Legal borrowings in the area of civil rights and interests protection under the legislation of Ukraine and the EU

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Abstract
The authors proved the relevance of the issue of harmonisation of Ukrainian law with EU law, which determines the existence of an institution of borrowings in the field of civil and civil procedural law. The authors conducted a retrospective analysis of legal discourse on legal transplantation, including in the field of civil legal protection. The process of convergence of civil and economic and legal positions in the European integration area on the basis of private law was investigated. The materials for the examination of the adaptation and implementation program and the case law were analysed. It is revealed that for Ukraine and other countries of the European continent, in the field of protection of civil rights and interests, the norms that have been enshrined in European regional international instruments are of particular importance. It is determined that not only transplantation of legal norms but also transplantation of legal concepts takes place in the sphere of protection of civil rights and interests in the aspect of legal borrowing.

Key words: Legal transplantation, EU legislation, Adaptation and implementation program, Effective system.

Introduction

Legal borrowing is an integral part of the globalisation process. Today, in order to maintain competitiveness in the world and regional markets, states are required to adapt the domestic legal field to safeguard and protect the interests of economic entities and citizens in all areas of law. At the same time, they are a kind of instrument of counteracting legal colonialism as an element of globalisation, when only certain legal constructs and legal norms are perceived in order to preserve national legal traditions. The legis-

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lator accepts a certain legal provision, but at the same time remains committed to legal continuity, to its own historically elaborated principles of law-making, and to the principles of the national legal system (Dodonov *et al.*, 2019; Karmaza *et al.*, 2019).

Another reason for the continued interest in the issue of "legal transplantation" is its renewed and enhanced practical relevance. Especially after the collapse of communism in the late 1980s and the subsequent massive legal and institutional reforms in countries that were previously part of the Soviet sphere of influence, legal transfers or "transplants" experienced a boom. In the 1990s, there was a new wave of involvement of foreign development assistance agencies and international organisations in legal reform and transition. International economic organisations such as the World Bank and the International Monetary Fund, as well as national development assistance agencies and private organisations like American Bar Association, have undertaken ambitious legal aid projects, commercial laws, civil law, and even constitutions exported from developed countries to the countries with transition economies. The introduction in Ukraine of such reforms and strategies for providing legal assistance helps people quickly and efficiently solve their problems without losing a large amount of material and intangible resources. Thanks to such efficiency, it is possible to build personal and state welfare.

With the independence of Ukraine, the Ukrainian society faced a necessity to build a new state and a system of law that would ensure the effective functioning of social relations in various spheres: from family to land, from hereditary to economic and legal. Along with national legislation, the process of using legal borrowings from foreign law systems has begun in Ukraine, which in practice have proven their effectiveness. The domestic civil law institute has been most actively involved in this process. Due to the above factors, in particular the fact that the effective functioning of public relations in various fields depends on high-quality legal borrowing, this in turn helps to increase the chances of society for sustainable welfare and development.

Analysis of the legal discourse on legal transplantation

The problem of legal transplants began in the mid-1970s. Alan Watson is considered the founder of this concept, which became controversial with Otto Kahn-Freund (1974). A. Watson (1976) understands legal transplant as the driving force behind changes and developments in the systems of law of individual states, and defines it as the movement of a rule of law or system of law from one state to another, from one person to another. Otto Kahn-Freund (1974) emphasised the necessity to take into account the socio-political content (constitutional and political order) in the donor country and the recipient state, especially in areas where pressure is exerted by influential groups in the middle of the state.

In contrast, Alan Watson insisted on the possibility of transposing the rule of law without analysing its purpose and purpose in the donor country. In authors' opinion, this position is more applicable in Ukraine in the presence of influence of certain financial-industrial groups on most spheres of the national economy of the country. In particular, there are situations where substantial changes are made in the adoption of certain laws modelled on the basis of the relevant act in the EU or the US, whereby the

mechanism operating in the donor country does not always function effectively in Ukraine (Naumenkova *et al.*, 2019; Mishchenko *et al.*, 2019). Along with A. Watson, Rodolfo Sacco (1974) identified methodological aspects of legal transplants.

The works of these scholars have become the basis for constructing the concept of borrowing and "transplantability" of legal norms between systems of state law and the emergence of discussions in the scientific world. There are opponents of this concept. Thus, Pierre Legrand (1997) finds it impossible to use legal transplants because a legal rule that has been transferred from one jurisdiction to another is only a "formal set of words devoid of its original content". In addition, the camp of opponents is quoted by Montesquieu (1748), who noted that, "The political and civil laws of each nation must be so adapted to the people for which they were created that it would be a pure "un grand hazard" if the laws of one people could meet the needs of another".

However, since then, significant changes have taken place in the globalised environment, including in the legal plane. Along with the introduction of legal transplants into the national legal system, there is an accompanying process – the adaptation of foreign law, in particular EU law, to local economic and socio-political conditions, cultural and legal characteristics. In this process, the legislator sometimes goes beyond the traditional application of the rule of law, showing innovativeness, readiness to respond to the challenges of a globalised economy. This phenomenon is denoted by the term indigenisation, which means the process of adapting legal borrowing to the needs of the national legal system, local economic conditions, socio-political conditions, cultural characteristics.

In order to understand the legal discourse on legal transplantation, it is necessary to return to the original discussion between Kahn-Freund and Watson. As is well known, Otto Kahn-Freund's (1974) annual Chorley Lecture at the London School of Comparative Law offered a context-based approach to legal reform based on legal borrowing. Kahn-Freund proceeded from the famous Montesquieu (1748) quote, "The political and civil laws of every nation ... must be so adapted to the people for whom they were created that it would be a pure chance (not a great danger) if the laws of one nation could meet the needs of another".

In a series of works, all former Soviet Union satellites in Central and Eastern Europe, as well as countries such as Cuba, China, and North Korea, were seen as forming a separate, so-called, socialist legal family (Bakardjieva Engelbrekt, 2015). However, in a subsequent publication, the former CEE socialist countries are classified in one of the families within the framework of the civil legal tradition. This conversion was mainly in response to scientific and political criticism (La Porta *et al.,* 2008).

Institutional influence and legal transfer are assumed to be carried out equally regardless of the area of law and regulation or the relevant economic sector (Whitman, 2008). However, to expect the transfer of legal norms and institutions of a different nature, such as civil law, commercial codes, banking and labour rules, and constitutional rules and practices is equally unrealistic as to act in the same way without affecting local preferences and resistance (Bakardjieva Engelbrekt, 2015). A number of in-depth comparative studies strongly suggest that local actors, heritage and policies of interest groups differ significantly between policy areas, which explains the different sectoral dynamics of institutional change (Steinmo *et al.*, 1992). This was a highlight of Kahn-Freund's (1974) oversight of transplant legal

standards, which were later developed and largely endorsed by Teubner (1998).

Legal borrowings in the civil law of Ukraine

The active dynamics of legal interaction and ongoing legal change are driven by processes of supranational and international integration within certain structures, in particular the EU, in which scientists, lawyers and international institutions (IMF, World Bank, etc.) from different legal systems communicate exchange opinions, proposals, and eventually come to a joint decision.

The basis for EU-Ukraine cooperation in the field of justice, set out in the 2001 Action Plan, was revised in order to enhance EU-Ukraine cooperation in the light of the development of the EU's area of freedom, security and justice and the new enlargement of borders, which took place on May 1, 2004, after which the EU and Ukraine for the first time began to border on each other as immediate neighbours (Knill, 2001).

The updated EU-Ukraine Action Plan on Justice, Freedom and Security (2008), for the first time among the agreed tasks and areas of cooperation and implementation, noted the strengthening of legal cooperation between the EU and Ukraine in civil matters, identified the following areas:

- promoting the practical implementation of legal aid in civil matters;
- full implementation of the Hague Convention on the Taking of Evidence (1970) and the Hague Convention on the Service of Documents (1965);
- enhancing cooperation in the field of the protection of the rights of a child, including by exploring options for adherence to international conventions, including parental responsibility, adoption, alimony and maintenance decisions, as well as wills and succession;
- ensuring the implementation of the 1980 Hague Convention on Civilian Aspects of International Child Abduction.

The current issue of harmonisation of Ukrainian law with EU law, including in the civil field, is closely related primarily to the issues of legal borrowing, as a result of which elements, norms, legal institutions will be brought to the law of Ukraine, which are elements of the rule of law of European countries and, in many respects, for Ukrainian law is extraneous.

Implementation of the Law of Ukraine of March 18, 2004, "On a nationwide program for the adaptation of Ukrainian legislation to the legislation of the European Union" provides for a convergence of civil and economic-legal positions in the European integration area on a private law basis. In modern conditions, the differences between them are erased for the following reasons:

- the draft of the Civil Code of Ukraine was developed based on the experience in the EU countries, and its project was subject to the expertise of European experts;
- the practice of protection of civil rights is considering the provisions of international acts;
- the international treaty ratified by the Verkhovna Rada of Ukraine is a part of national legislation in accordance with Part 1 of Art. 10 of the Civil Code of Ukraine (2003);

- if the international treaty of Ukraine establishes rules other than those stipulated by civil law, the rules of the international treaty of Ukraine are applied (part 2 of Article 10 of the Civil Code of Ukraine, Law of Ukraine "On International Treaties (2004)");
- if the international treaty is not in force on the territory of Ukraine, then the rules of international law are taken into account when regulating the relevant civil rights and interests;
- EU contract law makes extensive use of a variety of standard contracts:
  a. standard contract – sample – reference sample on the basis of which the contract is concluded;
  b. standard contract – offer (acceptance) – expression of the offer by one party or both regarding the binding conditions of the future contract;
  c. standard contract – formular – made by practice a set of optimal conditions of a particular contract based on the unification of contractual conditions in a certain field of activity;
  d. general terms – defined by one of the parties or jointly the contract parameters, which extend to several contracts;
  e. adhesion contract – a typical form of contract that sets out all the terms of a future contract in a certain standard form that can be accepted by the other party by joining it without the possibility to amend it (Bakhin, 2002).

This system of standard contracts has had a significant impact on the contractual practices of EU countries and, through legal borrowing by economic entities, on the CIS countries, including civil law of Ukraine, which has significantly influenced the procedures for the protection of their rights. However, it is worth agreeing with S.M. Berveno (2006) that their provisions should not contravene the Civil Code of Ukraine and other laws of Ukraine when applying standard contracts. A standard contract approved in violation of these requirements shall be considered contrary to the laws of Ukraine, shall not be enforceable and may be terminated in accordance with Art. 21 of the Civil Code of Ukraine.

Periodic inspections of the implementation of the adaptation and implementation program are carried out, reports of responsible persons are heard, and decisions are made on implementation or improvement. On 8 November 2018, on the basis of the report of the Deputy Minister of Energy and Coal Industry for European Integration, Bill 9044 was recognised as not in general contrary to European Union law (Verkhovna Rada of Ukraine, 2018). The Bill amending certain legislative acts of Ukraine to improve the procedure for redress by a law enforcement agency or a court in accordance with the case law of the European Court of Human Rights has been improved on the mechanisms of redress and has borrowed effective rules of European law. Alignment of the legislation of Ukraine with the practice of the European Court of Human Rights was made by amending the Law of Ukraine "On the procedure for compensation of damage caused to a citizen by unlawful actions of bodies carrying out investigative activities, bodies of pre-trial investigation and court" and the Civil Code of Ukraine.

Legal borrowings are used by Ukraine in the field of civil law also on the recommendations of international organisations or during international events. For example, Ukraine has implemented the recommendations re-

ceived during the review of the UPR National Report on October 24, 2012 regarding the inclusion in the bill of provisions expressed by treaty bodies regarding discrimination from Nicaragua.

According to Art. 14-16 of the Law "On the Principles of Prevention and Combating Discrimination in Ukraine", a person affected by discrimination may seek the protection of his or her rights in court, the Ombudsman, as well as the state authorities or local self-government bodies, to claim compensation for material or moral damage. Civil, administrative and criminal liability is established for violation of the requirements of the Law.

Also, the Law of Ukraine "On Amendments to Certain Legislative Acts of Ukraine" introduced amendments to Art. 60 of the Civil Procedure Code of Ukraine, which introduced and recognised in European practice (ECtHR practice – decisions in Nachova et al. v. Bulgaria, Stoic v. Romania, EU Directives 2000/78 and 2000/43) the principle of burden-sharing in cases about discrimination. This article of the CPC establishes that "In cases of discrimination, the plaintiff is obliged to provide factual evidence that the discrimination took place. In the case of bringing such data, it is the defendant's responsibility to prove their absence".

Romania's comments on the use of minority languages in the justice system were also fulfilled. Procedural legislation provides for the possibility of involving, if necessary, an interpreter at the expense of the state (Article 86 of the Civil Procedure Code).

A negative example of legal borrowing is the adaptation situation in the field of copyright and related rights, which also requires improvement in line with EU law. The current law "On Copyright and Related Rights" was adopted in 2001, since then there have been many issues in practice in implementing its provisions requiring legislative regulation and amending to adapt it to European norms and standards. In May 2018, the deputies of the Verkhovna Rada of Ukraine submitted to the committee a bill No. 7539 "On Amendments to Certain Legislative Acts of Ukraine Concerning the Regulation of Copyright and Related Rights". In addition, Ukraine has made clear responsibilities for the implementation of certain provisions of EU law when signing the Association Agreement. In particular, the project envisages: to bring the provisions of the Civil Code of Ukraine, the Law "On Copyright and Related Rights" in line with the rules of the European Union legislation on the protection and defence of copyright and related rights; to eliminate the shortcomings of the provisions of the legislation in the field of copyright and related rights; to resolve issues that arise in practice and require a legislative definition; harmonisation of the relevant provisions of the current legislation with each other, in particular the provisions of the Civil Code of Ukraine and the Law "On Copyright and Related Rights". However, these objectives were not fully achieved in the proposed bill.

Borrowings take place not only in the broad fields of civil law, but also in narrow issues. Thus, the Law of Ukraine "On Amendments to Article 9 of the Law "On Medicines"" made an attempt to resolve the main contradiction of the systems of acquisition of rights to medicinal products: exclusive intellectual property rights and non-exclusive (right to introduce medicinal products into commercial circulation) in accordance with the legislation on medicinal products. The purpose of such changes is, first of all, to bring the legislation of Ukraine on medicinal products in line with the requirements of international law, in particular the Agreement on Trade-Related Aspects of Intellectual Property Rights (1995), as well as the direc-

tives of the European Parliament and the Council of the EU, which is provided, inter alia, by an order of the Cabinet of Ministers of Ukraine regarding the adaptation of legislation of Ukraine in the field of intellectual property to EU legislation (Order of the Cabinet of Ministers, 2005) aimed at implementing the Law of Ukraine "On the National Program of Adaptation of Ukrainian Legislation to Legislation of European Union" (2004).

The purpose of implementing the rules on the "intellectual" novelty of the Law of Ukraine "On Medicines" is the issue of practical realisation of the opportunities to protect rights, which appear in the authors and right holders of objects of intellectual property, in particular manufacturers of reference drugs. New revision of Art. 9 of the Law provides for the following triad of protection of intellectual property rights:

- establishment of the legal regime of protection of information of registration dossier from disclosure;
- protection of the exclusivity of these registration materials;
- establishment of control over the registration materials of medicinal products for the observance of patent rights.

Legal transplantation of the EU judiciary norms

It should be noted that for Ukraine and other countries of the European continent in the field of protection of civil rights and interests the norms, which have been enshrined in European regional international instruments, are of particular importance. Serious attention is paid to the transparency of the judiciary in the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms (1998). Article 6 of the Convention contains the requirement to ensure that Member States have the right to a public hearing of their case in their territories by a court, as well as the obligation to publicly declare a judgment and the conditions for its limitation.

The recommendation of the Committee of Ministers (1997) concerning the selection, processing, presentation and archiving of court decisions in legal information retrieval systems is important for ensuring the transparency of the judiciary. In particular, it states that full awareness of the practice of all courts is one of the main conditions for the fair application of the law. In this document, the Committee of Ministers of the Council of Europe recommends that its members set up such information search electronic systems, which will contain court decisions, archived and disaggregated by subject matter, given that such information should be accessible to the general public via the Internet (Ruda, 2007). The requirement to inform the public about the whereabouts of courts and the procedure for referral to court is set out in Recommendation of the Committee of Ministers of the Council of Ministers of May 14, 1981 No. K (81) 7 "Committee of Ministers to Member States on measures facilitating access to justice", which provides that the information may be submitted either to the judicial authorities themselves or to another competent authority. Similar rules are enshrined in other international instruments (Ovsyannikova, 2008).

The activities of the European Court of Human Rights in the application of the Convention for the Protection of Human Rights and Fundamental Freedoms are increasingly transnational in nature. From the outset, the Convention's control bodies viewed the Convention as a means of establishing pan-European standards of law and order. The Convention, or more

precisely the case-law of the European Court of Justice, has accumulated European experience in the field of human rights and established common European standards in this area, which then had a decisive influence on the development of national legal systems. The standards developed by the European Court of Justice concern "all areas of law: constitutional, criminal, civil, administrative" (Salvia, 2004).

The European Court of Human Rights plays an important role in the protection of civil rights and human rights at the international level. In addition, its decisions make it possible to improve the protection of citizens' rights in Ukraine. T.V. Solovyova (2012) rightly points out in this regard, "the ruling of the European Court of Human Rights is meaningful and relevant to the applicant when it is implemented by public authorities who have violated the Convention (Convention for the Protection…1998)". One of these bodies is the court, and its procedural capabilities in this area are determined by the rules of the Civil Procedure Code of Ukraine.

Chapter 3 of Section V of the Civil Procedure Code of Ukraine regulates the issue of reviewing the decision of the national court in accordance with the decision of the European Court. Amendments to the Code of Civil Procedure have added such a basis for review as a new circumstance – a finding by the European Court of Human Rights of a violation of the Convention on the Protection of Human Rights and Fundamental Freedoms in a court case in connection with a decision on which an applicant applied to the European Court of Human Rights.

Not only transplantation of legal norms but also transplantation of legal concepts takes place in the field of protection of civil rights and interests in the aspect of legal borrowing. In particular, the definition of "Final Court Decision in a Case" is an example. The subject of the right to a constitutional complaint must submit to the Constitutional Court of Ukraine, together with a complaint itself and a decision, which is final in his civil case (Preparation for practical work). However, in civil procedural law this concept is not defined. The relevant rule of law links the bindingness and the finality of a decision only to the peculiarities of the validity of the act of justice (Code of Civil Procedure…2004).

However, the European Court of Human Rights also lacks a single position regarding the definition of this term:

- final decisions were determined after their review by the courts of cassation (Article 6 "Right to a fair trial"), and in no case did the court of supervisory jurisdiction recognise the court completing the review of judgments at national level;
- the decision of the Supreme Court of Ukraine in the decision of the Court "Shagin v. Ukraine" was recognised final (Article 6 "Right to a fair trial");
- the finality of a decision depends on the period of admissible appeal against the act of justice: in the decision of the Court in the case Timotievich v. Ukraine, the decision of the national court violating the applicant's interests was overturned on the initiative of the prosecutor, who exercised his discretion – Art. 1 of Protocol No. 1 to the Convention (The case "Timotievich v. Ukraine", 2005).

Conclusions

The system of ways of civil rights and interests protection, defined by Article 16 of the Civil Code of Ukraine, is extremely extensive and the list of such methods is inexhaustible, unlike the methods of protection defined by the European legislation. Thus, the remedies applied by the European Court of Human Rights (such as the recognition of violations of the right provided for by the European Convention and just satisfaction (Article 41)) cannot be supplemented by other remedies applicable in national law. Such protection under EU law may also be applied as compensation for damage caused. Providing such protection, state bodies improve the welfare of society, since compensation for damage helps the individual feel that they rights are protected.

Regarding the possibility of introducing the experience of European legislation towards the use of non-jurisdictional (extrajudicial) forms of protection of civil rights and interests, there are the use of methods of reconciliation of the parties with the participation of a neutral mediator, as well as negotiations. Self-defence under EU law is also implemented through the Commissioner for Human Rights, a non-judicial institution whose activities complement the work of other defence institutions that is absent in the domestic legal system.

The place of international norms in national law is determined by the constitutional act of each of the states, so the application of legal norms of European Union law clearly requires their implementation in national legal systems. Extending the procedures for appealing and reviewing judgments in accordance with European standards as a result of the exhaustion of national remedies in the civil justice process requires the correct implementation of the term “final decision” in the rules of national civil procedural law.

Constitutional Court rulings following a constitutional complaint may be the basis for reviewing a civil court's judgment in circumstances that have reopened, but cannot serve as another national remedy that would “hinder” an appeal to the European Court of Justice. The content of the final decision should be linked to the validity of the act of justice, which in the author's view are identical concepts.

Therefore, the problem of legal borrowing remains a debatable issue and needs further analysis and research. In today's globalised legal environment, legal borrowing, provided they are effectively applied, can be the optimal means of legal regulation of civil and commercial relationships, a formative factor in improving the quality of the provision of legal services and indirectly a way to increase the welfare of society. Indeed, the welfare of society depends not only on its security of material resources, but also due to the opportunity to protect rights at the international level.

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