Annals of the Academy of Romanian Scientists
Series on Economy, Law and Sociology
ISSN 2068-200X Volume **1**, Number **1**/**2009**

THE ROLE AND FUNCTIONS OF THE ROMANIAN JUDGE WITH REGARDS TO THE COMMUNITY LAW

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Rezumat: *În procesul integrării comunitare sistemul juridic intern, ca şi justiţia comunitară, au un rol proeminent, asigurând şi garantând drepturile şi libertăţile individuale, respectarea şi aplicarea tratatelor U.E. Aşadar, buna funcţionare a justiţiei, calitatea şi celeritatea în înfăptuirea actului de judecată, în acord cu marile principii ale Dreptului Comunitar - prioritatea, aplicarea imediată, subsidiaritatea şi proporţionalitatea - interesează întreaga societate şi constituie parametrii esenţiali ai drumului îndelungat al integrării juridice comunitare.*

Abstract: *Within the process of the European Union integration, the internal judicial system, as well as the Community justice, has a significant role, granting each individual's rights and liberties, also assuring the observance and implementation of the European Union Treaties. Therefore, the efficiency of justice, the quality and celerity in achieving the act of judgment, according to the great principles of the Community Law – priority, immediate application, subsidiarity and proportionality – concern the entire society and represent essential parameters of the long road of the community legal integration.*

Keywords: National judge, Juridical European integration, Legislative and Euro jurisprudential Compatibility, Competence of Internal Judge in the Application of Communitarian Law

I. EUROPEAN LAW – A NEW NORMATIVE AND JURISPRUDENTIAL ENVIRONMENT FOR THE ROMANIAN JUDGE

1. Preliminaries

1.1. During the latest 6 decades (starting with 1950) the Romanian nation has been completely absent from the ideological space and, in particular, from the real space of the European growth, during which time 6, then 10, 12, 15 and 27 nations have enlightened and extended the European Union, as other nations, like the Swiss and the Norwegian, "have only denoted a discreet enthusiasm regarding the European construction"[2]. However, all Europe's nations benefited from the European construction, directly or indirectly, taking into consideration the "peace dynamics", the development consequences and the progressive massive integration in the European Union. For the Romanian judge the Community Law and the jurisprudence of the European Court of Justice in Luxembourg have been "western enigmas" until December 1989, and subsequently they have become, in a relatively short time, more and more emphasised, "fantastic elements", small

[1]Professor, Ph D, Jurist, Former judge at the European Court of Human Rights.
[2]Jacot-Guillarmond, Oliver, *Juge national face au droit Européen*, Bruxelles, Bruylant, 1993, p.23

"acquaintances", "tempting" subjects and presently "decisive targets", towards which the Romanian judge has to "set sail" and "navigate".

In Romania, ***the progressive application of the politics of European Economic Integration*** and then, of the political integration, has been and still is mainly, if not exclusively, ***the problem of the political and administrative authorities***, and not of the judges[1].
For this reason, the removal or the alienation of the Romanian judge from the Community legal order has guided him, although slightly powerless, towards Strasbourg, within the area of human rights, especially through the "force of attraction" of the European Court of Human Rights against Romania, starting with 1997[2].

1.2. So, which is the actual portrait of the Romanian judge and what is his role in regard to the European Law, hence with the European legal integration?

The Romanian judge is obviously characterized by:

- a significant absence from the Community legal space, both theoretically and also practically, being less "close" to the principles of the Community Law, which are like a essential "bridge" between the national jurisdiction and the community jurisdiction, but also
- a timid approach to the norms of the European Council and a restrained reaction to the European Court of Human Rights jurisprudence, despite their authority in Romania's national legal order.

1.3. Notwithstanding the fact that the national judge plays a key role in the process of Community integration, he continues to remain a discreet actor, even ignorant, to this continental demarche.

"Definitely, the activities the national judge is summoned to fulfil when applying the European Law, are enrolled in the political and cultural finality represented by the progressive and pacifist integration of all countries from the continent, without exceptions".

2. The national judge – a common law judge of the Community Law

The national judge has the competence of judging all litigations that concern the application of the Community Law, if the Community norms do not assign them the jurisdiction.

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[1]Party, Robert, *Le juge au libre échange européenne*, in *L'avenir au libre échange en Europe*, Zurich, 1990, no. 637, p. 232 – assessment over the situation in Switzerland.
[2] Koller, Arnold, *Le patrimoine juridique du Conseil de l'Europe: son rôle dans le rapprochement avec les pays de l'Est,* in *Revue Universelle de Droit de l'Homme,* 1990, p. 385.

This statute is the effect of the direct application and of the Community Law priority principle, which allows the national judge to create rights and obligations for individuals, with a double consequence:

- they can validate them in front of the national judges, and

- the national instances have the obligation of guaranteeing their observance[1].

However, this ***Community Law competence*** of the national judge is not absolute, it can, or, better said, it needs to merge ***with the competence of the Court of Justice in the matter of interpreting the Community Law*** and in the matter of appreciation of the validity of these derivative[2] law dispositions.

For that reason, the constituting treaties have invested the Court of Justice with the absolute prerogative of independent interpretation and have put forth to the national judge the disposal of a special procedure, based on which it is realized the necessary cooperation between him and the Court of Justice of the European Union.

At the same time, ***only the Court of Justice has the competence to enquire the legality of the documents issued by the European Union's institutions***.

Consequently, the national judge would be able to require the Community judge a direct answer over the legality, validity and the application method of a Community normative text, within a trial in process of being solved, in order to substantiate his legal decision on the basis of and also in applying the Community Law.

The concept of national jurisdiction includes therefore, ***the institutions that belong to the jurisdictional organization of the Member States.***

The constituting treaties use wordings such as "the jurisdiction of the Member States" or "the national jurisdiction", nominating so those internal institutions which compose the jurisdictional organization of the Member States and which belong to the legal or administrative order, having or not having repressive competencies and in which the national judiciary law has specialized them.

Within the national law there can also be established ***other authorities*** with professional or corporate character, especially from the economic or social domain of which jurisdiction capacity remains uncertain.

The Community Law qualifies them as jurisdictions only if they fulfil the following conditions: they have a legal basis, they are permanent, they have

[1]. Bonlouis, J, Darmon, M., Huglo, Jean-Guy, *Contentieux communautaire,* 2001, Dalloz, p. 8.
[2] Hugle, J. G., *L'application du droit communautaire par le juge national, Gaz. Eur. Du Palais*, nr. 15, June, 1997, p. 15.

character of compulsory and legal jurisdiction, and they apply a debatable and contradictory procedure, similar to the one of common law and so on.

In such a context it has been repeatedly emphasized, within the community jurisprudence and within the compared jurisprudence, the specific major role of the judge, next to the legislative and administrative authorities, ***in the execution and the application of the international treaties***[1]**.**

3. The new normative and jurisprudential environment of the Romanian judge

3.1.The three jurisdictions: Bucharest, Strasbourg and Luxembourg

Obviously, and even more and more frequently, the following question is *being asked*: which is the normative environment in which the Romanian judge progresses at present?[2].

The Romanian judge is under the "sweet burden" of the national law, somehow "molested" by a second pylon, the jurisdiction of Strasbourg, to which Romania has unconditionally obeyed, on 18 May 1994, when Romania ratified the European Convention on Human Rights, without any reticence (after only 8 months as from the accession to the Council of Europe), and steering towards the Community Law and from the jurisprudence of the Court of Justice of the European Union.

The prior application of the Convention and the imperativeness of the jurisprudence must be the managing principles in the internal law and jurisdiction of our country, ***clearly defined by art. 11 para 2 and art. 20 para 2 and by art. 148 para 2-5 of the Constitution of Romania, so that the Romanian judge sees himself in the situation of being*** "dominated" by the "charge" of the grand legal systems – the national system, the European system on human rights and the Community system; all these in the context of which the process of forming and "specializing" the national judge as the first Community judge, according to the subsidiarity principle, is unfortunately without a solid pathway in the case of every judicial institution in Romania.

3.2. The decentralized application of the Community Law. The principle of subsidiarity

Within a community formed by 27 Member States the principle of subsidiarity represents "the arch key" of Community Law application, being consecrated as it

[1]The Court of Justice of the European Communities, Preotore di Salo decision, 11.06.1987, Rec. 1987, p. 2545.

[2] Pescatore, Pierre, *Les objectifs de la Communauté européenne comme principes d'interpretation dans la jurisprudence de la Cour de Justice, Mélanges…*, Paris/Bruxelles, 1972, forme II, p. 325.

is both in the Treaty on the Functioning of the European Union (art. 5 para 2) and also in the preamble of the Treaty on European Union.

The Court of Justice has constantly decided that, according to art 5 of the Treaty establishing the European Community, "the admission of the Member States authorities involves ***assuming their obligations to apply the Community Law, and the issue of knowing in what manner they apply these authorities and fulfil those obligations, in the context given by the Member States to their determined internal authorities, is exclusively belonging to the constitutional system of each state."***[1]

These Community obligations of effect are "imposed to all internal authorities of the Member States, including, within their competencies, to the jurisdictional authorities"[2].

3.3. The unity of the European Law and the diversity of the national contexts[3]

The application of the Community Law is conditioned, throughout the Member States, by respecting the particular aspects of each national judicial system, although the Community norms strive to be realized in the national plan with a "content and an equal efficiency"[4].

The Courts in Strasbourg and Luxembourg, by numerous decisions, have assessed, based on the comparison of the internal systems - relative on the disproof of the national taxes or on the recovery of those paid in time, that the internal ***norms cannot be considered as incompatible with art. 9, 12, 13, 92, 93 and 95 of the Treaty establishing the European Economic Community.***

Therefore, the jurisprudence establishes with eloquence that ***the unity of the European Law is compatible with a sort of social and cultural pluralism***; the national legislations pursue an explanatory purpose regarding the Community Law, being of the Member States competence to choose the most adequate means in regard to the requirements of the Community Law, especially that of ***the principle of proportionality***.

[1]The Court of Justice of the European Communities, International Fruit Codecision of 15 December 1971, Rec. 1971, p. 1107.
[2]The Court of Justice of the European Communities, Colson and Kamann decision of 10 April 1984, Rec. 1984, p. 1891.
[3]Jacot-Guillarmond, O., *op. quote* p. 54-57.
[4]*Pescatore, P., L'application du droit communautaire dans les états membres*, Luxembourg, 1976, p. VI.

THE ROMANIAN JUDGE IN FRONT OF THE COMMUNITY LEGAL ORDER. THE ROLE AND FUNCTIONS OF THE NATIONAL JUDGE IN REGARD TO THE COMMUNITY LAW

1. An efficient legal system – the first condition for the juridical integration in the European Union.

1.1. The Community Law has to be applied in a decentralized manner, in the general limit of its effect and in the specific limits of the national procedural principles.

The Court of Justice has constantly asserted the principle of the institutional autonomy of the Member States as regards the judiciary and procedural law organization: in the absence of the Community settlement, it belongs to the internal legal order of each Member State to establish the competent jurisdictions, the means of action in justice and the procedures intended to guarantee the protection of the litigants, as a direct effect of the Community Law[1].

The national judge is, therefore, in the centre of the legal organization autonomy of the Member States and in the limits of applying the Community Law[2]; his incidence over the organization of the internal jurisdictional functions are more and more direct, precise and imperative[3].

The limits of applying the principle of the institutional autonomy of the Member States are:

a. the conservation of the useful effect of the Community Law;

b. procedural non-discrimination and

c. the observance of the Community procedural exigencies or rules.

a. The first limit of the institutional autonomy consists in the fact that **the national procedural law does not have to annihilate the useful effect of the Community Law**. It has to allow and also totally guarantee the internal effect of the Community obligations and, generally, of the international commitments, the internal pursuance of the international treaties being of a major importance[4].

The Court of Justice has repeatedly decided that the national procedural law has to

[1]The Court of Justice of the European Communities, Mireco decision – 10 July 1980, in Rec. 1980, p. 2559.
[2]Oliver, Peter, *Le droit communautaire et les voies de recours nationales*, CDE, 1992, p. 348.
[3]*Grevisse, F., Bonichot, Jean Claude, Les incidences du droit communautaire sur l'organisation et l'exercice de fonction juridictionnelle dans les Etats membres, Mélanges Boulois*, Paris (Dalloz), 1991, p.298.
[4] Jacot-Guillarmond, *O., op. quote* p.196.

imply the direct effect of the Community rule and has defined this direct effect as an admittance of the individual rights which the internal jurisdictions have to defend[1].

The Community Court has recently stated, even more expressively, this limit in the "Zuckerfabrik decision", stressing out the fact that **"the national judge, commissioned to apply, in the context of his competency, the Community Law dispositions, has the obligation to guarantee the complete effect of the Community Law[2]".**

b. The national procedural law does not have **to discriminate the means and actions of the Community Law**, in regard to the means and actions which apply to the national law.

According to the constant jurisprudence of the Court of Justice of the European Community, the recognized right in the internal legal order of each Member State (in the absence of a Community regulation) to establish the procedural means of action in justice, intended to guarantee the protection of the rights which the litigants invoke in the name of the Community Law, exists only if the following discrimination is not being created: the legal protection practiced by the Treaty, as it is expressed in the art. 177 (of the Treaty establishing the European Communities), implies that any type of action, mentioned in the national law, is compelled to have the power to be used in order to guarantee the observance of the Community rules and of the direct effect, under the same conditions of admissibility and procedure as the conditions for the guarantee of the national law"[3].

c. By the original (primary) and/or the secondary (derived) European Community documents **it has been also limited the institutional autonomy of the Member states, in the procedural matter**, being relevant to this statement the provisions of art. 5 of the European Economical Community (the principle of cooperation), of art. 7 (discrimination prohibition on nationality reasons), and of art. 189, which define the regulations, directives and decisions relating to exercising the jurisdictional function at internal level.

These outline the framing in the discretionary space left to the Member States[4], and the examples of Community documents, given by the specialist doctrine[5] in certain matters, are eloquent.

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[1]The Court of Justice of the European Communities, Van Gend /Loos decision, 5 February 1963, p. 25.
[2]The Court of Justice of the European Communities, Zuckerfabrik decision of 21 February 1991, in Rec. 1991, p. I-415.
[3]The Court of Justice of the European Communities, Rewe decision, 7 July 1981, p. 1805.
[4]Wilmars, J. M., *Réflexions sur le système d'articulation du droit communautaire et du droit des Etats membres, Mélanges Boulois*, Paris (Dalloz), 1991, p. 391.
[5]Jacot-Guillarmond, O., *op. quote,* pp. 202-203.

Therefore, for example, all the directives impose to the Member States **a jurisdictional protection system** which would allow the beneficiaries to obtain the execution of the directives in justice, and **the obligation of the conformable interpretation** represents another procedural exigency of the Community Law imposed to the national judge.

It is true that this disposition (art. 189 para 3 of the Treaty establishing the European Community) allows to the Member States the freedom to choose the ways and means intended to guarantee the effective application of the directives, but this freedom implies however the entire obligation, of each addressee State, to take, within the national juridical order, all the measures with the aim of fully guaranteeing the effect of the directives, according to the intended objectives[1].

1.2. The transparency of the national procedural law and the guarantee of the effective juridical protection of the individual rights conferred in the Community Law.

1.2.1. The priority principles and the direct effect of the Community Law, substantially separate the national law of the European Union law, fact constantly underlined in the jurisprudence of the Court of Justice of the European Union:

- The primacy and the direct effect of the Community Law dispositions do not release the Member States from the obligation to eliminate, from their internal legal order, the dispositions which are incompatible with the Community Law[2].

- In the event that the Court's decision reveals the incompatibility of some legislative dispositions from a Member State with the Treaty, it implies, for the authorities who exercise the legislative power, **the obligation of changing the subject dispositions, in a manner conformable to the Community Law exigencies**[3], which also reveals the ***compulsory particularity of the Community jurisprudence***.

Therefore, the national legislator has to harmonize the internal procedural law with the European Union Law and he is indebted to obey to the decisions of the Court of Justice of the European Union, which has decided that, virtually, the procedural conditions imposed in the internal law would not practically have to

[1]The Court of Justice of the European Communities – Von Golson / Kamann decision, 10 April 1984, in Rec. 1984, p. 189.
[2]The Court of Justice of the European Communities, Comisia c. Italia decision, 104 / 1986, in Rec. 1988, p. 1799.
[3]The Court of Justice of the European Communities, Waterkeyn decision of 14 December 1982, 314 /81, in Rec. 1982, p. 4337.

make impossible the exertion of the rights given by the Community legal order[1].

The doctrine has however emphasized that **these procedural requests have to be evaluated depending on the exigencies of the European Convention on Human Rights**[2], especially those of equity, celerity, impartiality and legality, comprised by the concept of an equitable procedure defined in art. 6 of the Convention. Besides, within the jurisprudence of the European Court of Human Rights, it has been decided that the legality exigency includes the pre-eminence of the law, inherent characteristic of an equitable trial and an essential component of the concept "provided by law", defined in the art. 8 para 2, 9, 10 and 11 of the same Convention.

1.2.2. ***The guarantee of the effective judicial protection of the individual rights***, conferred by the Community Law to the individuals, represents the fundamental mission of the Member States authorities, the national judge being the one who applies the Community norm, eliminating when necessary the incompatible internal norm.

Such an authority given to the national judge ***represents actually a consecration of his full competencies as a Community judge***[3].

The jurisprudential principles which illustrate the complementarity in choosing the effective measures, between the legislator and the judge, as well as between the Community Law and the European Convention on Human Rights, represent precise markers for the clarification of internal procedural law and, inherently, of the national judge, who exerts the full and effective control over the application and observance of the Community Law.

1.3. Border aspects of the compatibility of the internal judicial power with the Community exigencies:

a. **An independent legal power and a group of competent magistrates, capable to assume and apply the Community acquis**;

b. **A judiciary power found in a real race of preparation and appropriation of the Community Law and of the European law of human rights**;

c. **A modern and compatible with the European standards judiciary organization;**

[1]The Court of Justice of the European Communities, San Giorgio decision of 9 November 1993, 199 /82, in Rec. 1983, p. 3595.
[2]Jacot-Guillarmond, O., *op. quote*, p. 206.
[3]Barav, Ami, *La plenitude de compétence du juge national en sa qualité de juge communautaire*, in *Mélanges Boulouis,* Paris (Dalloz), 1991, p. 2.

d. **A system of simplified, transparent, effective and operative and less costly competencies and judiciary procedures**;

e. **A strong administrative auto-government of the judiciary power, which would guarantee its independence and functionality in full accordance with the European principles and exigencies, guaranteeing the citizens confidence in the national judge and in his responsibility of Community judge.**

2. **The responsibility of the national judge** – primary aspect in guaranteeing the effectiveness of the legal power.

In his capacity of community judge, ***the national judge is, without any doubt, the bond between the principle of the institutional autonomy of the Member States, on the one hand, and the limits of this principle included in the concept of the useful effect of the Community Law***, in the procedural non-discrimination, in the observance of the Community procedural exigencies or rules, on the other hand. On this basis get outline the specific ***responsibilities*** belonging to the national judge.

2.1. *The loyal cooperation with the Community institutions*

The loyal cooperation with the Community institutions represents, according to art. 5 of the Treaty establishing the European Community, one of the supreme obligations of the national judge, as it consists of the direct and special connection of the Community institutions with the legal authorities of the Member States, **commissioned to look after the application and observance of the Community Law in the national legal order**[1].

2.2. *The interpretation of the national procedural law according to the European Law.*

The principle of interpreting the national procedural law according to the Community Law represents ***the corollary of the national judge obligations*** in applying **the Community standards**. The national jurisdiction is expected to interpret its national law in the light of the directive text and finality in order to reach the result intended by the art. 189 para 3 of the Treaty of the European Economic Community[2].

Applying the concrete consequences of this principle in a cause, the Court of

[1]The Court of Justice of the European Communities, Zwartveld Decree of 13 July 1990, read by Jacot-Guillarmond, Oliver, p. 209.
[2]The Court of Justice of the European Communities, Johnston decision on 15 May 1986 (d. 222/84), in Rec. 1986, p. 1651.

Justice has disclosed[1], in reply to the decision of the first instance judge and of the Spanish judge, that the latter should have left beside a Spanish law of 1951, relative to the judiciary system of the anonymous societies, which was incompatible to the directive no. 68/1951 of the Council, in a matter of the societies law.

2.3. ***The elimination of the national procedural rules contrary to the Community Law***

The imperative obligation of the national judge **not to apply the national procedural rule contrary to the Community Law is one of the specific responsibilities of the judge, illustrated as principle,** in the "Simmenthal decision" as of 9 March 1978[2] of the Court of Justice.

Therefore, **by principle, any national judge summoned within his competency, has the obligation to integrally apply the dispositions of the Community Law and to protect the rights that this offers to the individuals, leaving apart all the dispositions, possibly contrary, of the national law, either before or after the Community rule.**

The Court has firmly decided (in the Simmenthal context mentioned above) that the national judge, commissioned to apply, within his competency, the dispositions of the Community Law, has the obligation of guaranteeing the complete effect of this rules, leaving apart in case on need, by his own authority, any other contrary disposition of the national legislation, being even posterior, without being braced by its preliminary elimination through legislative ways or any other constitutional procedure.

2.4. The facilitation of the individual's access to the rights guaranteed in the Community law represents another specific responsibility of the national judge.

Compared to the national law, the rules of the Community law have a **public order characteristic**, so that, in the investigation and adjudication of a cause, the national judge is expected to examine their incidence **on his own**.

The access of the individual to the rights guaranteed by the Community Law, which has a decisive role in the Community structure, remains illusory if the individual demands have not been effectively and concretely solved by the judge[3].

[1]The Court of Justice of the European Communities, Marleasing decision of 13 November 1990.
[2]The Court of Justice of the European Communities, Simmenthal decision of 9 March 1978 (d. 106 /77), in Rec. 1978, p. 629.
[3]Jacot-Guillarmond, O., p. 213.

2.5. The useful effect of the Community Law creates and imposes other obligations too, **commissioned to the national judge, in his capacity of Community judge**, systematized, masterly, by the Community Law doctrine[1]:

- the obligation to do whatever is necessary in order to eliminate the national normative dispositions which oppose to the full efficiency of the Community standards;

- the obligation to apply the principle, inherent to the Treaty of the European Economic Community, according to which the Member States are obliged to repair the damages caused by the chargeable breaches of the Community Law;

- the obligation to admit, in certain circumstances, the direct effect of the directives, non-transposed in the national law;

- the obligation to call for provisional measures, even contrary to the national law, in view of an efficacy protection of the individual rights based on the Community Law and so on.

Obviously, the configuration of the main specific responsibilities of the national judge and the redefinition of the national jurisdiction within the exigencies of the Community Law, clearly reveal us **the conclusion of the admittance of a plenitude of competency and jurisdiction of the national judge, in his capacity of Community judge.**

Also, we note that, in parallel to this progressive European integration, which establishes the jurisdictional competencies of the national judge, we also assist ***to a process of interaction between the national jurisdictions and the Community jurisdiction***, phenomena which, during the latest years, ***has acquired new dimensions, especially in the matter of the human rights, generated especially by the mutual interaction of the Community law and of the European Convention on Human Rights***[2].

[1]Barav, Ami, *La fonction communautaire du juge national*, doctorate thesis, 16 December 1983, Strasbourg, p. 612, *quote repeated* by *Guillarmod*, *O. J.*, (e. p. 213 and the next one).
[2]Pipkorn, Jorn, *La Communauté européenne et la Convention européenne des droits de l'homme,* in *Revue Trimestrielle des Droits de l'Homme*, Bruxelles (Bruylant), 1993, p. 221.