Facultative Jurisprudence and Compulsory Jurisprudence in Romania

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Abstract:
Since 2007, as Romania joined the great European family, the influence EU law over the domestic law has been constant and extremely auspicious. This influence has produced a series of changes in the legal system, as Romania took over the European legal rules contained in the EU treaties which it has signed, and some Compulsory sources – such as directives, recommendations –, and acknowledged and enforced the jurisprudence of the European Court of Justice and of the European Court of Human Rights.
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Accession to the European Union represents a great advantage for our country in all respects. This democratic union of states is based on the equality in rights of all its citizens belonging to the Member States. All the activity and the whole way of functioning of the European Union is based on the principle of representative democracy, with respect for human rights, for the notions of pluralism, non-discrimination, tolerance and justice.

It is obvious then that the values promoted by the European law are deeply democratic rights, humanitarian and moral.

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The Praetorian formula, do, dico, addico, perpetuated over time and transposed in jurisprudence it influenced and influences essentially the law, whether we speak of Anglo-Saxon legal system, or of the continental type. In ancient Rome, by jurisprudence was understood the science of law, but also the correct application of law, considered as a science and as an art. An essential step in the history of jurisprudence is the work

of Trebonian (534 AD), called Corpus IurisCivilis. His work was composed of a pieces selected from the Roman law (Institutiones, Digestum, Codex and Novellae), before and during Justinian's time.

It is said that the origin of jurisprudence should be sought before the birth of law. In other words, law also existed in the primitive societies, where there were no laws. This law is either the work of the people, expressed by habit or later by the rules given by the ruling authority (usually the King), who made the law by the pronounced sentences, i.e., via jurisprudence. It is not wrong, therefore, to say that the seeds of the written law, of what then would be a norm of law, are to be found in ancient times[1].

The term jurisprudence derives from the Latin term juris + prudentia, i.e. the practical knowledge of law.

Professor N. Popa distinguishes between the judicial practice and the judicial precedent, pointing out that in establishing the jurisprudence, an important role is played by the Supreme Court (Court of Cassation, Supreme Court, etc.), which has the sovereign right to solve the conflicts between lower courts and to impose them a certain interpretation; such consistent and uniform solutions are sometimes invoked as a judicial precedent in the judicial activity and based on them are solved the cases in the courts. Thus, judicial practice can become a source of law[2].

In Common Law system law has a secondary role compared with jurisprudence, and the judge is the one who makes the law. The judicial practice has a very important role in countries such as England, USA, and Canada.

The British jurisprudential law is composed of Common Law (which includes solutions given by the Royal Courts of Westminster), equity (principles of justice, which represent a set of rules emerged in the fifteenth and sixteenth centuries from the jurisprudence of the Chancellor; rules pronounced by the royal courts to complete and revise the Common Law system) and Statutory Law (the written law deriving from the documents issued by the Parliament; laws whose application remains under the control of the judicial power).

Jurisprudence in the Romanian legal system

Jurisprudence has played an important role within the legal phenomenon in which our people developed since the beginning of the Romanian Nation and the

Romanian State. Obviously, on the territory of the modern day Romania, jurisprudence had a special place, since the Roman occupation. In the Romanian Principalities, jurisprudence and custom have played an important role among the sources of law. Thus, in feudalism, jurisprudence and local customs formed the substance of the Romanian law, in a time when the secular jurisprudence acted together with the ecclesiastical one.

Subsequently, the role of jurisprudence among the sources of law fluctuated from one era to another, and jurisprudence lost some of its practical significance. There is obviously a justification which coincides with the time of the major legislative codification in the nineteenth century, when it was placed on the top of the Romanian law the concept of "the exegesis School", of literary and formalistic interpretation of the legal norms, and when the Roman law dictum prevailed: optima lex, quaeminimumjudici, optimusjudexquiminimumsibi.

As an example, jurisprudence under the regulation of the old Civil Code was often contradictory and confusing regarding the applicability of the theory of unpredictability, particularly in the early years of transition to a market economy, when the unpredictability was determined by the economic phenomenon of monetary devaluation through inflation[3].

Yet, I consider it is wrong and even absurd to think that the laws created by man can cover immediately and permanently all the aspects of social life subject to regulation, and we ought to pay attention also to those showed by the followers of the "School of free law",who supported the judge’s powers and his conscience to solve fairly the litigation. Kantorowicz, the chief exponent of this theory, which has among the supporters Ehrlich and Fr. Geny, believes that the judge is a creator and an innovator of law, much more effective than a normative act that cannot be adapted immediately to a concrete need.

I believe that truth is "somewhere in-between" and it is necessary a balance between the authority and the attributionof the legislative power to create rules of law and the act of creation and application of law which must come from the magistrate.

Therefore it is good that now the inevitable fact happened once Romania joined the European Union: the development or better said the beginnings of developing a

legal system which combines the system of judicial precedent with the Roman-Germanic one. There are multiple proofs for this fact and do not regard only the recognition of jurisprudence (not on the whole) as a source of law. We should not forget that the system of judicial precedent establishes the role of the judge as a creator of law (judge made law). This attribution is placed in the hands of the Romanian magistrate through art. 1 in the Code of Civil Procedure, which states that the judge must solve the case even in the absence of a rule of law, using ultimately the principles of law.

The best proof in this regard is represented by the jurisprudence of the European Court of Justice and of the European Court of Human Rights and by the impact of this jurisprudence on the domestic law.

The relationship between the Luxembourg Court of Justice and the national courts is one of cooperation and is primarily aimed at the uniform application of the European Union law. The premise from which we should start is that outside the national legal order, specific to each Member State of the EU, within the European Union another superior legal order also functions, with direct application, and influencing the national law of the member countries.

Thus, for the first time, the Court of Justice, in the famous case called briefly "Van Gend& Loos"– where Company N.V.Algemene Transport- en ExpeditieOnderneming van Gend& Loos, with headquarters in Utrecht litigated with Nederlandse Administration der belastingen (the Dutch tax authority)– [4] ruled by the decision of 5 Feb.1963 in the favour of the superiority of the Community legal order over the national legal order. The legal basis of the file is represented by the infringement of art. 12 of the Treaty of establishing the EEC, prohibiting the introduction of customs duties or increasing the existing customs duties in the Common Market (the name existing at the time), the claimant company arguing that the Dutch Customs Administration charged an increased customs duty to a chemical that came from the German Federal Republic (former West Germany), and this represented a breach of the Community legal order. We specify that the Court of Justice found that the claims were grounded. It is very important to note the fact that this court established that the subjects of Community law are not only the states but also the citizens and any legal person.

Taking into account the case presented above, I would like to mention that the evolution of the Community / European jurisprudence went so far as it was stated that the Community rules are superior to the national ones, even if the latter have a constitutional character. I remind in this regard the decision of the Court of 17 December 1970, InternationaleHandelsgesellschaftmbH v. Einfuhr und VorratsstellefuerGetreide und Futtermittel, C-11/70 [5].

In this case, the explanatory memorandum notes that:

Whereas indeed, the law stemming from the treaty, an autonomous source of law, cannot, by its nature, be removed by the rules of national law, whatever they may be, without losing its Community nature and without questioning the legal foundation of the Community; whereas, therefore, reference to infringements either of fundamental rights, as stipulated by the Constitution of a Member State, or of the principles of a national constitutional structure cannot affect the validity of a Community act or its effect on the territory of the respective state.

In the case of Costa vs. Enel, in 1964, the Court of Justice held that the EEC Treaty represents an own legal order that was adopted by the Member States of the Treaty. This entails the impossibility of giving priority to national rules over the European provisions previously adopted and integrated into the national legal systems. As mentioned, the Community law/ European law "... is an organized and structured set of legal rules, with own sources, with bodies and procedures able to adopt them, interpret them and sanction their violation[6]."

Currently the Community jurisprudence has evolved and it is stated the priority of Community law over the national law, regardless of the national rule arose before or after the Community rule. It is eloquent in this respect the decision of 19 March 1978 Amministrazione delle finanze dello Stato c. Simmenthal, C-107/77 [7]. As stated in the literature "based on the principle of primacy of Community law, the Treaty provisions and the acts with direct effect of the Community institutions, in their relations with the national law of the Member States, following their entry into force, make ineffective, according to the law, any contrary provision of the existing national legislation, and also, because these provisions are a part of the national law of each member state, having a higher legal force, they prevent the valid adoption of some new national normative acts,

insofar they would be incompatible with the Community law. ... The national judge in charge of applying, within its jurisdiction, the provisions of the Community law, is obliged to ensure the realization of the full effect of these rules, against any conflicting provision of the national legislation, even a later one, without requesting or waiting for its prior removal in a legislative way or by the constitutional court[8]. ”

In the domestic legislation a special role is played by the decision pronounced in the procedure of the preliminary question before the national court. Thus, to ensure the uniform and unitary interpretation of the Community rules, the European Community Treaty (ECT) has adopted an original solution, at least partially different from that practiced in a centralized state or within a federation of states. Thus, while in these cases it is established one or more supreme courts to ensure the uniform application of law in all areas, the authors of the European treaties were forced to invent a solution that should be consistent with the special structure of the Community, respectively a solution that will be based on the recognition of the sovereignty of the national courts as regards their own jurisdiction. In these conditions it could not be taken into account the above mentioned model, namely that to confer the European Court of Justice a direct control through an appeal, on the way of application of the Community law by the national courts [9].

The solution is found in the current art. 267 TFEU (for instance Article 234 TEC) where it is stated:

The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:

(a) the interpretation of the Treaties;

(b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union;

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.

Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court.

If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay [10].

In conclusion, it could be noticed that "in the normative pot" of the EU, it was found a legal solution, because on the one hand it is not affected the independence of the judicial systems of EU member states, but at the same time it is respected the principle of primacy of the European law. This reasonable solution is also extremely effective in obtaining the purpose of the uniform and unitary application of EU regulations.

We can conclude that, at present, at the level of the domestic law jurisprudence is divided in two categories:

- Compulsory, consisting of the decisions of the European Court of Justice, of the European Court of Human Rights and of the High Court of Cassation and Justice (in matters of interpretation of law issues). This type of jurisprudence has become Compulsory in the domestic law, starting right from the convictions against Romania. On the other hand, the new civil and penal codes establish the mechanism of "pronouncing a prior decision to solve issues of law". That procedure is a remedy against anon-unitary practice in the application and interpretation of law and draws from Article 267 of the Treaty on the functioning of the European Union, regarding the preliminary question referred to the ECJ. It should be mentioned that the mechanism introduced by the Romanian law-maker is also based on the recommendations of the European Commission. All in all, by this procedure the Supreme Court becomes the basic institution in charge of ensuring the uniform practice, having also the role conferred by the law-maker in the Compulsory interpretation of the texts of law. The decision of judicial interpretation of the High Court of Cassation and Justice, on matters of law interpretation, becomes compulsory for all the courts called to solve the same legal issue, from the moment of its publication in the Official Journal.
- subsidiary and facultative, a real source of inspiration for magistrates, lawyers and other categories of law practitioners. In Romania, the judge obeys the law and in his work he applies the rules of law. The interpretation of law, as done by the

magistrate, should be adapted to immediate reality and should be a source of inspiration for the legislative power.

Conclusions

The evolution of the domestic law and of jurisprudence in terms of its classification as a source of law will be very interesting . More than likely the direction will be given by the desire of building a large European state, whose foundation should be retrieved in the bases of the current European Union. Yet, such a state cannot exist outside of a unitary legal system, from the point of view of the procedural and substantial law; in that sense solutions for the crystallization of a European procedural law, a European civil law are being looked for. It is necessary that the steps taken in this direction should be increasingly faster, but better balanced, because the big European family, including all the state attributes, represents a great benefit and a factor of progress, inclusively in the field of law.

References:

[1] Ionescu, S. (2008). Justice and Jurisprudence in the Rule of Law, p. 70.
[2] Popa, N. (2012). Teoria generală a dreptului,pp. 206-207.
[3] Ciongaru, E. (2013). Imprevision Principle in the Romanian Legislation, in Proceedings of the2nd WSEAS International Conference on Economics, Political And Law Science(EPLS '13), p. 262.
[4] Internet, http://curia.europa.eu/jcms/upload/docs/application/pdf/2009-05/tra-doc-ro-arret-c-0026-1962-200802142-05_00.pdf
[5]Internet, www.EUR-lex.europa.eu
[6] Ţinca, O. (1999). General Community Law, p. 200.
[7]Internet- http://curia.europa.eu/en/content/juris/c1_juris.htm
[8] Tudor, G., Călin, D. (2006). Jurisprudenţa CJCE, vol. I, pp. 124-131.
[9] Buta, Gh. (2009). Preliminary question in the supreme court, article published in the volume of proceedings of the Romanian Academy-Andrei Rădulescu Institute of Legal Research, scientific session of the Institute of Legal Research 2009, p. 202.
[10] http://iaduer.ro/?p=791