Iurisdictio Mechanism in Terms of the European Judge Activity Within the Preliminary Ruling Procedure

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Abstract: The Court of Justice of the European Union, alongside national courts, provides not only a consistent and uniform application of European law but, Apparently paradoxical, from a certain perspective, creates new rules of law. Of course, at first glance, our assumption may seem hazardously, and in any case not in accordance the "classic" conception that the judge is only meant to apply a law to a particular case, issuing rules of law shall be the competence of the legal bodies of states. In these circumstances, we considered it useful to examine an ancient Roman law concept - *iurisdictio* - and show that it is still current. Usually, when the magistrate "speaks right", the solution which will be given will be implicitly included in the rule indicated (which is pre-existing) because the judge is only to find, after the debates and on the evidence, whether the rule of law is not applicable or practical case to be decided. However, this study also addresses the way in which *iurisdictio* operates in terms of the European judge activity within the preliminary ruling procedure.

Keywords: *iurisdictio*; European Union law; the Court of Justice of the European Union; preliminary rulings; jurisdictional activity

1. Introduction

An important role in the current development of European law has the Court of Justice of the European Union. This court, alongside national courts, provides not only a consistent and uniform application of European law but, apparently paradoxical, from a certain perspective creates new rules of law. Of course, at first glance, our assumption may seem hazardously, and in any case not in accordance the "classic" conception that the judge is only meant to apply a law to a particular case, issuing rules of law shall be the competence of the legal bodies of states.

In a very recent study on the methods and functions of comparative law (Sinani, Shanto, 2013, p 32), invoking a Roman aphorism - jus dicere, non jus dare - it is claimed this classic thesis and is argued that "judge not create law, but only

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interprets and applies the law in particular cases in practice." But also from the Roman law comes iurisdictio attribute that defines the foundation of the judge activity and which, etymologically, means "speaks right". Prima facie, it would appear that there is an apparent contradiction in terms, which would be contrary to Roman law rigor.

In these circumstances, we considered it useful to examine an ancient Roman law concept - iurisdictio - and show that it is still current. However, we believe it is useful to complete a previous study, already published on the interpretation function of European judge (Cimpoeru, 2013, pp. 19-24), with these contributions of this paper. An argument in support of this method of approach is just the close relationship between the interpretation function and iurisdictio which represent two facets of the European judge activity on the preliminary ruling proceedings.

2. Iurisdictio - Roman Law Perspective

As shown in the literature (Molcut, Oancea, 1993, p 60), Roman private law has experienced three procedural systems: legis actiones system, formulary system, and cognitio extraordinarem (extraordinary system).

The first two procedural systems, legis actiones and formulary system were characterized by the division of the process into two phases: in iure (in front of the magistrate) and in iudicio (in front of the judge).

The magistrate had a main task to organize the trial in determining what it is about (de quo re agitur), he performed a public dignity. Usually, the praetor performed duties of the magistrate, and consuls or governors had such powers. The magistrate (praetor) had two competencies: iurisdictio and imperium.

In the legis actiones system, iurisdictio was the right of the magistrate to pursue the forms (procedures) by whereby the parties watched to assert claims. Depending on the role of the magistrate, iurisdictio was of two kinds: contentiosa and voluntaria. In the first case, the parties had divergent interests, and the trial was finalized with a sentence. In the second case, the interests of the parties were not divergent and the magistrate cooperated with each other to achieve a legal form of agreement between them. Imperium was the magistrate's power which broadly included iurisdictio.

The judge was a private person, chosen by the parties and confirmed by the magistrate who intervened in the second phase of the trial (in iudicio) and led the

contradictory discussions, listened plea lawyers, assessed the evidence and pronounced sentence, and then returned to a simple person.

Note at this point that the magistrate exercised iurisdictio ("speaks right"), both in contentious proceedings (contentiosa) and in non-contentious proceedings (voluntaria).

In the formulary system, the praetor's role, as the holder of iurisdictio evolves. It was drawn the formula which, essentially, represents a specific procedure for each claim (action). By formula, the praetor gave instructions to the judge how to judge the claim.

The formula contained several main parts:

- intentio indicated asserting the plaintiff's claims;
- demonstratio included the legal cause of the plaintiff's claims;
- condemnatio which empowered the judge to pronounce a conviction or acquittal;
- adiudicato which gave the judge the power to transfer property (in trials in the object property).

In the extraordinary system, the trial was conducted from beginning to end by the magistrate who takes over the duties of the judge. The extraordinary procedure has its origins in the magistrates' right to settle certain disputes without sending the parties in front of the judge. This right was exercised under the imperium power.

3. Iurisdictio - Modern Perspective

To elucidate the issue it seem interesting the comments made by Professor Mircea Manolescu (1993, p. 65) concerning the jurisdictional act characterization in terms of Roman law: "the praetor drew up formula with which judge then continue into another phase jurisdictional act; the praetor did not make anything but set the rule, namely the major premise, and the judge determined the facts, namely minor premise (....).

The praetor did not establish the rule in the sense that it created at that moment (strictly speaking, there were sometimes situations when the praetor created a new formula if the applicant's claims were not included in a pre-existing model of formula), but he made only a conditional syllogism, saying that if the judge finds such situation then condemn, if you find another situation, not to condemn."

Analyzing the formulary procedure, the author finds an apparent paradox in terms of the deployment chronology of the jurisdictional act. Thus, to the Romans, first of all it was established the rule of law, and then there were examined the facts in relation to this. This "reversal" of the specific phases of law enforcement is only apparent. It shows that after facts analyzing of the facts, the praetor establishes which rule is applicable. Further, the judge must go back "to the facts" to check "norm" indicated by the praetor.

In other words, the author points out that "we do not talk about the application of law to the facts, but the discovery of the rule (norm) which addresses to a particular character symptomatic of the fact." Further, it states that "it is not absurd that Roman magistrate, firstly established the rule and from it the symptom; after that the judge, noting whether or not the symptom, gave the solution. Because when the problem is thus solved, the solution pre-exist, and only then it can be explained that the famous declarative character of the court decision".

Beyond a certain imprecision of terms less used in the juridical literature[1], we believe that this interpretation about the praetor's activity is worthy of interest. When the magistrate "speaks right" (iurisdictio), he chooses and indicates the rule of law to be checked by the judge whether or not is applicable to the specific fact (case).

This iurisdictio power of the magistrate, which was specific to the *legis actiones* and formulary systems (when the trial was divided into two phases), will remain in Roman law in the extraordinary system when the magistrate takes over the judge's powers and there is a single person who judge.

Usually, when the magistrate "speaks right", the solution which will be given will be implicitly included in the rule indicated (which is pre-existing) because the judge is only to find, after the debates and on the evidence, whether the rule of law is not applicable or practical case to be decided.

This implicit nature of the solution, meaning that this is included by default in a pre-existing rule of law, only "spoken" by a magistrate, explained in a satisfactory way the declarative character of the court decisions. In this regard, it should be a short comment.

[1] In the cited book, N. Manolescu proposes a new approach to the Law science of as "legal clinic", by analogy with what is known in medical science "medical clinic". Hence the abundance of the medical terms, such as diagnosis, treatment, clinical investigation, symptoms, etc.

As it is known, in addition to the declarative court decisions which produces retroactive effects (*ex tunc*), there are decisions that produces effects only for the future (*ex nunc*). It is the case of the rights constitutive claims when the plaintiff requests enforcement of the law to certain facts on which it relies in order to create a new legal situation. Can we explain by the magistrate's iurisdictio from Roman law and the ex nunc effects of the constitutive character of the court decisions? We believe that the answer to this question may be yes.

In the formulary system if the magistrate thought that the applicant's claims are founded, but there is no corresponding model formula under his iurisdictio, he had the right to create a new formula, showing the judge, in mandatory terms, how to proceed in solving dispute (Molcut, Oancea, 1993, p 72). In other words, the magistrate enacted a new rule of law applied only to this case. Unlike the first case, the solution given by the judge is implicitly contained in a pre-existing formula when the magistrate "speaks right", in the second case, the solution is included in the new formula created by iurisdictio.

Of course, this theoretical approach, which allows a large extent explain of the constitutive character of the court decisions, is insufficient and has only one primary nature. The "Praetorian law", containing creative solutions of the praetor, as we have seen, was the starting point of jurisprudence as a source of law.

Unlike the systems connected to the Anglo-Saxon civilization basin where the jurisprudence is recognized as a source of law, in the legal systems belonging to the Roman-Germanic family, the case law has a limited creative role only indirectly, such as Romanian judgments of the High Court of Cassation and Justice in the matter of appeals on points of law or Romanian decisions on unconstitutionality of legal texts of the Constitutional Court (Popa, Eremia, Cristea, 2005, pp. 176-177).

From this perspective, it is clear that additional arguments are needed to substantiate the constitutive character of court decisions, but this does not form the subject of this study.

4. Iurisdictio Mechanism in the Preliminary Ruling Procedure

As shown in a previous study (Cimpoeru, 2013, pp. 16-17), preliminary ruling procedure of the Court of Justice of the European Union in terms of art. 267 of the Treaty on the Functioning of the European Union[1], covers two categories of disputes:

6.1. In the case of „litigation of interpretation" of the EU Treaties, because his original privilege - iurisdictio - the European judge is authorized to o "say" (to "choice", to "indicate") a certain "norm" from "text" as the Treaty relevant. Note that in this case the CJEU has an absolute and native competence to interpret officially Union treaties.

6.2. In the case of „litigation of interpretation" of EU derivatives acts (acts adopted by the institutions, bodies, offices or agencies of the European Union), the situation is more nuanced.

In this case, the interpretation becomes a dual aspect: the European judge will interpret both "norms" contained by of the derivative act (lower rank act) and "norms" from "text" EU Treaties (higher rank act) also, eventually, under the empire of iurisdictio will "choose" only the norm that is consistent with the „text" of Union treaties.

6.3. In the case of „litigation of legality" of EU derivatives acts (acts adopted by the institutions, bodies, offices or agencies of the European Union), the situation is similar to that presented in section 6.2. Comparing the normative content of the derivative act with the higher act one, the judge can establish whether that the act is "valid" or "invalid" in relation to the EU Treaties.

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