FORMS OF IMPLEMENTATION OF INTERNATIONAL TREATY NORMS

Nataliya HALETSKA,
PhD Candidate, Department of Theory and Philosophy of Law of Law Faculty,
Lviv National University named after Ivan Franko

Summary

In this article the author analyses forms of implementation of international treaty norms by European states. Firstly, the author defines the notion «forms of implementation», secondly deals with the typology of forms of international treaty norms implementation (automatic integration, procedural incorporation and substantive incorporation) and finally discusses factors influencing the choice of the state of a particular form of national implementation. The author uses Constitutions of European states as the basis of its analysis.

Key words: national implementation, form of national implementation, automatic integration, procedural incorporation, substantive incorporation.

Аннотация

В статье автор проводит теоретическое исследование форм имплементации норм международных договоров европейскими странами. Во-первых, автор определяет понятие «формы имплементации», во-вторых, анализирует типологию форм имплементации норм международного договора (автоматическая интеграция, процедурная инкорпорация, материальная инкорпорация), наконец, рассматриваются факторы, влияющие на выбор конкретной формы имплементации на национальном уровне. Автор использует Конституции европейских государств как основу для анализа.

Ключевые слова: национальная имплементация, форма национальной имплементации, автоматическая интеграция, процедурная инкорпорация, материальная инкорпорация).

Overview of the topic. This paper aims to analyze the legal phenomenon of forms of implementation, classify such forms and name possible factors influencing the choice of a particular form of implementation by a state. The author analyses constitutions of European states with respect to the issue of forms of implementation. The author argues that the majority of European states tend to regulate this matter at the constitutional level. Furthermore, there are certain similarities between the regulations, which allow speaking about the few types of forms of national implementation.

Importance of the researched topic. International treaties are concluded between states in order to cooperate on certain matters, to establish mutually beneficial rules, international organizations and procedures. Except negotiations, international treaty law can be considered as the only instrument of peaceful conflict resolution. Without any doubt compliance with international treaties is a crucial moment, since without compliance the conclusion of treaties would be senseless. The compliance with international treaties to a large extent depends on the implementation of international treaties into the national legislation. Having analyzed forms of implementation adopted by European states the author argues that there are several types of such forms, that different forms of implementation may potentially lead to a different result of implementation and the choice of a specific form of implementation may be influenced by different factors.

State of research. This topic partially has been addressed in works of many scholars, specifically, V.G. Butkevych, P.M. Eisemann, A.S. Gaverdovskyy, J. Jackson, F. Kunig, B.I. Osminin, R.A. Mullerson, P.M. Rabinovych, N.M. Radanovych, E.T. Usenko, S.V. Chernychenko, V.S. Vereshchetin and many others. Council of Europe has published an interesting research on this matter under the title «Treaty Making – Expression of Consent by States to be Bound by a Treaty» in 2001. However, the up to date research does not address the issue of factors influencing the choice of a specific form of implementation and how forms of implementation affect the result of the implementation.

The purpose of the article is to analyze types of forms of international treaty implementation in European states, define factors influencing the adoption of a specific form or forms of international treaty implementation by a particular state and determine how forms of implementation affect the result of the implementation.

Main material. 1. Terminology Analysis. International treaties do not provide a definition of the notion 'forms of implementation' or any guidance on the implementation process. The result of the implementation is more important, in particular the compliance with international treaties. Therefore, Article 26 of the Vienna Convention on the Law of International Treaties provides that «Every treaty in force is binding upon the parties to it and must be performed by them in good faith» [12]. Article 27 provides that «A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty» [12].

However, international dispute settlement bodies in its case law may mention particular forms of implementation. For instance, the European Court of Human Right in its decision as of January 18, 1978 in the case «Ireland vs. United Kingdom» stated that «by substituting the words «shall secure» for the words «undertake to secure» in the text of Article 1 (art. 1), the drafters of the Convention also intended to make it clear that the rights and freedoms set out in Section I would be directly secured to anyone within the jurisdiction of the Contracting States. That intention finds a particularly faithful reflection in those instances where the Convention has been incorporated into domestic law» [1]. However, in a different case ECHR has stated that «As noted in the judgment of 9 February 1967 in the «Belgian Linguistic» case, the main purpose of the Convention is «to lay down certain international standards to be observed by the Contracting States in their relations with persons under their jurisdiction.

This does not mean that absolute uniformity is required and, indeed, since the Contracting States remain free to choose the measures which they consider appropriate, the Court cannot be oblivious of the substantive or procedural features of their respective domestic laws» [2]. Hence, international dispute settlement bodies, like ECHR may direct states, but they do not define the particular way of implementation.

The notion «forms of implementation» is usually not addressed in national constitutions as well. Hence, there is no a universally established or regionally widespread terminology with respect to naming the legal phenomenon of establishing a link between international law and national law. The doctrine does not have a single opinion on this matter as well. Sometimes this phenomenon is entitled «forms of incorporation» [3, p. 88]. Sometimes it is called «methods by which treaties become part of international law» [4, p. 67].

By applying linguistic method the author argues that the notion «forms of implementation» is the most appropriate to describe the legal phenomenon of creating a link between international law and national law. Particularly, the author defines the notion «national implementation» and the notion «forms/ways/methods» separately and then provides a single definition. Specifically, the author believes that the notion 'national implementation' shall be defined as «the process of legal realization of international legal norms on the territory of the state, which is realized by legislative, organizational enforcement and interpretation activities» [5, p. 12]. The notion «way» can be defined as a particular activity or system of activities allowing doing something, realizing something and achieving something. The notion «form» can be defined as an outer image of something: type, construction etc. The notion 'method' may be defined as the way of learning about phenomena; process of combination of processes used in a particular sphere [6]. The notion «way» does not precisely address external form of national implementation. Similar drawback is attributable to the notion «method». The notion «form» seems to be the most appropriate for defining external effect of national implementation. Summing up, the aim of national implementation is to establish a link between international law and national law; such link may have different form depending on the state and the notion «national implementation» is considered as the most precise in describing this legal phenomenon.

2. Classification of Forms of Implementation in European States. Despite each state has a unique legal system and a unique set of rules governing national implementation, it is possible to categorize forms of national implementation based on certain similarities. The author analyses constitutions of European states with respect to the form of implementation. The author's research has certain limitations: in particular, it is limited to constitutions of European states. The author analyzes forms of implementation of international treaty norms, which means that the national implementation of customary international law is not addressed. Based on the preliminary outcomes of the research the author uses the following typology of forms of national implementation. This categorization was originally developed by the Committee of Legal Advisers on Public International Law («CAHDI») of the Council of Europe in 2001 [3, p. 88-92]. All forms of national implementation can be divided into three types: a) automatic integration. This form of national implementation provides that international treaties become part of the domestic legal order automatically. Hence, there is no need to adopt special laws of by-laws to implement international treaties; b) procedural incorporation. This form of national implementation provides that international treaties are implemented after the publication of a law or a by-law. However, such laws or by-laws are of procedural nature and do not materially change international treaties; c) substantive incorporation. This form of national implementation provides that international treaties are implemented after the adoption of a law or a by-law. Such laws or by-laws adapt international treaties to domestic legal order.

The author suggests using the following questionnaire for analyzing provisions of constitutions of European states as to the form of national implementation:

1. Whether the constitution of the state specifies the place of international treaty in the legal order of a particular state. Preliminary research shows that constitutions of many European states address the matter of the relationship between international law and national law by emphasizing the supremacy of international law. However, the form of national implementation is usually not addressed at the constitutional level.

2. Whether it is necessary to undertake additional actions for the implementation of international treaties. If yes, which, for instance: a) adoption of a law or a similar act; b) adoption of an act, which is subordinate to the law; c) publication the text of an international treaty into an official gazette. The second question is crucial in differentiating between different types of national implementation. Specifically, when the national legislation does not require adoption of additional acts (laws or by-laws) and/or constitution specifies that international treaties become part of the domestic legal order, such state may be considered as using automatic integration. When the state requires adoption of laws or by-laws, which can materially change provisions of international treaties, substantive incorporation is used. Finally, when the state requires publication of international treaties in the form of law or by-law, procedural incorporation takes place. However, it is worth noting that several forms of national implementation may co-exist within one state. Secondly, some states may use a mixed form of national implementation, which combines features of several forms.

3. In case the law or other act is adopted: whether the text of the international treaty is fully incorporated into such act. The third question aims to draw a line between substantive incorporation and procedural incorporation. Procedural incorporation takes place, when the law of by-law contains the text of an international treaty without any changes and it is officially published. Such law basically shall inform the general public about the content of the international treaty. In contrast, material incorporation takes place, when the law or by-law is adopted with the aim to regulate certain relations and bring the domestic legal order into conformity with international obligations undertaken within certain treaty.

4. Whether there are few forms of national implementation depending on the type of international treaties. The fourth

question shall address the combination of several forms of national implementation within one state.

Overall, it is worth mentioning that the typology of forms of national implementation is rather vague. For example, states with automatic integration may adopt internal laws bringing into compliance their national legislation with international treaties. This may be done in order to avoid conflicts between international treaty norm and national legislation. Such approach brings automatic integration closer to the substantive incorporation. Secondly, many, if not majority of European states require publication of international treaties in official gazettes for purposes of transparency, even states with automatic integration (e. g. Ukraine). It is hard to tell, whether such approach brings automatic integration closer towards formal incorporation.

3. Causes for choosing a particular form of implementation. Forms of national implementation in each particular state are adopted as a result of influence by many factors. The combination of factors is the result of historical development of each particular state. In author's opinion, the research of factors causing the choice of the specific form of national implementation may help to better understand peculiarities of implementation activities in the particular state. Having analyzed constitutions of European states, the author suggests outlining the following factors having an effect on the choice of the form of national implementation. It is worth pointing out that the below-mentioned list of factors is not exhaustive and each factor may have different effect in different states.

In author's opinion following circumstances may be considered as factors influencing the choice of the form of national implementation: a) internal procedure of approval, accession to the international treaty; b) content of international treaty obligations; c) providing direct effect to provision of the international treaty; d) similarity between provisions of the international treaty and national legislation of the implementing state; e) historical reasons, participation in international organizations (customs union etc.).

Each state provides in its national legislation (in the majority of states, at the level of constitution) an internal procedure of approval, accession to the international treaty. With respect to influence on the choice of the form of national implementation it is important, whether the parliament participates in the decision-making regarding approval of the international treaty. If the parliament does not participate in approving the international treaty, then the parliament is likely to be more active at the stage of implementation [7, p. 315]. This trend is visible in the United Kingdom, Ireland, where provisions of international treaties are implemented by adopting internal legislative acts. At the same time the following options are possible: 1) internal legislative acts are adopted without a reference to the international treaty, which has caused the adoption of a law; 2) internal legislative acts are adopted with a reference to the text of an international treaty; 3) in case the state can comply with its obligations under an international treaty without the adoption of the internal legislative act, then, the implementing act is missing [3, p. 93]. In the latest case it is difficult to differentiate between formal and substantive incorporation. Thus, the level of parliament's involvement into the process of approving execution of international treaties may have an effect on the choice of the form of national implementation.

Depending on the nature of international obligations, which are specified in the international treaty, the state may use different form of national implementation [8]. This factor originates from the division of treaties into self-executing and not self-executing. Self-executing treaties are more likely to be implemented via automatic integration and not self-executing international treaties are more likely to be implemented via substantive incorporation. Some states in its legislation divide international treaties into self-executing and not self-executing. For example, Article 5.3 of the Law of Russian Federation «On the International Treaties» provides «provisions of officially published international treaties of the Russian Federation which do not require the adoption of internal implementing acts, shall be directly applicable on the territory of the Russian Federation. Appropriate legal acts shall be adopted for the enforcement of other provisions of international treaties» [11]. Thus, Russian Federation divides all provisions of international treaties into two groups: self-executing and not self-executing at the legislative level. The application of this legislative division is problematic, since there are no criteria which can help to distribute all provisions of international treaties between these two categories. Though, it is clear that the international treaty is not self-executing, in case there is a provision in such international treaty mandating the state to adopt implementing legislation [8]. The Constitutional Court of the Russian Federation in one of its decisions quotes Article 5.3 of the Law of Russian Federation «On the International Treaties» and refers to the International Covenant on Economic, Social and Cultural Rights and the Convention of International Labor Organization № 111, which barely can be considered as self-executing international treaties due to their program nature. Such acts contain provisions as to the adoption of legislative acts as well [8]. Summing up, the division into self-executing and not self-executing international treaties can be different for each states, as it on its own determines, whether the treaty is self-executing or not. Consequently, the respective form of national implementation is followed by the state. Hence, states that maintain division into self-executing and not self-executing use few forms of national implementation: automatic integration and substantive incorporation.

The third factor provides that a choice of the form of national implementation is made based on the fact, whether such form makes direct effect of the international treaty possible. The direct effect shall mean that the provision of the international treaty may be applied by physical persons, legal entities in the particular county directly. This means that the direct application of international treaty provisions does not require a legislative act. Automatic integration and formal incorporation allow direct effect of international treaty provisions. In contrast, substantive incorporation does not make possible direct effect of international treaty provisions, as provisions of international treaties will be «transplanted» into domestic legislation. Domestic implementing legislation will substitute international treaty provisions. It is worth pointing out, that substantive incorporation allows material

«adaptation» and «accommodation» of international treaty provisions in accordance with the vision of a particular state. This can materially impact the original content of international treaty provisions. For example, some Soviet scholars have emphasized that international treaties cannot have direct effect and there is an absolute necessity in the substantive incorporation. For instance, «state bodies, legal entities and physical persons as subject of domestic legal order shall be governed by the provisions of international treaties not directly but indirectly through legislative acts of the state» [9, p. 67]. Thus, substantive incorporation was a form of national implementation in Soviet states. The danger of this approach is that the state may effectively undertake international obligations, but these international obligations would be meaningless inside the state without effective mechanisms of national implementation.

Potentially, the choice of the form of national implementation depends on the similarity between provisions of the international treaty and domestic legislation. R.A. Mullerson demonstrates the potential effect of this factor by stating «the supremacy of international law over domestic laws is de-facto proclaimed. In fact, there is supremacy of the international law created in accordance with main principles of bourgeois law over domestic law» [10, p. 16]. Despite potential ideological bias, the rationale of this statement may be as follows. Domestic law of states that have the biggest impact on the creating of international treaty provisions is more likely to be similar with such provisions of international treaties. Accordingly, when provisions of international treaties correspond with domestic law, the state does not need to «adapt» its domestic law and it should be easier to apply direct effect. Thus, automatic integration of formal incorporation can be used as the form of national implementation. In the contrary situation, states may try to «soften» the effect of provisions of international treaties and avoid conflicts with the provisions of international treaties by choosing the most appropriate way of its implementation and using substantive incorporation.

With respect to the participation in unions of states, it is worth mentioning that being a participant in the particular union for a prolonged period of time can affect the formation of the legal order in its entirety and the choice of the form of national implementation in particular. The same applies to states being part of one empire/commonwealth etc. For example, Ireland and some other states (Israel, Malta, Australia, Canada) having close politic, economic and other ties with the United Kingdom follow Westminster tradition and applies substantive incorporation [3, p. 93]. Similarly, the majority of states formerly having ties with the USSR have chosen automatic integration as the form of national implementation. The accession of the state to the union of states affects the choice of the national implementation form as well. For example, Czech Republic has amended its Constitution before acceding to the European Union. On October 18, 2001 the Constitution of Czech Republic was amended by the so-called «Euro-amendment», which has entered into force on June 1, 2002. Specifically, Article 10 of the Czech Constitution was amended and the direct effect of international treaties was spread to all international that have been promulgated and approved by the parliament. Before the «Euro-amendment» the direct effect applied only to international treaties dealing with human rights.

Having characterized factors having an effect on the form of national implementation, such factors may be grouped into external (factors existing at the international level and internal (factors evolving as a result of internal processes). Internal factors may comprise internal procedure of approval, accession to the international treaty; providing direct effect to provision of the international treaty; similarity between provisions of the international treaty and national legislation of the implementing state; historical reasons, participation in international organizations (customs union etc.). The content of international treaty obligations may be considered as an external factor.

Conclusions. The author argues that the notion «forms of national implementation» is the most appropriate to describe the legal phenomenon of the form of establishing a link between international treaty and domestic law. The author argues that there could be some common for many states reasons for choosing the particular form of national implementation, in particular internal factors, such as internal procedure of approval, accession to the international treaty; providing direct effect to provision of the international treaty; similarity between provisions of the international treaty and national legislation of the implementing state; historical reasons, participation in international organizations (customs union etc.) and external, such as the content of international treaty obligations.

List of reference links:

1. ECHR, Case of Ireland v. The United Kingdom // [Electronic resource]. – Access mode : http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57506#{%22itemid%22:[%22001-57506%22]}.

2. ECHR, Case of the Sunday Times v. The United Kingdom // [Electronic resource]. – Access mode : http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57584#{%22itemid%22:[%22001-57584%22]}.

3. Council of Europe, Treaty Making – Expression of Consent by States to Be Bound by a Treaty. – Netherlands : Kluwer Law International, 2001. – 349 p.

4. Trone J., Federal Constitutions and International Relations. – University of Queensland Press, 2001. – 164 p.

5. Рабінович П.М., Раданович Н.М., Європейська конвенція з прав людини: проблеми національної імплементації (загальнотеоретичні аспекти) / редкол. : П.М. Рабінович (гол. ред.) та ін. – Серія 1. Дослідження та реферати. – Вип. 4. – Львів : Астрон, 2002. – 192 с.

6. Академічний тлумачний словник ; «Словник української мови» в 11 томах (1970–1980) // [Електронний ресурс]. – Режим доступу : http://sum.in.ua/s/forma.

7. Jackson J., Status of Treaties in Domestic Legal Systems // A Policy Analysis : American Journal of International Law. – Vol. 86. – Issue 2. – P. 310−340.

8. Danilenko G.M., Implementation of International law in CIS States // Theory and Practice. – EJIL 10. – 1999. – P. 51−69. – [Electronic resource]. – Access mode : http://ejil.oxfordjournals.org/content/10/1/51.full.pdf.

9. Гавердовский А.С. Имплементация норм международного права. – К. : Вища школа, 1980. – 320 с.

10. Мюллерсон Р.А. Соотношение международного и национального права. – М. : Международные отношения, 1982. – 136 с.

11. Федеральный закон от 15.07.1995 г. № 101-ФЗ «О международных договорах Российской Федерации» (ред. от 25.12.2012 г.).

12. Vienna Convention on the Law of International Treaties // [Electronic resource]. – Access mode : https://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf.

ИВАН КРЕВЕЦКИЙ – ПРЕДСТАВИТЕЛЬ «ГОСУДАРСТВЕННОГО НАПРАВЛЕНИЯ» В УКРАИНСКОЙ ИСТОРИОГРАФИИ

Наталия ГИРНА,
старший преподаватель кафедры украиноведения
Львовского национального медицинского университета имени Данила Галицкого

Summary

The article analyzes scientific publications of I. Krevetskij, which are the base of a new historiographical direction in Ukrainian historical science – Lviv state school. Its representatives considered the Galicia-Volyn Principality as the first form of Ukrainian statehood, and national liberation processes of XIX–XX centuries, as the form search of lost Ukrainian state. Belong to the subject of this scientific article the reasons for formation a new state historical school in Lviv and I. Krevetskij person as the famous historian of the Revolution 1848–1849 years in Galicia. The publication investigated most significant works of I. Krevetskij defining its scientific method and vision of formation of Ukrainian statehood.

Key words: I. Krevetskij, state historical school, historiographical researches, Galicia.

Аннотация

В статье анализируются научные публикации И. Кревецкого, которые стали основанием нового историографического направления в украинской исторической науке – львовской государственной исторической школы. Как известно, ее представители рассматривали Галицко-Волынское княжество как первую форму украинской государственности, а национально-освободительные процессы XIX–XX вв. – как форму поиска утраченного украинского государства. Предметом исследования также являются причины, повлиявшие на формирование «государственного направления» во львовской исторической школе, в частности серьезное изучение И. Кревецким революционных событий 1848–1849 гг. в Галичине – так называемой «Весны народов», и его видение целостности украинского народа в контексте национально-освободительного движения. Анализируются наиболее значительные работы И. Кревецкого, определяющие его научный метод и видение формирования украинской государственности.

Ключевые слова: И. Кревецкий, «государственная историческая школа», историографические исследования, Галичина.

Постановка проблемы. Современное изучение истории Украины требует детального анализа научного наследия исследователей, сыгравших исключительно важную роль в становлении украинской историографии. К их числу принадлежит историк Иван Кревецкий (1883−1940), который был среди основателей «государственного направления» в украинской историографии. Именно принадлежность ученого ко львовской исторической школе, которая рассматривала исторический процесс как проявление активной деятельности национальной элиты в формировании государственных институтов на примере исторического развития Галичины конца XVIII – начала XIX в. и ее предыдущих этапов, способствовала выработке нового направления в исторической науке, получившего названия «государственной школы».

Состояние исследования. В историографии отсутствуют специальные работы, которые рассматривали бы деятельность И. Кревецкого в контексте формирования им «государственной школы». Однако отдельные аспекты деятельности ученого, библиографа и общественного деятеля нашли свое отражение в работах Ф. Стеблия [29; 30], публикациях В. Качкана, У. Яворской, И. Кихтан и других. Исследователи обращали внимание на изучение И. Кревецким истории Украины и Галичины, а не на его библиографическую деятельность.

Однако важные теоретические и научно-методичные проблемы, поднимавшиеся исследователем, оказались нерешенными в современных научных изысканиях.

Цель статьи состоит в комплексном анализе научно-критических взглядов И. Кревецкого как представи-