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КРИМІНАЛЬНО-ПРОЦЕСУАЛЬНА ВІДПОВІДАЛЬНІСТЬ ЗА НОВИМ КРИМІНАЛЬНИМ ПРОЦЕСУАЛЬНИМ КОДЕКСОМ УКРАЇНИ

Анотація
Проаналізовані концепції розуміння кримінально-процесуальної відповідальності у кримінально-процесуальній науці. Розглянуті питання щодо поняття кримінально-процесуальної відповідальності. Проаналізовано та узагальнено теоретичні дослідження проблем, пов'язаних з визначенням особливостей прояву кримінально-процесуальної відповідальності. Визначена система мір кримінально-процесуальної відповідальності за КПК України 2012 року. Окреслена процесуальна форма реалізації кримінально-процесуальної відповідальності.
Ключові слова: кримінально-процесуальна відповідальність, міри кримінально-процесуальної відповідальності; процесуальна форма реалізації кримінально-процесуальної відповідальності.

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УГОЛОВНО-ПРОЦЕССУАЛЬНАЯ ОТВЕТСТВЕННОСТЬ В СООТВЕТСТВИИ С НОВЫМ УГОЛОВНЫМ ПРОЦЕССУАЛЬНЫМ КОДЕКСОМ УКРАИНЫ

Аннотация
Проанализированы концепции понимания уголовно-процессуальной ответственности. Рассмотрены вопросы о понятии уголовно-процессуальной ответственности. Проанализированы и обобщены теоретические исследования проблем, связанных с определением особенностей проявления уголовно-процессуальной ответственности. Определена система мер уголовно-процессуальной ответственности согласно УПК Украины 2012 года. Очерчена процессуальная форма реализации уголовно-процессуальной ответственности.
Ключевые слова: уголовно-процессуальная ответственность, меры уголовно-процессуальной ответственности; процессуальная форма реализации уголовно-процессуальной ответственности.

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ADAPTATION OF THE TRUST TO CIVIL LAW SYSTEM

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In this article the concept of the trust in the legislation of some European countries is investigated. In particular, legal regulation of the trust in France and Germany is investigated. The concept of the trust, given by Model rules of the European private law is analyzed. Different aproaches to the trust in Common and Civil Law are analyzed. Specifics of continental model of fiduciary property are defined.
Keywords: fiduciary property, trust management, trust, European private law, Common Law, Civil Law.

The statement of the problem. The most important problem wich needs to be solved in terms of European integration is the adaptation of institutions which have different approaches in Common and Civil Law. The trust is one of the most famous institututions of the Common Law that was concidered the specific institution of exceptionally Common law for a long time. But simultaneously with processes of integration of European countries began the process of adaptation of the trust to Civil Law.

The analysis of the last researches and publications. There are a lot of scientists that dedicate their works to the researche of the trust in national and foreign law, such as R.A. Maydanyk, S.A. Slipchenko, V.V. Vitryansky, Pr. Mifsud-Parker, J.-Fr. Adelle and others.

The definition of parts of a common problem unsolved earlier. There are still not many works that are dedicated to the investigation of the ways of adaptation of the trust in Civil Law. And there are very few investigations of the meaning of trust given by «Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference (DCFR)».

The aim of the article. The main goal of this article is the researce of different aproaches to meaning of the the trust in Common and Civil Law and searching of the ways of adaptation of the trust to conditions of Civil Law.

The statement of the main material. There are a lot of definitions that have been given for the "trust" in Anglo American jurisdictions. Here are some of them.

The trust is an equitable or beneficial right or title to land or other property, held for the beneficiary by another person, in whom resides the legal title or ownership, recognized and enforced by courts of chancery [1]. Or trust is a holding of property subject to a duty of employing it or applying its proceeds according to directions given by the person from whom it was derived [2].

R. David point out that the trust is established, by the general rule, according to the following scheme: a person establishing the trust (the settlor of the trust) causes that some property will be managed by one or several persons (trustees) in interests of one or several persons – beneficiaries [3, p. 236].

K. Matridis considers, that the trust is a legal relationship in which one person (the founder of a trust) transfers to the possession to other person (trustee) any property or the right and simualtaniously oblige him to manage this property on his own behalf as the independent owner, but on condition of transfering the benefit to a third person (beneficiary) [4, p. 24].

The analysis of the given definitions allows to come to a conclusion that the trust in its classical understanding is the transfer of the property by the founder of the trust (who is the owner of property – settlor), to another person – the confidential owner (trustee) for management in interests of the third person or persons, specified by the founder – beneficiaries (beneficiary), or for achievement of the special purpose that was defined by the settlor.

Consequently, there are three parties involved: the settlor who establishes the trust; the trustee or fiduciary to whom the ownership is transferred with the stipulation that he administer the property in favor of a third party; and the beneficiary or fid commissary (cestui que trust) who holds the beneficial title to the property, that is to say, the person who receives the equitable title. This tripartite structure allows understanding why the most important point is found in the fact according to which the trustee does not have the enjoyment or title to the economic advantages of the property, this being so because the trustee is legally bound to give that enjoyment to a third party called the beneficiary. The trust implies, therefore, a peculiar situation by virtue of which a person, who has divided his patrimony, sets aside some of it in order to constitute a trust, transmitting the corpus to another, not for him to take possession of, but for him to administer and manage for the benefit of someone else, who can just as well be the settlor himself. In other words, the institution of the trust rests upon a division of ownership between ownership in form, or legal ownership, and ownership in substance, or bonitarian ownership, a distinction that has its roots in the duality of the English law which, as we know, distinguishes between the Common Law title and the Equity title. Legal or formal ownership, then, is subject to the Common Law, while ownership in substance, or that to be possessed, is subject to the laws of Equity, that is to say, the fiduciary's title is protected by the common law courts and the beneficiary's (cestui que trust's) by the equity courts [5].

And as we know, what is possible for Common Law, because of its historical development which caused distinction between Common Law and Equity, is impossible for Civil Law that does not know such a division. Besides there is a principle of in division of property, supposed to be fundamental in the Roman legal system and therefore presumptively also in modern Civil Law, precludes acceptance of an institution, such as that of the trust, by which property is divided into legal and equitable rights [6]. That`s why the trust in its classical sense can`t exist in countries where Civil Law prevails.

But on the other hand, there are numerous advantages of the trust which make it very attractive for European countries with Civil Law systems. Even though Civil Law jurisprudence rejects the concept of the Common Law trust, as a theoretical matter, the practical usefulness of the device for its beneficiaries is undisputed even by Civil Law lawyers. The French scientist, Lepaulle, considers that «the trust is the guardian angel of the Anglo-Saxon, which accompanies him everywhere from the cradle to the grave. It is at his school and his athletics alike. It follows him morning to his office and evenings to his club. It is by his side on Sunday at church or in a committee meeting of his political group. It will support his old age until his last day, and then it will watch at the foot of this tomb and extend over his grandchildren the light shadow of its wings» [7]. And as Maitland said, «if we were asked, what is the greatest and most distinctive achievement performed by Englishmen in the field of jurisprudence, I cannot think that we should have any better answer than this, namely the development from century to century of the trust idea» [8].

That`s why trusts were accepted in practice and then in theory in some European countries. For example, German legislation does not contain any rules about trust, although some kind of trust relationships we may meet in practice. This kind of operations in Civil Law countries is called fiducia. The first type of confidential operations with property in Germany is called fiducia-management, and it presents the mechanism of transfer of the property right from the founder of management (fiduciant) to the manager (fiduciary) who is obliged to operate in fiduciant`s favour or in the third party`s interests. The fiducia-management provides transfer of property – the object of fiducia – for management in interests of fiduciant. Such model is applied, for example, in case of feigned transfer of a thing with the purpose to avoid the collecting of it and on condition that it will be returned in the future [9, p. 136].

The second type of the trust relations in Germany is a fiducia-ensuring when the debtor gives to the creditor as ensuring the property which the creditor undertakes to return to the debtor on condition of full payment of a debt [9, p. 136]. This way of ensuring was developed in German courts for the purpose of avoidance of a number of the legislative restrictions connected with use of the mortgage in due time. By means of this legal design the borrower transfers to the creditor the ownership to a movable thing which is transferred

to ensure the obligation. The agreement on preservation of a thing in possession of the borrower and about establishment of mediate possession of the creditor is for this purpose concluded. Having allowed mediate possession, on the basis of the confidential agreement, justice legalized ensuring the credit with a movable thing without its transfer to possession of the creditor [9, p. 137].

In France trust relationships had got their regulation by Civil Code. In February, 2007 the law on a fiducia came into force in France. According to that law, French Civil Code was added with the section devoted to the fiducia.

In contrast to the Anglo-Saxon trust (which confers a right in rem), a fiducia is a limited contractual ownership, as it can be exercised only for the purposes of the fiducia arrangement and is protected against the creditors of the fiduciary. A transfer of property gives rise to specific requirements, irrespective of the nature and number of assets that are the object of the arrangement, namely registration with the tax authorities of the constitution, amendment and termination of the fiducia agreement, and publication of the agreement and its amendments at the National Registry of Fiducia, which will be created by decree of the Conseil d'Etat. Certain transfers (essentially immovable assets and going concerns) must be published.

A fiducia may include assets, rights and collateral. In the latter case the fiduciary receives and manages a security that is already perfected either for its own benefit or for the benefit of a third party (or both) [10].

According to art. 2011 of the French Civil Code a fiducia is the operation by which one or more grantors transfer assets, rights, or security rights, or a set of assets, rights, or security rights, present or future, to one or more fiduciaries who, keeping them separate from their own patrimonies, act to achieve a specified goal for the benefit of one or more beneficiaries.

A fiducia is established by legislation or by contract (art. 2012). The art. 2015 of the French Civil Code establishs some rules about parties of the fiduciary contract. According to that article, can be fiduciaries only the credit institutions mentioned "under I of Article L. 511-1" of the Monetary and Financial Code of France, the institutions or services listed in Article L. 518-1 of the same Code, investment enterprises mentioned in Article L. 531-4 of the same Code, as well as the insurance enterprises governed by Article L. 310-1 of the Insurance Code of France. Members of the legal profession of "avocat" can also act as fiduciaries. The grantor or the fiduciary may be the beneficiary or one of the beneficiaries of a contract of fiducia (art. 2016).

The art. 2018 of the French Civil Code determines essential terms of the fiduciary contract. According to that article the contract of fiducia determines, on pain of nullity: 1) The assets, rights, or security rights transferred. If they are future assets, rights, or security rights they must be determinable; 2) The duration of the transfer, which may not exceed ninety-nine years from the date the contract is signed; 3) The identity of the grantor or grantors; 4) The identity of the fiduciary or fiduciaries; 5) The identity of the beneficiary or beneficiaries or, failing that, the rules that allow for their designation; 6) The task of the fiduciary or fiduciaries and the extent of their powers of administration and alienation.

When the fiduciary acts for the account of the fiducia, he must so state expressly. Likewise, when the fiduciary patrimony includes assets or rights whose transfer is subject to publicity, the transfer must make an express reference to the name of the fiduciary in that capacity (art. 2021). In his relations with third parties, the fiduciary is deemed to enjoy the broadest powers over the fiduciary patrimony, unless it is shown that the third parties knew of the limitations to his powers (art. 2023). In his relations with third parties the fiduciary is free to do what he thinks is necessary, but he must give an account of the result of his actions to the grantor. According to art. 2022 of the French Civil Code the contract of fiducia defines the conditions in which the fiduciary gives an account of the result of his actions to the grantor. However, when during the execution of the contract the grantor is placed under tutorship, the fiduciary gives an account of the results of his actions to the tutor at the request of the latter at least once a year, without prejudice to the frequency of accounts set by the contract. When during the execution of the contract the grantor is placed under curatorship, the fiduciary gives an account of the results of his actions, under the same conditions, to the grantor and to the curator. The fiduciary gives an account of the results of his actions to the beneficiary and to the third person designated by application of article 2017, at their request, according to the frequency provided for in the contract.

The specific of liability is determined in art. 2025-2026 of the French Civil Code. According to it, without prejudice to the rights of the creditors of the grantor holders of a right to follow property that derives from a security right published before the contract of fiducia was executed and outside cases of acts in fraud of the rights of the creditors of the grantor, the fiduciary patrimony may only be seized by the holders of claims arising from the preservation or the management of that patrimony. If the fiduciary patrimony is insufficient, the patrimony of the grantor is the common pledge of these creditors; unless the contract of fiducia makes all or part of the liabilities the obligation of the fiduciary. The contract of fiducia may also limit the obligation of the fiduciary liabilities to the fiduciary patrimony exclusively. Such a clause is ineffective against creditors unless they have expressly accepted it. The fiduciary answers, on his own patrimony, for the faults he commits in the fulfillment of his task.

The order of termination of the contract is defined by art. 2028-2030 of the French Civil Code. The contract of fiducia may be revoked by the grantor so long as it has not been accepted by the beneficiary. After acceptance by the beneficiary, the contract can only be modified or revoked with the consent of the grantor or by judicial decision (art. 2028). That rule should guarantee rights of the fird part of this relationships – beneficiary. The contract of fiducia ends upon the death of the grantor when he is a natural person, by the

arrival of the term, or by the achievement of the goal sought when this occurs before the arrival of the term. When all the beneficiaries renounce the fiducia, the contract of fiducia also terminates as of right, except when contractual provisions anticipate the conditions under which it continues. Under the same reservation, the contract terminates when the fiduciary is subject to a judicial liquidation or dissolution or disappears following a transfer or takeover and, if he is a legal counsel, in case of temporary interdiction, disbarment or being left out from the roll (art. 2029). When the contract of fiducia terminates in the absence of a beneficiary, the rights assets security or which are in the fiducary patrimony return to the grantor as a matter of law. When it ends with the death of the grantor, the fiduciary patrimony returns to his succession as a matter of law (art. 2030) [11].

In the conditions of increase of popularity of the trust in the countries of Civil Law the decision on development of universal approach to interpretation of this institute was created. The universal rules about trust were fixed in special document - «Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference (DCFR)», which was directed on reconciliation of legal systems of a Civil and Common Law.

According to art. X.-1:201 of the DCFR a trust is a legal relationship in which a trustee is obliged to administer or dispose of one or more assets (the trust fund) in accordance with the terms governing the relationship (trust terms) to benefit a beneficiary or advance public benefit purposes. A trust takes effect in accordance with the rules in Chapter 10 (Relations to third parties) with the effect that the trust fund is to be regarded as a patrimony distinct from the personal patrimony of the trustee and any other patrimonies vested in or managed by the trustee (art. X.-1:202).

The essence of the trust in DCFR is reflected in art. X.-5:201. According to that article except where restricted by the trust terms or other rules of this Book, a trustee may do any act in performance of the obligations under the trust which: (a) an owner of the fund might lawfully do; or (b) a person might be authorized to do on behalf of another [12].

That means that all powers which are owned by the owner are delegated to the trustee. It gives the ground to say that according to DCFR the trust is the special property right limited by conditions settled by owner or by the law and necessity to act according to a certain purpose.

Conclusion. It is necessary to pay attention to the fact that in the DCFR the trust isn't defined by division of the property right as it takes place in the Anglo-Saxon Law. That allows to Civil Law countries to use advantages of the trust without breaking rules of their legal systems. So there are two approaches to trust in European countries – with division of the property, which is typical for Common Law countries, and without division of the property, which is used in Civil Law countries.

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АДАПТАЦІЯ ТРАСТУ ДО РОМАНО-ГЕРМАНСЬКОЇ ПРАВОВОЇ СИСТЕМИ

Анотація
У статті досліджено поняття трасту за законодавством деяких європейських країн. Зокрема, досліджено правове регулювання трасту у Франції та Німеччині. Проаналізовано поняття трасту за Модельними правилами європейського приватного права. Проаналізовані відмінності в підходах до трасту в англо-американському і романо-германському праві. Виявлено особливості континентальної моделі довірчої власності.
Ключові слова: довірча власність, довірче управління, траст, європейське приватне право, англо-американське право, романо-германське право.

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АДАПТАЦИЯ ТРАСТА К РОМАНО-ГЕРМАНСКОЙ ПРАВОВОЙ СИСТЕМЕ

Аннотация
В статье исследовано понятие траста по законодательству некоторых европейских стран. В частности, исследовано правовое регулирование траста во Франции и Германии. Проанализировано понятие траста по Модельным правилам европейского частного права. Проанализированы различия в подходах к трасту в англо-американском и романо-германском праве. Выявлены особенности континентальной модели доверенной собственности.
Ключевые слова: доверительная собственность, доверительное управление, траст, европейское частное право, англо-американское право, романо-германское право.

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THE CONCEPT AND FEATURES OF LEGAL SYSTEM OF CANON LAW

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The article is devoted to the problem of definition of the status of canon law in the categories of modern jurisprudence. Canon law is defined as the independent individual legal system. The study of the structure of the canonical legal system in the context of legal comparativistics allows marking the presence of all necessary features of the legal system. The results of the study of the subject and methods of canonical and legal regulation underscore the characteristics of canon law and are additional confirmation of the given thesis.
Keywords: canon law, legal system, canonical and legal life, canonical and legal regulation, method of akribeia, method of economy.

Problem statement. The number of references to canon law has increased in modern legal literature. In particular, they refer to highlighting historic aspects of its existence, the study of models of relations between church and state, comparative analysis of canon law and other religious legal systems, etc. However, one may notice that most of these references have a significant drawback: they only use the secular methodology, whereby their research becomes one-sided and does not get to the essence of canon law. It seems that one of the issues that require primary attention in this regard is the status of canon law.

Analysis of recent studies and publications. Over the past twenty years, since the collapse of communist ideology, canon law has become the object of scientific research for scholars and historians, as well as for lawyers. In particular, a number of scientific works are worth attention, including works by I. A. Balzhik, D. D. Borovoy, M. Yu. Varyas, A. A. Dorskaya, S. V. Misevich, I. O. Pristinskiy, G. I. Trofanchuk, S. B. Tsebenko, V. A. Tsypin, S. O. Shalyapin and others.

Allocation of unresolved parts of the general problem. Modern studies of canon law refer to the questions of its historic development, the sources, the bodies of church authority (particularly in judicial system), etc. However, they practically do not refer to the problem of the status of canon law (except for S. O. Shalyapin, who described confessional legal systems), putting everything to reflection on the place of canon (church) law in the national legal system. This raises the need to use methodological tools and the framework of categories and concepts of contemporary jurisprudence to address the question about the essence of canon law.