Artículo de investigación

The categories "legal tradition" and "anomaly of the legal sphere" in the context of regulation of innovations of modern society

Категорії "правова традиція" та "аномалія правової сфери" в контексті регулювання новацій сучасного соціуму

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Abstract

The relevance of the article is due to ignorance of legal traditions and lack of sufficient theoretical and practical basis for legal inheritance make it impossible to complete the formation of a coherent and stable legal system since it is based not so much on borrowing but on one's own legal experience as is built on centuries-old legal traditions as well as modern achievements of legal realities.
The object of the study is public relations that cannot be settled through standard means of regulation. The article deals with the categories "legal tradition" and "anomaly of the legal sphere". The method of comparison, the dialectical method, the logical method, the method of analysis and the method of synthesis, the method of deduction in the writing of this scientific work were used.
As a result of the study, the authors made the following conclusions. To normalize the anomalies of the legal sphere and accelerate their adaptation in the legal field, the legislative nature of such an anomaly should first of all be determined, as well as to fill the gaps in its legal regulation, which will result in a reduction of conflict situations, respect for human rights and

Анотація

Актуальність статті зумовлена необізнаністю у власних правових традиціях та відсутністю достатньої теоретичної та практичної бази щодо правової спадщини зумовлює неможливість завершення формування цілісної та стійкої правової системи, оскільки її основу складають не стільки запозичення, скільки власний правовий досвід, що будується на столітніх правових традиціях та звичаях, а також на сучасних надбаннях правових реалій.
Об'єктом дослідження є суспільні відносини, що не можуть бути врегульовані за допомогою типових засобів регулювання. Предметом дослідження в статті є безпосередньо категорії "правова традиція" та "аномалія правової сфери". Були використані метод порівняння, діалектичний метод, логічний метод, метод аналізу та метод синтезу, метод дедукції при написанні даної наукової роботи.
У результаті проведеного дослідження автори зробили наступні висновки. Для унормування аномалій правової сфери та пришвидшення їх адаптації у правовому полі слід в першу чергу визначити законодавчо

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interests, further formation of a new legal tradition and an increase in legal heritage.

Keywords: Legal tradition, legal anomaly, legal regulation, legal inheritance, domain name.

правову природу такої аномалії, а також заповнити прогалини у її правовому регулюванні, що матиме наслідком зменшення конфліктних ситуацій, дотримання прав і інтересів людини, подальше формування нової правової традиції та примноження правової спадщини.

Ключові слова: правова традиція, аномалія правової сфери, правове регулювання, правові спадщина, домене ім'я.

Introduction

The development of any society is impossible without the use of borrowings of past historical eras. These borrowings in the legal field were reflected in the legal legacy, which, while retaining the spirit of the law, enabled him to change over time, adapting to the contemporary challenges of society. Thus, the legal heritage, as a complex of legal institutions: legal traditions, legal experience, embodies the dynamics of law, taking into account its retrospective nature. This combination may, in one way or another, give rise to various anomalies of the legal sphere, which should be timely identified and prevented by the imperfection of legal regulation such an institution as a "domain name" by all possible legal means.

Non-acquaintance of legal traditions and lack of sufficient theoretical and practical basis for legal inheritance make it impossible to complete the formation of a coherent and stable legal system since it is based not so much on borrowing but on one's own legal experience as is built on centuries-old legal traditions as well as modern achievements of legal realities.

The need to study the subject of the legal tradition is primarily due to the theoretical and legal basis that characterizes it as a phenomenon of legal culture, the category of jurisprudence and the constituent continuity of law. Thus, these three planes underlie the Ukrainian legal existence and set the vector of its development because of the features of retrospective processes.

Moreover, the connection between modern realities in law and legal traditions is ensured precisely by such characteristics of tradition as static and dynamism, which, although opposite, invariably complement each other. Static is manifested in the conservatism and stability of the tradition, which ensures its constancy and formation, that is, a certain nucleus, the foundation that, underlies a further "superstructure". This "superstructure" is an innovation in law, which often takes the form of an anomaly and can be viewed in terms of the dynamics of tradition. Thus, the main purpose of the existence and application of the legal tradition is to stabilize and regulate social relations, to maintain order in the relations between the subjects of law, to preserve legal institutions.

At the same time, along with established legal traditions, there are anomalies of law, which represent a continuous movement and transformative properties, which are conditioned by contemporary challenges of a society in connection with new needs and demands.

The problem of interpreting anomalies in the law relates not only to scientific perception but also to the further possibility of their resolution and to minimize the occurrence of possible violations related to them. Thus, leaving legal anomalies outside of the law, that is, legal regulation, creates a favorable situation for the loss of the right, as a social regulator, of authority due to its inability to adapt to the conditions of reality. Ignoring the recognition of anomalies and their ordering will ultimately lead to a decrease in the dynamics of legal traditions, which will result in further impoverishment of the legal heritage due to the lack of legal material to supplement it.

So, that is why the consideration of the interaction between the legal heritage and the anomalies of the legal sphere is a significant theoretical contribution to science, which in the future can be of practical use since it will contribute to the formation of effective mechanisms and a focused approach to reducing the spread of legal anomalies and the formation of respect for values, community values which

will create favorable conditions for the development of society and its legal environment.

Methodology and analysis of recent research

The authors used both general research methods and special legal research methods when writing this scientific work. Thus, the comparison method, the dialectical method, the logical method, the analysis method, the synthesis method, and the deduction method were used.

Furthermore, the research of these issues is devoted to a large number of scientific works of domestic and foreign theorists, among them Vovk, D. O. (2013); Loboda, Yu. P. (2009); Oborotov, Yu. M. (2003; 2019); Ryazanov, M.Yu. (2015); Smotrov, O.I. (2009). However, the level of research of the topic still allows continuing the study of manifestations of anomalies of the legal sphere given their retrospective nature.

The purpose of this article is to investigate the interaction of legal traditions and anomalies of the legal sphere in the context of disclosing the content and regulation of innovations in modern society.

In this way, to achieve this goal, the following tasks were set:

- To characterize the category of legal heritage and its element – the legal tradition, to explore their importance for the development of law;
- To determine the essence of anomalies of the legal sphere;
- To analyze the domain name in the context of the modern industry anomaly;
- To propose ways of resolving anomalies of the legal sphere.

Presentation of key research findings

Law, like any other social institute, has its historical background, which determines the retrospective nature of legal phenomena, concepts, and categories existing at the moment. The historicity of law allows us to preserve the original ideas and principles that formed the basis for the formation of legal systems, without hindering their modification in the conditions of today. Therefore, to claim that law is a constant is not worth it, because the historically defined vector of its movement is transformed under the influence of social and political processes that take place in society. Thus, the historicity of law applies above all to the world of ideas that it promotes, and has a manifestation through a legal inheritance, which in turn is expressed through the totality of legal traditions.

New realities require an appropriate change in legal priorities and values, and, at the same time, a sense of justice that should be given spiritual and cultural significance (Kharytonov, Kharytonova, O., Kharytonova, T., Kolodin, & Tolmachevska, 2019).

Legacy is a vast array of information, expressed not only in material values but also a special worldview, attitude to God, a special legal mentality, which is important for the preservation of legal matter and its further development (Smotrov, 2009). The conclusions and concepts formed as a result of the legal experience of the society, and are now actively used in the formation of the legal consciousness of the modern man, which finds expression in the legal culture and imprints on the formation of new legal experience: the form of new legal institutions (their branch), which will be basis for the formation of further legal inheritance. Thus, there is a double interconnection whereby the existing legal system is based on and forms a legal inheritance.

However, the legal inheritance cannot be the same for socio-cultural groups of all state entities, as it is based on the legal development of historical periods within a separate civilization, characterized by its own legal culture, legal family or the legal system.

The legal heritage is embodied in the various legal institutions that underpin every legal integrity, through which the law exists, functions and develops. Primarily, the state of legal inheritance is reflected in the legal culture and is reflected in legal normativity and various types of legal activity.

Noting the role of legal inheritance for the existence of law and the whole legal sphere, the positive and negative components of legal inheritance should be distinguished. Thus, in the national legal heritage, such legal traditions as the tradition of the power holders should be ignored, the tradition of substitution of laws by departmental acts, the tradition of disrespect for court decisions, the tradition of non-recognition of lawyers by the elite, etc. At the same time, the tradition of asserting law as truth (justice), the tradition of inviolability of the legal foundations of society, the tradition of deploying laws in by-

laws, the tradition of using treaties in the legal life of society, etc., must be maintained and approved in the new conditions. Among the mentioned legal traditions, we distinguish such aspect of the domestic legal heritage as the use of the treaty, since the use of the treaty is the most important tendency of modern legal development, and the widespread use of contractual relations is the defining aspect of the existence of modern law (Oborotov, 2019).

It is worth to note that continuity is manifested in the preservation and use of legal inheritance, which is reincarnated following transformations of social reality and is primarily reflected in legal artifacts – objects, means, institutions that are created to give the flexibility to further legal regulation. At the same time, the legal mentality and legal traditions are distinguished by their stability, as deep, fundamental concepts in the content of the legal heritage, as they are formed and develop under the influence of those factors that are given a regulatory value by society.

Legal tradition is a complex concept that various scholars try to interpret through the lens of concepts and categories that they believe are fundamental. Thus, Yu. M. Oborotov (2003) believes that the legal tradition is a connection of the times, social (legal) inheritance, general family experience of a culture that has acquired a stable character, enshrined in certain stereotypes and rules of cultural activity. Yu. Loboda (2009) understands the legal tradition as the laws of development of the sphere of the legal existence of society and at the same time the principle, idea, and tendency of development of the legal component of social organization.

The importance of legal heritage in the existence of modern law can be traced through the nomenclature of its functions: stabilization – ensures the stability of relations; fixative – associated with holding a positive result; system-forming (ordering) – is determined by its ability to give relationships the appearance of a system; regulative (restrictive) – outlines order in chaos, manifests itself in custom; information – expressed in the accumulation, storage and transfer of information; socialization – under its influence, a personality is formed, a person is involved in the social and legal experience, etc. (Oborotov, 2003).

It should be also noted that the legal heritage cannot be compared with the legal system or any of its elements, since the legal heritage characterizes the collaboration of legal phenomena and their impact within the legal reality, without taking into account the specification of legal norms, legal principles, justice, legislation, legal relationships and other key components of the legal system, highlighting only their relationship to one another. Thus, the legal heritage focuses on providing the dynamics of legal development based on the overall historical orientation of the legal system. This category is a set of qualities and characteristics of legal reality because of its historical development.

The study of legal inheritance allows seeing why in a society or group of societies united in civilization, such an image of law, such social significance of law, such legal system, and thus reflect the dynamics of the historical existence of the legal system, the formation, and implementation of legal norms, knowledge of the law by the subject of law, reproduction of legal prescriptions in the form of legal behavior, etc. (Vovk, 2013). It is through legal inheritance that one can explain the nature and significance of any legal phenomenon that has arisen in connection with the development of society and was not known before, thus bringing it closer to the limits of legal regulation that will be most favorable for this phenomenon under the conditions set by time.

Moreover, the era of information technology that has embraced the current society has allowed expanding variations of the long-known property institute, allowing the individual to enjoy digital goods, including, for example, e-mail, social networking page, account, profile, virtual property, cryptocurrency, and other cryptocurrencies. Thus, there was destruction, deviation from the usual understanding of the legal category of property, which in legal reality takes the form of an anomaly of the legal sphere. The information society is a society in which the production, distribution, and consumption of information is the main area of activity (Kharytonov, Kharytonova, Tolmachevska, Fasii, & Tkalych, 2019).

In addition, having analyzed the rules of the Civil Code of Ukraine (2003), in particular Art. 28 and Art. 294 - 296, we can conclude that the name category applies exclusively to individuals since the right to a name is an inalienable personal non-proprietary right that guarantees the social existence of an individual. Thus, a domain name, as a virtual rights object, has nothing to do with common name interpretation. Yes, a domain name should be considered to be the name or the name of a piece of space on the Internet, which is a specific address of the location of another

virtual civil rights object. That is, a domain name combines the essence of a name (s) and addresses that allow for identification on the Internet. Therefore, a domain name can be considered a legal fiction because it negates the usual perception of the term "name".

Anomalies, given their usual interpretation, should be considered as phenomena isolated from the general context of the human psyche due to their serious deviation from the norm, the usual state of things. The anomaly can also be characterized by disharmony, that is, inconsistency with the legal reality of the established clear ideas about a particular phenomenon. At the same time, anomalies should not be considered a critical phenomenon, since their appearance is a natural result of the development of the general opinion of society, including the legal one. Any phenomenon that found its way into the consciousness of society and its further expression in law was anomalous at that point because it did not fall within the established norms and criteria established by the society of a particular historical period.

The prevalence of anomalies in different areas of legal reality allows us to distinguish some of their varieties:

1) Rulemaking anomalies – gaps and conflicts of law;
2) Anomalies of legal behavior – abuse of law and objectively unlawful behavior;
3) Law enforcement anomalies – legal conflict, defective legal facts.

In practice, all three manifestations of anomaly can be illustrated by the domain name as a legal artifact of the digital era.

The domain name has become an integral part of modern society, although a few years ago it did not exist at all. Therefore, the domain name should be considered an innovation, so with a certain amount of courage it can be called an anomaly.

At the present stage of the distribution and use of domain names, the interpretation of this concept has not found a single conventional design. According to the authors, the most successful is the interpretation of the domain defined by Art. 1 of the Law of Ukraine "On Telecommunications" (2004), according to which the domain is a part of the hierarchical address space of the Internet, which has a unique name that identifies it, is served by a group of domain name servers and is centrally administered. Simply put, a domain should be understood to mean a part of cyberspace that is accessed through the creation and operation of an individual address bar.

The legislator has not yet defined the legal nature and location of the domain name, so it causes a lot of confusion. Thus, some scholars attribute the domain to property rights objects, while others attribute it to intellectual property rights, thereby going beyond the usual understanding of these two legal categories, creating an anomaly within civil law.

Considering the anomaly of the domain name through the prism of its varieties, the following should be noted.

The anomaly of the rulemaking activity is manifested by the existence of gaps in the legislation on the regulation of domain names. Thus, there are no substantiated and legally enforced rules for the use and disposal of such objects. Because of this, there are many misunderstandings, including who owns the rights arising from the domain name rights, as well as the ability to transfer the domain usage rights and protect the infringed rights.

The anomaly of legal behavior manifests itself through abuse of law.

In the legal literature, abuse of law is understood to mean such a form of exercise of law, contrary to its purpose, by which the subject causes harm to other participants in public relations.

For example, registering a domain name similar to another domain name is an example of abuse of a domain. Thus, everyone has the right to rent any domain name that has not yet been reserved and use it for the intended purpose. However, registering such a domain name may violate the rights of a similar domain user, since the domain spelling will change the focus of the query and the search engine will come across a completely different website than the one you were about to visit.

The complicated form of such abuse is already a recognized offense, known as cybersquatting or cyberpiracy – registering domain names that match or resemble means that allow the identification of legal or natural persons to resell them to legal owners or use such means for other purposes that violate the rights of the latter.

In the enforcement sphere, the anomaly of the domain name's rights is manifested through legal conflict or defective legal facts. Thus, the

existence of encroachment on any rights entails legal conflicts that need to be resolved, despite the absence of any specific rules of regulation. Not only the entities or national courts but also international courts are involved in resolving such conflicts. The European Court of Human Rights (hereinafter the ECtHR), seeking to regulate the legal conflict in a certain way, found that imposing a ban on the use and disposal of domain names by an individual would protect the common interest which lies in enhancing the existing system of protection of intellectual property rights in respect of trademarks and/or other individual designations, as it seeks to prevent third parties from illegally using distinctive identifications and reputation of the protected designations and names intended to cause damage. Researchers believe that the ECtHR's conclusion is based on the historically formed view that property rights in the context of the manifestation of human freedom cannot be completely unrestricted and that the rule of law, as a regulator of society's coexistence, may set certain limits on the owner's freedom by imposing on the property some "restrictions in the public interest" or "in the interests of individuals" (Smotrov, 2009). The ECtHR's conclusion provides a clear example of the understanding and qualification of an anomalous legal phenomenon through legal tradition.

Concerning defective legal facts, they should be understood to be of a legal nature with deficiencies present. A legal fact is defective in cases where its features do not correspond to the model enshrined in the hypothesis of a rule of law – a legal criterion. The defect of a legal fact should be considered the presence in it of such features, which indicate a significant change in its content – a social criterion (Chuvakova, 2001; 2004; 2017). For example, registering a domain name as a trademark should be considered a fraudulent transaction, which can be regarded as a defective legal fact, since in this case there is also a legal and social criterion, given that the domain name and trademark have different legal nature and regulation.

Conclusions

There is still no clear structured generally accepted the understanding of the category of anomalies in the legal field. However, legal anomalies are characterized by a high level of uncertainty and uncontrollability of the expected result due to the objective influence of certain physical or social factors. Besides, it is impossible to predict in what area of law and why an anomaly may occur, which makes it impossible to prepare for the elimination of possible deviations from the norm.

Analyzing the above, it should be concluded that to normalize the anomalies of the legal sphere and accelerate their adaptation in the legal field, the legislative nature of such an anomaly should first of all be determined, as well as to fill the gaps in its legal regulation, which will result in a reduction of conflict situations, respect for human rights and interests, further formation of a new legal tradition and an increase in legal heritage.

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