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Vladyslav Yefimenko,
Second-Year Postgraduate Student at the Department of Service and Medical Law, Educational and Scientific Institute of Law of Taras Shevchenko National University of Kyiv, 60, Volodymyrska Street, Kyiv, Ukraine, postal code 01033, yefimenko.vladyslav@gmail.com
ORCID: *orcid.org/0000-0003-3475-6263*

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ADAPTATION OF THE PRINCIPLE OF SUBSIDIARITY IN WESTERN AND EASTERN LEGAL SYSTEMS

Abstract. ***Purpose.*** The article is devoted to covering the essence and adaptation of the principle of subsidiarity in socio-economic relations and administrative legal relations of subjects of various levels, which were formed during the XX and XXI centuries, and how the gradual change in the role of the principle of subsidiarity affected its further adaptation in various legal systems. ***Research methods.*** The work was carried out on the basis of general scientific and special methods of scientific knowledge, including the comparative legal method and analysis. ***Results.*** For a reasonable analysis of the possibility of adaption of the subsidiarity principle in Western European and Eastern European legal systems, the main theoretical and legal approaches to the definition of the concept of "principles of law" were generally considered through pre-grouping researchers and members of the scientific community by territorial affiliation and political-legal systems, namely by dividing them conventionally into "Western European" and "Eastern European". In addition, taking into account that the scientific approaches were considered starting from the XX century, the global formation of the opinion on the principles of law in the totalitarian (Soviet) system, in comparison with the Western European opinion, was analyzed as well. Based on the coverage of approaches to the definition of "principles of law", approaches to the definition of the principle of subsidiarity were highlighted, but also in the present time, namely, within the post-Soviet and European scientific space. ***Conclusions.*** Having familiarized with the theoretical and legal approaches to the principles of law of the above-mentioned groups of scientists in the Soviet and European scientific communities, it was possible to conclude that the adaptation of the principle of subsidiarity, as a modern principle of law (administrative), to totalitarian regimes or systems with a high level of centralization of powers would be challenging, if not impossible. After all, the content of the principle of subsidiarity, without distorting its genesis and high social orientation which was formed by the Catholic Church, is directed precisely to decentralization and expansion of powers and independence of subordinate subjects of the system, which is difficult to allow under totalitarian power. Bringing up the relevant issue, the article emphasizes the importance of understanding historically determined processes and their impact on socio-economic relations in society and, as a result, the possibility of adapting certain principles in modern legal systems.

Key words: principle of subsidiarity, principles of law, content of principle, legal approaches, historical aspect, adaptation.

1. Introduction

The study of the role and character of a certain principle within a specific field or institution of law requires a preliminary understanding of theoretical and legal approaches to the category of "principles of law", which can significantly help in revealing its essence and application or existence in particular states, political regimes, or other systems. Based on the above, we consider it appropriate to analyze the concept of the principle of subsidiarity and its definition by highlighting the main theoretical and legal approaches to it, and then identifying the main approaches to the definition of the "principle of law" available in Western European and Eastern European legal doctrines of the last century. The latter will help to assume the possibility of application and further development of the principle of subsidiarity in the Western European and post-Soviet space. To this date, the principle of subsidiarity is still poorly analyzed from different points by domestic legal researchers and lawyers. The principle of subsidiarity was a subject of analysis of such research-

ers as Hrytsiak I.A., Matseliuh I.A., Pukhtetska A.A., and others. However, most of attention was paid to the history of the principle or its use within separate modern systems. Thus, it can be said that its functional features or the basic reasons of its functioning within different legal systems remain uncovered. For the above-mentioned purpose, different scientific methods were used. The induction method was used to generalize the main characteristics that could unite the positions of the representatives of the legal doctrines that we study in the research. Among the specialized legal methods, the comparative legal analysis of Western European and Eastern European legal doctrines was used to find some common and distinctive features to identify the different approaches to the principle within the mentioned doctrines. In addition, the retrospective method was used to analyze the genesis and the evolution of the principle of subsidiarity which has been forming during the XX and XXI centuries in western and eastern Europe.

2. Basic provisions of the principle of subsidiarity.

By applying a comprehensive approach to solving the problem, we consider it necessary to preliminarily highlight the approaches to defining the principle of subsidiarity itself, taking into account the work of Western European and Eastern European scientists. Moreover, it is worth noting the non-legal genesis of the principle of subsidiarity.

Thus, speaking about the previous and non-legal origin of the principle of subsidiarity, it is essential to mention the Catholic Church. For the first time, the idea of subsidiarity was elucidated in the doctrine of the Catholic Church at the end of the XIX century, which was formulated by the German politician Wilhelm Immanuel von Kettler. After Kettler, the importance of the principle of subsidiarity as a component of the social state was developed and emphasized by the Popes. For example, Pope Pius XII in his Decree of 1946 criticized the totalitarian regime, including communism, and emphasized that the studied principle should eliminate the possibility of arbitrary intervention of the state in the private sphere of a person's life without necessity, and therefore, be an integral part of any kind of social activity of a person. Later, in the second half of the XX century, Pope John XXIII developed the idea of applying the principle of subsidiarity in public administration. In this case, according to the principle, it was assumed that the political leadership or the state power would provide greater freedom for independent activity, decision-making by institutions, groups, and associations with the aim of achieving the public good (Matseliuh, 2020, pp.7-8).

Speaking about modern approaches to understanding the principle of subsidiarity, developed by representatives of Western and Eastern legal doctrine, it is important to pay attention to several main approaches.

The principle of subsidiarity can be seen as an "ethical principle" related to the social doctrine of the Catholic Church mentioned above. It provides that the main purpose of the principle is to allow smaller groups of people to be recognized by larger, more powerful groups (Linnan, 1989, p. 403).

The principle of subsidiarity is also actively used in modern international systems, including the system of protection of human rights and freedoms of the Council of Europe. The so-called "judicial subsidiarity" determines the relations of the national and supranational levels and is related to the process of "indirect regulation" or "indirect influence" of a higher subject on a lower one within the scope of the European Convention on Human Rights, which takes place between the contracting parties, signatories of the Convention, and the force of the decisions of the Strasbourg Court regarding them that combines the principle's legal judicial nature (Cassese, 2015, p. 14). Within the same approach, the principle of subsidiarity acts as an integral part of argumentation and proof when considering conflicts regarding human rights violations before international or regional supranational courts, namely, in terms of gathering evidence and preliminary settlement of the issue at the national level (Besson, 2016, p. 69).

In addition, there is another so-called "sociological" approach to the principle of subsidiarity. According to this approach, the principle harmonizes the interests of subjects and combines natural human rights with public interests, and also helps establish authority between institutions, private individuals or other subjects within a particular state (Kondratiene, 2012, p. 53). Following the principle, each social and political group should help smaller groups or more local groups, so that the latter have the opportunity to achieve their respective goals, but not transfer these tasks to themselves by usurping the full power (Carozza, 2003, p. 38).

Modern Ukrainian scientists mark a "political-legal" approach, which distinguishes between two dimensions - positive and negative. In a negative sense, the state or public institution is prohibited from interfering in the relations of institutions or groups of a lower level or other subjects, where they can independently solve a problem using economic and effective methods. If we refer to the positive aspect, in vertical or horizontal relations,

a higher-level institution supports lower-level subjects and helps to solve their problems, as it is common for the system of the European Union and the system of the European Convention on Human Rights (Karabin, 2014, p. 61).

It should be mentioned that within Ukrainian legal doctrine, attention is also paid to the principle in the system of international organizations and regional supranational entities, for example, in the system of the European Union. Currently, there is a tendency to consider the principle of subsidiarity in the list of such principles as decentralization and deconcentration, which aims to regulate competences between regional and local levels of administration in the European Community, setting the goals and functions of institutions as a defining feature of the principle. Such an approach to the principle can be defined as "functional"; it focuses exclusively on the regulatory influence on the distribution of competences between subjects of different levels (Hrytsiak, 2006, p. 16).

In addition to the approach, which regards the principle of subsidiarity in the same manner as the principles of decentralization and deconcentration, Nepomnyachchy O. M., together with his colleagues, determines that the processes of decentralization are aimed not only at financial or any support of local initiatives and projects but, first of all, at the formation of a liability system of the communities for ensuring their own socio-economic development. (Nepomnyashchyy, Marusheva, Medvedchuk, Lahunova, Kislov, 2021, p. 91). Thus, decentralization complements subsidiarity in terms of the responsibility of the subordinate entities for solving their local issues independently, which should be an integral part of the autonomy granted to them in solving such issues. Subsidiarity complements decentralization in the aspect of the possibility of applying for financial or resource support to superior subjects only in the case when their local problems or issues cannot be solved by them independently, efficiently and with sufficient saving of resources.

Thus, in the Western legal doctrine, the principle of subsidiarity has been actively developing for half a century and finds its practical application in the work of institutions within the states and also at the international level, as evidenced by the bulk of approaches and opinions considered. Within Ukrainian scientific space, interest in the principle is still at its initial stage, as far as there are only few relevant scientific works, although the prospects for its conceptual understanding and practical application, as demonstrated by Western lawyers, are quite broad. On the other hand, the principles of decentralization and deconcentration, which are inextricably linked with administrative reform in Ukraine, attract considerable attention in modern domestic science. The study of the latter, in turn, opens the door to the gradual understanding of the principle of subsidiarity.

3. Approaches to the definition of the concept of "principles of law" among Western and Eastern European scientists.

Since in the modern scientific community the principle of subsidiarity, according to the "functional" and "political-legal" approaches, is related to the implementation of administrative regulation of social relations between the competences of subjects of different levels, it will be fully justified to attribute the principle of subsidiarity to the principles of administrative law, and therefore, to the principles of law.

Further to this topic, we propose to consider more comprehensively the approaches to the definition of the concept of "principles of law", which was formed in the legal doctrine of the last century, in order to determine the possibility of applying and developing the principle of subsidiarity in Western European and post-Soviet countries. This category is also characterized by various approaches to its interpretation.

Starting from the historically conditioned post-revolutionary Soviet period, it is worth starting from the position of the positivist approach to the "principles of law" advocated by Yavych L.S., Yershov V.V., and Kornev V.N. According to this approach, the principles of law appear as certain theoretical ideas, normative and guiding provisions to various types of human activity. The principles of law are determined and specified in the content of legal norms. They are objectively determined by certain material conditions of society's existence and guide the entire mechanism of legal regulation of social relations (Yavich, 1967, p. 64). The principles of law become a reference point for the legislative activity of state authorities regarding their concretization through the creation of specific norms, as a result, the principles of law act as independent regulators of social relations together with the norms of law. Moreover, the principles are obligations established by law and addressed to subjects of law-making and law-enforcement activities, which involve taking specific actions to ensure and implement some legal values (Kornev, 2018, p. 69).

In addition to the positivist approach, there was also an "ideological" one. It states that the category "principles of law" should belong to the sphere of human legal consciousness, legal ideology and science, which is due to

their fundamental importance for the formation of a certain human worldview. Thus, Alekseev S.S. believed that their existence is always driven by the economic and socio-political system, and, accordingly, they exist in law itself and are a phenomenon of an ideological nature (Alekseev, 1972, pp. 102-105).

Mr. Smirnov underlines that the principles of law find expression in the creation of relevant guiding provisions, the conscious desire of people to direct their behavior in line with the trends and objective laws of the development of society as a whole, as well as its individual social phenomena, which include both the economy with politics and the norms of morality with human rights (Smirnov, 1977, p. 11).

Another approach that was formed at the time of the ideological approach was also a "normativist" approach. According to the latter, the principles of law are universally binding, formally defined and established provisions by the state (Lukasheva, 1973, pp. 94-95).

After paying attention to the scientists of the Soviet period and gradually moving to the study of the development of the concept of the principles of law, it will be logical and expedient to draw attention to the positions of modern domestic scientists. After Ukraine gained independence together with the collapse of the Soviet Union and liberation from the views imposed by the ruling party, the scientific community received the opportunity and impetus to express those scientific positions that went beyond the previous ideology.

The most generalized understanding of the principles is given in the work of Boyaryntseva M. A., who has relied on the positions of such scientists as Kopeichikov V. V. and Sumina V.O. Thus, the principles of law are considered as basic positions, fundamental ideas characterized by universality, general significance, higher imperativeness, and reflect the most essential provisions of law (Boiaryntseva, 2015, p. 116).

Mr. Pohrebnyak focuses on various scientific categories in their connection with principles and demonstrates their interdependence. He calls the term "idea" the genetic aspect of principles and emphasizes their intellectual-spiritual character. Mr. Pohrebnyak justifies this statement by the fact that the basis of the formation of principles is the intellectual process of a person's understanding of the world fixed in thought, which gives principles the character of universality, fundamentality, self-sufficiency for a certain historical period and sets certain principles for further development and movement (Pohrebnyak, 2008, p. 240).

Another way of looking at the category of principle of law is to look through the prism of its "nature of requirement". Mr. Dvorkin considers the principles of law as requirements, imperatives for people who observe them or have obligations to observe them in connection with legal relations in which they act as a party to justice or other moral dimensions without observing or understanding which these principles cannot function (Dvorkin, 2000, p. 519).

Administrative law scientist Sharaya A. A. combines most of the previously mentioned aspects of principles from separate definitions and from various scientists and stresses that principles are the basic, initial provisions of any theory or teaching, the basic principles of explanations and instructions, which are characterized by universality, general significance, higher imperative, and reflect essential provisions of theory, teaching, science, legal system, state system, etc. In addition to the given definition, the scientist underlines that the principles are characterized by such a property as an abstract reflection of the laws of social reality, which determines their role in the system of a large number of phenomena. In addition, Sharaya A. A. defines the principles as the source of many phenomena, processes, and conclusions are related to them as an action to a cause (real principle) or as consequences to a basis (ideal principle). (Sharaya, 2016, p. 206).

Going forward, having previously paid attention to the research of scientists of eastern Europe during the last century and up to the present, we will move on to the representatives of the scientific community of the Western legal doctrine.

Mr. Palombella states that the principles of law refer to the sources of law. They have found wide application in the precedent law of judicial bodies both at the national level of the countries of the Anglo-American legal system and in international law, including by the UN court. In this field, the principles of law, acting as a source of law, are used to provide official judicial interpretation of norms and rules of laws and by-laws or to provide legal justification for a specific decision (Palombella, 2015, pp. 3-4).

Jordan Daci and Joseph Esser describe the principles of law as the abstract rules that do not regulate the behavior of the subjects of legal relations directly (indirect influence), as opposed to the legal norms expressed in legislative acts (direct influence). The principles are implemented by acting as a foundation and basis for the introduction of specific prescriptions in the content of legal norms based on them. Principles of law appear as a form of expression of points of view or as a proposal to act in a certain way, but they do not specify the way to do so, nor do they indicate a specific

way of solving a particular issue. Such a task relies on legal norms, which specify legal cases regarding the implementation of legal principles (Esser, 1956, p. 51).

Mr. Kornev mentions the position of Robert Alexy, who also resorts to comparative analysis. According to Mr. Alexy, a rule is a norm that provides for a specific form of behavior under specific circumstances, the breach of which casues specific consequences, which is also called subsumption, and in the legal field it is known as the qualification of the norm, which was already mentioned in the positions of scientists above. By relying on this provision, the scientist calls the principles of law norms that do not provide for specific and detailed forms of behavior under specific conditions, and are not characterized by the onset of consequences. Mr. Alexy concludes that the rules (legal norms), following his understanding, have the same binding force for the subjects in respect of which their application is possible. The principles of law, in turn, are characterized by their optimization. In other words, they have the so-called "weight" of different levels, are not universally binding, but are applied as necessary, actual possibility, with certain legal tools, etc., which indicates their "optimization" nature (Kornev, 2018, p. 67).

It can be seen that according to the results of our review of the positions of scientists and lawyers, certain trends and signs are observed that are common to Western legal doctrine and Eastern (Soviet and post-Soviet) legal doctrine.

For example, scientists of the Soviet period endowed the principles of law with an ideological character, claiming that they were the basis of people's conscious desire to establish certain material conditions for the existence of society and the regulation of social relations. In addition, positivist and normativist approaches gained considerable popularity, seeing the normative nature of the principles of law and their definition, establishment and consolidation directly by the state.

Among the group of domestic scientists of independent Ukraine, there is the privilege of the approach according to which the principles of law are perceived as the basic principles, original ideas, provisions that have the character of universality, flexibility, imperativeness and reflect the most essential provisions of the law, and do not come purely from imperative imposition and establishment by the state by the authorities, indicating that the principles of law are the highest category.

If we analyze the positions of the representatives of the group of foreign scientists, then the issue of studying the relationship between the principles of law, legal norms and rules is becoming relevant nowadays. A few studies are devoted to such a broad category, but those that exist deal with comparative analysis of other categories.

4. Conclusions.

Therefore, it can be seen that the representatives of the Western scientific community, in their legal adaptation, carefully treated the original essence of the principle of subsidiarity, namely, its representation in the Catholic social doctrine. After all, its nature was not in any way distorted or turned in the other direction within the countries of a democratic orientation, and its content remains the provision of a wide opportunity for the achievement of goals by lower subjects independently, as well as providing them with support in this by higher subjects only in case of urgent need. Moreover, in the Western world, this principle was incorporated in different systems, where it would be relevant. That is why research and development of it continue to this day.

At the same time, against the background of the development in the XX century of the systems of political power that were new for humanity, which provided for an extremely high level of control over all spheres of citizens' lives, the concept of the principle of subsidiarity was added to the concept of its belonging to the social state, without which it cannot exist and presupposes freedom and independence in the actions of the citizens of such a state from the total control of the government, which would not be adapted in any way in totalitarian regimes.

As a result, this principle did not receive recognition and even attention during the years of the Soviet Union, because the principle tends to the opposite - decentralization and a greater distribution of powers between subjects of different levels, giving subordinates more freedom and independence in making decisions on local issues.

However, Eastern European scientists showed some interest in it after the Soviet period, taking into account the western trend and the European integration process of already independent Ukraine.

It can be concluded that the relevance of adaptation and application of the principle of subsidiarity remains to this day. The eastern post-Soviet countries, where power remains at the high centralized level, will not be able to effectively apply and introduce it into their system. Although, the effectiveness and positive impact of the principle of subsidiarity when applied to the social well-being of society has been proven by Western countries for more than seventy years, and will be proven and developed in the future even more.

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Владислав Єфіменко,
аспірант другого року навчання кафедри службового та медичного права навчально-наукового інституту права Київського Національного Університету імені Тараса Шевченка, вулиця Володимирська, 60, Київ, Україна, індекс 01033, yefimenko.vladyslav@gmail.com
ORCID: *orcid.org/0000-0003-3475-6263*

АДАПТАЦІЯ ПРИНЦИПУ СУБСИДІАРНОСТІ В ЗАХІДНИХ ТА СХІДНИХ ПРАВОВИХ СИСТЕМАХ

Анотація. ***Мета.*** Стаття присвячена висвітленню питання значення та застосування принципу субсидіарності в соціально-економічних відносинах та управлінських правовідносинах суб'єктів різного рівня, які складалися протягом двадцятого та двадцять першого століття, а також як поступова зміна ролі принципу субсидіарності впливала на його поступову адаптацію в різноманітних правових системах. ***Методи дослідження.*** Робота проведена на підставі загальнонаукових та спеціальних методів наукового пізнання, в тому числі порівняльно-правового методу та аналізу. ***Результати.*** Для доцільного аналізу можливості адаптації принципу субсидіарності у західноєвропейських та східноєвропейських правових системах було розглянуто основні теоретико-правові підходи до визначення поняття «принципи права» загалом, попередньо групуючи дослідників та членів наукової спільноти за територіальною приналежністю та політико-правовою системою, а саме розділивши їх на умовно «західноєвропейських» та «східноєвропейських». Також, враховуючи, що розглянуті підходи розглядались починаючи з двадцятого століття, було розглянуто глобальне формування думки про принципи права в тоталітарній (радянській) системі, у порівнянні із західноєвропейською думкою. На підставі висвітлення підходів до визначення «принципів права» були висвітлені підходи до визначення принципу субсидіарності, але в сьогоденні, у пострадянському та європейському науковому просторі. ***Висновки.*** На підставі ознайомлення з теоретико-правовими підходами до принципів права вищезазначених груп вчених у радянській та європейській наукових спільнотах можна було зробити висновок, що адаптація принципу субсидіарності, як сучасного принципу права (адміністративного), до тоталітарних режимів або систем із високим рівнем централізації влади була б проблематичною, якщо б не неможливою. Адже зміст принципу субсидіарності, не спотворюючи його генези і високої соціальної направленості, що була сформована ще католицькою церквою, направлено як раз у бік децентралізації та розширення повноважень і самостійності нижчестоящих суб'єктів системи, що важко допустити при тоталітарній владі. Піднімаючи зазначене питання, стаття наголошує на важливості розуміння історично-обумовлених процесів та їх впливу на соціально-економічні відносини в суспільстві та, як результат, на можливість адаптації тих чи інших принципів у сучасних правових системах.

Ключові слова: принцип субсидіарності, принципи права, зміст принципу, правові підходи, історичний аспект, адаптація.

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