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RECODIFICATION OF CIVIL LEGISLATION OF UKRAINE: A PARADIGM OF IMPROVEMENT

Kharytonov E. O., Kharytonova O. I.

INTRODUCTION

Ukraine's course for integration with the European Community determins the adaptation of domestic civil law to the European concept of private law.

As the realization of these tasks is impossible without proper theoretical support, it is important to study the ways of improving the regulation of civil relations. Recently, several conferences have been held in Ukraine on the issues of updating civil law in the context of its European integration aspirations (Kharkiv, 2019; Odesa, 2019). Relevant issues on the Web are being actively discussed[1]. However, the problem of recodification as a legal category was practically not investigated. Only in some cases was it mentioned in the context of the study of problems of codification of legislation, its modernization, etc.[2]

At the same time, the conceptual problems of recodification, as a form of improvement of Ukrainian civil law, remain out of the attention of legal scholars. The articles contained in the Web of Science generally refer to the problems of recoding national civil legislation, which differs from those in Ukraine.

The purpose of the article is to characterize recodification as a paradigm for improvement of Ukrainian civil law and to determine the directions of its implementation.

The methodology of the study was determined by the fact that it was focused on the problems that need to be voiced in the process of preparation of the recoding and its implementation. This led to the use of historical, dogmatic methods, the method comparative analysis, as well as to determine the logic of presentation of research material: from the general characteristics

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[1] Спасибо-Фатєєва І.В. З приводу концепції щодо модернізації Цивільного кодексу України (рекодифікації). URL: https://sud.ua/ru/news/blog/157375-z-privodu-kontseptsiyi-schodo-modernizatsiyi-tsivilnogo-kodeksu-ukrayini-rekodifikatsiyi; Спасибо-Фатєєва І.В. Щодо реформування окремих інститутів цивільного права. URL: https://sud.ua/ru/news/publication/157461-schodo-reformuvannya-okremikh-institutiv-tsivilnogo-prava

[2] Кабрияк Р. Кодификации / Пер.с фр. Л.В. Головко. М.: Статут, 2007. 476 с.; Музика Л.А. Що є актуальним для сучасного цивільного законодавства України: модернізація, системне оновлення чи рекодифікація? *Науковий вісник Львівського державного університету внутрішніх справ. Серія юридична.* 2015. Вип. 1. С. 145–154; Довгерт А. Рекодифікація Цивільного кодексу України: основні чинники і передумови для старту. *Право України.* 2019. № 1. С. 27–41.

of forms of systematization of civil law – through the experience of European codifications and recodifications – to the analysis of problems of recodification of Ukrainian civil legislation.

According to this logic, the differences between codifications and recodifications are considered and it is proved that codifications take place when there are significant changes in society that are not in line with the outdated concept of legislation. Instead, recodification is possible in cases where the concept of civil law corresponds with the challenges of time and the codes created under it are “passionary”.

1. Forms of civil legislation systematization

Improvement of legislation implies simultaneous systematization of legislative acts, that is, their ordering for the purpose of instrumental use, improvement, qualitative change, supplementation, scientific treatment, forecasting of social consequences of regulatory influence on public relations.

Traditionally, there are three main types of systematization: incorporation, consolidation, and codification, of which codification is the most important. Codification is a legal form of legal acts systematization, which is associated with the adoption of new ones, with the change of obsolete regulations, with their availability and more effective application[3].

We do not present here other points of view regarding the forms of systematization and do not analyze the question of their correlation since their analysis goes beyond the issues of interest to us. Let us note only that it seems to be the right position that codification is the highest step of systematization[4].

At the same time, the problem of distinguishing of such concepts as codification, modernization, systematic updating, and recoding of civil legislation is considered urgent. Among them, over the last twenty years, the attention of foreign and domestic legal experts has been increasingly drawn to recodification, which is characterized as a legislative activity, a significant change in the structure and scope of legal regulation that is included in the source code (the group of codes), taking into account the practice or its (their) use, and change (including additions or exclusions) of the fundamental and other most important provisions of the code (the group of codes)[5].

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[3] Общетеоретическая юриспруденция: учебный курс: учебник / под ред. Ю.Н. Оборотова. Одесса : Феникс, 2011. С. 137–139.; Гетьман Є.А. Кодифікація як форма систематизації законодавства України. *Пробл. законності*. 2008. Вип. 99. С. 228–236.

[4] Музика Л. А. Окремі питання кодифікації: цивільно-правовий аспект. *Наука і правоохорона*. 2014. № 2. С. 268–274. URL: http://nbuv.gov.ua/UJRN/Nip_2014_2_44.

[5] Музика Л. А. Що є актуальним для сучасного цивільного законодавства України: модернізація, системне оновлення чи рекодифікація? *Науковий вісник Львівського державного університету внутрішніх справ. Серія юридична.* 2015. Вип.1. С. 147–149.

Although the proposed characteristic includes such important features of recodification as the existence of an "original code", "substantial modification of the structure and scope of legal regulation", "taking into account the practice of its application of the original code", it does not sufficiently distinguish codification and recodification.

In this context, we recall the point of view that the development of codification is subject to a certain cycle, which has its own internal logic. According to Cabriac, schematically such a cycle can be divided into four phases: the period of creation of codes, their period of validity, the period of crisis, and the period of reforms[6].

In general, one can agree with this (noting, as appropriate, that a similar scheme was proposed earlier to explain the repetitive nature of the receptions of Roman private law[7]). At the same time, it is doubtful that the actual identification of the "reform period" with "recodification" is justified, for which Cabriac, characterizing the mentioned period, states: "recodification always means something other than codification – every recodification can be done only with the current code…[8]"

This approach gives the impression that every "reform period" causes improvements to the current code, which is a "recodification".

However, the "reform period" can be both the final phase of codification (recodification) and the first phase/period of "preparation for new codification". The attribution of it to the first or second case depends, first and foremost, on the circumstances that Cabriac himself qualifies as conditions for the "birth and development of codification": a social need for legal certainty and a strong political will aimed at codification[9].

However, with the clarification that "social needs" is a generalizing concept, encompassing several "creative" social, anthropological and other factors, among which may be: change of social order, ideology, political regime, the concept of legislation, legal doctrines, etc., which form the "critical mass" of a radical reform of the system of law and legislation (codifications). If, however, such "creative" factors are absent and the current code has a stock of "passionarity", then the legislation can be updated within the limits of recodifications.

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[6] Кабрияк Р. Кодификации / Пер.с фр. Л.В. Головко. М.: Статут, 2007. С. 113.

[7] Харитонов Є.О. Рецепція римського приватного права (історико-правові та теоретичні аспекти). Одеса: Одес. ун-т, 1997. 51 с.; Харитонов Є.О. Концепція циклічного розвитку цивілізацій як методологічна основа рецепції римського приватного права. *Актуальні проблеми держави і права*. 1998. № 4. С. 48–54.

[8] Кабрияк Р. Кодификации / Пер.с фр. Л.В. Головко. М.: Статут, 2007. С. 201

[9] Кабрияк Р. Вказ.твір. С. 113-114.

We call the code "passionary" if it is not the result of simply the systematization and modernization of accumulated legislative material, but was created on a fundamentally new concept of law. Passionary codes are a realization of a concept that is significantly different from what existed before. They make significant changes to the level of regulation of a certain type of public relations, transferring it into a new quality, and thus affecting the social relations that are regulated. Often, they can serve as a model for lawmaking in other countries, inspiring developers to take new decisions (and sometimes to borrow directly). The French Civil Code (Napoleon Code), the General Civil Code of Austria (ABGB), the Civil Code of the Province of Quebec, the Netherlands Code are examples of "Passionary Codes".

The Civil Code of Ukraine can be classified as an act of legislation of the "passionary type". It was created on a new conceptual basis as a code of civil society, the rule of law and a code of private law, taking into account current European trends and experience[10].

Speaking of the "passionarity" of civil codes, we should also note that this feature is not a purely legal category, but is based on the requirements of the perspective of the methodological (ideological) basis of the Code. In other words, the methodological basis of codification must also have its stock of "passionarity", conditioned by the existence of an appropriate worldview basis, the nature of social values, the upbringing of an appropriate level of legal culture, legality, justice, understanding, etc.

The provisions outlined above, using the technique from the popular work cited above, by Cabriac, illustrate with several examples the codifications and recodifications of civil law, including the "source material" and the result of the latter.

2. Experience in classical recoding of civil law

The most radical way to improve civil law is to formulate a modern concept that is based on more sophisticated principles that meet the challenge of time and, consequently, codify it.

The "Great European codifications", which took place mainly during the nineteenth and early twentieth centuries, are of considerable interest in terms of the use of their experience, since they were carried out in circumstances relevant to Ukraine: combining new revolutionary ideas with the "old" law, which led to the emergence of an "intermediate law", which became the beginning for the creation of a new Code (France); the need for adequate legislative regulation against the backdrop of economic liberalism and the

[10] Харитонов Є.О. Новий Цивільний кодекс України як кодекс "пасіонарного" типу. *Вісник Хмельницького інституту регіонального управління і права.* 2002. № 2. С. 16–20.

conviction that overall prosperity will grow by itself unless the development of free enterprise is hampered by state interference, burdened, however, by attempts to pursue social policy within a paternalistic way of thinking (Germany); the need for national alienation from the empire burdened by the idea of universal imperial regulation of civil relations, and the search for variants of the concept of civil law to select more liberal, "private" models for imitation, without yielding to the interests of trade (Switzerland); overcoming the confusion of law and particularism of the right-mindedness of residents of different parts of the state (Austria).

However, because even a good concept of civil law does not always guarantee a perfect result, the problem of further improvement/updating of the old new legislation sooner or later arises. Then the concept of "recodification" as a significant revision of existing codes emerges, to adapt to the current needs of today.

Useful here is the experience of the Eastern Roman Empire (Byzantium), which can be said to lead the way in the recoding of civil law. It should be noted that the role of law in the Eastern Roman Empire (Byzantine society) was more "down to earth" than in ancient Rome, with which it is genetically linked. Here, the law does not function as an element of public consciousness. Byzantines are not usually interested in the philosophical basis of law. More important to them is the socio-political aspect – law plays the role of the political and social regulator in a state that concentrates lawmaking in the hands of the central government.

A feature of the Byzantine (Greco-Roman) system of law is also the emergence of systematic collections – codes of laws that were not known to the classical Roman law of the Antiquity. At the end of the 3rd century, the Gregorian Code appeared, followed by the Germogenian) Code, which were informal collections. During the reign of Emperor Theodosius II, an official collection of imperial constitutions was created, supplemented with excerpts from the works of classical lawyers (Theodosius Code). Overall, this Code was a comprehensive piece of legislation that covered both private and public law.

The first, and in fact, the only codification of the Byzantine legislation was the creation of the Justinian Code. On April 7, 529, Justinian I approved the Code, which came into force on April 16 of that year. As the practice of applying the Code revealed many shortcomings, a new commission, chaired by the Tribonian, was created, which revised the text of the Code and incorporated into it many new constitutions of Justinian I. The Code of the Second Edition came into force on December 29, 534. Justinian's Code is divided into 12 books. Books from 2 to 8 are assigned to private law, the 9-th is devoted to criminal law, 10–12-th – to administrative law.

The Cordi constitution allowed to Justinian law-making on issues that were thematically included in the Code outline: “if suddenly the changing nature of things creates something that needs to be approved by the emperor, new constitutions will be issued (Novella constitutions).”

Life has proved the need to supplement and interpret the rules of the Second Edition of the Code. Therefore, in the following years, the reign of Justinian I (up to 565) was issued about 170 short stories, mainly on public and church law. Only a few novelties concerned private law spheres. Rest of them concerned marital family and hereditary relations. As the Novels were not subject to Justinian’s systematization but had the character of current lawmaking, they could be considered a continuation of the Code. We think that this is how the material for the third edition of the Code (more precisely, “recodification”) was formed, which Justinian never did.

Although the proportion of private law in the Code of Justinian was considerable, Digesta (a collection of fragments of the work of Roman jurists) and the Institution (a textbook of Roman law, which was given the force of law) served more as material for subsequent recodifications.

In our view, a significant factor in recodification was the mismatch between the level of legal mentality and the legal consciousness of the Romans and Byzantines. Although Justinian I was very proud of the “sacred temple of Roman justice” he had created, but the collections he had created were of little use for practice because they were too “qualified” for jurists of the time. Therefore, there is a need to prepare simpler collections, more convenient for practical needs. There is a time of “recodifications” – a reworking of existing codified legislative acts in order to adapt them to the current needs of today. Their characteristic features were: vulgarization of law and its adaptation to practical daily needs, “publicization” of civil relations, Christianization of law.

In 740 (or in 726), “Ekloga ton nomon” or “Ekloga Leonis”, commonly referred to as “Eclogue”, appears[11]. It consisted of 18 titles covering issues of matrimonial property law, gift-giving, inheritance law, guardianship and custody, slave status, sale, loan, emphitheusis, hiring, testimony, property relations of stratiotes and other officials, punishment for crimes, martial law. The placement of the material is marked by a departure from a number of principles of Roman private law, which is reflected, in particular, in the refusal of classification on a formal principle (personal law, property law, lawsuits), and its replacement by another, more specific and simplified principle, according to which “facts are located the way they are represented

[11] Эклога. Византийский законодательный свод УШ века. Византийская Книга Эпарха. Рязань, 2006. С. 49–90. Коментар до Еклоги Є.Е. Ліпшиць див.: Вказ.твір. С. 9–48, 91–226.

in human life, starting with betrothal and marriage, where you can find the elements of all these rights – personal law, property law, lawsuits.” In the content of Eclogue, there is a marked desire to adapt the Roman law to the needs of modern times, to move away from formalism, rituals, and to give “publicity” to private torts. It is the desire to expand the public sphere (through state or religious intervention) that is the most characteristic feature of the collection.

The imperfection of Eclogues’ norms led to attempts to improve it, partly returning to the principles of “Justinian law”. Therefore, in the middle of the ninth century, a collection of Private Extended Eclogue was created, which, in most cases, relies on Justinian’s legislation. It was an act of transitional type – a kind of a “bridge” between pre-classical and classical Byzantine law.

At the end of the IX century, Emperor Vasily the Macedonian modified the Justinian’s Collection for its improvement, unification, and modernization. The works were continued and completed already during the reign of his son – Emperor Leo VI the Wise at the beginning of the tenth century. The merit of these emperors of the Macedonian dynasty is that they understood the need for change, embraced the idea of legal reform and supported it with the authority of the imperial power.

A grand program of “purification of ancient laws” was developed, which aimed not only to remove the “layers” of the law of the Isaurian dynasty but also to revise the rules of Justinian’s compilation from their possible application in new conditions, the elimination of contradictions, Hellenization, etc. It was about the replacement of the Latin Corps of Justinian with the Greek Code of Laws, the creation of his own “Greek Justinian”[12]. This can not be called “codification” (because it is about working out existing codes), but it may be – “recodification”.

This program envisaged a minimum program and a maximum program.

The minimum program envisaged the creation (in parallel with the implementation of the maximum program, designed for decades) of a compact and publicly available collection of laws that would contain the materials needed by practitioners – judges, lawyers, etc. According to this program, the commission, headed by Patriarch Totti, created the collection “Isagoge” (“Introduction”), which traditionally covers Byzantium procedural, private and criminal law. In February 907, Emperor Leo VI took the opportunity to reconsider the Isagoge, and was instead issued a Prohiron, devoid of the restrictions on imperial sovereignty that saturated the Isagoge. Leo VI wrote the preface to Prohiron by himself. First outlining the importance of law, justice, and legal education, he formulated Prokhoron’s task: to eradicate the

[12]Культура Византии. С. 227.

fear of laws from the minds of people, to make the assimilation of laws more accessible by reducing unnecessary and concentrating the necessary legislative material. The essence and content of Prohiron were determined by its designation as a "handbook of laws."

The maximum program was designed to create a universal Code of Laws (a kind of encyclopedia of law). Eventually, its implementation led to the creation of Basilika – a collection of laws in 60 books, to which several volumes of scholia (commentary) were later added.

Since the main purpose of the Basilica was to recodify – the systematization of legislative material scattered across parts of the Code of Justinian – the prevailing principle in the Basilika was the systematic and chronological principle of norm placement. According to this conceptual approach, each Basilika title begins with a fragment of the works of Roman jurists contained in Digestas, followed by the provisions of the Code, the Institutions, and Novels, which confirm or supplement Digest's provisions.

Following the instructions of Leo VI, everything "superfluous", what is repeated in the new laws is not used, abolished by later laws, should be removed from the Basilica[13]. The Digestas were incorporated into the Basilika almost completely, even many of those provisions that were amended or repealed by the Justinian Constitutions.

The works on the creation of Basilika were, in essence, a revision of the legal acts (which is a sign of recodification) that have accumulated over the last centuries. At the same time, the purpose of the audit was not to abolish Justinian's old law but to restore its basic provisions while modernizing the latter, which would make them usable in the new conditions. Therefore, after the publication of the Basilika in court, it was possible to refer to both the Basilika and the "Code of Justinian" (in its Greek version).

The last legal monument of Byzantine law is considered by Hexabiblos (Six Books), which was published by Byzantine jurist and judge Constantine Armenopoulos around 1345. Hexabiblos contained extracts of civil and criminal law from Basil, compiled in 6 books.

Hexabiblos are often criticized for being primitive. Nevertheless, it is logical to assume that the level of the assembly was determined primarily by the needs of the practice. Unlike previous collections, Hexabiblos has virtually no public law rules. This gives reason to consider it as an unofficial Byzantine Civil Law Code, created by recoding.

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[13] Азаревич Д.И. Из лекций по римскому праву. Вып. 1. Одесса, 1885. С. 70.

3. The relevance of civil law recodification in Ukraine

Therefore, it should be noted that the creation of a theoretical basis for codification is a lengthy process, but one that ensures that the desired result is achieved with the least loss in the future. This applies, to a large extent, to the problems of developing a methodological basis for the codification of civil law in Ukraine that its developers had to overcome[14].

Since the USSR ceased to exist in December 1991, partly becoming the CIS, the enactment of the Fundamentals of Civil Law has depended on the goodwill of the former Soviet republics. Ukraine did not go this way, so the mentioned Fundamentals in our country never came into force. The question of creating basic laws that would regulate civil relations and, consequently, of legal adaptation in the field of regulation of civil relations was raised.

In the face of the threat of a "legal vacuum" in Ukraine in the early 1990s, the creation of the concept of civil law development began, based on which new ideas about the concept of law should be based on the ideas of civil society and the rule of law.

When drafting the Civil Code, the problem of sample selection arose, which, in turn, resumed discussion between supporters of "civil law concept" and "commercial law concept."[15]

Under the influence of the desire to adapt to the European legal systems in the process of discussions, the concept of modern civil law of Ukraine was formed based on European ideas about private law[16]. It was noted that the ideas are largely based on the reception of Roman private law, which is the primary source of most Western codifications[17], adjusted following national perceptions of the phenomenon of law, civil law, and its institutions[18].

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[14] Кодифікація приватного (цивільного) права України / За ред. проф. А. Довгерта. Київ, 2000. 336 с.; Харитонов Є.О. Новий цивільний кодекс України – завершення кодифікації чи її початок. *Суспільство. Держава. Право.* 2002. Випуск І. Цивільне право. С. 7–12; Харитонов Є.О. Формування сучасного цивільного права України: вплив західної та східної традиції права. Правова система України: історія, стан та перспективи : у 5 т. Х. : Право, 2008. Т. 3 : Цивільно-правові науки. Приватне право / За заг. ред. Н.С. Кузнєцової. С. 79–121.

[15] Харитонов Є., Харитонова О. Деякі особливості концепції так званого "господарського права". *Українське право.* 2000. Число 1. С. 25–31.

[16] Кодифікація приватного (цивільного) права України / за ред. А. Довгерта. К. : Укр. центр правн. студій, 2000. 336 с.

[17] Харитонова О.І., Харитонов Є.О. Порівняльне право Європи: Основи порівняльного правознавства. Європейські традиції. 2-ге вид., доп. Х., 2006.

[18] Див.: Підопригора О., Харитонов Є. Римське право і майбутнє правової системи України. *Вісн. Акад. прав. наук України*. 1999. № 1. С. 95–103; Харитонов Є.О. Рецепція римського приватного права як підґрунтя сучасної цивілістики. *Вісн. Акад. прав. наук України*. 1998. № 2. С. 104–111.

After all, the main features of the concept of modern civil law in Ukraine are as follows:

1. The civil law of Ukraine is by its very nature a private law, covering all relations with the participation of a private person – both property and non-property;
2. "Private person" is the main category of civil (private) law. All civil law institutes are directed to protect the rights of such a person;
3. All parties to civil relations shall be equal in this respect;
4. Civil law proceeds from the possibility of the comprehensive civil legal protection of non-property relations;
5. The core of the civil law of Ukraine is the Civil Code, which by its very nature is a code of private law and is intended to regulate the totality of relations in this field;
6. In the regulation of civil relations, both private and public legal means are used;
7. In determining the means of civil law regulation, preference is given to contracts over acts of legislation.

The concept of civil law of Ukraine was reflected in the process of drafting the Civil Code, the dynamics of which, at that time, testified that by the concept it was approaching the best European models, conceptually based on the Western tradition of law.

At the same time, the forecasts for harmonization (at that time it was about "harmonization", which reflected hopes for the successful completion of the codification of national legislation on a fundamentally new ideological basis) of Ukrainian legislation with European as a long-term process were confirmed.

In particular, in the final stage of the discussion of the Civil and Commercial Codes of Ukraine, the proponents of the development of separate commercial legislation (Commercial Code) actively made various arguments in favor of such a decision, proved the error of applying of the "general civilistic approach" in solving issues of regulation of relations in the "economic activity"[19].

After the adoption of the Civil and Commercial Codes, the dispute gained new momentum[20], which was facilitated by the fact that, among other things, the scope of civil and commercial law was not clearly delineated[21].

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[19] Мамутов В. І знову про загальноцивілістичний підхід. *Право України*. 2000. № 4. С. 93-94.

[20] Мамутов В.К. Отзыв на статью И.В. Спасибо-Фатеевой "Последняя попытка расшифровать "Код да Винчи", т.е. Хозяйственный кодекс Украины. *Юридичний радник*. № 4. 2006. С. 94; Розовский Б.Г. Хозяйственное право: с эмоциями и без: моногр. Луганск, 2008. 230 с.

Another "stumbling block" on the path of harmonization of domestic law to the European concept of private law was the regulation of family relations, where the Byzantine tradition[22], in which family relations are considered outside civil relations, still prevailed. Although the 1996 draft of the Civil Code of Ukraine envisaged the regulation of family relations by the rules incorporated into the special book Family Law, it was opposed by supporters of the Ukrainian legal traditions and opponents of the regulation of private relations by a single Civil Code. As a result, the Family Code was adopted separately and even earlier than the Civil Code.

As a result, the concept of the Civil Code of Ukraine (as a single code of private law) suffered losses, which eventually, due to the development of social relations, determined the updating of Ukrainian civil law. This naturally raises the question of which of the ways to update the legislation is appropriate to choose: the gradual introduction of fragmentary changes, codification or recodification.

Here it is advisable to mention the division of codes depending on their effectiveness into 1) self-created and 2) borrowed. The first includes those that are adequate expectations of the morality of the people whose lives they are intended to regulate (French Civil Code). The latter include those who have been forcibly or voluntarily transferred from one legal field to another, with little regard for the realities of life in the country.

Analyzing the relationship between self-created and borrowed codes, Cabriac notes the benefits of self-created codes but rightly notes that "borrowed" (transplanted) codes can be both ineffective and effective. A code transplant is more likely to succeed when its country of origin and the country that implements the code are almost indistinguishable from one another's lifestyle. In addition, partial, not complete, transplantation is the key to success. In any case, the success of the code depends on where the will is directed: to integrate transplanted legal norms into an element of national law, or to abandon integration by abandoning them as much as possible[23].

Assessing the Civil Code of Ukraine from such an angle, we can conclude that it is a passionate code, created in accordance with the requirements of a society that needed a code that is able to protect the property and property rights of the individual, serve market civil relations, etc. Partial transplantation

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[21] Посполітак В.В., Ханик–Попсолітак Р.Ю. Аналіз наявних суперечностей та неузгодженостей між Цивільним та Господарським кодексом України. К., 2005. 264 с.; Проблемні питання у застосуванні Цивільного і Господарського кодексів України / Під редакцією Яреми А.Г., Ротаня В.Г. К., 2005. 336 с.

[22] Харитонов, Є.О. Історія приватного права Європи: східна традиція. Одеса, 2000. С. 13–44.

[23] Кабрияк Р. Кодификации / Пер. с фр. Д.В. Головко. М., 2007. С. 440–459.

of some provisions of the codes, which successfully regulate similar public relations on a private conceptual basis, took place. The criticism of the Civil Code of Ukraine for its alleged "originality" seems unreasonable. It was not a simple borrowing of individual decisions, but a consideration of the general trends in the development of private law in Europe. The mentioned tendencies were reflected in the civil codes of a number of states that arose in the post-Soviet space, including the Civil Code of Ukraine.

The "passionarity" of the Civil Code of Ukraine gives grounds for the assumption that the losses in question could be easily eliminated in the future since there are a necessary conceptual basis and a "margin of safety" for regulatory material.

In any case, the principles of, the Definitions and Model Rules of European Private Law, the Draft Common Frame of Reference (DCFR), should serve as guidelines for recodification and its methodological basis[24]. Their mission is to provide a basis for improving the concept of private law under the basic values of European civilization. This should be taken into account by all European countries when defining the purpose and objectives of developing modern private law.

Despite the rather consistent orientation of the CC of Ukraine to the European standards, we should be prepared for significant differences between the DCFR principles and the decisions of domestic legislators. Some of them can be overcome relatively quickly and painlessly, the transformation of others looks quite problematic. It is suggested to take this into account in the process of recoding. It should also be noted that adapting to the solutions recommended by the DCFR in this field can be quite complicated and will require not only recodification of national legislation, but also an appropriate adaptation of justice.

CONCLUSIONS

As the experience of European codifications and recodifications shows, if circumstances, primarily economic, political, cultural, ideological, may be factors of codification and recodification, then the political will, legal culture, mentality, legality, etc. are the factors of their successful completion and implementation. Therefore, when defining the concept of modernization of civil law, the values of society should be taken into account, as well as its possible response to codification/recodification.

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[24] Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of reference (DCFR). Full Edition. Prepared by the Study Group on a European Civil Code and the Research Group on EC Private Law (Acquis Group) / Ed. by Christian von Bar and Eric Clive. Vol. I – VI. Munich, 2009.

Due to the popularity of public-law means of influencing of the economy in Ukrainian society, the thesis that the abolition of the Economic Code of Ukraine is the precondition for recodification is doubtful[25]. The moral obsolescence of this act is obvious. Nevertheless, it should also be borne in mind that most Ukrainians are in favor of a combination of government and market methods, and one-third of Ukrainians support a return to a planned system with full state control. Therefore, the abolition of the Commercial Code of Ukraine should not be a prerequisite for recodification, but an element of this process.

The proposal to return the Family Law Book to the Civil Code does not take into account the peculiarities of the national mentality. In our opinion, instead, it should be about updating, in addition to civil law, also the family law of Ukraine, with appropriate adjustments to the rules concerning the definition of the private legal status of a person.

One of the main tasks of updating (recoding) civil law should be to determine the private legal status of a person who meets the European standards in this field. Unfortunately, the rules of the Civil Code in this area appear to be morally outdated and reflect the post-Soviet approach. Therefore, their refinement in the process of recodification should be paid no less than that of any other civil relationship. We think that this approach is in line with the recommendations of Western specialists for the post-Soviet countries: to take into account that when creating new civil codes, they cannot immediately reach the level of private-law structures that exist in the western countries, and therefore should progress to this level gradually.

Since the improvement/updating of civil legislation is proposed to be carried out primarily as a recodification, a careful study of European concepts on this issue is advisable, given that recodification itself is not such an indisputable option.

As Smith noted, "the creation of a European Civil Code is more political than legal issue … In national systems, legal positivism has largely been abandoned. Even in the Netherlands, where with the entry into force of the new Civil Code in 1992, it could be expected that the rules adopted would be clearly enshrined, judges are given such discretion that such courts do indeed form law. The formation of European private law by imposition does not conform to the legal spirit of the time (Zeitgeist). Such an imposition is the result of a belief in a centralized political power: the idea that the European Union can create a single law characterized by legal certainty and

[25] Довгерт А. С. Рекодифікація Цивільного кодексу України: основні чинники і передумови для старту. *Право України.* 2019. № 1. С. 27–41.

predictability only by introducing the same text is… a simplified statement formed by proponents of positivism during the Napoleonic era”[26].

This, in our opinion, shows that the process of improvement of domestic civil legislation (recodification) on the way to its Europeanization is a process no less complicated than the codification of the civil legislation of Ukraine at the turn of the millennium.

SUMMARY

Ukraine’s course for integration with the European Community determins the adaptation of domestic civil law to the European concept of private law. Since the realization of this task is impossible without theoretical support, it is relevant to study ways to improve the regulation of civil relations. Recently, in this context, the problem of recoding Ukraine’s civil legislation has become more problematic. However, questions of its conceptual support lack the attention of jurists, without which changes cannot be effective.

The purpose of the article is to characterize recodification as a paradigm for improvement of Ukrainian civil law and to determine the directions of its implementation.

The methodology of the study was determined by the fact that it was focused on the problems that need to be voiced in the process of preparation of the recoding and its implementation. This led to the use of methods of historical, dogmatic and comparative analysis, as well as to determine the logic of submission of research material: from the general characteristics of forms of systematization of civil law – through the experience of European codifications and recodifications – to the analysis of problems of recodification of Ukrainian civil legislation.

According to this logic, the differences between codifications and recodifications are examined, and it is argued that codifications take place when significant changes occur in the community that is not in line with the outdated concept of legislation. Instead, recodification is possible in cases where the concept of civil law meets the challenges of time, and the codes created under it are “passionate”.

Passionary codes are characterized by the fact that they are not the result of simply systematizing and modernizing the accumulated legislative material, but were created on a fundamentally new concept of law. Such codes are a realization of a concept that is substantially different from what existed before. They make significant changes to the level of regulation of a certain type of public relations, translating it into a new quality, and thus affecting the

[26] Смітс Я. Європейське приватне право як змішана правова система. *Європейське право.* 2012. № 2–4. С. 219.

social relations that are regulated. Examples of "Passionary Codes" are the French Civil Code (Napoleon Code), the General Civil Code of Austria (ABGB).

The article proves that the Civil Code of Ukraine is also a passionary code because it was created following the requirements of a society that needed a code capable of protecting the property and property rights of an individual, servicing market civil relations, etc. This leads to the conclusion that the shortcomings of the Civil Code of Ukraine, discovered during its application, can be eliminated by recodification on the updated conceptual basis. At the same time, one of the main tasks of recodification is to determine the private legal status of a person that would meet European standards. The rules of the Civil Code of Ukraine in this area reflect a post-Soviet approach. Therefore, they need more attention during the recodification of the civil code. This vision is in line with the recommendations of Western specialists for the post-Soviet countries: keep in mind that when creating new civil codes, they cannot immediately reach the level of private-law structures that exist in Western countries, and therefore must progress to this level gradually.

In any way, the terms of the Draft Common Frame of Reference (DCFR) should serve as guidelines for recodification and its methodological basis. However, adapting to the solutions recommended by the DCFR in this field can be quite complicated and will require not only the recoding of national legislation but also the corresponding adaptation of legal consciousness.

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Information about authors:
Kharytonov E. O.,
Doctor of Law Science, Professor,
Head of Civil Law Department
National University "Odesa Law Academy"
Fontan road 23, Odesa, Ukraine
ORCID: https://orcid.org/0000-0001-5521-0839

Kharytonova O. I.,
Doctor of Law Science, Professor,
Head of Intellectual Property and Corporate Law Department
National University "Odesa Law Academy"
Fontan road 23, Odesa, Ukraine
ORCID: https://orcid.org/0000-0002-9681-9605