CONVERGENCE OF THE PUBLIC AND PRIVATE LAW

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Abstract

This article is concerned to the achievement of the division of the law on public and private branches. Under the view of the authors such division is nominal and applicable just for study of law. Convergence confirms that the problem, functions and purpose of law are common, but the systemic and sectoral division of law are nominal. The main purpose of organizing relations is to organize any other relations, in particular which regulated by the norms of the private and public law. The relations which were built on the basis of the commons (norms) of coordination and subordination these relations at the really difficult period of history of Russia mediated, saved and changed the border between the private and public law, by virtue of that Russia survived the legal collapse. Today the question about not just obvious convergence of the private and public legal commons mentioned in the legal literature, means factually rapprochement of the subsystems of the private and public law, but also means intra-branch rapprochement of legal systems which form the branches of law.

Keywords: convergence, private, public, Rome law, civil law

INTRODUCTION

The discussion of the problem of convergence of public and private branches in the scientific circles of Russia intensified after the publication at 2011 the monography of one of the outstanding Russian scientists, doctor of law professor N.M. Korshunov focused to this problem (Meissner H.,1971).

The term of convergence in the scientific and education literature [from latin word «converge» - go up, gather] means as the process of approchement, of gathering and even merge of the objects and theirs features at the evolution process.

This term was obtained by the law from the political-economic learning 50-60 years of the past century with imminence of the erasure of economic, political and ideological differences between the capitalist and socialist systems, leading ultimately to their merger (Gelbreit Gr., 1969).

MATERIALS AND METHODS

Today virtually all lawyers – authors of the scientific publications unanimously call convergence as foreshadowing of the modern time. The features of convergence were founded in the reforming of the criminal justice (Zaytsev O.A., Abshilova G.V.) in interpenetration public and private prejudice (Kuznetsova O.A.), in the preparation of the energy code, regulates the commons of state regulation of the fuel-power balances and relationships of the customers of the energetic resources, theirs rights and obligations which

have the private character (Blinkova E.V.), in the field of the regulation of the procurements (Belov B.E.), in the sphere of the repletion of life wants of the citizens (Bobrovskaya O.N.), in the sphere of work of self-regulated organizations (Leskova U.G.) and in many other spheres.

We can tell with assurance that in the field of the regulation of the modern business and (more wider) civil relations [material and non-material relations], there are not any spheres, where the public and private basis and respective methods did not leave a traces.

Professor Korshunov N.M. concluded in his monographie that «Combination of the private and public law regulation as in the field of the private relations as in the sphere of the public relations – is the appropriate process of the legal development» (Sorokin P.A., 1964).

This characteristic has not been always useful for the regulation of the civil law relationships in Russia. Professor V.P. Kamishancky, for example, distinguished three stages of the development of the private and public commons in the civil legislation of Russia during the last 100 years (Rose J., 1968). But, we think, that there were four stages of the development.

RESULTS AND DISCUSSION

During the first stage [1917-1985 year] the imperative method of the regulation of the business affairs dominated. V.I. Lenin defectively advised to the developers of the new Civil Code of Russia – «We do not recognize «personal, private», everything is public, not private for us in the field of commerce. We need to apply just our revolutionary consciousness for the civil relationships, not «corpus juris romani» (Kovalev S. I., 1986).

At this situation the term «Private» was taken of from the legislative process. Just the term «Private International law» has saved its name. This term means the regulation of the relations between the Russian organizations with the foreign subjects.

The second stage continued from 1985 to 1991. It was linked with so called «reconstruction» of the political and economy structure of our society. There was a breakage of the soviet public order and a blistering improvement of the political and economy freedoms, new forms of the property and types of the legal entities, which were not known by the soviet civil law, were adopted. The role of the imperative norms was decreased as the role of the dispositive norms improved.

This process was inhibited a little bit at the beginning of the third stage, which can be nominally dated 1991-2001, but after that the abovementioned process increased noticeably in cause of rapid process of the privatization and deregulation. At the time of the intensive legislative procedure some new imperative norms were adopted, although the dispositive norms prevailed.

At the time when the state walk off form the economy, the culture, science and education, the destroying of the agriculture structure of the soviet period theoretically improved the role of the private commons, but on practice these changes without the necessary public control and help did not resolve any problems of state. Moreover, Russia lost all its advances of past years.

The fourth period, which can be nominally dated from the start of the 2000 and to the nearest time, linked with gradual consciousness of the importance of the public and, consequently imperative purposes in the commercial life of the country, in its economy, culture, communal service and other spheres of life of the society. Interference o the government in the private relations became the demand of time. The society and the government understood, that the resolving of all socially important problems is impossible without the adoption of the public norms (commons) in the civil law, which regulate the rules of conduct of the participants of the private, in particular contract relations. These relations show clearly the mean of the civil (private) law.

At the time of the investigation of the abovementioned periods it is necessary to pay attention to the fact that despite to the displacement of private or public commons (norms) is still mediated by the continuing under any legal provisions of the swinging pendulum of organizational relations, the allocation of which a separate item for the first time offered by O.A. Krasavchikov([Kamishansky V.P., 2012).

The main purpose of organizing relations is to organize any other relations, in particular which regulated by the norms of the private and public law.

The relations which were built on the basis of the commons (norms) of coordination and subordination these relations at the really difficult period of history of Russia mediated, saved and changed the border between the private and public law, by virtue of that Russia survived the legal collapse.

Today the question about not just obvious convergence of the private and public legal commons (norms) mentioned in the legal literature, means factually rapprochement of the subsystems of the private and public law, but also means intra-branch rapprochement of legal systems which form the branches of law.

This question was announced by Morosov S.U. - the head of the civil law sub division of the Ulyanovsk State University. He writes, that «the questions of the intra-branch rapprochement of the legal subsystems, are characterized by the connectivity organizational and commercial and non-material relations. Link between the mentioned groups of the relations stipulate the limit of the freedom of the participants of he contract relations. The civil organizational relations stipulates “plasticity” of the civil branch of law, because this plasticity extends boundairies of the dispositivity and provides the possibility to use such instruments of the self-regulation as contract and to institute the self rules» (Lenin V.I.).

One more feature of the development if the modern civil law in Russia in the light of the process of convergence of the private and public commons (norms) is the creation of the inter-branch norms, which can be classified as private or public law institutions. Morover, such norms, as signum temporis can be founded in the other branches of law: family law, labour law, land law etc. The most indicative example of such inter-branch norm is an article 223 of the Civil code of the Russian Federation – the moment of the creation of title of the buyer under the contract. In the part 2 of this article is pointed that «in the circumstances when the transfer of the property should be registered, the buyer will obtain the title on the property upon the registration…»

Intra-branch norms are also the following articles of the civil, family, land law and any other branches of law, where the rights and obligations can be founded directly not after the declaration of will or the happened fact, but after their registration in accordance with the current legislation in specialized state organ, which execute the public functions: Registry of Births, Marriages and Deaths [divorce, death and its consequences for the successors], notary public, registration office, ministry of justice and others.

Take off of the abovementioned norms from the legal branches dependence, mediation of the public and private commons by the norms of the organization relations, and confirmation of the fact of the convergence of the public and private law convicts in necessity of the changing mind of the division of the law on private and public law and fix the place, time where it has happened.

With that all these facts shows that our legal science feels misunderstanding something more, which is

applicable to the law – unity of its purpose, functions and its mission in the regulation of the public relations in totally.

The sources of uncomunity and disconnection at list in Russia can be founded in the original division of law

public and private, which was reduced to absurdity from the times of V.I. Lenin.

Such division nowhere near was applicable to the law and is not useful at nearest time. In the English - american countries law legal tradition there was not before and there is not now. There is not such division of law in the Islamic and some other common law countries.

At the time of the analysis of the problem of the “private” and “public” in the regulation of the public relations,

in particular, social - economy relations professor G.V. Maltsev pointed: “The problem of the division of the private and public law is just the problem of the European law, this problem was founded and developed historically as the part of one of the world cultures – European and applicable just to the one legal system of the Europe – legal system of the continental countries. England, which was separated from the European mainland small strait, due to the historical conditions, was able to create conceptually other model of the legal system – common law , where there is a sphere of the common law and the law of the equity, but there is not a division of law to the public and private”. And hereinafter: “As what in Germany or in France is self-evidently and necessary, is unacceptable in the other legal systems, built of the other commons” (Korshunov N.M., 2011).

CONCLUSION

Today it is mistaken in believing that the division of law to the private and public was proposed by the Rome

law. But the latest research shows that this division was proposed 13 centuries later the collapse of the Western Roman Empire. Generally the scientists appeal by the following section of the thesis of Rome jurist and state person Ulpian, who lived on the turn and II and III century AD. This section, which was included in the first title of the first book of Digests of the Rome imperator Ustinian, contains reasoning’s of Ulpian about

the justice and law with following wording: “Education of law divided on two parts: public and private. Public law is that related to the Rome state, but the private law related to the benefit of the persons; there is something effective for public relation and private relation.

Public law considered from sacra, ministry of priests, status of magistrates. Private law is divided to the three parts, because it is composed of natural prescriptions, from prescriptions of nations or civil prescriptions”. And hereinafter:

“Civil law is not divided from the natural law or from the law of nations. Thus, if we add something to the common law or cut it, we create our own, civil law”.

ACKNOWLEDGEMENTS

This publication has been prepared with the support of the "RUDN University Program 5-100".

REFERENCE LIST

Alexeev S.S. Private Law: scientific-journalistic essay. Moscow, Statut. 1999.

Gelbreit Gr. New industrial society, translation frm English. Moscow. 1969.

Sorokin P.A. The basic trends of our times. New Haven. 1964.

Rose J. Was stecht hinter Konvergenz theorie? B. 1969.

Meissner H. Konvergenz theory und REalitat. S. Aufl, B. 1971.

Bregel E. Theorie of convergence of two economy systems. World economy and international relations. No 1. 1968.

Kamishansky V.P. About the public and private commons (norms) in the civil law and convergence of the civil law. Convergence of the private and public law: problems of the theory and practice. Source book of the Russian Scientific- Practice conference on memory of the professor N.M. Korshunov. Moscow, MAEP. 2012.

Kovalev S. I. History of Rome. Course of Lectures. K. 1986

Korshunov N.M. Convergence of the private and public law : problems of the theorie and practice. Moscow, 2011.

Korshunov N.M. pointed collected ed. O.A. Krasavchikov. Organization civil law relations. Anthology of the Ural civil law 1925-1989. Collection of articles. Moscow. 2001.

Lenin V.I. About the purposes of Narkomust in the conditions of the new economy policy.

Letter to D.N. Kurskomu: 17 May 1922. Complete set of works. Vol. 44

Maltsev G.V. To the question about the civil and public law. Law and civil society in the modern Russia. Moscow, edt. RAGS. 2003.

Marks K., Engels F. German ideologie. Marks K., Engels F. writings. 22 edt., Vol. 3.

Morosov S.U. To the question about the rapprochement of private and public law in the light of the problem of the legal convergence. Convergence of the private and public law: problems of the theory and practice. Source book of the Russian Scientific-Practice conference on memory of the professor N.M. Korshunov. Moscow, MAEP. 2012.

Pokrovsky A.I. The main problems of the civil law. Moscow, Statut. 1998.