

# Private law in the Russian law system: conceptual understanding and development prospects

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**Abstract**—The article examines the evolution of the views of local jurists on the place of private law in the system of law. Contrary to the assertion of individual researchers linking the formation of the sectoral principle of building a system of law with the imperious attitudes of the Soviet state and the prevailing Marxist-Leninist ideology, the author justifies the idea that this principle does not contradict the previous pre-revolutionary experience of examining the system of law, which only nurtures Russian scientists. Analyzing the current stage of development of systemic notions regarding the internal form of Russian law, the author suggests that this experience, in particular, the idea that this division is derived from the very nature of a person who recognizes himself as an isolated individual and in the same time as a member of the social whole. The article justifies that in the system of modern Russian law, not only does the convergence of private and public law take place. Simultaneously with the convergence processes, the divergence system is observed in the system of law, in which its coherence is seen.

**Keywords**—*system of law, private law, branch of law, convergence and divergence in law*

## I. INTRODUCTION

Consideration of the problem of private law and its place in the system of modern Russian law in the context of rethinking the Soviet legal heritage requires the researcher, first of all, objectivity and reliance on certain conceptual foundations.

But by the beginning of the 20th century, the social and economic situation in our country had changed dramatically. On this basis, the Roman legal tradition of dividing the system of the right to public and private becomes in demand in Russian legal science. In the

works of P.I. Novgorodtsev (1886-1924), L.I. Petrazhitzky (1867-1931) and some other domestic jurists, it finds not only its recognition, but also further development. In particular, G.F. Shershevichvich, considering the dominant system of the right to divide into private and public law, doubted that the boundary between them can be based on the difference of protected interests. He was convinced that only the distinction between the domestic relations, rationed by objective law, could be justified, and the distinction between public and private law could be justified: "Such opposition between private and public cannot be ignored by the right to normalize life and this extremely important domestic phenomenon corresponds to the basic division of the objective right to civil and public. It is based on the observation of an outstanding phenomenon and is therefore full of theoretical and practical significance." Unfortunately, these and other fruitful studies did not continue during the Soviet period due to known ideological limitations ("we do not recognize anything private"), as constantly pointed out in modern legal literature.

## II. MATERIALS AND METHODS

As the basic methodological model, in our opinion, it is quite possible to serve the concept of the origin and development of the Western tradition of law, one of the provisions of which is the thesis of the "Since the 1st and 2nd of the 2nd, the history of the West has been characterized by alternating periods of renewal and continuity. The turbulent revolutionary upheavals are replaced by periods of peaceful development, when the changes born by the revolution are embedded in the existing tradition and at the same time transform it."

We believe that this provision may well serve as a methodological guideline for considering the formation of ideas about the system of law in Russian legal science. This year marks the 100th anniversary of the Russian Revolution of 1917, the results of which, including in the field of domestic jurisprudence, can be objectively assessed from the point of view of dialectic of renewal and continuity. It is no coincidence that G.J. Berman argued that each great revolution took more than one generation to complete its journey, and each of them was followed by a long period of evolution.

As you know, pre-revolutionary domestic legal scholars, as well as foreign legal scholars, treated the distinction to public and private law differently. As noted by G.F. Shershevichvich, this had its historical preconditions in the Russian reality: until the 19th century, due to the large influence of community-legal regulation in the system of our right, these legal communities were not found. Accordingly, Ulpian's proposed distinction to private and public law (depending on interests) did not support one of the founders of the theory of law and the state N.M. Korkunov, considering the common interest as a combination of individual private interests.

By the early 1930s, a relatively free scientific search within Marxism was winding down, and there was a long period of dogmatic Marxism-Leninism, including the issue at hand. But now, the rather negative assessment of the significance of the ideas developed by Soviet scientists in the 1920s is beginning to be supplemented by the identification of what has been introduced into the legal science by Marxism as solid theoretic and methodological basis of modern social studies. Thus, in some publications it is argued that Soviet lawyers have convincingly shown that the theory of historical materialism creates a reliable foundation of true scientific research. In their interpretation, the doctrine of social and economic formation as a subtle and extremely complex social organism was developed, where the economic basis and superstructure were presented as a single social system. The methodological basis for identifying the relationship between economics, law and the state was the ideas contained directly in the writings of K. Marx and F. Engels. But the founders of Marxism-Leninism could not at one time determine in detail the mechanism of this relationship, which created lacunae in the Marxist-Leninist general theory of state and law formed after the October Revolution. According to V.N. Shchukov, the merit of the Soviet lawyers of the 20s of the 20th century was the comprehensive and deep disclosure of the fundamental laws of the relationship between material production, class structure, and public consciousness, legal and political systems that develop the relevant basic tenets of Marxism. It was a new step in the development of the theory of the state and law in general (not just Marxist!), which raised it to a fundamentally new research level. At the same time, Soviet legal scholars did not have complete categorical certainty and systemic theoretical unity.

### III. RESULTS

It becomes obvious that despite all the deviations from the principle of the rule of law of the period of "cult of personality" and the dictates of official Marxist-Leninist dogma in the national society, the development of true legal thought continued in our country and in these years.

In this regard, it seems biased and far from the truth the position of individual researchers, who, in particular, claim that only under the threat of possible repression by the state of the dictatorship of the *proletariat Soviet scientists-lawyers they refused to divide into private and public law in Roman jurisprudence and developed a doctrine on the branch division of the Soviet law system in favor of the authorities* [1].

This statement is far from the truth, as G.F. Shershevichvich rightly pointed out that, theoretical, pedagogical and practical reasons lead to the need to divide the existing law by department. And he, using the term "law system" as one of the first pre-revolutionary theorists of law, elaborated on the characterization of the public law system and the private law system. At the same time, as elements of these subsystems, he is listed as nothing more than the branches of law - state, administrative and others - in the system of public law and civil; trade, etc. - in the system of private law.

More rights A.S. Komarov, who rightly draws attention to the works of famous Soviet researchers M.M. Agarkov (in .), B.B. Cherepakhin (in 1947), devoted specifically to private law, and written when the question of his relationship with the public law in our country was still debatable and firmly decided not in favor of the private. In addition, this author analyzes cases of the "sleeping" state of private legal regulation in socialist civil law: the institution of property law and in general material law, as well as foreign economic activity [2].

It is no coincidence that the content of the textbook on the general theory of the state and the law of A.I. Denisov has an independent section, which outlines the issue of the division of the right to private and public (not characteristic of Soviet law!). Interestingly, this material was analyzed using the philosophy of Aristotle, theories of Ulpian, Dernburg, Kavelin, Mayer, Gambarov, Muromtsev, Iering, Trubetsky, Girke, Birling, Grimm, etc., which allowed the formation of legal worldview, the necessity of which was challenged on other pages of the textbook [3].

The debate on this issue is no better in modern jurisprudence. On the one hand, domestic legal scholars, following the development of modern Russian legislation, have not abandoned the industry principle in the construction and study of the system of Russian law. The creation of 20 codes, which are still based on the industry or inter-industry principle, demonstrate the value of the Soviet legal experience regarding the internal form of Russian law, if we take a

break from seriously updating the content of the legal framework included in these codes.

As for attempts to introduce private and public division into the structure of modern law, as well as scientific understanding of the problem in modern scientific literature, they can hardly be considered satisfactory. One of those who deeply researched the state of its resolution was N.M. Korshunov, who justified the idea of *convergence of* private and public law in the modern legal reality of Russia. The distinction between private and public law, which is based on the social interests of the same name and/or the peculiarities of public relations requiring appropriate legal regulation, he argued that it was now more commonly used to do so legal criterion. The attractiveness of its application for the separation of private and public law lies, in the opinion of this civilist, that from the point of view of scientific methodology the basis of classification of any objects should be only inherent in these objects property (significant feature of them). As such, the author referred to the method of legal regulation [4].

Surprisingly, here the researcher himself makes the same methodological error, which he decries. The method of legal regulation, as well as social interests, are not the basis of the law itself (private or public), but elements of the system of activities to streamline certain social relations, i.e. legal regulation.

#### IV. DISCUSSION

We believe that the authors are closer to the truth, who see the criterion of distinguishing between private and public law not so much in the properties of their constituent norms and not in the special methods of legal regulation used in their formulation, as in models the basis of their further legal regulation. It is possible to agree with V.I. Ivanov, who argued that the beginning of legal regulation should delineate private and public relations. The model of private relations must meet the criteria of will autonomy, property separation and equality of their subjects, and the model of public relations should be in the presence of power and competence. The right, as a reflection of social relations, is able to show their system as the unity and separation of private and public [5].

The views of this modern civilist largely echo the long-standing statements of G.F. Shershevich: "... private or civil law can be defined by material moment as a set of rules of law governing private relations in the state, and public law as a set of rules of law governing public relations in the state" [6].

However, the value of G.F. Shershevich's position is not only that. Modern civilists often agree with him on this issue and write that it is necessary to study, first of all, public relations, and not their legal regulation [7, 8]. At the same time, another position of this Russian civilist, which we would like to draw attention to, is ignored.

Following the proposal to examine the public relations themselves regulated by private and public law, and even discovering two types of activities: free

(private) and nonfree (public), as does another civilist, it becomes inevitable appeal to the concept of civil society [9]. After all, only with its appearance, "... when the state achieves its actual developed political form, man does lead a double life: a life in a political community in which he recognizes himself as a social being, and a life in the civil society in which he operates as a private citizen..." [10].

In our opinion, this approach allows to put at the center of the study of the system of law the main actor – *a* person, which is clearly forgotten in the debate about the separation of private and public law modern civilists, trying to justify their View. Thus, they repeat the mistake that was made in the Soviet legal science: "It is not a secret for many today that most approaches to the study of legal reality or even excluded the individual from the circle of discussed problems, or indirectly, partly affected the legal existence of the individual. In essence, theoretical developments separated the law from the individual, from his forms of existence" [11].

If we turn to the works of G.F. Shershevich concerning the system of law, they have a clear understanding that the division into private and public law is conditioned by the dual nature of a person who recognizes himself as a separate individual and at the same time as a member of the public whole [6].

On the basis of this, G.F. Shershevich draws attention to the person whose conduct is supported by the law as a private person or agent of power. The division of the right to the public and the private, according to Crome, corresponds to the dual position of man as an individual and as a member of the highest human communication with common interests.

#### V. CONCLUSION

In conclusion, one very fruitful idea, formulated in the pre-revolutionary period by G.F. Shershevich and to which modern researchers have returned again, can also be pointed out. Without calling this process a "convergence" like N.I. Korshunov after 100 years, he foresaw the interpenetration of private and public law: "There is no doubt that further development of the law will increasingly blur the sharp boundaries between public and private law..." [6].

The understanding of all the previous legal heritage, both pre-revolutionary and Soviet, as well as the study of modern processes of the development of the Russian law system and their reflection in our legal science, suggests that so far, neither the division into private and public law nor the industry-building of the law can ensure the effective development of the Russian legal system.

Indeed, recently the idea of convergence or, in other words, convergence, interweaving of various structural elements of legal matter has become popular in jurisprudence. It seems to us that such reasoning is not without logic. In the context of the globalization of legal form, the complexity of legal subjects, the line between elements of the legal system is gradually beginning to blur. This provision actualizes either the

emergence of complex branches of law, or the rejection of the industry division of the law system [12, 13]. Through the prism of the concept of convergence, it is already possible to take a fresh look at all legal matter. As N. M. Korshunov rightly noted, "within the framework of rapprochement there is mutual enrichment, interpenetration of law in different areas, when combined into single legal formations, in holistic legal structures of advantage and achievements different areas of law and different legal systems." The further convergence in law as a process of interaction between certain elements of the national legal system, as well as individual legal systems in the form of increased interconnection and coherence was spoken of by many law researchers.

As N.M. Korshunov rightly points out, "the right is one in its foundation, covers the entire social life and gives content to both public and private law. That is why the dogmatic distinction between both can only be conditional and given solely for educational and practical purposes" [4].

The industry division of Russian law is no better. It is becoming increasingly difficult to identify independent branches of law that do not have integrated institutions. It becomes obvious that the term "industry independence" now takes on a conditional meaning: "clean" industries do not occur; the same relationships can be included in the subject of legal regulation of several industries.

Further development of jurisprudence, study of deeper structural links in legal matter allows expanding the understanding of the patterns of development of both the system of law and its structural elements. Expansion and change of the law system, of course, should not go in a chaotic manner. Structural elements in any case should ensure the unity of all legal matter, its coherence, internal connection with the state. In this regard, it is impossible not to notice that at the same time as the processes of convergence in the law, there is also a divergence

On the one hand, new branches appear in the system of law, they are formed gradually and objectively, due to the development of the economy, the state itself, complex social processes (the divergence of the law) [14]. On the other hand, some branches of law are losing their autonomy by merging with other branches of law (convergence of law). The agreed flow of the two above-mentioned wave processes in the Russian law system constitutes the coherence of the law system.

#### REFERENCES

- [1] S. A. Ivanova, "Private and public law: classification issues", in *Education and law*, 2012, No 12 (40), pp. 70-75.
- [2] A. S. Komarov, "Civil Code of Russia as a source of private law", in *Development of the basic ideas of the Russian Civil Code in modern law and jurisprudence: A collection of articles dedicated to the 70th anniversary of S.A. Hohlov*. Statute, 2011, 368 p.
- [3] V. N. Shchukov, "General Theory of Law: History and Modern State", in *State and Law*, 2017, No 4, pp. 107-125.
- [4] N. M. Korshunov, *Convergence of Private and Public Law: Problems of Theory and Practice*.

- [5] V. I. Ivanov, "Private Models: posing the question", in *Education and law*, 2011, No 5 (21).
- [6] G. F. Shershenevich, *General Theory of Law: Textbook*. 2, 3, 4. 4. Moscow: The Law College of Moscow State University, 1995, 362 p.
- [7] V. E. Belov, "To the issue of private relations", in *Education and law*, 2012, No 12 (40).
- [8] V. I. Ivanov, "Models of Behavior in Private Law", in *Education and law*, 2012, No 12 (40).
- [9] V. F. Popondopoulo, "Public Relations system and its legal forms (to the question of the system of law)", in *Jurisprudence*, 2002, No 4, pp. 79-88.
- [10] K. Marx, and F. Engels, *To the Jewish question*. T. 1, 486 p.
- [11] A. I. Bryzgalov, "On some theoretic and methodological problems of legal science at the present stage", in *State and law*, 2004, No 4.
- [12] O. D. Tretyakov, "Coherence of legal systems (exemplified by the U.S. Constitution, Afghanistan and the Philippines)", in *Russian investigator*, 2008, No 10, pp. 35-38.
- [13] S. S. Alexeyev, *Ascent to the right: Search and Solutions*.
- [14] J. A. Spirin, and R. V. Shagiyaeva, "System of law and its coherence", in *Actual law problems: textbook for master's degree*. Moscow: Norm: INFRA-M, 2016, 352 p.