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SUBSIDIARY APPLICATION OF LEGAL RULES AS A MEANS TO ELIMINATE LEGISLATIVE LACUNAE

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SUMMARY

The article deals with the legal nature of the institution of subsidiary application of legal rules, defines the basic requirements and preconditions for its use in the process of law enforcement activities. We have substantiated the provision according to which subsidiary application of legal standards should be considered more widely than merely as an inter-branch analogy, since it can be applied either there are legislative lacunae or not. We have concluded that subsidiary application of legal rules means application of regulatory directions to the specific relations, which regulates similar essential features of relations in related spheres. On the basis of the analysis, we have suggested a set of features indicating the difference between the analogy of the law and the subsidiary application.

Key words: subsidiary application, inter-branch analogy, legislative lacunae, sphere of legal regulation, legal regulation.

СУБСИДІАРНЕ ЗАСТОСУВАННЯ НОРМ ПРАВА ЯК ЗАСІБ ПОДОЛАННЯ ПРОГАЛИН У ЗАКОНОДАВСТВІ

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АНОТАЦІЯ

У статті досліджено юридичну природу інституту субсидіарного застосування норм права, визначено основні вимоги та передумови стосовно його використання у процесі правозастосовної діяльності. Обґрунтовано положення, відповідно до якого субсидіарне застосування норм права доцільно розглядати ширше, ніж тільки як міжгалузеву аналогію, оскільки воно може використовуватися як за наявності прогалин у законодавстві, так і за їх відсутності. Зроблено висновок, згідно з яким під субсидіарним застосуванням норм права слід розуміти застосування до конкретних відносин нормативного припису, що регулює подібні за суттєвими ознаками відносини у суміжних, споріднених галузях. На підставі проведеного аналізу запропоновано сукупність ознак, що вказують на відмінність аналогії закону від субсидіарного застосування.

Ключові слова: субсидіарне застосування, міжгалузева аналогія, прогалини у законодавстві, сфера правового регулювання, правова регламентація.

Introduction. The category of "subsidiary application" is now reflected both in the general theory of law and in the branch legal sciences. Traditionally, this concept means application of regulatory directions to the specific relations, which governs similar essential features of relations in the related spheres. Of particular importance is the institution of subsidiary application in cases where there exist legislative lacunae, when the efficiency to eliminate the latter arises as a necessary component of the process of full implementation of the goals set before the law.

The purpose of the article is to study the legal nature of the institutes of subsidiary application of legal rules, as well as to determine the basic requirements and prerequisites for the use of the above institutes in the process of law enforcement activities.

The problem of subsidiary application of the law was investigated by such scholars as A. T. Bonner, V. M. Kartashov, V. V. Lazaryev, V. I. Lyeushin, S. V. Polenina, E. I. Spector, J. G. Yanyev and others. At the same time, there are different approaches among scholars regarding the application of the legal rules in the subsidiary manner: in particular, some researchers consider subsidiary application of rules as a variant of the analogy of the law, while others address it as an independent institution. Thus, V. I. Lyeushin regards the subsidiary application of norms to the analogy of the law, "but at a higher level", since in the first case it is necessary to establish similarities not only in social relations, but also in the methods of legal regulation of these relations [1, p. 16-20]. M. J. Baru takes a different view and believes that the subsidiary application of law takes place in cases where the legislative body deliberately refuses to duplicate the same legal rules in various branches of law [2, p. 25]. In its turn, S. V. Polenina considers the legal concepts, common to the related branches of law, as another reason for subsidiarity. She emphasizes the necessity to clearly differentiate between the analogy of the law, which has a sphere within one or another branch, and subsidiary use, which is the application of the rules of one branch to the relations of the related sphere [3, p. 28].

According to A. T. Bonner, due to insufficient development in the theory of law, the issue of subsidiary application of legislation is mistakenly qualified as an analogy in practice, and sometimes in the literature. A. T. Bonner believes that the analogy of the law applies the specific rules of the branch, and in the analogy of law − the general content of a particular branch or law in general. Unlike such cases, in the subsidiary application of the law, reference is made to the specific rules of the

other (related) branch. These standards are applied in addition to the norms of the main branch [4, p. 117-119]. A. Bonner points out quite rightly that the necessity for application of criminal procedural rules may arise in the civil process, in particular, in the case of the necessity to conduct a judicial experiment or obtain samples for examination. Thus, for example, when a court schedules an examination according to the civil proceedings it is advisable to be guided by article 245 of the Criminal Procedural Code of Ukraine (hereinafter referred to as the CPC of Ukraine) [5], which regulates the procedure for obtaining samples for examination, since the applicable civil procedural law does not regulate this issue. Also, practically, there may be a reverse situation in which it is necessary to refer to the provisions of the Civil Procedural Code of Ukraine for the proper application of the norms of the CPC of Ukraine. Thus, for example, part 4 of article 128 of the CPC of Ukraine establishes that the form and content of a complaint in a criminal proceeding shall conform to the requirements established for actions brought in accordance with the civil procedure. At the same time, the CPC of Ukraine does not provide for the consequences of non-compliance with formal and substantive requirements. In this regard, based on the provisions of part 5 of article 128 of CPC of Ukraine, in case of non-compliance with the requirements, regarding the content and form of the claim for compensation of pecuniary and/or non-pecuniary damage, brought during a pre-trial investigation, an investigation officer or prosecutor, using article 185 of the Civil Procedural Code of Ukraine for an analogy, makes a decision to suspend the case, explaining the necessity to eliminate the shortcomings of the document, as well as establish an appropriate term for this.

V. V. Fidarov also considers the subsidiary application of the legal rule as an independent institution and points out that this is neither a way nor a means to eliminate the legislative lacunae, but the very effect, the nature of the effect of these norms, which is expressed in the fact that the legal standards, in addition to regulating direct relations, carry an additional and auxiliary load. Hence, the standards acquire an additional subsidiary property [6, p. 94].

J. G. Yanyev emphasizes that the subsidiary application of the legal rules is predetermined by the unity of law and its division into relevant branches and institutions, interrelations between them, and the genetic links existing between the related and homogeneous branches. In the subsidiary application of the legal standards, there is a similarity in the subject and method of legal regulation. Therefore, referring to the subsidiary application of the legal standards, as a way to eliminate the lacunae, it is necessary to establish the similarity of the case which is to be resolved with a social relation regulated by a related legal institution or a related branch of law [7, p. 76-79].

Speaking about the legislative lacunae, it should be noted that this notion refers to the lack of normative regulation of a certain group of social relations in the field of legal regulation, provided these relations are to be regulated from the standpoint of the principles of law. The legislative lacunae are traditionally considered by the legal science as one of the most common types of defects in law. Proceeding from the fact that the legislative lacunae have a direct negative impact on the effectiveness of the legal regulation of social relations, revealing these lacunae is of a great importance for implementation of the normative legal acts. The theory of law specifies a set of features which enables to raise questions about the legislative lacunae in a particular case. This set usually includes: (a) the fact that a specific situation is within the scope of the sphere of relations subject to legal regulation; (b) the impossibility of resolving this situation through the existing regulatory requirements (in connection with or with complete absence, or with their incompleteness). In its turn, the institution of eliminating the legislative lacunae should mean the adoption of a decision by competent law enforcement agencies (both judicial and non-jurisdiction) on a matter which is not fully or partially regulated by law, but is within the competence of this body.

The similarity of social relations and methods of legal regulation is established within the framework of the analogy of the law, relating to the legislative lacunae elimination of one branch of law in the related field, both logically and legally. The inter-branch analogy is characterized by the same features as the analogy of the law (intra-branch), with the exception of the features inherent in subsidiary application which are conditioned exclusively by the peculiarities of the legal regulation of such social relations by the norms of various branches of law.

The purpose of the subsidiary use of the law as an independent institution lies in the use of the rules of law to directly regulate social relations within the framework of several branches of legislation. According to E. I. Spector, the subsidiary application unifies the legal structure in order to avoid duplication of norms governing such relationships by using an identical subject and method [8, p. 80] (actually the scientist is speaking about the principle of saving the normative material).

In this regard, it seems appropriate to agree with the statement that the subsidiary application is not limited to eliminating the lacunae, as it can also occur in cases where there are no legislative lacunae. Thus, there are such legal concepts which are equally interpreted and applied in various branches of law (for example, general conditions for the conclusion of contracts, limitation of actions, execution and termination of obligations, etc.). In particular, part 7 of article 179 of the Commercial Code of Ukraine indicates that before the conclusion of economic contracts, the rules established by the Civil Code of Ukraine shall be applied. Similarly, the issue is resolved in relation to the termination of economic obligations. And as the civil law devotes a number of norms and provisions, in particular, to such a concept, then, accordingly, there is no need to highlight them in other related spheres. It is enough for the legislative body to make reference to the provisions of this sphere.

Depending upon the fact if there is such a reference, there are two types of subsidiary application of the law. Firstly, if there is a direct indication of the necessity to apply to the related field of legislation; and secondly, if the legislative body considers such application possible. Such types of subsidiary application of the rules are called authorized and by default.

The authorized subsidiary application consists of two types. Thus, in one case, the legislative body sends the law enforcers to a certain field of legislation, in the other − to an uncertain number of the applicable normative acts or those to be adopted in the future. With the subsidiary application of the rules by default, the legislative body does not indicate either the sector of legislation, the rules of which may be applied in a subsidiary manner, nor the system of legislation as a whole. Possibility of subsidiary application of rules is not clearly indicated, but is allowed both through the similarity of relations, regulated by the related branches of legislation, and due to their similar legal institutions. There is no doubt that the legal norms of general importance to many branches adopted by such institutions, such as terms, deeds, representation, and others, regulate the relevant relations in a similar manner, regardless of the legal branch [9, p. 97].

The main difficulty, arising from the subsidiary application of the right by default, is to determine if there is a "tacit consent" of the legislative body with regard to such application of legal norms. This problem can be solved in the following way. The civil procedural law includes such institutes as procedural periods, judicial challenges and notifications, etc. The norms, part of these institutes, are characterized by the fact that they are, in their majority, "auxiliary", since they ensure the proper use by subjects of their rights, the fulfillment of their responsibilities, the determination of the possibility

of resolving disputes. It is difficult to rebut the "tacit consent" of the legislative body to the subsidiary application of legal norms governing identical (or similar) relations. Thus, the term "a weekend", as well as "another weekend" is contained in article 124 of the Civil Procedural Code of Ukraine [10]. In this case, in order to determine whether a day is a weekend or other weekend, it is necessary to apply articles 67 and 73 of the Labor Code of Ukraine in a subsidiary manner [11]. And, for example, the field of labor law makes use of the legal consequences of a transaction committed by an incapable person, stipulated by article 226 of the Civil Code of Ukraine [12], in the form of recognition of such a transaction null and void. It is obvious that it is difficult to insist on the validity of an employment contract concluded by an individual recognized incapable by the court. Consequently, the legislative body has not included the norms in the article justifiably, which regulate the effects of the conclusion of an employment contract by an incapable person. This is done in civil law in detail, the rules of which in this case should be applied in a subsidiary manner.

As E. I. Spector writes, the "appropriate" application of the norms is subsidiary, when the legislative body, by a specific reference, indicates that the rules of other branches (institutions) regulating such relations, apply to certain relations included in the subject of this branch or institute. Therefore, it is possible to point out differences of the analogy of the law and the subsidiary application of the legal rules. Firstly, the subsidiary use in some cases may be not temporary, as a kind of analogy of the law (inter-branch analogy), but stable, directly established by the legislative body in order to achieve unity in the legal regulation of social relations. Secondly, the subsidiary application of the rules is carried out directly by the will of the legislative body, which, in the relevant legal norm, introduces special references to other norms regulating such relations.

The method of legal regulation serves as a criterion to differentiate between the application of the legal rules by analogy and the application of norms in a subsidiary manner. As V. I. Lyeushin points out, when the method of legal regulation determined generally is not contrary to the method of legal regulation of a norm intended for such relations of another branch, a sub-branch, institute, it becomes possible for the subsidiary application.

Taking into account the information mentioned above, it is considered expedient to address the subsidiary application of the legal rules more widely than merely as an inter-branch analogy, since it can be applied depending upon the fact whether there are any legislative lacunae.

However, regardless of whether the subsidiary application of the legal rules is considered to be a kind of analogy, or is an independent institution, it is possible only under certain circumstances, namely: a) in the field of legislation the rules are absent, which directly regulate this social attitude; b) there is a direct prohibition of the legislative body on the subsidiary application of the rules; c) there exist the legal rules in related spheres which mediate the relations to be regulated; d) social relations subject to regulation, and those, regulated already, shall be characterized by similarity; e) methods of legal regulation shall be also similar.

Particular attention should be paid to the problem of the ratio of intra-branch, inter-branch analogy of the law and the analogy of law. In this regard, it should be noted that if there are no prerequisites for the application of the intra-branch analogy of the law, the inter-branch one is applied, followed by (if there are no conditions for the application of the latter) the analogy of law. This scheme is mostly used in the areas of private law, where the analogy is provided for by law. The spheres of public law, where the inter-branch analogy is not widely spread, strict adherence to such a scheme makes no sense, since it has more theoretical than practical significance. However, the analogy of law in any case is even less desirable.

From this perspective, attention should be paid to the criteria to determine whether the application of analogy is possible in order to eliminate the legislative lacunae. Thus, the analogy is always possible, except in those cases where the legal consequences are associated only with the specific legal rule. On the basis of this, one can identify the following areas in the national legal system, in which the analogy is unacceptable, namely: (a) the sphere associated with the qualification of an act as an offense and the establishment of measures of legal liability; (b) the sphere of public legal relations, which are regulated by an imperative method, where the material rights and obligations of the party arise due to the legal rules of specific content; (c) the sphere of responsibilities of public authorities and local self-government bodies and their officials (in particular, it is prohibited to determine, by analogy, the powers of bodies of public authority and local self-government, their officials, established by the Constitution and laws of Ukraine, as well as the grounds and methods of their actions); (d) the sphere where the law extends its provisions only to cases expressly provided for, which is an indication that this provision is not valid for other cases. In general, while characterizing the institute of analogy in law one should take into account the fact that its main purpose is to respond to the changes and the new social relations, which require legal regulation and resolution in a timely manner.

Therefore, one should consider such means of eliminating the legislative lacunae as the application of rules by analogy (in the form of both intra-branch and inter-branch) not as an exception in nature of the phenomenon, but as an institution, due to the properties of the law itself, a natural legal instrument, aimed at ensuring its functioning as a single, integral and dynamic system.

As an example of the application of the inter-branch analogy, we can suggest the decision of the judge of the chamber of civil cases of the Kharkiv Regional Court of Appeal of December 14, 2006 [13] on the remand of the administrative case to the court of first instance to eliminate the shortcomings in the execution of the case, with a time limit for eliminating such shortcomings. Thus, in this case, the judge, having revealed the shortcomings in the execution of the case, and taking into account that the norms of the Code of Administrative Procedure of Ukraine (hereinafter referred to as the CAP of Ukraine), at the time the case was tried, did not contain any requirements regarding the order of return to the court of first instance by an appellate court of a case, executed improperly, in accordance with the requirements of part 7 of article 9 of the CAP of Ukraine (in force at the time of the trial) [14], considered appropriate to apply the provisions of part 4 of article 297 of the Civil Code of Ukraine (in force at the time of the trial) by analogy, and ordered to remand the case to the court of first instance for shortcomings in the execution.

We can suggest a similar situation regarding the determination of the jurisdiction of an administrative case, when a party is a court or a judge of this court. Thus, considering that this issue is not regulated by the Code of Administrative Justice of Ukraine, the courts, when considering the materials of an administrative claim brought before an administrative court judge, are guided by the provisions of the Civil Procedural Code of Ukraine, which establishes the procedure for determining the jurisdiction of civil cases, in which one of the parties are the court or the judge of this court [15]. Taking into account the foregoing, one can conclude that the above rule of the Civil Procedural Code of Ukraine is applicable to determine the jurisdiction of an administrative case under the rules of the inter-branch analogy.

Conclusion. Consequently, as we can judge from the foregoing, subsidiary application occurs only between related

branches and institutions, which are identical in character, as well as genetically interrelated. At the same time, referring to the subsidiary application of the rules of the related branches of law, one should bear the fact in mind that it is permissible only under certain conditions. In particular, it is necessary to identify a significant similarity in regulated relations, as well as in the methods of their legal mediation. When choosing a subsidiary application of the legal rule, one should also take into account the principles inherent in the field of law to which these rules actually belong.

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