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APPLICATION OF SOME CONCEPTUAL BASES OF FEDERALISM IN LEGAL DETEMINATION OF COMPETENCE OF THE EUROPEAN UNION (TO STATEMENT OF A PROBLEM)

The European dimension of foreign policy of Ukraine, joining our state into the European legal space, signing and ratification of the Association Agreement between the European Union and its Member States, on the one side, and Ukraine, on the other side, and the European Atomic Energy Community (further the Association Agreement) of 16.09.2014[1] put before modern science and practice an important goals of comprehensive study of the nature and functioning of integration formation, legal system of which has considerable impact on improvement of national law[2].

Determination of the particularities of the political and legal nature of the European Union is in the focus of almost all researches, which anyway concern activity of this complicated structure. Concentration of attention on different elements of its nature, allows to distinguish special features of legal regulation of various social processes in which participants are the various legal subjects of the EU, and to establish specifics of relationship of the Union and the states cooperating with it.

Federalistic grounds in the governing system within the EU and fixed at the legal level mechanisms of realization of

[1] Угода про асоціацію між Україною, з однієї сторони, та Європейським Союзом, Європейським співтовариством з атомної енергії і їхніми державами-членами, з іншої сторони// Офіційний вісник України від 26.09.2014. – 2014 р., № 75, том 1, стор. 83, стаття 2125

[2] Костюченко Я. М. Правове регулювання співробітництва України і Європейського Союзу: автореф. дис. … канд. юрид. наук: 12.00.11 / Я. М. Костюченко. – К., 2010. – С. 9.

competence of the Union form a major base of modern European integration. Using the conceptual principles of such governance from practice of democratic federal states and combination of them with forms of cooperation, traditional for international law, gives the opportunity to develop and apply effective methods of achievement of the all-union goals, for which the pivots are the values of the European Union (Art. 2 Treaty of the European Union). This also gives an opportunity to apply the much more effective mechanisms of protection of the Member States sovereignty.

Therefore, the appeal to the analysis of such principles does not lose the relevance. At the same time, it should be noted that the European integration, and in particular, the cooperation of the states within the EU is not a certain set of the verified templates, founder of which was Western Europe, but alive movable substance which develops and improves constantly. That in turn creates a basis for further researches in this area.

The problem of the legal nature of the European communities, and then the European Union was an object of research of numerous foreign and domestic scientists: L. Azoulai, M. Arah, M. M. Biryukov, N. Bloker, J. Buchanan, P. Bumont, C. Wizerill, I. A. Gritsyak, V. Della Sal, A. Deshwood, D. Elazar, M. L. Entina, I. Zaydl-Hokhenveldern, J. Zimmerman, N. Katalano, P. King, V. S. Koval, B. M. Lazarev, S. Leykoff, P. F. Martynenko, V. I. Muravyev, M. M. Mykiyevich, D. Sidzhanski, K. V. Smirnova, R. Stevens, A. E. Tolstukhin, D. Wayatt, P. Hay, T. Hyueglin, A. A. Chetverikov, G. Shermers, J. Steiner, R. Watts, M. A. Ushakov, H. S. Yakimenko, I. V. Yakovyuk, etc. The variety of the reserchers approaches to the definition of the legal nature of the EU (confederation, federation, the international organization, the sui generis organization, etc.) is extrimly considerable. At the same time a question which somehow concerns the legal nature of the Union is also can be regarded of a great importance: this is a coordination of national interests of the EU Member State, preservation of its sovereignty, with simultaneous attraction it into a network of interactions, interdependences and interpenetrations of a regional supranational integration in the way that these factors don't disserve the state, other participants of integration.

Of course, in this context, with regard to the EU, the most widespread is the appeal to the principle of power confering (which is typical both for the international organizations, and for federal model of management), and also to the principles of subsidiarity and proportionality (Art. 5 of the Treaty on the EU)[1].

It is necessary to notice that, the federal concept, particular principles of which are applied within control system of the EU, traditionally finds support among the Western researchers, politicians, public figures[2]. Significant contri-

[1] Основи права Європейського Союзу. Нормативні матеріали (із змінами, внесеними Лісабонським Договором) / за ред. М. В. Буроменського. – Х.: Фінн, 2010. – 392 с.

[2] The general conclusion, which is observed in these studies, is a statement of fact that in the

bution to its evolution was provided by K. Beyme[1], A. Bogdandy[2], J. Buchanan[3], M. Burgess[4], V. Della Sala[5], A. Dashwood[6], D. Elazar[7], J. Zimmerman[8], L. Cortou[9], N. Katalano[10], P. King[11], S. Leykoff[12], V. Ostr[13], D. Sidzhanski[14], R. Stevens[15], R. Watts[16], C. Friedrich[17], T. Hugheglin[18] and many others lawyers and political scientists who tried to reconsider the settled views of federalism in compliance with modern conditions[19],

twentieth century «f ederalism» is transformed from an abstract generalized category under which researchers previously understood not ojust the federation itself, but a confederation, an associate state, confederal state and condominium, to the concept of well-defined meaning, that allows to separate it from other concepts.

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[2] Bogdandy, A. Von. The European Union as a Supranational Federation: a Conceptual Attempt in the Light of the Amsterdam Treaty [Text] / A. von Bogdandy // Columbia Journal of European Law. Winter. – L., 2006. – P. 127–159; Богданди, А. Конституционализм в международном праве: комментарии к предложению из Германии [Текст] / А. фон Богданди // Право и политика. – 2008. – № 1. – С. 50–63.

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[15] Stevens, R. M. Asymmetrical Federalism [Text] / R. M. Stevens. – New-York: PubUcus, 1989.

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[19] Комлева, Ю. Е. Государственно-политическая организация Священной Римской

I. V. Ranzhina[1], V. I. Salo[2], M. V. Stolyarov[3], M. H. Farukshin[4], etc.

As Yakovyuk I. V. notes., the analysis of the legislation of the EU and the practice of its realization allows to make a conclusion, according to which, in organization and functioning of the European Union the manifestation of the main signs of a federal state is rather accurately traced. However, at the same time, of course, the European Union is not a federation.

For theoretical understanding of processes of integration within the European communities, and thus within the European Union and an explanation of the practical moments of further development of different types of competence (exclusive (Art. 4 Treaty on Functioning of the EU (TFEU), shared with Member States (Art. 5TFEU), supporting (Art. 6TFEU), special (Art. 5 TFEU, Art. 24 TEU) upon which the EU is conferred by Founding Treaties, the terms «federal political system» and «federal legal order» (federal legal order) sometimes are used. This term seems to be better adapted for demonstration of certain features of legal regulation of variety of public interests and creation of constructive interaction of different levels of the power in the integration union. At the same time the reservation is made, that such terminology concerns an explanation of some aspects of functioning and the legal nature, in general, of «hybrid» federal systems to which carry also the European Union[5].

The particular aspects of federal management are quite often used for the characteristic of competence of the EU and the mechanism of distribution of powers between the EU and member states, the final purposes of which are, on the one hand, the achievements of the aims of integration union, and on the other – the protection of sovereign rights of member states.

Exhaustiveness of the provisions on the limits of the EU competence is one of the most indicative characteristics of the Treaty of Lisbon of 2007. In p. 2 Art. 5 of the Treaty on the EU (TEU) it is

империи германской нации в новое время: феномен «имперского федерализма» [Текст]: дис…. канд. истор. наук: 07.00.03 / Юлия Евгеньевна Комлева. – Екатеринбург, 2005. – 287 с.

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[2] Сало В. І. Внутрішні функції держави в умовах членства в Європейському Союзі [Текст]: дис…. канд. юрид. наук: 12.00.01 / Володимир Ігорович Сало. – Х., 2008. – С. 53–57.

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[4] Фарукшин, М. Х. сравнительный федерализм [Текст]: учеб. по спецкурсу / М. Х. Фарукшин. – Казань: Изд-во Казан. ун-та, 2003. – С. 157.

[5] Watts, R. L. Federalism, federal political systems, and federations [Text] / R. L. Watts // Annual Review of Political Science. – 1998. – Vol. 1, Issue 1. – P. 120.

accurately specified that «Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out there in» further it is established, that «Competences not conferred upon the Union in the Treaties remain with the Member States». That actually repeats the formulation of Art. 4 (1) of the TEU where it is mentioned that «In accordance with Article 5, competences not conferred upon the Union in the Treaties remain with the Member States». At the same time, the Treaty provides the norm that proposals on modification to the Treaty «may, inter alia, serve either to increase or to reduce the competences conferred on the Union in the Treaties.» (p. 2 Art. 48 of TEU). It has to be mentioned, that installation of the catalog of competences Founding Treaties (Art. 2–6 Treaty on Functioning of the European Union (TFEU)) and their clear division into exclusive, shared, supporting, it is possible to consider them at the same time as «control» and rationalization of powers of the EU. It is clear that member states during the work on revision of Founding Treaties were unambiguously concerned about the question of establishment of borders of activity of the Union. It is brightly traced in a question of a possible universalization of basic rights in the EU (p. 2 Art. of 51 Charter of fundamental rights of the European Union contains such formulation «This Charter does not establish any new power or task for the Community or the Union, or modify powers and tasks defined by the Treaties».) Thus, it is apparently important that the competence of the EU has immanent restrictions and scope of the application of the EU law to be corresponded to them. Generally, such situation also can be equally referred to traditional international intergovernmental organizations, the sphere of powers of which is limited to provisions of their constituent treaties and the aims of establishment. However such statement can seem rather simple and unambiguous if not to take certain nuances into account. For example, Art. 114 of TFEU which conferred the Union with large legislative powers in the sphere of harmonization of the national legislation of member states (article is placed in Chapter 3 «Approximation of laws», the section VII «Common rules on competition taxation and approximation of laws» of TFEU) didn't change during the process of the Lisbon reforms. It can seem strange, considering that Laeken declaration of December 15, 2001[1] [6] raised a question of possibility of revision of former article 95[2] of the Treaty on the European Community (nowadays Art.

[1] Laeken Declaration on the future of the European Union (15 December 2001)// Bulletin of the European Union. 2001, No 12. Luxembourg: Office for Official Publications of the European Communities. «Presidency Conclusions of the Laeken European Council (14 and 15 December 2001)», p. 19–23.

[2] This is about the articles the Treaty of European Communities, which allowed European Parliament along with the Council (Art. 95) or Council (Art. 308) to adopt the legislation and other measures on the questions, were not directly within the jurisdiction of the Community, that went beyond its competence.

114 of TFEU) [7][1], and such opportunity accurately contacted to the need «providing that new revision of competence won't lead to unjustified expansion of powers of the EU or to its infringement of spheres of exclusive competence of member states»[2]. In this sense, it is also can be regarded as important the reference of some reserchers to the provisions of Art. 19 of TEU, which obliges Member States to provide the judicial remedies sufficient to support effective legal protection in the spheres covered by the legislation of the Union [3][9]. Such situation probably contradicts with the doctrine of the procedural autonomies of member states, to some extent. But at the same time it is connected with a case law of the Court of the EU which usually provides a priority to judicial protection of the rights in the EU (case of Unibet)[4]. Thus, undoubtedly there is a fact that the changes provided by the Treaty of Lisbon, contain a direct challenge to functional and constitutional concepts of the EU legal order advantage to which was given during last 50 years. The best characteristic of this situation provided in Art. 3 (6) TEU where enshrined that «The Union shall pursue its objectives by appropriate means commensurate with the competences which are conferred upon it in the Treaties». As specifies L. Azoulai, such situation accurately reflects change of an initial position. The aims are not the main source of powers and the main instument of the Union any more[5]. In turn, the aims are subordinated to the competence specified in the Treaty. It is traced in the course of functioning of internal market the competence concerning regulation of it is shared between the EU and Member States (joint competence). Therefore, this competence is usually limited.

Concerning a konstitutsionalization of the rights of individuals in the EU, a certain distinction from a former situation it is traced in the text of Art. 4 of TEU. Member States continue to adhere to their rights for ensuring achievement of the EU goals. However, on the other hand, the Union has to respect the national identity of Member State peculiar to their main political and constitutional structures and the main functions of the state. It is interesting that functions of the state are not considered in the context of institutional functions (legislative, executive, judicial), and are understood as the independent, such, concerning «ensuring the territorial integrity of the State, maintaining law and order and safeguarding national secu-

[1] Основи права Європейського Союзу. Нормативні матеріали (із змінами, внесеними Лісабонським Договором) / за ред. М. В. Буроменського. – Х.: Фінн, 2010. – 392 с.

[2] Citing after: Azoulai Loïc. The question of competence in the European Union. – Oxford: Oxford University Press, 2014. – p. 11 [8]

[3] Halberstam D. Comperative federalism and the role of the judiciary. In The Oxford Handbook of Law and Politics, edited by K. Whittington, D. Keleman, and G. Caldeira, p. p. 142–64. Oxford: Oxford Univ. Press, 2008.

[4] Case 432/05 Unibet (London) Ltd and Unibet (International) Ltd v Justitiekanslern. Judgment of the Court 13 March 2007// ECR 2007 I-02271.

[5] Azoulai Loïc. The question of competence in the European Union. – Oxford: Oxford University Press, 2014. – P. 11

rity». The Treaty recognizes that Member States have primary competence on the organization of certain areas of jurisdiction, which are concerned to be a vital for social integration in Europe. The state competence isn't reduced any more to powers which can potentially damage the creation of internal market and protection of the rights of individuals. On the contrary, the states admit political actors, providing unity in society.

Such state of relations can bring to new legitimate restrictions in implementation of the main legal norms of the EU or to appearance of new obligations for the defined categories of individuals who traditionally were considered as carriers of the rights by the EU law.

Considering already mentioned, use of the term «federal order of competence» for the characteristic of dimension and realization of competence of the EU rather favorable from the theoretical point of view. In this regard, we again can remind the proposed and detailed in the Founding Treaties the typology of EU competence which is necessary in order to ensure the distribution of powers between the Member States and the Union. In turn the Court of the EU also repeatedly in the decisions addresses to the need of providing «a competence order», established in the Founding Treaties, in particular in those cases which concern the determination of compliance of international treaties to the primary EU law by the Court of Justice (associated cases of Yassin Abdullah Kadi and Al Barakaat International Foundation v Council and Commission of 03.09. 2008)[1]. At the same time, there is a large number of arguments which prove that use of definition of the European Union as a federal order of competence, insufficiently convincing. Practice of functioning of the EU shows a deep interlacing of powers of the EU and Member States in all fields of activity of the Union and at all levels – legislative, executive and judicial. Therefore, use of purely constitutional methods directed on establishment of accurate classification of the types of powers of the EU, which are already mentioned above, is not reasonable. Also, it is actually difficult to define the nature of competence of the EU in concrete spheres, only on the basis of Articles 2–6 of the Treaty on Functioning of the EU. And not only because that in many spheres of policy, exists a complex of relations in areas which are regulated by the legislation of Member States and which are settled by the EU law. But at first, it is because that the dimension of EU competence is actually a zone where powers of the Union and its member states interact. And, as Boukun writes in the research, realization of competence of the EU happens through some kind of «resolutions of mutual adjustments» by means of what borders of activity of member states and the Union are constantly reconsidered[2]. Besides, it is necessary to notice that in

[1] Joined Cases C-402/05 P and C-415/05 P Yassin Abdullah Kadi and Al Barakaat International Foundation v Council and Commission, Judgment of 3 September 2008 // [2008] ECR I–6351 para 282.

[2] Цитую за Azoulai Loïc. The question of competence in the European Union. – Oxford: Oxford University Press, 2014. – p. 12 [8]

general, despite quite accurate formulations of Founding Treaties on distribution of competence by different types, there are certain disagreements between the formal provisions reflected in documents and practice of activity of Community and national institutes. Moreover, there are distinctions in distribution of competence between the EU and member states at the legislative level and a certain duplication of their powers on implementation level. Also, the problem which concerns existence of a certain difference between limited will of member states and the competence of the European Union fixed in Founding Treaties and application of the EU law, rather often goes beyond these limits, demands careful studying in the future.

Quite problematic for today is the question that connected, on the one hand, with increase of individual or joint activity of Member States in those spheres which it is traditionally are transferred to the jurisdiction of the European Union (it is about introduction of a certain flexibility in those questions, which, as a rule, reqiere the centralized decision at the level of the EU, considering requirements of integration). On the other hand intervention of the European Union in those spheres, regulation of which is referred to the competence of Member States (such as centralization or voluntary accepted or entered, powerful supranational intervention are observed in those spheres where the national autonomy is supposed) is often occurs. Such state of athings is most accurately seen in the field of economic policy and in connection with the current economic crisis.

Thus, it is obvious that a question which was brought up in Leaken Declaration, of how to integrate the content of restriction of a law and order of the EU and at the same time to keep «the European dynamics», without undermining institutional balance which developed within 10 years, didn't receive a definite answer.

In end it is possible to draw a conclusion that purely federal model of determination of competence of integration union is insufficient in modern terms of development of the European Union, though efficiency of the separate mechanisms inherent to a federal law and order is universally recognized.

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