THE ROLE OF THE PRINCIPLE OF THE RULE OF LAW IN THE CASE LAW OF THE COURT OF JUSTICE OF THE EUROPEAN UNION FROM THE PERSPECTIVE OF HUMAN RIGHTS

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Abstract:
The European Union (EU) is based on the principle of Rule of Law and the European integration process itself has been characterized as 'integration through the law'; at the heart of EU legal system being its judicial institutions, in particular the Court of Justice. Thus, from Van Gend and Loos, Costa till Kadi case, etc. the Court of Justice of European Union through its case-law developed a new international legal order, where the supremacy is given to EU Law instead of national, where the Rule of Law principle is always respected, sometimes in the detriment of United Nations instruments, guaranteeing, though, the individuals' fundamental rights.

Key words*: *Rule of law, case-law, Human rights, Court of Justice of the European Union

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1. In lieu of introduction.

Nowadays, when the terrorist acts threat the global security, towards more and more individuals or organizations considered as 'terrorists' different restrictive measures are applied, either at international level by the United National Security Council (UNSC) or at EU level under the Common Foreign and Security Policy (CFSP). The EU Member States, as United Nations (UN) Charter signatory parts, use the CFSP framework to "implement sanctions imposed by the UNSC under Chapter VII of the UN Charter".

Even after the Treaty of Lisbon amending the Treaty on European Union (TEU) and the Treaty establishing the European Community entered into force the CFSP remained an intergovernmental area, where the high politics of EU are implemented through the international law, therefore the Court of Justice of the European Union (CJEU) as a specialized court in 'Community Law' does not have jurisdiction in the CFSP matters, all the instruments issues under this framework are enforced/challenged before the national courts. In this context, apparently we can't speak about the respect of the Rule of Law principle, as long as, the CJEU has no jurisdiction to challenge the measures adopted under CFSP umbrella.

Moreover, it has been argued that, at this moment, there is no efficient judicial remedy that could allow the individual to challenge a CFSP restrictive measure at EU level (Beulay: 2009, p. 38). Since in the supranational matters in the Areas of Freedom, Security and Justice the CJEU has a direct control and can assure the correct application of the principle of Rule of Law, then, in the field of CFSP, this control is 'limited' to do not say 'excluded'. In other words, the CJEU can exercise its control only over those

instruments that need an implementation through the supranational mechanism, therefore, the Rule of Law principle being marginalized.

Meanwhile, the exclusion of CJEU's jurisdiction over the CFSP matters is seen like a violation of the right to an efficient judicial protection, as the individual who is directly concerned in a CFSP instrument, has no possibility to challenge it before the EU courts.

2. Background: "terrorist lists". After the terrorist attacks, first against United States and afterwards in Spain and United Kingdom, the number of actions and activities concerning the fight against terrorism, at the international level was increased. As result, the UN and the EU began a new period of cooperation, by adopting instruments "previously unknown in this field" (Spaventa 2008: p. 129). Their main task was merely to identify and to impose sanctions to the individuals and organizations, which, pursuant to specific criteria, can be considered as terrorists by international and national communities alike.

The EU counter-terrorism measures are spanning from the Framework Decision on Combating Terrorism, to that on the European Arrest Warrant, from the agreement with United States on extradition, to that on Passenger Name Records. Among these documents EU adopted also two Common Positions which identified certain individuals and organizations as being involved in the "terrorist acts". Both, the Common Position 2002/402 and the Common Position 2001/931 contain a list of individuals and organizations which are sanctioned due to their participation to the terrorist acts.

Despite the fact that, a big amount of provisions was adopted, it was negatively observed the fact that "such evolution in intergovernmental actions has not been matched by a corresponding evolution in the system of judicial protection" (Eeckhout 2008: p. 128). Due to the fact that the international organizations were "ill equipped", they do not guarantee at least "the basic rights of individuals and organizations that are targeted through international instruments". (Spaventa 2008: p. 129)

In this context, some authors consider that the interface between supranational and intergovernmental matters, the instrumental use of Treaty competences to exclude or limit both judicial and democratic accountability, has brought a considerable reduction of fundamental rights standards in the EU (De Wet: 2011, p.19). Nevertheless, as we will mention further, by analyzing the case-law, the CJEU tries to fill up this gap, stating against the EU institutions, and indirectly against UNSC Resolution in view to assure that the individual's rights are guaranteed and protected.

It is well known that the EU has its own level of human rights protection. Even in the case when an UN Resolution does not fit with the EU standards, the CJEU can apply the "European Solange Tradition" (Eeckhout 2008: p. 127). In other words, as long as the international legal order does not provide the individual listed in a UN Resolution with an effective remedy, EU Law cannot dispense with review on the basis of its own constitutional standards (Ziegler 2009: p. 297).

Taking into consideration that the fight against terrorism measures features a cross border approach between supranational and intergovernmental dimensions, the "EU institutions have adopted the relevant legal [instruments] using their powers across both dimensions" (Eeckhout 2007: p. 184). That's why a strict limitation between Justice and Home Affairs and CFSP case-law seems to be difficult. However, the link between them is, in our case, stressed on two elements: 1) fight against terrorism for EU security; and 2) human rights protection, indeed the right to a judicial remedy. Nevertheless, it is important to mention that the CJEU overcomes the formal Treaty limitations through its creative case-law. Also, the Court may apply to some extend, by means of analogy, some of the important principles of EU law initially developed under the Constitutional Law of its Member States, as far as; the EU is founded on the principle of the Rule of Law and of human rights protection. However, the slightly

difference between human rights protection, in general, assured by Strasbourg Court, and that assured by CJEU, is that the EU has a particular protection. This protection has to be done during the adoption/implementation of institutions' acts.

Thus in *Advocaten voor de Wereld (*Case C - 303/05*)* the Court has ruled:

45.[...] [B]y virtue of Article 6 EU, the Union is founded on the principle of the rule of law and it respects fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, and as they result from the constitutional provisions common to the Member States, as general principles of EU law. It follows that the institutions are subject to review of the conformity of their acts with the Treaties and the general principles of law, just like the Member States when they implement the law of the Union [...] (Arnull et al. 2006: p. 238) (emphasis added).

When the rights were not protected by a Member State, even implementing EU law, its responsibility is judged by European Court of Human Rights (ECtHR) (See *Mattews vs. UK,* Application no. 24833/94).

In this article we will attempt to look closer at some of CJEU judgments in order to evaluate their specific approach and to see to what extent it can increase its competences in view to assure the human rights protection. Taking into consideration the complexity of ruling in these cases, which falls beyond the scope of this article to provide a detailed analysis, we will mention only the points we are interested in.

3. Supranational issues (case study). Although, the case law in this field cannot be considered as purely related nor to the police and judicial cooperation in the criminal matters, neither to CFSP matters, we divided them in view to better fit with the article's topic.

A. Organisation des Modjabedines du peuple d'Iran (OMPI) v. Council and UK

For the first time, a European Court - Court of First Instance - annulled a decision of EU Council declaring a legal entity – *Organisation des Modjabedines du peuple d'Iran (*Case T – 228/02*)* as terrorist organization and freezing its assets (Eckes 2008: p. 206).

The OMPI was listed as an organization associated with terrorism, not by the UN Sanctions Committee, but by the European Union itself. As result, the Member States are required to freeze the funds of this organization. In our case, United Kingdom, by an internal act, also included the OMPI in a list to be sanctioned.

Thus, we have a UNSC Resolution at international level, at EU level; we have a Common Position – intergovernmental level, a Regulation – supranational level and a UK internal act – national level. In this context, the question raised is which would be the CJEU approach in the intergovernmental matters using the human rights protection, if it reviewed, although indirectly, UNSC resolutions acts that appear to be *erga omnes,* in order to assess their conformity with fundamental rights as protected by the EU legal order. In challenging their inclusion into the list, the claimants relied, among other, on the infringement of the right to a fair hearing and right to effective judicial protection (Spaventa 2008: p.138). In the end, it appears that the persons or organizations included in the list have no possibility to submit observations to a court neither before, nor after their inclusion.

In analyzing the lawfulness of the OMPI inclusion in the terrorist list the CJEU found that both rights to a fair hearing and the right to an effective judicial protection are related to the decision to freeze funds. It continued by arguing that "the listing procedure initially takes place at the national level", as result, these rights have to be protected within the national procedure (Case T – 228/02, par. 119). However, once the person/organization is included in the EU list, the European Council has the duty to respect EU law rights (Spaventa 2008: p.139), including those mentioned above. Nevertheless, it is not for the European Council to decide if the national proceedings

were well founded and if the fundamental rights were respected, that being a competence of the CJEU. Especially, in the context that "the strict limitation of the jurisdiction of the EU Courts in the Union's intergovernmental fields makes it possible for the European Council to adopt lists publicly alleging that certain persons are supporting terrorism without giving them any opportunity to challenge this allegation" (Eckes 2008: p. 207).

The case is interesting from two main reasons, one because it sets the human rights principle to be respected by the EU institutions implied in the case, when imposing economic sanctions, and from another reason, it might be possible to have a future precedent, which would increase the indirect control of CJEU over this field, namely, by indirect "supranationalisation" the CFSP instruments. Indeed, first it is enacted a Common Position within the CFSP and afterwards, a Regulation is adopted, transposing this measure into EU law (Griller 2008: p. 532). In other words, the European Council looks to reconfirm its intergovernmental instruments trough the supranational one. As result, the CJEU has the right to challenge the 'newly' created instrument assuring both human rights and rule of law principles' protection.

B. Sison v. Council and al-Aqsa v. Council

The CJEU affirmed the OMPI principles, indeed, the possibility to challenge the list, in Sison and al-Aqsa (Court of First Instance [CFI] 11 July 2007, Case T – 47/03, *Sison v. Council*) annulling two European Council decisions concerning the list of terrorists and their funds freeze as a sanction for terrorist acts.

Moreover, the European institutions "expressed their general intention to improve the procedural safeguards of the adoption procedure" (Eckes 2008: p. 207). As result, "the EU immediately announced that it would provide a "statement of reasons" to those included in the terrorist lists" (Hayes 2007: p. 3). This statement of reasons has to contain sufficient details and arguments in order to allow those listed to understand the reasons for being sanctioned and listed, in view to permit the CJEU to exercise its powers for judicial review where a formal challenge is brought against the listing persons/organizations. Also, those listed can challenge the decision of the national competent authority according to national procedures or challenge the decision before the CJEU. Despite these improvements, it has been proved that still the "fundamental rights remain unprotected" (Eckes 2008: p. 207).

C. Segi and others v. Council

After the OMPI case another one *Segi (*CFI 7 June 2004, Case T – 338/02, *Segi and others v. Council)* highlighted the weaknesses of the EU's sanctioning practices: the lack of judicial protection in intergovernmental matters. Segi, is an alleged terrorist organization fighting for Basque independence, listed in the Council Common Position 2001/931. First of all, the case was brought before the ECtHR, which refused the jurisdiction on the grounds that the issue was one potential, rather than actual, violation of fundamental rights.

At the same time, it has been argued that, Segi being listed "as alleged terrorist supporters in CFSP common position, their assets are not frozen by the Community but by the Member States" (Eckes 2008: p. 211).

The applicants asked for granting them the damages as result of illegal Segi inclusion into the list, the CFI dismissed the action for manifest lack of jurisdiction. In the appeal, the Advocate-General Mengozzi agreed with the CFI that the EU Courts are not competent to rule on an action for damages in the Union intergovernmental field and suggested that the "national courts should fill this gap" (Spaventa 2008: p. 147). He was concerned with the non existence of an action for damages in relation to EU law. And relying on the fact that the EU is bound by the fundamental rights and the rule of law principles he argued that "the fact that the EU courts lacked jurisdiction did not imply that there was no judicial remedy available" (Spaventa 2008: p. 147), adding in the end

that the national courts should consider themselves competent to challenge and declare, where relevant, an intergovernmental instrument as being invalid, despite the fact that they are able to refer the matter to the CJEU.

Concerning the effective judicial protection the Court has argued that "even if [it is] no effective judicial remedy, that situation cannot in itself give rise to Community jurisdiction in a legal system based on the principle of conferred powers, as follows from Article 5 TEU" (Case T-338/02).

However, the Segi case was a little different from those mentioned above, from the fact that the contested common position was based on both supranational and intergovernmental matters and the appellants "took the view that the Council has adopted this common position for the sole purpose of depriving them of the right to a remedy and that Community powers should have been used" (Ooik 2008: p. 401). The CFI first "held that it had no jurisdiction to take cognizance of the action but only insofar as it was based on a failure to have regard to the powers of the Community" (Ooik 2008: p. 402), afterwards, it held that "EU was the correct legal basis for the adoption of the part of contested common position" (Ooik 2008: p. 401). In this way, it was confirmed the limited jurisdiction of the CJEU over the intergovernmental instruments.

4. Intergovernmental issues (case study). Yassin Abdullab Kadi (Case T – 315/01), Abmed Yusuf and the Al Barakaat International Foundation (Case T – 306/01) brought actions before the CFI also against a CFSP measure of freezing their assets, as result of listing them as terrorists. After CFI dismissed their application they appealed the case before Court of Justice which, in fact, reversed in many points the previous findings. (The cases *C-402/05 P and C-415/05 P* were joint in one case, ECJ 3 September 2008 - *Yassin Abdullah Kadi, Al Barakaat International Foundation v Council of the European Union, Commission of the European Communities, United Kingdom of Great Britain and Northern Ireland,* (hereinafter Kadi and Al Barakaat Foundation)

The case is interesting by the fact that the CJEU challenged, although indirectly, a UN Resolution, by 'increasing' its supranational competences to whole EU, as not only the Community but entire European Union in based on the principles of Rule of Law and of human rights protection. The appellants have being deprived of their substantial right of judicial protection not only under the international law (guaranteed by the European Convention on Human Rights and Council of Europe) but also under EU law (constitutional traditions, Treaty provisions and Charter of fundamental rights).

- *CFI rulings.*

In this context, the CFI ruling on the relationship between UN Law (international) and Member States law (national) and EU Law (European), held that:

"The standpoint of international law, the obligations of the Member States of the United Nations under the Charter of the United Nations clearly prevail over every other obligation of domestic law or of international treaty law including, for those of them that are members of the Council of Europe, their obligations under the European Convention on Human Rights and, for those of them that are Members of the Community, their obligations under the Treaty" (Griller 2008: p. 533).

From these reasons the Court concluded on prevailing effect of not only UN obligations but also of those obligations issued from Security Council Resolutions. In this case, the individual could apply to UN International Court of Justice thought its State in view to challenge this resolution, as result, no EC remedy is available. Similar visions held in paragraph 240 of the case:

"... Member State may, and indeed must, leave unapplied any provision of Community Law, whether a provision of primary law or general principle of that law,

that rises any impediment to the proper performance under the Charter of the United Nations".

In conclusion, based on all these reasons, it's necessary to stress on the fact that the CFI "principally denied its own power of judicial review vis-à-vis resolutions of Security Council" (Griller 2008: p. 534).

It is also important to note that CFI did a clearly distinction between the cases when the EU institutions merely transpose into Community law resolutions of the Security Council – like in Yusuf and Kadi cases – and instances where the Security Council resolution leaves the identification of individuals who are to be subjected to sanctions, and also the procedural requirements for such action, to the member states. For instance, in the later cases, CFI, nevertheless, "insisted on application of human rights protection standards as enshrined in EC law", annulling a decision for the "lack of a sufficient statement of reasons" and as result of "violation of the applicant's right to a fair hearing" (Griller 2008: p. 534).

- *CJEU rulings.*

The CJEU's conclusions on the relationship between UN law and Community law were slightly different, considering that "a regulation designed to give effect to UN Security Council resolutions must enjoy immunity from jurisdiction as to its internal lawfulness save with regard to its compatibility with the norms of *jus cogens*" (Griller 2008: p. 535).

In this context, it found by contrast that:

"The Community judicature must, ... ensure the review, in principle the full review, of the lawfulness of all Community acts in the light of the fundamental rights forming an integral part of the general principles of Community law, including review of Community measures which, like the contested regulation, are designed to give effect to the resolutions adopted by the Security Council under Chapter VII of the Charter of the United Nations" (Griller 2008: p. 535).

The reason of such ascertained facts was the argument that the obligations imposed by an international agreement cannot have the effect prejudicing the constitutional principles of the EU Treaty, which include the principle that all Community acts must respect fundamental rights.

The three conclusions that can be issued from the case are that first the EU being based on Rule of Law principle can review any act adopted, second that character of EU's legal order autonomy is assured by the exclusive jurisdiction of its Courts and last but not least, that the fundamental rights are an integral part of the EU law, which respect is also guaranteed by the European Courts.

On the basis of an overall assessment of the case it may be concluded that the EU uses the CFSP instruments as a bridge between International Law and EU Law. The mechanism starts with an international document which, within CFSP is transposed in the EU that becomes afterwards supranational, by adopting a community instrument. Here is the 'magic point', as the matters being considered as intergovernmental can be transposed and challenged by the EU Courts. However, we positively great the CJEU courage to contest a *jus cogens* act in view to assure that EU is based on the principle of Rule of Law and therefore within the EU territory the fundamental rights are guaranteed and protected.

5. Conclusions. The progress in cooperation at the international level increased after the terrorists threats. The measures in this field are taken by EU usually with a cross dimension character, implicating supranational and intergovernmental instruments.

The EU, at this moment, is not equipped with an efficient system that could provide an individual with a viable judicial remedy, as the Court jurisdiction is almost

excluded to challenge directly the CFSP measures and to pronounce over damages as result of illegal inclusion of a person as terrorist or his funds freeze.

The European Union is using the CFSP as a bridge between the international and its institutions. As well as, the intergovernmental instruments can be implemented through supranational one, conferring to the CJEU to rule "indirectly" over European Union security measures.

At the same time, CJEU's judgment challenges the UN sanctions regime, and that it may, from a general perspective, compromise compliance with international obligations (Payandeh, M., Sauer, H. 2009: p. 314).

The exclusion of the CJEU control could be summarized in three grounds concerning the special politic character of the CFSP inherited from its predecessor the European Political Cooperation; the sensitiveness of some particular measures taken and the protectionist and suspicious character of the subjects implicated in the decision-making, indeed, the Member States, which do not want to harm the intergovernmental character of CFSP by enlarging the CJEU's jurisdiction.

The human rights protected at the EU level are more specific or with a higher standard of protection. CJEU rules over the EU fundamental rights, using in its interpretations ECtHR case-law. These judicial bodies do not compete but complete each other. At this moment, if a CFSP measure violates an individual's right guaranteed in the ECHR, the responsibility is assumed by the Member States and not by the EU.

Nevertheless, it is true to consider that in order to safeguard the coherent and effective implementation of the Rule of Law principle and of human rights protection the CJEU has to be placed in the top of the pyramid as a 'super court' and not as a 'super power', to increase its competence over the CFSP matters.

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