THE COSSACK LAW OF THE HETMANATE AS A POLITICAL AND LEGAL PHENOMENON

Statement of issue. The discipline named “History of State and Law of Ukraine” is mandatory for learning in higher educational institutions. Even a brief overview of any monograph or textbook would anticipate that Ukraine’s geographical territory has to be conceived under the word “Ukraine”, and the “Law of Ukraine” is a broad term which not only may refer to modern Ukrainian legislation and jurisprudence. Thus, in a historical context, under the term “Law of Ukraine” various legal norms acting in a certain time fragment are referred to. Upon such a consideration, under the “Law of Ukraine” one may also conceive the law of antique colonial towns, the “Restatement of Laws of the Russian Empire” (in the times of the Russian Empire reign), and even the directives of German occupational forces in 1940s, as for a more obscure example. It is apparent that owing to the lack of Ukraine’s standalone, or its termination, the vast majority of the legal norms were laid down by the historical conquerors, and so they hardly could be adjusted to the mentality of local Ukrainian folk, its concepts of “law” and “equity”. Therefore, the situation somehow reminds a famous Russian proverb: “I became married without myself”. At the same time, an inalienable part of the “Law of Ukraine” could be represented as an “entirely-Ukrainian-law”, which is created by the national political elite considering the Ukrainian mentality. In fact, the germinators of such type of laws were not necessarily ethnical Ukrainians, for instance Pylyp Orlyk, the creator of Orlyk’s Constitution, had been a representative of a Germanized Czech family.

Hence, the key qualifying features of “The Law of Ukraine” are the following. Firstly, its standalone (which does not exclude adapted judicial legacy borrowed from developed countries). Next goes the adjustment to the legal ideals and concepts of the majority of the Ukrainian folk as a political nation. Thirdly, the law of Ukraine has got ties to the territory of modern Ukraine. In such a view, the “Rus’.Justice” cannot be formally recognized as a source...
of “Law of Ukraine”, but represents the law of Kievian Rus’, whose jurisdiction in the Middle Ages encompassed contemporary Belorussian, Russian, Polish and other territories.

The aim of the research. The goal of the given publication is to characterize the process of germination of “Law of Ukraine”, its initial difference from the law of all the neighboring states (Poland, Moscow, Ottoman Empire etc.).

The current state of research on the topic. Among a substantial historiographic of the Ukrainian Cossack State, where mostly historians’ treatises prevail (for instance, V. Brekhunenko, V. Gorobets, O. Hurzhiy, Y. Mytsyk, V. Smolii, V. Stepankov, G. Storozhenko, V. Shevchuk, T. Chukhlib, V. Shcherbak etc.), we find considerably less treatises of legal historians (I. Boiko, I. Hrozovsk’kyj, A. Kozachenko, O. Kresin, I. Panionko, I. Usenko etc.), and so, there is not much research embracing Cossack law as such. Among the treatises on Cossack law, some works could be foXaamund concerning peculiar branches of Cossack law of the Hetmanate (e.g. I. Boiko), or discussing the codification process (for instance, A. Yakovliv, or V. Kulchytsky). One of the most recent works relating to Cossack law of the Hetmanate is devoted to the issue of the legal system formation not only from the view of positivism, but also from ius naturale, meaning the natural law.1 However, upon our point of view, the given topic still bears a substantial intellectual resource.

Main body. Cossack law is frequently conceived as a system of customary-legal norms, which had been germinated in Zaporozhian Sich5, and then have obtained their features of a “historical type of Ukrainian customary law”, and became a factor of a self-identification of Ukrainians (if more-precisely – “proto-Ukrainians”, or the “Rus” folk of Ukraine of the XVII–XVIII centuries), laying down as a foundation of the societal regulation under the jurisdiction of the “Cossack state”. The latter, in our point of view, is a civilizational phenomenon in the history of Ukrainian folk, a concordant scientific category and a substantial layer of the folk’s historical memory, being an important period of Ukrainian state evolution – both ideologically and institutionally. In the broadest conception of “Cossack state” (and, accordingly, its initially unwritten law, and subsequently, the written one – Authors), encompasses all Cossack “heritage” which subsisted one after another, or in parallel within the contemporary territory of Ukraine covering XVI-late XVIII centuries. Here, we could name such formations in particular: the Zaporozhian Sich, the Rzeczpospolita Registered Cossack Regiments, the Cossack Hetmanate (1648–1764), the Sloboda Cossack Regiments, the Danubian Sich. They were allied by collateral principles and a wayward system of values in their social life, which was ground down upon the ideas of freedom, equity, equality of rights and the public interest. Here we could briefly outline a mostly ignored circumstance: the Cossack sector of the population was primordially formed as an international one, as the path to the Sich was not only free to local Ukrainian people (upon the those-day terminology – “The Rus’ people”), but to “Polish people, Lithuanians, Belarussians, Great Russians, Dones, Bulgarians, Vlachs, Montenegrins, Turkish people, the Tatars, Jews, Kalmyks, Germans, Frenchmen, Italians, Spaniards, Englishmen”. Hence, the Cossack mentality was germinated not rather upon the foundation of a national ground, but upon the recognition of the social value of freedom, economic independence and self-dignity as an inalienable moral part of a Cossack as a free man, which possesses weaponry and could fight for his rights even at the cost of his own life.

At the same time, the Cossack law was observed as a privilege, not a mere set of rights or a legal system – Cossack law was treated in the same way as, perhaps, nobility law. Similarly to the so-called suburban nobility, the Cossack was a free man, a minor proprietor and manufacturer staying aside from feudalism and its serfdom-oriented derivatives. However, in contrast to ordinary nobility, the Cossacks were stringently hostile to feudalism, and thus was recognized as a social ideal to the vast majority of the enslaved population of Ukraine. The impact of the Cossack ideals could be proved by an elemental process of joining the Cossacks by the folk, which intensively lasted in the XVII century and was reflected in a self-willed acquisition of Cossack rights by country folk, townsfolk and the nobility as well – basically all the social sectors which upheld the Cossack philosophy. The last self-willed turn to the Cossacks could be spotted within the battle of Napoleon against Russia and in the course of Independence Contest of 1917–1921. In overall, the Cossack era witnessed the processes, which defined the peculiarities of foundation and evolvement of a modern Ukrainian state, as well as the genesis of the Ukrainian nation in parallel.

The rise of the Cossack Hetmanate under its official name – Vijsko Zaporizkje, had become an apogee in the development of the Cossack state and one of the most crucial results of the National revolution of the Ukrainian folk in the middle of XVII century. The revolutionary character of the circumstances of the Ukrainian history that began under the reign of B. Khmelnychskyi (also known as the “Khmelnychchyna”) in 1648 and have ascertained the foundation of a new form of Ukrainian state, have lasted until the liquidation of P. Doroshenko’s state institutions in the Right Bank Ukraine in 1676. This statement is one of the most supported by the leading national medievalists V. Smolii and V. Stepankov6. Owing to the efforts of the abovementioned scholars, the national historical science has concluded that the events taking place in 1648–1676 were the stages of a monolith process the Ukrainian folk’s ordeal for founding its own national state, its standalone and territorial integrity, as well as a struggle against the feudalization of the society. The Ukrainian folk desired to create a new model of social-economic relations, as well as the new quality of Ukrainian law as such.

The contemporary Ukrainian scholars (in contrast to Polish and Russian peers) frequently utilize the term “Revolution” to refer the events of 1648–1654, since within the abovestated period, the jurisdiction of Vijsko Zaporizkje encountered a drastic change in the societal structure, which were owed to the changes in feudal land possession. The societal structure alteration was substantially reflected in the change of the legal status of various social sectors of then-living Ukrainians. The Hetmanate jurisdiction has encountered an alteration in the judiciary, which could be illustrated by the liquidation of “statute” courts and the law itself. The Revolution, in fact, should be called...
a “National” one as the aforementioned alterations objectively corresponded to the interests of then-living Ukrainians, apart from a relatively narrow “polonized” nobility. The revolutionary features of the Hetmanate law (hereby, under the term “revolutionary” we mean the character of the changes in the then-acting Ukrainian law – the Authors), which have founded a new stage in the Cossack law development. Its main aspect was the loss of corporatism and the acquisition of legal features of common Ukrainian law. This phenomenon was largely owed to the process of joining Cossacks by the formerly enslaved peasantry and miscellaneous townsfolk (with an exception of the Jewish minority).

Upon the view of the Authors, the new quality of Ukrainian Cossack law as the national law – in contrast to the old corporate law, could be reflected in the following features:

– Foremost, the transformation of customary Cossack law with the customary law of separate lands into a precisely national, common law of the Hetmanate, and hence, to the Cossack-era law of Ukraine. As claimed by M.M. Bedri, this means it became a legal foundation for the Ukrainian folks’ right to exercise its independence by developing its own state. Another concordant entry to tell is that the norms of Cossack law started to spread upon all the sectors of the folk within the Hetmanate jurisdiction, including the representatives of minorities, which hallmarked the commencement of a new reality. In fact, this reality was reflected by a civilizational choice of nearly all sectors of the Ukrainian folk to be released from feudal serfdom – not only the Cossacks were versus the Polish feudalism. Thus, the vast majority of the then-Ukrainian folk desired to uphold the Cossack philosophy, indoctrinating it to their own lives.

– Secondly, important changes have been introduced to the corpus of the sources of law within the previously mentioned time fragment. The Hetmanate state authorities have abolished most of the sources of law acting in Ukraine within the Rzecz Pospolita reign. In peculiar, it concerned various regulations of the Polish authorities and seims, such as “Ustava on Voloks” (1557), “Ordinance on the registered Vijsko Zaporizske” (1638) and other legal acts, which confirmed the powers of the Polish nobility, the magnates, the Catholic Church and the Polish authorities. At the same time, the Ukrainian National Revolution of the mid-XVII century has not formally aborted all the legal acts of the former reign: for instance, the Lithuanian Statute of 1588, the volumes of Magdeburg law, the Sachsenspiegel, the “Order of laws” by Bartholomew Groitsky etc. The courts did not directly use them while adjudicating cases, not even speaking concerning their direct application. On one hand, we may find that the norms regarding the peasantry fixture, or the move of the folk to other social sectors, did not act within the period of Khmelnycychyna. On the other hand, we may conclude that the succession of legal tradition took place at least to a certain extent.

– Thirdly, the abovementioned processes promoted the transformation of the law’s social identity. That is, the social consciousness of the folk has subsequently changed, especially in respect with such legal maxims, as “equity”, “morals”, “the good”, “the vice”, etc. It could be illustrated by the germination of novel legal norms. They frequently considered such significant (and sensitive) legal institutions such as land ownership and possession, class dependence, Cossack self-government, the scope of peasant duties etc. The newly-coined legal norms proved the domination of natural-legal views on the law in general, and have corresponded to the Ukrainian legal mentality. The foundation of this mentality could be found in individualism and anthropocentrism, bearing libertarian and occasionally anarchical views. Hence, the law was enriched by the principles that were mainly connected with the person and society and was conditioned by the human nature and its societal being. In contrast to the “Cossack” approach, then-acting law was primordially connected to the state, not the citizen. As of its historical epoch and geographic region (between Rzecz Pospolita, the Moscow autocratic monarchy and the autocratic Osman empire, whereas the Crimean khane was its vassal), it was an unprecedented phenomenon, impossible to a certain sense. Concerning the given statement, we would agree with Kushy’nska, who claimed that the XVII–XVIII centuries could be considered the exact time when the Ukrainians commenced to realize their definite national distinctions, considerably impacted by the Cossack customary law.

– Fourthly, new sources of law have been adopted – namely, the legislative acts promulgated by the Hetmanate authorities. Since the Cossack law considered the power authorities to bear a necessity to be properly regulated, the Revolutionary times witnessed a vast increase of legal regulations, primarily aimed to adjust the regiment management system. The norms of Cossack law also considered such concordant spheres of societal life, such as the administrative, penal and judiciary ones.

– Fifthly, the character of the Hetmanate’s evolvement (as a jurisdiction), mainly and surprisingly affected the penal order. The system of crime and punishments was simplified. Such acts, as an assault on the king’s power, or feudal-magnate order were abolished from crimes. The intentional or unintentional acts against the Catholic Church or religion were also aborted from them. At the same time, new crimes were enacted: for instance, the treason relating to the insurgent folk, a failure to comply with the orders of the sergeant-mayor, or failure to aid at the battlefield. All the aforementioned elements of crime were usually punished by a death penalty, which was amenable to explanation owing to a permanent war for independence.

The last quarter of the XVII and nearly the whole XVIII century was generally characterized as a decline of the Cossack-Hetmanate state. This tendency was illustrated at its most in the gradual abandonment of revolutionary conquests of Khmelnycychyna in the social and political sphere and the alteration of dominants in application of the national and externally imposed legislation by the Ukrainian authorities.

It found its impact in the following:

Firstly, the autonomy of Ukrainian legal life and the distinctness of its legal order was primordially determined by the fact that the Hetmanate’s folk preserved the right to use its “ancient”, “old”, or traditional legal norms. This
state of affairs was a crucial pledge not only for Lithuanian-Rus, but for the Cossack society, meaning preservation of the “existence of a conventional order of things, the societal stability and security” (let us agree with S. Kovalyova)11. It could be proved, inter alia, by the fact that the formal preservation of “old laws and freedoms” in Ukraine was forcibly affirmed by the central Russian authorities. The formula of the inviolability of “Malorossian rights” had become a general rule of the Hetman articles of late XVII – early XVIII centuries. Even the Moscow authorities had to agree with this legal fiction (as we have to admit — the Authors). Even the ordinances of Peter the Great (which, in fact, were aimed at the limitation of self-government in then-existing Ukraine) mentioned the so-called “previous rights”.

Secondly, upon the new (so-called, the Moscow-autonomic) historical conditions, the autonomic law of the Hetmanate was used to establish the interests of the newly formed privileged social sector — the Cossacks (and primarily the Cossack elders, which carried the highest societal rank among the Cossacks – the Authors). The latter attempted to create a centralized system of subordination upon a strict legal foundation, as well as the establishment of their right to land ownership and the right to exploit the labor of dependent peasants. It was performed, inter alia, under a tentative historical motto of renovating of “the old laws and freedoms”. Concerning the aforesaid issue, the elders found their support both from the side of Hetmans and the Russian tsarism. As of the case law, the courts became to refer to the sources of law relating to Polish-Lithuanian reign more frequently. Hence, the Lithuanian statute and the volumes of the Magdeburg law were recognized as legally binding in most of the official documents. Many scholars (including O. Gurzhiy, T. Chukhib) find a collision in the Hetmanate law, which consisted precisely in the formula of the “old laws”12. In fact, the matter is that while applying the formula of “old laws”, the representatives of various social sectors of the Hetmanate frequently acted upon their own interests, and thus did not interpret the legal norms in a single way. Yes, the Ukrainian nobility and the elders usually treated the “old laws” as the conventional order and legal status of the ruling class before 1648, which was mainly based upon the Lithuanian statute and volumes of the Magdeburg law. In contrast, the peasants or the lower-rank Cossacks (meaning not the elders — the Authors) considered that “the old laws” should be interpreted as the legal norms, which settled in Zaporozhian Sich and thus denied any serfdom-based relations between the people.

**Inferences.** Hence, the Cossack law is a civilizational phenomenon, inalienable from Cossack state and is an entirely Ukrainian national political-legal phenomenon, whose apogee accounts for the Hetmanate reign. The civilizational choice of all the societal sectors had made a decisive impact on the legal system of the Hetmanate, and it had been made in favor of establishing the main maxims of the Cossack philosophy (actually we could call it “libertarian”, despite the term “libertarianism” appeared only in the XIX century — the Authors). The civilizational choice of the Ukrainian folk also has promoted the change in the social identity of then-acting law. Upon the given considerations, the authors come to the following conclusion: not so much the folk of the Hetmanate has outstripped its historical time (meaning the pre-bourgeois relations), as it intuitively combine the own “I want to” with the imperative “I have to”, or “I am obliged to”.

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7 Bedryi M.M. *Supra note*, 3, 82.


манщини (зокрема її початкового етапу – Хмельниччини). Обґрунтовується теза про те, що вирішальним впливом на формування тогочасної української правової системи слугував цивілізаційний вибір представників усіх суспільних верств тогочасного населення земель під гетьманською юрисдикцією на користь закріплення основних засад «казацької» філософії – своєрідної системи цінностей в обустройтві суспільного життя, що основувалася на ідеях свободи, справедливості, рівноправності та громадського інтересу. Наводяться аргументи, що свідчать про започаткування нової якості українського козацького права – на противагу колишньому через зміну соціальної сутності – воно набуває ознак українського національного права. І цю його якість загалом не змогли похитнути зміни домінант в застосуванні доморощеного та нав’язаного ззовні права, що припадають на занепад козацько-гетьманської держави, останню чверть XVI ст. і фактично усього XVII ст. вітчизняної історії. Робиться висновок, що одним з наслідків козацького впливу на правові відносини було фактичне випередження населення Гетьманщини свого історичного часу – добуржуазних суспільних відносин.

Ключові слова: козацьке право, козацька держава, Хмельниччина, Гетьманщина.

Резюме

Макарчук В.С., Терлюк И.Я., Литвиненко А.А. Казацьке право Гетманщини як політико-правовий феномен.

Исследуется казацкое право, как цивилизационное явление украинской истории и сугубо украинский национальный политико-правовой феномен, неотделимый от Казацкой державы, апогея эволюции которой приходится на времена существования Гетманщини. Подчеркивается, что истоки процесса зарождения собственно украинского права, то есть время, когда был заложен его первоначальное (изначальное) отличие от права соседних государств польского, московского, оттоманского и т.д., приходится на период Гетманщины (в частности её начального этапа – Хмельниччины). Обосновывается тезис о том, что решающим влиянием на формирование тогдашней украинской правовой системы служил цивилизационный выбор представителей всех общественных слоев тогдашнего населения земель под гетманской юрисдикцией в пользу закрепления основных принципов «казацкой» философии – своеобразной системы ценностей в обустройстве общественной жизни, которая основывалась на идеях свободы, справедливости, равноправия и общественного интереса. Приводятся аргументы, свидетельствующие о начале нового качества украинского казацкого права – в противовес прежнему корпоративному через изменение социальной сущности – оно приобретает признаки украинского национального права. И это его качество в целом не смогли поколебать изменения номинантов в применении доморощеного и навязанного извне права, которые приходятся на упадок казацко-гетьманского государства, последнюю четверть XVII ст. и фактически весь XVIII век отечественной истории. Делается вывод, что одним из последствий казацкого влияния на правовые отношения стало фактическое опережение населением Гетманщины своего исторического времени – добуржуазных общественных отношений.

Ключевые слова: казацкое право, казацкое государство, Хмельниччина, Гетьманщина.

Summary

Volodymyr Makarchuk, Ivan Terlyuk, Anatoliy Lytvynenko. The Cossack law of the Hetmanate as a political and legal phenomenon.

Cossack law, as a legal system, is researched by the authors, as a civilizational phenomenon of Ukrainian history, as well as an entirely Ukrainian national-political and legal phenomenon, inseparable from the Cossack state, which had been the apogee of evolution of which belongs to the times of the Hetmanate. It is emphasized that the origins of the process of origin of Ukrainian law itself, that is, the time when its original difference from the laws of neighboring states – Poland, Moscow, Ottoman Empire, etc., and belongs to the period of the Hetmanate (in particular, its initial stage of the Khmelnytsky region). The thesis, which is argued by the authors of the article is that the decisive influence on the formation of the Ukrainian legal system at that time was, in fact, the civilizational choice of the representatives of all social strata of the land population under the Hetman’s jurisdiction in favor of consolidating the basic principles of Cossack philosophy reflecting a peculiar system of values in the arrangement of the society, including freedom, equity, equality and public interest. Arguments of the authors are presented indicating the beginning of a new quality of Ukrainian Cossack law – in contrast to the former corporate one; it is becoming a sign of Ukrainian national law owing to the change in social nature. And this quality, in general, could not be undermined by the changes of the dominant in the application of the homegrown and externally imposed rights that fell to the decline of the Cossack-Hetman state, the last quarter of the 17th century and, in fact, throughout the whole 18th century as well. It is concluded, that one of the consequences of the Cossack influence on the societal legal relations was the fact that the population of the Hetman region actually outstripped its historical time of pre-bourgeois societal relations.

Key words: Cossack law, Cossack state, Khmelnytsky’s period, Cossack’s Hetmanate.