

F.A.Yerzhanova

*Ye.A.Buketov Karaganda State University
(E-mail: erzhanova_farida@mail.ru)*

The concept and features of the European law

On the basis of analysis of scientific literature, constituent documents of the European Union, as well as the decisions of the European Court of Justice an attempt is made to identify the main features of European law. This article is intended to consider the termination problems of «the European law», to discuss relationship with the concepts of «the law of the European Communities», «Law of the European Union», to analyze the characteristic peculiarities of the European Union law, to discover the fundamental principles of European law, which determine its specific legal nature.

Key words: European Union, European law, European Union law, principles of European law.

An entirely new legal phenomenon — the European law has formed in the modern world. European Community law arose in the second half of the XX century, and can be defined as both as the product, and the tool of integration that took place in Europe. Today the European Union consists of 28 member states. EU experience shows that economic and political integration is an natural and logical phenomenon. Similar integration processes are developing in other regions.

European law, the formation of which began with the creation of the European Communities, is one of the most dynamic and fastest growing legal systems [1; 99]. Since that time, this legal system has established itself as universally recognized, and plays a fundamental role in the regulation of social and public life of a large part of the European continent.

European law has a lot of characteristics and features on account of the structure of the European Union legal system, peculiarities of the European Union institutional structure, hierarchy and principles of the European law, the subject and method of legal regulation of a various public relations fields and others. Let us evaluate some of them.

Today such terms as «European law» [1; 19], «Law of the European Communities» and «Law of the European Community» [2; 20] are firmly included into scientific circulation.

In the literature, there are different approaches to the define the European law, some of them are significantly different.

Prof. B.N.Topornin examines the concept of «European law» in the broad and narrow senses. Thus, under European law in the broad sense B.N.Topornin understands the legal regulation of relations in Europe, covering the organization and activities of virtually all European international organizations, the whole set of economic, social, political, scientific and cultural relations. In the narrow sense European law is the law of the European Communities, supplemented to a certain extent by legal regulation of the entire European Union [1; 19].

By some authors European law is defined as a set of European countries' national legal systems. In this case, the «European law» refers to the family of European legal systems. In this context, it is relevant to state that «Europe — a special world, a special family of mankind» [3; 8].

In legal literature, European law is regarded as the law of the European Community and the national law of the Member States. In this approach, the emphasis is made on the close cooperation of the law created within the EU and Member States' national legal systems, which allows to separate the last from the national legal systems of other European countries because of the special legal order set by the EU member states.

European Communities, embodying a new and original legal order, base their functionality on the existence of a special and independent (autonomous) system of law. However, the system itself is created and functions not in a legal vacuum. It is most closely and directly interconnected with the national legal systems of the Member States [4; 53]. «There has been an «interweaving» of two strata of legal regulation in separate areas of the European and national law. Alignment and similarity in interests of the Member States facilitates harmonization and convergence of their laws. In areas recognized as common, legal norms created by the EU institutions lead to eradication of the legal differences and introduction of unified, common and harmonized methods of legal regulation» [5; 68]. Thus, subordinating the national law to the EU law, Member States not only create common economic, but also a common legal space.

Another position is that «European law» includes the law of all European organizations, including the Council of Europe, the North Atlantic Treaty Organization (NATO), the Organization for Economic Cooperation and Development (OECD), the Organization for Security and Cooperation in Europe (OSCE), and others. Central place in it is occupied by the law of the three European communities — European Coal and Steel Community (ECSC), European Economic Community (EEC) and European Atomic Energy Community (Euratom), transformed in 1992 into the European Union. This is a definition of the European law by prof. A.H.Saidov [6; 79].

The concept of «European law» in the legal literature also refers to the set of regulation norms that are governing the relationship developing in the framework of European integration associations within the European Communities and the European Union. [7; 34] In addition to the European Community law and the European Union law, this concept is supplemented by the provisions of the European Convention on Human Rights, 1950: «The European Convention for the Protection of human Rights and Fundamental freedoms signed in Rome on 4 November can be regarded as incorporated into the law of the European Communities. It can assumed that European law includes the European communities' law, the law of the Union, and the European Convention for the Protection of Human Rights and Fundamental Freedoms.» From this perspective, European law is considered in the textbook «European law», edited by L.M.Entin [7; 35].

The term «European Union law» is used since the early 1990s with the creation of the European Union [8]; before that the established legal array was referred to as «the law of the European Communities» or «the law of the European community.» Some scholars consider the notion of «European Union law» as a synonym of the broader notion of «European law» [9; 835, 836].

Thus, the term «European law» is used in legal literature in a variety of meanings. But it should be noted that in one way or another most authors associate the European law with the right of the European Communities. In our opinion, the most correct is the position of B.N.Topornin, who defines the law of the European Communities as the European law in the narrow sense of the word. The concept of the «European law» can be interpreted much wider, it can be include national legal systems of European countries as well. Although the terms «Community law», «law of the European Community», «European Union law» are not quite equal, but, in our opinion, adequately express the most common essence and nature of the European law, so they can be used interchangeably.

European law is a system of legal norms established in connection with the formation and functioning of the European Communities and the European Union. These norms are carried out and used within their jurisdiction on the basis and in accordance with the Treaties and the general principles of law [7; 43].

A wide debate unfolded in the scientific literature regarding the legal nature of European Union law. Some authors are of the opinion that EU law is identical to international law [10; 128]. Other authors believe that the law of the European Union is complex: it cannot be separated from the common international law, but at the same time, a certain part of it is a form of coordination, convergence and harmonization of the domestic law of the Member States [11; 64]. The last opinion is, in our view, the most precise, since, on the one hand, the basic acts of the EU are international treaties, and on the other — acts of the EU institutions adopted on the basis of the Treaties play a very important role in the functioning of the European Union.

EU law is extremely different from the law of the international organizations in the traditional sense. EU law is endowed with much greater autonomy than the law of other international organizations. Treaty of the European Union, signed in 1992 in Maastricht, initiated a new stage of integration in Western Europe. In accordance with article A of the Treaty, the European Union «is based on the policy of the Community, complemented by new directions and forms.» In particular, it is about: 1) the implementation of the common foreign and defense policy; 2) on cooperation in the field of justice and home affairs.

In accordance with this, three elements can be distinguish in the structure of European Union. The European Communities constitute the first composite element, and two areas of intergovernmental cooperation, introduced by the Maastricht Treaty constituted the second and the third elements. These constituent elements, or «pillars» of the EU, differ in functions and methods of legal regulation. Communities' activity is based on the «principle of supranational», which states that the Community authorities have priority in the areas falling within their competence, while the other two «pillars» of the European Union (common foreign and defense policy and cooperation in the field of Justice and Home Affairs) are of the traditional forms of interstate cooperation.

In the legal literature there is a suggestion that «the Communities' law and the law of the European Union — are largely coinciding, but not identical concepts. The legal regime of the rules applied in the Communities, that form the first pillar of the Union, and rules applied in the second and third pillars, have signifi-

cant differences.» [7; 34, 35]. Since the signing of the Maastricht Treaty in 1992 that established the European Union, the term officially denotes only one of the three, namely the European Economic Community. Moreover, with the creation of the term «European Community», the countries who signed the Maastricht Treaty, retained the independence of the other two communities, and thus the difference between the legal basis for their existence and peculiarities in legal regulation. Accordingly, the term «EU law», which is widely used in modern literature, actually describes the legal system of not one but all three communities, forming a core and basis of the European law [7; 38].

Constitutive (Paris) Treaty on the formation of the European Coal and Steel Community, signed in 1951 for a period of 50 years, was not prolonged, and in 2002 the ECSC ceased to exist. Therefore, currently in the structure of the European Union there are two Communities, each maintains its relative autonomy and operates on the basis of its Constitutive Treaty, and the structural elements of the European law are the legal systems of Euratom and the EU.

European Union countries made an attempt to adopt their own European Constitution. The draft of the Constitution was signed in 2004, but not entered into force, since it has not been ratified by all EU countries. Therefore, many of the provisions of the draft Constitution in 2004 were transferred to the new treaty, which brought changes and additions to the Treaty of the European Union and the Treaty establishing the European Community. The new treaty was signed in 2007 in Portugal, and was called the Lisbon Treaty [12; 68]. The Lisbon Treaty introduced a lot of new changes to the law and the structure of the European Union; in particular, all references to the «European Community» were replaced by the «European Union», the system of the «three pillars» was mostly eliminated, and etc.

European law differs from international law on the following grounds. Firstly, the international legal order is based primarily on cooperation, while the legal order of the European Union is aimed at the development and deepening of the European integration. This difference of the EU law from the international public law has been recognized by the Court of the EU: «the Treaty establishing the EEC, is more than an ordinary contract, which gives justification to mutual obligations of the States who signed it.» Secondly, the international law and the EU law have different sources: international law is contractual, while EU law is mostly developed by the EU institutions, whose acts constitute the secondary EU law.

International law and the law of the European Union operate in different systems. International law regulates the relations of the interstate system participants, and the EU law covers relations developing both in interstate and domestic systems, as it regulates the relations of the Member States with each other and the relationship between the subjects of the domestic law of the member countries. These circumstances caused the differences from international law both on the subject composition, and on the object of regulation.

The decision of the Court of Justice on the case of the EU Commission / Italian Republic, adopted on February 26, 1976, introduces the concept of the Communities' law autonomy, which includes independence from both the international and domestic law in the opinion of the Court of Justice. Although the EC Treaties are concluded by the States, the legal order based on them is objectified and does not depend on the will of the individual member states. The EU law acts equally and in the same way on the territory of all the Member States and should be applied by national judicial authorities in their original form.

The definition of the concept of the «European law» can be approached from other positions. While describing the European law, it should be kept in mind that it is not a separate branch of the law, but goes along with the constitutional, administrative, civil, financial laws, etc. European law appears as a special independent legal system that exists alongside the national legal system and the international law [7; 41].

European law as a special system is characterized by two main features. Firstly, all legal norms that form the European law are generated by the development and deepening of the integration process, which found its organizational expression and fulfillment in the creation of the European Communities and the European Union. Secondly, all these legal norms are united by the fact that they are intended to ensure the achievement of EU goals and tasks [7; 43].

In contrast to the traditional law of international organizations, the main purpose of which is to regulate the corporate activities of the organization itself, the European Union law is intended primarily to ensure the development of the integration processes between the individual member states of the EU. Because of this, it has a number of very specific features, among which the primary ones are: European Union law has priority over the national law of the Member States; its provisions are obligatory not only for the States parties, but also for their physical and legal entities.

The practice of the Court of Justice has gradually strengthened the representation of the EU law special nature. The EU law is moving towards strengthening its autonomy and becoming a new kind of law. The

most important principles of the European law have developed under the influence of the Court of the EU. This applies especially to the principles of direct, immediate action of the European law, and principle of supremacy of the EU law.

Supremacy of the European Union law has not been stated in any of the three founding treaties establishing the European Communities. The priority of Community law over the Member States national law is not even indirectly referenced in the constituent treaties. The principle of the primacy of the EU law over the participating countries domestic law has found its expression in the practice of the Court of Justice, which proclaimed the supremacy of the Communities law and has contributed to ratification of this principle as the supreme principle governing the relations of the EU law with the Member States legal systems.

The concept of the primacy and supremacy of the EU law over the national law has found its fullest expression in the decisions of the Court of Justice for *Costa v. ENEL* and *Van Gend et Loos*. Activity of the Court of the European Communities, which has gained recognition, consolidated the principle of the EU law direct effect on the territories of the member states and subsequently — the application of this principle in the national legal systems.

The decision of the EU Court on the case of *Van Gend en Loos* of 5 February 1963 has played a key role in the application of the supremacy principle in the national legal systems. In its final decision on the case the Court of Justice emphasized that «... The community has formed a new form of the law in the international law... the subjects of which are not only participating the States but also their citizens. For this reason, regardless of the legislation of the member states, the law of the European Communities may provide certain rights for individuals and impose certain obligations on them...» The Court also pointed out that all the legal rules contained in the founding treaties of the European Communities and expressed in absolute form, possess qualities such as validity, sufficiency, legal integrity, and can be directly applied to natural and legal persons of the participating States without requiring special implementation procedures.

For the first time the doctrine of EU law supremacy towards the national legal systems of the Member States has been formulated by the Court of the European Communities in the judgement of *Costa vs. ENEL*. The decision of the Court of Justice, adopted March 15, 1964 in the case of *Costa vs. ENEL*, was of fundamental importance and has had a strong influence on the EU law. In this decision, the EU Court formulated two major conclusions with regard to the relation of the EU law and the national law of the States Parties. Firstly, the EU member states have transferred a part of their sovereign rights in favor of the Community created by them and shall not be entitled to reverse it by subsequent unilateral actions that are inconsistent with the established within the EU legal order. Secondly, no Member State can call into question the status of EU law as a system uniformly and generally applicable in respect to the Community.

In the judgment *Costa v. ENEL* the EU Court ruled: «In contrast to the international treaties, the European Economic Community (EEC) Treaty has created its own legal order, which, after the Treaty came into force has become an integral part of the Member States; legal systems and their courts are bound to respect it. By creating a community with its own body, legal personality and international capacity, and in particular, real powers from the limitation of sovereignty and the transfer of powers from the States to the Community for an unlimited amount of time, Member States have limited their sovereign rights, though within certain limits, and thus creating a legal body, which is mandatory for their citizens and themselves.» The principle of the European Union law precedence, formulated in the judgment of the EU Court, means the absolute rule of the EU law over any domestic law of the Member States.

Along with the justification of the EU law direct action in the legal systems of the Member States and its supremacy over the national law, the EU Court of Justice developed the concept of autonomy from its international law. In this regard, the decision of the Court of Justice in the case of *Van Gend et Loos* (1963.), in which the European Court of Justice concluded that «the Community constitutes a new legal order of the international law for the benefit of which, though within certain limits, states have limited their sovereign rights, legal order, the subjects of which are not only Member States but also individuals» is indicative. In this decision, the Court defined the legal order of the EU as a new legal order of the international law.

With the continuous integration, the EU law has increasingly distanced itself from the international law. The development of the EU law was going in the direction of strengthening its autonomy, becoming a new kind of law. Generally, in the rule on international legal personality, an individual does not have the legal personality, however, in practice of the European Communities, the European Union has changed the classical notions about the place of the individual in the contemporary international law.

One of the most important milestones in the consolidation and further development of the EU law supremacy over domestic legal rules of States Parties principle was the decision of the Court of the European

Communities on the case of Simmenthal (1978). Most importantly, the Court noted that the direct duty of the national court is to provide full and effective operation of the EU law rules on the territory of each Member State, as well as to refrain from using any contrary provision of domestic law, even if the domestic legal rules were adopted later. Secondly, the European Court of Justice emphasized that not all legal provisions adopted in the EU have the supremacy, but only those who have the status of «direct action» norms on the territory of States Parties.

Principle of the supremacy EU law over national law of the Member States is considered today as an unwritten, but the primary rule in force in the European Community. It applies regardless of the nature and the final form of consolidation of a particular legal norm. In addition, it is typical for regulations adopted in the framework of the EU as well. The Court of Justice shall not be entitled to cancel the domestic law of the Member States, contrary to EU law. However, the Court can achieve the desired results through by applying of the concept of supremacy in the practice of national courts.

These two most important features play a key role in the functioning of the entire European Union legal system and define the relationship between the EU law and national legal systems of the Member States. For more than 60 years of European integration, they evolved from mere features to the fundamental principles of the European Community law: the principle of supremacy of the EU law over the Member States domestic national law; principle of direct effect of the law on the territory of the EU Member States.

Thus, in the analysis of European law it must be taken into account that all of its components with their characteristic features represent a unified system — the law of the European Union. All this leads to the conclusion that European law is a new, unique system of legal regulations of international and inter-state relations. The principles of EU law are the core and the fundamentals of the European law — most general provisions defining the meaning, content, implementation and development of all the other rules of the European Union law.

References

- 1 *Топорнин Б.Н.* Европейское право. — М.: Юрист, 2001. — 455 с.
- 2 *Хартли Т.К.* Основы права Европейского сообщества. — М.: Юнити, 1998. — 598 с.
- 3 *Борко Ю.А., Загорский А.В., Караганов С.А.* Общий европейский дом: что мы о нём думаем? — М.: Междунар. отношения, 1991. — 232 с.
- 4 *Энтин Л.М., Наку А.А., Водолагин С.В., Толстопятенко Г.Л., Козлов Е.Ю.* Европейское право: Учебник для вузов. — М.: Инфра-М Норма, 2000. — 896 с.
- 5 *Тихомиров Ю.А.* Курс сравнительного правоведения. — М.: Норма, 1996. — 466 с.
- 6 *Саидов А.Х.* Сравнительное правоведение (основные правовые системы современности). — М.: Юристь, 2003. — 448 с.
- 7 Европейское право. Учебник для вузов / Под общ. ред. проф. Л.М.Энтина. — М.: Норма, 2001. — 720 с.
- 8 Право Европейского Союза: правовое регулирование торгового оборота: Учеб. пособие / Под ред. В.В.Безбаха, А.Я.Капустина, В.К.Капустина, В.К.Пугинского. — М.: Зерцало, 2000. — 400 с.
- 9 *Кашкин С.Ю.* Право Европейского союза: Учебник. — М.: Юрайт, 2010. — 1120 с.
- 10 *Хирилер М., Диммерман Б.* Западноевропейские интеграционные объединения. Право / Пер. с нем.; под общ. ред., с предисл.: Аметистов Э.М., Брагинский М.И. — М.: Прогресс, 1987. — 368 с.
- 11 *Олтеану О.М.* Правовой механизм эволюции ЕЭС к наднациональным федеративным структурам // Вестн. МГУ. Сер. 11. Право. — 1993. — № 1. — С. 55–63.
- 12 Европейский союз. основополагающие акты в редакции Лиссабонского договора с комментариями. — М.: Инфра-М, 2008. — 920 с.

Ф.А.Ержанова

Еуропа құқығының түсінігі мен ерекшеліктері туралы

Мақалада ғылыми әдебиеттер, Еуропа одағының құрылтай құжаттары мен Еуропа Әділет Сотының шешімдеріне негізделі отырып, еуропа құқығының ерекшеліктерін айқындауға бағытталған мәселелер қарастырылған. «Еуропа құқығы» түсінігінің өзекті мәселелері, оның ішінде «Еуропа қауымдастық құқығы», «Еуропа одағы құқығы» арақатынасы, Еуропа одағы құқығының ерекшеліктеріне сипаттама бере отырып, еуропа құқығының қағидаларына құқықтың негізін қалаушы көрсеткіш ретінде талдау жасалған.

Ф.А.Ержанова

О понятии и особенностях европейского права

В статье на основе анализа научной литературы, учредительных документов Европейского союза, а также решений Европейского Суда Справедливости предпринята попытка выявить основные черты европейского права. Автором рассматриваются проблемы понятия «европейского права», соотношение с понятиями «право Европейских сообществ», «право Европейского союза», анализируются характерные особенности права Европейского союза, раскрываются основополагающие принципы европейского права, обуславливающие его специфическую правовую природу.

References

- 1 Topornin B.N. *The European law*, Moscow: Yurist, 2001, 455 p.
- 2 Hartley T.K. *Foundations of Law of the European Community*, Moscow: Yuniti, 1998, 598 p.
- 3 Borko Yu.A., Zagorsky A.V., Karaganov S.A. *Common European home, what we think of it*, Moscow: Mezhdunarodnye otnosheniya, 1991, 232 p.
- 4 Entin L.M., Naku A.A., Vodolagin S.V., Tolstopyatenko G.L., Kozlov E.Yu. *The European law*, Textbook for colleges, Moscow: Infra-M Norma, 2000. — 896 p.
- 5 Tichomirov Yu.A. *Course of Comparative Law*, Moscow: Norma, 1996. — 466 p.
- 6 Saidov A.Kh. *Comparative jurisprudence (the main legal systems of modern times)*, Moscow: Yurist, 2003.
- 7 *The European law*, Textbook for colleges, Under the general editorship of prof. L.M.Entin, Moscow: Publishing Group NORMA-INFRA, 2001, 720 p.
- 8 *The European Union law: legal regulation of trade turnover*: Textbook, Ed.by V.V.Bezbach, A.Ya.Kapustin, V.K.Kapustin, V.K.Puginsky, Moscow: Zertsalo, 2000, 400 p.
- 9 Kashkin S.Yu. *The European Union law*. Textbook, Moscow: Yurait, 2010. 1120 p.
- 10 Hirschler M., Zimmerman B. *Western European integration associations*, Moscow: Progress, 1987, 368 p.
- 11 Olteanu O.M. *Moscow State University Bulletin*, Ser. 11. Law, 1993, 1, p. 55–63.
- 12 *European Union. Fundamental Acts in edition of the Lisbon Treaty with comments*, Moscow: Infra-M, 2008, 920 p.