CONSIDERATION OF FOREIGN LEGAL EXPERIENCE IN THE PROCESS OF DEVELOPING LEGAL SYSTEM: THE SEARCH FOR ONE'S OWN IDENTITY

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Summary

The need to build one's own legal system with the possibility and value of using foreign legal experience both positive and negative is the focus of the research. We determine the conditions to be met by borrowing law and legal institutions. Along with this, the expediency of the use of foreign legal experience is pointed out. Special attention is drawn to the need to find one's own identity. The need to build a new paradigm of comparative law in the context of critical legal studies is explained. Emphasis is placed on the national character and national self-determination of the new paradigm of comparative law as a basic condition for the development of a national legal system.

Key words: legal system, comparative legal studies, the paradigm of comparative law, critical legal studies, drawing legal experience.

Аннотация

Исследуется необходимость построения собственной правовой системы с учетом возможности и полезности использования зарубежного правового опыта, как положительного, так и отрицательного. Выделяются условия, которым должны отвечать заимствованные правовые нормы и правовые институты. Наряду с этим рассматривается целесообразность использования зарубежного правового опыта. Отводится особое внимание необходимости поиска собственной идентичности. Поддерживается необходимость построения новой парадигмы сравнительного правоведения в контексте критически-правовых исследований. Делается акцент на национальном характере и национальном самоопределении новой парадигмы сравнительного правоведения как основном условии развития национальной правовой системы.

Ключевые слова: правовая система, сравнительно-правовые исследования, парадигма сравнительного правоведения, критически-правовые исследования, заимствование правового опыта.

Problem definition. Ukraine is a young state striving for building its quality national legal system. It is an active process that forces the legislators to keep up with the needs and requirements both of the society as a whole and every person separately. Thus, facing new problems that require immediate solving, the legislators address foreign practices. Their aim is to learn about the legal experience (both positive and negative) of other countries, their ideas, legal norms and legal institutions, as well as consequences of the respective legal regulation.

Topicality of the researched topic. At present, lawmakers can make use of comparative law, the subject of which includes comparative study of the experience of different countries in a generalized form [1, c. 9-10]. Back in the Soviet times some scholars distinguished a range of problems that should have become the subject of comparative studies, including, among others, critical analysis of Western comparative studies [2, c. 62-63]. Stressing the abovementioned elements of the subject, it seems reasonable to investigate the influence of foreign legal experience on development of our own legal system, criticism of views on possibility and necessity of borrowing legal norms and institutions, as well as responsibility of legal cultures, mentality, social and economic circumstances, and political conditions of foreign legal norms formation, their effectiveness and performance in conditions of a national legal system, as well as their correlation.

The present state of research. Not many scholars have looked into the problem of the criticality of comparative legal studies in regard to the possibility or necessity of borrowing respective legal norms into one's legal system. At present, such criticism concerns mainly the application of legal ideas to solve specific national problems, borrowing of legal transplants in the form of legal norms and legal institutions. Separate authors draw attention to the consideration of correlation between the conditions in which the legal norms were created and existed, under which they changed or died away, and conditions, in which the borrowed norms of the legal donating system are supposed to exist. Soviet scholars were also engaged into the criticism of foreign legal experiences, however, they concentrated their attention not on the possibility of borrowing, but on total criticism of the institutions of the so-called "bourgeois" world. The problems of foreign influence on the development of the national legal system were studied by Kh. Bekhruz, Ch. Varha, M. Damirli, V. Kudriavtsev, Kh. Kiots, M. Marchenko, R. Lezhe, L. Luts, V. Osiatynskyi, A. Sayidov, A. Skurativskyi, V. Tumanov, K. Tsvayhert, H. Frankenburh and others. However, considering insufficient attention to this problem at the present stage, it proves to be necessary to analyze this problem in detail in order to apply the results of the research in further practice.

The aim of the article is to explain the necessity to build Ukraine's legal system with consideration of its uniqueness, which could be achieved on condition of studying and the possibility of quality application of legal experience of other legal systems.

Main provisions. The present legal reality is determined by the process of mutual influence of different legal systems, the dialogue of different legal cultures, and combination of traditions and innovations in legal consciousness and legal development [3, c. 64], as well as the influence of globalization and international cooperation. Law, in its turn, is always the quintessence of values, thoughts, ideas and considerations about proper order of social relations that exist within a certain culture, which are the manifestation of traditions that have

not changed for a long time, a certain reflection of communicative space of a particular socio-cultural community [3, c. 65]. Therefore, building of a legal system, and, respectively, law should correspond to both the time of its effectiveness, and all socio-cultural, economic and political conditions in society, legal customs and traditions, legal culture, as well as spiritual values, religious beliefs and mentality[1].

Legal system, legal consciousness, and legal culture are closely connected to historical development of the society, as well as its cultural and civilization authenticity that reflect beliefs of the people, their values and ideals [5, p. 221]. At present, Ukraine is still greatly influenced by the determination of the course for its development as a state. This issue remains topical. The President of Ukraine V. Yanukovych, who has repeatedly stressed the necessity of Ukraine's development towards "the West", has recently claimed the necessity to hold an all-Ukrainian referendum to choose between accession of Ukraine to the European Union (hereinafter – the EU) or the Customs Union of Belarus, Kazakhstan and Russia. This way, along with the attempts to perform all conditions posed by the EU before signing the Association Agreement and Free Trade Zone Agreement planned for November 2013, the leaders of the country offer the citizens to make their final choice. Such procedure could be explained by the fact that it is only after the conclusion of the Association Agreement and observance of all requirements to be ready for EU-membership that a referendum would be necessary. It is only after accession to the EU that Ukraine would have to pass a part of its sovereignty to the EU, and this is where the nation's agreement is necessary.

Latest sociological surveys show that Ukrainians are more inclined to European integration, however, it is necessary to be ready to deal with problematic issues concerning the correlation of national legal culture and Western legal culture represented by the EU.

A special place among the elements of legal culture is occupied by legal consciousness. Thus, national legal consciousness is aimed at ethnic and regulatory self-determination, and is based on mental and ethnic understanding of aims and ideals of development, and is manifested in the legal ideology that reinforces the integrity of national legal consciousness, which is a procedural fundamental element of social and political unity. Correction and reproduction of legal consciousness, including the national one, is an obligatory element of the process of establishment of Ukrainian institutions of a legal state and civil society. A significant role in the development of law and legal consciousness is played by comparative studies, which are the result of diversity of realities in different countries and on different continents, and their dialogue [6, c. 131]. In our opinion, similarly to legal culture, we can distinguish legal consciousness of individuals that constitute legal consciousness of the society. It is the latter that, together with legal education of the citizens, can reveal their attitude to the existing legal system, its effectiveness, performance, as well as their ability to analyze the quality of legal regulation of social relations, and their correspondence to social needs of the people. Therefore, it is possible to analyze the possibility and relevance of borrowing foreign legal experience and possible results of its application, as well as influence on the national authenticity of a country's legal system.

Functioning of a legal system depends on social factors that reflect the spiritual sphere of social life: religion, traditions, culture; as well as on factors constituting the material part of life, interests and needs of different components of the social structure of the society. However, globalization processes facilitating improvement of some components of the structure of a legal system can deliver a devastating blow to other components of this system, primarily, to the national legal culture [7, p. 85]. Therefore, it is always necessary to estimate risks and consider possible influence on legal culture, which eventually may turn out to be negative. Thus, globalization projects should not turn into the imposition of western standards, in the sphere of legal culture including, as they are destined to be successful only with the consideration of national peculiarities of a society, including cultural sphere in general, and legal culture in particular [7, p. 87].

The authors of scholarly literature still point out that transitive legal systems of post-Soviet countries are on the verge of not only the old and the new, but are also placed between traditionally distinguished civilizations: the Western or European and the Eurasian ones. Under conditions of facing such choice for creation of a "pure" model, there may occur a forced imposition of such different model onto the legal system. In such a case, borrowing of forms and elements of legal system, which is estimated as a more progressive one, comes into conflict with elements of the legal culture and mentality of the recipient legal system resulting in rising social tension [8, c. 97]. Such opinion seems to be correct, as the legal culture, mentality, social values, and conditions in which legal norms are established are unique, and therefore it is important to take into account such differences foreseeing at the same time the results of incorrect legal transfers. It is also worth adding that laws cannot be imposed, they should fit the culture of a certain nation and state [9, p. 13].

The use of comparative legal studies, among others, lies in its importance for better understanding and simultaneous improvement of the national law, as well as in facilitation of better understanding of other nations, and therefore making a contribution into creation of space that would be favorable for the development of international connections [10, p. 71]. This seems reasonable, as the diversity of problems arising in the society and requiring their solving increases every day. Therefore, when there is a request in the society, it is the consideration of international legal experience that is correct and top-priority. Scholarly literature justly points out that "conscious penetration into different societies and cultures of our planet" aiming at stimulating the processes of extinction of "the deep-rooted national views" and

[1] *«Mentality» (from Lat. mens - mind, thinking, psychology) is often understood as a relatively stable complex of guidelines and inclinations of a person or a social group inducing a certain type of perception, thinking and acting manifested in particular forms of behavior and experienced emotionally, which combines rational and intuitive, social and personal, and conscious and unconscious aspects; it is formed in the course of the centuries, depends on traditions of culture and social structures, and the entire environment of human life activity, and, in its turn, determines their functioning as an important factor of cultural and historical dynamics. Thus, on the one hand, mentality is a result of traditions, and on the other hand, it is itself a deep seated source of the development of culture. Consequently, mentality is a humor typical of people of the given culture, psychological peculiarities that underlie conventions and moral of the people, being expressed through automated psychological reactions to typical actions and situations [4].*

improvement of mutual understanding between the nations is the exclusive advantage of comparative legal studies for legal reforms of developing countries. This kind of stimulation "of the constant criticism of one's own order by comparative legal studies" is aimed at overcoming nationally-limited "dogmatic discussion" and further development of national law [11, p. 71]. However, along with the criticism of one's own order, in case of necessity and possibility of applying positive experience of other countries, it is necessary to remember not only about the relevance of introducing the borrowed legal norms and separate legal institutions, but also about the critical character of comparative legal studies related to borrowing foreign legal experience. Such criticism should be taken into account, for, as we have pointed out in our previous research, critical legal studies are a kind of cognitive activity in the sphere of law, which lies in the assessment and analysis of the development of foreign legal institutions and critical approach to possible, reasonable or necessary borrowing or consideration of their positive experience in order to improve one's own legislation and prevention of negative consequences that can or could arise in connection with application of legal norms of different legal systems without taking into account all principles and conditions to which the norms that national lawmakers want to apply should correspond.

Famous German comparativists have accurately pointed out that comparative legal studies is similar to "the school of truth"; it extends and enriches "the set of decisions" and provides a critically-minded researcher with a possibility to find "the most optimum solution" for the given place and time" [12, p. 28]. Employment of the results of comparative legal studies proves to be a positive experience, however, two conditions are very important here: it is necessary not to lose one's uniqueness and not to forget that legal norms are primarily created upon request of a particular society, and they are greatly influenced by conditions peculiar for it only.

At first glance it may seem that criticality in regard to comparative legal studies of foreign law and legislation should be separated into an independent approach to comparative studies, consideration and application of achievements of foreign law. However, we believe that this is not quite reasonable, as separation of normative and functional approaches to comparative legal studies is generally accepted. Due to the disadvantages of the former approach, studies have led to the latter, which starts from posing a certain social problem, and further searches for a social norm or institution that could help solve this problem, as in majority of cases new problems and new tasks usually require adequate methodological tools and development [8, p. 89; 13, p. 48-53].

Usually, comparative activity of functionalists starts from questioning or feeling dissatisfaction with the way of regulation within the legal system of a certain legal institution. Such comparison stimulates gut feeling that there may be elaborated a more efficient regulation mechanism within a different legal system [14, p. 99]. Such feeling appears as a hope to find the best solution for the problem that has arisen, as well as the hope to use legal experience to improve legal regulation.

A positive aspect of functional method is the explanation of a mechanism of solving a particular legal problem within the national legal order without association with the system of legal terminology of the researcher's own legal order. Its negative aspect is the fact that a comparative scholar should absolutely discard the concepts and notions of his/her own law that are rooted in his/her legal consciousness. A positive feature of this method is the fact that it enables determination of a specific field of foreign law that should be studied to find analogues to solve one's own legal problems [15, p. 1140-141].

Famous German comparativists have come forth with a model of comparative legal studies that includes five characteristic stages of investigation in the sphere of comparing laws and legal ideas, the last stage being critical assessment of the results of comparative legal process of research, where a scholar should assess the result of their work from the perspective of what is left open for further comparison in regard to different functional importance of the legal concepts compared [16, p. 114-116].

It is worth mentioning that, as K. L. Sheppeli has justly stated, "to receive the most adequate picture of the cross-constitutional influence, it is necessary to take into consideration both borrowings and discarded provisions" [17, p. 78]. However, it is necessary to add that these provisions could be applied to any borrowing of legal norms or institutions if a certain problem in the recipient country finds its solution in the donor country. The author is right to point out that "this or that choice of the borrowed provisions can be supported not only by striving to the best alternative, but also by the wish to avoid the worst imaginary consequences". However, it is not only the authors of constitutions that look ahead and think about what could help them solve problems in the most successful way, but also the legislators who solve new problems of the society every day by timely creating quality norms taking into account both positive and negative foreign experience and this way protecting themselves from devastating criticism of tomorrow. Therefore, taking into account such experience, the authors of the laws, "know about the past and present and realize what they would like to avoid" [17, p. 78].

Taking into account the abovementioned, it is worth stating, that we agree with the statement of M. A. Damirli in regard to the development of the new paradigm of comparative legal studies, as it is the search for national identity that is the main element on which the legal system of Ukraine, as well as any other country, should be built. One cannot but agree with the author that the elaboration of many problems of the contemporary legal studies cannot do without consideration one's historical traditions and experience, that it is necessary to develop a creative perception of everything valuable accumulated over the history of comparative legal studies, that it is necessary to avoid mechanic transfer of some approaches and notions into the apparatus of comparative legal studies, and that it is necessary to take into account some problems that are being solved by other social and comparative sciences [8, p. 99].

Conclusions. Thus, we can conclude that our own law should be created by our own hands with inevitable consideration of both positive and negative legal experience of other countries, as it is exactly what can provide for preservation of one's own identity. It is necessary

to remember that there are differences between national legal systems, which include both temporary and long-term, and those that are not likely to disappear even in the remote future [18, p. 6].

Important and useful in the process of studying foreign legal experience appears to be the assistance of foreign legal consultants who can present the essence and peculiarities of legal regulation within their country, which could become the donor country more efficiently; however, they should be the assistants only, as they cannot penetrate into the essence of the problem of the recipient country, and in the worst case scenario, they could lack understanding of traditions, mentality and other conditions influencing the development of a particular state.

Each country is peculiar, it has its own unique mentality; its culture and origins have no parallels, and, therefore, its radical change by a direct decision from another country seems ridiculous. It is necessary to take into account all these conditions that, apart from everything else, testify to the fact that copying foreign laws is unacceptable, and of use may be only the experience, which could be used to develop one's own legislative process.

Therefore, it is worth building a new paradigm of comparative legal studies, where, apart from the already highlighted aspects, we should distinguish a critical approach not only to one's own system, but also to everything new, to all borrowed legal norms and institutions to determine possibility, necessity and relevance of making such borrowings, which may and should turn into such a field of comparative legal studies as critical legal studies. All procedures of studying legal experience of other countries should correspond to the character of the latter. It is also worth taking into account that not everything should be borrowed from other countries, even if their experience proved to be effective, as legal norms are created upon request of a certain society and its conditions, therefore, not everything can be borrowed, not everything suits our needs, no matter how perfectly these norms or institutions regulate legal relations in their legal system.

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ОСНОВЫ АДМИНИСТРАТИВНО-ПРАВОВОГО РЕГУЛИРОВАНИЯ СУДЕБНО-ЭКСПЕРТНОЙ ДЕЯТЕЛЬНОСТИ

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Summary

In this article, according to the analysis of the current legislation and thoughts on the problem of legal scholars, the theoretical issues of administrative and legal regulation of forensic activity are defined. The purpose of this question is the effective protection of rights and freedoms of natural persons and legal entities. The author underlines that the analysis of the investigative and judicial practice indicates a lack of the usage of scientific and technological progress, the latest scientific technologies in the judicial process of Ukraine. The reason is the lack of developed principles of administrative and legal regulation of forensic activity. Also we should pay attention to codification of all branches of law in accordance with the socio-economic and political changes that are taking place in our society. Concerning with it, the theoretical issues of administrative and legal regulation of forensic activities are becoming more important.

Key words: administrative and legal regulation, the object, forensic activities, legal regulation, subject of forensic activities, expert.

Аннотация

В статье на основе анализа действующего законодательства и мыслей на эту проблематику ученых-юристов определены теоретические вопросы административно-правового регулирования судебно-экспертной деятельности, целью которой является действенное обеспечение прав и свобод физических и юридических лиц.

Автор подчеркивает, что анализ следственной и судебной практики свидетельствует о недостаточном использования достижений научно-технического прогресса, новейших научных технологий в процессе судопроизводства Украины. Причиной этого является отсутствие разработанных принципов административно-правового регулирования судебно-экспертной деятельности. Также хотелось бы обратить внимание на то, что сейчас поставлена цель кодификации всех отраслей права в соответствии с социально-экономическими и политическими изменениями, которые происходят в нашем обществе и в связи с этим теоретические вопросы административно-правового регулирования судебно-експертной деятельности приобретают все большее значение.

Ключевые слова: административно-правовое регулирование, обьект, судебно-експертная деятельность, правовое регулирование, субьекты судебно-экспертной деятельности, эксперт.

Постановка проблемы. Анализ следственной и судебной практики свидетельствует о недостаточном использования достижений научно-технического прогресса, новейших научных технологий в процессе судопроизводства Украины. Причиной этого является отсутствие разработанных принципов административно-правового регулирования судебно-экспертной деятельности.

Актуальность темы исследования. Также хотелось бы обратить внимание на то, что сейчас поставлена цель кодификации всех отраслей права в соответствии с социально-экономическими и политическими изменениями, которые происходят в нашем обществе. Все указанные факторы, в контексте последующих этапов реформирования органов исполнительной власти, обосновывают актуальность тематики этой научной статьи.

Состояние исследования. Теоретическим основанием выбранных для рассмотрения вопросов стали работы отечественных и зарубежных ученых в области уголовного и административного права В.Б. Аверьянова, И.А. Алиева, Л.Ю. Ароцкера, В.П. Бахина, Р.С. Белкина, А.И. Винберга, Г.Л. Грановского, В.К. Гижевского, В.Г. Гончаренка, В.Г. Грузковой, В.И. Грязина, И.В. Горы, Ф.М. Джавадова, О.В. Жгенти, А.В. Ищенка, Т.А. Коломоец, В.О. Коноваловой,