

“The Roman Spirit” of the Code of Napoleon

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Abstract

This article touches upon some historical aspects of codification using as an example the French Civil Code of 1804, as well as development of the Roman private law and its impact on legal systems of Western Europe and Russia. The author makes conclusion about the necessity to improve the Russian civil law, law enforcement and teaching practice of vocational subjects with regard to academic traditions of Western Europe.

Keywords: codification, legal system, Roman law, civil law, educational standards.

History of the Russian legal system is a miraculous entwining of peculiarities of both the Romance and Germanic and Socialistic legal families. In the times of reforms, modernization and globalization, we irrevocably refer ourselves to legal experience, especially as we approach “milestone anniversaries”. The Code of Napoleon of 1804, that made a significant impact not only on civil law of Western Europe, but on the global legal system, is still in the scope of interest of scholars and practicing lawyers, despite being thoroughly studied by civil lawyers, historians and legal theorists.

This year is 210th anniversary of foundation of one of the oldest higher academic institutions in Russia – the Kazan University. This event has coincided with another significant date for all legal community – 210 years since adoption of the French Civil Code. The mentioned events make the reason for referring to such a historically great legal landmark.

History of codification has many examples when its result could be associated with its inspirer rather than its drafter. Thus, the Roman codes created by lawyers (the Code of Justinian was developed by ten lawyers – decemvirs), that reflected in these legal documents their personal understanding of what was right and fair, were associated with Papinianus, Gaius, Ulpianus, Modestinus and Paulus. Some other legal records do not make reference to either their creators, or their inspirers (for instance, in the beginning of the XIII c., Eike von Repgow compiled the “Saxon Mirror”, a law book containing norms of common law and legal practice of the North-East Germany that was used in many German lands and towns as an official legal source).

Works of some American legal scholars, practicing lawyers and public officials (Payne, Jefferson, Hamilton, Franklin, etc) were used for working out fundamental provisions of the Declaration of Independence of the United States and the US Constitution of 1787 that has proved its power for more than two hundred years. Common law of the United Kingdom and the United States is still developed by a community of high quality judges.

Several codes that have been made in various countries often have reference to a name of a person whose theoretic conception the given act emerged from. One of them is the Code of Napoleon. No doubt, that Napoleon took an active part in developing a draft of this legal act (thus, in particular, the Emperor chaired 57 out of 102 sessions of the Council and actively participated in discussions). However, to be fair from historical point of view, it should be emphasized that a main drafter and a “father” of the French Civil Code was Portalis, who used the Roman private law as a main source.

The blossom of the Roman law took place in the early times of the Empire (I c. BC – III c. AD). At that time, the emperors, aiming at limiting the power of the Senate, authorized the most outstanding lawyers to interpret existing legal norms that were compulsory for all public officials and judges, thus equaling acts with official interpretation to a law. From the second half of the III c., when the Emperor enjoyed the legislative power, this privilege was no longer rewarded, system of legal sources began to change and the Roman law went through difficult times [1].

Yet, caught by glossers and post-glossers, the Roman tradition didn't fall into oblivion. Thanks to reception of the Roman law, its principles were assimilated by legal systems in many European states. The influence of the Roman civilization resulted in merging of many classical doctrines that lay basis for law making and law enforcement practices. The Roman law, being “one of the most outstanding legal achievements of the humankind, was namely created by professional law makers rather than the Emperors and senators as ‘the law of the wise’ ” [2].

When working on the Civil Code of 1804 [3], its drafters used five main sources, including the classical Roman law,

the French common law, works of renowned French lawyers, "intermediary law" (*droit intermediaire*) used at times of the Revolution of 1789 – 1799 and legal heritage of the greatest French enlighteners [4].

The French Civil Code preserves not only the Roman terminological tradition, but Roman legal conception. Thus, the Code of Napoleon is centered on the institute of property, containing the Roman interpretation of property as an abstract and absolute right: "Property is the right of enjoying and disposing of things in the most absolute manner, provided they are not used in a way prohibited by laws or statutes" (see Article 544).

The Code of Napoleon borrowed and developed the Roman legal concept of equality of parties and its voluntary and irreversible basis. Consent between the parties was an obligatory condition for the contract to be valid: "There is no real consent, if it resulted from mistake, act of violence or fraud" (Article 109).

In France, as contrasted to its reception in Germany, the Roman law enjoyed recognition not because its being the law of the Roman Empire, but because of having high legal standards. The French law didn't break its ties with the Roman law, using its proper concepts and legal terminology or, if needed, norms of substantial law. For example, division of civil law into three main parts including "persons" (legal position of subjects), "things" (objects of law and the relevant property rights), "law suits" (means of implementations and defense), which date back to "Institutiones" of Gaius. This very system was used as basis of the French Civil Code of 1804. Founded on the Roman law with regard to circumstances, there developed law of things and law of obligations. The family and inheritance law was based on the ancient French common law.

Coutumes were largely used on the territory near the northern French borders. At the same time, in some districts where coutumes were spread the Roman law was not completely denied.

Works of famous French lawyers of the XVII and XVIII cc. Dumoulin, Coquille, F. Bourgoïn, Domat, J. Pottier, K. Olivier) were as much the main reference points for developers of the Code of Napoleon as works of renowned Roman lawyers. The French civil law was built thanks to the help of practicing lawyers, who continued reception of the Roman law, but also secured the major part of the national common law [5].

The French publisher J. Sorel wrote about the Code of Napoleon the following: "I can hardly imagine any other country where civil law would penetrate so deeply into its customs and could become the integral part of the spirits, feelings and literature of the whole nation". We assume that J. Sorel's words may be referred to one more nation – the Romans, whose spiritual genius revealed itself primarily in development of legal forms and concepts. The Twelve Tables was a must-know of every Roman citizen.

The Code of Napoleon influenced much not only on development of civil law of the continental Europe, but also Russia. Thus, the project of the Civil Code of the Russian Empire of 1809 compiled by M. M. Speransky had the same three parts as the French civil Code. However, in its structure and combination of norms and, mainly, in sense of the legal institutes, the work of the great public figure and scholar V. V. Speransky had differences from the Code of Napoleon and became an important landmark in the history of the Russian legal science and methods of research and development of the Russian law. Therefore, replying to suspicions in plagiarisms, M. Speransky wrote the following to the Emperor Alexander: "Some people were trying to find proof that the Code I propose is an interpretation from French and is a mere imitation. This is a lie or lack of information which are easy to find out, for both are written. As a source, the Roman law, with all its provisions will always remain the same, but having common sense, knowing various sources and the language they are written in, one can get much use from them without imitating anything and having French or German academic background" [6].

The modern doctrine of the international private law [7], with reference to national sources of the international private law of foreign countries, names the Code of Napoleon of 1804 as "the oldest civil code containing norms of the international private law" [8]. Collision norms were developed thanks to the statute doctrine created in the medieval Italy, which was closely connected with an active steam of commerce among the republic type of cities and the necessity to create general principles of fair conflict resolving caused by differences of their laws (statutes). Since all these statutes had the same basis originated from the Roman law, these differences were not so serious [9].

The Code of Napoleon shows advantages of codification of law, as one of its main drafters – Portalis, would says: "...Laws are made with an aim of containing general principles of law, thus establishing a deep approach to a problem. It should determine principles containing different meanings and never constringe to details of every problem that may appear" [10]. However, to grasp the idea of the modern French or any other civil legislation, it is not enough to study the Code of Napoleon, one should also study main tendencies of the court practices. Thus, in particular, the French court practice, being conservative in preserving the Code text, played quite a significant role in interpreting articles and adjusting the old text to new types of relations. This is also applicable to the Russian law enforcement practice, especially judicial practice, when interpretational novelties of servants of the Themis differ much not only from the spirit, but the letter of law.

It is not only the Code of Napoleon that the "Roman spirit" intercepted. Now, the Roman private law is studied all around the world. In Western Europe it is considered as a possible normative basis for unification of civil and commercial law. These tendencies reflect not only the unity of legal language of participants of integration into Europe, but the possibility of unification of their professional training. Modern Russia is restoring and developing private legal traditions in the system of legal education and practice based on provisions of the Roman law, with regard to most recent experience.

We assume that, because of one more modernization of the Russian education, it is essential to reconsider not only federal educational standards, but teaching techniques of the fundamental subjects, including the Roman law, which are used now for teaching lawyers. The experience of some colleagues from abroad, who apply law cases in their classes helping to accumulate theoretical knowledge (and the relevant professional competences) when studying a certain legal casus, would not only help to bring the Russian education closer to the European standards, but will provide a modern graduate from the legal department with dozens of options on how to apply the acquired knowledge and would help him to "plunge into the depth" of the legal practice.

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