компетенции органов государственной власти и органов местного самоуправления как субъектов, осуществляющих управленческую деятельность, сущность и особенности которой вытекают из содержания исполнительной власти и местного самоуправления.

Основу методологического подхода к определению компетенции органов публичной власти составляет постоянный анализ «достаточности» компетенции в соответствии с объемом ее структурных составляющих (задач, функций, компетенции и т.и.), чтобы соответствующий субъект публичной власти имел возможности действовать исключительно в рамках законов и по минимуму применять дискреционные возможности в управленческой деятельности. Суть методологического подхода заключается в определении формулы компетенции, учитывающей результаты указанного анализа, опираясь на стратегическую цель эффективного управления и выявления закономерностей в регулировании конституционно-правовых отношений, связанных с «компетенцией». Концепция «разумного законодательства» должна быть основой нормативной регламентации процесса децентрализации, который предусматривает согласование с конституционными требованиями и обеспечение примата местного самоуправления с рационально ограниченным распоряжением ресурсами (в том числе – финансовыми) на соответствующей территории.

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COMPARATIVE AND LEGAL ANALYSIS OF THE CONCEPT OF „MARRIAGE" BY CANON LAW AND THE FAMILY CODE OF UKRAINE

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Summary

The comparative and legal analysis of the term «marriage» in canon law and the Family Code of Ukraine is made, the procedure of formation of legal framework of regulating the solemnization of marriage is discussed, the main differences between state and church solemnization of marriage and differences between the registration procedures are determined. The correlation of the concept of „marriage" is examined. The amount of influence of a church on solemnization of marriage, understanding of the concept of „marriage" as a legal, spiritual and ethical category is also determined.

Key words: marriage, couple, Family Code of Ukraine, canon law, capacity to marry.

Аннотация

Осуществлен сравнительно-правовой анализ понятия «брак» согласно каноническому праву и Семейному кодексу Украины. Рассмотрен порядок становления правового механизма регулирования заключения брака, определены основные разногласия между государственным и церковным заключением брака и различия между регистрацией. Определен объем влияния церкви на заключение брака, понимание понятия «брак» как правовой и духовно-нравственной категории. Важность рассмотрения этой проблемы обусловлена разногласиями, которые возникают в процессе заключения брака по семейному законодательству Украины и каноническому праву, а также ролью и влиянием церкви как социального института на порядок его заключения.

Ключевые слова: брак, супруги, Семейный кодекс Украины, каноническое право, правомерность брака.

Formulation of the problem. Under the influence of modern development of legal relationships and the emergence of the new ones a research focuses on the impact of spirituality and understanding of a church as a social institution, its role in all spheres of a society, on understanding the concept of „marriage" in particular. The interpretation of the concept of marriage by the church is a socially important element for understanding the importance of such phenomenon for people and a society as a whole. Today it is clear that the formation of modern family law was influenced with canon law through the prism of religion as a part of the formation of legal awareness of citizens. Thus, the comparative and legal analysis of the concept of „marriage" due to the norms of canon law and the Family Code of Ukraine (FCU) makes it possible to identify differences and the influence of a church on realizing the importance of marriage.

Canon law, being today a spiritual analytics, has very deep roots. At the same time, the place of canons in the state is insignificant. Government policy is aimed at meeting various strategically important interests, but not at strengthening the legal culture of a society. There is the reason to assert the blatant disregard of basic principles of morality, absence of a specific system to restore human and spiritual values of a society. The appeal to canon law updates the examination of the depths of Scripture as a source of regulatory models that have influenced the formation of the modern legal culture [1, p. 41].

Topicality of the research. The importance of consideration of this problem is due to differences arising during solemnization of marriage by family legislation of Ukraine and canon law and the role and influence of the church as a social institution on the order of its solemnization.

State of the study. The theoretical basis of the study of such range of problems is the works of such outstanding researches as Z.V. Romovska, Ju.I. Sem'onov, L.M. Baranova. V.I. Borysova, I.V. Zhylinkova, V.F. Opryshko, F.P. Shul'zhenko, O.S. Olijnyk, V.V. Luts, R.B. Shyshka, S.V.Fursa, O.B. Hryniak, V.S. Hopanchuk, O.I. Kharytonova, V.K. Antoshkina, D.S. Borminska, I.V. Spasibo-Fat'eieva, L.V. Krasytska, Ju.A. Baliuk, etc. However, comprehensive comparative and legal studies of canon law and family legislation were not carried out, indicating the urgency and importance of a chosen research topic.

The aim and objectives of the study are to expand the concept of „marriage" in canon law and the Family Code of Ukraine, to investigate differences in the procedure of solemnization of marriage by canon law and the Family Code of Ukraine, to carry out comparative and legal analysis secular and religious marriage.

Presentation of the basics. Among a huge variety of public relations regulated by the legislation of our state, you can select the scope of rather complex human relations, namely marriage relations, based on solemnization of a marriage. According to the Article 21 of the FCU a marriage is a family union of a man and a woman registered in the body of registration of civil status acts (RCSA). Family legislation provides that a family living of a woman and a man without a marriage is not a ground for the emergence of the rights and responsibilities of spouses among them. On the grounds of a marriage a family is created. In Ukraine a marriage is recognized valid if it is properly registered. One of the principles of regulation of family relations is recognizing a marriage contracted only in government bodies of registration of civil status acts. This principle is based on the constitutional principle of family protection by a state (art. 51). The state is interested in strengthening and stability of a marriage, and therefore controls its solemnization and termination and protects only the marriages contracted in the bodies of RCSA. With the registration act a state confirms that this alliance receives public recognition and protection as the one that meets certain requirements [2].

Only registered in the bodies of RCSA a marriage creates legal consequences. Just from the date of state registration of a marriage, the couple gets a set of mutual rights and obligations, and a child born after the state registration of a marriage is considered to be born in a marriage.

A document confirming a marriage is a marriage certificate (a sample of which is approved by the Cabinet of Ministers of Ukraine), issued by the Department of RCSA. It has evidential meaning and confirms that the person has definite subjective rights, such as receiving alimony, pensions, housing or inheritance rights.

In contrast to the state contracting of marriage church solemnization and registration of a marriage is held by canon law and Christian rituals. A bride and a groom on their own are entitled to a wedding in the church. After the wedding ceremony the priest gives a church wedding certificate. But a state and a church do not cooperate because there is no legal basis for state recognition of the validity of the wedding certificate. As the law recognizes only registered (civil or secular) marriage contracted in bodies of RCSA, public attendance in the actual marital relationship or solemnization of their marriage by religious ceremony is a personal matter of every citizen, but does not entail any legal consequences of legal marriage. Setting the obligatory state registration of a marriage means that the actual marriage relationship, no matter how long they last, are not marriage in the legal sense and do not give rise to legal consequences.

There is no secret that in recent years more and more couples live together as one family without state registration of marriage,so-called „actual marriage" relationship – that is how the lawyers today define unregistered state relations between a man and a woman. Sometimes the notion of a „virtual marriage" is used. Nowadays, the relationship between a man and a woman can be called a „factual marriage" when, firstly, a couple lives in the same area, secondly, has common household chores and, thirdly, does not register their relationship in public authorities [3].Often the researchers recognize the concept of „marriage" as a contract. But a marriage does not contain all the required signs of the contract and has its own specific features, extrinsic for a contract. These features include: voluntariness, that is, the presence of voluntary consent of both in a spouses (Art. 24 of FC); achieving marriage age by a man and woman that marry (Art. 22 of FC); registration of a marriage in accordance with the body of law, designated byFC focus on the formation of personal family union of man and a woman. These concepts coincide also in canon law with the only difference in registration. Property relations in a marriage for persons contracting the marriage or a spouse during the marriage can be regulated by a marriage contract. And the contract already contains almost all the features of a civil and legal contract. The Family Code provides that as the unregistered marriage in the bodies of RCSA, but also a church marriage are not the reason for the emergence of property or family relationships. At the same time the Article 21 of the Family Code determines that the religious marriage ceremony is the basis for the emergence of the woman and man's rights and responsibilities of a spouses in the case when a religious marriage ceremony was held before the creation or restoration of the state bodies of registration of civil status acts. As for the marriage, unregistered in the bodies of RCSA, the Family Code recognizes the possibility of extending the regime of the right for joint ownership on the property acquired by persons who are not in a registered marriage, during cohabitation if the other isn't provided by a written agreement between them (Art. 74 of FC). Certainly a marriage itself is affected by the conditions of marriage, that are the ones without which there won't be a legally capable marriage. According to the Article 37 of the FC a legally capable marriage is the one that is contracted in compliance with the law. The cases of not legally capable marriage include: voidness of marriage in legal form and invalidity of marriage on the grounds provided for in paragraphs 1-3 of the Article 39 of the FC, and subsequent cancellation of the act's record of a marriage by the body of RCSA.

According to the Article 26 of the FC brothers can't marry their sisters as well as cousins, aunts, uncles, nephews and nieces. Persons who are related to with attitudes of adoption also cannot be married to one another. Marriage is allowed between the adopter and the adopted child only in case of cancellation of adoption. For all that paragraph 5 of the Article 26 of the Family Code solemnization of marriage between the adopter's child and the child adopted by him/her, also between adopted children – the right to contract a marriage can be given only by the court's decision. The case of marriage with a person recognized as legally incompetent is declared invalid.

We also should not forget about the existence of religious legal systems, which have influence on the procedure of solemnization of marriage. Canon law in modern

society is not frequently used, the Vatican is the only country to apply canon law. The principle of separation of a church and a state was declared by almost all the countries with large Christian communities that applied canon law. According to this, the church has the right to regulate only the internal church relations, and its provisions are considered solely as corporate that cannot contradict the law. The validity of canon law in its territory is recognized only by a few states. Among them is Cyprus. According to the Article 111 of the Constitution of Cyprus any questions on engagement, marriage, divorce, judicial separation or restitution of conjugal rights and family relationships should be governed by the law of the Greek Orthodox Church or with the church of another religious group, which was used in 1960, and should be under the jurisdiction of courts of such church. Moreover, the Constitution prohibits the legislature to invade the defined scope [4, p. 13].

The classic canonical concept of marriage becomes the idea of it as „the most comprehensive (physical, moral, economic, legal, religious) communication between a husband and a wife" [5, p. 8].

There are concepts of a religious marriage and a civil marriage. Though mostly people who contract a church marriage in modern times also contract a civil one, but historically it was not compulsory. A church marriage is carried out by the rituals of corresponding religion, a civil marriage is registered in the public institutions. People can live together, forming a family, but without solemnization a marriage. Historically, a marriage was the union between a man and a woman. In the modern era the laws of some countries allow civil marriages between persons of the same sex.

The Great Dictionary of the Ukrainian language defines a marriage as a family union, cohabitation of a man and a woman by mutual consent [6, p. 1625]. The wedding – a church marriage, is one of the sacraments – the union of man and a woman, consecrated by the church, where, it is believed, the LORD with his presence unites souls into a whole one [7]. In the sacrament of a marriage ceremony the Lord presents its gracious help to the couple to be able to struggle against all adversities that happen in their life together. A marriage is perceived by a church as a sacrament, moreover the sacrament is not so much a wedding, as the marriage as a union of a man and a woman, consecrated by the church. The church attaches great importance to this sacrament, reasonably believing that every family, blessed by the church, is its symbol. Orthodox theology believes that the formation of marriage is possible only in the church with the blessing of a bishop or a priest. According to this point of view, the church with its religious rites and prayers call on God's blessing on a bride and a groom. A marriage begins with the blessing of a church and continues throughout the life of the couple. It is believed that the Holy Spirit gives Christian spouses the grace that they can faithfully perform their duties and serve God together, deserving of eternal life itself.

Apostle Pavlo compares the sacrament of marriage with a mystery of Christ's unity with the church and says: „This is a great mystery..." (Eph. V, 32). „A man will leave his father and mother and join to his wife: and they will be one flesh" (Genesis II, 24) – defines God the essence of the mystery.

The ambiguity of legal nature of the institution of marriage has led to the complexity of its legal structure in Roman law that established conditions on which directly depended the validity of marriage [8, p. 61]. It is, in particular, marriage age (rubertas) of future husband and wife, that is 12 years for a woman and 14 – for a man; sonubium – no close relationship, and the absence of mental illness and staying in another marriage. Besides, the prohibition on marriage within the genus (gens) – exogamous nature of Roman marriage – is a long-standing rule which is always followed [8, p. 74]. Analyzing the articles of French Civil Code of 1804, a marriage can be defined as a union of a man and a woman based on mutual consent and aimed at a family creation. This individual right of public nature can neither be limited nor alienated. An important characteristic of a marriage is community of living and the availability of sex. As an argument L. Lypets offers that along with the state registration of marriage it is necessary to permit the registration of marriage in other ways, particularly in a church. The implementation of this proposal is possible by implementing the norms of the Civil Code of Spain and the Republic of Latvia into the Family Code of Ukraine, namely: 1) Article 49 of the Civil Code of Spain: „Every Spaniard has the right to marry in Spain or abroad: a) before a judge or an official specified by this Code; b) in a religious form prescribed by the law"; 2) Article 63 of the Civil Code of Spain: „Registration of religious marriages in Spain is held by simply providing the judge who leads the State Register a marriage certificate issued by a church, in which must be reflected all circumstances required by the law for the State Register"; 3) Article 53 of the Civil Code of the Republic of Latvia: „Solemnization of marriage is held by a head of the department of civil status records or a clergyman of religions specified in the Article 51, on the condition of keeping the rules of marriage solemnization"; 4) Article 58 of the Civil Code of the Republic of Latvia: „On every contracted marriage clerics have a period of fourteen days to send needed information to register solemnization of marriage at the department of civil status records, in which the marriage took place. For failure to do so the cleric may bear administrative responsibility" [9, p. 11].

A marriage can be called the foundation of every human life. Unfortunately, the lack of understanding of genuine truth of vocation of marriage remains a problem. Effective help in identifying this vocation is one of the priorities of a church, because a marriage is one of the most valuable wealth of mankind. A primary desire is to provide its assistance to those who already know the value of marriage and try to show fidelity to this life. And also with its voice to reach those who are unsure, worried and looking for the truth, and are unfairly prevented to live free according to the project of own family [10, p. 5]. One of manifestation of the church's desire to cooperate with the Christian spouses is a desire to help to understand God's plan concerning it. Especially this knowledge is gaining relevance in the context of today's events, when the family is undergoing rapid and profound changes in culture. In this difficult situation many families do everything to remain true value to those who are the foundation of the family institution. Some people have lost all understanding of the truth about marriage and family life. A loss of this understanding leads to irreversible destruction of organic family ties with the society for which it is the basis and relentless power through its mission to serve life [11, p. 50].

However, the concept of marriage contains a different meaning, the emphasis here is on the vision of marriage as unfathomable and inexhaustible mystery. Christian marriage becomes another way of understanding the true salvation. The main merit of this is of Jesus Christ whom all are equal and all in. There is a harmony in which unity does

not deny diversity. Apostle Pavlo points out sanctifying power of a couple in which a man helps a woman to attain salvation, and the woman, instead, helps the man. The couple, being a symbol of the indissoluble unity of Christ with a church, is still an unsolved mystery, which gives the salvation for Christian souls through love [10, p. 50]. The problems of the relationship between a state and a church still remain complex and not fully resolved. For example, the first major act of the Ukrainian independent state in church affairs was the law from January 1, 1919 on the supreme government of the Ukrainian Autocephalous Orthodox Church [12, p. 19].

Indisputable is the fact that the Orthodox Churches and the State of Ukraine have a lot in common and different in their positions. However, key differences between the state and the church are permission or prohibition of divorce.

Distinctive attention is the fact that civil law is not in the plane of understanding of a marriage as a holy sacrament. In chapter 2, Article 25 of the FCU is determined that individuals have the right to remarry only after the termination of the previous marriage. Persons, who have been married, can register repeated marriage only upon presentation of documents confirming the termination of the previous marriage (divorce certificate, death certificate of a spouse, decree of nullity of a marriage).

In the Orthodox Church a marriage is indissoluble because of the sacrament and through the guidance of Christ: „What God has put together, let no man divides." Instead, kindly understanding human weakness in the protection from sin, giving divorce the Orthodox Church claims that Grace could not be accepted. State laws, allowing divorce, cares only comprehensive study of the causes of divorce and fairness of the decision.

Common points between the church canons and the family law are evident in the example of unity, the main principle of which is monogamy. This automatically excludes the possibility of polygamy in a marriage. The Article 25 of the FCU establishes the principle of monogamy, which lies in the fact that a woman and a man can simultaneously live only in one registered marriage. Thus, a marriage cannot be contracted if a woman or a man lives in another registered marriage. Deciding this problem the law establishes a purely formal approach – only the fact of existence of a registered marriage is important, but not real marriage relationship. There is quite possible situation when the parties are separated for many years, have no common interests and don't communicate with each other. Nevertheless, a registered marriage is an obstacle to solemnization of a new one.

Simultaneous living in a marriage with two or more persons (polygamy) in Ukraine is not recognized at the level of family law and church law. Family law contains general rules on marriage for all citizens of Ukraine, regardless of their religion. Persons, whose religion allows polygamy, are able to live by the rules of their faith. However, the state registration of a marriage is made by secular and not religious principles, one of which is monogamy.

As the legal regulation of matrimonial and family relations in Ukraine is administered exclusively by a state, and is recognized only the marriage contracted in state bodies of registration of civil status acts, so, opposed to this assertion, a church quite radically argues that civil spouses means nothing to God. The church has every right to demand a church marriage from its believers. But this, however, does not mean that a state must introduce compulsory church marriage. It is because the couple has religious significance, the form of it should always be a matter of personal freedom. Christians are called to freedom. Both a church and a state should make every effort to apply, on the one hand, their power over their spouses in accordance with their objectives, on the other hand, to do it in cooperation and harmony.

The right of God takes precedence over any law – this is one of the main principles that define the vision of a church on the importance of a marriage. The family right is adopted by a church as a matter of canon law. Delimitation of jurisdictions is the best traced by the example of the impact of court decisions. The essence of delimitation is that judicial decisions of church courts in family matters, subject to a church, are not valid and do not oblige the believers, and vice versa, church courts cannot issue decisions in cases of spouses of believers that are under the jurisdiction of the government. Matrimonial cases have double legal consequences. The competence of the judicial authorities of a church extends to the internal affairs of the laity. In its turn, the government, without the consent of a church has allowed dissolution of a marriage – it is contrary to the teachings of the Orthodox Church. However, a church encourages respect for secular laws, for spouses of believers could also have civil consequences in a state. Christian holy duty is to give obedience to state authority, which the Lord teaches himself. We must follow the civil laws that serve to maintain moral order.

Conclusion. A church and a state care about a marriage that is reflected in the legal regulation of spouse's vitality. In particular, a state clearly regulates the rights and obligations arising from marriage and family relations, noting that they are protected by the law, except cases of using them for other purposes. Besides, using by family members their rights can in no way do harm to the interests of a society and a state, the rights of other citizens. This protection is carried out by the court, boarded of trustees, and bodies of registration of civil status acts.

Canon law, passing the revealed truths, also cares about the vocation to matrimony. Giving an impartial analysis of the events that have an impact on the formation of the ideological position of a society, the legislator seeks to respond to the new needs of spouses and not to lose the truth. A struggle between integrity and concession regarding amendments to the existing civil and religious laws constantly lasts. Therefore, diplomatic flexibility in defending issues on religious freedom, which does not go beyond constitutional provisions, helps to avoid confrontation and constructively approach to solving the problems.

Concluding comparative and legal analysis, we can summarize that a marriage is a means of regulation and legalization of relations between heterosexual persons. Religion was of great importance to people in shaping the knowledge and understanding of a marriage. Religious canons even now are an integral part of matrimonial relations. Some countries allow to contract a marriage only by church canons and traditions, and only such a marriage is considered valid, and thus generating legal consequences. But along with a church marriage appeared the notion of a secular marriage. This marriage is in no way associated with religion and does not provide for accessories of spouses to any particular religion.

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АНАЛИЗ ТЕОРЕТИЧЕСКИХ ПОДХОДОВ К ПОНИМАНИЮ ПОНЯТИЯ ГОСУДАРСТВЕННОЙ СЛУЖБЫ В УКРАИНЕ

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Summary

The article, based on an analysis of theoretical approaches of researchers from the field of administrative and labor law, the theoretical approaches to the interpretation of the term „public service". Emphasized that the civil service is quite multifaceted and includes both legal and organizational, social, political and other aspects. It is proved that among the authors there is no unity of opinion on how it should be understood civil service, with no consensus not only on inter-branch but the branch level.

Key words: theoretical approaches, civil service, administrative law, labor law.

Аннотация

В статье, на основе анализа теоретических подходов ученых из области административного и трудового права, исследованы теоретические подходы к толкованию понятия «государственная служба». Отмечено, что государственная служба является довольно многогранной и включает в себя как правовой, так и организационный, социальный, политический и другие аспекты. Доказано, что среди авторов нет единства во взглядах по поводу того, как следует понимать государственную службу, причем единодушия нет не только на межотраслевом, но и на отраслевом уровне.

Ключевые слова: теоретические подходы, государственная служба, административное право, трудовое право.

Постановка проблемы. Одним из ключевых составляющих элементов государственно-властного механизма является институт государственной службы, через который реализуется основная часть публично-управленческой деятельности. Отсюда очевиден тот факт, что от состояния данного института, от уровня его развитости прямым образом зависит качество и эффективность выполнения государством ряда своих основных задач и функций, в частности тех, которые осуществляются ею в целях обеспечения прав, свобод и законных интересов человека и гражданина, создания и поддержания условий для комфортной жизнедеятельности и нормального развития как отдельных лиц, так и общества в целом. Понятно, что любая более-менее существенная реформа системы публичного управления, предусматривает также и просмотр и совершенствование основ организации и функционирования государственной службы. На сегодня в сфере государственной службы, с целью ее совершенствования, сделан целый ряд важных позитивных шагов, однако не меньший их круг здесь имел и довольно противоречивый характер. В связи с этим ряд существенных аспектов данного института до сих пор не получил конструктивного решения, что обусловливает актуальность дальнейшего научного изучения проблематики государственной службы.

Состояние исследования. Следует отметить, что государственная служба как предмет (объект) научного изучения уже достаточно давно находится в поле зрения, как исследователей из области административного права и государственного управления (В.Б. Аверьянова, Ю.П. Битяк, В.К. Колпаков, Д.М. Павлов, С.В. Кивалов, В.М. Гаращук, С.Г. Стеценко, Ю.В. Ковбасюк, А.Ю. Оболенский, В.Я. Малиновский, А.Ф. Мельник и др.), так и теоретиков с трудо-правовой сферы (Н.Б. Болотина, В.С. Венедиктов, М.И. Иншин, П.Д. Пилипенко, Л.П. Грузинова, В.Г. Короткин, И.П. Лаврінчук, А.Н. Обушенко, Е.Ю. Подорожный, Ю.П. Дмитренко и др.). Такой значительный научный интерес к проблем-