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Constitutional Perspective of the EU–Ukraine Association Agreement Application: Ukrainian Problems – European Remedies

The dramatic story of the EU–Ukraine association agreement moved its path to the sphere of practical implementation with the outset of the agreement's provisional application starting from the first of November 2014. Introducing the discussion, it should be noted that the issue of Ukraine association with EU has a long history, starting at the times of President L. Kuchma, who was officially declare the task of the association with EU already in 1998[1] (the actual negotiations started in 2007 and lasted for 6 years).[2] The public opinion viewed the Association Agreement as a milestone on the Ukrainian way to the full membership in the European Union, bearing in mind the famous "European" association agreements with the countries of Central and Eastern Europe which opened the EU door for countries of the former Soviet block.

The dramatic course of events during the negotiation process was overwhelmed by still more dramatic events taking place after the refusal of President V. Yanukovich to sign the finalized version of the agreement, thus leading the Vilnius summit of November 2013 to the failure. The Ukrainian revolution and the escape of President V. Yanukovich from the country led to the legal vacuum of power, which had a result of a politi-

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[1] President of Ukraine decree № 615/98 "About the approval of the Strategy of the integration of Ukraine into the European Union" of 11.06.1998.

[2] Official site of the Ministry of foreign affairs of Ukraine: http://www.mfa.gov.ua [10.01.2015].

cally motivated split of the procedure of the conclusion of the association agreement into separate signing of political and economic parts.[3] The Russian invasion that followed was the reason of the further tripartite discussion of the DFCTA postponing until the start of 2016.

Separately should be noted that the provisional application of the association agreement does not have much of a political reasons. It is a normal practice of the European Union towards the so-called "mixed agreements" as the standard time of the entire ratification period is between three and five years.[4] What can have political motivation in this context is the selection of the parts of the agreement, which immediately come into force. But this issue is certainly a subject to a separate political analysis.

However, the political events around the issue of the association to some extend overshadowed the purely legal aspects of its application. This article is aimed to fill this gap by providing the analysis of the most evident legal challenge that the EU–Ukraine association agreement embodies from the perspective of the Ukrainian constitutional law: the formation of supranational association institutions and the obligatory nature of the acts, adopted by these institutions.

According to the Law of Ukraine № 1678-VII of 16 September 2014 as well as Council Decision 2014/691/EU of 29 September 2014 and in accordance with Art. 486 of the Association Agreement *inter alia* into force come Articles 5 "Fora for the conduct of political dialogue" and 6 "Dialogue and cooperation on domestic reform" of Title II "Political dialogue and reform, political association, cooperation and convergence in the field of foreign and security policy".

Article 5 above makes a direct reference to procedures foreseen by Articles 460 and 467. In general terms Title VII "Institutional, general and final provisions", which includes the mentioned articles, may be a challenge to the existing constitutional framework of Ukraine. In accordance to Article 461 of the Agreement there will be created the Association Council with the power to take decisions "binding upon the Parties, shall take appropriate measures […] to implement the decisions taken."[5] Moreover there will be established another institution – Association Commit-

[3] Political block of the agreement was signed on 21 March 2014 and the economic part was signed on 27 June 2014. The split took place mostly due to political and legal reasons.

[4] A. Rosas, *Mixed Union – Mixed Agreements*, w: *International Law Aspects of the European Union*, ed. M. Koskenniemi, The Hague 1998, p. 125–148; J. Heliskoski, *Mixed Agreements as a Technique for Organizing the International Relations of the European Community and its Member States*, The Hague 2001.

[5] Art. 463 of the Association Agreement.

tee. The Association Council may delegate to the Association Committee any of its powers, including the power to take binding decisions. And the Association Committee shall have the power to adopt decisions in the cases provided for in this Agreement and in areas in which the Association Council has delegated powers to it. These decisions shall be binding upon the Parties, which shall take appropriate measures to implement them.[6]

In other words the association agreement clearly implies the formation of supranational institutions with the power to adopt decisions binding for Ukraine. If to compare this state of affairs to the current Constitution of Ukraine, one will be rather embarrassed with the results of this comparison. However, this analysis is an essential element of the study.

It is feasible to start with Art. 75 of the Constitution, which states that the sole legislative institution of Ukraine is the Supreme Rada (The Parliament of Ukraine). In accordance with the decision of the Constitutional Court of Ukraine in case N 1-6/2002 the determination of the Parliament as the sole legislative institution of Ukraine implies that any other body of the state power does not have competence to adopt laws. The Parliament fulfills its legislative prerogatives independently and without participation of any other bodies.[7] Article 92 of the Constitution determines the list of the issues, which are to be regulated exclusively by laws of Ukraine. This list includes a vast variety of business, economy and social sphere issues, Just to name the most prominent:

- the grounds of the exploitation of the natural resources, exclusive (sea) economic zone, continental shelf, organization and exploitation of energy systems, transport and communication (p. 5);
- legal grounds and guarantees of entrepreneurship, rules of competition and norms of anti-trust regulation (p. 8);
- grounds for international business activity and customs (p. 9), etc.

The same article also foresees that these are the laws of Ukraine that set the taxation system, the grounds for formation and functioning of the financial, money, loan and investment markets.

It is obvious from the list that many mentioned spheres are correlated with the parts of the Association agreement, thus implying the possibility of the adoption of a binding act by the Association Council or Committee, should this possibility be foreseen in the appropriate article of the Agreement.

[6] Art. 464–465 of the Association Agreement

[7] Para. 2 Official interpretation of the provisions of Article 75 of the Constitution of Ukraine see in the Decision of the Constitutional Court of Ukraine № 17-рп/2002 of 17.10.2002.

According to Article 116 of the Constitution of Ukraine it is the Cabinet of Ministers that is assigned to ensure the state sovereignty and economic independence of Ukraine as well as to carry out internal and external policies. The Cabinet of Ministers as well as ministries is entitled to issue decrees and orders within the limits of its competences under the separate procedure, which includes registration of these acts in the Ministry of Justice of Ukraine.[8]

In this context it is of interest to mention the Conclusion of the Constitutional Court of Ukraine in the Rome Statute case.[9] Despite the fact that the decisions of the Constitutional Court of Ukraine do not have the power of precedent, this decision deals with a similar question – the exposition of the Ukrainian legal system to the decision of supranational institutions. Comparing the status of the European Court of Human Rights and the International Criminal Court, the Constitutional Court of Ukraine came to the conclusion that there is a critical difference from the perspective of the Ukrainian constitution. This difference is that petitions and claims to the European Court of Human rights are guaranteed by the Ukrainian state as they are directly foreseen by the Ukrainian constitutions – in particular by Article 55, which guarantees the right for petitions to international courts in search of human rights protection. The story is different with regards to the International Criminal Court, which according to part 1 of Article 17 of the Rome Statute has the independent right to initiate proceedings by its own initiative, if a state is unable or unwilling to start the proceedings by itself. According to the decision of the Constitutional Court, Ukraine has its own judiciary system, which is described by Article 124 of the Constitution. This article contains the limited list of judiciary institutions, which does not include International Criminal Court. Since there is no other provision of the Ukrainian Constitution creates the ground for possibility of the jurisdiction of the International Criminal Court the Constitutional Court of Ukraine came to the conclusion that the Rome Statute contradicts the Ukrainian Constitutions. Therefore it can be signed and ratified only after corresponding changes are introduced to the Constitution. So, the Constitutional reference to the international institution as well as to the documents it adopts is viewed by the Constitutional Court of Ukraine as the crucial fact which determines the exposition of such documents to the national legal system of Ukraine.

[8] Article 117 of the Constitution of Ukraine.

[9] Conclusion of the Constitutional Court of Ukraine in Case 1-35/2001 of 11 July 2001.

Another point to mention is that Article 8 of the Constitution declares the principle of the rule of law and states that the laws and other regulating acts must be adopted on the basis of the Constitution and be in conformity with it. Interesting enough is the fact that Article 9 of the Constitution does not establish the priority of international law in Ukraine, simply stating that ratified international treaties are a part of the legislation of Ukraine. This priority is clearly established in Article 19 of the law of Ukraine "About international treaties", which states the following:

"1. International Treaties of Ukraine, concluded and properly ratified, shall constitute an integral part of the national legislation of Ukraine and shall be applied pursuant to the procedure envisaged for norms of national legislation.

2. Where a Ukrainian international treaty whose conclusion was effected in the form of law provides for rules other than those envisaged by the legislation of Ukraine, the rules of the international treaty shall apply."[10]

In terms of the constitutional law perspective there are two remarks to be made. First is that the priority is not systematic – in other words there is no priority of the international law as a system over the system of the national law of Ukraine. The priority rule is applicable only is case of competition of norms between those set in the international treaty and those already existing in the national legislation of Ukraine. Certainly if there is no competition then, the general rule is applied, viewing the rules set in an international treaty as a part of national legislation of Ukraine. The second remark is that the installment of international law in the national legal system of Ukraine is limited only to the treaties in the sense of the definition provided by Vienna Convention on the Law of Treaties as Article 2 of the Ukrainian law "On international treaties" repeats the same definition.

The provided analysis leads to the following conclusions. First, the legal system of Ukraine does not know the option to use the decision of international organization in the role of the national law binding source as only international treaties are installed in the national system. Second, the design of article 463 of the Association Agreement implies that the decisions of Association Council (Committee – art. 464–465) are binding for Ukraine as a party of the Association Agreement. Under the current constitutional framework, the said decisions do not have direct effect or direct applicability in the manner that EU regulations have,[11] although

[10] Law of Ukraine № 1906-IV of 29.06.2004.

[11] Art. 288 TFEU.

logically they should have. In the EU law the decision of such institutions do have the supremacy and direct application qualities[12] therefore due to the principle of reciprocity these documents also should have the same qualities in the Ukrainian legal system as well. The practice of the fulfillment of the association agreements only confirms this suggestion as these Association Council decisions were "directly applicable and effective in the EU Member States and has supremacy over their national laws."[13]

However, currently the possibility of the application of the EU-Ukraine Association Council decisions looks more like EU directives, however, the formula "Parties shall take appropriate measures to implement them" is different from the *modus operandi* of the directives' implementation, which are "binding, as to the result to be achieved… but shall leave to the national authorities the choice of form and methods."[14] Moreover, unlike the EU directives the decisions mentioned in the Association Agreement are binding entirely and not only "as to the result to be achieved".

Third, the Parliament and the Cabinet of Minister are the bodies of legislative and executive power, correspondingly entitled to adopt laws and executive normative acts. However, they are independent in their activity, thus they cannot be viewed as the direct addressees of the obligation to implement the Association Council (or Committee) decisions automatically. Moreover, nothing prevents them from alteration of the initial text of such decisions. It is especially true for the Parliament, as the legislative procedure implies discussions and adoption of changes to the initial draft. Therefore, the ultimate question – who is bound by the Association institutions' decisions and how practically these documents are to be implemented by the Ukrainian state – has legal vacuum as the answer, as there is a gap between the existing constitutional order of Ukraine and the specific nature of these documents. However, the general principle of the international treaty law clearly states that no country can invoke the provision of its domestic legislation, including the constitution, to justify the breach of its obligations under the international law.[15]

However, the problem is not new. The similar practice of Association Councils with competences to adopt obligatory acts has been widely applied. One of the examples is so-called "European Association agreement"

[12] Case C-192/89 – Sevince v Staatssecretaris van Justitie [1990] ECR I-3461.

[13] J. Zemanek, *Status and Tendencies in the Czech Republic*, w: *East Central Europe and the European Union: from Europe agreements to a Member Status*, Baden-Baden 1997, pp. 163–182.

[14] Art. 288 TFEU.

[15] Art. 27 of the Vienna Convention on the law of treaties (1969).

type concluded by EU with the Central and Eastern European countries.[16] The practice of the CEE countries certainly offers some clues and remedies for the current Ukrainian constitutional challenge. The "European Association agreement" had a rather standardized template including the formation of the Association institutions (Council and Committee) obtaining the power to adopt acts, binging for the parties.[17] The general remark can be the following quotation of Zd. Kühn:

"All Central European countries were obliged to remodel their legal systems and make them gradually compatible with the *acquis communautaire*. All things considered, it would be ineffective to approach the obligations flowing from association agreements like an ordinary international treaty."[18]

Another important issue to mention is the established case-law of the European Court of Justice with this regards. First, it stated that international agreements only provide for the parties' rights and obligations and do not ensure the delegation of sovereign powers to intergovernmental institutions established on the basis of the agreements.[19] In the Court's view, establishment of a special institutional mechanism for consultations and negotiations on the implementation of an international agreement, this does not necessarily mean the exclusion of the possibility of the document's provisions having direct effect.[20]

However, in a number of cases has the ECJ found that the provisions of association agreements, and the Association Councils' directly-connected decisions aiming to implement them, have direct effect.[21] But to acquire the property of the direct effect the decisions of Association Councils should be in compliance with the requirements as set for the direct effect of the provisions of the international agreements.[22]

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[16] Hungary (1991), Poland (1991), Romania (1993), Czech Republic (1993), Slovakia (1993), Bulgaria (1993), Latvia (1995), Estonia (1995), Lithuania (1995), Slovenia (1995) etc.

[17] Art. 104–108 Association agreement with Hungary, Art. 102–106 Association agreement with Poland, Art. 104–108 Association agreement with Czech Republic, Art. 111–115 Association agreement with Lithuania, Art. 106–110 Association agreement with Romania, etc.

[18] Z. Kühn, *European Law in the Empires of Mechanical Jurisprudence: the Judicial Application of European Law in Central European Candidate Countries*, "Croatian Yearbook of European Law and Policy" 2005, nr 1, pp. 55–73.

[19] Case 270/80, Polydor [1982] ECR 329.

[20] Case 104/81, Kupferberg [1982] ECR 3641.

[21] Case 181/73, Haegeman v. Belgium [1974] ECR 449; Case 43/75, Defrenne v. SABENA [1976] ECR 455.

[22] Case C-192/89, Sevince [1990] ECR I – 3461.

To be more to the point the article offered in-depth study of two practical cases of the constitutional reforms, which took place in a close interconnection with the fulfillment of the Association agreements, however, bearing in mind possible full-scale membership in the European Union, which actually became the fact of history. These cases are of Slovakia and Poland, the countries sharing centuries of common history of Ukraine as well as the dramatic events of Stalinism and Communism. In both practical cases the changes at the level of Constitution were meant to give a basis for both entering into the association and consequently membership obligations and to make their fulfillment possible from the perspective of the national constitutional framework.

1. Slovakia

The Constitution of Slovakia was initially adopted at the end of 1992[23] after the separation the Czechoslovak Federation. Despite the high expectation as for the European integration raised at the civil society, the provisions of the original text of the Constitution were rather limited. Article 7 provided the following:

"The Slovak Republic may by its own discretion enter into a union with other states. The right to secession from this alliance shall not be restricted.

The decision to enter into union with other states or to secede therefrom shall be subject to a constitutional statute and subsequent ratification by means of a public referendum."

Article 11 of the Constitution, which dealt with the role of international treaties in the Slovak national legal system also had a rather general wording, without clear declaration of the international agreements as the part of the national law or stating their priority as for the national statutes.[24]

Certainly the ambiguity of the mentioned provisions of the Slovak constitution was one of the legal obstacles on its way in the European integration process. The constitutional reform of 2001 in the anticipation of the accession process was one of the milestones of the Slovak way to the EU membership. As it is indicated in the Commission's Report on Slovakia progress towards accession of 2001:

"In February 2001, the Parliament adopted an amendment to the Constitution, thus taking a significant step forward in consolidating demo-

[23] Ustava Slovenskej Republiky 460/1992 (of the Collection of law).

[24] Second report submitted by the Slovak Republic pursuant to Article 25 paragraph 1 of the Framework Convention for the protection of national minorities (ACFC/SR/II(2005)001) of 3 January 2005.

cratic institutions, strengthening the rule of law and preparing Slovakia for EU accession. The amendment provides, *inter alia*, the constitutional basis for transferring the exercise of a part of Slovakia's sovereign rights to the EU and provides for the supremacy of EC law over Slovak legislation. The transposition of EC legislation has been facilitated by introducing the possibility in this regard of issuing Government decrees in certain circumstances. Moreover, the amendment empowers Slovakia to join organisations for mutual collective security."[25]

The mentioned amendment was introduced to the Constitution by Constitutional Act No. 90/2001 Coll. and became effective 1 July 2001. The changes included the abrogation of Article 11 and total revision of Article 7 of the Constitution. In the new wording Article 7 consists of five parts. Parts one and two are directly connected to the Slovakia integration with EU, setting the general framework. In particular, part one of Article 7 stipulates that the entry of the Slovak Republic into a union, as well as secession from such a union is to be confirmed by a referendum. Part two of the article deals directly with the specific features of the *sui generis* legal system of the EU. The exact wording reads:

"The Slovak Republic may, by an international treaty, which was ratified and promulgated in the way laid down by a law, or on the basis of such treaty, transfer the exercise of a part of its powers to the European Communities and the European Union. Legally binding acts of the European Communities and of the European Union shall have precedence over laws of the Slovak Republic. The transposition of legally binding acts which require implementation shall be realized through a law or a regulation of the Government according to Art. 120, para. 2."[26]

Parts 3–5 of Article 7 deal with possibility of Slovakia to join an organization of mutual collective security and specific status as well as specific features of international treaties on human rights and fundamental freedoms.

Commenting part 2 of Article 7, which is the main focus in terms of relations between the national and EU legal systems, it is important to emphasize that these provisions directly establish at the constitutional level:

- possibility to transfer powers from the national state to the EU;
- supremacy of the EU binding acts;

[25] European Commission's Report on Slovakia progress towards accession of 2001, SEC(2001) 1754 of 13.11.2001.

[26] Official text of the Constitution at the official site of the Constitutional Court of Slovak republic http://portal.concourt.sk/pages/viewpage.action?pageId=1277980 [10.01.2015].

- obligation to transpose to the national legislation of the acts, which require implementation.

Thus the Slovak experience shows that the constitutional reform was the most efficient and convenient way to resolve the major legal problems arising on the Slovak path to the EU membership. The constitutional installation of the major EU principles such as supremacy and direct applicability ensured stable legal ground for both smooth incorporation of the EU *acquis communautaire* existing at that moment and no-conflict application of the EU law, developed after the accession of Slovakia to the EU.

2. Poland

The collapse of Soviet block and later Soviet Union offered new opportunities to Poland, which already started the democratization process following the historical "Round Table talks" of 1989.[27] As Z. Brzezinski noted, it was already clear that Hungary and Poland were successfully leading the way to political pluralism.[28] One of the distinctive features of the Polish society at that time was the existence of the social consensus as for the fact that there is no alternative but to pursue democracy and free market economy.[29] By the beginning of 1990th Poland had embraced the concept of free enterprise, created parliamentary institutions and established freedom of press and religion.[30] Moreover, the country's political and military elite reached an overwhelming consensus on Poland's integration to NATO and EU.[31] To a large extend the cumulative effect of wide-range measures paved the way for Poland to enter the European Agreement, which was initiated in 1989 and after of about a year negotiations[32] was concluded in December 1991.[33] This agreement, as well as all

[27] F. Millard, *The Context of Polish Constitutional Reform*, "International Journal of the Sociology of Law" 1992, nr 20(17), pp. 17–28.

[28] Z. Brzezinski, *Ending the "Cold War"*, "Washington Quarterly" 1989, nr 12(4), pp. 701–1129.

[29] J. Bielecki, *Poland: No retreat from democracy*, "Washington Post", 15 Feb. 1992.

[30] C. Gati, *East-Central Europe: the morning after*, "Foreign Affairs", Winter 1990–1991, nr 69, pp. 129–145.

[31] L. Vinton, *Domestic Politics and Foreign Policy, 1989–1993*, w: *Polish Foreign Policy Reconsidered*, eds. I. Prizel, A. Michta, New York 1995, pp. 23–24; R. Kuzniar, *Poland's Foreign Policy after 1989*, Warsaw 2009, p. 9.

[32] M. Glogowski, *Poland-EC: behind the negotiations*, "Warsaw Voice" 1991, nr 24, available in LEXIS. Nexis library.

[33] A. Wagner-Findeisen, *From association to accession – an evaluation of Poland's aspiration to full Community membership*, "Fordham International Law journal" 1992, Vol. 16, Iss. 2, p. 485.

the other European Agreements was generally described as the document marking "the reconciliation of Europe with itself" thus "causing the fundamental change of the direction."[34]

However, the full-scale process of fulfillment of the Association Agreement was blocked by the problems of the Polish legal system, which at that time was described as "disjoined hodgepodge of statutes dating from different eras, replete with loopholes and inconsistencies, and thus totally inadequate to address current legislative, social and economic concerns."[35] Therefore, the change of the legal system was one of the priorities for Poland at that time.

The Constitution of Poland of 1952, which was in force at that time, was the first document to be changed as this Soviet-influenced document had a net effect of entrenching the Communist party and declaring "brotherhood" with the Soviet Union, rather than was a Constitution as a real source of power.[36]

The work on the development of a new constitution was announced already in 1989 by the Seym, in which Solidarity received the majority at the first free elections of the post-Communist Poland.[37] As the interim decision it was offered so called "Small Constitution" of 1992, which actually was the introduction of changes to the existing Constitution. These changes were concentrated upon the division of competences between legislative and executive branches of power as well as on the competences of the local self-government.[38] It also annulled outdated parts of the previous Constitution replacing statements about Poland being a communist and socialist state with those of liberal democracy and market economy.[39]

The reformed 1952 constitution was fully repealed and completely replaced by the new Constitution adopted in 1997. From the perspective of the issue in focus, it should be that Articles 90 and 91 were the practical response to the challenge that the European integration set for Polish constitutional law. In particular Art. 90 directly foresees the delegation of powers from Polish state to an international organization by virtue of an

[34] *Eastern Europe: Trade accords seen as the step towards full EC membership*, "External impact Eur. Unification" 1992, nr 19, available in LEXIS. Nexis library.

[35] A. Wagner-Findeisen, op.cit., p. 537.

[36] M. Brzezinski, *Constitutional Heritage and renewal: the case of Poland*, "Virginia Law Review" 1991, nr 77(1), pp. 49–112.

[37] S. Gebethner, *From one constitution to another*, "Warsaw Voice", 5 May 1991, *available* in LEXIS. Nexis library.

[38] S. Frankowski, P. Stephan, *Legal Reform in Post-communist Europe: The View from Within*, Boston 1994.

[39] Ibidem.

international treaty. Certainly this provision was introduced bearing in mind the specific legal system of the European Union. Art. 91 continues the issue – besides declaring the inclusion of international agreements into Polish legal system, it emphasizes the priority of international treaties over the national statues as well as their direct applicability, unless its application depends on the enactment of a statute. Moreover, it separately deals with the status of the decision of international organizations, created by international agreements. According to part 3 of Article 91 states:

"If an agreement, ratified by the Republic of Poland, establishing an international organization so provides, the laws established by it shall be applied directly and have precedence in the event of a conflict of laws".

So the reform of Polish constitutional law with regards to European integration process provided the constitutional declaration of the following principles:

- possibility of delegation of powers from Polish state to an international organization by virtue of an international treaty;
- priority and direct applicability of international agreements in the Polish national legal system;
- systemic priority and direct applicability of the law, created by an international organization over the national law, meaning that the least document of an international organization is higher in the hierarchy than the highest document of the national legal system. Certainly Constitution is an exception, but this issue will be dealt with below. This provision certainly includes the priority of the EU "secondary legislation" over the national statutes.

Speaking about the practice of the constitutional law application in the CEE countries, it should be noted that the EU law was used as an argumentative tool for the consistent interpretation of domestic constitutional law. Despite the fact that EU law was not formally binding within the associated states, the very nature of association seemed to call for a sophisticated concept of a strong persuasive source of law.[40] As Zd. Kühn noted,

"Bearing in mind the peculiar nature of the Enlargement, in my opinion, as well as in the opinion of Polish courts, EU law shall be obligatorily considered wherever the domestic law of a candidate country is to be harmonized."[41]

The practical examples of this approach can be found in a number of the decision of the Polish Constitutional Tribunal. In particular, in case

[40] H. Glenn, *Persuasive Authority*, "McGill Law Journal" 1987, nr 32, p. 261.
[41] Z. Kühn, op.cit.

K 15/97[42] the Tribunal stated that despite the provision of Articles 68 and 69 of the EU–Poland Association Agreement oblige to use "its best endeavours to ensure that future legislation". Moreover, they also imply the obligation "to interpret the existing legislation in such a way as to ensure the greatest possible degree of such compatibility". The Tribunal also repeated its position in a number of other cases.[43] The similar position was also taken by the Polish Supreme Court, which already in 1995 declared that since the Polish goal of accession to the European Union the case-law of the European Court of Justice may and should be taken into consideration to interpret the provisions of the Polish law."[44]

Another point to make is that the current constitutional challenge of Ukraine as well as the constitutional transformations of the CEE countries at the edge of the millennium must be viewed through the lens of the general trend of the inter-connection between the EU and national law of the member-states. There are two issues to start with. First, is the treaty-based or international law origin of European Union, which leads to the fact that the crucial difference between EU and a federation is the need for national law of the member-states, enabling the enforcement of the EU law by national executive and judiciary bodies.

The second is the general trend of incorporation of the EU law at the constitutional level in the "older" member-states, the process, which started in 1970th and intensified after Maastricht with the member-states officially consolidating the supremacy of the EU law and its direct application at the constitutional level. Commenting upon the first point, it is relevant to refer to the opinion of national highest courts. In particular the Irish High Court in Raymond Crotty v An Taoiseach case emphasized that

"Had the Oireachtas [the Irish Parliament] not passed the European Communities Act 1972 Ireland might still have been a member of the Community in international law. […] Acts of the institutions of the Community derive their status in domestic law from the European Communities Act 1972."[45]

[42] The Gender Equality in Civil Service Case. In Polish the decision K. 15/97, OTK [Orzecznictwo Trybunalu Konstytucyjnego, the collection of decisions of the Constitutional Tribunal], nr 19/1997, at 380; English translation 5 East European Case Reporter of Constitutional Law 271, at 284 (1998).

[43] See for example its decision in case K 33/03 of April 21, 2004.

[44] W. Czapliński, *Harmonisation of Laws in the European Community and Approximation of Polish Legislation to Community Law*, "Polish Yearbook of International Law" 2001, nr 25, pp. 45–68.

[45] Case *Raymond Crotty v An Taoiseach*, [1987] IR 713.

A similar conclusion was made by the German Constitutional Court in its decision in Brunner v. European Union Treaty case:

"The Federal Republic of Germany therefore remains, even after the entry into force of the Union Treaty, a member of a union of States whose Community Authority derives from the Member States and can have binding effect on German sovereign territory only by virtue of the German implementing order."[46]

Despite the fact that in the light of ECJ decision in Van Gend en Loos case[47] the reliance of national courts on national law for the reception of EC law has been characterized as "constitutional disobedience" to EC law.[48] This defiance occurs every time a national court decision relies on the EU law with regards of viewing it as a part of the national legal system.[49]

This development, together with the special status of the Constitution in terms of the practical implementation of the EU law supremacy principle caused the phenomenon of incorporation of the EU law at the constitutional level of the member-states. Irish and British European Communities Acts of 1972 were among the first documents of this type. As T.K. Hartley emphasized practical aspects of the British European Communities Act in terms of its application in possible court cases, stating that: "the relevant rules of Community law would have no legal effect in the United Kingdom: The only basis on which they could have effect – the European Communities Act 1972."[50] The similar understanding was demonstrated by other European scholars.[51]

After the ratification of the Maastricht treaty the issue was brought about to the front as the treaty marked "marks a new stage in the process of creating an ever closer union among the peoples of Europe."[52] In this context the supremacy of EU law principle turned out to be a factor, substantially modifying the formal subordination within the domestic legal system as the EU legislative system turns upside-down the standard inter-

[46] Cases 2 BvR 2134/92 & 2159/92, Brunner v. The European Union Treaty.

[47] Case Van Gend en Loos (26/62).

[48] D. Phelan, *Revolt or Revolution: The Constitutional Boundaries of the European Community*, Dublin 1997, p. 57.

[49] L. Goldstein, *Constituting Federal Sovereignty*, Baltimore 2001.

[50] T. Hartley, *Constitutional problems of the European Union*, Oxford 1999, pp. 176–177.

[51] P. Taylor, *The Limits of European Integration*, London 1983, pp. 283–284; G. Hogan, A. Whelan, *Ireland and the European Union: Constitutional and Statutory Texts and Commentary*, London 1995, pp. 14–15.

[52] Article A of Maastricht Treaty on European Union, 1992.

relations between governments to their respective Parliaments. These are members of national governments who as the Council of Ministers have the final word in the EU legislative process, with national parliaments hardly participating in the process at all.

In connection of the Maastricht treaty ratification the Constitution of France was amended by the Constitutional Law of 25 June 1992. It supplemented the Constitution of the Republic of France with a new Title XV "On the European Communities and the European Union"; the new Articles 88-1, 88-2, 88-3, and 88-4. The provision of these articles declared participation of France in the European Union, transfer of powers to the EU as well as specific rules of the formation of the EU law, implying the acceptation of the EU law supremacy doctrine.[53]

The similar course of events took place with regards to the Basic Law of the Federal Republic of Germany, which was also amended in December 1992. Amended articles 23–25 stipulated the participation of Germany in the European Union, the implementation of subsidiarity principle,[54] participation of the Federal institutions in the EU legislative process as well as the precedence of international law over the national law of Germany.[55] In such a context the application of supremacy and direct applicability of the EU law doctrines sounds like logical interpretation. This development was rather general and included such countries as Portugal,[56] Sweden,[57] Ireland[58] as well as others.

The CEE countries during the accession process followed the pattern, consolidating the supremacy and direct applicability of the EU law at the constitutional or quasi-constitutional level. As the example of the latter can be used the Constitutional act of the Republic of Lithuania on membership of the Republic of Lithuania in the European Union, a separate document adopted in 2004 by Seimas (Parliament) of Lithuania and included into the Constitution by virtue of Article 150 of the Constitution.[59]

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[53] V. Vadalapas, *Independence and Integration – Constitutional Reform in Lithuania Preparing its Accession to the European Union*, "Verfassungrechtliche Reformen zur Erweiterung der Europäischen Union. Forum Constitutionis Europae" 2000, Vol. 2, pp. 9– 22, www.whi-berlin.eu/documents/vadapalas.pdf [10.01.2015].

[54] This principle certainly implies both supremacy and direct applicability of the EU law.

[55] V. Vadalapas, op.cit.

[56] Article 8.3 of the Constitution of Portugal.

[57] Articles 3–6 of Chapter 10 of the Constitution of Sweden (Instrument of Government), http://www.riksdagen.se/en/Documents-and-laws/ [10.01.2015].

[58] Article 29 of the Constitution of Ireland.

[59] Official site of Seimas of the Republic of Lithuania, http://www3.lrs.lt/home/Konstitucija/Constitution.htm [10.01.2015].

This document directly declares the transfer of national competence to the EU institutions, binding nature of the EU law as well as its direct applicability and supremacy over the laws and other legal acts of the Republic of Lithuania.[60]

Conclusions

The political importance of the EU–Ukraine association agreement – to say its vital existential role for the future of Ukraine and the dramatic event surrounding its conclusion overshadowed the pure legal aspects of its implementation. However, the commencement of its provisional application brings legal aspects to the front. At the current state, there is a gap between the Ukrainian constitutional order and the ultimate obligation of Ukraine to implement the binding decision of the supranational institutions established under the Agreement (Association Council and Committee).

The successful experience of the countries of Central and Eastern Europe, which had the similar problems, shows possible solutions to the problem. Particularly, in Slovakia and Poland it was a constitutional reform with the introduction to the Constitution of separate articles legitimizing the status of documents, adopted by international organization, certainly including the Association Agreement institutions and later the European Union itself. This development created important legal prerequisites for further European integration of the countries, which ended up with full-scale EU membership.

Moreover, the general trend of consolidating the principles of supremacy and direct applicability of the EU law at the level of national constitutional acts of member-states reflects the specific features of the EU law application as well as its inter-connection and inter-dependence with the national legal systems.

Therefore at the level of its constitution Ukraine has to accept the specific role of the EU law as a *sui generis* legal system. At the current stage the focus is certainly on the implementation of the Association institutions' decisions, however, in a longer perspective there is a distinct need for the constitutional consolidation of principles governing the inter-relations of the EU law and national law of the member-states – i.e. the principles of direct applicability and the supremacy.

It is necessary to emphasize that despite the fact that EU law is not binding for Ukraine at this moment, it is important to use it at least as the

[60] Ibidem.

interpretive tool for the application of the national legislation due to the legislatively set goal of European integration. In this way the Ukrainian legal system will get rid of the limits, preventing it from exposition to the EU legal system, contributing to its independent development towards the standards already existing in the European Union. From this perspective the overcome of the mentioned constitutional gap is of critical importance for the creation of adequate procedures of the practical implementation of the Association Agreement.

Key words: Eastern Partnership, Ukraine, foreign policy, democratization, association agreement