

The Principle of the Primacy of EU Law: Some Challenges to its Dominance

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Принцип примата права ЕС: некоторые вызовы его доминированию

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Аннотация. В научной статье обсуждаются вопросы, связанные с принципом верховенства права Европейского Союза, рассмотрен вопрос становления этого неписаного принципа посредством решений принятых Судом правосудия Европейского Союза, приведены примеры судебных производств «Ван Генд ен Лоос против Администрации внутренних доходов Нидерландов», «Коста против ЭНЕЛ» и т. д. В статье дано разъяснение значения и сущности принципа верховенства права Европейского Союза, подвергнуты анализу действия и принятые по предложению премьер-министра РП решения Конституционного суда Республики Польша, которыми последняя пытается оспаривать верховенство решений Суда правосудия Европейского Союза и некоторые пункты Учредительных Договоров ЕС. Далее представлены действия Европейской Комиссии по разрешению этой правовой дилеммы и ответ Суда правосудия Европейского Союза с назначением соответствующих санкций по вопросу несоблюдения и невыполнения принятых обеспечительных мер (пени составляет 1.000.000 евро в день). На основе представленного материала автором сделаны соответствующие выводы и подчеркнута важность незыблемости принципа верховенства права Европейского Союза как основного краеугольного камня, на котором держится вся правовая система Европейского Союза.

Ключевые слова. ЕС, СПЕС, ЕСПЧ, ДЕС, ДФЕС, Конституционный суд Польши, Комиссия ЕС.

ԵՄ իրավունքի գերակայության սկզբունքը – որոշ մարտահրավերներ ընդեմ դրա գերակայության Խուդոյան Գարիկ Մ.

ՀՀ ոստիկանության կրթահամալիրի ակադեմիայի

*Վարչական իրավունքի և ոստիկանության վարչական գործունեության ամբիոնի պետ, իրավաբանական
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Ամփոփագիր. Սույն գիտական հոդվածում քննարկվում են Եվրոպական Միության իրավունքի գերակայության սկզբունքի հետ կապված հարցեր, Եվրոպական Միության արդարադատության դատարանի կայացրած որոշումներով այդ չգրված սկզբունքի ձևավորման գործընթացները, բերվում են դատական վարույթների օրինակներ, որոնցից են «Վան Գենդեն den Loos v. Inland Revenue Administration of Netherlands», «Costa v. ENEL» գործերը և այլն: Հոդվածում պարզաբանված է Եվրոպական Միության իրավունքի գերակայության սկզբունքի իմաստը և էությունը, վերլուծվել են Լեհաստանի Հանրապետության վարչապետի առաջարկով Լեհաստանի Հանրապետության Սահմանադրական դատարանի կատարած գործողություններն ու ընդունած որոշումները, որոնցով վերջինս փորձում է վիճարկել Եվրոպական միության Արդարադատության դատարանի որոշումների և ԵՄ Հիմնադիր Պայմանագրերի որոշ դրույթների գերակայության հարցը: Այնուհետ ներկայացված են Եվրոպական Հանձնաժողովի կողմից այս իրավական երկրներանքի լուծման համատեքստում ընդունված քայլերը և Եվրոպական Միության Արդարադատության դատարանի պատասխանը՝ ընդունված միջանկյալ միջոցները չկատարելու համար համապատասխան պատժամիջոցների սահմանման վերաբերյալ (տուգանքը՝ օրական 1,000,000 եվրո): Ներկայացված նյութի հիման վրա հեղինակը անում է համապատասխան եզրակացություններ և կարևորում Եվրոպական Միության իրավունքի գերակայության սկզբունքի անձեռնմխելիությունը՝ որպես հիմնական անկյունաքար, որի վրա հենվում է Եվրոպական միության ողջ իրավական համակարգը:

Հանգուցաբառեր՝ ԵՄ, ՄԻԵԴ, ԵՄԱԴ, ԵՄՊ, ԵՄԳՊ, Լեհաստանի Սահմանադրական դատարան, ԵՄ հանձնաժողով:

In the modern world public authorities are trying to implement the concept of rule of law at the same time realizing the typical standards of a democratic society. The European Union is not devoid of these processes either, and moreover, in line with democratic standards. EU within the framework of the global legal system was able to turn the rule of law and the fundamental principle of the primacy of EU law¹ into an exemplary form of law enforcement. In different legal systems legal norms have different legal force and subordination. Concerning EU legal framework it's clear that to avoid various legal collisions and problems in own legal system, the EU fixed a clear hierarchy of legal norms² [1]. In this context, the fundamental principle of the primacy of EU law plays a key role among all kinds of EU legal regulations. Nevertheless, in the EU legal system itself, even taking into account all these regulations, there is a certain paradox of deliberate denial of the principle of primacy of EU law by the certain EU member countries³. In order to reveal the essence of the principle of the supremacy or primacy of EU law, and to understand the reason of these kinds of contradictions, first of all, it is suggested to refer briefly to the judicial precedents due to which this principle was established, and then discuss the problem we are interested in.

In the world order emerging after the Second World War, both Constitutional legal regulations of European countries and international treaties needed new legal frameworks with the newest approaches.

The principle of the primacy of EU law is not enshrined in the EU treaties, it has developed over time by means of the case law (jurisprudence) of the Court of Justice of the European Union (hereafter

CJEU or "the Court"). And the first CJEU (at the time ECJ) act initiated the primacy of EU law was the case C-26/62 *Van Gend en Loos v Administratie der Belastingen*, in which Court has declared: "*I. Article 12 of the Treaty establishing the European Economic Community produces direct effects and creates individual rights which national courts must protect.*" [2; 16; 17]. Ipso facto, what the Court declared meant that the laws adopted by European institutions must be integrated into the legal systems of EU countries, which are obliged to comply with them. EU law therefore has primacy over national laws.

The next significant steps in the matter of becoming a legal basis for primacy of EU law were a gradually adopted judicial decisions (cases) in which the Court affirmed the primacy of European law: Case 6/64 *Flaminio Costa v E.N.E.L.* [3], Case 11/70 *Internationale Handelsgesellschaft mbH v Einfuhr - und Vorratsstelle für Getreide und Futtermittel* [4], Case 106/77 *Amministrazione delle Finanze dello Stato v Simmenthal SpA* [5], Case C-106/89 *Marleasing SA v La Comercial Internacional de Alimentacion SA* [6], Case 51/83 *Commission of the European Communities v Italian Republic* [7].

Thereby the evolution of judicial cases is reduced to the following: the Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields and the subjects of which comprise not only member states but also their nationals [16; 17]; the Court clarified that the primacy of EU law must be applied to all national acts, whether they were adopted before or after the EU act in question. EU norms prevail even over the Union member countries' constitutional norms (in case of relevant acts, they should be necessarily incorporated into national law), and in cases of conflict between these norms, national courts (later also public authorities) should give preference to EU norms, and at the same time take the necessary actions to eliminate contradictions in national norms. Thus, EU law becoming superior to national law, the principle of primacy therefore seeks to ensure that citizens are uniformly protected by an EU law across all EU territories.

In the context of the subject discussed one can give a new example where the rule of law of the EU is questioned. So, contrary to the principle of primacy of EU law, Poland's Constitutional Court judgment of October 7, 2021 (case K 3/21) found various articles of the Treaty on European Union (TEU) unconstitutional. On March 2, 2021, CJEU ruled on a request for a preliminary ruling from the Judicial Administrative Chamber of Poland's Supreme Court (case C-824/18) on the interpretation

¹ The principle of the primacy of EU law is based on the idea that where a conflict arises between an aspect of EU law and an aspect of law in an EU country (national law), EU law will prevail. If this were not to be the case, EU countries could simply allow their national laws to take precedence over primary or secondary EU legislation, and the pursuit of EU policies would become unworkable.

² The hierarchy of EU law is based on primary legislation and secondary legislation. In his turn the Primary legislation is made up of: the EU Treaties, which are binding agreements between EU member countries, the Charter of Fundamental Rights (since the Treaty of Lisbon), general principles established by the Court of Justice of the European Union. Secondary legislation comprises all the acts adopted by the EU institutions which enable the EU to exercise its powers: regulations, directives, decisions, recommendations, and opinions. Finally, International agreements with non-EU countries or with international organisations are an integral part of EU law. These agreements are separate from primary law and secondary legislation and form a sui generis category.

³ German Constitutional Court ruled against a CJEU judgment, as well as the Czech and Romanian constitutional courts in 2006 and 2021, respectively.

of Article 267 of the Treaty on the Functioning of the European Union (TFEU) and Articles 4(3) and 19(1) of the Treaty on European Union⁴. In response to this Poland's Prime Minister challenged the CJEU's judgment and submitted a written request to Poland's Constitutional Court for it to rule on (i) the compatibility of EU law with the Polish constitutional order; and (ii) whether Poland's domestic courts were bound by CJEU judgments. He requested the Constitutional Court to determine whether article 1 TEU should be interpreted as enabling or requiring national authorities not to apply the Polish Constitution, or otherwise as requiring national authorities to apply EU provisions contrarily to Poland's Constitution. He, also requested the Constitutional Court to rule on whether (i) a domestic court must apply legal provisions that are contrary to the Polish Constitution, including a provision that has been declared unconstitutional by the Constitutional Court thus becoming ineffective; or (ii) the application of Poland's Constitution must prevail.

On October 7, 2021 Poland's Constitutional Court in his judgment, with 10 votes in favor and 2 against, (i) examined the compatibility of articles 1, 2, 4 (3) and 19 (1) TEU with the Constitution; and (ii) ruled on the matters raised by the PM declared: First, the Constitutional Court found that articles 1 and 4 (3) TEU are "incompatible" with the Polish Constitution, since they allow the EU to overstep the powers transferred by the Republic of Poland under the treaties. Second, the Constitutional Court considered the second paragraph of article 19 (1) "incompatible" with the Constitution because it allows for (i) the disapplication of the Polish Constitution; and (ii) the overturning of Constitutional Court judgments that invalidate EU law provisions. Finally, the Constitutional Court found that articles 19 (1) and (2) TEU were "incompatible" with Poland's Constitution because they allow EU courts to unlawfully invalidate

⁴ On 29 April 2020, the Commission launched an infringement procedure on the law of 20 December 2019 amending a series of legislative acts governing the functioning of the justice system in Poland. On 31 March 2021, the Commission decided to refer Poland to the Court of Justice and asked for interim measures (C-204/21). On 14 July 2021, the Court of Justice imposed interim measures on Poland, granting the request of the Commission on all points. The Court ordered Poland in particular to immediately: Suspend the provisions by which the Disciplinary Chamber of the Supreme Court can decide on requests for the lifting of judicial immunity, as well as on matters of employment, social security and retirement of Supreme Court judges; Suspend the effects of decisions already taken by the Disciplinary Chamber on the lifting of judicial immunity; and Suspend the provisions preventing Polish judges from directly applying EU law protecting judicial independence, and from putting references for preliminary rulings on such questions to the Court of Justice.

Poland's constitutional provisions, and even review the judge appointment process [8; 13; 14].

Also, regarding the November 2019 proceedings (joined cases C 585/18, C 624/18 and C 625/18), the CJEU delivered a judgment on October 27, 2021, ordering Poland to pay a periodic penalty payment of €1,000,000 to the European Commission⁵ (case C-204/21 R Commission v Poland) [10; 11; 13], for not suspending the application of the national provisions on the Supreme Court's Disciplinary Chamber. If Poland does not pay the fine, the EU could withhold Poland's COVID recovery funds for the unpaid amount [8; 9].

Moreover, in this regard the position of European Court of Human Rights (ECHR) it is appropriate to mention. Both Courts converge in emphasizing the importance of appearances in this field as an essential means of preserving the trust which justice in a democratic society governed by the rule of law must inspire in the citizens (see, e. g., *Micallef v. Malta*, 15.10.2009, 17056/06, § 98, recalling that "justice must not only be done, it must also be seen to be done"). Finally, against this background, it comes as no surprise that on the issue of whether a court can be considered as "established by law", the CJEU, in contrast with its approach on the other issues addressed, explicitly relied on Strasbourg case-law (§§ 168, 171). The reason would appear to be that under Article 6 of the Convention too, the answer to this issue can only be given from an institutional perspective, which is much closer to the perspective adopted by the CJEU in the present case. In this connection, see also the recent judgment in the case of *Reczkowicz v. Poland* (22.7.2021, 43447/19) in which, after abundantly referring to the case-law of the CJEU concerning the recent reform of the judiciary in Poland, the ECHR found that the Disciplinary Chamber of the Polish Supreme Court could not be considered a "tribunal established by law" (§ 277) [11; 8].

⁵ In relation to the abovementioned rulings of the Court of Justice of 14 and 15 July 2021, the Commission considers that Poland has failed to take the necessary measures to fully comply with them. On 7 September 2021, the Commission, therefore, took two decisions. First, the Commission decided to request the Court of Justice to impose financial penalties on Poland to ensure compliance with the Court's interim measures order requested under Article 279 TFEU (of 14 July 2021). On 27 October 2021, the Court of Justice imposed €1 million as a daily penalty payment on Poland for as long as the interim measures order of 14 July 2021 has not been fully complied with. Second, the Commission also decided to send a letter of formal notice under Article 260(2) TFEU to Poland, for not taking the necessary measures to comply fully with the judgment of the Court of Justice (of 15 July 2021) finding that Polish law on the disciplinary regime against judges is not compatible with EU law.

On October 27, 2021 at the framework of the above mentioned case C-204/21 R, the Vice-president of the CJEU emphasized that: “a Member State cannot plead provisions, practices or situations prevailing in its domestic legal order to justify failure to observe obligations arising under EU law (judgment of 12 November 2019, *Commission v Ireland (Derrybrien Wind Farm)*, C-261/18, EU:C:2019:955, paragraph 89), and, second, that the obligation of the Member States to comply with EU law is binding on all their authorities, including, for matters within their jurisdiction, the courts (judgment of 4 October 2018, *Commission v France (Advance payment)*, C-416/17, EU:C:2018:811, paragraph 106)⁶” [10; 14].

Of course, it is clear that in the end, if the Polish authorities do not resolve this issue on their own, and if this most serious legal crisis is not possible to resolve in an economic way, then the next step in resolving the issue will most likely be a political approach (for example, depriving Poland of the right to vote in the European Council), and with the continuation of the negative scenario, even the exclusion of Poland from the EU. It can be definitely stated that without the principle of the supremacy of EU law, the existence of the entire EU legal system is put into doubt. In the end, it is necessary to realize that by entering the European family, you become the bearer of its value system and you agree to the originally proposed legal conditions (EU treaty terms. For instance, see article 2 of TEU [15]).

Finally, summing up the above-mentioned, we can state that not being enshrined in the founding treaties of the EU as a fundamental principle, the principle of the EU law primacy is one of the cornerstones of the EU's existence. It was step by step implemented by EUCJ in EU legal system as a principle, adding to the series of unwritten EU legal sources and resolving legal gaps in that field.

All European institutions together and the Member States are responsible under the Treaties for guaranteeing the rule of law as a fundamental value of the Union and making sure that EU law, values and principles are respected. Otherwise, it appears that the primacy of EU law gets pulverized at the highest levels of European politics at the pleasure of highest political actors.

The shaking of the foundations of the principle of primacy of EU law can be seen as an attack on the European community of values and laws as a whole, undermining the primacy of EU law as one of its cornerstone principles in accordance with well-established case-law of the CJEU, expresses

deep concern that this decision could set a dangerous precedent.

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