

GENERAL CONSIDERATIONS REGARDING THE RECEPTION OF THE JURISPRUDENCE OF THE COURT OF JUSTICE OF THE EUROPEAN UNION IN THE PROCESS OF LEGISLATIVE CODIFICATION IN MEMBER STATES

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Abstract

*The importance of the role of jurisprudence related to other spheres of thought also appears as a reflex under the conditions of the development of society and the emergence of new situations and realities. The new situations could not be resolved based on texts adopted centuries before, and, as a result, jurists found, in the texts of the old laws, the means which, through ingenious interpretation, can be used to resolve new cases. In the legal systems of the founding states of the European Union, jurisprudence was not considered, in principle, a source of law, because the judgements of courts only produced effects *inter partes*. For this reason, the authors of the treaties did not include community jurisprudence in the nomenclature of sources of law. However, in the European legal system, jurisprudence has the value of source of law. The interpretation which the European courts give is imposed to all authorities, including national ones, an argument which confirms the status of source of law of European jurisprudence. As a consequence, no practitioner who must resolve an issue of European law may say that he has mastered this law, if he does not know the relevant judgements of the European courts.*

Keywords: *jurisprudence; system of law; European legal system; European jurisprudence.*

Introductory elements

Modern society finds itself, mainly due to the diverse and modern means of communication, in a permanent and continuous process of eliminating political, cultural, legal, and, not least, economic barriers. The concepts of unification, uniformisation, integration, globalisation are becoming more and more frequent at a global as well as regional level. Political-economic phenomena such as the European Union have long ceased to shock anyone, and the success of such initiatives is gradually being accepted by their fiercest critics. The free movement of people, goods, capital tends to increasingly ignore country borders. International relations have achieved, in all areas, an importance which will increase each year, these aspects involving giving up

economic self-isolation and national pride in favour of opening to knowing and understanding other, similar or completely different, types of culture.

In certain historical eras, Europe was relatively more homogeneous than today, from a spiritual, cultural, economic and even political point of view. [1] The great states were formed and consolidated progressively, in constant competition and rivalry. The idea of a peaceful organisation of this type of Europe emerged numerous times, but it was never taken into consideration by those in power, who only chose between two policies: domination or balance. The idea of a united Europe is considered to be very old, finding its origins in Antiquity, when the Roman conquests were considered manifestations of such a tendency [2].

In the book Community jurisprudence it is said that, "The EEC Treaty created its own legal system, which is integrated in the legal systems of Member States and which is mandatory in front of national courts of law. The subjects of this legal system are not only the Member States, but also their citizens, the legislation of the European Union also aiming to initiate certain rights which become part of their legal heritage. These rights arise not only where they are expressly guaranteed by the Treaty, but also due to the obligations that the Treaty imposes in a clearly defined manner to individuals as well as Member States and community institutions"[3].

Of course, the existence of a legal system cannot be conceived outside of social organisation, being ensured and guaranteed by the state, which, through its authorised bodies, drafts, adopts and controls the enforcement and compliance with the laws which govern the life of its citizens.

A comparison of the law of different states, even though it seems impossible at first glance, may bring out a series of similarities, especially from a pragmatic point of view. For these reasons, the call in favour of partial or complementary legislative unification was launched beginning with the 16th century.

Much later, with the emergence of the big supernational structures, politics truly understood the meaning and the usefulness of this call and partial legislative unifications or uniformisations were initiated. It should be taken into account that there have always been very big differences between the customs of one region and those of another, moreso between the customs of the territories of different states, but,

nevertheless, the history of European law is a whole and an old creation, whereas the histories of national laws are belated scientific creations, forced by the idea of the sovereignty of states.

Roman law, adopted by most European states, has, directly or indirectly, with different intensities, in different eras, in various forms, exercised a profound influence on the European legal systems. [4] Along with the states modernising and updating the law, a European legal science was developed and taken as a method and body of ordered and systematically organised rules, Roman in their essence, but European as expanse. With the appearance of codes these differences were accentuated, and in the second half of the 19th century foreign law systems were completely ignored. The motivation for the appearance of the codes resides in rationalism and in the principle of legal security, much invoked and exploited by the political power.

Today, the European Union is based on its own institutional and legal structure, which does not correspond to the classic principle of the separation of powers, the four Institutions being a dynamic body which responds to the interests in question and ensures the achievement of the aim of the Union.

The European institution which represents the interest of the law is the Court of Justice of the European Union. It manifests as an internal jurisdiction, invested by the European Union with all the necessary components for achieving justice, and which cooperates with the national jurisdictions, ensuring uniform interpretation and enforcement of European law, thus creating European jurisprudence as main source of law of the European Union, applicable in all member states.

Jurisprudence as a source of law - concept and historical evolution

As legal science, jurisprudence was created by jurists – *iuris prudentes*, *iuris consulti*, by interpreting normative provisions in laws, resulting in certain given solutions, upon the resolution of cases by a jurisdictional body, by interpreting regulations provided in laws or other normative documents or by determining the applicable legal regulations for ongoing cases, with the help of the principles of the applicable legislation or the general principles of law. [5]

The importance of the role of jurisprudence related to other spheres of thought also appears as a reflex under the conditions of the development of society and the emergence of new situations and realities. The new situations could not be resolved based on texts adopted centuries before, and, as a result, jurists found, in the texts of the old laws, the means which, through ingenious interpretation, can be used to resolve new cases.

In the continental countries, after the revolutions of the 17th and 18th centuries, although important codes and laws were adopted, which somewhat reduced the role and functions of jurisprudence; still, legal judgements and those of constitutional courts were considered source of law.

In the Anglo-Saxon system, however, jurisprudence has always kept its role and force as main source of law, the judge fulfilling the role of authority which sets the rules, and the sentences of the courts constitute a mandatory precedent for the future.

Thus, Mircea Djuvara states that [6], “an interpretation which leads to injustice is not a good interpretation, just as a law which leads to injustice is not a good law... but, in so many cases, the judge does not find a clear expression of the law. He must then first ascertain the facts, the social conditions, the legal judgements in the conscience of the respective society, to ascertain them with all the scientific rigour, and not arbitrarily”.

Furthermore, he opines that, “This is an extremely difficult scientific operation. We may imagine the enormous culture required from the judge and the jurist in general in order to exactly ascertain, with rigour and the help of science today, all the factual circumstances, as well as all the currents of thought of the respective society... jurisprudence, thus understood, many times achieves justice differently from the strict letter of the law, custom or doctrine. In this respect, it can be said that it is the formal source of positive law” [7].

In the legal systems of the founding states of the European Union, jurisprudence was not considered, in principle, a source of law, because the judgements of courts only produced effects *inter partes*. For this reason, the authors of the treaties did not include community jurisprudence in the nomenclature of sources of law. [8] However, in the European legal system, jurisprudence has the value of source of law.

The role as creator of law was a necessity in the case of European courts, because the constitutive treaties were drafted as framework treaties, with general provisions, which needed clarifications and amendments. On the other hand, the multiple linguistic versions of the community documents have equal value as authentic documents, which – when there are differences between the versions – again raise the problem of discerning the precise sense of the regulations.

The interpretation which the European courts give is imposed to all authorities, including national ones, an argument which confirms the status of source of law of European jurisprudence.

As a consequence, no practitioner who must resolve an issue of European law may say that he has mastered this law, if he does not know the relevant judgements of the European courts.

The conclusion which may be drawn is that the national judge who is always in the centre of national law, and, therefore, of international law [9], is the main factor of European legal integration and the enforcement of European as well as international conventions.

Therefore, national and especially European and international jurisprudence represent a dynamising, efficient and effective factor of the procedures for legal harmonisation, of assimilation and implementation of European and international law, and not only of optimisation of internal law.

Thus, the idea that the judge essentially has the role of interpreter and public authority for the enforcement of European law, which involves a certain specialisation in the subject and the awareness of their responsibility as a decisive factor in European legal integration, in agreement with national particularities, becomes clear.

He is fully responsible for the uniform enforcement of the requirement of European legal order as a unifying virtue of the authentically common legal order [10]. He is, however, encouraged by the doctrine and jurisprudence of the European courts to “fully assume the national role of interpreter of European law and depository of its legal execution, since he can not deviate from his obligation to apply European law to the justice seekers who invoke it” [11].

The appeal to European jurisprudence shows that judges do not endanger national identity and democracy, since, on the contrary, the courts in Strasbourg and Luxembourg, stimulate the principle of subsidiarity and the protection of material and procedural law, asking the national judge to have an active role in a national procedural framework adapted to the requirements of European and international law.

The jurisprudence of the European Court of Justice implemented in the jurisprudence of the Member States of the European Union

In the absence of provisions of constitutive treaties regarding the hierarchy of the sources of European law, the hierarchy was established by the Court of Justice: Primary law, which groups the sources of law with supreme legal force ; General principles of law.; International agreements; Derived law documents.

Within derived law, there is a hierarchy between legislative documents and enforcement documents. The former are adopted through legislative procedures, and the latter enforce them, are based on them and must conform to them, under the nullity sanction. Certainly, a delegated acts must be subordinated to the legislative act which gives it the ability to bring about changes or amendments.

On the other hand, the classic classification of normative act and individual act exists in any legal system. A judgement adopted by applying a regulation in a concrete situation must be subordinated to it.

The general principles of European law were thus initiated and formulated in the judgements of the Court of Justice of the European Union in Luxembourg and then included in the Treaties Establishing European Communities or in the amending treaties, finally being consecrated as such in the Treaty of Lisbon, which was signed by the 27 member states of the European Union on 13 December 2007 and came into force on 1 December 2009.

The autonomy of the European legal order was affirmed by the Court of Justice of the European Union, first through judgements *Van Gend en Loos* (1963) and *Costa v. ENEL* (1964). The Court emphasised this characteristic of the legal system of the Union in order to free the European construction from the dependence on national legal systems, which would have altered its essence.

The legal nature and the meaning of European law and direct applicability were the main creation in judgements *Costa – Enel – 1964*, *Walt Wilhelm (1968)*, *Internationale H.-1970*, and *Limmenthal II – 1978*, and others, in which other principles are affirmed:

- The TCE created its own European legal order, which has become an integral part of the legal order of member states, whose courts must obey (*Costa-Enel*)
 - The legal system arising from the Treaty, an independent source of law, cannot be, due to its special nature, surpassed by internal legal regulations, being superior to them (*Costa-Enel*);
 - Conflicts between European and national provisions must be resolved by applying the principle of precedence of European law (*Walt Wilhelm*);
 - The validity of the measures adopted by European institutions may be interpreted only in light of European law, as its direct effect (*Internationale H.-*);
 - Respecting fundamental rights is an integral part of the general principles of law protected by the Court of Justice (*Internationale H.*);
 - The direct applicability of European law means the full and uniform implementation of its regulations in all member states, beginning with the date they came into force and as long as they are in effect (*Limmenthal II*);
 - A national court has the obligation to apply European law and to ensure its full direct effect, removing, even *ex officio*, any contrary internal regulation (*Simmenthal III*).
- By analysing all of these it can be observed that CJEU jurisprudence was tasked with – by the pretorian way of elaborating law – taking the decisive step from the objective obligation of the state to the legal subjective right of the individual. This was an act of exceptional temerity, since it characterises, the shift from the traditional order of international law to the autonomous European order, which obeys its own structural principles, in the sense of a supernational order for functioning.

The fundamental elements were established, for the first time, in the older sentence in case *Van Gend & Loos*, in which the CJEU granted article 12 of the TEC – which prohibits the introduction of new custom taxes and duties, having the same effect, as well as the increase of existing custom taxes and duties in relations between member states – direct effects, namely in the sense that this article establishes

individual rights, which state courts must respect. In the motivation of the sentence it is systematically and teleologically argued: if a certain regulation produced direct effect, it should be judged according to the spirit, the systematic and text of the Treaty.

The objective of the TEC is to create a Common Market, the functioning of which directly involves the European citizens, that is, the Treaty is more than an Agreement which only establishes mutual obligations between member states. The Van Gend & Loos judgement states that: "The conclusion to be drawn from this is that the Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals. Independently of the legislation of Member States, Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage. These rights arise not only where they are expressly granted by the Treaty, but also by reason of obligations which the Treaty imposes in a clearly defined way upon individuals as well as upon the Member States and upon the institutions of the Community".

Then, regarding art. 12 of the TEC, in question, it is emphasised that the Treaty contains a clear and open interdiction and – that is why, according to its nature – it is excellently suited to produce direct effects in the legal relations between member states and individuals subject to their laws, without an intervention of the state lawmaker being required.

Corresponding to establishing the preponderantly economic objectives of the Community, the fundamental rights with an economic and social connection form the main object of jurisprudence until now, still, there already is a succession of other different fundamental rights. In this respect, the lawyer specialised in German law notices the methodical and pragmatic predisposition of jurisprudence, which – regularly – proceeds in a result-oriented manner, and, with this occasion, even occasionally omits a more precise determination of the area of defence of fundamental rights, ensured by the right in question.

The following are included among the fundamental rights recognised by the CJEU: the right to property; the freedom to choose an occupation, the right to economic

activity; the freedom of assembly and of association; the freedom of religion; the freedom of opinion and information; the respect for private and family life; the confidentiality of correspondence with the legal defender; the right to not incriminate oneself; the inviolability of residence; freely choosing business partners.

The autonomy of the European legal order from the legal order of the member states is not absolute. At the moment the states founded the Union, it did not become a foreign entity, external to them. To support this idea, it is established that: the legal system of the Union and the national one apply to the same individuals, in their double quality of citizens of the member states and of the European Union; the law of the Union comes to life and reaches its objectives only when it is accepted in the legal order of the member states.

Therefore, there have been natural interactions between community law and internal law. In this respect, the member states provided in art. 4 par. (3) TEU the principle of sincere cooperation. The importance of the principle of sincere cooperation is also emphasised by CJ jurisprudence regarding the indirect effect of community regulations. Thus, based on this principle of sincere cooperation, the Union and the member states mutually respect and support each other in the fulfilment of the missions arising from the treaties. The member states adopt any general or specific measure to ensure the fulfilment of the obligations arising from treaties or resulting from the acts of the institutions of the Union.

The member states facilitate the Union's fulfilment of its mission, and abstain from any measure that may endanger the achievement of the objectives of the Union. The principle was inserted in the treaty because it was realised that the legal order of the union could not reach the intended objectives by itself. Unlike the national legal systems, the EU system is not closed, and, in order to be applied, it needs the support of the national legal orders. All the institutions of the member states must admit that the legal order of the EU is not exterior or foreign to them, but that the member states and the EU institutions represent a whole, in order to achieve certain common objectives. As a consequence, the member states must not only respect the regulations of the Union, but also apply and bring them to life.

In order to manifest the cooperation between the European law and the national law, at a legislative level, the mechanism of the directive was applied, which establishes that the member states choose the most adequate form and means for their national specificity, in order to achieve the objectives set at a European level.

In this respect, the normative acts of the member states must answer to the necessity of a modern legislative framework of the European Union, represent a coherent and articulated response to the need for reformation of the fundamental institutions as well as mechanisms which pertain to the essence of socio-economic relations, as well as of procedural instruments.

The entirety of legal regulations (codes, methodological or implementation regulations, etc...) of the member states of the European Union must pursue the idea of promoting a monistic concept of regulating legal relations. In this perspective, these, the legal norms, must incorporate the entirety of European regulations regarding persons, family relations and commercial relations. Furthermore, the process of elaborating these norms must also take into account the provisions of private or public international law.

Therefore, by correlating provisions which originate from the tradition of national law, with provisions contained in European instruments as well as with international ones, by selecting the basic regulations by virtue of the solutions constantly offered by the European doctrine and jurisprudence over the years, the whole of legal regulations must respond to the necessity for adaptation of the current European legislation to the requirements of its socio-economic realities.

The jurisprudence of the Court of Justice of the European Union goes further and emphasises the priority of the Union's law as needing to be general and absolute, that is, to manifest over the entirety of national law, including over the constitutional rules of the member states. [12] The example referenced in this respect is the Simmenthal case [13], case in which the Italian court which tried this case showed that, according to the judgements of the Constitutional Court, it could not remove the national regulation contrary to European law without prior notice to the Constitutional Court, which would declare it unconstitutional. The Court of Justice of the European Union, however, responded that, " any national judge, notified under his competence, has the obligation to fully apply the community law and to protect the rights it grants to private persons, by

not applying any potentially contrary provision in national law, regardless whether it is anterior or ulterior to the community regulation". Therefore, the national court must itself ascertain, without delay, that the national regulation contrary to the EU one can no longer be applied.

In European law, obligations of result are usually states, giving member states the freedom to choose the means of fulfilling these obligations. The Court of Justice decided, constantly, that according to art. 5 TCE, recognising the power of Member States involves undertaking their obligations to apply community law, and the question of how such powers are to be exercised and executed, within the framework given by the Member States to their internal bodies, is solely a matter for the constitutional system of each state[14], and these community obligations of result are imposed to all internal bodies of the Member States, including, within their competences, to jurisdictional bodies [15].

According to art.10 T.C.E: the member states shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the present Treaty, and refrain from any measure which could jeopardise the attainment of the objectives of the present treaty.

Thus, the role of member states in the implementation of European law is structured on three principles : the participation of national authorities in applying European law, which is materialised in three areas: legislative, administrative and judiciary; the obligation of collaboration of member states resulting from the provisions of art.10 T.C.E. is also called the principle of community loyalty or of sincere cooperation and forces the member states to act, thus being a positive obligation, which corresponds to the principle of the materialisation of the principle of the supremacy of community law over national law; the principle of institutional and procedural autonomy which guarantees that the measures for applying community regulations are taken within state legal systems by national institutions and in accordance to the existing procedures in these systems.

In case of non-compliance to European law, a series of sanctions can be applied, such as: community administrative sanctions (art. 83 of Euratom Treaty sets the following sanctions: a warning, the withdrawal of financial or technical assistance,

seizure of the undertaking, total or partial withdrawal of source materials or special materials – the CJEU has the competence to control the sanction judgements established based on the regulation); national administrative sanctions which are established by the member states by enforcing the principle of procedural autonomy or which can only be applied by national authorities when they are provided in European regulations (e.g.; with regards to the common agricultural policy, the Commission, being delegated by the Council, may apply the sanction of exclusion from subsidies); penal sanctions, which do not fall under the competence of the European Union, not being established in treaties, thus the member states may penally sanction the violation of European regulations.

By virtue of those shown regarding the European legal order, the Romanian legislative system has begun to adapt the national provisions starting with the fundamental law, the Constitution of Romania, which, in art. 135, provides that "... (2) The State must ensure:... g) the implementations of the policies for regional development in accordance with the objectives of the European Union, and, in art. 148: Integration in the European Union provides that : "... (4) the Parliament, the President of Romania, the Government and the judicial authority guarantee the fulfilment of the obligations arising from the accession act and the provisions of paragraph (2).

These adaptations continue with the New Romanian Civil Code, which expressly provides the principle of priority implementation of community law in art. 5. "In the areas regulated by the present code, the regulations of community law shall be applied with priority, regardless of the quality or status of the parties."

Conclusions

In conclusion, the jurisprudence of the European Union consecrates the unification of European law as being compatible with a certain social and cultural pluralism; and in this respect national legal systems have a justified purpose with respect of European law, and the Member States have the competence to choose the most adequate means in terms of the requirements arising from European law, especially from the point of view of the proportionality principle.

Therefore, the member states of the European Union must make a legislative effort through which the internal legal order can be directly and harmoniously integrated in the European legal order, because only the Constitution and the national legislative power can transpose these objective, and, therefore, ensure that the national judge exercises the new responsibilities of an European judge.

These principles and purposes constitute landmarks which guide the adaptation of national law, making it directly compatible with the European law, so that the latter can also be invoked and applied through national legal paths.

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