



KYIV-MOHYLA
LAW & POLITICS JOURNAL

KYIV-MOHYLA SCHOLARLY PEER-REVIEWED JOURNALS

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Source: Kyiv-Mohyla Law and Politics Journal 6 (2020): 177–195

Published by: National University of Kyiv-Mohyla Academy

<http://kmlpj.ukma.edu.ua/>

The Correlation of Constitutional and International Law: The Ukrainian Case

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Abstract

Constitutional and international law often interrelate and regulate certain areas differently. The legal scholar's viewpoint significantly determines his or her approach to the role of international and constitutional law in certain legal circumstances. This article focuses on the issue of determining the place of international treaties and generally recognized international law principles and norms in Ukraine's domestic legal system. Ukraine has a well-established practice of automatically recognizing international treaties' priority over its norms of domestic legislation, but this priority cannot be regarded as absolute. This article argues that legal scholars advance different arguments on this because they apply different approaches—approaches that originate either in constitutional or international law.

Key Words: constitutional law, international law, international treaties, generally recognized international law principles and norms, constitution, Ukraine



Historical and Contemporary Approaches to the Issue

Correlating national and international law is rooted in the origins of international legal cooperation. Not until the 19th century, however, did the correlation become the subject of doctrinal studies. These studies were initiated by three major German constitutional law scholars, namely Paul Laband, Georg Jellinek, and Rudolf von Jhering, when their research's focus shifted from constitutional law to international law. Following their lead and for nearly a century and a half, numerous international legal scholars also have studied this correlation. These studies continue, particularly in post-Soviet legal scholarship.

Today, foreign and domestic legal scholarship examining the correlation between national (domestic)¹ law, primarily constitutional law, and international law has revealed the correlation's interdisciplinary features. Many fundamental, problematic issues remain contentious, however, and they will not be solved by international lawyers alone. Resolving these issues will require international and constitutional legal theorists to collaborate more closely. Some of the issues requiring closer collaboration are within the scope of constitutional law. These include questions about the proper place that international treaties and generally recognized international law principles and norms should occupy in national (domestic) legal systems and the ways in which conflicts between international treaties and national (domestic) legislation should be managed. These issues are vitally important to Ukraine because, as a relatively young independent nation, Ukraine has only recently begun to confront these issues. This inexperience has resulted in a wide range of approaches to these issues, some of which are inconsistent with others. Most domestic legal scholars agree on some of these approaches. Nevertheless, ambiguities in certain parts of the Ukrainian Constitution that regulate these issues continue to complicate the problem of correlating national (domestic) law and international law.

The growing impact of international law and international legal systems on national (domestic) law and national (domestic) legal systems is one of the most significant consequences of globalization in the contemporary world. Scholars often identify and assess these impacts based on dualist or monist concepts for correlating national (domestic) with international law.² Lately, however, the borders between these two concepts have become fuzzier, at least within constitutional theory and practice in most states. This is because most states do not adhere to these concepts' pure form. Instead, they often adopt the hybrid concepts of "mild dualism and mild monism," "restrained dualism," "realistic dualism," "dialectic dualism," and many more. Therefore, differentiating one from another can be difficult.³

1 Translator's note. Ukrainian legal scholarship prefers term "national" over "domestic" when referring to legislation adopted by competent Ukrainian public or competent USSR public bodies still in force in Ukraine, hence the former was used originally by the author. Nonetheless, to ease comprehension for our international audience, both terms sometimes appear here. When they do not, "national" is intended to be synonymous with "domestic."

2 Oleksandr Merezhko, *Pravo mizhnarodnyh dohovoriv: suchasni problemy teorii ta praktyky* [Law of International Treaties: Contemporary Problems of Theory and Practice] (Kyiv: Takson, 2002), 275–76; Kostiantyn Savchuk, "Mehanizm vzayemodiyi mizhnarodnoho prava z natsionalnoyu pravovoyu systemoyu Ukrayiny [Mechanism of Correlation of International Law with National Legal System of Ukraine]," in *Mehanizm harmonizatsiyi zakonodavstva Ukrayiny z yevropeyskym ta mizhnarodnym pravom* [Mechanism of Ukrainian Legislation' Harmonization with European and International Law], (Kyiv: Institut derzhavy i prava imeni V. M. Koretskoho NAN Ukrayiny, 2011), 28–49.

3 V'yacheslav Shamray, "Do pytannia doktryny spivvidnoshennia mizhnarodnoho dohovoru ta konstytutsiynoho prava Ukrayiny v umovah yevropeyskoyi intehratsiyi [To the Issue of

Concepts other than these, plus other factors, play a more significant role in correlating national (domestic) and international law, however. These primarily include national traditions, the level of certain states' (including their legal systems) integration in international community and regional international organizations, and states' general direction in their political and legal development. The experiences of countries other than Ukraine proves that these factors more strongly influence the specifics of domestic constitutional regulation than the correlation between national (domestic) and international law. This regulation varies significantly among states. Yet it determines the nature, status, and place international treaties occupy in national (domestic) legal systems. Therefore, it also determines these states' approaches to correlating the recognized principles and norms of international law with national (domestic) law.

Constitutional Law and International Treaties

An overwhelming majority of states consider international treaties as part of their domestic legal system. However, their constitutions create difficulties in affixing international treaties' place in their states' national (domestic) legal system. International treaties may be regarded "part of national legal system," as, for example, in Albania, Estonia, Lithuania, Poland, Russia; "part of federal law," as for example, in Germany; "part of internal legal order," as for example, in Spain and Croatia; and part of internal (national, domestic) legislation, as, for example, in Northern Macedonia and Ukraine. This diverse terminology requires legal interpretation. In practice, therefore, reaching a strictly defined understanding and even a unified perception adopted by all states is quite difficult. In some cases, these outcomes are simply impossible.

No unified solution exists within different states for integrating international treaties into national legal systems. Most states integrate all ratified treaties into national law. Certain states assign that status only to treaties focused on protecting human rights and human freedoms, as, for example, in Slovakia, Czech Republic, Ethiopia, Benin, and Madagascar. The widest range of approaches, however, focuses on the instances in which international treaties have not yet been recognized as part of a state's national legal system. Certain states give properly concluded and adopted international treaties priority over national law. Most states recognize the priority of international treaties over national law regardless of the time when they entered into force—either before or after ratification. A third group of states apply the *lex posterior derogate legi priori* principle by which international treaties overrule previously enacted national legislative acts, though they may be affected by posterior national legislative acts of

the Doctrine of International Treaty and Constitutional Law of Ukraine Correlation within European Integration],” *Pravo i hromadyanske suspilstvo* no. 2 (2015): 25; Olha Streltsova, *Konstytutsionalizatsiya protsesu asotsiatsiyi Ukrayiny z Yevropeyskym Soyuzom. Teoriya ta praktyka* [Constitutionalization of the Process of Ukraine's Association with European Union: Theory and Practice] (Kyiv: Pravova Yednist, 2017), 429.

the same status. The status of international treaties that do not require ratification is usually lower in the hierarchy of statutes than that of national legislative acts. Certain other states, including Ukraine, do not address this issue in their constitutions at all. This has created grounds for diverse and sometimes opposing approaches to this issue in Ukrainian academic literature.

Certain authors state that Article 9 of the Constitution of Ukraine, which addresses the issue of correlating international treaties and Ukraine's national legislation, deals exclusively with treaties recognized as authoritative by the Verkhovna Rada (Parliament) of Ukraine through its ratification of them. They contend that Article 9 makes these treaties part of Ukrainian national legislation.⁴ Therefore, only these treaties have priority over national statutes. Ukraine's Constitution, of course, is exempt. Accordingly, international treaties not subject to the parliament's ratification do not become part of national legislation; therefore, they do not acquire legally binding status in internal affairs. This view sometimes supports the conclusion that Ukraine may choose not to fulfill its obligations undertaken through these international treaties.⁵ Other scholars state that when an international treaty is ratified by the Ukrainian parliament as a Law of Ukraine, it is legally equal to the general domestic law of Ukraine. The correlation of a treaty with other domestic laws in this respect is established under the *lex posterior derogat legi priori* principle.⁶ This, in turn, is grounded on Article 9 of the Constitution of Ukraine, which, unlike other state constitutions, does not specifically provide for the priority of international law over the national legislation.⁷

A different group of scholars adheres to the approach that integrates intergovernmental and interagency international treaties into the national system of legislation in the same way that interstate international treaties ratified by Verkhovna

4 *Konstytutsiya Ukrainy: naukovo-praktychniy komentar. Natsionalna akademiya pravovyh nauk Ukrainy* [Constitution of Ukraine: Academic and Practical Commentary. National Academy of Legal Sciences of Ukraine] (Kharkiv: Pravo, 2011), 72.

5 Olena Nazarenko, *Mizhnarodni dohovory Ukrainy v systemi dzherel konstytutsynoho prava Ukrainy: avtoref. dys. ... kand. yuryd. nauk. 12.00.02—konstytutsiynе pravo* [International Treaties of Ukraine in the System of the Sources of Constitutional Law of Ukraine: autoreferat of PhD dissertation. 12.00.02—constitutional law] (Kyiv, 2006), 14.

6 Volodymyr Shapoval, "Systemy natsionalnoho ta mizhnarodnoho prava i konstytutsiynе rehulyuvannya [Systems of National and International Law and Constitutional Regulation]," *Visnyk Konstytutsynoho Sudu Ukrainy* no. 2 (2004): 61–80.

7 Viktor Skomoroha, "Okremi pytannya implementatsiyi norm mizhnarodnoho prava i konstytutsiyna yurysdyktsiya Ukrainy [Certain Issues of Implementation of International Law Norms and Constitutional Jurisdiction of Ukraine]," *Ukrayinskiy chasopys mizhnarodnoho prava* no. 1 (2002): 6–11; "Dissenting opinion of the Constitutional Court of Ukraine Justice Volodymyr Shapoval in case regarding the constitutionality of the provision of Para. 2 Part 1 Article 39 of the Law of Ukraine "On Higher Education" (case regarding the marginal age of higher education institution manager) of July 7, 2004," Constitutional Court of Ukraine, accessed September 6, 2020, <https://zakon.rada.gov.ua/laws/show/nc22d710-03#Text>.

Rada of Ukraine in the form of the Law of Ukraine become national law.⁸ Proponents of this approach contend that the failure to recognize these treaties as part of national legislation would deny them legal force and make them unenforceable, even if they created obligations for the state under international law.⁹ Thus, this approach recognizes all these types of international treaties as having priority over Ukraine's national legislation when they conflict. Other arguments favoring this approach rely on the constitutional principle *pacta sunt servanda* as requiring Ukraine's diligent execution of international obligations.¹⁰ This approach is also supported by the contemporary trend in the international scholarly community favoring the recognition of international law's priority.¹¹ Articles 26 and 27 of the Vienna Convention on the Law of Treaties (1969), which was ratified by Ukraine on May 14, 1986, while it was still part of the USSR, state that

Every treaty in force is binding upon the parties to it and must be performed by them in good faith

and that

a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.

Additionally, Article 19 (part two) of the Law of Ukraine "On International Treaties of Ukraine" of June 22, 2004, which was preceded by the law with analogous name of December 22, 1993, specifically states that

...if international treaty of Ukraine, which came into force in appropriate order, provide other rules than those provided by the

8 See: Ihor Zabokrytskiy, "Problemy pravovoho statusu mizhnarodnykh dohovoriv Ukrainy u systemi dzherel konstytutsiynoho prava Ukrainy [Issues on the Legal Status of International Treaties of Ukraine in the System of the Sources of Constitutional Law of Ukraine]," *Visnyk Natsionalnoho universytetu "Lvivska Politehnika." Yurydychni nauky* no. 825 (2015): 73.

9 Mykhaylo Baymuratov and Oleksandr Batanov, *Kurs konstitutsionnogo prava Ukrainy. Tom 1. Obschaya chast. Osnovy teorii konstitutsyonnogo prava* [Constitutional Law of Ukraine course. Volume 1 General part. Basics of Constitutional Law Theory] (Kharkiv: Odissey, 2008), 255; Streltsova, *Konstytutsionalizatsiya*, 435.

10 Volodymyr Denysov, "Status mizhnarodnykh dohovoriv u Konstytutsiyi Ukrainy [Status of International Treaties in the Constitution of Ukraine]," *Visnyk Akademiyi pravovykh nauk Ukrainy* no. 1 (1997): 32.

11 Volodymyr Yevintov, *Mezhdunarodniy i vnutrenniy pravoporyadok v strukture mezhdunarodnogo soobshchestva. Realizatsiya mezhdunarodno-pravovykh norm vo vnutrigosudarstvennom prave* [International and Internal Legal Order within the Structure of International Community. Realization of International Legal Norms in Internal State Law] (Kyiv: Naukova dumka, 1992), 26.

legislation of Ukraine, the rules of international treaty of Ukraine shall apply.

Moreover, Article 18 of the Constitution of Ukraine states that

the foreign political activity of Ukraine is aimed at ensuring its national interests and security by maintaining peaceful and mutually beneficial co-operation with members of the international community, according to generally acknowledged principles and norms of international law.¹²

Article X of the Declaration of State Sovereignty of Ukraine of July 16, 1990, and the provisions of certain Ukrainian domestic statutes regarding the priority of the application of treaty terms in case of a conflict between them and the national legislation of Ukraine also support this approach.

Delving into these documents, however, is beyond this article's scope. Nevertheless, their mention here sets the stage for discussing international treaties' priority when they conflict with national Ukrainian law. This discussion must first acknowledge that an international treaty is legally binding when Ukraine's parliament consents to the treaty having this effect.¹³ This consent is given through a national law ratifying the international treaty. An international treaty that is ratified by the Verkhovna Rada of Ukraine is immediately enforceable by national law enforcement bodies. Ukraine's Constitution, unlike other constitutions, is silent on this issue. Thus, it is unlike, for example, Article 91 of the Constitution of Poland that authorizes the direct application of an international treaty in cases when its application is not dependent on the legislative enactment of a national statute. Thus far, this much is certain in Ukraine: national law enforcement bodies are required to apply those provisions immediately after the ratified international treaty comes into force. Therefore, a ratified international treaty has two features. First, its terms are international law binding on Ukraine. Second, these terms are part of Ukraine's national law.

But what is the legal status of unratified treaties in Ukraine? Ukraine is bound by its international obligations by the *pacta sunt servanda* principle. This principle is not explicitly stated in the Constitution of Ukraine. Instead, it is derived from generally

12 Mykhaylo Buromenskyi, "K voprosu o deystvii norm mezhdunarodnogo prava vo vnutrennem pravoporyadke Ukrainy [To the Issue of the Force of International Law Norms in the Internal Legal Order of Ukraine]," in *Mezhdunarodnoye parvo kak osnova sovremennogo miroporyadka: kollektivnaya monografiya Liber Amicorum k 75-letiyu prof. V. N. Yevintova*, ed. Andriy Melnyk, Svitlana Melnyk, Timur Korotkiy (Kyiv-Odesa: Feniks, 2012), 264.

13 Translator's note. The formulation of Article 9 of the Constitution of Ukraine is quite complex with focus on parliament's consent to treaty bindingness, however it does not include the term "ratification," while in fact it means just that. Therefore, the English text of this article uses term "ratification" in the following cases further on.

acknowledged international law principles and norms that Ukraine is obligated to honor under Article 18 of its Constitution following the example of the majority of other states—for example, under Article 24 of the Constitution of Bulgaria, Article 135 of the Constitution of Lithuania, Article 8 of the Constitution of Moldova, Article 17 of the Constitution of Uzbekistan, and many more—and to apply it in its *foreign* policy.

Even if we agree with Mykhaylo Buromenskyi when he states that this principle provides for the unconditional possibility for domestic courts to have jurisdiction in such cases,¹⁴ this does not mean that the *pacta sunt servanda* principle applies to domestic activity in the same manner as it applies to a state's foreign policy. The major difference between the positions of international law and constitutional law scholars in approaching this issue lies in the fact that international law requires the state to honor any kind of international treaties entered into by itself or by its bodies, regardless of their content or status; that is, whether or not that treaty is subject to ratification. In this respect, the requirement of international law may be regarded as absolute.

Constitutional law generally does not deny the state's obligation to comply with the *pacta sunt servanda* principle. However, it does not recognize the absolute priority of any international treaty over all domestic laws and other statutes. This priority may be recognized for international treaties of certain type or rank, namely those that require state consent through ratification. And it also may be recognized when domestic law goes beyond a state's internal affairs according to international standards and gains extraterritorial and international features. This primarily occurs when a state enforces or otherwise protects human rights and freedoms as is authorized by most international documents and by the constitutional doctrines and practices of most countries.

Globalization has increased supranational and international legal regulation of issues that formerly belonged to domestic regulation. But this regulation does not preclude states from independently deciding that matters beyond the scope of international regulation will or will not be given priority over domestic laws. As for matters within the scope of international regulation, states typically enact a domestic statute that implements the provisions of the international treaty into national legislation. This way, the provisions of international treaty are fully reflected in the national legislation. Applying the treaty in domestic affairs of the state by simple reference to it shall be deemed *de facto* unconstitutional before that national legislation is adopted. Therefore, the logic of Article 9 of the Constitution of Ukraine stipulates that it can be applied only in foreign policy of the state if that is possible without its implementation into domestic law. One of the frequently adopted approaches in such cases is to implement special conflict of law norms aimed at solving collisions between domestic statutes and international treaties.

Ukrainian legislation often includes international norms. Most Ukrainian codes, including the Civil Code, Commercial Code, Customs Code, Tax Code, Air Code, Water Code, Forest Code, and other codes, include a provision stipulating that when a code norm and the norm of a ratified international treaty conflict, the international treaty's

14 Buromenskyi, "K voprosu," 264.

norm prevails. A range of other ordinary laws of Ukraine include similar provisions, for example the laws “On cinematography” (of January 13, 1998),¹⁵ “On topographic--geodesic and cartographic activity” (of December 23, 1998),¹⁶ “On plant world” (of April 9, 1999),¹⁷ and other statutes. Volodymyr Denysov and Andriy Melnyk clearly point out in their research that this priority is attributed not only to the treaties ratified by Verkhovna Rada of Ukraine but to other international treaties as well.¹⁸

The examples provided by Denysov and Melnyk focus on specific state activities that should be regulated by domestic legislation, when this legislation includes requirements imposed by international treaties, giving the treaty requirements priority if they conflict with the domestic legislation guarantees of the state’s adherence to international obligations already undertaken by it.

Choice-of-law norms that appear quite often in national legislation do not prove the universality of the principle of the priority of norms of all international treaties over national legislation of Ukraine, as the authors mentioned above state. Instead, they show the approaches taken by Ukraine. For example, certain Ukrainian codes do not automatically recognize the priority of international treaties over the codes’ provisions. Instead, they defer to the Ukrainian parliament to determine whether the treaty or the code governs. Part 3 of Article 4 of Budget Code of Ukraine, for example, states that:

if the international treaty of Ukraine requiring the adoption of new or amendments to current laws of Ukraine, which regulate budgetary issues, is submitted for ratification, the drafts of these laws are provided for review to Verkhovna Rada of Ukraine together with the draft of the law on ratification and are adopted simultaneously.

Therefore, correlating the norms of international treaties and national legislation is not as definite as certain Ukrainian legal scholars focusing on international law assert. The issue could be resolved by amending the Constitution of Ukraine in a way that accounts for contemporary international trends, the experience of other states, and the national peculiarities of Ukraine. Before then, Articles 9 and 18 of the Constitution

15 Law of Ukraine “On cinematography,” Ukraine, accessed September 7, 2020, <https://zakon.rada.gov.ua/laws/show/9/98-%D0%B2%D1%80#Text>.

16 Law of Ukraine “On topographic-geodesic and cartographic activity,” Ukraine, accessed September 7, 2020, <https://zakon.rada.gov.ua/laws/show/353-14#Text>.

17 Law of Ukraine “On plant world,” Ukraine, accessed September 7, 2020, <https://zakon.rada.gov.ua/laws/show/591-14#Text>.

18 Volodymyr Denysov, Andriy Melnyk, “Rozvytok pravovyh zasad ta mehanizmy verhovenstva mizhnarodnoho prava u vnutrishniomu pravi Ukrayiny [The Development of Legal Principles and Mechanisms of International Law Supremacy in Internal Law of Ukraine],” in *Vzayemodiya mizhnarodnoho prava z vnutrishnim pravom Ukrayiny*, ed. Volodymyr Denysov (Kyiv: Yustynian, 2006), 33.

of Ukraine offer guidance. But the Law “On international treaties of Ukraine,” which contemplates a general law on priority of international treaties, is not helpful because the priority should be established by the Constitution, not an ordinary law. Instead, the priorities should be primarily based on Part 1 of Article 8 of the Constitution of Ukraine establishing rule of law principle. This principle should be regarded not as an abstract norm that covers even unconstitutional laws, but as a norm inseparably tied to basic human rights and freedoms. These rights and freedoms are those values generally recognized by all civilizations and cultures regardless of a nation’s ideologies, religions, and the like. They are the values now reflected in and promoted by international law.¹⁹

The European Commission for Democracy through Law (Venice Commission) included in its Rule of Law Checklist adopted at the 106th plenary session dated March 11–12, 2016, a chapter called “The connection between international and internal law.” There, in its discussion of “legality,” the Commission states that the principle *pacta sunt servanda* is critically important in bringing international law into national legal systems.²⁰ This does not mean that international law should always have supremacy over the Constitution and ordinary legislation. Some matters are best left to individual states. However, according to the Commission, the adequacy of the rule of law in a state depends on whether that state corresponds its national legislation to the international law on human rights (underlining supplied), including the binding status of international courts’ decisions.²¹ Therefore, conforming national legislation with international human rights treaties and national judicial practice with the practice of international courts is an essential requirement of the rule of law. And this should be the starting point for correlating international treaties and national legislation in Ukraine’s legal system.

Recognized Principles and Norms of International Law and Constitutional Law

The issue of the correlation of recognized principles and norms of international law and national legal systems is even more indeterminate if compared to the status and place of international treaties in these legal systems. Regardless of the fact that the approach to such principles and norms in most contemporary states is largely positive, it is not common to recognize priority of international norms to the national legislation (legal order) on constitutional level, in Europe, and generally in the world, with all due respect to them and in trying to comply its own legal order with their own requirements, often found in constitutions (Article 10 of the Constitution of Italy, Article 8 of the Constitution of Northern Macedonia, Article 7 of the Constitution of Hungary) or even acknowledging it as a part of national legal system (Article 9 of the Constitution of

19 See: Mykola Koziubra, *Zahalna teoriya prava* [General Theory of Law] (Kyiv: Vaite, 2015), 347–51.

20 Serhiy Holovaty, *Mirylo pravovladdya. Pereklad. Komentar* [Rule of Law Checklist. Translation. Commentary] (Kyiv: Vaite, 2017).

21 Holovaty, *Mirylo*, 17, 124.

Austria, Article 6 of the Constitution of Georgia, Article 15 of the Constitution of Russia and others) of the states which set the correlation between the recognized norms of international law and national legislation. Moreover, certain of those states that regard recognized principles and norms of international law as the part of their national legal system provide priority to the norms of international legislation only to ratified international treaties (Article 123 of the Constitution of Estonian Republic, Article 15 of the Constitution of Russian Federation and other). One of the major reasons for this position is the ambiguity of “recognized principles and norms of international law” compared with the norms of international treaties. Generally acknowledged are mostly the principles and norms of the United Nations Charter and “certain other” norms and principles that relate mostly to customary international law. This greatly sophisticates the level of their correlation with national legislation, which usually results in a more definitive correlation.

Nevertheless, the recognition of such principles and norms by the majority of states does not create the obligation of each state to comply with them in their internal activities or give them priority over national legislation unless those principles and norms are specifically stated in a ratified international treaty that becomes part of national law.

Scholarly approaches to determining the place of the recognized principles and norms of international law in Ukraine’s national legal system vary according to the scholar’s attitude toward incorporating international treaty provisions into national law. Most scholars, specifically those who focus their research on constitutional law, usually do not find any constitutional reasons to bring generally recognized international law norms and principles into Ukraine’s national legislation of Ukraine, though they might take a contrary view with respect to international treaties. In their view, this is possible only in cases when generally recognized international law norms and principles became adopted within universal international treaties, where Ukraine is one of the parties, and when those treaties are ratified by Verkhovna Rada of Ukraine.²²

Contrary approaches in Ukrainian legal scholarship can be found, however. Proponents of these approaches, most of whom are international law scholars, state that regardless of the formal fact that the Constitution of Ukraine is silent on the issue, an analysis of national legislation and its application provides grounds for the view that generally acknowledged principles and norms of international law *de facto* may apply in Ukraine’s internal legal order.²³ Certain other international law scholars advocate a more radical approach. Mykhaylo Buromenskyi, for example, states that generally acknowledged principles and norms of international law, like international treaties, are part of Ukraine’s national legal system and have priority over national legislation. Except for the arguments regarding international treaties already provided before in

22 Dmytro Terletskyi, *Konstytutsiyno-pravove regulyvannya diyi mizhnarodnyh dohovoriv v Ukrayini: avtoref. dys. kand. yuryd. nauk. 12.00.02* [Constitutional Regulation of International Treaties’ Force in Ukraine: autoreferat of PhD dissertation 12.00.02] (Odesa, 2007), 12.

23 Denysov, *Rozvytok*, 39.

this article, he cites Article X of the Declaration on the state sovereignty of Ukraine of July 16, 1990, which states in Part 3 that

Ukrainian SSR recognizes the ... priority of generally acknowledged norms of international law over the norms of national law.²⁴

But this argument is flawed.

Firstly, it is quite doubtful that this Declaration may be considered a “normative act of constitutional character and level.”²⁵ As is generally acknowledged in international law, this approach to declarations is not commonly accepted. Quite a few of international legal scholars consider declarations to be acts that, while highly important for legal theory and practice, are not necessarily legally binding. No exception is made even for the General Declaration of Human Rights (1948).

Secondly, the final part of the Declaration on the State Sovereignty of Ukraine stresses that the Declaration is the basis for the new Constitution of Ukraine. Therefore, since the Basic Law was adopted, the Declaration has exhausted its role, being left to history as one of the major pre-constitutional documents related to the formation of Ukrainian State.

Thirdly, even if we adhere Mykhaylo Buromenskyi’s position and view the Declaration as a normative act, under Chapter XV of the Constitution of Ukraine

laws and other normative acts adopted before this Constitution entered into force, are binding in part which does not contradict the provisions of the Constitution of Ukraine.

The history of the Constitution drafting and adoption states that it is not possible to implicitly and bluntly state that the provisions of Article X of the Declaration on State Sovereignty of Ukraine are compliant with the Constitution of Ukraine. The Concept of the New Constitution of Ukraine and its projects state that the provision on the priority of international legal norms, including the norms of international treaties, in different ways was present in different constitutional projects, including the project of the Constitution of Ukraine as in force of November 15, 1995, which was adopted by the Constitutional Commission of Ukraine on November 23, 1995. This provision was extracted from its text only on the final stage of its preparation. Moreover, it was extracted for a purpose.

This extraction might have been motivated by the fact that many states at that time did not adhere to the priority of international legal norms over national legal norms principle, mostly viewing it as a possible threat to their sovereignty over internal matters. Other motives might have played a role, given the difficult conditions those who were establishing the Ukrainian state then faced.

²⁴ Buromenskyi, *K voprosu*, 265–66.

²⁵ Buromenskyi, *K voprosu*, 265–66.

The absence of a provision on the priority of generally recognized norms of international law over the norms of national law in most constitutions around the world does not hinder their application by national (domestic) judicial practice in order to strengthen argumentation of the motivational part of the decision but not for the attribution of the priority rule to those principles and norms over the norms of national laws for decisions to be rendered in each individual case. Unlike the norms of international treaties, generally recognized norms of international law do not constitute part of Ukrainian domestic legal system, therefore, they should not be regarded as a source of the national law of Ukraine.

Olha Streltsova points out that the Treaty on Association of Ukraine and the EU frequently stresses the necessity of adhering to generally recognized international legal principles and common European values²⁶ that are the ground for the Treaty. However, regardless of that provision, it is the Treaty on Association itself which should be regarded as the source of the national law of Ukraine consecutively also having priority over Ukrainian national legislation. This status may not be attributed to the generally recognized principles and norms of international law even though they are reflected in the Treaty.

The Correlation between International Law and National Constitutions

Characterizing the question of correlating international law and national constitutions as problematic may seem fanciful for many Ukrainian domestic constitutionalists and others. We have already mentioned the position of nearly all states for solving this issue. They apply the priority of their constitutions over the norms of international law principle. The constitutions of some states recognize the priority of ratified international treaties over national laws and other statutes while simultaneously stressing the absolute supremacy of their constitutions and impossibility of concluding international treaties which contradict them. Examples include Article 123 of the Constitution of Estonia, Article 8 of the Constitution of Belarus, and Article 15 of the Constitution of Uzbekistan. Most states, however, follow the approach that while their constitution is supreme over international treaties, the issue of correlation between them and the constitution is regulated less strictly. A good example is provided in Article 95 of the Constitution of Spain of 1978 that states:

The conclusion of an international treaty containing stipulations contrary to the Constitution shall require prior constitutional amendment.

This formulation is reflected in varying form in numerous constitutions of the new European and Asian states that appeared after the collapse of former “socialist

26 Streltsova, *Konstytutsionalizatsiya*, 443.

commonwealth,” including the Constitution of Ukraine. According to Part 2 of Article 9 of the Constitution of Ukraine

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

This means that the Basic Law of Ukraine similarly to the Constitution of Spain and other constitutions indirectly but indisputably provides for the principle of the supremacy of the constitution over international treaties. This is not disputed by most international law scholars. They mostly defend the principle of priority of international treaties over the national legislation of Ukraine by stressing the impossibility of incorporating international treaties that contradict Constitution of Ukraine into the national legal system of Ukraine.²⁷

Most states, including those without a similar constitutional provision, provide that the constitution controls state bodies' power to regulate the conformity of international treaties with the appropriate constitution (either prior to ratification or in posterior procedure). This indirectly proves constitutional priority over international treaties.

However, regardless of this practice, certain Ukrainian domestic legal scholars keep their attempts to ground the priority both of international treaties, specifically the European Convention on Human Rights and Fundamental Freedoms,²⁸ and also generally recognized norms of international law over the Constitution of Ukraine.²⁹ They argue their position by citing principles and norms of the European Commonwealth, found in the abovementioned Convention, and on the priority of communitarian law (acts of supranational organizations) over national law,³⁰ and also on the positions of the mentioned Article X of the Declaration on State Sovereignty of Ukraine, and on Part 1 of Article 8 of the Constitution of Ukraine which addresses the issue of the rule of law by stating that it may not be “limited by national borders” and includes generally recognized norms of international law.³¹

Certain of those arguments have already been mentioned in this article in previous sections. Their analysis requires further development, however. Firstly, from the grounds

27 Volodymyr Yevintov, “Pryame zastosuvannya mizhnarodnyh standartiv prav lyudyny. Komentar do st. 9 Konstytutsiyi Ukrayiny [Direct Application of International Human Rights Standards. Commentary to Article 9 of the Constitution of Ukraine],” *Ukrayinskiy chasopys prav lyudyny* no. 1 (1998): 27.

28 Vasyl Paliyuk, “Mistse Konventsii pro zahyst prav lyudyny ta osnovnyh svobod u pravoviy systemi Ukrayiny [Place of the Convention for the Protection of Human Rights and Fundamental Freedoms in Legal System of Ukraine],” *Yevropeyskiy Sud z prav lyudyny. Bazovi materialy zastosuvannya praktyky*, ed. Yuriy Zaitsev (Kyiv: Ukrayinskiy tsentr pravnychyh studiy, 2003), 9, 412, 418.

29 Buromenskiy, *K voprosu*, 270–71.

30 Paliyuk, *Mistse*, 418.

31 Buromenskiy, *K voprosu*, 270–71.

of constitutional law, generally recognized principles and norms of international law and norms of international treaties have incontestable (absolute) priority only within the scope of international law. Their priority in national (domestic) law is limited. The highest position in the hierarchy of the statutes is under the established position occupied by the constitution. Generally recognized norms of international law and norms of international treaties regardless of their rank in this hierarchical system occupy the position lower than that of the constitution. This is a well-established approach in the theory of constitutional law, as well as in constitutional practice applied in most European states and elsewhere.³² Only certain constitutions recognize the priority of international treaties over national constitution. They include serious reservations, however. The Constitution of the Netherlands allows the possibility for the parliament to adopt international treaty which contradicts the Basic Law, but this requires the consent of two-thirds, or qualified majority of members of the parliament.

The approach on the priority of the constitution over the norms of international law may be corrected significantly only in case the state is admitted to certain supranational international or regional organizations (while also not all of those), specifically to the European Union. The doctrine of the priority of EU law extends to all statutes of the EU-member states, including national constitutions. The European Court of Justice has frequently addressed the issue of the impermissibility to contrapose national constitutions and other statutes and EU law. However, even under such conditions, constitutional courts of many EU member states continue to advocate the supremacy of the constitution in national legal systems. The most consistent approach in this respect has been taken by the Federal Constitutional Court of Germany, which is the most active opponent to the European Court of Justice. In the decision of June 30, 2009, in a case regarding the Lisbon Agreement, the German Federal Constitutional Court has stated that

after coming of the Lisbon Treaty into force, European Union shall not become the structure similar to the state... Union is not a federative state, it will keep being the union of sovereign states with active principal limitation of powers in certain cases.³³

Therefore, the EU is obliged to respect the sovereignty and national identity of its member states. Constitutional identity is an important element of that national

32 Lech Garlicki, "Mezhdunarodnoe pravo v konstitutsionnom porjadke Respubliki Polsha [International law in constitutional order of the Republic of Poland]," in *Mezhdunarodnoe pravo XXI veka*, ed. Volodymyr Butkevych (Kyiv: Promeni, 2006), 414–36; Lech Garlicki, *Polskie parvo konstytucyjne. Zarys wyklady* (Warszawa: Liber, 2010), 142–48.

33 Jürgen Schwabe, Torsten Heissler, *Izbrannye resheniya Federalnogo Konstitutsionnogo Suda Germanii* [Selected Decisions of the Federal Constitutional Court of Germany] (Moscow: Infotropic Media, 2018), 912.

identity, being also an undeniable part of the nation's democratic self-determination.³⁴ It provides the full powers of EU member states the in independent and responsible regulation of social relations in political and social spheres, including the status of being the “treaty masters.”

The inviolability of the principle of the constitutional supremacy in national legal systems is systematically supported by the constitutional courts of Italy and Poland. The Constitutional Tribunal of Poland has frequently stressed in its decisions that

[t]he Constitution stays the highest law of the Republic of Poland regarding all international treaties which are binding on it,”³⁵

and that this institution has to stay as the court of “the last resort” in cases touching the Constitution of the Republic of Poland. This decision has provided clear boundaries for the EU law supremacy principle in national legal order of Poland.³⁶

Considering that Ukraine's membership in the European Union is in the distant future, an analysis of the approaches applied by the EU member states regarding the supremacy of national constitutions is beyond this article's scope.

Secondly, it is a false approach to regard the text of Article 9 of the Constitution of Ukraine, which provides supremacy to the Basic Law over the norms of international treaties, as an example of “absolutely positivistic approach.”³⁷ The institutional and normative aspects are attributes of either system of law, whether national or international. This feature — this demand — of the rule of law has significantly contributed to its formation within the liberal theory of natural law, specifically its distinctive features such as determinacy, predictability, order, stability, and the like. This theoretical approach is supported in practice by the European Court of Human Rights. Ignorance of these features — the constituent parts of the rule of law principle — is the first step toward denying the rule of law principle itself and its determinative feature, which attributes the highest legal power to the Constitution. This will eventually lead to chaos, which is unfortunately still an attribute of Ukrainian government's higher-level officials. This, unfortunately, negatively impacts the legal atmosphere of the whole society.

Generally, the constitution is one of the distinctive features of the state because it expresses the state's national sovereignty. Therefore, it should be respected regardless of all the possible negative effects around it. These should be solved under the procedure determined by the constitution itself.

34 Schwabe, *Izbrannye resheniya*, 907

35 “Wyrok Trybunalu Konstytucyjnego z dnia 11 maja 2005 r.,” accessed August 11, 2019, <http://trybunal.gov.pl/sprawwytrybunale/katalog>.

36 Halyna Dovhan, “Doktryna verhovenstva prava Yevropeyskoho Soyuzu: natsionalniy aspekt (pozytsiya konstytutsiynih sudiv okremykh derzhav-chleniv YeS) [The Doctrine of the Rule of Law of European Union: national aspect (the position of constitutional courts of certain EU member states)],” *Pravo Ukrayiny* no. 11 (2019): 98–107.

37 Buromenskyi, *K voprosu*, 252.

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Анотація

Конституційне та міжнародне право часто перетинаються та по-різному регулюють окремі сфери. Водночас, погляди науковців дуже суттєво впливають на їх підходи щодо ролі міжнародного та конституційного права у окремих правових обставинах. Ця стаття присвячена питанню визначення місця міжнародних договорів та загальновизнаних норм та принципів міжнародного права в національній правовій системі України. Україна має доволі поширену практику автоматичного визнання пріоритету норм міжнародних договорів, згода на обов'язковість яких надана Верховною Радою України, водночас, цей пріоритет не може вважатися абсолютним. Ця стаття присвячена розгляду підстав та аргументів що базуються як на конституційному, так і на міжнародному праві, які використовують науковці для обґрунтування своєї позиції.

Ключові слова: конституційне право, міжнародне право, міжнародні договори, загальновизнані норми та принципи міжнародного права, конституція, Україна