

# TRANSFER OF LAW FROM THE CASE LAW OF THE EUROPEAN COURT OF JUSTICE TO THE LEGAL SYSTEMS OF THE MEMBER STATES

*Emilian CIONGARU\**

## Abstract

*Modern society has been in a permanent and continuous process of elimination of the political, cultural, legal and, last but not least, economic barriers mainly due to the diverse and modern means of communication. The concepts of unification, uniformization, integration, and globalization are more and more frequently encountered at word and regional levels. The political-economic phenomena of the European Union type do no longer amaze anyone and the success of such initiatives is gradually accepted by the bitterest critiques. The creation of the new European law order marks a new approach of the law philosophy and justice in the domestic law, a philosophy that aims at achieving the supreme individual good of the European citizen as the basis of the supreme good of the new entity and implicitly at attempting to obtain a better social life.*

Key Words: *law system of the European Union member states, European law, community case law, justice, legal norm.*

## 1. The European Union Law – concept

The European Union law as the totality of European legal norms regulates the conduct of the member states, the natural and legal persons from the member states, the European Union institutions and the Union itself by involving new approaches in the internal law of the members states, new codifications of the legal norms as an important stage of the systematic research technique of the law.

The liberty of movement of individuals, merchandises and capital tends to ignore more and more the states' frontiers. The international relationships have acquired, in all fields, an importance that is growing each year<sup>1</sup>, these aspects involving the give-up to economic self-isolation and national vanity in favor of opening towards knowledge and understanding other types of similar or completely different cultures.

In certain historical epochs, Europe was relatively more homogenous than today on the spiritual, cultural, economic and even political levels. The big states have formed and consolidated progressively in constant competition and rivalry. The idea of some peaceful organization of this type of Europe appeared numerous times, but it has never been taken into account by those who held power and who chose only

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\* Associate Professor, Ph.D., Hyperion University, Associate scientific researcher, Romanian Academy-Institute of Legal Research "Acad. Andrei Radulescu", Bucharest, Romania.

<sup>1</sup> R. David & C. Jauffret-Spinosi, *Le grands systèmes de droit contemporains*, Dalloz, Paris, 1992, Preface.

between two policies: domination or balance. The idea of unity of the Europe is considered as being very old, it dating back to the Antiquity period, when the Roman conquests were considered as manifestations of such a tendency.<sup>2</sup>

Of course, the existence of a legal system cannot be conceived outside social organization, law being ensured and guaranteed by the state which, by its authorized organisms, is the one that writes, adopts and follows the enforcement and observance of the laws governing the life of its citizens. The law is a set of rules of conduct imposed by the public power, meant to ensure order in society. It is a social activity, a product of practice and social existence, bearing the characteristics specific to a particular order, of a particular historical community.<sup>3</sup>

A comparison of the law of diverse states, even if it would seem impossible at first sight, may bring a series of similarities, especially of pragmatic order. For these reasons, as for the 16<sup>th</sup> century they launched the call for the partial or complementary legislative unification. Much later, once with the emergence of the great supranational structures, the policy really understood the significance and usefulness of this call and they initiated partial legislative unifications or harmonizations. Mention must be made of the fact that there have always been very large differences between the customs of a region and the customs of another one, so much the more between the customs existing on the territories of some different states but, despite all these, the history of the European law represents in reality a unity and it is an old creation, whereas the histories of national legislations are tardy scientific creations forced by the idea of states' sovereignty.

The Roman law taken over by most European states has exercised in different epochs, with different intensities, under variable forms, directly or indirectly, a deep influence over the European legal systems. Together with the modernization and updating of the law in each state, a European legal science has emerged as a method and body of rules ordered and systematically organized, Roman in their substance but European in length. Once with the appearance of *codes*, these differences have accentuated and in the second half of the 19<sup>th</sup> century they came to totally ignore the foreign legal systems. The motivation of appearance of *codes* resides in rationalism and in the principle of juridical security so much invoked and used by the political power.

Nowadays, the European Union relies on its own institutional and legal structure which does not correspond to the classical principle of power separation, the four Institutions representing a dynamic body that answers the present interests and ensures the achievement of Union finality.

The European institution representing the interest of law is the *European Court of Justice*. This is an internal jurisdiction vested by the European Union with all the components necessary to make justice and which cooperates with national jurisdictions thus providing a uniform interpretation and enforcement of the European law and giving birth to the *European case law* as the main source of law of the European Union, with applicability in all member states.

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<sup>2</sup> L. Cartou, *Communautés européennes*, Paris, Dalloz, 1991, p. 3.

<sup>3</sup> M. Tutunaru, I. Flămînzeanu, *Juridical concepts and juridical doctrines*, Scrisul Românesc Publishing House, Craiova, 2015, pp. 14-15.

The doctrine states that although the Court of Justice is organized by continental law systems, in which is not recognized the character of source of law of jurisprudence, however over time, because the influence of Common Law system, the Court cited whole passages from its previous decisions, referring to its previous jurisprudence and rulings by the Court of Justice began to constitute a source of law of the European Union.<sup>4</sup>

## 2. The jurisprudence - the science of law and source of law

As a science of law, the *case law* was created by legal experts – *iuris prudentes, iuris consulti*, by the interpretation of the normative dispositions contained in laws resulting in certain resolutions given upon the settlement of a case by a jurisdiction organism, through the interpretation of some norms provided under the law or other normative acts or by determining the juridical norms applicable to the pending cases with the help of the principles of applicable legislation or the general law principles.

The importance of case law role in relation to other spheres of thinking also appears as a reflex in the conditions of society development and the emergence of new situations and realities. The new situations could not be settled based on the texts adopted centuries ago and, consequently, legal experts found, in the texts of old laws, the means that may be used for the settlement of new cases via a fine interpretation.

The importance of jurisprudence in European Union Law arising from the decisive role which it has European Court of Justice and has played in achieving economic integration and progress towards political integration.<sup>5</sup>

In continental countries, after the revolutions from the 17<sup>th</sup> and 18<sup>th</sup> centuries, they adopted important codes and laws which reduced somehow the role and functions of case law; however, legal decisions and those of the constitutional courts were considered as a source of law.

But in the Anglo-Saxon system the case law has always kept its role and force of main source of law, the judge having the position of an authority that establishes rules and the court judgments represent a mandatory precedent for the future.

In this regard, Professor Mircea Djuvara shows that<sup>6</sup> “an interpretation resulting into injustice is not a good interpretation, in the same way as a law resulting into injustice is not a good law ...., but in so many cases, the judge no longer finds a clear expression of the law. Then they must first ascertain the facts, the social circumstances, the legal appreciations from the consciousness of such society, and to ascertain them with the entire scientific rigour and not arbitrarily”.

He says further on that “This is a scientific operation of extraordinary weight. We can realize what an enormous culture the judge and the legal expert must have in general to be able to exactly ascertain with rigour and with the help of today’s science all the circumstances as well as all the thinking currents from such society ... *the case*

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<sup>4</sup> M. Niemesch, *General Theory of Law*, Hamangiu Publishing House, Bucharest, 2014, p. 186.

<sup>5</sup> M. Tutunaru, *European Union Law*, Scrisul Românesc Publishing House, Craiova, 2014, p. 100.

<sup>6</sup> M. Djuvara, *General Law Theory; Rational Law – Sources and Positive Law*, edition supervised by M. Ioan, All Publishing House, Bucharest, 1994, p. 286.

*law understood as such represents the law many times in a different way than shown by the strict law, the customs or the doctrine. In this regard, we may say it is the formal source of positive law”.*<sup>7</sup>

In the law systems of the states that founded the European Union, the case law was not considered, in principle, as a source of law because the judgments produced only *inter partes* effects. For this reason, the authors of treaties did not mention the community case law in the nomenclature of law sources.

The creative role of law was a *need* in case of the European courts because the constitutive treaties were elaborated in the form of framework treaties with general provisions that needed clarifications and supplementations. On the other hand, the multiple linguistic versions of the community acts have equal value of authentic acts, a fact that again raises the question of discerning the precise meaning of norms - when there are differences between versions.

The interpretation made by the European courts is imposed to all authorities, including the national courts, an argument that confirms the statute of law source of the European case law.

Consequently, no practitioner who must settle a European law matter can say that they control this law, unless they know the relevant judgments of the European courts.

The conclusion that may result is that the *national judge*, who is also at the center of the national law and implicitly of international law<sup>8</sup>, is the main factor of European juridical integration and enforcement of the European and international conventions. However, this transposition has to take into account the impact on national legal cultures in order to mitigate the corrosive effect of international law on them.<sup>9</sup>

So national case law and especially the European and international one represents an activating, efficient and efficacious factor of the procedures of legislative harmonization, assimilation and implementation of the European and international law and not less of optimization of the domestic law.<sup>10</sup>

Thus, there is the idea that the judge has essentially the role of interpreter and public authority in the enforcement of the European law, supposing a certain special professionalization in the matter and consciousness of its responsibility of a decisive factor in the European juridical integration, in concordance with the particularities of national order.

They are fully *responsible for the uniform enforcement of the exigency of European legal order as a unifying virtue of the legal order genuinely joint*.<sup>11</sup> They are encouraged by the doctrine and case law of the European courts to fully assume “the national role of interpreter of the European law and repository of the judiciary

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<sup>7</sup> *Idem*, p. 288.

<sup>8</sup> A. Julie, G. Antoine, *Judges and globalization. The new revolution of the law*, Rosseti Educațional Publishing House, Bucharest, 2010, p. 32 and the following

<sup>9</sup> C. D. Butculescu, *The role of international law in uniform legal cultures*, in volume *Romanian Law in the context of European Union requirements*, Hamangiu Publishing House, Bucharest, 2009, p. 443.

<sup>10</sup> O. Jacot-Guillarmod, *Juge national-face au droit européen*, Brussels, Bruylant, 1993, p. 57

<sup>11</sup> R. Lecont, *Quel eut été le droit des Communautés sans les arrêts de 1963 et 1964*, Paris, Dalloz, 1991, p. 361.

execution thereof since they cannot derogate from their obligation to enforce the European law to the litigants invoking it”.<sup>12</sup>

The call to European case law shows that judges do not jeopardize national identity and democracy since, on the contrary, the courts of Strasbourg and Luxembourg stimulate the principle of subsidiarity and protection of the material and procedural law by asking the national judge to have an active role in the national procedural framework adapted to the exigencies of the European and international law.<sup>13</sup>

In the absence of some clarifications of the constitutive treaties in terms of the hierarchy of European sources of law, such hierarchy has been established by the Court of Justice: 1) Primary law grouping the sources of law with a supreme juridical force; 2) General principles of law; 3) International agreements; 4) Secondary legislation acts.

Within the *secondary legislation*, there is a hierarchy of the legislative acts and the implementing acts. The first are adopted by legislative procedure, whereas the second ones are founded on them and must comply with them under the sanction of cancelation. Certainly, a delegated act must also subordinate to a legislative act which confers it the capacity to bring modifications or supplementations. On the other hand, in any legal system, there is the classical classification between a normative act and an individual act. A decision adopted for the enforcement of a regulation in a concrete situation must subordinate to it.

Thus they initiated and formulated the *general principles of the European law* in the judgments of the European Court of Justice of Luxembourg and then they were introduced in the Foundational treaties of the European Communities or in the modifying treaties and they were finally consecrated as such in the Lisbon Treaty that was signed by the 27 member states of the European union on December 13<sup>th</sup> 2007 and entered into force on December 1<sup>st</sup> 2009.

The autonomy of the European legal order was affirmed by the European Court of Justice later on in the judgments *Van Gend en Loos* (1963) and *Costa c. ENEL* (1964). The Court underlined this character of the Union’s legal system in order to release the European construction from the dependence on the national legal systems which might have altered its substance.

The legal nature and significance of the *European law and its direct applicability* were the main creation of judgments *Costa – Enel – 1964*, *Walt Wilhelm* (1968), *Internationale H.-1970*, and *Limmenthal II* – and others where they affirm other principles as well:

- TCE has created *its own European legal order* that has become an *integrating part of the legal order of members states* that their courts are forced to observe (*Costa-Enel*)
- the legal system emerged from the Treaty, *an independent source of law*, cannot be outperformed by the internal legal norms due to its special nature and *it is superior to them* (*Costa-Enel*);

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<sup>12</sup> European Union Court of Justice (CSJE) – Luxembourg, *Award 111 V 201*, Constit., 23.X.1985.

<sup>13</sup> O. Jacot-Guillarmod, *op. cit.*, p. 282.

- the conflicts between European regulations and the national ones must be solved by virtue of the *principle of priority of the European law* (Walt Wilhelm);
- the validity of measures adopted by the European institutions may *be interpreted only in the light of European law* as its direct effect (Internationale H.-);
- *the observance of the fundamental rights* is an integrating part of the general law principles defended by the Court of Justice (Internationale H.);
- *the direct applicability of the European law* means the full and uniform enforcement of its regulations in all members states as of the date of entry into force thereof and as long as they are in force (Limmenthal II);
- a national court must enforce the European law and *ensure its direct and full effect* by eliminating, even ex officio, any internal contrary norm (Simmenthal III).

By analyzing all these, we may notice that they *relied on the CJEU case law* to make – by way of elaboration of the praetorian law - the decisive step from the state's subjective obligation to individual's subjective legal right. This was an act of extraordinary courage since it characterizes the passage from the traditional order of international law to the autonomous European order which obeys its own structural principles as a supranational order of operation.

The fundamental elements were first established in the oldest judgment of the case Van Gend & Loos<sup>14</sup>, where CJEC *gave article 12* from TCEE – forbidding the introduction of new customs charges and taxes having the same effect and the increase of customs charges and taxes existing in the relation between members states – *direct effects*, namely this article *establishes individual rights that the state courts must observe*. In the motivation of judgment they argue systematically and teleologically: if a certain regulation produced a direct effect, it should be appreciated *according to the spirit, systems and text of the Treaty*. TCEE objective is the creation of a Joint Market whose functioning concerns directly the European citizens, that is the Treaty is more than an Agreement establishing only mutual obligations between the member states.

As for art. 12 from TCEE under discussion, we underline the fact that the Treaty contains a clear and unlimited interdiction and – this is the reason for which, due to its nature – it excellently qualifies to produce direct effects in the legal relationships between the member states and individuals by obeying their law without the need of any intervention of the state legislator.

Corresponding to the establishment of the preponderantly economic objectives of the Community, the fundamental economic and social rights form the *main object of case law* so far, and yet there is a succession of different other fundamental rights. In this respect, the legal adviser trained in German law notices the methodic and pragmatic predisposition of case law which usually proceeds in a

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<sup>14</sup> V. Gend & Loos judgment holds that: “From all these facts we must draw the conclusion according to which the Community represents a new order of international law in favor of which the states – even if in a limited framework – confined their rights of sovereignty, namely a legal order whose subjects are not only the member states but also individuals. That is why, the community law – which is independent from the legislation of the member states – is going to confer rights to individuals in the same way it imposes obligations. Such rights emerge not only if the Treaty establishes them explicitly but also on the basis of unequivocal obligations that the Treaty imposes on individuals, the member states and the Community organisms”.

manner oriented towards the result and, on this occasion, even omits sometimes a more precise establishment of the defense domain of fundamental rights ensured by the right under discussion.

Among the fundamental rights recognized by CJEU are the following: the right of property, the liberty of trade, namely the right to economic activity, the liberty of association and the liberty of coalition, religious freedom and the freedom of cult, the liberty of opinion and information, observance of private life and family life, the confidentiality of correspondence held with one's defense lawyer, the right to not accuse oneself, the inviolability of one's residence, and the free choice of one's business partner.

The autonomy of European legal order towards the legal order of member states is not absolute. Since the states instituted the Union, this has not become a foreign entity exterior to them. To support this idea they have established that the legal system of the Union and the national one shall apply to the same individuals in their double quality of citizens of the member states and the Union; Union's law emerges and attains its objectives only to the extent to which it is accepted in the legal order of the member states.

Natural interactions have been established between the community law and the internal law. In this respect, member states provided *the principle of loyal cooperation*<sup>15</sup> in art. 4 paragraph (3) of EUT. Thus, by virtue of this principle of loyal cooperation, the Union and member states respect and help each other in the effort to accomplish the missions resulted from treaties. The member states adopt any general or special measure to ensure the fulfillment of obligations resulting from treaties or from the acts of Union's institutions.

Member states facilitate the fulfillment by the Union of its mission and refrain from any measure that might endanger the fulfillment of Union's objectives.

The principle was introduced in the treaty since they understood that legal order of the union could not attain by itself the proposed objectives. Unlike the national legal systems, the EU system is not a closed one needing the support of the national legal orders so as to be enforced. All the institutions of the member states must admit that the EU legal order is not *exterior* or *foreign* to them and that the member states and the EU institutions form a joint assembly in order to achieve some joint objectives. Consequently, member states must not only observe the Union norms but also *enforce them and bring them to life*.

To manifest the cooperation between the European law and the national law on a legislative level, they started enforcing the *directive mechanism* establishing that the member states shall choose the most adequate form and means for their national specificity so as to attain the objectives set at European level.

In this respect, the normative acts of the member states must answer the need of a modern legislative framework of the European Union, and represent a coherent and articulate answer to the need of reformation both of the fundamental institutions and mechanisms related to the substance of social-economic relationships and procedural instruments.

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<sup>15</sup> The importance of principle of loyal cooperation is also underlined by the CJ case law regarding the *indirect effect* of community norms.

The assembly of legal norms (codes, methodological or implementation norms etc...) of the European Union member states must follow the idea of *promoting a monist conception of regulation of the legal relations*. In this perspective, legal norms must incorporate all European regulations on individuals, family relations and commercial relations. Moreover, the process of elaboration of such norms must also take into account the dispositions of private or public international law.

By correlating the dispositions resulting from the tradition of national law to provisions contained in the European instruments and to international provisions and selecting the basic norms by virtue of the solutions constantly given by the doctrine and European case law over the years, the assembly of legal norms must answer the need of adaptation of current European legislation to the exigencies of social-economic realities thereof.

### 3. The jurisprudence of the European Court of Justice

The case law of the European Court of Justice goes farther and underlines that the priority of Union law must be *general and absolute*, that is it must manifest over the *assembly of national law*, including over the *constitutional rules* of the member states. The example of reference in this respect is *Simmenthal*<sup>16</sup> case, a case where the Italian court judging this trial showed that, pursuant to the judgments of the Constitutional Court, it could not eliminate the national regulation contrary to the European law without first notifying the Constitutional Court in order to declare it as unconstitutional. But the European Court of Justice answered that “any national judge called on their competence *must integrally enforce the community law* and protect the rights conferred by it to individuals by the non-enforcement of any potentially contrary disposition from the national law, regardless whether this is prior or subsequent to the community norm.” so, the national court must ascertain itself, without delay, that the national norm contrary to the EU norm can no longer be enforced.

In the European law, they usually provide the *obligations of result* by letting the receiving states the freedom to choose the means to fulfill these obligations. The Court of Justice has constantly decided that, pursuant to art. 5 from ECT, *the recognition of member states' powers implies their obligations to enforce the community law, and the form in which the internal entities of member states exercise these powers and execute such obligations shall exclusively belong to the constitutional system of each State*<sup>17</sup>, and such community obligations of result *are imposed to all internal authorities of the member states, including their competences and jurisdictional authorities*.<sup>18</sup>

Pursuant to art. 10 from E.C.T., *member states shall take all general or special measures necessary to ensure the execution of obligations resulting from this*

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<sup>16</sup> Judgment of Court of March 9<sup>th</sup> 1978 – Case 106/77 - Amministrazione delle Finanze dello Stato v Simmenthal SpA. – Reference for a preliminary ruling: Pretura di Susa - Italy. – Enforcement by the national court of an act contrary to the community law.

<sup>17</sup> CJEC, International Fruit Co. judgment of 15.12.1971, Rec. 1971, p. 1107.

<sup>18</sup> CJEC, Von Colson and Kamann judgment of 10.04.1984, Rec. 1984, p. 1891.



*treaty and they shall refrain from any measure susceptible to jeopardize the achievement of goals of this treaty.*

Thus, member states' role in the enforcement of the European law is structured by three principles: 1) – participation of national authorities to the enforcement of the European law materialized into three domains: legislative, administrative and judicial; 2) – the obligation of collaboration of the member states resulting from the dispositions of art. 10 E.C.T. is also referred to as the *principle of community loyalty* or of loyal cooperation and forces the member states to act, being thus a positive obligation which corresponds to the materialization of the principle of primordality of community law over the national law; 3) – the principle of institutional and procedural autonomy guaranteeing that the measures for the enforcement of community norms are taken in the state legal systems by the national institutions and according to the procedures existing in these systems.

In case of inobservance of the European law, there is a series of sanctions such as *community administrative sanctions* (art. 83 from CEEA Treaty establishing sanctions such as the warning, the withdrawal of financial support or the technical support, seizure of firm, total or partial withdrawal of raw or special materials – ECJ has the competence to control the sanctioning decisions established based on the regulation); *national administrative sanctions* that are established by the member states based on the enforcement of principle of procedural autonomy or they may be enforced only by national authorities when provided under the European norms (e.g. in the field of joint agricultural policy, the Committee, following the delegation received from the Council, may enforce the sanction of exclusion from subsidies); *penalties* that do not belong to the European Union competence as they are not established by treaties, thus the member states are the ones that may criminally sanction the violation of European regulations.

By virtue of the aspects shown above regarding the European legal order, the Romanian legislative system has started the harmonization of national provisions starting with the fundamental law, the *Romanian Constitution* which, in art. 135, stipulates that "... (2) The State must provide: ... g) the enforcement of regional development policies in concordance with the European Union objectives and in art. 148: *The accession to the European Union provides that:* "... (4) the Parliament, the President of Romania, the Government and the juridical authority shall guarantee the fulfillment of the obligations resulted from the accession and the provisions of paragraph (2).

These adaptations are continued with the Romanian *New Civil Code* where they expressly provide in art. 5 the principle of *enforcement with priority of the community law* "In the matters regulated by this code, the norms of community law shall apply with priority, regardless of parties' quality or statute."

#### 4. Conclusion

As a conclusion, the European Union case law consecrates the unity of European law as being compatible to a certain social and cultural pluralism, and in this respect the national legislative systems follow a justified goal in terms of the European law, and the member states have the competence to choose the most

adequate means to observe the exigencies resulted from the European law, especially from the *principle of proportionality*.

This way, the European Union member states must make a legislative effort by which they may directly achieve the harmonious integration of the internal legal order into the European legal order, since only the Constitution and the national legislator may transpose these objectives and ensure that the national judge may exert their new specific responsibilities of a *European judge*.

These principles and goals represent landmarks that must orientate the adaptation of the national law and make it directly compatible to the European one, so that the latter might be invoked and enforced by the national judicial ways.

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