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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.

[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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GENERAL PROVISIONS OF THE DOCTRINE OF OBLIGATION

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INTRODUCTION

The problem of developing the theoretical foundations for the regulation of civil relations has always stood in front of civil scientists. Particular attention is paid to this problem in nowaday's context. Civil legislation must address the main task – to ensure the dynamic and progressive development of the economy on market, competitive principles.

The Civil Code of Ukraine in 2003 (hereinafter referred to as "the CC") substantially changed the rules of the general part of the law of obligations compared to the CC of 1963. As this normative act incorporates the achievements of national and world theory and practice of civil law, therefore, their correct perception and use is impossible without a comprehensive and complete study of both historical and modern experience of applying the relevant norms, analysis of the need for improvement of legislation. According to V.I. Golevinsky, building a correct theory on obligations is one of the most important tasks of science and one of the most vital issues for any evolving legislation[1].

Renewed civil law requires a rethinking of many theoretical problems of civil law, including the need to understand and establish the possibility of using constructions of foreign legal systems[2].

Today it is relevant to formulate basic provisions on obligations on a single methodological basis, to create a scientific concept, since only having a common theory, doctrine, concept, we can speak about the improvement of legislation on obligations. The Legislation on obligations is so wide that its creation on various methodological and conceptual principles poses a threat to the successful development of the economy, and therefore to the development of the country as a whole.

The need to build a general theory on obligations (in law – a common part of the obligation law) is indisputable. Only after establishing general provisions it is possible to successfully anticipate and identify separate, most

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[1]Голевинский В.И. О происхождении и деленииобязательств. Варшава: Тип. О. Бергера, 1872. С. 25.

[2] Докладно методологія побудови вчення зобов'язання була окремо досліджена у наступній праці: Голубєва Н.Ю. Зобов'язання у цивільному праві України : методологічні засади правового регулювання : монографія. Одеса: Фенікс, 2013. 642 с.

commonly encountered, relations on obligations. However, the historical development of law and science went the other way – separate obligations were formulated in law and doctrine earlier than general theory. But only the development of a general theory on obligations in the legislative order, the establishment of abstract bases of the obligation law, allowed to depart from legal formalism, casuistry, the regulation of specific relationships to effectively regulate new obligations that appear with the development of society.

General obligations are the principles that must be met by any obligation, unless otherwise specified in the law, the contract, their development is a difficult task of the legislator (first of all, it is a task, of course, of the doctrine, but the point is still set by the legislator).

The doctrine on obligation, as the doctrine of the basic principles on obligation, rather than the doctrine of particular cases on obligations, is becoming methodologically relevant today and is the starting point for further research.

1. Obligatory law as a branch of civil law

The category of obligations is one of the key concepts in the system of civil law concepts and categories that existed in the most ancient legislation.

In early Roman civil law, it was not yet about “obligations” but about ways of acquiring things and protecting the rights that arose in the course of committing these actions (actio). Only in the times of classical Roman private law the notion of obligation was formed (obligatio), a feature of which is: the universality of the formulation of obligations for different types of obligations; obligation to perform; addressing the person, not things.

Despite many common features of the modern conception of obligations and ancient Roman law, Roman law is characterized by several features that have been significantly deformed in modern law and order. First, even at the highest stage of development, Roman law has not come to the recognition that any legal agreement between the two parties to establish any obligation has itself legal force[3]. Second, the obligation was a purely personal relationship between two or more individuals. This principle was reflected in the following provisions: as a rule, it was impossible to enter into obligations through a representative; no contracts were recognized for the benefit of a third party; as a rule, the possibility of replacing the parties in the obligation was not recognized. Third, Roman law provided for a strictly limited list of obligation forms strictly related to its special claim: where there were no claims, there

[3] Харитонов Е. Категория обязательств в римском частном праве. *Юридический вестник*. 1997. № 1. С. 105.

were no obligations, and vice versa. Fourth, Roman law was characterized by the extreme severity of the debt burden. Initially, there was a possibility of recovering the debt on the individual of the debtor. Much later, the penalty was transferred to his/hers property.

However, the system of obligations of Roman law was so successful that it was later borrowed by the vast majority of European states. This does not mean that obligation law is fully reciprocated by later legal systems, but the impact is undeniable. The level of integration of European countries is largely due to the reception of Roman law.

The genesis of obligation law in Ukraine has peculiar features and dates back to the pre-state period, when it was first regulated by mono-norms and then by customary norms. The development of binding standards was also characteristic of the Scythian state, the ancient cities-states located in the territory of modern Ukraine. The emergence and development of Kievan Rus and its main inheritance, the Russkaya Pravda, had great importance for the further development of the obligation law in Ukraine. This period of development of the law of obligations is characterized by the improvement of various contractual forms, rules on compensation for the damage caused. As in Roman law, the severe consequences of breach of obligations and damage were foreseen. The charge was applied to the debtor.

In the period of feudal fragmentation of Russia, the obligation law remained in the same state as in the previous period, which was due to the fact that the leading legal act remained the “Russkaya Pravda”.

According to the Lithuanian statutes, a rather comprehensive system of norms, in comparison with others, had providing institutions: a bail, a deposit, a guarantee, a pledge. In general, the mandatory rules in these regulations were rather limited and small. Instead, compulsory law was the main legal institution of civil law of the Hetmanate. The contractual obligations and obligations on compensation of damage were thoroughly regulated.

Analyzing the legislative acts, which were in force in one or another way in the Ukrainian lands, we find that the legislation paid little attention to the general provisions on obligations and the contract. Most of the rules are dedicated to specific types of contracts.

In the second half of the XVIII century the legislation of the Russian Empire is being extended in Ukraine. Along with the Code of Civil Law, common in all areas of the Russian Empire, there was also national-regional civil law.

In the Soviet period, the development and emergence of new institutes of the obligation law was conditioned by the adoption of the Civil Code of the Ukrainian SSR in 1922. The institutes of the law of obligations were enshrined in a separate section, and the law of that period had elements of the

imperative method of regulation. More dispositive was the CC of the Ukrainian SSR in 1963.

Contemporary compulsory law of Ukraine is recognized as a branch of civil law, primarily because it regulates relatively homogeneous contractual and non-contractual obligations, contains rules of general and special action, which have a substantive and functional orientation.

The norms of compulsory law first and foremost regulate property relations related to the exchange of results of activities of participants of civil turnover (which includes economic turnover, as well as the turnover of non-property benefits).

As a set of civil law regulations governing civil turnover, the law of obligations constitutes a certain system of civil law rules and is divided into General and Special parts.

Section 2 of the Book. 5 of the CC "General provisions of the contract" is separated into a separate block outside the general provisions on obligations, but not to be construed as an independent group of rules, relative to the system of rules of obligations.

The importance of the obligation law for the development of society is manifested in the following functions: first, the rules of the obligation law are intended to strengthen the legal protection of the interests of conscientious participants of the civil turnover; second, the consolidation and legal regulation of the relations of the civil turnover, ensuring their organization, order and stability, promoting their further strengthening and development (economic commitment function); thirdly, the promotion of the achievement exactly those goals of which the links between the subjects of civil trafficking are intended.

The main *tendencies in the development* of the obligation law are: unity, differentiation and unification of special legislation, prevailing development of contract law, differentiation of contract law by economic activity, strengthening globalization.

2. The concepts and main characteristics of obligation

The recognition of the essence of any legal phenomenon involves, first of all, an investigation of its nature. According to modern interpretation in Ukrainian civil science, the concept and essence of obligations are one of the types of civil legal relations.

The term "*obligation*" cannot be equated with the term "*duty*". The relevance of the issue of the relationship and the delimitation of the obligation from the duty is due to the existing confusion in the current law enforcement practice and the inaccuracy in the delimitation of the obligation from the public legal duty.

Obligation is a civil legal relationship, a structural element of the content of which is the debtor's duty, but the notion of duty is universal and not always part of the obligation.

Obligation legal relations differ from property legal relationships: 1) by the number of related persons (in the obligation it is only the creditor and the debtor, and this is known, specifically identified persons at the time of the emergence of relationship); 2) by the object (in the obligation it is not a thing, but the action of the obliged person, and in the obligation the object may not be clearly defined (eg, determined genetically, alternatively, etc.); 3) on the grounds of occurrence (except that these grounds differ significantly, the fundamental point is that the obligation may arise as a result of both lawful and unlawful acts, and the legal property relations do not arise as a result of the offenses); 4) by the specific form in which the rights and obligations are expressed (obligation is a claim and a debt); 5) in substantive legal relations the essence of subjective right is reduced to the right to one's own behavior; in relative legal relations it becomes the right to demand specific behavior from the obliged persons. 6) by the nature of the realization (in the obligation, the creditor's right can be exercised only in the performance of the debtor's obligations, and not by committing by authorized person his/hers own actions on a particular, except for the features contained in Art. 621 of the Civil Code of Ukraine); 7) according to the peculiarities of legal regulation (not only the regulation of the origin, protection and termination of the right is important for the obligation, but also the clearly defined procedure for fulfilling the obligation); 8) by value for civil turnover (the obligation reflects the dynamics of civil rights and obligations, that is, the obligation observes the civil turnover, and the property legal relations fix the statics, the ownership of property rights outside the exchange between the participants of the civil turnover); 9) at the time of existence (the obligation of the relationship is always temporary: concluded for a known time or with an indefinite duration of the obligation, limited by the actual interest of the creditor in the performance); 10) common to the various obligations is the need for interaction between the parties to the obligation, both contractual and non-contractual, in order for it to be fulfilled; in order for it to be enforced, however, such interaction is not peculiar to property law; 11) the circle of obligations is not defined in the law, the types of obligations are incomparably bigger than property rights; 12) property relationships are always material, and obligatory, though rare, but not always.

But, despite the differences in these types of relationships, they are interconnected and interdependent. The Civil Code also partly considers it possible to apply remedies to obligations (Art. 621 of the CC).

The specificity of the obligation as a civil legal relationship are as follows: 1) the obligations basically mediate the process of moving tangible and intangible goods; 2) the obligatory legal relations are always established with a specific subject and, therefore, have a relative nature; 3) obligations generally contain an obligation to take certain active actions, but may also include passive actions, in some cases, include only passive actions; 4) obligations do not create duty for persons who do not participate in it as parties. However, the obligation may give rise to rights for the third party against the debtor and (or) the creditor (Art. 636 of the CC); 5) the object of the obligation is a certain behavior of the debtor, the object of the obligation are those things or property, intangible goods in respect of which there is interest of the participants of this legal relationship; 6) the specificity of the content of the subjective obligation law is that it is always a right not to one's own, but to another's (debtor's) actions, reduced not to the permissibility of one's own actions by the authorized person, but to ensuring the possibility of performing these actions; 7) obligations have a special meaning (right to claim and debt); 8) is established, as a rule, for a definite period, that is, on the basis of a further termination; 9) the application of special methods of coercion to the offender in the case of non-performance and improper performance of the obligation, that is, in breach of the obligation.

The object of the obligation is the action of the debtor. An action is that external object to which the right is directed, which in turn is realized in relations.

Thus, the object of the obligation is thaton what the rights and obligations that make up the content of the obligation are directed, that is, those actions which (or withholding from which) the creditor is entitled to demand from the debtor; the subject of obligation are those tangible and intangible goods to which the parties enter into relations and to which their actions are directed. For example, a liability arising from a purchase and sale agreement involves the transfer of property and the payment of that property, and the subject matter is the specific property for which the purchase and sale agreement is concluded. In some obligations, the item is generally absent, for example, in some contractual obligations to provide services.

In this case, the object and the content of the obligation do not coincide, since the object is the actions (behavior, including withholding of actions) of the debtor, and the content is the obligation – the debtor's debt and the right of the creditor to claim. Benefits, on which is directed the execution have diverse character depending on the type of commitment. In the obligations arising from property transfer agreements, the object of performance is the property, in the obligation to perform the work – the result of the work, in the obligation to provide services – the service itself as a special type of activity. The object

of performance in non-contractual obligations, as well as in obligations arising from contracts for the transfer of property, is property (for example, in the obligation to compensate for damage it has the nature of compensation for the damage caused, in the obligations negatorim gestio – compensation of cost, etc.).

Actions as an object of obligation can be active (positive) and passive (negative). All kinds of activities can be reduced to two. The first of these: "give" is an action that aims to make a change in substantive law (transfer of thing to property, temporary use, etc.), to increase the property of the creditor in another way (cession, debt relief).

A group of obligation, the object of which is to "transfer", can be divided into subgroups, depending on the specific subject of the transfer, the purpose of the transfer and the result (legal title acquired by the person who took over the property).

First, the obligation may be directed to the transfer by the party into the property of the other party of anything, individually determined or defined by generic characteristics, in particular, to pay a certain amount of money (sale, mine, gift, life-support, rent), as well as the transfer of rights (for example, claim rights).

Second, the obligation may be directed to the transfer by the party to the other party of any other substantive right (an agreement establishing an easement).

Third, the obligation may be directed to the provision by the party for the use of the other party of the thing, with the transfer of the individually determined thing on condition of return of the thing to the owner (rent (lease), loan (free use of property), as well as rent of housing).

Fourth, the obligation may be directed to other types of "transfer": 1) the issuance of a remuneration (in the obligations arising from a public promise of a remuneration without announcing a competition); 2) the issuance of award (in the obligations arising from the public promise of the award as a result of the competition); 3) compensation of expenses (in the obligations arising from committing actions in the property interests of another person without his/her assignment); 4) compensation for the damage caused, (in the obligation in case of creation a threat to the life, health and property of an individual or property of a legal entity; obligations arising from causing harm); 5) compensation for the value of acquired or preserved property without sufficient legal basis.

Actually, the fourth group may be in some way attached to the first (after all, it is ultimately the transfer, in most cases, of money or things to the other party), but due to the specifics of the rules on non-contractual obligations, it stands out separately.

Fifth, the obligation may be directed at returning the property to its owner in the obligations arising out of the acquisition or retention of the property without sufficient legal basis.

The second group of active actions: "do something" covers the whole range of actions not covered by the term "give". The most important of these actions are those covered by the word "work", which is understood in the classical literature quite widely, and today, traditionally, is divided into two groups of actions: the actual work in the narrow sense of the word (performed in the framework of contractual obligations type) and services.

The action that constitutes the object of the obligation may also be negative. Depending on the purpose, the following restraints may be distinguished from the object of the obligation. The action that constitutes the object of the obligation may also be negative. Depending on the purpose, it may be distinguished the following withholding acts from action as the object of the obligation: 1) aimed at making things more efficient and easier to use; 2) aimed at creating the possibility of using the thing; 3) are aimed at withholding the use of the thing or the use of this property in own interest (the carrier and the custodian are not entitled to use the property transferred to them for performance of the contract); 4) aimed at building effective competitive relations (abstaining from competition, abstaining from entering into a commission agreement with other persons). This list is not closed, because it depends on the interests of the creditor, the limit of which should be the inadmissibility of limiting the capacity of persons.

Analyzing the possible varieties of the object of obligation, it can be distinguished obligations: 1) those whose object is the transfer of property; 2) those whose object is to perform the work; 3) those whose object is to provide services; 4) those whose object is to refrain from action. Of course this is not taken into account various combinations of actions in a single obligation.

Actions can be both one-off, multiple, and lasting. A one-time action (or a one-time satisfaction when considering this from an obligation standpoint) should be understood as an action (s), which is carried out in one moment. Repeated acts of a debtor may have multiple (the execution of the debtor may be embodied in several active transactions, in a series of identical acts of execution over a period of time) or continuous nature over a period of time.

An obligation (a certain behavior of obliged person) may be divisible and indivisible.

An object is divisible when an action can be taken in parts, such as paying money. Thus the object (action) is divided without disturbing the essence, so that each part of the action has the same meaning as the whole, and differs from the latter only quantitatively. The indivisibility of an object of obligation (action) comes: 1) by virtue of the indivisibility of the object of performance (the thing to which the action is directed), without changing the property and

reducing its value; 2) by virtue of the indivisibility of the action itself, that is, the impossibility of performing it in parts at all, for example, the making of a sculpture or the performance in negative obligations; 3) if the object (action) is separate in itself, but its implementation in parts does not satisfy the interest of the creditor; 4) by virtue of the agreement the action, which is itself divisive, is recognized as indivisible, for example, the construction of a house.

As a general rule, the obligation is indivisible, the debtor is not entitled to transfer in part the subject of the obligation (Art. 529 of the CC).

The extent of defining the object of the obligation may be different: 1) the object is specifically (absolutely, precisely) defined as unique or individualized actions; 2) the object is defined only by genus, generically (not by species), by determining the amount, weight, volume of the thing that constitutes the transfer; at the stage of fulfillment, such an obligation will inevitably be transformed into types (the right to determine specific, individualized property for transfer to the buyer belongs to the seller, since it is he/she who distinguishes from the mass of similar goods those that will be transferred to the buyer); 3) the amount of debt of the debtor can be established only in general form (obligation with an indefinite amount of claims – aleatory), but the obligation sets the criteria for determining specific amounts and services at the stage of performance of the obligation; 4) the object is identified as an alternative obligation.

Obligations may be emerge relatively several objects (binding, alternative and optional obligations). Obligations with a simple multiplicity of an object (binding commitments) are distinguished by the fact that the object of it is several actions that the debtor must perform in full without the right to choose one or another action, the debtor must perform all actions.

An object of obligation may be several separate actions, of which only one must be performed, at the option of one of the parties of the obligation – alternative obligations. However, these actions are defined. Uncertainty lies the unknown of what the action will accomplish. One of several actions must be performed, so it will not be considered proper to fulfill each obligation in part. It is proposed to supplement Art. 539 of the Civil Code of Ukraine part 2 of the following content: "the party of the obligation, which has the right to choose the subject of performance in the alternative obligation, cannot compel the other party to perform or accept part of or part of the other performance object".

The most important question in an alternative obligation is to determine the person who has the right to choose the object of performance. The right to choice usually belongs to the debtor. By virtue of the law or the agreement of the parties, the right to choice may belong to the creditor (for example, under Art. 8 of Law of Ukraine "On Consumer Protection") or a third party. In some cases, the CC gives the right to choose (Art. 1192).

Alternative plurality is characterized by the need to choose between mutually exclusive methods of execution. The wording of Art. 539 of the CC has a dispositive character, which gives the debtor the right to choose in an alternative obligation and not provided by any other rule that encourages the debtor to make such a choice. Therefore, we consider that Art. 539 of the Civil Code of Ukraine requires editorial clarification by adding part 3 of the following content: "an alternative obligation becomes ordinary (not alternative) after the choice by the party who has right for it", and also part 4 of the following content: "if the party to whom the right of choice is exercised has not made the choice before the due date of performance of the obligation, or other term specified in the contract or law, the right of choice of performance shall pass to the other party".

Not provided by the CC of Ukraine the consequences of the inability to fulfill an alternative obligation, the ways of solving this issue are researched by the author separately[4]. Optional obligations are also highlighted in the literature. But in modern civil science, the existence of optional obligations raises doubts as to the appropriateness of their existence[5].

The content of the obligation legal relationship constitutes the right of claim of the creditor and the debt of the debtor.

The content of the right of claim of the creditor consists of the ability of its owner (creditor) to demand from the obliged person (debtor) to perform or refrain from carrying out a certain action (actions), in the case of performing a duty – to obtain and assign the results of such execution.

We consider that a breach of obligation creates a new obligation, a completely different type – a security obligation that aims to restore the rights of the victim. The right to defense that arose from the exercise of a regulatory relationship is an independent subjective right and is not an integral part or particular stage of the development of regulatory subjective law. It is necessary to distinguish between actions as the actual object of the obligation and actions constituting the fulfillment of a new obligation, which arose as a result of violation of the creditor's right under the former obligation. However, the term "former obligation" is not entirely accurate, as these obligations (breached and guarded) may exist in parallel. Although a liability arising from a breach of the creditor's liability under the obligation is a new obligation, it should not be regarded as an innovation, i.e. the grounds for termination of the original obligation.

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[4] Голубєва Н.Ю. Поняття альтернативних зобов'язань за цивільним законодавствам України та шляхи удосконалення їх правового регулювання. *Часопис цивілістики*. 2015. № 18. С. 3–13.

[5] Докладніше у праці: Голубєва Н.Ю. Ефективність застосування факультативних зобов'язань у цивільних відносинах. *Часопис цивілістики*. 2016. № 20. С. 221–225.

Another component of the content of the obligatory legal relationship is the debt of the debtor. The essence of the duty is to perform or retain a specific action in the interests of the subjective person.

In civilistic doctrine, as a rule, the terms “debt” and “obligation” are used in the same way, which is true, but it is impossible to equate the concept of “debt”, “duty” with the concept of “obligation”.

In the CC, the term “debt” is used in the following statements, which can be interpreted as: first, “duty”: “to repay debts – means to perform duties (Part 3, Art. 44, Art. 366 of the CC); “To pay debts” means to fulfill a duty (Part 4 of Art. 124 of the CC); “Debt forgiveness” means discharge from duty (s) (Art. 605 of the CC); in Part 2 of Art. 191 of the CC, the term “debt” is used in one logical line, with the term “right of claim”, and therefore means – duty; “Replacement of debt” means “replacement of the obligation of a prior obligation to a debt obligation”, since in a debt obligation – only one party has obligations – it is the debtor (in respect of a specific obligation) and in a prior obligation, even if the prior obligation is unilateral, it is a duty, because if the previous contract was fully responsible for the subject matter of the loan agreement, it could not have been a different contract but was a hidden loan agreement (Part 1 of Art. 1053 of the CC);”transfer of debt” means the replacement of the debtor, the transfer of duties of one person to another (Art. 520 of the CC);”deduction of the share of the testator’s debts attributable to this property” means the reduction of the hereditary mass due to the performance of the obligations of the testator in his obligations (art. 1238 of the CC); “Debtor’s debts” – obligations under obligations (art. 1281 of the CC) “recognition of ..debt or other obligation” – means recognition of a liability in a monetary obligation or other obligation (art. 264 of the CC); secondly, “obligations”: “to answer for debts” – means to answer for obligations (Part 2 of Art. 124, Art. 1043 of the CC); “Personal debts of a company member” – means the personal obligations of a company member, as opposed to the obligations of the company (Part 1 of Art. 149 of the CC of Ukraine);third, a certain amount of cash: “amount of debt” – means a certain amount of cash, not a monetary obligation as a whole or a debt of the debtor (art. 625, 966, 1084 of the CC); “Principal payment” means the payment of a certain amount of money (art. 554 of the CC), since the term “payment” is usually associated with the subject of monetary obligations; “making a deptin a notary’s deposit” (art. 537 of the CC) – deposit of money or securities in a notary’s deposit; fourth, a debt document (art. 18, 545 of the CC).

In the framework of the rules on the surety contract, the term debt is used in different meanings: 1) “payment of principal dept” means a certain amount of money, securities, etc. (Art. 554 of the CC); 2) “to admit a debt” – to admit a debt, to admit a duty in any obligation, and not only for a monetary

obligation (Art. 555 of the CC); 3) "transfer of debt to another person" (Art.559 of the CC) – transfer of duty of the debtor to another person.

The use of the term "debt" in a binding manner generally makes it difficult to apply the rules of law, even when the same terms are applied in different fields of law. A possible way out of this situation is to change the word "debt" in the CC to other terms: liabilities, monetary obligations, amount of money, obligation – within the meaning of a particular article of the CC.

The obligations of the debtor do not have homogeneous nature: they may include basic and additional responsibilities. Basic obligations actually form a binding legal relationship as a separate kind, they form the nature of the relevant obligation and are crucial for the classification of different types of obligations (to transfer goods, perform and transfer work, provide a service, etc.).

Additional responsibilities provide the order in which basic responsibilities are fulfilled. By analyzing the additional responsibilities in the content of the obligation, it can be stated that they are characterized by the fact that they do not have counter obligations. Thus, if the transfer of the work and its acceptance have the nature of counter-synagmatic duties, the information obligation does not imply the counter-obligation of the other party. The other party has a correspondent right to request relevant information, but there is no counter-obligation.

As a rule, talking about the content of obligations in Ukrainian civil science, the focus is on the obligations of the debtor, who correspond to the rights of the claim of the creditor. But in this category of obligations the obligations of the debtor are not exhausted, the security duties and the obligations of the debtor must be researched separately.

CONCLUSIONS

Thus, there are several types of responsibilities in obligatory legal relationship. First, the obligations to provide (debt) – are the basic obligations in the obligation to which the creditor's rights correspond. Providing, as a general rule, creates certain benefits for the creditor. Second, security obligations that are designed to protect the interests of the parties in obligation that is not directly related to the provision. Third, creditor obligations.

Based on the research of features, elements of the obligation and the analysis of the legislative definition of "obligation" it is proposed to clarify it as follows: "1. An obligation is a civil legal relationship in which one party (debtor) is obliged to perform certain actions (transfer of property, perform work, provide service, pay money, etc.) of property or non-property nature or to abstain from the other party (creditor) certain actions, and the creditor has the right to demand from the debtor the performance of his/her duty, or both parties act as creditors and debtors against each other".

The actions of a debtor of a non-material nature must be expressly provided for in the contract or law, and shall comply with the requirements of this Code, other acts of civil law, the principles of reasonableness and justice.

General provisions on obligations may apply to restitutionary, corporate civil legal relations, unless otherwise specified by the Civil Code of Ukraine and other laws and do not follow from the substance of the relevant legal relationship. "

The following definition differs from the existing definition be: a) an indication of the civil legal nature of the relationship; b) an indication of the possibility of the debtor's obligation of property or non-property; c) an indication of the multiplicity of actions as the object of the obligation; d) an indication of the possibility of a two-way binding obligation; e) established criteria for the delimitation of non-property obligations with different kinds of household promises, moral obligations; f) an indication of the possibility of applying to the restitutionary, corporate civil legal relations the rules of obligations, which will emphasize their different legal nature, but the possibility of subsidiary application of the rules to the relevant relations.

Clarification of the possibility of a two-way binding obligation can be done in another way: set out Part 1 of Art. 510 of the Civil Code of Ukraine (which now has the following meaning: "the parties of the obligation are the debtor and the creditor").

Thus, many common law issues give rise to lengthy discussions. For example, the dispute about the objects of legal relations, including obligations, has been going on for decades, different authors put forward different, more often fair, logical and substantiated theories, but it seems that the dispute is being conducted "for the sake of dispute". Today there are so many different views on the legal relationship, its object, subject matter and content that it seems that a single, common position will never be developed.

Our scientific exploration is aimed at developing a general concept of obligation that would correspond the current state of civil science. However, such concept may not be perfect a priori, it cannot solve all the problems accumulated in theory and in practice. Its main purpose – is to stimulate further research in order to improve the general provisions on obligations in Ukrainian law.

SUMMARY

The section aims to formulate basic provisions on obligations on a single methodological basis, to create a scientific concept, which would lead to the improvement of legislation on obligations. It is noted that only the development of a general theory on obligations in the legislative order, the establishment of abstract bases of the obligation law, allowed to depart from legal formalism, casuistry, the regulation of specific relationships to effectively regulate new obligations that appear with the development of society.

General provisions on obligations are the basis that must be met by every obligation, unless otherwise stated in the law, contract, and their elaboration is a challenge for the legislator.

The historical approach is used in the section to investigate specifics of obligation from their appearance in Roman law. It is revealed that the main tendencies in the development of the obligation law are: unity, differentiation and unification of special legislation, prevailing development of contract law, differentiation of contract law by economic activity, strengthening globalization.

Based on the research of features, elements of the obligation and the analysis of the legislative definition of "obligation" the conclusion on the new approach to the definition of obligation is drawn. It is proposed to understand an obligation as a civil legal relationship in which one party (debtor) is obliged to perform certain actions of property or non-property nature or to abstain from the other party (creditor) certain actions, and the creditor has the right to demand from the debtor the performance of his/her duty, or both parties act as creditors and debtors against each other.

On the basis of the analysis of the doctrine and the legislation, changes in the definition of the obligation, its object and its content are proposed.

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SOME ASPECTS OF CIVIL LEGISLATION RECODIFICATION IN THE CONTEXT OF EUROPEAN INTEGRATION PROCESSES

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INTRODUCTION

The adoption of the Civil Code of Ukraine (hereinafter – CC of Ukraine) on 16.01.2003 testified to a fundamental change in the legal regulation of civil relations, which became the basis of private law of an independent Ukraine. The overwhelming majority of the rules of the CC of Ukraine is characterized by high legal technique, complete regulation of civil relations. A large number of novelties were introduced for all legal institutions, including the field of property law. At the same time, 16-year practice of application of Civil Code of Ukraine norms also revealed vulnerable provisions, contradictions, which necessitated many changes to make, the analysis of which gives grounds to confirm the continuous improvement of the civil legislation. However, in our view, the mechanism of regulation of individual relations requires further improvement in several directions, which is caused by the introduction of new objects of civil rights, the imperfection of legal norms revealed in the course of their application by the courts and the participants of civil legal relations; as well as Ukraine's aspirations for European integration.

Adaptation to the conditions of the EU internal market needs updating of civil law with a simultaneous solution to the general problem of choosing between the private (humanitarian) approach and the public-law (state-regulatory) approach.

These circumstances should be taken into account when defining the algorithm of adaptation of Ukraine to the EU legal system (at present it looks like a legal adaptation to the conditions of the EU internal market, which is, first and foremost, in the perception and adoption of the European concept of private law).At the same time, the problems of ideological and mental compatibility must also be resolved, without which the desired result of adaptation of justice, legal understanding, legal doctrine, legislation and, finally, the concept of law (in particular, private law) cannot be achieved.

It is well-known that any modern social activity needs more and more attention from the analysis and study of the nuances of its implementation, comprehensive examination of the economic status of counterparties, analysis of legal and title documents, investment characteristics of real estate objects, identification of possible risks of transactions and the possibility of reducing them.

On the need for systematic update of Civil Code of Ukraine started talking at the beginning of 2019. The logical continuation of this process was the creation of a working group on the recodification (updating) of the civil legislation of Ukraine in the summer of 2019.

Currently, through the joint efforts of the world's leading experts, the best legal standards have been found for many areas of private legal relations. Such rules are embodied in numerous international instruments on the unification of private law. On this basis, the most recent modernization (and, at the same time, harmonization) of national civil codes and private law doctrines has begun in European countries. Thus, the global (especially European) tendency towards the unification and harmonization of private legal regulation is a significant factor in the modern updating of civil codes in many countries.

Of course, Ukraine cannot stay away from these world processes, so Ukrainian researchers have made efforts to identify major problems, gaps in civil law and develop proposals to improve the legal regulation of civil relations, as well as fill in the gaps. Particular interest were the problematic issues regarding the low level of modern legal technology observed in drafting bills, the possibility of introducing new private law institutions (negative obligations, the category of "error", etc.) into the domestic law, the archaic nature and blanket type of many other existing norms and other.

1. Prospects of Ukraine civil legislation renewal in the area of property protection

The traditional and most widely used ways of protecting property rights in Ukraine are a lawsuit to seize property from someone else's illegal possession (vindication lawsuit) and a lawsuit to remove obstacles to the use and disposal of property (negative lawsuit).At the same time, the terms "vindication" and "negative" lawsuits are not used in the Civil Code of Ukraine, despite the fact that such term is directly enshrined in separate legislative acts. In view of the well-established practice of applying these methods of protection and the unification of legislative acts governing the protection of property rights, articles 387 and 391 of the CC should be supplemented by the names of those methods of protection. Requires to solve the problem of competition vindication, restitution and conditioning, that laid down in art. 1212 of the CC[1].Established in civil science and jurisprudence in the application of a negative claim is the position to not extending on such claims the limitation period. At the same time, the CC does not have an appropriate standard, which requires mandatory consideration when making changes to the CC.

[1] Civil Code of Ukraine of May 10, 2018 (as amended and supplemented) // Official Text- K. : PALIVODA AV, 2018. 408 p.

Another problem of the CC in the field of property rights protection, which needs to be addressed when updating civil law, is the problem associated with the use of such a method of protection as recognition of property rights. According to art. 392 of the Civil Code, the property owner may bring an action for recognition of his property right, if this right is contested or not recognized by another person, and also in case of the loss of a document certifying his ownership. Unlike the first two grounds for recognition of title, the loss of the title deed may not be accompanied by a violation of the title of the owner, and may therefore even be considered as a preventive measure aimed at preventing a violation of title in the future, for example, by the person who found the lost title documents. Therefore, the recognition of property rights on grounds of loss of title documents has its own peculiarities, as well as certain problems that lie in the proper determination of the jurisdiction of the court to be addressed in such case; finding out the possibility of considering such case in a separate civil proceeding, failing separate trial and the jurisdiction of economic or administrative courts – determining the proper defendant, as well as the possibility of applying this method of protection of property rights, not only in case of legal documents loss, but also in in the absence of them at all. More information about these issues, see. Dzera I.O. Some issues of property rights recognition under art. 392 of the Civil Code of Ukraine[2].

It should be noted other problems in applying this method of protection on the grounds of loss by the owner his title documents: 1) the inability to identify the defendant, because in this case the right of ownership is not disputed by anyone; 2) complication of determining the form of the procedure by the wording art. 392 of the Civil Code, according to which the owner of the property can sue for recognition of his ownership; 3) the reason for the application of this protection method may be not only the loss, but also the absence of the title document, unless it was issued at the time of acquisition by the person of ownership or the law did not provide for its receipt at all.

Solving these problems in court practice carried out in different ways. Thus, most often, as defendants are involved government or local self-government, whose competence is the issuance of a legal document. At the same time with the adoption of the Code of Administrative Justice of Ukraine, such disputes are subject to resolution in the administrative procedure, which leads to problems in determining the jurisdiction of such cases. Exclusion from art. 392 of the Civil Code of the construction of “lawsuit” or its replacement by “statement” also does not fully solve the problem under study,

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[2] Дзера І.О. Деякі питання визнання права власності за статтею 392 Цивільного кодексу України. *Підприємництво, господарство і право*. 2018 № 5. С. 19–24.

because such cases can be heard in a separate proceeding only in civil proceedings. In the presence of economic or administrative nature signs of such disputes, the problem remains unresolved.

Therefore, in our opinion, issues related to the use of this method of protection can be resolved by amending art. 392 of the Civil Code regarding the extension of the grounds for its application by such grounds as the absence of a legal document, as well as a special reservation in the procedural legislation regarding the procedure for dealing with cases on this basis in different forms of litigation and different types of proceedings.

There are also several loopholes and contradictions in the field of the protection of common partial ownership that have been identified as a result of the practice of applying Chapter 26 of the Civil Code of Ukraine. Thus, at same time, several problems arise when co-owners use art. 365 of the Civil Code of Ukraine, which regulates termination the right to part on the claim of other co-owners.

Firstly, the norm of art. 365 of the Civil Code is constructed in such way that it provides possibility of appeal against such claim only by other "co-owners" and not by "co-owner". Therefore, the question arises of the possibility of bringing to court one of the co-owners with a claim for termination of the right to share of the second co-owner, that is, if there are only two of such co-owners in the joint partial ownership.

Secondly, the question arises as to the possibility consideration of such cases in the economic process. In particular, there is no provision in the Economic Code of Ukraine that would provide for such way of termination of the right of share.

However, the jurisprudence notes the possibility of applying the provision of Art. 365 of the CC to relations with the participation of economic entities. Thus, the Supreme Court notes, that because "economic relationships about termination of the right to share in the joint property by court decision that based on the claim of other co-owners not governed by other legal acts than civil law, for such cases the relevant provisions of the Civil Code of Ukraine are subject to application, in particular, provisions of art. 365 of this Code"[3].

The third problem is availability in case law different legal positions about that whether all four conditions must be present in the aggregate, or one or more of them at all. This is due to the fact that the article itself lists these conditions without making any reservations about their application. In the case law, there were decisions that indicated the need for these four conditions in the aggregate, but subsequently they were revised in cassation with a

[3] Дайджест судової практики Великої Палати Верховного Суду. № 2019/1. С. 36. URL: https://supreme.court.gov.ua/userfiles/media/daidjest_6.pdf.

different interpretation of such grounds. The reason for implementation of such interpretation was the letter of the Supreme court of Ukraine "Analysis of some questions of the applicator by courts the legislation of property rights in the consideration of civil cases" from 01.07.2013, according to which from the norm art. 365 of the Civil Code follows that the termination of the person's right to share in the common property is allowed in the presence of any of the circumstances provided for in paragraphs 1–3 of part 1 of art. 365 of the CC, but provided that such termination would not cause significant harm to the interests of the co-owner and his family members[4]. On the basis of the above, it is necessary to note the tendency to consider such disputes with the use of a similar interpretation of art. 365 CC. However, for the purpose of uniform application by the courts this provision, need to make changes to art. 365 of the Civil Code, while eliminating the contradictions laid down in the said article.

It is also difficult to determine the size of a share, in particular, the notion of a "small" share as one of the conditions for termination of the right to share.

So whether it be a small part compared to other parts of the co-owners, or just less than their shares and how much less.

The issue of a small share is usually decided by the court depending on the particular circumstances of the case. At the same time, in our opinion, it would be more expedient to make a corresponding reservation in art. 365 CC.

It should also be proven in court that the termination of a person's right to share will not materially harm the interests of the co-owner and his or her family members. The Supreme Court pointed attention to this condition to terminate the right to share, and noted the possibility of extending it to relationships involving economic entities, with the caveat, that the provisions on co-owner of interest to be applied to all property relations which arise between co-owners in common property, and reservation about "and his family" shall be applied solely to individuals as participants in these relations. "[5]At the same time, it would be more effective to implement the relevant clause in art. 365 of the Civil Code regarding the interests of co-owners and family members (for individuals), as well as the interests of co-owners (for other members of civil relations).

Not devoid of gaps and the mechanism of the co-owner rights protection in case of sale share with violation of the right of pre-emptive purchase of the

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[4] Лист Верховного Суду України від 01.07.2013 р. URL: https://protocol.ua/ua/analiz_deyakih_pitan_zastosuvannya_sudami_zakonodavstva_pro_pravo_vlasnosti_pri_rozglyadi_tsivilnih_sprav/

[5] Постанова Великої Палати Верховного Суду України від 18.12.2018 р. у справі № 908/1754/17. URL: http://www.reyestr.court.gov.ua/Review/78977551.

share provided by art. 364 CC, which can be summarized as follows: 1) no indication of the extension of the right of pre-emptive purchase of the share only in cases of alienation under the contract of sale; 2) an unclear mechanism of transfer of rights and obligations of the buyer. Thus, law does not oblige you to rearrange the purchase agreement with the new owner. Therefore, the court's decision to transfer the rights and obligations of the buyer to the co-owner whose rights have been violated will be considered a title deed, on the basis of which the buyer's party to the contract will be replaced, but there will be no disclaimer in the contract itself. It should be borne in mind that all the terms of such agreement must be considered valid, except for those that defined the identity of the previous buyer, who was not a co-owner. Therefore, the invalidation of a contract for the alienation of a share concluded in breach of a pre-emptive right is an inadequate means of protection.

Based on the above, it is necessary to note the expediency of taking into account the investigated gaps and contradictions in the formulation of amendments to the acts of civil law in connection with their upcoming update. At the same time, the main attention should be paid to the existing gaps and contradictions revealed in the process of application of civil law norms by the courts in the settlement of civil cases, the decision of which should be based on the achievements of civilistic science and results of court practice.

2. Expertise of the land with the purpose of acquiring ownership

Due diligence procedure enables you to reduce your risk and make transaction decisions based on objective information. There are several types of Due Diligence: technical, marketing, environmental, legal, economic, tax and more.

Due diligence (in english) is "due diligence, prudence". Encyclopedic English Banking Dictionary by B.G. Fedorova defines "due diligence" as a proper check and indicates that "in the work of Western investment banks, "due diligence" designates a set of actions designed to provide the project with minimal protection against disasters: a trip to a place, acquaintance with counterparties, study of the environment and places, social and other risks"[6]. It is generally accepted that a legal (law) audit is a systematic process of obtaining and evaluating the objective facts of a person's legal constituent, which establishes the level of their compliance with established law, case law and business practices.

The research of the due diligence is devoted to the scientific works of foreign scientists, in particular, J. Bower (studied the role of the merger and

[6] Due Diligence. URL: http://services.svdevelopment.com/ua-lawyer-audit-analiz.html

acquisition acquisitions process), R. Waterman (explored ways to effectively manage the company), and authors of the balanced scorecard R. Kaplan and D. Norton, and many others. At the same time, Ukrainian studies are limited to articles on specific issues: I.M. Tkachuk examines the differences between auditing and due diligence, and the works of V.M. Likhovchuk, N.E. Silicheva, O.O. Tereshchenko and M.V. Stetskais dedicated to the prospects of developing due diligence in Ukraine. About due diligence as a kind of audit services write I.M. Gnoeva, A.O. Kasich, B.V. Melnychuk[7].

In the current legislation of Ukraine there is no definition of legal (law) audit, corporate audit, and moreover the due diligence procedure, there are also no mechanisms regulating the procedure for its conduct.

It is believed that this term was put into circulation in the 1930s in the United States. At first, it meant the procedure of disclosing information to a broker before an investor about companies whose shares were traded on the open stock market. Further due diligence moved into the US banking industry. He had in mind a comprehensive system for collecting and analyzing information about potential or existing clients and partners, which was intended by banks to protect property from possible losses. This term refers to the independent verification of information about the issuing company for possible violations of the law, conducted with due care, which allows to limit the liability of the underwriter for errors contained in the emission of securities issue. However, the concept was not explicitly defined in the legislation because, as stated by state courts, it is not possible to establish a single volume of requirements for underwriting of due diligence of different companies.

Nowadays, the concept of legal (law) audit has become quite broad. Today, due diligence means a comprehensive investor-led audit to assess the various risks involved in investing. As a rule, it is done when deciding whether to buy a share in a business or a business project as a whole.

Sometimes a legal (law) audit or ‘due diligence’ is defined as the due diligence of the parties involved in preparing the agreement documents to form a credible basis for the truth and completeness of the provisions of the documents and the facts contained therein.

In some cases, this term refers to the collection and analysis of information about potential or existing clients and partners in order to assess their financial condition and reliability. The amount of legal due diligence, first of all, depends on the specificity of the asset (real estate – land, house with land,

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[7] Безус А.М. Застосування процедури дью ділідженс як важеля зменшення інформаційних ризиків при здійсненні емісії цінних паперів. URL: http://www.investplan.com.ua/pdf/9_2018/11.pdf

separately located building, apartment, office; corporate rights to the entity that owns the property on the property right, etc.), and also the history of ownership of such an asset (how the property was purchased, for example, through privatization, construction, purchase; sole proprietor or owners changed, if so, how long ago (after the statute of limitations had expired) on which basis the property had been acquired on a quotes, or no registered owners at all, since the property is being sold as an investment, under construction).

Thus, the well established practice of due diligence the purchase of real estate and land lots.

The real estate due diligence procedure is usually carried out in several stages, during which the owner's rights to the real estate object, the history of the creation of the object, the chain of purchases, the analysis of the privatization procedure are analyzed.

Specialists also identify the actual encumbrances with which the object is for sale, carry out an expert examination of the seller's real estate transactions, establish competence and restrictions on the transaction.

Thus, due diligence of land lot includes examining the legality of the ownership and use of land, obtaining all necessary approvals and complying with the necessary procedures for their disqualification, withdrawal, change of purpose, etc., verify the legitimacy of transactions on land, setting the existing restrictions on the land, the restrictions established for agricultural land. So there are peculiarities of holding a due diligence land formed with rights. Thus, when checking the allotment (formation) of a land plot, it is necessary to check the grounds for the development of land management documentation, approval of land management documentation and its expertise, analysis of existing restrictions on land use, the establishment of geodetic parameters and topographic plans, etc. Analysis of current land use may include research into the features of the legal regime of current land use, the history of land use, establishing the impact of the current regime on the registration of land rights. When researching the history of a real estate object, all the legal documents are checked, the lawfulness of the purchase of the real estate object, information from the archives of the administrative-territorial unit, state registers, BTI registration, etc. is raised[8].

In many jurisdictions, title verification is limited to formally verifying current ownership of an entity by, for example, obtaining an extract from the relevant registry. In Ukraine, this is also possible, but we have a much more acute question of historical defects that may affect the title of the current owner. This is, in particular, facilitated by the relatively weak protection of a

[8] URL: https://www.de-jure.ua/wp-content/uploads/2019/09/Due-diligence-obiektivnerukhomosti.pdf

conscientious purchaser in the form in which it is implemented in our legislation (art. 388 of the Civil Code of Ukraine).

For the acquisition of ownership of immovable property by the statute of limitations must be given title value for a court decision recognizing ownership which is made on the basis of establishing by him the fact of possession of real estate in compliance with statutory requirements. The state registration of real estate rights in Ukraine should have only fixing nature.in this connection, one can also mention the liberal approach of the courts to vindication, which allow this method of protection without the need to deny the whole chain of ownership of the disputed object (for example, the decision of the SCU in the case No. 6-136ts12).

For example, an assetdeal is the land under the target asset that is important for the legal audit of the assetdeal. This is due both to the possibility of further use by the buyer of the purchased real estate for the intended purpose (for example, the location of parking places for visitors to the mall, the construction of warehouses for the maintenance of the commercial object, etc.), and to a purely legal an opportunity to make an assetdeal.

Thus, according to Part 2 of art. 377 of the Civil Code of Ukraine dated 16.01.2003 № 435-IV the size and cadastral number of the land plot on which the target asset is located are essential conditions for contracts that provide for the transfer of ownership of the real estate object (except for apartments in apartment buildings), if the land plot under the commercial real estate object is not furnished, then the transaction may not be possible before its proper registration. In this regard, conducting a legal audit of the land is also a prerequisite for planning a real estate transaction.

3. Conditions of acquisition of property rights on real estate for a long timeowning

Cases were common and remain, when a person owns certain property, building, land without being the owner of such property, without properly documented possession, owever, this has been going on for a long time. Such cases relate to villages, district centers, but are increasingly occurring in cities. As a rule, a person conscientiously and openly seized such property, that is property will improve over time at the expense of the owner’s labor or money.

Despite the fact that in Art. 344 of the Civil Code of Ukraine spelled out the conditions of acquisition of the right of ownership by the statute of limitations, many questions arise regarding the conditions acquisition of ownership. Article 344 of the Civil Code defines such important conditions of limitation, as honesty of ownership; transparency of ownership; continuity of possessions (real estate for 10 years, movable property for five years);

possession within a specified period, these conditions should apply simultaneously[9].

Open ownership implies, that the purchaser of the real estate does not conceal the fact of possession and uses it as its owner. Continuity condition is characterized by the need for long and continuous possession of real estate to acquire ownership of the property for a long time ago, but it should be noted in accordance with Part 3 of Article 344 of the Civil Code of Ukraine the loss of immovable property by the owner, not of his own volition, does not interrupt the statute of limitations, if the real estate has been returned within one year, or in the event of a claim for the demand for that real estate.

French civil law in Art. 229 of the Civil Code of France requires the following conditions of acquisition of title to the statute of limitations, possession of a permanent and continuous, peaceful and open, which is undeniable and is carried out by the person in the form of the owner. Unlike the civil law of Ukraine, the French civil law establishes a 30-year statute of limitations on both movable and immovable property[10].

The German Civil Code (BGB), in accordance with paragraph 943, provides for a fair use condition for the acquisition of ownership if the owner is dishonest, or later learns that the property does not belong to him, acquisition by prescription is excluded[11].

In countries where there is a statute of limitations, an ancient owner is not obliged to personally own a thing for the entire period of limitation.

Such owner may attach to the term during which he owned the term of ownership of his predecessor. In accordance with Paragraph 943 of the German Civil Code (BGB), if under a succession of thing passed into the possession of a third party, who will own it as owner, then the statute of limitations that has expired during the possession of the predecessor is credited to this third party[12].

A similar rule exists in the Civil Codes of the Republic of Poland, the Republic of Belarus.

Thus, it is obvious that the legislation of different countries where there is an institution of limitation, has similar conditions of acquisition of ownership of immovable property for a long time ago, differs in the number of conditions, terms of acquisition of ownership.

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[9] Civil Code of Ukraine of May 10, 2018 (as amended and supplemented). Official Text-K. : PALIVODA AV, 2018. 408 p.

[10] Civil Code of France. URL: https://pandia.ru/text/77/231/34260.php

[11] German Civil Code (BGB). URL: https://ru.wikisource.org/wiki/Германское_гражданское_уложение/Книга_3/Раздел_3

[12] Ibid.

There are a lot of questions about the acquisition of title to the land prescription. Often there is a situation where observance of all conditions of limitation does not lead to the emergence of ownership of the land.

Accordingly, to Part 3 of Article 344 of the Civil Code of Ukraine in this case, if the person took possession of the real estate on the basis of a contract with the owner of the property, who after the expiration of the contract did not make a claim for the return of his property, then that person acquires the title to the real estate after the expiration of fifteen years of possession of the real estate since the expiration of the statute of limitations. Considering also the simultaneous fulfillment of the conditions of good faith; openness, continuity of ownership and tenure for a fixed period[13].

It should be noted that the acquisition of the ownership of the land plot by prescription is also regulated by Art. 119 of the Land Code of Ukraine, which states that citizens who conscientiously, openly and continuously use the land for 15 years, but who do not have documents proving that they have the rights to this land, can apply to a public authority, Council of Ministers of the Autonomous Republic of Crimea or local self-government body requesting that it be transferred into ownership or made available. The size of this land plot shall be established within the limits established by this Code[14].

In order to acquire ownership of real estate, the legal value of the property must be given legal value by a court decision on recognition of ownership, which is made on the basis of establishing by him the fact of possession of real estate in compliance with the statutory requirements. State registration of real estate rights in Ukraine should only be of a fixed nature.

CONCLUSIONS

Adaptation to the conditions of the EU internal market requires the updating of civil legislation, while simultaneously addressing the general problem of choosing between a private-law (humanitarian) approach and a public-law (state-regulatory) approach.

These circumstances should be taken into account when defining the algorithm of Ukraine’s adaptation to the EU legal system (at present it looks like a legal adaptation to the conditions of the EU internal market, which is, first and foremost, in the perception and adoption of the European concept of private law).

It should be noted that it is advisable to take into account the gaps and contradictions investigated in the formulation of amendments and

[13] Civil Code of Ukraine of May 10, 2018 (as amended and supplemented) // offic.-text .: PALIVODA A.B.,2018.- 408 c.

[14] Land Code of Ukraine // URL: https://zakon.rada.gov.ua/laws/show/2768-14

supplements to the civil legislation in connection with their future updating. At the same time, the main attention should be paid to the existing gaps and contradictions revealed in the process of application of civil law norms by the courts in the settlement of civil cases, the decision of which should be based on the achievements of civilistic science and results of court practice.

Not devoid of gaps and the mechanism of the co-owner rights protection in case of sale share with violation of the right of pre-emptive purchase of the share provided by art. 364 CC, which can be summarized as follows: 1) no indication of the extension of the right of pre-emptive purchase of the share only in cases of alienation under the contract of sale; 2) an unclear mechanism of transfer of rights and obligations of the buyer. Thus, law does not oblige you to rearrange the purchase agreement with the new owner. Therefore, the court's decision to transfer the rights and obligations of the buyer to the co-owner whose rights have been violated will be considered a title deed, on the basis of which the buyer's party to the contract will be replaced, but there will be no disclaimer in the contract itself. It should be borne in mind that all the terms of such agreement must be considered valid, except for those that defined the identity of the previous buyer, who was not a co-owner. Therefore, the invalidation of a contract for the alienation of a share concluded in breach of a pre-emptive right is an inadequate means of protection.

Based on the above, it is necessary to note the expediency of taking into account the investigated gaps and contradictions in the formulation of amendments to the acts of civil law in connection with their upcoming update. At the same time, the main attention should be paid to the existing gaps and contradictions revealed in the process of application of civil law norms by the courts in the settlement of civil cases, the decision of which should be based on the achievements of civilistic science and results of court practice.

The adoption of the Civil Code of Ukraine on January 16, 2003 evidenced a fundamental change in the legal regulation of civil relations, which became the basis of the private law of an independent Ukraine. The preferred majority of the Civil code rules is characterized by high legal technique, complete regulation of civil relations. A large number of novelties were introduced for all legal institutions, including the field of property law. At the same time, 16-year practice of application of Civil Code of Ukraine norms also revealed vulnerable provisions, contradictions, which necessitated many changes to make, the analysis of which gives grounds to confirm the continuous improvement of the civil legislation.

Adaptation to the conditions of the EU internal market needs updating of civil law with a simultaneous solution to the general problem of choosing between the private (humanitarian) approach and the public-law

(state-regulatory) approach. It is emphasized that these circumstances should be taken into account when defining the algorithm of adaptation of Ukraine to the EU legal system (at present it looks like a legal adaptation to the conditions of the EU internal market, which is, first and foremost, in the perception and adoption of the European concept of private law). At the same time, the problems of ideological and mental compatibility must also be resolved, without which the desired result of adaptation of justice, legal understanding, legal doctrine, legislation and, finally, the concept of law (in particular, private law) cannot be achieved.

The monograph deals with some aspects of civil legislation recodification in the context of European integration processes, in particular: prospects for updating the civil legislation of Ukraine in the field of property rights protection, expert report of land field for the purpose of realization of transactions on the acquisition of property rights, as well as the peculiarities of acquiring property rights for real estate property by the statute of limitations.

Keywords: civil law, recodification, property, property rights, acquisition of property rights, statute of limitations.

SUMMARY

The adoption of the Civil Code of Ukraine on January 16, 2003 evidenced a fundamental change in the legal regulation of civil relations, which became the basis of the private law of an independent Ukraine. The preferred majority of the Civil code rules is characterized by high legal technique, complete regulation of civil relations. A large number of novelties were introduced for all legal institutions, including the field of property law. At the same time, 16-year practice of application of Civil Code of Ukraine norms also revealed vulnerable provisions, contradictions, which necessitated many changes to make, the analysis of which gives grounds to confirm the continuous improvement of the civil legislation.

Adaptation to the conditions of the EU internal market needs updating of civil law with a simultaneous solution to the general problem of choosing between the private (humanitarian) approach and the public-law (state-regulatory) approach. It is emphasized that these circumstances should be taken into account when defining the algorithm of adaptation of Ukraine to the EU legal system (at present it looks like a legal adaptation to the conditions of the EU internal market, which is, first and foremost, in the perception and adoption of the European concept of private law). At the same time, the problems of ideological and mental compatibility must also be resolved, without which the desired result of adaptation of justice, legal understanding, legal doctrine, legislation and, finally, the concept of law (in particular, private law) cannot be achieved.

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THE RIGHT OF USE ANOTHER'S LAND PLOT WITH THE AGRICULTURAL PURPOSES (EMPHYTEUSIS)

Goncharenko V. O.

INTRODUCTION

Radical changes in the field of land legal relations, which are introduced by including in Art. 14 of the Constitution of Ukraine[1], property on land, have led to the creation of a system of proprietary rights on land, among which one of the closest in content to property on land is the right of use another's land plot for agricultural purposes (emphyteusis).

In the civil legislation of Ukraine, the relations about emphyteusis are regulated by the norms of property and contract law. The peculiarity of the legal regulation of emphyteusis under the civil law of Ukraine is the absence of its legal definition, while its essence is contained in the rules that usually regulate the rights and responsibilities of the parts of such legal relations, which necessitates the analysis of the features of this proprietary right to another's property.

Until 2004, the norms of civil law were not applied to the regulation of land relations, except for those property relations that have arose and organically combined with public relations in the field of use and protection of land, natural resources, environmental protection (damages, transfer of ownership of buildings and structures on land plots, inheritance of land plots, civil liability for violation of land law, natural resources and environmental legislation etc.). This is due to the fact that in Art. 2 of the Civil Code of the USSR[2] of 1963 the principle of separate legal regulation of property relations by the rules of civil law was provided, while land, forest, water, mining relations – respectively, by the rules of land, forest, water and subsoil legislation.

The reform of this model of legal regulation of land relations took place with the entry into force of the Civil Code of Ukraine[3] of 2003, which re-established provisions for the application of civil law to regulate public relations in use of land, natural resources and protection of environment.

[1] Конституція України: Закон України від 28.06.1996 р. № 254к/96-ВР. *Відомості Верховної Ради України*. 1996. № 30. Ст. 141.

[2] Цивільний кодекс Української РСР: Закон Української РСР від 18 липня 1963 р. *Відомості Верховної Ради Української РСР.* 1966. № 46.

[3] Цивільний кодекс України: Закон України від 16.01.2003 р. *Офіційний вісник України*. 2003. № 11. Ст. 461. С. 7.

According to Art. 1 of the Civil Code of Ukraine, this act applies to the regulation of land, natural resources, ecological relations within the limits set up by the Civil Code of Ukraine. Therefore, in paragraph 1. Art. 9 of the Civil Code of Ukraine it is provided that the provisions of the Civil Code of Ukraine apply to the settlement of relations arising in the areas of use of natural resources and environmental protection, if they are not regulated by other legislation.

In the Land Code of Ukraine[4] provisions on the correlation of its norms with the norms of other branches of law have been included. Thus, Part 1 of Art. 3 of the Land Code of Ukraine provides that "the land relations are regulated by the Constitution of Ukraine, this Code, as well as normative legal acts adopted in accordance with them".

Since the Civil Code of Ukraine was adopted two years after the adoption of the Land Code of Ukraine, problems of theoretical and practical nature regarding the relationship between civil and land legislation arose. Different approaches to legal regulation in the Civil Code of Ukraine and the Land Code of Ukraine of the right of use another's land plot for agricultural purposes (emphyteusis) indicate a problem with distinguishing between civil law and land law regulation of this right.

In the context of European integration processes, in order to provide legal conditions for the development of the institution of emphyteusis, it is necessary to develop proposals for amendments to the current civil and land legislation of Ukraine.

1. The main features of emphyteusis under the civil legislation of Ukraine

The civil legislation of Ukraine determines the main features and grounds for emphyteusis. However, it should be noted that the Civil Code of Ukraine does not define emphyteusis, and its essence can be clarified only from the analysis of its characteristic features under Art. 407 of the Civil Code of Ukraine. In particular, in accordance with Part 1 of Art. 407 of the Civil Code of Ukraine, the right of use another's land plot for agricultural purposes is established by a contract between the owner of the land and a person who has expressed a desire to use this land for agricultural purposes (hereinafter – the land user). This indicates that the only basis for the occurrence of such a proprietary right as emphyteusis is a contract between the owner of the land and the land user (emphyteuta).

[4] Земельний кодекс України: Закон України від 25.10.2001р. № 2768-ІІІ. *Відомості Верховної Ради України*. 2002. № 3. Ст. 27.

According to Part 2 of Art. 407 of the Civil Code of Ukraine emphyteusis may be subject to alienation on the basis of the contract and can be inherited. That is, emphyteusis can be sold, donated, exchanged and otherwise transferred to another person. However, it should be borne in mind that only the proprietary right to use the land plot can be alienated, and not the land plot itself in respect of which emphyteusis has been established.

At the same time, Part 3 of Art. 407 of the Civil Code of Ukraine and Part 3 of Art. 102-1 of the Land Code of Ukraine stipulate that the right of use a land plot of state or communal property for agricultural purposes may not be alienated by its land user to other persons, included in the statutory fund, pledged. It seems that this legal norm unjustifiably narrows the range of powers of the land user in the case of establishing of emphyteusis in relation to state or communal lands.

After all, the right to use a land plot on the basis of emphyteusis is not related to the restrictions established by law (we meen the ban until July 1, 2021 on the right to make contributions by land shares to the share capital of the companies and to sell agricultural land, provided by paragraphs 14 and 15 of Section X of the Land Code of Ukraine) in relation to land plots for agricultural purposes, as emphyteusis provides only the right to use someone else's land plot and does not cover the right to dispose of it.

By introducing a restriction on the selling of emphyteusis established for land plots of state or communal property for agricultural purposes, the legislator is trying to limit the privatization of the land fund of Ukraine. However, the position of the legislator is incorrect, because the alienation of the emphyteutic right does not affect the change of owner of the land in respect of which the emphyteusis is established.

Similarly, we have to underline the injustice of the exemption established by the Civil Code of Ukraine regarding the terms of the contract of emphyteusis for land plots of state or communal property. So, Part 1 of Art. 408 of the Civil Code of Ukraine sets a maximum term of 50 years for the contract of emphyteusis established for land plots of state or communal property.

Moreover, it is not clear how to apply the provisions of Part 4 of Art. 102-1 of the Land Code of Ukraine, according to which the term of use of land of state, communal and private property for agricultural purposes (emphyteusis) may not exceed 50 years.

First of all, it should be noted that this norm shows the tendency of the legislator to identify the property right of emphyteusis with the obligatory right to lease the land, for which in Part 4 of Art. 93 of the Land Code of Ukraine it is also provided a maximum term of 50 years.

In addition, the lack of understanding by the legislator of the essence of the division of rights into property and obligations is evidenced by the inclusion in land legislation provisions about the possibility of alienating the

right of land lease, including by sale at land auction, as well as pledge, inheritance, deposit to the share capital of the company – for a period of up to 50 years, except in cases specified by law.

Thus, before the introduction of the specified innovation to Part. 5 of Art. 93 of the Land Code of Ukraine, the need to include the emphyteusis in the civil legislation of Ukraine was explained by the fact that the rights of the tenant of land can not be considered as a proprietary right, because they can not be the subject of an independent contract of sale (although they can, in some cases, be inherited)[5].

It is important to note that in the case of sale of the right to lease the land the preemptive right to purchase this right by the owner of the land is not provided for, as provided in the case of sale of emphyteusis in accordance with Part 2 of Art. 411 of the Civil Code of Ukraine. In addition, setting a maximum term for a emphyteusis agreement is not compatible with the main feature of this institution as a lifelong right, the purpose of which is such a fiduciary attitude to the land as to its own, which is directly ensured by the indefinite use of the object of emphyteusis. Sukhanov[6] noted that emphyteusis is essentially a perpetual lease. Therefore, the provision on the establishment of a maximum term of 50 years for the emphyteusis agreement established in respect of land of state or communal ownership, should be excluded from Part 1 of Art. 408 of the Civil Code of Ukraine.

So, the legislative regulation of the maximum terms of the emphyteusis contract is not appropriate. It is more probable that it is necessary to establish the minimum terms of emphyteusis. In determining the minimum terms of the contract of emphyteusis should by analogy use of the provisions of Part 3 of Art. 19 of the Law "On Land Lease"[7], according to which the lease of agricultural land for commercial agricultural production, farming the term of the lease contract is determined by agreement of the parties, but may not be less than 7 years.

The most important feature of emphyteusis is its proprietary nature with the simultaneous emergence of this institution on the basis of the contract. An important consequence of the recognition of the proprietary nature of emphyteusis is the absolute nature of the protection of rights of land user. According to Art. 396 of the Civil Code of Ukraine, the provisions on the

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[5] Покровский И.А. Основные проблемы гражданского права. М.: Статут (в серии "Классика российской цивилистики"). 1998. 353 с. С. 36.

[6] Суханов Е.А. Проблемы правового регулирования отношений публичной собственности и новый Гражданский кодекс. *Гражданский кодекс. Проблемы. Теория. Практика*: Сборник памяти С.А. Хохлова. М., 1998. 480 с. С. 299.

[7] Про оренду землі: Закон України від 06.10.1998 р. № 161-XIV. *Відомості Верховної Ради України*. 1998. № 46-47. Ст. 280.

protection of property rights (Chapter 29 of the Civil Code of Ukraine) also apply to emphyteusis as a proprietary right to another's property. At the same time, protection (by vindication and negator lawsuits) is provided not only from violations by third parties, but also from the actions of the owner of the land plot in respect of which emphyteusis has been established.

According to the classical definition of absoluteness, property rights are protected from any person, regardless of the change of owner of the thing. It is the proprietary nature of emphyteusis that explains the preservation of this right in the case of transfer of property on land plot to other persons. So, there is a principle known to classical Roman private law, according to which property right follows the things in respect of which it is established, and not directly related to the holders of these rights.

The characteristic of "following" is an element of the absoluteness of property rights. In turn, "following" affects the content of another characteristic of property rights – the principle of individualization (specialty, certainty) of property right, according to which property right arises in relation to an individually-defined thing, ends with its death and follows it everywhere, regardless of change the owner of the thing. All of the above is characteristic of emphyteusis, and therefore: emphyteusis does not end with the change of owner of the land plot and its object is an individually-defined thing – agricultural land. Also, by virtue of the principle of specialty, a separate contract must be concluded for each land plot, which provides for the emergence of emphyteusis, as proprietary right cannot arise in relation to a set of things.

The alienation of emphyteusis means that it can be transferred by the land user to another person under any civil contract, except as provided in Part 3 of Art. 407 of the Civil Code of Ukraine. This contract can be both payment or free. In accordance with Part 2 of Art. 411 of the Civil Code of Ukraine in case of sale of the right to use the land the owner of this land has a priority over other persons to purchase it at the price, announced for sale, and on other equal conditions. The right of priority is not used in the case of the sale of emphyteusis at public auction, when the emphyteuta is a bankrupt or sanctions for the offense are applied, because in this case there is a forced sale. The priority right applies only to the paid alienation of emphyteusis, and therefore cannot be applied in the case of alienation by donation.

In the procedure of sale of emphyteusis, the seller of it is obliged to notify in writing the owner of the land plot provided for use about the intention to sell his right of use to a third party indicating the price announced for sale and other conditions of sale.

The owner of the land plot, who within one month declares in writing his intention to buy the emphyteusis, is obliged to buy it at the price and on the

conditions announced for sale. If the landowner refuses to purchase the emphyteusis or does not give written consent to the purchase, or agrees to a possible purchase at another price, the land user has the right to sell his right to any person, but on terms previously announced for sale. If the owner of the land plot, having agreed to the purchase of emphyteusis, subsequently abandons his intention, the land user may demand from him compensation for damage caused by such refusal, in accordance with Art. 22, 23 of the Civil Code of Ukraine.

If a land user sells an emphyteusis in violation of the owner's right to preferential purchase, the landowner may apply to the court within one year to transfer the rights and obligations of the buyer. The right of preferential purchase will be considered violated in the case of: a) failure to notify the owner of the land plot of future sale, including non-compliance with the form of notification or failure to indicate in the notice of all terms of sale; b) sale of the emphyteutical right earlier before the time; c) providing the landowner with information about the terms of the future sale, which do not correspond to reality; d) changes in the terms of sale compared to those previously announced; e) the conclusion of a fictitious transaction aimed at violating the right of preferential purchase of emphyteusis, and others violations aimed at restricting or depriving the owner of the land plot of the preferential purchase. At the same time, the plaintiff is obliged to deposit into the deposit account of the court the amount of money that the buyer must pay under the contract (Part 4 of Art. 411, Art. 362 of the Civil Code of Ukraine).

Since the right to use a land plot of state or communal property cannot be alienated by its land user to other persons (Part 3 of Art. 407 of the Civil Code of Ukraine), the content of Art. 127 of the Land Code of Ukraine, in which as an alienator of emphyteusis defined public authorities, the Council of Ministers of the Autonomous Republic of Crimea and local governments in accordance with their powers under Art. 122 of the Land Code of Ukraine. It is also noted that the purchasers of emphyteusis can be citizens, legal entities and foreign states on the grounds and in the manner prescribed by the Land Code of Ukraine. Thus, in Art. 127 of the Land Code of Ukraine implies, despite its name, the paid establishment of emphyteusis, rather than the sale of existing emphyteutic right.

The sale of the right of emphyteusis on land plots of state and communal property on a competitive basis in the form of an auction is carried out in the cases and in the manner prescribed by Chapter 21 of the Land Code of Ukraine (Part 2 of Art. 127 of the Land Code of Ukraine).

In accordance with Part 1 of Art. 133 of the Land Code of Ukraine, emphyteusis may be pledged, unless otherwise provided by law.

In accordance with Part 3 of Art. 407 of the Civil Code of Ukraine the right of use of the land plot of the state or municipal property for agricultural needs isn't transferred in the pledge. The transfer of the right to a part of the land plot as a pledge is carried out after its allocation on the ground in accordance with the land management documentation. Pledgee of agricultural land plot and property rights on it (lease, emphyteusis) can only be banks (Part 3, 4 of Art. 133 of the Land Code of Ukraine).

Also the characteristic of emphyteusis is that it can be inherited both on the basis of a will and by the law. A feature of emphyteusis, which, in particular, helps to distinguish it from superficies, is its purpose. The land is given to the user of superficies only for construction, and to the emphyteuta – only for agricultural purposes.

The Civil Code of Ukraine provides for only one basis for the emergence of emphyteutic law – the contract between the owner of the land and a person who has expressed a desire to use this land for agricultural purposes. However, emphyteusical law may arise on other grounds, in particular, by will. For example, it is not clear why the legislator allows the establishment of superficies by will, but does not provide such a basis for the emergence of emphyteutic law. Established by law (Part 2 of Art. 411 of the Civil Code of Ukraine), the right of priority for the landowner to buy an emphyteutic right is provided only for the sale of an existing emphyteutical right, and therefore cannot be an obstacle to the existence of a will as a basis for emphyteusis. Therefore, it is necessary to supplement Part 1 of Art. 407 of the Civil Code of Ukraine and Part 1 of Art. 102-1 of the Land Code of Ukraine by amendment that emphyteusis can also be established by will.

Thus, the most important feature of emphyteusis is its proprietary nature with the simultaneous emergence of this institution on the basis of the contract. Thus, emphyteusis harmoniously combines the binding legal basis of origin and all the features characteristic of property law, such as: absoluteness, special object – agricultural land, long-term, alienability, heredity, purpose, "following" the thing. In addition, the characteristics of emphyteusis as a proprietary right to another's property are: limited in comparison with the property content (usually excludes the right to dispose of the object of property rights, and in case of emphyteusis the law prohibits the sale of state or communal land for agricultural use needs, as well as the prohibition provided for the deposit of emphyteutic rights to the share capital, its transfer as pledge- Part 3 of Art. 407 of the Civil Code of Ukraine), secondary to property rights, the principle of limiting property rights and restoring it in full in case of cancellation of limited property rights (the principle of elasticity of property rights).

2. The contract of emphyteusis

Under the contract of emphyteusis one party (the owner of the land plot) transfers the agricultural land plot for use to the other party (land user, emphyteuta), and the land user is obliged to use it in accordance with the purpose and terms of the contract.

In the structure of the relationship about the emphyteusis, it is necessary to distinguish the grounds for the occurrence of emphyteusis from the grounds for the acquisition of an existing emphyteusis right by a new subject. Emphyteusis can be transferred under a contract between the previous and next land user, and by inheritance. The emphyteutist may alienate his right as for charge and free of charge, in particular, the emphyteutic right may be the subject of a contract of sale, donation, exchange, pledge and may be transferred in any manner not prohibited by law to another individual or legal entity, except for the right to use land of state or communal property for agricultural purposes. The alienation of emphyteusis is not about the transfer of ownership of the land, but about the alienation of the right to use it exclusively.

The characteristics of the contract of emphyteusis, first of all, require the definition of the features of this contract. Thus, the use of land on the terms of emphyteusis is limited and targeted, because in case of emphyteusis, the owner transfers to the user the posession and the right of targeted use, while retaining the right to dispose of land. The legal purpose of the land plot provided for use is determined by the contract of emphyteusis. Therefore, the parties may not specify in the contract of emphyteusis any other legal purpose of the land plot than use for agricultural purposes.

In accordance with Part 5 of Art. 626 of the Civil Code of Ukraine, the contract is a payment agreement, unless otherwise provided by contract, law or does not follow from the essence of the contract. So the contract of emphyteusis is a payment agreement, if its gratuitousness is not expressly provided by the contract.

In parts 1 and 2 of Art. 640 of the Civil Code of Ukraine the presumption of consensual character of it is established. The enshrinement of this presumption in law is explained by the fact that the agreement is a mandatory term for the conclusion of the contract, and the transfer of the thing only complements it and it is necessary only for certain types of contracts. The contract of emphyteusis is consensual, as the transfer of land is not required for the emergence of emphyteusis. At the same time, it is impossible to exercise this right before the boundaries of the plot are established on the ground, as it is prohibited by law to start using the land plot (Art. 125 of the Land Code of Ukraine). In addition, emphyteusic right arises from the moment of its state registration. Thus, the moment of concluding of a contract of emphyteusis and the transfer of property rights do not coincide in time (Art. 334 of the Civil Code of Ukraine).

In addition, the contract of emphyteusis can be described as bilateral and reciprocal, as the obligation of the landowner to transfer it for use corresponds to the emphyteusis' right to demand such transfer.

The form of the contract of emphyteusis is not stipulated separately in the civil legislation of Ukraine. Land Code of Ukraine in Part 6 of Art. 102-1 also contains a very clear provision that the conclusion of the contract of emphyteusis is carried out in accordance with the Civil Code of Ukraine, taking into account the requirements of the Land Code of Ukraine. Thus, notarization of the contract of emphyteusis may be carried out by agreement of the parties.

However, the third paragraph of Part 6 of Art. 102-1 of the Land Code of Ukraine provides for special requirements regarding to the form of the emphyteusis agreement. Thus, the owner of the land plot may establish a requirement for notarization of the contract of emphyteusis and cancel such a requirement. Establishment (cancellation) of the claim is a unilateral transaction subject to notarization. Such a requirement is an encumbrance of property rights on land and is subject to state registration in the order prescribed by law.

It is important to note that the proprietary right to use the land for agricultural purposes (emphyteusis) is subject to state registration in accordance with Art. 182 of the Civil Code of Ukraine and in the order prescribed by the Law of Ukraine "On state registration of proprietary rights to immovable property and their encumbrances"[8], and therefore the contract of emphyteusis is not subject to state registration.

Thus, the emphyteutic right arises from the moment of state registration of this right, and the contract between the owner of the land plot and the person who has expressed desire to use this land plot for agricultural needs, is concluded from the moment of its signing or notarization.

In contrast to the land lease agreement, the essential terms of the contract of emphyteusis are not defined by law. In accordance with Part 1 of Art. 638 of the Civil Code of Ukraine, a contract is concluded if its parties have duly agreed on all the essential terms of the contract. The essential terms of the contract are the conditions on the subject of the contract, the conditions defined by law as essential or necessary for contracts of this type, as well as all those conditions on which at the request of at least one of the parties must be agreed[9].

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[8] Про державну реєстрацію речових прав на нерухоме майно та їх обтяжень: Закон України від 01.07.2004 р. № 1952-IV. *Відомості Верховної Ради України*. 2004. № 51. Ст. 553.

[9] Брагинский М.И. Договорное право. Общие положения. М.: Изд-во "Статут", 1998. С. 295–339.

An essential condition of any contract without exception, and hence the contract of emphyteusis, is the condition of its subject. The subject of the contract of emphyteusis is a land plot provided for use for agricultural purposes. Agricultural land that is transferred to emphyteusis may be in private, communal or state property.

The parties to the contract of emphyteusis may narrow the boundaries of the land use (for example, by stating that it should be used for arable land or perennial plantings, etc.), but not expand them, as agricultural land is used by their owners or users only within the requirements for use of lands of a certain type established by Art. 31, 33–37 of the Land Code of Ukraine (paragraph 2 part 5 of Art. 20 of the Land Code of Ukraine).

Currently, the issue of establishing of requirements for the quality of land transferred for use on the basis of the contract of emphyteusis is unresolved. The only requirement for the land plot is the purpose, i.e. belonging of the land plot to the category of agricultural land. However, the composition of lands of this category, in addition to productive, includes lands that are not used in agricultural production (e.g., swamps, ravines etc.)[10]. In order to guarantee the rights of land user, we propose to establish the mandatory fertility characteristics of the land plot that is transferred to emphyteusis.

The validity period of the contract of emphyteusis is set by the agreement of its parties. If the right of emphyteusis is established for an indefinite period, each of the parties may withdraw from the contract, notifying the other party at least 1 year before such refusal (Part 2 of Art. 408 of the Civil Code of Ukraine).

At the same time, the owner of the private land plot and the emphyteuta can no longer enter into such an agreement for a period of more than 50 years due to the provisions of Part 4 of Art. 102-1 of the Land Code of Ukraine. In this case, there is a tendency of the legislator to identify the categories of land lease and emphyteusis, which leads to the exclusion from economic relations of such an important institution as emphyteusis.

The fee in the contract of emphyteusis is a payment made by the land user to the landowner. According to Art. 632 of the Civil Code of Ukraine, the price in the contract is set by agreement of the parties. In cases specified by law, prices (tariffs, rates etc.) are applied, which are set or regulated by authorized state authorities or local governments. The fee in the rent for land plots of state and communal property is a regulated price, and therefore the legislative change of the maximum amount of this fee is the basis for revision of the amount of rent established by the terms of the contract. However, in a

[10] Глотова О.В. Правове регулювання правочинів щодо земельних ділянок в Україні: автореф. дис. ... канд. юрид. наук: 12.00.06. К., 2003. 20 с.

relationship of emphyteusis, the price cannot be regulated, even in the case of establishing emphyteusis in relation to a land plot of state or communal property. Therefore, we do not consider it expedient to propose legislative regulation of the minimum or maximum amount of payment for emphyteusis. The exclusively private-law nature of the regulation of emphyteusis differs favorably from the currently over-regulated land lease obligations.

The calculation of the amount of the fee in the contract of emphyteusis should be carried out taking into account inflation indices, unless otherwise provided by the contract. The amount of the fee for emphyteusis can vary significantly depending on the nature of land use and the conditions of its provision[11].

In contrast to the land lease agreement, for which the law in Part 2 of Art. 21 of the Law of Ukraine “On Land Lease” puts forward special requirements for the payment of rent for land plots of state and communal property, for the contract of emphyteusis law provides full freedom in determining the amount, form and terms of payment under this agreement. Thus, the fee for emphyteutic land use is paid to the owner of the land in the amount, form, order, conditions and within the period specified in the contract.

The fee in the contract of emphyteusis may be changed with the consent of the parties to this contract. The emphyteuta should have the right to demand a corresponding reduction in the fee under the contract if the condition of the land plot transferred to the emphyteusis has deteriorated without his fault. In this regard, it is advisable to add this right to change the amount of payment under the contract at the request of the emphyteuta in the civil legislation of Ukraine.

However, the fee for the use of land of state or communal property, defined in the the contract of emphyteusis, concluded at the land auction, may not be reduced by agreement of the parties during the contract and also in case of its renewal (Part 5 of Art. 102-1 of the Land Code of Ukraine).

At the same time, the contract of emphyteusis may be free of charge. In this case, the question arises: does the possibility of free transfer of land in the emphyteusis fit to all forms of land property? It is thought that gratuitous transfer of land for use on the basis of the contract of emphyteusis can take place only in the case of concluding an agreement on a land plot of private land fund, as transfer of land for use from state and communal funds without payment is contrary to fiscal interests of a state.

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[11] Емелькина И.А. Система ограниченных вещных прав на земельный участок: монография. М.: Волтерс Клувер, 2011. С. 39.

The analysis of the civil and land legislation of Ukraine about the right of use another's land plot for agricultural purposes allowed to determine the conditions of the contract of emphyteusis:

1) the subject of the contract of emphyteusis (cadastral number, location and size of the land plot);

2) payment for land use with indication of its size, indexation, forms of payment, terms, the order of its introduction and revision and responsibility for its non-payment;

3) conditions of use and legal purpose of the land plot ;

4) conditions for preserving the state of the object of emphyteusis;

5) conditions and terms of transfer of the land plot to the land user;

6) conditions for returning the land plot to its owner;

7) existing restrictions of use of land plot and encumbrances of proprietary rights on land;

8) identification of the party that carries the risk of accidental damage or destruction of the land plot or a part of it;

9) responsibility of the parties.

With the consent of the parties, the contract of emphyteusis may specify other conditions, including the quality of land, the procedure for fulfilling the obligations of the parties, the procedure for insuring the land, the procedure for reimbursement of costs for protection and improvement of the object of emphyteusis, reclamation works, as well as circumstances that may affect the change or termination of , the contract of emphyteusis etc.

The content of the contract is the rights and obligations of its parties. Under the contract of emphyteusis, the landowner is obliged to transfer the land plot to the land user. The transfer of the object of the contract of emphyteusis to the land user must be carried out by the owner of the land within the terms and conditions specified in the contract of emphyteusis on the basis of the act of acceptance-transfer. The owner of the land plot is obliged not to prevent the land user from exercising his rights (Part 3 of Art. 409 of the Civil Code of Ukraine). In accordance with Part 1 of Art. 409 of the Civil Code of Ukraine, the owner of the land has the right to require the land user to use it for the purpose specified in the contract. The owner of the land plot is also entitled to receive a fee. The amount of payment, its form, conditions, procedure and terms of its payment are established by the contract (part 2 of Art. 409 of the Civil Code of Ukraine). The owner of the land has in accordance with Part 2 of Art. 411 of the Civil Code of Ukraine, the preemptive right of acquisition, as well as to receive interest on the sale price of emphyteusis to another person – the so-called "laudemia" (Part 5 of Art. 411 of the Civil Code).

The land user has the responsibilities provided for in the norms of Part 2 and 3 of Art. 410 of the Civil Code of Ukraine, Art. 96 of the Land Code of

Ukraine. Thus, the land user is obliged to: 1) ensure the use of land for its intended purpose, increase its fertility, apply environmental production technologies, comply with environmental legislation, refrain from actions that could lead to environmental degradation and at its own expense to bring it to the previous state in case of illegal change of its relief, except for cases of illegal change of relief by another person (part 3 of Art. 410 of the Civil Code of Ukraine, Art. 96 of the Land Code of Ukraine); 2) to pay in time the fee under the contract of emphyteusis, as well as other payments established by law (Part 2 of Art. 410 of the Civil Code of Ukraine, Art. 96 of the Land Code of Ukraine); 3) not to violate the rights of owners of adjacent land plots and land users (of Art. 96 of the Land Code of Ukraine); 4) increase soil fertility, apply environmental production technologies, refrain from actions that may lead to deterioration of the ecological situation and preserve other useful properties of the land (Art. 96 of the Land Code of Ukraine); 5) timely provide the relevant executive authorities and local governments with data on the condition and use of land and other natural resources in the manner prescribed by law (Art. 96 of the Land Code of Ukraine); 6) comply with the rules of good neighborliness and restrictions associated with the establishment of land easements and protection zones (Art. 96 of the Land Code of Ukraine); 7) to store geodetic signs, anti-erosion constructions, networks of irrigation and drainage systems (Art. 96 of the Land Code of Ukraine); 8) notify the owner of the land of the intention to sell the right (Art. 96 of the Land Code of Ukraine).

The land user has the right to: effectively use the land in full in accordance with the contract (Part 1 of Art. 410 of the Civil Code of Ukraine) and independently manage the land (p.a) Part 1 of Art. 95 of the Land Code of Ukraine); to acquire ownership of crops and plants, for manufactured products (p.b) Part 1 of Art. 95 of the Land Code of Ukraine); use in the prescribed manner for their own needs available on the land common minerals, peat, forests, water, as well as other useful properties of the land (p. c) Part 1 of Art. 95 of the Land Code of Ukraine); claim for damages in cases provided by law (p. g) Part 1 of Art. 95 of the Land Code of Ukraine); to transfer the right to use land for agricultural purposes by inheritance; to alienate the right to use the land plot for agricultural needs, unless otherwise provided by law (Art. 411 of the Civil Code of Ukraine).

CONCLUSIONS

The analysis of the norms of the Civil Code of Ukraine and the Land Code of Ukraine regulating the right of use another's land plot for agricultural purposes (emphyteusis) allows us to draw the following conclusions. Thus, these Codes lack unity in the legal model of regulating of public relations about the land. The norms of the Civil Code of Ukraine and the Land Code of

Ukraine contain unnecessary repetitions of normative material. It is undeniable that the institution of property rights, including land rights, is an institution of civil law. Of course, any codified act and, in particular, the Land Code of Ukraine, is not devoid of elements of complexity. However, the inclusion in the Land Code of Ukraine of norms of civil law (private law) by its nature means not only unnecessary duplication of law, but also a mixture of subjects and principles of regulation of private and public law. Such mixing leads only to contradictions and artificial complication of legal regulation, and in practice to the weakening of state control over the use of land. Therefore, the provisions of Chapter 16-1 of the Land Code of Ukraine on emphyteusis and superficies should contain only a reference to the relevant articles of the Civil Code of Ukraine.

The specific features of emphyteusis as a proprietary right include the fact that it may be sold and inherited. However, only the proprietary right to use the land plot can be alienated, and not the land plot itself in respect of which emphyteusis has been established.

An important consequence of recognizing the proprietary nature of emphyteusis is to give the land user the absolute nature of protection of his rights. According to Art. 396 of the Civil Code of Ukraine, the provisions on the protection of property rights (Chapter 29 of the Civil Code of Ukraine) also apply to emphyteusis as a proprietary right to another's property.

SUMMARY

The paper is devoted to a characteristic of emphyteusis in civil legislation of Ukraine. The origin, essence, terms and peculiarities of emphytheusis according to the civil legislation of Ukraine have been analyzed and its concept and ways of improvement of emphytheusis have been determined in the thesis. Definition of the contract of emphyteusis is given based on analysis of science literature, national legislation and drafts of normative and legal acts of Ukraine.

The main characteristic of the contract of emphytheusis is given in the paper. The conditions of the contract of emphyteusis according to the civil legislation of Ukraine have been analyzed.

The specific features of emphyteusis as a proprietary right include the fact that it may be subject to alienation on the basis of a contract and transferred by inheritance. The proprietary right to use the land plot can be alienated, but not the land plot itself.

An important consequence of the recognition of the proprietary nature of emphyteusis is to give the land user (emphyteuta) the absolute power of the protection of his rights. According to Art. 396 of the Civil Code of Ukraine, the provisions on the protection of property rights (Chapter 29 of the Civil Code of Ukraine) also apply to emphyteusis as a proprietary right to another's property.

Several conclusions in the emphytheusis theory was accomplished. On this basis, propositions as to the improvement of current civil legislation concerning legal regulation of emphytheusis were formulated.

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3. Емелькина И.А. Система ограниченных вещных прав на земельный участок: монография. М.: Волтерс Клувер, 2011. 368 с.
4. Земельний кодекс України: Закон України від 25.10.2001р. № 2768-III. *Відомості Верховної Ради України*. 2002. № 3. Ст. 27.
5. Конституція України: Закон України від 28.06.1996 р. № 254к/96-ВР. *Відомості Верховної Ради України*. 1996. № 30. Ст. 141.
6. Покровский И.А. Основные проблемы гражданского права. Москва : Статут (в серии “Классика российской цивилистики”). 1998. 353 с. С. 36.
7. Про оренду землі: Закон України від 06.10.1998 р. № 161-XIV. *Відомості Верховної Ради України*. 1998. № 46-47. Ст. 280.
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9. Суханов Е.А. Проблемы правового регулирования отношений публичной собственности и новый Гражданский кодекс. *Гражданский кодекс. Проблемы. Теория. Практика*: Сборник памяти С.А. Хохлова. Москва, 1998. 480 с.
10. Цивільний кодекс Української РСР: Закон Української РСР від 18 липня 1963 р. *Відомості Верховної Ради Української РСР*. 1966. № 46.
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ON THE ISSUE OF DETERMINING THE CIVIL-LAW STATUS OF SERVICEMEN

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INTRODUCTION

Modern society faces a number of complex social and political problems, including the realization of military reform and building a legal country are prime. The recognition and promotion of universal values is a prerequisite for the establishment and functioning of the rule of law. Among the generally recognized legal values that exist in modern civilized society, the central place is occupied by those who determine the status of a person, regulate and protect his rights and freedoms.

National defense is one of the most important functions of the state and military service – the honorable duty of citizens. Changes in the domestic politics and international situation of Ukraine have significantly affected this traditional institute of the state. During the course of the military reform, there is considerable legislative activity regulating military service and a number of questions regarding the need to determine the legal status of military servicemen.

Servicemen along with the general legal status have a special status that not only complements the general, but also changes (limiting) him. Special status is determined by the totality of rights, freedoms, duties and responsibilities envisaged by the general, above all the Constitution, and special (military) legislation.

Human rights are defined and guaranteed by acts of international law: the Universal Declaration of Human Rights (1948)[1]; The International Covenant on Economic, Political, Social and Cultural Rights (1966)[2]; The International Covenant on Civil and Political Rights (1966) and two optional protocols to the latter[3]; European Convention on Human Rights and Fundamental Freedoms (1950) and its Protocols[4]. These documents are the basis for any

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[1] International Human Rights Standards // The Great Ukrainian Legal Encyclopedia: in 20 vols. / OV Petryshyn (ed.) Et al. 2017. Volume 3: The General Theory of Law. P. 294.

[2] International Covenant on Economic, Social and Cultural Rights 1966 // Legal Encyclopedia: [in 6 volumes] / Ed. qty. Yu. S. Shemshuchenko (ed.) [And others]. Kiev : Ukrainian encyclopedia. M. Bazhana, 2001. Volume 3: K–M. 792 p.

[3] International Covenant on Civil and Political Rights 1966 // Legal Encyclopedia: [in 6 volumes] / Ed. qty. Yu. S. Shemshuchenko (ed.) [And others]. Kiev : Ukrainian encyclopedia. M. Bazhana, 2001. Vol. 3: K–M. 792 p.

[4] Marmazov V.E. (2003) *До питання про телеологічне (цільове) тлумачення Конвенції про захист прав і основних свобод людини* [On the teleological (purposeful) interpretation of

national legislation regulating the field of human rights and freedoms, including servicemen.

An important role in the regulation of the rights of servicemen is played by a group of international legal acts of direct action that determine the legal status of servicemen. These include, in particular, the acts that determine the rights of military servicemen in armed conflict – the Geneva Conventions of 1949 and their Additional Protocols, ratified by the USSR in 1954[5].

Protecting and safeguarding the fundamental human rights of the citizens of one's own country is the main task of any country. Ukraine is no exception in this matter. However, the most regulated issues are the legal and social protection of military servicemen and the obligation to pay damages.

Before proceeding to the study of the problem posed to us, we must determine what is the "status" and what is the peculiarity of the "legal status of a serviceman".

E.O. Kharitonov notes, that one of the main issues of private law is the determination of the status of the individual, the regulation of his relations with society. It is no exaggeration to say that the categories "personality", "person", "subject of private law" are among the key concepts of private law, at a crucial points of which Guy emphasized in the second century[6].

As in all periods of the existence of law concept of "entity" included three features: social, legal and legal status, there are different approaches to the definition of "legal status".

It should be noted that the category "legal status" has recently appeared in legal scientific literature. Until the 1960s, Soviet scholars identified it with legal capacity; it was not regarded as a separate legal category. O. Skakun, explained the position of scientists of the era of socialism by saying that legal status and legal capacity arise and terminate in the subject at the same time, that they are equally inalienable, respectively, their similarity is the basis for identification[7].

Over time and with the development of legal thought in the 1980s, the category of "legal status" began to be sufficiently developed in the theoretical and legal literature of the Soviet era, formulated as a problem and as one of

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the Convention for the Protection of Human Rights and Fundamental Freedoms] *Адвокат*. 2003, № 6, 29–31.

[5] Protection of War Victims // Legal Encyclopedia: [in 6 volumes] / ed. qty. Yu. S. Shemshuchenko (ed.) [And others]. Kiev : Ukrainian encyclopedia. MP Bazhan, 1998. Vol. 2: D – J. 744 p.

[6] Haritonov E.O, Haritonova O.I. (2019) *Приватне право як концепт. Том III. Концепт приватного права і рекодифікація цивільного законодавства в Україні: рефлексії фронтиту: монографія* [Private law as a concept. Volume III: The Concept of Private Law and the Recodification of Civil Law in Ukraine: Frontline Reflections: A Monograph] Odessa, Feniks.

[7] Skakun O.F. (2011) *Theory of Law and State* (3rd ed.) Kyiv, Alerta.

the key concepts in the general theory of state and law, as well as in other fields legal science.

In the contemporary legal literature, the concept of "legal status" has not been unequivocal and continues to be debatable[8].

1. Characteristics of the legal status of the serviceman

It is enshrined in the law that servicemen enjoy all the rights and freedoms of man and citizen, guarantees of these rights and freedoms[9]. Passing military service, on the one hand, realize right to the work, but on the other – carry out activities in the interest of the whole society, which stipulates the obligation of the state to ensure the realization of the rights of citizens entitled to them, and in the case of damage to the mainstream interests and non-material goods of the citizen (military serviceman) – the duty to guarantee his compensation.

The military official, as a distinguished subject, uses protection from the side of the state in compensation of damage, damage to his life and health.

The concept of status ("status") has a Latin origin and means status, position[10]. [10] Using a variety of sources, let's look at some definitions of this word. Status – the legal position (set of rights and responsibilities) of a citizen or legal entity[11].

Status – legal status, status. Status – legal status (set of rights and responsibilities) of a citizen. General legal status – the status of a person as a citizen of the state[12].

The legal status of a serviceman is complex in its legal structure, in addition it has a two-part structure that includes civil and special units. Such separation is rather conditional, since both parts are interconnected and complementary. We believe that today there is a need to change the relationship and role of the structural elements of the legal status of a serviceman, if previously paramount were military service and duties, then now they should be organically combined with such categories as human rights, dignity, humanism, freedom, democracy, justice. All this requires a theoretical analysis in the interest of determining the legal status of military servicemen.

Special (branch) status determines the peculiarities of the situation of certain categories of citizens, provides the opportunity to perform their special functions.

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[8] Makarchuk V.V. (2016) Теоретико-правовий дискурс щодо правового статусу реєстрового козацтва [Theoretical and Legal Discourse on the Legal Status of Registered Cossacks] *Administrative law and process.* № 2 (16). C.154–162.

[9] Constitution of Ukraine (1996). URL: http://zakon2.rada.gov.ua/laws/show/

[10] Marchuk V.P. (2003) Glossary of legal terms. Kyiv, MAUP.

[11] Volinka K.G. (2006) Explanatory Dictionary of State and Law Theory, Kyiv, Magistr.

[12] Kelman M.S. (2016) General theory of state and law, Kyiv, Kondor.

Creation of special subjects of law is a natural process of differentiation of legal relations. Changing the sphere of legal regulation, complicating the mechanisms of regulation requires fixing on different categories of citizens certain, not peculiar to other subjects, rights and responsibilities.

Possession of the personality of a special subject of law is important for the legal regulation of his behavior, determination of his position in connection with the interaction with other subjects of law – the entry into certain legal relations[13].

The servicemen – a person who is in the military service. Persons in military service are persons who are in the reserve for manning the Armed Forces of Ukraine and other military formations for a special period, as well as for carrying out the work of defense of the state. Reservists are persons who serve in the military reserve of the Armed Forces of Ukraine, other military formations and are intended for their recruitment in peacetime and wartime[14].

Servicemen, from a legal point of view, persons who are with the state in public-legal relations and their activity in the army, in the navy, in institutions, departments and establishments of military and naval agencies, directly or indirectly contribute to the accomplishment of the tasks of defense and protection of the state.

Each servicemen is assigned a corresponding military rank. In military service and military rank, some servicemen may be superiors or subordinates to others. Servicemen who are not superior to other servicemen by their superiors or subordinates by their position and military rank may be senior or junior. All military servicemen take the military oath. Soldiers are personally responsible for protecting their homeland.

The status of servicemen is a set of rights and freedoms, duties and responsibilities of servicemen established by law.

The term “status of a serviceman” is equivalent to the term “legal status of a serviceman” and includes the whole complex of rights, freedoms and duties of a serviceman, formally defining his legal position in society. Foreigners and stateless persons who, in accordance with the law, serve in the Armed Forces of Ukraine by law are classified as servicemen. Citizens of Ukraine, foreigners and stateless persons who are serving in military service are servicemen[15]. Citizens acquire the status of military servicemen with the beginning of military service and lose with the end of military service

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[13] Jarovska I.M. (2016) Сучасна теорія держави і права: традиційність та новаторство підходів [Contemporary State Theory and Law: Traditional and Innovative Approaches]. URL: http://nbuv.gov.ua/UJRN/vnulpurn_2016_837_43

[14] On the Armed Forces of Ukraine: Law of Ukraine (1992) URL: https://zakon.rada.gov.ua/laws/show/1934-12

[15] Ibid.

(it is retained also for servicemen taken captive, held hostage or interned). The nature of the status of a serviceman is determined by two interrelated factors: the possession of Ukrainian nationals and the military service. This implies that the civil rights and responsibilities of military servicemen may be somewhat limited in the interests of the service. At the same time, the status of the serviceman provides for certain compensations, guarantees and privileges for the servicemen. “The status of servicemen is a set of rights, freedoms guaranteed by the state, as well as the duties and responsibilities of servicemen established by the state”.

The legal status of a serviceman is special and is exercised through the realization of possible and necessary rights and responsibilities through the processes of securing them; implementation; legal protection. In an emergency, the legal status of the serviceman has additional specificity. An emergency situation is a legal fact that gives rise to special legal relations between servicemen and the state – relations concerning additional guarantees in the form of privileges, compensations, allowances, additional payments.

For example, the participation of a serviceman in the JFO (Joint Forces Operation) in Eastern Ukraine.

The special status of a serviceman reflects the peculiarities of his/her position in relation to other categories of citizens. This position is influenced by the special nature of military service.

In addition, the special legal status of a serviceman consists of general (civilian) and military service units, with these units dialectically interacting with each other.

At the same time, the general legal status of servicemen is also of a special nature, since the legislation on this category of citizens establishes restrictions on certain constitutional rights and freedoms. Servicemen, reservists in the course of their duty in the military reserve, and employees of the Armed Forces of Ukraine may be restricted in their freedom of movement, free choice of residence and the right to freely leave the territory of Ukraine, the right to collect, use and impart information in accordance with the law[16].

The specifics or peculiarities of the legal status of servicemen are determined by a number of factors, namely: first, a serviceman, being a citizen of his country, performs the duties of protecting citizens from criminal encroachments, which are connected with the necessity of unconditional fulfillment of the assigned tasks in any conditions of operational and combat situation, including those associated with risk to life. From this it follows that

[16] On the social and legal protection of servicemen and their families: Law of Ukraine (1992). URL: https://zakon.rada.gov.ua/laws/show/2011-12

a serviceman as a citizen must be given the appropriate constitutional and administrative rights and responsibilities, be responsible.

Secondly, the rights and freedoms of servicemen are determined with a view to their ability to be exercised in military conditions, which entails some significant restrictions on rights and freedoms. They derive from the content of the military oath and the statutes of the Armed Forces of Ukraine.

Thirdly, the law stipulates and objectively justified restrictions on servicemen in their rights to work, freedom of speech, movement, rest, etc. are compensated by providing them with certain privileges and guarantees. Moreover, the approach to the establishment of the latter should be differentiated depending on the official position of the serviceman, the specifics of the service.

Fourth, military servicemen perform operational and combat tasks in difficult climatic and geographical conditions, day and night, any weather and any time of the year. All these circumstances make it necessary to grant military servicemen the right to various kinds of compensation.

Fifth, all military servicemen, in accordance with the military statutes, regardless of their military rank and position, are equal before the law and bear the responsibility established for the citizens, taking into account the peculiarities of its legal status[17].

Thus, the legal status of a serviceman is special and can be defined as follows: the legal status of a serviceman is his special legal position in society and the state, determined by the system of special rights of the general, military legislation of rights, freedoms, duties and responsibilities.

2. Specificity of civil legal status of a serviceman

Recognizing each subject of law, the state establishes its legal status, provisions for the state, its bodies, other individuals and legal entities. Civil status of a serviceman is a set of rights, legitimate interests, the protection of which is guaranteed (guaranteed) by the state, as well as the duties of servicemen, which determines the limits of his participation in property and personal non-property relations. One part of the rights, legitimate interests and duties belongs to him as an individual, and the other is due to the specific situation.

These elements of the civil legal status of a serviceman are established by law, and their implementation is ensured by the forms and methods provided for by civil and civil procedural legislation. Consider, in more detail, some of the envisaged rights of military servicemen, taking into account the specifics.

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[17] Basic V.P. (2000) Міжнародне гуманітарне право: Навчальний посібник [International *Humanitarian Law*: A Handbook Kiev : Worth.

Of course, the right to life is of key importance for all human rights, since in its absence all other human rights and freedoms lose their significance. However, the legislator, while imposing on the serviceman the duty to protect the state, admits that there is a risk to his life. The presence of a “risk to life” in relation to a serviceman can be recognized as nothing more than a restriction on the right to life, since it is thus allowed that a person may lose his or her life in the performance of duties in the interests of the state. The logical consequence of the said “risk to life” is a similar restriction on the right to health, personal safety and integrity, which may also inevitably be violated by the “risk to life” permitted by the legislator.

A servicemen is guaranteed integrity and cannot be arrested except on the basis of a court order. In addition, a serviceman may not engage in tasks not provided for in his/her duties. The use of military servicemen to perform tasks other than military service is prohibited and entails liability under the law. Servicemen may be involved in the aftermath of accidents, catastrophes, natural disasters and in other cases only by decision of the Verkhovna Rada of Ukraine[18].

During military service military pay is providing. The financial security is determined depending on the position, military rank, duration, intensity and conditions of military service, qualification, academic degree and academic rank of a serviceman. Cash and other types of security are stored for servicemen captured or held hostage, as well as interned in neutral states or missing persons. The families of the said servicemen are paid monthly security, including additional and other types of financial security, in the amount established by the serviceman on the day of his capture or hostage, internment in neutral states or unaccepted absence. For a special period in Ukraine, servicemen are not fined for defaulting on their credit obligations, as well as interest for using a loan. Based on the provisions of Articles 5, 6 of the Law of Ukraine “On the status of war veterans, guarantees of their social protection” of 22.10.1993 № 3551-XII, part 15 of Art. 14 of the Law of Ukraine “On social and legal protection of servicemen and their families” of 20.12.1991 № 2011-XII the Supreme Court concluded that the servicemen from the beginning to the end of the special period, and reservists and servicemen – from at the time of the call, during the mobilization and until the end of the special period, no penalties, penalties for failure to pay obligations to enterprises, institutions and organizations of all forms of ownership, including banks and individuals, as well as using a loan[19].

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[18] Sitnyakivska S.M. Hlivnuk M.G. (2014) Соціальний та правовий захист військовослужбовців [Social and legal protection of military men]. URL: http://eprints.zu.edu.ua/23744/1/Ситняківська_С._Хливнюк_М..PDF

[19] Statutes of the Armed Forces of Ukraine. URL: https://ifnmu.edu.ua/images/studentam/pidgotovka_oficeriv_zapasu/statuti_zsu.pdf

This paragraph does not apply to servicemen who have voluntarily surrendered. Also, one of the main aspects of state support for military servicemen is the right of military servicemen to health and medical care. The health protection of military servicemen is ensured by the creation of favorable sanitary and hygienic conditions for military service, life and a system of measures to limit the effects of dangerous factors of military service, taking into account its specificity and environmental conditions, which are carried out by commanders (chiefs) in cooperation with local authorities, local self-government bodies[20].

Also, the Law of Ukraine "On Social and Legal Protection of Servicemen and Members of Their Families" regulates the issues of ensuring their rights and freedoms, social and legal protection of servicemen, their families and limiting certain rights in connection with the performance of their military service duties, and exactly:

– servicemen have the right to participate in elections, to be elected to councils of all levels, to participate in national and local referendums; at the same time, servicemen cannot be members of any political parties, movements, organize and conduct strikes; freedom of conscience and the right to freely satisfy one's religious needs are guaranteed; freedom of scientific, technical and artistic creativity is guaranteed; military servicemen may not engage in entrepreneurial activity, but, at the same time, the state guarantees them material and other security in the amount that stimulates interest in military service (namely: financial, material security);

– same law defines the procedure for exercising the right of military servicemen to rest, namely: length of working day and distribution of working time; the procedure for providing basic and additional holidays; provision of free health care and spa treatment and rest;

– law defines the procedure for providing servicemen with accommodation: before receiving permanent accommodation, servicemen must be provided with service accommodation; servicemen are paid monetary compensation for temporary renting (hiring) of housing;

– law also provides for the right to education: servicemen are allowed to study at other educational establishments without interruption of service in the manner stipulated by the Regulation on passage of military service to the Armed Forces of Ukraine by citizens of Ukraine and the right to free travel of a serviceman and his family on leave within Ukraine, when transferred to a new place of service, to a place of residence when released from military service within Ukraine.

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[20] Sitnyakivska S.M. Hlivnuk M.G. (2014) Соціальний та правовий захист військовослужбовців [Social and legal protection of military men]. URL: http://eprints.zu.edu.ua/23744/1/Ситняківська_С._Хливнюк_М..PDF

This law provides for pension provision for military servicemen, establishes that the time of stay of citizens of Ukraine in military service is credited to their insurance experience, seniority of work in the specialty, as well as to the experience of public service. It should be noted that the legal norms concerning the rights of servicemen, social protection issues are duplicated in other laws that regulate the order of creation and activity of military formations in Ukraine. Thus, the Law of Ukraine "On the Armed Forces of Ukraine" contains Article 16 "Social and legal protection of servicemen, their families and employees of the Armed Forces of Ukraine", which in fact duplicates the legal provisions of the Law of Ukraine "On social and legal protection of servicemen and their families"[21].

3. Ensuring the legal status of the serviceman

Legislation establishes additional rights (privileges, compensation, social and legal guarantees) for servicemen who also characterize their general legal status as special. Military service rights are related to the enlistment of military servicemen and the passage of service. They are divided into general, official and special.

Common military service rights are the rights enjoyed by all servicemen, which are connected with the passage of the last military service and are intended to indirectly ensure the effectiveness of their activities through the implementation of moral and material incentives: in the general group of military service rights can be distinguished by which: a) promotion (career); b) state financial support; c) the right to protection; d) benefits; e) incentives.

Another structural element of the legal status of a serviceman is the established legal responsibility, the Law of Ukraine "On Military Duty and Military Service"[22] and the Statutes of the Armed Forces of Ukraine[23]. Depending on the nature and gravity of the offense, servicemen are involved in the following types of legal responsibility: disciplinary, administrative, material, civil and criminal[24]. Responsibility should be understood to mean

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[21] Pashinsky, V.Y. (2013) Правове регулювання соціального і правового захисту військовослужбовців в Україні [Legal regulation of social and legal protection of military personnel in Ukraine] *Law Science*.

[22] On Military Duty and Military Service: Law of Ukraine. *Bulletin of the Verkhovna Rada of Ukraine* (BB). 1992. No. 27. Article 385.

[23] Statutes of the Armed Forces of Ukraine. URL: https://ifnmu.edu.ua/images/studentam/pidgotovka_oficeriv_zapasu/statuti_zsu.pdf

[24] Borisova V.I., Spasibo-Fateeva I.V., Yarotskiy V.L. (2011) Civil law (2nd ed.) *Retrieved from* URL: http:// uristinfo.net/2010-12-27-04-58-59/264-tsivilne-pravot1-viborisova-ta-in.html; Borisenko V. (1994) Особенности уголовной ответственности военнослужащих [Features of criminal liability of military personnel] *Retrieved from* URL: https://juristlib.ru/book_1994.html; Holodkov I.V. (1999) Право военнослужащих на защиту своих прав, свобод и законных

the duty of a serviceman to be punished for an offense that may be expressed in restrictions of a personal, property or organizational nature. The legal responsibility of military servicemen has its own specific features related to the special nature of military service.

Ensuring the legal status of a serviceman is the activity of public authorities, military administration bodies and officials to create the conditions (guarantees) for the lawful and steady implementation of it and legal protection. The realization of the legal status is a process of materialization of the rights and duties of a serviceman, in the course of which he receives a benefit that constitutes the content of a specific subjective right with the fulfillment of a socially necessary, established norm of law, duty.

Legal protection is understood as an element of the exercise of the legal status of a serviceman whose content is the activity of the state, military authorities, commanders and commanders, and the military serviceman himself/herself to create legal conditions conducive to stopping the process of exercising his/her rights and duties (protection of rights), and in in case of violation, resumption of this process (protection of rights). Thus, an institution of legal protection enters into force only when there is a threat to the process of realization of the legal status or it is interrupted for any reason. Ensuring the legal status of a serviceman is a legal duty of the state.

Guarantees of the legal status of a serviceman are general conditions and special (legal) means that create him/her actual opportunity to enjoy the rights and obligations, satisfy the interests and securely protect them. In this case, all guarantees are divided into general and legal.

General guarantees are objective material and spiritual conditions for exercising the rights and responsibilities of a serviceman. It should be noted that the components of general safeguards are the following: economic, political, social and spiritual.

Legal guarantees of the legal status of a serviceman are a system of interrelated ways and means (normative, institutional and procedural) that ensure the proper recognition, realization of rights and duties of a serviceman and their legal protection. Legal guarantees of the rights, duties and responsibilities of servicemen are expressed, first and foremost, in the norms of the legislation, which disclose and specify the constitutional rights and obligations, and also establish the procedure for their exercise;

Legal guarantees of the legal status of a serviceman include such types as: 1) guarantees of realization of rights and duties; 2) guarantees of legal

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интересов в сфере военно -административных отношений [The right of military personnel to protect their rights, freedoms and legitimate interests in the field of military – administrative relations] *Retrieved from* URL: https://juristlib.ru/book_1216.html

protection of the rights and duties of the serviceman (protection, protection and legal assistance); 3) organizational (service) guarantees;

Legislation includes the following legal guarantees for the exercise of the rights and duties of a serviceman: the obligation to fulfill the legal requirements of servicemen; circumstances that exclude the criminality of the serviceman; inadmissibility of interference in the official activity of a serviceman; guarantees of personal security of the armed serviceman; guarantees of personal safety of servicemen and their families.

The legislator enshrined the following guarantees for the legal protection of a serviceman: the right of a serviceman to judicial protection; supervision over observance of rights and duties of the serviceman; the activities of the Ombudsman; legal assistance to servicemen; protection of the rights of military personnel by public associations; self-defense; responsibility of citizens and officials guilty of violating the rights of servicemen and preventing them from performing their duties.

Organizational guarantees of the legal status of the military may be norms that establish the need; making managerial decisions aimed at securing the rights of a serviceman as a person; issuing orders on issues related to providing social guarantees for family members; improving the style of work of military management bodies; raising the level of service, staff and legal culture of military personnel, developing and implementing a program to increase the legal knowledge of the personnel of units and units of troops, etc.

An emergency situation is defined as a set of conditions and circumstances that have arisen as a result of objective or subjective factors that have caused negative consequences for the object of influence that have resulted in the death of people, significant damage to property of citizens, legal entities and the state, environmental damage equilibrium, normal functioning of the life-support system, threats to the constitutional order and security of the state, requiring the introduction of special legal regulation and immediate actions involving external forces in relation to the object and means. In the event of an emergency, servicemen require additional, qualitatively and quantitatively other legal guarantees of their legal status, designed to compensate for the increased risk to life, difficulties and poverty associated with the performance of military duty in such circumstances.

According to the type of emergency situation, a group of additional guarantees is also defined: a) additional guarantees of legal status of a serviceman during the period of military service; b) additional guarantees for the period of Emergency; c) additional guarantees for the timing of tasks in the context of non-international armed conflict; d) additional guarantees for the time of participation and fight against terrorism; e) additional guarantees in the course of completing tasks in the territory after the completion of large-scale military operations.

For example, one of the types of emergencies can be attributed to JFO (Joint Forces Operation) in Eastern Ukraine.

In terms of the content of the guaranteed subjective right, the following groups of additional guarantees should be distinguished: a) additional guarantees for the exercise of the constitutional right of a serviceman to remuneration for work without any discrimination; b) additional guarantees of the right of the serviceman to social security by age, in case of illness and disability; c) additional guarantees of the right of the serviceman to rest; d) additional guarantees for the right of the serviceman to housing.

Depending on the legal form of the guarantee, the following additional guarantees are allocated: a) benefits; b) compensation; c) additional payments; d) benefits.

By the nature of the legal rules that ensure the legal status: a) substantive law; b) procedural and legal.

Also, it should be noted that the study of regulations and scientific literature showed that, depending on the circumstances, the grounds for the division of additional legal guarantees for types may be the following: 1) the legal force of the normative legal act; 2) type of emergency; 3) the content of the guaranteed subjective right of the serviceman; 4) legal form of guarantee; 5) the nature of the legal provisions that ensure legal status.

Depending on the legal force of the regulatory act, additional guarantees are divided into a) the guarantees provided by law and b) the guarantees established by the by-laws.

CONCLUSIONS

Summarizing the above, we can draw the following conclusion. Protection of the homeland is the responsibility of the citizen of Ukraine. Defense of the country is one of the permanent functions of the state, the presence of its own army and other armed formations is usually considered an important feature of the state.

The population is objectively distinguished by a special, fairly large group of people carrying on military service. From this, in turn, functionally follows the existence of a special legal status. By its nature, this type of activity is objectively related to certain sufferings, burdens, but this does not mean that the subjective rights of a given social group lose their fundamental importance or are relegated to the background.

Thus, the legal status of a serviceman is special and can be defined as follows: the legal status of a serviceman is his special legal position in society and the state, determined by the system of special rights of the general, military legislation of rights, freedoms, duties and responsibilities.

In addition, the legal status of military personnel is characterized by a large number of restrictions on universal (constitutional) rights and freedoms.

Regulatory acts not only establish the specific rights of military personnel, but also modify the effect of universal human rights and freedoms of military personnel in the context of their professional duties. In view of this, we consider it necessary to carry out work on the regulation of normative acts of both military legislation and legislation in different fields of law, which will allow: to eliminate the existing contradictions, gaps of the current legislation; abolish obsolete rules of law.

SUMMARY

The study of the civil status of military servicemen is of scientific and practical interest, given the specifics of military service, since this category of citizens cannot be fully protected from the negative consequences of performing their official duties. It is important to create conditions for the continued exercise of military rights by military personnel, while excluding any restrictions other than those provided for by law. At the same time, existing regulations which should regulate social relations involving servicemen differ to some inconsistency, which reduces the efficiency of their use. The purpose of the study is to clarify the issue of analysis of legislation on the legal and civil status of military servicemen. The object of the study is the public relations that are formed in connection with the determination of the peculiarities of the civil status of servicemen. The subject of the research is the definition of the civil status of servicemen and normative legal acts that establish the peculiarities of civil law status of servicemen. The methodological basis of the study is dialectical, historical, formal-logical, system-critical, statistical and other methods. Therefore, in the current context, it is necessary to develop a new concept of ensuring the subjective rights of servicemen based on the rule of human rights in the performance of military duty. Under the civil legal status of a serviceman should determine the set of rights and legitimate interests, the protection of which is guaranteed (guaranteed) by the state, as well as the duties of servicemen, which determines the limits of his participation in property and personal non-property relations. One part of the rights, legitimate interests and duties belongs to him as an individual, and the other is conditioned by the specifics of his position. Elements of civil legal status of a serviceman are established by law, and their implementation is ensured by the forms and methods provided by civil and civil procedural legislation. Most of the previously formulated scientific provisions are based on fundamentally different approaches to Soviet law than modern ones. Although they remain of some importance, they still need to be rethought in the light of new perceptions of the status of servicemen. Which confirms the need to eliminate the legal and factual obstacles to the implementation by military personnel of their full subjective rights and responsibilities.

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THE TEORETICAL FOUNDATIONS FOR THE RECOGNITION OF VIRTUAL PROPERTY AS A TYPE OF OWNERSHIP

Nekit K. G.

INTRODUCTION

The concept of virtual property has emerged in the context of attempts to identify approaches to the legal regulation of relationships associated with the so-called Massively Multiplayer Online Games (MMOG), the rapid development of which no longer allowed to leave this issue aside. One of the first works to mention virtual property is a study by E. Castronova, who conducted a thorough economic analysis of MMOG Norrath. His analysis revealed striking statistics: according to 2001 data, 40,000 players were registered in the game, about 12,000 of them considered this place their permanent home; the average user of the game spent approximately 4 hours a day or more than 20 hours a week in the game; the gross domestic product of the game was estimated at US $ 135 million; the value of the domestic currency in the exchange markets was approximately $ 0.0107, which exceeded the value of the yen and lira[1].

One of the first researchers on virtual property, J. Fairfield back in 2005, noted that the United States is lagging behind the needs of time, not taking into account the latest trends in the recognition and protection of virtual property. To substantiate his position, he referred to the experience of China, Taiwan and Korea, which have long been committed to implementing virtual property regimes for digital property. This is not surprising, given the level of development of the online gaming industry and virtual property in the Eastern countries. According to 2004 data, there are more than 1,000 professionals in China who make a living solely by selling virtual property[2].

In light of the current situation in the world, as well as the degree of involvement of Ukrainian citizens in the online gaming industry, the problems of virtual property have become significant within the Ukrainian legal reality. Thus, according to analysts, in the first quarter of 2017 citizens of Ukraine

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spent $ 190 million on the purchase of computer games and payment for game content. In 2018, Ukraine is in the top 50 countries that show the highest rating of the game industry development, having risen from 47 to 45 places in this ranking for the year[3].

Such impressive results suggest that the legal regulation of virtual property relationships can no longer be left aside.

1. The concept and essence of virtual property

The idea of virtual property that arose with respect to virtual items in online gaming has gradually gained a broader interpretation and extended to other types of virtual assets. Today, virtual property is understood not only by in-game objects and avatars, but also by domain names, URLs, ebooks, tickets, email accounts, social networking accounts, websites, chats, bank accounts, cryptocurrencies and more[4].

According to J. Fairfield, virtual property is inherently a code that was designed to “act more like land or mobility than ideas”. According to a scientist, code can be considered virtual property if it meets three characteristics: rivalrousness, persistence, interconnectivity[5]. Ch. Blazer in his research proposes his own definition of virtual property. In his view, virtual property is a persistent computer code stored by a non-remote resource system, where one or more persons are empowered to control the computer code, including the removal of all other persons[6]. To the characteristics of the code that allows us to consider it as virtual property, proposed by J. Fairfield, Ch. Blazer proposes to add two more features: the presence of the secondary market and the value added by the user[7]. Gr. Lastowka and D. Hunter, describing virtual property in online games, view it as database records hosted on a server that allow a participant’s computer monitor to display images already present in the software[8]. DaKunha proposes similar to J. Fairfield’s definition of virtual property: virtual property is a software code designed to

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[6] Blazer Ch. The five indicia of virtual property. Pierce Law Review. 2006. Vol. 5. P. 141. Available at SSRN: https://ssrn.com/abstract=962905.

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behave as if it had the qualities of the physical, belonging to the material world, movable things or parts of reality[9].

These concepts focus on defining what should be consideredas virtual property. In fact, we are talking about virtual property as an object of legal relations. However, obviously, there will be a right to this kind of property, which can be defined as a virtual property right. There is a need to study the nature and characteristics of virtual property as a special kind of right.

To determine the nature of virtual property, it is necessary to dwell on the starting points of the categories of "property" and "property right". The main point that should be paid attention to when characterizing virtual property is the possibility of the existence of a right of ownership of incorporeal things.

Without claiming to be original, let us turn to Roman private law to study this issue. In the context of this study the division of things (res) into corporeal (res corporals) and incorporeal (res incorporales), proposed by the Romans, is of particular importance. According to Guy, corporeal things are those that, by their nature, can be visible, such as earth, slave, clothing; incorporeal things are those that cannot be touched, but they exist under the law, such as inheritance, usufruct or obligations[10]. Modern legal systems of the world to one degree or another follow this approach. Thus, in the Anglo-American tradition, ownership is usually interpreted quite widely. It is defined as a "bunch" or a set of rights or expectations in movable and immovable things that are protected from third parties, including the state[11]. Such rights include the right to use, own, remove third parties, and alienate things. "Things" is also interpreted quite broadly and include land rights, movable and incorporeal things[12]. An important difference between the Roman-German tradition is the distinction between property as such and things. The concept of "thing" most often narrows and is limited only to bodily objects. Thus, the German Civil Code (BGB) restricts the objects of ownership only to bodily things. According to par. 90 of the Civil Code of Germany, things in terms of law are bodily objects[13].

Despite the fact that Ukraine is a country of Romano-German legal tradition, the approach enshrined in Ukrainian legislation on things is different. Thus, the Ukrainian law accepts that some incorporeal objects, such as electricity or gas, are equal to things because of their similarity to material

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[13] Ibid. P. 222.

things. According to the Ukrainian concept of property rights, the object of property rights can be both corporeal and incorporeal. Thus, according to Art. 316 of the Civil Code of Ukraine, the object of ownership is the thing (property). And according to Art. 190 of the Civil Code of Ukraine, property as a special object are considered a separate thing, a set of things, as well as property rights and obligations. Property rights are a non-consuming thing. Thus, the concept of "thing" in Ukrainian law is widely interpreted, and includes not only objects of the material world, but also incorporeal things. Property rights and obligations are, in fact, incorporeal things, and therefore, the domestic concept of ownership does not preclude the application of property rights provisions to virtual assets.

The next step in the analysis of the legal nature of virtual property is the distinction between virtual property and intellectual property, whose objects are actually property rights, that is, incorporeal things.

There is no common opinion on the correspondence between virtual property rights and intellectual property rights. Since virtual property, as well as intellectual property, is intangible, it is often mixed with the latter[14]. In such case, the primary rights of the intellectual property owners and all related ones are governed by the End User License Agreement (EULA). However, the result of this approach is the limitation of the virtual property owners by the owners of intellectual property rights. This is why the concept of virtual property has appeared. Thus, the idea is to make difference between intellectual and virtual property.

There are also some assumptions that intellectual property is a component of virtual property, that is, intellectual property is a separate category within virtual property. Thus, J. Gong groups virtual property into four categories: avatars, domain names, virtual movables, and intellectual property[15]. However, it seems that the concept of intellectual and virtual property should not be confused, since the concept of virtual property was introduced precisely to refer to objects that do not exist in the material world but only in virtual reality.

According to J. Fairfield, online resources have nothing to do with intellectual property. On the contrary, these resources were designed to have

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[14] Hurter E. The international domain name classification debate: are domain names "virtual property", intellectual property, property or no property at all? CILJSA. 2009. № 42. P. 288-289; Nelmark D. Virtual property: the challenges of regulating intangible, exclusionary property interests such as domain names. NW J Tech & Intell Prop. 2004. № 3. P. 1–7; Stephens M. Sales of in-game assets: an illustration of the continuing failure of intellectual property law to protect digital-content creators. Texas LR. 2002. Vol. 80. P. 1513–1534.

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the same characteristics as real movable things. This fact makes the ownership provisions an obvious source of regulation for such resources[16]. J. Fairfield's position has been supported in numerous follow-up studies. Ch. Blazer notes that the only similarity between virtual and intellectual property is that both of them relate to intangible interests, but their similarity ends there[17].

Ch. Blazer analyzes attributes of virtual property, proposed by J. Fairfield and by himself, in order to distinguish virtual property from intellectual property. Thus, according to Ch. Blazer, rivalrousness of virtual property objects make a fundamental difference between virtual and intellectual property (rivalrousnessmeans the ability of an object to be controlled by only one person at a specific time – for example, by using an email address, the user excludes all other persons from access to it[18]). Intellectual property is not only intangible but also uncompetitive. For example, listening to a song stored in MP3 format does not in any way limit the ability of others to listen to the same song. Restrictions on the use of intellectual property arise not from the rivalrousness of such property, but from the exclusive rights guaranteed by law. Thus, the simplest and most effective way to distinguish between virtual and intellectual property is to determine whether the property is competitive in nature or only protected by exclusive rights[19].

Another feature of virtual property is also the distinction between virtual and intellectual property. Persistence is an attribute of traditional property that is often lacking in intangible objects. For example, a melody is persistent (stable) only as long as it sounds. A tune is protected by intellectual property rights only after it is fixed on a tangible medium, which at the same time is the subject of traditional (private) property rights. Therefore, intellectual property is characterized as intangible and unstable. On the contrary, virtual property, despite its intangibility, is persistent (permanent). For example, a user who uses the mail service may not without reasons expect that his / her emails will be kept for months, even if he / she only uses the account for a few minutes a day[20].

The need to distinguish between virtual and intellectual property can be traced thanks to the analysis of Dorel v Arel's case conducted by J. Moringelo. The case involved a claim by the creditors of the domain name.

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[16] Fairfield, J. Virtual property. Boston University Law Review [online]. 2005. Vol. 85. P. 1064. URL: https://ssrn.com/abstract=807966.

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[18] Fairfield, J. Virtua lproperty. Boston University Law Review [online]. 2005. Vol. 85. P. 1047–1102. URL: https://ssrn.com/abstract=807966

[19] Blazer Ch. The five indicia of virtual property. Pierce Law Review. 2006.Vol. 5. P. 143. Available at SSRN: https://ssrn.com/abstract=962905.

[20] Ibid. P. 144-145.

The problem that arose was connected to the fact that in case an approach when a domain name is protected by trademark provisions is used, the domain name is intrinsically linked to the business reputation of the company and in this form is of no interest to creditors. On the other hand, if you consider a domain name as a separate object of virtual property, it becomes valuable because it exists as a standalone property that can be alienated for a considerable amount of money[21]. Not dwelling here on the differences between Anglo-American and Ukrainian law, let us note only that in some cases it is important to qualify objects as virtual property and not to confuse the concept of virtual property with intellectual property.

Thus, the virtual property category was proposed to protect users' rights to virtual property. However, inevitably, there are some issues connected to the rights of providers / developers of virtual worlds, platforms and more. An urgent issue is the balance of interests between these two categories of subjects.

The positions of the researchers on this issue differ. Thus, J. Nelson is in favor of defending virtual world developers and against granting users virtual rights to in-game items. He points out that virtual worlds have been created by developers for years, and they put a lot of effort into their development. Granting virtual property rights to users will inevitably reduce the developer's authority over the objects they create, which is unfair[22]. In his turn, J. Fairfield notes that today it is no longer possible to dispense with the rights to virtual resources only for developers of virtual worlds. Recently, the number of applications for theft of virtual items has increased. In North Korea, police received more than 22,000 reports of theft of virtual assets during the year. And the problem is that the developers of the virtual worlds do not have enough tools to influence the offenders. Even if the developer of the virtual world has reason to sue the offender, he or she has little incentive to file such a claim. First, the operator of the virtual world does not lose anything, because there was only a transition of the virtual object from one user to another. Secondly, filing a lawsuit against a hacker can draw users' attention to the security flaws that could have their accounts compromised, and this will cause developer contractual liability. Thus, if users do not acknowledge their virtual

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[22] Nelson J. W. The virtual property problem: what property rights in virtual resources might lookl ike, how they might work, and why they are a bad idea. Mc George Law Review. 2010. Vol. 41. P. 34. Available at SSRN: https://ssrn.com/abstract=1805853 or http://dx.doi.org/10.2139/ssrn.1805853

property rights to the items they own, they will be left without due compensation[23].

One solution to the problem of securing the rights of both virtual world developers and users is to distinguish between different levels of “ownership” within the virtual world. Thus, S. Abramovitch proposes to distinguish three levels of “property” in virtual worlds. The first level is the virtual world itself, which is essentially a computer code protected by intellectual property rights. The second level is objects within the virtual world, such as avatars, swords, clothing, buildings, etc. that are analogous to real-world property objects. The third level is the in-game items, which are both intellectual property and virtual property objects. For example, a virtual book is both a physical object and its content is an intellectual property right; the designer line of clothing in the virtual world is both a physical object, but the design of these garments is protected by intellectual property right. This example can also be used to distinguish between intellectual property rights that a developer has to the object he created, content and software for the virtual world, and other rights that players may have to in-game objects embodying physical objects[24].

This approach is well suited to substantiate the possibility of coexistence of virtual property of users and rights of operators of virtual worlds or other web platforms. Virtual property rights to virtual property will be related to intellectual property rights to virtual property just as property rights in the physical world are related to intellectual property rights in the physical world. That is, the existence of virtual property rights will in no way affect the intellectual property rights embodied in virtual items. Just an alienation of a virtual property object will not mean the transfer of intellectual property rights to another person (as in the case of clothing).

2. Ownership theories as the basis of virtual property right

According to many researchers of virtual property, the general property theory, with the properties of cyberspace being took into account, may well be applied to virtual property[25]. In support of their position, proponents of securing the virtual property regime for digital assets turn to three key theories

[23] Fairfield, J. Virtual property. Boston University Law Review [online]. 2005. Vol. 85. P.1081. URL: https://ssrn.com/abstract=807966

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[25] Fairfield, J. Virtual property. Boston University Law Review [online]. 2005. Vol. 85. P.1047–1102. URL: https://ssrn.com/abstract=807966.

of property rights: J. Locke’s labor theory[26], J. Bentham’s utilitarian doctrine[27], G. Hegel’s philosophy of personal freedom[28].

The justification for the possibility of extending the ownership of virtual property through the theory of J. Locke is that players, spending a considerable part of their time and effort, actually invest their work in creating virtual objects. A striking example is the ability of a player to extract iron ore on their own and to forge a sword that becomes the player’s property through virtually independent creation. This approach, among other things, raises concerns that the work of the individual player and the creator of the virtual world is opposed here. The question arises whether such a sword creation can be considered a player’s own work since the opportunity to mine the ore, forge the sword, etc. is provided to the player through the program code. Critics of this approach draw analogies to the situation where a glass of tomato juice is poured into the ocean – the ocean does not turn into tomato juice and does not become the property of the one who poured the juice. But supporters of J. Locke’s theory argue that players do not claim ownership of the entire virtual world, and the requirement to give them the rights to individual small fates, such as a castle or sword, is quite legitimate, since it is the work of the player created much of the value of this virtual thing[29].

Taking this approach with a great deal of skepticism, we cannot fail to note that given the above figures regarding the number of people involved in online games and the amount of time they spend in the game, investing their efforts in creating virtual things, this theory is not without of rational grain. According to D. Sheldon, in order for an avatar in World of Warcraft to reach a higher level, the average participant must spend more than 350 hours in the game, which is the equivalent of nine weeks of full-time work. Thus, obtaining valuable items in online games and high-level avatars requires a significant contribution of labor[30].

Against the skeptical remarks that games cannot be equated to work, proponents of this theory cite examples with real-world players who earn high fees by actually playing the game (such as football, tennis, etc.). The fact that in China people make money by playing virtual games, working according to

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[28] Гегель Г. Философия права. – URL:http://pavroz.ru/files/HegelPhilprava.pdf

[29] Lastowka G. and Hunter D. The laws of the virtual worlds. California Law Review. 2004. Vol. 92(1). P. 47.

[30] Sheldon D. Claiming ownership, but getting owned: contractual limitations on asserting property interests in virtual goods. UCLA Law Review. 2007. № 54. P. 761.

a work schedule like any ordinary enterprise, provides additional argument that labor theory can be applied to substantiate virtual property rights[31].

In addition, the researchers claim that psychologically participants actually perceive virtual objects as their property. This is evidenced by the fact that the participants not only exercise their right to exclude others from using their belongings due to the mechanisms of the game, but also go to court with claims against other persons who violate their rights to virtual objects[32]. It should be noted that one sees a reference to one of the most fundamental theoretical characteristics of property – to treat things as one's own, while all others treat it as alien[33].

J. Bentham's theory of utilitarianism is aimed at justifying the institution of private property. The idea is that the right of private property should arise when the general effect of its origin will have as a consequence the increasing of the general utility or social welfare. With respect to virtual property, this may not be obvious since, unlike the creation of, say, a new building in the real world, the creation of a new avatar or virtual sword does not seem to be of obvious value to society. However, given the amount of time and money that is invested in virtual items, the virtual objects they create are of high value to humans. From the point of view of utilitarian theory, the public good consists of individual benefits. As millions of people invest their efforts in creating valuable assets in virtual worlds, there are reasons to recognize property rights based on transaction value for individual users. Thus, even in such a narrow view of the social usefulness of avatars and virtual assets, utilitarianism gives reason to consider these objects to be property[34].

The basic idea of G. Hegel's theory of property is the concept of property as an extension of personality[35]. As the simplest example to illustrate this approach, the example of a wedding ring is given – this item is not just an object of human property, it is closely linked to the sense of self. Consequently, even in the absence of any other justification for the ownership of such objects, the theory of personality provides grounds for recognizing the ownership of them. With regard to virtual objects, this theory is quite applicable, because, first, there are no particular differences between the

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[31] Welcome to the new gold mines. URL: https://www.theguardian.com/technology/2009/mar/05/virtual-world-china

[32] Sheldon D. Claiming ownership, but getting owned: contractual limitations on asserting property interests in virtual goods. UCLA Law Review. 2007. № 54. P. 761.

[33] Алексеев С.С. Право собственности: проблемы теории. Москва: Издательство НОРМА, 2007. С. 19–21.

[34] Lastowka G. and Hunter D. The laws of the virtual worlds. California Law Review. 2004. Vol. 92(1). P. 45.

[35] Гегель Г. Философия права. URL: http://pavroz.ru/files/HegelPhilprava.pdf

accumulation of real and virtual values, so if the theory of personality gives grounds for recognition of ownership of land or goods, it also gives grounds for recognition of ownership of virtual land and goods. Moreover, when it comes to an avatar, the theory of personality even more readily confirms the need to establish ownership of it. It is well known that people feel connected to their game avatar and perceive it even not as a thing, but as a continuation of themselves. Some users even associate themselves more with their avatars than with their real personalities[36]. Therefore, if one considers that property rights should arise where one feels a continuation of things, for virtual things the justification offered by the theory of personality is even more obvious than for real ones[37].

Each of these theories is criticized by opponents of recognizing ownership of virtual assets. Thus, J. Nelson identifies two counterarguments against the justification of virtual property rights using the theory of J. Locke. First, he points out that Locke's theory of labor concerns the acquisition of property rights in the real world. Because virtual property does not exist in its natural state, it cannot be acquired on the basis of Locke's theory. Secondly, he, referring to the court cases, states that the US courts have refused to rely on labor theory to substantiate the grounds for ownership[38]. However, both of these counterarguments do not seem to be sufficiently. J. Nelson states that the chain of property rights must begin somewhere, and Locke's theory states that property rights begin when humanity first mixes work with an object that exists in its natural state. However, virtual resources do not exist in the natural state, they have already been isolated from nature, processed by the developer [of the game] and offered to users for consumption, and therefore the Locke's theory is not applicable here. However, J. Nelson does not take into account the fact that since the time of Locke there have been significant changes in public life, and with the advent of virtual worlds his theory can be applied by analogy. As W. Erlank rightly points out, it is likely that Locke would adapt his theory to the virtual worlds. And it's important to remember that within the virtual world, the developer acts as God, as the creator of the entire virtual world and its resources. In the real world, God creates, for example, ore, but it

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[36] Castronova E. Virtual worlds: a first-hand account of market and society on the Cyberian Frontier. CESifo Working Paper Series. 2001. № 618. P. 22–24.Available at SSRN: https://ssrn.com/abstract=294828.

[37] Lastowka G. and Hunter D. The laws of the virtual worlds. California Law Review. 2004. Vol. 92(1). P. 48-49.

[38] Nelson J. W. The virtual property problem: what property rights in virtual resources might look like, how they might work, and why they are a bad idea. Mc George Law Review. 2010. Vol. 41. P. 14. Available at SSRN: https://ssrn.com/abstract=1805853 or http://dx.doi.org/10.2139/ssrn.1805853

is up to man to obtain ownership of these resources. The developer replicates the virtual world by analogy with the real world, and himself develops mechanisms that enable users to extract resources and assign them[39]. Even taking into account the position of J. Nelson, he himself notes that the virtual world is the result of the work of the developer, and this is already a first-level virtual property. Therefore, this counterargument does not stand up to criticism. Second, the position of the US courts concerned two specific cases, which in a particular case establish the possibility or inability of ownership. However, it does not take into account all possible options for the acquisition of property rights. Therefore, we consider the above arguments to be inapplicable to deny the possibility of applying Locke's labor theory to substantiate the concept of virtual property rights.

The utilitarian concept may be objected to that the granting of ownership of certain virtual objects to certain users diminishes the well-being of other participants in the game and thus diminishes the value to society. Therefore, virtual property rights cannot be established from the standpoint of utilitarian theory. However, this objection is also easily contested: the utility function of proponents of this theory is used to justify the existence of virtual property rights, not to distribute those rights[40].

The counterarguments against personality theory are that the theory makes it difficult to justify the possibility of alienation of virtual property rights, since they are inextricably linked to the owner. However, in the real world, alienation of, say, wedding rings or even parts of the body is allowed, however, there are exceptions to the alienation of certain corporeal objects[41].

D. Horton also criticizes the theory proposed by Gr. Lastowka and D. Hunter to substantiate the possibility of recognizing the ownership of virtual property[42]. The researcher notes that if ownership of virtual assets is recognized, there are many difficult questions to answer. For example, will businesses have to pay compensation to their clients every time they make changes to their rewards programs (for the number of flights, for example), do their servers break down, or do they decide to end the virtual world? Will lenders be able to claim their game avatar rights? How will the issue of separation of virtual assets in the event of divorce be resolved[43]?

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[39] Erlank W. Property in virtual worlds: dissertation. 2012. P. 156.

[40] Lastowka G. and Hunter D. The laws of the virtual worlds. California Law Review. 2004. Vol. 92(1). P. 46.

[41] Ibid. P. 49.

[42] Horton D. Contractual Indiscernibility (November 30, 2014). Hastings Law Journal, Vol. 66, 2015 Forthcoming. P. 1061-1062. Available at SSRN: https://ssrn.com/abstract=2516361

[43] Ibid. P. 1063.

Indeed, all of the above questions may arise, moreover, they already arise. There are already cases where users are suing the claims of virtual world developers, moreover, there is a practice of satisfying users' requirements regarding the protection of their virtual assets. Thus, in the case of Li Hongchen v. Beijing Arctic Ice Technology Development Co, a "resident" of the virtual world, has argued against the developer of the online environment, as his virtual property was seized by a hacker. The trial court ordered the provider to return the property to its rightful owner, and this decision was upheld by the Court of Appeal[44]. We would like to emphasize that in this case the court protected the individual right of the owner – the right to control the property and protect it from all over the world, not only from the person who committed the violation[45].

Similarly, in the case of claims of creditors on virtual property – we consider it quite permissible, if such property will have a certain market value. This also applies to the division of virtual property between spouses. Therefore, the problem is not whether to recognize virtual property or not, but rather how to allocate rights between providers / companies / developers and users, but also to determine the essence of virtual property.

CONCLUSIONS

It is no longer possible to deny the existence of digital property – the "gray" markets for the sale of virtual items are growing, the number of thefts of virtual things is expanding, and new types of objects that are qualified as "virtual property" are emerging. Therefore, the issue of protecting the rights of the owners of such property should be resolved as soon as possible. One solution to the problem of protecting their rights is to extend the legal provisions on property to virtual objects.

In support of the possibility of having a virtual property right, we can give an example of Eastern countries where virtual resources are officially recognized as virtual property. Thus, since 2001, the Ministry of Justice of Taiwan has formally established that virtual objects are property, can be alienated and transferred to third parties, that actions with such objects or accounts fall under the provisions relating to property rights and that theft of such property shall be punishable under criminal law. It has been stated that accounts and game values are stored as electromagnetic records on the game server. The account holder is authorized to control the account and the electromagnetic records so that it can be freely sold or transferred. Although such accounts and values are virtual, they have real value in the real world.

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[44] Knight W. Gamer wins back virtual booty in court battle (Dec 23, 2003). URL: https://www.newscientist.com/article/dn4510-gamer-wins-back-virtual-booty-in-court-battle/

[45] Fairfield, J. Virtual property. Boston University Law Review [online]. 2005. Vol. 85. P. 1086. URL: https://ssrn.com/abstract=807966

Players can participate in the auction or submit it online. Accounts and virtual valuables are the same as property in the real world, so there is no reason not to consider accounts and virtual values to be free from theft or fraud by criminal law[46].

Recognizing virtual property will help protect millions of users, protect them from theft, enable the alienation and inheritance of virtual resources, which eliminates shadow markets and eliminates the issue of the fate of virtual property after the death of the user and more. Ultimately, it will also help to address the issue of taxation of virtual property transactions carried out in the shadow market, which will significantly replenish the budgets of all countries in the world. All objections raised against virtual property can reasonably be rejected – private property rights in the real world are also not limitless and unconditional. According to J. Fairfield, changes in the information society once created the objective need to move from telephone to the Internet, ending this stage should be to protect buildings in virtual worlds[47].

Normative theories of ownership provide enough grounds for recognizing ownership of virtual assets. In spite of the possible critical attitude towards each of the theories of ownership, this criticism is equally possible when applying these theories to real-world objects. Therefore, we must finally acknowledge the fact that virtual property rights may exist, the more important question today is what they represent and how they should be distributed.

SUMMARY

The concept and essence of virtual property as special right for virtual (digital) property as well as the possibility of justifying the concept of virtual property rights using the main regulatory theories of property rights are analyzed in this section. Objects of the virtual property right are investigated. The conclusion is drawn that such objects in fact are incorporeal things. Such conclusion allows to speak about a possibility to extend the legal regime of property to virtual things. Differentiation of virtual and intellectual property is carried out. Peculiar features of virtual property, which allow distinguishing it from intellectual property, are revealed. This emphasizes the need of independent existence of the virtual property right.

The labor theory, the theory of utilitarianism and the theory of individual freedom as the basis for the existence of the virtual property right are considered. It is concluded that each of the theories presented can be used to justify the possibility of the existence of property rights to virtual assets. The foreign practice of normative regulation of virtual property relations is given.

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[46] Fairfield, J. Virtual property. Boston University Law Review [online]. 2005. Vol. 85. P. 1086. URL: https://ssrn.com/abstract=807966

[47] Ibid. P. 1102.

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5. Erlank W. Property in virtual worlds: dissertation. 2012.

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21. Welcome to the new gold mines. URL: https://www.theguardian.com/technology/2009/mar/05/virtual-world-china

22. Алексеев С.С. Право собственности: проблемы теории. – Москва: Издательство НОРМА, 2007. 239 с.

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PRIORITY OF THE PRIVATE LEGAL METHOD IN REGULATION OF IT RELATIONS IN THE CHANGING FORMS AND VECTORS OF THE IMPACT OF IT LAW

Omelchuk O. S.

INTRODUCTION

The field of IT law is developing rapidly in Ukraine and becoming one of the most promising areas of training for lawyers. The question of determining the place of IT law in the national legal system is extremely urgent. It is necessary to outline the boundaries and methods of legal regulation in this field, since the dynamics of development of relations in the field of information technology requires the widest possible expansion of the scope of information technology. The specificity of the information technology sector is marked by a tendency to self-regulate relations in this field, which is confirmed by the situation with crypto currency assets; relationships that arise during communication on social networks, etc.

However, most public relations, which are decisive for the sphere of interference with IT law, are regulated by state legal norms, but complicated by the informational features of their application. The process of formation of specific cross-sectorial features of legal regulation of relations in the field of IT is noted in the literature[1].

The pluralism of views inherent in modern science opens new vectors of knowledge of law; it's not limited only as a social regulator. The application of the methodological tools of the various social sciences makes it possible to consider law in the context of its social nature, as an element of the social system.

Based on the civilizational approach, law is characterized as a phenomenon inherent in civilization, serving as an element of socio-political system and social consciousness, law is a component of the spiritual world of man and his worldview; law reflects the views of individuals and society as a whole about human status, truth and injustice, justice, good and evil, human rights abuses and restoration, crime and punishment, humanism and cruelty, etc[2].

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[1] Новицький А.М. Місце ІТ-права в загальній системі інформаційного права. URL: http://aphd.ua/publication-179/

[2] Харитонов Є.О. Сутність ІТ-права (ІТ- право як концепт). *ІТ право: проблеми і перспективи розвитку в Україні: збірник матеріалів науково-практичної конференції.* Львів: НУ "Львівська політехніка", 2016. С. 276.

1. General provisions on the consciousness and its types

In order to determine the nature of the impact of IT law society and the dynamics of changing vectors of such influence, it is necessary to find out what information technologies at the current stage of development of science and technology influence the public consciousness.

Consciousness is the feeling of each person's existence and actions. It is a quality inherent in people that is a generalized and purposeful reflection of reality, imaginary construction of actions, predicting consequences, regulation and self-control of behavior, that has an external forms of creative expression and is language-related. Human consciousness is a reflection of information processes.

Social consciousness arises as a result of the dependence of human activity on social conditions of life, also is an implementation of the new type of orientation. That is, social consciousness is a product of social existence.

Over the course of history, a number of forms of social consciousness emerged and developed. There are morality, religion, philosophy, art, political consciousness and legal consciousness. Each of these forms has its own specificity and plays a special role in public life.

Social consciousness, together with the individual, makes, what is commonly called, the spirituality of the individual, society, nation, state, humanity. Social consciousness is the systematic unity of the sensual, informational and intellectual components that reflects all social being.

Individual and social consciousness constitute dialectical unity. Individual consciousness is formed and developed under the influence of social consciousness, and the social consciousness deepens its essence and replenishes its content at the expense of the individual. The carrier of social consciousness is society, the carrier of individual consciousness is the individual.

The public consciousness contains in itself the ideas, views, ideas, illusions, social feelings of people that are distributed in society. Public consciousness reflects the conditions of daily life, needs, interests.

It should be noted that any socially significant object of interest in society is reflected in the public consciousness. Information technology is no exception. By information technology we mean not only certain technological models and communication channels, but also the whole range of tools, mechanisms, techniques associated with the global expansion of the information space[3].

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[3] Стефанчук У. Інформаційні технології та їхній вплив на формування громадської думки в Україні. *Українська національна ідея: реалії та перспективи розвитку.* 2008. Вип. 20. С. 130.

Scientific progress that takes place in the process of self-realization of society, produce more and more ways and means of applying information, thus increasing its value. The increasing efficiency of the use of information assets, the information base of society is increasingly contributing to effective social development. The information space thus formed is attracting more and more subjects of different status – individual, society, state – each of which has its own interest.

The interests of the individual in the information field are to exercise human rights to access information and to use information for physical, spiritual, intellectual development and other activities.

Social consciousness is not a mathematical sum of the individuals of the members of the respective society; they are constantly interacting and developing in parallel, their development is determined by both common and individual factors for each form of consciousness.

The public interest does not always intersect with the individual, and therefore the public consciousness otherwise reflects the phenomenon of information technology. Today we are seeing a high-quality reincarnation of society based on information technology. At the present stage of civilization's development the processes of globalization, humanization, greening, and informatization are inherent in the public consciousness. Information technologies have a significant impact on such changes in the mass consciousness.

Modern information technologies have caused the emergence and intensive dissemination of fundamentally new models of social integration, communication, socio-political activity, lifestyle, education, etc.[4]

There are several factors behind the spread of information technology that have an impact on the public consciousness.

Dissemination of Internet resources with objective information on the implementation of various functions of the state, with various registers of legal information, monitoring studies of the efficiency of the work of the state apparatus and local self-government bodies – undoubtedly leads to the formation of public consciousness of the society of a fundamentally new type. Involvement of a large number of citizens in state processes through the mechanisms of direct democracy (electronic petitions, polls on official websites of state bodies, electronic appeals), widespread access to mathematical indicators that reflect the effectiveness of the activities of individual state or local governments, broad discussion of current and potential legislative initiatives – all these determine the functioning of modern civil society.

[4] Інформаційні технології як фактор суспільних перетворень в Україні : зб. аналіт. доп. / М. А. Ожеван, С. Л. Гнатюк, Т. О. Ісакова; за заг. ред. Д. В. Дубова. К. : НІСД, 2011. С. 3

The active introduction of information technology in the economy also influences the formation of a new type of social consciousness. The widespread and relative availability of e-commerce technologies, the emergence of new technological models for doing business, consolidation of simple and clear rules of the legislation on the use of modern information technologies in business cause positive changes in the public consciousness, approaching the transition of society to the post-industrial model.

The spread of IT in the fields of education, science, culture is also reflected in the level of public consciousness, bringing the average member of society closer to the values of modern civilization and shaping the general intellectual level of society.

Information technology, however, can be dangerous for the individual and the public, if misused or malicious.

At the individual level, dangerous influences of the information space can lead to changes in the psyche, mental health of the person. We should talk about the degradation of personality, if the forms of reflection of reality are simplified, reactions are coarser and the transition from higher needs (in self-actualization, social recognition) to lower (physiological, everyday. There is also a shift in values, lifestyle, reference points, the worldview of the individual. Such changes cause antisocial actions and are dangerous for the whole society and the state[5].

For example, the Internet at the present stage of development is a special virtual environment, which consists of virtually all those kinds of relationships that exist outside it, because the internet is a reflection of real life. The imaginary anonymity and unrestricted freedom of action on the Internet creates the illusion of permissiveness, which often translates into real-life behavior.

Information influence is also possible at the level of public consciousness. Negative influence is usually called manipulation of consciousness.

Awareness of the importance of the use of information technologies in everyday life and public life plays a paramount role in the development of the information society. Therefore, we can talk about the formation of information consciousness of society. As noted A.V. Kolodyuk, formation of information consciousness is a fundamental prerequisite for the use of information and communication technologies in the life of every citizen[6].

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[5] Жарков Я. Небезпеки особистості в інформаційному просторі. *Юридичний журнал.* 2007. № 2. URL: http://www.justinian.com.ua/article.php?id=2554

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The media consciousness according to the media can be divided into the following types:

1) information consciousness of the person, which reflects the attitude of the person to information technologies on a household level;

2) group information consciousness, which determines the understanding and use by a group of persons of a certain set of information knowledge;

3) information consciousness of society – provides a general understanding of the information sphere of society.

Public justice characterizes the attitude to the law of the whole society, reflects its interests.

The legal consciousness of a society is based on a historically defined system of social relations – economic, social, political, spiritual – throughout the whole society. It reflects the legal nature of relations in society, principles and patterns of legal communication between members of society, experience of legal activity[7].

According to the level, form and volume of the reflection of legal life, social justice is divided into legal ideology and legal psychology. Legal ideology of society is a system of legal ideas, views, ideals, principles, concepts that are characteristic of the whole society. Legal ideology substantiates and evaluates existing or emerging legal relations, law and order. The best reflection of legal ideology is the system of legislation in the broad sense.

Legal psychology of society encompasses the totality of feelings, values, moods, desires, or experiences that are characteristic of the entire society.

Legal ideology should be formed as a process of revealing theoretical consciousness, coordinating and reconciling different public interests through the achievement of social compromise. In the development of legal ideology take part lawyers, political scientists, economists, take into account specific-historical conditions of society life, balance of power, level of public consciousness, social psychology, will and interests of both majority and minority, other factors[8].

Law influences society within its functions. The functions of law are the directions of its influence, which are inherent to it as a whole, and therefore inherent in each of its elements. A particular branch of law, given its specificity, may have additional special functions, may use some of the functions of law to a greater extent, and another may use less.

Legal influence on the public consciousness is exercised when performing (or not performing) by the right it social functions. Social functions are a

[7] Скакун О.Ф. Теорія держави і права : підручник. Х. : Консум, 2001. 656 с.

[8] Соснін О.В. Правова свідомість як фактор забезпечення засад захисту інформації. *Захист інформації.* 2010. № 1 (46). С. 10.

specific perspective of law, where regulatory and protective functions are combined in a separate, qualitatively uniform sphere of social relations, economy, politics, ideology. Law performs a general social function of shaping legal values, principles and desirable behaviors.

In order for the law to really perform its functions, the subject must be clearly aware of its nature, goals, basis (through ideology and psychology) and put it into practice through appropriate actions (through the behavior of the subject of public relations). Under developed consciousness, in the result of this interaction happens a deep awareness and understanding of the role of law, it is evaluated in terms of criteria for compliance with the needs of society, awareness of the need for an acting system of legislation, compliance with the requirements of laws, etc.[9]

2. The impact of IT law on the public consciousness

The impact of IT law on the public consciousness means not only regulatory influence, but the whole spectrum of influence on the formation of new and change of old values, traditions and behaviors.

In order to determine the direction of the impact of IT law on the public consciousness, it is necessary to find out the sources of origin of law related to IT law. Among the traditional ways of IT law norms occurrence, related to the emergence of new socially significant relations and the subsequent creation of an effective regulator of such relations in the form of a rule, we note the emergence of a new method of lawmaking related to the globalization of relations (including European integration processes). for Ukraine).

In view of the obligations, that should be fulfilled by the Ukrainian legislator, certain norms are adopted, which are imposed by the international community and are implemented for reasons other than the sustainable evolutionary development of social relations.

In the legal literature exude three types of formation of legal rules in the field of IT:

– those that have happened historically (“About Information”);

– those that have been accepted at the request of the international community (Law of Ukraine “On Electronic Digital Signature”, “On Electronic Documents and Electronic Document Management”;

– those adopted at the request of industry development (Law of Ukraine “On the National Informatization Program”)[10].

[9] Бурдоносова М.А. Правовий нігілізм як форма деформації правової свідомості населення. *Держава і право*. Вип. 45. С. 57.

[10] Новицький А.М. Місце ІТ-права в загальній системі інформаційного права. URL: http://aphd.ua/publication-179/

We can trace the dependence of forms implementation of the rule of law and the level of interest in the immediate and effective implementation of the rule of law from the manner in which a separate legal rule arises, however, in the case of IT law, the above methods are generally acceptable.

The extraterritorial nature of the construction and operation of many IT objects necessitates a combination of national and international legal regimes for regulating them. A large number of IT relations are implemented through soft law in the form of various recommendations, resolutions and declarations issued by international organizations (International Telecommunication Union, World Intellectual Property Organization, UN, UNESCO, Council of Europe, Internet Corporation for Assigned Names and Numbers, etc.)[11].

All the features of the IT relationship listed above are also reflected in the nature of the impact of IT law on the public consciousness. The impact of the right on the public consciousness passes at two levels at once – the levels of perception of law and the levels of socio-legal actions (behavior). It is with these two levels that different directions of influence of law are connected.

Public relations that arise within the limits of the use of information technologies have a number of features, among them innovation, high technology, formality. The specificity of the sphere of relations, which is the subject of legal regulation of IT law, determines the peculiarities of the mechanism of influence of IT law on the public consciousness. Thus, within the information sphere of influence on the public consciousness, IT law forms an idea of the latest information technologies and reflects the attitude of the society (state) to certain elements of the information society.

Regulatory material in IT law can serve as a real source of education for society, which will serve as a key to attracting a wide range of subjects to IT relations and further development of information technologies. An important element of the mechanism of legal influence should be the stimulation by the state of the use of information technologies by people (electronic document circulation, filling in electronic declarations, online transactions, electronic citizens' appeals, etc.). Formation in the public consciousness of the positive image of "virtual" relationships, their security and perspective, accessibility and convenience – is the predominant goal of influence of IT law within the information direction of influence.

The value-oriented or axiological direction of the impact of IT law generates in the public consciousness the imagination and calls for respect for the values protected by the norms of IT law. The peculiarity is that within the

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[11] Позова Д.Д. Система джерел правового регулювання інформаційно-технологічних відносин. *Часопис цивілістики.* 2017. Вип. 24. С. 95.

legal impact of IT law, values such as information, privacy, and self-identification are objectified. that are not so obvious and do not come directly from human nature. The integration of values inherent in the information society into the existing system of legal values is a challenge facing IT law today.

The result of the psychological impact of law is the formation of an image of law in the totality of the elements that are included in it and the phenomena associated with it.

The formation of the individual's psychological attitude to law is influenced by the social group and society as a whole[12]. Within the limits of social reality, society is stratified on different grounds into groups without the need for individuals belonging to the social group to be even acquainted with one another. Political, economic, cultural processes in society create the conditions for the formation of a group endowed with a separate legal status (electorate, mass consumer, etc.).

Transformation of society by means of information technologies into a "reasonable society" implies the coexistence of both old (traditional) and new (non-traditional) forms of differentiation of society that determine the range of social expectations, requirements, services, and jobs.

Information technology development is a catalyst for stratification processes, with virtual communities emerging as a new form of social organization in the information space (forum and community members on social networks, newsletters, blog readers, etc.). The inevitable division of society into new "executions": users, creators of technology or personal options for using them[13].

The indirect impact of IT law through group consciousness on the public consciousness also takes place.

The cultural direction of the influence of IT law is to increase the general cultural level of society through the harmonious introduction of the latest technologies in life, bringing the society to the achievements of modern civilization, using the latter to enhance the intellectual, ethical and spiritual levels of development of society as a whole.

At the behavioral level, law uses the power of its regulatory and protective influence to evaluate the actions of individuals by encouraging or condemning the latter. The specificity of IT law determines the following features of its impact on legal awareness at the behavioral level:

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[12] Шаравара І.І. Правосвідомість як юридична категорія та її основні структурні елементи. *Науковий вісник Ужгородського національного університету: серія: Право.* 2015. Вип. 33. Т. 1. С. 57.

[13] Інформаційні технології як фактор суспільних перетворень в Україні: зб. аналіт. доп. / М. А. Ожеван, С. Л. Гнатюк, Т. О. Ісакова; за заг. ред. Д. В. Дубова. К. : НІСД, 2011. С. 23.

– given the progressive nature of the law, it is able to stimulate the relationship not only by ensuring their legal protection, but also can generate the latter in real life, "prompting" possible participants of the relationship the possible content of relations with the latest technologies;

– encourages the enhancement of process efficiency through the use of information technologies, while ensuring at the legislative level the freedom to use new communication opportunities and means.

Thus, law, on the one hand, is itself a formal manifestation of social consciousness, reflecting the perceptions and views of the various phenomena of reality formed in society. On the other hand, law influences the public consciousness, forming ideas and thoughts, ideas and values of society and prejudices the behavior of individuals.

Thus, IT law and public consciousness are interdependent, since IT law is the creation and reflection of public consciousness, while IT law influences further changes in public consciousness and the formation of legal culture in the field of information technology.

In the context of the study of the impact of IT law on the minds of individuals and the public consciousness, it is necessary to address the nature of IT relationships at the present stage and identify the place of IT law in the system of modern branches of law. In the context of the European integration of Ukraine and the subsequent recodification of civil law, the science of civil law must develop relevant approaches to determining the nature of IT relationships, taking into account the methods by which IT relationships should be regulated.

The scope of IT law regulation is extremely broad. When describing IT legislation, they often refer to the rules of civil, commercial and administrative law. Civil relations are especially distinguished in this area, because they are most relevant to the specifics of IT relations. IT relations that are governed by civil law generally include: contracts for the provision of software development or use services; civil contracts for work with IT specialists; contracts of legal support of freelancers; legal audit of IT companies; legal protection of web site owners and related content; registration and protection of copyright and trademark on the Internet; execution of the contract of sale of an individual IT object – site, domain, brand, etc. legal support of activity of online shops; creation and registration of legal entities in the field of information technology; license agreements; protection of intellectual property rights; protection of information, etc[14].

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[14] Харитонов Є.О. ІТ-право: альтернатива парадигми. *Наукові праці Національного університету "Одеська юридична академія"*. 2016. Т. 18. С. 19.

The specificity of relations in the field of information technology is marked by the intensity of development of such relations, which causes complexity for the legislator in the matter of regulating such public relations. Thus, the lawmaking process should aim to form the most general rules and to overcome the gaps as soon as possible. At the same time, IT legislation should enable participants in these relationships to self-regulate their compliance with the general principles of the law[15]. In general, these statements are relevant to private-law relations, and therefore priority should be given to private-law methods in regulating information technology relations.

In support of the thesis on the priority of private-law methods in the regulation of relations in the field of information technology, it should also be noted separately that among the sources of regulation of relations in the field of IT include legal custom and a civil contract. Legal practices are usually understood to mean those rules of conduct that are not established by official legislative acts but are established in a particular field of relations. Thus, according to Art. 7 of the Civil Code of Ukraine, civil relations can be governed by custom, in particular, the custom of business turnover. The use of custom as a real regulator of relations in the field of IT relations is appropriate, because it is often the case that relations in the field of IT are derived from real civil relations and may be subject to the same customs of business turnover.

At the same time, considering the large number of loopholes in the regulation of IT relations and the widespread use of analogy of law and analogy of right in resolving disputes in the field of information technology, the construction of a civil contract generally corresponds to the specifics of the sphere of IT and will enable the participants of relations to freely carry out their rights to IT objects and enter into relations in the exercise of those rights. The legislator laid down this possibility in the content of Art. 6 of the Civil Code of Ukraine, according to which the parties have the right to enter into an agreement that is not provided for by the acts of civil law, but is consistent with the general principles of civil law (so-called "not named contracts"). In addition, it is provided that the parties may conclude one of the agreements envisaged by the civil law acts (the so-called "named contracts"), but to regulate in it their relations which are not at all regulated by these acts, or, if regulated, to depart from the provisions of civil law and to regulate them at their discretion. The only caveat to this is the inability to depart from the imperative provisions of civil law, namely: 1) unless explicitly stated in these acts; 2) if the obligation of the parties to the

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[15] Позова Д.Д. Система джерел правового регулювання інформаційно-технологічних відносин. *Часопис цивілістики.* 2017. Вип. 24. С. 96.

provisions of civil law acts derives from their content or from the substance of the relations between the parties[16].

In addition, the literature has repeatedly demonstrated the need to enhance the use of private legal coercion in civil protective legal relationships[17]. Public and private coercion cannot be opposed but must complement each other, forming a system of methods for the protection of violated civil rights. The specifics of the methods of regulation of private legal relations require the widest possible application of private legal coercion in this field. The sphere of IT relations is already becoming a feature of the sphere of private legal relations, and therefore the use of private legal coercion corresponds to the specificity of the impact of IT law on public relations. Independent settlement of conflict situations, arise in violation of civil rights by entities in the field of information technology, maximizes the potential of the dispositive method of IT law. The use of self-defense, a pretentious form of influence over the offender are adequate ways of protecting one's own rights in the field of IT, their effectiveness and perspective are proven by daily practice.

CONCLUSIONS

The sphere of relations in the field of information technology is not homogeneous; it includes relations that are both public and private. Such relationships cannot be separated and co-existent in the field, and therefore the legal regulation of the field should take into account such specificity of relations in the field of IT. The areas of influence of IT law are not limited by the individual consciousness of participants in the relations in the field of IT, a й extend to the public consciousness, forming perceptions and behavioral stereotypes in society's consciousness. The dynamism and technology of the IT sphere determines the possibilities of regulating such public relations. The specifics of IT relationships require a broad involvement of a civil contract as a source of regulation of relations in the field of IT. In addition, a significant number of civil relations within the sphere of IT relations require the preferred use of private law methods in regulating this sphere of public relations. Shifting the Priority to Private Law Methods in the Regulation of Public Relations in the IT Sector is in line with current scientific approaches to determining the place of IT law in the law system.

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[16] Позова Д.Д. Система джерел правового регулювання інформаційно-технологічних відносин. *Часопис цивілістики.* 2017. Вип. 24. С. 95.

[17] Яроцький В.Л. Приватно-правовий примус в цивільних охоронних правовідносинах. *Вісник Національної академії правових наук України.* 2018. № 1. С. 235.

SUMMARY

Within the framework of the research, the perspectives of shifting the priority of methods of legal regulation of the sphere of IT relations in accordance with the vectors of influence of information technologies and IT law and the public consciousness are identified. In the context of the study it is proved that modern information technologies have caused the emergence and intensive dissemination of fundamentally new models of social integration, communication, socio-political activity, lifestyle, education and more. The problems of the topic are outlined, namely in the specifics of the sphere of information technologies the tendency of relations in this sphere to self-regulation is determined, which determines the perspective of the research.

It has been determined that law is a formal manifestation of public consciousness, reflecting the perceptions and views of the various phenomena of reality formed in society. On the other hand, law influences the public consciousness, forming ideas and thoughts, ideas and values of society and prejudices the behavior of individuals. IT law and the public consciousness are interdependent, since IT law is the creation and reflection of the public consciousness, while IT law influences further changes in the public consciousness and the formation of the legal culture in the field of information technology.

The specificity of modern relations in the field of information technologies and corresponding restrictions of legislative regulation of relations in the field of IT are determined. The idea of the composition of public relations related to the sphere of IT law has been formed. The utmost importance of civil contract and legal custom as sources of legal regulation of relations in the sphere of information technologies is proved. It has been determined that the design of a civil contract is broadly in line with the specifics of the IT field. The use of a civil contract in the regulation of relations in the field of IT will give the participants of the relationship the opportunity to exercise their rights freely over the objects of IT and enter into relations in the exercise of these rights.

The necessity of the widest possible use of private legal coercion in the protection of civil rights of participants of legal relations in the sphere of information technologies is proved. It has been found that self-management of conflicts arising from civil rights violations by information technology entities maximizes the potential of the dispositive method of IT law.

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CIVIL LEGISLATION OF UKRAINE AND ITS LIMITS

Shyshka O. R.

INTRODUCTION

According to the Resolution of the Cabinet of Ministers of Ukraine of July 17, 2019 No. 650 it has been set a course for updating the civil legislation of Ukraine. Therefore, today there is a need to revise not only the rules of civil legislation but also existing paradigms and accumulated legal knowledge. One important aspect of such revise is the understanding of civil legislation and its system, including the verification of such legislation on compliance with the principle of supremacy of law, in particular, with such its components as the effectiveness of the aim and means of legal regulation, reasonableness, predictability, determinancy and logicality of its constituent elements, that is, the normative-legal array. The need to update the civil legislation of Ukraine is caused by global trends in mankind development and progress, which ceaselessly affect the social life of man, and with them there are new challenges and demands for legal formalization of relationship, which either do not fit into the concept of regulation of the sphere of civil law, or mechanisms of legal regulation are powerless to ensure the inviolability of the rights and interests of the participants of civil relations. This also applies to the idea of developing common world standards of the legal regulation of civil relations.

Today there are two main approaches to understanding the term 'civil legislation of Ukraine' and its system according to Chapter 1 of the Civil Code of Ukraine in Ukrainian scientific literature. In accordance with the first one (N. S. Kuznetsova[1], A. S. Dovhert[2], R. A. Maidanyk[3], Yu. O. Zaika[4],

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[1] Кузнєцова Н. С. Акти цивільного законодавства. *Енциклопедія цивільного права України*. Ін-т держави і права ім. В. М. Корецького НАН України ; відп. ред. Я. М. Шевченко. Київ : Ін Юре, 2009. С. 30; Кузнєцова Н. С., Довгерт А. С. Сучасне цивільне законодавство України: здобутки, проблеми, перспективи. *Вісник Південного регіонального центру Національної академії правових наук України*. 2014. № 1. С. 59–60. URL: http://nbuv.gov.ua/UJRN/vprc_2014_1_7.

[2] Кузнєцова Н. С., Довгерт А. С. Сучасне цивільне законодавство України: здобутки, проблеми, перспективи. *Вісник Південного регіонального центру Національної академії правових наук України*. 2014. № 1. С. 59-60. URL: http://nbuv.gov.ua/UJRN/vprc_2014_1_7/.

[3] Майданик Р. А. Цивільне право: Загальна частина / Т. І. Вступ у цивільне право. Київ : Алерта, 2012. С. 330, 336–338.

[4] Цивільне право України. Загальна частина / за ред. Бірюкова І. А., Заіки Ю. О. Київ : Алерта, 2014. С. 26.

R. B. Shyshka[5], L. V. Krasytska[6], D. V. Bobrova[7], O. Ye. Kukharev[8], V. I. Truba[9], S. N. Prystupa[10], etc.) civil legislation is understood as the system of normative legal acts that contain the rules of civil law. The essence of this approach is mainly confined to that 'civil legislation' and 'acts of civil legislation' are identical notions, and its system, as it is noted by L. V. Krasitska, consists of the Constitution of Ukraine, the Civil Code of Ukraine and other codified acts, the Laws of Ukraine; subordinate normative legal acts; international treaties regulating civil relations, the consent to be bound by which was given by the Verkhovna Rada of Ukraine[11]. At the same time, both in science and in practice this approach is considered a dogma that doesn't question. The second approach (Ye. O. Kharytonov) considers the term 'civil legislation of Ukraine' more broadly than the first one, namely, as the whole set of formally fixed rules regulating civil relations[12]. In this case, the system of civil legislation of Ukraine includes: the acts of civil legislation of Ukraine, contracts of the subjects of civil law, customs, international treaties, other forms of civil legislation (legal doctrine, precedents, corporate norms, etc.)[13]. However, as we can see, such a system at the national level does not reflect all the regulators of civil relations which one way or another affect the ordering of civil relations. But, before attempting to improve the system of sources of civil law, it is necessary to figure out the normative-fixed model of system of civil legislation of Ukraine, what this research is devoted to.

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[5] Цивільне право України : підручник, 2-ге вид., перероб. і доп. У 2 частинах / за заг. ред. проф. Р. Б. Шишки, Ч. 1. Загальна. Київ : Ліра, 2018. С. 50–51.

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[11] Сучасні проблеми цивільного права та процесу : навч. посіб. / С. О. Сліпченко, О. В. Синєгубов, В. А. Кройтор та ін. ; за ред. Ю. М. Жорнокуя та Л. В. Красицької. Харків : Право, 2017. С. 55–56.

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1. The Ukrainian model of the system of civil legislation in accordance with Chapter 1 of the Civil Code of Ukraine (realm of due)

Chapter 1 of the Civil Code of Ukraine should be analyzed to answer the posed question.

The determined issue is primarily attributed to the conception of the Civil Code of Ukraine, which originates from Art. 1. The content of this article provides for the requirements that identify certain relations as civil and what regulates these relations is called civil legislation. In particular, Art. 1 of the Civil Code of Ukraine establishes that the civil legislation regulates personal non-property and property relations (civil relations), based on legal equality, free expression of the will, property independence of their participants.

Within the framework of the above issues, the question arises: what does belong to the civil legislation? To answer this question, the laws of logic and the rules of linguistic (grammatical, literal) interpretation should be applied.

Chapter 1 of the Civil Code of Ukraine is entitled 'Civil Legislation of Ukraine' and consists of 10 articles. By the logic of things, everything related to such a chapter should characterize in one way or another Ukraine's civil legislation and its system. Art. 1 of the Civil Code of Ukraine also draws attention to civil legislation and outlines the relations that fall under its regulation. This leads to the opinion that Chapter 1 of the Civil Code of Ukraine answers several questions. Firstly, what does the civil legislation of Ukraine regulate? Accordingly, civil relations (Part 1 of Art. 1 of the Civil Code of Ukraine), and in cases established by law, also some other relations that are not civil (Part 2 of Art. 1 of the Civil Code of Ukraine). Secondly, what does belong to the civil legislation? Answering this question, but without going into a detailed analysis of this chapter, we can make assumptions that the civil legislation covers the acts of civil legislation (Art. 4 of the Civil Code of Ukraine), contract (Art. 6 of the Civil Code of Ukraine), custom (Art. 7 of the Civil Code of Ukraine), international treaties (Art. 10 of the Civil Code of Ukraine). At least this is indicated by the title and structure of Chapter 1 of the Civil Code of Ukraine.

In such circumstances, we can presume so far that the category 'civil legislation of Ukraine' is broader than such notions as 'acts of civil legislation', 'contract', 'custom', 'international treaties', that is, generic concept in relation to the above stated notions, which should accordingly be considered as specific ones. The aforesaid should also lead to another logical conclusion that the category 'civil legislation of Ukraine' have to be commensurate to the category 'source of civil law', and taking into the account that the system of civil legislation may also cover contract, custom and international treaties, along with the acts of civil legislation then the scope of the concept 'civil legislation of Ukraine' have to be considered as a system of legal forms of external expression (fixation) of civil law norms in the state.

However, such conclusions contradict the current doctrine of civil law, according to which the content of civil legislation of Ukraine consists of acts of civil legislation of Ukraine, that is, of normative legal acts containing civil law norms[14].

In order to refute or prove the assumptions made, Chapter 1 of the Civil Code of Ukraine should be analyzed in detail.

Particularly, Art. 4 is entitled 'Acts of Civil Legislation of Ukraine'. It is known that the acts of civil legislation act as sources of civil law, the separate forms of legal regulation, and therefore such acts regarding civil legislation are considered as specific and generic concept. This is confirmed by the following logic way. Thus, by applying the one of the laws of logic, namely the law of the inverse relation between the content and the scope of the concept, it is to be concluded, that the scope of the concept 'acts of civil legislation of Ukraine' falls entirely within the scope of another, wider in scope concept, that is 'civil legislation of Ukraine'. Just as the 'civil legislation of Ukraine' is included into the scope of broader in scope concept 'Ukrainian legislation'. Consequently, the acts of civil legislation of Ukraine have to be a type of civil legislation.

In the context of this article, attention should also be paid to Part 1, which states that the Constitution of Ukraine is a basis of the civil legislation of Ukraine. Although Art. 4 is entitled 'Acts of Civil Legislation of Ukraine', but the lexical and grammatical structure of sentence of Part 1 is more general and applies not only to the acts of civil legislation, but also to other components of civil legislation of Ukraine. Considering this, it is logical to conclude that along with the acts of civil legislation, a separate element of the system of civil legislation of Ukraine is the Constitution of Ukraine. At least, the analyzed article indicates this and emphasizes that the Constitution of Ukraine is at the heart of all civil legislation. An argument may also be that civil legislation is not a type of normative legal act.

Along with the Constitution of Ukraine and the acts of civil legislation of Ukraine, a special place in the system of civil law of Ukraine is occupied by the general principles of civil legislation. Art. 3 of the Civil Code of Ukraine entitled 'General principles of civil legislation' indicates this. Thus, if we again apply to the law of the inverse relation between the content and the scope of the concept, we can conclude that the scope of the concept 'general principles of civil legislation' is included in the scope of another, broader concept that is 'civil legislation'. Accordingly, like the acts of civil legislation,

[14] Майданик Р. А. Джерела цивільного права України : поняття, система, види. *Правова доктрина України* : у 5 т. Т. 3 : Доктрина приватного права України / за заг. ред. Н. С. Кузнєцової. Харків : Право, 2013. С. 199–202.

the general principles of civil legislation have to occupy a special place in the system of civil legislation of Ukraine. By the way, if we compare such collocations as ‘general principles of civil legislation’ and ‘acts of civil legislation’, which by their name are of the same type, the conclusion have to be drawn that the acts of civil legislation are not the general principles of civil legislation, and vice versa. Therefore, the general principles of civil legislation are not the part of the acts of civil legislation of Ukraine, as it is considered to be.

Let’s also try to prove this with another article. Art. 8 of the Civil Code of Ukraine, which contain the rules of application of analogy, should be taken as a basis. Part 2 establishes that the general principles of civil legislation are applicable to the regulation of civil relations where an analogy of statute cannot be used. According to Part 1, the analogy of statute applies, if civil relations are not regulated by the Civil Code of Ukraine, other acts of civil legislation or contract, they are regulated by those legal norms of the Civil Code of Ukraine, other acts of civil legislation that regulate similar in content civil relations.

If we consider the general principles in the context of the acts of civil legislation as part of the legal norms of the Civil Code of Ukraine, then the application of certain general principles should be covered by an analogy of statute. But by such a logic there can be no analogy of law. Therefore, applying the law of contradiction, and assuming that the legislator was not mistaken in Art. 8 of the Civil Code of Ukraine, it have to be logically concluded that the general principles are separate element of the system of civil legislation of Ukraine, namely a separate form (source) of the establishment of civil law rules in the state, and its provisions make up its content.

Another argument in favor of the fact that the general principles of civil legislation are separate sources of civil law, constituent elements of the system of civil legislation, is the derivative nature of some rules of civil law from those that are inherently primary sources. In particular, the derivative nature of certain rules of civil law from others is stipulated in Part 1 of Art. 4 of the Civil Code of Ukraine, which states that the basis of the civil legislation of Ukraine is the Constitution of Ukraine. Undoubtedly, the whole Constitution of Ukraine cannot be the framework of civil legislation, since such the basic law contains rules of both public and private law. The basic ‘bricks’ in this aspect may be the norms of private law, which acquire a civil law character by virtue of the adoption of the sphere of civil law at the legislative level in the state. Thereby, the civil law rules set out in the Civil Code of Ukraine are derived from the civil law rules contained in the Constitution of Ukraine. And this means that certain norms of the Constitution of Ukraine act as a certain base, the initial ‘bricks’ for other rules of civil law, which have, accordingly, a derivative character. But thereof this the

Constitution of Ukraine does not become part of the Civil Code of Ukraine and other laws of Ukraine, which are enacted in accordance with the Constitution of Ukraine and other normative legal acts, because it is a separate source of civil law. As well as the Constitution of Ukraine, the general principles of the civil legislation of Ukraine also serve as the foundation for other normative legal acts of the system of civil legislation, except, sure, international treaties in force, the consent to be bound by which was given by the Verkhovna Rada of Ukraine. Hence, for these reasons the general principles of civil legislation are an important element of the system of sources of civil law of Ukraine.

Such a normative reference, in its classical approach, contradicts the doctrine of civil law, since in the vast majority general principles are not considered at all as an enshrined separate form of establishment of civil law rules in the state. They are regarded as ideas enshrined in law in certain rules of civil law. The position of a separate source of civil law is supported by O. O. Pervomaiskyi[15] and R. A. Maidanyk[16]. This idea is upheld by N. S. Kuznetsova and A. S. Dovhert, who call them the laws of natural law[17]. In some legal systems, general principles are explicitly defined as sources of civil law. In particular, Art. 2 of the Civil Code of Romania provides that the law, customs and general principles of law are the sources of civil law[18]. A similar approach was applied in Art. 1 of the Civil Code of Spain[19].

In the context of the system of civil legislation of Ukraine the question about the place of the contract is raised. The answer to this question is in Art. 6 of the Civil Code of Ukraine. This article is entitled ‘Acts of Civil Legislation and Contract’. Using a literal interpretation of this sentence we can conclude that one concept is compared with another as categories of the same order. That is, if the acts of civil legislation are the type of civil legislation, then contract have to be correlated with civil legislation like

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[15] Первомайский О. А. Понятие источника гражданского права в контексте современного правопонимания : гл. 3, разд. 3. *Харьковская цивилистическая школа: в духе традиций* : монография / под ред. И. В. Спасибо-Фатеевой. Харьков : Право, 2011. С. 185–186, 190.

[16] Майданик Р. А. Джерела цивільного права України : поняття, система, види. *Правова доктрина України* : у 5 т. Т. 3 : Доктрина приватного права України / за заг. ред. Н. С. Кузнєцової. Харків : Право, 2013. С. 221.

[17] Кузнєцова Н. С., Довгерт А. С. Сучасне цивільне законодавство України: здобутки, проблеми, перспективи. *Вісник Південного регіонального центру Національної академії правових наук України*. 2014. № 1. С. 60. URL: http://nbuv.gov.ua/UJRN/vprc_2014_1_7.

[18] Codul civil României : Legea din 17 iulie 2009 nr. 287/2009. URL: http://legislatie.just.ro/Public/DetaliiDocument/175630 (дата звернення 05.02.2020)

[19] Código Civil de España. Real Decreto de 24 de julio de 1889. Modificación publicada el 04/08/2018. URL.: https://boe.es/buscar/act.php?id=BOE-A-1889-4763&tn=6&p=20180804 (дата звернення 05.02.2020).

specific concept with generic one. Accordingly, a civil law contract have to be considered as a type of civil legislation of Ukraine. Let's try to check it in another way. If the contract, in accordance with Art. 6 of the Civil Code of Ukraine, is capable of regulating civil relations and civil relations, in compliance with Part 1 of Art. 1 of the Civil Code of Ukraine, are regulated by civil legislation, it is logical to conclude that the contract have to be a type of civil legislation of Ukraine.

The contract as a type of civil legislation is covered by the content and logic of Part 1 of Art. 1 of the Civil Code of Ukraine, otherwise, if the contract is not a type of civil legislation, it turns out that part 1 of Art. 1 of the Civil Code of Ukraine does not cover all civil relations. And if not, an absurd conclusion can be drawn up that there are other civil relations which, therefore, have to be regulates by another system of sources of law, which the contract itself belongs to. But then such a system cannot comply with the ascending rules, which are set out in Section I 'Basic Provisions' of the Civil Code of Ukraine, except those related to the contract (we are talking about Art. 6 of the Civil Code of Ukraine), since this section directly relates to the system of civil legislation and other important components of this system.

Part 1 of Art. 8 of the Civil Code of Ukraine also points at the contract as the component of civil legislation. In particular, part 1 provides: if civil relations are not regulated by the Civil Code of Ukraine, other acts of civil legislation or by contract, they are regulated by those legal rules of the Civil Code of Ukraine and other acts of civil legislation that regulate similar in substance civil relations (an analogy of statute). Firstly, this article indicates that the contract regulates civil relations, and according to Part 1 of Art. 1 of the Civil Code of Ukraine civil relations are regulated by civil legislation. Hence, the contract have to be a type of civil legislation. Secondly, the term 'contract, as well as 'acts of civil legislation', are combined in a single row as full-fledged magnitudes of the same order in the lexico-grammatical structure of the sentence, where the contract is not an act of civil legislation, and an act of civil legislation is not a contract. Accordingly, the contract is a type of civil legislation.

Custom also belongs to civil legislation. This follows not only from Chapter 1 of the Civil Code of Ukraine, entitled 'Civil Legislation of Ukraine', but also from Part 1 of Art. 1 of the Civil Code of Ukraine. Thus, if civil relations can be regulated by custom (Part 1 of Art. 7 of the Civil Code of Ukraine) and civil relations are regulated by civil legislation (Part 1 of Art. 1 of the Civil Code of Ukraine), then we can draw a consistent conclusion that custom and civil legislation have to be correlated as specific and generic concept.

The civil legislation of Ukraine also includes an international treaty in force, the consent to be bound by which was given by the Verkhovna Rada of Ukraine. The latter directly follows from the content of Part 1 of Art. 10 of the Civil Code of Ukraine.

The foregoing leads to the conclusion that Chapter 1 of the Civil Code of Ukraine establishes a legal model of a sufficiently broad understanding of the system of civil legislation of Ukraine, where such a concept in its scope is commensurate with the term 'source of civil law'. This system includes: general principles of civil legislation, the Constitution of Ukraine, relevant international treaties, acts of civil legislation, contract and custom. In accordance with the title of the Book One 'General Provisions' of Section I 'Basic Provisions' and Chapter 1 'Civil Legislation of Ukraine' of the Civil Code of Ukraine the above list is exhaustive today.

2. The examples of systematization of civil legislation in the legal systems of other states

2.1. Russian model of civil legislation system

In contrast to the Ukrainian system of civil law Russian one is modeled a bit differently. The term 'civil legislation' in the Civil Code of the Russian Federation (hereinafter referred to as the Civil Code of RF) is rather narrowly presented.

In particular, Art. 3 of this Code is entitled 'Civil Legislation and Other Acts Containing the Rules of Civil Law'. From the title of the article we can conclude that the civil legislation is not covered by the concept 'other acts containing rules of civil law', as well as other acts containing the rules of civil law are not covered by the concept 'civil legislation'. This title also indicates that civil legislation refers to the broader concept 'acts containing the rules of civil law'. Therefore, not all the acts containing the rules of civil law form the civil legislation, but in their systemic manifestation civil legislation and [other] acts containing the rules of civil law are constituent elements of the system of the sources of civil law. At the same time, the title of such an article does not reveal the main point namely what the civil legislation of the Russian Federation consists of. To answer this question it is necessary to analyze the content of Art. 3 of the Civil Code of RF.

Paragraph 2 provides that civil legislation consists of the Civil Code of RF and other federal laws adopted in accordance with to it which regulate the relations specified in paragraphs. 1 and 2 of Art. 2 of this Code. From the above norm we can draw the conclusion that civil legislation is made up of the certain laws. These laws include the Civil Code of RF itself and other federal laws adopted corresponding to the Code. The term 'federal laws' does not cover the Constitution of the Russian Federation, since the basic law is not adopted in keeping with the Civil Code of RF, and on the contrary, the Civil Code of RF is enacted in compliance with the Constitution of the Russian Federation. The laws containing the rules of civil law but not adopted according to the Civil Code of RF also do not belong to federal laws.

This conclusion can be drawn based on the subparagraph 2 of the paragraph 2 of Art. 3 of the Civil Code of RF, which provides that the rules of civil law contained in [other laws] have to comply with the Civil Code of RF. In this case, the term 'other laws' means those laws that can not be attributed to civil legislation, but at the same time, they contain the rules of civil law and satisfy the requirements of the Civil Code of RF.

It is important to say that the Constitution of the Russian Federation (the basic law) can not belong to other acts containing the rules of civil law. This is due to the fact that other acts containing the rules of civil law, in accordance with Art. 3 of the Civil Code of RF, have to comply with the Civil Code, and the basic act of the Russian Federation can not meet the last law, as it already have been stated.

We can draw some specified conclusions from the above mentioned. Firstly, the system of civil legislation of the Russian Federation is reduced only to laws (in the narrow sense of the word), and therefore the Russian model in this aspect has a rather narrowed approach to understanding the term 'civil legislation' compared to the Ukrainian model. Secondly, being the fundamental law the Constitution of the Russian Federation however occupies a separate place among the sources of civil law of RF. This can also be explained by the fact that the rules of the Constitution of the Russian Federation are of primary character towards the other rules of civil law, which are contained in the relevant normative legal acts.

2.2. Moldovan model of civil legislation system

In the Civil Code of the Republic of Moldova (hereinafter referred to as the Civil Code of RM) Chapter 1, like in the Civil Code of Ukraine and the Civil Code of RF, is entitled 'Civil Legislation'. Meanwhile, the structure of such a Chapter has completely different content regarding the system of civil legislation. Particularly, Art. 3 of the Civil Code of RM, entitled 'Civil Legislation', discloses the meaning of this notion. Civil legislation, as specified in part 1, consists of the Civil Code of RM, other laws, ordinances of the Government and subordinate normative legal acts, which regulate the relations identified in Art. 2 of the Civil Code of RM and which have to conform to the Constitution of the Republic of Moldova.

It is possible to draw certain conclusions from the given norm. Firstly, civil legislation, in its simplified form, consists of laws and other normative legal acts. Secondly, the Constitution of the Republic of Moldova does not belong to the civil legislation, particularly to the laws (within the meaning of the term 'law' used in Art. 3 of the Civil Code of RM), because such a supreme law cannot correspond to itself, and based on the provisions of Art. 3 of the Civil Code of RM the laws have to conform to the Constitution of the

Republic of Moldova. Accordingly, it have to be undisputed that the Constitution of the Republic of Moldova occupies a special place among the system of sources of civil law of the Republic of Moldova. Thirdly, the term ‘civil legislation’ enshrined in the Civil Code of RM is not commensurate with the notion ‘civil legislation of Ukraine’ as well as with the term ‘civil legislation of the Russian Federation’. This can be explained by the fact that the concept ‘civil legislation of Ukraine’ is broader in scope than the term ‘civil legislation of the Republic of Moldova’, and the latter is wider in scope than the notion ‘civil legislation of the Russian Federation’. The above-mentioned demonstrates the different approaches to the systematization of sources of civil law in the legal system of Moldova, Ukraine and Russia.

2.3. Mongolian model of civil legislation system

The system of civil legislation of Mongolia is presented in Art. 2 of the Civil Law of Mongolia. In particular, part 2.1. of this article provides that civil legislation consists of the Constitution of Mongolia and other legislative acts adopted under the Civil Law of Mongolia[20]. From the above norm we can conclude that the civil legislation of Mongolia is composed of certain legislative acts, that is shown from the lexical and grammatical structure of the sentence. Thus, civil legislation as a generic concept is represented in this norm by two groups – the Constitution of Mongolia and, accordingly, other legislative acts, which were enacted in compliance with the Civil Law of Mongolia. In this case the word ‘other’ indicates that the Constitution of Mongolia is also a legislative act and an integral part of the system of civil legislation of Mongolia. However, the Civil Law of Mongolia can not be classified under the civil legislation of Mongolia, because the normative legal act doesn’t appear to be adopted in accordance with its own requirements.

The above-mentioned shows that the Mongolian model of the civil legislation system, in comparison with the Ukrainian, Russian and Moldovan models, is substantially different. The essential distinction of this model is that the Civil Law of Mongolia is not an integral part of the system of civil legislation, but the Constitution of Mongolia, unlike the Ukrainian, Russian and Moldovan models, belongs to the civil legislation of Mongolia.

CONCLUSIONS

To sum up, it should be mentioned that the category ‘civil legislation’ in various legal systems has different scope of such a legal concept: from its understanding as a system of laws (the Russian model), as a system of laws

[20] Иргэний Монгол улсын хууль : Монгол улсын хууль 2002 оны 1 дүгээр сарын 10-ны өдөр. URL: https://www.legalinfo.mn/law/details/299 (дата звернення 05.02.2020).

and other normative legal acts (the Moldovan model), as a system of legislative acts (the Mongolian model) to a broader understanding as a system of officially recognized forms (sources) of external expression of the content of civil law matter (the Ukrainian model).

Based on the conducted research, the civil legislation of Ukraine includes: general principles of civil legislation, the Constitution of Ukraine, relevant international treaties, acts of civil legislation, contract and custom. Proceeding from Chapter 1 of the Civil Code of Ukraine the above list is exhaustive for today. This legislative approach conceptually differs from modern legal doctrine, which comes down to the fact that civil legislation is mainly considered as a system of normative legal acts that contain the rules of civil law. Consequently, this makes a determined problem, namely the mismatch between the realm of the due and the realm of knowledge of the due, which does not contribute to a unified legal understanding. In consideration of this when working on the recodification of civil legislation of Ukraine, the need for a revision of either the doctrinal approach to the concept and system of 'civil legislation of Ukraine', or the normative enshrined model defining the concept and system of 'civil legislation of Ukraine', appears.

Expressing my own view on this, I believe that the legislator's approach is quite progressive, although unusual (especially taking into account that the concept 'legislation' covers civil law contract, custom and general principles of civil law) and have to be supported, in view of the current course of recodification of civil legislation of Ukraine. An example of a typicality is the ECHR's approach to the term 'law' under which it understands both the rules fixed in written law and the rules that have emerged in case law (see decision if ECHR 'Tolstoy Miloslavsky v. the United Kingdom' of 13 July 1995, Application No. 18139/91, § 37).

Furthermore, in the context of such a legislative approach, there is a need to take into account and enshrine those sources that are not reflected in Chapter 1 of the Civil Code of Ukraine. In particular, this concerns the practice of the ECHR, which, in accordance with Art. 17 of the Law of Ukraine 'On the implementation of judgments and the application of the practice of the European Court of Human Rights', is a source of law and is often used by courts to resolve the issues of civil law nature. At the same time, it is important to identify that the subject of regulation of such a law, in accordance with its preamble, is only public legal relations, and therefore this law can not be attributed to the civil legislation of Ukraine. The same relates to the acts of official interpretation of rules of law (interpretative legal acts), adopted under the procedure prescribed by law by a relevant state body (for example, the Constitutional Court of Ukraine, the Supreme Court, etc.). While not being sources of law, such acts make a significant effect on the legal understanding of the content of a civil law rule or on the cases and

procedure for applying a civil law rule to a particular case. The demand for definiteness of such acts of official interpretation of the rules of law in the field of civil law stems from, first of all, the necessity of bringing the current legislation into conformity with the requirements of principle of supremacy of law, namely, the requirements of the legal determinancy. Primarily, this relates to the fact that the application of such acts is regulated only by the rules of procedural law, and the latter cannot be applied in the regulation of civil relations. In addition, this necessity arises from the fact that sometimes the legal position of the Supreme Court becomes not law-interpretating, but law-making, in fact acts as a 'source' of the regulation of civil relations, contrary to the Constitution of Ukraine and the Civil Code of Ukraine. Therefore, when defining acts of official interpretation of the rules of law, including those issued by the Supreme Court, the sphere of civil law requires the fixation of certain legal guarantees, which would be aimed at ensuring the stability and immutability of the rules of civil law, among them the inviolability of the rights and interests of participants of civil relations[21]. Legal revision addresses local legal acts of a legal entity as well, in particular, which serve as a source of regulation of intracorporate relations. Although the solution to this question depends on the resolution of another issue, notably, the place of intracorporate relations in the subject of civil law[22]. The identification of the place of sports regulations or other local legal acts with a manifestation of 'soft law' also requires the revision of knowledge.

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[21] See, e.g., Шишка О. Р. Висновки верховного суду України як «джерело» цивільного права : деякі вразливості та проблеми неспівпадіння з концептом ЦК України // Проблеми цивільного права та процесу : тези доп. учасників наук.-практ. конф., присвяч. світлій пам'яті О. А. Пушкіна, Харків, 24 трав. 2019 р. / МВС України, Харків. нац. ун-т внутр. справ; Харків. обласний осередок Всеукр. громад, орг. «Асоціація цивілістів України»). Харків : ХНУВС, 2019. С. 217–222; Шишка О. Р. До постановки проблеми про відповідальність держави Україна за неправомірне втручання Верховним Судом у права людини // Модернізація цивільно-правової відповідальності. Матвєєвські цивілістичні читання. Матеріали міжн. наук.-практ. конф. Київ, 18 жовт. 2019 р. / Р. А. Майданик, Цюра та ін.; відп. ред. Р. А. Майданик. Київ, 2019. С. 333–341.

[22] See, e.g., Шишка А. Р. Концепт статьи 1 ГК Украины: методологический путь к познанию и проблемы // Методология исследования проблем цивилистики : сб. ст., посвящ. памяти проф. А. А. Пушкина / под ред. Ю. М. Жорнокуя и С. А. Слипченко. Харьков : Право, 2017. С. 389–414; Шишка О. Р. До обґрунтування необхідності визначення корпоративних відносин в предметі цивільного права : до постановки проблем // Корпоративне право України та європейських країн: питання теорії та практики : збірник наукових праць за матеріалами XV Міжнародної науково-практичної конференції (6–7 жовтня 2017 р., м. Івано-Франківськ). Івано-Франківськ, 2017. С. 264–269; Шишка О. Р. Предмет цивільного права України: чи настав час переосмислення та формування нової парадигми? // Предмет правового регулювання галузей вітчизняного права: матеріали міжнародної науково-практичної конференції, м. Київ, 15–16 березня 2019 року / ред. кол. І. С. Гриценко, Р. С. Мельник та ін. Київ : Гельветика, 2019. С. 40–45.

SUMMARY

According to the Resolution of the Cabinet of Ministers of Ukraine of July 17, 2019, No. 650 it has been set a course for updating the civil legislation of Ukraine. Therefore, today there is a need to revise not only the rules of civil legislation but also existing paradigms and accumulated legal knowledge in this area. One important aspect of such revise is the understanding of civil legislation and its system.

It is also concluded that the category 'civil legislation' in various legal systems has different scope of such a legal concept: from its understanding as a system of laws (the Russian model), as a system of laws and other normative legal acts (the Moldovan model), as a system of legislative acts (the Mongolian model) to a broader understanding as a system of officially recognized forms (sources) of external expression of the content of civil law matter (the Ukrainian model).

Based on the conducted research, the author draw a conclusion that the civil legislation of Ukraine includes: general principles of civil legislation, the Constitution of Ukraine, relevant international treaties, acts of civil legislation, contract and custom.

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12. Цивільне право України : Підручник / Є. О. Харитонов, Н. О. Саніахметова. Київ : Істина, 2003. 776 с.

13. Майданик Р. А. Джерела цивільного права України : поняття, система, види. *Правова доктрина України* : у 5 т. Т. 3 : Доктрина приватного права України / за заг. ред. Н. С. Кузнєцової. Харків : Право, 2013. 760 с.

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GROUNDS AND CONDITIONS FOR ACQUISITION OF OWNERSHIP OF IMMOVABLE PROPERTY BY PRESCRIPTION

Statsenko O. S.

INTRODUCTION

The Civil Code of Ukraine provides for the grounds for acquiring ownership of property. One of these grounds is the acquisition of ownership by the statute of limitations. The obligatory condition of acquisition of the property right under the acquisition prescription, in particular the acquisition of the property right for the property prescription, are those circumstances in which the property claimed for acquisition by the person (natural or legal) must have the status of landless property and which cannot be considered as belonging to the property, the right of which is acquired in accordance with the provisions of Art. 330–333, 336–339, 343 of the Civil Code of Ukraine. Thus, the right to ownership of immovable property is based on certain circumstances, which are determined by the legislation of Ukraine. The Institute of Acquisition is quite interesting. The provisions of Art. 344 of the Civil Code of Ukraine establishes a list of conditions necessary for the acquisition of ownership of the property by prescription, through which the contents of this civil law institution are revealed.

The provisions of Part 1 of Art. 344 of the Civil Code of Ukraine provides that the owner of immovable property who conscientiously, openly and for 10 years continuously owns the specified real estate, which is not his property, may acquire the right of ownership of this immovable property by prescription. The analysis of the mentioned norm shows that the statute of limitations should be defined as the legal structure of the acquisition of the right of ownership of immovable property by the statute of limitations. Hence, there are a number of legal facts within the legal composition, such as the seizure of real estate, possession of real estate and terms of ownership of real estate. Each of these legal facts must correspond to the qualifying features such as – good faith possession of real estate, open ownership of real estate, long and continuous possession of real estate. For the acquisition of real estate in the property according to the statute of limitations has a tenure of 10 years, and also requires the availability of additional legal facts – the recognition of ownership in court and the state registration of ownership of real estate. Finding out the procedure and peculiarities of acquiring ownership of immovable property by the statute of limitations requires the disclosure of the civil legal concept of “real estate”.

It should be recalled that in legal literature and law practice it is stated that in accordance with the requirements of Art. 182 of the Civil Code of Ukraine, Art. 3 of the Law of Ukraine "On State Registration of Property Rights to Real Estate and their encumbrances", the right of ownership of immovable property under the statute of limitations, is acquired from the moment of state registration of the immovable property and the adoption of the relevant court decision on the recognition of the ownership of the immovable property by prescription. Hence the approach that "if the owner of the real estate did not register this real estate, then he will not be able to acquire ownership of the real estate specified by the statute of limitations"[1]. This, apparently, was based on the analysis of the wording stated in the provisions of the Civil Code of Ukraine: "... a person who conscientiously took possession of another's property" (Part 1 of Article 344 of the Civil Code of Ukraine), whereby the object of the statute of limitations is property belonging to the property right to another person who has registered his property in due course. A similar conclusion can be drawn from the analysis of the case-law on the consideration of cases of recognition of ownership by statute of limitations.

1. The subjective composition of the statute of limitations as the basis for the acquisition of ownership of real estate

It should be agreed with D.D. Lupenyk, who stated that "courts have no right to refuse a claim for recognition of the right of ownership of immovable property only after the reasons for the lack of state registration of the ownership of real estate"[2]. It should be noted that today most of the cases pending before the courts on claims for recognition of ownership of immovable property by prescription, relate to immovable property which took place at a time when the law did not provide for mandatory state registration of rights to Real Estate. In this connection, the provisions of h. 3, 4 Art. 3 of the Law of Ukraine "On state registration of real rights to real estate and their encumbrances", according to which: "rights to real estate that have arisen before January 1, 2013, are recognized as valid under the conditions: 1) if the registration of such rights was carried out in accordance with legislation in force at the time of their occurrence; 2) if, at the time of such rights, legislation was in force that did not provide for their mandatory registration and in the cases specified in Art. 28 of the Law of Ukraine "On state registration of real rights to real estate and their encumbrances"[3].

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[1] Диба І. Набувальна давність. *Юридичний вісник України*. 2005. № 44 (540). С. 14–18.

[2] Луспеник Д. Спори про набувальну давність: проблеми теорії і судової практики. *Юридичний журнал.* 2006. № 5 (47). С. 114–118.

[3] Про державну реєстрацію речових прав на нерухоме майно та їх обтяжень: Закон України від 01.07.2004 р. № 1952-IV. *Відомості Верховної Ради України.* 2004. № 51. Ст. 553.

Equally important in the context of the study of the statute of limitations as a basis for the acquisition of ownership of real estate is to find out its subject composition. In civil science there is no single approach to determining the range of subjects of limitation, as scientists interpret the rules of Part 1 of Art. 344 of the Civil Code of Ukraine, where the general term "person" is used. Therefore, analyzing the positions of scientists, it is impossible to disclose the subjective composition of the statute of limitations, which is also explained by the fact that the subject of legal relations (persons who took possession of real estate in good faith and continue to own it openly and long-term) and the subject of law (persons – owners of real estate, and persons who have acquired the right of ownership of immovable property by prescription) are regulated by Art. 344 of the Civil Code of Ukraine, do not always coincide.

The provisions of Art. 2 of the Civil Code of Ukraine it is determined that the participants in civil legal relations are natural and legal persons, as well as the state and state bodies and other subjects of public law. The stated norm divides the participants of civil relations into subjects of private and public law. However, used in Part 1 of Art. 344 of the Civil Code of Ukraine, the term "person" gives no reason to conclude that it can be applied directly to public law entities. However, when analyzing the provisions of Chapter 2 and Chapter 24 of the Civil Code of Ukraine, which regulate the emergence of rights and obligations to acquire property rights, the term "person" is used for individuals and legal entities. Thus, the provisions of Art. 344 of the Civil Code of Ukraine does not exclude the participation of territorial communities and the state in the relations regarding the acquisition of the right of ownership of immovable property by the statute of limitations. This assumption is based on the provisions of Art. 167–169 of the Civil Code of Ukraine, namely: "these entities for the exercise of rights and obligations in civil relations may be created by legal entities of public law (state authorities, local self-government bodies, state and communal enterprises, educational institutions) that enjoy they have the same rights and responsibilities as other participants in civil legal relations with respect to immovable property (Article 82 of the Civil Code of Ukraine). Thus, legal entities can be subject to obligations and property relations. As a rule, such legal persons exercise the ownership, use and disposal of real estate under the right of economic management or operational management.

Considering the above, in the relations with the real estate, the subjects of the respective legal relations may be individuals, legal entities of private law and legal entities of public law[4]. In the first two cases, the legal entity is the

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[4] Стаценко О.С. До питання особливостей набуття прав на нерухоме майно за набувальною давністю в Україні. *Правові та інституційні механізми забезпечення розвитку України в умовах європейської інтеграції: матеріали Міжнародної науково-практичної конференції* (м. Одеса, 18 травня 2018 р.). У 2-х т. Т. 2 // відп. ред. Г.О. Ульянова. Одеса: Видавничий дім "Гельветика", 2018. С. 527–529.

same as the entity, in the latter case, the legal entity and the legal entity are not the same. Such conclusion was expressed by the position of the Ministry of Justice of Ukraine, stated in the explanations dated October 13, 2011 "On some aspects of acquisition of ownership of the property of the landless real estate", according to which "acquisition of the ownership of the real estate for a long time ago is possible – what is the subject of civil legal relations[5]".

According to the analysis of the provisions of Art. 344 of the Civil Code of Ukraine give the opportunity to conditionally divide the terms of acquisition of ownership of immovable property by prescription into separate categories, in particular those related to possession (integrity and openness of ownership) and those related to tenure (continuity possession).

In the civil law of Ukraine, the integrity of the ownership of real estate is defined as a condition of taking possession of real estate, without distinguishing it among the openness and continuity. The above indicates the reflection in the provisions of the civil law of Ukraine on the relations with the acquisition of ownership of immovable property by prescription, the Roman approach to determine the integrity of ownership of immovable property to acquire ownership of this immovable property, having legal value at the time of immovable property property[6]. However, some scholars argue that "the integrity of ownership must be proved not only at the time of seizure of real estate but also throughout the period of possession of real estate"[7].

Before finding out the meaningful content of the category of good faith in the statute of limitations, it should be noted that its existence is connected with the division of ownership into legal and illegal. Although the Central Committee of Ukraine, does not directly attribute such division of ownership into species, from the analysis of its provisions it is seen that the category of "honesty", as well as the category of "dishonesty", characterizes the most unlawful possession, since both the bona fide and unscrupulous owner acquired the property without a proper right. grounds and out of will of the real owner of the property.

It is generally accepted in domestic legal science to disclose the content of the terms of the statute of limitations on the integrity of the seizure of real estate, taking into account the provisions of Part 1 of Art. 388 of the Civil

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[5] Обдимко Ю.С. Деякі аспекти набуття права власності на об'єкти безхазяйного нерухомого майна. *Офіційний веб-сайт Міністерства юстиції України.* URL: http://www.minjust.gov.ua/37181

[6] Дождев Д.В. Римское частное право: учебник. 2-е изд., изм. и доп. / Под ред. В.С. Нерсесянца. Москва: Норма, 2004. 542 с.

[7] Печеный О.П. Приобретательная давность. Харьковская цивилистическая школа: право собственности: монография / Под ред. И.В. Спасибо-Фатеевой. Харьков: Право, 2012. 302 с.

Code of Ukraine, which contains the definition of "conscientious purchaser". This concept is revealed through the categories of "did not know" and "could not know", which characterize the erroneous attitude of the acquirer of property to the volume of property rights of the transferor under the contract. It should be noted that the range of persons who may be subject to statute of limitations is wider and is not covered by the notion of "good faith purchaser". It is believed that the seizure of real estate in this case may occur not only on the basis of a contract of repayment, but also on the basis of other transactions with which the law relates to the transfer of ownership, including inheritance.

Given this, the subject of the statute of limitations in Part 1 Art. 344 of the Civil Code of Ukraine can be defined as a person who took possession of real estate on the basis of a transaction and at that moment could not know that he does not receive ownership of the specified real estate[8]. In law enforcement, the condition of the statute of limitations on good faith seizure of real estate often acquires other content that enables the rightful owner of the property (for example, by contract) or even the actual owner of the real estate to use this civil institute in the absence of title documents. Integrity in such cases is justified by the actions of the person regarding the maintenance, repair of property, payment of taxes, etc. In the case law (more often at the level of the courts of first instance), there are many cases of satisfaction of claims for recognition of ownership of real estate by the statute of limitations for persons who rented housing, owned official housing, etc.

Note that the acquisition of ownership of unmanaged real estate by acquisition is not explicitly provided for in Art. 335 of the Civil Code of Ukraine, which regulates the acquisition of ownership of unmanaged things. However, the above is not an obstacle to the attribution of landless real estate in domestic legal science, on the basis of a comprehensive interpretation of Art. 335, 344 of the Civil Code of Ukraine, to objects of limitation[9] and the recognition by the courts of the right of ownership of such immovable property by prescription. Since, in accordance with the provisions of Part 1 of Art. 335 of the Civil Code of Ukraine: "not only is the landlord not a property that has no owner, but also a thing whose owner is unknown, the purchaser of

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[8] Стаценко О.С. До питання особливостей набуття прав на нерухоме майно за набувальною давністю в Україні. *Правові та інституційні механізми забезпечення розвитку України в умовах європейської інтеграції: матеріали Міжнародної науково-практичної конференції* (м. Одеса, 18 травня 2018 р.). У 2-х т. Т. 2 // Відп. ред. Г.О. Ульянова. Одеса: Видавничий дім "Гельветика", 2018. С. 527–529.

[9] Суярко Т.Д. Набуття права власності на нерухоме майно за давністю володіння: загальна характеристика умов володіння та об'єкта. *Вісник господарського судочинства*. 2011. № 1. С. 79–83.

such a thing obviously assumes that it may have an owner, which precludes his good faith."[10] Secondly, the takeover of landless property is due to the provisions of the Central Committee of Ukraine, namely Art. 335, that is, it is legal that a priori precludes good faith in the sense of Part 1 of Art. 344 of the Civil Code of Ukraine.

Following the above approach to understanding the essence of the condition of the statute of limitations – good faith seizure of real estate, the application of the statute of limitations to a homeless real estate is considered possible only if it is alienated by the acquirer, who considers the alienator the owner of the real estate, and therefore, is a goodwill. 388 of the Central Committee of Ukraine. Some researchers of the Institute of Acquisition do not see problems for the application of the Institute of Acceptance to homeless real estate, which is caused by a different understanding of the content of the condition of good faith seizure of property.

There is also an approach to understanding the nature of the foregoing acquisition limitation, which provides for the possibility of applying this institution to landless real estate. For example, TD Suyarko states that: "the purchaser is conscientious, if at the time of taking possession of the real estate he had every reason to believe that the legal owner of the real estate is absent or if the owner has the property, then he has lost interest in this real estate"[11]. A similar approach to understanding the essence of the condition of the statute of limitations on good faith seizure of real estate is also found in court practice. Thus, the lawful seizure of real estate (on the basis of a contract, as a result of the law) makes it impossible to comply with one of the basic conditions of prescription – the integrity of the possession, and therefore excludes the possibility of acquiring such real estate for ownership. Art. 344 of the Civil Code of Ukraine. The exception may be only the case of the use of the statute of limitations on the lawfully acquired real estate (on the basis of a contract with the owner), provided for in Part 3 of Art. 344 of the Civil Code of Ukraine.

Open ownership of property is the next condition of the statute of limitations, which is directly provided by the norm of Part 1 of Art. 344 of the Civil Code of Ukraine, while in the legal literature there is no unambiguous approach to the definition of this concept. Most of the definitions of "open ownership" existing in the scientific literature boil down to the fact that open ownership means owning property without hiding it from third parties, but

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[10] Хопта С.Ф. Набувальна давність у контексті правозастосовної практики. *Часопис цивільного і кримінального судочинства.* 2012. № 5 (8). С. 82–92.

[11] Суярко Т.Д. Набуття права власності на нерухоме майно за давністю володіння: загальна характеристика умов володіння та об'єкта. *Вісник господарського судочинства*. 2011. № 1. С. 79–83.

this behavior of the owner is different in each case. In civil science, an approach has been taken whereby open ownership is obvious to third parties, and the latter must be able to observe this possession, but this does not mean that the owner is obliged to specifically inform others about his possession[12]

Analyzing this definition, the question arises: "does open ownership of real estate imply an obligation on the bona fide purchaser to show his ownership so that it is obvious to all others? is it enough for a bona fide purchaser intentionally not to conceal his possession? " The content of the statute of limitations does not answer these questions. However, in our opinion, it is inappropriate to oblige a bona fide purchaser who owns real estate as his or her own to special measures aimed at ensuring open ownership of real estate, since such requirements are not imposed on the owner of the real estate. In this regard, it is apparent that open ownership only implies that the purchaser of the property does not conceal the fact of ownership from third parties and uses the real estate, as would normally be done by the owner[13].

2. The issue of determining the period of limitation

The term is one of the most important terms of the statute of limitations, the observance of which, in conjunction with other legal conditions, is subject to clarification when deciding the issue of ownership of immovable property of an ancient owner. From the provisions of the civil legislation of Ukraine the dependence of determining the terms of the statute of limitations on the type of property and on the grounds for taking possession of this property is examined. The need to own real estate for 10 years, and movable property for 5 years to acquire ownership of real estate or movable property, provided for Part 1 of Art. 344 of the Central Committee of Ukraine.

When considering the definition of the statute of limitations, it becomes important to find out the order in which the period expires, in particular: the beginning of the period, the suspension and interruption of the term, as well as the moment and consequences of its expiration. A study of the beginning of the statute of limitations allows us to find out the order of the period of that period. It should be noted that in accordance with the generally defined rule for calculating the terms specified in the provisions of Art. 253 of the Civil Code of Ukraine, the period begins from the moment of occurrence of the event or the next day after the relevant date. From the provisions of Part 1 of Art. 344 of the Civil Code of Ukraine implies that the statute of limitations begins from the moment of taking possession of real estate.

[12] Науково-практичний коментар Цивільного кодексу України: у 2 т. / За ред. О.В. Дзери (кер. авт. кол.), Н С. Кузнєцової, В.В. Луця. 3-е вид., перероб. і доп. Київ: Юрінком Інтер, 2008. Т. I. 832 с.

[13] Цивільний кодекс України: наук.-практ. комент.: у 2 ч. /за заг. ред. Я.М. Шевченко. Київ: Видав. Дім "Ін Юре", 2004. Ч. 1. 704 с.

However, the question arises: when does this moment arise in the case of the acquisition of real estate under the contract, since the moment of transfer of the real estate and the time of the conclusion of the contract may not coincide in time. In this case, we believe that the takeover of real estate occurs not earlier than the actual transfer of real estate to the acquirer. This conclusion is explained by the fact that only from the moment of the transfer of real estate, the acquirer acquires the status of the owner of real estate, which is alien, which in accordance with the provisions of Part 1 of Art. 397 of the Central Committee of Ukraine. It is noted that the legislator in Part 1 of Art. 344 of the Civil Code of Ukraine, the beginning of the course of the statute of limitations did not depend on the expiration of the limitation period. Such an order of expiration of the statute of limitations and the statute of limitations in accordance with Part 1 of Art. 344 of the Civil Code of Ukraine is conditioned by the need to protect the interests not only of the owner of the real estate, but also a conscientious purchaser who may not be aware of the illegality of the acquisition of real estate. In this case: "the protection of the interests of the conscientious purchaser is that the duration of the period of ownership of real estate is equal to the anticipated period of ownership of real estate to acquire ownership of this real estate, and not dependent on the beginning of the limitation period, as theoretically, the situation may arise when the statute of limitations will begin after the expiration of the foreseen in part 1 of Art. 344 of the Civil Code of Ukraine the term for acquisition of the right of ownership of immovable property by the statute of limitations"[14]. In this case, the period of limitation period will not begin, and if the period of limitation period still begins, this period will not be able to continue in case of termination of limitation period.

Given this, it is theoretically possible that a real estate owner may never know who his real estate is, and therefore will not be able to exercise his right to claim it (in other words, the statute of limitations will not begin), and therefore, the grounds for starting there will be no current limitation period. Under such conditions, a conscientious acquirer, having held the real estate for a long time, will not be able to acquire the ownership of this real estate for a period of time. The practical existence of this situation would completely offset the value of the statute of limitations and would increase the amount of immovable property that would remain out of civil circulation. The conclusion that it is inappropriate to establish the interdependence of the statute of limitations and the statute of limitations is stipulated by the legally prescribed possibility of renewing the statute of limitations. Due to this, there may be a

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[14] Вахонєва Т. Набувальна давність як правовий інститут цивільного права: історія та сучасність. *Підприємництво, господарство і право.* 2004. № 6. С. 36–41.

situation where the statute of limitations provided for by the civil law of Ukraine has expired, but a person cannot acquire ownership of real estate due to the statute of limitations due to the renewal of the limitation period. In the event of a dependency on the beginning of the statute of limitations on the expiration of the statute of limitations, the unscrupulous owner could be in a hurry, knowing that at any time he would be able to exercise the right to claim his real estate within the limitation period. In such circumstances, the statute of limitations may not begin and the possession of a bona fide acquirer of immovable property within the stipulated period may not have the effect of acquiring the ownership of immovable property by prescription.

Thus, the current period of acquisition of limitation in Part 1 of Art. 344 of the Civil Code of Ukraine should not be dependent on the commencement or termination of the limitation period. At the same time, we consider that the Central Committee of Ukraine should contain separate rules on the order of validity of the statute of limitations in order to avoid in practice unjustified references to the need to be guided by the statutory procedure of the statute of limitations[15].

Continuity of possession of the property during the period of acquisition limitation is provided by the possibility of the person claiming the presumptive possession of the real estate to attach to the time of his possession of the real estate even the time during which the person – the heir (part 2 of Article 344 of the Civil Code of Ukraine) owned this property. The content of the said norm indicates that the legislator has provided an opportunity to attach the term of prescription under universal succession. This is confirmed by the position of most domestic scientists in this regard[16]. However, we consider the drawback of the legislative wording of Part 2 of Art. 344 of the Civil Code of Ukraine is that the lexical interpretation of this rule gives the impression that the accession of the term of possession is possible only by inheritance. The content of other provisions of the Civil Code of Ukraine does not indicate the identification of definitions of "term" and "term" (for example, Article 530 of the Civil Code of Ukraine). In any case, to prevent a double understanding of the norm of Part 2 of Art. 344 of the Civil Code of Ukraine to the legislator in the text of the said article it would be necessary to specify the type of succession, which would enable the person –

[15] Стаценко О.С. До питання особливостей набуття прав на нерухоме майно за набувальною давністю в Україні. *Правові та інституційні механізми забезпечення розвитку України в умовах європейської інтеграції: матеріали Міжнародної науково-практичної конференції* (м. Одеса, 18 травня 2018 р.). У 2-х т. Т. 2 // відп. ред. Г.О. Ульянова. Одеса: Видавничий дім "Гельветика", 2018. С. 527–529.

[16] Луспеник Д. Спори про набувальну давність: проблеми теорії і судової практики. *Юридичний журнал*. 2006. № 5 (47). С. 114–118.

heir (successor) to attach to the term of his possession of real estate, also the time during which the real estate was owned by the heir[17].

The expediency of the legislative securing of the possibility of accession as a result of the singular succession of possession of a bona fide purchaser of property under Part 1 of Art. 344 of the Civil Code of Ukraine is stipulated by the fact that during the possession of such owner may never know about the illegality of acquisition of real estate and consider himself the owner. In addition, a conscientious acquirer, considering himself the owner of real estate, can alienate it to another person, and such a transfer of real estate can occur many times. Due to this, for a long time there may not be a person who owns the real estate continuously for the period necessary for its acquisition into the property after the statute of limitations.

Thus, in the case of alienation of such real estate, the legislator must give the person who has taken possession of the real estate the opportunity to acquire ownership of this real estate, provided that the requirements of Part 1 of Art. 344 of the Civil Code of Ukraine, however, with the adherence to its term of ownership of real estate, the term during which the real estate was owned by its predecessor, is also an ancient owner. It should be noted that when implementing the provisions of Part 2 of Art. 344 of the Civil Code of Ukraine regarding succession, there may be a number of questions about joining the statute of limitations in case of inheritance.

An important issue that needs to be analyzed in the context of the study of the order of the limitation period is to find out the reasons for its suspension. It should be noted that the norms of the Central Committee of Ukraine on the limitation period do not regulate this issue. In civil science, there are supporters of the legislative fixation of the relationship between the statute of limitations and the statute of limitations regarding the suspension of their term. In particular, V.P. Makoy acknowledges that the regulation in foreign civil law is quite successful: “Yes, the scientist draws attention to the German civil law, where the issue of the statute of limitations in relation to the limitation period is reduced to the existence of common grounds for stopping the term”[18]. Instead, we consider that within the limits of the Central Committee of Ukraine on the statute of limitations, the stated grounds for stopping the period of the statute of limitations are subject to legislative fixation. It is believed that the suspension of the statute of limitations, should occur as a result of filing a claim for the claim of property from the possession of the ancient owner.

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[17] Яворська О.С. Правове регулювання відносин власності за цивільним законодавством України: навч. посіб. Київ: Атіка, 2008. 332 с.

[18] Маковій В.П. Набувальна давність у цивільному праві: дис. ... канд. юрид. наук. Харків, 2007. 224 с.

It should be noted that according to the general concept and in our opinion the possession of the property is interrupted by the recognition of the ownership of the real estate in another person and the transfer of the real property to the owner, leaving the intention to own the property in order to acquire the property right for the property by way of renouncing the ownership, alienation to other persons, loss of ownership, claim by the rightful owner in due course of the right to property. The interrupted period of antiquity shall be restored in full in case of refusal of the rightful owner in a claim for the right to property, in case of return of the lost possession within one year for real estate.

However, the continuity of possession "for prescription" does not mean that the property must be permanently in the actual possession of the owner. It may be temporarily withdrawn from its possession for the same reasons on which it may be withdrawn from the owner's property (for example, in a lease), without any consequences. In the event of an interruption of the statute of limitations, the elapsed time before the interruption loses value for the calculation of the statute of limitations. After the break, the period begins again. The necessity to protect the rights of the real estate owner, who can file a specific claim (in accordance with the provisions of Part 2 of Article 267 of the Civil Code of Ukraine, the claim is accepted by the court regardless of the expiry of the limitation period), makes it necessary to suspend the period of limitation.

The claim to seize real estate from someone else's "illegal" possession, in modern civilistics is considered as the basis for interruption of the statute of limitations. However, the above violates the rights of the ancient owner and does not correspond to the interests of the civil turnover. If, in practice, a court has rejected a claim for the seizure of immovable property from another's unlawful possession, it is important that the statute of limitations does not begin to resurface but continue. This is even more appropriate given the possibility of filing such a lawsuit repeatedly during antiquity. In such circumstances, the very suspension of the statute of limitations will ensure the balance of interests of the owner and the ancient owner. In addition, in practice, there may be circumstances of abuse of the right to file a claim.

Regarding the property of an incapacitated person, we consider it inappropriate to legislate in Ukraine the suspension of the period of acquisition limitation period for the acquisition by the ancient owner of the property of such property. This can be explained by the provision of custody of incapacitated persons for the protection of their rights and interests, both property and personal property. In accordance with the provisions of Art. 72, 74 of the Civil Code of Ukraine, custody of incapacitated persons is established for the preservation and use of immovable property belonging to

the incapacitated person in the interests of the latter. In addition, incapacitated, the person remains for a long time or forever, and therefore suspension of the statute of limitations will not give the opportunity to acquire ownership of the immovable property of the specified person for the statute of limitations. It is considered that the above may not correspond to the purpose of the statute of limitations for the return of immovable property to civil circulation.

Consideration should be given to investigating the legal effects of the statute of limitations. From the content of Part 4 of Art. 344 of the Civil Code of Ukraine the right of ownership by the prescription for immovable property is acquired by court decision. It follows from the content of the said norm that the existence of a court decision for the acquisition of immovable property by prescription is an additional condition to those provided for in Part 1 of Art. 344 of the Civil Code of Ukraine. At the same time, in order to comply with this condition for the acquisition of real estate property, the legislator considers the necessary state registration, which is clearly stipulated in the provisions of para. 3 h. 1 tbsp. 344 of the Civil Code of Ukraine. In the case of misconception about the ownership of real estate, the specified acquirer of the right to acquire immovable property, there is no reason to appeal to the court for "legalization" of their ownership of immovable property by prescription. At the same time, it is emphasized that the return of real estate to its owner or the acquisition of ownership of immovable property by the statute of limitations becomes impossible.

Therefore, in view of the above, relatively bona fide purchaser of title to immovable property under the statute of limitations in the sense of Part 1 of Art. 344 of the Civil Code of Ukraine, in the case of receiving information during the possession of real estate, the acquirer of the fact that he is not the owner of real estate, and also as a result of judicial appeal against his possession of real estate, is considered justified by the requirement of Part 4 of Art. 344 of the Civil Code of Ukraine[19]. Despite the presence in Part 4 of Art. 344 of the Civil Code of Ukraine on the legislative requirement on the acquisition of ownership of certain types of property on the basis of the statute of limitations by court decision, procedural legislation does not determine in what order the court should decide the issue of recognition of ownership of such property by the statute of limitations. In practice, there may be a situation in which at the time of expiration of the statute of limitations and the need to bring a

[19] Стаценко О.С. До питання особливостей набуття прав на нерухоме майно за набувальною давністю в Україні. *Правові та інституційні механізми забезпечення розвитку України в умовах європейської інтеграції: матеріали Міжнародної науково-практичної конференції* (м. Одеса, 18 травня 2018 р.). У 2-х т. Т. 2 // відп. ред. Г.О. Ульянова. Одеса: Видавничий дім "Гельветика", 2018. С. 527–529.

conscientious purchaser to court as a result of Part 4 of Art. 344 of the Civil Code of Ukraine will expire limitation period for the owner of real estate.

In the case of the decision on the acquisition of the right of ownership of immovable property in the limitation period in favor of the ancient owner, the court in the decision should clearly determine the moment when the right of ownership arises on the basis of establishing the moment from which the period of acquisition limitation began, which must be clearly stipulated by the procedural legislation. This will help to avoid problems with mandatory state registration of ownership of real estate, in practice. According to paragraph 3 of Part 1 of Art. 344 of the Civil Code of Ukraine: "by the statute of limitations, the right of ownership of real estate subject to state registration arises from the moment of state registration". Based on the analysis of the provisions of Art. 344 of the Civil Code of Ukraine implies that for the acquisition of ownership of immovable property by the statute of limitations, the statutory requirement for state registration, as well as the requirement for a court decision, is an additional, but obligatory condition to those provided in part 1 of Art. 344 of the Civil Code of Ukraine. The obligation of state registration for the emergence of ownership of immovable property by prescription is also confirmed by the imperative nature of the provision of Art. 3 of the Law of Ukraine "On State Registration of Property Rights to Real Estate and their Burdens"[20], according to which the right of ownership of real estate subject to state registration arises from the moment of such registration.

A similar situation is also observed in the content of other provisions of the Central Committee of Ukraine, in particular in para. 3 h. 2 tbsp. 331 and Part 2 of Art. 1299, according to which ownership of newly created and hereditary immovable property arises from the moment of state registration. At the same time, we question the expediency of granting the state registration of legal value for the acquisition of the right of ownership of real estate according to the statute of limitations, which is consistent with a number of provisions of the legislation of Ukraine. It is believed that state registration of real estate rights in Ukraine should only be of a fixed nature. The essence and purpose of state registration of the right of ownership of real estate, in this case, will be reduced to official recognition by the state, as well as confirmation and accounting of the facts of acquisition of rights to real estate, or changes or termination of these rights.

Thus, for the acquisition of ownership of immovable property by the statute of limitations must be given legal value to the court's decision on the

[20] Про державну реєстрацію речових прав на нерухоме майно та їх обтяжень: Закон України від 01.07.2004 р. № 1952-IV. *Відомості Верховної Ради України.* 2004. № 51. Ст. 553.

recognition of ownership, which is made on the basis of establishing the fact of possession of real estate with observance of statutory requirements. In the case of the consequences of consideration of such a category of cases, the court in the decision should clearly state the moment when the right of ownership of immovable property arises, which is determined on the basis of the court's establishment of the moment from which the statute of limitations began. State registration of the right to immovable property should not have legal value for the acquisition of ownership right after the prescription, but should act only by the act of its fixing, confirmation and certification.

According to Part 3 of Art. 344 of the Civil Code of Ukraine: "if a person has taken possession of real estate on the basis of an agreement with the owner of this real estate who, after the expiration of the contract, has not made a claim for the return of his real estate, then that person acquires the right of ownership of the real estate upon acquisition expiration fifteen years of possession of real estate since the expiration of the statute of limitations"[21]. The legislative structure of Part 3 of Art. 344 of the Civil Code of Ukraine has the characteristics of a separate variety of statute of limitations, as it is characterized by a different circle of subjects, legal conditions, including a different order of the period of prescription.

For the acquisition of ownership of immovable property by acquisition prescription is required, in accordance with Part 1 of Art. 344 of the Central Committee of Ukraine, good faith seizure of this real estate. Instead, the analysis of the norm of Part 3 of Art. 344 of the Civil Code of Ukraine implies that it does not contain any condition for the integrity of the seizure of real estate, since the seizure of real estate in this case occurs lawfully on the basis of an agreement with the owner of the real estate. With the expiry of the contract, the legal basis for owning the real estate disappears and the owner begins to own it illegally, while remaining, however, its legal acquirer. In this regard, the buyer of real estate in Part 3 of Art. 344 of the Civil Code of Ukraine is not subject to the statute of limitations in the sense of Part 1 of Art. 344 of the Civil Code of Ukraine, therefore, the requirement for the integrity of the seizure of real estate can not be made to him. However, Part 3 of Art. 344 of the Civil Code of Ukraine does not contain requirements for openness and continuity of ownership of real estate. Such requirements are considered expedient to be imposed on the subject of acquisition limitation in part 3 of Art. 344 of the Civil Code of Ukraine. Open ownership implies that the purchaser of the real estate does not conceal the fact of possession from third parties and uses the real estate as its owner. The specified condition of

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[21] Цивільний кодекс України: Закон України від 16.01.2003 р. *Відомості Верховної Ради України.* 2003. № 40–44. Ст. 356.

the statute of limitations does not determine the integrity of the purchaser, so it may concern the subject of the statute of limitations in part 3 of Art. 344 of the Civil Code of Ukraine, which is the acquirer of immovable property under a contract whose term has expired.

The requirement for continuity of the ancient possession must apply to the ancient owner under Part 3 of Art. 344 of the Civil Code, which follows from the essence of the institution of the statute of limitations, characterized by the need for continuous and long-term ownership of real estate to acquire ownership of this immovable property by prescription. With regard to the condition of the statute of limitations on the possession of real estate as its own, which exists doctrinal and in practice refers to the subjects of the statute of limitations in part 1 of Art. 344 of the Civil Code of Ukraine, its legislative consolidation in part 3 of Art. 344 of the CC of Ukraine is considered inappropriate. This is because the subject of the statute of limitations in Part 3 of Art. 344 of the Central Committee of Ukraine, unlike the conscientious purchaser, from the very beginning owns real estate on behalf of someone else's, that is, not as his own.

Investigating the issues of the terms of the statute of limitations for Part 3 of Art. 344 of the Civil Code of Ukraine, it should be noted that the specified norm enshrines a longer – 15-year period of statute of limitations for the acquisition of real estate property, compared to the 10-year term under part 1 of this article. You should also pay attention to the legislative formulation of the norm of Part 3 of Art. 344 of the Civil Code of Ukraine, where it is stated that a person acquires the right of ownership over immovable property fifteen years after the statute of limitations has expired. This norm, defining the period of the statute of limitations, at the same time establishes a special order of its course, which is that the statute of limitations begins to emerge only after the statute of limitations has expired, unlike the period of the statute of limitations for part 1 of Art. 344 of the Civil Code, the course of which is not tied to the expiration of the limitation period.

A special procedure for the period of acquisition of limitation in Part 3 of Art. 344 of the Civil Code of Ukraine is conditioned by the fact that "from the moment of termination of the contract the owner of the real estate is obliged to return the real estate at the request of its owner, to whom the legislation gives a clear term for making such a request, thereby stimulating him to take active actions"[22]. In the event that the owner of the real estate has shown indifference or negligence, or for other reasons did not do so within the limitation period, the owner will have the grounds stipulated by law not to return the real estate to him and begin to own it in the order of limitation.

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[22] Цивільний кодекс України: Закон України від 16.01.2003 р. *Відомості Верховної Ради України*. 2003. № 40–44. Ст. 356.

It should be noted that in the context of the terms of acquisition of ownership of immovable property by the statute of limitations, due to Part 3 of Art. 344 of the Civil Code of Ukraine a person for acquisition of the right of ownership of real estate by acquisition prescription must possess this real estate for a much longer period than the subject of acquisition prescription in part 1 of Art. 344 of the Civil Code of Ukraine. In total, the period of ownership of real estate should be at least 18 years. Based on the analysis of the provisions of the civil legislation of Ukraine, it is possible to draw a preliminary conclusion about the impossibility of application, in combination with the norm of Part 3 of Art. 344, provisions for contracts. As an example, the provisions of Art. 764 of the Civil Code of Ukraine, which stipulates that in the event of the tenant continuing to use the property under the lease agreement, the absence of claims by the lessor, within one month after the expiration of the lease agreement, the said contract will be considered to be renewed for the same period as stipulated in the contract.

Analyzing the provisions of the contract of property management, it should be noted that after the expiration of the contract, in the absence of statements by the parties to the contract for its amendment or termination, the contract continues for the same term and the same conditions as specified in the contract (h. 2 Article 1036 of the Civil Code of Ukraine). It traces the preservation of the legal basis for the possession of real estate, which enables the real estate manager to acquire ownership of this real estate in accordance with the norms of Part 3 of Art. 344 of the Civil Code of Ukraine.

CONCLUSIONS

The expiration of the contract, provided that the owner of the real estate does not make a claim for the return of the real estate, should be considered as one of the legal facts that precedes the beginning of the period of acquisition limitation in accordance with the norm of Part 3 of Art. 344 of the Civil Code of Ukraine. However, it should be noted that, in accordance with the provisions of the civil law of Ukraine, the expiration of the contract is not the only reason for termination of the contract and obligations for it, as a result of which the property owner has the right to demand his return. The same consequences occur in the event of termination and termination of the contract. In view of the above, it is considered advisable to replace the provisions of Part 3 of Art. 344 of the Central Committee of Ukraine for “extraordinary” prescription. A similar statute of limitations exists in most jurisdictions of foreign countries. It should be noted that, in the experience of foreign states, the use of “extraordinary” prescription may fully fulfill the legislative purpose of Part 3 of Art. 344 of the Civil Code of Ukraine in order to eliminate the

gaps in which immovable property may remain out of civil circulation forever, in cases where the ancient possession of real estate does not fall under the provisions of Part 1 of Art. 344 of the Civil Code of Ukraine.

Taking into account the peculiarities of legislative regulation of the statute of limitations in the Central Committee of Ukraine and foreign legislative experience, it is advisable to extend extraordinary statute of limitations in Ukraine to the cases of: 1) legal possession of property due to Part 3 of Art. 335, h. 3 Art. 344, Part 3, Art. 1157 of the Central Committee of Ukraine; 2) legal possession of real estate as its owner in the absence of proper registration of the ownership right and title documents on it; 3) unlawful misappropriation of real estate. In this case, the extraordinary acquisitive prescription will be characterized by the absence of a condition for bona fide seizure (possession) of real estate and longer, compared to Part 1 of Art. 344 of the Civil Code of Ukraine, the term of possession, necessary for the acquisition of real estate in the property by the statute of limitations.

Given the disadvantages of Part 3 of Art. 344 of the Civil Code of Ukraine in terms of establishing the procedure for the term of the statute of limitations, the term of the "extraordinary" statute of limitations must occur in parallel with the statute of limitations in accordance with the provisions of Part 1 of Art. 344 of the Civil Code of Ukraine. In this case, the conditions for which the necessity of observance of which does not depend on the integrity or bad faith of the purchaser of immovable property, in accordance with Part 1 of Article 1, must be common to the statute of limitations and "extraordinary" statute of limitations. 344 of the Civil Code of Ukraine. Such conditions, as evidenced by the above comparative analysis of the substantive content of h. 1, 3 Art. 344 of the Civil Code of Ukraine, is the openness and continuity of the ancient possession of real estate, the observance of which is obligatory for the acquisition of ownership of real estate by acquisition, including "extraordinary" prescription.

SUMMARY

Therefore, the modern development of economic relations attests to the importance of the statute of limitations as a legal mechanism for ensuring the efficiency of civil turnover, an integral part of which is real estate. At the same time, the Institute of Acquisition as the basis for the acquisition of ownership of real estate is characterized by the imperfection of legal regulation of relations related to antiquity, which complicates or makes it impossible to acquire ownership of immovable property by prescription. This points to the need to improve the legal regulation of prescription in Ukraine, taking into account, on the way of Ukraine to European integration, the legislative experience of EU countries.

Together with the above, attention is drawn to the need to distinguish between such legal categories as “grounds” and “conditions” of acquiring ownership of real estate. The main reason for acquiring the ownership of immovable property by the statute of limitations is a court decision, whereas the conditions of acquisition are certain circumstances, the existence of which may be the basis for the acquisition of ownership of the immovable property.

On the basis of the conducted research it is concluded that there is a need to distinguish between such legal categories as “method” and “grounds” of acquisition of ownership of immovable property by prescription, since way is a tool of realization of the will of the acquirer of property right, including the right to other things, and the grounds are a legal fact that leads to legal consequences in the form of acquisition of ownership of property, in particular, the right to immovable property for a period of time. Attention is drawn to the fact that the acquisition of ownership of real estate is carried out by means of primitive and derivative methods that differ from the moment of acquisition of ownership. At the same time, the moment of acquiring the ownership of real estate is traditionally regarded as a derivative way of acquiring this right, but it also occurs in the original ways. The latter include, in particular, the acquisition of the right to immovable property by prescription.

The obligatory condition for acquiring the right of ownership of immovable property under the statute of limitations is those circumstances in which the immovable property claimed by the person acquiring the property must have the status of a landless property and which cannot be attributed to the property acquired in accordance with Art. 330–333 and Art. 336–339 and Art. 343 of the Central Committee of Ukraine. The most important conditions of the statute of limitations, which must be applied at the same time, are: good faith ownership of property; open ownership of property; continuity of ownership of property; possession of property within the statutory period.

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