



права інтелектуальної власності / В.В. Колесніченко // Науковий вісник Херсонського державного університету. Серія «Юридичні науки». – 2013. – Вип. 3. – Т. 2. – С. 30–33.

2. Боняк В.О. Конституційне право людини і громадянина на освіту та його забезпечення в Україні : дис. ... канд. юрид. наук : спец. 12.00.02 / В.О. Боняк. – К., 2005. – 207 с.

3. Матузов Н.И. Личность, права, демократия: теоретические проблемы субъективного права / Н.И. Матузов. – Саратов : Изд-во Саратовского ун-та, 1972. – 292 с.

4. Грачева Т.В. Право человека на образование и его развитие в условиях глобализации / Т.В. Грачева // Закон и право. – 2004. – № 3. – С. 49–51.

5. Приз І.Ю. Право на освіту та його місце у правовому статусі громадянина України / І.Ю. Приз // Юридическая наука в XXI веке: перспективные и приоритетные направления исследований : матер. междунар. науч.-практ. конф. (г. Симферополь, 13–14 сентября 2013 г.). – Симферополь : Юридическая мысль, 2013. – С. 94–98.

6. Шишка Р.Б. Охорона прав суб'єктів інтелектуальної власності у цивільному праві України : дис. ... докт. юрид. наук : спец. 12.00.03 / Р.Б. Шишка. – О., 2004. – 469 с.

7. Запорожець І.Г. Адміністративно-правові засади управління у сфері охорони прав на об'єкти інтелектуальної власності : дис. ... канд. юрид. наук : спец. 12.00.07 / І.Г. Запорожець. – Х., 2006. – 201 с.

8. Жаров В.О. Захист права інтелектуальної власності в Україні / В.О. Жаров. – К., 2002. – 188 с.

9. Про авторське право і суміжні права : Закон України від 23 грудня 1993 р. № 3792-ХІІ [Електронний ресурс]. – Режим доступа : <http://zakon.rada.gov.ua/go/3792-12>.

DEFECTIVE LEGAL FACTS IN FAMILY LAW: CONCEPT AND TYPES

Olga YAVOR,

PhD, Associated Professor,

Department of Civil Law in National Law University named after Yaroslav Mudryy

Summary

The paper signs of legal facts defects that allowed to form a common understanding of models of legal regulation of relations connected with the establishment of nullity of legal facts in family law. Author finds out what might be the consequences of defects, as well as the regularities of manifestations of common features of defects in the family law field relations. The article marks those cases which may act grounds of nullity of legal facts in family law.

Key words: defective legal fact, invalid marriage, invalid adoption, invalid marriage contract, administrative order of annulment of legal fact, judicial procedure of annulment of legal fact, consequences of the legal fact nullity.

Аннотация

В статье установлены признаки дефектности юридических фактов, что позволило сформировать общее понимание модели правового регулирования отношений, связанных с установлением их недействительности в семейном праве. Выяснено, какими могут быть последствия дефектности, а также выявлены закономерности проявления общих черт дефектности в семейно-правовой сфере отношений. Обозначены те случаи, которые могут выступать основанием дефектности юридического факта в семейном праве.

Ключевые слова: дефектный юридический факт, недействительный брак, недействительное усыновление, недействительный брачный договор, административный порядок признания юридического факта недействительным, судебный порядок признания юридического факта недействительным, последствия дефектности юридического факта.

Introduction. A general understanding that legal norm fixes an abstract model of the actual circumstances in which this rule links the emergence, modification or surcease of certain legal consequences is formed in legal doctrine. Any specific real relationship is much more complex and richer in features compared to its regulatory model. Therefore, the concept of legal facts defects have to include criteria to distinguish permissible from a variety of social relationships substantial and legally significant violation [1, p. 65].

The importance of this distinction is related in particular to the fact that the classification of legal facts as defect has a result in automatic cancellation of legal consequences that were associated with it. This is so-called absolute defect of legal fact. Therefore, one of the important tasks of legal technique in the current development of the domestic legal system is to improve methods of presentation in hypotheses law legal facts. Legal technique is a system of rules and methods of preparing the most perfect form and structure of legal acts which provide the most complete and exact form of

regulatory requirements of their content, and access to and understanding of the regulation, comprehensive coverage of the subject regulation [2, p. 123].

Proper selection of items to legal structure is the most important part of the problem of choosing the best option of regulating social relations. Hypotheses of legal rules which are overwhelmed by actual composition of elements, as well as compounds that do not contain the necessary elements reduce the effectiveness of the mechanism of regulation and sometimes lead to violations of the law order and to the destabilization of society.

In this regard, the scientific community should pay attention not only normal, steady state operation of the mechanism of law, but possible failures, interference in his work. One of the negative aspects of the implementation of the laws often serves defective legal fact or structure that prevents the further implementation of the law, emergence, change or termination of relationship entails other negative consequences in the legal system.

Following the adoption of the Family Code of Ukraine three dozen changes



were made to it text. Litigation of the application of family laws includes almost 800 thousand of court decisions. Legal practice faces new types of defective legal facts and their compositions. Therefore the problem of legal facts defects in family law is particularly relevant.

The problem of legal facts defects has a long history. Roman law provided responses to defects will and volition. Today, in an increasingly dynamic development of social relations legal facts acquire adequate structural complexity and not a simple form, which in turn leads to a significant increase in the number of cases of violation of the structure and form of the system of legally significant circumstances. Thus these defects range from “harmless” minor matter of law to very serious.

The value of the defective facts in the mechanism of legal regulation of family relations is largely due to their negative role. It is resulting in destabilization of the legal rules enforcement and in violating of the rights and legitimate interests of participants of public relations. Scientific and practical development of uniform rules and procedures of the legal qualification of defective facts in family law will ensure compliance with the principles of justice and equity in law [3, p. 5].

Neither science nor legal practice has not developed a clear understanding of the nature of the defect facts, its specificity in family relationships, correlation with family law offense. The specificity of legal action to respond to faulty facts is not established to this day.

Legislative and law enforcement agencies of the public power government don't use the whole arsenal of legal and technical tools that can minimize the impact of defective regulation of the facts on family relationships. The rules that are specifically designed to establish protective measures in case of defective actual compositions which significantly reduces the efficiency of the entire system of family and regulations are not always possible to find. In general, issues of legal facts defects in family law remain relevant and practically significant, and scattered legislation on the subject are those that require some improvement.

The concept of defect fact, the question of technical design of institute of legal invalidity of fact in the law, and

the problem of determining response to defects actual situation in law enforcement are among the nodes in the theory of legal fact. Therefore, this problem has always been a research interest among researchers of different legal sciences, mostly representatives of civil law science. At the same time, we must admit that the issue of legal facts defects and their composition in family law in terms of the general characteristics of the individual studies were not. In most cases, researchers focus on specific forms of legal facts defects in family law - the nullity of marriage [4], the nullity of the marriage contract [5; 6], the invalidity of adoption [7] and others. We believe that the theory of legal facts in family law requires a holistic view of the possible manifestations of defects legal facts, legal consequences that can lead to such defects, defects of the specific legal facts in family law compared to other areas of regulation, types of defects, legal protection measures in family law from the negative consequences of defective legal facts. For this it is necessary to clarify the concept and classification of defective legal facts, to determine their legal nature, to determine the causes and conditions that contribute to the occurrence of defective legal facts in family law, to develop a general characterization of measures to protect against the consequences of defects of legal facts in family law and to make recommendations for improving legislative regulation of situations related to legal facts defects in family law. Certainly, multidimensional of problems that are described does not allow to answer completely to all issues that are related to the defects of legal facts in family law, however **the purpose of this article** is to address the most urgent, basic theoretical legal concept of legal facts in family law.

Description of the main research material. Issues of legal facts defects are not always a question of assessment of real phenomena (relations that arise in family law regulation), but of their legally defined models (legal structures) which may be defective under certain conditions stipulated by law.

The first stage of the origin and development of the institution of defective facts is associated with civil law, such as those of its rules which describes agreements and other transactions. Originally division of defective transactions on negligible and

disputed was not in a Roman law, as there was no general doctrine of the nullity of contracts. However, if we look at the history of Roman private law [8; 9], we can reveal legal measures to respond to possible defects in legal structure in the ancient world. The first provisions of the legal texts about defective facts were not systemic and had fragmented nature. As the story goes, the problem of defective facts arises not only in civil law but also in family and other areas of law and practice. However, civil law, as at that time the most developed branch of law, faced with the need to respond to a variety of negative deviations in actual formulations first.

Admittedly, the problem of defective facts occurs simultaneously with the emergence of the law as a certain standard model behavior. Thus because of the diversity of objective social relations different kinds of deviations from legal models that are set out in the rules are appearing in practice regularly. The dialectics of social and legal life leads to the establishment of the dichotomy “social norm – social rejection”. Law and legal practice have at some stage of development set of measures from the most negative deviations from the norms and standards.

Defects characterize not events or actions, but their models and legal structures that are created in respect of legal action on their installation, fixing, legal qualifications and more. The statement of fact as defective is possible as a result of display of real phenomena by means of legal evidence and comparing these phenomena with the standard.

Defective legal facts and their compositions are the kind of legal anomalies that there are certain variations in the legal field. Defective legal fact can be defined as a special kind of legal facts, which has legal structure defect and (or) non-compliance with the reality (action or event) and, consequently, entails legal consequences in the form of its own invalidity and remedy if it took place.

We have to note the inadmissibility of the offense and the identification of legal facts with the defects. This theoretical step leads to inaccurate understanding of the place and role of defective actual situations in the system of legal facts. It doesn't allow to see the specific quality defective facts as a special, independent group of legal facts. Defective legal facts



have a special intermediate between lawful and unlawful actions. Inconsistency to specific legal prescriptions allows to clearly distinguish facts from defects (disorders) of lawful action. This feature is called the number of researchers as a basis for full or partial identification of the legal structure with bug offenses. However, this identification is false.

Differentiation between offense and defective legal fact may be carried out on two criteria: 1) by presence or absence of fault – offenses are characterized by obligatory presence of fault, defective legal fact has not this feature mandatory; 2) by legal consequences – the offense entails application of legal liability (punitive, penalties), the defective fact entails the measures of restoring the original state or correct existing deficiencies. Defective can be caused by circumstances which are not regarded as an offense. However, offenses are not the result only of defects of legal facts. In other words, defective legal fact and offenses may be the same, but it is not always [1, p. 66].

It is also necessary to distinguish problem of defective legal acts, errors in the legal strengthening of legal facts (defects on the establishment of their models in legislation) from defects of legal fact. This is a theoretical and practical distinction between “legal fact defect” and “legal error”. As a result of violations of the requirement of adequate reflection of the social situation in the regulation we get an error of law-making, but not defective legal fact. Defective facts are a problem of the enforcement of law, not law-making.

Another important point is that the defectiveness of legal facts should not be confused with its incorrect legal qualification (assessment). As a result of this fact that is estimated by enforcement authority does not get any defects, but an error of law of the authorized person may result in defective adoption of enforcement act. Wrong qualification does not change the actual circumstances, but may be a cause of a new fact of defect (for example, the judgment with false qualifications). Typically, the adoption of mistake enforcement act entails its abolition and (or) changes of it.

Types of defective legal facts should be based on substantive and procedural criteria which are interrelated. Specificity of impaired interest (private or public)

determines the features of procedural order of protection the legal system features defective facts. Procedural basis for classification of defective facts on the negative and insignificant can be identified in addition to the substantive criteria. This procedural basis includes: 1) the method of establishing invalidity of fact (e.g., mandatory of court order); 2) the number of persons which are eligible to initiate the finding invalid (defective). These procedural criteria are derived from the basic material criteria. Thus, in family law, as a general rule, there is valid legal presumption that if the relevant members of family relationships do not make legal defects fact that legal defect is considered absent. Public authorities can be authorized only to certify legal facts and they should not interfere in the sphere of personal relationships of participants of such relations [10, p. 159].

Thus, a common feature for all circumstances with which the law binds the application of the legal consequences of defects fact is that they all get legal significance only at the initiative of the interested party. The state does not assume powers of intervention in this sphere of private relations. For example, marriage is considered valid (even if its conclusion had defects) if any individual (one of the spouses, the third person) declares breach fact of signing the marriage of his rights or legitimate interest.

We agree with those researchers who come from the fact that minor defects legal fact that does not entail specific legal consequences can not be regarded as independent types of defective legal facts. This selection has no proper scientific and practical value for the typology. If the legislation provides for a special response to procedural defects fact, it is not insignificant deviation from the norm. In the case of the silence of law about the response to other possible defects of facts these facts can be considered insignificant and legally irrelevant. However we do not actually have to deal with defective legal fact because of its insignificance deviation from the norm. Legal practice if abstracted from these defects.

There are two main types of defective legal facts. Insignificant facts are the type of defective factual circumstances that are invalid because of the special instructions in the laws and there are not required of court confirmation of the absence of legal

significance. Disputed facts are the type of defective legal facts, which need to confirm invalidity in court at the request of the statutory audience.

The above typology of defective facts on insignificant and disputed does not preclude their classification on the basis of other criteria such as the possibility of correction, the point detection etc. [11, p. 274]. However typology that is presented is aimed directly at disclosing specifics, the defective nature of the facts. It has, in my opinion, the greatest scientific and practical value. Other classifications which may be held are minor or complementary.

It is necessary to distinguish from other law enforcement tools protective measures that are specifically aimed to neutralize of the effects of defective legal facts.

In the case of defective legal facts a tool of the returning of the parties in the original position that existed prior to the actual situation of the defect is mainly used. It achieves localization and possible adverse effects and redress.

Abolishment of illegal acts is a special event to respond to legal defects of legal facts. The content of the sanctions is to cancel the authorized persons of illegal acts that entail cancellation by these acts of legal consequences.

However, there are other safeguards, including stabilization legal consequence [1, p. 81]. For example, recognition of “defective” valid marriage. Legislator seeks to preserve the relations established fact, even if not complied with certain requirements, as a general rule may be a ground of invalidity. Stability of relations that are regulated by law is an independent social value which makes protection of rights and legitimate interests of citizens, allows to ensure stability relations. The reason for demand of this measure is largely continued character of family relationship.

Conclusions. The model that is presented in this article is a prime example of embodiment in legislation the concept of balancing interests [12, p. 5]: legislator tries to find a balance between social values such as the stability of family ties, on the one hand, and the certainty of legal regulation that requires strict adherence to the requirements for the emergence, change or termination of legal relations on the other. Moreover, they in turn



also are not arbitrary. These requires are manifestation of procedural fairness that is procedure, compliance with which is a minimum guarantee of a fair result.

References:

1. Чувакова А.М. Юридические факты, фактические составы и их дефекты: [монография] / А.М. Чувакова. – О. : Фенікс, 2009. – 112 с.
2. Ткачук А.Ф. Законодавча техніка: [навч. посібник] / А.Ф. Ткачук. – К : ІКЦ «Легальний статус», 2011. – 268 с.
3. Муругина В.В. Дефективность юридических фактов как негативная черта правовой системы: автореф. дисс. ... канд. юрид. наук: спец. 12.00.01 «Теория и история права и государства; история учений о праве и государстве» / В.В. Муругина. – Саратов, 2010. – 22 с.
4. Сафончик О.І. Правове регулювання припинення шлюбу в Україні: автореф. дис. ... канд. юрид. наук: спец. 12.00.03 / О.І. Сафончик. – О., 2004. – 20 с.
5. Жилінкова І.В. Проблеми правового режиму майна членів сім'ї: дис. ... докт. юрид. наук: спец. 12.00.03 «Цивільне право і цивільний процес; сімейне право; міжнародне приватне право» / І.В. Жилінкова; Нац. юрид. акад. України ім. Ярослава Мудрого. – 336 с.
6. Уляненко О.О. Шлюбний договір у сімейному праві України: дис. ... канд. юрид. наук: спец. 12.00.03 / О.О. Уляненко; Нац. акад. внутр. справ України. – К., 2003. – 185 с.
7. Зілковська Л.М. Правове регулювання усиновлення в Україні: дис. ... канд. юрид. наук: спец. 12.00.03 / Л.М. Зілковська; Інститут держави і права ім. В.М. Корецького НАН України. – К., 2002. – 177 с.
8. Крестовська Н.М. Основи римського приватного права: [навч.-метод. посібник] / Н.М. Крестовська, І.С. Канзафарова. – О. : Фенікс, 2006. – 160 с.
9. Основи римського приватного права: [підручник] / [В.І. Борисова, Л.М. Баранова, М.В. Домашенко та ін.]; за заг. ред. В.І. Борисової та Л.М. Баранової. – Х. : Право, 2008. – 224 с.
10. Тонієвич Є.Д. Правові наслідки невиконання нареченими обов'язку пройти медичне обстеження і повідомити один одного про стан свого здоров'я / Є.Д. Тонієвич // Вісник Вищої ради юстиції. – 2013. – № 2(14). – С. 158–171.
11. Коструба А.В. Юридичні факти в механізмі правоприпинення цивільних відносин: [монографія] / А.В. Коструба. – К. : Ін Юре, 2014. – 376 с.
12. Scassa T. Interests in the Balance / T. Scassa // In the Public Interest: the Future of Canadian Copyright Law / ed. M. Geist. – Toronto : Irwin Law, 2005. – P. 25.