VALIDATION OF THE DERIVED LAW NORM IN THE EUROPEAN AND INTERNATIONAL LAW

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Abstract

Throughout realizing the study we analyzed the validity of the European law norm resulting from the derived sources of law with obligatory force (regulations, decisions and directives) in connection with the European law norm, the national law norm and the general principles of law considering the jurisprudence of the European Court of Justice and the supremacy of the European Union law also over national constitutions. Thus the European Union represents a new law order, having as subjects not only states member, but also the nationals of these states, who benefit of rights that can be appealed before national courts against public organisms or other private persons and obligations. Therefore, the European Court of Justice has successively imposed the direct applicability of community norms, continuing with the priority of these norms so that in the end the principle of the supremacy of the European law has been adopted. The European norm has to be respected and interpreted in a uniform manner in all states member, considering the fact that the supremacy of the European law over the national law is seen as a sine qua non of the integration, but also a fundamental principle of the Union. National courts guarantee the supremacy of the European norm and its unitary application – aspects analyzed in this study- through the procedure of preliminary decisions.

Keywords: *direct applicability, priority, suveranity, supremacy, Constitution, European juridical order, preliminary decisions.*

JEL Classification: *K33*

1. Introductory aspects

Community European law represents a living construction, in constant evolving.

Originally created by the Member States of the European Community through the adoption of treaties, conventions, directives, regulations etc., was perfected by the jurisprudence of the Court of Justice of the European Community (now the European Court of Justice).

The main goal that I had in making this work was to identify the rules in the event of a national litigation when the national rule susceptible of application, be it a constitutional provision, contrary to the European standard.

In order to achieve our goal we have analyzed the hierarchy of legal norms "involved" , the principles underlying this classification and legal, social and institutional context.

Community law, European now, has evolved over time from a set of distinct rules to rules directly applicable in cases Member States. The next step in the formation of the European legal system was that of priority consecration of the European standard in relation to the national norm, and finally to rule the European standard Principle.

2. Rule of European law and its relationship with national rule

The legal force of the European standard is consolidated differently depending on the circumstances in which it applies according to legal rules it comes into conflict.

We can make a distinction between three categories of legal rules, each expressing its own legal order: legal international standard, legal European standard and national legal norm.

European law rules are classified, informally, depending on their source, the primary European rules (arising from treaties), derived binding rules (they come from regulations, decisions and directives) and the general principles of European law (stemming from the jurisprudence of the European Court of Justice) .

In the context when the European legal rule is in conflict with the international legal norms as reflected in international agreements concluded by the Community, assimilated by European law, then the international legal norms have primacy over the national rule applicable in the Member States in the virtue of their relationship with the EU and not with international law.

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In relation to European law, the rules arising from international agreements signed by the European Union are part of the European law system, with binding character.

Regarding the rule of European law and the national law, we retain the direct applicability of the Community rules imposed in the absence of legal provisions by the European Court of Justice, despite initial resistance exhibited by some Member States.

Direct applicability is, in the acceptance of the Court, the guarantee of the existence of the natural law rule. European Union constitutes a new legal order and its subjects are not only Member States but also their nationals who enjoy rights and obligations.

2.1. The direct effect of European law in relation to national legal provisions

The direct effect of Community law in relation to national law is no longer a novelty long ago, but is useful as a reminder to European legal construction analysis. Court of Justice of the European Community imposed the direct applicability of the Community rule since 1963 by adopting the Van Gend & Loos.

In argument, the Court of Appeal to the overall purpose of the European Economic Community Treaty, namely, the establishment of a common market whose operation involves the presence of nationals of the Member States and to the provisions of art. 177 which guarantees the unity of interpretation of the Treaty by national courts.

2.2. Since the rule of priority in European law

The next step in the construction of the Community legal system was that of the implementation of the priority rules principle of Community law.

Again, the Court of Justice of the European Community had a creative and decisive role. In the absence of express statutory provisions , the Court elevated to the priority principle the Community law by the order dated 1964 judgment in Case Flaminio Costa v. ENEL of 15 July 1964.

Returning to the same arguments that we put forward when given directly applicable Community provision - the objective of the integration can not be achieved unless Community law is respected and interpreted uniformly in all the Member States - the Court took a step forward from the theoretical and practical point of view, replacing the notion of legal order of international law previously used with its own legal notion. Therefore the Community legal order is autonomous in relation to the international legal order.

It was decided that, resulting from the nature of the Community, the priority of the Community law over the national law is a sine qua non condition of integration. Therefore, „Community rules take precedence over all national rules, regardless of rank or national text in question (constitution, law, decree, judgment) or the EU text (treaty, regulation, directive, decision)”[2].

With the solution given in Case IN.GO.CE appears one new notion more advanced in conceptual terms and Community right supremacy. The primacy must be understood an in the case of susceptible simultaneous application of Community and national standard or in case of conflict between national norm and rule of Community law the latter shall prevail outside any rank or time criteria .

The most important of the effects of Community law primacy, respectively European law over national law, is tacit repeal of the national rules contrary to rules of Community law, including by depriving national rule of applicability.

The same Court of Justice of the European Community once held the rank of statutory applicable principle by Member States the supremacy of Community law by, by another order given in case IN.GO.GE in 1998, pointed out the effect of supremacy.

Based on the direct applicability of Community law already confirmed previously, application which requires that Community law must produce uniformly all the effects in all Member States, from their entry into force and for the whole period of validity of their rules: decides the following: national court must apply within its jurisdiction, the provisions of Community law are required to give full effect to those provisions, removing, if necessary, its own motion to apply any conflicting provision of national legislation, even further without having to request or await its prior removal by legislative or other constitutional means.

In our opinion, with that judgment, the priority has become an outdated notion of European legal realities, being replaced by the notion of supremacy of Community law.

Supremacy requires the Community rules to repeal legislative acts contrary to itself, while the priority assumed that the act applies before the national community that, without being repealed, remains in force and is applicable to possible future situations.

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[2] See Camelia Toader, *Rolul judecatorului in integrarea europeana*, Studii de drept românesc no. 1-2/2002

On the other hand, the primacy of Community law means that the Community legislation applicable to both previous papers and to the subsequent ones, as is apparent from the judgment in Simmenthal Case. Also looming primacy in relation to administrative acts of minor importance since it can be applied to any provision of national law contrary to Community law, irrespective of its legal status (high or low importance).

Likewise, Declaration regarding the rule annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, it reiterates the case law of the Court of Justice of the European Community, the priority treaties and laws adopted by the European Union in relation to the law of the Member States.

However, although it retains the precedence of Community law, the Conference decided to step forward and annex the "Opinion of the Council of 22nd of June 2007", as contained in document no. 11197 / 07 (JUR 260), the final act.

In the Permit of the Legal Service is mentioned that "the supremacy is a fundamental principle of Community law, this principle is, according to the Court, inherent to the specific nature of the European Community".

Basically, is the Declaration is used the notion of priority as in the opinion of the Legal Service of supremacy.

To this document, the Permit of the Legal Service – the official legislative act which gives rise to the principle of primacy of EU law over national law, though the rule had been established by the Court?

Is it the supremacy of European law last stage of redefining the relationship between the national legal system and the system of European law or to expect transformation of European law and the practice of the European Court of Justice in a hierarchical control procedure by which national courts pronounce on a matter of Community law, then asking the Court to validate the decision made at the national level?

3. Rule of law versus European Constitution

One of the most sensitive aspect of European law supremacy was related to the ratio of the norm of European law and national constitutional provisions as questions, in the opinion of the Governments national, the sovereignty itself.

The solution was found by the same Court of Justice creator of the judgment in Internationale Handelsgesellschaft mbH v. Einfuhr casa, note invoking fundamental harm to the Member States covered by the constitution can not affect the applicability of a Community Member State.

Considering that primacy is exercised according to European Court of Justice on all the rules of national law, we conclude that the Community law prevails in the national constitutions.

3.1. Exception of unconstitutionality versus preliminary orders procedure

As shown, the supremacy of European law means a situation where the European standard by its entry into force, is directly applicable in its relations with the national law of the member states, not only causing unenforceability of any provision of law to the contrary, but also available to prevent the adoption of new national legislation, to the extent that they are incompatible with Community rules.

The contrary solution equivalates the cancellation of effective commitments assumed unconditionally and irrevocably by Member States, challenging the very foundations of the European Union. In support of this idea we invoke Article 267 of the Functioning Treaty applied to European Union according to which any national court has the right to appeal to the Court whenever considers that a preliminary decision on a question of interpretation or validity of Community law is necessary to enable it to give judgment .

The preliminary ruling procedure had a double function: on one hand is a mechanism through which national courts and the European Court of Justice engage in a dialogue on the extent of the scope of Community law when it comes in conflict with the national standards, and on the other hand is the "primary mean of modeling the relationship between national legal systems and law system."[3].

The importance of this procedure is particularly unexpected with regard to treaties transformation into a European constitutional framework . Treaties are started by having a regulatory independence from their creators - national states - becoming a constitutional system, a fundamental charter of a supranational system of governance[4].

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[3] See Paul Craig, Grainne de Burca, *Dreptul Uniunii Europene,* Hamangiu Publishing House, Bucharest, 2009

[4] See Beatrice Andreşan Grigoriu, *Procedura hotărârilor preliminare,* Hamangiu Publishing House, Bucharest, 2010

A former judge at the European Court of Justice observed that the direct effect and supremacy of Community rights are the twin pillars of the Community legal system and the preliminary ruling procedure is "the keystone of the edifice" without which "the roof would collapse and the two pillars would remain nothing but a lifeless ruin that would remind us of the temple at Cape Sunion - gorgeous, but without much practical use."

Preliminary ruling mechanism is similar to that of raising the objection of unconstitutionality, noting that the provisions of the Treaty requires national courts to solve directly for the Community rule, the incompatibility between it and the national norm, regardless of its position in the hierarchy of national rules (organic laws, ordinary constitutional) .

Usual way to raise an exception of unconstitutionality, be it raised to the request of the parties or on its own, contrary to this principle[5].

In all cases the settlement of the dispute between the supremacy of Community norms and constitutional position of national courts to all this was resolved by preliminary rulings.

If the initial report of the national legal system and the system of Community law was bilateral and horizontal, the statutory rule of European law, the report became vertical and multilateral, European Court of Justice enrolling national courts, not equal and independent entities, as were considered initially, but as the authority to observe and apply EU law, meaning that recognize the supremacy of legal rules resulting from European acts.

In our opinion, national courts have not only the power but also the obligation to apply with priority European law, to apply the "principle of consistent interpretation" between European and national law. They also have the obligation to observe procedural autonomy required to apply their own procedural rules in resolving disputes, including those that are incidental Community rules.

Europenaă Court of Justice has no jurisdiction to rule on the compatibility of national law with Community rules, but to interpret the Treaty, the national court which must consider, under the Court's interpretation, if the national rule is not compatible with Community standards.

Some authors have found that the binding effect of a preliminary ruling in the case brought before the European Court of Justice "exercises indirect control over national law de facto".[6].

Court set up an universal "droit au juge" without white spots on all decisions of the national authorities in terms of Community law, representing a genuine general principle of Community law derived from the common traditions of the Member States[7].

Despite the vehement opposition of the Member States relating to the supremacy of the Constitution Eropean to the European Union, with tenacity , pursued and, why not managed with the support of the European Court of Justice, constitutionalising national law of Member States, both original treaties and jurisprudence, as well as presenting the "Treaty establishing a Constitution for Europe".

Although the project did not enjoy the expected success, in the sense that it was ratified by Member States under its constitutional procedure, the European Union has not abandoned the idea of a European Constitution, Lisbon Treaty taking mostly of the Constitution text.

Under the provisions of article 11 par. 4 of the Treaty shall be introduced the notion of citizen legislative initiative , following the European Parliament and the Council to adopt regulations for the procedures and conditions required for a citizens' initiative.

The Charter of Fundamental Rights has become legally equal with the Treaties.

All the steps described above are, in fact, a very important step in the evolution of the European Union, perhaps the most important in the creation of the European people, some authors considering that "Community law is dead , long live EU law"[8].

Charter of Fundamental Rights of the European Union, the Community judicature, legislative and institutional developments show that there is a European company which, according to Habermas, Europe needs a constitution that protects the integrity of the division of powers between the national governing bodies and Member States.

Doctrine sees European Constitution on two solutions: either the European constitution is not considered a true constitution (in the traditional sense of the term), or to redefine constitutional matter. In

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[5] See Beatrice Andreşan Grigoriu, op. cit.

[6] *Ibidem*

[7] See Francisco Fernandez Segado, *Controlul de „Comunitaritate" al ordinii juridice interne efectuat de catre judecatorul national si consecintele sale asupra sistemului constitutional,* available at www.umk.ro

[8] See Beatrice Andreşan Grigoriu, *Procedura hotărârilor preliminare,* Hamangiu Publishing House, Bucharest, 2010

this literature has noted "the need for adaptation and development of the classical theory of constitutional law" should be reconsidered working concepts of constitutional law[9].

It may be that there is another way to look at national sovereignty, based on the idea of joint exercise of the attributes of state sovereignty and the exercise of such attributes to the EU institutions as a result of their delegation by nation states, this mode being valid as long as the original states, in their sovereign will, decide to make part of the "system" of the European Union.

4. Conclusions

The direct effect and supremacy of European law over national law would be possible only by virtue of European Court of Justice, but by "real cooperation and national courts of Member States, which should materialize mechanisms and procedures to individual subjects as to invoke Community law directly before the national court , even compared with national law".[10]

The primacy of EU law over national law is apparent from the national Constitution itself of each Member State of the European Union who voluntarily decided to transfer some of the specific tasks involved including the concept of sovereignty to the European Union and voluntarily restricting certain tasks related to sovereignty in its benefit.

Such supremacy results from the national law and not of the European Court of Justice that grants to priority general, public character while the national Constitution is the one governing it.

Priority of application of Community law applies only to the extent permitted by national Constitution[11].

Bibliography

1. Beatrice Andreşan Grigoriu, *Procedura hotărârilor preliminare,* Hamangiu Publishing House, Bucharest, 2010
2. Paul Craig, Grainne de Burca, *Dreptul Uniunii Europene*, Hamangiu Publishing House, Bucharest, 2009
3. Ioana Eleonora Rusu, Gilbert Gorning, *Dreptul Uniunii Europene,* C.H. Beck Publishing House, Bucharest, 2007
4. Francisco Fernandez Segado, *Controlul de „Comunitaritate" al ordinii juridice interne efectuat de catre judecatorul national si consecintele sale asupra sistemului constitutional,* available at www.umk.ro
5. Simina Tănăsescu, *Despre posibila constituţionalizare a dreptului comunitar,* available at www.ccr.ro
6. Simina Tănăsescu, Ioan Muraru, *Constituţia României - Comentariu pe articole,* C.H.Beck Publishing House, Bucharest, 2008
7. Camelia Toader, *Rolul judecatorului in integrarea europeana*, Studii de drept romanesc no. 1-2/2002
8. G. Vrabie, *Les implications du traité établissant une constitution pour l'Europe dans la hiérarchie des sources du droit*, Buletin ştiinţific no. 16, Cugetarea, Iasi, 2007.
9. Krzysztof Wojtyczek, *Les fonctions de la constitution ecrite dans le contexte de la mondialisation*, available at www.umk.ro
10. *Tratatele fundamentale ale Uniunii Europene,* C.H.Beck Publishing House, Bucharest, 2010
11. Community/European law magazine
12. „Curierul Judiciar" Journal
13. Court of Joustice of European Union case law available at http://curia.europa.eu

[9] See G. Vrabie, *Les implications du traité établissant une constitution pour l'Europe dans la hiérarchie des sources du droit*, Buletin stiintific no. 16, Cugetarea, Iasi, 2007

[10] See Simina Tănăsescu, *Despre posibila constituţionalizare a dreptului comunitar*, available at www.ccr.ro

[11] See Simina Tănăsescu, Ioan Muraru, *Constitutia României - Comentariu pe articole,* C.H.Beck Publishing House, Bucharest, 2008