SARA Law **R**esearch **C**enter
International **J**ournal of **L**egal and **S**ocial **O**rder, https://www.ccdsara.ro/ijlso
ISSN 2821 – 4161 (Online), ISSN 2810-4188 (Print), ISSN-L 2810-4188
N°. 1 (2022), pp. 311-318

THE CONSTITUTION – THE SUPREME SOURCE OF ROMANIAN LAW?

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Abstract

The purpose of this article is to conduct an analysis of the dynamics between the principle of constitutional supremacy and the principle of priority application of European Union law. Starting from a question and still asking questions, this article is intended to be a preamble for debates:, what is the difference between priority and supremacy?", "does the European Union have good reasons to be concerned about certain decisions pronounced at national level?", "is there a need for a reinterpretation of the normative hierarchy?"... For some of these questions I will try to answer, but for the rest, at this moment, the answer would / could be uncertain or non-existent.

Key words: *Constitutional supremacy; priority principle of Union law; Constitutional Court; CJEU.*

INTRODUCTION

Is the Constitution the supreme source of Romanian law? At first glance, the question seems candidly expressed, but in essence, precisely by formulating the title under the configuration of a query, we want to draw attention to some "insecurities" that at least at the moment create problems of interpretation. Because of this, it is necessary to do a report between the principle of constitutional supremacy and the principle of priority of European Union law in this situation.

The basis of the Treaty of Lisbon was the desire for prosperity and development. In other words, the past of the European Union shows us nothing but this strong desire to ensure balance and cooperation[1], but in this continuous process of evolution and adaptation, at some point it seems that this cooperation

[1] https://drept.unibuc.ro/documente/dyn_doc/publicatii/revista-stiintifica/Pascu%20Anca.pdf A. Pascu under the coordination E.S. Tănăsescu, The priority of European law in national law – once again current, site visited on 29.09.2022.

has turned into an interdependence. Interdependence which is somehow beginning to be felt as an intrusion into the national order and the independence of the state, especially on the basis of the case-law of the Court of Justice of the European Union *(I. Boghirnea, E.N. Vâlcu, 2009, pp. 253-258),* which over the time has issued decisions in favour of the priority application of Union rules and principles over constitutional regulations themselves.

It is interesting to note that among law specialists the views are divided, At times reaching controversial findings, and even in the context in which a good part of the doctrine inclines to find that the principle of priority of Union law cannot contradict or disprove the supremacy of the Constitution, The recent case-law practice of the Court of Justice of the European Union has brought a slight destabilization with regard to these beliefs *(T. Avrigeanu, 2010, p.76).* Thus, through a decision issued by it, the judges at national level have the possibility to stop applying the decisions of the Constitutional Court of Romania to the extent that they contravene Union law, without risking their disciplinary liability. The attention is drawn to the application of the case-law of the Constitutional Court relating to criminal procedure rules applicable in the field of fraud and corruption, decisions which are enforceable in breach of Union law, in particular the provisions concerning the protection of the financial interests of the Union, the value of the rule of law, the guarantee of independence of judges, As well as the principle of the supremacy of EU law[2], but in the regulation of Article 147 paragraph (4) of the Constitution of Romania it is specified precisely that these decisions of the Constitutional Court are generally binding having power only for the future, their failure to comply with them attracting the disciplinary responsibility of the judge who does not implement them.

1. THE RELATIONSHIP BETWEEN THE PRINCIPLE OF PRIORITY APPLICATION OF EUROPEAN UNION LAW AND CONSTITUTIONAL SUPREMACY

Clarifying the dynamics between these two principles is an essential aspect, but for this to be done effectively, it is necessary to analyze the difference between "priority" and "supremacy". In the Romanian legal doctrine, supremacy is considered beyond a principle, a quality of the Constitution, which places it at the top of the political-legal institutions of a state-organized society, making it the source of all regulations in the economic, political, social, legal fields *(I. Muraru, E.S. Tănăsescu' 2005, pp. 62-63; M. Grigore and all., 2011, pp 305-309).* From a strictly legal point of view, the supremacy of the Constitution expresses its position of over ordering within the system of law *(F.C. Kund, 2006, p. 13),* implicitly, the entire system of law is ordered by the Constitution, which essentially implies the compliance of all other categories of normative acts with it

[2] Press Release nr. 230/21, Luxemburg, 21 December 2021. https://curia.europa.eu/jcms/upload/docs/application/pdf/2021-12/cp210230ro.pdf , site visited on 29.09.2022.

(I. Muraru, E.S. Tănăsescu' 2005, p. 67). Moreover, the distinction between the two notions is ensured by the very Constitution of Romania, which in the content of Article 1 paragraph 5 regulates the fact that, in Romania, the observance of the Constitution, its supremacy and laws is mandatory", whereas the principle of priority of European Union law is found in Article 148, alin 2 , as a result of accession, the provisions of the constituent treaties of the European Union, as well as other Community regulations of a binding nature, shall take precedence over the contrary provisions of national laws, in compliance with the provisions of the Act of Accession.

In order to explain the situation as clearly as possible, the Constitution is recognized as the "fundamental law of the state", it is one of the main forms of expression of national sovereignty and the identity of a state because the Constitution contains the basic principles of its organization. fundamental rights and duties of citizens of that state. The Romanian State by virtue of its sovereignty and as an independent entity joined the European Union on 1 January 2007, It thus had to take over and transpose at national level rules of Union law and to pursue their proper application in practice in order to align with the principles of the Union. This is what the Union treaties designate as the "principle of loyal cooperation", in order for the Union mechanism to function effectively and to limit as much as possible the inconsistencies in ensuring efficiency, a compromise was necessary, thus Romania partially cedes its sovereignty, As a form of diminishing the autonomy of the will following the accession to the European Union.

However, this situation must not be interpreted as a loss of state identity, the priority of Union law being precisely on the basis of national sovereignty, implicitly of the constitutional supremacy which expressly recognizes this principle. In this regard, the literature states that in the internal legal order the legal act by which Romania joined the European Union has legal force inferior to the Constitution and constitutional laws, but superior to the organic and ordinary laws *(M. Andreescu, A. Puran, 2018, p. 289)*, a rather controversial point of view in the doctrine.

A second stage, important to analyze, is how the dynamics of principles have evolved over time, but also an interpretation of how doctrine maintains so different views in relation to them. Until the entry into force of the Charter of Fundamental Rights of the European Union, implicitly of the Reform Treaty, also recognized as the Treaty of Lisbon on 1 December 2009, there was no system for guaranteeing fundamental rights, This is why constitutional regulations were referred to in the member states of the European Union.

With the evolution and development of the European Union and the principle of priority of Union rules, it strengthens its "power" mainly by way of jurisprudence, emblematic in this respect being the Costa C case Enel. In that case, the Court of Justice of the European Union has taken a firm position limiting

the ability of national governments to introduce laws in conflict with the Treaty on European Union[3]. As a brief presentation of the case, IN 1962, ENEL (Ente Nationale per l Energia Electrica) was formed in Italy by nationalizing the process of electricity production and distribution. An Italian citizen who was a shareholder of the electricity company opposed the measure and in protest stopped paying his bills *(E. Vâlcu, 2012, pp.24-25).* The electricity company sued him for non-payment, with the Italian citizen claiming that nationalization would be a breach of Union rules, he appealed to the Court of Justice, and the latter granted him justice on the grounds that, by virtue of the partial transfer of sovereignty, a unilateral, subsequent law, was passed on to the Court of Justice. incompatible with union objectives cannot prevail[4]. At least at that time such a decision produced rumor at the level of the Italian State because it objected by its finding to a decision previously given by the Italian Constitutional Court, thus opposing the principles of national constitutional law.

Other similar cases followed this case, such as Simmenthal I, Simmenthal SpA or Simmenthal II, in which the judges reached the following conclusions: "The national judge, having the role of applying the provisions of Community law within his competence, is obliged to ensure the full effect of those rules, leaving, if necessary, unenforceable by its own authority, any contrary provision of national law, without having to require or wait for its prior removal by law or any constitutional procedure *(E. Vâlcu, 2021, p. 3-4).* These decisions have been a powerful picture of how the European Union has evolved, Strengthening their position and, moreover, they do not come in the form of undermining national authority or at least not so should be regarded as their purpose is to make national rules and case law more efficient and to associate them with the governing principles of the Union, in other words, to function well together we need a common vision, if our visions do not coincide, we will not be able to work together to achieve our common goals and interests.

Another important aspect to note in practical terms, interference between European Union law and national law arises, in particular, when there are contradictions between legal rules belonging to legal systems *(M. Andreescu, A. Puran, 2018, p. 284)*, or these contradictions are rare. The explanation lies in how each state at national level understands to rally to the principles and norms of the Union. It is necessary to speak of the Union regulations that are part of the category of legally binding acts, which have the role of legislative uniformity being mandatory for all the states in the European Union. Union directives are intended to complement the legislative minuses these are binding only in terms of the outcome and require national transposition into those types of national legislation that satisfy the requirements of clarity and legal certainty *(I.N Militaru,*

[3] https://www.avocatoo.ro/blog/costa-v-enel-c-6-64, M. Constantinescu, 30.09.2022.
[4] Idem.

2017, pp. 136-142; I.N. Militaru, 2010, pp. 22-28). The decision under Article 288(4) of the Treaty of Lisbon is binding in all its elements, and if specific recipients are indicated therein it becomes binding only on them, decisions are thus interpreted differently depending on whether its recipients are member states or individual recipients. When addressing one or more Member States, they behave like a directive, and in the case of private recipients who may be natural or legal persons, they behave like a regulation.

2. INTERVENTION OF THE COURT OF JUSTICE OF THE EUROPEAN UNION ON DECISIONS GIVEN BY THE CONSTITUTIONAL COURT OF ROMANIA

In order to have a thorough understanding of the way of interacting between national and Union jurisprudence, I considered it appropriate to present a relatively recent situation in practice, a situation which I will treat more as a case study, either because the national doctrine has not reached a generally accepted point of view, and given the complexity of the issue, I do not think that such a point of view will be reached anytime soon. even the fact that I in the novice position do not allow myself a point of view that I consider satisfactory, so I will treat the situation as a mere observer as objectively as possible.

The preconditions of the case are in view of the High Court of Cassation and Justice of Romania, which had to rule on cases concerning tax evasion, corruption and influence trafficking, especially in relation to the management of European funds[5]. The Constitutional Court, being notified, drew attention to the unlawful composition of the panels in which the cases were judged, thus annulling the decisions given by the High Court of Cassation and Justice. In addition to these cases, the situation of the Bihor Tribunal is added, which in the face of a previous decision of the Constitutional Court on the limitation must exclude part of the evidence available in certain cases of corruption and influence trafficking[6]. In this context, both the High Court and the General Court have requested the opinion of the Court of Justice of the European Union, although their approach has raised numerous points of view in the literature. Several issues have been raised: Can judges at national level leave the decisions of the Constitutional Court unenforced without being disciplined? Are MVCs mandatory in such situations? The CVM is the Communication and verification Mechanism which for Romania requires a regular check in support of the improvement of the judicial and administrative system. National courts want to draw attention to a potential risk that the Constitutional Court's decision may pose in the fight against corruption, especially given that these decisions are binding and applicable for the future.

[5] Press release nr. *230/21,* Luxemburg, 21 December 2021.

[6] https://www.bihorjust.ro/doua-dosare-aflate-in-pronuntare-la-tribunalul-bihor-repuse-pe-rol/ A. Laboș, site visited on 2. 11.2022 .

The Court of Justice of the European Union has considered that MCV is mandatory in all its elements for Romania[7] and the fact that judges at national level have the possibility to stop applying the decisions of the Constitutional Court to the extent that they are contrary to Union law, without the risk of their disciplinary liability. On the other hand, the Constitutional Court expressed that this decision can only be implemented as a result of the amendment of the Constitution, which cannot be made by law[8]. However, the importance of the decision at national level is undeniable, with the doctrine positioning itself mainly on two "barricades". Specialists in the field of EU law who consider that the application of Union rules and decisions is a priority, especially by supporting these claims on the previously stated case law in which the European Union has strengthened its position even in relation to the national constitutions of the Member States On the other hand, specialists in the field of constitutional law who consider that decisions given at Union level cannot, at least not in a direct way, cause amendments or oppose the Constitution, because such a fact would produce a national hazard. There are also stated opinions that tend to bring these discussions to a balanced position starting from the finding that in this process of adapting and developing cooperation relations, naturally, the situation is very different. There will also be some strong interventions by the European Union on national law issues, even at constitutional level. All the more so insofar as these issues concern issues which have the potential to undermine Union principles.

Beyond this brief presentation, there remain numerous discussions and viewpoints that determine polemics even at the time of the article, especially against the background of new controversial issues and decisions taken by the Constitutional Court. Personally, I am aligning myself with a balance position and I believe that much more free discussion on this subject is needed to understand the impact on the practical level. The fluidity and the accelerated pace of evolution of social, economic, and legal realities make it increasingly difficult and illusory to enunciate a generally accepted point of view that has absolute value.

CONCLUSIONS

As far as I can see, at least in part, some of the issues I have tried to raise in my article remain unresolved to the end. The Constitution is the fundamental law of the state and even after accession to the European Union when the state has ceded a part of legislative sovereignty, from the point of view of a good part of the doctrine, in the normative hierarchy, the Constitution occupies the upper position being a form of expression of national identity, The Union regulatory regulations occupy a secondary place even by virtue of the cooperation between the Member States and the European Union. Decisions given at Union level shall

[7] Decision of May 18, 2021, the Association of "Judges of Romania" https://curia.europa.eu/juris/liste.jsf?num=C-83/19&language=ro . site visited on 01.11.2022.
[8] https://www.ccr.ro/comunicat-de-presa-23-decembrie-2021/, site visited on 01.11.2022.

be deemed not to have an impact on the amendment and opposition to constitutional regulations. On the other hand, the doctrinaries that lean in favor of EU law regard with circumspection the foregoing, especially on the basis of the case-law of the Court of Justice of the European Union. However, I believe that my article fulfills its purpose for which it was made, that of determining debates, because only by having discussions can we find solutions that are probably somewhere in a balance position.

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