Primacy of the EU Law in the National Constitutional Space – Reflections

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I. European Union Law and National Constitutional Law

The relationship between European Union law and national constitutional law still remains one of the most debated issues of European constitutional law.

The Treaty Establishing a Constitution for Europe (CT) provided in Art. 10(1) "The Constitution and law adopted by the institutions of the Union in exercising competences conferred on it shall have primacy over the law of the Member States." - so for the first time primacy of European law over national law was explicitly provided in a legal norm, reflecting the already existing ECJ case law. But the unborn Constitution did not come to fulfillment. The "primacy clause" however survived in the Declaration Nr. 17 concerning primacy, as part of the Lisbon Treaty although outside the corpus of the treaty: "The Conference recalls that, in accordance with the well settled case law of the Court of Justice of the European Union, the Treaties and the law adopted by the Union on the basis of the Treaties have primacy over the law of Member States, under the conditions laid down by the said case law."

Dissatisfaction dominates in legal doctrine with this "outsider" position of the primacy clause in the Lisbon Treaty. But there are sober voices, treating The Declaration Nr. 17 as an unconditional acceptance of the primacy of European law over national law, even outside the Treaty corpus, being more clearly even than the dead Constitution[1] and paying tribute to the compromises, which often have to be reached in a supranational union.

Given the settled case law of the ECJ, the principle of primacy was already established since 1964 as *"a cornerstone principle of Community law"*. These are the words of the Legal Services' opinion of 22 June 2007 expressly referred to in the quoted Declaration Nr. 17 to the Lisbon Treaty. The last represents an interesting legal drafting technology supplying opinion of the legal service with the force of positive law (I feel personally concerned having served as head of the Legal and Legislation Department of the Bulgarian Parliament for 14 years, 1990 – 2003).

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1 *Pernice,* Salvaging the Constitution for Europe, A Reform Treaty for the EU, WHI – Paper 4/07.

The reference in the Declaration to the case law of the ECJ is made without any reservation whatsoever. The Declaration recognises the principle of primacy "under the conditions laid down by the said case law". This means that provisions of national constitutions, even those regarding fundamental rights, cannot be referred to against "the Treaties and the law adopted by the Union".

However, the new provision does not only raise the question of what happens to the supremacy of constitution (if opposed to primacy), whose guardian the national Constitutional Court is, it also offers the opportunity to recall the many aspects of the relationship European law – national constitutional law, and to make reflections upon the role and function of legal scientists in treating this relationship.

II. Supremacy and Primacy

European law overrides national law in case of conflict. This clear concept of the ECJ jurisprudence is transponed expressis verbis in the Declaration Nr. 17 as "primacy" of European law. Legal doctrine, especially European law scholars,[2] however use "supremacy" as a synonym.

As a matter of fact the term "supremacy", frequently used in textbooks, has appeared only once in the text of an ECJ judgment so far. It is a judgment from before the 1973 accession of English speaking countries which was translated later.

'Supremacy' occasionally appears in Advocate General opinions, but sometimes, the Advocate General plays it safe: "...by virtue of the primacy or supremacy of Community law, they prevail over any conflicting national law".[3]

The etymology of "supremacy" gives birth to definitions, which always contain the idea of hierarchy, and always the superlative degree.

Coming back to national constitutional soil "supremacy" belongs to modern Bulgarian constitutionalism – Art. 5(1) provides: "The Constitution shall be the supreme law, and no other law shall contravene it." So, supremacy belongs per definition to the Constitution[4]. In Bulgaria there is a tradition in favor of the "Stufenbau der Rechtsordnung" - the Law on Normative Acts explicitly contains it.

"Primacy" – *etymology*: means the state or condition of being prime or first, as in time, place, rank … , hence excellence; supremacy; a definition, to which "supremacy" also belongs as a dimension, a stratum. "Primacy" is an established notion in modern Bulgarian constitutionalism – Art. 5 (4) of CRB[5] explicitly provides: "Inter-

2 *Попова,* Основи на правото на Европейския съюз, Планета, 2. изд., 2001, с. 96-101; *Корнезов,* Преюдициалното запитване пред СЕО, Сиби, 2008, с. 321-337.

3 *Mayer,* Supremacy – Lost ?, German Law Journal, 11/2005.

4 *Tanchev,* Supremacy of Constitutions in the Context of Constitutional Pluralism, in: *de Zwaan* et al. (ed.), The European Union – an ongoing process of integration. Liber Amicorum for A. E. Kellermann, 2004, p. 251-156.

5 CRB – Constitution of the Republic of Bulgaria, which means the Constitution in force.

national treaties which have been ratified in accordance with the constitutional procedure, promulgated and having come into force with respect to the Republic of Bulgaria, shall be part of the legislation of the State. They shall have primacy over any conflicting provision of the domestic legislation." This provision is from the original text (1991) and introduces a moderate monism in the relationship international law-national legislation, establishing *primacy in application*, if collision but without affecting the Constitution.

"Primacy" can be found much more frequently in ECJ decisions, albeit often enough the Court just refers to the terminology used by parties or the national court. Sometimes the Court uses "precedence", the verb "override", etc.

The draft for the Constitutional Treaty was using "primacy". Now, Declaration Nr. 17 to the Lisbon Treaty uses "primacy" too. The difference between primacy and supremacy could be related to British versus American English, but from the essence of the terminology used stems that the term supremacy implies more an idea of hierarchy in the way the German concept of *Geltungsvorrang* does. If that is correct, primacy is indeed the better word, as the ECJ has never touched the validity of national law and has never pointed to any kind of hierarchy or ranking of norms between European law and national constitutional law.

III. The Position of National Constitutional Courts

What jurisprudence and legal theory today accept as a settled issue is the primacy over national statutory law. What is still contested to some extent is the primacy over national constitutional law, and this is where the critics of the Court's primacy concept have been most visible.

Some national courts, notably the German Federal Constitutional Court, have appeared to be reluctant to accept an unconditional primacy of European law as far as it concerns fundamental rights and their protection.

Some years ago in cases brought before the Member States to examine the constitutionality of the Constitutional Treaty, the Spanish *Tribunal Constitucional* and the French *Conseil constitutionnel* had to take a position on primacy.

What emerges from the Spanish and the French decisions is a positive attitude towards primacy and a conceptual distinction between supremacy on the one side and primacy on the other side, with supremacy being the concept attributed to the national constitution as the supreme law of the land within a hierarchy of norms, whereas primacy simply describes the fact that European law takes precedence over national law if there would be a collision, without the necessary implication of a hierarchy between European law and national constitutional law.

IV. Bulgaria

Bulgaria is a (new) member of the EU and the EU Law enjoys in Bulgarian space a universal and direct effect, which overrides national law if collision appears. Legal theory, legislation and jurisprudence in Bulgaria made conceptual contributions, tabling arguments like the "shared sovereignty", "opened statehood", a.o. (Ruling Nr. 3/2004 of the Constitutional Court) aiming on reconciling supremacy of national constitutional law with the primacy of EU Law, without which the last would not be able to fulfill its functions. However, many of the concepts proved to be initially deposited in the Bulgarian Constitution, so they had to be derived, what explains the economical amendments to the Constitution, effectuated in Bulgaria preparing the Accession.

The Bulgarian constitution does not provide explicitly the primacy of EU Law over national constitutional law. Primacy stems from the transferred constitutional competences in favor of the EU, from basic constitutional principles - Art. 5 (4) - and from legislation.[6] National and European – both are legal orders, which live and regulate in their own scopes. National constitutional law must be in compliance with EU Law. If a collision appears then the European provisions are to be applied.

There are cautious attempts for giving a nuanced answer to the primacy question. Attention deserves the fact that neither on European, nor on national level a slogan is raised "European law breaks national constitutional law" as a replica to the famous phrase of the German constitution in relation to the federal structure. Nuances are looked for in the basic strata of the relationship, where equilibrium instead of supremacy is needed, especially in the field of the subsidiarity principle aiming on preserving the dignity of national constitutions without tackling the issue of hierarchy.

Facing the expected entering into force of the Lisbon Treaty, legal theory and jurisprudence have a mission: to carry closer to European citizens the values and functions of European constitutionalism, and to facilitate their exercising. The traditional constitutional law terminology, developed through centuries for the national statehood is still in use, but it does not reflect the sui generis nature of the supranational European Union und sometimes creates misunderstandings. So it is not a language game but it is a task of the European legal doctrine to develop new terminology for the European constitutionalism (without a constitution) appropriate to the new concepts, which are already in application.

6 "If a normative act is in contradiction with an European law regulation the regulation is applied." - Art. 15 (2) of the Law on Normative Acts.