *supra* note 4, at 16-22.

[19] Case 48/71, Comission v. Italy, 1972 E.C.R. 529.

[20] Case 294/83, Parti Écologiste „Les Verts" v. European Parliament, 1986 E.C.R. 1339.

[21] Simon, *supra* note 4, at 23.

Today, in light of the ratification process of the Constitutional Treaty, the constitutional nature of the founding treaties gives rise to no more doubts. The development of community law has led the European construction to the stage at which arranging the treaties of the Community and the European Union in order seems to be desired or even necessary. Community law is continuously adapted to the changing social and economic conditions of the united Europe.[22] As the above examples proved it happened to a large extent due to the case law of the ECJ.

With reference to the above, one recalls the words of President W. Hallstein, who indicated that, by creating the Community, the Member States have subjected themselves to the new legal system in question.[23] It could also be added that by confirming the absolute supremacy of community law, the ECJ imposed on Member States nothing more than what they had accepted themselves in advance. In this way we reach the conclusion that the legal order in question is necessary to achieve the equally necessary unification of community law.[24] The ECJ's rulings in the 26/62 Van Gend & Loos v. Nederlandese Administratie der Belastingen [25] and 6/64 Flaminio Costa v. E.N.E.L.[26] cases undoubtedly provide the manifestation of law making, although that is a consequence of prior arrangements among the Member States creating the European Community.

The community legal order, as any autonomous legal order, has an effective system of court protection in case of infringement of the European integration law or its application. The ECJ as the jurisdictional authority of the European Community makes a foundation of the above mentioned court protection. The role of the ECJ's judges is to ensure that the European integration law maintains its community nature and that it is uniform under all circumstances and towards all of its subjects. In order to achieve this, the ECJ has been granted powers of trying cases the parties to which may be individuals, Member States and the EC institutions.

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[22] *See* Koen Lenaerts, Marlies Desomer, *Bricks for a Constitutional Treaty of the European Union: Values, Objectives and Means*, 27 EUROPEAN LAW REVIEW 377-407 (2002).

[23] Walter Hallstein, President of the European Movement, Speech before the European Pariliament on the report of F. Dehousse: The European Parliament, July 18, 1965.

[24] Simon, *supra* note 4, at 16.

[25] Case 26/62, N. V. Algemene Transport – en Expeditie Onderneming Van Gend & Loos v. Nederlandese Administratie der Belastingen, 1963 E.C.R. 1.

[26] Case 6/64, Flaminio Costa v. E.N.E.L., 1964 E.C.R. 1141.

C. Where are the Emperor's Clothes?

The ECB has been considered a Community institution just under the ECJ case law, although the EC Treaty has not provided it with such a rank. The Constitutional Treaty, by including the ECB among the institutions of the Union, takes into consideration only the stage of the European Integration development. Although it is considerably important from the formal point of view, from the substantial point of view, the Constitutional Treaty introduces no changes with reference to the role of the ECB as the element of the institutional balance in the EU. In conclusion, even if, thanks to some European nations who rejected the Constitutional Treaty in a referendum, the Constitutional Treaty does not enter into force, "the procession" will go on. It would be only a pity that the European Union would not have "new clothes" that are already certainly sewn and that the European Union desires so much.