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Formation and Strengthening of Private Law Fundamentals of Civil Society in Ukraine

Problems of civil society for several decades are the subject of an animated discussion of political scientists, philosophers, economists and lawyers. Together with this, in the modern period and, especially, in the post-Soviet Union region the ideas of civil society have gained special significance. The reason for that is served by the necessity at times of "great changes" that coincided for the countries of former USSR with the millenniums' change to find social guides that allow to maintain the succession of historical development, to define goals linking fundamentals of the universe social advancement with national features, to make life of the society humane and a man itself - social.

Key words: *Civil society, civil law regulation, civil law principles, subjective rights protection.*

The research of legal problems in civil society in legal doctrine of Ukraine is still at the beginning phase.

Ukrainian legal scholars continue to discuss questions concerning the very notion of the term "civil society".[1]

In the doctrine there is no uniform understanding of what civil society corresponds to. Furthermore, the word combination "civil society" is quiet conditional considering that there is just no "non-civil", much less "anti-civil" society.

Virtually, the term "civil society" has gained in the scientific literature its special content and in the current interpretation represents a definite type (condition, character) of society, its social and economic, political and legal nature, the level of maturity, sophistication. In other words, civil society is the highest level of social community development and meets a range of criteria established by historical experience.

In the modern understanding and meaning civil society is "a society able to resist a state, control over its activities, able to point out its place, to keep in tight reins". That is to say that civil society is a society able to make its state a rule-of-law state. However it does not mean that the only activity of civil society is to struggle against the state. Within the frames of sociality principle, i.e. social state, civil society allows the state to actively interfere in social and economic processes. Another thing is that it does not allow the state to concentrate its power over itself, make social system totalitarian"[2].

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1 Правова доктрина України. Том 1. (автор підрозділу 3.1 «Громадянське суспільство: доктрина і вітчизняна практика» *А.М. Колодій*), 2013, 461-468.

2 *Протасов В.Н., Протасова Н.В.,* Лекции по общей теории государства и права, М., 2010, 535.

It is possible to agree with the opinion set forth in the literature that civil society arises only there and only at the time where state institution is not able to exercise its functions of a regulator of social relations; where there was an arrangement of prerequisites for civil compromise and worldview pluralism; where an aggregate of social institutions with their own status and being able to equal dialogue with state institution, able to resist political expansion of the state, to be its counterbalance, to restrain its strive for monopoly, transforming from the system of providing advancement of the society into the system of self-sustainment; where the authority of the state is substantially adjusted by the condition of civil society[3].

Without detailing the very notion of civil society, it should be noted that regardless national characteristics, regional features etc., we can talk about the presence of common grounds (principles) of the civil society functioning. They are economic freedom, poliform of property, market-based economic development, absolute recognition and protection of natural rights of a man and a citizen; legitimacy and democratic nature of the authority; equality before the law and justice, reliable legal protection of the individual; legal state built on the principle of separation of powers and interaction of its separate branches; political and ideological pluralism, the existence of legal opposition; freedom of speech, of thought, independence of the media, non-interference of the state into the private lives of citizens, their mutual rights, obligations and responsibilities; class harmony, partnership and a national consensus; effective social policy ensuring an adequate level of life.

Of course, the given list of basic principles is not exhaustive and can be extended and detailed.

Without intending to delve into this discussion, we restrict ourselves to stating that we agree with the definition of civil society as "association of free individuals and citizens' community formed voluntarily to assure liberty and initiatives of the individual, the rights and duties of a man and a citizen, serve other common interests, which due to private ownership in economic sphere, democratic in the political, pluralism in the spiritual, justice in the legal spheres that causes existence the vast majority of the so-called middle class that is able to subjugate democratic, legal, social state to the civil society"[4].

However, some researchers considering civil society as a number of non-governmental institutions that are capable of self-organization and cooperation closely with each other and the state, where the state is not opposed to civil society, and creates for its normal functioning and development the most favorable conditions, derive an individual citizen beyond the limits of the civil society. The stress is on the fact that the civil society is "a social phenomenon that consists of the institutions that are public (non-governmental) association, but not of separate persons"[5], in our view, unreasonably hypertrophies factor of institutional structure of civil society.

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3 И.И. Кальной и др.. Гражданское общество: истоки и современность / Науч. ред. проф. И. И. Кальной, доц. И. Н. Лопушанский. 3-е изд., перераб. и доп. — СПб.: Издательство *Р. Асланова* «Юридический центр Пресс». 492 с., 2006, 31.

4 Правова доктрина України, Том 1, За заг. ред. *О.В. Петришина,* 2013, 976 с., 466.

5 *Мерник А.М.,* Інституції громадянського суспільства: поняття, особливості, види. Автореф. канд. дис. Харків, 2013, 7.

The individual, personality, citizen is a core of the civil society. There is no civil society without roots of personality. A human being in the civil society is ambitious and goal-seeking. He or she understands his welfare depends only on him/her. He/she is civilized, tries to know the laws of its state, fights for their implementation and at the same time opposes them if they do not meet his/her interests. A man in a civil society must have a civic positions and not afraid to show them openly. He must understand that no one in his place is not able to solve his life's problems [6].

Just being based on such understanding of the civil society we can talk about "maturity" of public relations establishing both between individuals and between them and the numerous kinds of public associations formed on the principles of voluntariness and functioning as independent self-governing institutions.

One of the most difficult problems of formation and further functioning of the civil society is to determine the relation between that society and the state.

Undoubtedly, this question is of present interest only in relation to the democratic rule-of-law state, since only such a state can be associated with civil society.

The analysis of recent social phenomenon that is beginning to emerge in the era of capitalist relations, providing the individual a certain economic independence and freedom, gives grounds to affirm that the state as a systemic organization of society is a specific instrument to ensure its integrity and consolidation of the population.

Unlike the state, the civil society does not have a feature of systematicity.[7]

However, the dynamic processes of social development, first of all the development of civil society, including due to globalization and informatisation of public life, form a new social and community challenges of the state as a whole.

If the class nature of the state has been recognized for a long time by politicians, scholars, then among the modern tendencies of state studies it should be noted the interest of the researchers to the general social purpose of the modern state.

This is caused primarily by the fact that the civil society, which is formed as a stable community of citizens on the basis of the recognition of common values and the safeguards for the rights, requires the state to be an effective mechanism to ensure the inviolability of property and rights, since only the state has universal instrument that can be to provide such guarantees - legal regulation, the coercive means, army and other armed groups.

"The society overcomes the difficulties and contradictions and seeks ways of solution of new tasks in the political, economic, social and international spheres, - said Yu. A. Tikhomirov. - It inevitably puts that conditions of life for its self-preservation, which should ensure that the state, through its system-oriented means of influencing public processes. Gradually forms the substance that may be called “public mandate" that society gives to the state in order to achieve national goals. These are, firstly, the

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6 См. Философия права. Курс лекций, Том 2, Отв. ред. *М.Н. Марченко,* М., 2011, 211.

7 *Мерник А.М.*, Інституції громадянського суспільства: поняття, особливості, види. Автореф. канд. дис. Харків, 2013, 6.

life values of society and the people, secondly, on the most important spheres in which you want to provide a holistic regulation and management, thirdly, about taking care of people, their rights and freedoms insurance, the level of life, fourthly security in the broadest sense in the political, ecological and other spheres. This determines the high social role of the state.

But at the same time the society limits the operation of the "mandate" requiring from the state legitimacy, controlling the activity of national institutions and public officials, making responsible for the acts done. These are elements of "public mandate" of the state that are obligatory for it." [8]

As it is evidenced by the events of recent months in Ukraine, the state has not only recklessly ignored the elements of "public mandate" but cynically has been violated the rights and freedoms of Ukrainian citizens. That is what led to the mass protests of the Ukrainian citizens against the tyranny of the state and its officials, total corruption, riddled with all the mechanisms of state power, lawlessness and legal nihilism.

Analyzing the situation as a result of the revolutionary resistance of civil society, we can state that the state over the past ten years since the "Orange Revolution" failed to create the conditions to meet the requirements set by the community in November-December 2004: decriminalization of power, providing the transparency of the making-decision process concerning the most important government decisions, fighting corruption and lustration of state bodies from corrupt officials, the implementation of the Ukrainian national idea simultaneously with ensuring the rights of national minorities to self-preservation, to develop and promote their languages and traditions, the development of inter-regional, inter-ethnic and international cultural relations.

Without exaggeration, we can say that the state during this period did not provide the development on the appropriate level of local government, did not take into account regional features and needs of separate territories, did not ensure the unity of the Ukrainian nation, and did not formulate the modern Ukrainian national idea. As a result, having seizured state power, Ukrainian officials were engaged exclusively in their own interests, violating the interests of civil society.

The lack of the effective mechanisms of public control over the activity of the state made it impossible for opposition of civil society manifestations of criminal violations of fundamental rights and freedoms of citizens by the state as a whole and by its officials, that eventually led to massive public protests and numerous victims.

Even now, we cannot find the developed at the appropriate level functions, forms, tools, and mechanisms of public control over the state of civil society in the legal science.

Realizing that "civil society is organically linked with the state, it did not exist before the state and outside the state, and at the same time civil society has supreme sovereignty over the state, the meaning of which is that it is the interests of civil society are the country's priority over the public interest, the structure of the state apparatus, the forms of the state, state and legal regime and others."[9], should be determined at the current stage of development of the Ukrainian society and the Ukrainian state priority is to ensure real interaction between civil society and a democratic state.

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8 *Тихомиров Ю.А.,* Государство, М., 2013, 17.

9 Правова доктрина України, Том 1, За заг. ред. *О.В. Петришина,* 2013, 976 с., 470.

Today, first steps were made in this important area: to create important institutions such as the Anti-Corruption Bureau, lustration committee, and others. It is necessary to fill their job with content, directing the joint efforts of civil society and state influence on overcoming the crisis in the political, social and legal spheres.

Law is to play a crucial role in these processes.

Without pointing on the problems of modern legal thinking, to identify its nature and characteristics, as it is a separate object of study and deserves a detailed consideration of the legal, philosophical, political and sociological aspects, and it would be preferable to fix on the analysis of the role of law as a special phenomenon in the functioning of civil society, which refers to the key values, because that law is regarded as a measure of justice. At the same time the law is a powerful regulator of social relations.

S.S. Alekseyev considered law as an instrument (mechanism) of implementation and ensuring the reproduction of the social system, its permanence in a stable, contiguous functioning through time. "And thanks exactly to law being regarded as in the unity of the law, such kind of state of affairs achieves when this social system, continuously and without changing its qualities and features, “rolls” and “rolls" in a given mode of its informational and organizational structure, and (theoretically) so that its mission of "extreme freedom" and "permanent antagonism" focuses on defining and maintaining the boundaries of freedom of people. In principle this mission of law in society is unique, and - what is crucial - (and again, in principle) – have no political and moreover ideological content"[10].

It should be mentioned that traditionally the importance of law for the civil society functioning was seen primarily through the prism of formation of a rule-of-law state.

However, in modern researches we can be clearly seen the tendency to serious extension and detailing the approaches to the definition of the functions of law in modern public life.

The conceptual approach to understanding law as an element of civilization and culture allows to characterize the origins, importance and social value of law in a broad, generally social terms. As a profound element of culture law not only absorbs its values, but also implies fundamental requirements and achievements of civilization, thus ensuring the preservation and to some extent the augmentation of the potential of material, social and spiritual wealth of society [11].

Considering that fundamental economic principle of civil society includes private property, and, therefore, the regulation of property relations becomes extremely urgent and, first of all, private law mechanisms and in general private law become more important among the legal instruments.

The original sphere for the law as a phenomenon of civilization is exactly private law, i.e. the legal sphere that is not a product and an instrument of public authorities (and in this respect is not a "product derived from the authorities", though it is permanent connection with it), and is created spontaneously, due to the requirements of life itself, under the pressure in the transition of society in the era of civilization, under the influence of her strict imperatives. It is quite revealing that the same factors

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[10] *Алексеев С.С.,* Самое святое, что есть у Бога на земле. Иммануил Кант и проблемы права в современную эпоху, 2-е изд. М., 2013, 132.

[11] См. *Смоленский М.Б.,* Право и правовая культура как базовая ценность гражданского общества, Журнал российского права, 2004, №11, 73.

associated with the mind, mental and creative activity of the individual that determined the development of society during the transition to civilization (including private property, individualization), predicated the existence and intensity, largely predominant, the development of "horizontal" legal relations, which were based on many legal sovereign "centers", independence of the subjects, the free determination of the terms of its behavior [12].

Modern civil law, acting as core of the array of private law norms is intended to be a legal basis for civil society.

Law as a unique social phenomenon belongs to the fundamental values of the world culture created by mankind during its development. Defining social value of civil law, S.S. Alekseyev paid attention to such circumstances. Firstly, starting with the ancient works on law common trend was determined that manifested in the legal establishment, called over time as "civil law", not only began to cover the main elements of the practical life of people - property, employment, acquisition and transition of property, their protection, family etc. – but also in this context gained the role of the source of initially legal characteristics and mechanisms of social regulation.

Civil law establishment (as customs, precedents, and then the laws) began to form and put into practice all that original, unique, socially profound and regulatory elegant, it is typical for law as the highest form of social regulation of public relations in a civilization" [13].

Secondly, through the sphere of the civil (private) law back in ancient times there was a considerable intellectual enrichment of law, when mind has rushed into the sphere of social regulation, and in connection with the needs of business life and legal practice has shown its power in the creation of legal mechanisms, structures and categories of high intellectual order.

And third, the most important factor - exactly the civil law as a system of laws (codes) laid down the foundations of a modern civil society.

First of all, using the system of civil laws the culture of private law has realized, the essence and historic destination formulated by S.S. Alekseyev, paying attention to two basic principles. "Firstly, as the starting point *("spirit"), free democratic society - the place and the source of true and ensured freedom of the person, legal autonomy*, dispositivity, legal sources, without which no real democracy and no civilized market cannot be done in principle, by its very nature. And, secondly, private law, expressed in the civil codes, due to normative generalizations opened its nature and purpose also as the intellectual mechanisms and structures of high order (even higher than, for example, it was typical of the Roman private law)"[14].

At the present stage of renovation of civil law both in Western Europe and in the countries of the former USSR manifested all the signs of a new civil law, emphasizing its close connection with civil society and giving to every reason the grounds to conclude that it is the private law, the core of which is civil law, and acts as tool and most important instrument of civil society.

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12 См. *Алексеев С.С.,* Восхождение к праву. Поиски и решения, 2-е изд., М., 2002, 127.

13 *Алексеев С.С.,* Гражданское право в современную эпоху, М., 1999, 3.

14 *Алексеев С.С.,* Гражданское право в современную эпоху, М., 1999, 6-7.

The vast majority of the characteristic features of civil society is reflected in the Civil Code of Ukraine (hereinafter - the Civil Code), designed to ensure the normal functioning and development of civil society, that is, autonomous substance, independent from the state. Autonomy, independence, initiative of individuals can be ensured only if of natural, objective (overnormative) character of civil rights as those are recognized and determined by practice itself. That is why property and non-property relations based on legal equality, free will, property independence of participants who are the subject of civil law regulation and the basis of civil society, should be regulated by the Civil Code in accordance with its fundamental principles.

The fundamental principles of civil law, enshrined in Article 3 of the Civil Code of Ukraine, are: the inadmissibility of arbitrary interference with the private life of persons, the inadmissibility of the deprivation of property rights, except in cases provided by law; freedom of contract, freedom of enterprise, securing legal protection in case of violation of the rights, bono fides, reasonability, justice.

Thus, the conceptual feature of the new Civil Code of Ukraine is that it is a code of private law. It is through the institutions, structures and mechanisms of civil law as a private law society realized the principles, ideas and principles which make it a civil society.

As a certain state, civil society is characterized by the interaction of three principles:

1) generally recognized egalitarian law implying a certain minimum of freedoms for each person that is enshrined by the law of equal rights, duties and responsibilities of citizens (legal sphere);

2) private property (economic sphere);

3) publicly recognized the inner freedom of man (the sphere of personal, spiritual entity).

Namely such institutions of civil society as family, church, school and other communities, various voluntary organizations and unions, have the means of influence on the individual to comply by this individual generally accepted moral norms.

Civil society does not refer to state-political, and mainly to the economic and personal, private sphere of human life and activities; relations arising between the two of them. This is free, democratic, legal, civilized society, and there is no place for the regime of personal power, voluntarist methods of government, class hatred, totalitarianism, violence against human beings; where there is a respect for the law and morals, principles of humanity and justice. This is a market multistructure competitive society with a mixed economy, a society initiative entrepreneurship, a reasonable balance between the interests of different social strata.

As it was already noted, the dialectic of relation between civil society and the state is complex and contradictory. Civil society representing a self-developing system is constantly under the pressure from the government. However, the state is interested in the free development of civil society as a prerequisite for its own development. The maturity of civil society is one of the main conditions for the stability of the democratic regime. Civil society controls the action of a political authority. The weakness of the civil society makes the state to usurp its rights, resulting in the inversion of functions of the state and civil society. In this case, the state assigns the function of civil society, forcing it to perform only decisions on the national level. Then the relations between the state and society may be characterized as relations of

constant interaction and mutual contradictory and influence, and nature and direction of the latter to a large extent depend on the degree of development of civil society and its institutions. Civil society harmoniously coexists with the state in a democratic regime; it is in opposition to it under totalitarianism and constructive confrontation with the authoritarianism. [15].

Civil society is open, democratic, anti-totalitarian society, capable of self-development and where the central place is occupied by a person, a citizen, and an individual. It is incompatible with the directive and distributive economy. Free individuals-owners amalgamate to collectively meet their interests and serve the common good.

However, the evolution of approaches concerning human rights in the system of social values during the period of XXth century shows that dramatic events that accompany mankind in the edge of the third millennium created certain prerequisites for formation of the new legal consciousness.

"Revolutions and wars that were constantly taking place throughout the century, put the ground where intolerance and violence were established and flourished, that in turn served as the basis for the creation of new political regimes and specified corresponding the legal order, as said Professor M. De Salvia, famous researcher of European law. When such political system, totalitarian political system, law was so alienated from a man, instead of to guarantee freedom, as it was almost always stated in the fundamental laws of these states, often turned into an instrument of oppression; the individual was not recognized as value in himself/herself, and was only the amorphous part of the collective expression will. That meant that the fundamental rights of a citizen in such cases almost systematically subordinated to the interests of the state. Often enough freedoms were and to this day remain the prerogative of a small group of officials that used them to their advantage, while the vast majority of the population was almost depraved of these freedoms. In this case, it is noted fairly that freedom granted to the citizens subjects and the law argues that the freedom provided by a group of citizens, subjects, and the law - the expression of public interest - releases. Then it is necessary to reconcile freedom and law. Such reconciliation can only happen if we put a human being on the proper place, because it is the highest value and the bearer of values at the same time"[16].

This profound by its content and meaning conclusion explains the attention that is given to the individual development, securing human rights in the modern society.

Our state received certain additional impetus in this direction with the accession to the European Convention on Human Rights.

Of course, the Constitution of Ukraine particularly plays an important role in the realization of human rights, formation of the modern legal status of the citizen. However, not only constitutional law, but also other sectors of the national legal system must ensure implementation and enforcement, in particular the preservation and protection of individual human rights.

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15 *Пушкін О., Скакун О.,* Концепція нового Цивільного кодексу України // Українське право, № 1, 1997, 8.

16 *Сальвиа М.,* Европейская конвенция по правам человека, СПб., 2004, 23-24.

Civil law is the main regulator of social relations with private nature. Exactly the rules of it accompany the person from birth to death, and sometimes even longer (inheritance law, copyright). The Civil Code is not only a major act of civil law, but also the basis for the whole system of private law, the code of life for the whole civil society.

The Civil Code of Ukraine which not coincidentally was named as the constitution of civil society, in art. 1 provides that the rules of civil law govern moral and economic relations based on legal equality, free will, property independence of their participants. This approach is in harmony with the concept of civil society regarding the status of the person - the person in a civil society is emerging as an autonomous and sovereign identity. It is equal among equals, as people will have united in their community, and it is logical to assume that they themselves produce values, norms and rules that are going to follow [17].

The Civil Code of any country reflects the values of a particular society, makes it possible to determine the ideological foundation and property on which it plans to build its development and its future.

The new Civil Code of Ukraine became the legal foundation of civil society, an important tool for its construction. It should be seen as a social contract of the members of the Ukrainian community that accompanies their privacy and regulates all activities.

As already noted, private property constitutes ownership basis and the market economy for civil society, since they are the main tool of the autonomy and independence of the individual.

It is to be recalled that with the reformation of property relations, the revival of private property and the "equation" of its rights to other forms (mainly public), recovery of the market infrastructure of the economic sector the process of transition from a totalitarian regime to democracy, which was the prerequisite for the formation of civil society and the rule-of-law state.

Property category occupies a special place in the public mind and in the whole social life. As a multidimensional phenomenon, it has been and remains the subject of thorough historical, philosophical, economic and legal studies, and, consequently, the scientific debate, the severity of which is not reduced over time.

But today no one doubts the thesis that only in the country where the inviolability of property, not only declared, but also guaranteed, the citizen can be provided free personal development, prosperity and peace.

The state is obliged to provide the rule of law by establishing an effective regulatory framework (including, and, perhaps, above all - civil law one) of relations of the property.

That relationship of private property and the market economy as a whole constitute a material foundation of civil society, as they are the main tool of the autonomy and independence of the individual.

[17] См. И.И. Кальной и др.. Гражданское общество: истоки и современность / Науч. ред. проф. И. И. Кальной, доц. И. Н. Лопушанский. 3-е изд., перераб. и доп. — СПб.: Издательство *Р. Асланова* «Юридический центр Пресс». — 492 с.. 2006, 28.

Recall that it was a reformation of property relations, reviving private property, "the restoration of its rights" in relation to other forms (mainly public), recovery of the market infrastructure of the economic sector began the process of transition from a totalitarian regime to a democratic, which created prerequisites for the formation on the territory of the former Soviet Union, including Ukraine, of the civil society and the rule-of-law state. This does not happen accidently.

From the 20-30s of the last century, the rule of law within the Soviet state unequivocally monopoly (and subsequently - nation-wide) property entrenched, which is recognized as a socialist in nature. At the same time private property was seen as a derivative of the socialist one, and its existence was aimed solely at providing the consumer needs of the citizen [18].

Soviet legislation contained numerous restrictions to exercise by citizens of Ukraine, at the same time citizens of the USSR, the rights of private property. First of all, these restrictions related to the group and the number of objects that can be owned by citizens.

Fundamentals of Civil Legislation of the USSR and the union republics, being adopted in 1960 have fixed some of the most fundamental provisions which in view of their obligation had to be taken into account in the Civil Union Republics. In particular, art. 25 provided that property designated to satisfy their material and cultural needs may be in private ownership. Every citizen can have incomes and savings, a house (or part of it), a subsidiary household, household items, personal consumption and comfort in personal property.

It was particularly noted that property that is owned by citizens according to the right of private property, cannot be used for unearned income.

While in the law itself contained no direct prohibition on the acquisition of property of citizens in particular the number and size of the property, or the accumulation of earned income and savings, but still appropriate limits have been set. It is sufficient to recall the "norm" in the number of cattle determined by the Decree of the Presidium of the Supreme Soviet of the RSFSR of 11.13.1964, at which effectively negated the possibility of an individual farm and for decades have closed the prospects for the development of not only livestock, but also in the whole of the agricultural sector [19].

In the midst of serious regulatory restrictions it was also a house, which at the time belonged to the most important objects of personal property rights. In the 60-s an individual housing construction in large cities actually been terminated due to the decision of the CPSU Central Committee and Council of Ministers USSR dated 31 July 1957 it was encouraged in the cities to develop the joint construction of the citizens' multi-apartment houses on standard projects[20].

Articles 100-107 of the Civil Code of the Ukrainian SSR of 1963 consolidated restrictions that 30 years has been accompanying the right of property of citizens in the apartment building in Ukraine. For

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[18] *Ерошенко А. А.,* Личная собственность в гражданском праве, М., 1973 7-8; Советское гражданское право, Т. 1. Под ред. Красавчикова О.А., М., 1972, 295; Советское гражданское право. -Т. 1. Под ред. *Рясенцева В.А.,* М., 1975, 363-366.

[19] Об этих и других ограничениях детальнее см.: Маслов В.Ф., Основные проблемы права личной собственности в период строительства коммунизма в СССР. Харьков, 1968, 179-186.

[20] См.: СП СССР, 1957, № 9,102.

example, one residential building (or part of it) could be only in the personal property of a citizen. Cohabiting spouses and their minor children have the right to own only one residential house (or part of it), which was owned due to the right of personal property, or one of them is in their joint property (Art. 100 of the Civil Code of the Ukrainian SSR).

Analysis of the provisions of Art. 103 of the Civil Code of Ukraine is interesting from the standpoint of the general characteristics of the right to personal property in the Soviet period. According to this article, it was assumed that if the personal property of a citizen or a cohabiting couple would, on grounds permitted by law (emphasis added - NK), more than one residential house, the owner has a right to keep in his property in any of these houses. The other house (houses) must be sold within one year, presented or alienated in any other way. If within one year the owner does not exercise the right of alienation of the house in any form, by a decision of the executive committee of the local Council of People's Deputies, in whose territory it is located, the house is subject to a forced sale in the manner prescribed for the execution of court decisions (i.e., using the procedure public auction). If the sale of the house by force will not take place due to lack of buyers, the decision of the executive committee of the Council of People's Deputies of the house free of charge transferred it to the ownership of the state.

The legislation has determined also maximum size of the house - 60 m^2 (and from 1985 - 80 m^2). Only a citizen who has a large family or the right to additional living space, with the permission of the executive committee of the local Council of People's Deputies have the right to build or buy a house a larger area.

Other restrictions has been established as well on the rights of private ownership of the house[21].

In addition, the law defined the list of property that could be subject to the right of personal property. For example, the land on the basis of Articles 10, 11 of the Constitution of the USSR was the subject of exclusive property of the Soviet state as the basic means of production and other property that could be used for profit.

Although the citizen formally owned, used and disposed of property belonging to him at his discretion, taking into account the nature of the personal property of the consumer, these features were also largely limited.

First of all, it was not allowed the industrial use of property, as it was interpreted as unearned income. Commercial mediation, private-business activity were considered as the criminal offenses [22].

Analysis of the facts mentioned clearly indicates that with the strengthening of socialism the escalation of restrictions on the right of personal property took the place. And, as a consequence, the ordinary citizen of the USSR (and Ukraine in particular) the sense of ownership was virtually “driven away”.

It is in these circumstances and assumptions, restructuring and transformation of property relations in independent Ukraine began by the reform of property relations. And from this point of view, the Law

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21 *Дульнева Л. А.,* Право собственности на жилой дом, М., 1974, 56.

22 Детальнее см.: *Маслов В.Ф.,* Основные проблемы права личной собственности в период строительства коммунизма в СССР, Харьков, 1968, 204-223.

of Ukraine "On Property", adopted 7 February 1991, with no doubt, can be considered as the first and very important step to recovery (or rather, revival) of the institution of property in general, and the institution of private property in particular.

In all legislative instruments of 1991-1993 the legislator has enshrined the novels, which adequately has responded to the significant limitations of property rights contained in the previous legislation, and at the extent of his vision tried to eliminate them.

At the political level, the Constitution of Ukraine, adopted in 1996, entrenched the right of citizens to own property as an important attribute of the rule-of-law state and democratic society.

In particular, the Article 41 of the Constitution of Ukraine stipulates that everyone has the right to possess, use and dispose their property, the results of his intellectual and creative activity. No one can be unlawfully deprived of property rights. The right to private property is inviolable. The expropriation of private property may be applied only as an exception for reasons of social necessity on the ground and in the manner prescribed by law and subject to advance and complete compensation of their value. The expropriation of such objects with subsequent complete compensation of their value is permitted only under conditions of martial law or a state of emergency. Confiscation of property may be applied only by a court decision in the cases, amount and procedure that are established by law. The use of property shall be without prejudice to the rights, freedoms and dignity of citizens, the interests of society, shall not aggravate the ecological situation and the natural qualities of land.

At the same time, describing the fullness and depth of securing constitutional institution of property, it can be critical to note that not all of the fundamental principles of the right of ownership found in the immediate consolidation of constitutional provisions.

This statement is very important, taking into account its dominance in literature of the opinion that ownership is a complex legal institution, as there is a single right of ownership, which in turn implies that all subjects of law, which are determined by the owners have the same powers and the state should provide equal protection to all owners [23].

Being based primarily on the general principles of the legal system in the Commonwealth of Independent States, that by its roots is dating back to the tradition of Soviet law, a basic framework, basic principles of the single concept that is property rights, make constitutional norms.

Along with this, as content of the above art. 41 of the Constitution of Ukraine evidences, it has quite fragmentary nature.

In support of the integrated nature of the institute of property rights it may be noted that the criminal and administrative legislation contains rules which will determine the responsibility for violation of property rights in connection with the commission of a crime or administrative offence.

However, it is possible to say without any exaggeration that namely a civil law fills the institute of property rights with its "regulatory" content.

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[23] См.: *Литовкин В.Н., Суханов Е.А., Чубаров В. В.,* Право собственности: актуальные проблемы, М.: Статут. 731 с., 2008, 14.

One can hardly agree with the expressed view that by virtue of their nature the fundamental rules of law refer to a special kind of out-of-the-branch (fiducial) rules. This vision leads to the conclusion that an individual civil law or any other branch concept of property rights (for example, tax, administrative, criminal) does not exist. The law provides only one concept of public-private property rights, based on the norms of the Constitution and its accompanying norms of civil and other branches of law that define the individual elements of this concept [24].

No denying the complex nature of the institute of property rights as a single legal formation, we still believe that there are insufficient grounds for concluding that the law rules which established proprietary rights to own, use, dispose of the property, including the conditions of the general property (shared or joint) or provided peculiarities of real-legal methods to protect the violated rights etc., from the civil law are "transformed" into out-of-the-branch (fiducial) rules taking any new, additional qualities which change their legal nature.

Governing the relations of property and constituting one of the most important segments of the subject of civil law as a branch of the law, legal rules are aimed at establishing the legal regime of the right of ownership realization by implementing the possession, use and disposition of property, the grounds of acquisition and termination of property rights, as well as ways to protect it in the event of violations. These legal provisions are, first of all, in close unity with the whole array of civil law, concentrating in it the features and trends of the development of civil law at the current stage.

Similarly, the rules providing the criminal and administrative responsibility for violation of property rights (for examples, for theft, robbery, plunder etc.), do not lose the attributes of criminal and administrative rules and do not "leave" criminal or administrative law. At the same time, of course, regulating the property relations in society, they complement each other and create a complete legal regulation of all aspects of public relations of the property, creating an interdisciplinary (complex) institute of ownership.

By analysing the relevant articles of the Third Book of the Civil Code of Ukraine "The right of ownership and other proprietary rights," one can effortlessly draw the conclusion that the legislator establishes the basic norms, aimed at ensuring the economic freedom of each individual, the economic independence of the personality, based primarily on private property. Thus, Art. 319 of the Civil Code of Ukraine provides that the owner shall possess, use and dispose of property belonging to him at his own discretion. All owners are provided with equal opportunities to exercise their rights. The proprietor shall be entitled to make in respect of his property any actions not contradictory to the law.

Of course, the discretion of the owner in the implementation of his right to property belonging cannot be limitless - its limits are determined by the general rules established by Art. 13 of the Civil Code of Ukraine for the implementation of the subjective civil rights, in particular, the person is obliged to refrain from acts that could violate the rights of others, harm the environment or cultural heritage. The person is not allowed to perform acts with intent to cause harm to another person, as well as to abuse the

[24] См.: *Мозолин В.П.,* Модернизация права собственности в экономическом измерении // Журнал российского права, № 1, 2011, 27.

right in other forms. Art. 319 of the Civil Code, as well as art. 13 of the Civil Code provide that in exercising his rights and performing his duties, the owner is obliged to observe moral principles of society.

Guaranteeing the principles of the inviolability of property rights, Art. 321 of the Civil Code provides that no one may be unlawfully deprived of the right or restricted in its implementation. Cases of exception of property or restrictions on the implementation of property rights, as the order of exception (restrictions), may be established only by law. Such cases generally have the character of exceptions and can only be justified by reasons of social necessity. In case of violation of property rights, illegal encroachments on the property or creation of illegal barriers to the implementation of this law, the owner has an opportunity to use the full potential of civil protection methods, which have both a general nature and are provided in Art. 16 of the Civil Code, and are specially fitted for the recovery of violated property rights (Articles 386-394 of the Civil Code).

A.I. Solzhenitsyn, an outstanding writer and public figure of our time quite clearly defined the relationship between private property and civil society: private property creates independent citizens. Independent citizens create a civil society, and civil society, which is formed, in its turn, leads to the state governed by the rule of law [25].

Indeed, civil society "implies the existence of autonomous, sovereign, free individuals who are equal and endowed with private ownership for the conditions of their lives. It is private ownership for the living conditions that makes the human person really economically independent and free[26].

Analysing the Ukrainian legislation re ownership on its compliance with European standards, primarily with European Convention on Human Rights (hereinafter - European Convention), in particular, with Article 1 of Protocol 1, we should focus on some important aspects.

Article 1 of Protocol 1 to the European Convention, signed in Paris in 1952, provides that "every natural or legal person is entitled to own their property peacefully. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided by the law and by the general principles of international law.

However, the previous norms in no way detract from the right of the state to enact such laws, which, in its opinion, are necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties".

The above mentioned article is the only norm of the European Convention relating to economic rights. At the same time, as noted by the researchers of the Convention, when drafting the text of this article, participating states reserved the considerable freedom of choice of standards to be applied to determine the scope of the law and the possible and permissible limits of its application.

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[25] Приводится по кн.: И.И. Кальной и др.. Гражданское общество: истоки и современность / Науч. ред. проф. *И. И. Кальной*, доц. *И. Н. Лопушанский*. 3-е изд., перераб. и доп. — СПб.: Издательство Р. Асланова «Юридический центр Пресс». — 492 с.. 2006, 104.

[26] Там же.

The analysis of the content of Article 1 of Protocol 1 confirms the presence of its three distinct but interrelated standards:

1) the first general rule, which establishes the principle of peaceful possession and use of property;

2) the second rule pertaining the deprivation of property and connecting it with special conditions;

3) the third rule recognizing that state has the right to control the use of property in accordance with the general interests [27].

In the decision of "Sovtransavto Holding against Ukraine" the European Court of Human Rights noted that these rules are organically linked. The second and third provisions of Article 1 are special cases of "interference with the right of ownership", and that is why they must be construed in the light of the principle set out in the first provision.

As a side note, jurisdiction of the European Court plays an important role in solving specific issues related to the application of the provisions of the European Convention. A long-standing doctrinal debate about whether court practice is the source of law or not, and according to the practice of the European Court of Human Rights, is unambiguously positive, its law-making role is not denied, noted *V.A. Tumanov* [28].

Thanks to it the catalog of rights, protected by Court, was consistently detailed and expanded, concise messages were filled with a wide content, rules not being not expressed "explicite" but in fact being hidden therein, were formed [29].

The comparative analysis of the property contained in the Ukrainian legislation on the property and the European Convention is significant in the context of a broad application of Article 1 of Protocol 1 and the practice of the European Court on this issue.

If in Ukraine traditionally both legislator and civil law doctrine consider ownership as property law, the object of which is, first of all, the objects of the material world, the European Convention considers property much broader, and uses the term as identic to property.

As the analysis of the European Court jurisdiction, the following relates to property in the context of the European Convention, except movables and immovable as:

- corporate securities;
- decision of the arbitration body in a dispute;
- claims on compensation for damages under local law;
- legitimate expectations that there is a certain provision;
- economic interests related to business management, and management of clientele (business reputation, intangible assets, etc.);
- right to pension (if, within a certain period particular contributions were made).

The Court independently assesses the definition of "property", and this evaluation may diverge from the definitions and evaluations commonly used in the domestic (national) law. This method of "autonomous" interpretation is widely used by the European Court.

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27 *Гомьен Д., ХаррисД., Зваак Л.,* Европейская Конвенция о правах человека и Европейская социальная хартия: право и практика, М., 1998, 406-407.

28 *Туманов В.А.,* Европейский Суд по правам человека, М., 2001, 89.

29 Там же, 89-90.

Thus, the literature indicates that in one of its decisions (in the case of "Beeler against Italy" on January 5, 2000), the Court noted that the concept of "property" in Article 1 of Protocol No. 1 has an autonomous meaning which is not limited by ownership of physical things. It is independent from the formal classification in domestic law: certain other rights and interests constituting assets can be regarded as the right of ownership, and thus as "possession" for the purposes of this provision [30].

The criteria for assessing are economic value of a property as defining, that is, its monetary assessment on the basis of objective factors, as well as an attribute of real property, that is the property should be available. The European Convention does not protect the future rights [31].

In connection with the above provisions of Article 1 of Protocol 1 and appears crucial the second question exceptionally crucial for the analysis: what are the limits of permitted (reasonable) state intervention in the affairs of the owner?

Referring again to the Ukrainian legislation, the right of property is determined by the classic formula: the owner may possess, use and dispose of property within the limits prescribed by law.

And because the law is a product primarily of state activity we can interpret this principle as the possibility to use the property at one's discretion, within the limits ***prescribed by law, defined by the state***, or to the extent ***provided by the State and entrenched in the law.***

As Article 319 of the Civil Code of Ukraine provides that the owner cannot use the right of ownership to the detriment of the rights, freedoms and dignity of citizens and the interests of society, etc., and Article 1 of Protocol 1 states that the restriction or deprivation of property rights may be carried out only in the public interest and subject to the conditions provided for by law and by the general principles of international law, in this regard there is quite a fair question.

Firstly, how to interpret the concept of "public interest" in the context of the Ukrainian legislation concerning property, and Article 1 of Protocol 1 to the European Convention?

Secondly, are there such restrictions in the Ukrainian legislation?

Thirdly, are these restrictions within the frameworks of "public interest"?

These questions can be viewed as a set of interrelated, and exactly the nature of the response to them will provide us with an opportunity to clarify the issue: whether Ukrainian legislation on property meets the standards of the European Convention in the broad meaning.

The analysis of the mentioned above norms of the Ukrainian legislation on the property hardly gives a rise to doubts about their inconsistency with the interests of the owner.

Getting acquainted with these rules, we face virtually perennial problem of our legislation – lack of reliable mechanisms of relevant rules. Ukrainian legislation is "oversaturated" with rules-principles, rules-declarations. The lack of a stable legal framework of citizens' interests protection often negates their effectiveness.

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30 *Старженецкий В.В.,* Россия и Совет Европы: право собственности, М., 2004, 50.

31 *Гомьен Д., Харрис Д., Звоак Л.,* Европейская Конвенция о правах человека и Европейская социальная хартия: право и практика, М., 1998, 409.

That sense of security and protection of subjective rights (including property rights) forms a human perception of the usefulness of its legal status and, consequently, the existence of the prerequisites for social activity.

Analyzing the meaning of property in these important social processes, S.S. Alekseyev fairly pointed out: "... in civil society an individual must be the bearer of property – such that gives support in life to the individual, provides him an independent existence and which therefore gives an individual the status of a person, independent of government and, moreover, capable with the presence of other prerequisites to obtain the mandatory public authority in relation to the government"[32].

The method of civil law regulation which defines the methods and techniques of the impact of civil law to the appropriate public relations initially requires as an obligatory condition the legal equality of all participants, their economic and organizational autonomy, freedom of expression in the exercise of any legal actions. This method is organically combined with the main basis and principles of civil society functioning. It can therefore be said without any exaggeration that if the property basis of civil society is private ownership and the market economy, the legal regulation of this basis is provided primarily by civil law.

Not only the mentioned norms relating to regulation of property relations and constituting the statics of civil regulation, but also civil rules governing the whole civil turnover (the dynamics of civil regulation), associated primarily with the various civil contracts both defined and non-defined, provide to each citizen and society as a whole an opportunity to realize the vital needs, interests, desires, aspirations.

Following the Constitution, the Civil Code provides that an individual is able to have all the property rights established by both the Code and other laws. All individuals are equal in the ability to have civil rights and duties (art. 26 of the Civil Code of Ukraine).

Civil legislation provides a wide range of subjective civil rights. Besides considered property right, the participants of civil law relations (individuals and legal persons) may have other property rights: ownership, servitudes, emphyteusis, superficies; enter into civil transactions (in particular, into agreements) both provided and not provided by the law, but not contradictory to him, to carry out business activities not prohibited by law.

Exactly the civil law provided a special structure of a legal entity, able to extend significantly the possibility of legal regulation, first of all, property relations involving collective entities.

In modern conditions the use of the structure of the legal entity makes it possible to ensure the proper functioning of not only the entire production infrastructure of civil society (joint stock companies, limited liability companies, production cooperatives etc.), but also a plenty of non-productive (non-profit) organizations.

Overcoming the border of the third millennium, humanity has entered a new era, which must be marked not only with the strengthening of human values, but also with the steady development of the human intellect. After all, the success of the solution to many political, economic and social problems

[32] *Алексеев С.С.,* Право: опыт комплексного исследования, М., 1999, 650.

depends on how significant the intellectual potential of civil society and its level of cultural development will be.

Now, no one would deny that the intellectual activity and its results acquire priority in today's world.

Human creativity is his deeply aware need for self-expression, self-assertion, the addition of deep spiritual experiences in the search for harmony and self-improvement into the world. The ability for creative and intellectual activity distinguishes man from other living beings and does not depend on age, health status, abilities and talents.

Enhancing the role of intellectual activity and intellectual property predetermines the need to strengthen the effectiveness of their legal protection.

Legislative rules regulating the use and protection of intellectual property rights (as well as the rules that make up institute of property rights) belong to different branches of law: constitutional, administrative, criminal, procedural etc. However, a special place among them belongs to the civil law.

Civil Code of Ukraine for the first time combined the rules relating to the protection of the results of creative intellectual activity in the separate fourth book "Intellectual property rights".

Despite the long discussions that accompanied the process of codification of civil law in the CIS countries, in general, we managed to defend the position of a civil nature and, accordingly, the sectoral affiliation of these rules.

A proactive position on this issue has been taken by the World Intellectual Property Organization (WIPO) in cooperation with the WTO. Experts of these influential international organizations were strongly opposed to the concept of universal regulation of intellectual property rights namely in the Civil Code. In their opinion, the basic regulation of corresponding relations should be carried out with the rules of special laws that at the time of the Civil Code adoption were in almost all CIS countries. As for the Civil Code of Ukraine, it has been suggested that it is enough to make a few general norms of a purely declaratory nature.

Such approach in no way did not respond the conceptual basis of civil law codification and caused fierce opposition on the part of the drafters of the Civil Code in all CIS countries. In general terms, this position was formulated by well-known Russian civilist *V. Dozortsev* [33].

Institute of Intellectual Property is one of the most important civil and legal institutions, which is why its rules are organically linked with the other institutions of civil law - a legal entity, contracts, methods of protection, responsibility, etc.

In our opinion, the need for sufficiently detailed regulation of relations connected with the implementation of intellectual property does not exclude, but rather involves the deepening of the fundamental general principles of intellectual property rights in special legislation, most of which at the time of the Civil Code of Ukraine has acted and the content of these laws (their civil law component) was taken into account in the formation of the provisions of the Civil Code of Ukraine.

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[33] *Дозорцев В.А.,* Интеллектуальные права. Понятие. Система. Задачи кодификации, М., 2005, 25-28.

Thus, it was possible to ensure a reasonable balance between regulation on the codification level and at the level of specific intellectual property laws.

General provisions on intellectual property rights, entrenched in Section 35 of the Civil Code of Ukraine, one way or another relate to all intellectual property rights, mentioned in Art. 420 of the Civil Code of Ukraine. An important principle of the regulation of intellectual property rights provided for Art. 419 Civil Code of Ukraine: the right of intellectual property and ownership of the thing does not depend on each other, and the transfer of the object of intellectual property rights does not mean the transfer of ownership of a thing, and vice versa.

In this connection it is appropriate to quote a prominent scientist in the field of intellectual property rights *A. Pylenko,* who in the early twentieth century argued that any invention "... has only abstract and ideological content and its real substrate can be identified only in the undeveloped thinking ... the essence of the invention is not limited to those material objects in which it is embodied, the invention is always ... is an intangible, ... the object of a patent right is always an intangible ... "[34].

The Civil Code of Ukraine has entrenched intellectual property rights to literary, artistic and other works (copyright), the right to perform, sound recording, video program and the program (transfer) of broadcasting organizations (related rights); the right to scientific discovery; the right to an invention, utility model, industrial design; the right to the layout of integrated circuits; the right to innovation; rights to plant varieties, animal breeds; the right to a commercial name, a geographical indication. Also, the Code provides for the rights to a trade secret.

Thus, civil law regulation covers the whole spectrum of intellectual property rights and includes them organically in a system of protection by civil law means.

Conclusion

Civil Code Ukraine secured as the basic principles of modern civil law principle of fairness, good faith and reasonableness. This approach of Ukrainian lawmakers, who took common humanistic concept of the drafters of the Civil Code, is quite symptomatic of trends of development of modern Ukrainian society.

In addition, it should be noted that a decade of experience in the application of Civil Code has confirmed the viability of this principle, and its being in demand by the judicial practice is the undisputed evidence of the deepening and further development of the private law fundamentals of civil society in our country.

[34] Пиленко *А.А.,* Право изобретателя, М., 2001, 9.

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