

**Yevhen Kharytonov**

Professor, National University «Odessa Law Academy»

**Olena Kharytonova**

Professor, National University «Odessa Law Academy»

## **Adaptation of Law of Ukraine to the EU Law in the Context of European Traditions of Private Law**

With the ratification of the Agreement between Ukraine and the EU of 16 September 2014 the issue of adaptation of Ukrainian law to European law has become far more relevant. It requires future research in the field of the law of Europe as a phenomenon of European civilization in order to inquire into the methodological grounds of the correlation of legal systems in this sphere.

To begin with, it is necessary to define the essence of the concept of “European Law”.

The viewpoint according to which European law is regarded as a system of legal tenets, created in the course of the formation and functioning of the European Community and the European Union, which were applied within their competence on the basis and in accordance with their founding agreements and general principles of law seems to be appropriate<sup>1</sup>. Let us look at the final part of this definition, where they consider general principles of law according to which (along with founding agreements) the provisions of European Law function and are applied: Article F of the Agreement of 1992 envisages that “the Union respects the main individual rights as they are ensured by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they appear from general constitutional traditions of member states to be fundamental principles of law of the Community”. Therefore, it should be taken into consideration that the backbone of the fundamental principles of the EU is based on the priority of individual rights recognized in the European Convention as well as on the constitutional traditions of the European states. The same traditions determine the

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<sup>1</sup> *European law. Course book*, under the editorship of L.M. Entin, Moscow 2000, p. 43.

further development of the national law of the states which are members of the European Union.

On this basis we can characterize European Law as a system of principles, legal tenets which are created due to the formation and functioning of the European Community and the European Union based on and in accordance with the founding agreements and fundamental principles of law.

We should add that the basis of the definition of European Law should be consideration of the essence of law as the only European concept which is grounded in the idea of European unity itself. First and foremost, it concerns the concept of private law, which is based on the values of European civilization and acts as their embodiment in European legal thought.

However, the conclusion regarding the uniformity of European law cannot leave out the issue of the existence of traditions of law, and traditions of private law in particular, within its boundaries. Their existence is caused by the presence of relatively independent (though related) sub-civilizations within the European civilization. Based on the statement that law is an element of civilization, it is assumed that certain peculiarities of sub-civilizations influence the features of legal traditions which exist in Europe.

Herewith, it is reasonable to take into consideration the division of all European civilization into “Eastern” and “Western” sub-civilizations which is based on regarding characteristics of two types of historical, social and cultural development. In this context it is necessary to specify that, when using the terms “East” and “West”, the division is not made by geographical criteria but according to differences in mindset, outlook, material existence, culture etc.

Many scholars consider religion to be the main factor in assigning a society to a particular civilization. With such an approach the division of the Christian Church into Eastern and Western Churches, which was caused by the border which appeared between parts of the Roman Empire and with the course of time was transformed into the differentiation of Eastern and Western civilizations, corresponds to the European system “East–West”. Regarding this idea, some researchers draw the main “differentiation line” in Europe in such a way that divides Ukraine and Belarus into two parts separating Orthodox Ukrainians and Belarusians from Catholics<sup>2</sup>. Other authors criticize the criterion mentioned above and instead of “religious” classification factor they suggest another criterion (“universal, fundamental, inherent to all civilizations”) – recognized by each individual who is a member of a civilization, which is a “we” and “they” dichotomy: “we are different from them”,

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<sup>2</sup> S. Huntington, *The Clash of Civilizations*, „Polis” 1994, No. 1, p. 38–48.

“insiders” and “outsiders”<sup>3</sup>.

In our view in modern conditions the civilization-religion criterion does not work as it became the topic of political speculations due to its penetration into the general canvas of geopolitical interests and global ambitions. Besides, we cannot but mention such factors as the absence of a universal belief in God among the populations of the countries in question, the presence of several religious confessions in the majority of European countries, the inconsistency of such a criterion with rather popular ideas of ecumenism, etc.

Without dwelling on the issue in detail we should say that we consider it reasonable to differentiate not by one criterion but according to a total of the main features characteristic for the type of civilization (sub-civilization). Among them the crucial factors are attitude to people, determining their place in the Universe, environment and society. Herewith, we take into consideration that mainstream Western and Eastern types of civilization development do not coincide with geographical division and can be present to some extent in different civilizations in different parts of the world.

The features of the Western type of civilization development are:

- 1) sovereignty of the private person (recognition of the central place of the individual in the system of social relations);
- 2) a developed institution of private and corporate property which plays a key role in the economic life of society;
- 3) liberalism as the philosophical basis for social life;
- 4) social-political pluralism which is reflected in the division of functions of different branches of power and giving power to self-government etc.;
- 5) beliefs (religion etc.) which have the features of absolute inherent value or strive to achieve such understanding.

Formed on such grounds, the Western legal tradition has the following characteristics:

- 1) distinct differentiation between legal and other institutions. Although politics and morality can determine law, they are not understood as the law itself;
- 2) administration of legal institutions is delegated to a special circle of people who gain legal education for this purpose;
- 3) legal thought has an impact on legal institutions: it analyzes and systemizes law, acting as a factor which helps to create other legal categories;
- 4) law is conceived in society as a consensual unit, a unified formed system;
- 5) law is conceived as an integral system, an “organism” which develops through generations;

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<sup>3</sup> I.B. Orlova, *Euro-Asian Civilization*, Moscow 1998, p. 25.

- 6) the feasibility of a system of law is based on society's belief in the long lasting character of law;
- 7) the development of law proves that it not only lasts but has its history;
- 8) the historicity of law is connected with the understanding of its supremacy over political power;
- 9) confidence in the historicity of law is associated with faith in its supremacy over political power. It is believed that law to some degree is superior to politics and places an obligation on the state. Formally it can be described as the belief in the possibility of the existence of civil society and the law-bound state;
- 10) different jurisdictions exist and compete the society which makes the supremacy of law necessary and possible<sup>4</sup>.

Characteristic features of the Eastern type of civilization development are:

- 1) the predominance of collective, public and state interests over individual ones;
- 2) significant governmentalization of economic life, weakness and imperfection of private property institutions (the "Asian mode of manufacture");
- 3) a tendency to authoritarian ( or even tyrannical) type of power;
- 4) levelling social ethics;
- 5) an ethical-normative function of religion which results in a situation where religious principles practically acquire the features of the authority of law.

Formed on such foundations, the Eastern tradition of European Law has such characteristic features:

- 1) limitation of the paradigm of law by Christian teaching in its Orthodox interpretation;
- 2) a tendency to understand law as a totality of legal acts which were inspired by the needs of society and which are better known to the state;
- 3) arranging and conducting lawmaking, codification, research and other kinds of activity in the sphere of law by the "initiative from above";
- 4) weakness of creative research which results in the loss of the authority and significance of law;
- 5) a tendency to limit private-legal types of regulation, and a desire to ensure maximum control and interference in the relations of private persons. As a result, private law appears to be "mixed" with public-legal tenets;
- 6) vague distinction between legal institutions on the one hand and state (administrative, managerial) institutions on the other;

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<sup>4</sup> H.J. Berman, *Western Legal Tradition: the Formation*, Moscow 1998, p. 41–42.

- 7) absence of a theoretically grounded and recognized concept of the succession of law. As a result, such phenomena as reception, transplantation and adaptation of law often take place in latent forms, and have a limited and inconsequent character;
- 8) emphasis not only on the rights but on the duties of participants of civil-legal relations<sup>5</sup>.

Therefore, in reference to Europe, the “Western Legal Tradition” refers to those values, concepts, categories and institutions which are characteristic of the Western European sub-civilizations and based on the worldview, culture and mindset of the Western world, which originates from the Greek and Roman ancient world.

The tradition of private law as a concept inseparably associated with the Western European civilization is formed and functions on the basis of the Western tradition.

Herewith, as every long-term process the formation of the Western tradition and concept of private law can be reasonably divided into gradations that characterize the main stages of development.

The easiest way to conduct such a division would be orientation on the established division of the history of Europe into periods: the Ancient World, the Middle Ages, the Modern Period. Nevertheless, such division only roughly reflects changes which took place in the history of the Western European world. Besides, it is insufficient for identifying the stages of development of certain elements of civilization, each of which has its own rhythm.

Imbalance of the rhythms of the state and law (political history and elements of culture) is especially noticeable in the field of private law. While a change of political regime soon causes a change of public-legal tenets which are closely connected with public authority and are its continuation, its impact on private law is less obvious and more distant in time.

Drastic solutions are certainly possible in this sphere. Such an example is cancelling the right to private property by the Soviet power. However, non-recognition or introduction of a particular institution, especially in a certain country, is still not a change of legal framework. It is more a political than legal decision and requires many years of work on elimination and transformation of the legal framework which existed in the country. Moreover, more time is needed before ideas in the field of private law can be incorporated in the group of legal systems etc.

To consider differences in the rates of development of political history,

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<sup>5</sup> Y.O. Kharytonov, *History of Private Law of Europe: the Eastern Tradition*, Odessa 2000, p. 8–9.

that is public and private law, it is reasonable to distinguish periods (changes in time) and stages (qualitative changes of legal systems). In this case, preserving the division of history of Europe into the Ancient World, Middle Ages and Modern Period we have grounds for distinguishing several stages in the development of law in the West which are connected with the consideration of crucial moments in the development of law in general, and private law in particular.

H. Berman explains the presence of such “destructions” by the characteristic discrepancy between the ideals of Western legal tradition and its reality which from time to time led to forced elimination of legal frameworks by revolutions<sup>6</sup>, of which he counted six. In his view they were: 1) the Papal revolution of 1075–1122; 2) the Lutheran reform in Germany in the 16<sup>th</sup> century; 3) the English Revolution of the 17<sup>th</sup> century; 4) the American Revolution of 1776; 5) the French Revolution of 1789; 6) the Russian Revolution of 1917. Each of them created a new legal framework which embodied some of the main tasks of the revolution and changed the legal tradition, but finally remained within this tradition. Therefore, as a whole, the legal tradition was preserved and in fact renewed in the course of the revolutions<sup>7</sup>.

Agreeing with the conclusion regarding the need to consider the importance of revolutions for the formation and reforming of law, attention should be paid to significant drawbacks of such an approach, which question the validity of the suggested concept as a whole.

The first one lies in the overuse of the concept “West” and therefore erosion of criteria of the category the “Western Legal Tradition” and loss of certainty of factors which influenced its development. For example, it is possible to agree that the American Revolution influenced the development of certain institutions of Western law<sup>8</sup>. However, it was not crucial for the development of the Western legal tradition<sup>9</sup>. That is why distinguishing the American Revolution as a factor of its formation is hardly viable.

<sup>6</sup> Herewith, revolutions are understood as powerful explosions that took place when the legal system froze and could not adapt to new conditions and therefore it was accepted that it did not fulfil its ultimate goal and task.

<sup>7</sup> H.J. Berman, *Western Legal...*, p. 43.

<sup>8</sup> A. de Tocqueville. *Democracy in America*, Kyiv 1999, p. 341.

<sup>9</sup> It is surprising that the main supporters of American ideas in the field of law were so-called “economic lawyers” of the post-Soviet territory. (e.g. V.I. Mamutov, *Again About General Civil Law Approach*, “Law of Ukraine” 2000, No. 4, p. 93. For counter arguments refer to: Y.O. Kharytonov, *Anti-Civil Law or Seven Misstatements of So-Called Economic Approach*, “Law of Ukraine” 2000, No. 9, p. 90). It may be connected with the similarity of the situations: attempts of the state to overcome the chaos that arose with the change of economic relations in the conditions of unsuitability of the concept of the law which had existed before and not understanding their belonging to a particular civilization.

The second drawback of the concept is the erroneous thesis that Russia, Greece and Spain first were beyond the influence of the Western legal tradition but later they became part of the West (as well as North and South America)<sup>10</sup>. The designation of Russia as part of the West has always been controversial and now is denied by its leaders, who insist on the distinctiveness of “Euro-Asian civilization”. Therefore, this statement can be regarded as valid only for those parts of the Russian Empire, and, subsequently, the USSR, which chose to follow the course of European integration (the Baltic countries, Georgia, Moldova, Ukraine).

We should not confuse various phenomena such as the Papal revolution and subsequent religious, bourgeois and other revolutions. The Papal revolution determined the boundary between European chronological civilizations of the early and late Middle Ages. It is a line between the period of constitutionalization of the Western legal tradition which began in 1054 with the official recognition of the division of the Christian Church and completed with the recognition of the independence of temporal and religious power, which later became a significant feature of the Western legal tradition itself and had an impact on the development of traditions of private law. As regards the other revolutions mentioned above, they all had a particular, clearly expressed national character. They were national not in their aim to achieve a national goal but in their contradictions, which reflected their national character and the peculiarities of historical development of a certain ethnic group, nation, group of nations as well as specific features of a national or ethnic approach to solving problems generated in society. Therefore, we cannot agree with the idea that the loss of unity and solidarity of purpose of the Western civilization and transformation of relations of the race, religion, family, class, neighborhood, and cooperation into “superficial nationalism” happened in the 20th century and therefore caused the disintegration of the Western legal tradition<sup>11</sup>.

There are reasons to state that the national influence on the integrated Western legal tradition started much earlier – with reference to the formation of the European worldview of the Modern Period and related to the consequent process of transformations of cultures<sup>12</sup>. It resulted in the revolutions mentioned above, which caused the transition to a new stage of development of the Western legal tradition. Its characteristic feature was the formation within the Western legal tradition of relatively independent legal systems

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<sup>10</sup> H.J. Berman, *Western Legal...*, p. 20.

<sup>11</sup> *Ibidem*, p. 16.

<sup>12</sup> Ferguson believes that these factors already functioned in the Ancient World. A. Ferguson, *An Essay on the History of Civil Society*, Moscow 2000, p. 205–207, 307–327.

which reflected both features which were common for the Western legal tradition as a whole and particularities of its development in specific conditions of time and place.

In our view the significance of this stage in the development of the Western tradition of private law and completion of the formation of the private law concept should be especially emphasized. While since the beginning of the formation of Western law until that time, the tradition of private law either had been only arising (the law of the early Middle Ages) or had remained at the stage of thorough understanding and the creation of concepts, the formation of certain institutions etc., after the cluster of revolutions a breakthrough in this field took place and the primacy of rights of a private person became a distinguishing factor in establishing the main vector of the development of law. One can say that establishment of the foundation of the modern vision of the concept of private law took place.

Taking into account these factors, the following stages in the development of the Western tradition of private law should be differentiated:

- 1) The stage of “personal” (pre-private) law. The formation of the Western legal tradition as such continues. This is the period from the decline of the Western Roman Empire to the Papal revolution of 1075–1122;
- 2) The stage of “personal jurisdiction” (proto-private law). The beginning of the formation of the Western tradition of private law. It covers the period from the Papal revolution to the Reformation of the middle of the 16<sup>th</sup> century;
- 3) The stage of “egalitarian person-centralism of courts of justice”. Establishment of the Western tradition of private law. The period from the bourgeois revolutions of the 16<sup>th</sup> and 17<sup>th</sup> centuries until World War I. It marks the completion of the formation of the concept of private law and the transition of the development of the Western tradition of private law into a new quality.

At the first of these stages the transition from ancient law to the idea of the formation of the Western European law takes place. Such features of the Western tradition as the relative independence of law are formed. The chaotic borrowing of the Roman law tenets continues and their implementation into the collection of Barbarian laws takes place. Therewith, the Barbarian law is closely connected with political and religious life, customs and moral values. The Church does not have its own systematized legislative instruments and developed law until the 11<sup>th</sup> century. Canon law is inseparably connected with theology and even the expression *jus canonicum* is used not very often. The main principle that functions in the sphere of regulations of private re-

lations is subjection to “personal law” which is first of all determined by the feature of allegiance (citizenship).

At the second stage the formation of specific features of the Western legal tradition begins, interest in private law appears and the formation of its characteristic features starts. These changes take place during the Papal revolution (Gregorian reforms) of 1075–1122, which laid the foundation for the discovery of Justinian’s Roman texts exempting the clergy from the rule of emperors, kings or barons and establishing a strong Papal monarchy in the Western Church. The first European university was founded in Bologna to train lawyers and create legal science as well as separate canon and temporal law, Church and secular legal institutions.

At this stage the concept of law as an integrated and coordinated system is formed, confidence in the eternal nature of law and its ability to grow from generation to generation is stated; the development of law in the West acquires a certain inner logic: the changes are not just the adaptation of the old to the new but they become a part of a particular model of changes<sup>13</sup>, confidence in the supremacy of law over political power is formed; different jurisdictions and different legal systems compete in the same society. Private law begins its formation as a concept, in particular due to the ideas of the High Renaissance, the development of crafts and trade, canon law etc. The study of the principles of Roman law and the reception of its tenets take place.

The main principle of the regulation of relationships in the private sphere is “personal jurisdiction” – legal tenets are applied to a particular group of subjects: the decisive factor is not citizenship, race, gender etc. but their social background.

At the third stage the formation of the basis of the Western tradition of private law takes place under the influence of ideas of “natural law”: establishing the independent status of a private person, recognition of a complex of his or her personal or property rights, the introduction of the principle of contractual freedom etc. a characteristic feature is the reception of Roman private law as a universal tool for ensuring the rights of a private person.

On the other hand, the enrichment of the Western tradition of private law takes place due to national bourgeois revolutions aimed at overcoming the contradictions of internal state and social-cultural development. In particular, the Lutheran concept of Christian conscience to some extent facilitates the development and creation of a system of protection for private contracts and property rights in many Western countries. The English Puritanism promotes the development of independent court procedure with trial by jury

<sup>13</sup> H.J. Berman, *Faith and Order: the Reconciliation of Law and Religion*, Moscow 1999, p. 42.

and strengthens human rights not only in England but in other countries of Western Europe. The codification of civil law in France induces new codifications in the whole Europe and on other continents. The formation of “legal systems” takes place and within their framework the formation of civil-legal systems as well, which also affects the development of the Western tradition of private law. The latter loses “personal jurisdiction” and becomes a clearer complex. However, along with this, it differentiates according to mindset, mental outlook and national traditions, and now develops simultaneously not only in chronological but in geographical positions.

As for the “Eastern European Legal Tradition” it is understood as legal values, concepts, categories and institutions which are characteristic for the Eastern European sub-civilization founded on the outlook, culture and mindset of nations, ethnic groups that were part of so called “Byzantine Commonwealth of Nations” or now are successors of the “Byzantine Spirit” expressed in the principles of the Orthodox Christian religion.

In the Eastern European legal tradition the Eastern European concept of private law is formed under Western influence but it does not lead to the rise of an independent tradition of private law. It is explained by the absence of an independent philosophic basis, a specific character of “person-state” relationships and other similar factors.

Due to the fact that Ukraine was formed and continuously developed in line with the Eastern European legal tradition, a theoretically and practically significant question arises as to determining the grounds for its correlation with the law of the EU, in particular, the opportunities and the level of consideration of the Ukrainian mindset, peculiarities of legal consciousness etc.

In our view the issue of choice does not exist any longer as Ukraine, like any other state that is striving to be a member of the European Union, has already made its choice. And this choice is the European one. This is why the methodological ground for correlation of Ukrainian law with the law of the EU in the field of private law is the consideration of the fact that the concept of private law developed and was formed in the context of the development of the Western tradition of European law. Therefore, the adaptation of the law of Ukraine to EU law depends, first and foremost, on the readiness and ability of Ukrainian society to comprehend basic Western European civilization values (liberalism, human rights, private property rights, contractual freedom, respect of other person’s rights etc.); without these factors real progress towards this aim is impossible.

### Abstract

#### Adaptation on law of Ukraine to the EU in the Context of European traditions of private law

The article considers the problem of adaptation of the law of Ukraine to EU private law. It analyzes the concept of "European Law" and "EU law" as elements of European civilization and their correlation is determined. On the basis of differentiation between the Western and the Eastern European civilizations a conclusion about the existence of corresponding traditions of private law is made. The idea that the concept of private law is grounded in western culture is based on the fact that there is a need for the adaptation of Ukrainian law to EU law. This approach is the basis for the conclusion that the success of the adaptation of the law of Ukraine to EU law depends primarily on the willingness of Ukrainian society to accept the fundamental values of European civilization, such as liberalism, human rights, the right of private property, freedom of contract etc.

**Key words:** European law, the EU law, the law of Ukraine, private law, adaptation, European Traditions, European civilization, European subcivilizations

### Streszczenie

#### Adaptacja prawa Ukrainy do prawa EU w kontekście europejskich tradycji prawa prywatnego

Artykuł poświęcony jest zagadnieniom dotyczącym adaptacji prawa Ukrainy do prawa prywatnego Unii Europejskiej. Na podstawie analizy różnic pomiędzy Zachodnimi i Wschodnimi sub-cywilizacjami autorzy podjęli próbę podsumowania, przez pryzmat istnienia odpowiednich tradycji prawa prywatnego. Zwracają uwagę na to, że koncepcja prawa prywatnego jest elementem Zachodnioeuropejskiej sub-cywilizacji i podstawą adaptacji prawa Ukrainy do prawa Unii Europejskiej. Adaptacja prawa Ukrainy do prawa Unii Europejskiej jest możliwa, przede wszystkim, w oparciu o takie wartości europejskie jak liberalizm, prawa osobiste, prawo własności prywatnej, swoboda umów i inne.

**Słowa kluczowe:** prawo europejskie, prawo Unii Europejskiej, prawo Ukrainy, prawo prywatne, adaptacja, sub-cywilizacja