CONCEPTUALIZATION OF PUBLIC ORDER IN THE SYSTEM OF LEGAL CATEGORIES

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Annotation. The article examines the institution of public order as a complex legal phenomenon in the civil law system of Ukraine. Based on the analysis of scientific sources and legislation, the essence and content of the category of public order, its features and significance for the legal system are revealed. Special attention is paid to the study of public order in the context of the invalidity of transactions and private international law. The problem of determining the content of public order in judicial practice and doctrine, its correlation with the norms of civil law are analyzed. Theoretical and practical problems of applying the category of public order as a basis for the invalidity of transactions are considered. The historical development of the concept of public order from Roman law to the present day is studied, its transformation in the Soviet period and the peculiarities of understanding in the conditions of a market economy. Special attention is paid to the analysis of public order as a mechanism for restricting the application of foreign law in private international law. Approaches to the definition of public order in the legislation and judicial practice of Ukraine are analyzed, in particular, certain positions of the Supreme Court of Ukraine on the interpretation of this category. The problem of the relationship between public and private law in the context of public order, as well as the features of its application in different legal systems, is studied. The specifics of the application of the category of public order in international commercial arbitration and in the recognition and enforcement of foreign judgments are considered. Based on the conducted research, the need for a clear legislative definition of the category of public order and the improvement of the mechanisms for its application in judicial practice is substantiated. The conclusion is made about the dual nature of public order in civil law and its importance for protecting the fundamental interests of society and the state. Ways of improving the legal regulation of public order are proposed, taking into account international experience and modern trends in the development of law.

Key words: public order, nullity of a transaction, civil law, international private law, legal order.

1. Statement of the problem.

In modern law, public order is a complex multifaceted phenomenon that encompasses the fundamental principles of law and order, the moral principles of society and fundamental legal values. Its importance is especially growing in the context of globalization and integration of legal systems, when there is a need to protect national legal traditions and values.

The study of public order is of important theoretical and practical importance for the development of the legal system of Ukraine, especially in the context of harmonizing national legislation with European legal standards and ensuring effective legal regulation of social relations.

2. The purpose of the study

2. The purpose of the study is to conduct a theoretical and legal analysis of the concept and content of public order, determine its place in the legal system of Ukraine.

3. The state of the development of the problem.

The theoretical basis of the study is the works of leading domestic and foreign scholars in the field of legal theory, civil law and private international law. General theoretical aspects of public order were studied by V.A. Bigun, A.S. Dovgert, V.I. Kysil, A.V. Smityukh, L.A. Lunts, V.V. Luts, M.M. Boguslavsky.

It is worth noting that the problems of public order and its violation as grounds for the nullity of a transaction have already been considered by civil law scholars: D.V. Bobrova, M.I. Braginsky, O.V. Dzera, A.S. Dovgert, N.S. Kuznetsova, V.M. Kossak, R.A. Maidanyk, M.M. Sibilov, F. Kheifets, E.O. Kharitonov, R.B. Shyshka and other scholars of a younger generation. Their interesting conclusions, as a rule, had a general overview, and the comments and suggestions expressed mostly remained the property of civil law science and were not implemented in practice. Among them, the issue of distinguishing violation of public order from other grounds for invalidity of transactions deserves special attention

Certain aspects of public order in the context of international private law and civil law were the subject of research by O.M. Merezhko, V.I. Pavlova, Y.D. Prytika, S.V. Shevchuk.

4. Presentation of the research material.

First of all, we note that with the addition of Art. 228 of the Civil Code, part 3, a number of theoretical problems and assessments of the category of public order arose. Even if this part is a tribute to the elimination of contradictions with Art. 207, 208 of the Civil Code of Ukraine [1, p. 66], there are still actually two grounds for interpreting the term "public order". It is noted that the mechanical attachment of this ambiguous and, to a certain extent, atavistic (built on Soviet evaluative categories that are not acceptable in a market economy) part to Art. 228 of the Civil Code led to logical contradictions: transactions that contradict public order are null and void from the moment of their commission and the legislator does not require their separate recognition as invalid in court [1, p. 67]; the presumption of the nullity of such a transaction is recognized and means the right of the party who suffered from such a transaction to use the methods and means of protecting his rights available to him. Accordingly, the law enforcement agencies of the state, at the request of the victim, must take measures to protect the violated rights, for example, forcibly seize this property and transfer it to the owner. The other party that does not agree with this can challenge such a decision in court. This achieves a different approach to resolving the above disputes [2, p. 990].

When encroaching on property by a nullity transaction, it should be given such a public-law qualification that serves as a basis for the intervention of law enforcement agencies and the conduct of certain public events. Usually it is a matter of fraud. However, in such cases, in practice, they refuse and indicate that these disputes should be considered in civil order. So we have a vicious circle: disputes cannot be considered by the court because the law recognizes the transaction as null from the moment of its commission; law enforcement agencies cannot take operational measures, in particular, seize property, since the basis for its acquisition is in the field of civil law regulation.

The category of public order is evaluative and concerns its philosophical perception through legal normativity and ensuring the protective function of law. The need for it depends on a number of ontological circumstances: the presence of individuals who are trying to assert themselves, including by violating moral and legal norms that determine the boundaries of permissible and acceptable human behavior [3, p. 126]: a) in the field of private interests; b) in the field of public interests. Normativism is an objective criterion for determining what is legal (good) and what is illegal (evil).

At the semantic level, the "Soviet" order is defined as "a certain regulated state of social relations that did not have the best effect on the development of civil law and at a certain stage almost led to its replacement by administration. So, civilists have a caution regarding this concept, even if in its current form it concerns the private rights of an individual. Epistemologically, this refers to public and private law, which was aptly distinguished in Roman law in the famous statement of Guy.

Moreover, these categories, according to V. E. Mazurenko, are still mixed, which is a manifestation of the general tendency of the fusion of public-legal and private-legal elements [4, p. 36]. Here we are talking about public order in general as a legal order based on the norm of law: the result of the implementation of the norm of law, the precise and strict implementation of the requirements of laws and other regulatory legal acts [5, p. 48].

The problem has not only a national basis. Thus, the American civilist G. Lusk defined public order as one of those vague legal concepts that give law flexibility [6, p. 152]. In general, the analysis of the above approaches leads to the search for an answer to the question: can a judge who makes a decision based on the law and internal convictions be guided by vague concepts? Apparently not.

At least according to the Constitution of Ukraine:

1) state authorities and local self-government bodies, their officials are obliged to act only on the basis, within the limits and in the manner provided for by the Constitution and laws of Ukraine (Part 2, Article 19);

2) court decisions are adopted by courts in the name of Ukraine and are mandatory for execution throughout the territory of Ukraine (Part 5, Article 124);

3) the basic principles of judicial proceedings are legality, equality of all participants in the legal process before the law and the court; ensuring proof of guilt; adversarial nature of the parties and freedom in providing the court with their evidence and in proving its persuasiveness before the court, bindingness of court decisions (Article 129);

4) the court decides cases in accordance with the Constitution of Ukraine, the laws of Ukraine and international treaties, the consent to which is binding has been given by the Verkhovna Rada of Ukraine (Part 1, Article 8 of the Civil Procedure Code of Ukraine);

5) the court decision must be lawful and justified, based on the fulfillment of all requirements of civil proceedings, and in accordance with the law (Parts 1-2, Article 213 of the Civil Procedure Code of Ukraine).

The concept of public order is widely used in international private law. In particular, the clause on public order (ordre public) is a generally recognized institution of international law and is used in the mechanism for regulating private law relations

with a foreign element. It is considered one of the fundamental principles of private international law. Its essence lies in limiting the application of foreign law, which should be applied in the regulation of specific civil legal relations burdened with a foreign element, in accordance with the conflict of laws rules of a particular state.

The problem of public order is associated with the most complex legal mechanisms of private international law. In particular, it concerns the ratio of public and private interests, the limits of intervention of the state and its judicial system in relations between private individuals located in different countries, the possibility of combining the principle of autonomy of the will of the parties with the imperative norms of national laws, the admissibility of the application of foreign law on the territory of another state.

The concept of "public order" is used in the private international law of Ukraine and the law of foreign countries: the first reflects general standards, and the second reflects values that are recognized by law as the most protected at a certain historical stage. It is obvious that there are no and cannot be generally accepted definitions of the category of "public order". As noted by Prof. T. S. Kivalova, the definition of the content and purpose of the category of public order is one of the most complex problems of conflict of laws science and judicial practice, which is due to several factors: first, serious practical development of this institution began in Ukraine recently, with the liberalization of the participation of economic entities in foreign economic relations [8, p. 121].

In the epistemological aspect, the term "contradiction to the foundations of the Soviet system" (which is, given the temporal aspect, analogous to the category "contradiction to public order") first

appeared in the Fundamentals of Civil Legislation of the USSR and the Union Republics of 1961. [9], which provided for the refusal to apply foreign law. At that time, this institution in the field of private international law for other participants except the USSR had a theoretical rather than practical significance due to the limited participation of the USSR in international civil and trade turnover.

Contrary to the requirements of Art. 19 of the Constitution of Ukraine, the legislator did not fill the category of "public order" with specific norms, and thus caused controversy and uncertainty. It seemed that this issue was the sphere of doctrinal interpretation and the positions of legal theorists. However, they cannot find support in the legislation to support the correctness of their statements and positions. The legislator mentioned the concept of public order, but did not disclose its content. This necessitated the need for official interpretation by higher judicial instances, but they indicated only signs, and even then, in our opinion, they were not sufficiently balanced.

In part 8, paragraph 12 of the resolution of the Plenum of the Supreme Court of Ukraine dated December 24, 1999 No. 12 "On the practice of considering by courts of applications for recognition and enforcement of decisions of foreign courts and arbitrations and for the cancellation of decisions made in the procedure of international commercial arbitration on the territory of Ukraine" [10] it is interpreted that public order should be understood as the legal order of the state, the principles and foundations that form the basis of the system existing in it (relating to its independence, integrity, autonomy and inviolability, and basic constitutional rights, freedoms, guarantees, etc.) are defined. However, this definition cannot be considered generally accepted not only in the doctrine and practice of international private law in general. The definition of the category of ordre public largely depends not only on the peculiarities of the socio-economic and political system of each state, but also on the specific circumstances of each case considered by the court. Therefore, it is necessary to talk about the ad hoc nature of the definition of the category of public order not only at the international, but also at the national levels.

However, the definition of public order, which is provided for the interpretation of Art. 228 of the Civil Code of Ukraine do not coincide. Therefore, there are two different definitions of the category of "public order", which are mutually exclusive and contradictory. As for the first, the category of "public order" in private international law covers political aspects and there cannot be a single approach to its definition for different types and forms of states. The leading role in determining the category of ordre public should be played by the courts, relying on the specific circumstances of each case considered by them, and taking into account those legitimate rights and interests of the state, the violation of which in a given case may lead to a violation of the fundamental principles of the state system, create a threat to the independence of the state, its principles of security and inviolability. The second arises from the violation of private rights.

Quite interesting is the approach according to which it can be considered an intentional offense, which is characterized by external signs of a civil law agreement, which has a socially dangerous (harmful) nature and encroaches on the legally established social, economic and social foundations of the state, state security, basic constitutional rights and freedoms of citizens and provides for legal liability for the guilty party in the form of recovery of all received under such an agreement to the state's income. Here, in brief with a foreign element. It is considered one of the fundamental principles of private international law. Its essence lies in limiting the application of foreign law, which should be applied in the regulation of specific civil legal relations burdened with a foreign element, in accordance with the conflict of laws rules of a particular state.

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A number of scientists believe that public order cannot in any case be imagined abstractly, in the form of certain principles that are detached from specific legal norms. It is difficult to agree with this: determining the definition of "public order" cannot be a sectoral task, in particular, especially for civil legislation, but is a constitutional and legal problem. Providing the possibility of defining this key category at the level of the branch of law objectively and especially subjectively will lead to their subordination to local tasks (in this case, the need to recognize transactions as invalid), the emergence of various definitions that do not coincide in content. This will lose the core of legal understanding and will cause problems with the application of these categories in practice. Such differences are due to the fact that formally any invalid transaction can fall under the violation of public order. Establishing the grounds for the invalidity of transactions in the norms of civil legislation, the state determines such consequences of transactions committed by subjects of civil law as the only permissible ones. Failure to comply with the norm of civil legislation, which is the basis for the invalidity of a transaction, to one degree or another violates the interests of the state, since the latter has enshrined such grounds for the invalidity of transactions in legal norms. However, the legislator interprets the concept of "public order" in the narrow sense of the word, gives it special importance, distinguishing such a ground for the invalidity of a transaction from others.

If we turn to international private law, which is familiar with the category of public order, it should be noted that it separates the concept of public order from the norms of civil law. Along with the non-compliance of contracts with the requirements of the law, violation of public order, as a separate ground for the invalidity of contracts, is also used in other countries of Europe and America: in Switzerland, England, the USA.

At the same time, in international private law, violation of public order is only one of the grounds for the invalidity of a transaction, which is used along with others and is applied only in exceptional cases specified by law. As indicated, the application of public order is only an exception in judicial practice, not a rule, while acts of recognition of transactions that contradict the law are adopted regularly [11, p. 26].

Thus, according to the codification of civil law of Ukraine and the doctrine of private international law, public order and the norms of civil law are not identical concepts. By distinguishing a transaction that violates public order as a separate type of void transactions, the Civil Code of Ukraine proceeds from the content of the unlawful act itself and its danger to the interests of the state and society in general, as well as the significance of the violated interests as a result of the commission of such a transaction. At the same time, the category of public order is not applied to any legal relations in the state, but only to the essential foundations of law and order. In connection with the arguments given, the position of scientists who pointed out the inexpediency of the category of public order in civil legislation is contradictory.

5. Conclusions.

The analysis of the concept of public order allows us to conclude that it is complex in nature and important in the legal system of Ukraine. Public order acts as a special legal category that encompasses the fundamental principles of law and order, the moral foundations of society and fundamental legal values that require special protection by the state.

In the context of civil law, the category of public order has a dual nature: on the one hand, it is the basis for the nullity of transactions that violate public order, and on the other, it acts as a mechanism for protecting the fundamental interests of society and the state. In this case, it is important to distinguish violations of public order from other grounds for the invalidity of transactions, since this category is applied only to the essential foundations of law and order.

Of particular importance is the problem of determining the content of public order in the context of international private law, where it acts as one of the fundamental principles and mechanisms for restricting the application of foreign law. This necessitates the need for further improvement of legislative regulation and judicial practice regarding the application of the category of public order, taking into account international experience and modern trends in the development of law.

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