

SECTION 2

CONSTITUTIONALISM AS MODERN SCIENCE

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CONSTITUTIONALIZATION OF THE ASSOCIATION PROCESS BETWEEN UKRAINE AND EUROPEAN UNION: MEANINGFUL AND IMPLEMENTATING ASPECTS

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Summary

The purpose of the article is to research the process of constitutionalization of associative relations between Ukraine and European Union. The authors distinguish and reveal two significant aspects of this process: meaningful and implementing.

It is determined that the meaningful constitutionalization by its essence is the constitutional modernization, where the meaningful updation of the Constitutional provisions is being made in order to form the constitutional pillars for further democratization of social and political life in Ukraine, the approximation of the national political and legal system in accordance with the European values and principles, the improvement of the internal legal framework. The implementing aspect of constitutionalization means the purposeful formation of constitutional preconditions for the implementation of Association Agreement's provisions to the national legal system. The authors stipulate that the fulfillment of both meaningful and implementing constitutionalization of Ukraine's association with EU shall be implemented mainly by incorporating of this process directly into the context of the constitutional reform in Ukraine.

The article analyzes the organizational and legal measures aimed at the realization by Ukraine of its European integration purpose and determines that such measures should be carried out by three fundamental directions. Such tendencies include: 1) reformation of the meaningful and implementing principles of the Fundamental Law of Ukraine in order to ensure the constitutional support of this process; 2) concretization and detalization of the constitutional norms and principles in legislation (primarily, in those legislative and bylaws that

validity; the systemicity; the transparency; the national peculiarities of constitutional and legal development and the formation of a constitutional tradition; compliance with formal procedural requirements (legality); public recognition and support for the constitutional transformations (legitimacy); internal and external factors of political, social and economic nature to minimize their impact on the constitutional and legal processes.

At the same time, the implementation of any constitutional transformations primarily requires the determination of two crucial positions. These viewpoints cover the following issues: who is, *inter alia*, the “customer” of the implemented and systematic constitutional changes, and what is the pursued goal? It seems that the “customer” of the constitutional reform in our country is the people of Ukraine who seek to change the approaches to the organization of the state, the functioning of its apparatus, its mutual interaction with society. According to A. Lotyuk, the driving force for the constitutional and other current reforms within the state is the initiative of Ukrainian citizens, unprecedented activity of civil society and its institutions related to the modernization of the Constitution of Ukraine and the renewal of the Ukrainian state (Lotyuk, 2015, p. 110).

Taking into consideration these requirements of the Ukrainian people, the purpose of the constitutional reform should be considered the creation of a constitutional system of the limited governance as a practical embodiment of the constitutionalism doctrine. Consequently, Ukraine shall become the constitutional state (Boryslavska, 2016, p. 48).

It is believed that the achievement of this goal is logically correlated with the implementation of the goals and objectives of the Association Agreement between Ukraine and the EU. In particular, Art. 4 of the Association Agreement establishes that one of the purposes of the political dialogue between the Parties is “strengthen respect for democratic principles, the rule of law and good governance, human rights and fundamental freedoms, ... and contribution to the consolidating domestic political reforms” (Association Agreement, 2017).

In our opinion, the successful fulfillment of the tasks defined by the Association Agreement

requires the directing of the constitutionalization processes directly into the regulation area of these relations. It causes an objective necessity to regulate and confirm them at the highest - constitutional and legal level. Other words, obviously, that the constitutional formalization of the European orientation for further development of the country is not enough to implement the integration aspirations of Ukraine. This is possible only in case of creation of political, legal and economic systems compatible with European ones. In its turn, it requires the unification of constitutional approaches to the regulation of the prioritized constitutional institutions – human rights and freedoms, civil society, justice, mechanisms of power decentralization, parliamentary system of government market economy etc. On the other hand, the constitutionalization process directly depends on the consistent expression of the normative content of the Constitution of Ukraine in the current legislation detailing and developing its prescriptions (Marceliak, 2016, p. 72), as well as on the creation of appropriate organizational principles necessary for the effective lawmaking and law enforcement measures. Because of this, the Association Agreement acquis should become a particular guideline of the state’s legal policy, and all national legal acts should be interpreted and applied in maximum conformity with its provisions.

In this context, the constitutionalization of Ukrainian association with the EU is a multicomponent process, the implementation of which should in one way or another cover all levels of the legal system. The practical aspect of constitutionalization process of association between Ukraine and the EU is revealed through the dynamic set of organizational and legal nature measures. They are aimed at the implementation by Ukraine of its European integration purpose. Such measures should be carried out in three important directions at the regulatory level of the legal system.

Firstly, the fundamental precondition for the constitutionalization of associative relations between Ukraine and the EU is to reform the meaningful and implementing principles of the Fundamental Law of Ukraine to ensure the constitutional support of this process.

Secondly, an important element of the constitutionalization of the associative relations

between Ukraine and the EU is the concretization and itemization of constitutional norms and principles in the positive law systems and legislation (primarily in those legislative and bylaws aimed at harmonizing national law with EU law).

Thirdly, in the process of implementation of the Association Agreement's provisions, the legal and law enforcement activities of national public authorities, and especially the judicial bodies of constitutional and general jurisdiction, become crucial.

Therefore, the national constitutionalization of the association process is mediated by all types of state legal activity (law-making, law-based and law enforcement), which is connected with the necessity to provide individuals (individuals and entities) with the legal means and measures of direct application of the Association Agreement acquis. All these areas of constitutionalization are interconnected and complementary, but this relationship is hierarchical. It turns out that in any democratic, legal state the constitution is an act of higher legal force, its norms occupy the main priority with respect to the norms of other legal acts, and their action is determined by the principle of supremacy in the legal system, which provides for the implementation of law-making and law enforcement activities in the state on the basis and in accordance with its provisions (Terletsy, 2007, p. 69-70).

At the same time, no one constitution, no matter how it regulates the social relations, is unable to cover the full range of such relations, because, on the one hand, the constitution has a sustainable character, and social relations have a dynamic nature, and on the other hand, the range of these relations is extremely enormous. Therefore, a certain part of them is regulated by the legislative power through laws that must comply with the constitutional principles, purposes, declarations, i.e. its spirit (Baymuratov, 2008, p. 545-546). Also legal and law enforcement decisions of constitutional and general jurisdiction courts derive from the norms and principles of the Constitution of Ukraine.

Therefore, in our opinion, the first of the directions of constitutionalization process of the association, i.e. at the level of the Fundamental Law, is mainly the paramount one, since

the Constitution of Ukraine, being empowered within the national legal system by the rule and the highest legal force, determines the basis of associative relations' legal regulation and thereby gives the impulsion and directs the relevant processes at other levels, which should be considered as secondary constitutionalization. At the same time, the primary constitutionalization process of association between Ukraine and the EU has two aspects: meaningful and implementing.

3. Meaningful Constitutionalization of the Association Process between Ukraine and EU

The meaningful constitutionalization is a constitutional modernization with the meaningful updating of the Fundamental Law provisions in order to form the constitutional principles for further democratization of social and political life in Ukraine, approximation of the national political and legal system to European values and principles, improvement of the internal legislative framework. These are the changes that have been on the agenda for a long time in the context of the constitutional reform in Ukraine. But at the same time, these are the constitutional transformations on which the EU insists, considering them as a necessary condition for further development of associative relations with our state and the implementation of its European integration aspirations.

The relevant approach is directly reflected in the text of the Association Agreement between Ukraine and the EU. For instance, Art. 3 and Art. 6 of the Association Agreement define the desire both of Ukraine and the EU to cooperate in order to ensure that their internal policy is based on common principles, in particular, such as stability and effectiveness of democratic institutions, the rule of law and respect for human rights and fundamental freedoms, proper governance, market economy, balanced development, etc.

These provisions are stipulated in Art. 14 Chapter III "Justice, Freedom and Security" of the Association Agreement. This article provides that within the cooperation framework in the sphere of justice, freedom and security, the Parties pay special attention and importance to the establishment of the rule of law and strengthen-

ing of institutions of all levels in the governance field and law enforcement and judicial bodies. The article emphasizes that the cooperation between Parties will be aimed at the strengthening of the judiciary, improving its efficiency, guaranteeing its independence and impartiality and fighting corruption (On ratification of the Association Agreement between Ukraine, on the one hand, and the European Union, the European Atomic Energy Community and their Member States, on the other hand, 2014).

The constitutional reform is crucial for all other measures, including sectoral reforms. They should be based on the principle of constitutionalization. At the current stage one of the priorities of the constitutional reform is to establish such a mechanism of state power, which would make it impossible to usurp power by any of the highest state officials, and at the same time would ensure the unity of state policy (Nikitenko & Magda 2015). The reform was supposed to guarantee the fair justice, as well as lay down the foundations for local self-government reform and power decentralization.

Taking into consideration these principles, the reform of judicial system and decentralization of power (the reform of local self-government) have become the crucial priorities of the meaningful constitutionalization during the association process between Ukraine and the EU. In general, the Ukrainian external obligations have entirely been coincided with domestic interests mainly in these two spheres. Perhaps, we suppose, the further steps in the implementation of constitutional transformations in Ukraine were carried out quite quickly by developing proposals for the Basic Law reformation and their partial implementation.

Based on the external obligations and internal priorities, the main issue of the meaningful constitutionalization in the aspect of association process between Ukraine and the EU was the reform of the Constitution of Ukraine in respect of justice. In June, 2016 the Basic Law was amended by the relevant and additional provisions thereto. They cover all components of the judicial system, thereby ensuring a comprehensive update of its constitutional principles (Prylutsky & Streltsova, 2016, p. 9-17). The main purpose of these transformations was to optimize the judiciary system in Ukraine, guarantee fair

justice, independence and professionalism of judges, promote the status of contiguous institutions (High Council of Justice, prosecutor's office and advocacy) in conformity with the European standards, as well as to ensure the independence of the Constitutional Court of Ukraine and its ability to protect the Basic Law through the resolution of political conflicts in legal manner.

At the same time, the text changes to the Constitution of Ukraine, being the basic factor of constitutionalization process of association between Ukraine and the EU, does not mean mainly to the formal constitutional legalization. Moreover, such changes do not lead to the judicial system's exhaustion (in particular, the issue of the constitutional reform in respect of power decentralization and reorganization of local self-government in Ukraine are still on the agenda). Therefore, the further constitutionalization of the Ukrainian legal system is a complicated process. Its effectiveness will be determined by increasing of the constitutional quality and the level of regulation of social relations in the state.

4. The Implementing Constitutionalization of the Association Process between Ukraine and the EU

The second, i.e. the implementing aspect of constitutionalization, is aimed at the purposeful formation of constitutional preconditions for the implementation of the Association Agreement's provisions to the national legal system. The implementing constitutionalization predicts the entire set of measures to reform the constitutional legislation in order to create appropriate constitutional principles for the implementation of the Association Agreement's provisions to the national legal order of Ukraine. In fact, the implementing aspect of the constitutionalization of the associative relations between Ukraine and the EU means the ensuring of the implementation of the Association Agreement's provisions within the framework of the Ukrainian national legal order. There are certain important indicators of the implementing constitutionalization of the associative relations between Ukraine and the EU. Firstly, the consolidation within the Basic Law's principles of foreign policy activities of Ukraine (in particular, the European foreign policy orientation of the state), which is a pre-

requisite and a kind of constitutional and legal guarantee of succession and consistency in implementing measures within the associative relations between Ukraine and the EU. Secondly, the improvement of constitutional provisions in respect of national and international law interaction, in particular, those that regulate the implementation of international treaties into the national legal system (first of all, Article 9 of the Constitution of Ukraine).

5. Key Problems of Transformation of the Constitution of Ukraine in respect of the European Integration Direction.

In regard of the determination in the Constitution of Ukraine of the strategic orientation of the state to acquire the full membership of Ukraine in the EU, it should be noted that the debates in respect of the necessity for consolidation in the preamble or in Chapter I of the Basic Law of the provisions related to the European vector of Ukraine are discussed in national scientific scholars before the official amendments to the Constitution of Ukraine enter into force. The experts, referring to the Declaration on State Sovereignty of Ukraine in 1990, pointed out that it contains a provision that “The Ukrainian SSR acts as an equal participant in international communication, actively promotes the strengthening of universal peace and international security, directly participates in the European process and European structures” (our italics. – O.S.) (Declaration on State Sovereignty of Ukraine, 1990). Thus, it was noted that the Declaration, although in general form, establishes certain principles of European orientation of Ukrainian foreign policy and emphasized that the current version of the Basic Law immediately requires them.

On the one hand, this approach had an objective basis, because the change of political power forces (and especially in respect of the President of Ukraine) on the regular basis caused certain adjustments in the foreign policy orientation and development strategy of our state. Thus, during the presidency of L. Kuchma the so-called policy of “multiverse balancing” was laid down in the Ukrainian foreign policy activity. On the one hand, the priority direction of foreign policy activity of our state was the European integration, and on the other, Ukraine took part in some

integration projects throughout the CIS and built the bilateral relations with Russia and other Soviet Union’s former republics on the basis of good faith, cooperation and partnership. After the Orange Revolution, the newly elected President V. Yushchenko preferred the Western vector of Ukrainian cooperation in the foreign sphere. Instead, his opponent and the following head of the state, V. Yanukovich, radically changed Ukraine’s external priorities from the western to the eastern vector. As a result, new tendencies of Ukraine’s movement to Eurasian integration structures got the opportunity to exist. Consequently, these circumstances ultimately led to the refusal to sign the Association Agreement between Ukraine and the EU and was one of the factors of the Revolution of Dignity in 2014. Analyzing these events, V. Muraviov noted that the inclusion of the “European integration article” into the Constitution of Ukraine would contribute to its succession in internal and foreign policy, regardless of the change of political power forces, and consistency in the progressive development of our state (Muraviov, 2015, p. 29).

In addition, if we analyze the obligations in the political, economic and legal spheres undertaken by Ukraine under the Association Agreement, and especially the wide-ranging and scope of measures to be taken, including the adaptation of national legislative regulation to EU *acquis*, it becomes clear that this approach is designed for the long term and requires a phased, stability and predictability of the Ukrainian foreign policy vector.

Simultaneously, it is necessary to make some assumptions in respect of certain amendments to the Constitutional provisions related to the strategic orientation of Ukraine for the long period of time.

Firstly, it should be stated that the fixation in the text of the Basic Law of European integration aspirations of our state has an exceptionally internal, unilateral nature, since the Association Agreement between Ukraine and the EU does not currently provide Ukraine with any prospects of membership in this international association. It only emphasizes the Union’s recognition of European choice and aspirations of Ukraine as a European state that shares with the EU a common history and values. It also determines that the political association and economic integra-

tion of Ukraine with the EU will depend on progress in the implementation of this Agreement and on Ukraine's achievements in respect of common values and approximation to the EU in the political, economic and legal spheres. These provisions reflect the principles of conditionality and evolution. They are often used by the Union's practice in respect of associative relations' regulation, but at the same time they indicate that unlike the Agreements on stabilization and association with the Balkan countries or even former European agreements with the Central and Eastern Europe countries, the Association Agreement with Ukraine does not aim to prepare it for accession to the EU.

Based on these suggestions, we consider that the consolidation in the Basic Law of Ukraine of provisions in respect of its strategic movement to acquire the full membership in the EU should primarily be caused by the bilateral nature of such movement, which is currently absent.

Secondly, despite the fact that the Basic Law in a democratic society should be characterized by an increased degree of stability, it should be stated that in the current domestic realities, certain political interests have often been amended to the text of the Constitution of Ukraine. Therefore, even the including of these provisions in the text of the Constitution of Ukraine does not guarantee the full invariability of state's foreign policy priorities in the future.

Thirdly, we consider that the definition and consolidation of the strategic foreign policy of Ukraine in the Basic Law should primarily rely on the will of the Ukrainian people. Therefore, this issue should be brought to the general discussion through the national referendum. But taking into account that the part of the state's territory is annexed and occupied by the Russian Federation, the involvement of all Ukrainian citizens is almost impossible. Thus, even the referendum will be hold, its results cannot be considered completely positive and exact (Streltsova, 2019, p. 305-308).

Therefore, the entry into force of amendments to the Constitution of Ukraine (in respect of the definition of the European vector of state development) is only a small part of a much more global process. It should be supported mainly by the successful and constitutional

maintanance that will be the key to the Ukrainian gradual transformation into a democratic and legal state.

6. Conclusions

Thus, the implementation of both meaningful and implementing constitutionalization of association between Ukraine and the EU can be implemented only by incorporation of this process directly into the context of constitutional reform in Ukraine. It is important to realize that the implementation of constitutional reform and the establishment of associative relations with the EU should not be considered as two parallel directions of work holding in different coordinate systems. On the contrary, only maximum synchronization of measures carried out within these areas, determination on both bases of their priorities, coordination and confirmation of current tasks will allow to develop a comprehensive strategy of constitutional reform and provide constitutional transformations of a holistic nature. In our opinion, the instrumentarium laid down in the political and economic parts of the Association Agreement, under the conditions of its consistent and pragmatic application, can ensure the reformation of national political, legal, social and economic institutions in Ukraine, taking into account its national interests.

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КОНСТИТУЦІОНАЛІЗАЦІЯ ПРОЦЕСУ АСОЦІАЦІЇ УКРАЇНИ З ЄС: ЗМІСТОВНИЙ ТА ІМПЛЕМЕНТАЦІЙНИЙ АСПЕКТИ

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Анотація

Метою даної статті є дослідження процесу конституціоналізації асоціативних відносин між Україною та Європейським Союзом. Автори виокремлюють та розкривають два основні аспекти цього процесу: змістовний та імплементаційний. Визначається, що змістовна конституціоналізація по своїй суті є конституційною модернізацією, у ході якої відбувається змістовне оновлення положень Конституції з метою формування конституційних засад для подальшої демократизації суспільно-політичного життя в Україні, наближення національної політико-правової системи до європейських цінностей та принципів, удосконалення внутрішньодержавної законодавчої бази. Імплементаційний аспект конституціоналізації полягає у цілеспрямованому формуванні конституційних передумов для імплементації положень Угоди про асоціацію до національної системи права. Автори вважають, що здійснення як змістовної, так і імплементаційної конституціоналізації асоціації України з ЄС можна реалізувати лише шляхом включення даного процесу безпосередньо у контексті конституційної реформи в Україні.

У статті проаналізовано заходи організаційно-правового характеру, спрямовані на реалізацію мети європейської інтеграції України і визначено, що такі заходи мають здійснюватися за трьома основними напрямками: 1) реформування змістовних та імплементаційних засад Основного закону України для забезпечення конституційного супроводу цього процесу; 2) конкретизація та деталізація конституційних норм і принципів у законодавстві (передусім у тих законодавчих та підзаконних нормативно-правових актах, які спрямовані на гармонізацію національного права з правом ЄС); 3) правотлумачна та правозастосовна діяльність національ-

