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ON THE INTERNAL STRUCTURE OF MODERN PRIVATE LAW**E. G. Komissarova**

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Introduction: *the modern problematics relating to the co-existence of civil legislation and entrepreneurial (commercial, trade, economic) legislation are primarily investigated with respect to the dualism of private law. It would not be exaggeration to say that this problem has been chronically “burdening” civil law, starting from the point of clarifying its correlation with trade law. Modern approaches to the problem of dualism are often one-sided due to the insufficient study of the historical background of the issue, originating from the views of scholars and the legislator on the correlation between civil and trade law, and also because of the simple copying of the experience of foreign countries that followed the path of the private law dualism*

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due to the specificity of their national development. The traces of the simplified approach to this problem cause numerous theoretical inconsistencies both in the aspects of the trade, economic and entrepreneurial legislation continuity and in understanding the place of trade law in its current history. Studying pre-revolutionary sources, the authors research the real legal contours of trade norms in the legislation and in the doctrinal analyses of the past, the true meaning of these norms in the post-Soviet history of regulating property relations, and their influence on modern property relations. Alongside with the private law dualism and monism aspects, the authors turn to the analysis of the commercialization of civil legislation and differentiation of civil law norms as evolutionary processes in the development of civil law. According to the authors, this approach allows for understanding the true essence of modern civil legislation, providing the possibility to actualize the objective views of the private law monism supporters being in line with the legislator's position. The **purpose** of the article is to analyze the doctrinal achievements with regard to the legal format of private law and legislation. **Methods:** the methodological framework of the research is based on the general scientific (dialectical) method of cognition of the private law scientific concepts; specific methods of scientific cognition were also used (formal juridical method, historical legal method, method of comparative study of law). **Results:** the authors' conclusions are focused on the correction of the widely accepted and somewhat one-sided view of the correlation between the civil, trade, economic and entrepreneurial law in their historical inter-connection. The issue of the correlation between these types of law was and continues to be the question of the branch-specific structure of civil law, or the question of the internal structure of private law. As for entrepreneurial (economic, commercial) law in its current legislative and doctrinal form, the authors think that this is not a question of the correlation between civil law and entrepreneurial law but of the external surroundings of the private law system, the environment which is in contact with private law and which is opposed to it.

Keywords: private law; monism and dualism in law; trade, economic, entrepreneurial law; commercialization of civil law, differentiation of civil law

К ВОПРОСУ О ВНУТРЕННЕМ СТРОЕНИИ СОВРЕМЕННОГО ЧАСТНОГО ПРАВА

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Введение: современная проблематика сосуществования гражданского и предпринимательского (коммерческого, торгового, хозяйственного) законодательства в основном исследуется в аспекте дуализма частного права. Без преувеличения можно сказать, что проблема эта «отягощает» гражданское право практически вечно, начиная с выяснения его соотношения с правом торговым. Современные подходы к проблеме дуализма нередко носят односторонний характер как в силу недостаточного проникновения в историю вопроса, берущего свое начало в воззрениях науки и законодателя на соотношение торгового и гражданского права, так и за счет простого копирования опыта зарубежных стран, вставших на путь дуализма частного права в силу особенностей своего национального развития. Упрощенный подход к этой проблеме порождает множество теоретических нестыковок в вопросах как преемственности торгового, хозяйственного и предпринимательского законодательства, так и о месте торгового права и законодательства в его настоящей истории. Авторы статьи исследуют реальные правовые контуры торговых норм в законодательстве и в доктринальных оценках дореволюционных первоисточников, истинный след этих норм в постсоветской истории регулирования имущественных отношений и их влияние на современное предпринимательское право. Наряду с вопросами о дуализме и монизме частного права авторы обращаются к анализу процессов коммерциализации гражданского законодательства и дифференциации его норм как эволюционных процессов в развитии гражданского права. По мнению авторов, такой подход позволяет понять истинную сущность современного гражданского законодательства, давая возможность актуализировать объективные взгляды сторонников монизма частного права, находящиеся в согласии с позицией законодателя. **Цель:** анализ доктринальных достижений по вопросу о правовом формате частного права и законодательства. **Методы:** общенаучный (диалектический) метод познания научных концепций частного права; частнонаучные методы познания: формально-юридический, историко-правовой, метод сравнительного правоведения. **Результаты:** авторские выводы направлены на корректировку привычного и отчасти одностороннего взгляда на соотношение права гражданского, торгового, хозяйственного, предпринимательского в их исторической связи. Вопрос о соотношении указанных видов законодательства был и остается вопросом об отраслевой структуре гражданского права или вопросом о внутреннем строении частного права. Что касается права предпринимательского (хозяйственного, коммерческого) в его современном законодательном и доктринальном виде, то авторы полагают, что это вопрос не о соотношении права гражданского и предпринимательского, а о внешнем окружении системы частного права, той среде, с которой соприкасается и к которой противопоставляется частное право.

Ключевые слова: частное право; монизм и дуализм в праве;
торговое, хозяйственное, предпринимательское право; коммерциализация гражданского права;
дифференциация гражданского законодательства

Introduction

It would seem that the trade law in its true historical meaning of an archaic group of norms seeking for an independent trade codification, has become a part of the history and currently is of interest perhaps only for studying its scientific and legislative history covering the views on the formal unseparated special group of the “trade” norms which had not reached an independent status in due time. Such training courses and textbooks do exist, and their usefulness and timeliness are of no doubt [1]. One of the advantages of these training aids is that they make it possible to understand the essence of the existing and preexisting theoretical discussions on the necessity to adopt the Labour Code. It turns out that in reality this is not quite the case.

The process of the sequential development of the scientific (and often – of the pragmatic) thinking about the necessity to abandon the civil law monism idea and adopt the Business (Entrepreneurial, Economic) Code of the RF is being constantly continued. Sometimes, it is continued with a hyperbolic relying on “what was earlier” and “what they have”, in spite of the fact that all social, political, economic, juridical conditions that accompanied Russian pre-revolutionary and then post-soviet history, became a thing of the remote and not so remote past, and new social and juridical time brought about new RF Civil Code (hereinafter referred to as the RF CC). This was the code to unite two “codes, traditional for the continental European private law (the civil law and the business law),... and whose scope of regulation runs far beyond that of its European prototypes and includes practically all the private law branches” [23, sections 1416–1417].

The artificial exaggeration of the place and the role of the procedural and administrative order of regulating the trade that for a long time had not been supported with a system of consistent material norms in its history, causes the mess which starts from the names of the modern academic courses and finishes with the statement (which is not always properly reasoned) that both codes should exist; while only these material norms can comprise the continuity of the regulatory mechanisms.

In our opinion, it’s time to once again investigate the existing collected doctrinal and legislative data that were decisive for the trade law which was actually left in past days, and “new” business law which is united with the modern commercial (entrepreneurial) law by some of the scientists, and which is singled out by other scientists who treat it as a natural continuation of the Soviet economic law. We see this investigation important, as today’s civil science has actually granted the right of performing the monologue to the representatives of the entrepreneurial and commercial law science.

Adhering to the institutional approach and observing the traditions of the dogmatic and juridical studies, the authors strive for the restoration of the *veritas* which often falls out of the investigations of the trade law phenomena of the past and of the present, often detached from their civil law framework. In our opinion, the *veritas* implies the contrary view. All the history of the trade law is in fact the history of its co-existence with the civil law. For this, it is important to see and recognize those historical “underachievements”, to understand when these links were destroyed for laying more importance onto the (flexible, understandable, manageable, international etc.) trade law to the disadvantage of the civil law, and to find periods when the civil law was obtaining commercialization features at the expense of the more noticeable trade law which was also more in demand at some historical periods.

This will allow to de-escalate the idealization and simple demonstration of the remote past, which first did not rely on any legislation and then relied on administrative procedures when regulating classless relations and later class relations; keeping in mind that this remote past is usually presented without special author’s interpretations for supporting the ideas of the modern segregation of the trade law norms. It is not impossible that the problematic of the private law dualism (which traditionally replaced and continues to replace other concepts of the civil and commercial legislations relation) will gradually fade away, and the research line will be finally expanded with other adequate positions that justify this relation

in accordance with the already obtained legislative achievements.

Practically all the studies having a “dualistic” character demonstrate a permanent parallel with the trade law of the European states which is arranged as a separate Trade Code (Regulation) in the majority of the countries. This excursus often turns to be the only argument in supporting the idea that “adopting a Trade Code logically flows from the historical and social factors of the Russia’s trade activities; besides one should remember that practically every country has both the civil code and trade/ entrepreneurial codes, for example, Germany, France, the USA, and other states which have recently joined the market-oriented path of the economy development including Czechia, Slovakia, Estonia.” [2, p. 69]. The scientific supporters of this argument that “they have it but we don’t” are not just many in number but too many in number, and any attempt to list the names of the authors can break the logically acceptable limits of the scientific citing, this is why we shall omit it.

Let us remind about the so-called “comparative” etiquette which accompanied the scientific activities of the first Russian civil law researchers. As the Russian law historians note, “in spite of the fact that the comparative law method covered all the main civil law issues of that period, it was used by the Russian legal theorists “with no feeble imitation and servility, with no incense to “the civilized legal systems”, but with deep understanding of the value and the importance of the domestic law, the depth of its historical roots, its non-borrowed nature and independence” [11, c. 173]. Modern science often lacks it. But it does have enough blind phrases, formulated with no understanding of the true essence of these “historical and social factors (of commercial activity)”.

Numerous attempts of the modern trade law investigators to find the veritas in the history of the trade law and civil law relations, often ignore the scientific researches which were performed at the end of the 19th century and reproduce the veritas thoroughly and in detail. These works comprise comprehensive history originates from the ancient Roman law and the law of the absolutism period,

and rests in many ways on the real documentation. The force of its content can hardly allow the “modern historical replica” to overpass the documentary argumentation and scientific credibility of the available writings of the pre-revolutionary classics. Two of these works are the background and the mood of this research. The first one is the scientific published monographic work by scientist, law historian and theorist G. F. Shershenevich – “The System of Trade Actions. Criticizing the Trade Law Main Concepts” (1888) [19], which was later used as a basis for the ageless and repeatedly republished trade law course. In his work, the author revealed the true essence of the trade law by separating it from the merchant class law and placing it onto the trade-related actions platform. The second work is the publication by P. P. Tsitovich “Works on Trade and Exchange Law” [22]. The author who hewed to the private law dualism, is rightfully called the father of the trade law. He appeared to be G. F. Shershenevich’s opponent in his views on the civil and trade law correlation. We chose this work to be one more background of this article. By doing this, we get some guarantee of objectivity with respect to the conclusions which were formulated by us after the theoretical analysis of the views and judgements about the problem declared in the title of the article.

Pre-Revolutionary Doctrine of the Civil and Trade Law: about General and Special Aspects of Regulating the Trade (Commercial) Relations

The doctrine defines different periods in the trade law development, more often dependently on who is willing to demonstrate/ argue and what is going to be demonstrated and reasoned. We are proceeding from the supposition that in this matter “it has all been discovered before”, and so we support the arguments of G. F. Shershenevich who divided the systematic trade activities that appeared in the Middle Ages into three periods: Italian (19-18 centuries), French (14–18 centuries) and German (19th century) [19, p. 101, 110, 122], each of them was described by the author and his contemporaries almost true to fact.

As for the original Russian trade legislation where a true juridical aspect could be found and which is not just used for measuring time starting from random facts of primitive trade operations of the exchange nature, it can be viewed as being in place since 16th century when the tartars were defeated and the Russian lands accumulation was started which were governed by a single state administration via a single system of the legal norms.

As for the civil law, it has always existed in the Russian history as part of the European culture. The history kept different civil law memorials for us, as well as different civil law meanings: narrow, broad, mixed special. Irrespectively of the form of its existence that makes up its contents, the civil law was sometimes losing and sometimes giving prominence to the trade law norms which often surpassed the civil law. The whole point is in the nature of both the norms. Having appeared in different time periods and even in different places, they had one common purpose. If we put in the words of A. I. Pokrovskiy, this purpose was in teaching “the humanity to control the property relations standing behind it” [10, p. 9].

The history, the doctrine, and the legislator could never “cancel” this commonality of the targets in spite of the semi – pirate character of the trade law genesis, of its original conventional contents and then – a significant period of existing as one-class law with the mixture of the trade-private and trade-public laws.

The most vivid example of such life-long compatibility of the trade and civil laws is the example of the *Russkaya Pravda* (the collection of legal norms of the Kievan Rus). It is reproduced in the works of modern researchers for giving an evidence that “the trade law existed back at that time”. We will mention it to mark the milestone in the trade and civil law development which will prove the case of “evasion from the regulations meant for the general civil environment, in favour of the trade circulation” [19, p. 130]. The reasons for that evasion were the situations of general civil and trade inability, of trade loaning without uncomfortable formalities which accompany the civil law, but loaning together with interest thereon as op-

posed to the general civil loaning [13, p. 101-103]. If the *Russkaya Pravda* is an example of the original co-existence of the trade law and the civil law with their common property basis “for peer contractors”, then the example of the modern correlation of the civil and the entrepreneurial laws is the current RF CC with its chapter number two.

Other examples of the separation of the trade norms from the general civil norms in later legislation are brought by G. F. Shershenevich from documentary materials. He comes to a conclusion that the idea of the trade (meaning “private”) law independence is antithetical to the Russian legislation [19, p. 140–170, 178]. In the scientist’s opinion, not only the nature itself was in denial of Russia’s trading capabilities, but the trade law itself was not extremely useful with regard to the national industry development [19, p. 172]. Let us note that the author’s work that is being cited goes back to 1888. Earlier in 1857 the first complex scientific work about the trade law was published, authored by M. M. Mikhailov [8], the former Appellate Court member. His contemporaries evaluated the work as “poor”, because both the science and the policy were not yet ready to perceive it.

Actually, the Russian trade volume was large in the 19th century. With the benefactors’ assistance, the Russian literature, art and theatre art gained universal recognition. But the feudal and serfdom heritage was still influencing Russia, the economic type of a land-owner was prevailing even after the serfdom law reform, and the trade continued to be such type of the economic activity which had little impact on the macroeconomic situation in the country.

Despite the uncertainty of the *customs – trade law norms – civil law norms* correlation that affected the trade rules until the revolutionary events, it was a position of advantage to oppose the trade law to the “clumsy and bulky” civil legislation. Its Roman-law background that was focused inside the “life of the citizens” but not on the national interests associated with the trade development and the state’s treasure reimbursement, was unknown

and unclear for the tradespeople. These utilitarian reasons could become the original and not fully recognized cause for separating the trade norms from the civil norms, and later – for identifying the criteria (originally, simple empirical criteria) for grouping the norms out, for justifying disagreements between them, more often – for segregation, and sometimes for compromising. The legal criteria for separating the civil legislation from the trade one (or for combining them) were absent in every law systematization project of Russia developed before the 19th century. And even after this period not all the criteria were officially adopted while belonging only to the legal theorists but not to the legislator.

The necessity to fully revise the trade law and bring it to compliance with the West European dualistic templates, was first voiced by S. I. Zarudny, one of the authors of the 1864 court reform, who was anxious about the problems of reforming the commercial court organisation and proceedings, of the trade and non-trade incapacity, and who researched the trade law of Italy [7]. At the same time, the question of the trade law norms and civil law norms correlation was gaining theoretical momentum the civil law science that existed before the trade law science. This meant that everything what was established in the West, would start to spread in Russia. For the first time in the Russian history, the civil legislation together with the trade law began their development not only through the efforts of the legislator and questionable Senate policy, but through scientific concepts as well. The development of these concepts resulted in the gradual transferring of the trade law and civil law relations to the dualism positions. However, the small number of the scientific forces and yet short scientific history of that time did not allow to provide the legislator with the sound conclusions both on the possible separation of the trade law from the civil law fundamentals and on the justified unity of the private law.

As proved by the results of applying the inductive approach to the trade history, trade activities, trade relations and trade law in Russia, this phenomenon is specific due to its generalized-national character of development, and so it differs

much from the trade law of other countries. Reviewing the trade law historical distance covered by Russia, G. F. Shershenevich wrote in this regard that “in the West, the state is composed of classes with each of them developed into a special type, – in Russia, the state is divided into several classes made up of disintegrated classes which obtain their own specific features only in the course of time”. Such a status was largely the characteristic of both lack of independence and weakness of the trade class in the 16–17th centuries. Neither this class was powerful and authoritative in the 18th century, having its limiting function of “feeding the treasury and the troops”. While a part of the trade establishments of the West (guilds, shops) “reached a great age and are at their last moments” by that time [19, p. 145–146].

Numerous specific features of the Russian trade development are described both in historical works (V. F. Gelbke, N. L. Dyuvernua, S. I. Zarudny, A. I. Kaminka, K. A. Nevolin, S. V. Pakhman, V. A. Udintsev) and some of the modern works (I. V. Arkhipov, V. A. Belov, T. A. Batrova and others). Summarizing this theoretical treasure allows to make a conclusion that all the Russian law of the pre-Soviet period including the civil law, were characterised by two objective properties. The first one is lagging behind the other countries of the continent because of the inequality of the conditions, when some of the countries got past the capitalistic formation phase, and the others were just approaching it. The first one is moving in the same direction with the other countries of the continental Europe. With regard to the trade law, this movement had a tendency of its separation.

Preconditions of the West European Private Law Dualism

As known, studying the foreign law is part of the general history of the civil law. Informal traditions of this study were established in the works of the Russian civil science. Today, this tradition is an integral part of the modern civil science.

The dualism of the European private law is more often mentioned as an existing fact of life, with no discussion of the social and

economic reasons which to a much greater extent predetermined the dualism of the European legislations in the property relations regulation sphere. Despite their importance, we are not going to reproduce these reasons in the article. Let us make a reference to work "The History of the Trade Law Separation" by V. A. Udintsev [18], where a detailed description is given for the economic, social, political and legal background which was the reason for the European dualism of the private law in many countries of the continent, and for the reasons that made the dualism in Russia impossible.

In spite of the fact that the modern Russian legislator did not follow the path traditional for many of the European countries of the Franco-German approach, when the trade code was adopted independently of the civil one, we will mention this experience, but not for the repeat demonstration of its historical details, but for the purpose of some generalization, keeping in mind that it was taken into account when adopting the RF CC currently in force.

As Christopher Osakwe, the legislation reform advisor at the RSFSR Supreme Soviet (1990-1993), American comparativist, points out that "there was a conglomerate of ideas serving as the five sources that influenced the RF CC development: Fundamentals of the Legislation of the SSR and the Republics of 1991, the Model Civil Code for the CIS State Members, the Civil Code of RSFSR of 1964, Western civil and trade codes (especially of Holland, Italy, Switzerland, France, Germany, the USA), the Russian Constitution of 1993" [23, sec. 1423].

The prototype of the European trade legislation which was adopted by many countries on the continent, was born in France which headed the European civilization in the second half of the 15th century. Most Russian legal experts associate the prominence of France and its juridical achievements with the French Civil Code of 1804, its institutional system, formalized norms of the property law and the obligation law, the intelligibility of the code norms which were not so strictly limited scientifically as for example it was the case with Germany.

The less prominence is attributed by the lawyers to the fact of adopting the French Law of France as compared to its total civil law renovation. Its adoption was preceded not only by the Civil Law but by natural evolutionary processes which were involved with the organization and carrying out of the trade. The previous trade ordinances of 1653 and 1681 in the sphere of the land and sea trade which were the first sources in the trade norms systematization in the French history, actually predetermined the contents of the Trade Code of 1807.

The formalization in regulating the trade relations was the indication of the state law victory in regulating the relations over the guild law. The social and economic reasons for such an outcome of adopting the French Trade Code were named by G. F. Shershenevich: to break the links to the past experience, to destroy the merchant in his class meaning and to replace the tradespeople special law with the trade special law [19, p. 119]. The juridical reason appeared from the norms of the Civil Code which regulated only the general aspects of the property turnover and did not extend to the trade relations.

Together with the experience of consolidating of the trade custom perceived by the law, the preconditions for the Trade Code were represented by the efforts of the legal experts in the customary (coutume) and the written law. Theoretical efforts of J. M. Portalis, F. D. Tronchet, J. Melville, F. J. Bigot de Preameneu, F. Bourjon, R. J. Pothier, K. J. Olivier, who were considered by Napoleon to be the representatives of different components of the French culture, contributed to its development.

The intellectual ideas of the French lawyers were not fully approved in Germany which, starting for the 17th century, was occupied with its own scientific force which by that time got the "calm and magnificent voice of Savigny" [15, p. 245], who considered the law to be a national product and insisted that it cannot be dictated from the outside. F. C. v. Savigny did not support the codification ideas, but he did not argue against codification while insisting on the further law development and the law formulation via the scientific jurisprudence opportunities.

The political and social time that came after the adoption of the French Trade Code of 1807, had an impact on the trade law ideas of Germany which did not wish to remove the publicity elements from the trade law sphere. By that time, the German lawyers already could evaluate the dyarchy experience of the French codes and account for their drawbacks, having formulated the reasons for developing trade-specific juridical rules in Germany, i.e.: the development of the trade turnover as opposed to the rest of the civil turnover, and the status of the whole private law [25, sec. 42]. Thanks to the works of the German scientists, the court practice on the trade disputes was studied, and as there were no grounds for abandoning it, this allowed to systematize and generalize first the trade law but not the civil one for the codification purposes. The German leaders betted particularly on the trade law and not the civil law which at that period of the history which was not systematic and clear, while the trade law was characterized with experience, compensatory nature, improved protection of trust, specialization, typification, transparency, quickness, universality, cosmopolitanism. Its subjects were treated as specialized, they increasingly claimed for the legal order, but with this, a greater responsibility was demanded from them [6, p. 462].

Due to the fact that the trade law of Germany came into hands of the “legal theorists” and was strongly “scientificated”, the powerful influence of the German dogmatics kept many of the medieval trade law institutions alive, and these institutions “eventually became the core of the trade law codification” [24, s. 13]. One of the institutions was the circulation of the bill of exchange, covered by the norms represented as early as in 1847 in the Unified Bill Statute of Germany, which got the status of the empire law a year later. For this reason, the Statute got the role of a guidebook for the future trade legislation that was supposed to unite all the trade-law matter.

The trade codification aims were ambitious and the process was disputable. Some of the law-

yers proposed to abandon the idea of the trade law codification and to only include individual provisions regulation the trade turnover, into the Civil Code. But the Trade Code supporters achieved a victory in this discussion. A special credit in that goes to German legal theorist of that time L. Goldschmidt who managed to prove in a well-argued manner the practical meaning and the historical necessity of having the Trade Code (adopted in 1861 with the *All-German Trade Code* title) in parallel with the Civil Code.

Evaluating these facts, G. F. Shershenevich emphasized that the All-German Trade Code was the negation of the general civil law [19, p. 125] in terms of its dualism. In reality, the Trade Code did not originally have a commercial character, because it was meant for the compensation of norms of the missing Civil Code. This is why, being published prior to the Civil Code, this Code was viewed as a part of the existing civil legislation and was planned for a parallel action with it.

Later, during the codification efforts on adopting the Civil Code at the end of the 19th century, the question of defining the place of the trade-law norms in the emerging private law system was raised again. It was planned to fully renovate the civil legislation with removing the existed dualism of the trade and the civil law. But the structure of the German Code adopted in 1898 which comprised the general part and the special part, and correspondingly – the general norms and the special norms, and the availability of the formulated principles within it which were aimed at compensating for the missing special norms, and a strict hierarchy of the normative-legal instructions finally resulted in the trade legislation preservation. This legislation was reformed, with establishing the trade and civil law relation as the *general-to-specific* relation. Such a relation of the trade and civil codifications had not changed until the new German Trade

Code was adopted in 1897. And today the trade law of Germany, together with the civil law, is treated as a traditional branch of the German law, which is understood as a special law of the entrepreneurs (Kaufmann) and relates to the private law. It is applied in cases when at least one of the participants of the transaction is recognized as an entrepreneur in accordance with the Trade Code provisions.

As for the modern German civil law science, even with the codification dualism it was not and is not striving for the absolutization of the trade law features. As S. Gareis notes, “there is no single direction in which the trade activities aspects can go that far as to allow only special legal provisions to be possibly or obligatory applied within them... The trade activities are in principle dominated by the civil law norms which are also followed by other citizens” [4, p. 3–4]. This is one of the reasons why these trade law institutions are viewed as sale and purchase agreements in modern civil law textbooks [27].

The same compromise attitude is found in modern German literature with regard to the economic law which is viewed as “special private law of professional economy”. It is recognized as the one included into the system of the private law as part of the trade law – a private economic law in opposition to the administrative economic law. The newest proposals on developing the special branch of the entrepreneurial law also see it as one of the private law variants.

Therefore, the general result of the dual codification of the private law both in France and in Germany was never associated and is not associated now with the contradiction and absolute independence of one code norms from the norms of the other code. It should be specially noted that such a result was obtain in spite of the differences in motives, in original juridical purposes and in sequence of adopting the trade and civil legislations in these countries.

About the Russian Civil Law Monism

The monistic approach, as could be understood from its title, is based on the legislative acknowledgement of the fact that the general civil norms and the norms regulating the relations with the professional market players, are the same. And this does not allow for an independent codified act or other act of supreme juridical power, but does allow for the presence of a definite group of norms as part of the existing civil law codification, which are aimed on specific subjects only. In contrast to monism, the dualistic conception is based on the supposition that the norms regulating the civil law turnover, are self-sufficient and largely independent in their correlation, as they have different subjects of legal regulation.

The 20th century was prominent in the history of the private law dualism for the re-codification processes. For their own national reasons, two countries confronted the general acknowledgement of the processes of the trade law codification in the continental law.

As a result of uniting the trade law with the civil one, the dualism was overcome in Italy (1942) which once was the pioneer of separating the trade law from the civil law. A similar approach (starting from 1970) enshrines the modern civil law of the Netherlands. The country assimilated the civil and the trade law of France, and later (after the Netherlands liberated from the rule of France) adopted its own national original Civil Code, having abandoned the Trade Code idea. The changes were also observed in the Swiss civil legislation. It should be noted that the short but rather interesting experience of this small country attracts little attention of those supporting the dualism in property relations. It is also characterized with numerous national features, including the territorial-specific features, but even this experience should not be excluded from the arguments of theories that stand up for two codes instead of one. Since 1911, this country has been doing without an independent trade codification. In 1936, it adopted

the Swiss Code of Obligations which is in fact part five of the Civil Code [20].

One more prominent event of that century, this time for Russia, was the fact that its post-Soviet civil law got into the real scientific circulation with not only the Russian scientific maitres but also with the foreign ones. First of all – with Italian, Dutch and also Swiss. All these countries experienced the civil legislation modification which ended up with the termination of the trade codes juridical life (in the first two countries). For obvious reasons, such a participation could not help affecting the architecture of the draft Russian civil code which was developed with the involvement of lawyers from these countries.

Let us note that previously Russia had not had any predictable or manageable evolution with regard to the trade legislation acts, including in terms of its correlation with the civil legislation. There actually were attempts to adopt an independent trade legislation but these were the spontaneous attempts. As G. F. Shershenevich saw it, in this respect the year of 1832 was “a happy year for the trade law” [19, p. 173]. It was marked with the adoption of the Statute of Trade and the beginning of works on developing the Set of laws. The Statute of Trade, due to its “detachment from the formal links with the commercial courts proceedings, desolateness resulting from the meagreness of the juridical content”, obsolescence of part of its norms, got a known definition of “the debris store” from P. P. Tsitovich [22, p. 186]. Neither was a success the second document which aimed at separating the trade norms from the general civil legislation with the participation of M. M. Speranskiy, and remained a draft project. The social and economic environment also did not add to the realization of both the ideas. Russia was still finding itself in a strong feudalistic-serfdom position. It was a country organized by classes, there was no free market that could become the ground for the sequential bourgeois codification. The analogy with the trade codes of the Western Europe did not happen. Evaluating the Statute of Trade, “which seem

to contain the trade law norms”, G. F. Shershenevich was strongly categorical saying that “it has nothing in common with the trade codes of the western Europe” [19, p. 178].

When after having a break, the government got back to the codification works in 1882, the developers again faced a complicated question of what to do with the correlation of the civil and trade legislations in case the Statute is adopted. P. P. Tsitovich characterised this year as a “curious date” for the trade law [22, p. 440], as it got a theoretical support. A bit later, the customs of trade were researched (A. G. Zolotarev, 1887, A. H. Golmsten, 1895). In 1983, K. Gareis’s “German Trade Law” was translated into Russian [4]. The editorial committee performed a comparative study of the civil law and trade law institutions, analysed the correlation of the civil and trade laws in the legislation of the Russian Empire, and turned to the Commercial Code of France of 1807. As the law chronologists noted later, the question was likely not in the dualism establishment but in invalidating it and establishing the civil law unity. One of the conclusions of the committee was that separation of the trade private law from the civil law with the issuance of the Trade Codes of France and Germany happened “not because of the systematic codification of the legislative material” but exceptionally by virtue of the historical traditions [17].

There were different internal reasons which supported and strengthened the opportunity of the trade law individualization in the legislative structures, but finally did not make it happen. The reasons included the actual underdevelopment of the trade relations to the condition when they could affect the country’s economy; disintegration, improper systematicity and largely negative character of the existing trade legislation which actually fail to reach the status allowing for the separation; insufficient strength of the civil law and the legislation that were not capable of providing the convincing criteria for distinguishing between the trade norms and general civil norms

which at that time did not contain steady-systematic obligation norms that could act as the backbone and the basis for the trade and general civil concepts. With those national (economic, scientific and legislative) conditions, the European neighbours' achievements and experience (which was surely noticed and will be surely noticed in future by both its supporters and the opponents) of following the private law dualism path and adoption of two codes, the Civil Code and the Trade Code, was unapproachable for Russia in its historical period of development at the moment.

All these reasons in their complex provided for the pre-revolutionary legislative result which was taken up by the authors of the Civil Code of the Russian Empire for acknowledging the civil law unity just before the revolution.

The attempts to challenge this state of things were made after the February revolution, when its organizers associated the economic growth and the country's prosperity with the trade law, and considered it reasonable to separate the trade law norms into an independent code "which should have been wanted more urgently than the Civil Code" [3, p. 231]. It is unlikely that the question was only in the acknowledgement of the superiority of the Western codifications in regulating the trade turnover. Seemingly, the Russian legislators once again (and not for the last time – as the subsequent history would show) were trying to change the economic situation just through the priority of the commercial legislation norms. This historical moment of striving for a new legislation was repeated in 1992 in new economical legal conditions, when after the breakup of the Soviet Union there was a decision taken about the modernization of the legal system of Russia, and in particular – of the commercial legislation, which meant entrepreneurial freedom in its modern understanding.

However, the special thing about the accomplished February revolution was that contrary to the subsequent Soviet period, the number of scientific forces which could have codified the trade legislation was definitely insufficient; the tradi-

tional (particular) law which was still prevalent in regulating the trade turnover, was not generalized and systematized for the purpose of reaching definiteness in juridical concepts of the trade relations normative regulation. With this, the juridical traditions which could have acted as reference points for its autonomous codification, were not developed, and the trade relations themselves just did not reach the level of the capitalist relations.

This being the case, the trade law and legislation disappeared from the historical horizon accompanied by the state that ceased to exist after the October Revolution. This is one more historical characteristic of Russia, who, due to the subsequent historical and political events, did not allow the trade law to outgrow the state that triggered it. This is largely due to the fact that the processes similar to the European ones, when the trade law actually expand beyond the narrow limits of the trade sphere relations, spread into other economic spheres but were never fully completed in Russia. For this reason, the trade law concept did not become objectively wider, it did not manage to penetrate into industry, transport, banks, and it did not get to a position to globally mean the legal form of the market exchange of the goods, works, services, as it finally happened in the West.

G. F. Shershenevich wrote about the penetration of the trade law "spirit" into the economic turnover, about its triumphal march which "gradually conquered and conquered, dominated and dominated over more and more economic relations spheres, and stopped after facing the mining industry" [19, p. 150]. However, looking back from our historical moment, it cannot go unnoticed that these statements were in many respects ahead of time. In reality, the Russian history provided little time for the development of the trade law in its true meaning which could have been possible only in the conditions of real capitalist relations. This historical peculiarity explains the reasons of Russia's lagging behind from "getting into the private law dualism" while dualism was successfully adopted in scientific literature and affected the structure of the academic disciplines, but still was not introduced into

the legislative sphere. It's no use answering this question about whether this approach is good or bad, it is a historical fact-of-life which provided the property relations in Russia with a monistic method of controlling them. In practical terms, it means that the "fundamentals of the civil regulation of private relations which appear in different spheres of the human activities, no matter what their specific characteristics are, should be covered in the RF CC which is a core normative act of the civil legislation... The more specificity is contained in the private relation of a particular activity area, the stronger should these relations be regulated by the RF" [6, p. 63]. There are no reasons to extend this statement except probably for one argument. One should not forget that the today's proposals to legislatively formalize the private law dualism, are actually the call for breaking the legal regulation of commercial relations that was developed with certain difficulties and exists today, and the court arbitration practice which was established and continues to be established on the basis of the monism of the civil legislation. In case of choosing another path of development in regulating the property relations, both the RF CC norms and the legal enforcement practice will have to be changed. Is that needed? At least, there were no requests from the law enforcement practice regarding that.

Civil Legislation Differentiation and Civil Law Commercialization as the Rigorous Dualism Alternatives

In spite of the fact that the civil legislation had also "other satellites" which largely defined its contents, for example, commercialization and Westernization, the private law dualism phenomenon used to be and remains the most noteworthy for scientific exploration.

The private law dualism goes back to medieval Italy which was called "the birthplace of the customary law" in many of the scientific sources. The autonomy of the traditions as the regulators received the recognition of the reformers of the following epoch who maintained this branch as a separate law branch.

The Italian experience made it clear that for separating the trade law, not only the development of the cities, trade and the trade relations are required, but norms and principles have to be adopted which are absent in other branches. For their identification in the 16-17th centuries, the Italian lawyers undertook a research of the Rules of Oleron representing the collection of decisions by the sea court of 11-12th centuries, and Barcelona Sea Code of Justice of the 13-14th centuries. These particular ordonnances once gave rise to the objectivation of the commercial law as part of the traditional systems of norms, giving control to the commercial laws and consulate jurisdiction over the commercial operations performed causally, and resting exceptionally on the presumption or a fiction of being performed by merchants.

In its original meaning, the Italian private law dualism did not represent the question of the correlation between the general civil law and the trade law. At the moment when it appeared as a phenomena, it only covered the question about what role is given to the trade law and the civil law in regulating property relations. All the subsequent shades were acquired by the dualistic theories in connection with the evolution of the public relations towards their qualitative change.

Modern jurisprudence has accumulated a lot of private law definitions. Having acquired slightly corrected contents as a "problem of regulating the trade turnover when establishing relations between the civil and the trade law" [12, p. 3], the problem of the private law dualism actually grew into an all-around issue of the whole period of the parallel existence of the civil legislation and the norms adjacent to it, first the adjacent norms were economic norms only, and currently they are entrepreneurial (commercial, economic).

However, influenced by the pre-revolutionary discussions on the trade and civil law followed by the economic-law authoritarianism of the Soviet law, the problem of the private law dualism in the Russian model has acquired the format of less as the commercial norms in the civil law and even of their correlation, and more as the doctrinal competence between the trade (economic, entrepreneurial,

commercial) law and the civil law, which sometimes acted as an antipode to the civil law.

As known, the history of the civil law and trade law norms co-existence never resulted in bringing dualism into the Russian private law, in that dualism meaning which was adopted in the majority countries on the continent. Having existed in the pre-revolutionary science and withdrawn into the shadows due to its irrelevance in the Soviet period, dualism was right back in the post-Soviet period. However, the reasons for the pre-revolutionary and today's viability of the private law dualism ideas are not the same.

If in the pre-revolutionary science, due to the poor development of the legislation, dualism was explained by the necessity to demarcate the mobile and flexible trade law norms from the "heavy-footed" civil legislation norms (given that the objective existence of both was not quite obvious), then in the post-revolutionary science, the problem of law dualism was again popular because of the materialized ideological dead end: there was still no civil legislation of the "modern history" but the economic legislation was booming.

The civil law returned to the post-Soviet legal system in combination with the trade law following the pre-revolutionary model – as a phantom, i.e. the civil law did not come from the duality of the codes.

C. Osakwe who described a part of the little-known details of adopting the RF CC, was sure that the Soviet reformers who introduced the Civil Code had to answer three main questions: "1. What elements of the Soviet socialist law of the period before 1985, have to be preserved in the new post-soviet legal system? 2. What specifically and to what degree should be borrowed from the European legal system to enrich the Russian legal system? 3. Which particular elements and in what quantities could be borrowed from the Anglo-American common law, so that they could merge into the continental civil law basis of the new Russian legal system?" [23, s. 1502].

The first two questions could not escape involving the discussion of the civil and trade law

correlation problem. By the way, there were internal reasons for its resurrection. The will of some of the scientists to correspond to the juridical maxims established on the continent" and represented by "separate" Trade and Civil Codes, together with the doctrinal imprint of the "two-sectored law theory" by P. I. Stuchka and his successors, lead to the well-known opposition of the economic-oriented jurists and civil-law-oriented jurists. The latter, as C. Osakwe noted, "treated any code separation as a hidden attempt to resurrect the abandoned idea of the economic code in the modern Russian law, which in reality resembled not the Trade Code but an Administrative one; so they demonstrated vehement hostility toward the idea of the trade code existence separately from the civil code" [23, p. 1420].

The similarity of the pre-revolutionary reasons and the post-soviet reasons which did not allow Russia to acquire its own Trade (Entrepreneurial, Economic) Code, has largely a presumable character. The attentive reading of the works by the scientists involved with the development of the current RF CC who described in detail both legal and political peripeteias of its adoption (S. S. Alekseev, V. A. Dozortsev, A. L. Makovskiy, V. F. Yakovlev, S. A. Khokhlov), allows to reconstruct the reasons of the private law dualism which was never implemented in its pre-revolutionary history (this history, as we have mentioned above, was in reality the history of the disruption in the trade law existence and development) and in the modern history, which provided new alternatives to the private law dualism phenomenon. And here one has to agree with the opinion of V. A. Belov that "the absence of the objective reasons for such dualism at some periods of time makes it a senseless and unneeded phenomenon" [5, p. 74–75].

However, it was not easy for the Russian civil science to distance itself from the problem of dualism, which accompanied its own establishment and development first at the scientific level and then at the legislation-drafting level practically all the time. The problem was softly avoided in the Soviet period, when neither the

science nor the legislator for the well-known reasons did not care about the private law dualism as this law did not exist.

The modern approach is characterised with the deviation from the rigorous dualism position. It is replaced with alternative compromise concept about the differentiation of the legislation. V. D. Ruzanova noted within this context, “today it is quite reasonable to speak about the private (civil) law dualism as about its internal division which does not interfere with the unity of this law branch. Dualism as the internal civil law division which allows to account for the specific features of regulating the commercial (trade, entrepreneurial, economic) relations – is an absolutely positive phenomenon. In this meaning, it is not opposed to the civil law unity but expresses a certain level of the legal regulation differentiation of the individual groups of public relations within a framework of the unified civil law” [14, p. 54–55]. In the author’s opinion, it is the principal difference in the essence and the contents of the regulated relations but not the technical location of the specific legal norm in the legislation, that predetermines the difference in the legal regulation of different types and groups of property relations. This is the key idea and the sense of the unity and differentiation of the civil law regulation.

Today, when the history stepped far from that period when the European countries were actively using the formalized criterion of individualizing the trade legislation norms by way of the Trade Codes, we think that there is no any direct correlation between the norms of the modern entrepreneurial (commercial, economic) legislation and the formalized or non-formalized model of its individualization. It is not without accounting for the European experience that the question on the civil law commercialization has come into being, in spite of the still existing “popularity” of the dualism problem in the private law in both negative and positive aspects. It is not unthinkable that the recognition of this objective phenomenon which in due time accompanied both the general civil law (which was meant exceptionally for regulating the relations with the participation of the citizens) and

the modern civil law, will add to turning from underestimating the monistic approach in the RF CC in force.

As the foreign experts see it, the uniqueness of this codification “among the continental European civil codes is in the phenomenal number of the relations that are regulated by it... The Code successfully fuses the rules of two branches into a whole” [23, p. 1417]. Such a state of things was predetermined by the past and the present of the national history of the trade and trade relations development, by the time in the Russian history when the civil science appeared in it, by the specific features of implementing the property relations which experienced the dualism natural for all the countries with its division into the general civil relations and trade relations. But it has to be acknowledged that this was also the result of the civil legislation commercialization which had a “slowly creeping character” in the pre-revolutionary law, got stronger under the influence of the ideological dogmas in the Soviet civil legislation and obtained a completely understandable character in the post-soviet legislation.

The today’s commercialization of the civil legislation is the process as much as the result. If we speak about the result, we see the obvious natural growth of the civil legislation driven by the trade law in their common laborious pre-revolutionary history. It was the trade law that owing to traditions had to become an inexhaustible source of new institutions and norms generation.

G. F. Shershenevich provides numerous examples of the civil law commercialization due to the lack of its inclination to enforce own prescriptions in life, and due opportunity to make necessary concessions on the part of the less formalized trade law which is free from the necessity to interpret “literally”. The author underlined “the economic view (of the trade law) onto the things, its better correlation with life and absence of the details of the Roman studies, the ability to elude the fundamentals acknowledged and canonised by the civil law. ...This is the character of the trade law that makes the economic turnover sympathize with it and which gives it a significant advantage over the obsolete and static civil law” [19, p. 66, 71–78, 80].

G. F. Shershenevich impressively describes the pioneer endeavours of the trade law in the relations of representation, noting that the representation idea originated from trade relations and the trade law... Life insisted on the freedom of representation. The trade law was quick to satisfy this requirement and so deserved its sympathy. At present, the general civil law should follow the example of its little brother [19, p. 66–67]. The scientist also names other juridical spheres where the trade operations were actually the earliest movers: for example, vindictory action, considering the third parties' interests, fellowships, solidarity in relations and others. Not detracting from these merits of the trade law, G. F. Shershenevich finishes his reasoning with question “what was peculiar about them, what could not become the heritage of the whole civil turnover?” [19, p. 83]. P. P. Tsitovich noted that the trade law takes from the civil law “not only concepts but entire institutions changing the latter in its own way”, and on the other hand – it makes its own “institutions which are antithetical to the civil law, and for a long period of time develops them independently... of the civil law, and often passes them over to the civil law already well-developed” [22, p. 168]. The author underlined a comparatively vast creativeness of the trade law, mentioning also the influence of the protective mechanisms generated by commercial relations onto the civil relations” [22, p. 448]. It should be noted that the judgements by P. P. Tsitovich about the essence unity of the commercial law and the civil law are currently topical: “Both the laws define the property relations. In both of them, these juridical relations are settled into the rights and duties of the property (absolute) or obligation (relative) character”, but “that aggregate of the juridical relations, this active and flexible aggregate representing the trade as the business of a definite person, – is not known to the civil law” [22, p. 166–167].

A. I. Kaminka and K. P. Pobedonostsev gradually evaluated the processes of adoption by the Russian civil legislation (which is a part of the state system) of the constructions and sometimes whole institutions which originated from the trade

legislation. In the conditions of the economic relations development, this was in compliance with the interests of the trade turnover in general. And a similar nature of the trade law and the civil law was objectively adding to this converging. Only the trade law is enriched through the general provisions of the civil law, and the civil law enriches through the special provisions of the trade law.

If we speak about the commercialization as a process, then in accordance with the few scientific opinions, it is the previous and current movement of the civil law towards its development, under the influence of the more flexible norms of the commercial turnover and the subsequent adaptation to the requirements of the entrepreneurial activities regulation. There are several limits of such merging named in literature: the limit of the institutions, the limit of the notions, the limit of the principles [5, p. 81–82].

Commercialization can be called a process which is reverse to dualism. It does not separate and does not oppose but unites the civil law norms and the trade law norms, it provides for their interdependence and dependence on each other, and sometimes gives a signal on the necessity to merge certain norms into the other norms or to simply delete some of the (trade law) norms resulting from the civil law enforcement and development.

These processes continue uninterrupted today, taking away the force and the sense of the private law dualism argumentation. The qualitative changes in the property relations made the used-to-be “peaceful and calm” general civil law a thing of the distant past. The scientific treatment of the civil law, the historical savings and achievements implemented in it, accounting for the experience of the continent countries and today's steady processes of its commercialization, have securely provided for its authority in managing the property relations.

The civil legislation commercialization features are numerous. And these are not only the norms covering the contract form liberalization through introducing the electronic document workflow into the practice of contracts, but expanding the contract range via implementing the

mixed contract construction, completing the list of the named means of securing an obligation and so on. The signal is also received from those RF CC norms which are meant exclusively for the relations with the participation of the entrepreneurs. The role of the recent triple (two times in 2013 and one time in 2015) legislative additions into the obligation law sub-branch was not insignificant.

The civil science plays its own role in the civil law commercialization processes, searching for and finding the non-formal grounds for enriching the civil law sphere with a type of relations which had earlier represented exclusively public legal sphere of regulation (the state registration of the property rights), or reasonably covering the relations caused by the market economy, with no own sectoral affiliation (corporate).

Foreign practice also provides with its experience of commercialization. As was demonstrated in the history of other countries which refused the idea of the independent trade legislation, the distribution of the commercial relations issues outside the limits of the trade law, other branches' participation in the development of the institutions that are traditionally incorporated into the trade law body (bills, insurance, customs and etc.), deprived the trade codification acts of the unity which they used to rest on. For example, in Italy the trade legislation was actually devastated because of the comprehensive settlement of the company establishment questions in the civil code norms [16, p. 244].

The commercialization of the civil law was predetermined not only by the historically defined and still functioning trajectory of the civil law regulation of the property relations, but also by the development of other law branches, legislation, sciences and academic disciplines. In this respect, the achievements of the academic disciplines targeted at the trade deals and contracts are especially noteworthy. One should not downplay the importance of the expertise which was acquired in the trade deal theory as compared to the general civil deals that have a strong reinforcement (as well as the trade deals) in the form of the doctrines which consider the deal to be a juridical fact. It is impor-

tant to recognise the essence of the deal in the process of its life, its implementation aspect, and this is more explicitly achieved through the trade deals. Without any exaggeration, they are the core of the commercial law – without them, there will be no other content that fills in the commercial relations. However, this doctrinal approach should be free from the methods when the reality of this cognition is worked into the theory of the private law actual dualism. The tactics and didactics of the educational process have to proceed from the idea that the dualism theory can and should be considered as one of the trends in views on the status of the trade (commercial, entrepreneurial, economic) law in the Russian legal system.

The doctrine turns to the “trade deals” notion much less often than to the “trade law” notion, willing to differentiate it from the civil law. For this reason, it is necessary to point out the reserves of the scientific materials on the trade activities, which have not been researched by the contemporaries and were left by G.F. Shershenevich to the contemporaries of the jurisprudence for this purpose.

L. V. Shchennikova made an attempt to attract the doctrinal attention to the trade operations problematic, when she turned to the pre-revolutionary doctrinal views and proposed her own definition of the trade deal as the “deal where the object is the goods meant for using in the trade turnover, when this deal is professionally made by persons (in accordance with their trade profession) with the speculative purpose and as a craft” [21, p. 148]. It is not possible to disagree with the author in her opinion that the barriers for defining the trade deal today are the inertia of the legislator himself and the “doctrinal polyvocality” in matching terms “entrepreneurial activity”, “commercial”, “economic”, “trade” [21, p. 140].

The process of the civil law commercialization is inevitable. Ignoring this process, giving ground to the “rigorous dualism” is the same as attempting to turn around the history of the Russian legislation when all the types of conditions that surrounded it – social, political, economic – have become the thing of the past.

Conclusion

The history of the Russian trade law and the trade law legislation which has not in due time acquired the necessary status and remained in the “trade law and trade class law” equivalence, does not give any reason for the automatic transfer of the past scientific concepts on the private law dualism to the modern ground.

The correlation of the trade law and the civil law in their historical and legal reality, the domination of the economic law and legislation over the civil law in the Soviet period, theoretical views aimed at the separation of the entrepreneurial legislation from the civil legislation, despite their legislative correlation established in the post-soviet period, – these are all parts of the Russian juridical model of the private law regulation of property relations.

The problem of the private law model – either or monistic or a dualistic one – has a pure theoretical (conceptual) character. Any conclusions of the theory directly or indirectly affect both the legislator’s position and the law enforcer’s position. This obliges the theory and its representatives to be both up-to-date and convincing.

There are no reasons to be doubtful about the fact that the economic (entrepreneurial) law theory has grown out of the trade law theory, although not in Russia. The creation of the European trade law theory and its predictable derivative – the trade codes – turned to be the impulse for obtaining the mature trade class and horizontal trade relations which were not class-related and so required the recognition of the legal equality and private initiative of its participants. The subsequent extension of the trade rules to the other spheres of the economic life allowed to abandon the narrow sense of the trade law as the one covering exclusively the trade turnover. The Russian trade law could not reach these conditions.

In spite of the qualitative difference and the maturity degree of the trade legislation norms in pre-revolutionary Russia and in Europe, the process of the civil law commercialization driven by the trade law progressed with no interruption and provided the civil law (the law of pandects)

with everything what was not received by it when the Roman law was perceived. The opportunities of such enrichment of the civil law at the expense of the trade law did happen and continue to happen due to the trade turnover dynamism and specialization.

Striving for defending and justifying the non-existing civil law dualism contradicts with the tendencies which are currently observed in regulating the property relations and rest on the equality and autonomy of the participants of the relations. The point is not in the few processes of the trade law processes re-codification, but in the active and sequential processes of the civil law commercialization.

Fostering the idea about the commercial law independence is a step backward, simply for the reason that it will require redrawing of the existing civil legislation to avoid numerous duplications, let alone the established court practice and its positive traditions. A sound view on both the system of the civil legislation in force and its application permits to claim that today there are no reasons for correcting the mystic civil law ideas for the purpose of clearing a part of the normative space for the commercial law. As for the private and public fundamentals correlation in regulating the trade relations, the algorithm of this correlation has been included into the RF CC norms since 1994 and it is fully applicable for commercial (entrepreneurial) relations which are a kind of the property relations based on the equality, disposition and private initiative.

The importance of the theoretical studies on the commercial (entrepreneurial) law problems is undeniable. The point is that all theoretical ideas should not be typecast to the two-headed concept which finds more and more confirmations of being a “yesterday’s” idea. It is more important to enrich the scientific attention sphere with the issues of the terminology stability and its correlation with the civil law conceptual framework, as well as with the issues of the trade operations, the segregation criteria in the general system of the civil contracts, the special features of the commercial relations participants’ liability.

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