Principles and Values of the European Union as a Legal Basis for European Integration

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Summary: The article is devoted to the analysis of the legal nature of principles and values of the European Union, their ethimology and genesis, as well as their place and role in the legal order of the EU. One can argue that in the contemporary legal order of the European Union principles and norms that are enshrined in the founding documents of the European Union, stipulate the founding basics of the legal system of the EU. Besides, they execute the regulatory function in the relations between an individual and society. It is pointed out in the work, that principles and values appeared in the European Union law not at the same time. If principles were fixed in the first founding treaties when they were concluded, then the provisions on values were included in the founding treaties only recently that is in the latest Lisbon edition of 2007. It is underlined that the infringement by an EU Member State of values may result into imposing of sanctions against the infringer. However, EU principles and values acquire the particular importance in the course of the conclusion of international agreements with the third countries. With this regard the provisions of the Association agreement between Ukraine and the European Union and its Member States. Special attention is paid in the article to the investigation of the legal mechanism of the implementation of the EU-Ukraine Association agreement in the legal order of Ukraine as well ae the effect of principles and values on the process of legal reforms in Ukraine.

Keywords: principles – values – Constitution of Ukraine – EU law – Association Treaty – implementation – legal mechanism

1. Introduction

The European Union is a constitutional entity based on the principles and the determined values, which constitute a legal basis for the EU legal order. The EU

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principles and values are enshrined in the Treaty on the European Union[1] as well as specified in the EU Fundamental Rights Charter and have internal and external dimensions. The Association agreement between the EU and Ukraine, as many other EU international agreements, contains EU principles and values.[2] By means of the conclusion of the association agreements the EU law extends its effect on the internal legislation of the associated countries. Thus the EU principles and values become an integral part of the national legislation of third states. In this connection, the study of the peculiarities of the Association of Ukraine with the EU becomes topical for Ukrainian science of European law. Unfortunately, the legal problem of influence of the EU law on the nature and content of the association agreements, which creates preconditions for expansion of the Union acquis in the internal legal order of third countries, has not given sufficient attention in the Ukrainian and foreign literature on European law. The study of these issues is the actual problem of modern science of international and European law and its solution will be of considerable practical importance for Ukraine.

2. The Significance of Principles and Values in the European Union legal order

The European Union law is a separate legal order the legal bases of which is formed by the principles and values. The principles and values can be treated as a kind of a 'grund norm', the foundation of the whole EU legal system. However, these phenomena are not the same. As not the same is their role in the EU legal order.

In terms of etimology a principle (principum) means the main source, initial, guideline for the EU activities. Values are some phenomena of social consciousness in the form of the notions of good and evil, justice, moral considerations, principles. With the help of values people give an assessment of the phenomena of reality, require their implementation. Thus, values exercise regulatory functions in relation to an individual and society. Values designate moral and ethical aspect of a legal phenomenon. Where did these principles and values come from? Most of them found their consolidation in the national constitutions of European states.

[1] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007 // Official Journal of the European Union, 2007/C 306/01, vol. 50.

[2] Association Agreement between the European Union and its Member States, of the one Part, and Ukraine, of the other Part // Official Journal of the European Union, 2014/ L 161/3, vol. 57.

Before that, they were formed in the era of enlightenment and were politically declared during the Great French Revolution. After the Second World War, the establishment of democratic values and, along with it, the development of civil society, its institutions in the states of Western Europe gained a special weight. Similar constitutional foundations for democratic values and human rights and freedoms have been and continue to be characteristic of the European states of developed democracy.

In the European Communities the provisions on the protection of human rights were included in the founding treaties in the process of democratization of the EC. In the preamble to the Single European Act the Member States expressed their determination to work together to promote democracy on the basis of fundamental rights.

In Article F (2) of the Maastricht Treaty the Member States made commitments to respecting fundamental rights, as guaranteed by the European Human Rights Convention and the constitutional traditions common to the Member States. This is confirmed by the Treaty on the European Union (TEU), which states that the fundamental rights guaranteed by the European Convention on the Protection of Human Rights and Fundamental Freedoms and provided for by constitutional traditions common to all member states form the general principles of the law of the Union (Article 6).

For the first time common values were added to the principles and were enshrined in the Lisbon treaties on the European Union. The principles and values of the European Union pose the highest position in the hierarchy of the sources of the EU law. Many of them then are fixed in international agreements between the European Union and the third countries. Very often the EU agreements on cooperation with third countries contain provisions concerning the requirement to respect human rights and democracy in these countries (so-called essential element of international agreements – Bulgarian formula).[3] In addition to the principles democracy and human rights the respect for the principles of market economy is also related to the essential elements of cooperation agreements.

The aim of consolidating and support democracy, the rule of law, human rights and the principles of international law is included in Article 21(2) of the Treaty on European Union among the key objectives that define the Union's common policies and actions.

The most important is art. 2 of the Treaty on European Union It states: The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of

[3] INGLIS, K. The Europe Agreements Compared in the Light of their Pre-accession Reorganization. *Common Market Law Review*, 2000, vol. 37, no. 5, p. 1191.

persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

In the European Union the violation of the values by a Member State may result in the imposition of sanctions upon it in the form of suspension of certain of the rights deriving from the application of the Treaties to the Member State in question, including the voting rights of the representative of the government of that Member State in the Council (Article 7 TEU).

However, it should be borne in mind that the practical realization of all those principles and values substantially depends on their interpretation of each of these by the states. The Member States may have different standards concerning national values and fundamental rights. At the same time, those distinctions should not influence on the efficiency of their realization.[4]

To prevent possible differences regarding the interpretation of these principles and values political dialogue has been established within the framework of the majority of the EU agreements on cooperation.

In the EU the Court of Justice has accumulated extensive practice concerning interpretation and realization of the principles and common values. It concerns primarily democracy, rule of law, human rights, equality.

While speaking about democracy in the EU and its Member-States one should bear in mind that in both cases the content of it is different. So that it is not correct to compare the European democracy to a national democracy, even though the EU democracy draws aspiration from national democracies in the member-states.

The EU is not a state nor is a traditional international organization. It is a sui generis entity which differs from a state and from an international institution. At the same time the EU has many features of a state but for sovereignty. It allows us to conclude that democracy as phenomenon can be attributed to the EU. We can call it *"supranational democracy"*.[5] The same applies *mutatis mutandis* to other EU common values.

The national and supranational democracies are interconnected and dependent on each other. For instance, it is impossible for non-democratic states to form a democratic union. On the other hand, supranational democracy is not all sufficient. It supplements national democracies and at the same time in some clearly designated cases can even intervene and make corrections to its functioning in the member-states. The member-states have endowed the EU with limited powers

[4] SHUIBHER, N. Margins appreciation: national values, fundamental rights and EC free movement law. *European Law Review*, 2009. vol. 32, no. 2, p. 254.

[5] ARNOLD, R. Anthropocentric Constitutionalism in the European Union: Some Reflections. ŠIŠKOVÁ, N. (ed.). *The European Union – what is next? A Legal analysis and the political visions on the future of the union.* Köln: Wolters Kluwer Deutschland, 2018, pp. 117–118.

for this. The Court of Justice of the European Union (CJEU) strives to place national and supranational democracies in a mutually reinforcing relationship.

Beyond this sui generis political power, the European Union also has a singular institutional scheme which is, despite the similarities to national-level counterparts, different from the typical national-level system. For instance, it is impossible to compare the Commission to a government since the executive power in the EU is shared with the European Council and the Council of the EU. The same applies to the Council. The European Parliament has much limited legislative powers than national Parliaments etc.

The CJEU has understood the principle of democracy in a way which is based on two sources of democratic legitimacy at EU level, namely the Member States and the peoples of Europe.

At the very beginning of its functioning the EU suffered from so-called "democratic deficit", since almost all powers were concentrated in the executive institutions – Commission and Council. At that time the present European Parliament was called the Assembly, which has only consulting powers in legislative process. What is more, the provisions of the founding treaties did not contain any references to the democracy and rule of law.

However, step by step the situation with the democratic deficit in the EU radically changed. The EU Court of Justice was the mastermind of those changes. The crucial role was played by the CJEU, as an institution of the EU which is not bound by the political constraints that limit the action of the European Commission. The decisions of the CJEU covers the whole spectrum of democracy on the supranational and national levels.

The effect of the Case Van *Gend en Loos*[6] was to give the Community law to the people taking it out of the hands of politicians and bureaucrats. Of all the Court's democratising achievements none can rank so highly in practical terms. Moreover, the Court recognised in Van *Gend en Loos* that the two aspects of democratic legitimacy – namely, the right of the people to participate in the law-making function through representative bodies and the ability of individuals to vindicate their rights in judicial proceedings – are intimately linked: one of the reasons given for upholding direct effect was that 'the nationals of the States brought together in the Community are called upon to cooperate in the functioning of this Community through the intermediary of the European Parliament and the Economic and Social Committee.

In the Case Roquette *Freres*[7] the EU Court of Justice came to the conclusion that the consultation provided for in the Treaty is the means which allows the

[6] Case 26/62, Van Gend en Loos [1963] ECR 1.

[7] Case 138/79, Roquette Freres v Council [I980] ECR 3333.

Parliament to play a part in the legislative process of the Community. Such power represents an essential factor in the institutional balance intended by the Treaty. Although limited, it reflects at Community level the fundamental democratic principle that the people should take part in the exercise of power through the intermediary of a representative assembly. Due consultation of the Parliament therefore constitutes an essential [procedural requirement] disregard of which means that the measure concerned is void.'

In the 'Chernobyl case (Case *Parliament* v *Council*)[8] the Court held that, in order to maintain the institutional equilibrium created by the Treaty as amended by the Single European Act, the Parliament should be able to safeguard its newly won prerogatives and therefore have standing to commence proceedings against acts of the Council and Commission.

In its decision in the Case Associação Sindical dos Juízes Portugueses v Tribunal de Contas[9] the ECJ has affirmed that judicial independence (i.e., judges' responsibility to deliver justice independently, making impartial decisions based solely on fact and law) is a fundamental principle that has to be safeguarded all over the Union.

However, for the recent time the EU faces the problem of providing protection of the principle of Rule of Law on the Member States level. What is striking is that the with the protection of the Rule of Law has arisen in the countries that have joined the EU in the different times and have their own history of democratic development – Austria, Hungary, Poland – to name the most prominent examples. To avoid such problem, the EU has invented a legal mechanism for the protection of the Rule of Law in its Member States which includes political and legal instruments.

Article 7, which was enshrined in the Amsterdam Treaty on the European Community contains 3 three-stages procedures for providing sanctions against the Member State that breaches the Rule of Law. So, the Council, acting by a qualified majority, may decide to suspend certain of the rights deriving from the application of the Treaties to the Member State in question, including the voting rights of the representative of the government of that Member State in the Council. In doing so, the Council shall take into account the possible consequences of such a suspension on the rights and obligations of natural and legal persons.

This mechanism was partly used in attempt to resolve the Haider case[10] in Austria and Polish judicial reform case.[11]

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8 Case C-70/88, Parliament v Council [I990] ECR 1-2041.

9 Case C64/16, Associação Sindical dos Juízes Portugueses v Tribunal de Contas. Judgment of the Court (Grand Chamber) of 27 February 2018.

10 ŠIŠKOVÁ, N. European Union's legal instruments to strengthen the rule of law, their actual reflections and future prospects. ŠIŠKOVÁ, N. (ed.). *The European Union – what is next? A Legal analysis and the political visions on the future of the union.* Köln: Wolters Kluwer Deutschland, 2018, p. 157.

11 Ibidem.

In practice this mechanism has proved to be not very efficient, although some positive steps have been made to alleviate the crises.

In case of Austria the crisis was resolved by the formation of the ad hoc Committee of the Tree Wise Man, who reported that common values in Austria are respected. This mechanism was partially improved after the Nice conference by lowering the threshold for triggering the procedures of the application of sanctions against the Member State offender.

In case of Poland the crisis has been resolved in 2018 when a new legislation was adopted that alleviated some Commission`s concerns about the Justice Ministry`s ability to fire the heads of Courts without consultations, the equal retirement age for male and female judges, the publication of three Constitutional Court rulings from 2016 blocked by the Government). Under the Commission opinion, although, the progress reached is not satisfactory.

The EU Court of Justice with the involvement of the Commission turned out to be more efficient legal instruments for the protection of the rule of law. It was clearly proved in case of Hungary. The Hungarian Government also, as Poland, carried out Constitutional reform to consolidate its power at the expense of other branches of government. By carrying out this reform the common European values enshrined in the Article 2 of the TEU have been breached (rule of law, democracy, equality, respect for human rights etc.).

At that time the Member States were reluctant to use Article 7 for making Hungary to comply with the common values. The Commission brought the matter before the EU Court of Justice after the Commission found out that Hungary failed to fulfil its obligations under the EU law Directive 2000/78 on processing of personal data and on free movement of such data[12] and Directive 96/46 on the protection of individuals with regard to the establishing a general framework for equal treatment in employment and occupation[13]. So, there was not the case concerning the violation of article 2 of the TEU. In both cases rule of law was partially protected in linkage to the norms of the EU secondary legislation. It seemed that the Commission and the EU Court of Justice were not willing to initiate procedure for the alleged breach of the rule of law, since they were afraid that the protection of individual rights and independence of judicial power are the constitutional principles that are beyond the scope of the EU law. Instead they have chosen the simplest solution possible and the Commission brought the case before the Court on the bases of article 258 of the TFEU according to which in case when the Commission considers that a Member State has failed to

[12] Directive 2000/78 on processing of personal data and on free movement of such data. OJ. L303/16.

[13] Directive 96/46 on the protection of individuals with regard to the establishing a general framework for equal treatment in employment and occupation (No longer in force).

fulfil an obligation under the Treaties, it may bring the matter before the Court of Justice of the European Union[14].

The situation has not change afterword. Now the European Parliament endorsed the draft of the new regulation, according to which the Member States that threaten the Rule of Law, that is the governments of which are imputed in interference with the judicial system, corruption, fraud etc. will be deprived from access to EU funds.

The adoption of such a regulation may result in the broader application of article 263 for judicial protection of the Rule of Law in the Member States[15].

In our opinion, however, this protection will be a fragmentary one as in case of the infringement by Hungary of two directives.

The EU Court of Justice developed the Rule of law concept at the EU level. In the Case Parti écologiste "Les Verts" v European Parliament [16] the EU Court of Justice stated that the Community is based on the Rule of Law, "inasmach as neither its Member States nor its Institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty. Herewith, the EU Court of justice recognized that the EC Treaty is an EC Constitution and it should be judicially protected as well as the common values enshrined in it. That is, the Rule of law connotes judicial review of the EU legislation.

The EU Court of Justice also develops jurisprudence in the field of fundamental rights. In the area of the protection of human rights the EU Court of Justice relies on the catalogue of fundamental rights by reference to which the Court reviews the legality of the Community's legislative and administrative acts. The Court's case law on fundamental rights is founded on the constitutional traditions of the Member States, natural law and the common legal heritage of western civilisation.

In the early stages of its evolution the European Community did not pay much attention to human rights. It was believed that such issues were outside the goals of economic integration and that the list of human rights should thus not be included in the founding treaties of the European Community. Furthermore, in the decisions of the Court of Justice in the Case Friedrich Stork & Cie v High Authority of the European Coal and Steel Community,[17] the provisions of

[14] ŠIŠKOVÁ, N. European Union's legal instruments to strengthen the rule of law, their actual reflections and future prospects. ŠIŠKOVÁ, N. (ed.). *The European Union–what is next? A Legal analysis and the political visions on the future of the union.* Köln: Wolters Kluwer Deutschland, 2018, p. 157.

[15] Member states jeopardising the rule of law will risk losing EU funds. European Parliament. Press Releases. Plenary session 17-01-2019.

[16] Case 294/83, Parti écologiste "Les Verts" v European Parliament [1986] ECR 01339.

[17] Case 1/58, Friedrich Stork & Cie v High Authority of the European Coal and Steel Community [1958] 36–38, 40.

the EU law were interpreted as having primacy over the provisions of national constitutions of the Member States regarding human rights and freedoms. This caused fear on the part of EU institutions that Member States might be required to bring the provisions of EU law in accordance with their domestic law for the protection of human rights.

This achievement which was initiated by the CJEU with its judgment and has continued step by step to the present day, is one of the greatest contributions that the CJEU has made to democratic legitimacy in the European Union.

For the first time, principles of human rights law in the European Communities were recognized by the EU Court of Justice in the Case Stauder v City of Ulm[18]. In this case, a German citizen protested that his fundamental right to human dignity, protected by Article 1 of the German Grundgesetz (the German Constitution) was being infringed by having his name on his coupon when claiming reduced-price butter by the Community. The Court of Justice held that the Commission's decision in 1969 that had given the Member States permission to establish preferential prices for certain categories of the population, did not contain anything that could violate the basic human rights protected by the Court of Justice and enshrined in the general principles of Community law. So there was no infringement of fundamental human rights by the EU institutions. The activities of the national authority to amend its legislation according to the provisions of the adequate Community law were the reasons for violation. The requirement to indicate personal data on the coupon, which violated human rights, was not necessary. Thus, the concept of basic human rights was in this instance recognized as a general principle of European Community law for the first time.

In the Case Internationale Handelsgesellschaft[19] which dealt with the introduction of licenses for the export of agricultural products within the common agricultural policy, the Court of Justice held that fundamental human rights are part of the constitutional principles common to the Member States of the European Community. The Court of Justice was therefore supposed to protect basic human rights by applying the relevant provisions of the constitution and international agreements on human rights to which both the Member States were party. In this case, the Court of Justice decided that it should protect fundamental rights, taking into account the basic principles of the Community. Protection of these rights, in accordance with the common constitutional traditions of the Member States, should be provided within the structure and goals of the European Communities. The Court of Justice further stated that the source of the validity of the concept of human rights was the legal framework of the European Communities. In such

[18] Case 29/69, Stauder v City of Ulm [1970] ECR 419.

[19] Case 11/70, Internationale Handelsgesellschaft [1972] ECR 1125.

instances, the Court of Justice should apply national constitutions and international treaties of the Member States relating to the protection of human rights, not as the source of European Community law, but as the source of cognition of law to educe the fundamental rights taking into account interests of Communities.

In the Case National Panasonic v Commission of the European Communities[20], the Court of Justice held that although the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 was not the part of the EU legal order, its provisions should nevertheless be implemented. Therefore, any measures adopted within the EU would not be valid if they were contrary to the provisions of the Convention. So by virtue of the practice of the Court of Justice human rights were attributed to the general principles of European Community law.

The principle of equality is interpreted by the CJEU in close connection with the protection of human rights. In the decisions CJEU proceeds from the priority of the EU principles and common values, including the principle of equality, over national legislation.[21] At the same time, in its practice the CJEU shows respect for the constitutional traditions of the Member States.[22]

For Ukraine such EUCJ practice is of utmost importance since it clarifies many things with which such a young democracy as Ukraine constantly faces in the process of it development.

3. Legal grounds for the implementation of the Association Agreement in Ukraine

The implementation of any international agreements, including the AA, depends to a great extent on the approaches in the particular state to the correlation between international and municipal law. The policy of integrating Ukraine into the European Union, pursued since Ukraine acquired independence, generated the need to crate in the domestic legal order respective legal prescriptions for the effectuation thereof. Although Ukraine is not a candidate for joining the integration structures of the European Union, the state has already established deep and comprehensive legal ties with the European Union by the Association Agreement and new legal instruments are being added to the Association Agreement

[20] Case 136 /79, National Panasonic v Commission of the European Communities [1980] ECR 2033.

[21] Case 43/75, Defrenne v Société Anonyme Belge de Navigation Aerienne. (SABENA) [1976] ECR 455.

[22] Case 36/02, Omega Spielhalten- und Automatenaufstellungs-GmbH v. Oberbürgermeisterin der Bundesstadt Bonn ECR I-9609.

to regulate the relations of the parties. The development of integration relations with the European Union requires of Ukraine the creation of a legal base for regulating cooperation with the European Union.

The legal prerequisites for realization of the provisions of the law of the European Union within the legal order of Ukraine are created by the Constitution of Ukraine and other legislative acts adopted during the existence of the independent Ukrainian State in which fundamental principles have been established of the operation of norms of international law in its domestic legal order; these have significance in principle for the fulfillment of the Association Agreement.

According to the 1996 Constitution of Ukraine (Article 9), international treaties duly ratified by the Supreme Rada of Ukraine become part of the national legislation of Ukraine.[23] Norms of international treaties approved by the Supreme Rada acquire the status of norms of national law by means of bringing this constitutional mechanism into operation. This means that Article 9 of the Constitution of Ukraine establishes the legal basis for the respective application of norms of international treaties in the national legal order of Ukraine. However, Article 9 of the Constitution formally did not determine the absolute priority of norms of international law relative to norms of national law. The question arises in this connection: do the provisions of Article 9 affect international treaties ratified before the entry of the Constitution into force?

Article 18 of the Constitution of Ukraine, which provides that Ukraine shall be guided in its foreign policy activity by generally-recognized principles and norms of international law, also does not resolve the problem of the primacy of international law: on one hand this provision contains a clear reference to the priority of international-legal norms; on the other, this priority concerns only generally-recognized principles and norms of international law. Thus, a certain contradiction exists between Articles 9 and 18 of the Constitution: the first does not contain a provision on the incorporation of generally-recognized principles and norms of international law in the domestic legal order of Ukraine. The inadequacy of this constitutional mechanism is that neither the Constitution of Ukraine nor other legislative acts say anything about customary norms of international law or acts of intergovernmental organizations; that is, do not determine their status in the domestic legal order, although the significance of these acts in the legal regulation of international relations is constantly growing and cannot be ignored by the international legal practice of any State.

Endowing international treaties with the status of norms of national legislation causes numerous problems connected with the application of these norms into the domestic legal order of Ukraine. One of them, in particular, may arise

[23] Herald of the Supreme Rada of Ukraine, 1996, no. 30, item 141.

in connection with granting norms of international treaties the status of national norms: the adoption of a national norms of law which is contrary to obligations assumed that entails the suspension of the fulfillment of particular treaty provisions and, consequently, may be a violation of international legal obligations. All countries adhering to a dualist approach to the correlation of international and domestic law, including the members of the European Union, encounter this problem in practice. In order to resolve the question of the operation of norms of European Union law in their national legal orders, as European integration law requires, the great majority of these countries have been forced to insert in their constitutions respective changes establishing the priority of European Union law with respect to norms of international law.[24] Such international legal practice is extensively applied in countries applying to join the European integration structures.[25]

As noted above, granting norms of international law the status of norms of domestic law creates the legal foundation for the direct application of such norms in the domestic legal order of Ukraine. This legal approach may be regarded as *de facto* monism in resolving problems of the interaction of international law with domestic law, on condition of the existence in the country of a stable tradition of the direct application of norms of international treaties in the domestic legal order with the granting of priority significance to such norms relative to norms of national law which are adopted after their ratification.[26]

Such a tradition did not exist in Ukraine previously because the doctrine and practice of the USSR excluded the direct operation of norms of international law in the domestic legal order of the country. This position existed despite the incorporation in the fundamental legislative acts of the USSR providing that if an international treaty or international agreement in which the USSR or a union republic takes part establishes other rules than those which are contained in Union legislation or union republic legislation regulating the determined sphere of legal relations, the rules of the international treaty or international agreement apply (Article 129, Fundamental Principles of Legislation of the USSR and Union Republics; Article 64, Fundamental Principles of Civil Procedure of the USSR and Union Republics; Article 3, Statute on Diplomatic and Consular Representations of the Union of Soviet Socialist Republics; Article 425, Code of Civil Procedure of Ukraine, and others).

[24] MURAVIOV, V. I. *Law of the European Union*. Kyiv, 2014; RIDEAU, J. *Droit institutionnel de l'Union Européenne.* Paris: Parution, 2010, pp. 1119–1423.

[25] TANCHEV, E. National Constitutions and EC Law: Adapting the 1991 Bulgarian Constitution in the Accession to the European Union. *European Public Law*, 2000, vol. 6, no. 2, pp. 229–241.

[26] ISAAC, G. M., BLANQUET, M. Droit général de l'Union Européenne. Paris: Sirey, 2012, pp. 370–373.

In view of this, the provisions concerning the priority of international-legal norms in the event of a conflict with norms of municipal law were treated in a limited meaning: this rule might be applied within the framework of the domestic legal order as a means of the fulfillment by the State of its international obligations, the grounds for which was the right of the State to exercise jurisdiction on its own territory, being the sovereign right of any State irrespective of whether it recognized or did not recognize the primacy of international law.[27]

As the international-legal practice of many States with regard to the application of norms of international law in domestic legal order shows, the very fact of the recognition of the priority of international legal norms in regard to norms of national law still does not guarantee the effectuation of this principle in reality. Often resolved is the question of determining the legal status of norms of an international treaty, especially whether these norms become domestic law with all the legal consequences arising or whether they operate ad hoc, retaining the legal significance of a norm of international law.[28] Thus, the proclamation of the primacy of international law in and of itself does not guarantee the effective fulfillment of international legal norms as international obligations of the State so require.

In the course of acquiring independence Ukraine took certain steps which changed to a great extent the traditional Soviet approach to international law as an instrument of the regulation of relations between States, the use of which requires sanctions on the part of the State. Accordingly, a number of legal acts were adopted directed towards affirmation of the priority of international law and the creation of legal foundations for the application of norms of international law in the domestic legal order, especially with regard to the principles of international law. The Declaration on the State Sovereignty of Ukraine of 16 July 1990 recognized the priority of universal human values over class values and the priority of generally-recognized principles and norms of international law over norms of municipal law. As was indicated, the priority of generally-recognized principles and norms of international law is regulated more precisely in the 1996 Constitution of Ukraine (Article 18). However, unlike the provisions of many constitutions of European States concerning the status of generally-recognized principles and norms of international law (Article 24, Constitution of Germany; Article 11, Constitution of Italy, and others), there is no express indication in the legislation of Ukraine to the incorporation of these principles and norms in domestic law.

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[27] KUDRIAVTSEV, V. N. et al. (eds.). *Course of International Law in Six Volumes*. 1967, vol. 1, pp. 235–236.

[28] DENISOV, V. N. Development of the Theory and Practice of the Interaction of International and Domestic Law. In: DENISOV, V. N., EVINTOV, V. I., DZUD, J. and BOKOR-SZEGO, H. (eds.). *Realization of International Legal Norms in Domestic Law*. Kyiv, 1992, p. 20.

The provisions concerning the primacy of norms of international law relative to national law were elaborated in the Law of Ukraine "On the Operation of International Treaties on the Territory of Ukraine" of 10 December 1992. The preamble of the Law established the general principle of the primary of international law over domestic legislation set out as follows: "Proceeding from the priority of universal human values and generally-recognized principles of international law, endeavoring to ensure the inevitability of the rights and freedoms of man, and to become involved in the system of legal relations between States on the basis of mutual respect for State sovereignty and democratic foundations of international cooperation, the Supreme Rada of Ukraine decrees to establish that international treaties concluded and duly ratified by Ukraine shall comprise an integral part of the national legislation of Ukraine and shall be applied in the procedure provided for norms of national legislation".[29]

This status of international treaties was confirmed in national legislation in the 2004 Law of Ukraine "On International Treaties of Ukraine".[30] This Law precisely formulated the provisions with regard to the primacy of international law:

1. International treaties of Ukraine concluded and duly ratified shall comprise an integral part of the national legislation of Ukraine and shall be applied in the procedure provided for norms of national legislation.
2. If other rules have been established by an international treaty of Ukraine whose conclusion occurred in the form of a law than those which have been provided by legislation of Ukraine, the rules of the international treaty of Ukraine shall apply".

It seems that the provision recognizing the primacy of international norms over national legislation are relegated to fundamental provisions and should not be limited by regulation at the level of an ordinary law and have the legal force of an ordinary law.

The Constitution of Ukraine consolidated merely a provision to include part of international agreement in national legislation, and says nothing about the primacy of international norms with respect to norms of national law in the national legal order of Ukraine.

Provisions exist in other laws of Ukraine which refer to the operation of certain international treaties in the domestic legal order thereof. The Law "On the Police" (Article 4), adopted 20 December 1990, relegated to the legal foundations of police activity the Universal Declaration of Human Rights and international agreements ratified in the established procedure. Nonetheless, it does not follow

[29] Herald of the Supreme Rada of Ukraine, 1992, no. 10, item 137.
[30] Herald of the Supreme Rada of Ukraine, 2004, no. 50, item 540.

from Article 4 of the said Law that the provisions of these international legal acts will have priority significance if contradictions arise between them and the provisions of national legislation.

In other legislative acts Ukraine uses the formulate traditional for many Soviet normative acts concerning the application of norms of an international treaty in the event of a conflict with norms of national law (for example, Article 17, 1991 Law of Ukraine "On International Treaties"; Article 27.4, 2014 Law of Ukraine "On Standardization",[31] and others). However, one should bear in mind that these conflicts concern only specific laws; they do not resolve problems of the interaction of norms of international law with the national law of Ukraine as a whole.

As regards the status of acts of international organizations in the domestic legal order of Ukraine, the Law of Ukraine "On Postal Communication" (Article 27), adopted 4 October 2001, provides as follows: "The national operator in the procedure determined by legislation of Ukraine shall support cooperation with operators of postal communications of other States and ensure the fulfillment of decisions determined by normative acts of the Universal Postal Union, consent to the bindingness of which is granted by the Supreme Rada of Ukraine".[32] It follows from this that reference is being made to ensuring the fulfillment of acts of the Universal Postal Union adopted in the form of decisions. However, the question arises with respect to these decisions: which legal basis determines the powers of the Supreme Rada with respect to consent and bindingness of such acts, because the Constitution of Ukraine only regulates the status of international treaties. On the other hand, this formulation of the Law of Ukraine 'On Postal Communcation" (Article 27) testifies to changes in the approaches to determining the status of decisions of organs of international organizations in the national legal order of Ukraine; that is, the possibility of their application by national agencies in the procedure established by legislation of Ukraine.

Despite the absence in the Constitution of Ukraine of precise provisions concerning the priority of international law with respect to norms of domestic law, the Constitution and the Law of Ukraine "On the Operation of International Treaties on the Territory of Ukraine" and other legislative acts created the legal basis for the operation of norms of international treaties and norms of international customary law in its domestic legal order, which serves as evidence of the fundamental revision of the doctrine and practice of the problem of the correlation of international and domestic law, bringing Ukraine closer in this respect to European rule-of-law States.

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[31] Law of 5 June 2014, No. 1315-VII.

[32] Herald of the Supreme Rada of Ukraine, 2002, no. 6, item 39.

But not all questions of the interaction of international and domestic law have been resolved in the said legal acts, which under certain circumstances may complicate the proper fulfillment by Ukraine of its international obligations. Evintov justly emphasized that under the existing formulations of his problem the question remains unresolved in legislative acts of Ukraine as to on what grounds preference may be given to one of two norms of national law in the event of their being in contradiction.[33]

In member countries of the European Union which adhere to a dualist approach to the correlation of international and national law, doctrine refers to the general principle of law, *lex posterior*. In Ukraine, as noted, a dualist approach applies to the correlation of international and domestic law, but no legislative acts, judicial decisions, or generally-recognized doctrine exist indicating the means of resolving conflicts between norms of international agreements which have become part of national legislation and norms of national law which should be resolved by means of applying the rule *lex posterior*.

One effective means of ensuring the fulfillment by Ukraine of its international legal obligations may become the direct application of international legal norms by national courts of the country.

One argument in favor of including national judicial institutions in the process of applying international agreements in the national legal order may be that the European choice of Ukraine should be based on taking into account the doctrines and practices of national courts of members of the European Union, which have a key role in the effective functioning of European integration structures. Recognition of the primacy of law of the European Union with respect to the national law of member countries and the direction operation of its provisions in the national legal orders of these countries means taking measures ensuring the operation of the norms thereof. It should be pointed out that the doctrine of the direct operation of the law of the European Union extends to international agreements. This especially concerns international agreements which are concluded by the European Union with nonmembers if, proceeding from the content of such an agreement, the purposes and tasks thereof contain a precise and clear duty to fulfill it and for this the adoption is not required of any implementation measures, including special legal acts.[34]

Doctrines of the primacy and direct operation of the law of European integration structures of the European Union are directed towards effectively ensuring the operation of this law by all agencies of member States, but the principal role

[33] EVINTOV, V. I. Ukraine in the International Community. In: DENISOV, V. N., EVINTOV, V. I., AKULENKO, V. I., VYSOTSKIY, O. F. and ISAKOVYCH, S. V. *Sovereignty of Ukraine and International Law*. Kyiv, 1995, p. 52.

[34] Case 12/86, Demirel [1987] ECR 3719.

in this process belongs to national courts because they chiefly and not the judicial institutions of the European Union effectuate the defense of the rights of natural and judicial persons, relying on the means of direct application of European law. National courts thereby act as one of the legal guarantors of the realization of the tasks and purposes of European integration within the framework of European Union structures. A result of such extensive use of national judicial agencies called upon to ensure the fulfillment of European law as a law of direct operation is the high degree of legal certainty and legal stability of the functioning and development of the European Union integration structures.[35]

The question arises to what extent the legal order of the European Union, for which the practice of applying the law of European integration structures by national courts of member countries is characteristic, may influence the legal order of Ukraine. One of the most effective instruments of the influence of European Union law on the domestic law of Ukraine is the said Association Agreement, which, on one hand, is an integral part of European Union law and, on the other, is part of the legislation of Ukraine operating on the principles established in the Constitution of Ukraine (Article 9).

Given that certain provisions of this Agreement influence the movement of persons, freedom of the provision of services, and the development of entrepreneurial and investment activity in Ukraine by means of the clear consolidation of the rights and duties of natural and juridical persons with respect to their rights, such as the right to employment (Articles 17, 18, 19); nondiscrimination against companies, including those providing services through a commercial presence (Articles 87, 8, 92, 93, and 94), right of companies to hire key personnel (Article 98); right of access to the market of sea and air carriage and carriages on a commercial basis (Article 87), the problem inevitably arises of ensuring these rights in the domestic legal order of Ukraine, especially in the courts.

As regards the Association Agreement, it makes provision for the creation of an international-legal mechanism to settle disputes between Ukraine and the European Union; the basis for this is Article 477, establishing a Council for Cooperation, within whose competence is the consideration of appeals of natural and juridical persons. The Council, however, may consider only appeals if one of the parties raises a particular question during a meeting of their representatives. As practice of fulfilling the Agreement on Partnership and Cooperation shows, the overwhelming majority of recourses concerning violations of the obligations of the parties assumed in accordance with the Agreement were appropriate for the said mechanism of resolving disputes between Ukraine and the European Union.

[35] Treaty on Partnership and Cooperation between Ukraine and the European Community: Foundation and Activity of Companies. Kyiv, 1999.

At the same time, the Agreement contained provisions which, proceeding from the practice of the Court of the European Union, might be interpreted as conforming to the requirements of acts of European Union Law of direct operation. During the operation of the Agreement, however, neither party to the Agreement had recourse to the Court of the European Union concerning the application of certain of its provisions as having direct operation.

The Association Agreement, however, contains provisions which potentially make it possible for natural and juridical persons participating in the fulfillment thereof to apply to the courts of Ukraine in order to defend the aforesaid rights. Article 471 of the Association Agreement provides:

Within the scope of this Agreement, each Party undertakes to ensure that natural and legal persons of the other Party have access that is free of discrimination in relation to its own national to its competent courts and administrative organs, to defend their individual rights and property rights.

As a consequence of this, although the aforesaid cautious approach of the European Union to the direct operation of the provisions of the Agreement continues to exist, in principle one cannot exclude the possibility of the defense of the said rights of natural and juridical persons in the national courts of Ukraine.

Consequently, one may say that the incorporation of the Association agreement in the domestic legal order of Ukraine created merely the prerequisites for the consideration by courts of Ukraine of its provisions, and for this a special implementation act was not required. However, the realization of these possibilities depends directly on an understanding by the courts of Ukraine of the importance and necessity from a legal point of view of accepting for consideration this kind of recourse. In addition, one cannot exclude the adoption by Ukraine of a special implementation act establishing mechanisms for the application of international treaties, including the said Agreement of Ukraine with the European Union, in the national courts of Ukraine. There are certain legal grounds for this already in the present legal order of Ukraine, especially the 1991 Law of Ukraine "On Foreign Economic Activity" (Article 6), which provides that a foreign economic contract may be deemed to be invalid in a judicial or arbitration proceeding unless it meets the requirements of a law or international treaties of Ukraine. It is necessary to stress that Soviet doctrine and practice permitted the possibility of the application by national judicial agencies of norms of international law when resolving disputes in a judicial proceeding, in particular, in such spheres as ensuring the operation of international agreements concerning the carriage of passengers and cargo.[36]

[36] BASKIN, I. U. A., KRYLOV, N. B., LEVIN, D. B et al. *Course of International Law in Seven Volumes*. 1989, vol. I, pp. 299–300.

The possibility of the application by courts of the provisions of international agreement is contained in the Constitution of Ukraine (Article 9), proceeding from the recognition of international treaties in force, consent to the bindingness of which was given by the Supreme Rada of Ukraine, as a part of the national legislation of Ukraine. In addition, the direct operation of constitutional norms (Article 8) is consolidated in the Constitution, which should be interpreted in connection with Article 9 as a direct application of norms of international law in the event of their being contrary to norms of national law. It would be desirable to precisely determine the mechanism for the application of such treaty obligations of Ukraine in a law or to affirm this by judicial practice. Judges should receive the right and duty consolidated by a procedural law to turn to and apply international law. The conditions and procedure for such application should be elaborated. No less important is the task of providing the judge, the central figure in the application of law, with all the necessary sources of law, instructing him in international law, and inculcating in him the habit of the realization thereof. When deciding the question of the application by courts of Ukraine of international agreements, including the Association Agreement, criteria should be established relating particular provisions thereof to norms of direct operation which may be applied directly by courts.

The creation of legal prerequisites for the integration of Ukraine into the European Union require the resolution in its domestic legal order of the problem of choice of the means of the realization by Ukraine of its international obligations. It should be noted that Soviet doctrine and practice on matters of the application of international legal norms always delimited the sphere of operation of international and national law. It was believed that norms of international law create rights and duties for States, whereas norms of national law regulate the behavior of natural and juridical persons. Therefore, in order to enhance the effectiveness of the fulfillment by Ukraine of its international obligations it is necessary to transform norms of international law into norms of national law. In so doing, the transformation is regarded as a "means of the fulfillment of international law by means of the issuance by the State of domestic normative acts (laws, acts of ratification and publication of international treaties, administrative decrees, regulations, and so on) with a view to ensuring the fulfillment by the State of its international obligation or in the interests of the use by it of its international power".[37] This conception proceeds from an understanding that transformation includes any means of implementation and does not distinguish between transformation and national legal implementation.

[37] USENKO, E. T. Theoretical Problems of the Correlation of International and Municipal Law. *Soviet Yearbook of International Law* [1977], p. 69.

Other conceptual means of implementing international-legal obligations respectively are renvoi, incorporation (reception), and transformation. Renvoi occurs when a State includes in its legislation a norm sanctioning the application of international legal provision in order to regulate municipal relations. Incorporation (reception) is the incorporation of international legal norms into the national legal order without a change of their content. Information (reception) may be general, if international law is incorporated into the national legal order as a whole, or special, if one refers to the incorporation of individual international-legal norms. Transformation means that norms of international law are transformed into norms of national law by means of the publication of a special law or other normative act which regulates the same question as the respective norms of international law. But both conceptions in essence differ little one from the other because they deny the possibility of the direct operation of international-legal norms as an integral part of national law.

Ukrainian doctrine and practice as a whole on the question of the implementation of international-legal norms in the national legal order understandably did not differ from all-union, although Ukrainian scholars expressed original ideas relative to resolving this question.[38]

After Ukraine became an independent State, conditions emerged autonomously and on the basis of democratic principles of a rule-of-law State to resolve the problems connected with the implementation of norms of international law in the domestic legal order, comprehending in so doing the many years of experience of other States in the international community as a whole. The logical step after recognition of the priority of international law with respect to national legislation, which marked a certain departure from the approach traditional for Soviet doctrine and practice to the means of implementing international law in the national legal order in the form of transformation became the general incorporation (reception) of norms of international treaties by means of the inclusion of respective provisions in the Constitution and legislative acts, especially the laws of Ukraine "On International Treaties of Ukraine" and "On the Operation of International Treaties on the Territory of Ukraine", where provided that duly ratified international treaties are deemed to be part of national legislation. We refer not only to international treaties primarily in the sphere of private international law, as occurred in the Soviet Union, where certain legislative acts (Fundamental Principles of Civil Legislation of the USSR and Union Republics, Fundamental Principles of Civil Procedure of the USSR and Union Republics, and others) included a conflicts norm on the application in the event of a conflict with the rules of Soviet legislation of the rules of the

[38] BUTKEVICH, V. G. *Correlation of Municipal and International Law*. Kyiv, 1981.

international treaty, and this concerned all international treaties duly ratified. On the basis of incorporation with the adoption of a special law the norms of European Union law were introduced into the domestic legal order of European Union member States who adhered to the dualist conception of the correlation of international and municipal law.

4. Conclusion

One may therefore say that in Ukraine certain legislative activity is being carried out that is directed towards resolving the problem of the interaction of international law with domestic law, and in so doing priority is accorded to the operation of norms of treaty international law in national legislation, the means of which, however, require further improvement and universalization. However, the problem least resolved remains the application of generally-recognized principles and norms of international law in the domestic legal order of Ukraine and especially in its judicial practice. Possibly here too it is necessary to adopt a special law guaranteeing the application of this category of norms of international law in law enforcement agencies. It is essential to fill the gap in the legislation of Ukraine and include within it provisions relating to the operation of norms of customary international law in the legislation of Ukraine.[39]

What has been said relates entirely to the application of norms of European Union law in the domestic legal order of Ukraine. Norms of European Union law, just as the Association Agreement, have not acquired priority significance over norms of domestic law because the application of these norms depends partially upon the position of the Ukrainian legislator and completely on the practice of national courts. The further development of integration processes of Ukraine with the European Union require changes to be made in national legislation in order to create in its domestic legal order conditions for the operation of therein of legislation of the integration structures of the European Union.

The material gap in the legislation of Ukraine, including in the Constitution, is the lack of a solution to the status of acts (or decisions) of intergovernmental organizations. However, the further development of the integration of Ukraine into the European Union necessarily requires the making of respective changes in domestic legislation with a view to the creation of the legal prerequisites for the operation of secondary European Union legislation in the domestic legal order

[39] DENISOV, V. N. Role of International Law in the Foreign and Domestic Policy of Ukraine. In: SHEMSHUCHENKO I. S. (ed.). *State-Creation and Law-Creation in Ukraine*. Kyiv, 2001, p. 602.

of Ukraine because such operation is provided for by the Association Agreement (Articles 56, 96, 153).

The formation of the effective national mechanism for the implementation of norms of international and EU law in the domestic legal order of Ukraine will result in the Europeanization of the country's legislation, which may bring it closer to achieving the strategic purpose – integration into the European Union.

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