GENERAL PRINCIPLES OF LAW IN THE CONTEXT OF IMPROVING THE CONTEMPORARY NATIONAL LEGAL SYSTEM

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In the theory of State and law the division of principles of law into general legal (or general), inter-branch, and branch is widely recognized.[1] In addition, principles operating in other structural subdivision of the system of law — sub-branches and institutes of law — often are singled out additionally in doctrinal writings.[2] Usually they state that these principles are inherent respectively to law as a whole, several branches of law, or individual branches, sub-branches, or institutes of law and function as a system.

When characterizing general principles of law, legal doctrine usually draws attention to the fact that they encompass the legal foundations as a whole because they extent to the forming of the very legal principles and to all spheres of impact of these fundamental principles and further the unity and stability of the legal foundations formed of the system of legislation[3] and determine the qualitative peculiarities of all legal norms of a national legal system irrespective of the specific nature of the social relations regulated by them.[4]

It should agree that the regulatory nature thereof is one of the most essential indicia of principles of law: principles fixed in law acquire the significance of general rules of behavior having a general obligatory, authoritative character.[5] In this event the

[1] See, for example, *M. I. Baitin,* Сущность права (современное нормативное правопонимание на грани двух веков) [Essence of Law (Contemporary Normative Legal Understanding at the Edge of Two Centuries)] (2d ed.; Moscow, 2005), p. 149; *E. V. Skurko,* Принципи права в современном нормативном правопонимании [Principles of Law in Contemporary Normative Legal Understanding] (Moscow, 2008), p. 75; V. A. Kuchinskii (ed.), Общая теория государства и права [General Theory of State and Law] (2d ed.; Minsk, 2004), p. 196.

[2] See, for example, V. K. Babaev (ed.), Теория государства и права [Theory of State and Law] (Moscow, 1999), pp. 228–229; M. V. Tsvik and O. V. Petryshyn (eds.), Загальна теорія держави [Fundamental Principles of Theory of State and Law] (Kharkov, 2009), pp. 198–199.

[3] *A. V. Malko,* «Принципы права как важнейшая составляющая правовых основ развития общества» [Principles of Law as Major Component of the Legal Foundations of the Development of Society], in N. I. Matuzov and A. V. Malko (eds.), Принципы российского права: общетеоретический и отраслевой аспекты [Principles of Russian Law: General Theoretical and Branch Aspects] (Saratov, 2010), p. 43.

[4] Tsvik and Petryshyn (eds.), Загальна теорія держави [Fundamental Principles of Theory of State and Law] (Kharkov, 2009), p. 201.

[5] *A. M. Kolodyi,* «Принципи права: генеза, поняття, класифікація, місце і роль у правовій системі» [Principles of Law: Genesis, Concept, Classification, Place, and Role in the Legal System of Ukraine], in M. V. Tsvik and O. V. Petryshyn (eds.), Правова система України: історія, стан та перспективи [Legal System of Ukraine: History, Contemporary State, Prospects] (Kharkov, 2008), I, p. 693.

normative regulatory character is inherent to varieties of principles such as general principles of law. However, to what extent is this feature observed in those requirements which frequently are relegated to general principles of law (for example, the principles combine persuasion and coercion in law,[1] unity of rights and duties,[2] guaranteeing of rights and freedoms of citizens, combining of stability and dynamism in law, division of law into public and private)?[3] What normative regulatory capacity may be discovered in such principles? The coordination of these requirements with the greater recognition of the understanding of general principles of law as an autonomous source of law being acquired raises certain doubts.[4]

All this conditions the need for a more careful study of the nature of general principles of law and rethinking the post-Soviet approach to forming the list of such principles on the basis of international and foreign experience. In our view, this would enable the Ukrainian legal system to develop in the context of modern world legal processes, not remaining on the periphery of global legal development.

It should be noted that for the first time mention of general principles of law as a source of law emerged in international law. We recall that Article 38(1)(c) of the Statute of the International Court of Justice, annexed to the United Nations Charter and an integral part thereof, is the most important and best known example of this approach, pursuant to which the Court applies «the general principles of law recognized by civilized nations». In turn, this provision reiterated in full Article 38(3) of the Statute of the Permanent Court of International Justice of 16 December 1920 (permanent judicial organ attached to the League of Nations).

Mention of the principles of law in international treaties had existed earlier. An example is the I Hague Convention on the Pacific Settlement of International Disputes (Article 73) of 18 October 1907, pursuant to which an arbitral tribunal might apply the principles of law when interpreting the compromis submitted by the parties. Mention also should be made of the XII Hague Convention on founding an international prize court of 18 October 1907 (though it did not enter into force), which empowered the court in the absence of general rules to adopt an award in accordance with the general principles of justice and equity.

The fact should be noted that the Statute of the International Court merely declared an existing but not yet codified customary law norm. Commencing from 1794 the Mixed Anglo-American Commission created under the Jay Treaty expressly substantiated its awards on general legal principles. Over time, arbitral tribunals followed that example continuously and in so doing the competence of their awards was never challenged on this basis. Consequently, taking all this prehistory into account, one may conclude that after confirmation of the Statute of the International Court of Justice, the general principles of law were recognized

[1] *O. I. Tsybulevskaia*, «Принцип права: нравственное измерение» [Principles of Law: Moral Measure], in Matuzov and Malko (eds.), Принципы российского права: общетеоретический и отраслевой аспекты [Principles of Russian Law: General Theoretical and Branch Aspects] (Saratov, 2010), p. 193.
[2] *Iu. V. Barzilova*, «Принцип единства прав и обязанностей» [Principle of Unity of Rights and Duties], in Matuzov and Malko (eds.), Принципы российского права: общетеоретический и отраслевой аспекты [Principles of Russian Law: General Theoretical and Branch Aspects] (Saratov, 2010), p. 217.
[3] Tsvik and Petryshyn (eds.), Загальна теорія держави [Fundamental Principles of Theory of State and Law] (Kharkov, 2009), pp. 201–204.
[4] See, for example, *V. A. Tolstik*, Иерархия российского и международного права [Hierarchy of Russian and International Law] (Moscow, 2001), p. 10; Tsvik and Petryshyn (eds.), Загальна теорія держави [Fundamental Principles of Theory of State and Law] (Kharkov, 2009), pp. 193–194.

as a direct source of international law, irrespective of any resolution of a treaty character.[1]

The clause «recognized by civilized nations» in the formulation of the ICJ Statute is rather interesting, having been inserted at the suggestion of Elihu Root, an American lawyer, in 1920 when drafting the Statute of the Permanent Court of International Justice in the Committee of Jurists of the League of Nations and retained by the United Nations when drafting the Statute of the ICJ in 1945 as a reaction against Nazism.[2] Having regard to the sovereign equality of States, today all nations are considered to be «civilized»;[3] therefore, this clause, as a rule, is regarded as superfluous.[4] This happened because the existence of civilization assumes the recognition of law.[5]

Nonetheless, another explanation exists in doctrinal writings, according to which States which are progressive from the standpoint of legal development are considered to be civilized.[6] Therefore, it is advisable to orient oneself during the consideration of disputes by these principles. This enables certain provisions to be deemed to be general principles of law which are not necessarily accepted by all domestic legal orders. Having in view the diversity of the modern world, when establishing the universal nature of recognizing principles, it is necessary to be guided by the requirements of common sense,[7] applying the comparative legal method and orientating oneself in the practice which has formed in the principle legal families.

The question of the legal nature of general principles of law has been of traditional interest in international law. The view is rather popular that general principles of law are principles of natural law which operate within the system of international law, comprise the foundation thereof, and are the basis for verifying positive norms for validity. Positivists, as a rule, assert that these principles arise from international agreements and customary law and are not capable of adding anything new to international law other than reflect the consent of States.[8] Soviet specialists usually defended the approach under which general principles of law reiterate fundamental prescriptions of international law, for example, the principle of peaceful coexistence, the principle of the prohibition of the use of force, the principle of sovereign equality of States, and others.[9] The Soviet approach was, in turn, affected by the apprehension that principles of Western European and North American international law might be imposed on other States by means of their being proclaimed to be general principles of law.[10]

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[1] *Quoc Ding Nguyen*, Международное публичное право [International Public Law] transl. from French (Kyiv, 2000), I, p. 210.
[2] *V. M. Koretskyi*, «Общие принципы права» в международном праве [«General Principles of Law» in International Law], in Iu. S. Shemshuchenko (ed.), Академічна юридична думка [Academy Legal Thought] (Kyiv, 1998), I, pp. 265, 289.
[3] *P. Malanczuk*, Вступ до міжнародного права за Ейкхерстом [Akehurst's Introduction to International Law] (Kharkov, 2000), p. 86; *Nguyen*, Международное публичное право [International Public Law] transl. from French (Kyiv, 2000), I, p. 211.
[4] *M. N. Shaw*, International Law (6th ed.; 2008), p. 98.
[5] *Wolfgang Graf Vitzhum* et al. Международное право [International Law], transl. from German (Moscow, 2011), p. 96.
[6] *A. Aust*, Handbook of International Law (2005), p. 8.
[7] *J. Touscoz*, Міжнародне право [International Law], transl. from French (Kyiv, 1998), p. 207.
[8] This view is refuted by pointing to the fact that general principles of law have autonomous significance: if respective States preserve in their domestic legal orders principles whose existence at the international level they deny, the content of the said principles all the same continues to operate as a general principle of law. *Vitzhum* et al. Международное право [International Law], transl. from German (Moscow, 2011), p. 97.
[9] *Shaw*, International Law (6th ed.; 2008), p. 99.
[10] *Vitzhum* et al. Международное право [International Law], transl. from German (Moscow, 2011), p. 97.

One must concur that general principles of law should not be identified with principles of international law, even if they formulate general principles or main ideas in law. The nature and content of principles of international law and general principles of law are different. Principles of international law are formed on the basis of existing international customs and treaties. In turn, general principles of law are formed on the basis of the functioning of national legal systems as a natural law or result thereof.[1]

Consequently, by their origin general principles of law are principles of municipal law. International law merely states principles already established, existing, in national legal systems. The majority of specialists accept this treatment today.[2] Nonetheless, broader interpretations exist. Some jurists assert that general principles of law may occur both from municipal and from international law. For example, in the dissenting opinion from the Decision of the International Court of Justice of 20 April 2010 in the case concerning Pulp Mills on the Uruguay River (Argentina v. Uruguay), Judge Trindade asserts that the reference to general principles of law means not only references to principles which are present in *foro domestico*, but also principles inherent in a specific branch of international law (for example, international environmental law recognized principles of prevention and precaution). This cannot be the subject-matter of serious disagreement. One should take into account that the principles of a branch of international law usually also emanate from municipal law.

In investigating the phenomenon of general principles of law, one should bear in mind that their emergence as an autonomous source of international law is linked with the problem of «non liquet», given the existence of gaps in international law. Unlike a national judge, an international judge in this situation does not have the right to render a decision without a special authorization of the subjects of international law. The application of general principles of law enables a case to be decided without going outside the limits of existing law and to consider each international situation as a question, or subject-matter, of law.[3] Therefore, general principles of law are defined as formal sources of law, that is, as one of the means of forming law, with whose assistance rules become an integral part of positive law.[4] It should be noted that in contemporary international law general principle of law, as a rule, are applied subsidiarily. Their practical significance is reduced because of the continuing codification of international law; however, as before, situations are possible in which other sources of law do not contain a legal basis for the adoption of decisions.[5]

The category of «general principles of law» is used in European law and in the law of the Council of Europe.

The general principles of the Union's law are mentioned in the Treaty on the European Union (Article 6).[6] They are regarded as primary law of the European Union, as an addition to the norms of the founding treaties of the European Union. Deeming general principles of law to be an autonomous source of law of the European Union is based on the need to overcome gaps when the principle of limited individual powers operate (the European Union operates only within the limits of competence

[1] *V. G. Butkevych*, Міжнародне право [International Law. Fundamental Principles of Theory] (Kyiv, 2002), p. 126.
[2] *Nguyen*, Международное публичное право [International Public Law] transl. from French (Kyiv, 2000), I, p. 210.
[3] Ibid., I(2), p. 211; Shaw, International Law (6th ed.; 2008), p. 99.
[4] We recall that legal doctrine singles out material, or substantive, sources of law — creative forces of law, socio–political factors conditioning the content of legal norms.
[5] *Vitzhum* et al. Международное право [International Law], transl. from German (Moscow, 2011), p. 95.
[6] *Official* Journal of the European Union — C 083, 30 March 2010, p. 19.

granted to it by member States on the basis of the founding treaties). Specialists in European law assert that in individual spheres the founding treaties of the European Union form an imperfect legal system, the gaps in which need to be filled. One means of filling gaps is applying unwritten legal principles.[1] It is emphasized that general principles of law are the «children of national law»,[2] that is, national legal systems of the member States of the European Union are the source of their origin. These unwritten principles were introduced by the European Court of Justice from the law of member States by a means reminiscent of the development of the common law by English courts.

In the law of the Council of Europe general principles of law are mentioned in the 1950 Convention on Protection of Human Rights and Fundamental Freedoms (Article 7). According to this norm, the rule «no punishment without law» shall not «... prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by civilized nations». In this event reference is made to the application of criminal law against the State and its «law-abiding executors», the prohibition against retroactivity not concerning «crimes strengthened by the State».[3]

In the second half of the twentieth century, general principles of law also began to be considered as an autonomous form (or source) of law in the family of Romano-Germanic law.[4] This is regarded as one of the major aspects of the evolution of modern Romano-Germanic law.[5]

In our view, the reasons for the emergence of this concept in legal systems of Romano-Germanic law differ from the reason which existed in international and European law. Whereas international law resolved the problem of «non liquet» with the assistance of general principles of law, and European law the problem of limited powers of the European Union, national legal systems should have taken certain preventive measures with regard to the creation and application of laws entailing arbitrariness, having taken into account the dangerous practice of the use of positive law by individual European States contrary to its purpose. One such measure is the conception of general principles of law as an autonomous source of law enabling one to avoid identifying positive law with laws or State acts.

After the Second World War, the Federal Supreme Court and the Federal Constitutional Court of Germany noted in their decisions that constitutional law is not confined to the text of the Basic Law, but includes certain general principles which the legislator did not clarify in a positive norm, that a supra-positive law exists (especially principles immanent to a constitutional legal order but not reflected in the text of written laws) that bind even the constitutive power of the legislator.[6] The Constitutional Court of the Federal Republic of Germany, for example, substantiated the existence of the principle of proportionality: this is not expressly consolidated in

[1] *Matthias Herdegen*, Європейське право [European Law], transl. from German (Kyiv, 2008), pp. 181–182.
[2] *Takis Tridimas*, The General Principles of EU Law (2d ed.; 2007), p. 8.
[3] *P. A. Albrecht*, Забута свобода: Принципи кримінального права в європейській дискусії про безпеку [Forgotten Freedom: Principles of Criminal Law in European Discussions on Security], transl. from German (Odessa, 2006), p. 45.
[4] *John Bell*, Principles of French Law (1998), p. 14; *R. David* and *C. Jauffret-Spinosi*, Основные правовые системы современности [Basic Principles of Modern Legal Systems], transl. from French (Moscow, 1996), pp. 108–111.
[5] *P. Leger*, Великие правовые системы современности: сравнительно-правовой подход [Great Modern Legal Systems: Comparative Law Approach] (Moscow, 2009), pp. 38–39.
[6] *David* and *Jauffret-Spinosi*, Основные правовые системы современности [Basic Principles of Modern Legal Systems], transl. from French (Moscow, 1996), p. 110.

the 1949 Constitution of Germany, but the principle is a judge-made criterion for determining the conformity, or proportionality, of selected State means consolidated in legal acts to a certain legitimate purpose.[1]

In addition, the example of the law of the European Union and the tradition of the common law in England in all likelihood influenced recognizing general principles as sources of law in the countries of Europe, the common law being considered «the reservoir of all common and universal principles whose establishment in a law was not considered to be essential».[2]

It should be noted that judicial power played a large role in confirming this idea both in the law of the European Union and in national law. Doctrinal writings often assert that judicial practice is the main source of general principles.[3] The conception that legal norms may be extrapolated not only from normative legal acts, but also from general principles of law makes it possible for courts to apply law even when respective legal prescriptions are lacking, thereby removing from courts the accusation that they exceed their powers and distort legislation.[4]

The specific content of a principle usually is resolved by courts in the course of a careful, but constant legal development and only when this becomes necessary when deciding a concrete case (the path «from case to case»). This policy of courts finds its clearest expression in the practice of the European Court for Human Rights. Probably this is because in formulating specific requirements that form the content of principles of law, if often uses the phrase «inter alia». When mediating the administration of justice, general principles are seemingly transformed into specific normative legal requirements,[5] and a so-called completion of law is effectuated.[6]

Ukrainian courts also are beginning to be aware (albeit slowly) of their important role in the process of recognizing general principles of law and clarification of those requirements which form the content thereof. These actions find their external expression in judicial acts. The Constitutional Court of Ukraine, for example, exerts efforts for the Ukrainian legal system to accept certain general principles of law (especially, the principles of legal certainty and proportionality).

In a decision of 22 September 2005, No. 5-рп/2005, for example, in a case concerning the permanent use of land plots, the Constitutional Court of Ukraine pointed out that the requirement of certitude, clarity, and unambiguousness of a legal norm arises from the constitutional principles of equality and fairness, because otherwise the uniform application thereof cannot be ensured and an opportunity for unlimited discretion is allow in law-application practice that inevitably leads to arbitrariness.[7] The decisions of the Constitutional Court of Ukraine of 29 June 2010, No. 17-рп/2010,

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[1] *S. Shevchuk*, «Значення загальноправового принципу пропорційності для визначеності конституційності обмежень щодо реалізації конституційних прав і свобод» [Significance of the Fundamental Legal Principle of Proportionality for the Certainty of Constitutional Limitations on the Realization of Constitutional Rights and Freedoms], Вісник Академії правових наук України [Herald of Academy of Legal Sciences of Ukraine], no. 1 (2000), pp. 70–71.

[2] *S. Shevchuk*, Судова правотворчість: світовий досвід і перспективи в Україні [Judicial Law-Making: World Experience and Prospects in Ukraine] (Kyiv, 2007), p. 283.

[3] See, for example, *J.-L. Bergel*, Общая теория права [General Theory of Law], transl. from French (Moscow, 2000), p. 166.

[4] *T. C. Hartley,* Основы права Европейского сообщества [Basic Principles of the Law of the European Community], transl. from English (Moscow, 1998), pp. 143, 145.

[5] *N. S. Bondar*, Власть и свобода на весах конституционного правосудия: защита прав человека Конституционным Судом Российской Федерации [Authority and Freedom in the Scales of Constitutional Justice: Protection of Human Rights by the Constitutional Court of the Russian Federation] (Moscow, 2005), p. 259.

[6] *R. Zippelius*, Юридична методологія [Legal Methodology], transl. from German (Kyiv, 2004).

[7] *Офіційний* вісник України (2005), no. 39, item 2490.

in the case of the constitutional recourse of the Plenipotentiary of the Supreme Rada of Ukraine for Human Rights relating to the conformity to the Constitution of Ukraine (constitutionality) of Article 11, paragraph one, subpoint (5), indentation eight, «On Police», and also of 22 December 2010, No. 23-рп/2010 relating to the case concerning administrative responsibility in the sphere of ensuring road traffic safety,[1] emphasize that one of the elements of the supremacy of law is the principle of legal certainty, according to which the limitation of the fundamental rights of man and citizen and the embodiment of these limitations in practice is admissible only on condition of ensuring the predictability of the application of legal norms establishing these limitations. That is, the limitation of any right, the Court noted, must be based on criteria which make it possible for a person to distinguish lawful behavior from unlawful and to foresee the legal consequences of their behavior.

Direct and indirect references to the principle of proportionality may be found also in acts of the Constitutional Court of Ukraine. The principle of proportionality, for example, is expressly mentioned in the decision of 2 November 2004, No. 15-рп/2004, relating to the case concerning the assignment of a milder punishment by a court.[2] The Court stated that a rule-of-law State should use not excessive, but merely necessary measures conditioned by their purpose; from the standpoint of the principle of proportionality, the interests of ensuring the protection of rights and freedoms of man and citizen, ownership, public order, and security, and so on may justify legal limitations of rights and freedoms only in the event of their adequacy to socially-conditioned purposes.

In decisions of 24 March 2005, No. 2-рп/2005 in the case relating to the tax pledge[3] and of 12 June 2007, No. 2-рп/2007, relating to the creation of political parties in Ukraine,[4] the Constitutional Court of Ukraine mentioned the constitutional requirement of commensurateness, closely linked to the proportionality. In the decision of 20 June 2007, No. 5-рп/2007, relating to the case concerning creditors of enterprises of the municipal form of ownership,[5] the Court refers to the principle of commensurateness (or proportionality), which is an element of the idea of law and ideology of fairness and requires that a limitation of rights established in a law correspond to a lawful and socially-essential purpose.

Attention needs to be drawn to the fact that general principles of law have a close link with the theory of natural law: they prove the subordination of law to the behests of fairness in that form as the last is understood during a certain era and at a certain moment. In the view of Rene David, no legislative system can avoid such adjustments and reservations; their absence may lead to inconsistency between law and fairness.[6] General principles of law often are based on «natural justice» common to all legal systems,[7] and therefore they traditionally are linked with the existence of natural law; these principles form the moral foundation of law, its spiritual foundation. Georg Schwarzenberger emphasized that general principles of law are a means

[1] *Офіційний* вісник України (2010), no. 52, item 1746.
[2] *Офіційний* вісник України (2004), no. 45, item 2975.
[3] *Офіційний* вісник України (2005), no. 13, item 674.
[4] *Офіційний* вісник України (2007), no. 54, item 2183.
[5] *Офіційний* вісник України (2007), no. 48, item 1991.
[6] *David* and *Jauffret-Spinosi,* Основные правовые системы современности [Basic Principles of Modern Legal Systems], transl. from French (Moscow, 1996), p. 108.
[7] *Malanczuk,* Вступ до міжнародного права за Ейкхерстом [Akehurst's Introduction to International Law] (Kharkov, 2000), pp. 87–88.

of carrying over natural law into positive law.[1] One cannot exist, indeed, without certain principles of legal order. We refer, in particular, to the principles of good faith, prohibition of abuse of right, prohibition of unfounded enrichment, compensation of losses, the principle establishing that one cannot have equal power over equal, and the principle that one cannot be a judge in one's own case.[2]

General principles of law provide to a legal order (within a State and at the international level) its essential axiological measure; they underlie *jus necessarium* and point to the values which determine the legal order as a whole. These concern in full measure both material and procedural law principles. General principle of law form the foundation not only of interpretation and the application of norms of law, but also the very process of law-making; they reflect *opinio juris*, which forms the foundation for the forming of law. In the view of Trindade, these principles are a reflection of the objective «idea of fairness», on the basis of which they ensure the unity of law affecting the foundations of the necessary law of nations. Trindade believes that they emerge from the human or legal consciousness as an ultimate material source of any law.[3]

At the same time, it should be noted that some general principles of law were generated by the requirements of legal logic and legal technique (for example, *lex specialis derogat legi generali; lex posterior derogat legi priori; nemo plus iuris ad alium-transferre potest, quam ipse haberet*).[4]

One may accept that the extensive recognition of general principles of law as formal sources of law is linked with the conclusion of an alliance (or convergence) between natural law and positive law. Oppenheim emphasized that the formulation of Article 38(3) of the Statute of the Permanent Court of International Justice and the Statute of the International Court of Justice give evidence of the perception of the view of Hugo Grotius, which gives its due and acknowledges the decisive importance of the wills of States as the creators of international law, without tearing international law away from legal experience and the practice of mankind as a whole.[5] We note additionally that the said compromise found reflection also at the level of terminology: whereas the phrase «general principles of law» may be regarded as tribute to natural law, the phrase «recognized by civilized nations» imparts to the term a positivist nuance. In our view, thanks to general principles being deemed to be an autonomous source of law, one may avoid the undesirable juxtaposition of positivist and supra-positivist (natural) principles of law; all general principles in accordance with this conception are regarded as an element of positive law.

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[1] *Koretskyi*, «Общие принципы права» в международном праве [«General Principles of Law» in International Law], in Iu. S. Shemshuchenko (ed.), Академічна юридична думка [Academy Legal Thought] (Kyiv, 1998), I, pp. 291.

[2] *Touscoz*, Міжнародне право [International Law], transl. from French (Kyiv, 1998), p. 208; M. V. Buromenskii (ed.), Міжнародне право [International Law] (Kyiv, 2005), p. 48.

[3] *F. Bydlinski*, «Основные положения учения о юридическом методе. Часть вторая» [Basic Provisions of the Doctrine on Legal Method. Part Two], Вестник гражданского права [Herald of Civil Law], VI, no. 2 (2006), p. 208.

[4] *Malanczuk*, Вступ до міжнародного права за Ейкхерстом [Akehurst's Introduction to International Law] (Kharkov, 2000), pp. 87–88; *Touscoz*, Міжнародне право [International Law], transl. from French (Kyiv, 1998), p. 208; M. V. Buromenskyi (ed.), Міжнародне право [International Law] (Kyiv, 2005), p. 126; *Butkevych*, Міжнародне право [International Law. Fundamental Principles of Theory] (Kyiv, 2002), p. 126; *P. E. Zemskova*, Общие принципы права, признанные цивилизованными нациями, в международном праве [General Principles of Law Recognized by Civilized Nations in International Law] (Moscow, 2010), p. 10 (abstract diss, kand. iurid. nauk).

[5] *L. Oppenheim*, Международное право [International Law], ed. H. Lauterpacht (Moscow, 1948), I(1), p. 6.

The question of the functions which general principles of law perform in the process of the application of law is important for modern theoretical and practical jurisprudence. In our view, general principles of law:

(1) assist in interpreting norms of law. Because law should be regarded as an attempt to clarify general principles, the person making the interpretation should seek that variant of interpretation which is best embedded in the operating legal system. In this event, the variant which is consistent with the principles of law having deep system-forming significance is most well-founded.[1] Searching for the meaning of a law (subject of law-making), the interpreter should proceed from the assumption that this meaning lies in developing general principles of law, and not in violating them;

(2) act as grounds for a review of legal acts. The reference to principles may enable violations of rights to be eliminated that were committed during the adoption and application of norms of law. According to the Code on Administrative Proceedings of Ukraine (Article 2), for example, administrative courts have powers to verify normative-legal and individual legal acts or decisions of subjects of authoritative powers for their conforming to such general principles of law as equality, proportionality, good faith, impartiality, and so on. General principles of law acquire special significance as criteria on the basis of which control is exercised over the use of discretionary powers;[2]

(3) help overcome gaps in law. The use of general principles of law traditionally is linked with the use of analogy of jus, that is, resolution of a case (when there is a gap and when there is no «analogous» legal norm) on the basis of general or branch principles of law.[3] In our view, this approach needs to be revisited. We suggest that the direct application of general principles of law is the next subsidiary means of overcoming gaps, after analogy of lex and analogy of jus. Analogy of jus and the direct application of general principles of law are distinguished by the fact that a logical method of analogy underlies analogy of lex and analogy of jus: the idea of law already realized in one place in a law, with the assistance of the application of the rule of equality, is generalized and thus extends the sphere of its application to other instances or situations.[4] The use of analogy is structured according to the notion of a primordial inner consistency of law and the presumption of the consistency of the legislator: if he provided for this instance, then normally he would also decide to regulate an instance in essence similar the same way.[5] However, when turning to general principles of law, we proceed not from the similarity of relations. In order to regulate relations which are not stable, we see, to elaborate a specific rule which would best coordinate with general principles of law. Simultaneously, it is necessary to take into account that the application of general principles of law is a means of overcoming gaps, which is very rarely used when administering justice. This is explained by the improved state of the development of positive law, when virtually all situations requiring legal regulation have received respective direct or indirect regulation in legislation.

[1] *Bydlinski*, «Основные положения учения о юридическом методе. Часть первая» [Basic Provisions of the Doctrine on Legal Method. Part One], Вестник гражданского права [Herald of Civil Law], VI, no. 1 (2006), p. 234.
[2] *Herdegen*, Європейське право [European Law], transl. from German (Kyiv, 2008), p. 239.
[3] *P. M. Rabynovych*, Основи загальної теорії права та держави [Fundamental Principles of the Theory of Law and State] (10th ed.; Lviv, 2008), p. 179.
[4] *Zippelius*, Юридична методологія [Legal Methodology], transl. from German (Kyiv, 2004), p. 106.
[5] *E. V. Vaskovskii*, Цивилистическая методология. Учение о толковании и применении гражданских законов [Civilist Methodology. Doctrine on the Interpretation and Application of Civil Laws] (Moscow, 2002), pp. 342, 348.

The list of general principles of law is among the most interesting problems in the contest of this study. Having regard to the relative youth of an autonomous Ukrainian legal system, a rejection of succession from principles of socialist law, and the aspiration to accept European values, it is advisable for us to study international (including European) experience relating to the determination of such a list.

Bin Cheng, author of the classical work on the application of general principles of law in international law, singled out four groups of these principles:

(1) the principle of self-preservation (which allows the exile of foreigners, taking measures towards achieving the public well-being (expropriation, requisition, compensation) and public security, which justifies the right to self-defense, and so on);

(2) the principle of good faith (requires good faith in treaty relations (for example, compliance with the requirements *sub spe rati (pacta sunt servanda)*), prohibits abuse of right, and also provides for the existence of other requirements, especially *fraus omnia corrumpit, nullus commodum capere de sua injuria propria, allegans contraria non est audiendus*, the duty to maintain the status quo, the duty to notify about a change of policy);

(3) principles of law connected with legal responsibility (principle of individual responsibility, principle of fault, principle of full compensation, principle of direct link);

(4) principles of law connected with a judicial proceeding *(nemo judex in re sua, audi alteram partem, iuri novit curia, res judicata,* and others*)*.[1]

In a popular modern textbook of international law, Nguyen suggests a somewhat different grouping:

(1) principles connected with a general conception of law (prohibition of abuse of right and principle of good faith, necessity of compensation of harm in the event of a violation of an obligation, principle of legal certitude and ensuring trust in the law, and others);

(2) principles of treaty law (principle of useful operation, principles which concerning unlawful consent and interpretation, taking force majeure circumstances into account, determination of the period of limitations in accordance with the dominant view in theory);

(3) principles concerning disputes on compensation of harm (principle of compensation in full, requirement of existence of a cause-effect link between an act and the causing of harm, and so on);

(4) principles of a suit proceeding (principles carried over to the international legal order from national judicial systems);

(5) principles of compliance with human rights;

(6) principles concerning the regime of the operation of legal acts.[2]

There are usually relegated to general principles of law of the European Union:

(1) the principle of equality (non-discrimination), in accordance with which any discrimination on any grounds is prohibited in the European Union, especially based on sex, race, color of skin, ethnic or social origin, genetic features, language, religion or faith, political or any other views, affiliation to a national minority, ownership, origin, physical or mental defects, age, or sexual orientation.

[1] *Bin Cheng*, General Principles of Law as Applied by International Courts and Tribunals (1994).
[2] *Nguyen*, Международное публичное право [International Public Law], transl. from French (Kyiv, 2000), I, pp. 212–213.

The law of the European Union provides two forms of prohibited discrimination: (1) direct discrimination, under which the attitude towards a person is less favorable than those who are or who would be with respect to others in a comparable situation on any grounds under which discrimination is prohibited; (2) indirect discrimination, which occurs when at first glance a neutral legislation provision, criterion, or practice places persons of any protected group in a specially unfavorable position in comparison with other persons, except for instances when the legislative provision, criterion, or practice is objectively justified by a legitimate purpose, and the measures realizing this purpose are proper and necessary;

(2) the principle of proportionality, which means that in order to achieve a certain purpose agencies of power cannot impose duties on persons which exceed the established limits of necessity arising from the public interest. If the established duties are clearly incommensurate with the purposes, this measure may be deemed to be invalid because the losses for those whose interests are affected exceed the positive result obtained in the public interests;

(3) the principle of legal certitude and protection of legal expectations. We recall that legal certainty in the law of the European Union as an obligation of authoritative agencies to ensure to persons ease in elucidating the law and the possibility to take advantage of this right when necessary. In the law of the European Union this task is resolved with the assistance of various conceptions, the most important of which are the non-retroactivity of laws, vested rights, and legitimate expectations.

In turn, the principle of legitimate expectations means that the lawful measures of the European Union should not deceive a person convinced that a certain result is achieved if he will act in accordance with legal norms. Nonetheless, the principle of legitimate expectations is limited by criteria of advisability (the law protects expectations only of rational and prudent persons) and legality (expectations should have a legal character);

(4) the principle of a general prohibition of arbitrariness, assuming that measures to be applied by subjects of authoritative powers should have legal grounds, contain a reasonable substantiation, be effectuated in compliance with human rights and the principle of the supremacy of law, and should be subject to respective control;

(5) the principle of defense of or respect for fundamental rights. Fundamental human rights, no doubt, are an integral part of the legal order of the European Union. In guaranteeing these rights, the European Union is obliged to be guided by constitutional traditions common to the European Union countries and therefore cannot encourage measures incompatible with fundamental rights that are recognized and protected by the constitutions of European Union States. Respective international treaties on the protection of human rights also may serve as orientators which must be adhered to within the framework of European Union law;

(6) the right to defense, providing especially that every person whose rights and freedoms have been violated has the right to an effective remedy in court; every person has the right to a fair, public, and timely examination of his case by an independent and impartial court created on the basis of a law; in addition, every person may resort to the assistance of an advokat or defender and appoint his own representative.[1]

[1] For a characterization of the general principles of law, see *Tridimas*, The General Principles of EU Law (2d ed.; 2007), pp. 59–417; *Herdegen*, Європейське право [European Law], transl. from German (Kyiv, 2008), pp. 184–186; *Hartley*, Основы права Европейского сообщества [Basic Principles of the Law of the European Community], transl. from English (Moscow, 1998).

In our view, the majority of these principles is already regarded or may be regarded as general principles of Ukrainian law. Recognition of these general principles as formal sources of Ukrainian law should happen in the process of constant communication between judges, the community of jurists, and the general public. In other words, judicial decisions which are based on general principles of law should be approved by legal practitioners and legal doctrine, and should receive public recognition. Taking into account the modern state of the Ukrainian legal system, one may assume that this process will not be easy or fast.

Pohrebniak S. General Principles of Law in the Context of Improving the Contemporary National Legal System

Abstract. In the paper the nature of general principles of law is studied, the post-Soviet approach to the formation of the principles on the basis of international and foreign experience is rethought.

Key words: law, principles of law, sources of law, natural law, positive law.

Погребняк С. П. Загальні принципи права в контексті удосконалення сучасної національної правової системи

Анотація. У статті досліджено природу загальних принципів права, переосмислено пострадянський підхід до формування принципів на основі міжнародного та зарубіжного досвіду.

Ключові слова: право, принципи права, джерела права, природне право, позитивне право.

Погребняк С. П. Общие принципы права в контексте усовершенствования современной национальной правовой системы

Аннотация. В статье исследована природа общих принципов права, переосмыслен постсоветский подход к формированию принципов на основе международного и зарубежного опыта.

Ключевые слова: право, принципы права, источники права, естественное право, позитивное право.