

INTERNATIONAL LAW IN RUSSIA, UKRAINE, AND BELARUS: MODERN INTEGRATION PROJECTS

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<https://doi.org/10.17589/2309-8678-2019-7-3-107-133>

Modern challenges for international law application in the former USSR countries are inextricably linked to the regional integration issues. Despite seeking closer rapprochement with the EU, Russia never dropped its ambitions as a spearhead of political, economic and legal integration within the post-Soviet area. Belarus actively participates in the post-Soviet integration projects while seeking improvements of EU-Belarus relations. However, Ukraine embarked upon a long and challenging path of deeper political and economic integration with the EU and aligning its legal system with the EU acquis. Against this backdrop, this article studies the constitutional dimension of three post-Soviet republic's engagement in regional integration projects identifying the problematic issues in the application of international law.

Keywords: International law; regional integration; Russia; Ukraine; Belarus; EAEU; EU.

Recommended citation: Paul Kalinichenko et al., *International Law in Russia, Ukraine, and Belarus: Modern Integration Projects*, 7(3) *Russian Law Journal* 107–133 (2019).



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Introduction

Modern challenges to the application of international law in the former USSR union republic, each now an Independent State, are linked to regional integration issues. Despite seeking closer rapprochement with the European Union (EU), Russia never abandoned its ambitions to be a spearhead of political, economic, and legal integration within post-Soviet space. Following the dissolution of the Soviet Union, Russia led the evolution of regional integration: from the Commonwealth of Independent States (CIS), the Eurasian Economic Community, the Single Economic Area and the Custom Union, the Russia-Belarus Union State to the contemporary Eurasian Economic Union (EAEU).¹ Belarus actively participates in post-Soviet integration projects while seeking improved relations with the EU. However, Ukraine embarked upon a long and challenging path of deeper political and economic integration with the EU and aligning its legal system with the EU *acquis*.

This article considers the constitutional dimension of three post-Soviet republic engagements with various regional integration projects. First, it describes the

¹ Zhenis Kembayev, *Regional Integration in Eurasia: The Legal and Political Framework*, 41(2) *Review of Central and East European Law* 157 (2016).



constitutional foundations for the application of international law in the Russian legal system within the framework of Russian participation in the EAEU. Second, this article turns to the constitutional provisions on application of international law in Belarus and the challenges they provide for application of EAEU law. Finally, the application is addressed of international law in Ukraine in the context of the implementation of the EU-Ukraine Association Agreement and challenges to the Ukrainian constitutional system.

1. Russia

1.1. Application of International Law in the Constitutional Provisions

The Russian Constitution was adopted by a nationwide referendum on 12 December 1993 as the Basic Law of Russia. Its origin goes back to Western constitutional traditions and internationally recognized democratic values and human rights.² The 1993 Constitution achieved a dramatic shift from the Soviet legal heritage, especially the implementation and application of international law within the national legal system.³ It is important to mention that, when adopted, Article 15(4) of the Russian Constitution represented the most liberal provision regarding the application of international law within a national legal system among all former Soviet countries. As a result, Russian judges had considerable opportunity to enforce and interpret international law by means of their decisions in comparison with other judges.⁴ In accordance with Article 15(4) of the Russian Constitution:

Generally-recognized principles and norms of international law and international treaties of the Russian Federation shall be an integral part of its legal system. If other rules have been established by an international treaty of the Russian Federation than provided for by a law, the rules of the international treaty shall apply.

Unlike the 1992 amendments to the RSFSR Constitution, which merely upheld the supremacy of the generally-recognized human rights over domestic legislation, these provisions go further. This provision may be considered the strictest regulation of the primacy of international law in a national constitution during post-Soviet

² Federalizing Europe? The Costs, Benefits, and Preconditions of Federal Political Systems 353 (J.J. Hesse & V. Wright (eds.), Oxford: Oxford University Press, 1996); Comparing Constitutions 17 (S.E. Finer et al. (eds.), Oxford: Clarendon Press, 1995).

³ Gennady M. Danilenko, *Implementation of International Law in CIS States: Theory and Practice*, 10(1) *European Journal of International Law* 51 (1999).

⁴ Roman Petrov & Paul Kalinichenko, *The Europeanization of Third Country Judiciaries Through the Application of the EU Acquis: The Cases of Russia and Ukraine*, 60(2) *International & Comparative Law Quarterly* 325, 336 (2011).



space.⁵ Thus, according to the Russian Constitution, provisions of international treaties prevail over rules of the Russian domestic legislation.

In 1997, the Constitutional Court of the Russian Federation stipulated that the term “law” should signify laws and all other normative acts.⁶ The Constitution itself, however, is not subject to this stipulation. Following the Constitutional Court Decree,

international treaties of the Russian Federation that do not correspond to the Constitution of the Russian Federation, shall not be implemented or used.⁷

In case of failure to conform to the basic law, Russia cannot accept it without introducing necessary constitutional amendments.⁸ The requirement of ratification restricts the range of international treaties possessing primacy over domestic legislation.

Although the Russian legal system contains duly ratified international treaties, this rule cannot be understood in light of the *lex posterior derogat legi priori* principle if any discrepancy between the provisions of international treaties and future domestic acts occurs. In compliance with the Decree of the Supreme Court of the Russian Federation, national courts should not apply national legal provisions conflicting the provisions in ratified international agreements.⁹ The Constitution provided Russian judges with opportunities to apply and interpret different sources of international law in their decisions and the following highlights the current situation:

International law is no longer “alien” for [Russian] courts. They extensively refer to and apply it, together with domestic norms.¹⁰

⁵ Maksim Karliuk, *Russian Legal Order and the Legal Order of the Eurasian Economic Union: An Uneasy Relationship*, 5(2) Russian Law Journal 33, 38–39 (2017).

⁶ Определение Конституционного Суда Российской Федерации от 3 июля 1997 г. № 87-О // СПС «КонсультантПлюс» [Order of the Constitutional Court of the Russian Federation No. 87-O of 3 July 1997, SPS “ConsultantPlus”], para. 3.

⁷ Art. 125(6) of the Constitution of Russia, available in English at Russian Public Law: The Foundations of a Rule-of-Law State: Legislation and Documents 4–32 (W.E. Butler (transl. & ed.), 3rd ed., London: Wildy, Simmonds & Hill, 2013).

⁸ Федеральный закон от 15 июля 1995 г. № 101-ФЗ «О международных договорах Российской Федерации» // Собрание законодательства РФ. 1995. № 29. Ст. 2757 [Federal Law No. 101-FZ of 15 July 1995. On International Treaties of Russian Federation, Legislation Bulletin of the Russian Federation, 1995, No. 29, Art. 2757], Art. 12.

⁹ Постановление Пленума Верховного Суда Российской Федерации от 10 октября 2003 г. № 5 «О применении судами общей юрисдикции общепризнанных принципов и норм международного права и международных договоров Российской Федерации» // СПС «КонсультантПлюс» [Resolution of the Plenum of the Supreme Court of the Russian Federation No. 5 of 10 October 2003. On Application by Courts of General Jurisdiction of the Generally-Recognized Principles and Norms of the International Law and the International Treaties of the Russian Federation, SPS “ConsultantPlus”].

¹⁰ Petrov & Kalinichenko 2011, at 337–339.



To understand the peculiarities of the application of international law in Russia, we should study the practice of the Russian judiciary. The Russian legal system does not involve the rule of precedent of case law. Despite this fact, the Guiding Explanations of high Russian courts¹¹ are of vital importance for understanding the legal force of a specific international treaty within the Russian legal system. These guiding explanations act as a model of interpretation of primary and secondary Russian law. Therefore, lower courts *de facto* always consider them and follow. By way of example, the Guiding Explanations of the Plenum of the Supreme Court of Russia¹² set out precise criteria of various sources of international law that should be applied by Russian courts in their decisions: 1) when Russia is a party to an international agreement; 2) when an international agreement has been duly ratified by the Russian Parliament; 3) when an international agreement has been published in a designated official gazette; 4) when an international agreement is self-executing.

Consequently, Russian judges form their decisions in accordance with sources of international law and the interpretation and application of the 1950 European Convention on Human Rights (ECHR) is important for the Russian judiciary.¹³ As noted below, the Constitutional Court has developed a cautious approach with respect to the ECHR.¹⁴ This also affects the application of the EU-Russia PCA and other bilateral agreements between the EU and Russia.¹⁵

1.2. EAEU Law as a New Challenge for the Russian Legal System

Another distinctive feature of the Russian Constitution is the fact that, unlike other post-Soviet countries, it contains a so-called “integration clause” that enables the transfer of sovereign powers in order to take part in the functioning of international organizations. The Federal Law of 15 July 1995 “On International Treaties of Russian Federation” provides that Russia can join any international organization with reference to a ratified international treaty. The provisions of the said treaty should

¹¹ The high level of the Russian judicial system consists in the Constitutional Court of the Russian Federation and the Supreme Court of Russia.

¹² It was issued by the Plenum of the Supreme Court of Russia that is the highest body of the Supreme Court. It is empowered to issue unified interpretation of secondary laws and their application by lower national courts.

¹³ Sergei Marochkin, *International Law in the Courts of the Russian Federation: Practice of Application*, 6(2) Chinese Journal of International Law 329, 333 (2007).

¹⁴ Enforcement of judgments of the ECtHR has become an extremely politicized and notorious issue in Russia since 2013. The Constitutional Court declared that it was impossible to enforce the ECtHR judgments. See Paul Kalinichenko, *The Constitutional Order of the Russian Federation and Its Adaptability to European and Eurasian Integration Projects in Post-Soviet Constitutions and Challenges of Regional Integration: Adapting to European and Eurasian Integration Projects* 168 (R. Petrov & P. Van Elswege (eds.), London; New York: Routledge, 2018).

¹⁵ Alfred E. Kellermann, *The Impact of EU Enlargement on the Russian Federation*, 2(1) Azerbaijani-Russian Journal of International and Comparative Law 157, 172 (2005).



comply with the fundamentals of the Russian constitutional order and respect the protection of human rights. As a result, Russia as a sovereign State may become a member of any international organization if only the conditions for joining do not infringe its national legislation and Russia is able to adhere to the conditions of the concrete international organization.

In 2010, Russia, Belarus, and Kazakhstan established a Customs Union with common customs rules and supranational institutions. Since then, Russia has transferred its competence in the area of technical regulation and customs matters to the Eurasian Economic Commission. Political and economic integration in post-Soviet space continued in Nur-Sultan (formerly, Astana, Kazakhstan) on 28 May 2014. On that day, Russia, Belarus, and Kazakhstan concluded the EAEU Treaty (Astana Treaty), later acceded to by Armenia and Kyrgyzstan.

The EAEU Treaty came into force on 1 January 2015, posing new challenges in terms of the influence of international law in the Russian legal system. The Treaty created its special international system of regional economic integration with its own legal order instead of following the European integration model. Nonetheless, a certain similarity in spirit and content between the EU Treaties and the EAEU Treaty cannot be ignored.

The legal framework of Eurasian integration that concerns Russia¹⁶ includes numerous components, namely the EAEU Treaty and international treaties concluded within the Eurasian Economic Community (EurAsEC), and of the Customs Union and the Single Economic Space, decisions of the Eurasian Economic Commission, and the case law of the EAEU Court. The EAEU Court is vested with the full competence to interpret the Astana Treaty, other founding treaties, and other sources of the “Eurasian *acquis*.”¹⁷ Despite this favorable opportunity, the EAEU enjoys fewer benefits in power than its predecessor – the EurAsEC Court – that had as much influence as the Court of Justice of the European Union (CJEU).¹⁸ However, the EAEU Court may turn to the jurisprudence of the EurAsEC Court on the basis of *stare decisis*.¹⁹

4 April 2017 became a memorable day for the EAEU Court because of a particular case. In response to the request of the Belarus Ministry of Justice regarding the interpretation of the Astana Treaty in the field of competition (the *Vertical Agreements* case), in its Advisory Opinion the EAEU Court formulated the principle of “direct

¹⁶ Karliuk 2017, at 38–39.

¹⁷ Ekaterina Diyachenko & Kirill Entin, *The Court of the Eurasian Economic Union: Challenges and Perspectives*, 5(2) Russian Law Journal 53 (2017).

¹⁸ Roman Petrov & Paul Kalinichenko, *On Similarities and Differences of the European Union and Eurasian Economic Union Legal Orders: Is There the “Eurasian Economic Union Acquis”?*, 43(3) Legal Issues of Economic Integration 295 (2016).

¹⁹ Indent 10 of the Section “Applicable Law” of the EAEU Court Judgment of 4 April 2016 in the Case No. CE-1-2/2-16-KS (ZAO *General Freight* case) (Jul. 2, 2019), available at <http://courteurasian.org/doc-15423>.



effect.²⁰ The issue was the interpretation of the EAEU Treaty provisions related to the *de minimis* rules (cannot exceed 20%) for vertical agreements between the EAEU companies (Arts. 74–76 of the Astana Treaty). The Belarus draft law authorized the cut of the EAEU *de minimis* rules to 15% for the domestic market (being comparable with EU rules).

In this regard, the EAEU Court emphasized that the Eurasian Economic Commission had a supranational competition competence.²¹ After that, the EAEU Court proceeded to the examination of EAEU competition competence under the Astana Treaty and asserted that the competition rules for the EAEU market are covered by common policy, that is, by supranational regulation.²² The EAEU and its Member States should implement the coordinated policy. However, the EAEU institutions are responsible for defining common approaches to achieve the principal objectives of the EAEU Treaty. Therefore, the EAEU Court deprived the Member States of the ability to alter the EAEU common rules, especially the Astana Treaty provisions related to *de minimis* criteria for vertical agreements. More importantly, it was the first time that the EAEU Court had invoked the “direct effect” doctrine for the EAEU “common rules.” The conclusion states that

[c]ommon rules of competition have direct effect and should be applied by the Member States directly as international treaty provisions.²³

A parallel with the *Van Gend en Loos* judgment of the CJEU in 1963 is evident.²⁴ However, the EAEU Court in the *Vertical Agreements* case refrained from any quotes and references to the relevant CJEU case law. Comparing the two cases, the *Vertical Agreements* case is less ambitious in its conclusions and impact on the EAEU legal order than the *Van Gend en Loos* case in its impact on the EU legal order.

The other situation has a place in setting the primacy principle in EAEU law. The impact of the ECJ case law, which established the primacy principle in EU law, is more apparent. For the first time, ECJ judgments in the *Costa v. ENEL* case and the *Simmenthal* case were mentioned in the dissenting opinion of Judge K.L. Chaika in

²⁰ Консультативное заключение Суда ЕАЭС от 4 апреля 2017 г. по делу № CE-2-1/1-17-БК [Advisory Opinion of the EAEU Court of 4 April 2017 in the Case No. SE-2-1/1-17-БК] (Jul. 2, 2019), available at <http://courteurasian.org/doc-18093>. For comments, see Paul Kalinichenko, *A Principle of Direct Effect: The Eurasian Economic Union's Court Pushes for More Integration*, *Verfassungsblog*, 16 May 2017 (Jul. 2, 2019), available at <http://verfassungsblog.de/the-principle-of-direct-effect-the-eurasian-economic-unions-court-pushes-for-more-integration>.

²¹ Indent 10 of para. 1 of sec. IV of the Advisory Opinion.

²² *Id.* Indent 11 of para. 1 of sec. IV.

²³ *Id.* Indent 1 of para. 2 of sec. IV.

²⁴ *Van Gend en Loos v. Nederlandse Administratie der Belastingen*, C-26/62, 5 February 1963, [1963] E.C.R. 1.



the case *Russia v. Belarus* of 25 February 2017 supported an argument on impossibility of any Member States to act contrary to EAEU law provisions.²⁵

The next step was made by the EAEU Court in its Advisory Opinion of 10 July 2018 in the case *Decisions of the Customs Union Commission* where the Belarus Ministry of Justice asked to determinate the place of previous Customs Union Commission decisions among the EAEU sources of law. In this case, the EAEU Court formulated the Union priority over national legal acts. It concluded that the Member State should refrain from adopting national legal acts which are contrary to Union law.²⁶ In addition, the EAEU Court determined that “the content of the ‘Union law’ concept can be clarified in the context of the legal system in order to ensure the supranational nature of Union legal regulation” (indent 2 of para. 1).

However, the EAEU Court determination and ability to elaborate and advocate the “direct effect” and “primacy” principles as fundamental propositions remains unclear. First, there is no certainty of the positions of the EAEU Member States on their accountability to the EAEU Court case law, in particular, Advisory Opinions. Second, the Constitutional Court of Russia has defined a precise concept of the influence of decisions of international bodies on the Russian legal system. The 2015 *Avangard Agro Orel* case is an example. In this case, in line with the *Solange I* and *Solange II* reasoning,²⁷ the Constitutional Court reiterated its jurisdiction to verify the compliance of decisions of EAEU bodies with respect to human rights protected in the Constitution.²⁸

2. Belarus

2.1. Belarusian Constitutionalism, International Law, and the EAEU Treaty

Napoleon believed that constitutions should be *court et obscure* and, similarly, according to some American founding fathers, “short and dark.”²⁹ The Belarus Constitution,³⁰ as well as the constitutions of Russia and Ukraine, is almost twice as long

²⁵ Особое мнение судьи К.Л. Чайки от 25 февраля 2017 г. по делу № CE-1-1/1-16-БК [Dissenting Opinion of Judge K.L. Chaika of 25 February 2017 in the Case No. SE-2-1/1-16-БК] (Jul. 2, 2019), available at <http://courteurasian.org/doc-17993>.

²⁶ Консультативное заключение Суда ЕАЭС от 10 июля 2018 г. [Advisory Opinion of the EAEU Court of 10 July 2018] (Jul. 2, 2019), available at <http://courteurasian.org/doc-21263>.

²⁷ Cases *Solange I* (BVerfGE 37, 271 ff.) and *Solange II* (BVerfGE 73, 339 ff.).

²⁸ Определение Конституционного Суда Российской Федерации от 3 марта 2015 г. № 417-О // СПС «КонсультантПлюс» [Order of the Constitutional Court of the Russian Federation No. 417-O of 3 March 2015, SPS “ConsultantPlus”].

²⁹ Günter Frankenberg, *Comparing Constitutions: Ideas, Ideals, and Ideology – Toward a Layered Narrative*, 3(4) International Journal of Constitutional Law 439 (2006).

³⁰ The Constitution of the Republic of Belarus, adopted on 15 May 1994, No. 2878-XII (as amended by the republican referendums of 24 November 1996, 17 October 2004). The full text of the Constitution in English is available at <http://law.by/main.aspx?guid=3871&p0=V19402875e>.



as the American one.³¹ It is, arguably, not as “dark” either.³² However, there seems to be an exception, a “dark” spot concerning the interrelations of the international legal order and national legal system, as well as the place of acts of international institutions.

The Belarus Constitution differs from those of Russia and Ukraine as it does not provide for the priority of international treaties as in Russia, or of their effect in general as in Ukraine. However, it stipulates that the State shall recognize the supremacy of the generally-recognized principles of international law and ensure that its laws comply with such principles, which the Russian Constitution does as well, but the Ukrainian one does not.³³ Some of these principles are listed in Article 18 of the Constitution:

In its foreign policy the Republic of Belarus shall proceed from the principles of equality of States, non-use or threat of force, inviolability of frontiers, peaceful settlement of disputes, non-interference in internal affairs, and other generally-recognized principles and norms of international law.

In the opinion of the former head of the Constitutional Court, the generally-recognized principles of international law possess the highest legal force and the Constitution must be interpreted in light of them.³⁴ In any event, the 1978 Constitution of the Belorussian Soviet Socialist Republic referred to international treaties only in the context of concluding and ratifying them. The Belarus Constitution is an improvement because it recognizes international treaties as a source of law and refers to them in a broader context (mentioning them six times in the text).³⁵ However, the Constitution specifically prohibits the conclusion of international treaties that are contrary to it.³⁶

Alongside the notion “international treaties,” the Constitution also uses the notion “international legal acts.” Although the latter are used in the Constitution in the context of ratification,³⁷ it can be understood as including such acts as international agreements and acts of international organizations, as well as international individual legal acts.³⁸

Several interpretations are possible, one being that the status of international treaties depends on the status of national legal acts by which such agreements are adopted as binding. For instance, the Law on International Treaties provides

³¹ See the Constitute Project for the English versions of constitutions at www.constituteproject.org.

³² Thus, there are no such debatable provisions as “proper and necessary” clause.

³³ Art. 8(1) of the Constitution of Belarus.

³⁴ *Василевич Г.А., Василевич С.Г. Конституционные основы имплементации международных договоров Республики Беларусь и норм интеграционного права* [Grigory A. Vasilevich & Sergey G. Vasilevich, *The Constitutional Basis for the Implementation of International Treaties of the Republic of Belarus and the Norms of Integration Law*] 104 (Minsk: Pravo i ekonomika, 2015).

³⁵ *Пляхимович И.И. Комментарий к Конституции Республики Беларусь. Т. 1* [Ivan I. Plyakhimovich, *Commentary to the Constitution of the Republic of Belarus. Vol. 1*] 209 (Minsk: Amalfeya, 2015).

³⁶ Art. 8(3) of the Constitution of Belarus.

³⁷ Arts. 61, 116(4) of the Constitution of Belarus.

³⁸ Plyakhimovich 2015, at 248.



that legal norms of international agreements concluded by Belarus form part of national legislation and are subject to direct application, apart from situations where it follows from the agreement itself that a national legal act should be adopted. In this case, international treaties have the force of the ratifying act.³⁹ A similar provision is contained in the Law on Normative Legal Acts.⁴⁰ One can deduce that in this case the legal force of international treaties is equated to that of national legal acts by which such treaties are adopted as binding. Thus, given the equal legal force, the act adopted later in time takes precedence. As noted by Pavlova⁴¹ and Zybailo,⁴² a newly adopted national law, decree, or edict can theoretically annul the norms of an international treaty applicable on the territory of Belarus. Following this logic, the same would apply to the EAEU Treaty, which was ratified by a national law.

Nevertheless, there are other interpretations. According to Vasilevich, the principle *lex specialis derogat legi generali* must be applied.⁴³ In this case, international agreements enjoy priority over any kind of laws, while remaining lower than the Constitution, essentially claiming that the legislative provisions mentioned above are unconstitutional.⁴⁴ To support this point, Article 116 of the Constitution provides that the Constitutional Court can recognize laws, decrees and edicts of the President unconstitutional, if they do not conform to ratified international legal acts.⁴⁵

This demonstrates certain deficiencies regarding the status of international treaties in the Belarusian legal system. The acts of international institutions are more complex, which has relevance given the powers of the Eurasian Economic

³⁹ Закон Республики Беларусь от 23 июля 2008 г. № 421-З «О международных договорах Республики Беларусь» // Национальный реестр правовых актов Республики Беларусь. 2008. № 184, 2/1518 [Law of the Republic of Belarus No. 421-Z of 23 July 2008. On International Treaties, National Register of Legal Acts of the Republic of Belarus, 2008, No. 184, 2/1518].

⁴⁰ Закон Республики Беларусь от 10 января 2000 г. № 361-З «О нормативных правовых актах Республики Беларусь» // Национальный реестр правовых актов Республики Беларусь. 2000. № 7, 2/136 [Law of the Republic of Belarus No. 361-Z of 10 January 2000. On Normative Legal Acts, National Register of Legal Acts of the Republic of Belarus, 2000, No. 7, 2/136].

⁴¹ Павлова Л.В. Особенности законотворчества Республики Беларусь в области заключения международных договоров // Актуальные проблемы международного публичного и международного частного права: Сборник научных трудов. Вып. 1 [Lyudmila V. Pavlova, *Features of Lawmaking of the Republic of Belarus in the Field of Concluding International Treaties in Actual Problems of International Public and International Private Law: Collection of Scientific Papers. Issue 1*] 109 (E.V. Babkina et al. (eds.), Minsk: BSU, 2011).

⁴² Зыбайло А.И. Место источников права ЕврАзЭС в правовых системах государств-членов // Евразийский юридический журнал. 2013. № 7. С. 14–18 [Alla I. Zybailo, *Place of the Sources of EurAsEC Law in the Legal Systems of Its Member States*, 7 Eurasian Law Journal 14 (2013)].

⁴³ Vasilevich & Vasilevich 2015, at 124.

⁴⁴ See also Василевич Г.А. Конституционное право [Grigory A. Vasilevich, *Constitutional Law*] 37 (Minsk: Registr, 2012); Plyakhimovich 2015, at 244.

⁴⁵ Art. 116(5) of the Constitution of Belarus.



Commission – the main regulatory body of the EAEU – to adopt decisions that are directly applicable on the territory of member States.⁴⁶

2.2. Belarusian Constitutionalism and EAEU Legal Acts

When reviewing the constitutionality of the new technical standards legislation adopted to align national law with EAEU law, the Constitutional Court of Belarus recognized the priority of EAEU law in the respective field.⁴⁷ However, a caveat was introduced that priority cannot result in a violation of constitutional rights and freedoms. In essence, the Constitutional Court claimed the right to review EAEU legal acts on human rights grounds. This reasoning was grounded in the supremacy of the Constitution read jointly with the provision of the EAEU Treaty preamble requiring unconditional respect for the supremacy of constitutional human rights and freedoms.

The legal force of acts of international organizations can generally be deduced from the competence of the Constitutional Court to review the constitutionality of legal acts.⁴⁸ The Court can deliver opinions on the conformity of acts adopted by international institutions to the Constitution, international treaties ratified by Belarus, and laws and edicts of the president.⁴⁹ It follows that acts of international institutions are hierarchically lower than national legal acts. Moreover, until recently, it followed from Article 9 of the Law on the Constitutional Court⁵⁰ that acts of international institutions (as well as international treaties of Belarus) could be unilaterally found inapplicable by the Constitutional Court:

laws, decrees, and edicts of the President of the Republic of Belarus, international treaty and other obligations of the Republic of Belarus, acts of intergovernmental entities in which Republic of Belarus participates... acts of other State agencies, which are found by the Constitutional Court to be

⁴⁶ Regulation on the Eurasian Economic Commission (Annex 1 to the Treaty on the Eurasian Economic Union), para. 13.

⁴⁷ Решение Конституционного Суда Республики Беларусь от 13 октября 2016 г. № Р-1069/2016 «О соответствии Конституции Республики Беларусь Закона Республики Беларусь «Об оценке соответствия техническим требованиям и аккредитации органов по оценке соответствия»» [Decision of the Constitutional Court of the Republic of Belarus No. R-1069/2016 of 13 October 2016. On Conformity of the Law of the Republic of Belarus “On Technical Requirements Conformity Assessment and Accreditation of Conformity Assessment Bodies” to the Constitution of the Republic of Belarus] (Jul. 2, 2019), available at www.kc.gov.by/main.aspx?guid=44693.

⁴⁸ Art. 116 of the Constitution of Belarus.

⁴⁹ Art. 116(4) of the Constitution of Belarus.

⁵⁰ Закон Республики Беларусь от 30 марта 1994 г. № 2914-XII «О Конституционном Суде Республики Беларусь» // Ведомости Верховного Совета Республики Беларусь. 1994. № 15. Ст. 220 [Law of the Republic of Belarus No. 2914-XII of 30 March 1994. On the Constitutional Court, Bulletin of National Assembly of Belarus, 1994, No. 15, Art. 220].



inconsistent with the Constitution or acts which have higher legal force, shall be considered void... as of the moment determined by the Constitutional Court.

Adoption of the 2014 Law on Constitutional Legal Procedure⁵¹ has seen the removal of this provision. It provides that when an international obligation or an act of an international entity contradicts certain legal acts, the relevant State authorities shall take measures to terminate the participation of Belarus in such an international treaty, terminate the obligatory nature of such an act, or introduce changes therein.⁵² Arguably, the law has found a compromise between national constitutional rules and rules of international law with a view to ensuring that the Constitution is respected while avoiding international legal responsibility. Possibly these provisions intend to ameliorate the constitutional rules with a view to taking a favorable stance towards Belarus participation in the EAEU. Nevertheless, the dependency direction remains – the decisions of EAEU institutions remain dependent on the national legislation of Belarus.

Some scholars believe that acts of international institutions have lower force than national legislation. Zybailo states that the acts of international institutions rank below the Constitution, ratified international treaties, laws, and edicts of the President.⁵³ Vasilevich agrees: the wording of the Constitution makes acts of international institutions subordinate enactments.⁵⁴ However, he proposed a solution to the issue of priority of acts of international institutions in Belarus.⁵⁵

Because *pacta sunt servanda* is a generally-recognized principle of international law and the Constitution acknowledges such principles, Vasilevich claims that without fulfilment of decisions of an interstate entity and its organs it is not possible to talk about fulfilment of this principle.⁵⁶ He further claims that this conclusion does not contradict Article 116 of the Constitution because “a constitutional norm lives in time and its perception can change (if its formulation allows it).”⁵⁷

⁵¹ Закон Республики Беларусь от 8 января 2014 г. № 124-З «О конституционном судопроизводстве» // Национальный правовой Интернет-портал Республики Беларусь. 16 января 2014 г., 2/2122 [Law of the Republic of Belarus No. 124-Z of 8 January 2014. On Constitutional Legal Procedure, National Legal Internet Portal of the Republic of Belarus, 16 January 2014, 2/2122].

⁵² Paras. 7 and 8 of Art. 85 of the Law on Constitutional Legal Procedure.

⁵³ Zybailo 2013.

⁵⁴ Василевич Г.А., Василевич С.Г. О непосредственном действии актов Евразийской экономической комиссии // Евразийский юридический журнал. 2014. № 10. С. 35 [Grigory A. Vasilevich & Sergey G. Vasilevich, *On the Direct Action of Acts of the Eurasian Economic Commission*, 10 Eurasian Law Journal 34, 35 (2014)].

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.* at 36.



Vasilevich further proposes to reconcile the differing provisions. Based on the principles *lex posterior derogat legi priori* and *lex specialis derogat legi generali*, he proposes to specify the status of acts of interstate entities in a special or programmatic law. This would be compatible with the requirement of Article 116 of the Constitution regarding the compliance of acts of interstate entities with laws and edicts and other constitutional provisions, and comply with international treaties.

Although this proposal is an important contribution to resolving the issue of conflict of international legal obligations and national legal rules, certain comments must be made. The Statute on the Eurasian Economic Commission provides that decisions of the Commission are *binding* on Member States.⁵⁸ However, primacy and the binding nature of legal norms are different notions, and the EAEU Treaty does not provide for primacy of Commission decisions over national law.⁵⁹ To compare, one draft EAEU Treaty provided:

Legal acts of the Union shall be *binding*, shall have *direct applicability* on the territories of Member States, and shall have *priority* over the legislation of Member States.⁶⁰

Thus, the final version of the EAEU Treaty removed *priority*, retaining only the binding character and direct applicability of certain acts. Therefore, formally, there are no contradictions with the provisions of Article 116 of the Constitution, as Commission decisions can be binding and directly applicable, whereas they also can be checked for consistency with the Constitution, laws, edicts, and decrees. Such a contradiction would occur if the EAEU Treaty is amended to introduce priority, or if judicial interpretation or joint interpretation of the member States provides for it.⁶¹ Until then, the difficulty that arises is that of effectiveness of the binding nature of Commission decisions without primacy and viability of the EAEU legal order.


The resolution of the conflict proposed by Vasilevich can help avoid international responsibility while respecting the Constitution. However, a special act determining the force of acts of international entities can be overturned by another special law, meaning that the functioning of the EAEU legal order will be dependent on national legislation. This hardly favors the effective functioning of the former, since a conflict can occur.

⁵⁸ Point 13 of para. 1 of the Statute on the Eurasian Economic Commission.

⁵⁹ See Rilka Dragneva, *The Eurasian Economic Union: Balancing Sovereignty and Integration in Post-Soviet Constitutions and Challenges of Regional Integration*, *supra* note 14, at 168.

⁶⁰ Проект Договора о Евразийском экономическом союзе [Draft Treaty on the Eurasian Economic Union] (Jul. 2, 2019), available at <http://kazenergy.com/ru/2012-09-05-04-11-04/2011-05-13-18-20-44/10777-2013-09-10-07-03-15.html>.

⁶¹ The Statute of the EAEU Court (Annex 2 to the Treaty on the Eurasian Economic Union) provides that the Court's "clarifications of provisions of the Treaty" do not deprive the Member States of the right for joint interpretation.



In our view, it would be beneficial to amend Article 116 of the Constitution by removing the ability of the Constitutional Court to rule on conformity of acts of international institutions with laws, edicts, and decrees. For instance, amending constitutions was often the case for States joining the EU.⁶² Moreover, the President of Belarus has mentioned the possibility of amending the Constitution:

New problems and challenges have emerged. And time may require something new. It is necessary to start with important things if we dare to do it. We should create a group of wise people, lawyers to analyze the Constitution. If necessary, we will [amend the Constitution].⁶³

Until this happens, another way to deal with the issue is to read the Constitution as a “living document” following the approach outlined by the Chief Justice of the Supreme Court of the United States in the case *McCulloch v. Maryland*:

...we must never forget that it is a constitution we are expounding.⁶⁴

It follows that a constitution differs from other legislative acts leading to different interpretation, that is, an interpretation changing over time. As has been argued elsewhere, it is possible to interpret the problematic provision of the Constitution of Belarus as not applicable to supranational institutions.⁶⁵ At the same time, all the caveats regarding supranationalism of the EAEU and its institutions apply.⁶⁶

⁶² See, e.g., The Constitution of the Republic of Estonia Amendment Act (Jul. 2, 2019), available at <http://www.president.ee/en/republic-of-estonia/the-constitution>. The main provisions are: § 1. Estonia may belong to the European Union, provided the fundamental principles of the Constitution of the Republic of Estonia are respected. § 2. When Estonia has acceded to the European Union, the Constitution of the Republic of Estonia is applied without prejudice to the rights and obligations arising from the Accession Treaty. See also Constitutional Act of the Republic of Lithuania on Membership of the Republic of Lithuania in the European Union (Jul. 2, 2019), available at http://www.lrs.lt/upl_files/Lietuvos_pirmininkavimas_ES/dokumentai/CONSTITUTIONAL_ACT.pdf. Additionally see *The Impact of EU Accession on the Legal Orders of New EU Member States and (Pre-)Candidate Countries: Hopes and Fears* (A.E. Kellermann et al. (eds.), The Hague: TMC Asser Press, 2006). See also Art. 23 of the Basic Law for the Republic of Germany of 1949 (rev. 2012) (Jul. 2, 2019), available at https://www.constituteproject.org/constitution/German_Federal_Republic_2012?lang=en and Art. 88 of the Constitution of France of 1958 (rev. 2008) (Jul. 2, 2019), available at https://www.constituteproject.org/constitution/France_2008?lang=en.

⁶³ Lukashenko contemplates adjusting Belarus' Constitution to meet present-day challenges, Belarusian Telegraph Agency, 7 October 2016 (Jul. 2, 2019), available at <http://eng.belta.by/president/view/lukashenko-contemplates-adjusting-belarus-constitution-to-meet-present-day-challenges-95196-2016>.

⁶⁴ *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819). Overview of other cases is available in Charles Warren, *The Supreme Court in United States History. Vol. 1: 1789–1821* (Boston: Little, Brown and Co., 1922).

⁶⁵ See the explanation of the “living constitution” reading of the Constitution of Belarus in Maksim Karliuk, *The Constitutional Order of Belarus and Its Adaptability to the Eurasian Economic Union: A “Living Constitution” Workaround in Post-Soviet Constitutions and Challenges of Regional Integration*, *supra* note 14, at 153.

⁶⁶ See Maksim Karliuk, *The Eurasian Economic Union: An EU-Inspired Legal Order and Its Limits*, 42(1) *Review of Central and East European Law* 50 (2017).



The problem might remain as theoretical in nature. The Constitutional Court has never identified problems arising from the EAEU legal order. Similarly, no challenges were made regarding this issue, and Commission decisions are being implemented by Belarus. There was an attempt for formal cooperation between a national court of Belarus and the Court of the Eurasian Economic Community (EurAsEC) – the predecessor of the EAEU Court. The Supreme Economic Court of Belarus lodged a request for a preliminary ruling asking about the application of an international treaty and two Commission decisions.⁶⁷ However, the communication between the national and supranational institutions did not work out – the Belarus court withdrew the request,⁶⁸ whereas the Grand Chamber of the EurAsEC Court, having a right to reject the withdrawal, continued with the examination and delivered the ruling.⁶⁹ Future practice will show whether the theoretically problematic issues of compatibility of the Belarus and EAEU legal orders will arise in practice. If so, there are tools to overcome them without introducing otherwise undesirable amendments.

3. Ukraine

3.1. Constitutional Provisions

The constitutional system of Ukraine ranks among the most dynamic in post-Soviet space. Although Ukraine became independent on 24 August 1991, the political elites did not decide on the text of the Constitution until almost five years later. As a result, the Ukrainian *Verkhovna Rada* adopted the Constitution on 28 June 1996, the last in post-Soviet space. The constitutions of the Member States of the European Union set the tone of its structure, objectives, and basic principles.⁷⁰ Consequently, it makes provision for separation of powers, protection of fundamental human rights, and democratic freedoms. Therefore, as provided by the Constitution, Ukraine should become a modern European country willing to depart from its Soviet past and ready to take sides with States that share international and European democratic values. Therefore, this constitutional order could not remain stable for long.

⁶⁷ Решение Большой коллегии Суда ЕврАзЭС от 10 июля 2013 г. // Бюллетень Суда Евразийского экономического сообщества. 2013. № 2. С. 7–17 [Great Collegium of the EurAsEC Court Decision of 10 July 2013, Bulletin of the Eurasian Economic Community Court, 2013, No. 2, at 7–17]. For analysis, see *Исполинов А.С. Навязанный монолог: первое преюдициальное заключение Суда ЕврАзЭС // Евразийский юридический журнал. 2013. № 8. С. 21–30 [Alexey S. Ispolinov, An Imposed Monologue: The First Preliminary Ruling of the Court of the Eurasian Economic Community, 8 Eurasian Law Journal 21 (2013)].*

⁶⁸ Особое мнение судьи Смирнова по делу № 1-6/1-2013 [Dissenting Opinion of Judge Smirnov in the Case No. 1-6/1-2013] (Jul. 2, 2019), available at <http://courteurasian.org/page-20991>.

⁶⁹ Постановление Суда ЕАЭС от 20 мая 2014 г. [Decision of the EAEU Court of 20 May 2013] (Jul. 2, 2019), available at <http://courteurasian.org/page-20991>.

⁷⁰ For example, Richard C.O. Rezie, *The Ukrainian Constitution: Interpretation of the Citizens' Rights Provisions*, 31(1) *Case Western Reserve Journal of International Law* 169 (1999); Roman Petrov & Aleksander Serdyk, *Ukraine: A Constitutional Design Between Façade Democracy and Effective Transformation? in Democratization and the European Union* 170 (L. Morlino & W. Sadurski (eds.), London; New York: Routledge, 2010).



According to the initial version of the basic law, Ukraine was to be a strong presidential republic. Because of tense political periods in Ukraine, the Constitution was amended to reflect the will of the victorious political establishment. The first revision took place in 2004, during the “Orange Revolution,” and the aim was to diminish the powers of the President in favor of the *Verkhovna Rada*. The second revision in 2010, an initiative of the newly-elected pro-Russian President, Victor Yanukovich, was to reinstate the powers of the President to the level of 1996. The third revision, which followed the 2014 “Revolution of Dignity” (*Maidan Revolution*), introduced changes similar to those of the 2004 version of the Constitution, vesting the *Verkhovna Rada* with greater powers.

3.2. Application of International Law in the Legal System of Ukraine

Although the Ukrainian Constitution did not abnegate the binding effect of international treaties within the national legal order, generally-recognized principles of international law are far from being a fundamental part of the Ukrainian legal system.⁷¹ However, the initial version of the Constitution of Ukraine was technically less exposed to the influence of international law than the Constitution of Russia or even Belarus.⁷² The situation is changing because of the progressive Europeanization of the Ukrainian legal system, and of the Ukrainian judiciary in particular.⁷³ The Constitution of Ukraine provides in Article 9 that:

International treaties that are in force, agreed to be binding by the Verkhovna Rada of Ukraine, are part of the national legislation of Ukraine.

The conclusion of international treaties that contravene the Constitution of Ukraine is possible only after introducing relevant amendments to the Constitution of Ukraine.⁷⁴

The Constitution declares that only duly ratified international agreements are part of the national legislation of Ukraine. Following the hierarchy of sources of the Ukrainian legal system, these treaties rank below the Ukrainian Constitution and above Ukrainian subordinate legislation. Consequently, even a duly ratified international treaty is not entitled to override conflicting provisions of the Ukrainian Constitution and general principles of law contained therein. Nonetheless, a duly ratified international treaty overrides relevant provisions of subordinate legislation in the event of a conflict. This concept was subsequently included in Ukrainian legislation and case law of the Constitutional Court of Ukraine.⁷⁵

⁷¹ Petrov & Serdyk 2010, at 170–193.

⁷² See Sections 1 and 2 of this article.

⁷³ Petrov & Kalinichenko 2011, at 325–353.

⁷⁴ Another full text in English is available at <https://www.wipo.int/edocs/lexdocs/laws/en/ua/ua013en.pdf>.

⁷⁵ Закон України від 29 червня 2004 р. № 1906-IV «Про міжнародні договори України» [Law of Ukraine No. 1906-IV of 19 June 2004. On International Treaties], Art. 19(2) (Jul. 2, 2019), available at <https://zakon.rada.gov.ua/laws/show/1906-15>; Висновок Конституційного Суду України від 11 липня 2001 р.



Nevertheless, the fact that the application of international law within the Ukrainian legal order is not systematic deserves special mention. First, no settled practice on the application of provisions of international treaties exists. Moreover, their place within the Ukrainian legal system is not clear. Before the 2014 *Maidan* Revolution, the Ukrainian judiciary hardly referred to international treaties in their decisions and formally denied their direct effect within the Ukrainian legal system. However, the conditions have changed.

The judicial reform originating in the implementation of essential elements of the 2014 EU-Ukraine Association Agreement (EU-Ukraine AA) did not go unnoticed.⁷⁶ As for the EU-Ukraine AA, it contained such objectives as ensuring the rule of law, strengthening the judiciary, improving its efficiency, safeguarding its independence and impartiality, and combating corruption.⁷⁷ Consequently, Ukrainian judges refer to international law and decisions of international courts (mainly decisions of the European Court of Human Rights (ECtHR)) in their decisions. This judicial activism can be attributed to two possible reasons. The first is the elevated competitiveness and transparency of the Ukrainian judiciary resulting from ambitious reforms in 2015–2017.⁷⁸ The second is the policy implemented by international organizations (UN, OSCE, Council of Europe, EU, and others) since 2014. They have been consistently investing in training Ukrainian judges in the foundations of international law and case law of the ECtHR.⁷⁹ Despite these considerable changes, the Ukrainian judiciary does not apply provisions of international treaties and international law principles, including ECtHR judgments coherently. The approach is irregular and selective, in order to satisfy the needs of argumentation in a particular decision.⁸⁰

№ 3-в/2001 у справі № 1-35/2001 [Decision of the Constitutional Court of Ukraine on the Statute of the International Criminal Court of 11 July 2001 No. 3-в/2001 in the Case No. 1-35/2001] (Jul. 2, 2019), available at <https://zakon.rada.gov.ua/laws/show/v003v710-01>.

⁷⁶ Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part (Jul. 2, 2019), available at <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A22014A0529%2801%29>.

⁷⁷ Arts. 2 and 14 of the EU-Ukraine AA.

⁷⁸ Among these reforms were: elimination of high specialized courts with subsequent sacking of all judges who worked in these courts and introduction of a transparent system of selection of judges of common courts and the Supreme Court of Ukraine in 2016–2017. Detailed knowledge of the ECHR and the case law of the ECtHR are among key criteria of eligibility of newly appointed judges in Ukraine, more information is available at <http://vkksu.gov.ua/ua>.

⁷⁹ For example, the OSCE has drafted a comprehensive handbook for Ukrainian judges on application of decisions of the ECtHR [Застосування практики Європейського суду з прав людини при здійсненні правосуддя: Науково-методичний посібник для суддів] (Jul. 2, 2019), available at www.osce.org/uk/ukraine/232716?download=true. The Supreme Court of Ukraine launched a substantive handbook on the ECHR and database on the relevant case law of the ECtHR for the Ukrainian judges (Jul. 2, 2019), available at [www.scourt.gov.ua/clients/vsu/vsu.nsf/\(documents\)/04041CB11A2E814EC2257F9900411906](http://www.scourt.gov.ua/clients/vsu/vsu.nsf/(documents)/04041CB11A2E814EC2257F9900411906).

⁸⁰ For instance, Рішення Конституційного суду України від 25 січня 2012 р. № 3-рп/2012 у справі № 1-11/2012 [Decision of the Constitutional Court of Ukraine on the Pension Fund of Ukraine of 25 January 2012 No. 3-рп/2012 in the Case No. 1-11/2012] (Jul. 2, 2019), available at <https://zakon.rada.gov.ua/laws/show/v003p710-12>.



In order to promote the application of the ECHR and case law of the ECtHR, the Ukrainian *Verkhovna Rada* adopted a 2006 Law “On the Execution of Judgments concerning the Application of Practice of the ECtHR,”⁸¹ according to which ECtHR judgments regarding Ukraine are binding and are to be executed on the territory of Ukraine as a matter of priority.⁸² The law requires effective enforcement of the ECtHR judgments and payment of compensation. It also concerns revisions of the Ukrainian court decisions related to or caused by the ECtHR judgments. Furthermore, this law states that the Ukrainian judiciary is bound to consider ECtHR case law as a source of the national legal system.⁸³ The authorized State agency of Ukraine (Representative of Ukraine in the Council of Europe) must monitor national legislation and practices to ensure they are in line with the ECHR and case law of the ECtHR.⁸⁴ It should be added that, in prior years, the Constitutional Court of Ukraine and Ukrainian general courts partly followed the practice of referring to the ECtHR case law and recognized the binding nature of ECtHR judgments in their decisions.⁸⁵

In this context, the current application of international treaties and other sources of international law discourages the Ukrainian judiciary from including references to the EU *acquis* in their decisions. One important goal for the moment is the effective implementation of the Energy Community Treaty (EnC) and the EU-Ukraine AA within the Ukrainian legal system. We do not know whether the Ukrainian judiciary views decisions of the EU-Ukraine common institutions set up under the AA and the Treaty of the EnC as sources of national law. The effective implementation of the respective agreements in the legal system of Ukraine could be achieved by the adoption of a special law similar to the 2006 Law “On the Execution of Judgments concerning the Application of Practice of the ECtHR.” Ukrainian administrative courts have referred to the case law of the CJEU without, however, providing the legal reasoning behind this. This approach generated confusion within the Ukrainian judiciary, who repeatedly and mistakenly made references to CJEU cases as ECtHR cases. Consequently, in 2014 the High Administrative Court of Ukraine made a statement that Ukrainian administrative court decisions may not be based on doctrines and principles in CJEU case law. At

⁸¹ Закон України від 23 лютого 2006 р. № 3477-IV «Про виконання рішень та застосування практики Європейського суду з прав людини» [Law of Ukraine No. 3477-IV of 23 February 2006. On the Execution of Judgments concerning the Application of Practice of the ECtHR] (Jul. 2, 2019), available at <https://zakon.rada.gov.ua/laws/show/3477-15>.

⁸² *Id.* Art. 2.

⁸³ *Id.* Art. 17.

⁸⁴ *Id.* Art. 18.

⁸⁵ For example, Рішення Вищого спеціалізованого суду України з розгляду цивільних і кримінальних справ від 19 лютого 2013 р. № 5-915 [Decision of the Highest Specialized Civil and Criminal Court of Ukraine of 19 February 2013 No. 5-915 (*Y. Lutsenko* case)]. Analysis of case law of the Ukrainian courts, available at www.reyestr.court.gov.ua, indicates a steady increase of references to the case law of the ECtHR by Ukrainian judges since 2014.



the same time, it could act as argumentation and a “persuasive source of reference” regarding the “harmonious interpretation of national legislation of Ukraine with established standards of the EU.” The High Administrative Court considers that one reason for this practice is the need to effectively implement the EU-Ukraine AA.⁸⁶

3.3. Impact of the EU-Ukraine Association Agreement on the Ukrainian Legal System

The EU-Ukraine AA has affected significantly the Ukrainian legal system for a number of reasons. First, the EU-Ukraine AA has triggered and is likely to trigger further constitutional amendments to ensure that Ukraine shares EU common democratic values and effectively enforces the EU-Ukraine AA. Second, the Ukrainian judiciary is expected apply the provisions of the EU-Ukraine AA and the relevant EU *acquis* in the implementation of the EU-Ukraine AA, which would directly affect the Ukrainian legal system. Third, the decisions of common institutions set up under the EU-Ukraine AA will become part of the national legal system. As a result, the national executive and judiciary will put them into action.

3.3.1. Constitutional Amendments

On 2 June 2016 the *Verkhovna Rada* adopted the Law on amending the Constitution of Ukraine (with respect to justice), which became one of the first “post-Maidan” constitutional amendments.⁸⁷ Initiated by President Poroshenko to combat corruption and increase the independence of the judiciary in Ukraine, they produced considerable public debate in Ukraine and beyond. Externally, the European Commission for Democracy through Law (Venice Commission) made two thorough studies of the draft amendments for their compliance with European standards and emitted several important reservations.⁸⁸ Internally, on one hand, the draft amendments were criticized for extending the authority of the President of Ukraine: notably, the power to influence the appointment of judges, to narrow the scope of judges’ immunity, and to retain a complicated system of specialized

⁸⁶ Інформаційний лист Вищого адміністративного суду України від 18 листопада 2014 р. № 1601/11/10/14-14 [Information Letter of the High Administrative Court of Ukraine of 18 November 2014 No. 1601/11/10/14-14] (Jul. 2, 2019), available at http://www.vasu.gov.ua/sudovapraktika/inf_list/il18_11_2014_1601_11_10_14-14/.

⁸⁷ Закон України від 2 червня 2016 р. № 1401-VIII «Про внесення змін до Конституції України (щодо правосуддя)» [Law of Ukraine No. 1401-VIII of 2 June 2016. On Amending the Constitution of Ukraine (as to Justice)] (Jul. 2, 2019), available at <https://zakon.rada.gov.ua/laws/show/1401-viii>.

⁸⁸ The reservations concerned mainly the scope of judges’ immunity and preserving the balance of power in the procedure of appointment of judges and prosecutors (election of the Highest Law Council, which is responsible for the appointment of judges (qualified majority voting) and right of the Ukrainian Parliament to veto the appointment and removal of the General Prosecutor of Ukraine). European Commission for Democracy through Law (Venice Commission), Opinion No. 803/2015 of 26 October and of 3 December 2015.



courts in Ukraine. On the other hand, according to the Office of the President of Ukraine, the constitutional amendments were essential to achieve the objectives of the EU-Ukraine AA related to sharing common values, combating corruption, and improving access to the judiciary. More importantly, the constitutional amendments warrant that Ukraine observes the essential elements of the EU-Ukraine AA (respect for the principle of the rule of law)⁸⁹ and meets the objectives of Title III of the EU-Ukraine AA on justice, freedom and security. In accordance with this document, Ukraine should consolidate the rule of law, improve the efficiency of the judiciary, safeguard its independence and impartiality, and combat corruption.⁹⁰

The EU institutions expressed sufficient support for the constitutional reform in Ukraine. The annual report on the progress of implementation of the EU-Ukraine AA contained positive remarks about the 2016 constitutional amendments. That legislation

strengthens judicial independence and [reorganizes] the court system, by streamlining the judicial instances (from four to three) and by subjecting the sitting judges to examinations and mandatory electronic asset declarations.⁹¹

The most considerable modification in the constitutional reform in Ukraine introduced by the EU-Ukraine AA⁹² can be seen in revised Article 124 of the Constitution wherein it is stated that

Ukraine may recognize the jurisdiction of the International Criminal Court as provided for by the Rome Statute of the International Criminal Court.

This amendment affects the 2001 Decision of the Constitutional Court of Ukraine. According to the respective Decision of the Constitutional Court of Ukraine, the jurisdiction of the International Criminal Court does not comply with the national Constitution, and, consequently, the ratification of the former by the Ukrainian Parliament cannot be possible.⁹³ The wording of revised Article 124 of the Ukrainian

⁸⁹ Preamble, Art. 1(2)(e) and Art. 2 of the EU-Ukraine AA.

⁹⁰ *Id.* Art. 14.

⁹¹ Joint Staff Working Document "Association Implementation Report on Ukraine," SWD(2016) 446 final, Brussels, 9 December 2016.

⁹² Art. 8 of the EU-Ukraine AA.

⁹³ Decision of the Constitutional Court of Ukraine on the Statute of the International Criminal Court, *supra* note 75. Therein the Constitutional Court of Ukraine stated that in accordance with the Rome Statute the International Criminal Court complements the system of national judiciary. For example, the International Criminal Court may exercise its jurisdiction on territories of the countries which are Parties to the Rome Statute. It contradicts the Title VIII "Judiciary" of the Constitution of Ukraine which (Art. 124) provides that "delegation of competences of national judiciary is not permitted."



Constitution, in turn, empowers the Ukrainian Parliament to ratify the Rome Statute.⁹⁴

3.3.2. Application and Direct Effect of the EU-Ukraine AA in the Ukrainian Legal Order

Even before the EU-Ukraine AA was signed, the Ukrainian judiciary made occasional references to fundamental principles of EU law and elements of the EU *acquis*, as well as to case law of the CJEU.⁹⁵ This observation arises from a number of external and internal factors. First, since 2004 Ukraine's pro-European foreign policy has derived from the national programme of approximating Ukrainian legislation to EU law. In practice, some Ukrainian judges with expertise in EU law were encouraged to refer to the relevant EU *acquis* in their decisions. Second, the EU has been offering massive result-oriented support in technical and financial spheres to the Ukrainian judiciary. It triggered major internal institutional reforms within the Ukrainian judiciary, such as the establishment of the system of administrative courts. The settled case law of Ukrainian courts shows that primarily administrative judges have been inclined to initiate the application of the EU *acquis* within the Ukrainian judiciary. Third was the increased transparency of the Ukrainian judiciary. The national registry of Ukrainian case law began operating in 2006 and was favorably received by the Ukrainian legal community. Judges and lawyers received regular updates about developments in EU law via workshops and courses at Ukrainian legal higher educational institutions. In 2004, the Law "On the All-State Programme on the Adaptation of Ukrainian Legislation to EU Laws," which envisages the export of the entire "accession *acquis*" into Ukraine's legal system, was adopted.⁹⁶ Although already out-of-date, it encouraged the Ukrainian judiciary to use the EU *acquis* as an important source of reference.⁹⁷

The Ukrainian judiciary (including the Constitutional Court of Ukraine) had applied the EU *acquis* as a persuasive source of law long before the signature of the

⁹⁴ However, the ratification of the Rome Statute is likely to be postponed until the eventual implementation of the "Minsk II Agreement" regarding the military conflict in the East of Ukraine (Donbass area) caused by the aggression of Russia in Ukraine. In particular, the sides of the conflict must ensure the effective ceasefire, effective control by Ukraine of its Eastern border with Russia and guarantee the amnesty of illegally armed belligerents. These actions must take place before the ratification of the Rome Statute in order to avoid entrenching legal war between the government of Ukraine and the Russian government and governments of the self-proclaimed separatist republics in the East of Ukraine.

⁹⁵ Roman Petrov, *Regulatory Convergence and Application of EU Law in Ukraine in Legislative Approximation and Application of EU Law in the Eastern Neighbourhood of the European Union: Towards a Common Regulatory Space?* 137 (P. Van Elsuwege & R. Petrov (eds.), Abingdon; New York: Routledge, 2014).

⁹⁶ The main objective of this law is the "alignment of the Ukrainian legislation with the *acquis communautaire*, taking into consideration criteria specified by the EU towards countries willing to join the EU."

⁹⁷ Закон України від 18 березня 2004 р. № 1629-IV «Про Загальнодержавну програму адаптації законодавства України до законодавства Європейського Союзу» [Law of Ukraine No. 1629-IV of 18 March 2004. On the All State Programme of Adaptation of Ukrainian Legislation to That of the EU] (Jul. 2, 2019), available at <https://zakon.rada.gov.ua/laws/show/1629-iv>.



EU-Ukraine AA. For instance, in the event of conflicting provisions of national law, Ukrainian courts recognized the predominance of the EU-Ukraine AA predecessor (EU-Ukraine PCA).⁹⁸ Furthermore, the Ukrainian administrative courts have adapted from the EU legal system an unprecedented (for Ukraine) EU-originated concept of legal certainty for State liability issues.⁹⁹

Further dramatic political events in Ukraine and the *Maidan* Revolution in 2013–2014 that triggered the signature of the EU-Ukraine AA in June 2014 promoted the debate over the application of the EU *acquis* and case law of the CJEU by the Ukrainian judiciary. At the end of 2014, the High Administrative Court interfered and addressed the challenge in a traditional way for post-Soviet courts – issued an Information Letter to all administrative judges in Ukraine.¹⁰⁰ According to the Letter, EU founding treaties do not constitute part of legal system of Ukraine and, therefore, EU law and case law of the CJEU cannot be considered as part of the Ukrainian legal system

taking into account the European vector of Ukraine’s foreign policy and objectives of the Ukrainian law “On the All-State Programme on the Adaptation of Ukrainian Legislation to EU Laws” of 18 March 2004¹⁰¹

and the EU-Ukraine AA. The High Administrative Court also confirmed that

[l]egal positions as they are formalized in decisions of the CJEU can be taken into consideration by administrative courts as argumentation, reflections regarding the harmonious interpretation of Ukrainian legislation in line with established standards of the EU legal system, but not as a legal foundation (source of law) of a situation that caused a legal dispute.

⁹⁸ Рішення Вищого господарського суду України від 2 лютого 2005 р. № 12/267 [Judgment of the High Commercial Court of Ukraine of 2 February 2005 No. 12/267]. See also Рішення Вищого господарського суду України від 25 березня 2005 р. № 7/299 [Judgment of the High Commercial Court of Ukraine of 25 March 2005 No. 7/299 (*Closed Stock Company “Chumak” v. Kherson Custom Office*)]; Рішення Вищого господарського суду України від 22 лютого 2005 р. № 18/303 [Judgment of the High Commercial Court of Ukraine of 22 February 2005 No. 18/303 (*“Odek” LTD v. Ryvne Custom Office*)].

⁹⁹ Рішення Окружного адміністративного суду міста Києва від 25 листопада 2008 р. № 2/416 [Judgment of the District Administrative Court of the City of Kiev of 25 November 2008 No. 2/416]. Apparently, this judgment became pattern for subsequent decisions by Ukrainian administrative judges, see Рішення Окружного адміністративного суду міста Києва від 24 листопада 2008 р. № 5/503 [Judgment of the District Administrative Court of the City of Kiev of 24 November 2008 No. 5/503]; Рішення Окружного адміністративного суду міста Києва від 1 грудня 2008 р. № 5/451 [Judgment of the District Administrative Court of the City of Kiev of 1 December 2008 No. 5/451]; Рішення Окружного адміністративного суду міста Києва від 10 листопада 2008 р. № 5/435 [Judgment of the District Administrative Court of the City of Kiev of 10 November 2008 No. 5/435].

¹⁰⁰ Informational Letter of the High Administrative Court of Ukraine of 18 November 2014 No. 1601/11/10/14-14, *supra* note 86.

¹⁰¹ Law of Ukraine on the All State Programme of Adaptation of Ukrainian Legislation to That of the EU, *supra* note 97.



This compromising statement on behalf of the High Administrative Court of Ukraine led to contradictory consequences. First, Ukrainian judges were deprived of any formal grounds to apply various sources of the EU *acquis* in their decisions. Second, Ukrainian judges at the same time became authorized to refer to general principles, doctrines, and case law of the CJEU as a valuable source of interpretation in their decisions. Unfortunately, the High Administrative Court did not comment on the issues of application of the EU *acquis* referred to in the text of the EU-Ukraine AA and of binding decisions of the EU-Ukraine Association Council. Paradoxically, the 2016 constitutional amendments were meant to abolish the system of high-specialized courts in Ukraine, thereby invalidating this Information Letter of the High Administrative Court of Ukraine for the Ukrainian judiciary.

The statement of the High Administrative Court of Ukraine on application of CJEU case law enjoyed surprisingly enthusiastic support among judges of common and administrative courts in Ukraine. As a result, during 2015–2016, Ukrainian courts at different levels (general, specialized, high courts) referred to the EU-Ukraine AA and case law of the CJEU in a variety of their decisions.¹⁰² Those Ukrainian judges who had relevant experience and knowledge in application of the ECHR and case law of the ECtHR began to appeal to the EU *acquis* and the EU-Ukraine AA, in particular in decisions protecting fundamental human rights in Ukraine and economic cooperation between Ukraine and the EU (competition, taxation, protection of intellectual property rights).¹⁰³ Such references found extensive application in cases regarding Ukrainian natural persons and companies who claimed the direct effect of these provisions, particularly in the context of paying customs duties when crossing the Ukrainian border;¹⁰⁴ supply and trade of natural gas;¹⁰⁵ definition of origin of goods (honey);¹⁰⁶

¹⁰² Detailed information on case law of the Ukrainian judiciary can be available at <http://www.reyestr.court.gov.ua>. For example, the analysis of decisions of Ukrainian courts issued in 2014 and in 2016 indicates significant rise in references to the EU-Ukraine AA and various sources of EU *acquis* (fundamental principles, secondary acts, case law of the CJEU).

¹⁰³ For example, Рішення районного суду міста Чернігова від 26 червня 2016 р. № 750/5197/16-а [Judgment of the District Court of the City of Chernigiv on 26 June 2016 No. 750/5197/16-a]. The Judgment of the Interdistrict Court of the City of Kolomyia on 7 July 2016 No. 346/3499/16-с [Рішення Міжрайонного суду міста Коломиї від 7 липня 2016 р. № 346/3499/16-с] contains rather emotional passage: “The Court notes that after the signing of the Association Agreement with the European Union by the President of our country, and after the ratification by the supreme legislative body (the Verkhovna Rada of Ukraine), Ukraine, as a state aspiring the full membership in the EU, must respect private property rights of every person as a basic tenet and a cornerstone of European values and inviolable foundation of the EU, which must be complied by all Member States and by associated countries.”

¹⁰⁴ Рішення Апеляційного суду Львівської області від 6 квітня 2016 р. № 33/783/241/16 [Judgment of the Appellate Court of the Region of Lviv of 6 April 2016 No. 33/783/241/16].

¹⁰⁵ Рішення Окружного адміністративного суду міста Києва від 13 квітня 2016 р. № 826/594/16 [Judgment of the District Administrative Court of the City of Kiev of 13 April 2016 No. 826/594/16].

¹⁰⁶ Рішення районного суду міста Цирипінська від 29 квітня 2016 р. № 664/906/16-с [Judgment of the District Court of the City of Tsyrypynsk of 29 April 2016 No. 664/906/16-с].



or the legality of legislative drafts by the President of Ukraine.¹⁰⁷ Nonetheless, Ukrainian courts have not officially recognized the direct effect of the EU-Ukraine AA in their decisions. This issue may be relevant in possible litigation on the conformity of Ukrainian legislation to the objectives, principles and “essential elements” of the EU-Ukraine AA before the Constitutional Court and general courts.¹⁰⁸

3.3.3. Application of Decisions of the EU-Ukraine Common Institutions

The EU-Ukraine AA established a specific institutional framework (Association Council, Association Committee, and Parliamentary Assembly) with jurisdiction to issue decisions and binding legal acts. The Association Council is has the right to monitor the AA within the “framework of regular meetings between representatives of the Parties.”¹⁰⁹ Consequently, the Association Council may adopt decisions binding on the parties. In the meantime, this competence can be delegated to the Association Committee that assists Ukraine in achieving the results of the association.¹¹⁰

The Ukrainian legal system is not accustomed to the binding force of decisions and acts of the EU-Ukraine joint institutions, and therefore their legal effect is unclarified. As the Ukrainian judiciary has not issued any judgments with reference to the binding decisions of the EU-Ukraine Association Council and other common institutions, it has not clarified its position on the legal nature of these decisions. The Ukrainian Parliament and the Government are developing a draft law aimed at regulating all legal issues related to the implementation and application of the EU-Ukraine AA. Decisions of the EU-Ukraine common institutions will not be directly applicable, but will be enforced similar to international treaties. The draft law also considers binding decisions of the EU-Ukraine common institutions either as international treaties,¹¹¹ or as national laws, or as subordinate acts depending on their

¹⁰⁷ Рішення Вищого адміністративного суду України від 26 квітня 2016 р. № 800/251/16 [Judgment of the High Administrative Court of Ukraine of 26 April 2016 No. 800/251/16].

¹⁰⁸ Among the examples are the Executive Order of the President of Ukraine on banning the Russian social networks (on the matter of national security and sanctions against the Russian Federation caused by the annexation of Crimea in 2014 and military aggression in the East of Ukraine) and Law of Ukraine on banning the St. George (Guards') Ribbon (as propaganda of the Russian military aggression in the East of Ukraine). These legislative acts raise some concerns regarding their compliance with the objectives of the EU-Ukraine AA, in general, and freedom and expression and the principle of proportionality (as they are applied and interpreted within the ECHR and the EU Charter of Fundamental Rights), in particular. See Peter Van Elsuwege, *Ukraine's Ban on Russian Social Media: On the Edge Between National Security and Freedom of Expression*, *Verfassungsblog*, 2 June 2017 (Jul. 2, 2019), available at <http://verfassungsblog.de/ukraines-ban-on-russian-social-media-on-the-edge-between-national-security-and-freedom-of-expression>.

¹⁰⁹ Art. 463(1) of the EU-Ukraine AA.

¹¹⁰ *Id.* Art. 465(2).

¹¹¹ Within the issues related to political, territorial, human rights, participation in international unions and organizations, collective security, usage of Ukrainian territory and natural resources, military assistance and deployment of Ukrainian troops abroad (Art. 3(2) of the Law of Ukraine on International Treaties).



nature. In the former two cases, the binding decisions of the EU-Ukraine common institutions must be considered as part of the national legal system, which takes precedence over conflicting national legislation but not the Constitution. In the latter case, it will be regarded as a secondary legal source of the Ukrainian legal system. The draft law obliges the Ukrainian judiciary to apply these decisions as sources of law, whereas non-binding recommendations of the EU-Ukraine common institutions can be used as a source of interpretation of Ukrainian legislation and international obligations of Ukraine. Unfortunately, this draft law has not been submitted for first reading in the Ukrainian Parliament.

Conclusion

The analysis of the three constitutional legal orders with respect to the application of international law has shown considerable difference as far as the law in books and the law in practice are concerned. The influence of distinct regional integration processes has significance for the application of international law in Russia, Ukraine, and Belarus. On one hand, the process of Eurasian integration, culminating in the establishment of the Eurasian Economic Union, led to the creation of new institutions influencing the domestic legal order of Belarus and Russia. On the other hand, the process of European integration, epitomized through the European Union, constitutes an important source of reference for domestic constitutional developments in Ukraine, which faces challenges of implementing a new generation of Association Agreements with the EU.

The 1993 Russian Constitution is the most international law-friendly constitution among the countries of the post-Soviet area. Only the Russian Constitution has an explicit "integration clause" (Art. 79). Nevertheless, despite the initial openness to international law, recent constitutional developments in Russia have shifted in a different direction. The case law of the Russian Constitutional Court regarding the enforcement of decisions of the ECtHR reveals an increasingly defensive and isolationist position justified by the objective of guarding the national sovereignty and protection of the domestic constitutional principles against the influence of international law. Simultaneously, Eurasian integration creates new challenges for the Russian constitutional order. The case law of the EAEU Court introducing the direct effect of the Astana Treaty within the legal systems of EAEU Member States may potentially conflict with the Constitutional Court attempts to restore the full and unquestionable supremacy of the Constitution over decisions of international institutions and organizations and judgments of international courts. In the end, this strategy may endanger the effectiveness of the Eurasian integration project within the post-Soviet area and beyond.

The analysis of the Belarus constitutional order shows certain challenges in the application of international law, and that this order is not entirely compatible with the EAEU legal framework. The main problematic provision is, according to



one interpretation, the ability of the Belarus Constitutional Court to verify the compatibility of decisions of international regulatory bodies not only with the Constitution, but with national laws and decrees. It would be helpful to change the constitutional provisions in this respect. Because changing constitutional norms requires a referendum, it has been argued that it is possible to (temporarily) overcome the challenges by applying the “living document” doctrine. The “living document” reading of the constitution would make the Belarus legal order fully compatible with current EAEU law and allow that law to function and develop more effectively.

Ukraine went through a dramatic transformation from a country which pursued a multi-vector foreign policy to accommodate two conflicting integration projects (European and Eurasian) in a country with a firm pro-European policy as laid down in the EU-Ukraine AA. Externally, Ukraine committed itself to demanding conditionality and monitoring processes envisaged in the EU-Ukraine AA in return for better access to the EU internal market, establishing a Deep and Comprehensive Free Trade Area, and abolishing the visa regime with the EU. Looking at the pattern of adaptability of the Ukrainian constitutional order to the European integration project more widely, we may conclude that the external factors (such as the aims of the EU-Ukraine relations, including potential membership in the EU, introduction of the visa-free regime, and others) act as a catalyst for constitutional change. Furthermore, domestic and constitutional reforms in Ukraine must be compatible with the EU common values which constitute “essential elements” of the EU-Ukraine Association Agreement and lay the cornerstone of the policy of conditionality on behalf of the EU towards Ukraine.

References

Danilenko G.M. *Implementation of International Law in CIS States: Theory and Practice*, 10(1) *European Journal of International Law* 51 (1999). <https://doi.org/10.1093/ejil/10.1.51>

Diyachenko E. & Entin K. *The Court of the Eurasian Economic Union: Challenges and Perspectives*, 5(2) *Russian Law Journal* 53 (2017). <https://doi.org/10.17589/2309-8678-2017-5-2-53-74>

Frankenberg G. *Comparing Constitutions: Ideas, Ideals, and Ideology – Toward a Layered Narrative*, 3(4) *International Journal of Constitutional Law* 439 (2006). <https://doi.org/10.1093/icon/mol012>

Kembayev Z. *Regional Integration in Eurasia: The Legal and Political Framework*, 41(2) *Review of Central and East European Law* 157 (2016). <https://doi.org/10.1163/15730352-04102002>

Marochkin S. *International Law in the Courts of the Russian Federation: Practice of Application*, 6(2) *Chinese Journal of International Law* 329 (2007). <https://doi.org/10.1093/chinesejil/jmm013>



Rezie R.C.O. *The Ukrainian Constitution: Interpretation of the Citizens' Rights Provisions*, 31(1) Case Western Reserve Journal of International Law 169 (1999).

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