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Constitutional law matters of sustainable development under martial law: The case of Ukraine

Konstytucyjne i prawne zagadnienia zrównoważonego rozwoju
w warunkach wojny. Przypadek Ukrainy

Abstract: The article discusses a general vision of constitutional law matters related to sustainable development during wartime in Ukraine. The research contributes to the study of legislation by using legal norms, acts and cases. Enshrined in the Preamble of the Constitution of Ukraine, the state strategic course for Ukraine's full membership in the European Union and NATO provides for positive developments in approximating Ukrainian legislation to EU regulations. The article shows that the benefits of cooperation for sustainable development may occur only if the central and municipal authorities undertake environmental protection measures in Ukraine in three dimensions: environmental security and preventing the pollution of the environment during the war; private–public cooperation under martial law; and community leadership and mass media contacts.

Keywords: environmental security, invasion, human rights, accession, martial law, sustainable development, Ukraine

Abstrakt: W artykule omówiono ogólną wizję dotyczącą poszanowania kwestii konstytucyjno-prawnych zrównoważonego rozwoju w czasie wojny na Ukrainie. Badania przyczyniają się do rozwoju studiów nad problematyką legislacyjną poprzez stosowanie norm prawnych, ustaw i orzecznictwa sądów. Zapisany w Preambule Konstytucji Ukrainy państwowy kurs strategiczny na rzecz pełnego członkostwa Ukrainy w Unii Europejskiej i NATO przewiduje pozytywny rozwój sytuacji w zakresie zbliżania ukraińskiego ustawodawstwa do przepisów UE. W artykule wykazano, że korzyści ze współpracy na rzecz zrównoważonego rozwoju mogą nastąpić jedynie w przypadku podjęcia przez władze centralne i regionalne działań na rzecz ochrony środowiska na Ukrainie, przy czym działania przedstawiono w trzech wymiarach: bezpieczeństwo ekologiczne oraz działania zapobiegające zanieczyszczeniu środowiska w czasie wojny; współpraca prywatno-publiczna w stanie wojennym; przywództwo społeczne i kontakty z mediami.

Słowa kluczowe: bezpieczeństwo ekologiczne, inwazja, prawa człowieka, przystąpienie Ukraina, stan wojenny, zrównoważony rozwój

1. Introduction

Ukraine, as a European Union candidate country, accepted the obligation to use the legal environmental norms implemented by EU Member States. According to the European Union standards of sustainable development, as one of the priorities of regulatory EU policies, strategic actions should include environmental security. Under martial law, current developments of Ukraine statehood have involved the subjects of genocide and ecocide. Meanwhile, legal regulation of socioeconomic development and reinforcement of national security in Ukraine are among the most discussed aims of the modern European normative system. Thus, the completion of the Sustainable Development Goals of Ukraine for the period up to 2030¹ is depicted not only by domestic features, but also by arrangement of the EU-candidate status.

Ukraine accession to the EU and NATO is extraordinary and significant in the context of strategic and economic development. To this end, since 2018 Ukrainian foreign and internal policies have been focussed on preparations

¹ Указ Президента України «Про Цілі сталого розвитку України на період до 2030 року». [Ukaz Prezidenta Ukraïni «Pro Cili stalogo rozvitku Ukraïni na period do 2030 roku»] [Decree of the President of Ukraine “Goals of Sustainable development of Ukraine for the period of 2030”] [30.09.2019], <https://zakon.rada.gov.ua/laws/show/722/2019#Text> [access: 30.08.2023].

for accession to the European Union after the end of the martial law regime.² At the outset, the Ukrainian parliament voted to impose martial law in ten regions for 30 days starting from 28 November 2018, after Russian forces fired on Ukrainian ships and seized 23 sailors in the Black Sea off the coast of the Russian-controlled Crimean Peninsula.³ On 24 February 2022, after a full-scale invasion, the President of Ukraine, Volodymyr Zelenskyy, signed a decree on the imposition of martial law in Ukraine; the Verkhovna Rada approved it.⁴

Due to a rise of deviance in Ukrainian society, structural challenges to European assistance to Ukraine's transition policy occurred. The EU Member States' openness to Ukraine's successful accession is an essential, integral part of European security system. Today, the geopolitical and geoeconomic development of Ukraine–EU–NATO relations seems the most transparent in its 30-year history and traditions, thanks to the goals set out in the Preamble of the Constitution of Ukraine.

The goal of this paper is to show how Ukraine's laws are being adjusted to EU regulations and the new directions in legislative approximation under martial law.

2. Guidelines for development under specific circumstances of the regime of martial law in Ukraine

According to the Declaration of the right to development (4 December 1986, #41/128), 'development' is understood

² Ukraine backs martial law after gunfire at sea, <https://www.refworld.org/cgi-bin/texis/vtx/rwmain?page=search&docid=5c34a7796&skip=0&query=Ukraine> [access: 31.08.2023].

³ Закон України «Про затвердження Указу Президента України „Про введення воєнного стану в Україні» / Відомості Верховної Ради (ВВР), 2018, No. 48, ст. 381 [Zakon Ukraïni «Pro zatverdžennâ Ukazu Prezidenta Ukraïni „Pro vvedennâ voënnogo stanu v Ukraïni” Vidomosti Verhovnoï Radi (VVR), 2018, No. 48, st. 381] [Law of Ukraine „On Approval of the Decree of the President of Ukraine „On the Introduction of Martial Law in Ukraine” / Bulletin of the Verkhovna Rada (VVR), 2018, No. 48, Article 381] <https://zakon.rada.gov.ua/laws/show/2630-19#n5> [access: 30.08.2023]. *Follow-up to decisions and resolutions adopted by the Executive Board and the General Conference at their previous sessions, Part I: Programme issues, C. Follow-up of the situation in the Autonomous Republic of Crimea (Ukraine)* 207 EX/5.I.C Executive Board Job: 201911543, Two hundred and seventh session, PARIS, 13 September 2019 Original: English Item 5 of the provisional agenda, <https://unesdoc.unesco.org/ark:/48223/pf0000370522>, [access: 30.08.2023].

⁴ Указ Президента України «Про введення воєнного стану в Україні „Про введення воєнного стану в Україні», Відомості Верховної Ради (ВВР), 2022, No. 64 [Ukaz Prezidenta Ukraïni «Pro vvedennâ voënnogo stanu v Ukraïni»] [Decree of the President of Ukraine „On the imposition of martial law in Ukraine”, No. 64/2022, <https://zakon.rada.gov.ua/laws/show/64/2022#Text> [access: 30.08.2023].

as a comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom. ... Recalling the right of peoples to self-determination, by virtue of which they have the right freely to determine their political status and to pursue their economic, social and cultural development. Recognizing that the human person is the central subject of the development process and that development policy should therefore make the human being the main participant and beneficiary of development, Recognizing that the creation of conditions favourable to the development of peoples and individuals is the primary responsibility of their States, Aware that efforts at the international level to promote and protect human rights should be accompanied by efforts to establish a new international economic order,... Confirming that the right to development is an inalienable human right and that equality of opportunity for development is a prerogative both of nations and of individuals who make up nations⁵

In addition, under Art. 28 of the Copenhagen Declaration on Social Development, it is the matter of every country and that one should take into account the economic, social and environmental conditions of each country with respect of all rights and freedoms of people:

Our global drive for social development and the recommendations for action contained in the Programme of Action are made in a spirit of consensus and international cooperation, in full conformity with the purposes and principles of the Charter of the United Nations, recognizing that the formulation and implementation of strategies, policies, programmes and actions for social development are the responsibility of each country and should take into account the economic, social and environmental diversity of conditions in each country, with full respect for the various religious and ethical values, cultural backgrounds and philosophical convictions of its people, and in conformity with all human rights and fundamental freedoms. In this context, international cooperation is essential for the full implementation of social development programmes and actions.⁶

⁵ Declaration on the Right to Development: resolution/adopted by the UN General Assembly [04.12.1986], A/RES/41/128, <https://www.refworld.org/docid/3b00f22544.html> [access: 30.08.2023].

⁶ *Copenhagen Declaration on Social Development*, [in:] A. Gallagher, S. Leckie (ed.): *Economic, Social, and Cultural Rights: A Legal Resource Guide Philadelphia*: University of Pennsylvania Press, 2006, p. 421–443, <https://doi.org/10.9783/9780812205381.421>.

Article 4(3) of the Treaty of European Union states that there is a national identity of Member States. Moreover, the Association Agreement between the European Union and its Member States, of the one hand, and Ukraine, of the other hand, includes regulations concerning cooperation in the field of sustainable development.⁷

Ukraine has ratified the following international agreements:

- Convention for the Protection of Cultural Property in the Event of Armed Conflict, 14 May 1954⁸.
- European Convention on protecting archaeological heritage (as amended), made in La Valetta on 16 January 1992, supplementing the principles established in the European Convention on protecting archaeological heritage, signed in London in May 1969.⁹

On 26 January 2023, the Parliamentary Assembly of the Council of Europe (PACE) adopted Resolution #2482 (2023), ‘Legal and human rights aspects of the Russian Federation’s aggression against Ukraine’.¹⁰ The Assembly reiterated that the Russian Federation’s armed attack and large-scale invasion of Ukraine launched on 24 February 2022 constitutes ‘aggression’. The Assembly recommended creating a special tribunal regarding the crime of aggression committed against Ukraine and that Member States adopt different measures aimed at supporting Ukrainian authorities. The Assembly urged Ukrainian authorities to emphasise its focus on gathering information on and ensuring the safe return of forcibly transferred Ukrainian children. The Assembly recommended all Member States of the Council of Europe to establish an international compensation mechanism in cooperation with the Ukrainian authorities. The Assembly recommends the ECtHR prioritise the examination of applications against the Russian Federation stemming from the ongoing war of aggression.

For Ukraine, its integration into the European Union and NATO has become the only chance to protect its political and economic sovereignty in these times of informational globalisation and aggression of the Russian Federation. The EU agreed to provide assistance in support of four priorities:

⁷ Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part (fully in force as of September 1, 2017), <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A22014A0529%2801%29> [access: 30.08.2023].

⁸ Convention for the Protection of Cultural Property in the Event of Armed Conflict, UN Educational, Scientific and Cultural Organization (UNESCO), [14.05.1954], <https://www.refworld.org/docid/40422c914.html>, [access: 29.08.2023].

⁹ European Convention on the protection of the archaeological heritage (revised). Valletta, 16.01.1992, <https://rm.coe.int/168007bd25> [access: 30.08.2023].

¹⁰ Resolution #2482 (2023) “Legal and human rights aspects of the Russian Federation’s aggression against Ukraine”, <https://pace.coe.int/en/files/31620/html> [access: 29.08.2023].

- implementing decentralisation (designed to strengthen democracy and accountability at the local level, and to invest in local infrastructure),
- fighting against corruption (to ensure that previous reforms, such as the introduction of transparent e-procurement for government contracts, are sustained),
- strengthening civil society organisations and
- supporting the reforms needed for Ukraine to fully implement the EU–Ukraine association agreement.

The EU–Ukraine summit, held in Kyiv on 3 February 2023, following the outbreak of Russia’s aggressive war, issued a joint statement of close co-operation to meet the expectations that the Ukrainian people have expressed for strengthening the economic integration, advancing political reforms and fostering economic growth, the rule of law and EU membership for Ukraine.

Moreover, EU–Ukraine dialogue has faced challenges connected with the development of constitutional legality in Ukraine, such as

- norm collisions based on heritage of Soviet mentality and cultural dissimilarities,
- limitations of sectoral integration of Ukraine to the EU,
- state sovereignty of Ukraine no longer ruling directly,
- EU–Ukraine relations now coexisting and competing for influence with many other non-state actors (companies, nongovernmental organisations, intellectuals, etc.),
- the EU influencing policy by finding a common definition of autonomy, sovereignty and human rights protection development and
- the EU and NATO becoming a guarantee of geopolitical status for Ukraine.

Thus, the European Union has been gaining a direct, positive influence on the life of ordinary Ukrainians by means of humanitarian aid, professional and financial support of locals in Ukraine and refugees¹¹ abroad, support of democratic reforms, e-governance and digitisation, anti-corruption measures, public administration reforms, decentralisation and monitoring of legal reforms and public institutions’ functioning.

There is therefore an opportunity to reveal the fundamental challenges of sustainable development of Ukraine as a ‘must to release’ in mass media worldwide:

¹¹ Refugees from Ukraine recorded across Europe: 8 255 288. Government, Refugees from Ukraine registered for temporary protection or similar national protection schemes in Europe: 5 140 259. Source: UNHCR. <https://reporting.unhcr.org/operational/situations/ukraine-situation> [access: 23.05.2023].

- potential threats of bankruptcy of environmentally dangerous enterprises and military and critical infrastructure (Kharkiv and Mykolayv regions);
- latent threats from damaging nuclear power plants and uranium mines (higher local radiation and Chernobyl and Zaporizhzhya nuclear power stations);
- problems of water supply (Nova Kakhovka region [Kakhovka dam destruction] and Kherson region);
- facilitation of relative public securitisation from environmental dangers caused by natural processes or due to ignorance, accident, mismanagement or poor design and originating within or across national borders;
- activities followed by production of chemical and other dangerous substances (since 2022 the situation at Zaporizhzhya nuclear station has been out of control^{12, 13});
- soil pollution, disturbance of landscapes, nature conservation objects and territories and animal migration and deaths (south-eastern and eastern parts of Ukraine);
- complication of the epidemiological situation (global risks to life and health of people); and
- threats of dangerous changes in the environmental state of the zone of influence of the geological environment of the territory (mass closure of mines in the Eastern parts of Ukraine), etc.

On 13 June 2023, the Government of Ukraine adopted Regulation #527-p,¹⁴ which ensures the proper assessment and recording of the damage caused by flooding. Assessments will be carried out only after the completion of rescue operations, emergency works and demining processes. The assessment must be conducted according to the procedure envisaged in Resolution #473 and Resolution #257. Its results will be recorded in the State Register of Damaged and Destroyed Property. 8 On 16 June 2023, the Government of Ukraine adopted Resolution #609, allocating 980 million UAH for compensation for housing

¹² Director General's Statement on Serious Situation at Ukraine's Zaporizhzhya Nuclear Power Plant, <https://www.iaea.org/newscenter/statements/director-generals-statement-on-serious-situation-at-ukraines-zaporizhzhya-nuclear-power-plant> [access: 31.08.2023].

¹³ Супутник зафіксував пожежі та дим навколо Запорізької АЕС (фото) [Suputnik zafiksuvav požeži ta dim navkolo Zaporiz'koї AES (foto)] [The satellite recorded fires and smoke around the Zaporizhzhya NPP], <https://www.unian.ua/society/viy-na-v-ukrajini-2022-suputnik-zafiksuvav-pozhezhi-i-dim-navkolo-zaporizkoji-aes-11954955.html> [access: 31.08.2023].

¹⁴ UN High Commissioner for Refugees (UNCHR), UNHCR Ukraine Legislative Updates June 2023, <https://www.refworld.org/docid/64db4ff44.html> [access: 31.08.2023].

destroyed or damaged as a result of the explosion of the Kakhovka Dam.¹⁵ The procedure is regulated by Resolution #381 ‘eVidnovlennia” on damaged housing and by Resolution #600 on destroyed housing. On 19 June 2023, the Government of Ukraine adopted Resolution #626, providing one-time cash assistance to people affected by the explosion of the Kakhovka Dam. Eligible recipients (i) are registered in the hromadas which are affected by flooding and were not registered as recipients of the housing assistance for IDPs as of 5 May 2023 in these hromadas and (ii) moved or were relocated from the hromadas affected by the flooding in the Mykolaiv and Kherson oblasts, which are currently under the military control of the Russian Federation.

3. Competences of Ukraine in the context of European integration and sustainable development

From the legal point of view, current international, European and Ukrainian law reveal common trends and tendencies regarding the 3 ‘R’s: recovery, restoration and recycling:

- 1) Municipal administrative procedures of investment in biodiversity recovery projects are complicated and stretched. Also, they do not meet the provisions of the EU’s biodiversity strategy for 2030.¹⁶ Reasonable protection of EU investment in Ukraine is the most important question, as investment climate in Ukraine lacks adequate legal grounds of implementing the European Parliament Resolution on bilateral investment agreements between EU and Ukraine.
- 2) There is a need for standardisation of municipal planning documents and environment restoration plans. Haase et al. (2023), in a compiled time series, present different stream types and stream orders from a large geographical area of Europe. The authors conclude that comparison with unimpacted ‘reference’ communities, a standard practice in freshwater ecology, is becoming increasingly challenging due to the emergence of new communities resulting from climate change, non-native species invasions and other pressures. Progress towards biodiversity goals needs to recognise these changing pressures through flexible strategies to

¹⁵ Statement of the Ministry of Foreign Affairs of Ukraine regarding the Russian terrorist act at the Kakhovka HPP, <https://mfa.gov.ua/en/news/zayava-mzs-ukrayini-shchodo-teroristichnogo-aktu-ro-siyi-na-kahovskij-ges> [access: 17.06.2023].

¹⁶ Biodiversity Strategy for 2030, https://environment.ec.europa.eu/strategy/biodiversity-strategy-2030_en [access: 31.08.2023].

protect and foster Earth's remaining biodiversity. We call for adaptive environmental management that recognises conservation and restoration objectives as shifting targets that can be modified to adapt to global change and maximise the protection of biodiversity.¹⁷

- 3) Legal acts and regulations in 'household waste collection and recycling' are not implemented or are outdated.

According to the Strategy on the Government Policy on Internal Displacement till 2025, approved by the Cabinet of Ministers of Ukraine on 7 April 2023, No. 312,

the state should facilitate the voluntary and safe return of internally displaced persons to their places of origin or their resettlement to another region. At the same time, it is necessary to take measures to rebuild destroyed housing, as well as to reconstruct and repair damaged housing and other real estate or to introduce procedures for compensation for housing destroyed or damaged as a result of hostilities as a secondary way of compensating for violated property rights. The mechanism of intersectoral cooperation in responding to security-related risks (the need for demining, construction of shelters, etc.) and the restoration of critical and social infrastructure needs to be improved. It is necessary to take measures to respond to possible tensions and conflicts in territorial communities caused by the current situation. The main tasks required to solve these problems are:

- ensuring intersectoral cooperation between state authorities and local self-government bodies to formulate a state policy on returning to the place of residence and reintegration of internally displaced persons;
- introducing a procedure for accounting and compensating for the value of destroyed and/or damaged property;
- ensuring proper information and creating other conditions for internally displaced persons to make an informed decision to return to their abandoned place of residence;
- ensuring proper planning for the restoration of regions and territories affected by the armed aggression against Ukraine;
- assistance in implementing measures to increase cohesion and overcome conflicts;
- implementing information activities aimed at integrating internally displaced persons in host communities; and

¹⁷ P. Haase, D.E. Bowler, N.J. Baker, et al. *The recovery of European freshwater biodiversity has come to a halt*, p. 582–588, <https://doi.org/10.1038/s41586-023-06400-1>.

- creating the basis for restoring the damaged infrastructure of de-occupied settlements.¹⁸

It is understandable that municipal powers have to be strong and powerful in their communications with civil society, while state authorities need to foster democratic consolidation.

As civil society is a tool for checks and balances and for representing social interests, the situation gives rise to fundamental presuppositions of the future of Ukraine in research and development projects of the European Union and as a suitable object of scientific research. The modern situation regarding integrating the democratic legal state of Ukraine into the EU seems to be complicated.

In Ukraine the competences of the municipal authorities encompass analysis of urban plans, performance of strategic environmental assessments and issuance of administrative permissions for construction.

Local self-government is competent for setting fees for the usage of sanitation and water facilities. For example, in Odesa, the mayor has the right to establish limits on access to areas and site of cultural heritage that are under international protection¹⁹ and hardly damaged historical landmarks,²⁰ while managing sun-bathing and swimming places along the Odesa shores of the Black Sea.²¹

The main problems of current development include the low price of labour for Ukrainians, the high prices of gas, water and other utilities, migration flows within the country and abroad and the lack of legal provisions regulating the rational use of the water supply.

4. Conclusions

It is obvious that the EU's strategic line of cooperation with Ukraine has to be transformed under the conditions of martial law. This means that EU countries'

¹⁸ Ukraine: Strategy on the Government Policy on Internal Displacement till 2025, <https://www.refworld.org/docid/64afcfee4.html> [access: 31.08.2023].

¹⁹ E. Yufereva, *UNESCO mission arrives in Odesa to assess damage to UOC cathedral*, <https://spzh.news/en/news/75164-unesco-mission-arrives-in-odesa-to-assess-damage-to-uoc-cathedral> [access: 31.08.2023].

²⁰ H. Chen, J. Pennington, M. Kostenko, R. Gigova, *Historic Ukrainian cathedral badly damaged in Russian strikes*, <https://edition.cnn.com/2023/07/23/world/odesa-attacks-saturday-russia-ukraine-intl-hnk/index.html> [accessed: 24.07.2023]

²¹ M. Kostenko, A. Goodwin, *No bathing during air raids - but beaches in southern Ukraine port reopen*, <https://edition.cnn.com/2023/08/12/europe/odesa-beaches-reopen-ukraine-intl/index.html>, [access: 31.08.2023].

openness to the successful accession of Ukraine is an essential, integral part of the European security system.

Firstly, being under geopolitical pressure from Russia and in a 'dilemma of security', Ukraine has changed its 'geopolitical conjecture of choice' from bipolar (EU–post-Soviet countries) into a strategic course of integration into the EU and NATO.²² Today, the geopolitical and geoeconomic development of Ukraine–EU–NATO relations seems the most transparent in its 30-year history and traditions, thanks to the goals set out in the Preamble of the Constitution of Ukraine. Secondly, EU regulations and Ukraine laws on sustainable development have common goals. Finally, there are positive developments in approximating Ukrainian legislation to the EU regulations. Additionally, Ukrainian legislation is influenced by the European Union, which is a positive effect of legal reception.²³

Modernising Ukraine–EU projects has several benefits:

- minimising threats of information attacks and propaganda of the Russian Federation;
- standardising documents by means of digitisation;
- eliminating Soviet laws and legal acts, which is the role of legislative power, making reforms more socially orientated, which in turn is the role of executive power and specifying the functions of state and local authorities for achieving decentralisation goals; and
- integrating regulations of strategic environmental assessment, etc.

Therefore, such benefits may occur only if the central and municipal authorities undertake environmental protection measures in Ukraine in three dimensions:

- environmental protection and preventing the pollution of the environment during the war,
- private–public cooperation under martial law and
- community leadership and mass media contacts.

²² С.В. Глебов, *Зовнішньополітична двозначність України в контексті геополітичної кон'юнктури вибору*, „Правова держава” 2007, № 9, с. 235 [Glebov S.V., *Zovnišn'opolitična dvoznačnist' Ukraïni v konteksti geopolitičnoï kon'unkturi vïboru*] [Duality of the Ukraine's Foreign Policy in the Context of the Geopolitical Conjecture], *Правова держава* [Pravova deržava] [Constitutional State] 2007, No. 9, p. 235.

²³ Review of European Union Law and EU legal approximation developments and analyses, https://eu-ua.kmu.gov.ua/sites/default/files/inline/files/eu_law_and_legal_approximation_review_for_ukraine_-_a4u_ii_newsletter_no_61.pdf [access: 31.08.2023].

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