

NATIONAL ACADEMY OF LEGAL SCIENCES OF UKRAINE

YEARBOOK

OF UKRAINIAN LAW

Collection of scientific papers

Founded in 2008

№ 8/2016

UDC 340(058)(477)

ISSN 2077-4052

Recommended for publication by the Presidium
of the National Academy of Legal Sciences of Ukraine
(Resolution № 92/5 on 20.11.2015)

Yearbook of Ukrainian law : Coll. of scientific papers / responsible for the issue O. V. Petryshyn. – Kh. : Law, 2016. – № 8. – 388 p.

In the scientific journal «Yearbook of Ukrainian law» the best articles published by scientists of the National Academy of Legal Sciences of Ukraine, other educational and research institutions in the field of law, theory and history of state and law, state-legal sciences and international law, civil-legal sciences, environmental, economic and agricultural law and criminal-legal sciences in 2015, have been gathered.

Founder – National Academy of Legal Sciences of Ukraine

Publisher – National Academy of Legal Sciences of Ukraine

Editorial board:

V. Ya. Tatsii (Editor in Chief), Yu. S. Shemshuchenko (Deputy Chief Editor), O. V. Petryshyn (executive Secretary), Yu. V. Baulin, Yu. P. Bytiak, V. I. Borysov, A. P. Hetman, V. D. Honcharenko, V. N. Denysov, O. D. Krupchan, V. V. Komarov, N. S. Kuznietsova, V. M. Lytvyn, V. K. Mamutov, V. T. Nor, O. P. Orliuk, P. M. Rabinovych, O. V. Skrypniuk, O. D. Sviatotskyi, V. P. Tykhyi

Responsible for the issue O. V. Petryshyn

Registered by the Ministry of Ukraine for Press and Information
(Certificate of State registration of the print media.
KV Series number 15596-4068 R from July 9, 2009)

Address of the Editorial Board: 61024, Kharkiv, Pushkinska st., 70, National Academy of Legal Sciences of Ukraine, tel. 704-19-01.

© National Academy of Legal Sciences of Ukraine, 2016
© «Law», 2016

НАЦІОНАЛЬНА АКАДЕМІЯ ПРАВОВИХ НАУК УКРАЇНИ

ЩОРІЧНИК УКРАЇНСЬКОГО ПРАВА

Збірник наукових праць

Заснований 2008 року

№ 8/2016

Рекомендовано до друку президією Національної академії правових наук України
(постанова №92/5 від 20.11.2015 р.)

Щ92 **Щорічник українського права** : зб. наук. пр. / відп. за вип. О. В. Петришин. – Х. : Право, 2016. – № 8. – 388 с.

У науковому виданні «Щорічник українського права» зібрані найкращі статті, які були опубліковані у 2015 р. науковцями Національної академії правових наук України, інших навчальних і наукових закладів у галузі правознавства, з проблем теорії та історії держави і права, державно-правових наук і міжнародного права, цивільно-правових наук, екологічного, господарського та аграрного права і кримінально-правових наук.

Засновник — Національна академія правових наук України

Видавець — Національна академія правових наук України

Редакційна колегія:

В. Я. Тацій (головний редактор), Ю. С. Шемшученко (заступник головного редактора), О. В. Петришин (відповідальний секретар), Ю. В. Баулін, Ю. П. Битяк, В. І. Борисов, А. П. Гетьман, В. Д. Гончаренко, В. Н. Денисов, О. Д. Крупчан, В. В. Комаров, Н. С. Кузнецова, В. М. Литвин, В. К. Мамутов, В. Т. Нор, О. П. Орлюк, П. М. Рабінович, О. В. Скрипнюк, О. Д. Святоцький, В. П. Тихий

Відповідальний за випуск *О. В. Петришин*

Зареєстрований Міністерством України у справах преси та інформації
(Свідоцтво про Державну реєстрацію друкованого засобу масової
інформації. Серія КВ № 15596-4068 Р від 09.07.2009 р.)

Адреса редакційної колегії: 61024, Харків, вул. Пушкінська, 70,
Національна академія правових наук України, тел. 704-19-01.

ENVIRONMENTAL, ECONOMIC AND AGRICULTURAL LAW

A. Getman, Doctor of Legal Sciences, Professor, Pro-Rector for Scientific Work Yaroslavl Mudryi National Law University



UDC 349.6

ENVIRONMENTAL AND LEGAL SCIENCE: CURRENT STATE AND PROSPECTS OF DEVELOPMENT

Problem setting. The modern world is now in the active stage of globalization and integration processes which are taking place in the political, economic, social, spiritual and other spheres of public life. In this context legal integration is of great need for the national science. Many scientists and lawyers consider this integration to be the process of formation of a new worldwide system of the rules ensuring global interstate cooperation in various spheres of life of the society and state. The nature of legal integration is determined first of all by participation of the state in the activities of the world community, as well as apprehension extent of the relevant aspects of other states' law.

The aim of legal integration is to unite national legal systems into a single global legal environment. This process is complex and consists of several stages, namely: a) close cooperation and coordination of the principles of the development of the international legal system; b) bringing closer national legal systems to the international one under conditions of the preliminary adaptation of national legislation to the legal standards of this system; c) national legal systems entry into the international one and their final adaptation within the framework of a single legal environment.

Thus, legal integration is a global process which at the internal state level is reflected in the internationalization of national law. General globalization sig-

nificantly influences on the transformation and modernization of the state and legal institutions, regulations and relations at the international, national and regional levels, stimulates and accelerates the internationalization of law¹.

Ukraine does not stand aside of these globalization processes, but rather makes powerful steps for entering the European integration space and direct participation in them at different levels.

European democratic cooperation provides the solution of a wide range of political, social, economic, cultural, educational and other «domestic» tasks, coordinating national requirements with international standards, carrying out research including the legal research in various areas of public life. Among them is environmental and legal research conducted on in accordance with national approaches to rulemaking and foreign experience of regulation of relations in the sphere of use and reproduction of natural resources, environmental protection, environmental safety.

Paper objective of this paper is to examine the various types of research which are of great need for the Ukrainian society and are in the purview of environmental legal science. They are as follows: to substantiate the advisability for further codification of environmental legislation, to further develop the doctrine of human rights to a safe and

healthy environment, to study the theory of contractual relations in Ukraine's environmental legislation, to develop the concept of legal liability for violation of environmental legislation, etc.

The analysis of recent research and publications. The research of the issues of environmental legal science is constantly in the purview of the leading scientists of our state. There are the works of V. I. Andreitsev «Up-to-Date Issues of Environment Law Science»², A. P. Getman «Genesis of Environmental Law Science: a Historical Aspect»³, A. P. Getman «Doctrine of Environmental Law Science: Genesis of Theoretical Research of the Environmental and Legal Issues in the 20th Century»⁴; O. O. Orendarets's «Development of Environmental Law Science»⁵ etc. In addition, in recent years a series of re-

² Андрейцев В. І. Актуальні проблеми науки екологічного права / В. І. Андрейцев // Екологічне право в системі міждисциплінарних зв'язків: методологічні засади: матеріали «круглого столу» (м. Харків, 04.12.2015 р.). – Харків: Право, 2015. – С. 13–15.

³ Гетьман А. П. Генеза науки екологічного права: історичний аспект / А. П. Гетьман // Актуальні проблеми реформування земельних, екологічних, аграрних та господарських правовідносин в Україні: Міжнар. наук.-практ. конф. – Хмельницький: Видво Хмельницького ун-та упр. та права, 2010. – С. 196–199.

⁴ Гетьман А. П. Доктрина науки екологічного права: генеза теоретичних досліджень еколого-правових проблем у ХХ ст. / А. П. Гетьман // Правова доктрина України: у 5 т. – Т. 4: Доктринальні проблеми екологічного, аграрного та господарського права. – Харків: Право. – С. 10–96.

⁵ Орендарець О. О. Розвиток науки екологічного права: автореф. дис. ... канд. юрид. наук / О. О. Орендарець. – Київ, 2015. – 16 с.

¹ Гетьман А. П. Юридична наука в умовах глобалізації / А. П. Гетьман // Особистість. Суспільство. Право: зб. наук. статей за матеріалами Міжнар. наук.-практ. конф. (м. Полтава, 15.03.2012 р.). – Харків: Точка, 2012. – С. 5.

search, research and practice conferences, seminars, «round-tables» have been held concerning the issues of natural resources management, environmental protection, environmental policy, methods of legal and environmental disciplines teaching, etc.¹

Paper main body. In this sense, ecological and legal science as part of legal science occupies an important place in the social life and has different levels: fundamental, methodological, philosophical and legal, general theoretical, branch theoretical and applied. In the above mentioned context ecological and legal science is examined at the fundamental level. It should be interpreted as a system of knowledge and ideas on en-

vironmental law and its different institutions (ownership of natural resources and the right of environmental management, the legal principles of ecological safety, legal environmental protection, legal responsibility for environmental violations, etc.), the purpose of which is to develop the doctrine of environmental law, to study the relevant theoretical and methodological issues of environmental law and legislation, to design its conceptual apparatus and scientific categories and to analyze the role of the state in the implementation of the environment functions and policy.

The discussions on the subject of environmental law, its structure, content component and, accordingly, its science, having been held since the emergence of the relevant regulations in the framework of the state as an independent legal phenomenon. Along with this the economic transformations taking place in the Ukrainian society, reformation of public relations, the constitutional reform, the reform of higher education, including legal education, introduction of new educational standards cause the need to make the up-to-date decisions concerning the development of environmental legal science, its impact on legislative activity and legal practice, modernization of legal education and the development of scientific legal schools.

The subject of environmental law science includes not only the rules and institutions of this branch of law, but also the research of environmental and legal relations regulated by other branches of law (environmental management, environmental tax, taxes and

¹ Сучасні екологічні проблеми та методика викладання еколого-правових дисциплін: республ. наук.-практ. конф., 25–26.11.2010 р. – Харків: НЮАУ ім. Ярослава Мудрого, 2010. – 256 с.; Правові аспекти реалізації екологічної та природоресурсної політики: матеріали міжнар. наук.-практ. конф., 07–08.10.2011 р. – Дніпропетровськ: Дніпропетр. нац. гірн. ун-т, 2011. – 190 с.; Актуальні питання кодифікації екологічного законодавства України: зб. тез наук. доп. учасників «круглого столу», 09.11.2012 р. – Харків: НЮАУ ім. Ярослава Мудрого, 2012. – 203 с.; Сучасні досягнення наук земельного, аграрного та екологічного права: зб. матеріалів «круглого столу», 24.05.2013 р. – Харків: НУ «Юрид. академія України ім. Ярослава Мудрого», 2013. – 157 с.; Актуальні проблеми екологічних, земельних та аграрних правовідносин: теоретико-методологічні й прикладні аспекти: матеріали «круглого столу», 05.12.2014 р. – Харків: НЮУ ім. Ярослава Мудрого, 2014. – 320 с.; Екологічне право України: система та межі правового регулювання: матеріали Всеукр. наук.-практ. «круглого столу», 25.09.2015 р. – Дніпропетровськ: Дніпропетр. нац. гірн. ун-т, 2015. – 247 с.

fees for special use of natural resources, environmental insurance and audit, international environmental cooperation, etc.), their specific character, the grounds of origin, development and termination.

The current state of the development of environmental law science is characterized to a great extent by an extensive system of laws and regulations that regulate social relations in the field of natural resources, their reproduction, environmental protection and environmental safety. Notwithstanding the fact that environmental legislation has been updated mainly by means of excessive differentiation of regulations at the level of laws or by-laws¹, the relevant environmental and legal issues are studied in the context of the reflected by the Law of Ukraine «On Environmental Protection» idea of the development of the legal mechanism of the sustainable development of the country, prevention of harmful effects on the environment, prevention of negative environmental and social consequences of environmental hazard. In the research conducted after the adoption of this Law the basic principles of environmental protection were formulated, combined with efficient environmental management and provision of standardized quality of environment, the conceptual foundations of environmental rights and duties of men and citizens were worked out, the fundamental provisions of contrac-

tual relationship in environmental law² were identified.

The legislative model of the Law has determined the scientific prospect of environmental and legal research in the new social and economic, political, financial, environmental, cultural and educational realities of the sovereign state, the development of new laws and regulations in the sphere of ownership of natural resources and environmental management, environmental protection and provision of environmental safety.

This is that has become a basis and necessitated the following research:

– the mechanism of implementation of the law in environmental protection, the essential components of which include not only perfect legislation, but also the level of environmental legal awareness and culture of the subjects of implementation, their responsibility for environmental protection (S. M. Kravchenko);

– theoretical issues of ensuring the effectiveness of environmental assessment as an organizational and legal way of implementation of environmental law and legislation as well as guaranteeing the citizens' rights for safe and healthy environment (V. I. Andreytsev);

– the doctrine of the rise and development of environmental and procedural law as a mechanism for implementation of the rules of substantive environmental law (A. P. Getman);

¹ Попов В. К. Наукові основи екологічного законодавства України / В. К. Попов // Вісн. Акад. правових наук України. – 1995. – № 4. – С. 35–36.

² Андрейцев В. І. Актуальні проблеми екологічного права: новітні доктрини: ретроспективний аналіз та погляд у майбутнє / В. І. Андрейцев // Матеріали доповіді Міжнар. круглого столу. – Дніпропетровськ: Дніпропетр. нац. гірн. ун-т, 2010. – С. 27–28.

- harmonization of environmental legislation in Europe through the scope of integration associations (N. R. Malysheva) and legal foundations of environmental policy of the European Union (V. I. Lozo);
- the issues of formation and development of nuclear law of Ukraine (H. I. Baliuk);
- legal support of recreational activities (A. G. Bobkova);
- issues of social regulation in the field of environmental protection, theoretical and methodological provisions and principles of forming the legal and economic aspects of environmental safety policy (V. V. Kostytskii);
- the concept of interdisciplinary legal institute of ecological damage compensation according to environmental legislation of Ukraine (M. V. Krasnova);
- conceptual foundations of environmental control and prosecutorial supervision in Ukraine concerning the optimal correspondence of institutional and functional elements of legal regulation (O. V. Holovkin);
- theoretical and practical issues of the development of floristic law of Ukraine (A. K. Sokolova);
- the concept of correspondence between the form and content of environmental and legal rules, legal regulation of relations in the sphere of interaction between man and nature through systematization of the references of environmental law (P. O. Hvozdk).

Moreover, the significant scientific results have been obtained during research of the issues of land law and legislation. The following of them should be highlighted:

- the current issues of legal regulation of land relations in present day conditions (M. V. Shulha);
- the issues of the implementation of Ukrainian people's right to land ownership (V. V. Nosik);
- conflict in the legal regulation of land relations in Ukraine (A. M. Miroshnychenko);
- the legal issues of protection and use of agricultural land in Ukraine (P. F. Kulynych);
- the theoretical issues of the development of Ukraine's land legislation (V. D. Sydor);
- the issues of legislative support of the principle of legality in the regulation of land relations in Ukraine (T. O. Kovalenko).

The significant results of environmental and legal research that have been conducted over the years of independence of our country in leading scientific and educational legal centers of Ukraine (Kharkiv, Kyiv, Odesa, Lviv, Donetsk), include the following:

- legal environmental safety in various areas of economic activity: environmental safety of food and agricultural products; prevention of environmentally hazardous activities; legal aspects of environmental risk; radiation safety; environmental safety in the planning and building of cities; environmental safety in aviation; prevention of the negative impact of the objects of high environmental hazard;
- ownership, use and reproduction of wildlife objects;
- subsoil use: the legal principles of use and protection of natural resources;

legal foundations of the mining concession; legal support of mining, termination of subsoil use right;

- forest use, private ownership of forests, their protection and management of forest resources, responsibility for violation of forest laws, the legal regime of the plant world and its objects in settlements;

- legal regulation of natural resources of the exclusive (maritime) economic zone of Ukraine;

- the right to use resort, treatment, health-improving and recreational zones, the legal regime of the sea outfall;

- water resources use: responsibility for violation of water legislation; legal regulation of water resources use in agriculture, sources of drinking water, groundwater use and prevention of harmful effects of water, legal regime of small rivers;

- legal support of hazardous and household wastes handling;

- the legal foundations of implementation of some management functions in the field of ecology: environmental control; environmental monitoring; environmental audit; ecological forecasting; environmental licensing.

These studies in ecological and legal science have contributed to further scientific development and discussions concerning the issues of ecological safety and rational nature management, environmental protection, observance and guarantee of the environmental human rights.

Legislation and legal practice should be clearly subordinated to the mechanism of effective functioning of legislation in the field of environmental protec-

tion in achieving national priorities. The main requirements for such legislation include its accordance to the Constitution of Ukraine, approaching the relevant EU directives, implementation of multi-lateral environmental agreements in which Ukraine is a party, social acceptability, feasibility, economic efficiency. Legislation should facilitate the flexible use of economic tools for stimulating the introduction of innovative environmental technologies, the solution of problems at the national, regional and local levels.

The principal ways of influence of scientists engaged in researching the environmental and legal issues concerning legislative activity and legal practice are as follows: the development of draft laws in working groups, temporary creative groups by state order; development of draft laws concepts by authoring teams; the development of the proposals for draft laws prepared by other working groups or temporary creative research groups; the development of scientific proposals to improve existing legislation; preparation of expert opinions on draft laws, developed by the subjects of legislative initiative and introduced to the Verkhovna Rada of Ukraine; preparation of expert reports on the effectiveness of existing legislation.

Experts in the field of environmental law within the framework of implementation of the above mentioned ways of influence on the legislative activities have formulated and submitted the proposals for: developing national legislation on biological safety and its further improvement taking into account the relevant pro-

visions of the EU legislation; optimizing the planning and development of green belts; improving the quality and access to safe drinking water; minimizing waste production, its safe utilization and disposal; improving the quality of transportation flows and minimizing the continuous sources emission, etc.

Environmental and legal science faces objectified challenges of social and political, economic, financial, cultural, moral and educational, instructional nature and connected to them processes taking place in the country. The author considers that within the period of significant changes caused by the crucial reform package proclaimed and introduced by the President and the Government of Ukraine the question now arises of discovering new horizons in the theory of environmental law and legislation, developing the scientific concept which will make it possible to provide for their working out under current conditions as well as their future prospects, setting out the priorities of such development, producing the algorithm of adoption of the legislative acts and regulations implementation of which in the context of environmental safety and environmental protection is of great need for the economy, social and political spheres of the country.

Under these circumstances, it is advisable, above all, to get rid environmental and legal science of pseudoscientific research and those that cause harm to the theory of environmental law. Recently, the authors of some research in legal literature in pursuit of academic degrees and academic status or with the aim to improve their image among colleagues

propose to the scientific community the works of low theoretical quality, confuse the subjects of research, present as relevance and novelty of their achievements those that other representatives of legal community have already analyzed many times, draw conclusions without the adequate empirical basis or not taking into account methodological and gnosiological factors. Sometimes in the educational and literary reference environment the textbooks, study guides and other didactic and test guides are published, the authors of which generally neglect the established scientific achievements. In this regard, the thesis «Administrative and Legal Regulation of Subsoil Use in Ukraine» presented for the degree of the candidate of legal sciences in speciality 12.00.07¹ seems to be surprising. In the first place, the thesis corresponds to the speciality 12.00.07 – Administrative Law and Process; Finance Law; Information Law, approved by the decree of the Higher Attestation Commission of Ukraine on 8 October 2008, which is quite natural because it is defended by this speciality. In the second place, the work also concerns the speciality 12.00.06 – Land Law; Agricultural Law; Environmental Law; Natural Resources Law, approved by the decree of the mentioned above HAC of Ukraine. But these factors together produce a violation of item 11 of the resolution of the Cabinet of Ministers of Ukraine of 24 July 2013 «Procedure for Awarding the Academic

¹ Пашун А. В. Адміністративно-правове регулювання надрокористування в Україні: автореф. дис. ... канд. юрид. наук / А. В. Пашун. – Київ, 2015. – 16 с.

Degrees and the Academic Rank of Senior Scientific Researcher» according to which the candidate thesis is submitted for defense only in one speciality.

But the main drawback of this thesis is that it does not contain any new scientifically grounded results that solve specific scientific problems, which would have a significant importance for the environmental and legal science. There are no differences between the obtained results and previously known ones in the theory of environmental law. Most of the provisions are formulated in general terms and do not allow to distinguish their constitutive essence and understand the novelty for environmental law and legislation. And finally, it may be dangerous from the standpoint of the theory and methodology of ecological research that in the nearest future we will witness the defense of the new theses like Administrative and Legal Regulation of Water Use... Forest Use... the Use of Fauna and Flora... the Use of Community Landscape; and the list will go on and on.

The textbook «Administrative and Land Law of Ukraine» should be considered to be even more unconvincing «educational achievement». It makes an attempt to introduce into the educational process and scientific use the following terms: administrative and land law; administrative and land legal relation; members of the administrative and land legal relations; an object of administrative and land legal relations; administrative discretion in administrative and land legal relations and so on. The author of the textbook, in particular, emphasizes: «In fact, administrative law like «pene-

trate» into the other areas of law and «brings them into effect»: civil law, commercial law, environmental law, land law, financial law, criminal law, criminal procedural law, etc.»¹. After such «penetration» most of branches of Ukrainian law and legislation rather than administrative law can disappear in the scientific legal environment. The list of low-quality works proposed to the legal scientific community of late can be continued.

Therefore, an important task which should be resolved step by step in the scientific environmental and legal community is to create intolerance for accidental scientific products in the legal environment destroying the established conceptual achievements of scientists in the sphere of environmental management and environmental protection, ownership of natural resources and systems, environmental protection, implementation of environmental and economic mechanism and environmental activities, the well-balanced and effective system of quality environment management, guaranteeing the environmental human rights, etc. Without this environmental and legal science can not develop efficiently and solve the urgent problems of Ukrainian society taking into account the globalization processes which take place in today's world and have direct influence on Ukraine. There are the climate changes, depletion of ozone layer, conservation of biological diversity, chemical and radioactive pol-

¹ Бевзенко В. М. Адміністративно-земельне право України: навч. посіб. / В. М. Бевзенко. – Київ: Алерта, 2015. – С. 5.

lution, including acid rain, desertification, reduction of natural resource potential and others among them¹.

Conclusions of the research. In terms of world integration processes national environmental legal science should perform the following tasks:

- to examine the foundations of environmental legislation taking into consideration estimation and advanced programs of socio-economic development;

- to substantiate the system background, principles of formation, implementation and development of environmental law;

- to define clearly the criteria for legal regulation of environmental relations;

- to develop the mechanism of environmental law implementation;

- to provide for environmental law and legislation functioning in the context of fulfillment of conditions for state reforming in the economic, social, judicial, administrative and other spheres;

- to improve environmental law and legislation in the context of the development of the mechanism of globalization processes «challenges» that can have a negative impact on the «society-environment» interaction;

- to develop recommendations for optimizing the process of preparation, adoption and implementation of the «Code of Laws on Environment».

Science should present the reform of environmental law, current scientific concept and doctrine of its development in a contemporary economic and social context, correspondence to other branches of law, priority trends of legislative activities in this field of public relations for the short term and distant future, the sequence of adoption of environmental laws taking into account globalization economic, social and political challenges.

O. S. Kolbasov's words should be engraved by the gold letters saying to the environmentalists that environmental law should play a tremendous historical role as a counterweight to the rest of the right which protect the property prosperity and power combined with it².

Thus, environmental and legal science should clearly realize their own significance for further development of environmental law and legislation to be the tools of producing and organizing knowledge in the «environment-society-man» system in a contemporary context of the development of Ukrainian national identity.

Published: Екологічне право в системі міждисциплінарних зв'язків: методологічні засади: матеріали «круглого столу» (Харків, 4 груд. 2015 р.) / за заг. ред. А. П. Гетьмана; Нац. юрид. ун-т ім. Ярослава Мудрого. – Х.: Право, 2015. – 344 с.

¹ Гетьман А. П. Екологічна функція держави в новому глобалізаційному вимірі / А. П. Гетьман // Актуальні проблеми екологічних, земельних та аграрних правовідносин: теоретико-методологічні й прикладні аспекти: матеріали «круглого столу», 05.12.2014 р. – Харків: Нац. юрид. ун-т імені Ярослава Мудрого, 2014. – С. 14–22.

² Колбасов О. С. Завещание экологам / О. С. Колбасов // Журнал российского права. – 2000. – № 5/6. – С. 89–90.