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Applicability of Private Law of De-facto Regimes

Abstract:

The applicability of private law of de-facto regimes poses particular conflict-of-law challenges for the state and its respective authorities involved, in particular courts. This article analyses these challenges in the light of the Luhansk and Donetsk National Republics in Ukraine, and further illustrates problems arising from the (non-)recognition of de facto regimes in the context of other territories such as Taiwan and Moldova, and Crimea, among others. The article concludes that recognized states cannot simply ignore the existence of a de facto regime territory. The political non-recognition of such territories should not be an obstacle to the application of the law to protect the rights of individuals in private relationships.

I. Introduction

The modern world progresses in the period of economic globalization, where states do not exist separately, but constantly interacting both in public and private spheres. Private relations between individuals, companies go beyond the boundaries of a particular state and become private law relationships with foreign elements. While domestic legal relationships are obliviously governed by the law of the single state to which they are connected, international ones raise the special issue of the applicable law: it is necessary to determine which law should be applied to them.

At first sight, the problem of law chose has only technical character: one should analyze domestic international private law of the particular state, find the collision binding rule, and choose the applicable law to the relations with the foreign elements. But private law regulations can't exist separately from public actions of a particular state.

The political map of the world is constantly changing: some states disappear and others arise. But the above-described process doesn't always pass calmly and in accordance with the procedure generally recognized in the international treaties. Thus, newly formed states, such as Luhansk and Donetsk National Republics in Ukraine, Transnistria in Moldova, South Ossetia in Georgia, etc. do not gain international recognition. This means that recognized states don't interact with non-recognized ones in public law relations: do not establish consular and diplomatic institutions, do not become a part of international organizations and the party in international treaties, do not get loans for the development of the economy and the social sphere and so on. Non-recognition of newly formed states leads to the appearance of territory with un-

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clear legal status, and it arises new problems: on the one hand in case of the emergence of conflicts in the private sphere with a foreign element the court should use conflict of law rule and apply foreign legislation and on the other hand the non-recognition of a state leads to contradictory status of mandatory rules of conduct in force in its territory, which is called de facto regime law.

The following paper focuses on:

- issues of influence of procedure of political (public) recognition of a particular state on the possibility of applying by the court or other public authority the law of such state (de facto regime law) as a conflict of law rule in the private relationships with the foreign element;
- issues of applying the law of de facto regimes into the contract, international contract;
- issues of applying the law of de facto regimes by the courts as the material choice of law;
- issues of applying the law of de facto regimes by the courts as a conflict of law choice.

The principal purpose of this paper is to explore international and domestic (Ukrainian) legal acts, which regulate the applying of foreign law in private relations on the possibility of the application of the law of de facto regime, examine provisions of legal doctrine in this field and analyze the decision of international courts and recognized state courts.

II. State recognition as a precondition of the applicability of its law

First of all, in research of the problem of applicability of non-recognized law, it is important to describe the recognition and its legal consequences.

In the doctrine of international law, there exist two main theories of recognition of state: constitutive and declaratory.

The constitutive theory determines that only international recognition of the state creates international rights and obligations, which means that relations with non-recognized states are impossible.[1] Under this theory, a state exists exclusively by recognition by other states. The theory splits whether this recognition requires "diplomatic recognition" or merely "recognition of existence."[2] This theory provides that only and exclusively through recognition a state becomes an international person and a subject of international law.[3]

According to the declaratory theory, international recognition of a state only certifies its appearance in the international arena of a new subject, but does not create a

1 *И. Маланчук*. Вступ до міжнародного права за Ейкхерстом (*Malanchuk*, Introduction to international law by Eikhurst), Харків: Консум, 2000. с. 135.

2 *J. Yeh*, What would happen if Taiwan lost all of its diplomatic allies? The China post /Asia news network, Feb 13, 2017.

3 *J. Chitty*, The law of nations, 1844, p. 138, http://www.loc.gov/rr/frd/Military Law/Lieber Collection/pdf/DeVattel LawOfNations.pdf.

state.[4] An entity becomes a state as soon as it meets the minimal criteria for statehood. Therefore, recognition by other states is purely "declaratory".[5] This theory gives the possibility to affirm, that the state can exist independent of consents of other states, and its law can exist and should be applied by the legal entity of other states in private law relations.

After the appearance on the United Nations, the member states tried to develop the common legal act, which should determine the procedure of state recognition. For this purpose the International Law Commission of the UN in 1949 included the questions of recognition of states and governments to topics of the Commission work program, but the institution of recognition has not been codified and is still regulated by the customary law, general principles of international law, some multilateral and bilateral agreements[6],[7] resolutions of international bodies and organizations,[8] as well as diplomatic documents of certain states and doctrinal provisions.[9]

In addition, both in legal doctrine and in practice the international state recognition based on its form is divided on recognition *de jure*, recognition *de facto* and a special type of recognition – temporary recognition *ad hoc*.

Recognition of state *de jure* means that a recognized state strictly expressed in an official way its position in relation with another state by establishing full diplomatic, economic, trade, cultural and other relations.[10]

Next to *de jure* recognition, *de facto* recognition should be mentioned, which has a transitional nature. On the one hand such type of recognition provides the establishment of consular relations and the development of trade and economic cooperation between the states, but on the other hand recognition *de facto* is weak, not final, and

4 *А. О. Філіпєв*, Приватне право невизнаних держав та практика правозастосування (*Filipiev*, Private law of unrecognized states and practice of law enforcement). Університетські наукові записки, 2007, № 4. с.178.

5 *R. Perera, N. B. Fernando*, Recognition is essentially a political act declaratory in nature but clothed in legal reasoning. Regard to state practice, https://www.academia.edu/3798826/Recognition_is_essentially_a_political_act_declaratory_in_nature_but_clothed_in_legal_reasoning.

6 See Montevideo Convention on the rights and duties of states from 26 December 1936, which provide that the political existence of the state is independent of recognition by other states.

7 See Vienna Convention on the representation of states in their relations with international organizations of a universal character from 14 March 1975, which provide in art. 82 that the establishment or maintenance of a mission shall not by itself imply recognition by the sending state of the host state or its government or by the host state of the sending state or its government. Which confirms the possibility of state existence, regardless of its political recognition by other states.

8 See the Resolution of the International Law Commission from 24 April 1936, in which the commission declared that recognition has declarative value. The existence of a new state with all legal consequences that entail this existence does not depend on recognition by one or more states.

9 *З.З. Карвацька*, Проблема визнання у міжнародному праві (*Karvatska*, The problem of recognition in international law). Наукові записки Львівського університету бізнесу та права, 2010, с. 36.

10 *П. В. Пронюк*, Сучасне міжнародне право (*Pronyuk*, Contemporary International Law). навч. посіб. 2-е вид., змін. та допов. К. : КНТ, 2010, с. 344.

regardless that it is the first step to full recognition, *de facto* can be withdrawn by the state, which proclaimed this recognition.[11]

A special type of formal procedure of recognition of a state is *ad hoc*. It means that keeping the position of official non-recognition, the particular state can interact with the non-recognized state for the solution of a specific situation (e.g. protection of citizens of one state, which are in the territory of another one).[12]

For the purpose of this article effective recognition will be only a de jure one, because the legal consequences of it are recognition of legal force by the laws of that recognized state.

Another important concept, which needs research, is the concept of the applicability of the law. Under it the doctrine understands the realization of legal norms, which consist in the application of their regulations throw the individual acts of authorized bodies,[13] approval based on the rules of the law of decisions in specific cases.[14]

In case of private relations with foreign elements before an application of particular law, the legal body, whose duty is to apply the law, should determine if this particular law exists. When the existence of the law is confirmed, the legal body should analyze the regulative act and match the actual individual relationships that it regulates.

When a jurisdictional organ is facing relations with a foreign element, and under the general rule of international private law the law of the non-recognized state should be used, and that particular state does not want to have any relations with another state (a non-recognized one), the judicial organ should testify that the rules which exist in fact and have effect over a defined territory, people, or in reality do not exist, or that rules, which regulate the controversial relationship, are not a law.[15]

Thus, at first sight, international recognition has a decisive value for the applicability of particular state legal norm. Under the provision, which exists in the actual doctrine of private law, a recognized state without any doubt applies the material and the conflict of law rule only towards such states, which are recognized under declaratory theory and de jure form.

III. Private law relations vs. Public (Political) law

Another important moment, which should be discussed, is the correlation between the public relation of particular states and private relations between individuals.

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11 *К. Атіка,* Міжнародне приватне право. Курс лекцій (*Atika*, International private law. Course of lectures), 2009, с. 215, http://www.info-library.com.ua/books-book-150.html.

12 *И. Н. Бирюков*, Международное право: учебник для вузов (*Biryukov*, International law: a textbook for high schools), 6-е изд., перераб. и доп. Москва : Издательство Юрайт, 2013, с. 821.

13 *А.Д. Машков*, Теорія держави і права. Підручник (*Mashkov*, Theory of state and law. Textbook). К.: Дакор, 2014, https://idruchniki.com/2015073165661/pravo/teoriya derzhav i i prava.

14 *О.Ф. Скакун*, Теорія держави і права: Підручник (*Skakun*, Theory of State and Law: Textbook), Харків: Консум, 2001, с. 656, http://www.dut.edu.ua/uploads/1_948_39072050 .pdf.

15 *Філіпєв*, fn. 4, с. 179.

The famous Roman lawyer *Ulpian* in his digests writes that the law as integrity exists in two aspects, private and public. According to public law (*jus gentium)* everything belongs to the benefit of the Roman state, while the private law (*jus privatum*) states that everything which belongs to the benefit of individuals.[16]

For the study of the interconnection between the public recognition of a state and the possibility of the application of its law, it is important to identify the criteria for their division into public and private. From the period of the Roman Empire, the main criteria which divided the law into two branches is interesting, which is achieved by the rules of law. It was considered that for public law predominant value has a socially significant (public) interest. It means the interest of social community satisfaction, of which it is a condition and a guarantee of its existence and development, is recognized by the state and secured by the law. In contrast, the criterion for defining private law is private interest of a natural or legal person, which is expressed in the interests of individuals – in their legal and property situation as well as in their relationship with other subjects. [17]

The theories of recognition exist in the public law sphere, between states. Recognition of state here means the "official invitation"[18] to take part in the big political game – be a member of international organizations, which in turn gives the opportunity "to vote" and to be heard on the political arena and make a collective decision on some important world events.

On the other hand the main purpose of private law, which exists between equal private subjects (persons and companies), is resolving the legal problems between individuals.

In this regard, there is a question if the public non-recognition of a state automatically excludes the possibility of applying the law of such a state in a situation when such application is effective and directed on the protection of the private interests of the person?

Despite the purpose of private law, which aimed to resolve the legal problems between individuals, additional research as to whether this law is adopted by a reco-

16 Publicum jus est quod ad statum rei romanae spectat, privatum jus quod ad singulorum utilitatem (Ульпіан. Дигести, 1, 1, 1, 2); *Н. Дювернуа*. Чтенія по гражданскому праву. Т.1.Введеніе и часть общая. С.Петербургъ. 1902. https://books.google.com.ua/books?id=YYI.IBQAAQBAJ&pg=PA34&lpg=PA34&dq=Publicum+jus+est+quod+ad+statum+rei+romanae+spectat,+privatum+jus+quod+ad+singulorum+utilitatem&source=bl&ots=BlnB5w3zaa&sig=ACfU3U1PC6cJP2MVyRTZurY7ePf6swLMhA&hl=uk&sa=X&ved=2ahUKEwith8je9rLhAhUipIsKHc92CyYQ6AEwAXoECAQQAQ#v=onepage&q=Publicum%20jus%20est%20quod%20ad%20statum%20rei%20romanae%20spectat%2C%20privatum%20jus%20quod%20ad%20singulorum%20utilitatem&f=false.

17 *С.П. Погребняк*. Поділ права на публічне і приватне (загальнотеоретичні аспекти). Державне будівництво та місцеве самоврядування (*Pogrebnyak*. Dividing the rights to public and private (general theoretical aspects). Public construction and local government). Вип.12, 2006. с. 6.

18 Non-recognized states cannot take part in powerful political and military organizations (such as EU, UN, NATO), which have a strong influence over international politics and law. The political invitation here means the beginning of cooperation, the establishment of diplomatic ties between recognized states and non-recognized ones, which is understood as the first step towards international recognition.

gnized state should not have any special significance value. Placing interests of individuals on the top, we agree with the opinion that the international recognition of a state is not a prerequisite for the application of its law. The application of the effective law, even if it's adopted by an unrecognized state leads to an international harmony of decision-making. This ensures that the right acquired by an individual under the law of an unrecognized state is effective also outside the borders.[19]

The above statement finds its confirmation in the International court decisions. The two main decisions of the International Court of Justice (ICJ) and the European Court of Human Rights (ECHR) should be mentioned in the discussed themes.

Firstly, the basis for the delineation of recognition of the state and the application of its law became the Advisory opinion on legal consequences for states of the continued presence of South Africa in Namibia, in which the ICJ pointed out that non-recognition should not deprive the people of Namibia of any advantages following from international cooperation. In particular, the illegality of the acts by the Government of South Africa in Namibia should not be extended to such acts as registration of birth, marriages, and death.[20]

The Namibian exception has a strong influence over the judgment of the European Court of Human rights. Relevant is the *Cyprus vs. Turkey* case in which the ECHR's view, recognizing the judicial system in Turkish Republic of Northern Cyprus for the purposes of the Convention is also compelled by the need to avoid causing detriment to the individuals who may be able to use remedies offered by such a system to prevent violations of the Convention, and more generally to avoid a legal vacuum in human rights protection.[21] Most important was a statement of the Court under which the interest of the inhabitants requires some flexibility with regard to the acts of de facto authorities regarding private law relationships.[22] Otherwise, the inhabitants of the territory would be deprived of all their rights to which they are entitled.[23] Also, the Court provides that the life must be made tolerable and has to be protected by the de facto authorities, including their courts, and in the very interest of the inhabitants, the act of these authorities related to it cannot be simply ignored by third states or by an international institution, especially by a court.[24]

The Namibian exception and the decision of the ECHR in case of Cyprus vs. Turkey have a strong influence over the national court decision. Taking into account the

19 *K. Miksa*, Consequences of Non-recognition of State in Private International Law from the Polish Perspective, Osteuropa-Recht 2016, p. 151.

20 Legal consequences for states of the continued presence of South Africa in Namibia (South West Africa) Notwithstanding security council resolution 276 (1970). The advisory opinion of 21 June 1971, https://www.icc-cpi.int/RelatedRecords/CR2018_04586.PDF.

21 *G. Nuridzhanian*, (Non-)Recognition of De Facto Regimes in Case Law of the European Court of Human Rights: Implications for Cases Involving Crimea and Eastern Ukraine. European Journal of International Law, https://www.ejiltalk.org/non-recognition-of-de-facto-regimes-in-case-law-of-the-european-court-of-human-rights-implications-for-cases-involving-crimea-and-eastern-ukraine/?fbclid=IwAR2KEGzSB5IWsC8aVrvrlDaxlLNnlCb3-BCaqQrqhp_vOCMtVcialEPIPa2OY.

22 European Court of Human Rights. Case of Cyprus v. Turkey. Application no. 25781/94. Judgment Strasbourg, 10 May 2001.

23 *K. Miksa*, fn. 19, p. 152.

24 ECHR, Cyprus vs Turkey. The judgment of 10 May 2001, Reports 2001-IV, para. 96.

situation in Ukraine from 2014, when the part of Ukrainian territory (Crimea) got under control of the Russian Federation power, other territories (Donetsk and Luhansk regions) are under control of separatist groups, Ukrainian courts still should take the decision in private cases, connected with this territory with unclear status. The first court decision in Ukraine, in which the Namibian exceptions were used, was about the state registration of acts of civil status that took place in temporarily occupied territories of Ukraine (establishing the fact of the birth of a child), was taken by Popasnyansky district court of Luhansk region from 20 August 2015, case № 423/880/15-ц.[25]

Consequently, it should be noted that private and public law have distinct goals. Political non-recognition of states should not have a negative impact over private law relations. This statement in their decisions confirm both the International Court of Justice and the European Court of Human rights. Based on the above decisions it can be asserted that a state court in private law cases, first of all, should protect the right of individuals, looking for a way to apply the rules of an effective law, despite which jurisdiction body created this legal norm.

IV. Conflict of Law Difficulty

Analyzing the position of ICJ and ECHR we concluded that the law of the de facto regime should apply if it protects the interests of the private person. But it is still important to determine the possibility of using de facto regime law as a conflict of law rule.

Another problem, which one can occur in this situation, regards the *renvoi* concept. Renvoi is a traditional concept that can be found in the general part of various Private International Law acts, and literally means to send back or return.[26] Renvoi or Reverse referral is repeating sending the conflict rule of law of a foreign state to the law and order of the state the conflict norm of which was sent to this foreign law and order.[27] According to the application of non-recognized state law, the court should investigate:

- Should foreign law apply as a whole, i.e. including its conflict-of-law rules?
- Is reference actually made only to substantive law?

If the court applies de facto regime law as a whole, the collision norm, which such law contains can sent situation to regulation by some third material law. Such use of non-recognized state law automatically excludes purpose, based on which the court uses de facto regime law (in order to protect the rights of an individual most adequately).

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25 Рішення Попаснянського районного суду Луганської області від 20.8.2015 № 423/880/15-ц. (Decision of the by Popasnyansky District Court of Luhansk region dated August 20, 2015, No. 423/880/15-c). http://www.reyestr.court.gov.ua/Review/49187054.

26 *O. Karim Khan*, The doctrine of renvoi In Private International Law, https://www.academia.edu/21882717/THE_DOCTRINE_OF_RENVOI_In_Private_International_Law.

27 On International Private law. Law of Ukraine from 23.6.2005 № 2709-IV., https://zakon.rada.gov.ua/laws/show/2709-15.

It is interesting to compare the possibility for application de facto regimes law to international private law relationships which provide the Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) and the Law of Ukraine on International Private law from 23.6.2005.

Interesting for us is art. 3 which provides the freedom of choice, under which:

A contract shall be governed by the law chosen by the parties. The choice shall be made expressly or clearly demonstrated by the terms of the contract or the circumstances of the case. By their choice, the **parties can choose the law** applicable to the whole or part of the contract. A contract shall be governed by the law chosen by the parties. The choice shall be made expressly or clearly demonstrated by the terms of the contract or the circumstances of the case.[28]

To understand what the legislator means, on p. 13 of Recitals to the Rome I Regulation we can find next provision:

This Regulation does not preclude parties from incorporating by reference into their contract a **non-State body of law** or an international convention.[29]

Taking into account the possibility of using non-recognized state law as a choice of law, provided by Rome I Regulation the doctrine expresses ambiguous views.

In the commentary to Rome I regulation *Ferrari* points out that it is a controversial question if we can choose the conflict of law rule of non-a state law based on art. 3 of Rome I Regulation, with a conflict of law result. In the present, it is excluded. We can only choose the non-state law as a material law choose.[30] Thus, the concept of *renvoi* in the opinion of these scholars will not apply, choosing the law of de facto regimes, the legal entity should stop, and resolve the dispute based on such provisions.

Relevant is *Wendland's* point of view. He notes in his commentary to Rome I Regulation the provision of art. 3, which permits choosing only the law of the state (in the public law meaning). He also noticed that in case someone chooses customary law, it doesn't mean that this will be the conflict of law choice. But it may have consequences in a case when objectively applicable law accepts this customary law as applicable law.[31]

Another opinion was expressed by *Martiny*, who drew attention to the fact that despite the assertion of using only state law the Rome I Regulation does not create the definition of the state.[32] It means that we can only assume whether the European le-

28 Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32008R0593.

29 See fn. 28.

30 *Ferrari/ Kieninger/ Mankowski*, Commentary of (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I). Internationales Vertragsrecht, 2018. № 18.

31 *Wendland/ Mankowski*, Commentary of (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I). Beck Online. № 75.

32 MüKoBGB/*Martiny*, 8th Edition 2018, Art. 3 Rome I, para 28.

gislator adheres to the declarative theory of recognition, and understands under the concept of state only full recognized one.

Martiny adheres to the position that the theoretical possibility of choosing non-state law, which provides in the Recitals to the Rome I Regulation can be connected with the type of agreement, and the participants of it. It can be asserted that such a norm was provided to allow physical persons to choose *lex mercatoria* norms or to conclude a contract without the law of a particular state. But another understanding of non-state law we can find in a case when the parties decided to choose the religion law as a statute of contract. Thus, in England a case was heard by the court about the possibility of applying the law of Shariah, as a regulative law. The court does not apply the law of Shariah as a statute of contract. In a similar case, which held in Israel, the court declared invalid a provision that provided the law of the Torah as a statute of contract. It must be noted that choosing sports law is forbidden, too.[33]

The possibility of choosing international customs based on art. 3 of Rome I Regulation, applying International Commercial Terms, UNIDROIT Principles of International Commercial Contracts remains an important question. In the opinion of *Ferrari*, choosing the above mentioned international principles and customs can only be a material choice of law, which means that the absolute obligatory law of the state with its connecting factor should still be applied.[34]

Another type of regulation possibility of choosing the law of de facto regimes contains The Law of Ukraine On International Private law from 23.6.2005. Art. 1 provides that:

choice of law – is the right of participants in the legal relationship to determine **the law of which state should be** applied to the legal relationship with a foreign element.[35]

But this provision does not directly provide non-recognition of the state as a limitation of using its law. But the system of national private law created a complicated complex of rules, which allowed the national court not to use the law of the non-recognized state, even if by collision norm it should use it. Among these restrictions, the Ukrainian law provides imperative norms, warning about public order, reciprocity, evading the law, the impossibility to establish the content of foreign law for a reasonable time,[36] but non-recognition of state is missing in this list.[37]

The Ukrainian courts deny applying the law of de facto regimes in any form. The judgment of the Odessa Commercial Court of appeal in case №15/2002/06 of 18 of July 2006 may serve as an exemplification of this fact, the legal capability of the appellant cannot be defined by Transnistrian Law, because "Transnistria does not exist as a separate State, which is a well-known fact."

33 See fn. 32.
34 *Ferrari/ Kieninger/ Mankowski*, fn. 30., para 19.
35 On International Private law. Law of Ukraine from 23.6.2005 № 2709-IV, https://zakon.rada.gov.ua/laws/show/2709-15.
36 See fn. 35.
37 *Фіхінєв*, fn. 4, с.183.

In accordance with the actual circumstances of the case, the court did not give a legal value of legal actions of the appellant, which was legal under his personal law – the law of Transnistria.[38]

The court does not take into account that even though Transnistria is not officially recognized by Ukraine, it has an effective control over its territory by the law, public authorities, etc. And what is the main important thing – the law of Transnistria is completely different from the Moldovan one.

Asserting that Transnistria does not exist as a separate state, the Odessa Commercial Court of appeal denied the existence of any public relations on the territory of Transnistria, because they one way or another do not comply with the law of Moldova.[39]

However, the events that occurred in 2014-2015 in Ukraine (the annexation of the Crimea by the Russian Federation, the proclamation of the Luhansk and Donetsk People's Republic) lead to the necessity of developing a unified approach for application of law, which is valid on annexed territories and regulates private relations by the Ukrainian courts and other public authorities.

The events, as mentioned above, lead to the occurrence of a situation where a citizen of Ukraine, who lives on temporarily occupied territories, faces problems of obtaining documents, issued by Ukrainian public authorities. Instead of this, documents, confirming the registration of birds, marriage, and death are issued by de facto state authorities.

Ukrainian courts meet with the problem of recognition of higher specified documents, in time when Ukraine totally denies the existence of independent states on its occupied territories. The way out of this situation may be using practices of ICJ, namely the Namibian exception when despite the public non-recognition of one state by another, the documents issued in the interest of private persons are recognized.[40]

According to the Uniform State Register from July 2015 to May 2019, 30 718 judgments were passed in which judges referred to "Namibian exceptions", it should be noted that from January 1991 to June 2015 no such decision has been made.[41]

But, although documents issued by de facto regime authorities are recognized by Ukrainian courts, they are still not allowed to apply the law of the de facto regime as applicable law in private law relations with a foreign element. In our opinion, this disregard of the application of de facto regime law as material law to international private law relations testifies only a lack of awareness on the part of Ukrainian judges re-

38 Постанова Одеського апеляційного господарського суду від18 липня 2006 року у справі №15/202/06 (The decision of the Odessa Economic Court of Appeal of July 18, 2006 in the case No. 15/202/06).

39 *А.С. Довгерт/ В.І. Кисіл*, Міжнародне приватне право. Особлива частина: підручник (*Dovgert/ Kisil* (eds), International private law. Special part: textbook), К.: Алерта, 2013, с. 400.

40 *В. Ф. Нестерович*, Верховенство права та забезпечення прав людини на тимчасово окупованих територіях України (*Nesterovich*, The rule of law and human rights in the temporarily occupied territories of Ukraine), Наукові записки НаУКМА, 2017, Том 200, Юридичні науки, с. 90.

41 See http://reyestr.court.gov.ua/.

garding the main task of private law: despite any public interest protecting the rights of a private person at a maximum level.

V. The law of de facto regimes in international practice

1. Example of the Taiwanese law

As to the applicability of private law of de facto regimes, it is useful to pay attention to the Taiwanese example. It is a unique case that Taiwan, existing for half a century, has established trade relations, transportation communications, developed tourism, and established diplomatic relations with 17 countries including Guatemala, Haiti, Honduras, Kiribati, the Marshall Islands, Nauru, Nicaragua, etc. But most of the states do not recognize Taiwan, but nevertheless apply Taiwanese law in private relations.

It should be noted that around Taiwan there is a unique situation in international practice. De facto it is a separate state with all the relevant attributes – a constitution, a parliament, a government, its own currency, an army. De jure – it is one of the provinces of the People's Republic of China, whose power never actually extended to its territory.[42]

Throughout history, Taiwan has always been an administrative unit of China. From the middle of the 13th century, successive governments of China established administrative bodies in Taiwan, exercising their jurisdiction there. In 1895, Japan occupied Taiwan as a result of the war of conquest against China. In 1945, having won the final victory in the anti-Japanese war, the Chinese people at the same time regained Taiwan. On October 25 of the same year, the plenipotentiary of the countries of the anti-fascist coalition – at the ceremony of accepting the surrender of Japan – in Taiwan on behalf of the Chinese government solemnly proclaimed that Taiwan is now officially returning to China.[43]

But after war, in China, the struggle between the ruling movement *Kuomintang* headed by *Generalissimo Chiang Kai-shek* and the Communist Party continued, and the communists won, which led to the escape of *Chiang Kai-shek* to Taiwan and spreading its power on the island. But the main catalyst, which led to the separation of Taiwan from China, became a contract between Taiwan and the United States of America about mutual protection signed in 1954. The provision of this contract finally fixed separating Taiwan from China. In fact, the USA ensured the island's political survival. But later, the recognition of the People's Republic of China by the USA led to breaking diplomatic relations with Taiwan, and later the United Nations General Assembly transferred the right of Chinese representation from delegations from Tai-

42 *П. Бутирська.* Острів Тайвань: між залежністю і незалежністю (*Butyrskaya*, Island of Taiwan: between dependence and independence), Міжнародний громадсько-політичний тижневик «Дзеркало тижня». Випю №28, https://dt.ua/gazeta/issue/1160.

43 *А. В. Юрковский*, Практика функционирования политической системы и международные отношения. (*Yurkovsky*, Practice of the functioning of the political system and international relations), Сибирский Юридический Вестник, 2002, № 4, http://www.law.edu.ru/doc/document.asp?docID=1124880.

pei (Taiwan) to delegations from Peking. From that time onwards (1971), Taiwan has existed as a non-recognized state.[44]

Furthermore, it should be noted that Taiwan did not claim to be an independent state, and to separate from China. The events, which have led to the separation of Taiwan have political character and have been caused by internal conflicts. Both Taiwan and the People's Republic of China strive to build a united single China. The main contradiction occurs when it comes to determining the power and the regime of the state (democracy or communism).[45]

It should be noted that the People's Republic of China considers Taiwan as a part of China. That is why in private law relations the court uses Taiwanese law as an interlocal choice of law.

Nowadays, the island is totally autonomous, it is not dependent on China in any case. Analyzing the conformity of Taiwan with the feature of the state, provided in the theory of state and law,[46] we can conclude that this non-recognized state owns all features of statehood (territory, population, sovereignty, the ability to issue laws) and that its non-recognition is based on the political disagreement, and the unwillingness of sovereign states to worsen their relations with China, which has a rather strong political position on the international arena.

During the period of the separation of Taiwan, China still has no legal instrument for the realization of its power over Taiwan territory. But, despite all the information mentioned above, active participation companies of Taiwan in trade relations with other subjects of private law, the non-recognition of Taiwan allows assuming that effective legal norms, which regulate private law relations in Taiwan are not regarded as proper law.

But new approaches to the delimitation of private and public interests of the state and individuals changed the approach to identifying the recognition of the state and the application of the law applicable in its territory. The doctrine and the decisions of courts in recent years are the same: i.e. applying private de facto regimes' law regardless of its recognition by the power of this state.

The process of applying the law of de facto regimes in private relations is developing in the direction of applying such law in cases when such law will be effective. This statement is confirmed by the decision of the courts of the European Union states.

In the case, OLG Düsseldorf, verdict of 2. September 2009-18 u 71/05, held by the German Court, it was decided to apply Taiwanese law as a conflict of law choice without any doubts. In this case, the court decided on the responsibility for improper performance of the obligation by the carrier, based on Taiwanese law. [47]

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44 *А. О. Філіпєв*, fn. 4, c.183.

45 See *H. Li Victor*, The Law of Non-Recognition: The Case of Taiwan. Northwestern Journal of International Law & Business. Volume 1. Issue 1.

46 *В.М. Кириченко/ О.М. Куракін*, Теорія держави і права: модульний курс (*Kirichenko/ Kurakin*, Theory of state and law: a modular course), Центр учбової літератури, 2010, с. 264.

47 See OLG Düsseldorf, verdict of 2.9.2009-18 u 71/05 it is a case concerning the performance of a contract of carriage, concluded between Taiwanese and German companies. The

Applicability of de facto regime law (Taiwanese law) as a conflict of law choice is not rare in the decisions of the German courts. It is connected with a high level of trading between Taiwanese and German companies. In the case, OLG Düsseldorf, in its verdict of 17. January 2007-18 u 98/05, defining the carrier's liability for breach of his obligation decided to apply Taiwanese law without any doubts.[48]

It is interesting to look at the doctrinal justification of the application of the courts of Taiwanese law. In accordance with the opinion of *Schröder*, nothing impedes the choice of Taiwanese law, because of such a choice being connected with the polities of China, and this choice will be qualified as an interlocal choice of law.[49]

It should be noted that in the case of Taiwan we can find a unique application of de facto regimes law by country, which declares Taiwan as an integral part of China. Hong Kong's Court of Appeal recently considered whether to enforce a judgment of a Taiwanese court (in *CEF New Asia v Wong Kwong Yiu John*) even though the government of Taiwan is not recognized by the Hong Kong government.[50] In its decision the Court of Appeal agreed with the important statement made by *Lord Wilberforce* in 1967 in the case between *Carl Zeiss Stiftung v. Rayner & Keeler Ltd* providing that in case, "where private rights, or acts of everyday occurrence, or perfunctory acts of administration are concerned [...] the courts may, in the interest of justice and common sense, where no consideration of public policy to the contrary has to prevail, give recognition to the facts or realities found to exist in the territory in question."[51]

2. Analysis of court decisions on the de facto application of the law

In the case of the application of the law of de facto regimes, the position of the Common law system – manifested in decisions of British and American courts – is interesting. In the opinion of these courts, the law of non-recognized states can be applied in cases when the executive authority confirmed that such an application does not harm the external policy of non-recognition.[52]

The theory mentioned above is reflected in the decision of the Supreme Court of New York, 15 February 1928, in the case of the ex-*Petrogradskiy International Commerce Bank vs. National City Bank in New York*. This case concerned the recovery of a deposit of the *Petrogradskiy International Commerce Bank (Petrogradskiy ICB)* in the *National City Bank (NCB)*. The deposit, before the Russian Revolution, was managed by *Bankers' Trust Company* in the name of three individuals and was drawn

carries (a Taiwanese company) performs his obligation improperly, and responsible under the Taiwanese law.

48 See OLG Düsseldorf, verdict of 17.1.2007-18 u 98/05- the case concerning breach the obligation of the Taiwanese company in the contract of carriage, concluded between Taiwanese and German companies.

49 *C. Schröder*, Der multimodale Frachtvertrag nach chinesischem Recht, S. 43.

50 Hong Kong Enforces Taiwanese Judgment. International law office. https://www.internationallawoffice.com/Newsletters/Litigation/Hong-Kong/Herbert-Smith/Hong-Kong-Enforces-Taiwanese-Judgment.

51 *R. Pisillo Mazzeschi/ P. De Sena*, Global Justice, Human Rights and the Modernization of International Law. Springer. 2018. p. 30.

52 *П. Мавлиух*. Ін. 1, с. 134.

from the general account of the Russian government and deposited with the *National City Bank*. These individuals were empowered to sign checks in the United States appointed before the Soviet Revolution. In a time, when the USSR already existed and nationalized all commercial banks, including the *Petrogradskiy* one, its former directors requested from the *NCB* to make some payment. For recognizing their authority, a check was presented, signed by the directors who had been accredited in 28 former years as competent to draw, but the check was dishonored. The Supreme Court of New York, in this case, decided that despite the fact that the USA does not recognize the USSR, the court nevertheless shall recognize that the authority of the *Bankers' Trust Company*, confirmed by the Russian government before the revolution, is over. The new power in the USSR, by decrees of 1917, declared to merge the *Petrogradskiy ICB* into the People's Bank. Its assets were confiscated, its liabilities canceled, and its shares extinguished, and by a later decree, in January 1920, the People's Bank ceased to exist. So, despite political non-recognition of the USSR, the Supreme Court of New York applied the USSR law (decree of January 1920) to confirm the fact that the existence of the *Petrogradskiy ICB* is over.[53]

VI. Conclusions

The applicability of the law of particular states by the legal entity of other states is closely intertwined with the procedure of international recognition. In the doctrine of public international law, there are two main theories of state recognition: the constitutive and declaratory one. For the purpose of the applicability of de facto regime law, the declaratory theory, which provides that a state exists regardless of the presence of its public recognition by other states should be used. It allows affirming that non-recognized states have their own legal system, and the effectiveness of their law does not depend on public recognition. This, in the same way, concerns the form of recognition. Using *the de facto* form of recognition is enough to apply the law of such a state.

For the applicability of de facto regime law, in the case when a particular state is entirely ignoring the existence of the new state with its own legal system, there should be separate concepts of political recognition of a state with the consequences of the establishment of diplomatic relations, inclusion in international organizations, signing of international treaties and the applicability of law in private relations between individuals. The impulse to place the interest of private persons over the public one was given by the International Court of Justice by establishing the Namibia exceptions for the recognition of acts of state authorities of the non-recognized state. The approach of the ICJ was supported by the European Court of Human Rights, reflected in the case *Cyprus vs Turkey*, where the court affirmed that life must be made tolerable and be protected by the de facto authorities, including their courts, and in the very interest of the inhabitants, acts of these authorities related thereto cannot be simply ignored by third-party states or by international institutions, in particular courts.

53 See Petrogradsky Mejdunarodny Kommerchesky Bank v. National City Bank, 253 N. Y. 23,170 N. E. 479 (1930).

The applicability of the law of a de facto regime by the court or by another legal entity needs to be provided in the legal action which determines the law of which state should be applied in the case of private relations with a foreign element. Such an act, which allows choosing the applicable law for the European Union, is the Rome I Regulation. The provision of art. 3 and the Recitals to the Regulation allow choosing non-recognized state law as a material choice of law. The provision of this regulation allows choosing as a material choice of law international customs, principles UNI-DROIT and International commercial terms.

In Ukraine, the possibility of choosing the applicable law is provided by the Law of Ukraine on International private law. This legal act allows choosing state law, but it does not determine whether such a state should be recognized or not. But despite this fact Ukrainian courts do not apply the law of de facto regimes, even where such application would protect the legal interests of the parties.

The events in Ukraine, in the light of the existence of temporarily occupied territories, provide for changes in the recognition of legal acts that are issued on de facto regime's the territory. Ukrainian courts, substantiating their decisions, refer to the Namibian exception. But there is still a legal gap in the application of the effective law of de facto regime by the Ukrainian court, based on the choice of law.

In my opinion, even if Ukraine does not recognize the power of the occupied territory of Crimea and Donetsk and Luhansk areas, it should, first of all, protect the rights of individuals and apply Russian law (or other applicable law in the territory).

The decision of the *Popasnyansky District Court* of Luhansk, which changed the practice of non-recognition of a document issued by the non-recognized state, was a relevant decision for the Ukrainian doctrine and judicial practice. Using the Namibian exception, the courts now do recognize acts of birth, marriage, death issued by LNR and DNR authorities in order to protect the Ukrainian people. In this situation, the Ukrainian court in its activities acts in a very similar way to Chinese courts, when the latter courts in fact do apply Taiwanese law. Ukrainian courts in their argumentation both in the case of LNR, DNR and Crimea defend the position that LNR, DNR and Crimea are a part of Ukraine, the authorities which issued such documents (the act of birth, etc.) doing so because there are no Ukrainian administrative authorities on these territories. Furthermore, there is still a discrepancy as to the recognition of documents issued by other non-recognized states by Ukrainian courts.

Taking into account Ukraine's close relations with – non-recognized –Transnistria, the Ukrainian doctrine and the position of courts should be the same as with the lost Ukrainian territories and other de facto states: i.e. recognizing documents of non-recognized authorities if such documents refer to individuals and legal entities.

The option of applying non-recognized state law in other civil relations based on collision norms under the law of Ukraine "On International public law" should become a norm for Ukrainian legal proceedings. For this purpose, the Ukrainian doctrine should be established accordingly, in which first of all the private interest of physical or legal persons must be protected. This means that even in a situation where Ukraine does not recognize the existence of a de facto state in private law cases, the courts should nevertheless recognize legal acts issued by authorities of a non-recognized state, and – furthermore – apply de facto state law to a given dispute.

Even in the case of the annexation of the Crimean territory, when under the collision norm the law of Crimea needs to be applied, Ukrainian courts should actually apply Russian law, even though Crimea was annexed by Russia, given that it is – according to the Constitution of Ukraine – still a part of Ukraine. The Ukrainian doctrine should develop towards using the most effective law for private persons, despite the public relations of the state.

The most illustrative example of such an application of effective law (which is at the same time de facto regime law) is the case of Taiwan: the courts of EU countries (Germany) chose the law of Taiwan as a conflict of choice rule. Furthermore, the People's Republic of China, in its relations with foreign element, does in fact apply Taiwanese law as effective law (though justifying such application based on using interlocal Chinese law).

Thus, globalization leads to the emergence of new territories with an uncertain legal status. In most cases, such territories have a high organizational level in terms of political power and law. Recognized states cannot simply ignore the existence of a de facto regime territory. The political non-recognition of such territories should not be an obstacle to the application of the law to protect the rights of individuals in private relationships.