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TEMPORARY MANIFESTATIONS OF LEGAL DETERMINATION IN PRIVATE EUROPEAN LAW

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SUMMARY

This article analyzes the doctrinal approaches to the essence and content of the category of "legal certainty" in the European and Ukrainian legal systems. Its basic principles and the application procedure at the stages of law-making and law enforcement are studied. The individual constituent elements of legal certainty are investigated with the aim of achieving theoretical and practical uniqueness of their content and purpose in legal regulation. Particular attention is paid to the temporal factors that are part of the commented principle and affect the certainty of a legal norm and a court decision in view of their movement in time. The practice of using legal certainty in national law is analyzed, specific recommendations for the adaptation of European principles to it are proposed.

Key words: legal certainty, reverse action of law, promulgation of legal act, stability of law.

ВРЕМЕННЫЕ ПРОЯВЛЕНИЯ ПРАВОВОЙ ОПРЕДЕЛЕННОСТИ В ЧАСТНОМ ЕВРОПЕЙСКОМ ПРАВЕ

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АННОТАЦИЯ

В этой статье осуществлен анализ доктринальных подходов к сущности и содержанию категории «юридическая определенность» в европейской и украинской системах права. Изучены основные ее принципы и порядок применения на этапах правотворчества и правоприменения. Исследованы отдельные составляющие элементы правовой определенности с целью достижения теоретической и практической однозначности их содержания и назначения в правовом регулировании. Особое внимание уделено темпоральным факторам, которые входят в состав комментируемого принципа и влияют на определенность правовой нормы и судебного решения ввиду их движения во времени. Проанализирована практика использования правовой определенности в национальном праве, предложены конкретные рекомендации для адаптации к нему европейских принципов.

Ключевые слова: юридическая определенность, обратное действие закона, обнародование правового акта, стабильность права.

MANIFESTĂRI TEMPORARE DE SECURITATE JURIDICĂ ÎN DREPTUL EUROPEAN PRIVAT

REZUMAT

Acest articol analizează abordările doctrinale privind esența și conținutul categoriei de „securitate juridică" în sistemele juridice europene și ucrainene. Sunt studiate principiile sale de bază și procedura de aplicare în etapele legii și aplicarea legii. Elementele constitutive individuale ale securității juridice sunt cercetate cu scopul de a realiza unicitatea teoretică și practică a conținutului și scopului lor în reglementarea legală. O atenție deosebită se acordă factorilor temporari care fac parte din principiul comentat și afectează certitudinea unei norme legale și a unei decizii judecătorești având în vedere mișcarea lor în timp. Practica utilizării securității juridice în dreptul național este analizată, sunt propuse recomandări specifice pentru adaptarea principiilor europene la aceasta.

Cuvinte cheie: securitate juridică, efect invers al legii, promulgarea unui act juridic, stabilitatea dreptului.

Formulation of the problem. One of the main principles in the system of general principles of law is the principle of legal certainty. The requirement of certainty is one of the most important presented by a person to law. Its importance has long been recognized by European culture [1, p. 38]. According to the generally recognized paradigm, it is considered an essential element of the rule of law. In fact, the ideology and components of the rule of law are not always fixed in international legal acts, national constitutions and specific laws, but the application of these categories is required because it provides concrete and effective protection of human rights on the basis of justice. Therefore, a significant role in the construction and legal consolidation of the real content of certain principles of the rule of law belongs to legal science and judicial practice of European and national law enforcement institutions. This directly concerns the legal essence of the principle of legal certainty, the application of which guarantees the clarity of the grounds, goals, clarity and unambiguity of the content of regulatory requirements, especially those addressed directly to citizens. A person in accordance with the requirements of this

principle, guided by legal acts, should be able to confidently provide for the legal consequences of his behavior. Legal certainty is also called to ensure stability of legal relations, predictability, stability and invariability of court decisions, it is an integral part of the effective protection of participants in public relations. Thus, the achievement of legal certainty in the field of lawmaking and law enforcement leads to the optimal observance and protection of human rights. At the same time, there is a risk that, being too regulated, legal certainty may cause excessive rigidity, and the impossibility of achieving absolute certainty in drafting laws and administering justice will stretch. Consequently, studies of legal nature continue to be relevant.

Relevance of the topic. The protection of citizens' rights by judicial means is guaranteed on the basis of constitutionally determined principles of legal proceedings, as set forth in Art. 129 of the Basic Law. The law enforcement body, while administering justice, is independent and is guided by the rule of law. Despite the fact that in the new edition of the Basic Law the mention of legality is removed from the text of this norm, it is still presumed. This is because it is law that is the basis of the rule of law in the state, and law is the main source of the legal system and the law itself. At the same time, the new version of the Constitution, responding to the needs of the time, regulated the temporal characteristics of a fair trial, including in its basic principles of justice a new one: "on a reasonable time for a court to consider a case". Its appearance, as is commonly believed, is due to the signing by Ukraine of the Convention for the Protection of Human Rights and Fundamental Freedoms, in art. 6 of which the person's right to a fair trial is postulated in such a way that it includes as an integral part the right to a reasonable period of consideration of the case. In our opinion, the causal relationship here is somewhat different, because Ukraine introduced the Convention and judicial practice of the European Court of Human Rights (ECHR) into its national legislation in 2006 by its law. In fact, it has become frankly obvious that without regulatory changes, despite all good intentions, nothing will change. As dry statistics show, the number of complaints from citizens of Ukraine related to exceeding a reasonable time frame for proceedings in cases considered by the ECHR is growing. At the same time, as a rule, citizens complain about the duration of the examination in excess of five, seven, or even ten years. Consequently, the issue has become even more relevant.

The state of the study. In the scientific literature, quite a lot of attention has been devoted to the issues of legal justification of the principle of legal certainty and its constituent elements. The works of such scientists as L. Bogacheva, L. Entin, V. Cairns, V. Opryshko, A. Klimovich, P. Rabinovich, A. Soloviev, D. Suprun, L. Timchenko, S. Fedik, S. Pogrebnyak, A.Tatam and others should be mentioned. However, the works of these researchers mainly relate to the effectiveness of engaging in the commented legal principle as a legal category, which has a threefold nature: law-making, law-enforcement and interpretation. Meanwhile, the question of the nature and sources of legal support and adaptation to the Ukrainian realities of the principle of legal certainty is not given enough attention to scientists. It should also be noted the practical lack of comprehensive scientific research on the temporal manifestations of this principle and their effectiveness in specific enforcement. This work is **aimed at studying this issue**, which will allow us to develop a separate concept regarding the certainty of legal acts and court decisions in terms of their application and operation in time.

Statement of the main material. The historical sources of the phenomenon under consideration relate to the Greek concept of legal certainty, which is associated with the idea of the certainty of the law. At that time, all the laws were "defined" (that is, precisely formulated and written down), although no one was sure of the stability of such a law, which could lose force as a result of the adoption of a new one. This concept was further developed in Ancient Rome. According to her, the law could not be changed unpredictably and did not depend on the spontaneous actions of senators or other senior officials. Therefore, in this case, the law acted for a long time, which gave it stability, and the population – confidence in the stability of legal relations, which were regulated by the relevant law [2, p. 187]. It was in the process of Ancient Rome that the term "res judicata" appeared and was further developed, which is now customary to designate one of the components of the principle of legal certainty. "Res judicata" in Roman law is associated with the adoption of a judicial decision and its entry into force [3, p. 76; 4. p. 276]. At the present stage, the "res judicata" is used by the European Court of Human Rights in the sense of final judgment.

The range of sources of non-codified European law, which reflect the specifics of relations in the European Union and differences in the legal traditions of members of this community, is quite wide. It includes both legislative acts and the precedents of the Court of Justice of the EU, as well as international treaties. But the main thing that all of them are united conceptually is the observance in their design and application of the general principles that are essentially democratic, which stem from the internal nature of the law itself. The doctrine indicates that the principles of law are the initial ones, defining ideas, provisions, and attitudes that make up the moral and organizational basis of the emergence, development, and functioning of law [5, p. 18]. Such provisions are customary to include, in particular, the principles of legal certainty, proportionality, legitimate hopes and fundamental human rights [6, p. 104].

At the beginning of its application, the principle of legal certainty in the law enforcement sphere had a very limited interpretation and was perceived only as a manifestation of the res judicata rule. This category in its classical sense meant the inadmissibility of a re-examination of a case that has already been decided, and in it a final decision is made. However, in the future, as a result of practical application and interpretation by various European law enforcement institutions, the content of this principle has constantly expanded, covering its new manifestations aimed at ensuring the stability of the legal regulation of relations in society. Therefore, now the principle of legal certainty includes all factors that guarantee a person the opportunity to foresee the consequences of his behavior, to have confidence in the stability and immutability of his rights and obligations for the foreseeable future.

Uncertainty of a legal norm has negative consequences. In addition to the uncertainty and unpredictability of the behavior of participants in legal relations, on a practical plane, the principle of certainty of the legislative process is transformed into a specific requirement for the respondent state to ensure an appropriate level of law enforcement. The fact is that in Ukraine today, often the fulfillment of the requirements of regulatory legal acts is carried out inappropriately, and the main reason for this is their uncertainty. All this causes significant difficulties and forces entities to seek protection in international judicial bodies, which, as a rule, leads to the responsibility of Ukraine and reduces the authority of the latter as such, which cannot ensure the certainty of legal acts, and then protect their citizens.

The rule of law principle and its constituent elements form the basis for the formation of the legal system of the European Union. They are fully consistent the needs of the functioning of the integration legal order, providing its ideological orientation, which is based on a person as the highest social value, his social development, fundamental rights and freedoms [7, p. 54]. Among the principles that are common to the legal order of several or all Member States, an important place is

occupied by the principles of legal certainty, legal expectations, proportionality associated with fundamental human rights and procedural rights [6, p. 104]. Despite the fact that the principle of legal certainty is not fixed in the normative documents regulating the activities of the European Union, the Court of the EU postulates it as one of the general principles of European law. For example, in the Salumi case, the EU Court emphasized that the effect (consequences) of Community law should be clear and predictable for those to whom it applies [8], which reproduces the classic signs of the principle of legal certainty.

As you know, European law, in addition to the rules governing social relations, emerging during the integration processes within the European Community and the EU law based on them, also includes the principles and norms of the European system of human rights protection. Therefore, it seems important that the principle of legal certainty is widely applied in the practice of the European Court of Human Rights, the precedents of which can be considered part of European law. At the same time, the Court certainly emphasizes that the principle of legal certainty is inherent in the law of the Convention (paragraph 49 of the ECHR judgment in the Sunday Times v. The United Kingdom of April 26, 1979, paragraph 58 of the ECHR judgment in the Marx v. Belgium of 13 June 1979) Moreover, the principles of law are not only what is fixed in the law [9, p. 221]. This approach is very important for the ECHR. In the cases mentioned above, he emphasizes that the term "established by law" provides not only written law, but also unwritten, that is, stable rules of conduct in society, taking into account their morality. In particular, in the case of Steel and others v United Kingdom, the Court states the following: the Convention requires written or unwritten law to be sufficiently clear and to allow a person, if necessary, to foresee, to a certain extent and in certain circumstances, the consequences of a specific action. Moreover, the terms "legal" and "in accordance with the procedure established by law" have meaning not only in the sense of complying with national legal norms, but also in the sense that any restriction corresponds to a socially significant goal and is not arbitrary [10, p . 91]. Actually, in this definition, the ECHR fixes the relationship and interdependence of the principles of legal certainty and proportionality. As you can see, the commented principle has various manifestations, which in specific situations can border or even intersect with others. In particular, it is one of the defining principles of "good governance" and "proper administration" (establishing the procedure and its observance), partially coincides with the principle of legality (clarity and predictability of the law, requirements for the "quality" of the law) [11, p. 62].

It should be noted that the structure of the right to a fair trial, established in paragraph 1 of Art. 6 of the 1950 Convention is not fully defined elementwise. This is also recognized by the European Court of Human Rights. Therefore, it is precisely as a result of precedent developments and interpretation of the provisions of this norm that the contents of not only the indicated elements, but also those that are not spelled out in the article, but that are significant enough to reveal the essence of law, are revealed. Therefore, along with such categories as the publicity of the trial, the impartiality of the court, guarantees for the consideration of the dispute within a reasonable time, unnamed elements such as legal certainty, equality of initial opportunities, legitimacy of expectations, and reasonableness of consideration of the case acquire the significance of the principles of law. Actually, since most of the main provisions of the Convention are formulated in general terms (otherwise their interpretation may be too formal and therefore not effective), without applying the principles of case law of the European Union, it would hardly be able to ensure the effective operation of the Convention. Only the consistent development of the practice of the Strasbourg court makes it possible to eliminate the threat of an ambiguous understanding of the content of fundamental human rights and freedoms and the emergence of "double standards" [12, p. 259].

So, as already mentioned, part of the guarantees that make up the content of the right to a fair trial are not mentioned in Art. 6 of the Convention. They are developed and interpreted case-law of the Court. Indeed, it is quite difficult, without applying the decisions of the European Court, to unambiguously and indisputably determine the content of the terms "reasonable time", "legal certainty", "justice", "independence of judges", "impartiality" and others. It should be noted that in accordance with Part 1 of Art. 32 of the Convention, the interpretation of its norms falls within the exclusive competence of the court [13, Art. 32]. Therefore, the practice of the ECHR, which under these circumstances is recognized as the basis for an official international interpretation of the 1950 Convention, is decisive for the formation of a legal relationship between the legislator of the countries party to the Convention and the relevant law enforcement institutions. The doctrine on this subject expressed a good idea that the Convention is a skeleton, while case law is flesh, which gives it life [14, p. 153].

According to the case-law of the ECHR, the certainty of law at the stage of law-making is to ensure the possibility of effective implementation by a person their rights and obligations by ascertaining the legal consequences of their own or counterparty's behavior. This implies the need for the legislator to ensure the irreversibility of a legal norm in time, its stability, clarity, clarity and unambiguity. The basic requirements that a good (fair) law must meet, according to the apt expression of Francis Bacon, are: clear meaning; fairness of claims; ease of implementation; the law should be consistent with the form of the state and should generate virtue in citizens [15, p. 207]. As indicated in numerous decisions of the ECHR in specific cases, including against Ukraine, court decisions can be used not only in law-making, but also in law enforcement activities of the state [16, p. 10-11]. According to the practice of European legal proceedings regarding the fairness of law enforcement and in accordance with the principle of legal certainty, the content of judicial lawmaking is reduced to filling in the gaps in the legislation. This occurs when a certain rule of law is set out vaguely and incomprehensibly for the subjects of legal relations, which requires its additional interpretation when considering the case, or in the absence of an appropriate norm in resolving disputes, as well as in the presence of legal conflicts between the rules of law. In such cases, the principle of priority of these norms is formulated, which then becomes mandatory in judicial practice [17, p. 312].

It is still slowly, uncertainly, but legal certainty is gradually emerging in the Ukrainian national legal system. As before, so, in fact, and now, it was mainly focused on the creation and application of law in the interests of the state. But recently, changes have nevertheless been taking place, and now the Ukrainian legal system is a mixed structure of hard and soft law, where a person, and therefore his rights and freedoms, begins to take first place [18, p. 401]. The European principles of the rule of law, fundamental human rights, fair trial and the like are gradually recognized and put into practice. Certain attention is also given to legal certainty in the process of creating and applying the rule of law. Thus, the Constitutional Court of Ukraine in Decision dated June 29, 2010 No. 17-rp / 2010 described the legal certainty as an element of the rule of law: "One of the elements of the rule of law is the principle of legal certainty, which states that the restriction of fundamental human and civil rights and the implementation of these restrictions in practice is permissible only if the predictability of the application of legal norms established by such restrictions is ensured. That is, the restriction of any right should be based on criteria that will allow a person to separate legitimate behavior

from illegal behavior, to anticipate the legal consequences of their behavior "(paragraph three of subparagraph 3.1 of paragraph 3 of the reasoning part) [19]. At the same time, the supreme body of constitutional jurisdiction noted that the legal certainty is to meet such a situation when restrictions on the fundamental rights of a person and a citizen can occur only if the consequences of applying legal norms are clear and predictable for a person.

This approach is fundamental from the point of view of observing the rights provided for in the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 and the judicial practice of the European Court of Human Rights. Subject to the requirements of the Constitutional Court of Ukraine, this obliges the state, as an integrated and integrated entity, to refrain from arbitrary actions, ensuring strict observance of the principle of public law. This principle, in particular, contains the requirement: "public authorities are obliged to act only in the manner prescribed by law," and the boundaries of the discretionary powers of authorities should be clearly outlined by the limits of the law, both material and procedural" [20, p. 69]. An important temporal element of legal certainty, which should be applied in the national legal system, is to enable a person to reasonably foresee the legal consequences of their actions [21, p. 63]. Therefore, it should be noted that the State party to the Convention must ensure the indispensable application of the principle of legal certainty in the implementation of law enforcement activities, and thus achieve fair trial in the settlement of specific disputes.

The temporal manifestation of the principle of legal certainty in the practice of the European Court is personified in the requirements for ensuring the fact of bringing the content of the law to the attention of participants in legal relations. It is from this moment that the scope of the rights and obligations of each entity gains certainty, which, in turn, will allow them to plan their actions in accordance with the law, and therefore provide for their consequences. A similar approach, ensuring the real application of the requirements of the law, consists in the conscious implementation of it by the persons concerned. It, like in a drop of water, reproduces a combination of requirements arising from the principle of legal certainty, both in terms of the content and procedure for adopting the law, and in the process of its application [22, p. 367].

Temporal factors of applying the principle of legal certainty are considered to be one of the main ones. This is clearly reflected in the report of the Venice Commission, which states that legal certainty requires that the rules of law be understandable and accurate and aimed at ensuring that situations and relationships are predictable. Therefore, the reverse effect of a legal act in time does not meet the principle of legal certainty, at least in criminal law (in accordance with Article 7 of the ECHR), since persons must know the consequences of their behavior; but also in civil and administrative law, as this may affect rights and legitimate interests. Legal certainty requires respect for res judicata principle - final decisions of national courts should not questioned. This involves the enforcement of final court decisions. A system that casts doubt on final court decisions without convincing grounds in the public interest and without indication term, does not comply with the principle of legal certainty [23, p. 11].

The Court of Justice of the European Union is also actively applying temporary regulatory levers. For example, in his decisions on the cases of Racke v Hauptzollamt Mainz (1979) and Hauptzollamt Landau (1979), he repeatedly emphasized the importance of the principles of legal certainty and legal expectations. It was pointed out that "the principle of legal certainty is intended to prevent the entry into force of the provisions of Community legislation before they are published, and this possibility is exceptional when this is due to the objectives of the relevant legislation and if the legitimate expectations of those to whom it applies are duly ensured " [24, p. 146].

The European Court of Human Rights in its decisions, using the principle of legal certainty, also separately focuses on its temporal components. So, in the case of "Alexander Volkov v. Ukraine" dated January 9, 2013, statement No. 21722/11 a violation of the principle of legal certainty was found by the European Court of Human Rights. Considering the absence in Ukraine's legislation on the statute of limitations for holding a judge liable for violation of the oath, in the context of observing the requirements of the "quality of the law" when verifying the justification for interference with the rights guaranteed by Article 8 of the Convention. At the same time, the ECHR, in particular, stated the following: "As regards this case, there is no evidence that during the examination of the applicant's case there were any guidelines and practices that established a consistent and restrictive interpretation of the concept of "violation of the oath". The court also considers that the necessary procedural guarantees that could prevent the arbitrary application of the relevant substantive legislation were not introduced. In particular, the national legislation did not provide for any time limits for initiating and conducting proceedings against a judge for "violation of the oath". The absence of any statute of limitations was contrary to the rules of Article 6 of the Convention and gave the disciplinary authorities complete freedom of action, which violated the principle of legal certainty" [25, para. 180, 181].

In the temporal dimension, the principle of legal certainty has the meaning that it forms the requirements for the duration of a legal norm. Each act, in order for its action to begin, must be made publicly public. This means that the state, formulating the rules of conduct for participants in legal relations, while demanding knowledge and implementation of legal acts from them, must ensure their accessibility, bring to the attention of the subjects they concern. The law should be adequately accessible, the citizen should have the opportunity to be guided by the circumstances in what legal norms apply to this case [26, p. 49]. In Ukraine, it would seem that there should be no misunderstanding about this. The Basic Law states that laws and other normative legal acts that determine the rights and obligations of citizens that are not brought to the attention of the population in the manner prescribed by law are invalid, and that the law comes into force ten days from the date of its official publication unless otherwise provided by the law itself, but not earlier than the day of its publication (Articles 57, 94 of the Constitution of Ukraine). The procedure for promulgation of normative acts, and therefore the term for their entry into force, is established by the Decree of the President of Ukraine of June 10, 1997 "On the Procedure for Officially Promulgation of Normative Legal Acts and Their Entry into Force". By the Decree of the President of Ukraine of December 13, 1996 "On the publication of acts of legislation of Ukraine, the order in which the legal acts come into force is defined in the newsletter "Official Gazette of Ukraine". In Art. 59 of the Law of Ukraine on Local Self-Government, it is also indicated that acts of local government bodies and officials of a regulatory nature enter into force on the day of their official publication, unless a later deadline for the introduction of these acts is set by the body or official. However, practice shows that Ukrainian courts practically do not verify the legal force of acts, first of all, issued by local authorities, to which the parties to the process refer to justify their claims, thus allowing violations of the principle of legal certainty.

From the foregoing, we can draw **conclusions**. The category of "legal certainty" is an independent fundamental principle of European law. In Ukraine, it is necessary to take a number of measures in order to introduce the legal framework provided

for by this principle into the national legal system, taking into account the specifics of their application to legal relations in specific branches of law. For this, it is necessary to ensure the practice of equal application of the law, which is necessary for the proper protection of human rights and freedoms. This will ensure the legal security of the individual, who will be able to plan their activities and rely on the fact that in the exercise of their rights and legitimate interests, state bodies and courts will act predictably, in accordance with the established procedure, without going beyond discretionary powers and preventing arbitrariness. In the temporal aspect, it is necessary to create a situation where the application of inactive (not promulgated) legal acts of any level and their application in reverse order in time will become unacceptable.

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