The jurisdictional protection of fundamental rights at the national level

Abstract

Since 1576 French legal scholars admitted the possibility to contest ordinary laws in front of a given judge. The cornerstone of this legal thought was the consideration that all legal provisions contrary to "the laws of God and nature" are to be considered false and null [1]. Although Jean Bodin supported such a sanction, he was also underlining the necessity to refuse the application of a right to resist the unfair law, even though from the theoretical point of view he admitted that, in certain circumstances, citizens and also magistrates had the right to refuse respecting legislation contrary to the rule of law.[2]

After Jean Bodin, another great reformer, Hans Kelsen, was not questioning if the right to contest enacted legislation should remain written only on paper, but if such a right implies a constitutional review conducted through the application of a catalogue of fundamental rights and liberties that can be found in any modern constitution, and proclaimed as a result of the transposition of natural law obligations into positive law.[3]

[1] As it is summarized by Dieter Grimm, *La souveraineté*, in *Traité international de droit constitutionnel*, Tome I, Paris, Dalloz, 2012, pp. 548 – 606, at 559. See also, J. Bodin, *Six Livres de la Republique*, Livre Troisième, Fayard, 1986, chapter IV, at 98, 100, or 113.

[2] Dieter Grimm, op. cit., at 559. See also L. Duguit, *Traité de droit constitutionnel*, 3ème edition, tome III, ed. de Boccard, 1930, at 710: "J'apelle loi inconstitutionnele, toute loi contraire au droit superieur écrit ou non écrit".

[3] H. Kelsen, *Aperçu d'une théorie générale de l'État*, Revue du droit public, 1926, at 603: "Issus de la doctrine du droit naturel, qui admettait que l'Etat est limité par des regles absolues, provenant d'une instance qui lui serait étrangere, ils font aujourd'hui l'objet, en tant qu'éléments du droit positif, de normes étatiques".

Starting from Bodin's idea of contesting an unfair law, but also from those of Kelsen, considerable progress was achieved. The "right to resist" the unfair law present in Bodin's legal writings became today's norm, and the constitutional review of norms, - the founding stone of fundamental rights protection provided in every State that wants to be governed by the rule of law. In addition, legal scholars declared that in present times "contemplating the law, how it should be, means to take into consideration the revolutionary mystique, a sacred law, a deified law, a perfect creation", but " to write about law, how the law is, is to write about a legal rule, subordinated, relativized, an imperfect creation".[4]

This research thesis represents the writing about law that is no longer considered a sacred one for the litigant, but an imperfect creation always capable to fall victim to the critical gaze of a competent judge[5], being looked at with suspicion since the beginning of its creation. Through this conduct, legal provisions are forced to pass not only the political obstacle of their coming into force, but also the obstacle of a variety of judicial reviews.

This way, a new paradigm of constitutionalism is promoted, namely that in which the law is no longer exclusively equated with existing legislation, but with the legislation and the Constitution[6]; and in the case of the Member States of the European Union (EU), the new paradigm being even overfulfilled as the law is not

[4] B. Mathieu, *La loi*, 2e ed. Paris, Dalloz, 2002, at 1 *apud* H. Dumont, S. Van Drooghenbroeck, *La loi*, în *Traite international de droit constitutionnel* (M. Troper, D. Chagnollaud, eds.), Dalloz, Paris, 2012, pp. 530-572, at 530: *songer à la loi, telle qu'elle devrai (?) etre, c'est avoir a l'esprit la mystique revolutionnaire de la loi, la Loi sacrée, divinisée, oeuvre de perfection": "ecrire sur la loi, telle qu'elle est, c'est parler d'une regle juridique, subordonée, relativisée, oeuvre imparfaite".*

[5] Or even by the administrative authorities - within the field of EU law application, as the administrative authorities have the competence based on the Costanzo ruling to set aside any national norm that would come against the requirements of EU law.

[6] Manuela Atienza, *L'Argumentation*, in *Traité international de droit constitutionnel (M. Troper, D. Chagnollaud (eds.)* , 2012, tome I, Theorie de la Constitution, Dalloz, Paris, 2012, pp. 506 – 543, la p. 511.

only to mean legislation and constitution, but also to encapsulate and contain the European Court of Human Rights (ECHR) law and EU law together with its interpretative case-law.

As a consequence, the present research thesis is going to theorize the way in which the fundamental rights granted by both EU law and ECHR law are simultaneously relied on in front of the national Romanian judge. As a result, we shall observe that we are to witness a high degree of diversification of fundamental rights' judicial protection, a protection that although appears organized in a plural fashion, it is rarely truly pluralist.[7] In order to observe such a conclusion, the thesis is structured in three parts.

The first part (Chapter I) provides - in a comparative way - the different procedural mechanisms through which fundamental rights can be efficiently invoked in front of a Romanian national court. We shall observe the advantages and disadvantages of the Romanian constitutionality review, then of the conformity with ECHR law review ('the exception of unconventionality'), and lastly, the advantages and disadvantages of the way through which the national ordinary court is going to verify the conformity with EU law of a national provision applicable to a pending case ('the exception of unconformity with EU law'). The purpose of this comparative analysis is to underline the fact that each of these three exceptions gives birth to an autonomous judicial law review which has as a purpose the elimination, modification or disapplication of legislation contrary to a given fundamental right or freedom. The conclusion of the first part is that the litigant must rely on all three types of available judicial review concomitantly, if

[7] The main question to which this thesis whishes to provide valid answers is the following: *How is the EU law and the ECHR law applied within the subject matter of jurisdictional protection of fundamental rights and freedoms at the national level?*

he wishes to ensure that he will have access to the guarantees considered to provide the highest protection available to the rights at stake.

The second part (Chapters II, III and IV) continues by analyzing and emphasizing the conditions in which both provisions of EU law and EHCR law are to be applied in a case pending in front of a national judge, acquiring therefore the privileged status of "applicable reference norms" in a judicial review of primary legislation that is to be carried out.

We shall analyse the different types of judicial review available to be used at the national level, with an emphasis in Chapter II on the way in which EU law and ECHR law are integrated in the national constitutional review. The Constitutional Court of Romania has the competence, based on its own settled case law, to apply a "hidden" review of conformity with EU and ECHR law within its constitutionality review. We shall underline how the Constitutional Court establishes, and even equalizes the margin of EU law action while delimiting, through additional established praetorian conditions, the ways in which such special EU law provisions will produce any effect within such an enhanced constitutionality control.

In Chapter III we shall point out the way in which EU fundamental rights can be applied, directly or indirectly, by a national ordinary judge in order to provide the litigant with a right to benefit from an autonomous judicial review of primary legislation based on the competence provided through the provisions of article 148 (2) and (4) of the Romanian Constitution.

Chapter IV touches upon the conventionality review, namely the review through which a national court is to verify if ECHR law is respected by national applicable statutory provisions and measures. Ordinary judges have, at the same time, an obligation to apply a "hidden" EU law review since EU law provisions - and especially the Charter of Fundamental Rights of the EU (EU Charter) - are already actively used by the European Court of Human Rights in order to interpret in an evolutive manner the fundamental rights guaranteed by the European Convention on Human Rights and its additional Protocols.

The third part has as the main purpose to debate the way in which the above mentioned mechanisms of judicial review – be it constitutional, conventional or unional – give birth to different specific problems in this "jurisdictional constellation", the rising of a set of specific issues being likely to happen whenever the highest standard of protection is the one provided either by the constitution, or by legal provisions enacted only at the national level. We point out the limits and the counter-limits to the primacy of EU law on national law, underlining firstly the characteristics of the national constitutional identity, and secondly, its resemblance with the concept of *jus cogens* in international law. These two legal notions, together with the concept of "national interest" are presented as a limit to the desired unification of the different systems of fundamental rights protection while imposing at the same time on the national judge the legal obligation to keep applying the national norms considered to provide a higher level of fundamental rights protection although those national provisions should be considered, from the EU law perspective, tainted and unenforceable due to their contradiction with EU law provisions.

Consequently, the main purpose of this research thesis is to capture the precise

manner in which the judicial protection of fundamental rights is enforced at national level, in front of the national ordinary courts and by using all available mechanisms of legal protection, with the established purpose of "photographing" in a concrete manner the judicial interaction between different types of judicial review of primary legislation, especially as in the same time there is also the right to demand the intervention - in a pending case - of the Constitutional Court, of the Court of Justice and, in the future, even of the European Court of Human Rights.

Furthermore, we also aim to underline the way in which the Romanian Constitutional Court makes efforts to impose its own interpretation not only of the European Convention on Human Rights, but also that of the EU law provisions, by giving itself the power to review if the national Parliament has guaranteed, when legislating, at least the same standard of fundamental rights protection as the one ensured through applicable EU law provisions - without the Constitutional Court having however the competence to "handcuff" the ordinary national court to its own interpretation of EU law.[8]

We conclude by underlining that national ordinary courts are to be considered the judicial engines in guaranteeing an effective and total protection of fundamental rights at the national level, because it is the ordinary judge that is the one being asked to ensure not only the national standard of protection imposed by the Constitution, but also the minimal standard of protection imposed by the European Convention of Human Rights, and also the standard of protection imposed by the Charter of Fundamental Rights of the European Union together with the fundamental rights guaranteed - in addition - by general principles of EU law. We

[8] See *Melki and Abdeli* case.

consider that within this action of protection there is still the need to develop a structured manner of interaction between these three different types of judicial review. It is certain that not only the application of EU law, and especially that of the Charter, but also the application of ECHR law is to be considered one of the main tasks having to be performed on a daily basis by a national ordinary court.

Consequently, the legislation can no longer be considered subordinated only to the Constitution when a case has to be decided in front of a national ordinary court, but also to the international law of human rights protection and also to EU law taken as a whole as fundamental rights and their authentic interpretation are no longer the result of a national legislative process, because their elaboration and their application is to be fulfilled within a framework of continuous exchange that transcends the territorial boundaries of the State.