

TOPICAL ASPECTS OF DCFTA IMPLEMENTATION IN THE JUDICIAL PROCEEDINGS

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Abstract. The Association Agreement between the European Union and Ukraine is a new format of relations aimed at creating a deep and comprehensive free trade area (DCFTA) between Ukraine and the EU with the gradual integration of Ukraine into the internal market of the European Union. Focusing on the experience of rule-making of the EU member states, it is necessary to define and implement the legal rules and principles of the national judiciary, taking into account the rules and principles of European law (Chornomaz, 2016). In accordance with the strategy of European integration of our country, the adaptation of Ukrainian legislation is to approximate it with the modern European legal system, which will ensure the development of the political, entrepreneurial, social, cultural activity of Ukrainian citizens, economic development of the state within the EU to facilitate the increase of standards of living of the population. The implementation of the provisions of European legislation provided by the economic part of the Association Agreement (AA) is extremely important in the context of reforms, as the provisions can and should serve as a basis for a new model of socio-economic development of Ukraine.

The deepening of the processes of humanization and democratization of Ukrainian society, the gradual introduction of principles and rules of European law into the national judiciary through reforms in the field of justice, inter alia, have led to qualitative updating of criminal procedure legislation of Ukraine, in particular: use of differentiated approach to legal conflicts between persons who have committed criminal offences, which do not pose a great public danger, and victims; simplification and reduction of the procedure of criminal proceedings; ensuring procedural savings; reduction of the caseload; allowing the parties of the conflict to resolve issues of exemption from criminal liability in case of reconciliation between the offender and the victim independently, the appointment of the negotiated punishment and release from serving with probation, etc. Given the specifics of the approach to improving relations with neighbouring countries on a differentiated basis, the EU seeks to identify and base on existing positive sources of sustainability, as well as to monitor and respond to weaknesses with the appropriate set of methods and resources at its disposal.

The purpose of the article is to study a theoretical and practical definition of challenges of adaptation of Ukrainian legislation to the legislation of the European Union, institutional and organizational mechanisms of DCFTA implementation in the field of justice and certain norms of the current criminal procedure legislation. Ukraine is undergoing the second phase of radical reform of government structures; it has been continuing for 15 years but, unlike other countries, it is much more difficult for Ukraine to get rid of the burden of past problems. Judicial reform is also underway and domestic legislation is being significantly changed, including the transformation of the judicial proceedings.

The topical issue of the development of judicial reforms is an imperfection, and sometimes a contradiction of regulations, which negatively affects the process of realization of rights and responsibilities of all subjects of public relations, slows down the development of Ukraine as a state governed by the rule of law.

However, the introduction of institutions of concluding agreements, simplified proceedings, probation, and later mediation, into the criminal procedure legislation of Ukraine indicates the readiness of our state to change the concept of criminal procedure in accordance with the European standards, which will improve the situation of all parties to criminal proceedings. However, they need further completion and improvement. We are convinced that

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the introduction of such institutions will contribute to the legal development of society to achieve the European standards of restorative justice, which will encourage the further introduction of the latter in the legislation of Ukraine, resolving criminal conflicts by reaching a compromise between parties in cases specified by law. One of the ways to solve this problem in Ukraine is to regulate the process of adoption of regulations by the subjects of rule-making and taking into account the provision that legality as an objective property of law, in general, is the necessary condition and the main principle of the rule-making process.

Key words: DCFTA, implementation of law, the EU judicial proceedings, criminal procedure, justice, EU-Ukraine.

JEL Classification: O19, F15, F42, R38, R50

1. Introduction

Ukraine's external integration into the world economic space plays an important role in the development of the domestic economy, which is why Ukraine is interested in a favourable environment that would facilitate access to foreign markets and ensure stable trade flows based on continuous improvement of competitiveness of domestic production.

The Association Agreement between the European Union and Ukraine is a new format of relations aimed at creating a deep and comprehensive free trade area (DCFTA) between Ukraine and the EU and the gradual integration of Ukraine into the internal market of the European Union.

Focusing on the experience of rule-making of the EU member states, it is necessary to define and implement the legal rules and principles of the national judiciary, taking into account the rules and principles of European law (Chornomaz, 2016). In accordance with the strategy of European integration of Ukraine, the adaptation of domestic legislation is to approximate it with the modern European legal system, which will ensure the development of the political, entrepreneurial, social, cultural activity of Ukrainian citizens, economic development of the state within the EU to facilitate the increase of standards of living of the population. The implementation of the provisions of European legislation provided by the economic part of the Association Agreement (AA) is of fundamental importance in the context of reforms, as the provisions can and should serve as a basis for a new model of socio-economic development of Ukraine. Therefore, when developing the concept and programs of sectoral economic reforms, the requirements of the basic EU directives, harmonization with which is provided by the agreement, should be immediately reflected.

The deepening of the processes of humanization and democratization of the society of Ukraine, the gradual introduction of principles and rules of European law into the national judiciary through reforms in the field of judicial proceedings, *inter alia*, have led to qualitative updating of criminal procedure legislation of Ukraine, in particular: use of differentiated approach to legal conflicts between persons who have committed criminal offences,

which do not pose a great public danger, and victims; simplification and reduction of the procedure of criminal proceedings; ensuring procedural savings; reduction of the caseload; allowing the parties of the conflict to resolve issues of exemption from criminal liability in case of reconciliation between the offender and the victim independently, the appointment of the negotiated punishment and release from serving with probation, etc.

Taking into account the specifics of the approach to improve the relations with neighbouring countries on a differentiated basis, the EU seeks to identify and base on existing positive sources of sustainability, as well as to monitor and respond to weaknesses with the appropriate set of methods and resources at its disposal (JOIN, 2017).

The purpose of the article is to specify a theoretical and practical definition of challenges of adaptation of Ukrainian legislation to the legislation of the European Union, institutional and organizational mechanisms of DCFTA implementation in the field of justice and certain norms of the current criminal procedure legislation.

2. Challenges of adaptation of the legislation of Ukraine to the legislation of the European Union

The Deep and Comprehensive Free Trade Area (DCFTA) should be established within ten years of the date AA enters into force. In order for DCFTA to become operational, Ukraine needs to implement about 200 EU regulations, international treaties and standards. In 2015, it was supposed to prepare and discuss draft laws that harmonize domestic legislation with the basic EU directives governing relations in the main areas of trade (Implementatsiia Uhody, 2015). To implement European legislation, Ukraine should apply the following reforms:

- public service reform. A basic reform that will make it possible to modernize the basic tool (public service) needed to ensure the successful implementation of reforms at the administrative level. Most reforms will be doomed to sabotage by officials without it;
- anti-corruption reform. It stipulates to eliminate conditions and incentives for committing acts of

corruption, ensuring the inevitability of punishment for the crimes, limiting the influence of private money on politics;

- deregulation reform. This implies the dismantling of the old regulatory system inherited from Soviet times, which is designed to operate in a command and control system, and the creation of a new regulatory system that meets the nature and needs of a market economy. Implementing this reform will help improve the investment and business climate;
- tax reform. The main emphasis is on significant tax simplification, refusal to apply the system of advance tax payments, reduction of fiscal pressure on the salary fund (Chornomaz, 2016).

Despite numerous scientific studies on the characteristics of various aspects of the convergence of the judiciary of Ukraine with international law, we should emphasize that there is still no comprehensive theoretical and legal research.

Adaptation of Ukrainian legislation to the EU legislation is one of the main components of the process of Ukraine's integration into the EU, which is a priority of the foreign policy of our country.

This is the process of bringing the laws and other regulatory acts in line with the *acquis communautaire* (Materialy Uriadovoho portalu, 2000-2020).

According to Section II of the Law of Ukraine "On the State Program for Adaptation of Ukrainian Legislation to the Legislation of the European Union" dated March 18, 2004, "...*acquis communautaire* (*acquis*) is the judiciary of the European Union including acts of the European Union legislation adopted within the framework of the European Community, the common foreign and security policy and cooperation in the field of justice and internal affairs" (Pro Zahalnodержavnu prohramu, 2004).

Adaptation of national legislation to the legislation of international organizations is carried out by competent public authorities on the principles of law-making, planning, coordination, and control. Adaptation is a component of integration processes, a prerequisite for harmonization of national legislation with the legislation of international organizations. This is a consisted process, which is divided into several successive stages; it is necessary to achieve a certain degree of compliance of national legislation with international law and standards at each stage.

Implementation is the process of transposing legislation, including the creation of order and procedures for their realization (implementation in the narrow sense); this process also includes the interpretation, application, enforcement and execution of legal norms by the public authority (implementation in the broadest sense) (Chornomaz, 2016).

In international law, it is the actual implementation of international obligations at the national level, as well as one of the ways to realize international law

into the national judiciary, subject to the purpose and international norms.

Methods of implementation are incorporation (international legal norms are reproduced unchanged in the regulations of the state implementing international norms), transformation (international norms are reworked, transposing into national legislation to take into account national characteristics, including legal techniques), and general, private or specific reference (the international regulations are not directly included in the text of the law containing information about them) (Chornomaz, 2016).

The adaptation process covers all areas of legislation defined in the Partnership and Cooperation Agreement. Priority areas include those areas of legislation that are necessary for the strengthening of economic ties between Ukraine and EU member states.

Ukraine has been implementing measures to integrate the state into the European legal space and fulfil its obligations under the Partnership and Cooperation Agreement for a long time. The President of Ukraine issued several decrees, in particular: "On Ensuring the Implementation of the Partnership and Cooperation Agreement between Ukraine and the European Community" No. 148 dated February 24, 1998; "On Approval of the Strategy of Ukraine's Integration into the European Union" No. 615 dated June 11, 1998; "On Measures to Improve the Rule-Making Activities of the Executive Branch of the Government" No. 145 dated February 9, 1999. These regulations laid the foundation for comprehensive support of the process of adaptation (Materialy Uriadovoho portalu, 2000-2020).

In Ukraine, the introduction of a special procedure for criminal proceedings on the basis of agreements, simplified proceedings, future mediation (the draft law "On Mediation" passed the first reading in July 2020) etc. took place taking into account the recommendations of certain international legal acts, the purpose of which was to unify the legislation of different states in the field of restorative justice, the functioning of the institution of agreements, ensuring respect for human rights and fundamental freedoms. Such documents included Recommendation No. R (87) 18 of the Committee of Ministers of the Council of Europe "Concerning the simplification of criminal justice" dated September 17, 1987, Recommendation No. R (99) 19 of the Committee of Ministers of the Council of Europe to member states concerning mediation in penal matters dated September 15, 1999, Framework Decision of the Council of the EU "On the Standing of Victims in Criminal Proceedings" dated March 15, 2001 (Materialy Uriadovoho portal, 2000-2020), etc.

In addition, the national legislation of Ukraine took into account the case law of the European Court of Human Rights (hereinafter referred to as the ECHR).

In particular, Part 2 of Art. 8 of the Criminal Procedure Code of Ukraine (hereinafter referred to as the CPC) states that the principle of the rule of law in criminal proceedings is applied taking into account the practice of the ECHR, and Part 5 of Art. 9 of the CPC stipulates that the criminal procedure legislation of Ukraine is applied taking into account the practice of the ECHR [4]. The Law of Ukraine "On the Fulfilment of Decisions and Application of Practice of the European Court of Human Rights" dated February 23, 2006, stipulates the binding nature of ECHR judgments in cases against Ukraine and the need to introduce European standards of human rights protection into Ukrainian criminal proceedings (Materialy Uriadovoho portal, 2000–2020).

3. Institutional and organizational mechanisms for DCFTA implementation in the field of judicial proceedings and criminal procedure

Consider the case law on the implementation of Association Agreements/DCFTA. The identified ways of development will not only help assess the level of awareness of national judges about the need to fulfil their country's contractual obligations with the European Union, but it also comes up with an understanding of the level of openness of national courts to apply international law and EU law.

Even in the case of the Constitutional Court had not yet declared the direct effect of the Association Agreement/DCFTA in the Ukrainian judiciary, it could be asked to rule on the binding nature of decisions taken by the EU-Ukraine Association Council, as well as the obligations of the EU-Ukraine Joint Arbitration Commission to comply with the decisions of the European Court of Justice on the interpretation of the relevant EU's *acquis*. The Supreme Economic Court of Ukraine has previously recognized the supremacy of the Association Agreement over conflicting provisions of the national law (Emerson, Cenuşa, 2018).

The ongoing reform movement in the justice sector has motivated judges to seek inspiration in Ukraine's international treaty obligations and the decisions of the European Court of Human Rights (Petrov, 2018). Administrative courts have already used the EU's *acquis* and the case law of the European Court not as a source of law, but as a "convincing source of references" for "a harmonious interpretation of Ukraine's national legislation with the established EU standards." According to the Supreme Administrative Court, this practice is justified by the need for effective implementation of the Association Agreement between the European Union and Ukraine. In the work by Roman Petrov, dozens of court decisions dated 2014 were found; in those decisions, general, specialized and high courts referred to the Association Agreement/DCFTA and the EU's *acquis* (fundamental

principles, secondary legislation and case law of the European Court) to strengthen their legal arguments in cases of customs duties, supply and trade in natural gas, determination of the origin of goods (honey) and even the legality of bills of the President of Ukraine (Petrov, 2018; Emerson, Kovziridze, 2018).

Some judges even considered the entry into force of the Association Agreement/DCFTA as an obligation to apply EU common values in Ukraine. The latter may manifest itself in future (general or constitutional) case law in cases where new national legislation conflicts with such "essential elements" of the Association Agreement as freedom of expression (Emerson, Movchan, 2018).

The analysis of the process of approximation of Ukrainian legislation to the EU judiciary facilitates identifying problems that need to be urgently addressed and suggesting approaches to increase the efficiency of this process. The adaptation of Ukrainian legislation to the EU legislation is taking place simultaneously with the legal reform in Ukraine. The state must update the legislation under international principles and standards because its legal framework has not contained these principles and standards.

For example, the institution of the victim-perpetrator reconciliation agreement has become important for the criminal justice system of Ukraine and other countries and has been included in many international regulations.

Practitioners have a positive attitude to the institution of the victim-perpetrator reconciliation agreement. According to a survey of investigators, lawyers and judges in Zaporizhia, Dnipropetrovsk, Odesa, Kharkiv, Kyiv regions, 306 (83.15%) employees of investigative units, 418 (93.72%) court employees, and 436 (76.90%) defenders showed a positive attitude to the institution of reconciliation of the parties in criminal proceedings (Hvozdetzkyi, Liash, 2020). Chapter 35 of the CPC of Ukraine, which defines the specifics of criminal proceedings based on agreements, does not provide a legal definition of the concept of the victim-suspect/perpetrator conciliation agreement.

The current legal framework of Ukraine is contradictory, unstable, and therefore imperfect. However, the EU attaches particular importance to the quality of legal acts. The EU Council has taken a special decision on the rules of their preparation, according to which the legal act must: be clear, unambiguous, without excessive use of abbreviations, not contain slang, too long phrases, incomprehensible references to other texts, complications that make it difficult to read. Ukraine also needs to take into account the economic, political and social consequences of adopting relevant legislation in compliance with the requirements of EU law.

Analysing the development of domestic and foreign legal thought, we can identify several goals of

adaptation of Ukrainian law to the EU law: acquisition of EU membership; carrying out administrative, quality judicial reform, as well as reform of criminal legislation, establishing the rule of law and democratization of social processes; promoting access of Ukrainian enterprises to the EU market; attracting foreign investment; avoiding the undesirable consequences of EU enlargement, etc.

4. Strategic dimension of partnership: political dialogue of justice, security and human rights

In June 2016, the government launched a multi-year reform of the justice sector with amendments to the Constitution and the adoption of new legislation aimed at reorganizing the country's judicial architecture (by creating a new Supreme Court and reducing the levels of courts from four to three), strengthening guarantees of judicial independence (for example, by ordering current judges to take exams and submit mandatory electronic asset declarations), and terminating public monopoly on the execution of court decisions (by introducing private executors). Details of many of these reforms need to be regulated in implementing acts, but in general, they represent a fundamental change in Ukraine's judiciary and a revolutionary attempt to eradicate widespread corruption in the judiciary (see verification procedure).

Despite attempts to apply Georgian "shock therapy" to the justice sector, law enforcement remains biased, high-ranking officials and wealthy businessmen enjoy low responsibilities and high levels of illegal privileges, and others cannot defend their rights. The situation has improved somewhat under the previous and current governments, but Ukraine is still below average in terms of the World Justice Project Rule of Law Index 2017–2018, where the country ranks 77th. The selection of judges for the new Supreme Court (completed in November 2017) only partially helped clean up the judiciary, as the Public Integrity Council questioned the integrity, independence and professionalism of about a quarter of the newly appointed judges. Efforts to modernize the Prosecutor General's Office were ongoing, and the formation of the long-awaited High Anti-Corruption Court was delayed by the authorities. Adoption of the necessary legislation to establish HACC was postponed until 2018. After legislation has been adopted, attention is drawn to its implementation.

Changes in the field of justice are planned to be gradually implemented over the next few years. The initial practice of administrative and economic courts with the implementation of the Association Agreement between the European Union and Ukraine brings hope. Unfortunately, there is an overall impression that the dynamics of judicial reform has slowed down due to the

ruling elite wants to protect its own wealth and power in the name of the progress of an independent judiciary (Gabrichidze, 2014).

The implementation of the Association Agreement in the field of Justice, Freedom, Security and Human Rights contributes to the Sustainable Development Goals 5 "Gender Equality", 10 "Reduced Inequalities", and 16 "Peace, Justice and Strong Institutions" (Zvit, 2019).

In particular, the implementation of the provisions of the Association Agreement in 2019 contributed to the implementation of national tasks 16.3. "Increase the level of trust in the court and ensure equal access to justice", 16.6. "Reduce corruption" and 16.7 "Increase the efficiency of public authorities and the bodies of local self-government".

Fight against corruption

On September 5, 2019, the High Anti-Corruption Court (HACC) started its work. The President of Ukraine signed a decree appointing 38 judges, including judges of trial courts, lawyers, and scholars. HACC consists of a trial court (27 judges) and the Appeals Chamber (11 judges) (Zvit, 2019).

The Verkhovna Rada of Ukraine has supported a number of legislative initiatives of the President of Ukraine, namely the adoption of the following laws:

- "On Amendments to Certain Legislative Acts of Ukraine Concerning the Improvement of Certain Provisions of Criminal Procedure Legislation" (No. 187-IX dated October 4, 2019), which enshrines NABU and SBI the right to autonomously withdraw information from transport and telecommunications networks (so-called "wiretrapping");
- "On Amendments to the Law of Ukraine "On the Judiciary and the Status of Judges" and some Laws of Ukraine on the Activities of Judicial Self-Government" (No. 193-IX dated October 16, 2019), which provides for updating the High Qualifications Commission of Judges of Ukraine (HQC) by competitive procedure;
- "On Amendments to Certain Legislative Acts of Ukraine on Ensuring the Effectiveness of the Institutional Mechanism for Prevention of Corruption" (No. 140-IX dated October 2, 2019), the task of which is to replace the management structure of the National Agency of Corruption Prevention (NACP), strengthen capacity and guarantee independence of NACP;
- "On Amendments to the Law of Ukraine "On Prevention of Corruption" Concerning Whistle-Blowers" (No. 198-IX dated October 17, 2019), which was developed to determine the legal status of whistle-blowers, establish rights, guarantees and mechanisms for protecting such persons and equivalent persons (Zvit, 2019).

Prosecutor's office reform

Within the framework of the project of the Council of Europe "Continued support to the criminal justice reform in Ukraine", PWC Advisory LLC conducted

an organizational analysis of the Prosecutor General's Office of Ukraine in the period from January 20 to March 16, 2019.

On September 19, 2019, the Verkhovna Rada of Ukraine adopted the Law of Ukraine No. 113-IX "On Amendments to Certain Legislative Acts of Ukraine Concerning Priority Measures to Reform the Bodies of Prosecutor's Office"; according to the law, the Prosecutor General's Office of Ukraine was reformed.

In the 3rd quarter of 2019, the prosecutors of the former Prosecutor General's Office were recertified. Out of 1,083 prosecutors, 610 prosecutors (56%) successfully passed it. On January 2, 2020, the reformed Prosecutor General's Office started working (Zvit, 2019).

Ratification of the Rome Statute

The Ministry of Justice developed draft laws of Ukraine "On Ratification of the Rome Statute of the International Criminal Court" and "On Amendments to Certain Legislative Acts Concerning Cooperation with the International Criminal Court". On January 9, 2020, the draft laws were sent to the Ministry of Foreign Affairs for further submission to the President of Ukraine to introduce to the Verkhovna Rada of Ukraine (Zvit, 2019).

Reform of enforcement of court decisions

The key achievement of the reform is the creation of an independent profession of private enforcement officers who can effectively enforce court decisions based on free competition and lack of administrative influence. As of the beginning of January 2020, there are already more than 200 private enforcement officers in Ukraine.

Reform of the penitentiary system and probation

One of the key areas of reform is the creation of a Unified Register of Convicts and Detained Persons and a reintegration system to ensure a proper environment to encourage people to live without crime. The pilot run of the register is currently underway.

Law enforcement reform

Law enforcement reform continues in accordance with the Development Strategy of the Ministry of Internal Affairs of Ukraine until 2020. The reform process is also in line with the objectives set by the Action Plan of the Cabinet of Ministers of Ukraine and is taking place in close cooperation with the EU Advisory Mission Ukraine.

Ukraine continues to take measures to establish the Unified Aviation Security and Civil Protection System of the Ministry of Internal Affairs, which has the third largest helicopter fleet in Europe (55 Airbus helicopters). Ukraine participated in the exercise SeaBreeze 2019. Manned aircraft patrolled 40,000 km of the state border.

Key tasks for 2021–2022

– implementation of the National Human Rights Strategy until 2021 and development of an updated action plan for the implementation of the National Strategy;

– formalization of processes related to the EU-Ukraine Agenda on Freedom, Security and Justice (2021–2022).

5. Conclusions

Ukraine is undergoing the second phase of radical reform of government structures; it has been continuing for 15 years but, unlike other countries, it is much more difficult for Ukraine to get rid of the burden of past problems. Judicial reform is also underway and domestic legislation is being significantly changed, including the transformation of the judicial proceedings.

Although there are guarantees of due process, in practice persons with financial resources and political influence can avoid prosecution for crimes. The Ukrainian government has made progress in meeting domestic and international requirements to investigate and prosecute crimes committed under the rule of Viktor Yanukovich in late 2013 and early 2014, including the executions of protesters. Despite a general legislation boom and the introduction of forward-sighted inspections that have led to a quasi-automatic cleansing of the judiciary, the government's inability to prosecute large-scale high-level corruption has undermined the government's popularity and changed reform momentum.

The introduction of institutions of concluding agreements, simplified proceedings, probation, and later mediation, into the criminal procedure legislation of Ukraine is a positive element that indicates the readiness of our state to change the concept of criminal procedure in accordance with the European standards, which will improve the situation of all parties to criminal proceedings. However, the institutions need further completion and improvement. We are convinced that the introduction of such institutions will contribute to the legal development of society to achieve the European standards of restorative justice, which will encourage the further introduction of the latter in the legislation of Ukraine, resolving criminal conflicts by reaching a compromise between parties in cases specified by law.

The topical issue of the development of judicial reforms is an imperfection, and sometimes a contradiction of regulations, which negatively affects the process of realization of rights and responsibilities of all subjects of public relations, slows down the development of Ukraine as a state governed by the rule of law.

One of the ways to solve this issue in Ukraine is to regulate the process of adoption of regulations by the subjects of rule-making and taking into account the provision that legality as an objective property of law, in general, is the necessary condition and the main principle of the rule-making process.

However, the experience of Central (for example, Hungary and Poland) and South-Eastern Europe

(for example, Bulgaria, Croatia, and Romania) before and after joining the EU shows that the process of judicial transformation is long and difficult, and it also tends to a possible reverse in the absence of proper use of instruments coercion by the guardians of the EU treaties. This downward trend in the EU's rule of law creates negative feedback loops for corrupt elites outside the European Union and undermines the European Commission's position in fulfilling

the obligations taken in the context of the European Neighbourhood Policy. There are few means of influence outside the suspension of financial support ("less for less"), or actions that may contribute to further delay or refusal to implement judicial reform. Rethinking the EU's approach to creating and maintaining sustainability in the area of the rule of law is a topic that should take into account differences in EU domestic/foreign policy.

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