

SCTCMG 2019
**International Scientific Conference «Social and Cultural
Transformations in the Context of Modern Globalism»**

**RECEPTION AND TRADITIONAL LAW IN THE FORMATION OF
RUSSIAN LAW OF INHERITANCE**

Olga Akhrameeva (a)*, Irina Dediukhina (b), Oksana Zhdanova (c), Maria Malykhina (d), Yulia Labovskaia (e)

*Corresponding author

(a) North-Caucasus Federal University, 1, Pushkin Street, Stavropol, Russia
akhray-ova@yandex.ru, +7-928-306-60-27

(b) Stavropol State Agrarian University, 11, Zootekhnikeskii lane, Stavropol, Russia
i30041978@bk.ru, +7-905-446-65-80

(c) Stavropol State Agrarian University, 11, Zootekhnikeskii lane, Stavropol, Russia
ocsana2006@list.ru, +7-962-406-82-67

(d) Stavropol State Agrarian University, 1, Pushkin Street, Stavropol, Russia
marya.malykhina@yandex.ru, +7-962-402-46-02

(e) Stavropol State Agrarian University, 11, Zootekhnikeskii lane, Stavropol, Russia
ynar@mail.ru, +7-918-878-39-34

Abstract

The reformation of the Russian law of inheritance generates interest to the formation of the Russian legal system, to principles and traditions involved in it. Thus, the authors conducted a brief analysis of the formation of the legislation of the ancient Russian state in the context of active interaction with other states, in particular, with the Byzantine Empire. In this regard, the formation of national law of inheritance and the degree of influence of the Greek-Roman law on it are considered. It is proposed to consider the advent of such category as “reception”, what components were concluded in it at the moment of its appearance, and how national legislation was formed at that time and in subsequent historical periods. The authors conducted a comparative legal analysis of existing monuments of ancient and medieval legislation, the legislation of the period of formation of the Moscow state and the Russian Empire, the research of the formation of Russian legislation and the development of international relations of Kievan Rus, Tsardom of Muscovy, the Russian Empire, which influenced the legislation formation. As a result the authors concluded that there were no direct connections with the Roman legal system as well as evidences of direct borrowing from Roman law into Russian. In particular, this conclusion is made by the authors on the basis of the analysis of Russian last wills and testaments of the medieval period, the rules of inheritance law of the Council Code of 1649, and acts of the Russian Empire.

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Keywords: Law of inheritance, reception, Rus, Byzantine Empire, custom.



1. Introduction

In September 2018 (namely, since September the 1st, 2018), the amendments to the Civil Code of the Russian Federation came into force, introducing into the Russian legal field the institution of joint wills (or mutual testaments), a hereditary contract, a hereditary fund actively used in many countries of the Roman-German legal families. The main arguments of the project developers of these amendments were the similarity of our legal system to the Roman-Germanic, the existence of similar legal traditions, the reception of Roman law, etc. However, as the analysis of the final variant of these amendments and the law enforcement mechanism (notarization and witnessing procedures) showed, these amendments do not correspond to the prototypes (Davidson, 2012; Malavet, 1995; Nahuis, Noailly, Aouragh, & Verbruggen, 2005; Noailly & Nahuis, 2010; Ruotsalainen & Manning, 2007) and national legal traditions. Such areas of relations as family and inheritance law are connected with faith, traditions, religion, and the memory of predecessors. They are based precisely on the norms or traditions of the past. Accordingly, the reform of the legal regulation of these relations should be structured according to the way of the creation of law. Machiavelli (1531) paid attention to the connection between inheritance and state development for a good reason, arguing that peoples may forget enslavement, conquest, but they will never forget a lost inheritance.

2. Problem Statement

The ongoing reformation of civil and inheritance law is based on the classical approach that the Russian legal system is a part of the Roman-Germanic legal system. Accordingly, all the legal traditions are a reflection of the Romanic legal tradition, formed under the influence of the reception of Roman law. However, the ongoing reform of the Russian law showed the ineffectiveness of this approach, which was illustrated by the authors on the example of inheritance law.

3. Research Questions

The subject of the research is monuments of ancient Russian and medieval law, legislative acts of the Tsardom of Muscovy and the Russian Empire, the analysis of studies on the reception of Roman law and the evolution of Russian inheritance law, the research on the development of civil law in the Russian empire and the influence of Western European schools on Russian specialists in civil law.

4. Purpose of the Study

The purpose of the research is to analyze the basis of the formation of Russian inheritance law in order to clarify the question: did a reception of the norms of foreign legal orders and, in particular, Roman law take place in Russian civil and inheritance law?

5. Research Methods

The need to study the monuments of Russian and foreign legislation of ancient times in comparison with each other required the use of a comparative legal method. A similar method was used during the

comparison of the sources of the formation of national legislation and Roman law, the law of the Byzantine Empire.

6. Findings

The most traditional method of the formation of legislation, known in legal doctrine, is “reception”. The “reception of Roman law” is traditionally associated with transferring the norms of Roman law to recipient legislation. However, has this method always consisted of transfer, unadapted introduction of a foreign (Roman) norm? Did it relate to the formation of Russian law (legislation)?

The analysis of the sources of law of medieval European states, including Eastern European states (for example, Kievan Rus) showed that the influence of Roman law after the destruction of the empire (the Western Roman empire) was not as universal as it seemed in view of its importance for legal science (Benda-Beckman, 2001; Brenner, 1985). On the one hand, the period following the fall of the empire is characterized, on the one hand, by the Romanization of its provinces, by the decrease in the general level of culture and the barbarization of Rome. And on the other it is characterized by the growth of Roman influence. The territory of this influence covered the center of Italy and its South, where the Byzantine Empire maintained its influence until the advent of the Saracens and the Normans, South-Eastern and Northern France, Northern Spain, Germany, and also included the spread of legal norms (Roman law), due to a significant gap in legal management of this sphere by barbaric regulations.

A new stage of Roman law began in the end of the 11th century, when medieval European societies needed to regulate the emerging economic relations. This made medieval lawyers turn to the single system of perfect law of that time - Roman law. The study of Roman law in medieval Europe and its further spread led to a more substantial and formal development of Roman law than the actual period of the existence of classical Roman law itself. From this period the so-called “The reception of the Roman law” had started.

Historical and legal study of the formation and development of Russian inheritance law showed that the reformation of legal institutions based on family and marriage relations, connected with faith, traditions, religion, the memory of predecessors and based on the norms or traditions of the past also took place in national legislation. However, it was not so revolutionary.

Taking into account the regulatory origins of the management of inheritance law in the ancient Russian state, first of all it is necessary to mention the Russian Truth, as the main source of legal norms of that period, which some researchers regarded as the reception of the norms of Byzantine and German law. However, the textological analysis of the Russian Truth indicated that it arose under the influence of the so-called “Russian law”.

The last aspect referred to the norms of local Russian law and was reflected in the treaties of Russia with Byzantium of the 10th century. Thus, in the treaty of 944, the Law of the Russian (Russian Truth) was mentioned as an equal source of law along with the Greek Law. In the ancient Russian lands, Russian Truth became the main source of secular law until the end of the 15th century. Therefore, its articles had become one of the normative foundations of medieval Russian legalists of the 14th — 15th centuries - Justice of the Metropolitan, Pskov Judicial Charter, Law Code of Ivan the 3rd, the Grand Duke of Moscow. These articles were also taken into account when concluding international treaties of the Novgorod Republic and

Smolensk principality of the period of political fragmentation of Russia in the 12th – the 13th centuries (Sverdlov, 2005).

It indicated the high level of social relations and culture of the Slavic people already in the 9th century. Moreover, it confirmed that the institution of inheritance in the medieval period was formed under the influence of customary law norms that related to the preservation of the family community characteristic of all Slavic peoples. At the same time, the Slavic ordinary rules of the “Russian law” were different from the “pater familias” and German individualism, which were the basis of those norms that borrowed from Western European system of justice and were not typical of national legislation and law. And besides, the legislation of Kievan Rus itself differed from the early European feudal legislation, for example, it was more humane.

The first mention of the regulation of inheritance relations in ancient Russian states is reflected in the work of the Arab writer Ahmad Ibn Fadlan (he described the period from 392 to 322). In particular, he pointed out that the property of the deceased noble Rus was inherited as follows: As for the rich, they collected what he had and divided it into three thirds, and one third was for his family, other one third - to tailor the clothes for him, and the last one third - to make a drink (Melnikov, 2010). This fragment also confirmed that the rules of inheritance were applied on the basis of traditional law.

Another well-known textbook source of law of this period is the treaties of Byzantine Empire and Oleg (911) and Igor (944), which also allowed considering the procedure and amount of borrowing (reception) of foreign (primarily Roman or Byzantine) norms in the Ancient Russian law. These treaties also regulated the peculiarities of hereditary legal relations arising on the territory of the Byzantine Empire, and not on the territory of Ancient Russia, i.e. they concerned the category of Russians who were in the service of the Byzantine emperor. Accordingly, in this context there were not any borrowings in this part. At the same time, the treaties involved the cases of the operation of the Byzantine laws on the Russian lands. Thus, on the territory of Kievan Rus there were a lot of alien people from Byzantine Empire who wanted to subordinate the regulation of their property to Byzantine law. However, despite the existence of these norms, national sources did not express strong will to borrow them. This indicated the general rule that the Slavic people (Ruses) could not comply with the action of the Greek law alien to them. Moreover, based on the customs of community, reinforced by the customs and traditions of family community, the customs retain the most ancient stratum of the norms of tribal, marriage and related inheritance law.

Analyzing the Russian Truth, Yushkov (2002) strongly rejected the influence of foreign law (Melnikov, 2010) including Byzantine pointing out that it rooted in the law of the feudal period. As Shchapov (as cited in Melnikov, 2010) noted borrowing the norms of the Byzantine law, concerning not only the inner church life, but also the regulation of the life of the feudal society referred only to the period from the end of the 12th to the beginning of the 13th centuries and to subsequent period, when social life was completely subordinated to Christian principles, which were built, among other things, on the basis of the norms of Eclogue and Prokhiron.

Returning to the investigated institution, the authors noted the characteristic features of the inheritance law of the medieval Russian state:

1. The circle of inheritors included only the sons of the testator. At the same time, a spouse, daughters and side relatives were not included into it.

2. Undivided rule of hereditary succession

3. Accordingly, in the absence of sons, the property was declared heirless. In this case, a duke inherited after the peasant, and in the feudal class, daughters could be allowed to inherit.

4. Hereditary mass always involved an obligatory share of the church to organize funeral feast, and the share of widow, which she owned for life in the event of non-remarriage.

5. Daughters were not included in the circle of heirs, but they had the right to receive part of the property of the father when entering into marriage as a dowry.

6. The house of father always was inherited by the youngest of the sons. Inheritance by testament appeared only in the Expanded Truth at the beginning of the 13th century. At the same time, it was denounced as a specific legal construction of the “series”, which differed significantly from traditional content indicating a special subject as an heir, which may differ from heirs by law.

This circumstance, as well as other mentioned above, excludes the reception of Byzantine inheritance law. In addition, the lack of reception of Roman law, as a procedure for transferring legal norms and legal traditions from the “living legal system”, is also confirmed by the fact that by the time of the formation of the ancient Russian state, the Roman Empire was already divided, and its Western part, which retained significant influence of the classical Roman right, was destroyed. The Eastern part of the Roman Empire was transformed into the Byzantine, the law of which was based on other religious principles that formed canonical Orthodox law.

Thus, the authors emphasized again that the classical Roman law (as the law of the Roman Empire itself) did not directly contact the ancient Russian state; the reception of this right arose on the territories that were part of the area of influence of the Roman Empire (or rather, the lost Western Roman Empire); the revival of Roman law on the basis of scientific and practical interpretation received its beginning in the 11th century, when the ancient Russian law has already formed such legal monuments as the Russian Truth.

However, the individual territories that were part of Kievan Rus (Novgorod and Pskov Republics) subsequently gained relative independence and were in contact with system of justice already formed under the influence of the Roman law heritage (glossators and postglossators) through Eastern European states. However, the exact amount of reception or amended borrowing cannot be determined precisely because of the penetration of a culture built on the example of the Orthodox culture of the Byzantine Empire. Thus, the Pskov Judicial Charter (hereinafter referred to as PJC) did not contain a special section on inheritance law; the relevant questions were scattered in many articles. The provisions of Article № 14-15 were essential for inheritance. In Article № 14, the handwriting testament was mentioned - “he wrote handwriting and put it into the box”. The PJC did not specify the process of handwriting. For this reason, it can be assumed that Eclogue norms were used in the course of its creation.

One of the examples of a significant difference in the regulation of the inheritance legal relations of Ancient Russian and Byzantine law is the analysis of testaments, performed by Belyaev (1897) on the materials of the 14th – 16th centuries, who revealed several fundamental differences between the Old Russian testaments and their Byzantine counterparts.

Firstly, the so-called collective testaments were quite common in Russia, which was completely impossible for Roman and Byzantine law.

Secondly, in the Old Russian testaments, there were often orders to redeem the inherited estate of monastery, which also contradicted the classical ideas about the nature of testaments.

Thirdly, in Russian testaments there was often the indication to the second or third heir who inherits after the marriage of previous heir or monastic vows in the absence of descendants, which was also impossible in Roman law.

Finally, in Russian testaments sometimes it was not necessary to appoint heirs. Sometimes they were simply not indicated.

Duvernois (1869), who analyzed the Ancient Russian testaments for their similarity with Byzantine analogues, wrote: “The whole formal aspect of our spiritual certificates, their purpose, and their content is completely different” (Conclusion, par. 11). Besides, the “series” of the Expanded Truth was not even a testament in the true sense of the word, but the distribution of property among the heirs, which were indicated by law. In Byzantine law, heirs could be ascending (father, mother, grandmother, and grandfather), brothers, and spouses, not to mention the fact that under the testament property could go to almost any person. In the Ancient Russian law such options were excluded. This once again confirmed that the formation of ancient Russian inheritance law proceeded independently of Byzantine, but the close interaction of these countries influenced the change of legislation in its “soft” form (Melnikov et al., 2018).

Thus, the already mentioned examples of the existence in Russia of the Byzantine norms for their representatives were a vivid example of possible ways to illustrate the operation of these norms in a different legal culture (Ancient Russian), for subsequent adaptation and application on new territory. It was a vivid example of unobtrusive introduction and adaptation of foreign norms.

Subsequently, already during the drafting of the Council Code of 1649, the norms of Byzantine law were included along with the norms of other legal orders, in particular - the norms of the Statute of the Grand Duchy of Lithuania in 1588, which had undergone significant processing. “As a result, the norms of Lithuanian law were given greater certainty, concreteness of content, and often a different meaning” (Tomsinov, 2011, p. 7). From the norms of the “city laws” (Byzantine legal acts), separate norms of the Council Code also occurred. Namely, they occurred, and were not fully included in the unchanged content. Thus, by the decree of Tsar Alexei Mikhailovich,

borrowing the norms of Byzantine law during the creation of this collection was very limited: not all the norms were transferred to its contents ..., but only some of them were acceptable (decent) to the conditions of Russian society ... so, despite many borrowings from foreign sources, it remained, after all, quite a national code that reworked alien material in the spirit of the Ancient Moscow law, and did not become a slave compilation of foreign law. (Tomsinov, 2011, pp. 16-17)

Thus, the Council Code of 1649 reproduced borrowed norms in their simplified forms. The result of many years of work on the drafting of the Code was not only a codified compilation of the lawyers of 1497 and 1550, royal decrees and sentences of boyars, the Statute of the Grand Duchy of Lithuania in 1588, the Byzantine collection of Prokhirion, The Book of 100 Chapters and other legal monuments, but also significant editorial work on these borrowed norms. The result was the amendment of borrowed rules to such an extent that they began to express the Russian specific legal views and became stylistically

understandable by the majority of the population. Thus, the text of the Code of 1649 included the foundations of Byzantine law, then only those that had already been adopted by public consciousness.

Accordingly, the authors again came back to the fact that the borrowing was carried out not in the form of regular copying, but through a strictly defined choice and further processing. Consequently, national legislation did not test such a procedure as a “reception” both in its reduced understanding (full borrowing) and in a wide, modern approach (adoption of national law, norms of a different legal system, transfer of legal ideas, principles, norms and concepts, and their introduction into legal system).

In addition, the above-mentioned argument, based on studies of the sources of the pre-Peter period, a similar position, i.e. denying the reception of Roman law, the novelists of the late 19th - 20th centuries also supported this idea. They noted that Roman law never operated in Russia, “since there was never a direct connection between Roman and Russian cultures” (Avenarius, 2008, p. 206). If the reception of Roman law was understood literally as a borrowing of the legal norms of the law in force, then it should definitely be denied. In this regard, in new period of time the full reception never happened. E.A. Sukhanov and L.L. Kofanov supported the opinion that Russian civil law almost did not use the material norms of Roman law. However, both authors believed that there was a borrowing of Roman legal ideas (as cited in Avenarius, 2008), obtained by developers while studying at Western European universities.

7. Conclusion

Thus, local customs and traditions had a greater influence on the formation of the rights of peoples, tribes, and principalities that were included into Kievan Rus, Muscovy and the Russian Empire. Due to the close cooperation of the Russian territories with the Byzantine Empire, the influence of the Roman (Byzantine) law could not be avoided by all means. However, the formation of Russian legislation in general, and the formation of inheritance law in particular, took place in its own original way, namely, by preservation in the legislation of Ancient Rus of those rules that were adopted by ancestors who were tested in Russian society, and not by blind borrowing.

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