

UPRAWNIENIA SĄDU KONSTYTUCYJNEGO UKRAINY W SPRAWIE UMÓW MIĘDZYNARODOWYCH: PROBLEM WDROŻENIA

Streszczenie. Artykuł poświęcony jest teoretycznym i praktycznym problemom realizacji przez Sąd Konstytucyjny Ukrainy uprawnień w obszarze kontroli konstytucyjnej umów międzynarodowych Ukrainy. Na podstawie analizy obowiązującego ustawodawstwem Ukrainy, praktyki jedynej jednostki sądownictwa konstytucyjnego rozpatrującego odpowiednią kategorię spraw i pracowni doktrynalnych, zdefiniowane zostało znaczenie kontroli konstytucyjnej umów międzynarodowych, wyodrębnione istniejące problemy utrudniające skuteczną weryfikację umów międzynarodowych pod kątem zgodności z Konstytucją Ukrainy i sformułowano propozycje rozwiązania tych problemów.

Słowa kluczowe: weryfikacja umów międzynarodowych Ukrainy pod kątem ich konstytucyjności, wstępna kontrola konstytucyjna; właściwa kontrola konstytucyjna, praktyka Sądu Konstytucyjnego Ukrainy w obszarze weryfikacji konstytucyjności umów międzynarodowych.



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THE CONSTITUTIONAL COURT OF UKRAINE AUTHORITIES CONCERNING INTERNATIONAL AGREEMENTS: REALIZATION ISSUES

Abstract. The article is devoted to the theoretical and practical problems of the Constitutional Court of Ukraine authorities concerning international agreements implementation. On the basis of the analysis of current Ukrainian legislation, the practice of the sole body of constitutional justice in the relevant cases category consideration and doctrinal developments the significance of the constitutional control over the international agreements is ascertained. Moreover, there are singled out the existing problems, hindering the effective verification of international treaties compliance with the Constitution of Ukraine, and the proposals for overcoming them are formulated.

Keywords: the international agreements of Ukraine constitutionality verification; preliminary constitutional control; subsequent constitutional control; the Constitutional Court of Ukraine practice on the constitutionality of international agreements.

ПОВНОВАЖЕННЯ КОНСТИТУЦІЙНОГО СУДУ УКРАЇНИ ЩОДО МІЖНАРОДНИХ ДОГОВОРІВ: ПРОБЛЕМИ РЕАЛІЗАЦІЇ

Анотація. Статтю присвячено теоретичним та практичним проблемам реалізації Конституційним Судом України повноважень з конституційного контролю щодо міжнародних договорів України. На основі аналізу чинного законодавства України, практики єдиного органу конституційного судочинства з розгляду відповідної категорії справ та доктринальних напрацювань, встановлено значення конституційного контролю щодо міжнародних договорів, виокремлено існуючі проблеми, що перешкоджають ефективній перевірці міжнародних договорів на предмет відповідності Конституції України, а також сформульовано пропозиції щодо їх подолання.

Ключові слова: перевірка міжнародних договорів України на предмет конституційності; попередній конституційний контроль; наступний конституційний контроль;

практика Конституційного Суду України у справах щодо конституційності міжнародних договорів.

Statement of the scientific problem. The current trend of globalization and international environment impact on internal state affairs intensification, qualitative human rights and freedoms promotion and the international legal order operation depend on domestic and international law coherence. Thus, the research of the issue of the control over this coherence is topical and demanded.

The issues of the Constitutional Court of Ukraine (hereinafter - CCU) authorities on the international treaties constitutionality is directly related to the ratio between legal force of the Constitution and of international treaties, as well as to determination of priority between national sovereignty and international obligations. Although constitutional justice refers to the internationally recognized standards, this institution in Ukraine is a relatively immature, and therefore its formation and functioning raises many questions. As a result, in the conditions of incomplete certainty of the CCU general status, few of its authorities, including the authority on the international treaties constitutionality review, have not acquired a comprehensive study.

Recent research analysis. Scientific and theoretical basis for this problem study constitute the works of such scholars as I. Koreyba, P. Martynenko, O. Murashyn, V. Pohorilko, P. Rabinovych, M. Savenko, M. Savchyn, A. Selivanov, N. Sergienko, Y. Todyka, V. Shapoval and S. Shemchushenko. However, due to the complex legal and political dilemmas that arise during the implementation of the CCU powers concerning international treaties, these authorities are one of the least researched. The CCU practice in this category of cases is sparse – there was delivered only one decision on the international agreement unconstitutionality. In such circumstances, the issue of the CCU authority on the international treaties verification in terms of their constitutionality does not draw sufficient attention of scholars.

Purpose and objectives of the article. The purpose of this research was to investigate the problematic issues relating to the CCU authority on the international treaties of Ukraine constitutionality and to develop recommendations so as to resolve these problems.

The objectives of the article are to research the CCU competence in the context of issues on the international agreements constitutionality; to study of the CCU practice in this category of cases, identifying problems existing in this area and their causes; and to formulate proposals so as to overcome them.

Principal material statement. On the basis of the Constitution of Ukraine (art. 150) [1] and the Law of Ukraine "On the CCU" (art. 13 and 86-89) [3], within the CCU functions on the constitutional justice implementation there can identified two groups of authorities having legal significance regarding the international treaties constitutionality: verification of the international treaties submitted to the Supreme Council for establishing them binding constitutionality; and constitutionality verification of the effective Ukrainian international treaties.

However, referring to the CCU practice concerning the international agreements of Ukraine control implementation, it should be noted that it is not diverse. Constitutionality of the international agreements in force has not been examined by the CCU even once. Only one international treaty has been subject to the preliminary constitutional control before its ratification – the Rome Statute of the International Criminal Court of the 17th of July 1997 that provided the International Criminal Court establishment as an element of a new system of international justice.

During this case consideration the CCU encountered four challenges: to which moment the authorities in judiciary may be transferred to the international court of justice on the basis of the international agreement; to which extent the international court of justice authorities in judiciary may impair an immunity granted by the constitutional law; to which extent does the constitutional prohibition of a citizen extradition contradict to the transfer of judicial authority to the international court of justice; and to which extent the national fundamental rights are guaranteed by the Statute of the International Court.

Examining the case, the CCU proceeded from the fact that "Article 1 of the Statute emphasizes that this Court supplements national bodies of criminal justice. A similar provision is contained in the tenth paragraph of the Preamble of the Statute. Complementary national justice system nature of the International Criminal Court is specified in several other articles of the Statute as well, in particular in p. 2 of Art. 4, under which the Court may exercise its functions and powers on the territory of any State Party; in subparagraph "a" of p. 1 of Art. 17, under which the Court takes its proceedings not only at the request of the State Party, but also on its own initiative when the state having jurisdiction over a person alleged in crime, envisaged by the Statute, is unwilling or unable to conduct an investigation or to institute a criminal proceedings properly."

Thus, in contrast to the international judicial agencies under the fourth paragraph of Art. 55 of the Ukraine's Constitution that are by nature supplementary remedies protecting man and citizen rights and freedoms, the International Criminal Court is one that complements the system of national jurisdiction. Accordingly, the provisions of the tenth paragraph of the Preamble and Art. 1 of the Statute were recognized by the CCU as inconsistent with the Constitution of Ukraine.

The CCU interpreted Art. 124 of the Constitution as follows: only national courts are entitled to serve justice; the possibility of this competence transfer is not provided by the Constitution, as it infringes the principle of sovereignty positive aspects reflected in the Constitution, namely, the principle of national jurisdiction.

As to the admissibility of the International Court activity on the territory of the court, the CCU finds no violation of sovereignty, since ratifying the Statute, Ukraine uses its sovereignty in a way that allows appropriate action. However, in this case, sovereignty would be equated to the function of the parliamentary will.

In the part of the constitutional prohibition of extradition, the CCU found rather peculiar solution making the differentiation between the issuance to another state that is not permitted by the Constitution and transfer to the international court. The motivation is that the Statute includes provisions on transfer (surrender), but not on extradition. The prohibition should protect its citizens from a foreign punishing power that is beyond control of the State issuing a citizen. In the case of transfer to the international court it comes to surrender to jurisdiction created with regard to the will of the State through the relevant statute ratification. In addition, the authority of the International Court is limited and the sentences execution remains for the States parties, mainly for the native countries of each convicted individual, thus the prohibition of extradition was not assessed as an obstacle to the incorporation of the International Criminal Court Statute.

The CCU reviewed the International Criminal Court Statute compatibility with a guarantee envisaged in Art. 63 of the Constitution, under which convicted persons enjoy all human and civil rights, with the exception of restrictions determined by law and established by a court. In this case, the CCU considers the possibility that Ukrainian citizen sentenced by the International Criminal Court may serve his sentence in Ukraine, and therefore constitutional and legal guarantees are sufficiently protected.

In the opinion of the 11th of July, 2001 [4] the CCU recognized the Rome Statute of the International Criminal Court as contradicting to the Ukraine's Constitution in part that "International Criminal Court ... complements the national criminal justice authorities", thus establishing the ratification of the International Criminal Court Statute incompatible with Art. 124 of the Constitution.

No more cases within the international treaties previous constitutional review have been considered by the CCU, however at the same time in Ukraine there is a constitutional law mechanism of indirect control over the international treaties conformity with the Constitution – the CCU authority concerning the review of the constitutionality of the legislative acts on international treaties entry into force.

Concerning the acts on international treaties entry into force constitutionality, the right to lodgment is granted to a wider range of subjects: to the President of Ukraine, to at least forty-five people's deputies of Ukraine, Ukraine's Supreme Court, the Supreme Council Ombudsman and

to the Crimea Autonomous Republic's Supreme Council, thus the practice in this category of cases is slightly more prevalent than in the cases concerning the review of the international treaties constitutionality.

One of the examples of this category of cases consideration is a verification of the constitutionality of the Law of Ukraine "On Ratification of the European Charter for Regional or Minority Languages, 1992" at the constitutional petition of 54 people's deputies of Ukraine. In the decision of the 12 of July 2000 the CCU stressed that this Law was adopted by the Supreme Council of Ukraine, signed and officially promulgated with infringement of the Art. 94 of the Ukraine's Constitution. Based on the aforementioned, it was recognized that the Law of Ukraine "On Ratification of the European Charter for Regional or Minority Languages, 1992" - in connection with violation of the signing procedure - should be considered as inconsistent with the Constitution of Ukraine [5]. By the 15th of May 2003 the European Charter for Regional or Minority Languages has not been ratified in Ukraine that had a negative impact on the Ukraine's image as the Council of Europe member state.

Another precedent was the case at the constitutional petition of 54 people's deputies regarding the constitutionality of the Supreme Council's Resolution "On the Supreme Council accession to the Agreement on Parliamentary Assembly of the Independent States Commonwealth". In the ruling on the constitutional proceedings termination the CCU defined the Interparliamentary Assembly of the Commonwealth of Independent States legal nature as a body of interparliamentary cooperation and emphasized that the decree "is essentially a political act and does not generate for Ukraine or the Supreme Council of Ukraine any legal consequences, and therefore shall not be treated as a legal act within the meaning of Art. 150 of the Ukraine's Constitution". [6] Thus, the CCU refused to decide on the merits on the grounds of the jurisdiction lack in the case.

In 2000, 50 people's deputies brought to the CCU a petition on the unconstitutionality of the Law of Ukraine "On ratification of the agreements on the Black Sea Fleet" on the basis of violation of the of consideration, adoption and entry into force procedure, referring to the fact that during these international agreements conclusion there has occurred "delegation of powers to conclude international agreements of Ukraine by the President of Ukraine" that contradicts to the p. 3 part. 1 and 4 of the Art. 106 of the Ukraine's Constitution.

However, the CCU found that under the Vienna Convention on Law of International Treaties of 1969, the state can conclude international treaties by providing the power to an appropriate action to any other person. In this case, the power to conclude an international agreement is implemented on the basis of order, not through delegation of authority. Therefore no violations of the international treaty adoption procedure has been found by the CCU.

As for the people's deputies references that several provisions of the Agreement do not meet the Constitution of Ukraine, the CCU determined that these issues should be considered according to the procedure of the international agreements constitutionality review, but not according to the procedure of the laws of Ukraine constitutionality review. People's deputies are not empowered to initiate the proceeding on the international treaties constitutionality verification, therefore in its Ruling of the 26th of December 2000 the CCU refused to institute the proceedings on this view [7].

A similar fate befell the 51 people's deputies petition on the Law of Ukraine "On ratification of the Agreement on Common Economic Space" non-compliance with the Constitution of Ukraine. People's deputies relied on the provision "Ukraine will participate in the formation and functioning of the Common Economic Space within the limits established by the Constitution of Ukraine" that does not meet the Constitution of Ukraine, as it "does not fix Ukraine's position with the required accuracy and enables the interpretation of the Ukraine's consent to participate in all stages of the Common Economic Space and its entities formation." In addition, people's deputies drew attention that the Agreement stipulates the transfer of the sovereignty of Ukraine part to a single regulatory body that does not comply with the Constitution of Ukraine, deprives the people

of Ukraine of the sovereignty on its territory and is in contrary to the provisions of the Ukraine's Constitution. According to the CCU, the primary focus of the constitutional petition was given to the analysis of the Articles of Agreement and the Concept content [8]. Whereas such matters should be considered at the request of the President of Ukraine or the Ukraine's Cabinet of Ministers, instead of people's deputies, the CCU refused to initiate the proceedings.

It is obvious that in the abovementioned constitutional petitions people's deputies focused on the content of treaties ratified by the Law, i.e. on the issues that are subject to the CCU examination at the request of the President of Ukraine or the Ukraine's Cabinet of Ministers. Consequently, the CCU refused to initiate the proceedings on the ground of the right to apply absence.

Thus, it should be taken into account that the implementation of the CCU authority concerning the review of the constitutionality of the legislative acts on international treaties entry into force may indeed affect the legal fate of these international agreements. In the case of the internal regulations abolition on the grounds of non-compliance with the Constitution, the introduced international treaties automatically lapse.

However, it is difficult to attribute this authority to the CCU powers on the constitutionality of international treaties, as the arguments relating to the international treaty subject-matter will not be taken into consideration. The CCU will examine only this internal act adoption procedure observance and content compliance with the Constitution.

Therefore, the deployment of the institute of the constitutional petition on the review of the constitutionality of the legislative acts on international treaties entry into force as an alternative to the constitutional petition on the review of the constitutionality of international treaties themselves shall be impossible, as is evidenced by the CCU practice. On this basis, we propose to allocate this authority separately, not including them into the system of the CCU authority on the constitutionality of international treaties of Ukraine.

Thus, the CCU practice regarding the international agreements constitutionality review is not considerable. D. Terletsnyi offers to conduct simple arithmetic operations, according to which it appears that the total number of the CCU decisions and conclusions on the constitutionality of international treaties and laws on their ratification make up less than three percent [11]. If we exclude from this amount the decisions on the laws on international treaties ratification constitutionality revision, as in this case the object of review is not the treaty itself, but the internal act, this ratio will be even lower.

This state of affairs reasons lie in the constitutional proceedings in the internationally relevant cases commencement imperfections (in particular, in a narrow range of subjects authorized to apply to the CCU the request of this nature) and globally in the fact that international treaties fix the interstate economic or political agreements, thus their abolishment by the CCU decision may significantly degrade the Ukraine's image in the international environment.

For instance, I. Koreyba states that even recognition of the possibility of judicial review by the CCU of the acts on international treaties ratification, regardless of the final decision, inevitably leads to a defeat in international courts and to the loss of Ukraine's prestige on the international arena [9]. As noted by N. Sergienko, state actions, violating an international treaty due to its non-compliance with the domestic law will be deemed illegal at the international level and the sanctions may be imposed on this state [10].

It is necessary to consider that «*pacta sunt servanda*» principle operates under international law (Vienna Convention on Law of Treaties 1969, Art. 75 [2]). According to this principle, no member may refer to the domestic law provisions as justification of the contract performance failure.

In this regard, the question arises how the notion "legislation" shall be interpreted, and whether the Constitution is a part of the legislation. As established by the CCU in the decision N12-rp/98 of the 9th of July, 1997, the laws of Ukraine and international treaties ratified by the Ukraine's Supreme Council, adopted pursuant to the Constitution and laws of Ukraine, as well as

resolutions of the Ukraine's Supreme Council, of the President's of Ukraine decrees and regulations of the Ukraine's Cabinet of Ministers are covered by the term "laws".

It should be noted that in case an international treaty is ratified by the Parliament through the law adoption, the treaty objectively has the power of law. Its correlation with the laws in the ongoing regulation content and effects should be established under the "subsequent law overrides the preceding" principle (Latin: *Lex posterior derogat priori*). Thus, the international treaty is of the same legal effect as the law. Whereas the Constitution has the supreme legal force over the laws and, accordingly, over the international treaties, the obligatoriness of international treaties conformity to the Constitution does not contradict the «*pacta sunt servanda*» principle.

Principal inefficiencies of the submission procedure are a narrow range of subjects entitled to lodge petitions concerning the treaties constitutionality review and optionality of the preliminary control of international treaties constitutionality.

Taking into account that international treaties of Ukraine are ratified by the Ukraine's Supreme Council that should be responsible for such decisions adoption, it would be appropriate to provide the quorum of 45 people's deputies with the right to a constitutional petition for the CCU opinion on the constitutionality of international treaties already in force in the territory of Ukraine and those subject to ratification.

It is reasonable as well to introduce a mandatory petition for the CCU opinion on the constitutionality of international treaties before its ratification, defining a subject responsible for this filing, for instance, a subject that signed a treaty and is entitled to submit it to the parliament for ratification. Since unconstitutional treaties will be sifted away before their ratification, there will be no need to terminate Ukraine's international obligations under these treaties, as such obligations will not arise. Proposed novelty may eliminate the complications in international relations between Ukraine and contracting states.

Conclusions.

Taking into account Ukraine's aspirations to join the international integration processes and general globalization trend in the world, there is a special need for domestic and international law harmonization. Accepting international commitments, it is necessary to predict future interstate measures for their implementation, and to which extent these obligations are consistent with national legislation. Therefore, authorization of the CCU to ensure harmonious interaction between international agreements and domestic sources of law is both justified and essential. Moreover, the availability of the CCU authority to recognize Ukraine's international treaties as unconstitutional is one of the guarantees for national sovereignty that provides legal protection and supreme legal force of the Constitution. This control instrument does not only correspond to the international legal order, but also is an essential element in the international agreement adoption process (especially in the case of preliminary control) and consistent operation of domestic and international law.

However, political tinge of the matters relating to the international treaties and certain internal law procedural imperfections prevent the prevalence of the CCU practice concerning the international treaties, as potential negative consequences for Ukraine in its relations with other states, caused by the international treaties abolition for reasons of unconstitutionality, maintain sufficient impact on the substantial and quantitative elements of the CCU practice in such cases.

At the same time, should the necessary reforms on the procedural obstacles elimination with regard to the abovementioned recommendations be held, as well as a significance of the verification of international agreements constitutionality be reconsidered and indicated problems acquire further research, the implementation of the CCU authority on the constitutionality of international treaties will become more effective and widespread.

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