

NATIONAL SOVEREIGNTY AND THE SUPREMACY OF THE CONSTITUTION IN RELATION TO THE PRIORITY OF EUROPEAN UNION LAW

Marius ANDREESCU *

Andra PURAN**

Abstract

State sovereignty is one of the general features of power and the state and implicitly one of the constitutive elements of the state. In this sense, sovereignty is the right of the state to decide freely in everything that means domestic and foreign policy.

The supremacy of the constitution expresses the superordinate position of the fundamental law both in the legal system and in the entire social and political system of each country. The legal basis for the supremacy of the Romanian Constitution is represented by the provisions of art. 1 paragraph 5 of the Fundamental Law. The supremacy of the Constitution does not have a purely theoretical dimension, in the sense that it could be considered only a political, legal or, possibly, moral concept. Due to its express enshrinement in the fundamental law, this principle has normative value, being formally a constitutional norm

The relationship between constitutional norms and European Union law is interpreted differently, with several doctrinal conceptions and different solutions in jurisprudence. One school of thought affirms the supremacy of the Constitution, including over European Union law, even if it accepts the priority of application of the latter, in its mandatory norms, over all other norms of domestic law, and another the priority of unconditional application of all provisions of European Union law over all norms of domestic law, including over constitutional norms.

In this study we analyze the interferences between the principle of the priority of European Union law and the principle of the supremacy of the Constitution with reference to the relevant doctrine and jurisprudence in the matter.

Keywords: *national sovereignty, supremacy of the Constitution, priority of European Union law, interferences in doctrine and jurisprudence.*

1. Introduction

From a terminological point of view, but with different implications and content, the doctrine uses the notions of popular sovereignty, national sovereignty and state sovereignty.

The sovereignty of the people represents the right of the people to decide on their fate, to establish the political line of the state and the composition of its organs and to control their activity. Ideally, in a society in which state power truly belongs to the entire people, the sovereignty of the people is identified with state sovereignty.

National sovereignty is based on the sociological idea of a nation considered as a legal person that has its own will, distinct from that of the persons who temporarily compose it at the present time, a will that is expressed through the representatives of the nation designated through electoral procedures.

State sovereignty is one of the general features of power and the state and implicitly one of the constitutive elements of the state. In this sense, sovereignty is the right of the state to decide freely in everything that concerns domestic and foreign policy.

The supremacy of the constitution expresses the superordinate position of the fundamental law both in the legal system and in the entire social and political system of each country. In a narrow sense, the scientific substantiation of the supremacy of the constitution results from its form and content. Formal supremacy is expressed by the superior legal force, by the procedures derogating from common law regarding the adoption and modification of constitutional norms, and material supremacy results from the specificity of the regulations,

* Scientific Researcher, "Acad. Andrei Rădulescu" of the Romanian Academy (e-mail: andreescu_marius@yahoo.com).

** Lecturer, PhD, Faculty of Economic Sciences and Law, National University of Science and Technology Politehnica Bucharest (e-mail: andra.puran@upb.ro).

from their content, in particular from the fact that, through the constitution, premises and rules for the organization, functioning and attributions of public authorities are established.

National sovereignty and the supremacy of the Constitution represent the fundamental pillars of the Romanian rule of law, defining the way in which power is exercised and its limits. These principles are enshrined in Title I of the Romanian Constitution and establish that the people are the source of power, and the Fundamental Law is the supreme norm of the legal order.

The principle of priority of European Union law establishes that European norms prevail over the national law of the Member States, including over constitutional norms, in areas in which the States have ceded attributes of sovereignty. Also enshrined in the case law of the Court of Justice of the European Union (see the *Costa/Enel* case, 1964), this principle obliges national courts and authorities to apply European Union law and to leave the contrary domestic provisions unapplied.

In the context of Romania's Euro-Atlantic integration, the relationship, the internal legal and constitutional order, and on the other hand the application of the principle of priority of European Union law involves numerous legal problems and a new conception of national sovereignty.

2. Content

The sovereignty of the people represents the right of the people to decide on their fate, to establish the political line of the state and the composition of its organs and to control their activity. Ideally, in a society in which state power truly belongs to the entire people, the sovereignty of the people is identified with the sovereignty of the state.

National sovereignty is based on the sociological idea of a nation considered as a legal person that has its own will, distinct from that of the persons who temporarily compose it at the present time, a will that is expressed through the representatives of the nation designated through electoral procedures.

State sovereignty is one of the general features of power and the state and implicitly one of the constitutive elements of the state. In this sense, sovereignty is the right of the state to decide freely in everything that means internal and foreign policy.

Sovereignty as a feature and constitutive element of the state has the following features:

- Supremacy, in the sense that the state-organized power is superior to any other form of internal authority and the will of the rulers is realized as a binding will for the entire society;
- Independence from any state power or authority external to the state.

Defining the content of sovereignty through supremacy and independence does not mean dividing sovereignty into distinct parts, which would be contrary to the unique and indivisible character of sovereignty and implicitly of state power.

In the specialized literature it was stated that the principle of the supremacy of the fundamental law "Can be considered a sacred, intangible percept (...) it is at the top of the pyramid of all legal acts. And it would not be possible otherwise: The Constitution legitimizes power, converting individual or collective wills into state wills; it confers authority on the rulers, justifying their decisions and guaranteeing their application; it determines the functions and attributions that fall to public authorities, consecrating fundamental rights and duties, directs the relations between citizens, between them and public authorities; it indicates the meaning or purpose of state activity, that is, the political, ideological and moral values under which the political system is organized and functions; the constitution represents the fundamental basis and the essential guarantee of the rule of law; it is, ultimately, the decisive benchmark for assessing the validity of all legal acts and facts. All of these are substantial elements that converge towards one and the same conclusion: the material supremacy of the Constitution. But the constitution is supreme and in formal sense. The procedure for adopting the constitution externalizes a particular, specific and inaccessible force, which attaches to its provisions, so that no other law except a constitutional one can repeal or modify the provisions of the fundamental establishment, provisions that support themselves, postulating their supremacy."¹

The concept of constitutional supremacy cannot, however, be reduced to a formal and material meaning. Professor Ioan Muraru stated that: "The supremacy of the constitution is a complex notion whose content includes political and legal features and elements (values), which express the superordinate position of the

¹ I. Deleanu, *Instituții și proceduri constituționale - în dreptul roman și în dreptul comparat*, C.H.Beck Publishing House, Bucharest, 2006, pp.221-222.

constitution not only in the legal system, but in the entire socio-political system of a country."² So, the supremacy of the constitution represents a quality or a feature that places the fundamental law at the top of the political-legal institutions in a state-organized society and expresses its superordinate position, both in the legal system and in the entire social-political system.

The legal basis of the supremacy of the Constitution is represented by the provisions of art. 1 paragraph 5 of the Fundamental Law. The supremacy of the Constitution does not have a purely theoretical dimension, in the sense that it could be considered only a political, legal or, possibly, moral concept. Due to its express enshrinement in the fundamental law, this principle has normative value, being formally a constitutional norm. The normative dimension of the supremacy of the constitution implies important legal obligations, the non-compliance of which may attract legal sanctions. In other words, as a constitutional principle, normatively enshrined, the supremacy of the Fundamental Law is also a constitutional obligation with multiple legal, political, but also value meanings, for all components of the social and state system. In this sense, Cristian Ionescu emphasized: "Strictly formally, the obligation (to respect the supremacy of the fundamental law n.n.) is addressed to Romanian citizens. In reality, respecting the Constitution, including its supremacy, as well as the laws, was a completely general obligation, the recipients of which were all subjects of law - natural and legal persons (national and international) in legal relations, including diplomatic, with the Romanian state".³

The general meaning of this constitutional obligation refers to the conformity of the entire law with the norms of the constitution. By "law" we understand not only the component of the normative system, but also the complex, institutional activity of interpreting and applying legal norms, starting with those of the fundamental law. "It was the intention of the Constituent Parliament derived from 2003 to mark the decisive importance of the principle of the supremacy of the Constitution over any other normative act. A signal was given, in particular, to the public institution with a governing role to strictly respect the Constitution. Respect for the Constitution is included in the general concept of legality, and the term of respecting the supremacy of the Constitution imposes a pyramidal hierarchy of normative acts at the top of which is the Fundamental Law."⁴

One of the most important defining elements of the European Union is the existence of its own system made up of principles, written norms and rules established by case law. It is therefore important to clarify the relations between European Union law and national law. The solution to this problem is found in a set of rules that are not explicitly provided for in the founding Treaties but have been developed by the Court of Justice through several decisions, some of them controversial. The constitutions of the Member States of the European Union contain rules of principle regarding the relationship between European Union law and national law.

In practice, interference between European Union law and national law occurs especially when there are contradictions between the legal norms belonging to the legal systems. Of course, the issue of the relationship between the two categories of legal norms is of interest not only in such a situation, but also in cases in which a court of law may apply a norm of European Union law.

We appreciate that this issue can be analyzed on two levels: 1. the relationship between domestic law (other than constitutional law) and European Union law; 2. the relationship between the constitutional norms of the Member States, on the one hand, and European Union law on the other.

The jurisprudence of the Court of Justice of the European Union, the doctrine but also the domestic legislation refers to the principle of priority or supremacy, primacy, pre-eminence of European Union law over national legal systems.

The principle of the priority of European Union law stated above mainly concerns regulations in the economic field and less in the fields of foreign policy, security, justice and home affairs. The explanation lies in the fact that in the fields of economic activity, through the Constitutive and Accession Treaties, the Member States have understood to cede sovereignty and to accept the decision-making and adoption of legislation by the institutions of the Union.

The Court of Justice has developed the principle of the priority of European Union law taking into account the rule of public international law according to which "a party may not invoke the provisions of its internal law to justify the non-performance of a treaty". Another source was the provisions of Article 10 of the Treaty on European Union, amended by the Treaty of Lisbon. The rule contained in the provisions of Article 10 has

² I. Muraru, E.S. Tănăsescu (coord.), *Constituția României - Comentariu pe articole*, C.H.Beck Publishing House, Bucharest, 2009, p.18.

³ C. Ionescu, *Constituția României. Titlul I. Principii generale art. 1-14. Comentarii și explicații*, C.H. Beck Publishing House, Bucharest, 2015, p.48.

⁴ Idem.

remained unchanged to date and establishes the obligation of Member States to take all necessary measures to ensure the fulfilment of the obligations arising from the Treaties and acts of the institutions of the Union. The same provisions also impose a negative obligation on Member States to refrain from taking measures which would jeopardise the achievement of the objectives of the Treaty. These are not the only provisions in the Treaties of the European Union which substantiate the principle of the priority of European Union law over national law.

The Constitutional Court considered that the Treaties of the European Union can have a normative value only to the extent that they are incorporated into national law by a law. At the same time, it was admitted that a national law can derogate from the provisions of the Treaty. The Court of Justice had a different opinion expressed in the decision: "It follows from these considerations that the legal system born of the Treaty, an independent source of law, cannot, due to its special and original nature, be outclassed by domestic legal norms or whatever their legal force may be, without being deprived of its character as Community law and without the very legal foundation of the Community being called into question".

Another moment in the evolution of the Court of Justice's case law in this matter is represented by the "Internationale H"⁵ cases; "Simmenthal I"⁶ and "Simmenthal II"⁷. The following considerations from the decision in the Simmenthal II case are relevant to our research topic: "as such, any provision of the national legal order or any practice, legislative, administrative or judicial, which would have the effect of diminishing the effectiveness of Community law by denying the judge competent to apply it the power to do, at the very moment of such application, everything necessary to remove national legal provisions which, possibly, would represent an obstacle to the full effectiveness of Community rules... Therefore, the answer to the first question is that the national judge charged, according to his competence, with applying the provisions of Community law, is obliged to ensure the full effectiveness of these rules, leaving unapplied, of his own motion, if necessary, any contrary provision of national law, even subsequent, without requesting or waiting for its prior elimination by legislative means. or by any other constitutional procedure" (recitals 22 and 24 of the decision). Furthermore, the Court considered that national courts have the power to constrain and even sanction the legislative and executive powers in order to guarantee the full effectiveness of the principle of the priority of European Union law over national law.⁸

This principle must also be understood from the perspective of the rule of binding force of Union acts. Thus, under the provisions of art. 249 of the TEU, the regulation has general applicability and is binding in its entirety. In contrast, the directive is addressed to some or all Member States and is binding as to the result to be achieved, leaving to the national authorities the choice of form and means to be used to achieve the objectives set. The decision is binding in its entirety on the addressees to whom it is addressed.

The rule of direct application that characterizes some of the legal acts of European Union law concerns the way in which the principle of priority of European Union law is understood and applied. Regulations are directly applicable because they do not require transposition into national law. As the court has indicated in its case-law, Member States do not have to adopt national legislation to transpose regulations. Their provisions may be relied on by natural and legal persons directly before national courts. In contrast, the directive is not directly applicable. It must always be transposed into the legal system of each Member State to which it is addressed. The internal normative act transposing the directive is the one through which the content of the directive will enter the national legal system.

The principle of the priority of European Union law over national law must also be understood according to the criterion of the possibility of direct invocation of Community acts before national courts. The phrase "direct effect" designates the attribute of a Community normative act to create in the patrimony of natural and legal persons rights that they can invoke directly before national courts. Without going into details, we emphasize that under certain conditions, regulations, directives and decisions can have direct effect.⁹

One of the consequences of the principle of the primacy of European Union law is the obligation of national courts to interpret national law in accordance with European Union law.

⁵ 11/70, *Internationale H.*, (1970) ECR 1125.

⁶ 35/76, *Simmenthal SpA* (1976) ECR 1871.

⁷ 106/77, *Simmenthal* (1978) ECR 629.

⁸ For development see T. Ștefan, B. Andreșan-Grigoriu, *Drept comunitar*, C.H. Beck Publishing House, Bucharest, 2008, pp.196-202.

⁹ *Ibidem*, pp. 214-234.

In an attempt to ensure the effectiveness and uniformity of European Union law, the Court of Justice of the European Union has established several means to encourage Member States to correctly and timely implement directives and to ensure their enforcement. One of these means is the creation of the doctrine of vertical direct effect of directives. In the event that the provisions of a directive that have not been implemented or have been implemented incorrectly cannot have vertical direct effect because they do not meet the condition of being sufficiently clear, precise and unconditional to be able to infer the right that the litigant wishes to assert before the national courts, the Court has established the obligation, on the part of the national judge, to interpret national legislation in relation to the content of the directive.

One of the first cases in which this obligation was expressly stated was the Van Colson case. The Court held in the grounds of the decision that national legislation limited the right to compensation of persons who had been the subject of discrimination in the exercise of the right to work. Such a situation does not comply with the requirements of the effective transposition of Directive No. 76/207. Therefore, the Luxembourg court ruled: "It follows that in the activity of applying national law and in particular the provisions of a national law specifically introduced for the purpose of applying Directive 76/207, the national court is required to interpret national law in the light of the wording and purpose of the directive in order to obtain the result provided for in Article 189(3) of the T.C.E.". Consequently, the court stated: "It is for the national court to give the law adopted for the purpose of implementing the directive, in so far as national law grants it a margin of appreciation, an interpretation and application which is in conformity with the requirements of Community law."

The decision of the Court of Justice of the European Union, pronounced in the case *Seda Küçükdeveci v. Swedex GmbH & Co.*¹⁰, is also instructive for our research topic. The Court reaffirms the existence of the principle of non-discrimination on grounds of age and the role of the national court in its application.

The German legislation which provides that periods of employment completed before the age of 25 are not taken into account for the purpose of calculating the notice period is contrary to the principle of non-discrimination on grounds of age, as laid down in Directive 2000/78. In that situation, the national court must, if necessary, set aside any contrary national legislation, even in a dispute between private individuals. It follows from the grounds of that judgment that Directive 2000/78 gives concrete form to the principle of equal treatment in matters of employment and occupation. The principle of non-discrimination on grounds of age is a general principle of EU law. Therefore, the national court seised of a dispute in which the principle of non-discrimination on grounds of age, as provided for by Directive 2000/78, is brought into question, is required to ensure, within the framework of its powers, the legal protection that arises for litigants under Union law and to guarantee the full right to this principle, removing, if necessary, the application of any provision, possibly contrary, of national law.

In accordance with these conclusions of the Court of Justice of the European Union, it follows that Romanian courts, in situations in which they will apply the provisions of a national law implementing a directive, must interpret it in accordance with the text and purpose of the directive. It follows from the case-law of the Court on the matter that the national court is obliged, when it has to apply a law implementing a directive, to take into account not only the law in question, but also the entire body of national law rules and to interpret them in accordance with the requirements of the directive in question, in order to pronounce a solution in accordance with the aim pursued by the Community act. Given that Romanian law is characterised by excessive procedural formalism and, in particular, by significant inconsistencies and contradictions, the fulfilment of this obligation by the national courts will be very difficult.

Moreover, in its case law, the Court of Justice of the European Union considers that this obligation of national courts is subject to certain limits. The obligation to interpret national law taking into account the wording and purpose of the directive exists only to the extent that national law grants the court a margin of appreciation. In this regard, the Court held in the *Papino* case that: "The principle of interpretation in the light of the directive cannot serve as a basis for an interpretation 'contra legem' of national law".¹¹

We consider that whenever the national law confers on the court a "related jurisdiction" which excludes the existence of a margin of appreciation, the national judge is not under the above-mentioned obligation. For example, some of the normative provisions of a procedural nature may be included in this category. Also, in criminal matters, national courts cannot aggravate the criminal liability of persons in the event that they commit

¹⁰ Cause C-555/07.

¹¹ C-105/03, *Papino*, Judgment of 16 June 2005, paragraph 47.

an act incriminated by a directive, if this has not been implemented in national law. In doctrine but also in case law, the question has been raised whether national courts comply with the procedural rules of national law in the application of European Union law or whether there are procedural rules at the level of law.

There are currently no relevant procedural rules in the founding Treaties or in other legal acts of the Union that could be used by national courts. The exception is the procedural rules developed in the following areas: cooperation in civil and criminal matters; in the field of public procurement and social policies. In these areas too, the Member States have transposed into national law by means of normative acts the procedural rules found in Community acts. Therefore, the courts apply in particular the procedural rules of national law in these cases as well.

Faced with this problem and reality, the Court of Justice of the European Union has developed the principle of national procedural autonomy through case law. Thus, in several cases¹², the Court has considered that compliance with the principle of effectiveness of European Union law presupposes equality of conditions between actions protecting Community rights and those protecting rights guaranteed by national law. The procedural rules applied by national courts must not make it impossible to exercise the rights conferred by Community acts.

National procedural autonomy in the application of European Union law is based on two important principles:

- the principle of equivalence, according to which the procedural rules used by national courts to implement European Union law must be equivalent to those for the application of national law;
- the principle of practical possibility, according to which the procedural rules used by national courts to implement the rules of European Union law must not make it impossible in practice to exercise the rights enshrined in Community legal norms.

The Factortame I case is interesting for this issue. The British courts did not have the power, under domestic law, to order measures against the Government. In response to a preliminary question, the Court of Justice of the European Union stated that the effectiveness of European Union law would be diminished if a rule of national law could prevent the judge seised of a dispute governed by Community law from granting the interim measures necessary to ensure the full effectiveness of the judgment which seeks to establish the existence of rights resulting from Community legal acts. Therefore, in the Court's view, the national judge, in such situations, would have to ignore even the rules of substantive jurisdiction of the court or could resolve the case without complying with procedural rules found in domestic law.

However, the national procedural autonomy granted to courts in the application of European Union law should not be extended to the extent that it would be considered that the national judge would be entitled not to apply mandatory internal procedural rules in the resolution of such disputes on the grounds that only in this way would the principle of the effectiveness of Community law be guaranteed. As is clear from the case law of the Court of Justice of the European Union, national procedural autonomy has a concrete character, in the sense that it is conditioned by the particularities of each case, but also by the nature and importance of the procedural rules enshrined in national law applicable in the resolution of the dispute.

One of the most controversial issues reflected in the case law of the courts of the Member States but also in the case law of the Court of Justice of the European Union is the relationship between European Union law and domestic constitutional rules. The constitutional courts of some Member States, notably Germany, Italy and France, have consistently held that the principle of the priority of European Union law does not apply in relation to the regulations contained in a constitution, because the fundamental law of a state expresses national identity and sovereignty. This solution particularly concerned regulations on fundamental human rights and freedoms. Until 1 December 2009, the date on which the Treaty of Lisbon and the Charter of Fundamental Rights of the European Union entered into force, European Union law did not include a coherent normative system guaranteeing fundamental human rights. Consequently, the courts of the Member States have invoked domestic constitutional regulations in such situations.

We argue that there is a legal difference between the principle of the priority of European Union law over national law other than constitutional law, on the one hand, and the principle of the supremacy of the internal constitution on the other. The supremacy of the fundamental law of a state essentially expresses its superior legal force over any legal act that produces effects and applies on the territory of the state. The consequence of

¹² C-430 și 431/93 Jereen Van Schijndel (1995) ECR I-4705; C-326/96, B.S. Levez (1998) ECR I-7835.

the principle of the supremacy of a constitution is the conformity of all internal law with the norms of the fundamental law. To consider that on the territory of a state, even a member of the European Union, a legal norm contrary to internal constitutional regulations could produce legal effects, means to limit in an impermissible way the sovereignty of the state in question with the consequence of endangering the legal order built on constitutional principles and norms.

Moreover, the practice of the courts of the Member States of the European Union does not offer many examples of conflict between the norms of European Union law on the one hand and constitutional regulations on the other. This situation is explained by the fact that following the process of accession to the European Union, the Member States have adapted their constitutional regulations of a principled nature to the specific requirements of European Union law and have enshrined in one form or another the principle of the priority of this legal system over domestic law whenever there is a contradiction between the rules of the two categories of legal norms.

Of course, this issue remains open and is far from being resolved. We note that in the jurisprudence of recent years of the Constitutional Council and the Council of State of France, the concept of "constitutional national identity" has been developed. According to this principle, national courts will always apply domestic constitutional norms but also the rules included in ordinary legislation whenever these do not have a counterpart in European Union law.

The jurisprudence of the Constitutional Court of Romania reflects this issue. By Decision no. 148 of 16 April 2003 on the constitutionality of the legislative proposal to revise the Constitution of Romania¹³, our constitutional court clearly distinguishes between the supremacy of the Constitution and the principle of priority of European Union law, stating: "The consequence of accession is that the Member States of the European Union have understood to place the Community *acquis*, the founding treaties of the European Union and the regulations derived from them in an intermediate position between the Constitution and other laws when it comes to binding European normative acts".

In the specialized legal literature, with reference to the provisions of art. 148 of the Constitution and in accordance with Decision no. 148 of April 16, 2003, it was stated: "Therefore, it can be stated that in the internal legal order the legal act by which Romania joins the European Union has a legal force inferior to the Constitution and constitutional laws, but superior to organic and ordinary laws".¹⁴

In its subsequent jurisprudence, the Constitutional Court seems to have abandoned this distinction, basing its decisions solely on the principle of the priority of European Union law.¹⁵

However, by Decision no. 1258 of 8 October 2009¹⁶, the Court finds that a domestic law transposing a European Union directive into domestic law is unconstitutional. Such a solution, in our opinion, enshrines the principle of the supremacy of the Constitution and the obligation to comply with it in relation to the principle of the priority of European Union law. The Constitutional Court found that the provisions of Law no. 298/2008 are unconstitutional. From the considerations of the decision it follows that Law no. 298/2008¹⁷ was adopted in order to transpose into national legislation Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks. The Court refers to the legal regime of such Community acts, emphasizing that: "... it imposes its obligation on the Member States of the European Union with regard to the regulated legal solution, not with regard to the concrete ways in which this result is reached, the States benefiting from a wide margin of appreciation for the purpose of adopting them in accordance with the specifics of national legislation and realities".

Examining the content of Law no. 298/2008, the Court ruled that this normative act is likely to affect the exercise of fundamental rights or freedoms, namely the right to intimate, private and family life, the right to the secrecy of correspondence and freedom of expression. The constitutional court notes that the restriction of the exercise of these rights does not meet the requirements established by art. 53 of the Romanian Constitution.

¹³ Published in Official Gazette no. 317 of May 12.

¹⁴ M. Constantinescu, A. Iorgovan, I. Muraru, E. S. Tănăsescu, *Constituția României revizuită - comentarii și explicații*, All Beck Publishing House, Bucharest, 2004, p. 331.

¹⁵ See in this regard: Decision no. 308/2006 published in the Official Gazette no. 390 of May 5, 2006; Decision no. 59/2007 published in the Official Gazette no. 98 of February 8, 2007; Decision no. 1042/2007 published in the Official Gazette no. 12 of February 8, 2008 and Decision no. 1172/2007 published in the Official Gazette no. 54 of January 23, 2008.

¹⁶ Published in Official Gazette no. 798 of November 23, 2009.

¹⁷ Published in the Official Gazette no. 780 of November 21, 2008.

For our research topic, DCC no. 80 of 16 February 2014¹⁸ is relevant, on the legislative proposal regarding the revision of the Romanian Constitution. Regarding the interpretation of the provisions of art. 148 regarding integration into the European Union, the Court notes that: "constitutional provisions do not have a declarative character, but constitute mandatory constitutional norms, without which the existence of the rule of law, provided for by art. 1 paragraph (3) of the Constitution, cannot be conceived. At the same time, the Fundamental Law represents the framework and extent to which the legislator and other authorities can act; thus, the interpretations that can be made of the legal norm must also take into account this constitutional requirement, contained in art. 1 paragraph (4) of the Fundamental Law, according to which in Romania compliance with the Constitution and its supremacy is mandatory".

In the opinion of our constitutional court, considering that European Union law applies without any differentiation within the national legal order, not distinguishing between the Constitution and other domestic laws, is equivalent to placing the Fundamental Law on a secondary level compared to the legal order of the European Union. The legitimacy of the Constitution is the will of the people itself, which means that it cannot lose its binding force, even in the event that there are inconsistencies between its provisions and those of the European Union. Moreover, it was emphasized that Romania's accession to the European Union cannot affect the supremacy of the Constitution over the entire domestic legal order.

The Constitutional Court established that the binding acts of the European Union are norms interposed within the framework of constitutional review¹⁹. At the same time, it was emphasized the lack of constitutional relevance of the norm of European law, interposed in constitutional norms of reference within the framework of constitutional review. In this case, the referral to the Court based on the failure to comply with the provisions of art. 148 para. 4 of the Constitution²⁰. By the same decision, the Court established that it is necessary for the legal norm of European Union law to be limited to a certain level of constitutional relevance, so that its normative content supports the possible violation by the national law of the Constitution – "the only direct norm of reference within the framework of the constitutionality review". The constitutional court has enshrined, like the French Constitutional Council, the concept of "national constitutional identity", by which it understands the relevance of the supremacy of the constitution whenever the issue of compliance of domestic laws with European Union acts arises.²¹

Another aspect analyzed in constitutional jurisprudence refers to the application of the Charter of Fundamental Rights of the European Union in the context of constitutional review. Our constitutional court ruled that, in principle, it is applicable in the context of constitutional review "to the extent that it ensures, guarantees and develops the constitutional provisions in the field of fundamental rights, in other words, to the extent that their level of protection is at least at the level of constitutional norms in the field of human rights."²²

Also in connection with the application of European Union norms, with regard to human rights in the framework of constitutional review, it was stated that the reporting of the provisions contained in an act having legal force similar to the constitutive treaties of the European Union must be made to the provisions of art. 148 of the Constitution, and not to those contained in art. 20 of the Fundamental Law, which refers to international treaties on human rights, other than those of the European Union²³. Our constitutional court ruled that the provisions of art. 41 of the Charter of Fundamental Rights of the European Union, relating to the right to good administration, can be invoked through the prism of art. 148, and not art. 20 of the Constitution.²⁴

Also, in constitutional jurisprudence it was established that it is not within the competence of the Constitutional Court to analyze the conformity of a provision of constitutional law with the text of the Treaty on the Functioning of the European Union, through the prism of art. 148 of the Constitution. Such a competence, namely that of establishing whether there is a contradiction between national law and the treaty, belongs exclusively to the court of law, which also has the possibility of formulating a preliminary question to the Court of Justice of the European Union. It is interesting that the constitutional court considers itself incompetent to verify the conformity of a provision of national law with the text of the founding treaties of the European Union,

¹⁸ Published in, Official Gazette no. 246 of April 7.

¹⁹ See, DCC no. 668 of 18 May 2011 published in the Official Gazette no. 487 of 8 July 2011.

²⁰ See, DCC no. 668 of 18 May 2011 published in the Official Gazette no. 487 of 8 July 2011.

²¹ DCC no. 64 of 24 February 2015, published in the Official Gazette no. 286 of 28 April 2015.

²² DCC no. 871 of June 25, 2010, published in the Official Gazette no. 433 of June 28, 2010.

²³ DCC no. 967 of 20 November 2012, published in the Official Gazette no. 853 of 18 December 2012 and DCC no. 206 of 6 March 2012, published in the Official Gazette no. 254 of 17 April 2012.

²⁴ DCC no. 12 of 22 January 2013, published in the Official Gazette no. 114 of 289 February 2013.

also because, if it were to arrogate such competence, it would lead to a possible conflict of jurisdiction between the Constitutional Court of Romania and the Court of Justice of the European Union, which, at this level, is considered inadmissible.²⁵

Regarding the cooperation between the Constitutional Court and the Court of Justice of the European Union, our constitutional court stated that it remains at its discretion, in the application of the decisions of the Court of Justice of the European Union within the framework of the constitutional review, or the formulation by the Court of preliminary questions in order to establish the content of the European norm. "Such an attitude is related to the cooperation between the national and European constitutional courts, as well as to the judicial dialogue between them, without bringing into question aspects related to the establishment of a hierarchy between these courts." The Court of Justice of the European Union, in its recent case law, has a different opinion and has ruled on the supremacy of the legal order of European Union Law, over the domestic legal order and even over the constitutional order.

Thus, by the Judgment delivered on May 18, 2021, the Court of Justice of the European Union rules on a series of reforms in Romania relating to the judicial organization, the disciplinary regime of magistrates, as well as the patrimonial liability of the state and the personal liability of judges for judicial errors.²⁶

Six requests for a preliminary ruling have been made to the Romanian Court of Justice in disputes between legal persons or natural persons, on the one hand, and authorities or bodies such as the Judicial Inspection, the Superior Council of Magistracy and the Prosecutor's Office attached to the High Court of Cassation and Justice, on the other. The main disputes are set out in the context of a far-reaching reform in the field of justice and the fight against corruption in Romania, a reform which has been the subject of monitoring at European Union level since 2007, under the cooperation and verification mechanism established by Decision 2006/928²⁷ on the occasion of Romania's accession to the Union ('the CVM').

In that context, the referring courts raised the issue of the nature and legal effects of the CVM and the scope of the reports drawn up by the Commission under it. According to those courts, the content, legal nature and temporal scope of that mechanism should be regarded as being confined to the Accession Treaty and the requirements set out in those reports should be binding on Romania. In that regard, however, those courts refer to national case-law according to which EU law does not prevail over the Romanian constitutional order and Decision 2006/928 cannot constitute a reference rule in the context of a review of constitutionality since that decision was adopted before Romania's accession to the Union and the question whether the content, nature and scope of Decision 2006/928/EC fall within the scope of the Accession Treaty has not been the subject of any interpretation by the Court.

As regards the legal effects of Decision 2006/928, the Court found that it was binding in its entirety on Romania from the date of its accession to the European Union and required it to achieve the benchmarks, which were also binding, set out in the annex thereto. Those benchmarks, defined as a result of the shortcomings identified by the Commission before Romania's accession to the European Union, were intended, *inter alia*, to ensure that that Member State respected the value of the rule of law. Romania was therefore required to take appropriate measures to achieve those objectives and to refrain from implementing any measure which might jeopardise the achievement of those objectives.

The Court held that the principle of the primacy of EU law precludes national legislation of constitutional status which deprives a lower court of the right to disapply of its own motion a national provision falling within the scope of Decision 2006/928 and which is contrary to EU law. The Court recalls that, according to settled case-law, the effects associated with the principle of the primacy of EU law are binding on all the bodies of a Member State, without the internal provisions relating to the distribution of judicial powers, including those of a constitutional nature, being able to prevent that from happening. Recalling also that national courts are required,

²⁵ DCC no. 1249 of 7 October 2010, published in the Official Gazette no. 764 of 16 November 2010 and DCC no. 137 of 25 February 2010, published in the Official Gazette no. 182 of 22 March 2010.

²⁶ Judgment in the joined cases C-83/19, Association of the "Forum of Judges of Romania" v. Judicial Inspection, C-127/19, Association of the "Forum of Judges of Romania" and Association of the "Movement for the Defense of the Statute of Prosecutors" v. Superior Council of Magistracy and C-195/19, PJ/QK and in the cases C-291/19, SO/TP and others, C355/19, Association of the "Forum of Judges of Romania" and Association of the "Movement for the Defense of the Statute of Prosecutors" and OL/Prosecution Office attached to the High Court of Cassation and Justice - Prosecutor General of Romania and C-397/19, AX/Romanian State - Ministry of Public Finance.

²⁷ Commission Decision 2006/928/EC of 13 December 2006 establishing a mechanism for cooperation and verification of progress made by Romania towards achieving certain specific benchmarks in the field of judicial reform and the fight against corruption (OJ 2006 L 354, p. 56, Special edition, 11/vol. 51, p. 55).

as far as possible, to interpret domestic law in a manner consistent with the requirements of EU law or to disapply of their own motion any contrary provision of national law which could not be the subject of such a consistent interpretation, the Court finds that, in the event of a proven breach of the EU Treaty or of Decision 2006/928, the principle of the primacy of EU law requires the referring court to disapply the provisions in question, regardless of whether they are of legislative or constitutional origin.

By the Decision of December 21, 2022²⁸, the Court of Justice of the European Union ruled that Union law precludes the application of a case-law of the Constitutional Court to the extent that it, in conjunction with national provisions on prescription, creates a systemic risk of impunity. "The supremacy of Union law requires that national judges have the power to set aside a decision of a constitutional court that is contrary to that law, without being exposed to the risk of disciplinary liability."

The reasoning of the Judgment essentially states the following:

In these cases, the question arises whether the application of the case-law resulting from various decisions of the Constitutional Court of Romania (Romania), concerning the rules of criminal procedure applicable in matters of fraud and corruption, is liable to infringe Union law, in particular the provisions of that law which aim to protect the financial interests of the Union, the guarantee of the independence of judges and the value of the rule of law, as well as the principle of the supremacy of Union law.

The Court, sitting in the Grand Chamber, confirmed its case-law resulting from a previous judgment, according to which the CVM is binding in its entirety for Romania.²⁹

Thus, acts adopted before accession by the institutions of the Union are binding on Romania from the date of its accession. This is the case of Decision 2006/928, which is binding in its entirety on Romania as long as it has not been repealed. The benchmarks aimed at ensuring respect for the rule of law are also binding. Romania is therefore required to take appropriate measures to achieve those benchmarks, taking into account the recommendations made in the reports drawn up by the Commission.³⁰

Union law precludes the application of a case-law of the Constitutional Court which leads to the annulment of judgments delivered by panels of judges which were unlawfully composed, in so far as this, in conjunction with national provisions on limitation periods, creates a systemic risk of impunity for acts constituting serious offences of fraud affecting the financial interests of the Union or of corruption.

It was also noted that in the present case, the application of the case-law of the Constitutional Court at issue has the consequence that the fraud and corruption cases in question must be re-examined, if necessary, several times, at first instance and/or on appeal. Given their complexity and duration, such a re-examination inevitably has the effect of prolonging the duration of the related criminal proceedings.

The Court recalls that, having regard to the specific obligations incumbent on Romania under Decision 2006/928, national legislation and practice in this area cannot have the effect of prolonging the duration of investigations into corruption offences or otherwise weakening the fight against corruption. On the other hand, having regard to the national rules on limitation periods, retrying the cases in question could lead to the offences becoming time-barred and could prevent the effective and dissuasive punishment of persons occupying the most important positions in the Romanian State who have been convicted of serious fraud and/or serious corruption in the exercise of their functions. The risk of impunity would therefore become systemic for that category of persons and would call into question the objective of combating high-level corruption.

The reasoning invokes the supremacy of European Union law and notes that the principle of supremacy of Union law prevents national courts from being able, at the risk of disciplinary sanctions, to disregard decisions of the Constitutional Court that are contrary to Union law.

The Court recalls that, in its case-law on the EEC Treaty, it has established the principle of the supremacy of European Union law, understood as consecrating the prevalence of this law over the law of the Member States. In this regard, the Court has found that the establishment by the EEC Treaty of a legal order of its own, accepted by the Member States on a reciprocal basis, has as a corollary the impossibility for the said States to make a subsequent unilateral measure prevail against this legal order or to oppose the law arising from the EEC Treaty

²⁸ Judgment in the joined cases C-357/19 Euro Box Promotion and others, C379/19 DNA- Territorial Service Oradea, C-547/19 Association « Forumul Judecatorilor din România », C-811/19 FQ and others and C-840/19 N.

²⁹ See, Judgment of 18 May 2021, Association of Judges of Romania and Others, C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19 (see also CP No. 82/21).

³⁰ Under the principle of sincere cooperation, enshrined in Article 4(3) TEU.

to national law, regardless of its nature, otherwise there is a risk that this law will lose its Community character and that the legal basis of the Community itself will be called into question.

Furthermore, the executive force of European Union law cannot vary from one Member State to another depending on subsequent national laws, otherwise there is a risk that the achievement of the objectives of the EEC Treaty will be jeopardised, nor can it give rise to discrimination on grounds of nationality, prohibited by that Treaty. The Court thus considered that, although it was concluded in the form of an international agreement, "the EEC Treaty constitutes the constitutional charter of a community based on the rule of law, and the essential characteristics of the Community legal order thus constituted are, in particular, its primacy over the law of the Member States and the direct effect of a whole series of provisions applicable to the Member States and their nationals". According to the Court, the effects associated with the principle of the primacy of Union law are imposed on all the organs of a Member State, without internal provisions, including constitutional provisions, being able to prevent this. National courts are required to disapply of their own motion any national rule or practice contrary to a provision of Union law which has direct effect, without having to request or await the prior repeal of that national rule or practice by legislative or other constitutional means.

Furthermore, the fact that national judges are not subject to disciplinary proceedings or sanctions for having exercised the option of bringing a case before the Court under Article 267 TFEU, which falls within their exclusive jurisdiction, constitutes an inherent guarantee of their independence. Thus, in the event that a national ordinary court were to consider, in the light of a judgment of the Court, that the case-law of the national constitutional court is contrary to Union law, the fact that that national judge were to disapply that case-law cannot render him liable to disciplinary action.

3. Conclusions

We consider that the principle of pre-eminence or priority of European Union law is not equivalent to the principle of supremacy of a rule of law because supremacy is a characteristic of domestic constitutional norms. In this sense, the provisions of art. 148 paragraph 2 of the Constitution of Romania enshrine the priority and not the supremacy of the provisions of the Treaties establishing the European Union as well as of other normative regulations.

The Constitutional Court of Romania, in a press release from December 23, 2021, stated with reference to these Decisions of the Court of Justice of the European Union: "According to art. 147 paragraph (4) of the Constitution, the decisions of the Constitutional Court are and remain generally binding."

Moreover, the CJEU also recognizes, in its Decision of 21 December 2021, the binding nature of the decisions of the Constitutional Court. However, the conclusions of the CJEU Judgment according to which the effects of the principle of the supremacy of EU law are imposed on all bodies of a Member State, without domestic provisions, including those of a constitutional nature, being able to prevent this, and according to which national courts are required to leave unapplied, ex officio, any national regulation or practice contrary to a provision of EU law, presuppose the revision of the Constitution in force.

In practical terms, the effects of this Judgment can only occur after the revision of the Constitution in force, which, however, cannot be done by right, but exclusively at the initiative of certain subjects of law, in compliance with the procedure and under the conditions provided for in the Constitution of Romania itself.

We fully support the opinion expressed by the Constitutional Court. Our Constitution enshrines the obligation to respect the Fundamental Law and its supremacy in art.2 para. (5), "In Romania, respect for the Constitution, its supremacy and the laws is mandatory."

The provisions of art. 148, paragraph (2), regulate the principle of the priority of European Union law. As a result of accession, "the provisions of the constitutive treaties of the European Union, as well as other mandatory Union regulations, shall take precedence over contrary provisions in domestic laws, in compliance with the act of accession."

Consequently, the supremacy of the Constitution and the principle of the priority of European Union law have different legal natures. The supremacy of the Constitution is a quality of it determined by the social, economic and political realities of the Romanian people and by its traditions. It expresses and substantiates at the same time the characters and attributes of the Romanian State, national sovereignty. The supremacy of the Constitution and the obligation to respect it is not exclusively the concretization of the will of the constituent legislator, but is determined objectively, historically.

In contrast, the principle of the priority of European Union law is derived from the supremacy of the Fundamental Law because it is established by the will of the constituent legislator and by the international treaties to which Romania is a party.

References

- Deleanu, Instituții și proceduri constituționale - în dreptul roman și în dreptul comparat, C.H. Beck Publishing House, Bucharest, 2006
- Ionescu, Constituția României. Titlul I. Principii generale art. 1-14. Comentarii și explicații, C.H. Beck Publishing House, Bucharest, 2015
- Muraru, E.S. Tănăsescu (coord.), Constituția României - Comentariu pe articole, C.H. Beck Publishing House, Bucharest, 2009
- Ștefan, B. Andreșan-Grigoriu, Drept comunitar, C.H. Beck Publishing House, Bucharest, 2008
- Constantinescu, A. Iorgovan, I. Muraru, E. S. Tănăsescu, Constituția României revizuită -comentarii și explicații, All Beck Publishing House, Bucharest, 2004
- Judgment in the joined cases C-83/19, Association of the "Forum of Judges of Romania" v. Judicial Inspection, C-127/19, Association of the "Forum of Judges of Romania" and Association of the "Movement for the Defense of the Statute of Prosecutors" v. Superior Council of Magistracy and C-195/19, PJ/QK and in the cases C-291/19, SO/TP and others, C355/19, Association of the "Forum of Judges of Romania" and Association of the "Movement for the Defense of the Statute of Prosecutors" and OL/Prosecution Office attached to the High Court of Cassation and Justice - Prosecutor General of Romania and C-397/19, AX/Romanian State - Ministry of Public Finance.
- Commission Decision 2006/928/EC of 13 December 2006 establishing a mechanism for cooperation and verification of progress made by Romania towards achieving certain specific benchmarks in the field of judicial reform and the fight against corruption (OJ 2006 L 354, p. 56, Special edition, 11/vol. 51, p. 55).
- Judgment in the joined cases C-357/19 Euro Box Promotion and others, C379/19 DNA- Territorial Service Oradea, C-547/19 Association «Forumul Judecătorilor din România», C-811/19 FQ and others and C-840/19 N.
- Judgment of 18 May 2021, Association of Judges of Romania and Others, C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19
- Decision of Constitutional Court no. 308/2006 published in the Official Gazette no. 390 of May 5, 2006
- Decision of Constitutional Court no. 59/2007 published in the Official Gazette no. 98 of February 8, 2007
- Decision of Constitutional Court no. 1042/2007 published in the Official Gazette no. 12 of February 8, 2008
- Decision of Constitutional Court no. 1172/2007 published in the Official Gazette no. 54 of January 23, 2008
- Decision of Constitutional Court no. 668 of 18 May 2011 published in the Official Gazette no. 487 of 8 July 2011
- Decision of Constitutional Court no. 64 of 24 February 2015, published in the Official Gazette no. 286 of 28 April 2015.
- Decision of Constitutional Court no. 871 of June 25, 2010, published in the Official Gazette no. 433 of June 28, 2010
- Decision of Constitutional Court no. 967 of 20 November 2012, published in the Official Gazette no. 853 of 18 December 2012
- Decision of Constitutional Court no. 206 of 6 March 2012, published in the Official Gazette no. 254 of 17 April 2012.
- Decision of Constitutional Court no. 12 of 22 January 2013, published in the Official Gazette no. 114 of 289 February 2013.
- Decision of Constitutional Court no. 1249 of 7 October 2010, published in the Official Gazette no. 764 of 16 November 2010
- Decision of Constitutional Court no. 137 of 25 February 2010, published in the Official Gazette no. 182 of 22 March 2010.