

СУЧАСНА СИСТЕМА МІЖНАРОДНОГО ПРАВА

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PRINCIPLES AND VALUES OF THE EUROPEAN UNION AND THE LEGAL ORDER OF UKRAINE

ПРИНЦИПИ І ЦІННОСТІ ЄВРОПЕЙСЬКОГО СОЮЗУ І ПРАВОПОРЯДОК УКРАЇНИ

ПРИНЦИПЫ И ЦЕННОСТИ ЕВРОПЕЙСКОГО СОЮЗА И ПРАВОПОРЯДОК УКРАИНЫ

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Abstract. *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 a 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 as 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.*

Анотація. *Стаття присвячена аналізу правової природи принципів і цінностей Європейського Союзу, їх етимології та походження, а також їх місця і ролі у правопорядку ЄС. Можна стверджувати, що у сучасному правопорядку Євросоюзу*

принципи і цінності, закріплені в установчих документах про Союз, визначають фундаментальні засади правової системи ЄС. Окрім цього вони здійснюють регулятивну функцію у відносинах між індивідумом і суспільством. В роботі зазначається, що принципи і цінності з'явилися в праві Євросоюзу не одночасно. Якщо принципи були закріплені в перших установчих договорах про європейські співтовариства при їх укладанні, то положення про цінності були включені до установчих договорів тільки недавно, тобто до їх останньої Лісабонської редакції 2007 р.

У статті підкреслюється, що не дотримання цінностей окремими державами-членами ЄС може призвести до запровадження санкцій проти держави-порушниці. Проте особливе значення принципи і цінності Союзу набувають при укладанні ЄС міжнародних договорів з третіми країнами. У цьому зв'язку аналізуються положення Угоди про асоціацію між Україною та Європейським Союзом та його державами-членами.

Спеціальна увага у статті приділена дослідженню механізму імплементації положень Угоди про асоціацію між ЄС та Україною у правопорядку України, а також впливу принципів і цінностей Союзу на процес правових реформ в Україні.

Ключові слова: принципи, цінності, Конституція України, право ЄС, угода про асоціацію, імплементація, правовий механізм.

Анотація. Стаття посвячена аналізу правової природи принципів и ценностей Европейского Союза, их этимологии и происхождения, а также их места и роли в правопорядке ЕС. Можно утверждать, что в современном правопорядке Евросоюза принципы и ценности, которые закреплены в основоположных документах про Союз, определяют фундаментальные начала правовой системы ЕС. Кроме того, они осуществляют регулятивную функцию в отношениях между индивидом и обществом. В работе отмечается, что принципы и ценности появились в праве Евросоюза на одновременную. Если принципы были закреплены в первых основоположных договорах про европейские сообщества при их заключении, то положения про ценности были включены в основоположные договоры только недавно, т.е. в их последнюю Лиссабонскую редакцию 2007 г.

В статье подчеркивается, что не соблюдение ценностей отдельными государствами-членами ЕС может привести до ввода санкций против государства-нарушителя. Однако особенное значение принципы и ценности Союза приобретают при заключении ЕС международных соглашений с третьими странами. В этой связи анализируются положения Договора про ассоциацию между Украиной и Европейским Союзом и его государствами-членами.

Специальное внимание уделено в статье исследованию механизма имплементации положений Договора про ассоциацию между ЕС и Украиной в правопорядке Украины, а также влиянию принципів и ценностей Союзу на процесс правовых реформ в Украине.

Ключевые слова: принципы, ценности, Конституция Украины, право ЕС, договор про ассоциацию, имплементация, правовой механизм.

Problem

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 principles and values are enshrined in the Treaty on the European Union and 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. 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. 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.

Aim of the article. The aim of the article is to highlight the theoretical and practical problems of effect of the EU principles and values on the internal legal order of Ukraine. The association with the EU may be considered as the first step to the integration of Ukraine in the EU. The influence of the European Union *acquis* on the law of Ukraine is being investigated.

Analysis of latest researches and publications. The issues of the association between Ukraine and the European Union were elucidated mainly in the latest works by R. Arnold [14], N. Mushak [15], N. Sishkova [16]. Unfortunately, so far, the Ukrainian and foreign publications have not paid sufficient attention to the investigation of the role of the EU values and principles in the process of legal integration between Ukraine and the EU. However, new realities connected with the association between EU and Ukraine require special research of this problem.

Exposition of the main material of the research

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 etymology 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.

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. This is confirmed by the Article 6 of 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 [1].

For the first time values were enshrined in the Lisbon treaties on the European Union. They may be considered as the main sources of the EU law even for the principles. Many of them then are fixed in international agreements between the European Union and the third countries.

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).

It should be noted that, in general, the EU often uses its foreign policy as a tool to consolidate the political principles that create political obligations for the parties including Ukraine. Therefore, 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) [18]. In addition to the principles of democracy and human rights the respect for the principles of market economy is also related to the essential elements of cooperation agreements.

Thus, the Association agreement between the EU and Ukraine enshrines in its Preamble some of the provisions of the Treaty on the European Union (TEU) and the Treaty on the functioning of the European Union (TFEU) [2]. The issue is primarily about the shared values of the Union (Articles 2 and 3 TEU). In addition to respect for democratic principles, the rule of law, human rights and fundamental freedoms, including the rights of national minorities, non-discrimination, respect for diversity, human dignity the Association agreement adds to them the principle of good governance, the principles of the market economy, which should facilitate the participation of Ukraine in European policies.

The preamble also recognizes Ukraine as a European country that has a shared history and common values with the Member States of the Union. This provision, together with the provisions on the common values is important, first of all, since it opens the possibility for Ukraine joining the EU in the future, since a member of the Union can be any European country that respects the values specified in the Article 2 and shall implement them in life.

The significant support for the implementation in practice of the rule of law in Ukraine can be provided by the cooperation with European organizations. Their members are the states in which the rule of law and democracy has been functioning successfully for a long period of time.

However, it should be borne in mind that the practical realization of all those principles and norms substantially depends on their interpretation of each of these by the parties. 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.

The EU – Ukraine Association agreement provides for the continuation of the political dialogue, initiated by the Agreement on Partnership and Cooperation (PCA) [3], the EU-Ukraine Action plan [4], the EU-Ukraine Association Agenda [5]. The Parties shall hold regular political dialogue meetings at the Summit level, at the ministerial and at the parliamentary level.

Political dialogue shall be aimed at strengthening respect for democratic principles, the rule of law and good governance, human rights and fundamental freedoms.

Some legal instruments adopted by the institutions and bodies of the Union also govern the relations between Ukraine and EU besides the agreements on cooperation. The Common strategy became such a tool after the entry into force of the Treaty of Amsterdam

[6]. It contained the references to the EU contribution to the appearance in Ukraine of a stable, pluralistic and legitimate democracy and market economy [7].

The EU neighborhood policy provides for the establishment of special relations between the EU and Ukraine as such entities, which share a common border. Such a relationship should promote prosperity and good neighborhood, founded on the values of the Union [8].

The EU-Ukraine Action plan, which became an instrument of the neighborhood policy, has replaced the Common strategy on Ukraine, detailed the principles and values of the EU as a basis for partnerships. The maintenance of stability and efficiency of the bodies that promote democracy and the rule of law (continued administrative reform) is one of the main priorities of the cooperation between the EU and Ukraine. Other priorities include: carrying out judicial and legal reforms to ensure the independence of the judiciary and strengthening of its administrative capacity, ensuring the impartiality and effectiveness of the Procuracy, the effective fight against corruption, respect for human rights and fundamental freedoms, the development of civil society, the respect for freedom of media, freedom of expression, equality, respect for the rights of children.

Action plan in the field of Justice and Home Affairs calls for judicial reform in Ukraine, combating corruption etc [9].

The EU policy of the Eastern neighborhood also aims at building of the relations between Ukraine and the EU on the basis of the principles of international law and fundamental values, including democracy, the rule of law, respect for human rights and fundamental freedoms, the market economy [10].

One more legal tool for cooperation between the EU and Ukraine is EU-Ukraine Association's agenda, adopted in 2015. The document marks the beginning of the first stage of the European integration of Ukraine into the EU, since an integral part of the EU-Ukraine Association agreement is the formation of the free trade area. The EU-Ukraine Association's agenda is a recommendation. It pertains to so called soft law. However, it becomes a very practical one among the other documents which determine the framework of the EU-Ukraine cooperation. The very aim of its adoption is to facilitate the implementation of the EU-Ukraine Association agreement.

The EU-Ukraine Association's agenda emphasizes that as a European country Ukraine has its history that it shares with Europe as well as it shares common values together with the EU Member States.

As both the EU principles and values were transposed into the Association agreement with Ukraine, they became an integral part of the Ukrainian legislation after its ratification.

According to the 1996 Constitution of Ukraine (Article 9) [11], international treaties duly ratified by the Supreme Rada of Ukraine become part of the national legislation of Ukraine. 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.

On the other hand, 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.

It should be noted, that Ukrainian legislation included some of the democratic principles even before its cooperation with the European Union has started.

Since the beginning of 90-ies of the last century Ukraine started building the rule of law state after receiving its independence. Therefore, for Ukraine the notions of "constitutional state", "democracy" are those which pass its test in the course of the state-building. The principle of the rule of law was enshrined in the Article 8 of the Constitution of Ukraine (Article 8).

However, the main core of issues concerns the very understanding of the rule of law and democracy and how those concepts shall be adapted to Ukrainian realities [19; 20].

In case of an idealization of the situation, it is possible to announce that Ukraine's legal order is based on the model of the rule of law in that meaning that the Ukrainian State operates on the basis of laws, i.e. it establishes rights and it is obliged to abide to those rights. While adopting laws, the State extend the obligations not only to the subjects of internal law, but also to itself. So one can talk about the symbiotic relationship of the State and the law. However, this is not enough. Legal restrictions of the State and enforcement of the provisions of the legal acts by the State bodies, regardless of their content are not the only elements of the rule of law, because it means the rule of legislation. The concept of the rule of law is much wider and also includes such elements as: the adoption of legal acts by the State bodies in accordance with the rules and regulations established by the authority; the principle of legal certainty and the lawfulness; prohibition of the retroactivity of laws; responsibility of the individual solely on the basis of his breach of the positive law; the equality of citizens before the law; the right of citizens for trial; and free access to the courts; procedural guarantee of human rights. Thus, the rule of law is not functioning if there is no respect for the rights and freedoms of the individual.

It is believed that in Ukraine the rule-of-law state is synonymous with democracy. Democracy is based on the Constitution. And the Constitution enshrines the dominant role of the Parliament in making laws. So, the parliamentarianism is the Crown of the constitutional regime in Ukraine.

In practice, however, the situation is to a large extent different from the ideal. Model of the rule-of-law state in Ukraine has not yet been implemented to the full extent.

Although democracy in Ukraine is much more than, for instance, Russia's or Belarus's, however, Ukraine is not democratic in terms of Slovak or Austrian statehood.

In Ukraine the middle class that forms the foundation of the social and economic stability practically vanished.

The social unstructuredness of the society has led to that the power remains to be an object of interests of political elites and oligarchic groups.

The media serve the interests of their owners.

Political parties are unstable, ideologically amorphous party blocs. They have not become a form in which social self-realization takes place.

Human rights are being still violated and that manifests itself in different forms. The most famous examples of such violations include torture of detainees by police; detention for long periods without indictment; denial of access of lawyers to persons under arrest. Prisoners' rights are not abided. The State Department of Ukraine for the Execution of Sentences is not reformed. The penitentiary system in Ukraine is still far from the European type. People may not get their wages for the work done for several months. The corruption of the state apparatus flourishes. This list can be very long.

On the other hand, Ukraine cannot immediately become different. Ukraine is on the road to transformation into a socially-oriented society with transparent democracy. There is a replacement of value systems, which provides a clear orientation to the European scale of values.

A catalog of European values has already been formed. They are laid down in legislation and in international agreements.

In the process of building the rule of law state in Ukraine, one of its most important criteria is to create a fair, transparent and effective judiciary.

The judicial system of Ukraine has three major problems.

The first problem is that the judiciary is politically dependent. Today it is the President and the Verkhovna Rada that decide on the appointment and career of judges. High-ranking politicians tell the judges in which way the disputes shall be settled. As a consequence of such political dependence, the judges have got used to this system and consider it their role to serve the interests of the political power and earn money, instead of protecting human rights and asserting the rule of law.

The second problem is corruption which has penetrated into the judiciary and is convenient not only for judges, but also for those who have a chance to 'settle' their disputes in the courts by means of corruption.

The third problem is inefficacy of the judiciary. This issue needs optimizing human and material resources and streamlining the legal procedures.

Any reforms are null until there is justice that can ensure law and order.

On June 2, 2016, the Parliament of Ukraine adopted amendments to the Constitution of Ukraine in the sphere of justice and jurisprudence, which had been proposed by the President of Ukraine [12]. These constitutional amendments were directed at decreasing the courts political dependence and elimination of corruption that gives chance to move towards building independent and efficient judicial system in Ukraine. The changes came into force three months after their official publication (30th September 2016) [21].

The Law of Ukraine on the Constitutional Court was adopted on October 3, 2017 ("Law") [13].

The Law still provides for the model of the Constitutional Court of Ukraine ("CCU") that has proved itself inadequate to secure the full independence of this institution from political interests of various groups or personalities. The political confrontation led to the fact that in 2017 the CCU made only one judgment.

On the other hand, the Law provides for the requirement for the obligatory competition to select candidates for the CCU. Unfortunately, the wording of this requirement is exceedingly general thus allowing for all kinds of distortions at the legislative level. For the same reason, it would have been much more progressive to insert directly into the Constitution explicit and detailed provisions on the procedure and grounds for dismissing judges of the CCU and on the guarantees of the Court's financial sustainability [17].

There are some other innovations introduced by the Law. Thus, the Constitutional Court will no longer be entitled to provide for official interpretation of parliamentary laws. Its interpretational authority will be limited to the Constitution only. At the same time, the Court's jurisdiction will encompass the constitutionality of questions put on referendum.

In addition, individuals shall have the right to lodge a constitutional complaint with the Constitutional Court if a parliamentary law is, in their view, breaching the Constitution, whereupon the Court may declare such law unconstitutional (currently, individuals may submit only requests for interpretation of the Constitution). An individual may exercise this right provided all other available legal remedies (an ordinary court procedure) have been exhausted. A special parliamentary law shall govern the procedure for exercising this right. This novelty corresponds to the practice of many European countries providing for a constitutional complaint as the last resort of individuals to protect their rights [22]. However, the question remains whether legal entities may exercise this right alongside individuals. On 4th October 2017 the first constitutional complain has been submitted to the Court.

Finally, the Constitutional Court will be able to determine the moment from which an unconstitutional legal act becomes ineffective, which cannot have a retrospective effect, though.

The renewed law on Constitutional Court of Ukraine will show how the President is willing to release the Court from politics and the views of experts will be taken into account. If duly implemented in statutes, the constitutional amendments may give a chance for an independent and widely respected Constitutional Court of Ukraine.

There is also a need to review the powers of the Public Prosecutor's Office, removing from her the functions that limit the powers of other authorities, including the executive and judicial branches.

Thus, the legal prerequisites for the realization of the provisions of the international agreements, that enshrine the principles and values of the European Union, are granted by the national legislation of Ukraine.

It cannot be said that Ukraine has built a rule of law state with a developed democracy. This process is still going on. The state still protects the interests of a small group of people and not necessarily the Ukrainian citizens (many oligarchs have dual nationality, etc.).

In the process of European integration Ukraine will be obliged to adhere to the principles of the rule of law and democracy, and thus in the process of the development of cooperation with the EU the prerequisites for fostering in legislation and in its practical implementation of the values on the basis of which the European Union operates will inevitably appear.

However, Ukrainians themselves must oppose attempts to violate the Constitution and the law by the authorities and those who use legal nihilism of the Ukrainian people and use the support of the State apparatus to disrupt existing laws.

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