



The place of the russian legislation in the modern legal systems

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Abstract

The article reviews the leading modern legal systems. Their main features as well as advantages and disadvantages were identified. The article notes the existence of conditions for competition between legal systems, that, eventually, leads to a rapprochement between them on the basic parameters. The Russian law, by its characteristics, is referred to the continental legal family. The analysis of the key directions in the development of economic legislation reveals, at the same time, a tendency to penetrate the Anglo-Saxon legal institutions into the Russian legal system.

Keywords: continental law, Roman-Germanic legal system, Civil law, Anglo-Saxon legal system, Common law.



Introduction.

The processes of globalization take place in all spheres of modern society life. They contribute to the change of the world space, its transformation into a united zone, open for the free movement of goods, services, information and capital.

In these conditions the main task of national states is search for a place, which provides a decent quality of the population life in the occupied territory. The implementation of such task leads to the need to assess the competitive advantages compared to other countries. At the initial stage, national governments analyzed traditional parameters of rivalry, such as the level of free trade, investment protection and the quality of goods offered for sale. Ultimately, this led to the need to study larger social phenomena.

Recently, there has been an active debate on the issue of legal systems competition in general [1]. Moreover, the closer cooperation in the economic sphere, the more acute this competition. The states, that provide more effective remedies, attract the capital and labor resources necessary for dynamic development [2]. This is especially true for post-Soviet Russia, which is in the process of reforming legal system.

Methodology. Various general scientific methods and the methods of logical cognition are used in the work: analysis and synthesis, systemic, functional and formal-logical approaches. The development of conclusions was facilitated by the application of formal-legal and comparative-legal methods.

Results and Discussion. The identification of certain types of legal systems is one of the most debatable issues in the theory of law. The most widely spread theory is that it is necessary to identify the two main legal systems, namely: Romano-Germanic and Anglo-Saxon. Also, Scandinavian [3] and Islamic [4] systems are often referred to individual species. In the 20th century, it was also decided to define a socialist legal system [5]. Despite the diversity points of view on this issue, the dominant position of both Russian [6] and foreign [7] scientists is that all national legal systems are based on one of the two most widespread and influential legal families: the Romano-Germanic or the Anglo-Saxon.

The Romano-Germanic legal system is also referred to the continental or Civil law system. This legal model goes back to the ancient Roman law, which was recaptured in the Middle Ages by countries of continental Europe. The term «Civil law» derives from the Latin *ius civile*, i.e. the law applicable to all Roman citizens. Its origins and model are to be found in the monumental compilation of Roman law commissioned by the Emperor Justinian in the sixth century CE. The main legal source of it is a regulatory legal act. It has an unconditional priority over other sources. This circumstance, mainly causes its main advantages and disadvantages.



Advantages of such a construction of law are the existence of a well-organized and structured system of regulatory acts. As a rule, legislation regulates all major aspects of public life and is based on the written basic law - the constitution. The system of law is divided into branches, sub-branches and other smaller elements. Special legislative bodies are endowed with the lawmaking function. They create legal norms as general models of lawful behavior. Courts, carrying out justice, only apply them, but do not create the new ones. Disadvantages of the continental law are conservatism and some detachment from real life. This is due to the fact that the process of lawmaking can not objectively respond to changes in social relations with appropriate speed.

The Anglo-Saxon legal model is represented by the Common Law system. The leading source of it is a judicial precedent, meaning the judicial decisions that have already made in similar cases. These precedents are maintained over time through the records of the courts as well as historically documented in collections of case law known as yearbooks and reports. So, courts in this system are endowed with regulatory functions. An ordered set of such precedents forms Common law. On the one hand, this approach leads to casuiness and fragmentation of law, which is usually regarded as a disadvantage. The facts assessed by the court are compared not with the normative model, but with another similar case already resolved by the court. On the other hand, this model can quickly take into account the needs of changing living conditions. Anglo-Saxon tradition allows judges to pass laws and fill gaps, left by the legislature. Recently, when the speed of scientific and technological progress has increased many times, this is becoming especially actual. With this in mind, we can talk about greater adaptability of common law in comparison with the civil law system.

The globalization of the economy leads to the fact that states with the most effective legal systems acquire significant advantages. Economic sphere becomes the field of the collision of various legal systems [1]. So, A. Ogus [2] suggests considering their competition through the prism of economic analysis, which seems absolutely correct. Exactly the economy (its state and development) is the driver for the modern development of public relations and their legislative regulation. Increasing mobility of investment capital causes «competition of jurisdictions» [8]. Attraction of investments is associated with the creation of appropriate regulatory regulation. For success in this matter, it is necessary to ensure the availability of the most convenient legal mechanisms for protecting investments.

In the world, as a rule, the problems of correlation of the two aforementioned legal systems are discussed. And this becomes the subject of discussions at a sufficiently high level. Thus, the General Director of the Foundation for the Development of Continental Law, Jean Marc Bayussus, in a public speech to the Federal Chamber of Advocates on June 25, 2008 noted that the position of the countries of the Anglo-Saxon legal system is very strong in the World Trade Organization (WTO). Already, the trade rules of this organization are viewed as an international platform on the basis of



which a unified legal regulation of economic relations is formed. With this in mind, the speaker expressed his fears that Anglo-American law would be secretly presented in the future under the guise of international law. As an output speaker noted the need for cooperation between representatives of the continental legal system [9].

This kind of competition leads to a relative leveling of business conditions both on a regional and global scale. For example, in the countries of the European Union, the process of forming general rules for foreign economic activity is very active. This is facilitated by the passing of Directives, which extend to all the states of this association. There is a gradual replacement of national legal systems by the law of the European Union, which excludes competition between states. As a consequence, the use of conflict of laws rules becomes superfluous. Bernd von Hoffman notes that the European legal order has already formed the conceptual basis for the emergence of *jus commune* (common law) in the field of private international law [10]. Similar processes occur in Latin America [11], South Africa [12] and other regions.

The conditions of competition inevitably lead to the borrowing of the most successful legal constructions. This is called «convergence of legal systems». Such influence is found, in particular, in Romano-Germanic and Anglo-Saxon law [13]. Thus, in the countries of the Anglo-Saxon legal family, legal regulation tends to be systematized by passing laws. In the continental system (including Russia), increasing importance is attached to judicial practice.

As a special example, it is possible to cite traditionally the English institute – trust. Western European lawyers are widely discussing the issue of its use in the countries of Roman-Germanic law. Most researchers are trying to combine the trust with continental legal traditions, which don't knowingly «splitting» property rights [14].

This situation necessitates the choice of directions for further reform of Russian legislation. The legal system of Russia traditionally belongs to the continental family. It is based on the principles of Roman-Germanic law. The civil legislation of Russia, which developed in the 19th century, was influenced by the German legal tradition. However, recent trends in the development of Russian legislation allow to speak about a noticeable convergence with the legal system of Common law.

The latest reform of civil law led to the emergence of legal institutions that emerged and developed in Anglo-Saxon law. First of all, this refers to the sphere of contract law. Many lawyers criticized contract law for its excessive severity. This situation led to the fact that Russian companies tried to subordinate the most significant transactions to foreign jurisdictions. So, according to one of the sociological studies, more than half of respondents noted that they are almost all major deals trying to subordinate foreign law (mainly - to English). The main reason was the inconvenience of Russian legislation for doing business [15].



As a result of the reform, a sufficiently flexible legal regulation of the pre-contractual stage appeared. In addition, new contractual designs have been formed (for example, option and, subscriber). The institution of assurance of circumstances has also introduced. Other novels have been adopted that compensate for the excessive severity of Russian contract law.

We believe that such a trend will only increase in the future. Chairman of the Government of the Russian Federation Medvedev D.A. drew attention to the need to improve the quality of lawmaking and law enforcement [16]. He justifies this with ever increasing competition of legal systems in conditions when capital, new technologies, qualified personnel have the opportunity to move with sufficient ease to states with the most convenient conditions for doing business.

The process of Russian legislation development in the economic sphere faces systemic problems. The reform of the legislation on legal entities and contract law takes place in the context of a clash of two influential groups. The ideological inspirer of the first of these is the Council for the codification and improvement of civil legislation under the President of the Russian Federation. This body consists of representatives of the scientific legal community, which traditionally gravitates toward the ideas of the Romano-Germanic tradition. The second group is headed by the Ministry of Economic Development of the Russian Federation. It insists that it is necessary to borrow Anglo-American legal constructions. The main motive of such proposals is the common law system is dominant in the economic sphere. Most of the major world deals are formalized according to Anglo-Saxon law. In addition, very often arbitration clauses in foreign economic contracts refer to the jurisdiction of the courts of Great Britain.

Confrontation of these centers often leads to half-hearted solutions, when the borrowed models of legal regulation are far from being similar to the original designs. Sometimes this only emphasizes the Russian specifics and allows us to positively assess the results of lawmaking. So, with some reservations, we can possibly to positively characterize the Russian corporate management models. They can not be mechanically borrowed by different states from each other. This is especially true in cases where there are significant differences between them in the socio-economic conditions and mentality. In Russia, at present, an independent (and, in some respects, unique) corporate governance system is developing. It is close to the German model, but it is specific in the structure of the share capital, in the mechanisms of financing the activities of the corporation and in some other indicators [17].

At the same time, the persistent advocacy of its ideas by the Council on codification and the Ministry of Economic Development leads to negative consequences. Formed legal constructions often do not correlate with other regulators and look like a «foreign element» for the conceptual foundations of the Russian legal system. For example, Russia has a continental model of the shareholder



agreement, which is found in the legislation of countries in both Western and Eastern Europe. This is due to the organic influence of the Romano-German legal system on Russian civil law in general [18]. However, the imposed decisions of the Anglo-Saxon tradition in this institution led to negative consequences.

Thus, the existence of two decision centers related to the development of the economy, has its own positive and negative features. On the one hand, the conditions of competition in a constructive dialogue allow us to develop the most optimal solutions that take into account specific Russian realities. On the other hand, the compromise often leads to results that are far from the intended ones.

Conclusions. The main most widespread and influential legal systems (families) include the Roman-German (Civil Law) and the Anglo-Saxon (Common Law). All national legal systems of the most developed countries are based on one of the above. However, both these systems have their own advantages and disadvantages.. The analysis carried out in this article shows the existence of competition between the legal systems of different states. And countries with a continental tradition come to prevent the pressure of an increasingly influential Common law.

Globalization causes mutual integration and the establishment of closer ties between states. The law is unified and standardized practically all over the world. The processes of globalization and regionalization bring together almost all national legal systems. Competition jurisdictions, ultimately, lead to a convergence of national legal principles and the formation of unified institutions. The latter will be designed to promote trade and economic cooperation in general.

Russia is characterized by a continental model of the legal system. This is due to the organic influence of the Romano-Germanic legal system on Russian law in general. Nevertheless, the recent reforms of economic legislation allow us to speak about a noticeable convergence of the Russian legal system with the systems of Common law countries. The process of reforming Russian economic legislation is taking place in the conditions of competition among supporters of the preservation of the continental regime of legal regulation and lobbyists of direct borrowing of Anglo-American legal institutions.

References.

1. Peters, A., 2014. The Competition between Legal Orders. *International Law Research*, 3(1) // <https://ssrn.com/abstract=2404377> (accessed 27 January 2018).
2. Ogus, A., 1999. Competition Between National Legal Systems: A Contribution of Economic Analysis To Comparative Law. *International & Comparative Law Quarterly*, 48(2): 405-418.
3. Merryman, J.H., 1985. *The Civil Law Tradition. An Introduction to the Legal Systems of Western Europe and Latin America.* Stanford, p. 5.



4. Vago, S., 2003. Law and Society. New Jersey, p. 12-18.
5. Chloros, A.G., 1992. Common Law, Civil Law and Socialist Law: Three leading Systems of the World, Three Kinds of Legal Thought. Comparative Legal Cultures. New York, p. 83 - 97.
6. Marchenko, M.N. 2001. Comparative jurisprudence. A common part. M., pp. 262. (In Russian).
7. Liebesny, H., 1981. Foreign Legal Systems: A Comparative Analysis. Wash., p. 2-3;
8. Vogenauer, S., 2013. Regulatory Competition through Choice of Contract Law and Choice of Forum in Europe: Theory and Evidence. European Review of Private Law, 1:13 - 78.
9. Potapova, A.M., 2008. To develop the international influence of continental law and to resist the expansion of common law. The Bulletin of the Federal Chamber of Attorneys the Russian Federation, 3: 69-77. (In Russian).
10. Lagarde, P., von Hoffmann, B., 2000. The Europeanization of International Private Law. Zeitschrift Privatrecht., 8(1): 173 - 177.
11. Mirow, M.C., 2004. Latin American Law. A History of Private Law and Institutions in Spanish America. Austin: University of Texas Press, 359 pp.
12. Zimmerman, R., Visser, D.P., 1996. Civil law and common law in South Africa. Oxford, p. 832.
13. Mollers, T., 2000. The Role of Law in European Integration. The American Journal of Comparative Law, 48: 681 – 692.
14. Sonneveldt, F., 1992. The Trust: Bridge or Abyss Between Common and Civil Law Jurisdictions? / F. Sonneveldt, H.L. van Mens. Deventer: Kluwer Law and Taxations Publishers, 98 pp.
15. Afanasev, D., 2012. Competition jurisdictions: sovereignty by 10%. Sheets, 117 (3131). (In Russian).
16. Medvedev, D.A., 2013. The Constitution, the functions of the Government of Russia and effective management technologies. Zakon. 12: 32 - 40. (In Russian).
17. Sinenko, V., Tsukanova, E., Mityakina, N., Gusakova, Yu., Rubanov, S., 2017. Main models of corporate management: current state and development prospects. The Turkish Online Journal of Design, Art and Communication TOJDAC. April. Special Edition: 333-337.
18. Turanin, V., Sinenko, V., Mityakina, N., Fedoryaschenko, A., Lilikova, O., 2017. Shareholders' Agreements versus Contemporary Legal Systems. International Journal of Economic Perspectives, 11 (3).