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PRINCIPLES OF SUBSIDIARY APPLICATION OF THE LAW

Formulation of the problem. For the application of subsidiary legislation to meet the requirements of a particular truth it should be based on principles – the starting ideas of its being, which express the most important rules and the foundations of this type of law and state, which are homogeneous with the essence of law and constitute its main features, feature versatility, higher imperative and relevance, meet an objective need to build and strengthen a particular social system.

Taking this value as one of the possible, at the same time we pay attention to the fact that the actual identification of the concepts of «principles», «ideas» and «features» of law (and their interpretation both internal and external forms of content) seems not entirely accurate. If the term «principles of law» and «right ideas» can still be used as such, denoting the same or closely related legal category, their relationship with the concept of «traits law» looks different. If the «foundations» – is an ideological «grounds» methodological «basis» of law, they may not display the right features because they are the basis, the foundation occurrence, building of the most essential features of law.

The principles of law, permeating all the legal rules are the backbone of the national legal system, fulfill an important role in the regulation of social relations. Strict and accurate compliance of the law norms means also the implementation of the principles embodied in it. That is why when addressing specific legal issues must first be guided by the principles of law and, of course, to know these principles.

Analysis of the recent researches and publications. Today, it is continues an active debate among the scientific community and judges around this question, as subsidiary application of the legislation is an important tool to address gaps in civil and contiguous relationship. Many publications of both domestic and Russian jurists devoted to the theoretical and practical aspects of the problems of the principles, including: S.S. Alekseev, I.G. Babich, N.Y. Golubev, A.G. Didenko, S.I. Klim, A.M. Kolodiy, R.A. Maidanyk, N.S. Saniahmetovoyi, A.F. Jumper, E.O. Kharitonov, N.P. Chubohy, S.V. Shmalenya.

The aim of the study is to establish the principles of subsidiary application of law in civil and contiguous relationships.

Presenting the main material. In legal science similar principles have already been proposed, particularly S.V. Shmalenya notes that the use of analogies should be carried out in compliance with the principles of legality, fairness, reasonableness and expediency. But the proposed principles do not reflect the specifics of legal regulation of civil relations, including signing a contract that is not provided by the Civil Code of Ukraine, which determines, firstly, the recognition it as the source of law, and secondly, the parties may use the analogy at the conclusion of the contract that is not provided by the civil acts, resulting that the determined principles of analogy in the light of the use of law, not use, do not meet the sectoral norms of civil law (Article 3 of the Civil Code of Ukraine). It appears possible to determine the application of the principles of subsidiary application of the law in civil law through the general principles of civil law. Thus, Article 3 of the Civil Code of Ukraine secured the first general principles of civil law, which are: 1) the inadmissibility of arbitrary interference in the private sphere of life; 2) the inadmissibility of deprivation of property rights, except in cases established by the Constitution of Ukraine and the law; 3) freedom of contract; 4) freedom of entrepreneurial activity that is not prohibited by law; 5) judicial protection of civil rights and interests; 6) fairness, reasonableness and good faith.

Basing on the general principles of civil law, it is possible to identify and begin to study the application of the principles of subsidiary legislation. Thus, as the subsidiary application of the legislation is a kind of legislative technique that allows dumping legislation irrational duplication of identical or similar rules and concepts in related areas of law, and also application of subsidiary legislation may be made by

all participants of civil relations we can identify the following principles of this legal phenomena:

1. The principle of the inadmissibility of arbitrary interference in private life. This means the requirement to ensure «the sovereignty of the individual.» That means subjects, subsidiary applying provisions of the Civil Code of Ukraine, cannot arbitrarily interfere in the personal life of an individual or a legal entity. Thus, the Civil Code of Ukraine protected the right to privacy of health (Article 286 of the Civil Code of Ukraine), the right to privacy and confidentiality (Article 301 of the Civil Code of Ukraine), the right to personal papers (Article 303 of the Civil Code of Ukraine), right for privacy of correspondence (Article 306 of the Civil Code of Ukraine), protect the interests of an individual during photography, film, television and video recordings (Article 306 of the Civil Code of Ukraine), safeguarding the interests of an individual who is depicted in the photographs and other artistic works (Article 306 of the Civil Code of Ukraine).

The Constitution of Ukraine also guarantees the inviolability of personal and family life, except cases that are provided by the Constitution of Ukraine. It is prohibited the collection, storage, use and dissemination of confidential information about a person without his consent, except in cases specified by law, and only in the interests of national security, economic welfare and human rights. Every citizen has the right to get the acces to the information about themselves in public authorities, local governments, institutions and organizations, which is not a state or other secret, protected by law (Article 32 of the Constitution of Ukraine).

Everyone is guaranteed judicial protection of the right to refute false information about himself and members of his family and the right to demand of the removal of any information and the right to compensation for material and moral damage caused by the collection, storage, use and dissemination of such incorrect information.

2. The principle of freedom of contract. It is the recognition of the possibility of participants of civil relations to conclude contracts in the related fields of law, subsidiary applying provisions of the Civil Code of Ukraine. For example, Article 94 of the Family Code of Ukraine does not specify the consequences of failure to notarization of marriage contract. In this situation Article 220 of the Civil Code of Ukraine should be the subsidiary applied.

3. The principle of judicial protection of rights and interests. This principle is jurisdictional form of protection of rights and interests of relationship (civil, family, labor, housing, etc.) in case of their violation, non-recognition or contestation and is such that ensures the implementation of the principles of civil law under Article 3 of the Civil Code of Ukraine.

The principle of judicial protection of rights and interests based primarily on the Constitution of Ukraine, according to which the justice in Ukraine is administered exclusively by the courts, whose jurisdiction extends to all legal relations arising in the state (Article 124 of the Constitution of Ukraine). At the same time, judicial protection is possible for both those rights expressly specified in the Civil Code of Ukraine or other industry regulatory legal acts, and for those that follow the norms of the Constitution of Ukraine (Decision of the Supreme Court of Ukraine of November 1, 1996 № 9 «On the application of the Constitution of Ukraine of justice»).

Everyone has the right to apply to court for protection of his personal non-property or property rights and interests. Ways to protect civil rights and interests can be: 1) recognition of rights; 2) recognition of the transaction null and void; 3) termination in violation of law; 4) restore the situation that existed before the violation; 5) changing of the relationship; 6) termination of the relationship; 7) compensation and other means of compensation of property damage; 8) compensation of moral (non-proprietary) damages; 9) recognition unlawful decisions, actions or omissions of state authorities, authorities of the Autonomous Republic of Crimea or local self-government, their officials and officers (Article 16 of the Civil Code of Ukraine). And as paragraph 1 of Article 9 of the Civil Code of Ukraine provides the possibility of subsidiary application of the Civil Code of Ukraine to related legal relationships, the provisions of the Civil Code of Ukraine concerning the right to protection and ways of protection are applied to related relations.

4. The principles of the rule of law, legality, equality.

– The principle of the rule of law. Under the rule of law we understand the «rule of reason»; «the rule of law, a priority of human rights in society»; «code of rules that legitimized society and based on the achieved level of social ethics», «set of moral and legal values according to which relations are regulated in a democratic society, addressed the issue of human activity, considered the case in the courts», etc. It should be emphasized that the principle of the rule of law allows the court subsidiary apply the rules of civil law in cases of gaps in related areas of law.

According to the rule of law a person, his rights and freedoms recognized as the highest values and determine the content and direction of the state. This means that the court should not apply the legislation subsidiary if its use would violate the rights and freedoms of man and citizen.

– The principle of legality – the most important principle of law, which is one of the main criteria for determining the quality and effectiveness of

regulations related to civil law relations. Members of subsidiary application of the law, including judges are subject only to the law (Article 129 of the Constitution of Ukraine). The main principle of judicial proceedings is the legality (paragraph 1 of Part 3 of Article 129 of the Constitution of Ukraine).

The principle of legality requires strict compliance with the requirements of laws and other legal acts of all subjects of these relationships and determined that the court in identifying gaps in their work during the process of solving the case should properly apply the rules of civil law related to specific relations.

The court judgment must be lawful and justified. Guarantees of principle of legality is the supervision of the higher courts, the right of persons involved in the case, to appeal court decisions and rulings, the effect of sanctions and liability protection.

– The principle of equality. This principle comes from the fact that for the court all participants are equal before the law. No entity has any advantages over other entities in private law. This right extends to legal entities and the state. Although the law has some exceptions to this rule, for example, under the Law of Ukraine «On Protection of Consumer Rights» consumer has additional rights.

5. The principle of fairness, honesty, reasonableness. This principle acts through the evaluation of concepts which in civil law always used for such objects of valuation as the action or activity («good faith», «reasonable,» «regular,» «cost,» «advisable», etc.), things («personal use», «unowned»).

Aristotle divided equity (as part of the legal system) on natural and statutory [9, p. 150]. At the beginning of its development traditionally Roman private law closely bound principle of fairness with morality. Under the influence of Stoicism for the Roman lawyers natural law was an ideal law. With this idealistic approach an abstract system of law was created. It consisted of the institutions and principles. The law category of «justice» has gained the meaning «justitia». Roman jurists used the concept of «aequitas» to contrast iniquitas (injustice) – the legal situation that is contrary to justice. In accordance with the specifying of principle of justice appears the category «aequitas» (equality). This approach led to the development of the legal status of the individual as a subject of law. The increasing role of the individual in the law led to the development of the idea of humanity. The principle of equity used to correct, properties of the law, understanding of the positive law. Thus, in the Roman private law principle of justice has become a phenomenon by which it acquired universality in the regulation of civil relations and with the development of legal thought in ancient Rome, the principle of justice came priority.

In the Decision of the Constitutional Court of Ukraine of 11.02.2014, № 15-rp 2004 in case № 1-33/2004 in the case of the constitutional petition of the Supreme Court of Ukraine on the constitutionality of Ukraine (constitutionality) of Article 69 of the Criminal Code of Ukraine (case of the more lenient penalty) it is states that «justice» – one of the fundamental principles of law – is crucial in determining the law as a regulator of public relations, one of the dimensions of human rights.

In the 2008 Interim edition DCFR was published, in 2009 – revised edition DCFR which stipulates the principle of justice [1]. It should be noted that the principles of editorial DCFR 2009 were divided into two groups: underlying principles and overriding principles. The principle of justice is applied to the base ones. However, developers DCFR say that justice plays the role of one of the most important principles. Thus, it has dual role [2].

In various areas of private law justice has different meaning. In this case the principle of equity means identifying the scope of rule of law, limits of rights and duties adequately its relation to the requirements of legal norms in the subsidiary application of the law.

The principle of good faith (bona fides) originated in Roman law: even then treaties of «good conscience» began to appear. They meant that the content of such treaties is not determined by its condition, but true intent of the parties, or if they are incomprehensible business practices. After the fall of the Roman Empire, the concept of good faith as a principle of implementation of agreements arising again in practice for merchants in XI and XII centuries. Even at that time the good faith gradually turns into a general principle of civil law in the countries of continental family. Law of new nations in the process of reception of Roman law perceives good faith in its original functional form, namely as a tool to protect the actual content of the contract.

The principle of good faith – a principle which requires fair and honest behavior of participants of subsidiary application of the law in the application of norms of civil legislation to the related relationship.

Reasonableness – it weighed issues of subsidiary application of civil law to contiguous relationship with taking into consideration the interests all the participants. Thus, law using practice of subsidiary application of civil law to natural resource relations links the application of the principle of reasonableness when deciding on the reduction of compensation, based on the financial status of an individual – tortfeasor (part 4 of article 1193 of the Civil Code of Ukraine).

Conclusions. This article touched only some issues of principles that have leaked since Roman

private law and have found expression in the model rules of the EU. This study focuses on the following principles of subsidiary application of the law: the principle of inadmissibility of arbitrary interference in private life; the principle of freedom of contract; the principle of judicial protection of rights and interests; the principles the rule of law, legality, equality; the principles of fairness, honesty, reasonableness.

These principles require further investigation, as the category of «Principles» is an essential tool for the theory and practice of subsidiary application of the law.

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The article examines the principles of application of the subsidiary legislation to the civil and contiguous relationships. In this study focuses on the following principles of subsidiary application of the law: the principle of inadmissibility of arbitrary interference in private life; the principle of freedom of contract; the principle of judicial protection of rights and interests; the principles the rule of law, legality, equality; the principles of fairness, honesty, reasonableness.

Keywords: civil law, principles, legal gaps, subsidiary application, legislative technique, related areas of law.

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ПРИНЦИПИ СУБСИДІАРНОГО ЗАСТОСУВАННЯ НОРМ ЗАКОНОДАВСТВА

У статті досліджується принципи субсидіарного застосування норм законодавства до цивільних та суміжних з ним відносин. В даному дослідженні зосереджено увагу на такі принципи субсидіарного застосування норм законодавства як: принцип неприпустимості довільного втручання у сферу приватного життя; принцип свободи договорів; принцип судового захисту прав та інтересів; принципи верховенства права, законності, рівності, обґрунтованості; принцип справедливості, добросовісності, розумності.

Ключові слова: цивільне законодавство, принципи, прогалина в праві, субсидіарне застосування, законодавча техніка, суміжні галузі права.

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ПРИНЦИПЫ СУБСИДИАРНОГО ПРИМЕНЕНИЯ НОРМ ЗАКОНОДАВСТВА

В статье исследуются принципы субсидиарного применения норм законодательства к гражданским и смежным с ними отношенем. В данном исследовании сосредоточено внимание на таких принципах субсидиарного применения норм законодательства как: принцип недопустимости произвольного вмешательства в сферу частной жизни; принцип свободы договоров; принцип судебной защиты прав и интересов; принципы верховенства права, законности, равенства, обоснованности; принцип справедливости, добросовестности, разумности.

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