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RECEPTION OF LAW AND LAW ADAPTATION AS FORMS OF INTERACTION OF LEGAL SYSTEMS

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This article is devoted to analysis of the influence of some legal systems on others and their interaction. Some categories as “legal acculturation”, “reception”, “legal transplants”, “borrowing” are investigated. The conclusion is drawn that it would be justified to use the broadest universal term-concept to designate “legal acculturation”, by which one should have in view any borrowing of elements of some legal systems by another. The designation “legal transplants” is possible as well. The term-concept “reception of law” rather precisely characterized the borrowing of elements of legal systems of the past by later systems.

Keywords: legal acculturation, reception, legal transplants, borrowing, adaptation.

The statement of the problem and the analysis of the researches and publications in this area. The influence of some legal systems on others and their interaction has attracted the attention of legal experts for a long time. The most popular subject-matter of special studies of the influence of one law on another was the reception of Roman law, especially of scholarly inquiries from the Middle Ages onwards, and, then, during the Great European codifications [1; 2; 3; 4; 5].

The statement of the main material. In the process of discussions relating to the suitability of Roman law for application in law-creation and legal life which took place before and during the great European codifications of the eighteenth and nineteenth centuries, European legal experts formulated propositions which were important in principle with regard to comprehending the essence of the phenomenon of the reception of Roman law. Rudolf von Jhering formulated the general methodology reception, which was then defined: *Durch das römische Recht über aber das römische Recht hinaus* [6].

In the early twentieth century the studies in this domain were fewer: the western vision of the essence of the reception of Roman law on the whole had been formed. The subject-matter of the research determined the place of Roman law in the culture of Europe, the reception of Roman law in individual countries, under special conditions, and so on [7]. The existence of a crisis in this domain was recognized and was a turning point in the quest for new orientations of research [8].

In our view two problems arise here: (1) “expansion” of the concept of reception itself transcending the reception of merely Roman law; (2) the establishment of other orientations, together with reception, or forms of influence (interaction, borrowing) of legal systems.

It is advisable to commence the consideration of these questions with an analysis of the phenomenon of reception as a widespread instance of the influence of one legal system on others. Moreover, here we have a rather reliable theoretical base in the form of the conclusions of those who have studied the reception of Roman law. In addition, we take into account the emergence of a number of special studies of the concept and essence of the reception of law in post-Soviet space during the

last decade [9; 10]. Melnyk believes that this is a unilateral, voluntary process of borrowing, perception and further adaptation to the conditions of a certain country of a more developed law created at another moment of time or in another state with a view of improving the operation of own legal system. This is a complex matter which contains processes of inheritability, perception, repetition, and borrowing of legal form from other legal systems by virtue of their historical and cultural homogeneity. Therefore, reception is important to perceive as a natural process of carrying over, mastering, preserving, and using of new elements by legal systems [10, p. 6, 10]. Aznagulova characterizes the fact of the reception of law as a form of interaction of national legal systems, as a process of perception and adaptation to conditions of a certain country of law made in another state or in an earlier historical era [9].

We will stop here and draw attention to the principal shortcoming, in our view, of these and similar approaches: the aspiration to maximally expand the concept of the reception of law. However, the expansion of this concept seems unjustified because this is connected with a violation of the rules of “Ockham’s Razor”. Considering the roots of the term “reception”, its use is justified with regard to instances of the “renaissance” of elements of past legal systems in the process of the historical development of mankind. In this event we should speak not of the “interaction” of legal systems”, but of the “*succession* of law – the *influence* of one system on another”, which, indeed, does not reduce the importance of this phenomenon for the development of modern legal systems, and so on.

In order to answer the questions arising in this connection, in our view, one should touch upon the essence of law, factors and algorithms of its development (or transformation), using a so-called “civilization” approach, the essence of which is recognition of the decisive role of the development of civilizations (world and local). Civilizations are dynamic formations of the evolutionary type. The views relating to the character of their development may be combined more or less into two groups: (1) line development; (2) cyclical development. The conception of the cyclical development of civilizations based on the assumption of repeti-

tion of similar phases of the development of the culture thereof is more constructive. The greatest popularity of the cyclical theory of historical development was achieved after the publication of Oswald Spengler (1880-1936), *Der Untergang des Abendlandes: Umriss einer Morphologie der Weltgeschichte* (1918) [11], where ideas were formulated of cultural-historical types akin in structure and the poly-cyclicality of the historical process. Later A. J. Toynbee substantiated a suggestion concerning the determinative role for historical research of the categories of space-time and the consideration of the historical processes as challenges of history and responses of mankind ensuring a break-through to the future. The challenge which remained without an answer is repeated again, but the inability of society, having lost its creative forces, energy, and so on, to respond to the challenges deprives it of vitality and finally predetermines its disappearance from the historical arena. Civilizations pass through stages of birth, development, fall, and dissolution. In the event of the dissolution of civilizations the contacts in space and in time determining them grow [12, p. 59].

The propositions set out acquire methodological importance for assessing the succession of legal systems if the place of law in the structure of culture or civilization is taken into account, where it acts not only as an element of the socio-political structure, but also is called upon to be a carrier of the highest principles and values of civilization and realize the historical purpose of society connected with the affirmation in them of humanist principles. The essence of the phenomenon of law is not confined merely to the fact that it normatively objectivizes and realizes the needs of civilization. It also is a factor of individual self-expression of a person, creativity, the accumulation thereof, self-maturity [13, p. 200, 219, 221, 224]. Law arises in inseparable linkage with religion; then it acquires greater socio-political importance and a philosophical and professional legal comprehension and substantiation; and finally, law becomes an element of social and individual consciousness in the context of the development of the respective civilization. Because this process is repeatable, just as cycles of civilization can be repeated, the reception of law occurs.

A key moment of characterizing the reception of law is an understanding thereof as part of a general process of renaissances and contacts between a living civilization and a civilization that has receded into the past. Having regard to the foregoing, the reception of law may be defined as the renaissance thereof, perception of the spirit, ideas, and main principles, and also basic tenets of the law of preceding civilizations by subsequent civilizations at a certain stage of their development in the context of the general process of cyclical renaissances.

Depending on the peculiarities of the development of a particular local civilization, countries, or groups of countries, reception may have a various external expression and various types.

Reception of law should be distinguished from its restoration. Reception has the purpose (and is the final result) of the creation of something new in the domain of culture, law, and others on an

existing basis. Even if this occurs in the form of direct borrowing of legal norms, there is a new quality, something new, which arises in a new spiral of social development.

As regards restoration, it pursues the aim of reinstating something in its initial form, without changes and additions, or without those additions which might change the initial state of the basic material. In a certain sense restoration is the antithesis of the reception of law.

In noting the great role of the reception of law (especially Roman law) in improving legal systems and ensuring the succession of law with its assistance, we should take into account that this provided a link between legal systems only (vertically) (and merely to a certain extent "horizontally" in derivative receptions). Thus there is the question of the means, or forms, of the interaction of legal systems.

One category which first deserves attention of investigators is "legal acculturation". Various views exist with regard to its definition. However, most widespread is an understanding thereof as a rather complex process. The process of acculturation is defined as: "... the process of mutual influence and the result of this mutual influence of cultures on one another, or the borrowing of a phenomenon from one milieu and introducing it in another milieu, including acclimatization. Consequently, acculturation is a process of borrowing and the borrowing itself as a result – the borrowed object. In other words, acculturation is a process of borrowing expressed in the mastery of innovation by the borrowing group (or individual, people) and adaptation to this" [14].

Sometimes acculturation is regarded as an element of social administration which most influences social life in the domain of law-creation and law-application [14].

The following definition is rather successful. Legal acculturation is a relatively autonomous process of continuous interaction of legal systems assuming the use (depending on cultural and historical conditions) of methods differing in the nature and force of impact, a necessary result of which is change of the initial legal culture (or individual elements thereof) or one or both societies coming into contact [15, p. 7-8]. Understanding legal acculturation broadly, the author also singles out such forms thereof as borrowing and reception of law [15, p. 14].

Sofronova defines legal acculturation as the process of mutual influence of legal systems. She singles out "legal borrowing as a variety of legal acculturation, which assumes the transfer and preservation of legal elements without any changes" [16, p. 23]. The position of Sofronova with regard to the correlation of the concepts of "acculturation" and "reception" is interesting. She noted that reception, understood as only voluntary process, is a universal variant of acculturation and a perception of another legal culture not imposed by force. As a generic indicator one may name the unilateral character of borrowing effectuated solely at the initiative of the recipient. Two types of reception are distinguished: (1) horizontal reception: the perception of legal institutions within the framework of a simultaneously operating PSO;

(2) vertical borrowing, when there is a change of socio-economic formation assuming the extensive perception of diverse legal phenomena [16, p. 27].

In our view, in this position a confusion of concepts is permitted. Insofar as reception, as noted above, is a perception by later legal systems of elements of systems which receded into the past, horizontal reception is impossible by definition. Instead, one may speak of borrowing by one legal system from another one.

In evaluating the prospects for the use of the category of acculturation for forming a theory of interaction (or influence) of legal systems, one may assume that the most suitable for this is an understanding of legal acculturation as a universal concept which characterizes this as the infusion of one legal system into another [17, p. 199]. Some authors in defining legal acculturation as any carrying over of legal forms to another legal milieu distinguish such forms of the last as legal expansion (which is forcible) and reception (voluntary perception of elements of another legal system). Legal expansion is linked with legal transplanting [18]. We note in this connection that the concept „legal transplants”, introduced into scholarly discourse of comparativistics [19; 20] rather long ago, usually is used to designate any borrowings from

other legal systems (although sometimes it is used in the meaning of “one of the types of reception”) [19]. In other words, they look like a category, in our view, which actually is identical to the concept of “legal acculturation” and different from the concept “reception” [20].

Conclusion. Thus, one may conclude that these days at the stage of forming a general theory of interaction of legal systems there is no precise, generally-recognized difference of such categories as “legal acculturation”, “reception”, “legal transplants”, “borrowing”, and so on.

In our view it would be justified to use the broadest universal term-concept to designate “legal acculturation”, by which one should have in view any borrowing of elements of some legal systems by another. The designation “legal transplants” (although the last in the Ukrainian tradition has a certain natural technical hue) is possible. The term-concept “reception of law” rather precisely characterized the borrowing of elements of legal systems of the past by later systems. As regards the borrowing by legal systems one from another which coexist in time (horizontal borrowing), possibly this type of acculturation it would be advisable to call the “law (legal) adaptation” or “adaptation of legal systems”.

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РЕЦЕПЦІЯ ПРАВА ТА ПРАВОВА АДАПТАЦІЯ ЯК ФОРМИ ВЗАЄМОДІЇ ПРАВОВИХ СИСТЕМ

Анотація

Стаття присвячена аналізу впливу одних правових систем на інші та їх взаємодії. Досліджені такі категорії, як «правова акультурація», «рецепції», «правові (юридичні) трансплантації», «запозичення». Зроблено висновок про те, що виправданим було б використовувати у якості найширшого універсального терміно-поняття позначення «правова акультурація», під яким слід мати на увазі будь-яке запозичення елементів одних правових систем в інші. Можливе також позначення «правові (юридичні) трансплантації». Терміно-поняття «рецепція права» достатньо точно характеризує запозичення елементів правових систем минулого пізнішими системами.

Ключові слова: правова акультурація, рецепції, правові (юридичні) трансплантації, запозичення, адаптація.

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РЕЦЕПЦІЯ ПРАВА И ПРАВОВАЯ АДАПТАЦІЯ КАК ФОРМЫ ВЗАИМОДЕЙСТВИЯ ПРАВОВЫХ СИСТЕМ

Аннотация

Статья посвящена анализу влияния одних правовых систем на другие и их взаимодействия. Исследованы такие категории, как «правовая аккультурация», «рецепции», «правовые (юридические) трансплантации», «заимствование». Сделан вывод о том, что оправданным было бы использовать в качестве наиболее широкого универсального термино-понятия обозначение «правовая аккультурация», под которым следует иметь в виду любое заимствование элементов одних правовых систем в другие. Возможно также обозначение «правовые (юридические) трансплантации». Термино-понятие «рецепция права» достаточно точно характеризует заимствование элементов правовых систем прошлого более поздними системами.

Ключевые слова: правовая аккультурация, рецепции, правовые (юридические) трансплантации, заимствование, адаптация.

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THE INSURANCE OF PROFESSIONAL ACTIVITY OF ADVOCATE: EXPERIENCE FEDERAL REPUBLIC OF GERMANY

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The article is devoted to complex research and analysis of the institute of professional liability insurance of lawyer in Ukraine and Germany. As the professional activities of the lawyer is to provide legal assistance and is based on civil contracts, the provision of any legal aid of lawyer is a professional, financial responsibility for failure or improper fulfillment of their professional duties. Civil liability attorneys can come to common grounds provided by law, including the Civil Code of Ukraine. In all developed countries, such questions are successfully resolved through the mechanism of professional liability insurance – both mandatory and voluntary forms. Analyzing the practice of professional liability insurance for lawyers in Germany, you can identify the main directions of possible development of this institution in Ukraine.

Keywords: advocate, advocate activity, insurance, insurance of professional responsibility of advocates, insurance of professional responsibility.

Stellung und Bestimmung des Problems. Der Rechtsschutz der Persönlichkeit – ist ein unter der grundlegenden Merkmale der Rechtsstaatlichkeit, welches für ein System von wirksa-

men rechtlichen Mitteln zur Umsetzung und zum Schutz der Rechte und der Freiheiten bietet. In diesem System ist eine besondere Stelle für die Anwaltschaft festgelegt und vorgesehen, die eine