THE EUROPEAN COURT OF HUMAN RIGHTS AND THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES. SOME SPECIFIC FEATURES AND HUMAN RIGHTS APPROACH

Prof. dr. AURORA CIUCĂ
"Mihail Kogălniceanu" University, Iaşi

Many times being confounded or invoked with the belief that they have the ability to solve any type of dispute that could not find the solution on national arena, the two instances share the appellation "European Court" but they create two distinct juridical orders.

Being created by two European organizations that have different aims and powers, the courts of René Cassin and Jean Monnet oblige national states in different manners, in a large process of regional integration. From Strasbourg, the European Court of Human Rights (ECHR), the jurisdictional organism of the European Council answers to the objective of this organization to transform the European continent in a space of democracy, of the human rights guarantee and of the state of law. The Court of Justice of the European Communities (CJEC) builds in Luxembourg its own jurisprudence, by developing the initial treaties of the European Economic Community (the actual European Union) but its integrationist vocation is essentially inspired by the same values.

Both the European Council and the European Communities are regional organizations created by the will of states on basis of the international treaties but that act in different manners. The statute of the European Council, as a birth document of the organization is a treaty of classical international law. This supposes the application of the principle of the sovereign equality of the states parties (and as a consequence a horizontal dimension of their relations), the assumption of the obligations and their achievement in virtue of *pacta sunt servanda* and *the cooperation* as central element. The foundation treaties of the European Communities form a new type of organization and ask for other types of engagements to the states. The central objective, *the integration,* can be realized by the creation of some supranational structures, and this supposes the delegation from member states of some of their sovereignty attributes in order to adopt common norms. The supranational character, the conditions imposed for adherence, the authority owned by the European Commission, the Parliament and the Council are the distinct characteristics of the organization that we call the European Union today. Of course these aspects have become common in the specialty literature but a brief examination was imposed in order to understand the effects of these commitments.

The large number of the member states of the European Council (46 in the present-day) and of the European Union (27) confirms once again the will of the states to act together. This supposes a huge effort to adapt the national systems to the European demands, of course, in both cases (all the 27 members of the EU are also members of the European Council, in fact). Concretely, the European Convention for Human Rights (the basic document of European Council that stipulates the creation of the jurisdictional mechanism) is introduced in the internal law of the member states (looking for solutions to overpass the issues of the monist or dualist systems) and becomes "an instrument for the European public order"[1]. The Court of Strasbourg (together with the Commission[2] with which it formed a mechanism up to November 1st, 1998) declared the existence of some positive obligations from the states, it established a minimum system of protection standards for the human rights and, even more, it wanted to bring up to date the rights established by the Convention, by interpreting them in terms of the present conditions and mentalities.

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[1] See Ireland vs. The United Kingdom, 18th January 1978, Series A, no. 25, point 239 and Loizidou vs. Turkey, preliminary exceptions, 23rd March 1995, Series A, no. 310, point 75.

[2] The notion of communitarian public order is at the basis of the creation of the Commission in order to remove the reciprocal character of the obligations of the party states. In this sense, the European Commission of the Human Rights, 11th January 1961, Austria vs. Italy, DR 6, p. 742.

The states integrated into the communitarian juridical order also followed a process of adaptation that started with the revision of the national constitutions in order to make compatible the national system with the new rules. The idea of unlimited sovereignty was got beyond and the states accepted the new system. The role of the CJEC as jurisdictional organism is extremely important, as it has the assignment to cover the gaps of the basic treaties regarding the relation between the internal and the community law. Thus the Court establishes the principles of the direct applicability and of the primacy of the community law on the national[3] law, and forbids the application of the dispositions from the internal law that are contrary to the community[4] law. The Court also imposes to the European institutions the control of their acts conformity with the dispositions of the treaties[5].

1. ECHR[6] and CJEC: Jurisdiction, Function and Procedure: Differences and Similarities

Jurisdiction

The CJEC jurisdiction is established by the dispositions of the Treaty of Rome with its posterior modifications. The Court of Luxembourg is the only community jurisdictional organism with permanent character. It is the responsibility of the Court of Justice to ensure that the law is observed in interpretation and application of the treaties of the UE and the provisions lay down by the competent Community institutions. If, in general, the recourse to the international courts (or to the international arbitration) is facultative for states, in the European system, by exception, CJEC has the exclusive and compulsory competence to solve the communitarian disputes.

The *ratione personae* competence covers the solving of the conflicts between the member states of the EU, between the member states and the community institutions and between the institutions. The Court also can solve the conflicts between individuals or legal persons (arising from a member state) and the member states or between individuals and the community institutions.

The *ratione materiae* competence is given by the correct interpretation and application of the provisions of the community law as it arises from the primarily legislation (the treaties of the European Communities) and from the acts of the community institutions. The competence of the Court can be constitutional, administrative, interpretative of the community legislation etc.

Besides this, the Court has a consultative (non-contentious) competence that is given by the possibility to draw the recourse in interpretation. The interpretation activity can be realized, according to the basic treaties, previously (or even independently) to a litigation subject to the European Court, in the phase in which the litigation is on the list of a national court that has certain difficulties in the interpretation or application of the community norm. So that court could ask for the interpretation to the Court, on which basis its decision will be adopted.

The ECHR competence covers all the issues regarding the interpretation and application of the Convention and of its Protocols that are subject in the conditions provided by the articles 33, 34 and 47. As a consequence the Court has the competence to solve inter-states claims (33), individual claims (34) and to formulate consultative advices on the juridical issues regarding the interpretation of the Convention or of the Protocols.

Although the European Convention is not a community act CJEC has to respect the fundamental right within this document, according to article 6, paragraph 2 of the EU Treaty (but independently of the rights interpretation made by ECHR).

Judges. Counselors (Référendaires). Advocate General

The conditions required for the exercise of the judge function are similar for the two courts: these persons must "have the highest moral reputation and to meet the conditions required for the exercise of some high judicial functions or to be lawyers who have a well-known competence" (ECHR, according to article 21 of the Convention), or to be "elected among the personalities who assure all the guarantees of independence and who fulfill the conditions

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[3] The famous cases Van Gend en Loos vs. Administration fiscale, CJEC, 5th February 1963, aff. 26/62, Rec., p. 11 and Flaminio Costa vs. ENEL, CJCE, 15 juillet 1964, aff. 6/64, Rec. p. 1141.

[4] CJCE, 9 mars 1978, Administration des finnances vs. Simmenthal, aff.106/77, Rec.p. 629.

[5] CJCE, 23 avril 1986, Parti écologiste Les Verts vs. Parlement Européen, aff. 294/83, Rec. p. 133, pct. 23.

[6] As it is known, we speak about the European Court of the Human Rights, as unique mechanism, with permanent character of the European Convention of 1st November 1998, the date when Protocol no. 11 became valid at the Convention.

required in order to exercise in their countries the highest jurisdictional functions or who are lawyers with an arrant competence (CJEC, according to art.223 from the EC Treaty). Judges from both courts can be elected for a 6-year mandate and exercise their attributions independently from the state of membership, being elected in their individual capacity (individual title).

At CJEC, an advocate general elected near judges, who must fulfill the same conditions as those for the judges. This has the role to present the motivated conclusions in a public, impartial manner.

According to the European Convention of the Human Rights the judge is elected by a state that is part to a case who is a member of the formation that judges that case and if there is the impossibility to be present, an *ad-hoc* judge will represent that state. Usually at CJEC the national judge does not participate at the solving of the cases in which the membership state is implied. There is, of course, the formula "judge who knows the national juridical system" and who can be distributed in the formation of the grand chamber in the cases when preliminary issues appear.

It can also be noted a difference regarding the presence or the absence of the judge's legal counselors or of the "référendairs". These are members of a judge's cabinet only at CJEC (there are three référendaires and three assistants at the Court and three référendairs at the Court of First Instance) and they investigate the cases distributed by the judge. The cabinet draws the internal report and prepares the head notes that represent the next decision (that will be revised by the president of the instance). At ECHR, art.25 of the Convention stipulates the possibility of collaboration with juridical assistants but, in practice, they do not exist. This apparently minor difference gave birth into the doctrine to an ECHR disadvantageous interpretation, the superiority of CJEC being sustained as collegial institution (where decisions are taken together by judges and where référendairs presence assures impartiality) towards ECHR where the center of trust is fixed upon the judge as "isolated personality"[7] and not on the institution.

Both at Strasbourg and Luxembourg there are Judges-Rapporteur (juges rapporteurs) whose attributions are similar At CJEC they shares the prerogatives with the advocate general , but at ECHR he has the whole responsibility.

Courts Structure

CJEC has as work forms the chambers of justice, made of three or five members, lead by a president elected from the judges (for a period of a year).

The components of the chambers are published in the Official Journal of the European Communities. The Court can judge in the "Great Chamber" that is made of 13 judges, presided by the President of the Court (and composed of the presidents of the chambers by 5 judges and other designated judges) or in the plenum assembly (when the complaints are based on important articles of the treaties, that are expressly enumerated in the Status or when a case is considered to be of exceptional importance). The chambers made of three or five judges can decide in the cases that do not raise major problems. Chambers are not specialized, although there are sectors that need profound knowledge. ECHR, after the reform operated by the Protocol no. 11, is structured on committees, chambers and the Great Chamber (3, 5 and 17 judges, respectively). Committees decide upon the complaints admissibility and the chambers can pronounce both upon the admissibility and upon the fund. When a chamber has to solve a cause that raises serious interpretation problems of the Convention or of its Protocols, or the solution of which could lead to the contradiction of a previously pronounced decision by the Court, the chamber can deprive itself in favor of the Great Chamber.

Procedural Aspects

Both courts develop their activities according a proceeding that include a written and an oral phase. Inside CJEC the written phase is the most important. In the case of the direct appeals, the registry receives the petition, he/she verifies the achievement of the form conditions and then he/she publishes a notice in the Official Journal of the European Communities. The written phase can last between 5-6 months and 1 year for the very complex causes. In the case of the preliminary decisions, in order to diminish the duration of the process, the modification of the procedural regulation was imposed (in the year 2000). The oral phase, which is that of hearings, is very operative, the Court asks for the parties to answer punctually to some issues. Up to the year 2000 the Court had to obtain the expressed agreement of the parties in order to keep the hearings (and many times the parties were asking that the hearings should not take part).

[7] Hubert LEGAL, *Pouvoirs*, Revue française d'études constitutionnelles et politique, no. 96/2001, p. 80.

Actually, at the end of the written phase, the Court has already a decision project, and that determines the fact that the parties only assert their memories and the Advocate General should assert his conclusions.

CHR intimation is made after the petitioners have passed the obligatory jurisdictional stages from the internal law. After the verification by the registry of the fulfillment of the elements necessary to the request, the Court procedure provides: the verification of the complaint admissibility (according to the criteria expressly provided by article 35), the attempts of amiable solution (friendly settlement) and the examination of the merits for the admitted requests. In the case of the individual complaints, the president of the chamber, after the declaration of the admissibility, invites the parties to bring other elements of proof and written mentions. A hearing regarding the merits can be fixed, at the request of a party or *ex officio*, by the chamber, as well as the chamber can rich the conclusion that such a phase is not necessary. The decisions of the chambers are definitive if the parties declare that they will not request the return of the cause to the Great Chamber or if in term of three months from the decision date, the return to the Great Chamber was not requested (the first return demand to the Great Chamber was asked in September 2000).

A difference that can be mentioned refers to the secret of deliberation. The Court of Justice of the Communities is a collegial instance within which the judges' solidarity forbids any appreciation regarding the taken decisions. At the European Court of the Human Rights the judges' opinions are not only known, but there are also published the separate opinions of some of them. By comparison, we could affirm that at CJEC opinions of the Advocate General could have the role of dissident opinions in certain cases.

2. The Relation between the Two Courts Regarding the Human Rights: from Passing-By to Cooperation

The analysis of the jurisprudence of the two courts is probative concerning the evolution of their relations.

In a first stage, CJEC avoids any reference to the interpretation of the fundamental rights by ECHR in order not to influence the community system[8] or simply by sustaining that the interpretation of the Convention is inadequate to the community[9] system. The interpretation operated by ECHR is just a "source of inspiration" and not an element of community legality[10].

A few years later CJEC makes reference to the decisions of the European Court of the Human Rights. Thus in the P/S cause and Cornwall County Council[11] referring to the access to work and the work conditions and the equal treatment of men and women (by which a transsexual was job out of post) CJEC makes reference to the Rees[12] decision pronounced by ECHR: "it is the case to note that as the European Court of the Human Rights has stated, we mean by transsexual the person who physically takes part to a sex and who has the feeling that he / she is a part of the other sex…".

Freedom of expression is the object of another cause solved by CJEC, Vereinigte Familiapress Zeitungsverglas und vertiebs Gmbh vs. Heinrich Bauer Verlag[13]. The Court underlines that although a member state invokes article 30 from the EC Treaty in order to justify a legislation that blocks the free movement of goods, this measure has to be interpreted in the light of the general principles of law and especially of the fundamental rights, among which it can be mentioned the freedom of expression, which is established by article 10 of the European Convention. But the interdiction to sell publications (that offers the possibility to participate to games that have awards) touches the right to freedom of expression. That is why the Court regards the ECHR decision from the cause Informationsverein Lentia and others vs. Austria[14], showing that: "it must be reminded the fact that article of the Human Rights Convention showing that: "it must be reminded the fact that article 10 of the Convention for human rights admits

[8] CJCE, 18 oct. 1990, Drodzi, C-279/88, C-197/89, Rec I, p. 3763.
[9] CJCE, 7 mars 1983, SA Musique Diffusion française, 100 à 103/83, Rec, p. 1825.
[10] J.F. FLAUSS, *Les droits de l'homme comme élément d'une constitution et de l'ordre européen*, Les Petites Affiches no. 52, 1993, p.13.
[11] CJCE, C-13/94, Rec I, p. 1763.
[12] CEDH, 17 octobre 1986, Série A, vol. 106, pct. 38.
[13] CJCE, 26 juin 1997, Demande de décision préjudicielle, C-368/95, Recueil 1997, p. I-03689.
[14] CEDO, Série A, no. 276, novembre 1993.

derogations from this right in order to assure the maintenance of press plurality only if they are provided by law and if they are necessary in a democratic society".

Equally interesting is the CJEC motivation in the case X vs. Commission des Communautés européennes[15] in which it is presented the respect for the right to private life, that is established by article 8 of the European Convention that rises from the common constitutional traditions of the member states and that is one of the fundamental rights protected by the community juridical order. Thus, it is admitted the complaint of the plaintiff, who is a temporarily agent who refuses the AIDS medical test, by making appeal to right of the person to keep his/her health condition secret.

On the other hand the court of Strasbourg takes into consideration the jurisprudence of CJEC. In the causes Moustaquim[16] and Chorfi vs. Belgium[17] or Piemont[18] it is recognized the specificity of the community juridical order in the interpretation of the principle of non discrimination on the nationality ground. In the Matthews[19] case the Court shows that it takes into consideration the "structural changes" operated by the community treaties and by the *sui generis* nature of the European Communities.

Even if, as it was shown, in terms of the report between EU systems that is not a part of the European Convention, it is obvious the fact that the two spheres of jurisdictional competence cannot be ignored and a cooperation relation is being created between them more and more.

[15] CJCE, 5 octobre 1994, Aff. C-404/92P, Rec. 1994, p. 4737.
[16] ECHR, 18 Febr.1991, Series A, no. 193
[17] 7th August 1996, Rec. 1996, p. 915.
[18] 27th April 1995, Series A, no. 314.
[19] ECHR, 18th February 1994, Matthews vs. the United Kingdom, Req. 24833/94.