

TRANSFORMATION OF LAW PRINCIPLES IN THE SYSTEM OF LAW OF UKRAINE UNDER CONDITIONS OF GLOBALIZATION

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The article is concerned with the research of transformation of law principles in the system of law under conditions of globalization. The author grounds the thesis that legal globalization promotes the role and significance of law principles, which determine an informative character of the system of law, the directions of its further development. Increase in the role and significance of law principles in the national system of law is stipulated by establishment of universal values and ideals, increase in the influence of international law principles and principles formed and set by globalization entities. The practice of law enforcement testifies that implementation of law principles is faced with a number of problems, the settlement of which affects further development of the national system of law.

Key words: rule of law, globalization, legal globalization, law principles, system of law.

Удовика Л.Г. ТРАНСФОРМАЦІЯ ПРИНЦИПІВ ПРАВА У СИСТЕМІ ПРАВА УКРАЇНИ В УМОВАХ ГЛОБАЛІЗАЦІЇ / Запорізький національний університет, Україна

Стаття присвячена дослідженню трансформації принципів права у системі вітчизняного права в умовах глобалізації. Автор обґрунтовує тезу, що правова глобалізація підвищує роль і значення принципів права, які визначають змістовний характер системи права, напрями її подальшого розвитку. Зростання ролі й значення принципів права у вітчизняній системі права зумовлено утвердженням універсальних цінностей та ідеалів, посиленням впливу принципів міжнародного права та принципів, які формуються й встановлюються суб'єктами глобалізації. Практика правозастосування свідчить, що реалізація принципів права стикається із низкою проблем, від вирішення яких залежить подальший розвиток вітчизняної системи права.

Ключові слова: верховенство права, глобалізація, правова глобалізація, принципи права, система права.

Удовика Л.Г. ТРАНСФОРМАЦИЯ ПРИНЦИПОВ ПРАВА В СИСТЕМЕ ПРАВА УКРАИНЫ В УСЛОВИЯХ ГЛОБАЛИЗАЦИИ / Запорожский национальный университет, Украина

Статья посвящена исследованию трансформации принципов права в системе отечественного права в условиях глобализации. Автор обосновывает тезис, что правовая глобализация повышает роль и значение принципов права, которые определяют содержательный характер системы права, направления ее дальнейшего развития. Возрастание роли и значения принципов права в отечественной системе право обусловлено утверждением универсальных ценностей и идеалов, усилением влияния принципов международного права и принципов, которые формируются и устанавливаются субъектами глобализации. Практика правоприменения свидетельствует, что реализация принципов права сталкивается с рядом проблем, от решения которых зависит дальнейшее развитие отечественной системы права.

Ключевые слова: верховенство права, глобализация, правовая глобализация, принципы права, система права.

Emergence of new legal, economic, social and political processes and phenomena, intensification of international cooperation in all fields caused by globalization and integration processes make changes to the system of law and legislation, raise a row of complicated theoretical and practical problems requiring immediate and adequate settlement. Ukrainian researchers are faced with the issues of new comprehension of legal regulation processes under conditions of globalization in accordance with the global and European legal principles and standards, of grounding new legal institutes, provisions and instruments, which are more effective in the essentially new public realities, of comprehension of the process of Ukraine's integration into international and intergovernmental institutes, etc. It results in conceptualization of new doctrine approaches, principles, provisions, institutes in the national law, which can be considered an answer to the current processes of legal globalization.

Not only legal science but also legal practice faced complicated problems as a result of strengthening and enhancing international cooperation in the field of public and private legal relations, forming of the global legal space. In recent years Ukraine has seen an essential transformation of normative principles of public relations legal regulation by adopting new codes, in particular, the Criminal Code, Civil Code, Family Code, Civil Procedure Code, Criminal Procedure Code, Business Code, Budget Code, Tax Code of Ukraine, Code of Ukraine of administrative legal proceeding, etc. At the same time, further legal development and necessity of a system character of modernization of the national system of law and legislation together with modernization of the Ukrainian state presuppose availability of the basis, common denominator of legal changes. The law principles can serve as the denominator, which will enable further legal advancement of the national system of law. According to

the correct statement of A. Kolodij, a prominent Ukrainian scientist, these principles "are directly related to an overwhelming majority of the key general theory issues, namely: law essence, provision of law, legal act, legal system, legal regulation, etc. They connect law and politics, economy, morals, provide a unity of different legal processes, forms, theories, ideas and conceptions, concept and category series" [1, 3].

Thus, the purpose of the given article is research of transformation of law principles in the national system of law under conditions of globalization.

In the last 10-15 years, the problem of law principles has become a subject of research and debate both of domestic and foreign scientists, who have analysed their essence, features and application in modern legal realities using different methodological grounds. The significant steps in interpretation of legal principles, first of all, the principle of the rule of law, were taken at the XXII and the XXIV World Congresses in Philosophy of Law (Spain, 2005; China, 2009 respectively). The theoretical achievements of the scientists, who researched the principles of law, namely: A. Zaets, M. Kozubra, A. Kolodij, S. Pogrebnjak, P. Rabinovych, V. Selivanov, O. Skrypniuk, S. Shevchuk, M. Tsvik, V. Gorodovenko and others constitute the methodological ground of the research. Among foreign scientists, those, who dealt with interpretation of values, norms and law principles under conditions of the global community formation, are of interest, namely: J. Habermas, D. Held, F. Laporta, W. Kymlicka, N. Fraser, G. Teunber, I. Young, I. Shimazu, R. Alexy, A. Marmor, L. Ferrajoli, Boaventura de Sousa Caynjc, J-R. Capella, N. MacCormick, etc.

In our opinion, law principles should be understood as an agreed system of fixed, general imperative demands, which implement essential social and legal values and ideals in a concentrated form, determine the character and direct legal development of a certain system of law and of a legal system. The stand of S. Pogrebnjak, a Ukrainian scientist, is essential in understanding the place and role of law principles in the system of law. He marks that law principles "live" not only in the language of law but, first of all, in consciousness of entities of law; they actually manifest themselves through legal activity and find confirmation in legal acts" [2, 7]. "It proceeds from the axiomatic priority of principles over other provisions of law that most provisions are formed under influence or as development of one or another principle or a group of principles and should not contradict them. Legal provisions are usually only different manifestations of principles' action, ways of their specification" [3, 28]. Grounding on the understanding of law principles proposed by national scientists it becomes clear that transformation of the law principles content, their expansion and enhancement affect the law essence, provisions of law, legal acts, system of law and legislation, and, finally, the national system of law. Thus, special attention is paid to the issue of transformation of law principles under conditions of globalization and their influence on the national system of law.

An important step in transformation of the role and significance of the law principles in the national system of law was recognition of the principle of the rule of law in the Constitution of Ukraine (Article 8) as "a fundamental principle of the legal and political system of Ukraine" [4, 145; 5, 148], which implements and guarantees the priority of rights and freedoms of a person and a citizen. Later this principle was fixed in other laws (Article 8 of the Code of administrative legal proceeding of Ukraine, Article 2 of the Law of Ukraine "On law courts and status of judges"). The conception of the rule of law started to be applied in Acts of the Constitutional Court of Ukraine, the Supreme Court of Ukraine and other adjudicating bodies.

As the heritage of the British political and legal doctrine of the XVIIth century (A. Dicey), in the middle of the XXth century the principle of the rule of law acquired a European significance, then it became of the world, universal significance. It was applied in the Preamble to the Universal Declaration of Human Rights (1948), the Statute of the Council of Europe (1949), the Convention for the Protection of Human Rights and Fundamental Freedoms (1950) and in a number of other EU Agreements, in the Charter of Fundamental Rights (2000). The rule of law is regarded as a global ideal, as "as a matter of course, the rule of the "natural", universal social law" [6, 22]. At the same time, in the opinions of many western scientists it remains "a debatable concept" [7]. The debatable character of the principle is also marked by the Ukrainian scientists, namely: V. Averjanov, S. Golovatyj, M. Kozubra, A. Kolodij, S. Pogrebnjak, P. Rabinovych, V. Selivanov, O. Skrypniuk, S. Shevchuk and others. All the scientists are unanimous that the principle of the rule of law implements and guarantees the priority of rights and freedoms of a person and a citizen sets legal restrictions for government authorities.

In understanding of the principle of law one should pay attention to the interpretation of the rule of law by the Constitutional Court of Ukraine: "In accordance with part one of Article 8 of the Constitution of Ukraine (the Law №254к/96-ВР) the principle of the rule of law is recognized and valid in Ukraine. The rule of law is government of law in society. The rule of law requires the state to implement it in legislative and human rights activities, in particular, in laws, which, first of all, must be full of ideas of justice, freedom and equality, etc. One of the rule of law manifestation is that law is not limited to legislation as one of its forms but includes other social regulators, in particular, moral code, traditions, customs, etc., which are legitimated by society and stipulated by a historically attained cultural standard of society. All these law elements are united by quality; this meets the ideology of justice, idea of law, which, to a certain degree, is reflected in the Constitution of Ukraine (the Law №254к/96-ВР).

Combination of naturally legal and positively legal comprehension of law in the light of justice as an attribute of the rule of law and a form of its manifestation can be referred to the advantages of the interpretation of the rule of law by the Constitutional Court of Ukraine. This aspect is outlined by P. Rabinovych, a prominent Ukrainian scientist. The scholar, specifying separate inaccuracies in the position as to the interpretation of the Constitutional Court of Ukraine, finally notices that "on the whole, it is fairly legitimate and hopefully its promulgation will assist to introduction of the rule of law in Ukraine" [8, 14]. At the same time, in the scientist's opinion, it is the judgment of the European Court of Justice that is more legitimate and weighted, taking into consideration the peculiarities of the nature, purpose (functions) and powers (competences) of each degree of jurisdiction and a substantial difference in the period of their existence, a number of cases being considered by them. According to P. Rabinovych, integrality of comprehension of law and humanism are common things in the interpretations of the rule of law by the judgments of the Constitutional Court of Ukraine and the European Court of Justice. The basic difference consists, first of all, in the situational character of the content interpretation of the conception of law (and thus, of the conception of the rule of law) by the European Court of Justice. Moreover, "the content of the conception of "the rule" (concerning law) has been revealed by the European Court of Justice in detail, more or less specified – in a number of criteria formulated by it in the judgments awarded in definite cases" [8, 15]. Thus, in understanding the nature and content of the principle of the rule of law it is expedient to address both to achievements of prominent scholars and to the judgments of the Constitutional Court of Ukraine and the European Court of Justice, which specify the interpretation of the rule of law and take into account concrete historical and subjective cases .

Further scientific research concerning interpretation of the rule of law goes on. Analyzing the fundamental methodological approaches in the Ukrainian legal thought to interpretation of the phenomenon of the rule of law, P. Rabinovych and O. Lutsiv distinguish a "memberwise" approach, according to which the rule of law can be understood through separate elucidation of the phenomena of law and rule, and an "integrative" one, by which this phenomenon is interpreted through pointing to those "significant components" it consists of. The authors ground a dialectical complementarity of the both approaches mentioned [9, 296-309].

Complication, versatility of the conception and of the content of the principle of the rule of law is caused by the fact that it represents syncretistic unity of legal, political, moral, cultural values and ideals, civilization, universal, cultural, international, national ideas of justice, good, welfare, truth, achievements of theory (legal, political) and relevant practical experience. The above mentioned makes almost impossible giving the only universal definition of the principle of the rule of law common for everyone. Taking into account the theory and practice of political and legal experience, the most expedient thing is understanding and interpreting the principle of the rule of law in the light of unity and correspondence of interrelated principles "as a specified sum of closely interwoven principles, which together constitute the core of the constitutionalism doctrine, and consequently is necessary for any ... democratic social system" [10, 10]. Establishment of the principle of the rule of law in Ukraine is seen, first of all, in the constitutional law and national legal proceedings, it runs through the entire process of the national law system transformation. Thus, the principle of the rule of law as well as other legal principles only perform a regulation function in interrelation and co-operation with the classical provisions of law, idea provisions, definition provisions, declaration provisions and other regulators.

Alongside with the establishment of the rule of law in the national system of law, generally recognized principles of international law, which operate as provisions directly incorporated in the national

legislation, are introduced. An increase in the influence of the principles of international law on the national system of law is a constituent of the general tendency of strengthening the influence of international law on the national law and metalegal influence of international law. Thus, Article 18 of the Constitution of Ukraine provides for that foreign-policy activities of Ukraine are carried out on the basis of generally recognized principles and provisions of international law [11, 61]. Establishment and expansion of international principles of law are also promoted by admission of Ukraine to certain international bodies and institutes. Under conditions of globalization among the principles of international law, the following principles are of significance: the principle of sovereign equality of the states, the principle of their territorial integrity, non-interference in the internal affairs of other states, the principle under which the states should not use threat of force in their relations, debatable issues should be solved by peaceful means, and other principles provided for by the Charter of the United Nations Organization (1945), the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations (1970), the Final Act of the Conference on Security and Cooperation in Europe (1975) and by some other international legal documents.

Principles of law are essential in developing model laws. Thus, in the Recommendations of the International Consultative Seminar "Model legislative act and national law" (April, 2000) conducted by the Interparliamentary Assembly of the Commonwealth of Independent States among the forms of harmonization and rapprochement of national legislations of the member states the application of such a method of model legal regulation as "general principles" was recorded. For this reason modern scholars state that development of the principles of a relevant legislative act is inseparable from the ideological basis of the legal field or of another division selected as an object of making recommendation provisions (model documents). In addition, at the beginning there should be stipulated both presence of the principles and necessity of approbation of corresponding legal ideas of the planned model act, which could develop them for further application in a regional scale and serve a certain base for national legislation in a relevant field [12, 37].

The principles of law in general and the principles of international private law, in particular, implement the fundamentals of international cooperation inside the state, require states to establish in national law the provisions and rules, which are in conformity with the ideas, standards of international communication and its regulation, which are generated by international legal principles.

It is generally accepted that one of the most crucial problems of the late XX th and early XXI st century is the global ecological problem. In its settlement close collaboration and cooperation of international community on a certain common, generally recognized basis are essential. The principles of international ecological law serve as such a basis, namely: the principle of international nature protection cooperation, the principle of preventing transborder damage to the environment, the principle of responsibility for damage to the environment, the principle of preliminary evaluation of affect for the environment, the principle of information exchange on an ecological situation at national and regional levels, the principle of evaluation of transborder ecological consequences of planned activity, the principle of freedom of research and use of environment and its components as well as the other principles set in the Stockholm Declaration of 1972 [13, 682-687] and the Rio Declaration on Environment and Development of 1992 [14, 687-692]. The given and some other principles have influenced the development of the National Ecolaw and legislation.

The emergence of new principles of law in the national law system and transformation of the existing ones are promoted by the declared course of Ukraine's entering the EU, which is entitled by the member-states to implement fundamental sovereign rights. The above-mentioned results in the fact that directly or indirectly the given tendencies are applied not only to the EU member-states but candidate-states and states, including Ukraine, which do not carry such a status but are in contractual relations with the European Union concerning fulfillment of pre-admission commitments (first of all, adaptation of national legislations to the EU legislation). New models and management principles, which are formed under influence of the global administrative space, appear. The introduction of new models and management principles, which are of a decentralizing, polycentric, innovative character and which combine the principles of state and market control over personal freedom and new forms of collective and personal responsibility, is carried out within the process of renewing the administrative law doctrine, conducting the administrative reform in Ukraine. Scientific achievements of leading scholars in administration field, namely: V. Averjanov, V. Kolpakov, Yu. Bityak, I. Koliushko, V.

Timoschuk, O. Andrijko and others formed the theoretical ground of the Conception of Administrative Reform, whose content constituent was introduction of public administration, which included the following: priority of legislative regulation of functions, powers and rule for procedure of executive power bodies; improvement of legal protection of rights and freedoms of citizens by means of forming a full-fledged administrative justice, extra-judicial protection of rights and freedoms of citizens, judicial issues of court and off-court case consideration; strengthening responsibility of executive power bodies, its officers for decisions, actions or inactivity to citizens whose rights were violated; introduction of control mechanism over executive power performance on part of the society through institutes of parliamentary and direct democracy; providing administrative services by public administration; improvement of public administration procedures; forming new financial and economic grounds for functioning of public administration, etc.

The stated organizational and legal grounds of the administrative reform testify the application of new legal principles, on the basis of which substantial changes take place in public administration, transition from the paternalistic state to the regulated state model, from a "guardian-state" to the "partner-state", from the "hierarchical state" to the "receptive state" etc. is made, the theory of "public administration" is formed, where administration performs the function of a mediator – "moderator" – between interests of different citizens (customers), organizations, groups. Eventually, it assists in transition from positivistic understanding of administrative law as a "state-centered" administrative law to a "man-centered", "public-service" law; in establishment of liberal legal ideology, principle of the rule of law.

An increase in the role and significance of the principles of law in the national system of law is stipulated by spreading of the principles formed and set by globalization entities, namely: international universal and regional organizations, multinational corporations, finance and information groups, international non-governmental organizations and other national and supranational institutes. Among these principles, those determining mutual relations between the state and TNK are of essential interest. They are as follows: the principle of partnership, co-operation in settlement of common economic, financial and other problems, the principle of relative independence of globalization entities, the principle of collaboration and mutual assistance in solving the issues of global governance and other problems closely related to them [15, 3-15]. Undoubtedly not all the declared principles of mutual relations of different entities are implemented equally. Unfortunately, some of them, in particular, the principles of partner mutual relations of the state and TNK as to preserving peace and providing human rights [16, 549] are of a merely declarative and formal character in most cases.

The problems of "market of law" formation, implementation of the principles of law, first of all, the rule of law under conditions of globalization are in the sphere of interest of prominent Western scientists. At the XXII World Congress in Philosophy of Law (Granada, 2005) F. Laporta, a Spanish scientist, spoke about non-compliance of law globalization and market economy globalization, non-compliance of the global law being formed with the ideal of the rule of law. He said: "...preference is given to the systems of law, which are most favorable for activity of multinational corporations, that is they are characterized by cheap labor force and low taxes but, at the same time, by non-democratic regimes distant from the ideal of the rule of law" [17, 52]. We can agree with the opinion of the author that the modern global law exists in a form of the so-called "soft law", whose compulsory character is grounded not on external compulsion but on common advantage (e. g. the WTO). However, "soft law" has trouble with its implementation and observance, and thus it does not meet all the requirements of the rule of law. Juridization of international relations carried out by creating supranational political and legal unions (e. g. the EU) is more prospective in globalization of the rule of law.

The analysis of the practice of implementation and observance of the principles of law, first of all, the rule of law, of settlement of international disputes in a peaceful way, of protection of human rights under globalization is rather complicated and contradictory in many cases. More and more often aspirations of separate states to maintain dominating positions on the international arena under conditions of globalization results in violation of the principle of non-interference into internal affairs of other states. Taking into account further strengthening of fight of states for exhaustible natural resources, tightening measures against international terrorism, transnationally organized crime, a wave-like character of global financial and economic recessions, catastrophic destruction of ecological environment we can say about further increase and intensification of global threats, deep deformations of legal regulation at different levels, complication of realization and observance of the principles of law under conditions of globalization transformations. Thus, sharing the idea about establishment of the principle of the rule of

law in the national system of law we should pay attention to the global crisis of the principle of the rule of law itself. Under conditions of globalization legal collisions rise even when other principles are observed, first of all, the principle of non-use of force and threat of force and the principle of non-interference into internal affairs of a state, the principle of territorial integrity of the state and the principle of self-determination of people; the principle of settlement of international disputes in a peaceful way and the principle of protection of human rights. It is a global character of public transformations, strengthening of co-operation and interdependence of modern states, peoples, civilizations that has substantially strengthened the role and significance of the principles of law in international and national legal systems, complicated realization and observance of considerable part of the principles of international law. A trade conflict between Ukraine and Russia was an unpleasant example, which caused European resonance. The economic and trade pressure demonstrates the aspiration of Russia, despite the existing principles, to compel Ukraine to enter the Customs Union. Evaluating the mutual relations between Ukraine and Russia, the European Parliament expressed the opinion, according to which it considers that the conduct of Russia in relation to Ukraine in the field of trade does not meet the principles and provisions of international law and is unacceptable.

Thus, legal globalization promotes a wider use of the principles of law in the national system of law (first of all, of the principle of the rule of law). It is stipulated by establishing universal legal values and ideals, strengthening of influence of the principles of international law and the principles, which are formed and set by globalization entities (in particular, by universal and regional organizations, multinational corporations, finance and information groups, international non-governmental organizations and other national and supranational institutes). New principles determine the processes of development and reform of the national law. Recognition of the new principles of law, considerable part of which are formed and set by globalization entities, in the domestic system requires weighted and sound steps, adaptation and harmonization of the national legislation with the new principles and provisions. Practice of law application testifies that implementation of many principles is faced with a row of problems, the settlement of which will effect further development of the national system of law and eventually the national legal system.

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ІДЕОЛОГІЯ ГЛОБАЛІЗАЦІЇ У СУЧАСНОМУ СВІТІ ТА ЇЇ ВПЛИВ НА ДЕРЖАВУ І ПРАВО: АСПЕКТИ ТЕОРІЇ

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Наукова стаття присвячена дослідженню впливу на державу і право ідеології глобалізації у сучасному світі. Аналізуються наукові погляди на поняття і сутність глобалізації та глобалізму як ідеологічної основи глобалізаційних процесів. Визначаються напрями позитивного та негативного впливу глобалізації на національну державу і право. Досліджується сучасний стан національної правової ідеології у контексті глобалізації та формулюються пропозиції щодо напрямків та способів її формування з урахуванням останніх тенденцій та загроз глобалізаційних процесів.

Ключові слова: ідеологія, глобалізація, глобалізм, правова ідеологія, правова культура, держава, право, транснаціональні корпорації, негативний вплив, правова система, стратегія розвитку.

Войтанович А.И. ИДЕОЛОГИЯ ГЛОБАЛИЗАЦИИ В СОВРЕМЕННОМ МИРЕ И ЕЕ ВОЗДЕЙСТВИЕ НА ГОСУДАРСТВО И ПРАВО: АСПЕКТЫ ТЕОРИИ / Запорожский национальный университет, Украина

Научная статья посвящена исследованию воздействия на государство и право идеологии глобализации в современном мире. Анализируются научные взгляды на понятие и сущность глобализации и глобализма как идеологической основы глобализационных процессов. Определяются направления позитивного и негативного воздействия глобализации на национальное государство и право. Исследуется современное состояние национальной правовой идеологии в контексте глобализации и формулируются предложения относительно направлений и способов ее формирования с учетом последних тенденций и угроз глобализационных процессов.

Ключевые слова: идеология, глобализация, глобализм, правовая идеология, правовая культура, государство, право, транснациональные корпорации, негативное воздействие, правовая система, стратегия развития.

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