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RADICAL RECONSTRUCTION OF THE THEORETICAL AND METHODOLOGICAL FOUNDATIONS OF PRIVATE LAW IN UKRAINE: LIBERATION FROM THE INFLUENCES OF POST-COMMUNISM AND RUSSIAN CHAUVINISM TOTALITARIAN IDEOLOGIES

Abstract. ***Purpose.*** This research concerns the fundamental issues of a comprehensive assessment of the prospects of restructuring the theoretical and methodological foundations of domestic civil law science in view of the need for decisive deprivation of national legal consciousness from the relics of Soviet ideology. Such reconstruction is mandatory in the face of the confrontation of the Ukrainian People with full-scale aggression of the Russian Federation. The ideological "sanitation" of our public consciousness has become universal, but it is most relevant to modern law.

Research method. In methodological terms, this study attempts to criticize the influences of political ideology on private law science from the standpoint of legal cultural studies. The scope of the cross-cultural legal method was demonstrated on the example of a systematic analysis of the general methodology of private law or civil philosophy.

Results. This analysis focuses on studying two directions of substantial reconstruction of civil law science: 1) in the sphere of general methodology of private law; 2) in the field of scientific private law theory. The above allowed distinguishing ten priority ways of urgent actions to purify legal science from destructive influences of hostile totalitarian ideology, in particular, the imperial doctrine of the so-called "Russian world". This publication does not represent an exhaustive list of the activities or actions for our scientists in the area of civil law. It has a "motivating" nature and involves deploying a broad and open scholarly discussion in the domestic scientific society.

Conclusions. *The most important conclusion* is as follows: it is time to terminate the shameful presence of our jurisprudence in the cultural space that is dominated by the relics of Marxist-Leninist ideology, which were given a new lease of life in the notorious "Putinism". We must finally rethink the whole content of domestic civil law theory and methodology. The civil legislation of Ukraine must comply with not only the letter but also with the spirit of private law. Ukraine should return to the European cultural and legal tradition not on paper but in real life. Thinking based on the principles of natural law must oppose the philosophy of primitive positivism.

Key words: natural law philosophy, private law theory, civil law methodology, legal culture, totalitarian ideology, common sense.

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The bloody mire of Mongolian slavery,
not the rude glory of the Norman epoch,
forms the cradle of Muscovy,
and modern Russia is but
a metamorphosis of Muscovy.
Karl Marx

In general, Russia suffers
from a frightening poverty
in the sphere of facts
and a frightening wealth
of all types of arguments.
Anton Chekhov

1. Introduction

Amidst full-scale armed aggression of the Russian Federation against Ukraine, domestic lawyers do their best to approach our victory over a treacherous and cruel enemy. Military issues mainly have a public-law nature, but civil law scholars are looking for a way of switching legal science to the war context.

For example, "a consortium of Ukrainian and international lawyers is poised to initiate mass proceedings against the Russian state and private military contractors and businesspeople backing the Russian war effort to gain financial compensation for millions of Ukrainian war victims" (Walker, Koshiw, 2022).

However, in addition to the significance of addressing practical concerns during the judicial proceedings, there is also a need to spend the available time and resources to promote the theoretical and methodological fundamentals of domestic civil law science.

As a result of these efforts, several conceptual foundations of a fundamental research project were formulated, the idea of which is brought to your attention.

The fact is that the law in general and civil law in particular always have some ideological and political basis (Andrushchakevych, 2021, pp. 77–83). Consequently, the Russian imperial and later Soviet ideologies significantly influenced the legal understanding in Ukraine for a long time.

It is well known that theory and methodology take pride of place in civil law. General theoretical meanings and values not only determine the structure of civil law doctrines but are also immanently available in the content of some legal constructions and special terms. Such a substantial content of law should be rational and fully meet the principle of reasonableness. Politically ideologized doctrines in style terms always have significant sensory content, predominantly focused not on the mind but faith. For this very reason, an increase of so-called evaluation concepts in modern legal discourse indicates that the ideological foundations of domestic civil law theory do not fully meet the needs of private law (Kravchuk, 2021, pp. 18–22).

If we carry out an express review of the abstracts of modern legal theses in Ukraine, we will definitely see the widespread presence of "generic spots" of the Soviet Law Concept. First of all, it is a constant, almost ritual, reference to the use of the "dialectical-materialistic method", which, as everyone knows, is an organic component of the doctrine of "Marxism-Leninism", and the statement of a monopoly position in the legal doctrine of a "single faithful" theory of state and law (Kachur, Kozin, 2022, pp. 68–73). All this confirms the exclusively normative understanding of the essence of law itself from the standpoint of hidden, and sometimes frank, legal positivism. Domestic academic lawyers, including the authors of this publication, bear responsibility for such dogmatization of legal theory and methodology. It should be remembered that the lack of intent does not abolish guilt for negligence or self-confidence not only in actions but also thoughts.

The time is now to terminate the shameful presence of our jurisprudence in the cultural space, which is dominated by the relics of Marxist-Leninist ideology, which were given a new lease of life in the notorious "Putinism". We, all civil law scientists, should agree that we have been too enthusiastic about "language games" in the continuous translation of the whole array of legal concepts and terms from the Russian language into Ukrainian without noticing that the substantial content and the structure of the formally updated terminology remain unchanged. We must finally rethink the whole content of domestic civil law theory and methodology. The civil legislation of Ukraine must comply with not only the letter but also with the spirit of private law. Ukraine should return to the European cultural and legal tradition not on paper but in real life.

Two groups of tenth strategic directions of significant transformation of the theory and methodology of domestic civil law, which are being tested by legal scholars of Ukraine, are brought to your attention (Krupchan, Gaydulin, 2022). Therefore, this publication repeats some provisions, which are under consideration in Ukraine, because it is aimed at engaging foreign partners in the scientific discussion.

2. In the sphere of general methodology of private law

There is a need to rethink the thesis of the antagonistic nature of the worldview positions of natural law and legal positivism. At the same time, it should be kept in mind that this thesis has become consistent vulgar-mechanistic during the continuous stay of Ukrain-

ian civil law in a shared Soviet and post-Soviet ideological space, where Russian ideology dominated. Therefore, an important area for restructuring the scientific and legal methodology is search for a new *pluralistic philosophical paradigm of law*, which reconciles the various alternative concepts of nature and the essence of morality and law in the distinction and dialectical unity of private- and public-legal subsystems.

Further progressive development of Ukrainian civil law is impossible without clarifying the essence of modern Western legal concepts through the prism of their suitability for new theoretical understanding and solving the most pressing problems of private law (Majdanyk, 2019, pp. 143–180). Thus, it is expedient to draw special attention to those theories that modern Russian science and propaganda regard as the most hostile and dangerous by constantly declaring them as postmodern. Among such concepts, two competing schools are worthy of comparative study: the theory of *economic analysis of law* (*law and economics*) dominant in the US and the theory of *legal interpretivism* or *European hermeneutics of law*.

The deployment of systemic historical and legal research of origins, essential characteristics, and basic determinants of the Russian legal mentality is urgent. It is important to identify the profound reasons why this way of thinking contradicts the liberalist European paradigm of private law. For this purpose, it is necessary to get on with in-depth scientific discussion regarding the reactionary role of the *Asiatic mode of material and spiritual production*. This concept was developed by K. Marx in the early 1850s, but following Soviet science, it is purposefully suppressed in the modern political and legal ideology of the Russian Federation (Krader, 1975). This is due to the fact that the founders of Marxism were extremely negative about "Russian communism" as a doctrine and practice, which are antagonistic towards basic European cultural values. However, the need for this area of scientific search is primarily driven by the productivity of the cross-cultural approach to finding out the fundamental contradictions of European and Eastern civilizations.

It is essential to bring the style of philosophizing in the legal sphere, which characterizes the consistent scientific orientation in the spirit of high rationalism without any religious and ideological impurities, in line with the Western tradition. The crucial thing is that the relevant style recognizes no worldview system as absolutely correct. The subject of a separate study should involve Ukraine's capacity to borrow the institutional division of philosophical knowledge into (1) philosophy of law and (2) legal philosophy, which is common in the English-language cultural and legal tradition (Golding, Edmundson, 2005). If *philosophy of law* is recognized as metaphysics of the general ideological foundations of the legal system, then *legal philosophy* is understood as a praxeological theory of marginal principles of law and effectiveness of legal implementation on the basis of common sense and general principles of law.

There is an urgent need to revise conceptual and methodological approaches to the *interpretation of law and legal facts*. Such approaches have become almost axiomatic in post-Soviet law, but Western doctrine regards them as hopelessly outdated. In particular, it refers to recognition along with two stages of interpretation – clarification and explanation, the third – rulemaking interpretation, which is extremely negatively perceived in the Russian theory of law. Its hermeneutics is counterproductive towards the new institute named *Law of Interpretation*, which is being formed in English law. In this regard, by casting away banal "language phobias", it is advisable to carefully review the entire Ukrainian-language terminology system of civil law. Where it is possible and appropriate, we need to choose those synonymous verbal versions which have a direct etymological and semantic connection with Latin and English invariants, not a Russian loan word (Gaydulin, 2017, pp. 223–230).

3. In the field of a scientific theory of private law

For statist-minded modern Russian private law thinking, the idea of "decentralization" of the system of legal sciences is absolutely unfit. It is not acceptable for the totalitarian mentality that this approach allows for the highest positions of many versatile general theories of law that is inherent in the Western tradition of jurisprudence. In order to ensure the stability of such a pluralistic system of legal knowledge, it is proposed to supplement subordination ("vertical") interdisciplinary structural relations with a set of coordination ("horizontal") and reordination ("inverse") connections. A special role should be played by the subsidiary use of sectoral sub-theories to fill the gaps in general theories of law. It is believed that a civil law theory, that is formed amidst legal Europeanization and globalization, is able to play the relevant role.

Considerable intellectual efforts are now required to rethink the spirit of private law without being constrained by existing frameworks of the literal approach to legal thinking, which was formed in the bosom of the Soviet civil law tradition. This is prompted by the fact

that the "letter of civil law" is often a formalistic brake for creative development of a legal consciousness. Particular attention is paid to the widespread in the Western justice moral and legal principles of social harmony (the coordination of private interests), a universal common mind, the inviolable privacy of interpersonal relations, etc. For ideological reasons, Soviet law made these principles "anathema" as "bourgeois prejudices" motivated by class interests.

The post-Soviet institutional division of the private law system will be subject to radical reformatting. The new legal systematization should allow for the development of new branches and institutions of private law. In-depth implementation of some "exotic" legal institutions inherent in the Anglo-American cultural and legal tradition, similar to trust and acts of interpretative law, is important for the restructuring of civil law theory and methodology. The necessary step is substantiation of prospects for incorporation at the legislative level of such legal constructions in their European sense as: 1) denaturation; 2) reinterpretation; 3) innovation 4) adaptation; 5) convalidation, which together with the institution of amicable settlement are united by the concept of conversion. At the same time, the most pressing issue is the recognition of legal harmonization by the leading way of converging national systems of private law (Jessel-Holst, 2019, pp. 309–318).

The creation of *an updated theory of law sources* is most crucial for the true Europeanization of private law. In particular, the argumentation of the recognition of the sources of law: doctrines, contracts, practice of courts, discretion is required. Innovation is the conceptual development based on the experience of Scandinavian and some other countries, the expediency and need to introduce precedent private law in Ukraine, leaving legislation the main source of public law. This is explained by the fact that there is an approximation of different legal systems in the context of the place of judicial precedent in law systems. V. Beschastnyi, A. Fomenko, N. Obushenko and L. Nalyvaiko noted: "<...> the use of judicial precedent in the enforcement of continental law by countries becomes more widespread in clarifying and interpreting the provisions of the law. In the countries of the common law, on the contrary, the legislative path of the development of law is of particular importance" (Beschastnyi et al., 2019).

Europeanization and globalization of the domestic system of private law is impossible without a decisive "resuscitation" of a dogmatized theory of legal regulation, which is categorically distinguished from the current issues of *legal discretion* and *self-regulation* (Babadzhanian, 2022, pp. 11–16). The extremely high heuristic potential of civil law theory should be revealed by the results of establishing coherence between methods of scientific and legal knowledge and methods of legal regulation, in particular: 1) the dogmatic method of cognition and the imperative method of legal regulation; 2) comparative scientific method and dispositive method; 3) the hermeneutic method of cognition and the discretionary method of legal regulation.

4. Conclusions

This list of actions is not an exhaustive. It has a "motivating" nature and involves deploying a broad and open scholarly discussion in the domestic scientific society.

The framework, but programmatic, nature of this article determines that in order to commence the proposed restructuring of theoretical and methodological foundations of private law science, it is advisable to lay out the basic, in our view, directions of such conceptual restructuring. But this process should not be reduced only to the linguistic and terminological "cleansing" of our cultural and legal space liberated from the aggressor. The positive or integrative effect of such transformations, which are expected from the ideological "rehabilitation" of domestic civil law, is much more important than the negative ones. Only radical, conceptual changes in civil law theory and methodology can bring us closer to the European cultural and legal tradition (Hoffmann, 2016, pp. 181–196).

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КАРДИНАЛЬНА РЕКОНСТРУКЦІЯ ТЕОРЕТИЧНОЇ І МЕТОДОЛОГІЧНОЇ ОСНОВИ ПРИВАТНОГО ПРАВА В УКРАЇНІ: ВИЗВОЛЕННЯ ВІД ВПЛИВІВ ПОСТКОМУНІЗМУ І РОСІЙСЬКОГО ШОВІНІЗМУ ТОТАЛІТАРНОЇ ІДЕОЛОГІЇ

Анотація. ***Мета.*** Дослідження стосується фундаментальних питань комплексної оцінки перспектив перебудови теоретичних і методологічних засад вітчизняної цивілістики з огляду на необхідність рішучого позбавлення правосвідомості від реліктів радянської ідеології, що загострюється в умовах всенародного протистояння України повномасштабній агресії з боку Російської Федерації. Ці проблеми ідеологічної «санації» нашої суспільної свідомості набули суцільного характеру, проте вони найбільш актуальні для сучасної юриспруденції.

Методи дослідження. У методологічному плані дослідження являє собою спробу критики впливів політичної ідеології на приватноправову науку з позиції правової культурології. Можливості крос-культурного правового методу були продемонстровані на прикладі систематичного аналізу насамперед загальної методології приватного права або цивілістичної філософії.

Результати. Цей аналіз зосереджений на дослідженні двох напрямів змістовної реконструкції цивілістичної науки: 1) у сфері загальної методології приватного права; 2) у сфері наукової приватноправової теорії. Це дало змогу виокремити десять пріоритетних напрямів невідкладних дій для очищення правової науки від деструктивних впливів ворожої тоталітарної ідеології, зокрема імперської доктрини так званого «русского мира». Цей перелік не є вичерпним. Він має «мотивуючий» характер і передбачає розгортання широкої та відвертої наукової дискусії у вітчизняному науково-правовому товаристві.

Висновки. Найважливіший висновок полягає в тому, що настав час припинити ганебну присутність нашої юриспруденції в культурно-правовому просторі, де домінують релікти марксистсько-ленінської ідеології, які отримали друге життя в лоні горезвісного «путінізму». Ми мусимо нарешті переосмислити весь зміст вітчизняної цивілістичної теорії та методології. Цивільне законодавство має відповідати не лише букві, а й духу приватного права. Україна повинна повернутися до європейської культурно-правової традиції не словами, а справами. Мислення на основі принципів природного права має виступати проти філософії примітивного позитивізму.

Ключові слова: філософія природного права, теорія приватного права, цивілістична методологія, правова культура, тоталітарна ідеологія, здоровий глузд.

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