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THE PRINCIPLE OF PRIMACY OF EUROPEAN UNION LAW: A COMPARATIVE APPROACH IN RELATION TO THE CONSTITUTIONAL LAW OF THE MEMBER STATES OF THE EUROPEAN UNION

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SUMMARY

I. INTRODUCTION, II. THE PRIMACY OF EUROPEAN UNION LAW, III. THE MUTUAL COLLABORATION FOR THE IMPLEMENTATION OF EUROPEAN UNION LAW, IV. CONCLUSIONS, V. PROPOSAL FOR INSTITUTIONALIZATION IN PRIMARY EUROPEAN UNION LAW, VI. BIBLIOGRAPHY.

ABSTRACT

At the supranational level of the European Union legal order, the Principle of Primacy of European Union Law holds a prominent position, as one of the general principles of European Union Law, in relation to the Constitutional Law of the Member States of the European Union. The objective of this scientific research is to scientifically highlight the reasons for the primacy of European Union Law in relation to the national Constitutional Law. The purpose of this scientific research is to cure the non-uniform implementation of Primary and Secondary European Union Law that arises in various affairs of citizens of the European Union by national Authorities in the interpretation of European Union Law. The methodology of writing the scientific research is based on the use of the current Primary European Union Law and the current jurisprudence of the Court of Justice of the European Union in conjunction with the recent scientific theory in the cognitive object of European Union Public Law. Emerges the nature of its Principle of Primacy of European Union Law. For scientific analysis in the research field of Comparative Law, the scientific, modern and external comparative method of the macro-comparison is used. After reading of this scientific research, the readership will own the appropriate scientific tools which scientifically substantiate the primacy of European Union Law in relation to the Constitutional Law of the Member States of the European Union.

KEY WORDS

European Union Public Law, Comparative Law, European Commission, Court of Justice of the European Union, Public Management Science & Legal Science — Public Law.

RESUMEN

En el nivel supranacional del orden legal de la Unión Europea, el Principio de Primacía del Derecho de la Unión Europea ocupa un lugar destacado, como uno de los principios generales del Derecho de la Unión Europea, en relación con el Derecho Constitucional de los Estados Miembros de la Unión Europea. El objetivo del presente estudio científico es poner de relieve científicamente las razones de la primacía del Derecho de la Unión Europea en relación con el Derecho Constitucional nacional. El propósito del presente estudio científico consiste para sanar la aplicación no uniforme del Derecho Primario y Derivado o Secundario de la Unión Europea que surgiendo en diversos casos de ciudadanos de la Unión Europea por parte de las respectivas Autoridades nacionales en la interpretación del Derecho de la Unión Europea. La metodología de redacción del estudio científico está basado en el uso del actual Derecho Primario de la Unión Europea y la jurisprudencia actual del Tribunal de la Unión Europea en conjunción con la teoría científica reciente en cognitivo objetode de Derecho Público de la Unión Europea. Emerge la naturaleza del Principio de Primacía del Derecho de la Unión Europea. Para el análisis científico, en el ámbito de investigación del Derecho Comparado se utiliza el método comparativo científico, moderno y externo de la macrocomparación. Tras fin de lectura del presente estudio científico el público lector será dueño de las herramientas científicas adecuadas que documentan científicamente la prımacía del Derecho de la Unión Europea en relación con el Derecho Constitucional de los Estados Miembros de la Unión Europea.

PALABRAS CLAVE

Derecho Público de la Unión Europea, Derecho Comparado, Comisión Europea, Tribunal de Justicia de la Unión Europea, Ciencia de la Administración Pública & Ciencia Jurídica — Derecho Público.

"The only stable state is the one in which all men are equal before the law"

The School of Athens

Aristotle, Politics

I. INTRODUCTION

The present scientific research cures the issue of primacy of European Union Law in relation to the Constitutional Law of the twenty-seven (27) Member States of the European Union.

The Principle of Primacy of European Union Law is a general principle of European Union Law and has been established at the jurisprudential level by the Court of Justice of the European Communities (CJEC), before the Treaty of Lisbon entered into force where was in force the European Community[1], *Case C-6/64 of 15 July 1964, Costa v E.N.E.L.*[2].

Also, the Principle of Primacy of European Union Law derives from the process of the *European Integration* which the European Union ardently pursues at supranational level in accordance with the preamble to the Treaty on European Union (TEU)[3]. In addition the Principle of Primacy of European Union Law applies to all binding acts of the Primary[4] and Secondary[5] European Union Law[6]. This

1 CRAIG, PAUL. *Development of the EU*. In: Catherine, BARNARD & Steve, PEERS (eds.). *European Union Law*. 3rd edn. Oxford: Oxford University Press, 2020, pp. 14 — 16 and 28 — 30.
2 pp. 593 — 594 (ECLI:EU:C:1964:66).
3 OJEU: C 202/01/7.6.2016.
4 The Primary European Union Law includes the following: i. The Treaty on European Union, ii. The Treaty on the Functioning of the European Union and iii. The Charter of Fundamental Rights of the European Union.
5 The Secondary European Union Law includes the *legal acts*, which are called *legislative* when they are issued by the *ordinary or special legislative procedure* and *non-legislative* when they are issued by *special rules*, produced by the *institutions of the European Union* based on the specific competences assigned to them by the Primary European Union Law. Therefore, the Secondary European Union Law includes the following from the institutions of the European Union: i. The Regulation, ii. The Directive, iii. The Decision, iv. The Recommendations and v. The Opinions (Article 288 of the TFEU).
6 KOLIBIRIS, SOTIRIOS. *The defense of fundamental constitutional rights before the Public Administration in accordance with*

general principle of European Union Law ensures the uniform implementation of European Union Law in the national legal orders (national level) of all the Member States of the European Union.

Even it is important to scientific substantiation the nature of the Principle of Primacy of European Union Law in the supranational level of the European Union.

Finally, for the scientific analysis, one of the scientific methods of analysis of Comparative Law is used and specifically the *scientific, modern and external comparative method of the macro-comparison*[7].

II. THE PRIMACY OF EUROPEAN UNION LAW

It follows from the above that the argument that European Union Law does not take precedence over the Constitutional Law of the Member States of the European Union on the grounds that the Treaty of Lisbon[8] is not a constitutional treaty of the European Union, as the latter was rejected in 2005 with the relevant referenda of France on 29 May 2005 and the Netherlands on 1 June 2005, does not find a solid legal basis in the supranational legal order of the European Union. The reason such an argument does not find a solid legal basis is because the European Union with the institution of the Court of Justice of the European Union (CJEU)[9] has competence to implementation the rule of European Union Law even in the case of a conflict with rules of Constitutional Law of the Member States of the European Union with the examination the *European Commission's Infringement Appeal* in accordance with Articles 258 and 260 of the Treaty on the Functioning of the European Union (TFEU)[10]. This competence of the European Commission derives from the Article 17(1) of the Treaty on European Union. It is noted that the judgments of the Court of Justice of the European Union are enforceables and binding on all the Member States of the European Union[11].

In support of the above, in the case of an competent administrative organ of the German Federal Ministry of the Interior and Community (Bundesministerium des Innern und für Heimat) or French Ministry of the Interior (Ministère de l'Intérieur) in the exercise of its competences issues national arrangement with justification the implementation of national Constitutional Law against the Primary and Secondary European Union Law even in execution of a judgment of the German Federal Constitutional Court (Bundesverfassungsgericht) or French Council of State (Conseil d'État) respectively, after informing the European Commission[12], is legitimized the European Commission after the completion of the administrative procedure[13] with the competent Member

Public Law. Master's Thesis of Specialization (prototype), Athens University of Economics and Business, 2020, pp. 56 — 58 and 60 — 61.

7 KISCHEL, UWE. *Comparative Law*. Oxford: Oxford University Press, 2019, pp. 9 — 10, 28, 30 — 31 and 64 — 65.

8 OJEU: C 306/01/17.12.2007; Also known as the *Reform Treaty*.

9 Which is based in Luxembourg.

10 OJEU: C 202/01/7.6.2016

11 SCHÜTZE, ROBERT. 3rd edn. *European Union Law*. Oxford: Oxford University Press, 2021, pp. 193 — 226.

12 Either *ex officio* or after filing a *complaint with the European Commission*, by electronic sending or by form directly to the European Commission or indirectly to the European Commission's Representations in the countries of the Member States of the European Union, by a citizens of the European Union for affairs that concern them and in which they have a legitimate interest.

13 The administrative procedure includes the *European Commission's Letter of Formal Notice* to the Member State of the European Union in order for the Member State of the European Union within two (2) months to submit their comments to the

State of the European Union to *Infringement Appeal* in accordance with to the Articles 258 and 260 of the Treaty on the Functioning of the European Union before the Court of Justice of the European Union.

In the trial[14], the Court of Justice of the European Union[15] will implement the jurisprudence of the Principle of Primacy of European Union Law in relation to the Constitutional Law of the twenty-seven (27) Member States of the European Union arising from the founding jurisprudence of the Case C-6/64 of 15 July 1964, Costa v E.N.E.L. of the CJEC[16] resulting in being given the Court of Justice of the European Union to judge as inapplicable of the national arrangement based on the Constitutional Law of the Member States of the European Union which opposes the implementation of the rule of Primary and Secondary European Union Law[17].

In addition, it is worth noting that the Principle of Primacy of European Union Law receive of the concept that the rule of European Union Law *cannot be assimilated* from rules of national Constitutional Law but always remains *idiogenic*[18], i.e. only rule of European Union Law. As *idiogenic* and *unassimilated* the rule of European Union Law it primacy over any contrary both prior to or subsequent rule of national Constitutional Law.

Also, the rule of European Union Law is an interpretative criterion of national law for the constitutional legislator, the common legislator, the implementer of substantive and procedural law as well as for the national Authorities. In this context, the necessity of interpreting the rule of national Constitutional Law is included under the spirit of implementation the result sought by the rule of the European Union law.

This scientific theory is based on the theory that the European Union exercises a *uniform organic and regulatory power* within the territory of the European Union and this power was conferred upon to the European Union by all the Member

not implementation of the rule of European Union Law and the *European Commission's Reasoned Opinion* if the Member State of the European Union does not reply to the Letter of Formal Notice or does not give sufficient reasons for the not implementation of the rule of European Union Law, with to which they are formulated the reasons for not implementation of the rule of European Union Law by the Member State of the European Union. The Member State of the European Union then has an additional two (2) months to comply with the European Commission's Reasoned Opinion; CJEU Case C-788/19 of 27 January 2022, European Commission v Kingdom of Spain, paras. 6 — 9 and 48 (ECLI:EU:C:2022:55).

14 The judgment of the Court of Justice of the European Union becomes irrevocable, i.e. it is not subject to national judicial remedies before a national constitutional court (e.g. appeal in cassation).

15 BURCHARDT, DANA. *The relationship between the law of the European Union and the law of its Member States — a norm — based conceptual framework*. European Constitutional Law Review. 2019. Vol. 15, No. 1, pp. 75 — 77. ISSN: 1744—5515.

16 CRAIG, PAUL. *EU Administrative Law*. 3rd edn. Oxford: Oxford University Press, 2018, pp. 280 — 310.

17 CJEU Case C-51/20 of 20 January 2022, European Commission v Hellenic Republic, paras. 1, 19 — 20, 61, 67, 85, 95, 123 and 129 (ECLI:EU:C:2022:36); CJEU Case C-791/19 of 15 July 2021, European Commission v Republic of Poland, paras. 27 — 28, 50 — 51, 58 and 153 (ECLI:EU:C:2021:596).

18 The legal rule that stemming from a *special legal system*, i.e. from an independent source of law and has direct force, implementation and effect (See CJEU Case C-430/21 of 22 February 2022, RS, paras. 47 — 48 "[…] the establishment by the EEC Treaty of the Community's own legal system, accepted by the Member States on a basis of reciprocity, means, as a corollary, that they cannot accord precedence to a unilateral and subsequent measure over that legal system or rely on rules of national law of any kind against the law stemming from the EEC Treaty, without depriving the latter law of its character as Community law and without the legal basis of the Community itself being called into question", 49 — 51, 53 — 55 and 58 "ECLI:EU:C:2022:99").

States of the European Union with the position into force of the Treaties of the European Union, i.e. of Primary European Union Law in force.

Finally, it is noted that the Member States of the European Union have participated in the institutionalization of Primary European Union Law with the adoption of the Treaty of Lisbon to the Lisbon European Council on 13 December 2007, to which it was annexed and the *Declaration No 17* about the primacy of European Union Law against the national Constitutional Law, which includes the Opinion of the Council Legal Service of 22 June 2007 where indicatively in the last subparagraph the following is mentioned: "The fact that the principle of primacy will not be included in the future treaty shall not in any way change the existence of the principle and the existing case-law of the Court of Justice".

III. THE MUTUAL COLLABORATION FOR THE IMPLEMENTATION OF EUROPEAN UNION LAW

More generally, during the scientific interpretation and with the purpose of consolidating the legal culture, it follows that European Union Law excels even in the case of a conflict with rules of Constitutional Law of the Member States of the European Union. From the jurisprudence of the Court of Justice of the European Union it turns out that on the one hand because during to implementation of European Union Law takes into account the respective rules of national Constitutional Law, will must and the rules of national Constitutional Law be harmonized with the rules of European Union Law in order to strengthen the European Union's continuous course towards the realization of the common ultimate target of European Integration and the national Authorities as well as the national courts they should implemented the rules of national Constitutional Law without, however, to be affected the primacy of European Union Law[19].

Also, it is pointed out that on the part of national courts the observance of the interpretation of national Constitutional Law in accordance with European Union Law cannot be considered *contra legem* with justification that it implies a change in the established jurisprudence of national courts on the protection of national Constitutional Law.

It is noted that in the case that national law conflicts with European Union Law, the Authorities of the Member States of the European Union of the should ensure that European Union Law is applied. In this case, the national law is not annulled or repealed, but its validity is suspended[20].

IV. CONCLUSIONS

From the above scientific analysis which was based on the *scientific, modern and external method of the macro-comparison* which is one of the *scientific methods of analysis of Comparative Law*, it is concluded that European Union Law takes precedence over national Constitutional Law and this primacy can be activated with the competence of the Infringement Appeal against a Member State of the European Union before the Court of Justice of the European Union which provide for the Articles 258 and 260 of the Treaty

19 KOLIBIRIS, SOTIRIOS. *The defense of fundamental constitutional rights before the Public Administration in accordance with Public Law*. Master's Thesis of Specialization (prototype), Athens University of Economics and Business, 2020, pp. 61, 63 — 64 and 103.

20 CJEU Case C-205/20 of 8 March 2022, NE v Bezirkshauptmannschaft Hartberg-Fürstenfeld, paras. 35 — 37 (ECLI:EU:C:2022:168); CJEC Case 106/77 of 9 March 1978, Amministrazione delle Finanze dello Stato v Simmenthal, paras. 17 — 18 and 21 — 23

on the Functioning of the European Union in the European Commission.

It is also scientifically concluded that on the basis of the Principle of Primacy of European Union Law in relation to the Constitutional Law of the Member States of the European Union the national Authorities and national courts should ensure when interpreting European Union Law for the uniform implementation of Primary and Secondary European Union Law in various affairs of citizens of the European Union even in the case which is projected by national Authorities and national courts protection issue of national constitutional arrangement, without, however, to be repealed but only to be suspended the arrangement based on national Constitutional Law.

In addition, it was scientifically emerged by the Principle of Primacy of European Union Law the *idiogenic nature* of European Union Law with result that after its incorporation into the national law of the Member States of the European Union it is binding at the same time to the national legislative, executive and judicial Authorities of the Member States of the European Union for its uniform implementation throughout the territory of the European Union, as the latter holds a *uniform organic and regulatory power* within the territory of the European Union.

Finally, from the above *scientific, modern and external macro-comparative analysis*[21] additional it is concluded that in order to achieve the common ultimate objective of European Integration it should be consolidated at both national and supranational level of the European Union mutual collaboration between the national's Authorities and courts and the European Union's Authorities and courts at the implementation of European Union Law in various affairs of citizens of the European Union. This mutual collaboration is consolidated when at the implementation of European Union Law the rules of national Constitutional Law of the Member States of the European Union is considered and when at the implementation of any national constitutional arrangement does not affected the primacy of European Union Law.

V. PROPOSAL FOR INSTITUTIONALIZATION IN PRIMARY EUROPEAN UNION LAW

One (1) proposal is worded at the supranational level of the European Union which needs relevant institutionalization in the Primary European Union Law to the European Commission, which is the institution executive of the European Union that has the legislative initiative[22].

It is proposed for incorporation into the legal order of the European Union the addition of one (1) Article in the Treaty on the Functioning of the European Union[23]. One (1) arrangement is there-

(ECLI:EU:C:1978:49).

21 In the Comparative Law methodology, macro-comparison as a scientific comparative method has as its research object the comparison with legal data of entire legal systems of different legal orders and therefore constitutes an research method of external comparison. Whereas the scientific comparative method of the micro-comparison has as its research object the comparison with legal data of specıal legal systems, i.e. specific legal rules of the same legal order and therefore constitutes an research method of internal comparison. In addition, when the two (2) types of comparative method use current legal systems for comparison, i.e. current law, then the comparative method concerns legal comparison and is characterized as modern.

22 WALLACE, HELEN & REH, CHRISTINE. *An Institutional Anatomy and Five Policy Modes* In: Helen, WALLACE et al. (eds.). *Policy — Making in the European Union*. 8th edn. Oxford: Oxford University Press, 2020, pp. 68 — 74.

23 In accordance with to the Ordinary Review Procedure of the Treaties of Article 48(1) — (4) of the Treaty on European Union, which article presupposes the ratification of the amendment of the Treaty on the Functioning of the European Union by all the

fore proposed in order when in the trial before the national courts at the request of a citizen of the European Union who has a legitimate interest for the implementation a rule of European Union Law through of the *Preliminary Question's Procedure* to the Court of Justice of the European Union in accordance with to the Article 19(3)(b) of the Treaty on European Union in conjunction with the Article 267 of the Treaty on the Functioning of the European Union[24], all the national courts reject the reference to the Court of Justice of the European Union for a *Preliminary Ruling*, after the exhaustion of the judicial remedies before the national courts, to be provided the typically admissibility judicial remedy of *Infringement Appeal* before the Court of Justice of the European Union. This *Infringement Appeal* before the Court of Justice of the European Union to be brought by a citizen of the European Union who has a legitimate interest, according to the above, against the Member State of the European Union for the adoption of enforceable judgment.

With this proposal consolidates the *uniform* and *unitary* implementation of Primary and Secondary European Union Law in all areas of action of the European Union sought by all citizens of the European Union on the basis of the Principle of the Rule of Law, which constitutes a general principle of European Union Law and at the same time one of the *values* of the European Union in accordance with the Article 2 of the Treaty on European Union.

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Member States of the European Union in their national legal order in accordance with the respective national ratification measures of the Primary European Union Law.

24 KOLIBIRIS, SOTIRIOS. *The defense of fundamental constitutional rights before the Public Administration in accordance with Public Law*. Master's Thesis of Specialization (prototype), Athens University of Economics and Business, 2020, pp. 59 — 60.