

THE RELATIONSHIP BETWEEN NATIONAL LAW, EUROPEAN LAW AND INTERNATIONAL LAW IN A MULTILEVEL GOVERNANCE SYSTEM

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I. Preliminary remarks regarding the political system in Romania

The difficulty of examining the way in which international law takes effect in national law through the European law derives from the fact that the analysis should be conducted on a triple level: the general effect of international law in domestic law, the special features that European Law enjoys in national law and the relation between international law and European law. Thus, this study would mainly focus, on the way how Romanian Constitution regulates the relation between international law and national law respectively European law and national law, considered as “classical relations” and in subsidiary on the relation between European law and international law in a multilevel state which is supposed to be in the near future the European Union. Having a unitary structure and being part to a supranational organization, Romanian state should find a way to tackle the new forms of governance or multilevel governance¹, which emerge lately and which lead to a diffusion of powers away from the nation state.

According to the Constitution of Romania², President and Parliament have equal legitimacy. This represents the first new institutional setting for the Romanian modern state since its establishment through the union of the two Romanian kingdoms, Wallachia and Moldavia, in 1859.³ The tribulations of the communist epoch should have made Romanians more cautious about a President who is too powerful in comparison to other State authorities, and the choice of the law-makers in terms of ‘institutional design’ is certainly the embodiment of this caveat. In order to prevent dictatorship, the drafters of the 1991 constitution established a strong Parliament with equal legitimacy alongside the President⁴. Romania is defined as a “national, sovereign, independent, unitary and indivisible state”⁵. The form of government is the republic; the president represents the Romanian state in domestic and foreign relations, ensures obedience to the constitution and the proper functioning of state institutions, and is the guarantor of the state’s independence, unity and integrity. Parliament, bicameral, even Romania is not a federal state, is “the supreme representative organ of the Romanian people and the sole lawmaking authority. Article 1

¹ For these concepts see T.Conzelman, R. Smith, Multi-level governance in the European Union: Taking Stock and Looking Ahead, *Nomos*, 2008, p. 13-16.

² The Constitution is in force since 8 December 1991. The Constitution of Romania of 1991 was amended and completed by the Law No. 429/2003 on the revision of the Constitution of Romania, published in the Official Journal no.758/29 October 2003. The Constitution was approved by referendum on 18 and 19 October 2003 and it was republished by Legislative Council according to article 152, in the Official Journal no.767/31 October 2003.

³ At that time, the same person succeeded in being elected Head of State (domnitor) by the General Estates of both kingdoms, which included people from all social strata, while the legislative assembly was exclusively made up of the representatives of the upper and middle classes. Subsequent to this first experiment, the heads of the Romanian state would be either monarchs or Presidents elected by Parliament. The forced resignation on 1 May 1864 of the domnitor made it possible for the Romanians to entrust their throne to a foreign prince who pushed for the adoption of a Constitutional Pact in 1866. However, the head of State continued to be called domn until 1881, when Romania was proclaimed a kingdom. It was only in 1884 that this state of affairs was enshrined in an amended Constitution. Law No. 363 of 30 Dec. 1947 abolished the monarchy in Romania and established the Republic, headed by a Presidium, playing the part of a collegiate head of State. After 1974, the head of State became a one-person institution, appointed by a unicameral Parliament (The Grand National Assembly).

⁴ The direct legitimacy of the Head of State, however, was perceived by the members of Parliament, who also formed the Constitutional Assembly, as an imminent threat to their own authority, even to their own legitimacy.

⁵ See also for a detailed description of these characteristics: I.Muraru, E.S. Tanasescu, *Drept constitutional si institutii politice*, editia 12, vol.2, Ed. All Beck, Bucuresti, 2008; C.L.Popescu, *Constitutionalizarea formala, prin revizuirea constitutionala, a normelor care consacra valorile revolutiei romane din decembrie 1989*, *Revista Dreptul* nr. 1/2005, p.12-24.

par. 4 of the Constitution revised provide *expressis verbis* the principle of separation and balance of powers - legislative, executive, and judicial - within the framework of constitutional democracy. A Constitutional Court is created in order to defend and guarantee the supremacy of the constitution in a state governed by the rule of law and to support the good functioning of the public authorities within the constitutional framework of separation, balance and check of powers. After revision, articles on “Integration into the European Union” and “NATO Accession” were introduced.

The main cause for the ambiguity of the Romanian system may very well lie in the ambivalent constitutional relationships that the President must develop with other State authorities, particularly with Parliament and the Government. In fact, after the adoption of the Constitution of 1991, it seems difficult to clearly qualify the political system in Romania: is it a semi-presidential, or even a semi-parliamentary one, as had been the design of its founding fathers, or is it a semi-presidential system with presidential tendencies, which seems to be the path it has followed recently?⁶ In the words of one of the drafters of the Constitution, the so-called ‘semi-presidential’ political system was not chosen ‘to facilitate totalitarianism, but rather quite the contrary.’⁷

Regarding the subject of the present paper it is important to see which doctrine was chosen by the Romanian constitutional system concerning the value of the international norms in domestic law in a multilevel system⁸. As we all know the constitution of a state has the primordial role in the hierarchy of the sources of law, being on the top of the pyramid which is outlined by Kelsen. Romanian constitution provides in art. 1 par. 5 the supremacy of the constitution, outlining, among the other principles that the observance of the Constitution, its supremacy and the laws shall be mandatory. Since the beginning of the 20th century, two theories concerning relation between international and national law were drafted: the dualist theory with their representatives Heinrich Triepel and Dionisio Anzilotti and the monist theory represented by Hans Kelsen.

In monist systems-most of which embrace the monism with primacy of international law-the Constitution provides that international norms are integral part of the domestic legal system and, in certain cases, prevail over internal laws in case of conflict. Thus, international law and internal law form one entire legal system.⁹ The monism with primacy of internal law had been argued by the representatives of the School of Bonn, according to whom the international relations are based on force and international law appear in the framework of the relations between different states like a projection of internal law of the powerful state over the less powerful state¹⁰.

Dualist theories provide that international law and internal law are two different legal systems, the main element of difference being: the subjects of law – states in international law, individual and

⁶ E.S. Tănăsescu, Who is defending the Romanian Constitution? Between Presidential obligation and Constitutional Adjudication, AUB no.3/2007, p.23-37.

⁷ F.B. Vasilescu, in Geneza Constituției României, Monitorul Oficial, 1998, p. 511 et seq. The debates that took place in the Constitutional Assembly are extremely informative in this respect, as they accurately reflect the fear of members of the Convention that the president might acquire too great a legitimacy.

⁸ Multi level governance entails cooperative intergovernmental relations between sub national and national authorities or between national and supranational organs: multilevel government.

⁹ According to Kelsen’s normativism international law is the fundamental source of state sovereignty, from which the internal legal order is born. On the other hand, according to the positivist theory the state decides through its constitution to incorporate the international law in the legal system.

¹⁰ G.Moca, M.Dutu, Dreptul international public, vol.1, Ed. Universul Juridic, Bucuresti, 2008, p.75

collective subjects in internal law, the author of the legal norms – the subjects themselves in international law, the legislative body in domestic law and the character of the norms- horizontal, in international law, vertical, in domestic law. Dualist systems require that international law should be transposed and adapted in order to be susceptible of application in the legal internal order of a state. Transposition requires thus an act of the legislative body that copies international norms in the domestic legal systems and transforms them, as to be applicable for internal law subjects¹¹. The conclusion that could be noted is that the value of international law norms derives from the constitutional provisions, and not from the international law itself¹².

Article 11 par. 2 of the Romanian Constitution provides that duly ratified treaties form part of the internal law and only the treaties regulating the field of human rights and freedoms enjoy superiority over internal laws according to the art. 20 par. 2. Thus, the primary constitutional power decided to adopt the dualist theory regarding the relation between international and national law.

II. The relation between national law and international law according to the Romanian Constitution

2.1. General rules

According to Romanian Constitution an international treaty is a source of constitutional law if it accomplishes the following conditions: it is licit; its application is direct, immediate; the treaty must be ratified according to the international norms; it must contain provisions of constitutional law. Interpreting art. 11 and 20 of the constitution five rules can be inferred¹³: The Romanian State pledges to fulfill as such and in good faith its obligations as deriving from the treaties it is a party to; Only the treaties¹⁴ ratified by the parliament, according to the law¹⁵ are part of the national law; If a treaty Romania is to become a party to comprises provisions contrary to the Constitution, its ratification shall only take place after the revision of the Constitution, in order to avoid any contradiction between the international treaty and the Constitution; Constitutional provisions concerning the citizens' rights and freedoms shall be interpreted and enforced in conformity with the Universal Declaration of Human Rights, with the covenants and other treaties Romania is a party to; Where any inconsistencies exist between the covenants and treaties on the

¹¹ M.C. Eremia, I.L. Popa Mocanu, Raportul dintre dreptul european și dreptul intern. Ierarhia actelor normative în dreptul comunitar, AUB nr.1/2006, p. 28-58; D. Popescu, Raportul între tratatele internaționale și legea internă, Studii de drept românesc nr.1,2-1999, p. 101-113.

¹² I. Galea, The relation between national law, community law and international law- a difficult triangle, AUB no.4/2007, p.37-46.

¹³ **Article 11:** (1) The Romanian State pledges to fulfill as such and in good faith its obligations as deriving from the treaties it is a party to. (2) Treaties ratified by Parliament, according to the law, are part of national law. (3) If a treaty Romania is to become a party to comprises provisions contrary to the Constitution, its ratification shall only take place after the revision of the Constitution.

Article 20: (1) Constitutional provisions concerning the citizens' rights and freedoms shall be interpreted and enforced in conformity with the Universal Declaration of Human Rights, with the covenants and other treaties Romania is a party to. (2) Where any inconsistencies exist between the covenants and treaties on the fundamental human rights Romania is a party to, and the national laws, the international regulations shall take precedence, unless the Constitution or national laws comprise more favourable provisions.

¹⁴ The notion of treaty is defined by the Law no. 590/2003 as the legal act, irrespective of the denomination or the form, which contains a written accord at state level, governmental level or departmental level, having the goal to create, modify and extinguish legal rights and obligations, governed by international public law and consigned to a sole instrument or two or more connected instruments.

¹⁵ Law no. 590/2003 regarding treaties, published in Official Journal no. 23/12 January 2004.

fundamental human rights Romania is a party to and the national laws, the international regulations shall take precedence, unless the Constitution or national laws comprise more favorable provisions.

From these provisions results that Romanian original constituent power chose to adopt the dualist theory regarding the relation with public international law. In other words, Romanian legal system admits as a legal formal source in national law only the legal acts that are adopted by the representative assembly of the country, namely the Romanian Parliament¹⁶. The good faith (lat. *bona fides*) signifies the loyalty in the observance of international law, fidelity in the observance of international obligations, being an element of the principle *pacta sunt servanda*, according to which the states have the obligation to observe and to apply exactly the treaties they are party to. Thus, Romania has to exactly observe and in good faith the treaties that are in force, licit and legally concluded according to the provisions of international law. Corroborating art. 11 and 20, it is inferred that Romania should observe the human rights treaties it is a party to, this duty deriving from the obligation of Romanian state to regard human rights, the others states' sovereignty and the norms of international law. It is worth to add that these constitutional provisions refers only to the treaties, irrespective of their denomination (accords, conventions, covenants), concluded in the name of the Romanian state and ratified by the Parliament. I would like to add that the international acts, as departmental accords or international cooperation between local authorities, which are not ratified, are not covered by the constitutional provisions of article 11.

The ratification of a treaty is made through a law, by the Parliament, according to the law regarding the treaties, thus becoming an internal act. In this context, a problem is to know which the legal force of that treaty is in the national legal order. We can infer that the legal force of a treaty is the force to which it enters into the national order, having thus an infraconstitutional force¹⁷. The Romanian Constitutional Court in its decision no. 105/1998¹⁸ concluded that according to the constitution, legislation in force and parliamentary practice, international treaties signed in the name of Romania are subject to the ratification of the Parliament through law, being thus compatible with the institution of delegated legislation. Taking into consideration art. 73 par. 3 and 115 of the Constitution we can conclude that ratification of a treaty could be made through an ordinary ordinance, following a special law of empowerment adopted by the Parliament.

The legal provisions concerning the application of the treaties have to assure their observance by all Romanian authorities and all Romanian subjects of law according to art. 11 par. 2. Meanwhile, the law contains a provision according to which the treaties cannot be modified or removed through an internal act, being thus an effective application of the article 11 par. 1 of the constitution. The law also regulates the elements of a treaty, the object of settlement of the treaty and his limits, the parts of the treaty, the form of the treaty. Two interpretations have evolved into the Romanian constitutional law doctrine.

Upon the first opinion, according to article 11 par. 3 introduced in 2003 after revision, in order to assure the supremacy of the constitution, it had been provided the obligation to revise the constitution if it

¹⁶ For a detailed expose see E.S. Tanasescu, I. Muraru coord., *Constitutia Romaniei, comentariu pe articole*, Ed. C.H.Beck, Bucuresti, 2008, p.110-121.

¹⁷ The article 19 of the Law no. 590/2003 regarding the treaties provides that, in cases of emergency, exceptionally, the treaties concluded at governmental level can be ratified by the government through an emergency ordinance, upon the condition to thoroughly justify the emergency.

¹⁸ Published in Official Journal no. 263/15 July 1998.

is necessary to ratify an international treaty which provisions are contrary to the constitution. If not, Romanian state can declare that it will not be party to that treaty. Unfortunately, the constitution did not provide institutional and jurisdictional guarantees. Notwithstanding, the constitution stipulates the attribution of constitutional court to check the constitutionality of an international treaty, not *ex officio*, but upon notification by one of the presidents of the two Chambers, a number of at least 50 deputies or at least 25 senators. These subjects are restrictive and limitative enumerated by the constitution. Since the revision, there was not any notification to verify the constitutionality of a treaty prior to its ratification by the parliament¹⁹. Nevertheless, the rule is that international treaties must be subject to the procedure of ratification in order to be applicable into internal law, with the exception when the treaties contain provisions contrary to the constitution. Once the treaty becomes an act of internal law, its constitutionality can neither be questioned through an *a posteriori* control, nor by the persons whose fundamental rights could be thus violated. In the latter situation the provisions of article 20 par. 2 regarding the principle *lex mitior* become applicable.

Due to the fact that the review of constitutionality of the treaties prior to their ratification it is not automatic and systemic, the conflict of norms that might arise cannot be solved by the application of art. 11. But by a systemic interpretation of the constitution and through extension by analogy to the solution offered by art. 20, even this article is special in comparison to art. 11, the authorities should be able to apply the norms, in order to become compatible. If such a conflict intervenes in human rights area the solution is offered by art. 20 par. 2, which provides the primacy of the international law, unless the Constitution or national laws comprise more favorable provisions.

The second opinion²⁰ argues that Romania adopted the monist system according to which the treaties are self executing and art. 11 applies to all the treaties, not only to those ratified by the Parliament. All the international treaties Romania is a party to, being thus integrated into Romanian constitutional order are subject to the constitutional control exercised by the Constitutional Court in any moment, not only prior to ratification as art. 146 lit. b provides – parliamentary notification, but also after entry into force, through interpretation *a contrario* of art. 147 par. 3 corroborate with art. 146 lit. d – exception of unconstitutionality, thus an *a posteriori* control, unless an *a priori* control was not exercised.

2.2 The relation in the human rights area

We acknowledge to the first opinion expressed here, following the explanations regarding the relation between international law and internal law in human rights area. Art. 20 of the Romanian constitution regulates the primacy in enforcement of international rules over the national ones as regarding human rights, establishing two special rules: interpretation and enforcement of constitutional norms regarding human rights and primacy in enforcement of international acts over internal laws. Through this provision is given effect to the principle of supremacy of international law over the national law, the supra-constitutional character of international law in a multilevel state being outlined.

¹⁹ The sole example, prior to the revision of the constitution is the preventive control of constitutionality of the ratification law and not the content of the treaty. In the decision no. 338/1997, the Constitutional Court concluded that the notification was inadmissible for procedural reasons, being unable to verify the background of the case.

²⁰ C.L.Popescu, Controlul constitutionalitatii tratatelor internationale, Revista Dreptul no.11/2005, p. 9-32; K. Benke, Controlul constitutionalitatii tratatelor internationale in unele state europene si in Romania, Revista Dreptul nr. 9/2006, p.120-131.

As regarding the first rule, constitutional provisions concerning the human rights and freedoms shall be interpreted and enforced in conformity to the Universal Declaration of Human Rights, with the covenants²¹ and other treaties Romania is a party to. This rule starts from the idea that, according to art. 11, all the treaties, including those regarding human rights are incorporated into the national law only if they are in conformity to the constitution. In other words, the inconsistencies between the two types of norms are inappropriate and if so, their interpretation and enforcement should assure the mutual conciliation and should remove any conflicts of norms. The second rule endorses the primacy of enforcement of international provisions over the internal laws. In this case also the interpretation of internal laws should assure the conciliation with international rules in human rights area. If there are inconsistencies between the two types of norms, the conflict is solved following the principle of primacy of enforcement of international rules over the internal ones. But the derivative constituent power added the principle *mitior lex* according to which the primacy of enforcement of international rules is valid only if internal laws and Constitution of Romania comprise more favorable provisions²².

Two major consequences can be inferred from these provisions: the legislator should mandatory check if the bills adopted are in correlation with the international treaties Romania is a party to; the public authorities with competencies in negotiating, concluding and ratification of the international treaties should be aware of the correlation between an international act and Romanian laws and in difficult situation it should make reserves and declarations to the treaties.

The supra-constitutional value of the international rules in the human rights area is accepted by the constitutional jurisdiction also, which is the guardian of the supremacy of the constitution. Thus, through the decision no. 148/2003,²³ the Romanian Constitutional Court concluded that an article from the initiative of the revision of the constitution is unconstitutional on the reason it is contrary to article 6 of the European Convention of Human Rights and it violates the material limits of the revision. The Constitutional Court in the decision no. 146/2000²⁴ outlined the mandatory character of the international provisions over the internal laws in the human rights area and even of the interpretations given by the European Court of Human Rights for the interpret of the constitution of Romania. Following this jurisprudence, the guarantees and the protection forms of the human rights and freedoms were modified in order to be compatible with the international standards²⁵.

The same situation happens as for art. 21 of the Constitution which was revised by the derivative constituent power, according to the European Court of Human decisions²⁶ against Romania, significant

²¹ Covenant regarding civil and political rights and Covenant regarding social, economic and cultural rights.

²² See for details E.S.Tănăsescu, Despre autoritatea constituțională a unui tratat european, Revista Sfera politicii 120-121-122, <http://www.sferapoliticii.ro/sfera/120-121-122/art4-siminatanasescu.html>.

²³ Official Journal no. 317/12 May 2003.

²⁴ Official Journal no. 566/15 November 2000.

²⁵ As an example, the principle of equality provided by article 4 par. 2 and art.16 of Romanian Constitution acquired new valences in the Romanian legal system due to the influence exercised by ECHR's jurisprudence regarding article 14. Thus, Romanian Constitutional Court decided that this principle is applicable not only to its own citizens but also to any person and that Romanian citizens can complain to the international jurisdictions in order to invoke other standards of protection in human rights area and the mandatory character of their decisions.

²⁶ ECHR, 26 february 2006, Stere si alții c. României, application no. 25632/02; ECHR, 22 december 2004, Androne c.României, application no. 54062/00; ECHR, 2 march 2004, Sabin Popescu c.României, application 48102/99; ECHR, 17 juin 2003, Ruianu c. României application no. 34647/97; ECHR, 16 september 2003, Glod c. României, application no. 41134/98; ECHR, 26

being *Brumarescu c. Romania*, where there was a violation of article 6 of the Convention involving the right of access to a tribunal, the right to a fair hearing before a tribunal or the right to a reasonable time for judging²⁷.

There are also decisions of the European Court which Romanian legislation does not observe or decisions given by the Court without taking into consideration the effective legislation enforced by the Romanian state. For the first case, regarding the right to vote of the persons imprisoned, according to Romanian constitution a person convicted through a final decision of the court is not allowed to vote. But the Criminal Code of Romania provides as a supplement punishment the banning of all rights provided by art. 64, including the right to vote and to be elected to public authorities or elective public office. It is therefore an automatic ban, during the execution of sentence, of the electoral rights of persons sentenced to imprisonment irrespective of the sentence, length or the nature or seriousness of the offence, as decided the Court in the *Calmanovici* decision²⁸.

As for the second case, in the decision *Viasu c. Romania*, the European Court considered that Romanian state violates article 1 of Protocol no. 1 regarding the right to property due to the fact it does not ensure through legal and administrative measures an effective protection of the right to restitution, whether a restitution of the goods or grant of compensation in accordance with the principles of the rule of law and legality of the protection of this right; this decision is not beyond critics.

III. The relation between community law and national law within European Union

3.1 General considerations

The essential feature that community law enjoys in comparison with general international law is its specific nature, meaning that it enjoys supremacy, direct applicability and direct effect by itself and not because the national constitution or the national law provides so²⁹.

It was for the European Court of Justice to recognize through its case-law the distinct character of Community law: "by contrast to ordinary international treaties, the EEC Treaty has created its own legal system which, on the entry into force of the Treaty became an integral part of the legal system of the Member States and which their courts are bound to apply".³⁰ The same *Costa v. Enel* case provided for the

november 2002, *Mosteanu c. României*, application no.33176/96; ECHR, 4 May 2000, *Rotaru c. României*, application no. 28341/95; ECHR, 22 may 1998, *Vasilescu c, Romania*, application no. 53/1997/837/1043.

²⁷ See also, C. Birsan, *Conventia europeana a drepturilor omului*, comentariu pe, Ed. All Beck, Bucuresti, 2005, p.389-571.

²⁸ According to the European Court, the provision which imposes a blanket restriction on all convicted prisoners in prison and it applies automatically to such prisoners, irrespective of the length of their sentence and irrespective of the nature or gravity of their offence and their individual circumstances must be seen as falling outside any acceptable margin of appreciation, and as being incompatible with Article 3 of Protocol No. 1 of the European Convention. Recently, Romania was condemned by the ECHR in the decision *Calmanovici c. Romania*, 1 July 2008.

²⁹ See for the jurisprudence of the Court, O.Tinca, *Din jurisprudența Curții de Justiție a Comunităților Europene referitoare la primordialitatea dreptului comunitar și la interpretarea conformă*, *Dreptul* nr. 6/2007, p. 30-50; M.Dausés, *Prioritatea dreptului comunitar european în raport cu dreptul intern al statelor membre ale Uniunii Europene*, Programul legislativ Lex Expert; C.M. Nicolescu, *Jurisprudența Curții de Justiție a Comunităților Europene cu privire la prioritatea de aplicare a dreptului comunitar asupra dreptului intern al statelor membre*, *Revista română de drept comunitar* nr. 4/2008, p. 28/38; V. Constantin, *Este posibil un control de constituționalitate în România al dreptului derivat al Comunității și al Uniunii Europene?*, *Pandectele Române* nr. 2/2008, p.39-49; D. Mazilu, *Raportul dintre dreptul comunitar și dreptul național*, *Studii de drept românesc* nr. 1,2/2004, p. 87-96.

³⁰ Case 6/64, *Flaminio Costa v. ENEL*; P. Craig, G. de Burca, *EU Law. Text, Cases and Materials*, 3rd Ed., Oxford, 2003, p. 277.

supremacy of EC law “law arising from the Treaty could not be overridden by domestic legal provisions”. Further case-law confirmed that supremacy applies in also in relation to national constitution too.³¹ Direct applicability involves that community norms are incorporated in national law by themselves and not by ratification or due to the provisions of national constitutions. Direct effect, which represents the feature of community norm of creating rights and obligations for individuals which can be invoked directly before national courts was recognized for treaty provisions³², regulations and directives³³, under certain conditions.

As regarding the legal nature of the European Union numerous point of views were couched: it is a federal state, a confederation, an international organization, a *sui generis* structure; in my opinion, The European Union is a *sui generis* organization supranational and intergovernmental, within its framework the member states keep their sovereignty, on the one hand and a few competences are devolved to the Union, to its institutions respectively, on the other hand³⁴. Thus, the accession of new member states assumed *ab initio* the transfer to the Union of powers of state sovereignty, and thereafter the common exercise of some powers that traditionally fall within the scope of state sovereign power.³⁵ That transfer is reflected into states’ constitutions. Article 148 of Constitution of Romania regulates some aspects regarding the accession of the country and its rights as a full member state.³⁶ The topic of accession and integration is differently regulated into the constitutions of member states: while the majority³⁷ of states’ constitutions explicitly provide a default limitation of national sovereignty, establishing institutional guarantees for the obligations assumed through accession acts, others do not contain any provision regarding their membership to a supranational structure.³⁸ Institutional guarantees provided by Romanian constitution endorse all the three branches of government: legislative, executive and judiciary to the extent that the integration to EU assumes their participation to the observance and the enforcement of community norms, within the limits of their constitutional powers. Thus, in the context of the European integration the need for rethinking the concept of sovereignty flourished, new concepts emerging like: open statehood, post-sovereignty, late-sovereignty, multilevel governance. Starting from the rethinking of this concept, all

³¹ Case 11/70, Internationale Handelsgesellschaft mbH.

³² Case 26/62 van Gend en Loos v. Netherlands.

³³ Case 41/74, Van Duyn v. Home Office, Case 148/78, Pubblico Ministero v. Tullio Ratti.

³⁴ The Treaty of Lisbon reinforces the characteristics of the Union, as The Treaty establishing a Constitution for Europe did, referring to the equality of the member states, the wish of the people to be gathered in diversity: “The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State.”

³⁵ See also A. Albi, P. van Elsuwege, The EU Constitution, national constitutions and sovereignty: an assesment of a European constitutional order, European Law Review no.6/2004, p. 741-765; B.C.M. Predescu, Ordine constituțională și comunitară armonizate din perspectiva Tratatului de la Lisabona, Pandectele Române nr. 9/2007, p.46-56.

³⁶ Through this article institutional guarantees are regulated also in order to observe the *pacta sunt servanda* principle at international level and the well functioning of the Romanian state within that supranational organization.

³⁷ Austrian Constitution provides dispositions regarding European Parliament elections, authorities involved in nomination of European institutions’ members. French Constitution comprises chapter XV concerning European Communities and European Union, regulating the transfer of powers to the Union. According to article 24 of German Constitution it is recognized *expressis verbis* the right for the federation to transfer the right of sovereignty to international organizations on the legislative way. Similar provisions are found into constitution of Greece, Italy, Spain, Portugal, Ireland, and Sweden. For Hungary see also L. Trocsanyi, L. Csink, Constituție vs. drept comunitar: poziția Curții Constituționale a Ungariei în Uniunea Europeană, Pandectele Române nr. 6/2008, p. 17-29.

³⁸ Constitution of Finland, Netherlands, Belgium, Luxembourg, Denmark.

the constitutions of the members' states should contain provisions regarding: the delegation of competencies to the EU; the exercise of the sovereignty at national and European level as well, the latter through the European Parliament; the relation and the interaction between national and European law. The Romanian Constitutional Court stated that, through the transfer of the competencies to the EU institutions, these do not acquire a supra-competence, their own sovereignty. In fact, the member states decided to exercise in common some competencies that traditionally are by the domain of national sovereignty. The transfer of the member states national competencies to the supranational level is not possible without a democratic control of the citizens of the member states, realized through the European Parliament.³⁹

3.2. Accession and participation of Romania to the European Union

Legally speaking, accession of a state to EU implies the ratification of some international treaties (the founding treaties, the modified treaties, some external accords that bind Communities) and the accomplishment of some political and economic criteria, as well as the adjustment of the national legislation to the *acquis communautaire*. Prior to the revision in 2003, Romanian Constitution did not contain provisions concerning the transfer of state powers to international organizations or the joint exercise with other states of competencies specific to state sovereignty. It only contained the general rules of article 11 and 20, developed in the second chapter of the paper. After the revision, article 148 regulates an exception from the rule, applied only to the European integration, article which provides special rules for the accession to EU. According to this article, Romania's accession to the constituent treaties of the European Union, with a view to transferring certain powers to community institutions, as well as to exercising in common with the other member states the competencies stipulated in such treaties, shall be carried out by means of a law adopted in the joint session of the Chamber of Deputies and the Senate, with a majority of two thirds of the number of Deputies and Senators. The law of ratification of Romania's accession is an atypical law in the Romanian legal system, irrespective of the formal or material aspects.

Regarding the material aspect, this is a law of ratification of international treaties. It is neither a law of the revision of the constitution because it does not modify the fundamental law, nor an organic or ordinary law, the transfer of the competencies to the European institutions or the exercising of powers in common with other member states prevailing over the domain of ordinary and organic laws. Concerning the formal aspect, this law is approved with a majority of two thirds of the number of Deputies and Senators, which is different from the majority of two thirds of the number of deputies and senators, taken separately required for the revision of the constitution on a first phase⁴⁰.

As a consequence, this law is *a sui generis* one, having an infra-constitutional, but a supra-legislative legal force. While the first paragraph regulates the process of accession, the second one refers

³⁹ Coord. MURARU, Ioan, TĂNĂSESCU, Elena Simina, op. cit., p. 350-351, MURARU, Ioan, TĂNĂSESCU, Elena Simina, op. cit., p. 90-93

⁴⁰ Article 148 (1): Romania's accession to the constituent treaties of the European Union, with a view to transferring certain powers to community institutions, as well as to exercising in common with the other member states the abilities stipulated in such treaties, shall be carried out by means of a law adopted in the joint sitting of the Chamber of Deputies and the Senate, with a majority of two thirds of the number of deputies and senators. Article 151: (1) The draft or proposal of revision must be adopted by the Chamber of Deputies and the Senate, by a majority of at least two thirds of the members of each Chamber. (2) If no agreement can be reached by a mediation procedure, the Chamber of Deputies and the Senate shall decide thereupon, in joint sitting, by the vote of at least three quarters of the number of Deputies and Senators.

to the participation of Romania as a member with full rights within this supranational organization. Article 148 par. 4 and 5 provides institutional guarantees for all the three branches of government regarding transposition into national law of the community law through primary or secondary acts and the real enforcement of this legislation through administrative and judiciary bodies. This provision of the Romanian constitution is in accordance with the general norms of public international law, ECJ establishing a wide jurisprudence⁴¹ concerning the state liability for breaches or infringement of community law, irrespective of the facts are of legislative, judiciary or administrative bodies. The next paragraph establishes constitutional rules for well functioning of state institutions within European institutions. Thus the executive branch, the Government shall send to the two Chambers of the Parliament the draft mandatory acts before they are submitted to the European Union institutions for approval.

3.3. The relation between national law and European law according to Romanian constitution and judicial courts

Another exception from art. 11 of the constitution (comments on the second chapter) is regulated by art. 148 par.2 according to which the provisions of the constituent treaties of the European Union, as well as the other mandatory community regulations shall take precedence over the opposite provisions of the national laws, in compliance with the provisions of the accession act. Thus it is expressed the priority of enforcement of community law in an original manner: only constitutive treaties and other mandatory community regulations have prevalence over the internal contrary provisions. But the terminology used by the constituent power should be interpreted as follows: constitutive treaties comprise constitutive treaties, modified treaties, meaning all the primary legislation of the EU and the mandatory community legislation comprises secondary mandatory legislation of the EU. Thus, on the one hand the article restrict the priority of enforcement to the community law not to the European law and on the other hand at European level priority is applied to all regulations and not only to the mandatory one. Two opinions are devolved regarding the priority principle: at national level, we found the supremacy of the constitution over the community law and the priority of European law over other internal legislation; at European level, systemic and unconditioned priority of enforcement of community law over internal legislation, including the constitution of a state.

In its jurisprudence, for example case *Costa v Enel*, ECJ concluded that by creating a community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the states to the community, the member states have limited their sovereign rights and have thus created a body of law which binds both their nationals and themselves.⁴² According to this jurisprudence, the national authorities, especially the courts, in a situation of conflict between community law and national norms have to not apply the internal norms and to give

⁴¹ ECJ, *Kobler c. Austria*, 2004; *Andrea Francovich si Danila Bonifaci c. Italia*, 1991.

⁴² The integration into the laws of each member state of provisions which derive from the community and more generally the terms and the spirit of the treaty, make it impossible for the states, as a corollary, to accord precedence to a unilateral and subsequent measure over a legal system accepted by them on a basis of reciprocity. Such a measure cannot therefore be inconsistent with that legal system. The law stemming from the treaty, an independent source of law, could not due to its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as community law and without the legal basis of the community itself being called into question

priority to the norms of community law which are directly applicable. The national authorities could not annul, remove and invalidate the internal norms which are contrary to the community one.

From the point of view of the member states, the priority of enforcement of community law is accepted because of the provisions of their own constitutions or because of the states rights to establish the limits for the European Union competences. The majority of the European constitutional courts reserved for themselves the right to verify the constitutionality of community norms⁴³, applying thus the principle of the supremacy of the constitution over any other internal provisions, including over those that are the result of the ratification process. These jurisdictions concluded that community law could not have priority over the fundamental human rights, as they are protected into the national constitutions of the states, as long as those rights are not efficiently guaranteed at community level.

Article 148 par. 1 of the Romanian constitution provides the priority of the community law over the national one and par. 2 adds that this is an original priority because only the constitutive treaties and other mandatory community regulations have priority over the internal contrary provisions. Irrespective of the words used by the Romanian derivative constituent power, the enforcement of the principle of priority is the task of all Romanian authorities involved in the process of compliance of Romanian legislation with the European norms⁴⁴. The Romanian constitutional court in the decision 148/2003 concluded that community norms have supra-legislative but infra-constitutional force, thus *acquis communautaire* having an intermediary position between constitution and other laws, when speaking of mandatory European legal norms. Some authors argue that it should be made a difference between community norms regarding human rights and other community norms. Regarding the first category, it should be applied article 20 of the constitution, such norms having a supra-legislative force and a constitutional interpretative value. The second category concerning the other community norms should be integrated into internal law and enforced with priority, only after their constitutionality was verified.⁴⁵ In its first decision regarding the relation between national law and community law, the decision no. 59/2007⁴⁶, the Romanian Constitutional Court said that internal law could not be invalidated within the national legal order due to the fact it is not compatible with community law.⁴⁷

Regarding the conflict between national law and European law, the same court in the decision no. 558/2007⁴⁸ concluded that national courts should address to the European Court of Justice in order to assure the effective and homogeneous enforcement of the community law. In a relatively new decision⁴⁹, the Court said that the aspects concerning the compatibility of internal provisions with community law do not represent issues of constitutionality, being aspects of enforcement of legislation by the judicial courts, superseding the competence of the Constitutional Court.

⁴³ See the case Frontini of the Italian Constitutional Court, Cases Solange I, II and Maastricht of the German Constitutional Tribunal.

⁴⁴ See L. Dogaru, Aplicarea noimei juridice ca finalitate a interferentei sistemului de drept romanesc cu dreptul comunitar, Revista romana de drept comunitar nr. 4/2008, p.60-93; B.C. M. Predescu, op.cit., p. 51-52.

⁴⁵ I. Deleanu, Obligativitatea hotararilor Curtii Europene a drepturilor omului si ale Curtii de Justitie a Comunitatilor Europene (The mandatory effect of the decisions of ECHR and ECJ), Revista Dreptul nr. 2/2007, p.28-43.

⁴⁶ Published in Official Journal no. 98/08.02.2007.

⁴⁷ For critics against this decision see E.S.Tanasescu, Jurisprudenta. Comentarii (Jurisprudence. Comments), Curierul Judiciar no. 5/2007, p.1-21

⁴⁸ Published in Official Journal no.464/10.07.2007

⁴⁹ Decision no.413/2008, published in Official Journal no. 386/21.05.2008

Romanian judges expressed their position also regarding the relation between national law and community law, for example in the decision no. 4403/31.05.2007, the High Court of Cassation and Justice concluded that the community law has priority over the contrary internal law, producing concrete effects within the national order, the national judge being obliged to sanctionate the contrary. In other decision no. 2620/23.03.2007, the High Court stated that if the internal norms are in contradiction with community norms, the later have priority in accordance with the principles of priority and direct effect of the community law.

Thus, given the special character of EU, some features of federal arrangements can be find, features which had been taken into consideration by the Romanian constitutional power: the limitation of national sovereignty in favour of the EU; three levels of competencies: some competencies are given exclusively to the EU, others are shared with member states and others resting to the member states; recognition of the principle of subsidiarity which allows national parliament to signal a particular decision does not comply with the principle.

IV. International law binding on the Community

Regarding this part I would like just to mention three important ideas, in order to end the circle of three types of relations I talked about at the beginning of this paper.

First, the European Community law contributes to the effective respect of international law, including on national level, insofar as international law norms bind the Community. Thus, international custom and treaties bind the Community enjoy the same features as all sources of EC law and are even superior to secondary law in case of conflict.⁵⁰ The ECJ helped the enforcement of customary international law norms, recognizing their binding character, direct applicability and superiority over secondary community law.

Second, a tendency was observed in the sense that the European Community is progressively taking over the competence of the Member States to conclude treaties, even in an implicit way. ECJ in ERTA case held that each time the Community with a view to implementing a common policy adopts provisions laying down common rules, the member states no longer have the right to undertake obligations with third countries which affect those rules⁵¹. This could indeed, as case-law has shown, to the possibility of member states to enter into binding treaties, which could infringe community competence. We could note that the European Community gradually took over the competence to conclude international treaties from the member states, mainly through case-law developments.

Third, the relation between international treaties binding only member states and EC law is very difficult. Although the ECJ held that Member states remain bound by treaties, there are strict obligations to modify and denounce these treaties. In its interpretation of article 307, the Court said that, even if pre-accession agreements are not affected, member states have a positive obligation to take steps toward modifying them, if they are not compatible with EC law and even to denounce them. Post-accession agreements do not benefit from this protective norm. Regarding the new member states (10 in 2004 and 2

⁵⁰ See Case 11/70 Internationale Handelsgesellschaft, Poulsen case, Case T 115/94 Opel Austria

⁵¹ Case 22/70, Commission v. Council, See also case 3, 6, 7/76 Kramer and Case 466/98 to C 475/98 Open Skies Case

in 2007) the Acts of Accession said that the new member states have the obligation to bring their international agreements in conformity with EC law before accession and, if they encounter difficulties in negotiations, to denounce these agreements, if denunciation is possible.

In case of conflict between international law and community law the state is put in a difficult situation: if it observes EC law and infringes the international treaty, legal action in front of international court would be possible; if the state observes the international treaty and breaches the EC law, an infringement procedure could be started by the Commission.

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