DE GRUYTER OPEN
International Conference KNOWLEDGE-BASED ORGANIZATION
Vol. XXIII No 2 2017

NATIONAL LAW OR EU LAW

Georgi MIHAYLOV

"Neofit Rilski" South-West University Blagoevgrad, Bulgaria
mihaylov@law.swu.bg

Abstract: *The article examines cases of conflict between the national law of the EU Member States and European Union Law. There is an analysis of the legal advantage of EU law over national law or vice versa. Conclusions have been drawn that the national law should maintain its advantage when the reason for it is contained in the Constitution of the respective state.*

Keywords: European legislation; national law and EU law; a conflict between domestic and international law; the Constitution as a criterion for legal force.

1. Introduction

In recent years the European community has faced many challenges and problems that shake the unity of the Community and individual Member States. While the causes of the difficulties are of economic, migration or other social character, the problems always have the relevant legal dimension. Due to the nature of the legal regulatory system, what is factual always finds its legal expression.

In the field of law the fundamental issues that create problems and pose a challenge to the European Community are related to the ratio and the conflict between the law of national Member States and EU law. In recent years, filled with difficulties as the immigration problem and the financial crisis, the imbalance in the ratio national law and EU law stands out even brighter. Some Member States refuse to apply and comply with the developement of its legislation with the regulations and EU directives. As a result, for many years the UK has refused to replace their national currency with the common European one, adopted a number of restrictions on the rights and social status of immigrants from the EU Member States (which are mainly from Bulgaria and Romania) and finally in 2016 launched a crucial step in a referendum on leaving the EU. Another example of conflict with the European policy and legislation are the actions of the Visegrad Four countries that undertake completely different actions to solve the problem of migrants from those laid down in EU regulations and directives. An analysis of the criminal policy of the EU MS also shows that in this area of law there are many contradictions between different countries and the penalties they apply. Empirical studies show that a neoliberal country like the Great Britain has a higher percentage of sentenced to prison and jail compared to conservative countries such as Germany and France. The last place of this criterion belongs to social democratic countries like Sweden and Finland[1]. These indicators show that the neoliberal countries have to apply punitive measures much more often and much harsher against the perpetrators of criminal acts than countries with a different type of socio-political government.

The examples that have been pointed out and many other current and upcoming ones

DOI: 10.1515/kbo-2017-0111

suggest clarifying the legal and theoretical issue, which is in the basis of the problem raised, namely: What is the relationship between the national law of the Member States and EU law when they are in conflict?

2. EU Law

To answer this question, we first need to clarify the status of EU law. Some writers and politicians consider the EU law as part of the national law of the Member States, not as international law. In this sense, Dmitry Medvedev in his capacity as Prime Minister of the Russian Federation in 2011 at a meeting with his Slovenian counterpart Alenka Bratušek states that in terms of international law, EU acts constitute national legislation for Member States of the Community. This thesis can not be shared because the EU does not constitute a federation or confederation; it is a union among sovereign states that share common values[2] and economic interests. No Member State has fully deprived itself of their sovereignty while maintaining its state volitional character, being an essential feature of international law[3]. Along this line of thinking, despite the union form of the Community and the delegation of part of the national legislative and enforcement powers of the bodies of the Union, the relations between the Member States remain international. Therefore, the law governing these relations - EU law - is characterized as international law with all its distinguishing features, the main among which is precisely its state volitional character.

Although it is characterized as international, EU law differs from the classic understanding of the international law in that it is not a product of the direct expression of the free will of the individual Member States as separate subjects of international law. Under EU primary law (Treaties, the Single European Act, the Maastricht Treaty, the Amsterdam Treaty, the Nice Treaty, the Treaty of Lisbon) the legislative process is concentrated in the hands of the authorities directly involved in the process of decision-making in the Union - the European Parliament and the Council of the European Union. As part of the institutional structure of the EU[4], they seek to express their interests and will of the states (CEU) and nations (EP) of the EU. Their adopted secondary legislation (regulations, directives and decisions) without the need for additional ratification (by virtue of the membership in the Union) should be consistent and applied in the domestic legislation and enforcement of each Member State. Moreover, regulations and directives should be used with greater legal force than the current national legislation[5]. In the hierarchy of regulations the international ones are positioned as above the law as their legal force puts them between the laws and codes on the one hand and the Constitution as the supreme and fundamental law on another one.

According to the abovementioned positioning all international regulations, including regulations and EU directives should be a priority over the current legislation, which must comply and adapt to them. Logically, however, the question arises: What happens when there is a conflict (directly or indirectly) between EU law (in the form of regulations and directives) and the national constitution of a separate state?

3. National legislation

A similar conflict between the rules of the Union and those of national legislation is becoming more prevalent due to the many problems that arise in the European community and the different ways that different countries choose to resolve them. The immigration problem, the financial crisis affecting mainly southern European countries and the institutional arrangement of a number of other social issues are a serious challenge that the European community has to solve via its law. EU law

in the form of regulations and directives, which the Council and the European Parliament issue, are a means of solving political problems.

The intersection between law and politics, both internationally and on a domestic level, is the legislation[6]. The problem of dominance in conflict between national and EU law is inherently legal, but by being aggravating it acquires political dimensions. This is perhaps one of the reasons many of the political problems that the Union is facing not to be resolved. It is also needed to be justified a legal solution to resolve key political problems.

The delegation of legislative functions in the hands of the European institutions and the adoption of their acts directly operating on the territory of different countries without needing the approval of each legislative act creates tremendous contradictions. The so-called "refusal of sovereignty" by providing a huge legislative power in the hands of the European institutions deprives Member States of full protection. In developing international legal norms by Community institutions there is a lack of equal basis for coordination of individual national interests.

The specific model of direct effect of European law, without the need the separate regulations and directives to be approved by individual states, creates conditions to coerce. International legal relations within the European Community develop based on a subordination level instead of a coordination one, which is characteristic of international law. In this way, those Member States that disagree with the policy of the Community against immigrants or against international trade agreements (such as CETA) remain without an opportunity of their own state volitional statement under European law.

There is about to be a grand clash of legal force of national law against EU law that Member States themselves determine as they transfer along with their EU membership such a huge legislative power in the hands of its institutions. Evidence of the problem is facts such as the failed attempt to create a Constitution for the European Union in 2004 and the increasingly current theme in recent years - "two-speed Europe".

To resolve the problem, it should be coordinated the cooperation between the Member States of the Union in the field of rulemaking. When a provision of the EU law is contrary to the law of a Member State, it should be explicitly sanctioned by the respective state in order to have legal consequences and enjoy an above-law legal force. This way of the international interaction is well-known and functioning in international relations and after the sanctioning by the relevant state, the norm acquires the necessary legitimacy and legal force for a priority over domestic law.

Sanctioning of each regulation or EU directive by each Member State with a view to their legitimate action is absolutely necessary in order to balance the interests and respect the will of each of the 28 member states. Because if the legal order of the Union continues to function in the form of legal dictatorship against the will of the individual member states, it will not be long before more and more countries resist the action of the legal acts of the Union. It is not excluded due to this fundamental question concerning the establishment and the primacy of the EU law over national law, for other Member States (except the UK) to also leave the EU, and eventually the Union could disintegrate.

4. National law or EU law – juridical crisis

The legal crisis that originated from the direct and immediate effect of EU law and the conflict between Community and national law in different countries is a legal shenanigan, which is a risk for the future of the Union. The problems of social, financial and environmental character are

constantly deepening and the best way to resolve their legal solution is by returning the state volitional nature of the rulemaking in the EU.

The EU law cannot prevail and be penalized in national legislation as well as be applied to subjects of law in each Member State when the same thing is contrary to the constitution of the relevant country. The preamble to the Bulgarian Constitution reads "We, the Members of the Seventh Grand National Assembly, in an effort to express the will of the Bulgarian nation ... accept this Constitution." Therefore, if EU law is in contrast with the constitution, it is contrary to the will of the Bulgarian people. The Constitution is the supreme and fundamental law, which means that its legal power is over all other regulations, including international ones, such as the EU law. The role of the nation, whose will is constitutionally objectified, is to create a law to accompany the functioning of the state[7], even in its international relations. Therefore, if EU law conflicts the constitution directly or indirectly, it cannot be accepted and enjoyed with any legal force in the respective Member State.

In direct conflict with the constitutional norms of an individual country sanctioning of the relevant regulation or directive is unthinkable with a view to the rule of the legal force of the constitution, expressing the will of the people. If there are doubts about an indirect conflict with constitutional provisions, EU law should explicitly be ratified by the competent legislative authority of the relevant Member State in order to be institutionalized as an above-law normative act in the national legal system. Indirect conflict with the constitution exists when the European Union Law is contrary to a law or code that builds a concept of an abstractly formulated constitutional provision. The fundamental character of the constitution suggests its abstractly formulated principle regulations to be further developed in the current national legislation. This ensues that in doubts regarding a contradiction with those rules and indirectly with the Constitution, EU law should be analyzed and explicitly sanctioned by the legislative authority of the Member State.

The proposal de lege ferenda to change the rulemaking mechanism in the European Union is radical and concerns a fundamental principle of EU enshrined in its primary law. However, the problem of defending and protecting the national interests of individual Member States is gaining momentum; because what is in the interest of the Germans and the French may be contrary to the interests of citizens of other countries. In view of the relationship rights – interests, a consequence of the controversy can be an unwarranted restriction of rights. And that in turn can be seen as a breach of one of the fundamental obligations of the rule of law to effectively protect the rights of citizens.[8] The differences in interests and attitude of Member States and their citizens to EU legislation are mainly caused by differences in culture, lifestyle, history and psychology of European nations.[9] Therefore, despite being united by uniform economic interests, values, and natural rights, European nations yearn to regain full sovereignty in the field of law through which to highlight and protect the peculiarities of their national identity and interests[10].

5. Conclusion

"It is not possible to adopt international legal standards which will automatically become binding for the subject of international law without its explicit consent."[11] Therefore the EU must reform its fundamental legal principle by giving an opportunity to explicit sanctions of EU legislative acts of individual Member States. Thus EU law will be fully synchronized and in conformity with

national law, according to the government declaration of will of each country.
The alternative to the legislative policy of the European Union is inevitable - change or fail due to its inefficiency and conflict with national law.

References

[1] See Андонова, Г. *Възникване и развитие на престъпността и наказанията в минали и наши дни*, Електронно списание на ПИФ към ЮЗУ „Неофит Рилски“: „Право, политика, администрация“, том 3, брой 3/2016 г.; ISSN: 2367 – 4601, с.5

[2] Stoilova, V., *Intercultural dialogue in the European Union. Shared values and realities*, Profili (Vol. 2), Petrozavodsk State University, ПетрГУ, 2011, pp – 104 – 109.

[3] See Борисов, Орл. *Международно публично право*, С., 2013, с. 41

[4] Белова, Г., *Европейска интеграция*, Сиела, С., 2008, стр. 111 – 112

[5] Regarding the application of regulations and directives in the field of Labour and Insurance Law see Lazarova, N. *Conditions for the Acquisition of the right to compensation under the Bulgarian Legislation and compliance with the terms of Regulation (EC) № 883/ 2004,* "Economic, social and administration to the Knowledge – based organization", "Nicolae Balcescu" Land Forces Academy, Sibiu, 2016, ISBN 978-973-153-246-2; Лазарова, Н. *Приложение на антидискриминационните мерки в българското трудово законодателство съгласно Директива 1999/ 70/ ЕО* – В: Сборник с доклади, изнесени на Международна научна конференция „ООН: Исторически традиции и съвременно право“, УИ „Неофит Рилски“, Благоевград, 2015.

[6] See Михайлов, Г. *Регулаторната оценка като средство за политическа неутралност на правото* – Електронно списание на ПИФ към ЮЗУ „Неофит Рилски“: „Право, политика, администрация“, том 1, брой 2/2014 г.; ISSN: 2367 – 4601

[7] See Колев, Т. *Правото и правата като културен феномен*, С., 2015, с. 43 - 44

[8] Станин, М., *Ограничаване права на гражданите*, ООН: ИСТОРИЧЕСКИ ТРАДИЦИИ И СЪВРЕМЕННО ПРАВО, Сборник доклади, Благоевград, 2015, с.371

[9] GEORGIEVA, G. *"Multilingualism as a Significant Element to European Integration"*, The 21st International Conference The Knowledge-Based Organization 2015, Sibiu. Conference Proceedings 1; Management and Military Sciences: "Nicolae Bălcescu" Land Forces Academy Publishing House, p. 211. ISSN 1843-6722.

[10] As an example we can indicate the different legal regulation of the immunity of the bulgarian's members of the parliament and the members of the European parliament, considering the national traditions. See more in Mircheva, V., *The Immunity of the Members of the European parliament,* In: Europe in two speeds – is it possible?, Reports from International scientific conference, Blagoevgrad, 2012, p.115-123

[11] Борисов, Орл. Международно публично право, С., 2013, с. 42