2000

COUNCIL OF EUROPE CONSEIL DE L'EUROPE

607

Strasbourg, 14 December 2000
<cdl\doc\2000\cdl-ju\44-e-pdg>

Restricted
CDL-JU (2000) 44
Engl. only

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

SEMINAR

on "The Implications of the New Century
and Striving to Join European Structures for Constitutional Courts"
17-18 November, Tartu, Estonia

organised within the framework of the Joint Programme
between the European Commission and the Venice Commission
of the Council of Europe for strengthening democracy
and constitutional development in central and Eastern Europe and the CIS

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RELATIONS BETWEEN NATIONAL COURTS AND THE EUROPEAN COURT OF JUSTICE

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Relations between National Courts and the European Court of Justice

Report presented by Armando Toledano Laredo

The rule of law and the separation of powers characterize at first sight the European Union.

The rule of law because, as far as the early Sixties, the first President of the European Commission, Prof. Walter Hallstein, had noted that by analogy to what is known in Germany as Rechtstaat, the expression Rechtgemainschaft should be used in the european context considering the legal grounds and the guarantees existing in a democratic State and, similarly, in the European Economic Community.- A view which became more and more evident with the following European Treaties.

The separationion of powers because - bearing in mind Montesquieu's care for the legislative, executive and judicial powers to be distinct and precisely determined - the powers of each Institution are accurately described in order to avoid conflicts.

Setting aside the other two sectorial Communities - the Coal and Steel and the Atomic Energy related ones - and concentrating on the European Economic Community because of its larger approach and broader aims, it is worth noting that its very first achievement was the creation of a *Customs Union* , that is to say in GATT's language the substitution of a single customs territory for the six territories of the founding Member States.

Such customs union, achieved on 1st July 1970 eighteen months ahead of schedule, included the free movement of goods all over the Community area and consequentely the dismantlement of all boundaries within it. It was followed by the establishment of the *Common Market* , meaning an area without internal frontiers within which the free movement of goods, persons, services and capital as well as payments is ensured. Ultimately, the implementation of the Single European Act 1986 at the end of 1992 gave birth to the *Single Market* , in other words a market worth comparing to the national market of a single State.

Such a single market could not be completed and *a fortiori* implemented without uniform rules harmoniously interpreted and homogeneously applied. And this harmony and homogeneity called of course for legal certainty and legal protection to enforce it.- This is, in short, the inherent logic of the European integration model.

Legal certainty springs, on the one hand, from a single source of interpretation in order to avoid the danger of a discordant reading of the law provisions. This single interpretation is guaranteed in the different States by the Constitutional Courts or, in their absence, by the Supreme Courts.- On the other hand, legal certainty springs too from an identical application given to the same provision irrespective of the Court which has to solve the case.

Both levels of legal protection belong of course to the judiciary. In the Community framework, it belongs to the European Court of Justice and to the national courts and tribunals of the current fifteen Member States, a figure which shall become nearly the double with the accession of the applicant Central and Eastern European States.

This pivotal role of the judiciary needed a close relationship between the European Court of Justice and the national Courts which has been reached through the years, producing an operating and efficient network aiming at ensuring - in a European Union governed by the rule of law - the homogeneous interpretation and the harmonious application of Community law all over the European Union territory, regardless of the residence of european citizens.

The common denominator of this relationship is *Community law* be it *primary* i.e. the European Treaties or *secondary*, that is to say the Regulations, Directives and other Community legal acts adopted day after day by the Community Institutions.

It is not an easy thing, at first, to grasp the correct nature of Community law. It stems without doubt from public international law acts, which - while keeping their original nature - have generated a *new legal order*, the subjects of which are the Community Institutions, the Member States and their nationals as well.

Thus Community law is to be regarded as something new: *the common internal law of the Community*, rather than a law between the Member States, as it happens under the aegis of public international law. The case-law of the European Court of Justice has repeatedly held, in this context, that the EEC Treaty "albeit concluded in the form of an international agreement, none the less constitutes the constitutional charter of a

Community based on the rule of law" (Cf. Opinion 1/91 EEA Agreement, ECR 1991, p. 6012).

This specific nature of Community law brings with it the supremacy over domestic law, be it prior or posterior, be it ordinary or constitutional. It has, in many cases, a self-executing nature: the Regulations, some Directive provisions when the directive has not been transformed in due course in municipal law.

Back to legal certainty, the European Court of Justice "shall ensure that in the interpretation and application of this Treaty the law is observed" (Art. 220 EEC). Furthermore, the Court of Justice has jurisdiction to give *preliminary rulings* concerning the interpretation of the Treaty provisions as well as the validity and the interpretation of acts of the Community Institutions (Art. 234 EEC).

The preliminary rulings procedure is the backbone of the judicial network put into being in the Community context.

Except in the cases where a natural or legal person is directly and individually concerned by a Community legal act, there is no access for such persons to the European Court of Justice. The same persons may however complain to any court or tribunal of a Member State, which - where a question concerning the interpretation or the application of Community law is raised- may request the Court of Justice to give a preliminary ruling.

It is worth stressing that, where any such question is raised in a case pending before a national court or tribunal against whose decision there is no judicial remedy under national law, that court or tribunal has no choice, it shall bring the matter before the Court of Justice.

The Court of Justice - acting as a constitutional court - is thus the only court to have jurisdiction as far as the interpretation or the validity of Community acts or provisions are concerned and, at the end of the day, the national courts or tribunals shall be the ones to decide upon the cases brought to them and to apply Community law.

Naturally this long distance dialogue between the Courts is held - both in the written procedure and in the hearings - in the language of the *a quo* court or tribunal, which - if you allow me to use the word - "freeze" the national proceeding until the preliminary ruling is given.

The members of the European Court of Justice and of its Tribunal of First Instance as well as the members of any court or tribunal of the Member States are therefore Community law judges since the first interpret Community law or decide about its validity and the latter are the ones who ultimately apply Comunity law.

The European Court of Justice might appear as being somewhat innovative and distant for a new Member State, the same way it looked to the Six founding States at the beginning, but it shortly becomes, with its case-law, the lighthouse towards which every court and tribunal as well as every lawyer turn as soon as they are involved in Community matters and preferably before being involved.

Statistics show that some time has to elapse before a preliminary ruling is requested by a new Member State's court or tribunal and the reason may be found in the transitional period or more simply in the lack of knowledge of the Community procedures. It is therefore suitable to make it known as soon as possible to judges and lawyers and to economic operators as well.

After several decades of existence, the volume of Community acts and of the *"acquis communautaire"* makes it difficult to apprehend the essence of Community law but its fundamental principles are crystal clear.

The very existence of the single market - the core of the European integration - depends on the real and permanent uniform effect of the relevant rules of Community law in every Member State.

The basic principle is therefore the *principle of supremacy* of community law over national laws whatever their nature and regardless of the time of their entering into force, this principle being a principle of Community law itself (Case 106/77, Amministrazione delle Finanze dello Stato v. Simmenthal SpA).

The European Court of Justice has held that Community law could not "because of its very nature, be overridden by rules of national law, however framed, without being deprived of its character as Community law" (Case 11/70, Internationale Handelsgesellschaft mbH v. Einfur und Vorrats-stelle für Getreide und Futtermittel).

Community law, its principles and its provisions have effect independently of the legislation of the Member States since "the Community constitutes a new legal order, for the benefit of which the States have limited their sovereign rights, albeit within limited fields, and the subjects of which

comprise not only the Member States but also their nationals" (Case 28/67, Firma Molkerei-Zentrale Westfalen Lippe GmbH v. Hauptzollamt Paderborn).

The picture is now clear enough and any court or tribunal of a Member State, when faced with a municipal provision conflicting with Community law, shall : (a) refrain from applying it; (b) set it aside and (c) apply the Community law provision.

The setting aside of the municipal provision does not mean that it is of a lower order than Community law. It simply means that, by adopting or maintaining such a provision, the national legislator has acted *ultra vires*.

This being stressed, the national court or tribunal could have doubts about the correct interpretation to be given to the Community law provision or even about its validity.- In such a case, it should turn to the European Court of Justice, seek its preliminary ruling and solve the case after receiving the answer from Luxembourg.

The specificity and the originality of Community law have required some time before being totally understood and thus fully applied in the Member States.

Member States such as the three Benelux States had little problems with the novelties which have been described.- The Belgian Supreme Court held, along the lines of the Case 6/64 Costa v. ENEL, that "the Treaties which gave birth to Community law established a new legal order for the benefit of which the Member States have limited their sovereign rights in the fields determined by the Treaties themselves".

Italy, which traditionally belongs to the dualistic school, run counter difficulties, which were definitely overcome by the Constitutional Court recognizing the specific nature and thus the supremacy of Community law and the authority of the European Court of Justice (Cases SpA Granital v. Amministrazione delle Finanze dello Stato, 8.6.1984 and SpA Beca v. Amministrazione delle Finanze dello Stato, 23.4.1985).

The Federal Republic of Germany faced some problems with the Solange I judgement 1974, in which the Bundesverfassungsgericht regarded itself as having jurisdiction to review regulations against the fundamental rights laid down in the Grundgesetz as long as the process of integration in the Community had not developed far enough so that Community law contained a codified catalogue of fundamental rights.

In 1986, the Bundesverfassungsgericht Solange II judgement recognized that satisfactory durable guarantees existed that European Communities, particularly through the case-law of the European Court of Justice, ensured an effective protection of fundamental rights against action by the Community authorities, a protection which in essence was the same as that required as a minimum by the German Constitution, particularly because it guaranteed the essential core of fundamental rights.

Thus, as long as this guarantees are present - added the Bundesverfassungsgericht - it would not hear cases seeking to challenge the constitutionality of secondary Community law.

It is worth remembering that Solange I and II where connected with fundamental rights which, at that time, were not fully stated in the Treaties and that the same Bundesverfassungsgericht had held, in its judgement of 9 June 1971, that the supremacy of Community law and the direct effect of some of its provisions were the normal consequence of the system established by the European Treaties.

In France, there was at least theoretically for a time an unusual situation since the interpretation of international treaties did not belong to the judiciary but to the executive branch, namely the Ministry of Foreign Affairs.- On the one hand this praxis was abolished and, on the other hand, with the Nicolo judgement, the Conseil d'Etat lifted in 1990 its prior reservations.

Concerning the States which joined the Communities after their creation - when Community law had already become rather familiar for judges, lawyers, academics and economic operators as well, within the European Union and out of it - that is Denmark and Ireland in 1973, Greece in 1981, Portugal and Spain in 1986, Austria, Finland and Sweden in 1995, they took the necessary measures before their accession by completing or amending their constitutions in order to avoid any possible conflicting situation between their national laws and Community law, thus paving the way for a fair application of the latter by their courts and tribunals.

The United Kingdom solved the problem, before its accession in 1973, by giving effect to Community law through the European Communities Act 1972, which is the vehicle bringing the concepts of the Community legal order into the United Kingdom's system.

The overall picture of the enforcement of Community law throughout the European Union is no doubt a positive one thanks to the cooperation between national courts and the Europeaan Court of Justice.

Thinking of this judiciary network operating all over the European Union's territory, the visits paid by national judges to the European Court of Justice in Luxembourg are extremely useful because they are an excellent occasion both for a review of the basic principles of Community law and for an approach based on practice, that is following a live hearing of the Court after having received full information about the case at stake.

It is also a good occasion for the visitors to have an open dialogue with the European Court judges and to ask as many questions as they wish.

Year after year these visits take place and develop a personal contact and a better understanding between the European Court of Justice and the courts and tribunals concerned with Community law.

By way of conclusion, we could think that, in a few weeks, the world that has deeply changed in the past decades as we can easily witness shall be entering the XXIst Century.

The European integration will indeed be remembered as one of the major positive achievements of the XXth Century and the cooperation between Courts in the Community framework may most certainly show the way for larger and more ambitious judicial cooperations.