

NOTAS HISTÓRICAS Y GEOGRÁFICAS

Artículos

**THE INFLUENCE OF HISTORICAL TRADITIONS ON THE FORMATION OF
LEGAL CONSCIOUSNESS OF THE UKRAINIAN PEOPLE**

LA INFLUENCIA DE LAS TRADICIONES HISTÓRICAS EN LA FORMACIÓN DE LA
CONCIENCIA LEGAL DEL PUEBLO UCRANIANO

Oleg Gennadiiovych Danilyan

Yaroslav Mudryi National University, Kharkiv, Ukraine.
odana@i.ua

Oleksandr Petrovych Dzeban

Yaroslav Mudryi National Law University, Kharkiv, Ukraine.
a_dzeban@ukr.net

Yurii Yuriiiovych Kalynovskyi

Yaroslav Mudryi National Law University, Kharkiv, Ukraine.
kalina_uu@ukr.net

Karina Klenina

Kherson State University, Ukraine.
k_klenina@ukr.net

Recibido el 05 de mayo de 2020

Aceptado el 26 de diciembre de 2020

Abstract

This article reveals the influence of historical traditions and events on the formation of public legal consciousness of the Ukrainian people. The genesis of institutional and non-institutional forms of legal consciousness in Ukraine in different historical periods is traced. In particular, the characteristic features of public legal consciousness during the times of Kievan Rus, the Lithuanian-Polish era and the Russian Empire were identified. The peculiarities of the development of customary law as a basis for non-institutional legal consciousness of Ukrainians are revealed. It is noted that the customary legal situation in Ukraine is geographically and chronologically heterogeneous. However, despite all the differences in the historical development of Volyn, Polissya, Podillya, Dnieper, Slobozhanshchina, Southern Ukraine, customary property relations are identical in basic respects.

Keywords: legal consciensness, historical traditions, customary law, legal consciensness of the Ukrainian people.

Resumen

Este artículo revela la influencia de las tradiciones y los acontecimientos históricos en la formación de la conciencia jurídica pública del pueblo ucraniano. Se rastrea la génesis de las formas institucionales y no institucionales de conciencia jurídica en Ucrania en diferentes períodos históricos. En particular, se identificaron los rasgos característicos de la conciencia jurídica pública durante la época de Kievan Rus, la era lituano-polaca y el Imperio ruso. Se revelan las peculiaridades del desarrollo del derecho consuetudinario como base para la conciencia jurídica no institucional de los ucranianos. Se observa que la situación jurídica consuetudinaria en Ucrania es geográfica y cronológicamente heterogénea. Sin embargo, a pesar de todas las diferencias en el desarrollo histórico de Volyn, Polissya, Podillya, Dnieper, Slobozhanshchina, el sur de Ucrania, las relaciones de propiedad consuetudinarias son idénticas en aspectos básicos.

Palabras Clave: conciencia jurídica, tradiciones históricas, derecho consuetudinario, conciencia jurídica del pueblo ucraniano.

Para citar este artículo:

Gennadiiovych Danilyan, Oleg; Dzeban, Oleksandr Petrovych; Kalynovskyi, Yurii Yuriiiovych y Klenina, Karina. The influence of historical traditions on the formation of legal consciousness of the ukrainian people. Revista Notas Históricas y Geográficas, número 26, Enero-Junio 2021. pp. 144-165

1. INTRODUCCIÓN

Public legal consciences captures not only the current state of legal relations, it absorbs historical patterns of lawmaking and law enforcement, contains information about the genesis of various forms of legal consciences. It should be noted that the historical memory of the people preserves both positive and negative experiences in the implementation of various forms of law. It is impossible to comprehensively analyze the legal consciousness of modern Ukrainian society without the cultural and historical context, without taking into account the mental matrices of the people of Ukraine, which are the basis for further study and forecasting of various levels and forms of legal consciousness.

Legal consciousness has two main forms: institutional and non-institutional, which are interconnected and mutually influencing each other. According to the definition of O. Drobnyskyi, V. Zheltova¹, as well as S. Maximov², the institutional form of legal consciousness is represented in the form of documents, existing law, legal law, i.e. has a formalized positive legal nature. In turn, the non-institutional form of existence of legal consciousness has a non-documentary, informal, form and is represented by a sensory-volitional idea of law, which is fixed in theoretical works, literature, in particular memoirs. This form of legal consciousness has a natural and legal content through the traditions, ideas, interpretations of law at both domestic and theoretical levels. Accordingly, the spirit of the era, the peculiarities of the legal mentality absorbs both the first and second forms of legal consciousness.

The legal consciousness of Ukrainian society at the present stage is largely determined by the very traditions that were laid down by the age-old processes of our people's struggle for their statehood, culture (especially language), and religion.

¹ Zheltova, V., Drobnyskyi, O., *Philosophy and value forms of consciousness* (Moscow: Nauka, 1978), 158-161.

² Maksimov, S., *Legal reality: the experience of philosophical comprehension: monografIya* (Kharkiv: Pravo, 2002), 256-257.

The analysis of the influence of socio-cultural traditions on the formation of legal consciousness of Ukrainian society should begin in the days of Kievan Rus, because it was during this period that Orthodoxy was adopted, which determined the vector of spiritual, political and legal development of Ukrainians and other Slavic peoples.

2. FORMATION OF INSTITUTIONAL AND NON-INSTITUTIONAL LEGAL CONSCIOUSNESS IN KIEVAN RUS AND THE LITHUANIAN-POLISH ERA

The legal consciousness of the population of Kievan Rus was formed largely under the influence of Byzantine law. Such a monument of ancient Russian legal thought as *Russkaya Pravda*, in which the existing norms were codified and the division between criminal and civil law was established, is important for the ongoing scientific research. Indicative in this document is that property was valued above freedom and human life itself. The church had an active influence on consciousness (legal consciousness in particular) at that time, declaring that men and women, people of all social groups (including slaves, serfs) were equal before God and divided the entire population into categories according to the nature of their involvement in the church itself. In general, the adoption of Orthodoxy as such determined the peculiarities of the legal consciousness of the peoples that were the part of Kievan Rus. If we consider the etymology of the concept of “Orthodoxy” (Pravoslavie, law, praise) we see that it consists of two words “law” and “praise”, and it is primarily about God’s law and its special position in comparison with secular law. However, it should be noted that the Orthodox religion allowed the primacy of secular power over the church, in contrast to the Catholicism of that time. In fact, the Orthodox religion became the spiritual basis for the further development of public ideas about goodness, justice, equality, moral purity.

After the disintegration of Kievan Rus, the struggle of Ukrainians for the preservation of cultural identity and the formation of their own state became especially important. The legal consciousness of Ukrainians at that time was characterized by the determination of institutional

forms of preserving national and cultural identity, attempts to defend their rights within the Lithuanian-Polish state. As it is known from historical sources, Vytautas tried to form a unitary state, but he met with resistance from some (especially Ukrainian) lands, and was forced to leave limited statehood for them. In the second half of the fifteenth century The Grand Duchy of Lithuania transformed from a federation into a unitary state, but the triple Lithuanian-Belarusian-Ukrainian character of the principality remained. It was then that the “Lithuanian Statute” was issued, which contained mainly “Ukrainian law”³.

Analyzing the legal consciousness of Ukrainians in the XV-XVII centuries domestic researchers G. Boryak, T. Girich, N. Starchenko, N. Yakovenko, emphasize that the reconstruction of legal consciousness in its domestic, and especially mental dimension is a difficult research task, because the scientist is dealing with the so-called hidden reality, which manifests itself only in an indirect way - in verbal clichés characteristic of a certain time and environment, in the manner of performing some routine repetitive actions, in motivations and countermotivations of certain actions, etc.⁴

One of the indirect sources of the study of legal consciousness of Ukrainians in the XV-XVII centuries is the legal literature of various kinds. After all, it facilitated, on the one hand, the transition from the tradition of oral (customary) law to the norms of “written law”, i.e. codified law, and on the other - introduced into widespread use those verbal stamps that describe various nuances of human behaviour, that often were quite far from the sphere of law⁵.

Against the background of the underdevelopment of literary language as a means of transmitting psychological reactions, it gave an unexpected effect of total impregnation with legal terminology of

³ Potulnytskyi, V., *The theory of the Ukrainian politology* (Kyiv: Lybid, 1993), 115.

⁴ Starchenko, N., “Publicity as the dominant of cultural tradition (Volyn of the second part of the XVIth century)”, *Mesiiiaeuaiia Oshaipisa : mentalnist ta istoriia idei* 5 (1998): 68-81.

⁵ Yakovenko, N., *Parallel world: the studies on history of notions and ideas in Ukraine in XVI-XVII centuries* (Kyiv: Krytyka, 2002), 6-10.

almost all written products of those times: from household humorous miniatures that young roasters recorded in court and administrative books (the clerk emphasized the parody of these texts), to the works of the visionary genre (a classic example is the poetic drama of the late XVII century “Conversation in a nutshell about the soul of a sinner”, where the Last Judgment is depicted as a meeting of the city court with the participation of the apostles, lawyers, etc.)⁶.

Due to the unexplored nature of this phenomenon, it is difficult to say to what extent the popularity of the mentioned legal clichés correlated with the forms of real legal consciousness that should correspond to them. This, however, does not call into question the authority of the legal text as a definite absolute, equated with the sacred.

So, let us turn to a brief description of the main legal documents of that time, which reflect the institutional legal consciousness in the Grand Duchy of Lithuania. For example, the Lithuanian Statute, in a somewhat modernized interpretation, is a collection of criminal, civil, administrative, state, procedural and other norms of public life of the Grand Duchy of Lithuania.

As it is known, for the first time the legal synthesis of customary law with the new realities of social life was carried out by the codifiers of the First Lithuanian Statute of 1529, and it was further formalized in the Second Lithuanian Statute of 1566, which not only reflected the social changes accumulated over a quarter of a century, but also witnessed an increase in the level of codification techniques. According to the privilege of the Union of Lublin in 1569, the Second Statute retained the force of current legislation in the Ukrainian lands separated from the Grand Duchy and incorporated into the Polish Crown, where over time it received the semi-official name of the Volyn Statute (or “Volyn law”). However, contrary to the Sejm resolutions of 1647 and 1667, the Volyn Statute was never printed and was distributed only in manuscript copies.

⁶ Yakovenko, N., “Parodies and jokes in the Act books of Zhytomyr and Lutsk of the first half of the XVIIth century”, *Ukrainskyi arkhoeorafichnyi shchorichnyk* 2 (1993): 161-176.

Meanwhile, in the Grand Duchy of Lithuania in 1588, a new version of the Statute was adopted - the so-called Third Lithuanian Statute. Its action did not formally extend to Ukrainian territory, but gradually the Third Statute managed to displace from here the Second Lithuanian Statute thanks to repeated publications: in 1588 in Old Belarusian, i.e. in the original, and until the middle of the XVII century four times (years 1614, 1619, 1623, 1648) - in Polish.

In addition to the Statutes, after the Union of Lublin in 1569, the Crown Sejm constitutions came into force in Ukraine, which were distributed mainly in the form of printed collections of Sejm decrees for certain periods of time, such as: 1550-1579, 1550-1581, 1550-1596. etc. (in practical use, such collections were called “crown constitutions”). In the process of entering the newly incorporated Ukrainian lands into the body of the Polish Crown, the courts of Kyiv, Lutsk, Volodymyr, Kremenets, Zhytomyr, Vinnytsia, and Bratslav inevitably came into contact with certain elements of crown (Polish) law. This gave impetus to the distribution of his commented publications, known in Ukraine by the names of the compilers: the Statute of Jan Herburt, the Statute of Stanislaw Sarnitskyi, the Statute of Jan Januszowski, the Statute of Theodore Zawadskyi⁷.

Analyzing the above situation, it can be stated that the institutional form of legal consciousness in Ukraine developed under the influence of Polish-Lithuanian law, which linked the Ukrainian legal tradition with the European one. However, not all legal acts adopted were in the interests of the Ukrainian people and were not perceived by their legal consciousness as fair, as they asserted the dominance of the Polish Crown in Ukrainian lands.

Clearly, Ukrainians in that period preferred customary law as one that met the real needs of the population. That is, the non-institutional form of legal consciousness was more developed. This state of affairs was also due to the fact that legal literature, according to Ukrainian researcher N. Yakovenko,

⁷ Yakovenko, N., *Parallel world: the studies on history of notions and ideas in Ukraine in XVI-XVII centuries* (Kyiv: Krytyka, 2002), 83-85.

was not available to the entire population. In an environment where the circulation of legal literature is fixed, we can conditionally distinguish three groups:

- 1) judges and members of judicial boards;
- 2) lawyers;
- 3) individuals⁸.

Thus, there is good reason to believe that many copies of legal literature could be stored in the libraries of persons related to the field of justice.

At the same time, it should be noted that knowledge of certain legal formalities (institutional legal consciousness) was characteristic not only of the nobility but also of the tradesmen.

A bright example of this is the debate that broke out in the Volodymyr City Court in 1633 after the swearing-in of the Jewish burgher Hercyk Itskovich in a dispute with Mykola Kysil. Kysil denied the validity of the oath as being performed in violation of the formalities, referring to the “Statute of Januszowski”, and Itskovich responded referring to the “Statute of Zawadskyi”. The institution of oath mentioned here - a public procedure where the text established in the relevant code was pronounced word for word - seems to have played a huge role in accustoming the inhabitants of Ukrainian lands to “written law”. Paradoxically, despite the fact that every oath was considered a burden on the conscience, an “insult to conscience”, a person had to take an oath in many public situations: judicial, formal, official. In particular, the official oath was to be taken in the conditions of maximum publicity - during sejms or court sessions, and those wishing to “listen”.

In conclusion, it can be stated that the legal literature and various legal procedures, to some extent, affirmed the awareness of citizens with the “written law” and fostered among the population respect

⁸ Yakovenko, N., *Parallel world: the studies on history of notions and ideas in Ukraine in XVI-XVII centuries* (Kyiv: Krytyka, 2002), 86.

for the law as a whole, i.e. formed public consciousness. However, researchers of this period of Ukrainian history record the limitations of the book nomenclature, reducing it to a few purely useful works that met the demands of both amateurs and professionals.

Based on the above, N. Yakovenko formulated several problematic issues that directly relate to the genesis of the legal consciousness of Ukrainians: why until the middle of the XVIII century. Ukrainian literature did not produce any of its own reflections on the nature of law, the origins of laws, etc., does this not indicate a mechanical submission to the letter of the law against the background of absolute indifference to its spirit? is it a consequence of the secondary nature of Ukrainian intellectual culture in general, or is it a subconscious separation from those upper classes of society where “laws are written”?⁹. From our point of view, in the stateless times of Ukraine’s existence, the legal consciousness of the population was more focused on customary law and tried to abstract from official law as much as possible, at the same time not entering into fierce opposition with it. This situation was due to the fact that positive law was not usually Ukrainian in nature and was imposed by the colonizing states.

The researcher Tereza Khinchevska-Gennel who studied the forms of national consciousness of the Ukrainian nobility and the Cossacks of the late XVI-mid XVII centuries, looks at this problem from the other point: she came to the conclusion that this historical period should be interpreted only symbolically, because within it “it is impossible to accurately outline any cultural shifts, changes in mentality and consciousness of the people”. A concrete proof of the existence of a very real gap between the creators-intellectuals and the expected “consumers” of their cultural products can be, among other things, the observations of researchers on the extremely modest sphere of this “consumption”. For example, the results of the analysis of the margins and physical condition of the books of the Kyiv Desert-Nikolaev Monastery show that during the two hundred years of its book collection, which in the middle of the XVIII century had 840 volumes, it was used by only about 16

⁹ Yakovenko, N., *Parallel world: the studies on history of notions and ideas in Ukraine in XVI-XVII centuries* (Kyiv: Krytyka, 2002), 105.

people; most of these books, as it seems, do not to have reached their readers at all - and not only secular Western European and Polish editions (which could be explained by the specifics of the readership), but also Orthodox patristic¹⁰.

The next criterion that characterizes the development of both institutional and non-institutional legal consciousness of Ukrainians in different historical periods is the attitude towards the homeless, which was perceived as a threat to the established social and legal order. According to O. Gurevich, hostility to the homeless is a “normal” reaction of medieval society, focused on the unchanging social order. Where any mobility is suspected, every migrant is “alien” simply because he or she is not involved in the usual circle of connections in the family, corporation, or place of residence. Such people find themselves in a position, in the terminology of sociologists, of “extra-caste”, arousing suspicion as pariahs, overcasts¹¹. In fact, a person without a place of residence, without social status does not fit into the established composition of space and time of a particular social organism, so the public consciousness (legal consciousness in particular), which is quite conservative, does not perceive such a person within the legal field, denies his or her rights and legal protection. Exceptions were pilgrims, elders, folk narrators who were treated with special respect in Ukraine.

According to historical sources, the complex of hostility to homeless vagrants is inherent in Russian-Lithuanian law. It obliged the city dweller of the Grand Duchy of Lithuania to inform the authorities about every newcomer who stayed in his house, and the “unannounced” had to be “cought, bind in iron for two weeks and put to work”. The Statute recommends that homeless people who lived “without service and they do not do any work”, had to be on the third reminder “beating with whips, to be drown out of towns and places”. From numerous court statements and materials of investigations it is possible to be convinced that “people of this kind, dragging, idlers...” from the point of view of the average person are always potential thieves and offenders.

¹⁰ Khynchevska-Hennel, T., “Beresteiskyi union in XVIIth century from the Polish point of view” (Derzhava, suspilstvo i tserkva v Ukraini u XVII stolitti: materialy Druhykh “Beresteiskykh chytan”, Lviv-Kyiv, 1-6 february, 1995).

¹¹ Gurevich, A., Problems of medieval folk culture (Moscow: Iskusstvo, 1981), 33.

One of the most symbolic punishments of Antiquity, the Middle Ages, and early modern times, expulsion from the land, which begins with the archaic procedure of “deprivation of peace” is connected with the feeling of danger, (for example, such an outcast criminal in Old German law was identified with the wolf, which had to emphasize the general hostility to him). Expulsion from the land under the name “stream” is known to “Ruska Pravda” as a punishment for especially grave crimes according to the ideas of the time: premeditated murder without quarrel, theft of a horse, arson of a household¹².

The procedure for expelling a person from society for crimes called “eviction” (later “banishment”) is well known in Rusko-Lithuanian law. At the level of domestic legal consciousness, banishment was identified with the church anathema. The court verdict “on banishment” was accompanied with a ritual of warning “all and everyone”, i.e. it was to be hung “at the gates of settlements, castles, town halls, cities and towns everywhere” and orally declared in public by carriage drivers, forbidding “communication or collaboration” with the outcast. According to the strict prescription of the Statute of 1588, the exile seemed to be deleted from the list of the living: “his wife must be considered as a widow, his children – as orphans, and his house as a wasteland”. The quasi-death of the exile after his excommunication from the community is a particularly vivid evidence of ingrained in the depths of the archaic consciousness fear of people without roots, which automatically endowed them with the attribute of “suspects”, i.e. potentially capable of evil deeds regardless of personal qualities¹³.

Established norms and stereotypes of institutional and to a greater extent non-institutional legal consciousness were safeguards that allowed keeping society within certain limits, cutting off threatening to the integrity of public space patterns of behaviour.

¹² Bobrovskiy, O., “Pre-trial process on “Ruszkaya Pravda”, *Pravo i politika* 9 (2007): 105-109.; Bobrovskiy, O., *Criminal and Civil process on “Ruszkaya Pravda* (Tolyatti, 2007), 161.; Sverdlov, M., From “Ruskyi Zakon” to “Ruszkaya Pravda” (Moscow: Yuridicheskaya literature, 1988), 153.

¹³ Yakovenko, N., *Parallel world: the studies on history of notions and ideas in Ukraine in XVI-XVII centuries* (Kyiv: Krytyka, 2002), 17.

3. FEATURES OF THE DEVELOPMENT OF CUSTOMARY LAW AS A BASIS FOR NON-INSTITUTIONAL LEGAL CONSCIOUSNESS OF UKRAINIANS

The study of the public legal consciousness of Ukrainians without considering the evolution of customary law at different times, would significantly limit the understanding of this complex multifaceted phenomenon. In the following reflections, we will turn to various aspects and manifestations of customary law in the field of property relations as an example of the evolution of legal consciousness, especially at the non-institutional level.

As it is known, one of the basic human rights that is the basis of its independent existence is the right to property. In this context, the researcher S. Pakhman, studying civil legal relations in the Russian Empire, notes that the legal consciousness of the people of the XIX century did not distinguish between the concepts of “property - possession - use - disposal of property”. Even in the legal theory and practice of the XIX century there was no clarity in distinguishing these concepts: in legislative and other state acts, the terms “property” and “possession” are used mostly as synonyms, and property itself almost until the end of the XVIII century was not recognized in principle as a right.¹⁴ At the same time, the analysis of various sources allows us to state that in the legal consciousness of the peasants of the Russian Empire (Ukrainians in particular) in the XVIII-XIX centuries there were certain notions of property: they were clearly aware of the difference between “mine” and “someone else’s”. Not surprisingly, in Slavic languages there is a special pronoun that denotes ownership – “own”. Peasant logic is geniusly simple and concise. Everything in the world, from the point of view of popular legal consciousness is distinguished as: “my own, “someone else’s” and “common”. These are the three whales on which the whole customary legal system of ideas about property stands. And here it is necessary to make some explanations. Why don’t we use the pronoun “mine”? Because it means individual property, but in the folk environment family property was the leading¹⁵.

¹⁴ Pakhman, S., *History of Civil Law Codification* (Moscow: Zertsalo, 2004); Pakhman, S., *Customary Civil law in Russia: Family Rights, Inheritance and Custody: Legal Essays* (SPb.: Tip. 2 Otd. sobstv. e. i. v. Kantselyarii, 1879).

¹⁵ Hrymych, M., *Customary Civil law of Ukrainians XIX- the beginning of the XXth centuries* (Kyiv: Aristei, 2006), 47.

In the folk legal terminological dictionary of the XVII-XVIII centuries there is a verb “to own”, which roughly means “to declare a certain land as one’s own, to consider a certain land as one’s own”. This term can be found in the documents concerning the territories developed by *zaimanshchina*.

Family property for a peasant was exactly “own” (in the sense of family property), not “mine” (i.e. the property of the householder) and not “ours”, because “our” can be both family and public, it can be joint property of peasants and lords, etc. However, most often the common property was denoted by the adjective “common” in its various variants (“common”, “free”, “joint”, etc.). There was a distinction between “someone else’s” and “not mine”. “Not mine” in the understanding of a peasant is very specific: it can be the “son’s”, “daughter’s”, “someone else’s”, that is – “neighbor’s”, “lord’s” as well as “unknown whose”.

Based on this, for a peasant only the property in which he was involved, that is – “own” and “common” property was important. As for the land, this very principle existed here. According to popular legal consciousness, the land was “own”, “someone else’s” and “common”, regardless of whether it was the right of ownership, possession or use. Moreover, even the state peasants considered allotment land “their”. The fact that the state peasants considered the land given to them in the allotment, hereditary was the norm for the people’s legal consciousness of the XIX century. According to the vast factual material of court cases, land that was not formally owned (for example, land tenure of landowners, state-owned peasants on old-borrowed lands, etc.) could be considered “own”. Until extreme situations arose, the peasant was interested not in the formal but in the actual state of affairs: the peasant’s legal consciousness was not “theoretical” but “applied”. This revealed the precedent nature of the custom. For example, Ivan Ovcharenko, a peasant from the town of Trypillya in the Trypillya volost of Kyiv district, wrote in his complaint that “since ancient times” his father, a “former state peasant,” had 1 dec. manor and 8 dec. field, arable and hayfields. However, during a lustration inspection in 1872, part of the land was taken from him and given to other people, in particular Tymofiy Ovcharenko, “who had no land from his ancestors and never cared of it”.

The plaintiff, writing that the land “was assigned” to the peasant, at the same time calls this land “hereditary”. And such “misspellings” are typical of many cases. Among the lawyers of the XIX century the following opinion was spread: if to apply the fairest principle of private ownership of land, we will have to admit that state peasants mostly lived on their own land¹⁶.

To understand the legal consciousness of the Ukrainian peasantry, it is interesting that after the reform of 1861, the old borrowers on a general basis had to make ransom payments for the land they used, but “for their land” they flatly refused to pay. It was during this period that the process of activating the people’s legal consciousness began: understanding their customary legal heritage, connected with the new bourgeois realities and new legal terminology, in particular with the concept of “private ownership for land”.

Peoples’s legal consciousness of Ukrainian peasants of the XIX century included the moment when it was obligatory for the state to sanction their original customs. Since Roman times there is the right of the first loan. It almost always provided the state sanction for some degree. The Ukrainian legal tradition was no exception. Thus, the settlement of the Cossacks on the Dnieper to the rapids was authorized by King Sigismund I of Poland, the rights, freedoms and privileges were confirmed to the Cossacks by Stefan Batory. Since law and state control in ancient times were not yet perfect enough to control all cases of settlement of no man’s land, popular colonization took place spontaneously, only from time to time referring to general statements of power or abstract permission of the ruler. The same applies to other “liberties”, including tax exemptions from various activities. It is possible to find analogies in the privileges granted by Polish rulers to individual cities or towns under German (Magdeburg) law. It is possible to trace on these facts the interesting relationship between official codified law and popular legal consciousness. At the time of the settlement of Slobozhanshchyna, the Regulations on Zaimanshchyna (free loan), although associated in the popular legal consciousness with an ancient custom, nevertheless appeared in official legislation.

¹⁶ Hrymych, M., Customary Civil law of Ukrainians XIX- the beginning of the XXth centuries (Kyiv: Aristei, 2006), 48.

Despite the fact that the Lithuanian Statute refers to the nobility, this also applies to the Cossack state, as Batory equated it in rights with the Russian nobility. By the way, the perception of the provisions of the Lithuanian Statute (although it was created according to the best European models of European law) as “their” ancient customs is not the only case in the history of Ukrainian legal culture.

According to experts, the nineteenth century is characterized by a special revitalization in the legal sphere, the intensification of codification work, the development of a single legal terminology. This process was accompanied by extensive discussions both in academia and in government departments. The second half of the XIX century is characterized by a significant increase in legal awareness in the higher circles of the then society. Due to the intensification of the activity of the bar, this process also stirred the people’s legal consciousness of the Sloboda peasants, reviving in memory the events of two hundred years ago, when their ancestors conquered the lands of the wild field on the rights of the first loan. Having studied the materials related to the lawsuits on the claims of rural societies of Slobozhanshchina, you can see the conservatism of the people’s legal consciousness. As long as there was no threat of breaking the custom, the “old borrowers” were quite happy to live in a situation of two rights: *de jure* they ruled on state land, and *de facto* - on their own. But in an extreme situation - when they were forced to buy their own land - historical memory and legal consciousness were activated. Folk legal ideas clearly fixed the concept of succession: the lands acquired by the right of the first loan by military settlers in the seventeenth and eighteenth centuries, were clearly understood by their descendants in the nineteenth century as their own¹⁷.

¹⁷ Hrymych, M., Customary Civil law of Ukrainians XIX- the beginning of the XXth centuries (Kyiv: Aristei, 2006); Yakovenko, N., Parallel world: the studies on history of notions and ideas in Ukraine in XVI-XVII centuries (Kyiv: Krytyka, 2002); Yakovenko, N., “Parodies and jokes in the Act books of Zhytomyr and Lutsk of the first half of the XVIIth century”, *Ukrainskyi arkhеоhrafichnyi shchorichnyk* 2 (1993): 161-176.; Yakovenko, N., *Pidkomorski books of the Right-bank Ukraine of the end of XVI-first half of the XVIIth centuries. Book of the Kyiv Pidkomorskyi Court (1564-1644)* (Kyiv: Naukova dumka, 1991).

Considering the understanding of property rights in the public legal consciousness of Ukrainians of the XIX century, in our opinion, it is worth analyzing the popular legal ideas about common property. It is certain that these ideas are significantly different from the actual legal provisions, from the law: from the point of view of law, “common property” is quasi-property, virtual property, i.e. one that exists only in the minds of peasants. However, the paradox is that no matter how lawyers, legislators, officials imagine the legal side of this property, under whatever heading they record this property in laws, tax or statistical documents, court descriptions, that is, whatever the de jure situation was, de facto it was often implemented according to the custom. In the XIX century “common property” is a stereotype of popular legal consciousness, which the peasants tried (and often succeeded) to put into practice. According to popular belief, the very fact of using the land for a certain period of time reproduces certain user rights to this land. That is why this phenomenon of national-economic, legal culture can be called common “use” property.

The notion of common use property is based on the principle that land that does not require special cultivation can be used by all, regardless of social status and origin. However, each “commonality” had certain territorial restrictions (especially in the XIX century): “all” means - not the whole world, but only “own”, i.e. those who live in a particular settlement or locality (i.e. in several settlements). Of course, this is the “ideal” version of the people’s legal consciousness, which was corrected by the legal situation. However, throughout the XIX century such representations appear in various sources¹⁸.

A characteristic feature that determined the “commonality” of a land is, so to speak, the “gathering”, “industrial” or purely “consumer” nature of its use, without the active involvement of human labour. Therefore, the idea of common property in the national economic and legal culture of Ukrainians was primarily realized in relation to land. This is due to the household (economic) feasibility of their collective use.

¹⁸ Hrymych, M., Customary Civil law of Ukrainians XIX- the beginning of the XXth centuries (Kyiv: Aristei, 2006).

For the Ukrainian folk economic tradition, yard farming was a much more efficient form of land use. The “yard” included manor and arable land. As for arable land - forests, pastures, meadows, floodplains, grazings, etc., as well as reservoirs - here, in terms of economic feasibility, with small and medium plots of land it was always more profitable to use a larger plot together, as a group, than a smaller plot separately. This did not exclude the presence of meadows, hayfields, forest, plots owned by the family (in the yard).

4. CONCLUSIONS.

Summing up, we note that the customary legal situation in Ukraine is geographically and chronologically heterogeneous. However, despite all the differences in the historical development of Volyn, Polissya, Podillya, Dnieper, Slobozhanshchina, Southern Ukraine, customary property relations are identical in basic respects. Differences in decision-making do not have regional specifics. As for Galicia, although the difference in sources (Polish language, references to Polish and Austrian legal reality, etc.) gives the impression of being different, in fact the general features of customary law are stable: yard land ownership, lack (except for some forms) of communal land tenure, divisibility of families, fragmentation of land plots, general features of joint family property, the predominance of the customs of allotments over hereditary customs, important role of a woman as a successor to her husband, stable people’s legal ideas about the commonality of lands, the practice of contractual relations, similarity of customs of mutual assistance on the principle of exchange, syncretism of people’s legal consciousness, active law-making processes in the post-reform period, etc.

These phenomena, or rather their complex, can be considered the ethnic customary law of the Ukrainian village of the XIX century. This does not exclude regional and local specifics of the implementation of these phenomena. Thus, the pattern of the history of land relations was: the less time passed since the colonization of new lands, the more legally unstable these relations were, and, consequently, the more opportunities to identify and implement the custom. This applies to Slobidska Ukraine, where even in the post-reform period there was a certain chaos in land relations,

which had not yet resulted in a final form and was largely regulated by custom. In the south of Ukraine before the reform there was both yard and communal ownership; the distribution of land was based on the number of souls, the number of workers and the number of livestock; often there were combined options. Since there was plenty of land, the landowners did not supervise its distribution, the peasants used the land indefinitely.

Despite the fact that most of the territory of Ukraine in the XIX century was part of the Russian Empire, there different from the rest of Russia, the division of peasants into major groups by property status was practiced and, accordingly, by payment or by working duties according to the land ownership: those who paid duties with the work of livestock, hired work, etc. This tradition connects the Ukrainian system of land relations and the peasant organization with the European one. This feature of Ukrainian peasant culture cannot be called purely customary, but it is basic to it.

At the same time, the specificity of the Carpathian and Precarpathian regions is the special variability and development of pastoral economic and social customs. Western Ukraine in general demonstrates a higher level of legal regulation of issues related to the peasantry, and a special development of the institution of public land ownership and self-government. In the south of Ukraine during this period more progressive methods of management are widely used and, accordingly, commodity-money relations in peasant life are intensified, while the “old” Ukrainian regions tended to conservatism and archaic customs, Left-Bank Ukraine and Slobozhanshchina demonstrate special vitality of customary legal phenomena concerning land ownership, according to which the land acquired by the right of first borrowing or cleared of forest (“liadi”, “roztreby”) is the undisputed property of the peasant. He had the right to dispose of it at his own discretion, which contradicted the official status of these lands as “state”. Polissya and “lake” Volyn show extraordinary customs of using forest and reservoir lands. It is obvious that the peculiarities of the development of legal relations in different Ukrainian lands are a confirmation of the thesis about the heterogeneity of legal consciousness of Ukrainians, due to socio-economic, political and cultural-historical reasons.

Regarding the temporal differentiation of economic customs, there are, of course, also some features of the pre-reform (as for serf villages) and post-reform era. Thus, it is even possible to single out, for the sake of a certain specification, the so-called “lordly” economic customs, which regulated the out-of-legal relations between the landlord and the dependent peasant. However, for all their “ethnographysity” (for example, the customs of working for the “garntsi”, “sharvarky”, “darivshchiny”, “toloki”, etc.), they fit perfectly into the model of contractually binding customary relations.

Another feature also concerns the chronological aspect, which finds its manifestation in the development of legal consciousness (institutional and non-institutional) during serfdom and after its abolition. It is obvious that after the abolition of serfdom the legal consciousness of the peasants of new generations began to change gradually under the influence of commodity-market relations and the granting of new rights and freedoms (with all their formalities and limitations in the process of use). However, it should be emphasized that both before and after the abolition of serfdom, there were many gaps in the legislation, which were immediately filled by custom. During the time of serfdom there were ample opportunities for “lordly” law, which can not be interpreted solely as arbitrariness or good will of a landowner. In general, “lordly law” was a rather complex system of mutual rights and mutual obligations between the landowner and dependent peasants or employees, which was made as a mutual adaptation of the needs and requirements of both according to external circumstances (yield, fertility, material condition of one or another contract parties, changes in legislation, etc.). In practice, “lordly law” was often local in nature, but it was not devoid of general features. Thus, in all regions, peasants had the right to use the lord’s lands free of charge or for insignificant in-kind or labour duties.

Reforms in the countryside, the imperfection of the new legislation (institutional legal awareness) on the administration of the peasants were a favourable ground for the existence of custom. In the western Ukrainian lands it revealed less, because the process of reforming the peasant structuring began here earlier, and in addition, was implemented according to clear German schemes, but even here the law could not provide all the nuances of various peasant life.

As for the territory that was in the legal field of the Russian Empire, here, as can be seen from the “Local Regulations” adopted in the complex reform of 1861, the provisions were formulated entirely “stillborn” as for the Ukrainian reality. This applies first of all to the thesis that the owner of all the land of the former landlord and state peasants is “community” and not the farms themselves. Naturally, the de facto situation could not coincide with the de jure situation. The post-reform period demonstrates the active entry of capitalist relations into the countryside and the stubborn resistance of the conservative peasant reality. In fact, it is in this period that not so much conservative legal consciousness manifests itself as folk lawmaking¹⁹.

The analyzed reseaches of scholars on the customary law culture of Ukrainians of the XIX century, as well as sources first introduced into scientific circulation, indicate that the institution of ownership in the countryside in this period was largely based and regulated by custom, often against the law. There was a strange symbiosis of custom and law, which was a manifestation of folk lawmaking. It is the custom that has become an effective form of self-survival for the Ukrainian countryside, and for the entire ethnic culture of Ukrainians in general, in difficult political and socio-economic conditions within foreign ethnic states. Today, the richness and self-sufficiency of Ukrainian customary law culture is an important part of the spiritual heritage of Ukrainians, which allows recreating the constants of legal consciousness of the then Ukrainian society and understanding some features of the legal consciousness of modern Ukrainians. Analyzing the legal consciousness of Ukrainians in historical retrospect, we consciously focused on customary law, because it is formed as a result of communicative intersubjective interaction and is the basis of codified law. At the same time, we did not aim to consider all aspects of Ukrainian customary law culture, but focused as an example on understanding the concept of “property”, because it is property relations that are fundamental to the establishment of human autonomy in the social space.

¹⁹ Hrymych, M., Customary Civil law of Ukrainians XIX- the beginning of the XXth centuries (Kyiv: Aristei, 2006); Pahman, S., Customary Civil law in Russia: Family Rights, Inheritance and Custody: Legal Essays (SPb.: Tip. 2 Otd. sobstv. e. i. v. Kantselyarii, 1879).

5. REFERENCES

- Bobrovskiy, O. 2007. Criminal and Civil process on “Russkaya Pravda”. Tolyatti.
- Bobrovskiy, O. 2007. Pre-trial process on “Russkaya Pravda”. Pravo i politika 9: 105-109.
- Gurevich, A. 1981. Problems of medieval folk culture. Moscow: Iskusstvo.
- Hrymch, M. 2006. Customary Civil law of Ukrainians XIX- the beginning of the XXth centuries. Kyiv: Aristei.
- Khynchevska-Hennel, T. 1996. Beresteiskyi union in XVIIth century from the Polish point of view. Derzhava, suspilstvo i tserkva v Ukraini u XVII stolitti: materialy Druhykh «Beresteiskykh chytan». Lviv, Dnipropetrovsk, Kyiv.
- Maksimov, S. 2002. Legal reality: the experience of philosophical comprehension: monografiya. Kharkiv: Pravo.
- Pahman, S. 1879. Customary Civil law in Russia: Family Rights, Inheritance and Custody: Legal Essays. SPb.: Tip. 2 Otd. sobstv. e. i. v. Kantselyarii.
- Pahman, S. 2004. History of Civil Law Codification. Moscow: Zertsalo.
- Potulnytskyi, V. 1993. The theory of the Ukrainian politology. Kyiv: Lybid.
- Starchenko, N. 1998. Publicity as the dominant of cultural tradition (Volyn of the second part of the XVIth century). Mesiiiaeuaiia Oshaipisa : mentalnist ta istoriia idei 5: 68-81.
- Sverdlov, M. 1988. From “Russkyi Zakon” to “Russkaya Pravda”. Moscow: Yuridicheskaya literatura.
- Yakovenko, N. 1991. Pidkomorski books of the Right-bank Ukraine of the end of XVI-first half of the XVIIth centuries. Book of the Kyiv Pidkomorskyi Court (1564-1644). Kyiv: Naukova dumka.

- Yakovenko, N. 1993. Parodies and jokes in the Act books of Zhytomyr and Lutsk of the first half of the XVIIth century. *Ukrainskyi arkheohrafichnyi shchorichnyk* 2: 161-176.
- Yakovenko, N. 2002. Parallel world: the studies on history of notions and ideas in Ukraine in XVI-XVII centuries. Kyiv: Krytyka.
- Zheltova, V., Drobnyskyi, O. 1978. Philosophy and value forms of consciousness. Moscow: Nauka.