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THE RELATIONSHIP BETWEEN EU LAW AND NATIONAL CONSTITUTIONAL LAW IN THE FIELD OF FUNDAMENTAL RIGHTS

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Abstract: *The Constitutional Court of Romania carries out the control of the constitutionality of the laws and ordinances of the government and pronounces decisions that have a binding effect erga omnes. Within the constitutionality control, a special position is occupied by the EU law. In our paper we will focus on the interferences that may arise between the national norm, the EU law and the national Constitution, from the perspective of the jurisprudence of the Constitutional Court and the principle of priority of the EU law.*

Key words: *Constitution, fundamental rights, EU law, primacy*

1. Introduction

According to Article 148 of the Romanian Constitution, the provisions of the constitutive treaties of the European Union, as well as the other mandatory EU law regulations, have priority over the contrary provisions of domestic law, in compliance with the provisions of the Act of Accession.

According to the same constitutional text, Romania's accession to the EU's constitutional treaties is "done by law", "for the purpose of transferring responsibilities" to the institutions of the Union and of exercising jointly with the other Member States the powers provided by these treaties.

In applying of the Article 148 of the Romanian Constitution, the Constitutional Court emphasized that it is competent to make a constitutional review in which the reference norm is the Constitution.

This means that the fundamental law is the norm in relation to which the Constitutional Court establishes the constitutionality of an infra-constitutional norm.

In the control of constitutionality, the obligatory acts of the European Union are norms interposed to the norm of national law subject to the control of constitutionality and to the Constitution.

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In order to be relevant in the review of constitutionality, the EU law must meet two cumulative conditions: on the one hand, it must be sufficiently clear, precise and unequivocal, or its meaning must have been established by the Court of Justice of the European Union and, on the other hand, it must aim at rights and freedoms protected by national fundamental law.

However, the constitutional court does not have the power to establish the conformity of a provision of national law with the EU law. This jurisdiction belongs to the national court. If the Constitutional Court has doubts about the interpretation of a rule of EU law with constitutional relevance, it may refer a question to the CJEU for a preliminary ruling.

2. The Role of EU Law in Reviewing the Constitutionality of the National Laws

We can identify situations in which the Constitutional Court found unconstitutional legal provisions that were not agreed with EU law. For example, in decision no. 64 of February 24, 2015, the Constitutional Court found the unconstitutionality of some insolvency proceedings norms as the legislator did not guarantee at least the same level of social protection of labor as provided in the mandatory acts of the European Union on the right to "inform and consult workers" subject to collective redundancy proceedings in case of insolvency proceedings of the employer.

In the decision no. 633 of October 12, 2018, the Constitutional Court found that there are unconstitutional provisions that the legislator intended to introduce in the Code of Criminal Procedure, regarding the right of the defendant to be informed of the date and time of criminal proceedings and his possibility to participate in any act of criminal investigation.

The Constitutional Court found that the legislator ignored the provisions of Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 laying down minimum rules on the rights, support and protection of victims of crime and replacing Framework Decision 2001/220/Council JHA, which establishes an obligation for Member States to regulate criminal proceedings so as to "avoid contact between the victim and his or her family members, on the one hand, and the offender, on the other".

The Constitutional Court also checked the constitutionality of Article 277 paragraphs (2) and (4) of the Civil Code, which provides: “Same-sex marriages concluded or contracted abroad by either Romanian or by foreign citizens are not recognized in Romania ” and that “The legal provisions regarding the free movement on the Romanian territory of the citizens of the Member States of the European Union and of the European Economic Area remain applicable. ”

The Constitutional Court had doubts as to the interpretation to be given to several concepts laid down in the provisions of Directive 2004/38 of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their families to move and reside freely within the Member States, in conjunction with the Charter of Fundamental Rights and the recent case law of the Court, as well as the European Court of Human Rights.

The Court of Justice of the European Union, in Case C-673/16, Coman and others, held that in a situation where a citizen of the Union exercised his freedom of movement by moving and actually residing, in accordance with the conditions laid down in Article 7 (1) of Directive 2004/38, in a Member State other than that of which he is a national and has on that occasion established or consolidated a family life with a third-country national of the same sex, which is bound by a legal marriage concluded in the host Member State, Article 21 (1) TFEU must be interpreted as precluding the competent authorities of the Member State of which the Union citizen is a national from refusing to grant a right of residence on the territory of that Member State to that national, on the ground that the law of that Member State does not provide for same-sex marriage.

The CJEU has also held that Article 21 (1) TFEU must be interpreted as meaning that, in circumstances such as those at issue in the main proceedings, a third-country national of the same sex as a citizen of the Union, whose marriage to the latter was concluded in a Member State in accordance with the law of that State, has a right of residence for more than three months in the territory of the Member State of which the Union citizen is a national. That derived right of residence may not be subject to more stringent conditions than those laid down in Article 7 of Directive 2004/38.

Consequence of the CJEU decision, in its decision no. 534 of July 18, 2018, the Constitutional Court of Romania, in majority opinion, admitted the exception of unconstitutionality and found that the provisions of article 277 para. (2) and (4) of the Civil Code are constitutional insofar as they allow the granting of the right of residence on the territory of the Romanian state, under the conditions stipulated by the EU law, to spouses - citizens of Member States of the European Union and/or citizens of third countries - from same-sex marriages concluded or contracted in a Member State of the European Union.

3. The Compatibility with EU Law, in Particular with the Principle of The Independence of Judges, of the Decisions of the Constitutional Court Allowing the Reopening of Cases Completed by the National Courts

As they are of general applicability, the decisions of the Constitutional Court, from the point of view of their effects, can be equated with the measures of the legislator or of other actors that have normative powers.

Recently, the CJEU was notified by the Romanian courts for pronouncing preliminary decisions regarding the compatibility with the EU law of several decisions of the Constitutional Court that found unconstitutionality of the regulations on the composition of panels or on the administration of evidence. These decisions have allowed the reopening of cases resolved, including cases on corruption or on the protection of the EU's financial interests.

For example, in related cases C-357/19 and C-547/19, Eurobox and others, and in case C-379/19, DNA, pending before the Court of Justice of the European Union, the national courts ask whether the decisions of the Constitutional Court that removed the application of procedural rules such as those we talked about, infringe the principle of

independence of judges and the principle of security, as they generated the intervention of the Constitutional Court in their decision-making and challenged cases already resolved. The procedure before the CJEU is still ongoing in these cases.

The related cases C-357/19 and C-547/19 focus specifically on the effects of Decision no. 685/2018 of the Constitutional Court by which it was ruled, in essence, that certain panels of the national Supreme Court, the High Court of Cassation and Justice, were improperly composed.

Decision no. 685/2018 allowed certain interested parties to extraordinary remedies, which in turn raised potential problems not only concerning the protection of the Union's financial interests under Article 325 (1) TFEU, but also in the interpretation of the concept of "court constituted by law", which appears in the second paragraph of Article 47 of the Charter of Fundamental Rights of the European Union.

The High Court of Cassation and Justice has decided to refer the following question to the European Court of Justice: "Article 2 [TEU], Article 19 (1) of the Treaty and Article 47 of the [Charter] oppose the intervention of a constitutional court (a body that is not, according to domestic law, a judiciary court) regarding the way in which the supreme court interpreted and applied the unconstitutional legislation in the activity of constituting the panels?"

According to the referring court, the principle of the independence of judges and the principle of security preclude the establishment of binding effects of decision no. 685/2018 of the Constitutional Court on the final decisions at the date of adoption of this decision in the absence of serious reasons to question the right to a fair trial in those cases.

We consider that issues related to the legal establishment of a court belong to national law, as the CJEU is not competent to examine them. We also consider that the effects of the decisions of the constitutional courts are and remain those defined by the national legal orders, including the protection of principles such as *res judicata* and legal certainty.

Within the specific framework of European Union law, the CJEU has never required the removal, in general terms, the judicial authority from final judgments. At the same time, the CJEU did not oppose the extraordinary remedies provided by Romanian law for the reopening of proceedings settled by final judgments contrary to the EU law, respecting the balance and the particular procedural choice reached by the national legislator (see CJEU Decision of 11 September 2019 in the case Călin, C-676/17, paragraph 57). *A fortiori*, the situation must be the same as regards the effects and impact of a decision of the national Constitutional Court.

In accordance with the Opinion of the Advocate General in cases C-357/19 and C-547/19, we consider that the second paragraph of Article 47 of the Charter does not preclude a constitutional court, in a situation which generally falls within the scope of Union law but is not fully governed by it, to declare, in application of an effective and reasonable national standard for the protection of constitutional rights and on the basis of its interpretation of the applicable national provisions, that the panels of the national supreme court have not been established by law.

Furthermore, the EU principle of the independence of judges, enshrined in the second subparagraph of Article 47 of the Charter and in the second subparagraph of Article 19 (1) of the TEU, does not preclude the adoption of a decision by a Constitutional Court which, in the exercise of its constitutional powers, rules on the legality of the composition of court panels of the national supreme court, even if it has the consequence of creating the necessary conditions for admitting extraordinary remedies against final judgments.

In case C-379/19, DNA, the national court has doubts about the compatibility with EU law of some decisions of the Romanian Constitutional Court, no. 51/2016, no. 302/2017 and no. 26/2019, by which the court declared unconstitutional the participation of the national intelligence services in the execution of some technical supervision measures within the criminal investigation, with the consequence of excluding these evidences from the criminal cases.

The national court has doubts regarding the observance of the principle of separation of powers in the state and the independence of the judiciary as the Constitutional Court has established specific and imperative rules for the application of the law by the courts, which is the exclusive competence of the judiciary, and establishes new legal rules, which fall within the exclusive competence of the legislative authority.

The courts also argued that the decision of the Constitutional Court at issue in the main proceedings led to the exclusion of all evidence obtained with the technical support of the Romanian Intelligence Service, negatively and significantly affecting the fight against high-level corruption and that this decision constituted a breach of obligations pursuant to Decision 2006/928/EC of 13 December 2006 establishing a mechanism for cooperation and verification of progress in Romania to address specific benchmarks in the areas of judicial reform and the fight against corruption (“the MCV Decision”).

We agree with the Advocate General that Union law, including the MCV mechanism, does not regulate the way in which technical supervision measures are implemented in criminal proceedings, nor the role and powers of national intelligence services.

The Constitutional Court has jurisdiction to declare that certain actors or bodies cannot implement technical supervision measures, and the fact that such a constitutional decision will have procedural repercussions on ongoing and future criminal proceedings in matters of corruption is a natural consequence. As regards the "independence of judges", this does not imply a judicial system that is not subject to any control.

The courts have the privilege of independence in order to be impartial, but within the limits of the law and within constitutional controls. In conclusion, we consider that the principle of European Union law on the independence of judges, enshrined in the second subparagraph of Article 47 of the Charter and in the second subparagraph of Article 19 (1) TEU, does not preclude decisions of a national constitutional court declaring unconstitutional implementation by the national intelligence services of technical supervision measures in criminal proceedings and requiring the exclusion from criminal proceedings of any evidence thus obtained.

4. The Principle of the Supremacy of the EU Law and the Obligation of National Courts to Comply with the Rulings of the Constitutional Court

A dispute between the principle of the supremacy of EU law and the binding force of decisions of the constitutional courts seems to have been brought up recently in several Member States. The European Commission has expressed its concern at the ruling of the Polish Constitutional Court, which states that the interim measures ordered by the Court of Justice of the European Union in the field of the functioning of the judiciary are incompatible with the Polish Constitution. The European Commission also expressed concern about the decision of the Polish Constitutional Court, which considered some articles of the EU Treaties incompatible with the national Constitution. Tangentially, the issue was raised by the Advocate General in the related cases C-357/19 and C-547/19, in the context of the obligation of the decisions of the Romanian Constitutional Court and the possibility of disciplinary sanction of a judge for non-compliance with a decision of the constitutional court in conflict with EU law.

It should be recalled that there is constant case law of the CJEU on the supremacy of Union law and its implications for judicial institutions and national proceedings.

National courts, responsible for enforcing the provisions of European Union law, are required to ensure the full effect of those provisions, leaving, where necessary, unenforceable, any national provision contrary to the EU law, without requesting and without waiting for the national law to be repealed by the legislator or by any constitutional procedure. Provisions or practices which would prevent the national court from doing whatever is necessary to remove national legislation which would constitute an obstacle to the full effectiveness of directly applicable Union rules are incompatible with EU law.

The Advocate General in the related cases C-357/19 and C-547/19 considers that those considerations apply to all national rules, including the rules of constitutional nature. The question, however, is what are the procedural means by which national courts express "disagreement" with the decisions of the Constitutional Court that may be in conflict with EU law and within what "limits".

CJEU points out that where a national court considers that a judgment given by a higher court could lead it to give a judgment contrary to EU law, national rules under which lower courts are required to comply with a decision of a higher court may not invalidate the discretion on the reference to the Court of Justice for a preliminary ruling. A national court which has exercised the discretion conferred by Article 267 TFEU is obliged to follow the interpretation given by the CJEU and, where appropriate, must disregard the judgments of the higher court (Case C-173/09, Elchinov, paragraphs 27, 28 and 30, and Case C-416/10, Križan and others, paragraphs 68 and 69).

Advocate General in related cases C-357/19 and C-547/19, stressed that these conclusions should also apply if a lower court finds that a decision of a higher court is incompatible with EU law, but without notifying CJEU with a reference for a preliminary ruling, as the case-law has insisted on the possibility for lower courts to request a preliminary ruling, as a referral is not mandatory.

Without calling into question the Advocate General's conclusion, we consider that, from a practical point of view, it would be preferable for the national judges, faced with a binding decision of the Constitutional Court, raising doubts as to its compatibility with the EU law, to address a request to the CJEU for a preliminary ruling.

Problems can arise especially if the Constitutional Court, in its decision, has already presented an analysis of the applicable EU law and did consider that the internal rule is constitutional. Therefore, there may be a different national judicial practice regarding the compatibility with EU law of a decision of the Constitutional Court: there may be courts that consider that a reassessment of the considerations of the Constitutional Court in the light of EU law is impossible given that the Constitutional Court has already analyzed the applicable EU law and the decision of the Constitutional Court is binding; other courts may consider it necessary to overturn the decision of the Constitutional Court as it violates the EU law.

We believe that a court's disagreement with a decision of the Constitutional Court based on its possible incompatibility with EU law must be duly substantiated and, in particular, if an issue is addressed for the first time, could lead to a referral to the CJEU for a preliminary ruling.

It is important to note that the Advocate General, in his Opinion in the related cases C-357/19 and C-547/19, sought to place the case-law of the CJEU on the permissible limits of “judicial disobedience” into its proper context. He suggested, in essence, that the EU law opens up a space for rational legal discourse about the correct interpretation of EU law for any national court (no account being taken of formal judicial hierarchy).

On the one hand, that means that any national court or tribunal must be allowed to apply EU law and, if it considers it necessary, to make a make a request for a preliminary ruling to the Court of Justice under Article 267 TFEU.

On the other hand, however, provided that these minimum standards are met, by merely invoking EU law, a national judge does not completely break free from any constraints normally applicable to the exercise of the national judicial function, including national judicial hierarchy and discipline.

In his view, EU law provides a national judge a limited “license to disagree”, but no universal “license to disregard”. In view of the structure of the EU legal order, within which it is the Court of Justice that is the ultimate interpreter of EU law, the case-law of the Court has one purpose: to keep the access to this Court open to the lower courts of the Member States. In particular, superior courts in the Members States must not be allowed to prevent, by the use of their formal authority within the domestic system, the courts within their jurisdiction from making requests for a preliminary ruling to the Court.

We consider that the Romanian legal system does not prevent in any way the lower courts from asking questions to the CJEU, no appeal can follow the reversal of the decision of the lower court to refer a question to the CJEU for a preliminary ruling. The problem is even less in the case of the Constitutional Court, which has no mechanism to prevent this procedure before the courts or to intervene in any way in court proceedings.

5. Conclusions

The Romanian Constitution recognizes the priority of EU law. Within the constitutionality control performed by the Constitutional Court, the norms of EU law are norms interposed with the Constitution. The fundamental law is the only direct reference norm in the constitutionality control. The question may arise as to whether the fundamental law could lose its binding force as a result of an inconsistency between its provisions and those of the EU law.

Recently, some constitutional courts or the national judiciary courts of the Member States have raised the question of whether accession to the EU may affect the supremacy of the national constitutions or what should be the conduct of the national judge in the event of incompatibility with EU law of a binding decision of the constitutional court.

There is a wide range of EU case law on the priority of the EU law. However, it seems that the Member States and, in particular, the national judiciary courts express a strong desire for an argumentative enrichment of the European jurisprudence, specific to the national Constitution-EU law equation.

Given the fact that in Romania for example, the decisions of the Constitutional Court are generally binding and their non-compliance is a disciplinary violation for magistrates, we consider that if the judiciary courts have doubts about the compatibility of a decision of the Constitutional Court with the EU law would be preferable for the national judge to apply to the Court of Justice of the European Union for an interpretation of applicable EU law, especially if a matter is addressed for the first time.

On the other hand, it should not be omitted that the principle of the rule of law involves legal security, i.e. the possibility for the addressee of a norm to determine in a predictable manner his conduct taking into account the effects of the law. If some courts leave inapplicable *ex officio* national legal provisions or decisions of the Constitutional Court that they consider contrary to EU law, and other courts apply the same national regulations or binding decisions, considering them in accordance with EU law, a serious legal uncertainty may rise. In this context, a key role is played by the constitutional courts as partners in the dialogue with the European Court in the preliminary ruling procedure, as well as by invalidating national legislation incompatible with EU principles, they contribute to rendering European law more effective.

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