



Emerging Markets:

A Review of Business and Legal Issues

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- ❖ The Concept of Agroforestry Plantation and the Basis of Its Legal Status after Ecology Legislation of Ukraine by Yaroslava Onika
- ❖ Protection of the Right to Education with Criminal Prosecution in Ukraine: a Guarantee for the Constitutional Right Realization or a Measure of the State Coercion? by Anastasiya Zaleskaya
- ❖ The Law of Ukraine "On Protection of Personal Data": the Example of Legislative Activity of the Ukrainian Authorities by Olga Liuber

Emerging Markets: A Review of Business and Legal Issues

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The Concept of Agroforestry Plantation and the Basis of Its Legal Status after Ecology Legislation of Ukraine

Summary: *This article is devoted to the problem of the drafting of the legislative definition of the concept “agroforestry plantation”, and for the analysis of the main characteristics of its legal status after the current ecology legislation of Ukraine. For the drafting of agroforestry plantation concept it was made an analysis of the agroforestry plantation attributes, that are represented in the scientific works on the agricultural afforestation. At the same time it was learned the current Ukrainian ecology legislation that regulates the issues of protective forests using and keeping.*

Key Words: *agroforestry plantation, agricultural afforestation, legal status, land reclamation, soil protection.*

The Concept of Agroforestry Plantation and the Basis of Its Legal Status after Ecology Legislation of Ukraine

Ukraine is an agricultural state. There are 18.9 % of agricultural lands of Europe on the territory of Ukraine. So all methods of improving the agricultural production have a particular importance for our country development. Among such methods is the using of agroforestry plantation in the process of agricultural production.

Current legislation of Ukraine has not the concept of the agroforestry plantation; moreover the legislation of previous years also had not such concept. So we have no opportunity to make a citation from any act about the agroforestry plantation. That's why for the drafting of the concept of the agroforestry plantation it should be made a complex analysis of current ecological legislation and the scientific works in the sphere of agricultural afforestation.

Agricultural afforestation is a complex of forestry measures to better climatic and soil conditions for receiving high crops. Agroforestry plantation has a particular intended use – protection of soils, water and other natural resources from wind and water erosion in the process of agricultural production. In respect that agricultural production occupies an important place in the economy of Ukraine agroforestry plantation is a very necessary remedy. Nevertheless the current Ukrainian legislation does not regulate the conditions of use and protection of the agroforestry plantation. At present moment the only act that regulates the conditions of implementation of melioration is the Act on the melioration of the lands, as of January 14, 2000.

So for the drafting of agroforestry plantation concept it was made an analysis of the agroforestry plantation attributes, that are represented in the scientific works on the agricultural afforestation. First attribute of the agroforestry plantation is that this plantation is used in the agricultural production. Another attribute of the agroforestry plantation is that it is used for the protection of the soil from water and wind erosion, drought, desertification, cold and blizzard winds and other negative natural factors. In the same time agroforestry plantation is a kind of forests, so it has all attributes of forests too. Accordingly **agroforestry plantation** is forestry plots that function as protection of soils from wind and water erosion to oppose their degradation, drought,

desertification, cold and blizzard winds and other negative natural factors to better the results of agricultural production.

According to the item 8 the Act on the melioration of the lands, agricultural afforestation is a complex measures aimed at the improvement of the soils by means of soil-protective, flow-regulating and other qualities of the protective forests; to such forests are related **anti-erosion forests** and **shelter-belt forests**.

There are the Conditions of the Forest Division on the Categories and the Definition of Especially Protected Forestry Plots, as of May 16, 2007. The analysis of these Conditions allows making the conclusion that all forests in Ukraine are divided into groups according to the purposes of their using. So, taken into account the conditions of the Act on the melioration of the lands, Conditions of the Forest Division on the Categories and the Definition of Especially Protected Forestry Plots and the abovementioned information about the attributes of the **agroforestry plantation** we can point that **agroforestry plantation consists of forest plants of linear type, erosional preventive forests, that are used for ravines, denes, slopes, sands and other degraded lands, coastal protective belts and water-protective zones of rivers and other ponds reforestation, forest plots along shores of rivers, round lakes, ponds and other water objects, and ravine forests.**

So far as agroforestry plantation is a type of forests that function as protection of soils from wind and water erosion to oppose their degradation, drought, desertification, cold and blizzard winds and other negative natural factors to better the results of agricultural production, the current Ukrainian ecological legislation as abovementioned understands **protective forests**. As the item 39 of the Forestry Code of Ukraine, as of January 21, 1994, reads that the forests in our country are divided into several groups after their ecological, social and economic duties. One of such groups is protective forests, which have water-protective, soil-protective and other protective functions. So we can come to the conclusion that **the protective forests include also that group of forests which function as protection of soils from water and wind erosion and other negative natural factors to prove the results of agricultural production.**

As for the legal status of agroforestry plantation after the current Ukrainian ecological legislation it can be mentioned the following. All forests in Ukraine are its national treasure; on a par with other natural resources they are exceptional value for society, value that is not comparable

with any other material value produced by people. That's why the Constitution of Ukraine and the Declaration on the State Sovereignty of Ukraine provides exclusive ownership of the Ukrainian people on land, mineral resources, the atmosphere, water and other natural resources on the territory of Ukraine, mineral resources of its continental shelf, of its exclusive (maritime) economic zone, including forests too. Such exceptional nature of the legal status of the forests as all other objects of natural world is caused by unique natural origin. Moreover, all forests are under the government support regardless to their ownership. So the agroforestry plantation also has such unique status after the current ecological legislation of Ukraine.

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Protection of the Right to Education with Criminal Prosecution in Ukraine: a Guarantee for the Constitutional Right Realization or a Measure of the State Coercion?

Summary: *The article is devoted to the short analysis of the main factors that caused the criminalization of the violation of the right to education in the Criminal Code of Ukraine in 2001. It is revealed the social conditionality of the application by the legislator the criminal methods of the right to education protection in Ukraine.*

Key Words: *criminalization, social conditionality of criminalization, the right to education violation.*

Protection of the Right to Education with Criminal Prosecution in Ukraine: a Guarantee for the Constitutional Right Realization or a Measure of the State Coercion?

Right to education is a guaranteed by government opportunity of every person to receive education regardless to person's political and religious points of view, race, nationality and social status. In Ukraine right to education is a constitutional right and it is confirmed in the article 53 of the Supreme Law of the state.

According to the theory of the three generations of human rights formulated by French lawyer Karel Vasak, right to education belongs to the second generation – “positive rights”. The main peculiarity of the “positive rights” is that their realization is possible only because of proper economic support of the state. Besides the right to education the labor right, the right to rest, the right to an adequate standard of living, the right to the social security, etc. are related to the “positive rights”. Under the economic support it should be understood all necessary economic measures that are undertaken by the government to supply the opportunity of every person in Ukraine to get education: financing of the educational institutions, providing of an opportunity of receiving education from the State Budget, scholarship payment and so on.

But it must be stated that economic support of the state is not the only warranty measure that can provide the opportunity of every person to receive education. The legislator has also provided the criminal liability for the violation of the right to education. The Criminal Code of Ukraine in the article 183 provides the criminal liability for **illegal admission to the educational institutions of all types of ownership** and for the **unlawful demand of tuition in the public and municipal educational institutions**.

It should be noted that criminal liability for the violation of the right to education has been provided in the Criminal Code as of 2001 for the first time in Ukrainian history. It was a necessary measure because of increase of the number of violations in the educational sphere. Education is a great value for each person that allows everybody to become a rightful member of the modern

society. As mentioned Jacob A. Mincer, receiving education is an investment to the future success of every person as far as each next year of schooling means the raise of earning in future.

At the same time proclamation of the independence of Ukraine involved negative changes in political and economic life of the country. So the situation in system of receiving education has changed for the worse too. For example, in 1991 there were 24 400 preschool educational institutions, but in 2000 their amount decreased to 16 300; amount of places in such educational institutions accordingly decreased from 2 243 000 to 1 117 000. The amount of vocational schools decreased from 1 215 in 1991 to 970 in 2000. All these examples show that the situation with receiving education in Ukraine in less than 10 years has changed not for the better side. At the same time the increasing role of education for every person has made the right to education a target for criminal intrusion. The Ministry of Education and Science, Youth and Sport of Ukraine in the letter No. 1/9-272 dated April 9, 2012 has expressed concern for the facts of the violation of the rights of pupils and students for availability and free-of-charge basis of education. In particular it was stressed on the cases of illegal collecting of cash for different events, non-target use of parents' fees, etc. in the educational institutions. So the problem of the violation of the right to education in Ukraine is quite a great problem. That's why the criminal prosecution of the violation of the right to education is necessary measure.

It must be mentioned that up to the moment of this article writing and publication the practice of the bringing persons to the criminal liability for the violation of the right to education is not numerous in Ukraine. So there are some problems with the realization of this criminal item in practical work of internal affairs bodies. But in any case the guaranteeing of the right to education by criminal prosecution occupies important place in the system of guarantees of the constitutional rights realization.

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The Law of Ukraine "On Protection of Personal Data": the Example of Legislative Activity of the Ukrainian Authorities.

*No its Friday!
Force rules the world still,
Has ruled it, shall rule it;
Meekness is weakness,
Strength is triumphant,
Over the whole earth
Still is it Thor's-Day!
from the Saga of King Olaf*

Henry Wadsworth Longfellow

Constitutional Court of Ukraine, Ustymyenko Case, Judgment from 30.10.1997 № 5-zp

Thereby, collection, storage, use and dissemination of confidential information about a persons without their consent is prohibited by the second part of Article 32 of the Constitution of Ukraine, except of cases determined by the law, and only in the interests of national security, economic welfare and human rights. But there is no regulation, which fully defined collection, storage, use and dissemination of information, particularly on the mental state of man, his compulsory examination and treatment, there is no protection procedure of individual rights against unlawful interference with his private life, done by mental health services. Law of Ukraine "On Information" establishes only general principles of public access to information regarding them personally. The mechanism of this right is not properly defined. There is no regulation on use of confidential data in the field of psychiatry. Basic document: Judgment of Supreme Court of Ukraine №7 of 26 September 1990, "On the application of the law in cases of protection of dignity and honor of an individual, and business reputation of an individuals and a legal persons" (Section 3).

As it is obvious from the early Court decisions, the Case Law should be developed in the correct direction, as well as the legislation should. Even the newest Case Law of the Constitutional Court of Ukraine sounds well.

According to Judgment of the Constitutional Court of Ukraine from April 12, 2012 № 9-rp/2012, in relation to the citizen Trojan constitutional appeal on the official interpretation of Article 24 of the Constitution of Ukraine:

“2.1. Person's life and health, honor and dignity, inviolability and security are recognized as the highest social value, rights and freedoms and their guarantees determine the content and direction of the state, the state is responsible to the people for their activities; establishing and ensuring human rights and freedoms is the main duty of the state in Ukraine as a democratic state of law (Article 1 and 3 of the Constitution of Ukraine).”

Constitution of Ukraine has the highest legal force, laws and other legal acts adopted on the basis of the Constitution of Ukraine and shall conform to it; provisions of the Constitution of Ukraine are norms of direct effect, claims to court to protect the constitutional rights and freedoms of man and citizen directly according with the Constitution of Ukraine are guaranteed, constitutional rights and freedoms are guaranteed and can not be canceled (parts two, three of Article 8, Article 22 of the Constitution of Ukraine).

According to the first paragraph of Article 64 of the Basic Law of Ukraine's constitutional rights and freedoms of man and citizen may not be restricted, except in accordance with the Constitution of Ukraine.

Constitutional rights and freedoms are fundamental to the existence and development of the Ukrainian people, and the state is obliged to create effective organizational and legal mechanisms for their implementation. The absence of such mechanisms undermine the essence of the constitutional rights and freedoms, since it leads to the fact that they are declarative, and this is unacceptable in a state of law.

Mentioned Case definitively points at the priority of human rights and treasures declaring by the Constitution in Ukraine. But, in fact, reality differs from the high declarative language of that Court decisions.

All went wrong with the implementing into life the Law of Ukraine "On Protection of Personal Data". The Law of Ukraine "On Protection of Personal Data", adopted 01.06.2010 № 2297-VI, date of entry into force: January 1, 2011. Discussions related to correspondence of the Law with International and European Law are very loud until now. Ukrainian Constitutional

principles (freedom of movement, freedom of the privacy immunity) are broken by this Law too. There is no balance between security, legal order and constitutional freedoms since the Law "On Protection of Personal Data" entered into force in Ukraine. Although article 32 of Ukrainian Constitution states, that no one shall be a subject to interference with his private and family life, except of in accordance with the Constitution of Ukraine, the reality differs materially from the Main Law in Ukraine.

The present Law regulates relations related to the protection of personal data during its processing. The present Law does not apply to creation of databases of personal data and processing of personal data in such databases:

1. by natural persons – exclusively for non-professional personal or household needs;
2. by journalists – in the process of performing official or professional duties;
3. by professional creative workers – for performing creative activity.

According to Article 2 of the present Law, personal data is defined as data or a collection of data on a natural person that is or can be clearly identified. Processing of personal data is defined as any action or a series of actions performed partially or completely inside an information (automated) system and/or catalogue of personal data and related to collection, registration, accumulation, storage, adaptation, amendment, updating, use and dissemination (distribution, sale, transfer), depersonalization and deletion of data on a natural person.

According to Article 4 of the present Law, the following are subjects of relations related to personal data:

- subject of personal data;
- owner of the personal data database;
- manager of the personal data database;
- third party;
- authorized state body in the issues of personal data protection;
- other bodies of state power and bodies of local self-government, whose scope of authority includes personal data protection.

Objects of protection include personal data processed in personal data databases. By regime of access, personal data, except of depersonalized personal data, belongs to information with restricted access (Article 5 of the present Law).

Article 6 of the present Law establishes the general requirements to processing of personal data.

Article 7 of the present Law forbids processing of personal data on race or ethnicity, political, religious or world views, membership in political parties and trade unions, as well as data relating to health or sexual life. However, this provision of the Law does not apply if the processing of personal data:

- is carried out with an explicit consent of the subject of the personal data for such processing;
- is necessary to exercise rights and perform obligations in the sphere of labor relations, according to the law;
- is necessary to protect the interests of the subject of personal data or another person, in case of legal incapacity or severely restricted capacity of the subject of personal data;
- is done by a religious organization, public organization of a world-view nature, political party or trade union created according to the law, provided that such processing is related exclusively to the personal data of the members of such organizations or persons maintaining a stable contact with them due to the nature of their activity, and that the personal data is not disclosed to third parties without the consent of the subject of personal data;
- is necessary for rationale, satisfaction or protection of legal demands;
- is necessary for health care or treatment, provided that such data is processed by a medical man) or another employee of a health care institutions charged with protection of personal data;
- concerns criminal charges, court verdict, execution of legal authority by a state body to conduct operative investigation, counter-intelligence activity and combat terrorism;
- concerns data that was promulgated by the subject of the personal data.

The rights of the subject of personal data are described in Article 8 of the Law.

The personal data database is subject to state registration by means of entering an appropriate record into the State Register of Personal Data Databases by the authorized state body in the issues of personal data protection. Registration of personal data databases is done on application basis, by notification (Article 9 of the present Law).

According to Article 10 of the present Law, the use of personal data envisages any actions of the database owner in respect of processing and protection of such data, and actions related to granting full or partial right of processing personal data to other subjects of relations related to personal data, carried out by consent of the subject of personal data or according to the law.

The main problem of that law is with formulated in abstract manner its regulations. Even if imagine, that phisical person shall sign some paper, that she or he understand their rights and agree to let process of their personal data, it is not obviously, that authority specialist explain it clearly to them. Another non-fairness of the law is the long enough list of the exceptions of the processing of personal data. It is simply dangerous to imply such law in Ukraine.

01.07.2012, entered into force the Law of Ukraine "On amendments to some legislative acts of Ukraine on greater responsibility for violation of legislation on protection of personal data." The mentioned law supplemented the Administrative Offences Code of Ukraine and the Criminal Code of Ukraine. Article 182 of Ukraine's Criminal Code on violation of privacy was modified with the mentioned Law. A fine of five hundred to one thousand tax-free minimum incomes may be imposed to the person for illegal collection, storage, use, destruction, dissemination of confidential information about a person or an illegal change of such information, except as provided by other provisions of the Code , or it may be a subject to corrective labor for up to two years or arrest for up to six months, or freedom restriction for a term up to three years.

Very interesting document, *the Decree „On Approval of Registration and Receiving Order of Ukrainian citizens' passports”* approved the Ministry of Internal Affairs of Ukraine 13.04.2012 N 32.

It is regulation in that Decree:

V. Issuing a passport to some categories of citizens

5.2. Citizens of Ukraine who ever lived abroad and returned to live in Ukraine, get passports in the territorial divisions where they will get the registration of residence. The ground for a passport issue is a passport of Ukraine for traveling abroad with a mark of "Out of consular registration" supplied by foreign diplomatic institutions of Ukraine. If a person returned to live in Ukraine without removal of consular registration, he or she applies a statement about returning to live in Ukraine, stating address of the future registration or the place of residence in Ukraine to the territorial authority. Employee of the territorial authority revokes a note about registering consulate passport of Ukraine for traveling abroad and sends a message to the Foreign Ministry of Ukraine on registration of a place of residence in Ukraine. Passport of a citizen of Ukraine for traveling abroad with canceled stamp on staying at the consulates is the ground for his or her passport.

Freedom of movement has forgotten in the Decree.

The main inconsistencies between the Ukrainian legislation on Personal Data Protection, Public Data Access and On Grounds of Corruption Prevention and Counteraction are:

1. There is no clear distinguishing difference and no balance between personal data and public information definitions in Ukrainian legislation.
2. Declarative norms are mainly used in such legislation. Many regulations on issues will appear in the future – bad legislative technics in use.
3. Inconsistencies of these Laws with Ukrainian Constitution.
4. Personal freedoms and rights are not protected in regard to the personal data processing (other goals of Ukrainian power representatives, than they declare – control of citizens is real one.)

International and European Law Applicable to Protection of Personal data in Ukraine.

I. International and European Law Applicable to Protection of Personal data in Ukraine.

- 1) Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (ETS No. 108) 28 January 1981;
- 2) Additional Protocol to the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data regarding supervisory authorities and transborder data flows Strasbourg, 8.XI.2001;
- 3) Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data.

II. Ukrainian Legislation:

Acts:

- Constitution of Ukraine, 28.06.1996 № 254к/96-BP
- Law of Ukraine "On Ratification of Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data and Additional Protocol to the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data regarding supervisory authorities and transborder data flows, 06.07.2010 N 2438-VI;
- Law of Ukraine "On Protection of Personal Data", 01.06.2010 № 2297-VI;
- Law of Ukraine "On Amending the Law of Ukraine "On Personal Data Protection"", from 20.11.2012 № 5491-VI
- Law of Ukraine "On the One State Demographic Registry and Documents, which confirm Ukrainian Citizenship, identify or her special status", 20.11.2012 № 5492-VI;
- Law of Ukraine "On State Registration of Civil Status Acts", 01.07.2010 № 2398-VI;
- The Law of Ukraine On Information, 02.10.1992 № 2657-XII;
- Law of Ukraine "On Access to Public Information", 13.01.2011 № 2939-VI;
- The Law of Ukraine „On Protection of Information in Automated Systems”, 05.07.1994

№ 80/94-BP;

- Law of Ukraine “On Grounds of Corruption Prevention and Counteraction”, Declaration, 07.04.2011 № 3206-VI;
- Law of Ukraine "On the State Land Cadastre", 07.07.2011 № 3613-VI, date of entry into force: January 1, 2013;
- Law of Ukraine On Access to Judicial Decisions, 22.12.2005 № 3262-IV date of entry into force: June 1, 2006;

By-Laws

- Decree of Ministry of Justice of Ukraine „On Approval of Typical Order for Personal Data Processing in Personal Data Bases”, 30.12.2011 № 3659/5;
- Decree of Ministry of Internal Affairs of Ukraine „On Approval of Order of registration and receiving of citizen's of Ukraine passport”, 13.04.2012 N 320;
- Decree of Ministry of Justice of Ukraine „On Approval of Regulation on the One State Registry of Persons, who committed corruption offenses”, 11.01.2012 № 39/5;
- Decree of Ministry of Justice of Ukraine „On Approval of Regulation on the Unified State Register of Court Decisions conduction”, 25.05.2006 № 740 .

III. Useful links:

<http://zpd.gov.ua/dszpd/en/index>

<http://www.pravo.org.ua/publications/monohrafii-ekspertiv/1146-naukovo-praktychnyi-komentar-do-zakonu-qpro-zasady-zapobihannia-i-protydii-koruptsiiq.html>



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