THE PRIORITY PRINCIPLE FOR THE APPLICATION OF EUROPEAN LAW IN RELATION TO NATIONAL CONSTITUTIONAL LAW

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Abstract

The European law is an integral part of the legal system of Member States and it must be applied by their courts, stated the Justice Court of the European Union in its jurisprudence.

The EEC Treaty established its own legal order, integrated into the legal system of the Member States from the time the Treaty entered into force and which is imposed to their courts. Through the introduction of a community with unlimited time, equipped with its own institutions, personality and legal capacity, with a capacity of international representation and, more precisely, with real powers originating from a limitation on sovereignty or from a transfer of competences from the member states to the Community, they have limited their sovereign rights and have thus created a body of law applicable to their nationals and themselves. The transfer of rights and obligations corresponding to the Treaty's dispositions, which were carried out by the States from their national legal order in the benefit of the community's legal order, determine, therefore, a definitive limitation of their sovereign rights. Consequently, if a national rule is contrary to a European provision, the authorities of the Member States must apply the European disposition and the national norm is neither canceled nor repealed, but its mandatory force is suspended.

Keywords: law, European, priority, application, constitutional, national

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In addressing this theme I started from the much discussed decisions of the Constitutional Court concerning the constitutionality of a number of normative documents published in recent years concerning certain measures with a deep social character. It is about, among other things, the decision No. 871/2010 regarding the unconstitutionality objection of the provisions of law on the establishment of measures in the area of pensions, (published in Official Gazette No. 433/2010, Decision No. 1237/2010 concerning the Declaration of unconstitutionality of the law system of public pension unit, (published in Official Gazette No. 785/ 2010) adopted with the separate view of 4 judges of all 9 constitutional judges[2].

1. The supremacy of the Constitution in internal law

This principle, of the supremacy of the Constitution in internal law, is consecrated in article 1, par. (5) of the Fundamental Law[3], according to which, "in Romania, respecting the Constitution, its supremacy and its laws is mandatory". Taking into account that in the hierarchy of legal acts, which constitute internal legal order, the Constitution has the Supreme position, the inconsistencies between an internal rule and a constitutional one is sanctioned by the Constitutional Court (the only constitutional jurisdiction authority in Romania and the guarantor of the Constitution' supremacy) by declaring the legal provision unconstitutional.

As stated in art. 147 of the Constitution and article 31 of Law 47/1992 concerning the Organization and functioning of the Constitutional Court[4], the decision of the Constitutional Court, through which the discrepancy between the constitutional provisions of legal regulation is found, has the effect of suspending its application for a period of 45 days. In this period the organ which had legislative initiative (Government or Parliament) must set in agreement the normative act in its

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[2] Details and opinions on infringement of EU law through these decisions in **Ioan Ciochina-Barbu**, *The Recalculation of Special Pension is Done by Violating the Constitutional Provision, Community Legislation and Protection of Human Rights*, in „Legal Practice & International Law'', Published by WSEAS Press, www.wseas.org.,2011, Brasov, 2011, p.92-97**; Ioan Ciochină-Barbu** *Pension Reform Infringes The Constitutional Principles And The Legislation Of The European Union''*, Economy Transdisciplinarity Cognition, Vol. XIV, Issue 1/2011,ISSN 2067-5046,p. 485-493; **Ioan Ciochină-Barbu**, *Constitutional Principles of the European Legislation and Regulations Regarding Human Rights Ignored in Order to Justify a Questionable Reform* în „International Journal of Education and Information Technologies'', Issue 4, Volume 5, 2011, ISSN-207-4-1316, p.419-426; (http://www.naun.org/journals/educationinformation) ;

[3] The Romanian Constitution was adopted in the Constituent Assembly meeting of November 21, 1991, was published in the Official Gazette no. 233 of 21 November 1991 and entered into force after its approval by national referendum of December 8, 1991. In 2003 it was revised by Law. 429/2003, was approved by national referendum of 18-19 October 2003 and entered into force on October 29, 2003; the publication in the Official Gazette no.758 of 29 October 2003 of the Constitutional Court Decision no. 3 of 22 October 2003 to confirm the national referendum of 18-19 October 2003 law revising the Constitution of Romania. Following the review, the Constitution was republished by the Legislative Council, pursuant to art. 152 of the Constitution, with the updating of names and giving texts a new numbering in Official Gazette no. 767 of October 31, 2003;

[4] Republished in the Official Gazette, no. 807 of December 3, 2010;

entirety or articles of that act, declared unconstitutional, with the decision of the Constitutional Court. If this is not achieved, the normative act declared unconstitutional ceases its enforceability being deprived of legal effectiveness.

In article 148 par. 2 of the Romanian Constitution, the relationship between internal law and Community law is regulated (now, the European Union law, under the provisions of the Treaty of Lisbon[5]). Thus, according to these constitutional rules," as a result of accession, the provisions of the constituent treaties of the European Union, as well as other binding Community regulations, take precedence over the contrary provisions of internal law, in accordance with the provisions of the accession act".

The interpretation of the above legal regulations obliges us to ask ourselves whether the phrase *internal law*, takes into account the constitutional provisions. Does the priority of binding European law apply to constitutional norms also?

The Constitutional Court of Romania, in its entire jurisprudence, did not determine if and what is the relationship between constitutional law and European Union law.

In article 142, paragraph 1 and article 148, paragraph 2, the Constitution of Romania uses two distinct concepts, namely *supremacy* and *priority* of application of community law than the contrary provisions of internal law.

In terms of internal law, the Constitution is Supreme and, all the legal standards must comply with its letter and spirit. With regard to the internal legal order, one can speak of a hierarchy, aspect which leads us to the conclusion that the legal standards depend, as regard to its validity, on their compliance with the constitutional norms.

In the analysis of the priority principle for the application of European law in the internal legal order first we must start from the rights and obligations Romania has assumed when becoming a European Union Member and as a result of "the transfer of powers towards the community institutions" as it arises from paragraph 1 of article 148 of the Fundamental Law and not from the existence of a hierarchy between European Union Law and national constitutional law.

2. The principle of immediate application of the European Law

In the analysis of the principle of priority, the principle of immediate application of European law in the legal order of the Member States should be included at least briefly; this principle was assumed through the accession of Romania to the European Union. In this sense the jurisprudence of the Justice Court of the European Union stated that the immediate application of the rules of the European law requires its integration into the legal order of the Member States as soon as the rule of European law enters into force through publication in the Official Journal of the European Union or through notice. The integration of the rules occurs automatically, without the need for the adoption of internal acts of

[5] Adopted by Law no. 13/2008 to ratify the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed in Lisbon on December 13, 2007, published in Official Gazette no. 107 of February 12, 2008;

reception[6]. "Community law, rejects *a priori* the solution of reception" is stated in a specialty work[7]. The relationships between Community law and the law of the Member States, from this point of view, are governed by monism, irrespective of the constitutional preference between monism and dualism of each State[8]

When referring to the regulations of the EEC (now The European Union), the Court of Justice stated: "the EEC regulations, must not, in their capacity as immediate sources of rights and obligations ... be the subject of state measures with reproductive or executive character, which is likely to alter or condition in any way the entry into force and much less replace, derogate or abolish, even partially"[9] The European Law "should be applied by the national jurisdictions in all Member States, as well as the Community law"[10]

The application with priority of European law has "an ontological condition", preventing the attempts to mitigate its force by Member States[11].

3. The priority principle for the application of European Union law is dominant in the relationship between European law and national constitutional law

European law is applied in the member states with precedence over national law, removing the application of contrary national rules[12]

In the absence of direct legislation at the level of constituent treaties of the EEC (EU) the Court of Justice of the European Union stated, in its jurisprudence, that European law is an integral part of the law system of the Member States and must be applied by their courts.

Thus, by Decision of 15 July 1964, Case 6/64 relating to the request for a preliminary ruling made by Giudice Conciliatore from Milan, in the dispute Flaminio Costa v. ENEL[13], the Court of Justice of the European Communities (now CJUE) consecrated the principle of *priority* of Community law, stating that the regulations issued by the European institutions are integrated into the legal systems of the Member States which are obliged to obey them. The Court has pointed out that, unlike ordinary international treaties, the EEC Treaty has established a legal order of its own, integrated into the legal system of the Member States at the time of

[6] CJCE, June 22, 1965, San Michele, cause 9/65, Collection-I 5755, p.1;
[7] Raluca Bercea, *Community law. Principles*, CHBeck Publishing, Bucharest, 2007, p.208; Anamaria Groza, CHBeck House, Bucharest, 2008, p.366;
[8]Stelian Scaunas, *European Union, Construction, reform institutions, law*, CHBeck Publishing House, Bucharest, 2008, p.197; Ioan Ciochina-Barbu *EU's institutional law*, Wolters Kluwer Publishing House, Bucharest, 2010, p 74;
[9] CJCE, February 7, 1973, Commission v. Italy, cause 39/72, ECR-I 5755, p 101; CJCE, October 10, 1973, Smallpox, cause 34/73, ECR-I 5755, p 981;
[10] Harald W Renout, *Institution européennes*, Centre de Publications Universitaire, 2000, p.259;
[11] Raluca Bercea, op. cit. p.219, Anamaria Groza, op. cit.p. 366;
[12] Vlad Constantinesco, *La primauté du droit communautaire, mythe ou réalité?*, Mélanges Leontin-Jean Constantinesco, Carl Heymans Verlag, 1984;
[13]CJCE, Costa v. ENEL; ECJ, March 9, 1978, Simmenthal, cause 106/77, ECR-I 5755, p 639;

entry into force of the Treaty and which is necessary in their courts. Through the establishment of a community with unlimited duration, equipped with its own institutions, with personality and legal capacity, a capacity of international representation and with real power deriving from a limitation of sovereignty or a transfer of powers from the States to the community, they have limited their sovereign rights and have thus created a body of law applicable to their nationals and themselves. Transfer of rights and obligations, appropriate to the provisions of the treaty achieved by States from their internal legal order for the benefit of the community legal order, determines, therefore, a limitation of the sovereign rights. In consequence, if a national regulation is contrary to a European provision the authorities of Member States must apply the European provision and the national norm is neither cancelled nor repealed, but its legal effectiveness is suspended.

In the same decision, the Court of Justice made it clear that the priority of European law shall apply to all national laws, whether enacted before or after the European Act was adopted[14].

With regard to the protection of fundamental rights in the community legal order, through Decision from 17 December 1970, in case 11/70 concerning the request for the pronouncement of a preliminary ruling, made by Verwaltungsgericht Frankfurt in the dispute International Handelsgesellschaft MBH versus Einfuhr-Und Vorratsstelle Für Getreide Und Futtermittel (Office for the importation and storage of cereals and feeds)[15], the Court of Justice of the European Communities (CJUE) held that recourse to norms or legal notions of national law for assessing the validity of acts adopted by the Community institutions brings prejudice to the unity and effectiveness of Community law. The validity of such acts can be assessed only in the light of Community law. Consequently, invocation of harm brought to either fundamental rights as laid down in the Constitution of a Member State or the principles of a national constitutional structures, cannot affect the validity of a Community act or its effect in the territory of that State. In this case, the German Court who notified the Court of Justice of the European Communities considered that system of guarantees is contrary to certain structural principles of national constitutional law, which must be protected under Community law, so that the supremacy of supranational law succumb to the fundamental principles of German Law.

In the contents of the same decision, the Court also noted that, indeed, respect for fundamental rights is an integral part of the General principles of law whose observance is ensured by the Court of justice. The protection of these rights, inspired by the common constitutional traditions of the Member States, must be ensured within the framework of the structure and objectives of the community.

In addition, the Court of Justice of the European communities, (CJUE), through Decision of 9 March 1978 in Case 106/77, concerning the request for a preliminary ruling made by Pretore di Susa in the dispute Amministrazione delle

[14] Octavian Manolache, *Treaty of Community law*, 5-th Edition, C.H.Beck Publishing House, Bucharest, 2006, p.69, 71; Ioan Ciochina-Barbu, op. p 75;
[15] CJCE, Internationale Handelsgesellschaft (1970), Reports, p.35;

Finanze Dello Stato versus Simmenthal SPA[16], held that the direct applicability of Community law means that it is necessary for its rules to be applied fully and uniformly in all Member States since their entry into force and over the whole period during which they are valid. The directly applicable provisions are an immediate source of rights and obligations for all those to whom they are addressed, whether they are Member States or private individuals; also, this effect regards any court which, as an authority of a Member State, has the mission to protect the rights conferred to individuals by Community law. The national authority responsible for the implementation, within the framework of its competence, of the provisions of Community law has the obligation to ensure the full effect of these rules leaving unapplied, any provision contrary to national law, even at a later date, without having to ask or to wait its prior elimination through a legislative way or through any constitutional process.

Priority is "indivisible unconditional and absolute"[17]. *Indivisibility* is determined by applying with precedence all categories of formal sources of Community law[18]. With regard to the *unconditional nature* of the priority principle does not allow the invocation of any of the provisions of internal law which would result in releasing the Member States from its non-performance. Invoking a constitutional provision, in that respect, would be "contrary to community public order"[19]. The *absolute* character is given by the preeminence of European law, without taking into account the constitutional or infra-constitutional nature of national legal norms[20] or by the anteriority respectively posterity of national norms[21].

A problem arises when a contrary constitutional norm protects the fundamental rights. In this respect the Court of Justice has decided that if a national judge is faced with such cases he should take the measure of suspension of the application of existing Community rules for the time being, and to bring it to an appeal relating the assessment of validity. In this context, the Court of Justice has recognized the right of an internal judge to verify the contrary national measures, in terms of their proportionality to the intended purpose[22].

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[16] C.106/77 Amministrazione delle Finanze Dello Stato c. Simmenthal S.P.A, în ECR, 1978 (Reports of cases before the Court of Justice and before the Court of First Instance- din 1990), p. 629;

[17] Rostane Mehdi, *Le droit communautaire et les puovoirs du juge national de l'urgence*, în Revue trimestrielle de droit européen, p. 200;

[18] CJCE, 31 March 1971, Commission v Council (ERTA), cause 22/70, ECR-I 4407, p 263;

[19] CJCE, June 22, 1965, San Michele, cause 9/65, ECR-I 5755, p.1967, CJCE, July 13, 1972, the Commission v.Italia, cause 48/71, ECR-I 5755, p 529 ;

[20] CJCE, April 29, 1990, Ciola cause C-224/97, ECR, I 2517. See also Michel Fromont, *Le droit constitutionel national et l'integration européene*, Revue d'affaires européennes, nr. 3/1992, p. 425;

[21] CJCE, July 13, 1989, Wachauf cause 5/88, Reports, p.1439;

[22] CJCE, October 14, 2004, Omega, C-36/2002;

In general the Member States have accepted the principle of priority after some "hesitation and reticence", and the constitutional courts have adopted positions through which they favored national norms[23].

For the first time the principle of priority was tangentially mentioned in Protocol No 7 annexed to the Treaty of Amsterdam, with reference to the principles governing the effects of Community law enshrined by the CJCE. Thus, art 4 of this document stated that, "The application of subsidiary and proportionality principles ... does not bring prejudice to the principles developed by the Court of Justice with regard to the relationship between national and community law …"

With regard to the principles relating to the effects of Community law, in the specialty literature, it was appreciated that "they are in such a way constitutionalized, even though it would have been desirable for the formulation to be made in a more direct manner and especially not to have been entered into an additional protocol but in a leading position in the body of the Treaty on European Union or that of Rome[24]".

Neither the Lisbon Treaty enshrines the priority principle of the European law in its contents and even in the protocols. This principle is found in an annex of the final act embodying the opinion of the Council's Legal service on priority of 22 June 2007 (document 11197 (JUR 260). This document provides: "It derives from the jurisprudence of the Court of Justice that primacy of Community law is a fundamental principle of this law. According to the Court, this principle is inherent to the specific nature of the European Community. On the occasion of the first judgment of this constant jurisprudence (decision of 15 July 1964, case 6/64 Costa v. ENEL), priority was not mentioned in the Treaty. This situation has been perpetuated to the present. The fact that the principle is not included in the future treaty shall not affect the existence of that principle, and the jurisprudence in force of the Court of Justice".

As it is well stated in the specialty literature, the importance of this principle imposes its express consecration in treaties. The provisions of the document shown above represent "(shy) attempts to compensate for the absence of an essential provision, which would have had to be enshrined in both the Treaty on European Union and Treaty on the functioning of the European Union, the reformed version[25]."

Compliance with the principle of priority of European law is a result obligation for Member States.

So, according to the jurisprudence of the Court of Justice, "the provisions of the treaties and acts of the institutions directly applicable have as an effect, in their relations with the internal law of the Member States, not just to make any provision contrary to the existing national legislation unenforceable, through the mere fact of

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[23] Abdelkhaleq Berramdane, Jean Rossetto, *Droit institutionel de l'Union européene*, Ed. Monchrestien, 2005. p.135, 149-155;

[24] Claude Blumann, Louis Dubois, *Droit institutionel de l'Union européenne*, Ed. Litec, 2005, p.540;

[25] Stelian Scăunaş, op. cit. p.200, Anamaria Groza, op. cit. p.371;

their entry into force, but ... to prevent the valid formation of any new legal acts to the extent that these would be incompatible with the Community rules."[26]

In the same Decision the Court of Justice held that "the national Judge, in charge to apply, within its competence, the provisions of Community law, has the obligation to ensure the full effect of these rules leaving unapplied, any provision contrary to national law without having to ask or to wait its elimination through a legislative way or through any constitutional process. ".

Community judicial practice also decided that due to the prevalence of European law in relation to the internal one, some categories of people may require the national judge to interpret the national law in conformity with the community equivalent[27].

4. A regulatory act enclosing the independence of judges in the application of the principle of priority

In the early 2012, Law no. 24/2012 was enacted for the modification and completion of the law no. 303/2004 on the status of judges and prosecutors and Law no. 317/2004 concerning the Superior Council of Magistracy[28], which introduces at art. 99 letter "s" a new misconduct in relation to magistrates, namely, *non-compliance with the decisions of the Constitutional Court or decisions pronounced by the High Court of Cassation and Justice in the settlement of appeals in the interests of the law;*

The Superior Council of Magistracy has endorsed the draft normative act, with some remarks, provided that the provisions of the draft are in agreement with the fundamental principle of the exercise of justice by impartial independent judges, who are subjected only to the law.

When referring to the comments about the incriminated deviation in art. 99, letter "s" the Superior Council of Magistracy was not constant in supporting a trenchant viewpoint. Thus, he initially made it clear that the offence stipulated in article 99, letter "s" should not be regarded as misconduct, because it requires the verification of judgment calls. In addition these decisions may conflict with other rules of international law or with the decisions of the European Institutions for whom the Constitution provides for their implementation with priority according to art. 20. Therefore the text should be removed or supplemented in the shown sense. In the following paragraph it is shown that, in the case this offense will be regulated, only one breach cannot be disciplinary sanctioned, so in the proposed text the phrase "repeatedly" must be added; in this case a repeated conduct will be punished and not an isolated act.

What can one understand from such forms of double formulation of observations but an acceptance of violations of judges' independence principles, enunciated in the preamble of the notice?

[26] CJCE, March 9, 1978, Simmenthal, cause 106/77 ECR 629;
[27] CJCE, February 4, 1988, Mary Murphy, 157/86, Reports, p.686; CJCE, June 16, 2005, Maria Pupino, C-105/03;
[28] Published in Official Gazette no. 51 of 23 January 2012;

In the explanatory memorandum of the initiator of this normative act project is stated that the assessment of the legal provisions and the disciplinary practice of the Superior Council of Magistracy have revealed that the provisions of art. 99 do not cover a behavior range of magistrates which may seriously damage the prestige of Justice and the dignity of the position of magistrate. For this reason, the legislation did not allow the disciplinary sanction of such behavior which caused extensive damage to the image of Justice, both in Romania and Europe.

Also, the above mentioned explanatory memorandum noted that Law No. 303/2004, republished, with amendments and additions, exhaustively lists the deviations for which judges and prosecutors are liable to disciplinary action. However, in order for the regulation to be able to objectively respond to different practical situations it is necessary to extend the sphere of misbehavior, such as the inclusion in this category of acts which violate duties specific to their function or the prestige of there function is damaged and which are currently not sanctioned or are not sanctioned under there own nomen iuris.

Analyzing the content of this explanatory memorandum, the true reasons for introducing such disciplinary violations in the status of magistrates are nor apparent.

In an open letter from the National Union of Judges in Romania (UNJR) to the Boc Government, the initiator of this legislation, prior to its adoption, explained what the imposition of such deviations would mean.

"By establishing the supremacy of decisions of the Constitutional Court and the High Court of Cassation and Justice in the settlement of appeals in the interest of the law, the direct and priority application of the European Convention or Community law becomes impossible, when they contain more favorable provisions in the detriment of the decisions mentioned.

In other words, the State refuses its citizens the right to apply the provisions of the ECHR or Community law, prohibiting its magistrates to apply them in internal causes, although this task is provided in the Constitution.

Through the mentioned text, contrary to the provisions of article 20 par. 2 and article 148 par. 2 of the Constitution (which have not been repealed by the proposed amendment), the supremacy of Constitutional Court decisions on Community law and on European Convention on human rights is instituted, although the Constitutional Court is rather a political body and is not part of the judiciary system. Therefore, someone wants to exclusively ensure the application of some political decisions ".

The provision of article 99, letter "s" of law no 204/2012 contravenes even the dispositions of the Constitutional Court that through decision No. 1344/2008[29] considers that it does not have the responsibility to resolve the conflict between an internal normative act and the supranational legislation; this task is reserved for the Courts: "the courts are the ones who will directly apply Community law when national law is in conflict with it."

From the things presented above it arises the idea that this disciplinary violation contained in art. 99, letter "s" was introduced in order to intimidate the

[29] Published in Official Gazette nr.866 of 22 December 2008.

magistrates who would apply the priority principle of European law in the relation with internal law in settling the dispute deducted from their judgment.

Personally, I believe that this amendment constitutes an interference of politics in the work of the judiciary, which represents a serious impairment of the principles of the rule of law.

5. Conclusions

Court of Justice of the European Union, through a well established jurisprudence, awards absolute priority to European norms, even in the case of constitutional norms and has as its main argument the need to ensure efficiency and uniformity to Community law in all Member States, which has two main consequences: the validity of a rule of law belonging to the European Union may be analyzed only in the light of Community law and the Court of Justice of the European Union is the one responsible for solving it; the Member States ' Constitutions cannot prejudice the priority of European Union's Law.

The independent and impartial internal courts that make up the judiciary power in the meaning of Law 304/2004 are and must remain the only ones who have unlimited jurisdiction and the only ones invested with the power to appreciate, in the disputes with which they are seized, if they need to apply a legislative text of a national law or directly apply an international norm on the basis of the provisions of article 20, paragraph 2 of the Constitution.

To deny the power of the courts to assess themselves independently and impartially on the implementation and interpretation of a law under the grounds that a given interpretation of the same law was made by the Constitutional Court means denying them the power (and obligation) to settle claim deducted from judgment, which would practically mean a regrettable setback in the evolution of the rule of law, in the light of the requirements of the first paragraph of article 6 of the European Convention.

The European Union's legal order and internal constitutional order are complementary sets of legal rules and the relationship between them is not based on a hierarchy of rules, therefore the concept of *supremacy* is replaced by the concept of *priority*. In its jurisprudence neither the Court of Justice of the European Union uses the concept of superior or inferior legal order.

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