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RECEPTION OF ROMAN LAW IN ENGLAND

The reception of Roman civil law belongs to those problems that have been attracting attention of many scholars for a long period of time. During the last decade the subject of investigation was both general issues of adoption of Roman law ("reception") and adoption of certain institutes of Roman civil law [1, 89]. At the same time some peculiarities of the reception of Roman law in England still need careful investigating as there is an erroneous statement that this phenomenon did not take place in Anglo-Saxon legal system at all.

Considerable attention was paid to the definition of the concept and features of the Roman law which was regarded as a component of the general process of revival and this definition is of great significance for understanding and description of the reception of Roman law. In this case it is advisable to refer to the thesis about recurrence of revivals which are the example of a historic phenomenon which is constantly repeated. It was said: "The evocation of a dead or obsolete phase of the existing culture by the representatives of any civilization is not a unique event in history but a historic process which is repeated" [2, 600].

Thus, the reception of Roman law can be defined as its revival, perception and adoption of its spirit, ideas, main principles and provisions by a certain civilization on a particular stage of its development in the context of the general process of cyclical revivals.

The theory of cyclical development of civilizations should be taken as the methodological foundation for defining driving forces of the reception of Roman law. As it is known there were the attempts to consider the adoption of Roman law as an element of the general process of the renaissance of the antique culture in Europe (High Renaissance) which had considerable drawbacks. Namely, there exists a problem of compliance of chronological bounds between the reception of Roman law and High Renaissance, the beginning of which dates back to the 14th and 15th centuries [3, 619] while the reception of Roman law started in the 12th–13th centuries. Besides, certain interest to Roman law in Western Europe was noticed in the 11th–12th centuries [4, 64].

Taking these facts into consideration it was suggested to explain the differences in the dates of both phenomena with the help of "a more close link between civil law and production, development of commodity-money relations as well as with the fact that the 11th and 12th centuries were only the initial stage of adopting Roman law, namely, studying of Roman law, while its wider reception along with some changes and adaptation of Roman law to feudal conditions was a matter of a much later period [5, 111].

But even with this approach chronological limits did not coincide. Then it was suggested to consider the reception of Roman law as a long-term phenomenon which passed through a number of stages of its development [6, 125].

However, this approach failed to adequately determine the dates of the reception of Roman law as its beginning (the 11th century) occurred before the Renaissance and its final stage goes far beyond the end of the Renaissance.

These difficulties in the description of the reception of Roman law from the point of view of "progressive development" is the evidence of the right application of the theory of cyclical, spiral development of civilizations according to which the history of mankind is a change of a number of civilizations, which describes historical rhythm of movement of peoples, ethnic groups with close genetic roots and destinies. As we deal with the development of civilizations-cultures, each new stage includes higher achievements of previous civilizations (or the revival of those which do not exist) [7, 21–22].

This explanation of the essence of the reception of Roman law which was suggested in scholarly literature had a positive effect. However, the problem of "geographical" peculiarities of the reception of Roman law still exists. For example, it is of certain interest to elucidate why Roman law was adopted in some countries while it was not as popular in other countries of the world.

That is why the article makes an attempt to doubt the statement that the reception of Roman law did not take place in Great Britain and tries to prove that Roman law was adopted there but in some specific forms and types.

It should be admitted that there is a wide-spread opinion concerning England that it did not adopt Roman law and it has a specific legal system. Of course, they mention the fact that on the first stages of the development the reception of Roman law took place without any divergences. For example, in the 12th century Roman law was quite popular, it was studied at universities and university teachers from the Continent were invited to give lectures on Roman law. But later English common law prevailed in courts. Explaining the phenomenon they name geographical isolation, historical traditions, and specific features of political and cultural development of the country [8, 254].

But the question about other countries like Sweden or Scotland where Roman law was adopted arises. Didn't they have their own traditions, culture or patriotic feelings? Or were they closer to the Continent? So, the thesis that England did not adopt Roman law seems to be faulty.

Trying to disprove this point of view it is necessary to mention that though world civilizations develop as an integrated system of local civilizations, each civilization has its own rhythm of development and cyclic dynamics, they appear and dye in different periods. Moreover, the speed of development is different in the centre and outlying territories. Having looked at the history of mankind from such point of view, recurrence of revivals and different rhythms seem to be logical. Revival recurrence is caused by spiral development of civilizations and their different rhythm is the result of different rhythms of the development of local civilizations within the world civilization.

With such approach it becomes clear that in some countries the reception of Roman law took place earlier and in other countries it was much later. We may assume that the peak of the reception of Roman law in England was in the 11th and

12th centuries [9, 166]. Besides, the specific form of the reception in England, which led to certain masking of the phenomenon, is of great importance.

It is advisable to remember the thesis that the reception of Roman law may take place in different forms. Along with adopting the main rules it is possible to adopt its main ideas and spirit, to study at universities which influences the lawyers' and legislators' minds. The spirit of the adopted law deeply penetrates into the system which adopted the law. England can be a vivid example of non-typical forms of adopting Roman law.

In our opinion the reception of Roman law in this country took place in less common form. In continental law systems (Roman, German etc.) Roman law was adopted through the direct use, in the processes of codification and making laws, in England they adopted the spirit (ideas and methodology) of Roman law as well as general concepts of law making [10, 190].

As for the thesis concerning "the unique character of the development of the English law " and explanations that the opposition to adopting Roman law in court practice won and therefore the English common law prevailed it is worth paying attention to some other factors in this situation.

The point seems to be not only in the fact that the opposite court practices which was an abstract criterion in this sphere, predetermined the directions of the development of the law tradition. It is of certain logic to admit that the judges' choice in its turn had some guidelines especially when it meant to choose the main direction of the law development but not a temporary tendency

So, it is necessary to consider what exactly formed the "opposition" of court practice to adopting Roman law and try to determine why and how the long-term factors of specific character of English law, namely relative geographic isolation of the country, its historic traditions, and peculiar political and cultural development influenced its attitude to Roman law.

It seems worth mentioning such significant factor of the development of the law tradition as ideological background of a local civilization which is reflected in religion.

In the period of formation of European law traditions Christian religion was such ideological basis. The division into Western and Eastern branches of Christianity caused the emergence of Western and Eastern law traditions in Europe.

In its turn within Western Christianity there appeared and developed different theosophical directions. Different approaches to differentiation of the spheres of influence of both temporal and clerical powers arose. On their mystic and philosophic basis with some antique reflections a gradual separation of different law systems within the limits of the Western law tradition, which was itself in the process of formation, was observed

Division of law in "continental" and "island" laws was the first one in this process of so-called separation.

The "island" law began its formation in the 12th century. It was preceded by such events. After the Norman invasion in 1066 the official Christianity remained still quite orthodox. Like on the Continent the king and the Pope competed for

appointing bishops. At the same time, while the Pope won the competition on the Continent, the events in England developed in the contrary direction. The tension in the relations between Rome and England became more evident and severe during the rule of King Henry II (1154–1189), who was an active supporter of the idea of the independence of the English Church.

Especially popular at that time was the myth of Grail that narrates about Joseph of Arimathie, who seemed to have founded an independent church in Glastonbury. It goes without saying that the myth about English apostolic succession served political interests. At the same time ancient Celtic pagan tradition also found its reflection in the legends about the Holy Grail which gave wealth and prosperity and about its keeper.

It should be mentioned that the myth of Grail was spread not only in England but on the Continent as well. But while in Germany and France it gained popularity together with growing significance of Holy Communion and Mariolatry, in England it acquired the other meaning as relationships with the Roman Church were more and tenser. This confrontation ended with England's excommunication from the Church in 1209 for the king John's insubordination to the Holy See. All church ceremonies were stopped in England: churches were closed, church bells were silent, people could not be married in church and there were no memorial services for the dead. In 1209 all relationships with England were stopped. In his turn king John ordered priests to leave the country and expropriated church property for the benefit of the state treasury. The life in England acquired non-Christian character [11, 289–290].

So, a question can be asked: "Could both jurisprudence and court practice be oriented on Roman law which was coordinated at that time with Christian moral imperative?"

Apparently, it seemed impossible to hope for any kind of independence in such situation. Especially when considering the fact that temporal authorities actively interfered into the activity of courts. For example, King Edward's Mistress Alice Pierce was so influential at court that even directed judges' actions during court sessions.

In such situation the official attitude to Roman law and its reception was formed. But Roman law ideas regained importance after England's returning to the fold of the Church and continuous competition between the Catholic and Anglican Churches which ended for the benefit of the latter [12, 11].

Considering these facts it should be mentioned that the model of relations of English national and Roman universal legal traditions seem to be a little simplified. Real processes in this sphere looked more complex and led to somewhat different result. Taking into account that the English legal "branch" took place within the Western European legal tradition, it seems natural that it was impossible for it to escape all typical features of this tradition. In this connection it is interesting to notice that while scholars, who compare legal systems of the continental Europe, write that the reception of Roman law in England was impossible, some contemporary English researchers in their description of the types of law which

predominate in England at present such as English common law, statute law, commercial law, canon law, law of equity and law of European Community, mention Roman law underlining that the latter ensures the formation of the juridical outlook [13, 112].

Thus, we can come to the conclusion that the reception of Roman law in England took place; it just had a hidden character and took specific forms. Its factor and result is the fact that the evolution of the Western European legal tradition in its English variant followed the way of the development of Roman law in its main features. It was reflected in gradual prevalence of the spirit of the law over the language of the law, formation of both of them as the "system of claims", division of the court process in two stages of different functional purposes etc.

Similar peculiarities of the reception of Roman law are characteristic for the American legal system as well. Moreover, the ideas and provisions of Roman law had impact on American jurisprudence being reflected in legal theories of the country.

Thus, at the end of the 19th century a formalistic approach predominated in American jurisprudence which with its main ideas resembled the provisions which were characteristic to archaic civil Roman law. However, after a long and complicated competition (they are called "instrumentalist revolution") this method was forced out in the first half of the 20th century by the theory of "pragmatic instrumentalism". In the context of the subject matter of the article it is interesting to mention that "instrumentalism" is ideologically quite close to Praetor law in terms of its realistic direction, character of interpretation of norms of positive law etc [14, 115].

Evaluating the way the USA passed in the establishing of the national concept of law, from the point of view of describing its methodological grounds and guidelines, it is possible to conclude that it is similar to that, passed by the lawyers of the Ancient Rome.

In general, taking into account all the variety of impact Roman law had on the formation of the Western legal tradition it is possible to differentiate the following forms of its reception:

— studying Roman law at universities with the aim to form the outlook of future law experts;

— investigation, analysis and commenting of ancient Rome legal sources;

— direct use of norms of Roman law;

— the use of norms of Roman law as an example while adopting new standard acts (especially while realizing codification projects);

— the use of methods of creating norms of law and methods of their interpretation and application;

— adopting and using of the main ideas, principles and categories generated and improved in the process of the development of Roman law.

Summarizing the mentioned above and remembering that actually the reception of law never performs as a single phenomenon but takes place in different forms with one form prevailing, it is important to mention the most typical forms of the reception of Roman law in English and American legal systems.

In our opinion they are as follows:

— studying of Roman law at universities to form the outlook of future lawyers;

— studying of Roman law as a part of European culture;

— researching ancient Rome literary sources;

— using the methods of creating norms of law and methods of their interpretation and application.

Principal grounds for the mentioned legal systems should be determined regarding these factors.

Література

1. Харитонов Є. О. Рецепція римського приватного права (теоретичні та історико-правові аспекти) / С. О. Харитонов. — О., 1997. — 288 с.
2. Тойнби А. Дж. Постижение истории : пер. с англ. / сост. А. П. Огурцов ; вступ. ст. В. И. Уколовой ; закл. ст. Е. Б. Рашковского. — М. : Прогресс, 1991. — 736 с.
3. Всемирная история. В 10 т. Т. 3. — М. : АН СРСР, 1957. — 896 с.
4. Лосев А. Ф.Начальные стадии неоплатонической эстетики Ренессанса // Типология и периодизация культури Возрождения. — М. : Наука, 1978.
5. Косарев А. И. Римское право / А. И. Косарев. — М. : Юрид. лит., 1986. — 160 с.
6. Косарев А. И. Этапы рецепции римского права // Советское государство и право. — 1983. — № 7. — С. 124–127.
7. Харитонов Є. О. Рецепція приватного права: парадигма прогресу / Є. О. Харитонов, О. І. Харитонова. — Кіровоград : Центрально-Українське вид-во, 1999. — 144 с.
8. Косарев А. И. Римское частное право / А. И. Косарев. — М. : Закон и право : ЮНИТИ, 1998. — 254 с.
9. Харитонов Є. О. Історія приватного права Європи: Західна традиція / Є. О. Харитонов. — О., 2001. — 328 с.
10. Обережну оцінку цього явища див., наприклад: Романов А. К. Правовая система Англии : учеб. пособие / А. К. Романов. М. : Дело, 2000. 344 с.
11. Пеппис П. История языческой Европы / П. Пеппис, П. Джонс ; пер. с англ. Р. В. Котенко. — С.Пб. : Изд. группа «Евразия», 2000. — 448 с.
12. Немченко И. В. Язык средневековья. Толковый словарь / И. В. Немченко. — О. : Полис, 2001. 288 с.
13. Батлер У. З. Взаимодействие международного и национального права // Советское государство и право. — 1987. — № 5. — С. 109–114.
14. Саммерс Роберт С. Господствующая правовая теория в США // Советское государство и право. — 1989. — № 7. — С. 109–116.

Summary

Heiko M. O. **Reception of Roman Law in England.** Article.

The article is devoted to the examination of the peculiarities of the reception of Roman Law in England. The reception of Roman law can be defined as its revival, perception and adoption of its spirit, ideas, main principles and provisions by a certain civilization on a particular stage of its development in the context of the general process of cyclical revivals. The scientific debates about reception of Roman law of Roman Law in England were analyzed. Also it is considered what exactly formed the «opposition» of court practice to adopting Roman law and it is tried to determine why and how the long-term factors of specific character of English law, namely relative geographic isolation of the country, its historic traditions, peculiar political and cultural development influenced its attitude to Roman law.

Keywords: Roman Law, England, reception, adopting, development, peculiarities, court practice, civilization.

Анотація

Гейко М. О. **Рецепція римського права в Англії.** — Стаття.

Стаття присвячена дослідженню специфіки рецепції римського права в Англії. Рецепція римського права може бути визначена як його відродження, сприйняття й прийняття його духу,

ідей, основних принципів і положень певною цивілізацією на конкретній стадії свого розвитку в контексті загального процесу циклічного відродження. У статті також аналізуються наукові спори про час і періоди рецепції римського права в Англії. Також розглядається, що конкретно формує «протистояння» судового прецеденту для сприйняття римського права, й робиться спроба визначити, чому і яким чином довгострокові фактори й специфіка англійського права, а саме близьке географічне розташування країни, її історичні традиції, специфічний політичний і культурний розвиток, вплинули на відношення до римського права.

Ключові слова: римське право, Англія, рецепція, прийняття, розвиток, особливості, прецедент, цивілізація.

Аннотация

Гейко М. О. **Рецепция римского права в Англии.** — Статья.

Статья посвящена изучению специфики рецепции римского права в Англии. Рецепция римского права может быть определена как его возрождение, восприятие и принятие его духа, идей, основных принципов и положений определенной цивилизацией на конкретной стадии своего развития в контексте общего процесса циклического возрождения. В статье также анализируются научные споры о времени и периодах рецепции римского права в Англии. Также рассматривается, что конкретно формирует «противостояние» судебного прецедента для восприятия римского права, и делается попытка определить, почему и каким образом долгосрочные факторы и специфика английского права, а именно близкое географическое расположение страны, ее исторические традиции, специфическое политическое и культурное развитие, повлияли на отношение к римскому праву.

Ключевые слова: римское право, Англия, рецепция, восприятие, развитие, особенности, прецедент, цивилизация.

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І. Г. Бабич

ВИЗНАЧЕННЯ МІСЦЯ ПРИНЦИПУ СПРАВЕДЛИВОСТІ В СУЧАСНІЙ СИСТЕМІ ПРИНЦИПІВ ПРАВА

Особливість сучасного стану принципів цивільного права визначає сучасний стан цивільного законодавства взагалі.

Незалежно від того, чи є суб'єкт особою публічного права чи приватного права, їхня участь у цивільних відносинах регулюється цивільним законодавством на однакових засадах, які визначають вимоги до практичного забезпечення правового становища особи. Ці принципи права вперше зазначені у Цивільному кодексі, який регулює цивільні відносини в Україні; іменуються «загальними засадами цивільного законодавства» і зазначені в ст. 3 ЦК України.

Актуальним вважається розгляд принципів права через те, що у сучасній правовій науці склалось уявлення про принципи як такі, що офіційно закріплені в законодавстві. До того ж, як уявляється, відбувається звуження значення принципів у правозастосуванні та обмеження їх діяльності. Провідні ідеї розглядаються як допоміжні при виборі норм для застосування та не застосовуються для безпосереднього регулювання.

Принципи справедливості, добросовісності, розумності є принципами природного права. З цієї позиції необхідно розглянути принципи права, їх місце з точки зору співвідношення системи права і системи законодавства.