THE RELATIONSHIP BETWEEN THE EUROPEAN LAW AND THE ROMANIAN CONSTITUTIONAL LAW

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ABSTRACT: *La Constitution de la Roumanie a été révisée particulièrement dans le désir de faciliter l'intégration du pays dans l'Union européenne. Toutefois, nous croyons que la modalité par laquelle on a cherché à clarifier les rapports entre le droit de l'Union européenne et le droit national n'est pas entièrement satisfaisant. Ainsi, on peut se demander si les réglementations de l'Union européenne ont seulement une force juridique supérieure à la loi ou si elles ont aussi une force juridique supérieure à la Constitution. La réponse à ces questions peut présenter de l'intérêt également parce que des hésitations se sont manifestées sur ce sujet dans le contentieux constitutionnel d'autres États membres de l'Union européenne. En liaison avec ce problème on peut se demander aussi les règlements, les directives et les décisions qui font partie des sources du droit de l'Union européenne peuvent ou non être soumis à un contrôle de constitutionnalité. Les observations sur ces problèmes sont d'une incontestable actualité étant donné l'intention avouée de procéder à une nouvelle révision de la Constitution.*

KEYWORDS: *European Law, Romanian Constitutional Law, priority, control of constitutionality*

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The Romanian Constitution had to be revised in order to facilitate in particular the integration of Romania in the European Union[1]. It was therefore provided that the ratification of the Treaty of accession of Romania was to be done according to the legislation applicable[2], the organization of a referendum not being necessary to this end; it was also recognized that, having regard the accession of Romania to the European Union, the citizens of the Union fulfilling the requirements of the organic law, are entitled to elect or be elected within the local public authorities[3]; it was established that, having regard the accession of Romania to the European Union, the Romanian citizens are entitled to elect and to be elected within the

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[1] The Constitution of Romania was adopted by referendum in 1991 and was revised by Law no. 429/2003, which was also approved by referendum. On revising the Constitution, the articles were renumbered.
[2] Article 148 (1)
[3] Article 16 (4)

European Parliament[4]; having regard the accession of Romania to the European Union, all foreign citizens are permitted to acquire property rights upon land[5]; it was provided that the High Council of the Judiciary is the guarantor of independence in justice in order to assure the separation of the judicial power from the other powers[6]; it was established that the policies concerning the regional development shall be implemented in line with the objectives of the European Union[7]; it was provided that the national currency may be replaced by the common currency of the European Union[8].

Considering the amendments of the Constitution, the objectives of which were to find solutions for several fundamental matters, we believe that the amendments concerning the clarification of the relationships between the European Law and the Romanian Constitutional Law are not entirely satisfactory and clarifying.

The Constitution of Romania provides express rules concerning the legal relationship between the international treaties and the internal rules for two types of treaties: international treaties on human rights, on the one hand, and European law treaties, on the other hand.

As far as the international treaties on human rights are concerned, it is established within the meaning of Article 20 of the Constitution that the constitutional provisions on the rights and freedoms of the citizens shall be construed and implemented in accordance with the pacts and other treaties to which Romania is part.

If discrepancies exist between the pacts and treaties to which Romania belongs concerning the fundamental human rights, and the internal laws, then the international regulations are given priority, unless the Constitution and internal laws consist of more favorable provisions.

The text of the Constitution establishes, as far as human rights are concerned, the primacy of more favorable regulations of the international treaties to which Romania belongs, both over the applicable laws and over the Constitution.

The dispositions of the Article 20 of Constitution were applied especially in connection with the provisions of the European Convention for the Protection of Human Rights without ignoring or minimizing the consequences of other treaties to which Romania is part.

The National Judge shall therefore take into consideration both the national regulation and the conventional one comprised in the European Convention for the Protection of Human Rights which is relevant for that litigation, including the decision taken by the European Court of Human Rights; in case the conventional regulation seems to be more favorable, he shall refuse the application of the national regulation.

It is worth mentioning that the Constitutional Court itself adopted in its practice[9] the relationship between the regulations of the international treaties on human rights and the regulations within the Constitution.

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[4] Article 38
[5] Article 44 (2)
[6] Article 133 (1)
[7] Article 135 (2) (g)
[8] Article 137 (2)
[9] Constitutional Court Decision No. 148/2003, published in the "Official Journal of Romania", Part I, no. 317 of 12 May 2003; Constitutional Court Decision No. 1702/2009, published in the "Official Journal of Romania", Part I, no.53 of 22 January 2010; Constitutional Court Decision No. 1701/2009, published in the "Official Journal of Romania", Part I, no. 52 of 22 January 2010.

With regard to the European law treaties, within the meaning of Article 148 (2) and (3) of the Constitution, as a result of the accession, the provisions of the treaties establishing the European Union, as well as all the other mandatory European regulations have primacy over the contrary provisions of the internal applicable laws, provided that provisions of the Act of Accession are fulfilled.

Such provisions are also duly implemented for the accession to the revision acts of the treaties establishing the European Union.

Given the circumstances, one can ask: are European Union regulations legally more powerful than ordinary laws or are they also legally more powerful than the Constitution? This problem is also important because it appeared in other Member States of the European Union.

The provisions of Article 148 (2) and (3) of the Constitution seem to be sufficient to solve the problem concerning the relationship between the European Union Law and the Romanian Constitutional Law, in particular given the fact that Article 148 (1) establishes that the accession of Romania to the treaties establishing the European Union was done, so that "some of the duties could easily be transferred to the European institutions, and with a view to commonly exercising in cooperation with the other Member States the competences laid down in these treaties".

However, we believe that things get complicated, as the Constitution, without making a difference among various treaties and other international agreements, envisaged a control of constitutionality. Consequently, Article 11 of the Constitution mentions that all legally ratified treaties "are part of the internal law"; furthermore, the article adds that, if such a treaty consists of provisions contrary to the Constitution, "its ratification can only be performed after the revision of the Constitution". In accordance with Article 146 (b) of the Constitution, one of the duties of the Constitutional Court is to decide upon the constitutionality of the treaties or other international agreements, at the request of one of the presidents of the two Chambers of the Parliament, of a number of at least 50 deputies or at least 25 senators. In case of lack of constitutionality, Article 147 (3) of the Constitution provides that the treaty or international agreement cannot be ratified. Eventually Article 148 of the Constitution provides for no exception to the constitutionality control concerning the legislation on the accession of Romania to the treaties establishing the European Union, as well as the other mandatory European provisions. Within the meaning of the constitutional provisions of Article 146 (b) and Article 147 (3), there is at present and without distinction among various treaties and other international agreements, both an *a priori* and an *a posteriori* control, according to which a certain treaty or agreement can become inefficient if it breaks the provisions of fundamental law, or according to which their implementation depends on the prior revision of the Constitution.

Based on Decision No. 148/2003, the Constitutional Court was informed that all Member States of the European Union understood the necessity to place the "*acquis commnunautaire*" - the treaties establishing the European Union and the regulations derived thereof - on an intermediary position, between the Constitution and the other laws, when it is about mandatory European regulatory actions.

Even if this approach is questionable due to the references of the Constitutional Court for all the Member States, we believe that the rule laid down in Article 1 (5) of the Constitution, providing for the primacy of the Constitution shall apply, as the Constitution of Romania provides for no express derogatory rule in case of the European Union law treaties, similar to those existing for the treaties on human rights.

According to Article 11 of the Constitution, the revision of the Constitution prior to the ratification of a treaty within the European Union law which consists of provisions contrary to the Constitution may obviously be one of the best way to go, if the lack of constitutionality wouldn't be often visible *ex post* and if the control of constitutionality would also be clarified for all the other mandatory European Union provisions.

Under the circumstances, there is no doubt that it is not easy to indicate a solution that clarifies the relationship between the European Union law and the national law. The elaboration of a solution on this matter is expected to take into consideration the established case-law of the European Court of Justice, the solutions adopted by other Member States and the expected future development of the European Union.

As it is already known, in its Decision of 15 July 1964, Costa c. Enel (af. 6/64), the European Court of Justice distinguished the establishment, based on Community treaties, of an individual Union legal order, separate from the legal order of the Member States, and tried to prove that the primacy of Community legislation over the legislation of the Member States depends on the specific nature of the Communities[10].

In its Decision of 9 March 1978, Simmenthal (af. 106/77), the European Court of Justice established that the Community law shall be integrated in the framework of the "legal order applicable within the territory of each Member State", "having overriding priority[11]". This Court Decision holds true the fundamental idea that the Community law does not turn into national law and the Community legal order and the national legal order cannot be perceived as two distinct legal orders, which coexist under equal conditions, each of them within its scope.

The European Court of Justice asserted the priority of the European Union law both in the case of a conflict between the provisions of the Community treaties and a law (see the case Costa c. Enel), and in the case of a conflict between the provisions of a regulation and the constitutional provisions[12]. On the other hand, the legal provisions of a Member State could not prevent the application of the "unconditional and sufficiently precise" provisions of a directive[13] or the application of the decisions addressed to Member States[14].

According to the European Court of Justice, the priority of the European Union law is guaranteed both in relation to the previous national rules and in relation to the subsequent national rules[15].

In each Member State, the primacy of the European Union law was recognized according to the provisions of their Constitution, having regard to the particularities of the European Union legal order, or based on both criteria mentioned afore.

Let's take for example Greece, where the priority of the European Union law was accepted within the meaning of Article 28 of the Constitution, even if we are talking about constitutional provisions.

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[10] European Court reports 1964, English edition, p. 585.
[11] European Court reports 1978, p. 629.
[12] European Court reports 1971, Politi, case 43/71, Judgment of the Court of 14 December 1971, p. 1039.
[13] European Court reports 1979, Salumificio di Cornuda Spa, case 130/78, Judgment of the Court of 8 March 1979, p. 867.
[14] European Court reports 1981, Rewe, case 158/80, Judgment of the Court of 7 July 1981, p. 1805.
[15] European Court reports 1978, Simmenthal, case 106/77, Judgment of the Court of 9 March 1978, p. 629.

In Germany, on the other hand, the Constitution shall not be adapted along with each stage of the European construction and the Constitutional Court decided not to control the conformity of European Union rules with the provisions of the fundamental legislation, as long as it considers that fundamental rights are efficiently protected within the European Union [16]. The priority of European Union law is recognized according to the specific nature of the European Union legal order.

In Belgium, the priority of the European Union law is accepted based on several reasons associated with the particularities of the international legislation, including the European Union legislation; however, the Court of Arbitration supervises the constitutionality of European Union treaties[17].

In France, the priority of the European Union law is generally accepted based on the provisions of the Constitution, some of the courts also considering the particularities of the European Union legal order. France adapts its Constitution along with the revision of European Union treaties, aiming at the correlation of the fundamental legislation rules with the European Union legislation; the constitutionality control is not excluded[18].

In several Member States, it is obvious that the constitutional law "has made a stand against" the European integration process; the constitutionality control was preserved and takes different forms in each country.

However, this tendency does not comply with the case-law of the European Court of Justice, according to which the priority of the European Union law has to be guaranteed completely and unconditionally.

Consequently, even if the constitutionality control is limited to the fundamental rights guaranteed by the Constitution and to the fundamental principles of the constitutional order or even if it is suspended under special circumstances (see Germany for example), a conflict between the European Union law and the constitutional law is likely to occur.

On this overall background, the Romanian law followed two directions: the primacy of the European Union law over the regulations of the Constitution, on the one hand, and the primacy of the Constitution provisions over the European Union law, on the other hand.

Several reasons for the primacy of the European Union law over the internal law were sustained: the accession of Romania to the European Union means both the transfer of some of the sovereignty's competences to the Union, and the preferential application of the European Union law; Article 148 (2) of the Constitution of Romania providing for the primacy of the European Union law over the internal laws has in view the entire internal legislation, including thus the Constitution; Article 1 (5) of the Constitution of Romania governing its primacy shall be construed as follows - the primacy of the Constitution means its primacy over the internal legislation, having in view the preferential application of the European Union law[19].

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[16] See further, Adrian Hollaender, *Le problème de la primauté du droit communautaire en matière de droits fondamentaux*, *Studia Universitatis Babeş-Bolyai*, no. 2/2005, p. 81.
[17] See Rostane Mehdi, *Ordre juridique communautaire*, *Juris Classeur Europe*, fasc. 196, p.23.
[18] See Guy Isaac, Marc Blanquet, *Droit communautaire général*, 8th edition, Paris, p. 208-212.
[19] See Ion Gâlea, Mihaela Augustina Dumitraşcu, Cristina Morariu, *Tratatul instituind o Constituţie pentru Europa* (The Treaty establishing a Constitution for Europe), ALL Beck, Bucureşti, 2005, p. 23.

Considering another point of view, the treaties under the European Union law are subject to an *a priori* and an *a posteriori* control of constitutionality, according to the provisions of Article 1 (5) of the Constitution of Romania providing for its primacy, and according to the provisions of Article 148 of the Constitution providing for the primacy of the European Union law treaties over the contrary provisions of the internal law, without establishing an express derogatory rule which governs the relationship between the European Union law treaties and the Constitution. It is therefore understood that the provisions of the Constitution have primacy over the provisions of the European Union law[20].

Taking into consideration all the above issues, a revision of the Constitution to find a solution for the problem seems to be the best solution at present. The law based on which Romania ratified the Treaty of accession cannot be considered to have introduced derogations from the constitutional rules, as the revision of a Constitution can only be accomplished in the framework of a complex procedure involving the organization of a referendum during its final stage.

The revision of the Constitution could only provide for an *a priori* control of constitutionality of the European Union law treaties and a simplified amendment procedure of the Constitution, in case the European Union law treaties would consist of provisions which are contrary to it.

Pending the revision of the Constitution, the Constitutional Court could decide that the control of constitutionality does not cover the European Union law treaties. Such a solution could be based on the provisions of Article 148 of the Constitution. To this end, attention shall be paid to the fact that the European Court of Justice, appealing to the principles of common law for all Member States, granted protection for the fundamental rights at European Union level, finding inspiration in the European Convention for the Protection of Human Rights.

At the moment, Article 6 of the Treaty on European Union establishes that the Union recognizes the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union, which shall have the same legal value as the Treaties.

The priority of the legal provisions of the European Union in comparison with the disposition of the Constitution only regarding the fundamental rights and freedoms and excluding the other provisions of the acquis communautaire is disputable due to the fact that some of these rights and freedoms can't be entirely values without taking into consideration the assembly of the European Union law.[21]

Likewise, one can notice that according to the Declaration concerning primacy annexed to the final act of the Intergovernmental Conference which adopted the Treaty of Lisbon, the Treaties and the law adopted by the Union on the basis of the Treaties have primacy over the law Member States, under the conditions laid down by the case law of the Court of Justice of the European Union. As we already remarked, the Court of Justice asserted the priority between the European Union law and the constitutional provisions.

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[20] Corneliu Liviu Popescu, *Controlul constituționalității tratatelor internaționale* (The control of constitutionality of international treaties), *Dreptul* no. 11/2005, p. 15-16.

[21] Regarding the relations between the European Convention for the Protection of Human Rights and the Charter of Fundamental Rights of the European Union, see Marcela Comșa, *Scurte considerații referitoare la raporturile viitoare între Curtea Europeană a Drepturilor Omului și Curtea Europeană de Justiție* (Some Remarks upon the Future Relations between the European Court of Human Rights and the European Court of Justice), *Dreptul* no.11/2009, p. 190-198.

However, such a solution of the Constitutional Court would ignore the rule based on which the exceptions when it comes to constitutional matters may only be on purpose and strictly construed.

Pending the revision of the Constitution, it is therefore likely for the Constitutional Court to retain from declaring contrary to the Constitution any of the texts of the European Union treaties, upon which it was duly informed.

And still, given the fact that European Union regulations and decisions are not part of the category of "internal laws", we believe that they cannot be subject to a control of constitutionality. The regulations and decisions are adopted by the European institutions and are directly applicable. The national legislator does not have to intervene in the application of this regulation and no measures contrary to the provisions of this regulation may be adopted[22].

As far as directives are concerned, a formal control of constitutionality may be accepted, limited to the conditions under which that directive is legally transposed into the internal legislation; as well as a control of constitutionality regarding the legal provisions according to which that directive is transposed into the internal legislation, if these exceed the strict framework of that directive. We consider that this solution is in line with the provisions of Articles 148 and 146 of the Constitution of Romania.

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These observations regarding such a complex and acute problem could be incontestably considered present if we think about the confessed intention of proceeding to a new revision of the Romanian Constitution.

[22] To this end, it is very suggesting that the Government, by means of an Emergency Ordinance, repealed the provisions of a number of laws on the recognition and execution of the decisions of the courts from the Member States of the European Union, stating that Article 149 of the Treaty establishing the European Community says that a regulation shall be directly applicable in all member States, whereas no transposition rule of the regulation into the internal law is necessary (Government Emergency Ordinance no. 119/2006, published in the Official Journal of Romania no. 1036 of 28 December 2006).