

LEGAL CONVERGENCE: DIALECTIC ANALYSIS

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Abstract: *This article analyzes the concept of legal convergence, a systematic assessment of its scientific potential, explores the essential processes of legal convergence (unification, universalization, standardization, harmonization and expansion of law), subject to understanding the dialectical relationship of legal convergence and legal freedom, considers the functional concept of legal convergence as a method of knowledge of legal reality, on the example of the justification of the convergence (modus) theoretical and legal approach to the study of the scope of the concept of legal status of the subject of legal relations, presents the characteristics of external and internal legal convergence, as well as on the basis of the analysis of legal convergence. convergence as a trend in the development of political and legal life of the state, the main trends in the development of the Russian legal system are formulated.*

Keywords: legal freedom, trend of development of the state and law, legal system, system of law.

Based on Paragraph 8.1. of the Russian Academy of Sciences' Fundamental Research Plan for the period up to 2025, one of the paramount modern research areas in the sphere of legal science is the revealing of the development trends in the Russian state and law in the conditions of globalization: the interconnection of the history and modern age¹. So, during several centuries, one of the main trends in law has been its convergence, which is also not an exception in the 21st-century law, but vice versa becomes even more relevant.

In accordance with Part 4, Article 15 of the Constitution of the Russian Federation, the recognition of the generally accepted principles and standards of the international law is a part of the constitutional space, which apparently reflects objective processes of convergence of the international and national law. At the same time, the contents of convergence in law are not limited to the mentioned provision. Today, the national science is formulating the doctrine of legal convergence focused on the processes of the internal and external convergence, convergence of private and public law, reform of the legislation caused by objective

¹ Fundamental Research Plan of the Russian Academy of Sciences for the period up to 2025. 2005. Available at: <http://www.ras.ru/scientificactivity/plan2025.aspx>.

processes of the internal and external convergence of law. Moreover, it is currently challenging to overestimate the great scientific capacity of the concept of legal convergence, which, according to our humble estimates, is extremely high.

Legal convergence in the number of its functions is reasonable to define as follows:

1) The methodological approach to the research of abstract political law concepts;

2) The methodological approach to the study of the legal system of states, the system of law, and the legislative system;

3) The method of scientific research on political law reality;

4) The development trend in the political law life of the state, the legal system of states, the system of law, and the legislative system; the mechanisms of legal regulation of the most significant social relations;

5) An aggregate of the complicated political law processes of unification, universalization, standardization, harmonization and expansion of law of the national legal systems of the states and the legal families in order to achieve the optimum legal freedom (such a state of the legal system, when the subjects of legal relations execute their rights, not going beyond the legal regulation, at the same time, satisfying their legal interests the maximum way)²;

6) A political law model of development of the state and its institutions;

7) An element of the legal system of a state and an international community;

8) The source of law;

9) A political law condition for the achievement of the optimum legal freedom;

10) A form of objectification of legal freedom;

11) The base for modeling of the political law approaches to the investigated phenomena and processes.

From the perspective of the essence process, composing the investigated concept of legal convergence, one should characterize legal convergence as a historically caused objective, regular, irreversible voluntary and (or) mandatory process of unification, *universalization, standardization, harmonization and expansion of law* of the national legal systems of the states and legal families in order to achieve the optimum legal freedom considering the needs of the state and the international

² D.A. Tolchenkin, *Legal freedom*, Vladimir Law Institute of the Federal Penitentiary Service, Vladimir, 2006.

community, as well as the values of the international and national legal order, affected the influence of the international and the global law.

Forms of convergence

As seen from the definition, the essence convergence (globalization) processes (forms of its expression) include *unification, universalization, standardization, harmonization, and expansion of the law*. In the legal science, there is no single opinion on the essence and contents of the investigated issues, which evidences the problem of a single scientific-applied conceptual approach to the essence convergence processes in law, which is a candidate for the modern perspective scientific areas.

Universalization. So, the first form of legal convergence is universalization of law³, i.e. the process of elaboration of the general, integral approach to law (for example, the concept of universalization of human rights). The kinds of universalization of law include as follows: doctrinal universalization (for example, scientifically substantiated approaches of the world-known scientists) and normative (for example, the Constitution of the European Union, the Constitution of the USA).

Unification. The second form of legal convergence is unification of law – the process of inclusion of the unified forms to the legal systems of states; the creation of the standards that are agreed, not contradicting to each other, similar to each other in the internal law of the states, at the same time their contents cannot be identical; overcoming the differences between the national legal systems, as well as the creation of new standards filling the existing gaps in the regulation of some special issues. There are two kinds of unification of law: the unification for the purpose of optimization of the cooperation between the states; the unification for the purpose of execution of the international obligations undertaken.

There are two consequential levels of unification of law:

- 1) International (the level of the international agreement of the states);
- 2) National, as part of which the implementation standards of international law are exercised – the procedure of inclusion of the international legal standards to the national legal system considering the rules of legal technique and the international obligations of the states; actual execution of the international legal obligations at the interstate level through the application in the territory of the state of the standards of the

³ V.S. Nersesyants, The processes of universalization of law and the state in a globalizing world, in *State and Law*, 2005, no. 5, p. 38-47.

international law or those set in accordance with the international obligations of the standards of the national law.

Implementation is the actual execution of the international law obligations at the inter-state level through the application of the international law standards in the territory of the state or those set in accordance with the international obligations of the national law the following way:

1) Direct integration of the international agreements to the legal system through the translation into the national language as a separate legal act of the national system, considering the authenticity of the text (in the legal literature, this process is called incorporation);

2) Arrangement of the national law standards in compliance with the international obligations undertaken, deep legal-technical processing of the legislation resulted in the release of the corresponding regulatory act (transformation);

3) General or particular reference to the standards of the international agreements without the inclusion into the text of the inter-state legal acts, which requires appealing to the primary source⁴.

The brightest unification of the standards is implemented as part of the international private law. The kinds of unification of the international law standards include the creation by the states of the unified material standards; the creation by the states of the unified conflict rules relating to the law of the state subject to the application in a particular legal relation.

Harmonization. The third form of legal convergence is the harmonization of law – the approximation of the national legal systems, decrease and elimination of the differences between them due to the borrowing of the legal experience in the conditions of the lack of the international contract obligations. It may be both chaotic and target nature.

There are the following kinds of harmonization of law: depending on the way of harmonization: reception of law; legal infiltration; diffusion of law; and legal confirmation. Reception of law act as a phenomenal historical objective natural and regular process of mutual penetration of legal cultures, being the subject of comparative legal science evidencing the borrowing of the time-proof legal traditions and experience, 'legal spirit', the legal heritage of the civilizations significantly affected the development of the humankind and its globalization processes. Reception of law is the use of the legal material (experience) of a foreign state. The

⁴ A.V. Malko, *Legal equipment: dictionary reference*, Direct Media, Moscow, 2013.

target of reception is the achievement of the recipient's well-being considering social-economic, cultural and another compatibility.

Legal infiltration is the extraction (sampling) of the legal standards included to the international acts (contracts, conventions, and declarations) and in the national regulatory acts of one state to the interstate law of a particular another state. At the same time, there are two kinds of legal infiltration: horizontal (legal infiltration of the national law standards of one state to the interstate law of another state); vertical (legal infiltration of the international law into the interstate law).⁵ According to another definition, legal infiltration is a borrowing (mutual penetration) of legal standards as part of the international law or the national legislation of some states to the interstate law of other states in a set or accepted form⁶.

Another kind of harmonization of law is diffusion of law based on the penetration of the international law standards to the national legal system and implies the application of unified categories of the institutions and standards of law, obtained a legal force in some or another state due to its effectiveness. Diffusion of law serves to the unified interpretation of the law. By the diffusion of law, they also mean chaotic penetration of the legal standards applicable in a foreign state to the national system of law. The theory of diffusion of law was developed by professor I. Urudzhu. Diffusion of law does not depend on the presence of mutual agreement between the corresponding subjects of international law and became possible due to the development of information technologies⁷.

Legal confirmation is a process of borrowing of the legal culture through the adjustment, passive acceptance of the existing order of things and dominating opinions. Other kinds of harmonization of law are as follows: depending on the result of harmonization: full or partial (indirect); depending on the level of harmonization: global (reception of generally accepted principles of law); regional (for example, reception in the conditions of formation of the Czechoslovak Republic in 1918); local (Anglo-Saxon legal system).

⁵ T.A. Melnichenko, *Theoretical and regulatory grounds for legal infiltration*, Kolomna State Pedagogical Institute, Kolomna, 2006; S. A. Komarov, I. V. Lapteva, D. I. Titenkov, *Human rights and legal infiltration of the ideas of the European Court of Human Rights into the legal system of the Russian Federation*, Law Institute Publishing House, Saint Petersburg, 2015.

⁶ V.N. Kokhman, N.I. Polishchuk, *Legal infiltration of international law in the criminal executive legislation of the Russian Federation*, Law Institute (St Petersburg), Voronezh, 2008.

⁷ N.G. Doronina, "Diffusion in law as a direction of unification of private international law: on the issue of the object of information law", in *Journal of Russian Law*, 2015, no. 5, p. 125-134.

Standardization. Except for the unification, universalization, and harmonization of law, as part of the essence legal convergence processes, it is also reasonable to speak about the legal standardization, about the procedure of adjustment of the national law standards in compliance with the international legal standards (normative minimum), for example, the international law standards of human rights and freedoms, which define the necessary level of state legal regulation in a particular sphere (Universal Declaration of Human Rights 1948 became one of the first UN documents establishing the unified standards, which are the targets for the states). Among the kinds of legal standardization, there are universal (UN); regional (European Council, Organization for Security and Cooperation in Europe, Eurasian Economic Community etc.).

Expansion. The fifth kind (form) of legal convergence is the legal expansion, which is the process of compulsory (violent) convergence of law included in the imposition of one's legal system to another society as a result of external political or military aggression, colonization, occupation etc. It is opposed to reception. The target of legal expansion is the control over the recipient.

Legal expansion may be caused as follows:

- 1) military expansion;
- 2) ideological expansion;
- 3) economic expansion;
- 4) religious etc.⁸

There are two kinds of legal expansion: voluntary and compulsory.

Such are the forms of expression of legal convergence, containing its essence processes running with a particular purpose, which is the achievement of the optimal legal freedom, but at the same time, during our research, we paid attention to the prominent dialectical connections between the legal convergence and legal freedom, manifested as follows:

1) Legal convergence may be considered as a result of legal freedom because only in the conditions of legitimate actions of subjects of the international cooperation in this sphere, one may achieve optimal convergence processes;

2) Legal freedom is the most important prerequisite and at the same time the condition for the existence of legal convergence because it is impossible to achieve positive dynamics of convergence processes meeting the interests of all the participants without the mutual agreement of the subjects of the international law;

⁸ L.V. Sokolskaya, "Legal expansion as a historical form of legal acculturation", in *Actual problems of Russian law*, 2014, vol. 7, no. 44, p. 1333-1339.

3) Legal freedom may be considered as the target of convergence process, as a result of which the subjects objectivize their common will, at the same time acting legally in line with the accepted procedures and customs, considering the interests and sovereignty of each other;

4) Legal freedom and legal convergence may be considered as the elements of one system, where one cannot exist without the other;

5) Dialectical opposition of convergence is divergence, which narrows the opportunities and limits of legal freedom by the context of one state;

6) Legal convergence has the peculiarities of the source of law in the legal sense; the result of convergence is the acceptance of regulatory acts;

7) The axiological essence of legal convergence and of law is the same and is manifested in the achievement of the target, which is the optimal legal freedom (their coherence).

Thus, legal convergence and legal freedom are mutually conditioned concepts and processes, which should be assessed as a system.

Legal convergence as the method for cognition of legal reality

One more function of the concept of legal convergence as a method for the cognition of legal reality evidences the opportunity of using the convergence (modus) law theory approach to the research of the concept of the legal relation's subject legal status. So, we used the convergence (modus nature) as a method at the correlation of the following concepts: 'legal status', 'legal position', 'legal state', 'legal modus', 'legal model', 'regulatory model', and 'legal subjectivity', which allowed developing the matrix of four approaches: level, relevance, system-structure and modus, the unity of interconnection of which forms the convergence (modus) legal theory approach. Earlier, the mentioned approach was substantiated with regard to the family law status of the convicted as a special (modus) legal status⁹.

By investigating the contents of the external and internal legal convergence within the framework of the classification suggested a model by O.D. Tretyakova, in this paper¹⁰, we have an opportunity of formulating the following attributes of the states' legal systems development:

⁹ M.E. Tolchenkina, *Criminal executive policy in the field of ensuring the family-legal status of persons sentenced to imprisonment*, Akademiya prava i upravleniya, Ryazan, 2014.

¹⁰ O.D. Tretyakova, *Legal convergence*, Vladimir Law Institute of the Federal Penitentiary Service, Vladimir, 2012.

- 1) Continuity and interdependence of the states' historical development;
- 2) Approximation, including by overcoming the legal collisions through the elaboration of the collision standards and borrowing the ways of development;
- 3) Dynamism characterized by the renewal of the system, its changing nature and response to the new factors;
- 4) Regularity and tendency (direction, development of a particular area).

Besides, as part of the issue of the internal legal convergence, studying the issues of convergence of private and public law, the combination of the methods of legal regulation, particularly, by the example of the dialectics of the public and the private law mechanisms of redress of harm incurred by separate delicts, we may conclude about the conditional nature of the division of law into branches, about the presence of private and public (convergence) mechanisms of legal regulation of social relations for the achievement of a significant legal goal (for example, redress of harm incurred by the crimes to the full extent)¹¹.

The results of the analysis of the applicable legislation evidence the necessity of using the complex (convergence) approach to the legal regulation of the most challenging issues of social life and the increase in the role of the functional singularity of law. The conducted research allowed formulating the attributes of internal convergence of law: combination (confluence) of the methods for legal regulation of social relations; emergence of the complex (convergence, inter-branch) institutions and areas of law; complex statutory regulation of social relations; adoption of complex consolidated (general) regulatory acts based on the combination of private and public law methods for legal regulation; presence of codification in the legislation etc.

By analyzing legal convergence as a development trend of the political law life of the state, in this paper, we should conclude about the following development trends in the Russian legal system:

- 1) Formation of the 'humanized law';
- 2) Legal documentation of the fifth-generation human rights system – somatic rights;
- 3) Legal regulation of the state's centralization, the building of the power vertical, referendum law, enforcement of the democratic origins of law;

¹¹ V.E. Kozatskaya, *Civil liability for harm caused by crimes*, Moscow Academy of Economics and Law, Moscow, 2011.

- 4) Increasing program nature of law;
- 5) Development of the emergency legislation system;
- 6) The increase of the role of the sub-law normative work in the system of sources of the Russian law;
- 7) Improvement of the legal technique of legislative activities, including due to the implementation of legal (anti-corruption) assessment of the draft regulatory acts;
- 8) Development of the key branches, sub-branches, and institutions of law, composing in their unified interconnection the system of the Russian law, ensuring its specialization;
- 9) Combination of private law and public law methods of legal regulation of social relations, formation of complex branches of law, and inter-branch institutions;
- 10) Systematization of the legislation in the form of consolidation;
- 11) Formulation of corporate law;
- 12) Development of the private-public partnership institutions;
- 13) Legal regulation of alternative ways of the disputes resolution etc.

In the conclusion, we should note that such a scientific direction as the theory of legal convergence is promising and allows analyzing the political law reality in a new way, revising the course of the history and assessing the trends in the development of the state and law systemically.