Comment on Philipp Dann – Some Remarks on the Methodology of the "Constitutional Law" of the European Union

By Artur Kozłowski[*]

First of all, I would like to make it clear that the following observations on the methodology characteristic of European Union (EU) law are made from the viewpoint of the international law doctrine.

While searching for a methodological framework for the EU legal phenomenon, we should first define in this context the meaning of the EU legal substance itself. This is a necessary assumption, which in my opinion determines the question of definition of an appropriate methodology. Proper definition of the EU legal substance is a prerequisite to the selection of an appropriate methodology. This relationship is necessary because the primary aim of each methodology is to describe and perceive a given legal system so that all individual decisions taken within it meet certain recognised values. The final result of such an attitude should be the establishment of a law-abiding, coherent, and transparent system, which is open to further development, internally ordered, free of paradoxes, respecting the specific and inherent theory of the origins of rights and obligations.

In light of the above observations, we should now concentrate on the validating aspect of the creation of a "new" methodology of the EU legal system.

As regards the legal substance of the entity itself, we can choose from several typical solutions. According to the first one, the European Union is an example of an international organisation.[1] Granted, it has an extensive axiology and scope of action, but it is still a recognised form of cooperation among states, as defined by

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[1] DELANO R. VERVEY, THE EUROPEAN COMMUNITY, THE EUROPEAN UNION AND THE INTERNATIONAL LAW OF TREATIES. A COMPARATIVE LEGAL ANALYSIS OF THE COMMUNITY AND UNION'S EXTERNAL TREATY-MAKING PRACTICE 4-7 (2004).

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international law.[2] Further inference leads to the conclusion that the EU intends to become a separate state, either in the form of a federation, a confederation, or a completely new concept of state existence, yet in any case characterised by a primary scope of subjectivity.[3] Further reasoning may lead to the acceptance of cooperation of the member states in a form *sui generis*, undistinguishable against the background of the existing ideas, concepts and notions.[4] A choice made from the available options entails an applicable methodology. If we agree on the dominant role of the validating criterion, then, by adopting a certain simplification necessary to sharpen our vision, we will basically bring the field of choice down to a search for methodological description of the legal system connected with the functioning of either a primary or derivative entity of international law.

Such a research outlook will allow us to draw several more general conclusions. If the European Union accomplishes its objectives in the form of an international organisation, then the methodology of its "constitutional" law must in its essence remain within the domain of international law. In recognition of the noticeable specificity of the EU legal system, its descriptions use the concept of self-contained regime or the concept of autonomy of EU law.[5] In each of the above cases, the boundaries of international law have not been exceeded. Consequently, terminological or conceptual reshufflings cannot by themselves change the basic perception of the problem of choice, or possible change, of the methodology. Thus, the term "constitutional law" can apply equally to the founding treaties of, e.g. the United Nations Organisation, the International Labour Organisation, the World Trade Organization, or any other international governmental organisation, if that is the will of their member states or the treaty matter exhibits receptivity to "constitutionalisation" understood as the process of ordering, hierarchization, and differentiation of general principles of a given system.

On the other hand, if the EU has already become a state entity or will soon acquire the requisite characteristics, then the methodology of its legal order should in its

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[2] JAN KLABBERS, AN INTRODUCTION TO INTERNATIONAL INSTITUTIONAL LAW 14 (2002).

[3] This view is usually negated in the doctrine but is ideologically popular. *See* THOMAS OPPERMANN, EUROPARECHT 336-342 (1999); A. ŁAZOWSKI & R. OSTRIHANSKY, PRAWO INSTYTUCJONALNE UNII EUROPEJSKIEJ 34 (2004); Jan Barcz, *Charakter prawny i struktura Unii Europejskiej- Pojęcie prawa Unii*, *in* PRAWO UNII EUROPEJSKIEJ- ZAGADNIENIA SYSTEMOWE 51, 70-72 (Jan Barcz ed., 2003).

[4] That means a form of cooperation independent from distinction into primary and secondary systems or present in the form of a derivative legal order.

[5] *See* Report of the Study Group on Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, ILC, 56th Session, A/CN.4/L.663/Rev. 1, item 23.

essence be reduced to the level of domestic law of the new entity without becoming entangled in unnecessary methodological elaborations.

The comparison of the above two basic models of describing the EU legal substance allows us to see the differences between the primary and derivative legal systems. Whereas the former is defined by its own validation rules, the latter, in situations critical to its existence and development, relies on the support of external sources. This determinant is a necessary component of the methodology of EU "constitutional law." Even the increasing autonomy of EU law cannot change the above limitation, which affects the areas of "autonomisation" of interpretation, contextualisation, or systematisation of EU law. The primary legal system is the system which can be associated with the feature of sovereignty depending on the criterion of effectiveness. In this case we are dealing with the extent of actual authority, its "quality" and appropriate demonstrations on the part of the EU member states (the objective element), and their expressed conviction that the EU does not possess the requisite quality (the subjective element). A derivative system, even an autonomous one, does not possess the above features. The methodology which relies on the characteristics of a primary entity while excluding the above criterion, even if it prima facie gives the impression of a logical construction, does not describe reality but is to some degree a wishful projection. For that reason, from the *de lege lata* point of view the combining of characteristics of sovereignty with a derivative legal system, such as the EU system, and its methodology should be perceived as a mistake. This is because such a model becomes illusionary in the case of an actual dispute between the member States and the organisation.[6] The criterion of effectiveness, constantly present on the part of the EU member states, reduces all artificial methodological constructions. The validating rule of the EU legal system still belongs to the domain of international law because a derivative system (here the EU legal order in its entirety) has not until now developed its independent source of norms. In fact, all normative actions within the EU legal system must be approved by the member states. This support can be explicit or implied and so far has been an indispensable element of the EU perception. The presented relationship extends to both primary and derivative EU law. It may appear unbelievable, but from the perspective of the already defined mechanisms

[6] This concerns the kind of dispute which the parties (member states and the organisation) cannot resolve in the spirit of compromise invoking the idea of "Community". Regarding this concept, *see* Neil MacCormick, *Democracy, Subsidiarity, and Citizenship in the "European Commonwealth," in* CONSTRUCTING LEGAL SYSTEMS: "EUROPEAN UNION" in LEGAL THEORY 332, 339 (Neil MacCormick ed., 1997) and Stanisław Kaźmierczyk, *Założenia o refleksjach nad teorią prawa europejskiego*, *in* TEORIA PRAWA EUROPEJSKIEGO 19, 28-30 (Jacek Kaczor ed., 2005).

of international law operation even those methodological attempts at reconstruction of the EU legal body that emerge from judgments and interpretations of the European Court of Justice are subject to the above dependency and become a description of reality only on condition of their express and implied support with the will of the member states having their own decisive criterion of effectiveness. Consequently, legal interpretation of the EU does not acquire the aftertaste of constitutional interpretation in the meaning that could be assigned to that process within the original legal system.

At the present state of development of cooperation between the member states, separation of the EU from the international law methodology would require argumentation at a level of seriousness comparable to Copernicus' proof, but going in the opposite direction. Such reasoning could only be effective if the EU founding treaties were stripped of their international law character and life were breathed into the mythical EU constitutional charter. This is impossible to realise considering the present distribution of effectiveness between the member states and the EU.

In light of the above, we should not currently place the notion of sovereignty or the criterion of effectiveness outside the scope of reflections on EU "constitutional law."[7] It should be emphasised that this feature on the part of the member states defines the whole methodological construction of the EU legal system. On the other hand, hasty attribution of that determinant directly to the EU can only be classified as an element of contextualisation of EU development. At present those attempts should not lead to clear-cut conclusions. Basically, their roles can be reduced to *de lege ferenda* deliberations. If we reject both of the above search areas for an appropriate methodology on the level of primary or derivative international law, then we must conclude that the EU legal system and its methodology evolve towards a completely new, internally specified normative order. Consequently, this third solution places EU law in the methodological category *sui generis*, where the notional instruments of both international law and internal law of the intended state entity are not enough to pinpoint the ordering principle of a given system. However, this attitude to the problem of the method calls for a certain degree of caution as on the one hand it can be interpreted as an example of a peculiar helplessness in grasping the full image of the researched problem, while on the other, due to the dynamic character of the EU, it is subject to the risk of temporariness.

Collective consideration of the above assumptions takes us to the conclusion that a fourth methodological solution of the EU legal essence is unlikely. *Quartum non datur*.

[7] *See* MacCormick, *supra* note 6, at 338-339.

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