
# APPLICATION OF INTERNATIONAL LABOUR LAW BY DOMESTIC COURTS IN CENTRAL-EASTERN EUROPEAN STATES AND UKRAINE

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Abstract

*While national courts in most Western-European countries play a major role in the application of international law, the differences regarding the way in which such application occurs in some of the Central-Eastern European states (CEE) still remain. International law in most of the Central European socialist regimes had been set aside of domestic legal order and socialist constitutions did not refer, as a rule, to the status of international law in their national legal systems. Nowadays, most of post-communist constitutions make a reference to the international law, although the inconsistency between constitutional provisions and their application in practice often takes place. This paper provides an analysis of the enforcement of international law by domestic courts in the CEE states and members of the Commonwealth of Independent States (CIS). In this regard, the application of two types of international law is considered, namely the European Community law and public international law, including international labour law. Furthermore, it looks at the different tendencies and obstacles that affect national courts' approach towards interpretation of international norms. Paying particular attention to international labour standards, closer examination of the Ukrainian judiciary practice is included in the second half of the paper.*

## 1. Public International law and European Community law. Direct and Indirect Effect

When analyzing the application of international law in European States, especially for members of the EU, two types of international law shall be considered, namely the European Union law and public international law. The main principle employed when applying either of these types of law states that courts should, whenever possible, construe their national law in conformity with public international law and European Community law. It is argued that there is no fundamental distinction in the application of these two areas of law; and, that such a difference "is one of degree rather than of principle."[1] The situation is different, however, for those countries which are only aspiring to gain membership in the EU and are in the process of adapting their legislation in line with that of the European Union.

[1] Gerrit Betlem and Andre Nollkaemper, 'Giving Effect to Public International Law and European Community Law', *EJIL* 14 (2003), 569-589

In the late 1950s there was no a big difference in the way in which national courts applied public international law and European Community law. Some years later, in *Van Gend and Loos*[2] and *Costa v. ENEL,*[3] the European Court of Justice ruled out that the EEC Treaty[4] differs from ordinary international treaties. In *Van Gend and Loos*[5]*,* the ECJ held that, unlike ordinary international conventions, the EEC Treaty is more than an agreement creating mutual obligation between the Contracting States and that it is the EC law that determines its effect on national legal order, not the national law.[6] Thus, Community law confers rights upon individuals independent of the legislation of Member States, while in case of public international law, the effect of an international norm in domestic legal order is determined by national law. Since the EC law was transformed from purely interstate law to include the rights and responsibilities of private parties, national courts then became central actors for enforcing the EC law, which, in cooperation with ECJ, developed and elaborated doctrines with respect to rights and liabilities of private parties.[7]Application of the EC law became a model for dealing with public international law.[8]

When applying international treaty, attention shall be paid to whether such a treaty is self-executing or not, namely whether it has a direct or indirect effect. The principle of *direct effect* allows a national court to apply international law rule as an independent rule of decision in the national legal order provided that the given rule is not transposed into domestic law. Direct effect presupposes the existence of the rule of national law, be it written or unwritten, that empowers domestic courts to give effect to international law, such as, for example, constitutional provisions with regards to incorporation of international law in national legislation or specific rules of reference, which incorporate respective treaties of international law. Therefore, many states are considered to be relatively free to divide national legal order and international rights and obligations.

Contrary to the principle of direct effect is the principle of consistent interpretation (*indirect effect)***.** Indirect effect principle has priority over direct effect in application of both, the EC law and public international law. The reason for this is that national courts will usually use the principle of consistent interpretation when trying to resolve a conflict between international and national law. Direct application of international law may take place only in cases where national legal norm contradicts respective international provision very clearly and it is not possible to remove the inconsistency via interpretation.[9] With regard to EC law, the principle of consistent interpretation can be applied in both situations; if the respective directive has or has

[2] Case 26/62, *Van Gend en Loos,* [1963] ECR 1
[3] Case 6/64, *Costa v.* ENEL, [1964] ECR 585
[4] Treaty establishing the European Economic Community (Treaty of Rome, 1957)
[5] Case 26/62, [1963] ECR 1
[6] See also *Costa v. ENEL,* Case 6/64, [1964] ECR 585: "The executive force of Community law cannot vary from one State to another in deference to subsequent domestic laws, without jeopardising the attainment to the objectives of the Treaty set out in Article 5 (2) [now Article 10] and giving rise to the discrimination prohibited by Article 7 [now Article 12]."
[7] Betlem, G., Nollkaemper, A., *supra* note 1, pp. 569-589
[8] See Leben, Charles, 'Hans Kelsen and the Advancement of international Law', 9 EJIL (1998) 298. The author argues that the "Community law is 'successful international law… and …is thus a possible horizon of international law, indicating the route that international law must follow if it is to move forward."
[9] Betlem, G., Nollkaemper, A., *supra* note 1, at 572

not been transposed, thus making judicial interpretation and application an essential tool when dealing with correct transpositions of such rules.[10]

The principle of consistent interpretation applies to all rules of international law in both the EC law and public international law. Under this principle all provisions of domestic law shall be interpreted in light of international law; an issue, which is explicitly stated by the ECJ in *Marleasing*.[11] Nevertheless, application of this principle is not subject to any *a priori* qualities of a rule of international law. With regards to the EC law, it is stated in *Van Munster* case that *all* binding norms of EC law may be relevant for applying the principle of indirect effect. The same applies with regards to rules of public international law.[12]

The principle of consistent interpretation in EU law is similar to the principle of direct effect, while it is governed not by national law, but EC law. As the ECJ held in *Von Colson and Kamann*[13] "all the authorities of the Member States, including the courts…in applying the national law are required to interpret their national law in the light of the wording and the purpose of the directive in order to achieve the result referred to in the third paragraph of Article 189 EC" (now Art. 249). Also, "it is for the national court to interpret and apply the legislation adopted for the implementation of the directive in conformity with the requirements of community law, insofar as it is given discretion to do so under national law".[14] Therefore, under the Community law national courts are obliged to construe their national law in conformity with the EC law, while under public international law there is no such a principle according to which national courts should interpret their domestic law in conformity with international law.[15]

Nevertheless, public international law is often viewed as higher in the hierarchy even without explicit provisions in a constitution regarding its supremacy.[16] Indeed, courts of many countries apply the principle of consistent interpretation, even if it is not explicitly required by public international law. This is the case in Australia, United Kingdom, Israel as well as Holland, were the Supreme Court (*Hoge Raad*) held that any provision of national law must be interpreted so as to avoid a breach of international law, unless the legislature has explicitly stated otherwise.[17]

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[10] Betlem, G., Nollkaemper, A., *supra* note 1, at 572

[11] Case C-106/89, *Marleasing,* [1990] ECR I-4135, where the ECJ held that 'in applying national law, whether the provisions in question were adopted before or after the directive, the national court called upon to interpret it is required to do so, as far as possible, in the light of the wording and the purpose of the directive…'

[12] Betlem, G., Nollkaemper, A., *supra* note 1, at 577

[13] Case 14/18, *Von Colson and Kamman,* [1984] ECR 1891, para. 26

[14] Case 14/18, *Von Colson and Kamman,* [1984] ECR 1891, para. 28

[15] Betlem, G., Nollkaemper, A., *supra* note 1, at 574

[16] General Comment No. 9 of the UN Committee on Economic, Social and Cultural Rights on the domestic application of the Covenant (UN Doc. A/CONF. 39/27), para 15 states that "it is generally accepted that domestic law should be interpreted as far as possible in a way which conforms to a state's international legal obligations. Thus, when a domestic decision maker is faced with a choice between an interpretation of domestic law that would place that state in breach of the Covenant and one that would enable the state to comply with the Covenant, international law requires the choice of the letter."; See also Morgenstern, Judicial *Practice and the Supremacy of International Law*. 27 *BYIL* (1950), at 85-86

[17] Hoge Road 16 November 1990, NJ 1992, 107, para. 3.2.3

The principle of indirect effect was applied in the *Dekker Case*[18] and concerned the Directive 76/207/EEC on Equal Treatment of Men and Women[19], in particular the violation of the prohibition on gender discrimination. In this case, despite the absence of direct effect, an employer was held liable in a situation where there would not have been liability under the applicable national rules. The ECJ ruled that simple violation of the prohibition on gender discrimination is sufficient for civil liability "without there being any possibility of invoking the grounds of exemption provided for by national law."[20] Hence, when applying principle of consistent interpretation in civil law cases, the issue is whether or not the outcome of an interpretation of the applicable national law in conformity to the directive is acceptable in light of the general principles of law.[21]

Direct effect in both EC law and public international law may lead to giving precedence to the international rules over national rules.[22] In particular with regards to EC law, *Costa v. ENEL* case serves as an example.[23]In public international law, such a result follows from constitutional law. In cases where international norm does not have direct effect, it will not take precedence over the national norm. Nevertheless, legal consequences of indirect effect may be very similar to those of direct effect in practice. As follows from *Marleasing[24],* in EC law, the practice of consistent interpretation allows for direct effect, while 'community law precludes application of national law', as stated in para. 9 of the case.

There are certain limitations to the application of international law in both legal systems. These include the constitutional role of the courts, legal certainty and relevant national provisions.[25]According to Benvenisti, different political-legal factors prevent national courts from achieving effective application of international law, such as the narrow interpretation of constitutional provisions that import international law into national legal system; the tendency to interpret international rules in line with a government's interest; and usage of different 'avoidance doctrines', either specifically created for such issues or general doctrines such as standing and justiciability, in order to provide a government "with an effective shield against judicial review under international law."[26]

[18] Case C-177/88, [1990] ECR I-3941

[19] Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principles of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, OJ 1976 L39/40; amended by Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002, OJ 2002 L 269/15

[20] Para. 25 of the *Dekker Case,* C-177/88, [1990] ECR I-3941

[21] Prechal, S, 'Directives in European Community Law ,' (1995), p. 242

[22] Ibid., at 583

[23] *Costa v. ENEL,* [1964] ECR 593-594

[24] Case C-106/86, *Marleasing,* [1990] ECR I-4135

[25] Ibid

[26] Benvenisti, Eyal, 'Judicial Misgivings Regarding the Application of International Law: An Analysis of Attitudes of National Courts', 4 EJIL (1993), 159-183, at 161

## 2. Application of International Law by CEE Domestic Courts

The level of the application of international law, including labour law, differs between Central-Eastern European states. International law in most of the Central European socialist regimes had been set aside from the domestic legal order, while socialist constitutions, as a rule, were silent on the status of international law in their national legal systems.[27] Before joining the EU, the states concerned were required to bring their legal systems in line with the accumulated body of the European Union law (*acquis communautaire*). After the EU 2004 enlargement, the courts of new Member states had to apply both national and European law. Judges then had to interpret domestic law in the line with EU law, and in the cases where domestic law is incompatible with EU law, the latter has to be applied. These developments presented a serious challenge for the Central European judicial systems. Kühn notes that 'Europeanization' has been one of the major challenges as it is sometimes argued that the European directives have had a disruptive effect on national legal orders.[28]

For instance, prior to the 2004 accession, Poland is a successful example of an application of the EU law. In its decision of 13 March 2000, the Supreme Administrative Court in Warsaw, specified that candidate states fail to fulfill their obligation to harmonize domestic law properly with EU law, not only by incorrectly harmonizing, which is a problem with the national legislature, but also in cases where the interpretation of internal legal acts by public authorities is contrary to the *acquis communautaire.*" Thus, a judge, when applying a national rule, shall apply the corresponding EU rule, for example an EU directive, including its interpretation by ECJ and also the practice in the EU Member States. Hence, the Constitutional Tribunal of Poland asserted "the obligation to ensure compatibility of legislation results also in the obligation to interpret the existing legislation in such a way as to ensure the greatest possible degree of such compatibility".[29] To the contrary, in Czech Republic as well as Slovakia, European law did not play a role before the enlargement because of textual positivism with its "binding vs. non-binding" dichotomy, and therefore it was beyond the consideration of an ordinary judiciary.[30]

After becoming full members of the EU, national courts of respective states had to follow new rules, while uniform application of the European law is a fundamental requirement of the Community legal order.[31] According to Article 234 of the EC Treaty (ex Art. 177), the role of ECJ is to ensure as far as possible the uniform application of community law on the basis of preliminary references sent by national courts.[32]

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[27] Kühn, Zdenek, 'The Application of the European Law in the New Member States: Several (Early) Predictions', German Law Journal, Vol. 06, No. 03, at 564; See also Stein, Eric, 'International Law in Internal Law: Towards Internationalization of Central-Eastern European Constitutions?', 88 A.J.I.L. 427 (1994)

[28] Ibid at 563-564

[29] Gender Equality in the Civil Service Case. In Polish Decision K. 15/97, Orzecznictwo Trybunalu Konstytucyjnego (Collection of Decisions of the Constitutional Tribunal)

[30] Kühn, Z., supra note 27, at 570

[31] See joined Cases C-143/88, C-92/89 Zuckerfabrik 1991 ECR I-145 [1991]; also joined Cases C-46 and C-48/93 Brasserie du Pecheur/Factortame (No.3), 1996 ECR I-1029 [1996], para. 33

[32] See Case 166/73, Rheinmühlen- Düsseldorf v Einfuhr- und Vorratstelle für Getreide und Futtermittel, 1974 ECR 33, para. 2: „Article 177 is essential for the preservation of the community character of the law established by the treaty and has the object of ensuring that in all circumstances this law is the same in all states of the community."

In addition, when it comes to the application of European community law, it is necessary to consider the relationship between the decisions of ordinary judiciaries and those of national constitutional courts. For example, in Hungary and Poland, there is no direct link between the decisions of ordinary judiciaries and national constitutional courts. To the contrary, in Slovenia, Czech Republic and Slovakia a constitutional complaint against ordinary judiciary decisions can be lodged. Indeed, the remedy against the failure of national courts of last resort to refer the issue to the ECJ could be a constitutional complaint against a court decision as it occurs in Austria and Germany; in this case the argument of plaintiffs would be based on the breach of the right to their lawful judge.[33]

## 3. Obstacles to Applying International and the EU Law by CEE Member States

While the post-communist division of labour was rather centralized, the most important issues were concentrated in a single judicial body, namely a constitutional court, which is "situated outside the judiciary proper."[34] However, the centralization level varies from one country to another; the major obstacle to the application of European law still remains the general perception of ordinary judges and the textualist way of domestic law application.[35]

Central-Eastern European judges are also facing problems when using legal principles. In the opinion of Csaba Varga, a Hungarian scholar, the legal order can be sustained as a 'living entity' only through legal principles, which transform the legal order into a rational system thus being able to correctly respond to individual legal issues.[36] Furthermore, it should be taken into account that teleological (or purposive) argumentation appears to be "the characteristic response of modern lawyers to the problem of formality and equity"[37] and is taken up by Western European judges, while this is not the case in CEE states.

In addition, insufficient use of ECJ doctrines or absence of justification for the non-referral of an issue to the ECJ by a domestic court of final appeal may raise issues in some of the Member States. Furthermore, frequent references to the ECJ precedents or other sources of law are highly unexpected in the post-communist countries due to the lack of practice of judicial citation.[38]

Another obstacle to applying community law is that Central European judges often disregard soft law or persuasive arguments. Indeed, the doctrine of indirect affect of European directives presupposes that directives do not have direct horizontal effect (binding). Instead, the doctrine gives the directives a type of force in legal interpretation.[39] This follows as well from the

[33] Kühn, Z., supra note 27, at 575

[34] Ibid., at 576. By 'judiciary proper' Kühn means an ordinary judiciary, which is applying 'simple' law in a relatively textualist way.

[35] Ibid

[36] See Csaba Varga, Transition to Rule of Law / On the Democratic Transformation in Hungary 86(1995)

[37] Roberto M. Unger, Law in Modern Society. Towards a Criticism of Social Theory 209 (1976).

[38] Ibid., at 579

[39] Kühn, Z., supra note 27, at 579; See also Case 14/83 Von Colson v Land Nordhein-Westfalen 1984 ECR 1891 [1984] and Case C-106/89, Marleasing SA v La Commercial International de Alimentation SA 1990 ECR I-4135 [1990].

*Marleasing case*, the ECJ key judgment on indirect effect.[40] However, Central European judges are not likely to make use of comparative argumentation especially in those fields not formally harmonized by European law.[41]

## 4. International (Labour) Law in CIS states

After rejecting Soviet dualist approach to the implementation of international law in the domestic legal system, many of the CIS states gradually opened their constitutions to international law and proclaimed the letter to be part of the national legal order. However, the significance of such 'opening' can only be appreciated against previous Soviet experience in the field, as international law in former Soviet Union was never considered as something that might be invoked before, and enforced by, its domestic courts.[42] Under the Constitution of USSR, 1977, international law was not directly operating in the national legal system, which remained closed to international norms for more than seventy years.

Indeed, according to Article 29 of the USSR Constitution, the relations of the USSR with other states had to be based on the principle of 'fulfillment in good faith of obligations arising from the generally recognized principles and rules of international law, and from international treaties signed by the USSR'. In practice, however, this provision was not interpreted as a general incorporation of international law in Soviet domestic legal system. In the Soviet Union, international law and municipal law were considered to be absolutely different and separate legal orders. Dualist approach and the doctrine of transformation allowed the USSR to be party to various international treaties, while avoiding implementing their provisions in the national legal order.[43]

During *perestroika,* the undertaken legal reform aimed at ensuring the observance of internationally accepted rules, with specific emphasis on human rights norms. The reasons for legal reforms with particular focus on international law were, first of all, a consensus among policy-makers with regards to Soviet domestic laws and its non-conformity to international standards. Secondly, the failure of communist ideas led to less trust in national authorities, thus making international law and international institutions more credible. Finally, because of general recognition of international norms that express 'universal human values', especially those concerned with human rights, international law enjoyed high degree of legitimacy. It was then argued, that gradual transformation of international norms into national legislation should be accompanied by radical changes in constitutional provisions, which will allow international legal norms and principles to directly penetrate domestic legal order; and, that the Soviet Union shall accept a general constitutional principle that will proclaim international law being part of the national law.[44]

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[40] Case C-106/89, Marleasing SA v La Commercial International de Alimentation SA 1990 ECR I-4135 [1990], paragraph 8 (referring to Von Colson )

[41] Kühn, Z., *supra* note 27, at 579, 580

[42] Danilenko, G. M. 'Implementation of International Law in Russia and other CIS States', (1998), at 2

[43] Danilenko, G. M., *supra* note 42, at 3-5

[44] Ibid

For the first time in Soviet history, the Law on Constitutional Supervision of 1989 introduced a mechanism for direct incorporation of international norms into the domestic legal order by granting the Committee of Constitutional Supervision the power to review domestic laws, especially in the field of human rights, considering international obligations of the USSR. Already, in its first decision, the Committee declared several legal acts that excluded some labour disputes from the jurisdiction of the courts as being unconstitutional. Hence, the Committee relied on international law and applied it while deciding upon the case, by invoking, in particular Arts. 7 and 8 of the Universal Declaration of Human Rights, and, Art. 2(3) of the International Covenant on Civil and Political Rights, proclaiming the right of every person to an effective remedy for violation of their rights. However, the principle of international law as being part of national law was never adopted in the USSR Constitution.

After the collapse of the USSR, new constitutions started to introduce international law into their domestic legal systems, albeit to varying degrees. While the constitutional provisions regarding incorporation of international law differ from one state to another, Danilenko divides CIS countries into three main groups: the first group includes countries, constitutions of which proclaim international treaty or customary law to be part of the national legal order without establishing hierarchical status of international law towards domestic legal system (Ukraine[45], Kyrgyzstan[46]); the second group of countries proclaim international law as being part of national law with supremacy of international rules over national (Russian Federation, Kazakhstan[47], Moldova[48], Armenia[49], Georgia[50], Tadzhikistan[51]); the third group include, in their constitutions, only vague provisions with regards to international law (Uzbekistan[52], Turkmenistan[53]).

It should be noted, that only a few CIS constitutions contain provisions on guaranteeing the right to recourse to the courts in the case of rights violations by public authorities. For instance,

[45] Art. 9, Constitution of Ukraine 1996

[46] Art. 12, Constitution of Kyrgyzstan, 1993, states that "inter-state treaties ratified by the Republic of Kyrgyzstan and other norms of international law form a consistent and directly applicable part of the legislation of the Republic of Kyrgyzstan."

[47] Art. 4, Constitution of Kazakhstan, 1995, states that "international treaties ratified by the Republic of Kazakhstan have priority over its laws and are directly implemented except in cases when the application of an international treaty shall require the promulgation of a law."

[48] Art. 8, Constitution of Moldova, 1994, states that „the Republic of Moldova pledges to respect the Charter of the United Nations and the treaties to which it is a party", and "wherever disagreement appears between conventions and treaties signed by Republic Moldova and its own national laws, priority shall be given to international regulations."

[49] Art. 6, Constitution of Armenia, 1995

[50] Art. 6, Constitution of Georgia, 1996, states that "the legislation of Georgia corresponds with universally recognized norms and principles of international law…International treaties or agreements concluded with and by Georgia, if they are not in contradiction to the Constitution of Georgia, have prior legal force over internal normative acts. "

[51] Art. 11, Constitution of Tadzhikistan, 1994

[52] Art. 17, Constitution of Uzbekistan, 1992, states that the country's foreign policy "shall be based on the principles of sovereign equality of the states, non-use of force or threat of its use, inviolability of frontiers, peaceful settlement of disputes, non-interference in the internal affairs of other states, and other universally recognized norms of international law "

[53] Art. 6, Constitution of Turkmenistan, 1992, states that in dealing with foreign policy "Turkmenistan shall acknowledge priority of generally recognized norms of international law.''

constitutional review of administrative and legislative acts is envisioned by constitutions of Moldova (Art. 53) and Turkmenistan (Art. 40). However, not all courts in respective countries are able to effectively enforce the constitutional and international human rights of an individual against governmental legislative actions.[54]

For instance, before 1993, the then Constitution of Russia, inherited from the Soviet Union, did not enshrine the possibility of direct application of international law by national courts, as well as other states' constitutions of the former Soviet Union. Therefore, a special emphasis was put on the implementation of international standards when drafting new constitutional provisions. Thus, in 1991 the Declaration of the Rights and Freedoms of Person and Citizens contained a general clause[55] that incorporated international norms concerning human rights into the national legislation of Russia and became part of the then Constitution of Russia in 1992. Another important development in Russia during that period was the adoption of the idea of constitutional review, the enforcement of which was entrusted to a special and new judicial body, namely the Constitutional Court[56] and an individual complaint procedure was introduced for the constitutional review of 'law-applying' practice.

The individual complaints procedure was a real breakthrough from the human rights perspective in Russia.[57] Indeed, the first case in which the Constitutional Court of Russia relied on international law was submitted under the individual complaint procedure. In particular, the *Labour Code Case* concerned the controversial practice, sanctioned by a provision of the Labour Code, with regards to using simplified procedure to annul labour contracts with persons who had reached their retirement age. In its decision, the Constitutional Court ruled out that the simplified procedure enshrined by the Labour Code violated the principle of non-discrimination, basing its decision on such international instruments as the Universal Declaration on Human Rights, Conventions and Recommendations of the International Labour Organization as well as the UN Covenant on Economic, Social and Cultural Rights. Moreover, it should be noted that the decision in this case came before the inclusion of the 1991 Declaration of the Rights and Freedoms of Person and Citizens into the Russian Constitution. In order to allow for the direct application of international norms, the Court then had to broadly interpret a general clause of the 1978 Constitution, which stated: "foreign policy activity of the Russian Federation shall be based on the recognition and respect for the principle of fulfillment in a good faith of obligations and other generally recognized principles and rules of international law".[58] This provision had never been considered a general norm of incorporation. However, in the Russian domestic context, as the Constitutional Court ruled, the respective provision required courts to "access the applicable law from the point of view of its conformity with the principles and rules of international law."[59] In its decision, the Court also noted that the Declaration of the Rights and Freedoms of Person and Citizen ensured that generally recognized international human

[54] Danilenko, G. M., *supra* note 42, at 39
[55] Article 1 of the Declaration 1991
[56] *Zakon o Konstitutsionnom Sude* (Law on the Constitutional Court), *Vedomosty RF,* No. 19, item 621 (1991)
[57] Danilenko, G. M., *supra* note 42, at 9
[58] *Konstitutsia (Osnovnoy zakon) Rossiskoy Federatsii – Rossii* (Constitution (Fundamental Law) of the Russian Federation - Russia) 1978 (as amended in 1992), Art. 28
[59] *Vestnik Konstitutsionnogo Suda Rossiiskoy Federatsii* (Herald of the Constitutional Court of the Russian Federation), 1993, No. 1, p. 29 (hereinafter VKS)

rights norms directly created rights and obligations for the citizens of the Russian Federation and those norms prioritise over national laws.[60]

There were other cases in the field of labour law when the first Constitutional Court of Russia invoked international norms, for example, regarding some procedural norms and practices restricting the right of plaintiffs in labour disputes to appeal against the decisions of lower courts. The Constitutional Court declared the relevant restrictions unconstitutional, as respective norms and practices violated the right to an effective remedy of law by a court. Thus, the Constitutional Court based its decision on the provisions contained in the Universal Declaration of Human Rights, the Covenant on Civil and Political Rights and the Covenant on Economic, Social and Cultural Rights.[61] Another case concerning the Labour Code, then in force, and the Law on Procuracy, in accordance to which officers of the Procuracy could not challenge disciplinary measures and dismissals in courts.[62] The Court declared domestic laws unconstitutional as they violated the right to an effective remedy by a court of law and, again, relied on the international instruments mentioned above.

According to Article 15 (4), the 1993 Constitution of Russia, "the generally recognized principles and norms of international law and the international treaties of Russian Federation shall constitute an integral part of its legal system", and, "if an international treaty of the Russian Federation establishes other rules than those stipulated by law, the rules of the international treaty shall apply." The formulation "generally recognized principles and norms of international law" refers to both the treaty law and general customary law, while this is not the case for many of other CIS constitutions. Nevertheless, there is much skepticism towards the practical use of these constitutional provisions, which are considered to be 'more theory than practice.'[63]

The new Constitutional Court, set up under the 1993 Constitution, also relied on international law in its cases. For example, in the *Collective Labour Disputes Case*[64], regarding the right to strike, the Court invoked Article 8 of the International Covenant on Economic, Social and Cultural Rights[65] and held that restrictions in national legislation on the right of aviation workers to strike violated applicable international norms as well as Arts. 17 and 55 of the 1993 Constitution of the Russian Federation.

The decisions of Constitutional Court of Russia, however, provide little analysis on the applicable international law norms. The Court also fails to analyze the method employed when deriving "the generally recognized principles and norms of international law."[66] As Danilenko notes, the Court, when dealing with such principles "appears to believe that they may be

[60] *Vestnik Konstitutsionnogo Suda Rossiiskoy Federatsii* (Herald of the Constitutional Court of the Russian Federation), 1993, No. 1, p. 29 (hereinafter VKS)
[61] VKS, 1993, No. 2/3, p.41
[62] VKS, 1994, No. 2/3, p.24
[63] Report on the Conformity of the Legal Order of the Russian Federation with the Council of Europe Standards, Doc. AS/Bur/Russia (1994), in *Human Rights Law Journal*, 15, pp. 249, 250 (1994)
[64] VKS, 1995, No.2/3, p. 45
[65] According to Article 8 of the Covenant state parties must ensure "the right of trade unions to function freely subject to no limitations other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others."
[66] Danilenko, G. M., *supra* note 42, at 24

proved by simply citing international treaties or even non-binding international instruments". However, this would require the proof of actual practice by states. For instance, the Court did not analyze such actual practice of states regarding termination of labour relations with persons who had reached retirement age in *Labour Code Case.*[67] Furthermore, the Constitutional Court of Russia makes little, if any, distinction between self-executing and non-self executing treaties.[68] As illustrated by the Labour Law Case, where the Court based its decision on provisions of International Covenant on Economic, Social and Cultural Rights and the ILO Convention No. 111,[69] it may be the case that national courts of many monistic states would consider these instruments non self-executing due to their programmatic nature, thus making them unable to override contrary national legislation.[70]

## 5. International Law in the Domestic Legal Order of Ukraine

The 1996 Constitution of Ukraine contains a clause with regards to international law and its place in the domestic legal system. Paras. 1 and 2, Article 9 of the Constitution of Ukraine state: "International treaties that are in force, agreed to be binding by the Verkhovna Rada of Ukraine, are part of the national legislation 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."

Also, para. 2, Article 8 of the Constitution defines the Constitution of Ukraine as having the highest legal force. Laws and other normative legal acts are adopted on the basis of the Constitution of Ukraine and shall conform to it. In accordance with para. 3, Article 8, the norms of the Constitution of Ukraine are norms of direct effect. Appeals to the court in defense of the constitutional rights and freedoms of the individual and citizen are guaranteed directly on the grounds of the Constitution of Ukraine. Thus, Article 55 of the Constitution states that "everyone is guaranteed the right to challenge, in court, the decisions, actions or omissions of bodies of state power, bodies of local self-government, officials and officers." Furthermore, Article 55 also provides for the right of an individual, after exhausting all domestic legal remedies, "to appeal for the protection of rights and freedoms to the relevant bodies of international organizations of which Ukraine is a member or participant."

In order to better understand the operation of international law in a national context, it is necessary to draw on the judicial system of a country. The Ukrainian judiciary is comprised of the Constitutional Court of Ukraine and the courts of general jurisdiction. The courts of general jurisdiction include local courts, courts of appeal, higher specialty courts and the Supreme

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[67] *Vestnik Konstitutsionnogo Suda Rossiiskoy Federatsii* (Herald of the Constitutional Court of the Russian Federation), 1993, No. 1, p. 29

[68] The Law on International Treaties adopted in 1995 distinguished self-executing and non-self- executing treaties. Art. 5 of the Law states that "the provisions of officially published international treaties of the Russian Federation, which do not require the promulgation of domestic acts for application, shall operate in the Russian Federation directly. In order to effectuate other provisions of international treaties of the Russian Federation, the relevant legal acts shall be adopted."Sobranie, No.29, item 2757 (1995)

[69] Discrimination (Employment and Occupation) Convention, 1958 (No. 111)

[70] Danilenko, G. M., *supra* note 42, at 26

Court of Ukraine, which is the highest in the hierarchy of judicial bodies within the system of courts of general jurisdiction.

Thus, the 1996 Constitution of Ukraine provides for the creation of the Constitutional Court, an independent integral part of the judiciary of Ukraine, which is "the sole body of constitutional jurisdiction in Ukraine." It has the competency to decide "on issues of conformity of laws and other legal acts with the Constitution of Ukraine and provides the official interpretation of the Constitution of Ukraine and the laws of Ukraine."[71] It acts exclusively within the limits of its competence as provided in Arts. 150,151 and 159 of the Constitution of Ukraine, and Article 13 of the Law of Ukraine "On Constitutional Court of Ukraine."

With regards to issues of conformity of international law with the Constitution, Article 151 provides that the Constitutional Court "on the appeal of the President of Ukraine or the Cabinet of Ministers of Ukraine, provides opinions on the conformity with the Constitution of Ukraine of international treaties that are in force or international treaties submitted to Verkhovna Rada of Ukraine for granting agreement on their binding nature."

The Supreme Court of Ukraine also reviews cases where an international judicial institution, recognized by Ukraine, establishes a violation by Ukraine of its international obligations while considering a dispute.[72] The Supreme Court of Ukraine may refer to the Constitutional Court of Ukraine about recognition of a legal act or its individual provisions as unconstitutional. It has to be mentioned that not every judicial body is entitled to refer directly to the Constitutional Court regarding the recognition of a legal act as unconstitutional, as it is an exclusive privilege of the Supreme Court of Ukraine, providing that a judicial body is under the competence of the latter. Therefore, according to Article 150 of the Constitution of Ukraine and Arts. 40, 83 of the Law of Ukraine "On Constitutional Court of Ukraine," if there is a dispute concerning the constitutionality of a legal act within the process of a general legal proceeding, the Supreme Court of Ukraine, as a holder of the right to constitutional referral, shall be bound to refer to the Constitutional Court of Ukraine on the establishment of compliance of a respective act with the Constitution.[73]

Since the Constitutional Court is the only body that provides formal interpretation of the Constitution, the 'living law', created by specialty courts does not exist in Ukraine, and when deciding upon a case, the Constitutional Court is not bound to adhere to the interpretation of the challenged act, provided by higher specialty courts in Ukraine.[74] Therefore, jurisdiction of the Constitutional Court is limited by the area of constitutional review, which implies the guarantee of the supremacy of the Constitution of Ukraine.

[71] Art. 147, Constitution of Ukraine, 1996

[72] Art. 38, Law of Ukraine No. 2453-VI „On the Judicial System and the Status of Judges" of 07.07.2010,

[73] It should be noted that under the Constitution of Ukraine individuals have no right to file constitutional complaints to the Constitutional Court. However, according to the Law of Ukraine on the Constitutional Court, citizens of Ukraine, foreigners, stateless persons and legal entities can submit 'constitutional appeals' to the Court.

[74] See 'The Relations between the Constitutional Courts and the other national courts, including the interference in this area of the action of the European Courts', Report of the Constitutional Court of Ukraine, Conference of European Constitutional Courts, XIIth Congress, 2002, at 23

It shall be also mentioned that juridically, the Constitutional Court is not subordinated to the European Court of Human Rights and not bound, therefore, by the case law of the ECHR.[75] Courts of general jurisdiction, however, shall adhere to the decisions of European Court of Human Rights, while Ukraine is a member of the European Council. Also, the Constitutional Court of Ukraine may, in the consideration of a case concerning human rights and freedoms, refer to provisions of the European Convention on Human Rights, taking into account Art. 9 of the Constitution of Ukraine.

## 6. Application of International Labour Standards by the Domestic Courts in Ukraine

Previously, domestic courts of Ukraine, when deciding upon a case in the labour law field, did not rely on the international body of law in their practice before the collapse of the USSR and during early ninetieth. However, the situation started to change with an increasing number of ratified ILO Conventions and other international instruments. Thus, during the last decade, Ukraine has ratified a number of important ILO instruments including Labour Inspection Convention, 1947 (No. 81), Labour Inspection (Agriculture) Convention, 1969 (No. 129), Labour Administration Convention, 1978 (No. 150). A real breakthrough took place in the ratification of international instruments on safety and health, including Occupational Cancer Convention, 1974 (No. 139), Occupational Health Services Convention, 1985 (No. 161), Safety and Health in Agriculture Convention, 2001 (No. 184), Safety and Health in Mines Convention, 1995 (No. 176), Prevention of Major Industrial Accidents Convention, 1993 (No. 174). The analysis of some of the court cases provided in this paper was undertaken to trace the reference specifically to the international instruments mentioned above. Since the labour inspectorate plays the major role in enhancing international labour standards at a workplace, a large number of analyzed court cases deal mostly with international instruments concerning the labour inspectorate and health and safety issues.

Disputes related to the labour law fall under the competence of courts of general jurisdiction of Ukraine. Therefore, when examining a case, and if a decision in it was taken in line with, or was based on international or national norms, the attention shall be paid to courts of first instances, courts of appeal as well as the high specialized courts of Ukraine ( the High Administrative Court of Ukraine) and finally, the Supreme Court of Ukraine.

There two types of cases in question. The first case is when a labour inspector or the labour inspectorate as an institution is a plaintiff in a case against an individual –private entrepreneur, or what is more often, against an enterprise. The second type of cases refers to the situation when an enterprise or a private entrepreneur is a plaintiff in a case. However, in the majority of cases, labour inspection is a defendant.

The aim of the analysis is also twofold. On the one hand, it is necessary to estimate the overall practice of the Ukrainian judiciary with regards to the application of the international labour law, which implies the actual practice of judges and their decision to give the preference to an international norm over contrary national legislation. It also includes the situation when a

[75] Report of the Constitutional Court of Ukraine, Conference of European Constitutional Courts, XIIth Congress, 2002, at 25

decision is based on international as well as national norms, in a case where there is no collision between two, and whether an international norm is then seen as higher in hierarchy, equal to a national norm, or used by a judge as a mere reference in support for the main argument, based on the national law.

The legal scope of the labour inspectorate in Ukraine is determined by the Law of Ukraine "On the main Principles of State Supervision (Oversight) in the Area of Commercial Activity."[76] The law identifies the main principles for state supervision in the area of commercial activity. Articles 4, 5, 7 of the Law contain general requirements for the sate supervision and control, including the one concerning compliance with labour laws.

According to para. 4 Article 5 of the Law, bodies of state supervision (labour inspection) shall implement planned and scheduled measures of state supervision, provided that the written notification is sent to an enterprise or a private entrepreneur about an upcoming supervision no less than ten days prior to the date of an inspection. This important provision in the Law of Ukraine clearly contradicts the norms of the ILO Labour Inspection Convention, 1947 (No. 81), which is ratified by Ukraine.

The Article 9 of the Constitution of Ukraine states that international treaties in force, consented by the Parliament (Verkhovna Rada) of Ukraine as binding, shall be an integral part of the national legislation. Thus, in accordance with para.1 (a) Article 12 of the Convention, labour inspectors shall be empowered to enter freely and without previous notice at any hour of the day or night any workplace liable to inspection. Furthermore, para. 2 Article 12 of the Convention states that "on the occasion of an inspection visit, inspector shall notify the employer or his representative of their presence, unless they consider that such a notification may be prejudicial to the performance of their duties." Also important to notice, is that the Law of Ukraine No.877-V enshrines the principle of compliance with the international agreements, ratified by Ukraine. It is then difficult to explain why particular provisions of the Law do not conform to international agreements in force, namely the Convention No. 81.

However, another normative act that regulated the order of carrying out inspections[77] was in compliance with the Convention, although this act is situated on the lower level of hierarchy with regards to the mentioned Law of Ukraine. Therefore, it is necessary to analyze the courts' practice regarding the application of either the national or international norm in this respect.

*Case 1 (the courts of a first instance)*

The practice of courts of a first instance shows that there is often a lack of usage of international labour norms in courts' decisions. However, there are few positive examples as well. For instance, in its decision from 28.01.2010 the Desnyanskyi regional court of Chernigiv denied the claim of a plaintiff asking to declare unlawful and set aside the resolution of administrative violation. In this case, the plaintiff (an individual) created obstacles and did not let a labour inspector enter the workplace, although all the necessary documents for the

[76] Law of Ukraine from 05.04.2007, No. 877-V, text available in Ukrainian at http://zakon4.rada.gov.ua/laws/show/877-16/page2

[77] Act of Cabinet of Ministers of Ukraine from 18.01.2003 No. 50. Not in force since 18.04.20011

inspection were presented to the plaintiff. Thus, the plaintiff committed an administrative offense. The court based its decision on the norms enshrined in the Convention No. 81 as well as on national legislation. The plaintiff then diverted to the court of appeal with the same issue and was denied in his claim again, as the Court of Appeal recognized the judgment of the local court as lawful and further supported its argument by asserting that the local court correctly applied norms of international agreements in a controversial legal relationships.[78]

*Case 2 (the courts of appeal)*

The analysis of the case law shows that the courts of appeal apply international norms to a greater extent than the local courts. Very often, the courts of appeal set aside the decisions of local courts that did not use, when needed, an international norm instead of a conflicting national norm. Thus, in case of labour inspection versus a state company[79], Kyiv Administrative Court of Appeal overturned the ruling of the local court, where the plaintiff (a state enterprise) asked the court to recognize the actions of a labour inspector unlawful. In this case[80], a labour inspector detected the violation of labour law norms with regard to employment contracts, paid leave and other violation of workers' right. The labour inspector then issued an order for the enterprise to take measures to bring the respective issues into conformity with national labour laws. However, the enterprise claimed that the labour inspector unlawfully entered the workplace and thus refused to take specific measures prescribed in the order. The ruling of the local court was in favour of the state enterprise. After the claim of appeal was submitted by the Labour Inspectorate to the Court of Appeal, the Court ruled out that in its decision, the local court did not take into account norms of national laws regarding the issues mentioned above and its decision was based on the incorrect application of material norms law. Furthermore, the Court of appeal referred to the Convention No. 81 and explicitly sited the content of its provisions in its decision.

*Case 3 (high specialized courts)*

There are also cases, when neither a local court nor a court of appeal uses international norms as a preference to contradicting national norms. In this regard, the Higher Administrative Court of Ukraine may set aside the decisions of both or a lower court. Thus, in the case where a Joint Stock Company filed a complaint against a labour inspector, whose actions were considered as unlawful by the plaintiff, the court of first instance ruled upon the case in favour of the Company. Later on Kharkiv Administrative Court of Appeal, due to the claim of the labour inspection, set aside the ruling of the local court and pointed out that the latter based its decision on the fact that the labour inspector, when visiting the enterprise, did not have a special order empowering him or her to enter the workplace. To have such an order from a respective state organ in order to inspect the workplace is clearly envisaged by national norms. The Court of Appeal therefore made a reference to the Convention No. 81, which does not require a labour inspector to have a specific order for entering the workplace. In its decision the Court explicitly asserted the failure of the local court to take into account international norms. The Joint Stock Company then turned to the Higher Administrative Court of Ukraine with the

[78] Case No. 2-a-162/10 from 19.01.2011, available in Ukrainian at www.reyestr.court.gov.ua
[79] Case No. K-3263/08 from 03.11.2010
[80] Case No. 2-a-4450/102570 from 09.12.2010

request to cancel the decision of the Court of Appeal and having the same claims towards the labour inspection as it did in its complaint to the local court. The Higher Administrative Court did not satisfy the claim. It supported the decision of the Court of Appeal and again, made further reference to the Convention No. 81, while giving it a priority over national legislation specifically with regards to the requirements for labour inspectors to be provided with proper credentials, as it is stated in para. 1 Article 12 of the Convention. The Higher Administrative Court concluded that the national norms stipulating that the labour inspector must have an order from the competent state organ when entering an enterprise is in collision with the international norms and therefore, the international norm shall be applied when deciding upon this case.

It should be noted that the above-mentioned examples are a selection of the best practices of Ukrainian judiciary in the application of international norms and it is not often the case when a national court bases its decision on an international, but rather than on a national norm. However, the tendency to give priority to the international norms over contrary domestic legislation could be traced at least in cases concerning the labour inspectorate. In addition, there are cases where domestic courts refer to other international instruments, in particular the ILO Underground Work (Women) No. 45, Safety and Health in Mines Convention, 1995 (No. 176), the UN International Covenant on Economic, Social and Cultural Rights, 1966.

The current analysis of court cases confirms that the ILO Convention are referred to more often than any EU standards in the field However, there are some positives examples where European Social Charter (revised),1996, which is ratified by Ukraine, is used as a reference by domestic courts. With regards to the question whether other EU norms are also referred to in national courts of Ukraine, even though some of them may not be binding, this will require further examination of judicial practice.

**Conclusions**

Domestic courts play crucial role in the implementation of international legal norms at the national level. However, different legal, as well as political factors influence the efficiency of the implementation of constitutional provisions with regards to international law and its place in the domestic legal order in CEE as well as CIS states. Such factors may favour or, to the contrary, oppose direct application of international law and include the nature of applicable rules, independence and professionalism of the judiciary, participation in international institutions and the strengths of national democratic institutions as well as the rule of law. While in some of the post-communist states constitutional provisions concerning international norms have little impact on the functioning of national legal systems, the most important precondition for the effective implementation of such constitutional provisions is the establishment of the rule of law and democratic institutions in a given state.

Although in some countries of Central Eastern Europe in case of a violation of international law domestic courts are entitled to dismiss the contradicting domestic legal act, the major problem, however, appears to be in the independence of the judiciary and its objectivity. Indeed, the willingness of domestic courts to apply international legal norms appears to be sometimes

more important in determining the status of international law than just constitutional provisions.

Another problem for national judges in post-communist countries appears to lie in their lack of experience in applying international law, including the law of the European Union. Also, socialist legal scholars saw the relation between international and national legal systems as a mere theoretical issue, without really paying attention to practice. Other practical problems, such as lack of professional training of lawyers and judges in the field of international law field, and lack of translations of international treaties and court decisions create problems for adequate understanding and the consequent application of international legal norms.

In Ukraine, dealing with international labour law within national courts is a relatively new issue, with judges lacking experience and knowledge about the application of such norms. However, there is a positive tendency in the application of the international labour standards by domestic courts of Ukraine, especially by the courts of appeal and high specialized courts. In some cases, an international norm is used as a base for a decision rather than a contradicting national rule. Although in the majority of cases international norms are simply referred to in support of current national legislation and often are not given priority.

Finally, given that Ukraine is not an EU member state, its legislation still has to be approximated to the standards of the EU, which is stipulated by various national normative acts and is important for concluding an association agreement with the EU. With regard to the application of the EU labour standards and adopting subsequent legislation in line with EU norms, the Ukrainian legislative base is also far behind from many CEE states and requires further analysis on the issue of direct and indirect effects of international treaties, the approximation of Ukrainian labour laws to EU standards, as well as further examination of the courts' practice.

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