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LEGAL PERSONALITY IN UKRAINIAN PRIVATE LAW

Ukraine is regarded as a civil law country. In the civil law tradition, affirmative asset partitioning captured the attention of legal scholars in the late nineteenth and early twentieth century when the notion of juridical person was fully distinguished from that of "asset independence". At this stage in the civil law system, it became clear that in order to create an affirmative asset partitioning it would not be necessary to form a new legal entity or juridical person. The modern Ukrainian legal system was formed within the Russian Empire in the nineteenth century and was greatly influenced by German legal traditions. The German legal system was based mainly on fundamentals of Roman law. Thus, like most of continental Europe, Russia and Ukraine adopted Roman civil law traditions.

The legal entity of beings other than the human (juristic person) had been established since the early Roman law. Such entity is represented by the State, ecclesiastical bodies and education institutions which had long been recognized as having legal entity distinct from their members.

Another recognized juristic person is the corporation, which is established under the doctrine of corporate personality. Although this doctrine has been legally acknowledged, it is often describes as an «essentially a metaphorical use of language, clothing the formal group with a single separate legal entity by analogy with a natural person». Majority of the theories on corporate personality contended that the legal entity of the corporation is artificial due to the existence of the body corporate as a legal person is not real. It only exists because the law of the state recognized it as legal person and it is recognized either for certain purpose or objectives. Being merely a metaphor or an analogy, corporate personality is not entirely arbitrary and therefore must respond to the organizational realities of the corporation as well as conforming with and making intelligible the treatment of organization as legal actors.

The metaphor of personality is indeed useful in describing many of the corporation's traditional and modern corporate attributes, namely, separate legal entity, the rights to own property, to take its own legal proceedings, limited liability, to sue and to be sued and perpetual succession. Placing these attributes under the head of separate legal entity has resulted to selection of these few salient features from what would otherwise be an overwhelmingly complex reality.

The Fiction Theory is supported by many famous jurists such as Von Savigny, Coke, Blackstone and Salmond. Under this theory, the legal personality of entities other than human beings is the result of a fiction. Hence, not being a human being, corporation cannot be a «real person» and cannot have any personality of its own. Originally, the outward form that corporate bodies are fictitious personality was directed at ecclesiastic bodies whereby the doctrine was used to explain that the ecclesiastic bodies could not be guilty of a delict as they have neither a body nor a will. The ecclesiastical courts applied the Canon law which made use of the Romanistic Fiction theory in dealing with religious corporations that came under their jurisdiction. The lawyers in the temporal courts later borrowed the theory from their colleagues in the Courts of Christian. As a result, the fiction theory became an established theory of the English Law. Under fiction theory, rights and duties attached to corporation as artificial person totally depend on how much the law imputes to it [1, p. 57].

In 2000, Hansmann and Kraakman published an essay entitled «The Essential Role of Organizational Law» in the Yale Law Journal. Since then, a lively doctrinal debate has developed over the notion of asset partitioning and its attributes. According to Hansmann and Kraakman, a firm has two fundamental attributes: a well-defined decision-making authority and the ability to bond its contracts with an existing pool of assets [2, p. 1340 – 1341].

The division of the Ukrainian culture into two branches (Eastern and Western) is mainly reflected in the development of the private law. Thus, the tradition of law of the Western Ukraine shows a considerable influence of the West, and in the Eastern part of Ukraine the East European tradition is noticeable. These influences have formed the Ukrainian private law as it is on the current stage. They explain

the inconsistent attitude of the society towards the division of the law into private and public law, and the continuous discussion of lawyers on the practicability of separate economic law, i.e. the refusal to include family law in the civil law etc. These peculiarities of the Ukrainian private law tradition have influenced the development of the civil law conception of today's Ukraine as well.

The legal system of the Soviet Union was based on civil, or continental, law traditions. After the 1917 revolution and the emergence of the Union of Soviet Socialist Republics (USSR), the main effect of legal reform was an imposition of socialist ideological principles on the existing legal system and legal traditions. Fundamental changes were made in the sphere of civil law – everything connected with private property was removed from the Civil Code of 1922.

Socialist property, which constituted the heart of the new legal system, was regulated and implemented in the fullest manner in the Soviet Union, particularly following the Constitution of the USSR of 1936. The soil and its treasures were declared to be the exclusive property of the state and could be only used by other subjects. Socialist property enjoyed a special protection in civil law, through the ban on execution and prescription, as well as in penal law. USSR citizens owed their property to the state. They were entitled to own only such objects as were deemed necessary to satisfy their personal needs of material and cultural nature. As their individual property a small parcel of land was ceded to them by the *kolkhozes* only for use. Small private enterprise of single peasants and tradesmen, allowed in constitutional and statutory way, in the economic practice was at best tolerated.

So the scholars of Soviet Union received the task to explain and implement the idea of the national economy as a single, centrally directed state-owned enterprise that is included as a link in the apparatus of the state. Under such conditions, strictly speaking, there is only one entity, one entity – the state, and individual enterprises are only special economic organs of the state. The Authority also has no personality, because it is a single whole with the formation, whose body it is, does not and can not have any of its independent goals and interests, and its function is that it operates in.

The theory of the collective (A. V. Venediktov) based on the fact that the basis of the civil capacity of state organs is not only the unity of the socialist state property, but also the operational management of its constituent parts. Operative management of the property company is carried out not only the government-appointed leader, but also the collective state body, as it is in his actions embodied activities of the public entity. This theory is not free from internal contradictions, nonetheless turned out to be convenient in practical application, in particular, it is possible to justify and consolidate the foundations of property law in the liability of legal persons. But it is worth to mention that in law, excluding the Soviet period, in the field of private law have always been two kinds of actors (individuals) – a natural or legal person. Category entity was introduced in the scientific and practical revolution in order to, firstly, emphasize the personal nature of education, which is not a human individual, and secondly, to set off the features of a collective legal identity of union, as compared with other subjects of law – human personality [3, p. 75 – 76].

Soviet practice and, accordingly, the Soviet legal science is introduced in terms of subjects of law enterprise – a concept previously was located outside the legal scope and traditionally considered as the organizational and technical category or as a matter of (business). This enterprise provides category generalizing – of entities operating alongside such actors as a citizen of the state.

Since the beginning of legal reform in 1991, the legal community in Ukraine has recognized the adoption of a new civil code as vital. When fundamental changes occur in the economy with a move toward a market principles oriented laws. Ukraine's first major effort to overhaul its company law was the enacting in 1991 of both the Law on Enterprises and the Law of Ukraine «On Economic Societies» dated 19 September 1991 (the «Law on Companies») [4, p. 682]. Since then, the Law on Enterprises has been annulled and the Law on Companies has undergone extensive amendment. But Ukraine's company law still contains numerous defects in need of repair. The cause of these defects lies primarily in the fact that laws are generally passed on an ad hoc basis, with each new law or regulation coming into being to address a specific problem, but little thought apparently being invested in how the various laws are to interrelated.

On 1 January 2004, Ukrainian civil legislation underwent a fundamental transformation. The adoption of new Civil and Commercial Codes signified a new age for the national legal system, as these two legislative acts became the new basis for the development of some of the key legal spheres in Ukraine. There is a downside to this, however, because any defects in the Codes will be magnified in their importance through the promulgation of subordinate legislation built upon them.

The situation was intended to be fixed by the new Civil Code and Commercial Code as of January 16th,

2003. However, the codes were drafted by different teams of drafters without adequate coordination or common framework, which is why they have inherent controversies making the legislative regulation unclear and ambiguous. The draft of Commercial Code was presented by political group promoted another set of rules dominated by the planning economy ideology. A general expectation was that the battle between the proponents of the two codes would result in adoption of one of the competing Codes as they operated to negate each other and created two very different systems of regulation. Yet, both Codes became law simultaneously (1 January 2004) and the inconsistencies between them contributed to deterioration of the Ukraine's legal system. To conclude, the enterprises operate under the rules of the Commercial Code and the business associations operate under the rules of the Civil Code, the law on business associations and the new law on joint-stock companies [5].

The Civil Code of Ukraine 2004, the Economic Code 2004 and the Law of Ukraine' on Companies' 1991 provide the fundamental legislative framework for regulating activity of legal entities in Ukraine [6]. While the Civil and Economic Code cover the issues of mergers and acquisitions transactions from a predominantly general legal perspective, the Law of Ukraine' on Companies'states more specific regulations for the purchase and sale of Ukrainian legal entities. In accordance with Article 80 of the Civil Code recognizes entity as such organization established and registered in manner prescribed by law. The Civil Code restricted the choice of the corporate forms in which a business for gain could be conducted to business associations. All other sui-generis forms – private, daughter, collective, state, treasury, communal enterprises had to be transformed to business associations. The Civil Code provides for two types of legal entity: private and public. Private legal entities are created on the basis of bylaws by natural or legal persons. Public legal entities may be created by decision of the president of Ukraine, state bodies, and Crimean or local self-governing bodies. Legal entities may be created in the form of companies, institutions and other forms stipulated by law. A company is an organization created by combining the property of the founding parties, who enjoy participation rights in the company. A company may be created by one person, unless otherwise provided for by law. The Economic Code identifies business entities as: economic organizations, which are (i) legal entities incorporated under the Civil Code of the Ukraine; (ii) state, municipal and other enterprises established under the Economic Code; and (iii) other legal entities which pursue economic activities and which are registered in accordance with the law. This legal provision leads to the conclusion that in Ukrainian legislation there is no even basic concept what distinct legal personality is.

The influence of Soviet-type economy and regulation firstly confirms by the existence of state and municipal enterprise as subjects of law. Secondly collective «quintessence» of the legal entity inherits in the concept of the legal entity. As was mentioned according to the Article 80 of the Civil Code recognizes entity as such «organization». The concept «organization» is treated like organizational unity is expressed in the definition of goals and objectives entity, to establish its internal structure, competence authorities about their activities, the order of termination of the legal person and other constituting a unity guidance, but was borrowed from the Civil Code of 1963.

In summary, the legal personality in the law of Ukraine is in the state of flux and experiences substantial problems working out even the most basic concepts, such as distinct legal personality, taking for granted in more developed economies. The current state of the Ukraine's law is characterizes with artificial nature of the majority of the rules, i.e. failure to shape provisions of laws in conformity with the underling economic logic of the commercial relations which these rules regulate.

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SUMMARY

Akimenko Y. **Legal personality in Ukrainian private law.** – Article.

The article explores the tradition of the civil law legal system and the impact of its development on the formation of approaches to the essence of the legal entity. Application of Ukrainian legislation on the legal entities identified a variety of theoretical and practical problems. Analysis of the various theories of the legal entity and their manifestations in the regulations suggests that, as in the modern Ukrainian civil law, there is no single position in defining the essence of the legal entity, which is explained by the ambiguity of the concept of the legal person.

Keywords: private law, legal entity, legal personality.

АННОТАЦИЯ

Акименко Ю.Ю. **Юридическая личность в частном праве Украине.** – Статья.

В статье исследуются традиции романо-германской правовой системы, влияние правовой системы и её развития на формирования подходов к определению сути юридического лица. Применение действующего законодательства Украины о юридических лицах выявило множество теоретических и практических проблем. Анализ различных теорий юридического лица и их проявления в нормативных актах позволяет сделать вывод о том, что и в современном украинском гражданском праве отсутствует единая позиция в определении сути юридического лица, что объясняется неоднозначностью понятия юридического лица.

Ключевые слова: частное право, юридическое лицо, хозяйственные общества, юридическая личность.

АНОТАЦІЯ

Акименко **Ю.Ю. Юридична особа в приватному праві України**. – Стаття.

У статті досліджуються традиції романо-германської правової системи, вплив правової системи та її розвитку на формування підходів до визначення суті юридичної особи. Застосування чинного законодавства України про юридичних осіб виявило безліч теоретичних і практичних проблем. Аналіз різних теорій юридичної особи та їх прояви в нормативних актах дозволяє зробити висновок про те, що і в сучасному українському цивільному праві відсутня єдина позиція у визначенні суті юридичної особи, що пояснюється неоднозначністю поняття юридичної особи.

Ключові слова: приватне право, юридична особа, господарські товариства, юридична особа.