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RATIO OF UNIFICATION AND NATIONAL LEGAL TRADITIONS IN MODERN RUSSIAN INHERITANCE LAW

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Abstract

The reform of Russian legislation is perceived as the normal state of law, and belongs to the category of permanent, hidden processes. Moreover, the latter may include such reform of legislation, which establishes at the state level those methods of regulation that have already been formed by society. However, usually the reform processes of the Russian legislation entail suspicion, and sometimes misunderstanding of law enforcers themselves of other legal traditions, or rather, borrowing legal innovations from other systems of justice. There is nothing new in the process of exchange of achievements in the mechanisms of regulation, since any state strives to create a relations system beneficial for all legal entities. It is possible only taking into account the legal mechanisms and procedures already existing in the world. However, such improvement in the legal regulation should not contradict the already established traditional rule of law. The most vulnerable area of reformations is family, family and inheritance law, as well as procedural institutions that are directly related to these areas. For example, the institute of notaries, which was originally formed in the Russian legal field of the 21st century, including its functions as a mechanism to ensure the realization of the last will of a testator. Reforming legal relations based on ancient family traditions is a very dangerous process that affects the whole society. Throughout the 20th century Russian law did not affect this area in such a fundamental way in which modern reformers are trying to implement it.

Keywords: Inheritance law, borrowing, joint testament, EU law, single certificate, notaries.

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1. Introduction

The unification and harmonization of legal regulation present justified inevitability. It is reflected in bringing into a predictable form the disparate and diverse norms of the rule of law of foreign states whose citizens are active participants in legal relations. The purpose is certainly high. However, is the result of intervention in the mechanism of legal regulation truly high, which, as it is known in legal science, is based on human aspirations and weaknesses? One of the Russian proverbs says: "The law is like a tongue, wherever it turns, the sound comes". It has a negative connotation for the law enforcement process itself. However, in its essence it reflects not so much the duality of law and its creators, but also the very process of application based on such a noble principle as "justice". In transnational legal relations and legal relations involving a foreign element (i.e., a foreign counterparty), the sense of justice is becoming stronger, as well as the desire to increase the predictability of commodity traffic. For this purpose, the parties turn to existing mechanisms, existing intermediaries and supranational mechanisms.

The countries of the European Union went further in the improvement of regulation and began to create regulators ahead of their request. As it is known, legal regulators can be created either by the society itself, and the state only creates a shell and gives them state power, or vice versa - the state itself creates a regulator without the needs of society, outrunning it. In the latter case, perhaps the high purpose is to provide society with the necessary regulatory material in the image and likeness of other legal orders, based on different borrowing mechanisms.

Are these borrowing mechanisms justified? Are these anticipatory mechanisms justified if society is not yet interested in them? A good example of an advanced mechanism is the European Union Regulation 650/2012 of July 4, 2012 "On competence, applicable law, recognition and execution of decisions, adoption and execution of notarial acts on inheritance, as well as on the creation of a European certificate of inheritance" (hereinafter - Regulations on inheritance), the main purpose of which is to facilitate and simplify inheritance procedures, simplify the procedure for confirming the status of an heir in a member state of the European Union (hereinafter - the EU). However, implementing mechanisms affect the implementation of such a purpose and this will be shown later.

2. Problem Statement

In this regard, during the course of the reform, based on the borrowing of foreign legal norms and legal traditions, the main problem of the reformed legal field is the determination of the "golden mean". This point is crucial especially when it concerns such areas of legal relations, which are based on family-related traditions (inheritance, family, etc.).

3. Research Questions

Taking into account the above-mentioned aspects, the authors consider it necessary first of all to investigate certain categories that can be summarized as "forms of borrowing" that are used in the reformation of legal system. This will allow determining the most effective form of transferring foreign norms to national law. Through the example of specific changes in the field of inheritance and family law,

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the authors demonstrate the positive and negative sides of the process of the reformation of national legislation.

4. Purpose of the Study

The main purpose of the research is to determine the most effective borrowing mechanisms that take into account the traditions of the reformed legal system, as well as to analyze such reformation procedures as harmonization and unification of legal system. The history of the formation of Russian legislation in the period of the formation of the Russian (Moscow) state, taking into account the use of foreign norms, also indicates the fact that certain legal institutions (for example, notaries and inheritance law) should be changed only with regard to national legal traditions.

5. Research Methods

In order to achieve the purpose and to resolve the questions of the research, the authors first of all used the method of etymological analysis of the categories used to determine the mechanism for transferring foreign norms to the reformed legislation. Since the article touches upon the issue of the effectiveness of foreign norms in the Russian legal field, the authors conducted a comparative legal analysis of certain norms of inheritance law and notarial law of Russia and foreign countries.

6. Findings

Constant reform of Russian legislation is based on the use of both modern foreign legislation and the achievements of pre-revolutionary and Soviet legal concepts. However, how exactly does this use occur: is interested law completely transferred or in a modified form? Moreover, the most traditional way of the formation of legislation, known in legal doctrine, is reception. However, has this method always been in the form of a transfer, an unadapted introduction of a foreign (Roman) standard?

Many definitions of this method can be summarized as follows - it is the perception, assimilation, adoption or adaptation to national legal system of those social, cultural and legal forms that have arisen in another country (in another era). This is the perception (acceptance) of the principles, institutions, and main features of another legal system in national legal system. Most often they speak about the reception of Roman law, however, based on the basis of the definitions it is possible to speak about the reception of the law of various states, about the adoption of principles, institutions, and the main features of foreign legal systems. This is especially typical of the period of the formation of states, when the young state has no rules of law, but only traditions and political reality requires more than oral rules of behavior. It is necessary to note that during the formation of the legal system of the modern Russian state, the legal system of the Russian empire, its individual principles, legal institutions, etc. were borrowed

Thus, it is possible to say that the content initially incorporated into the reception does not correspond to modern borrowing mechanisms and is perceived as borrowing culture, mentality, etc., which allows reproducing relatively precise borrowed norms in the legal field of the recipient country for their original meaning and content. However, this may lead to the complete absence of not only the legal culture, but the culture as a whole. In this connection, other methods are used to introduce norms into the recipient

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legislation. However, are these methods always effective? Do all of them entail the formation of legal systems? Or do they reflect the development of a separate legal system? Do they only reflect the implementation of individual norms to solve a short-term task without wide usage ща them in the future? Are they associated with "borrowing"?

These other ways are: ***borrowing*** (incomplete or unprecise copying of a word or expression from one language to another; blind copying of words, rules of law, behavioral models, etc., or the selection of the most suitable word, rule of law which is most adapted to a new language, system of law), copying (creation of one or several copies of a thing (text) of elements of a system; copied norms do not take into account established legal traditions), ***introduction, inclusion, incorporation, simplification*** (changing of legal norm, making it more simple, reducing the complexity of its content), ***adaptation*** (change in legal systems (rules of law) under the influence of the external environment, foreign policy processes, external (international) subjects of law; the adaptation of existing national legal norms to new international state obligations without any changes in its legislation.), ***adjustment*** (change in activity according to changed external conditions), ***reception*** (perception, assimilation, adoption or adaptation to national legal system of foreign social, cultural, legal forms; perception (acceptance) of the principles, institutions, main features of another national legal system).

However, in addition to these simple forms of borrowing, the following forms of convergence of law are also used: ***unification and harmonization*****.** Moreover, if harmonization is the coordination of elements that make up a single system, or the provision of mutual conformity of all elements, then unification is the process of bringing to a uniform system or form; the development of uniform legal norms; the elimination of excessive diversity; the reduction to uniformity, to a uniform form of documents, norms, etc. This form of convergence is typical of states closely cooperating with each other, creating supranational unions in some areas of legal relations (the Customs Union, the European Union, etc.) with the same type of legislation. Thus, the most effective way of the reformation is reception and adaptation, both as independent ways, and in combination with others.

Turning to the question of the formation of national inheritance law and the echoes of Roman law, the authors again note that the inheritance law of any nation, society or state is based on traditions, customs, and sometimes religious norms (Benda-Beckmann, 2001; Brenner, 1985; Elinder, Erixson, & Ohlsson, 2012; Wolff & Gittleman, 2014). However, modern procedures for introducing foreign norms into national inheritance law have different purposes: from the provision of legal regulation of private interests, business inheritance, etc., and ending with the desire of a legislator to assist a minority, which is not always effective. Moreover, these innovations, for the most part, are borrowed from the legal orders of Roman law, traditionally included in the Roman-German legal family. So one of the proposals is a joint testament of spouses (Krasheninnikov, 2013), which implies the regulation in one document - testament of the will of each spouse in case of death in order to save time, and sometimes financial means to pay tariffs for the notarial act (notarial certificate of the will). This can be considered as a positive trend in the era of change, but with regard to the already formed ideas of testators about the procedure for issuing their last will, namely, about the freedom of the will.

However, the final version of the changes reflected in the Civil Code of the Russian Federation (hereinafter - the Civil Code) implies only the presence of the second spouse when the first spouse draws

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up a testament: "The notary has the right to certify the testament of each spouse in the presence of both spouses" (p. 4, a. 1123 of the Civil Code of the Russian Federation). Thus, an exception is introduced in the rule of testament secrecy.

It appears that a legislator has introduced an intermediate form between existing in other systems of justice and the fact that national legislation still retains the attitude to the will as the sole will, as a personal, autonomous and secret will.

Modern Russian legislation on joint testaments does not have formed regulatory approaches yet. Nowadays in this field of legislation there is: a joint testament, which can be made only by the spouses, it determines the property "consequences of death" of each spouse. However at the same time, a rule on the impossibility of changing the provisions of a will after the death of one of them is introduced, thereby introducing it into the "obligatory bondage" in accordance with the terms of a testament. Does society need such a tool? And if does, then why?

As it can be seen, introducing a new legal structure to resolve very rare situations, a legislator did not take into account the interests of the other possible participants of hereditary legal relations. The reference to similar foreign legal institutions also has no reasonable grounds, since there mutual testaments are, in fact, just two separate testaments, which are mutually irrevocable by agreement of the parties. In our opinion, the imperative ban on the unilateral cancellation of last will is an extremely harsh means of protecting the agreements reached between spouses.

The motive for drawing up a joint testament is close relations between spouses, and not economic aspect. However, the views and intentions of spouses may change over the course of life. It can be reasoned by not only their divorce. Therefore, any spouse has the right to declare the cancellation of testamentary dispositions. A cancellation made by one spouse results in the loss of force due to the testamentary dispositions of the other spouse. At the same time, after the death of one of the spouses, the bondage becomes more serious. Living spouse loses the ability to cancel testamentary dispositions.

Thus, for the legal tradition of the Russian Federation, it is necessary to preserve the principle of freedom of will with the possibility of bringing a notice (order) about the revocation of testament to the second spouse. Why such changes are introduced? They, in fact, only destroy the principles established in centuries, in case when the other features of these institutions are not applied?

It is also necessary to note the fact that in countries where this institution has been operating for quite a long time, it is not as popular as legislators suppose. So why nowadays is it necessary to copy foreign norms so thoughtlessly? It seems that instead of unification, which takes the form of uniformity, entailing the destruction of a reformed legal system, it is necessary to use a different approach when borrowing foreign norms. For example, it may be harmonization, which is one of the ways to bring together the rights of different states.

The bright example of unification in inheritance law is the Inheritance Regulations (Kalinichenko, 2018), adopted to facilitate and simplify inheritance procedures in an EU member state, primarily in determining jurisdiction corresponding to the place of residence of a testator. Moreover, in order to simplify the formalities on the territory of the EU related to the determination of the status of an heir or manager of the hereditary estate, a single European certificate of inheritance is provided. Based on this document, any

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citizen of an EU country will be able, without any additional formalities and judicial procedures, to confirm his status as an heir in any other participating State.

However, the disadvantages still exist and not only in the vagueness of the "last place of residence" category and in the absence of a legal definition of the minimum period of residence of a person who must pass in order for such a state to become his last permanent place of residence. The disadvantage is presented also by the specificity of formal procedures applicable in each country of such a conglomerate as the European Union, because the peculiarities of formal procedures in each of the countries and the public order requirements must be taken into account.

It is undeniable that borrowing is necessary, but it must be carried out reasonably and harmoniously with existing legal traditions. For example, according to joint testament the parents of a guardian can be appointed in order to protect the interests of minor children. This provision was introduced into the Federal Law "On Guardianship and Custodianship", thereby defining clearer grounds for protecting the interests of children, including their inheritance rights. It is reasoned by the fact that a parent will protect the interests of the child in this area, not a stranger appointed by soulless government agency.

However, no matter how the all borrowed innovations are spelled out, new mechanisms may get stuck at the stage of their implementation. For example, for effective use of a new institution of trust management, it is necessary to resolve the following questions. In order to begin the inheritance management procedures, it is necessary to provide a notary with information about the assets of a testator. The notary cannot start the process of protection and management of inheritance, unless he is personally convinced of what this property consists of. However, the provisions of p. 3 of a. 1171 of the Civil Code of the Russian Federation on the right of a notary to request the necessary information does not comply with other provisions of special notarial legislation, and only a heir or a will executor who has proof of ownership of a testator in certain assets can quickly start the process of the management of these assets.

In addition, the trust management of hereditary assets may complete earlier than the circle of heirs is determined. After all, a notary cannot do this for the period more than nine months from the date of inheritance release. However, a notary may remove the trustee, terminate the contract with him and thus leave the inheritance asset without management before the expiration of his authority to protect and manage inheritance.

The comparative legal study of notaries (Davidson, 2012; Gittleman, Ohlsson, Roine, & Waldenström, 2014; Gnoffo, 1996; Van den Bergh & Montangie, 2006; Zeng; 2012, Milena, 2011; Štaraitė-Barsulienė, 2012; Zakariya, Sari, Prabandari, & Budiatmaja, 2017; Toader, 2015; Smith, 2006) and the institution of inheritance law of Russia and other foreign countries indicates the ongoing process of unification, as the process of bringing the identical spheres of social relations to uniform regulation in the internal law of different states. It is impossible, especially in the sphere of hereditary relations due to the special process of the formation of the foundations of this institution.

On the basis of these singular examples, the authors illustrated the cases of the ineffectiveness of borrowing of foreign norms without taking into account the evolution of a reformed legal system (legal institution). In order to smoothly change the traditional and vital relations with history, with the formation of mentality and trust to legal institutions, it is necessary that the included norms (rules) are adopted by

popular consciousness and do not conflict with the real life and its practice. In order to achieve this it is necessary to spend some time.

7. Conclusion

The comparative legal analysis of the changes of Russian law revealed the negative aspects of the continuous amendments of traditional institutions in favor of transnational relations. After all, the considered institutions are connected with family relations, the regulation of which is unique. Therefore, the changes in this institution, if necessary, must, above all, preserve the legal traditions and legal mentality of the Russian people. A similar conclusion is confirmed by the analysis of changes in the inheritance law of the EU. Understanding the need to reform national legal systems in the context of active transnational relations, the authors pointed out that only reception and adaptation are the most effective ways of bringing together separate legal systems.

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