

APPROACHES TO THE CODIFICATION OF FAMILY LEGISLATION IN UKRAINE AND HUNGARY: COMPARATIVE ASPECT



Oksana Melnychenko

*Associate Professor, Ph.D.,
Kyiv University of Law of the National Academy
of Sciences of Ukraine,
Kyiv, Ukraine*

ORCID ID: <https://orcid.org/0000-0003-1217-1950>

Abstract. The article deals with integration processes in Europe. The connection of family legislation recodification with the integration of Ukraine is becoming a challenge; the area of family law is one of the most demonstrative because of its legal regulative ambiguity and particularities. The author compares the above mentioned processes in Ukraine and its neighbour - Hungary as a member of EU. The author proves that just monistic approach

affirms the integration direction policies of the state rather than dualistic approach to codification in the field of family law. Monistic codification ensures within its goals a coherent system of family legislation as a unity of elements ordered according to a principle. The subject legal example of Hungary would be valuable for Ukraine in the context of contemporary integration of Ukraine to Europe, migration processes and the development of private legal relations.

Keywords: *dualistic; harmonise; integration; monistic codification.*

Introduction

Ukrainian as well as Hungarian legal system has always been defined as Romano-Germanic legal system. The fundamental source of law is the written Constitution. Branches of law are represented by branch codified legislative acts (Codes) and other laws and bylaws. Codes are the complex sources of law which regulate relations of different institutes of this or that branch of law. They are not the main sources of law because have the same legal force as other laws. That's why they do not have the priority over other laws of a branch of law. Judges use them in complex with other legislation for the adjudication of cases. Besides, as laws regulate more important relations then bylaws, laws take precedence over bylaws in case of controversy between them. Bylaws shall correspond to laws and the Constitution concerning both states. This is the background of the beginning of the civil legislation recodification in Ukraine. Scientists and practitioners stress on the reasons of civil and family legislation unification. Among them is "the need of further private legal reforms, the existence of the norms of international acts models, modern experience of French and German civil codes recodification, a potential of native private legal science" (National Association of Ukrainian lawyers, 2020). But views differ. On the contrary to well-proved grounds and reasons of recodification, it lacks proved scientific legal basis. There is no doubt on this question in Hungary. The unification of civil and family norms has taken place in 2014 in this European country. The national values were reflected in the new code. This has the further effect. "In 2022, the European Commission brought a lawsuit before the European Court of Justice against Hungary for a 2021 law that discriminates against LGBTQ minorities. A majority of member states have joined the lawsuit on the commission's side"(Gulyas, Kasnyik, 2023).

Literature review. The topic of civil legislation codification is recently reviewed by many Ukrainian scientists and lawyers. Among them are. Such well-known Ukrainian lawyers as A. Dovgert, A. Kuznezova, M. Khomenko, H. Buyadzhi, V. Zahvataev, V. Kalakura, Y. Kapiza, O. Kot, O. Kohanovska, Maydanyk., Stefanchuk R. offer the concept of Ukrainian civil code renewal with the family code. They have represented the concept of recodification of civil and family legislation of Ukraine as a Working group established by the Cabinet of Ministers of Ukraine.

Research methodology. Comparative legal method is the main in the research. The methods of logical analysis, dialectical and dogmatic methods are also used.

Research results.

"It is important to admit that Ukrainian legal system is considered to have a well-structured hierarchy of normative acts. The number of laws increases constantly, which creates the problem of contradictions between them. The imperfectness of Ukrainian legislation lies in its instability, overregulation, complexity of norms etc." (Chernyavsky, Brusko, 2021).

The legal system of Hungary recognizes the universal rules and regulations of international law. The state continues to harmonize the internal laws and statutes of the country with the obligations assumed under international law. Such harmonization concerns not only international but also supranational EU law.

Thinking about advantages and disadvantages of a legal system it is necessary to account membership of a country in EU.

Ukrainian legal system is based on codes among which are: the Civil Code of Ukraine, Family Code of Ukraine, Commercial Code of Ukraine, Criminal Code of Ukraine, Land Code of Ukraine and others.

The Family Code of Ukraine is closely connected with the Civil Code of Ukraine. On the contrary to Economic Code of Ukraine the Civil Code of Ukraine is based on the market principles and was adopted on January 16, 2003 and came into force from January 1, 2004. During the last codification of Ukrainian civil legislation the legal norms of family legislation were planned to codify in the VI Book of the Civil Code of Ukraine. The family Code of Ukraine was adopted on January 1, 2003 as a separate code. But due to the close connection with the Civil Code of Ukraine it could come into force only at the same time as the last one.

The place of family law and family legal norms in Ukrainian and Hungarian system of law and the system of legislation has always been a controversial question.

The opinion of the well-known scientist H. Matveev is still the basis for the position of a dozen of scholars about the family law as a separate branch. It is composed on the idea of "particularity of matrimonial relations" (Matveev, 1985, p.34-34). In connection with

this it is supposed expedient to add one more particular feature – existence in family law a large number of public legal norms – that can serve as quite weighty argument in favour of recognition of family law as a separate branch (Bondar, 2013).

For example, the majority of Russian lawyers in the former USSR supported the idea about family law as the branch of civil law. But the Code on Marriage and Family of 1969 as the separate act of legislation existed in the former USSR. The Civil Code of USSR did not comprise the body of norms for the regulation of family relations. Thus, in practice the place of family law does not directly influence the place of family norms in the legislation of a state. In other words the place of family law in the system of law does not determine the way of codification of family norms in this or that country.

In any case family law is the institution of private law within the boundaries of civil law. That's why family norms find their reflection in such forms of codification's expression as Civil or Family Codes. In different countries with pandect system family legal norms are organized in a Family Code or in one or several books of a Civil Code.

The aim of codification inside a country is the renewal of legislation, removal of controversies, gaps, other disadvantages, bringing it to the requirements of contemporary needs. Codification is aimed at fundamental change of current legislation by the way of drafting and passing of a new codified act. This promotes stability. Codes are the basis of legislative activity. That's why codification can be only official.

So as social order is changing periodically and property, non-property relations is changing together with it, civil codes, that regulate these relations, also are changing. The regulation of family relations, also property and non-property, between particular classes of subjects of civil relations, has to be coordinated with the regulation of civil relations. That's why joining family and civil norms in one codified act according to the aim of codification has to provide their coordination and correspondence. As the practice shows norms within one code are more coordinated then legal norms of different codes, for example, Commercial Code of Ukraine and Civil Code of Ukraine contain a lot of contradictions till now. However, family and civil norms of the Civil Code of Hungary,

norms of Civil and Family Codes of Ukraine are coordinated at the proper level as these three codes are drafted on the basis of the same fundamentals and principles of market economy; the norms of the last one were planned to pass in one act. That's why the last civil codifications of both countries created the basis of the coordinated legal regulation of social relations in the sphere of civil and family relations (with some exceptions in judicial practice) at present. This is the positive aspect in the legal regulation of both countries.

The last codifications of civil law in Ukraine and Hungary were conducted by the method of codification-reform, not compilation. Codification-reform stipulates gathering legal norms and their bringing in some codified form with changes and amendments. It stipulates the higher level of juridical science and law making mastery. The aim of these codifications was not only gathering valid legal norms, simplification and unification of legislation but renewal of the legal regulation in accordance with the gradually changed social order of both countries at that time. Such renewal in family and civil law has to be conducted simultaneously each time. "The role of private property has cardinally changed and the development of market economy demanded full alternation of the Code" (Vekas, 2009, p.23) in Hungary as well as in Ukraine. The essence of hundreds of amendments was valuably reshaped in the united instrument – Civil Code.

The exclusive particularity concerning the last civil codification in Hungary, comparing with Ukraine, became Hungarian membership in EU that promoted its monistic character. "In general it is possible to say that new codification of private law in the Central and Western Europe goes in the direction to monistic structure" (Vekas, 2009, p. 23). Thus, Hungary follows European monistic way of civil legislation codification.

Ukraine on the contrary to Hungary has chosen the way of dualistic principle (approach) of codification, in other words, family, civil, commercial legal norms were incorporated in different codes, and the norms on protection of customers' rights and some norms were formalized by the separate law. "Dualistic structure during the regulation in the sphere of private law in Ukraine, particularly concerning family code, is based on the specific features of family relations", as

G. Matveev admitted (Matveev, 1985, p.35) that causes the specific legal regulation of these relations. Hungarian lawmakers, particularly professor L. Vekas, accounted specific features of family relations during the codification of civil legislation, that is: "the division into separate book played the role in the integration of the Code and let to account particularities of the legal material" (Vekas, 2009, p.24). That's why the argument concerning appropriate particularities can seem not the necessary condition for a separate Family Code as stated above.

Ukraine as well as Hungary is the participant of integration European processes (not only in law) that determines their future and current trend of development.

Family relations connect Ukrainian citizens with the citizens of Germany, France, Italy, Poland, Hungary and other citizens of EU. Ukraine makes efforts to ensure protection of its citizens, in particular in the sphere of family relations, declares and carefully changes and amends its legislation in the direction of modern trends of legal regulation and international standards.

Family relations connect the citizens of Ukraine with the citizens of Hungary, Poland, Germany, France, Italy and other countries of EU. The legal system and civil society of Ukraine have been formed, that are called for correspondence to contemporary tendencies of the legal development and international standards, promotion of European international processes.

However, the absence of the unified legal regulation in some institutions of family law of the countries within the legal space of EU constitutes the practical reflection of the problematic of social and legal origin. Substantive law of member-states differ from each other. At present even the idea of the European Civil Code is hardly implemented into life. The Treaty of Lisbon declares that the Treaties and the law adopted by the Union on the basis of the Treaties have primacy over the law of Member States. However, taking into consideration the abovementioned, the precedence of EU legislation over the national legislation of member-states is less manifested in the area of family law than in non-family branch. "In the area of family law the 'replacement' of national private international law by EU rules is less manifest" (Kramer, 2012, p.9). This affirms that harmonization and unification in the field of

family law would proceed more complicated and prolonged. "For a number of important issues rules on jurisdiction, applicable law and recognition and enforcement are absent. It is also in this area that substantive law in the Member States is not necessarily developing in harmony. This is also an area where a general principle of EU law (e.g. European citizenship) may continue to influence the development of the law in the area of private international law", Prof. Dr. Xandra Kramer says (Kramer, 2012, p.52).

Thus, just very family legal norms of member-states would be the hardest to bring to the unified standards while implementing into life the idea of the European Civil Code private law. This would get more complicated by the internal contradictions in the legislation of member-states. The less contradictions and particularities in the internal legislation of member-states and non-conformity of family legal norms to international standards and common tendencies in EU are, the faster Europe would pass the way to the united European legislation.

Elimination of such obstacles, softening of differences is especially urgent in the family law sphere of the legal regulation of community social relations.

The term 'harmonization' refers both to the 'harmonization' of various legislative acts within one legal system, as well as to the approximation of laws between different legal systems" (Faure, 2000, p.174). The first notion concerns such concept as 'codification' in the ultimate form and the second notion concerns such concept as 'integration'. Successful codification is the true way to successful integration.

These definitions are closely connected with the key issues of family law and policy of Ukraine and Hungary. Thus, the first-rate issues that spring to mind: what are the substantive goals of family policies and in what way does the form of the legislation matter?

The crucial idea consists in that one generalised act guaranties that family and civil legal norms are harmonized and similar rules are applied in all institutions of family law. "Let us first examine the concept of a system. A system is a unity of elements which are ordered according to a principle" (Haase, 2011). Civil and family legal norms regulate family relations in concord within the unified principles determined in the general part of

one code. Thus, changes and amendments in family law go hand in hand with changes and amendments in civil law. In such a way contradictions and separate approaches to the regulation of matrimonial relations are out of the question. Consequently, the substantive goals of matrimonial policies of a country are determined, transparent and correspond to the civil law principles. The codification mentioned concern the internal regulation of family relations. Transparent and determined policies are followed by the external integration (the way of monistic codification simplifies integration within the boundaries of Europe in the sphere of family law).

"We might well urge that the law, with its ultimate reliance on enforcement by coercion, has only a limited role to play in the sensitive field of inter-personal family relationships: and that there is a private realm of family life which the State cannot and should not seek to enter. Laying down principles and rules of human behaviour it can and should influence attitudes and behaviour" (Cretney, 1981). In this sense principles and rules of a united civil code would be important for the regulation of family relations.

The complexity of legal norms, excessive legal means do not promote integration and accession to EU for Ukraine not only in the realm of family law. No wonder that most European states have chosen the monistic codification of family norms. Recent codification of Hungarian civil law accepted the same monistic approach.

It is necessary to admit the goals of monistic codification of family legislation indicating the family policies of a country: 1) harmonization and clarification of internal family and civil legal norms; 2) improvement of their implementation; 3) more consistency in family legislation; 4) integration in the field of family law.

Without regard to the absence of the unified legal regulation the (on the part of European law codification), mental diversity, national customs and traditions, tenor of family life of European citizens, Europe makes maximum efforts for its legal, cultural, economic, social unity, integration and development. In historical retrospect the representatives of European community are assimilated in the view of their unified values, which open the boundaries of the national traditional culture. That's why the issue of the

united approach to some institutions of family law is the matter of time.

"As a theory of European integration, neo-functionalism provided an explanation of the European integration processes based on a 'spill-over' effect, which envisaged the 'spilling over' of one area of integration into another, in which law played a central role. This is illustrated, for example, by reference to 'the spilling over of community legal regulation from the narrowly economic domain into areas dealing with issues such as occupational health and safety, social welfare...' (Augestein, 2016, p. 224). In such a way it is clearly shown the close connection of integration processes and law.

The lawmakers of Hungary sagaciously and prudently treat the question of European codification and harmonization in law. Taking into consideration the abovementioned, the inclusion of the family legal norms in the Civil Code of Hungary will promote integration European processes, harmonization and unification of member-states' legislation and

in its turn the strengthening of the structural and legal unity of EU. At the same time the Hungarian legislators unambiguously stand for the protection of national interests and national legal order. At present the national customs and traditions prevail over European tendencies in the legal regulation of family relations. But the implementation of monistic approach to the codification of Hungarian civil law ensures in the far perspective the technical possibilities for the fluent transition to and joining with the unified EU tendencies in controversial issues of family law. Monistic approach would be more urgent for Ukraine with the achievement of accession to EU.

Discussion of research results.

The results of the research were discussed on the workshops and round tables within Kyiv University of Law of the National Academy of Sciences

Conclusions

Thus, family law in the system of law does not determine the way of the codification of family norms in this or that country. Joining family and civil norms in one codified act according to the aim of codification has to provide their coordination and correspondence. The last civil codifications of both countries created the basis for the coordinated legal regulation of social relations in the sphere of civil and family relations on market principles.

The contrary practical examples of Ukraine and Hungary in the area of family legislation codification highlight and prove the different real movement of the development of a country towards integration. Hungary follows European monistic way of civil legislation codification on the contrary to Ukraine. One generalised act guaranties that family and civil legal norms are harmonized and similar rules are applied in all institutions of family law even with the flow of time, changes and amendments in legislation. At the same time monistic approach proves the regulatory environment is directed to the current integration processes in Europe. As the topic argued is hanging over in discussions for the last year of war or so in Ukraine it has the deep roots to the integration processes taking place now and perspective of development alongside. The dualistic approach saves the native values of a family in the society broadly regulating family relations and has its advantages. But the unified civil code seems to be inevitable in the light of contemporary priorities of Ukrainian policies.

References

1. Augestein, D. (2016), *Integration through Law' Revised: The Making of the European Polity*, Kindle edition, New York, 224 p.
2. Bondar, T. V. (2013). Family law in the system of civil law of Ukraine ["Simeyne pravo u systemi civilnogo prava Ukrainy"], Private Law No. 1, Available at: [file:///C:/Users/user/Downloads/prpr_2013_1_14%20\(1\).pdf](file:///C:/Users/user/Downloads/prpr_2013_1_14%20(1).pdf)
3. Chernyavsky N., Brusko Y., (2021), *Researching Ukrainian Law*, Available at: <https://www.nyulawglobal.org/globalex/Ukraine1.html>
4. Cretney, S.M. (1981). The Codification of Family Law, *The Modern Law Review*, No. 44(1981), Available at: <https://onlinelibrary.wiley.com/doi/10.1111/j.1468-2230.1981.tb01621.x>

5. Faure, M.G. (2000), The harmonization, codification and integration of environmental law: A search for definitions, *European Environmental Law Review*, June, METRO Institute, Maastricht, pp. 174-182.
6. Gulyas V., Kasnyik M., (2023), Hungary's New Law Lets Locals Report on Same-Sex Families, *Bloomberg*, Available at: <https://www.bloomberg.com/news/articles/2023-04-13/hungary-s-new-law-allows-locals-to-report-on-same-sex-families>
7. Haase, M., (2011). What does it mean to codify law. In: China University of Political Science and Law, International Conference on Comparative Law and Global Common Law. Beijing, China, October 24-25 2011, Available at: <https://ru.scribd.com/document/261130449/Haase-What-Does-It-Mean-to-Codify-Law>.
8. Kramer, X. (2012), A European Framework for private international law: current gaps and future perspectives, Policy Department C: Citizen's Rights and Constitutional Affairs, Brussels, 102 p., Available at: <http://www.europarl.europa.eu/document/activities/cont/201212/20121219ATT58300/20121219ATT58300EN.pdf>
9. Matveev, G. (1985), Soviet Family Law. [Sovetskoe semeynoe pravo], Legal literature, Moscow, 208 p. 34-35p.
10. Vekas, L., 2009. About the new Civil Code of Hungary. In: Trnava University, *the Conference on the Reform of Private Law in the Central and Western Europe*. Trnava, 17-18 September 2009. Trnava: Typi Universitatis Tyrnaviensis
11. The idea of the need for having family Code as a separate act dominates among advocates and scientists [Sered advokativ ta naukovic dominue dumka pro neobhidnist zberezhenia simejnogo kodeksu yak okremogo zakonodavchogo aktu], the National Association of Ukrainian lawyers, 2020, Available at: <https://unba.org.ua/news/6018-sered-advokativ-ta-naukovic-dominue-dumka-pro-neobhidnist-zberezheniya-simejnogo-kodeksu-yak-okremogo-zakonodavchogo-aktu.html>