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HISTORY OF FORMATION AND DEVELOPMENT OF THE MAIN LEGAL SYSTEMS (LEGAL FAMILIES) IN THE WORLD

HISTORIA DE FORMACIÓN Y DESARROLLO DE LOS PRINCIPALES SISTEMAS LEGALES (FAMILIAS JURÍDICAS) EN EL MUNDO

Elizabeth V. Rozanova
Moscow State Pedagogical University, Russia

Mikhail M. Stepanov
Institute of Legislation and Comparative Law under the Government of the Russian Federation, Moscow, Russia

Igor A. Alekseev
Pyatigorsk State University, Pyatigorsk, Russia

Achilles K. Aivazidis
Pyatigorsk State Linguistic University, Pyatigorsk, Russia

Maxim S. Prokoshin
Russian Presidential Academy of National Economy and Public Administration, Moscow, Russia

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Abstract

The relevance of the study of the formation and development of legal systems in the modern world is due to the increasingly complex development of legal systems in different countries. To understand the direction in which national legal systems and national legislation need to develop, it is necessary to rethink the legal families that have existed for centuries and understand the algorithms for their development, identifying new vectors for improving modern legal systems in different countries. Throughout the history of humanity, Roman law constantly changed under the influence of the cultures in which it was introduced, resulting in various legal systems. A mixture of Roman law and the canonical and local legal customs of continental Europe became the basis of the so-called Romano-Germanic legal family.

Keywords: legal system, Roman law, Romano-Germanic (continental) legal family, Anglo-Saxon legal family, Muslim law, Hindu law.

Resumen

La relevancia del estudio de la formación y desarrollo de los sistemas legales en el mundo moderno se debe al desarrollo cada vez más complejo de los sistemas legales en diferentes países. Para comprender la dirección en la que deben desarrollarse los ordenamientos jurídicos nacionales y la legislación nacional, es necesario repensar las familias jurídicas que han existido durante siglos y comprender los algoritmos para su desarrollo, identificando nuevos vectores para mejorar los ordenamientos jurídicos modernos en los diferentes países. A lo largo de la historia de la humanidad, el derecho romano cambió constantemente bajo la influencia de las culturas en las que se introdujo, dando como resultado varios sistemas legales. Una mezcla de derecho romano y las costumbres legales canónicas y locales de la Europa continental se convirtió en la base de la denominada familia jurídica Romano-Germánica.

Palabras Clave: sistema legal, derecho romano, familia jurídica romano-germánica (continental), familia jurídica anglosajona, derecho musulmán, derecho hindú.

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1. INTRODUCTION

Throughout the history of humanity, Roman law constantly changed under the influence of the cultures in which it was introduced. Thus, various legal systems appeared. A mixture of Roman law and the canonical and local legal customs of continental Europe became the basis of the so-called Romano-Germanic legal family. It was formed based on the study of Roman law in Italian, French, and German universities, which created a common legal science for many European countries in the 12th-16th centuries based on the Institutes of Justinian. The law of the countries of the Romano-Germanic family is characterized by a single scheme of the hierarchical system of sources of law, a single fund of basic legal concepts, and the division of law into branches (constitutional, civil, criminal, etc.). In all countries of the Romano-Germanic family, the division of the right into public and private is recognized. Two legal groups are distinguished: Romance, based primarily on French law and including the legal systems of Belgium, Luxembourg, Holland, Italy, Portugal, and Spain, as well as German, uniting along with the legal system of Germany the legal systems of Austria, Switzerland, and some other countries.

2. Methods

The historical development of the continental legal system (family) has a long history based on the foundations of Roman law. Roman law was studied at universities in Italy, France and Germany. In the 12th-16th centuries, under the auspices of these universities (being the leading ones in Europe) and on the basis of Justinian Code, the foundation of legal science was created, considered at that moment in its modern sense for most European countries. The fundamental role in that process was obviously played by the University of Bologna in Italy. It should be noted that the codification of Justinian was a fairly systemic and serious document for that time written in Latin (the language of scholars and clergy). The Roman law has become the foundation of Roman civilization as one of the most powerful civilizations of antiquity[1].

[1] David, R., The main legal systems of our time (Moscow: Progress, 1988).

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Gradually, the basic rules of Roman law were beginning to be perceived by the legislator. Under the dominance of subsistence farming and the absence of commodity production and a market in feudal Europe, there was no need for such norms. However, with the growth of capitalist relations and the development of commodity exchange, carefully developed Roman law, designed for a society where private property prevails, was increasingly used by the nascent bourgeoisie. This is what made it possible to adapt it to the commodity-money relations developing in feudal Europe.

The reception of Roman law led to the fact that even in the era of feudalism, the legal systems of European countries – their legal doctrine and legal technique – acquired a certain similarity. Canon law also had a unifying influence.

3. Results

The law of the countries of the Romano-Germanic family is characterized by a single scheme of the hierarchical system of sources of law, a single fund of basic legal concepts, and the division of law into branches (constitutional, civil, criminal, etc.).

The English law lacks generally accepted division of the right into public and private since English (Saxon) law did not accept the basic traditions of Roman law. It should be also noted that there are no European-type codes in England. Branches of English law are not clearly expressed and the boundaries between them are blurred, unlike the countries of the continental legal systems.

The judicial system in England has historically evolved differently from the Romano-Germanic one: English courts have common jurisdiction and any court in England has the power (judicial jurisdiction) to review different categories of cases: from civil and commercial to criminal cases.

An important feature of Muslim law should be noted: herein, the law as a legal category, as an act issued by the competent authority, does not exist in principle. Among Muslims, only Allah has legislative power. The rulers on the earth do not have the right to legislate, are not endowed with the powers (which only Allah can grant them) to create the right on the earth. In fact, the most important and the only source of Islamic law are the works (collected writings) of ancient legal scholars.

4. Discussion

Romano-Germanic (continental) legal family

The Romano-Germanic family includes legal systems that originated initially in continental Europe based on ancient Roman law, as well as canonical and local legal customs. They seem to continue Roman law, being the result of its evolution and adaptation to new conditions. The dominant role in such systems belongs to the law and, primarily, the code.

The history of the spread of the Romano-Germanic legal family began with the territory of continental Europe, then the Romano-Germanic law spread to Latin America, most of Africa, and gradually reached the Middle East and Japan. This process can be explained by quite understandable historical events of that time - the colonial activity of many European countries, as well as by a fairly high level of codification and systematization of legislation in Europe starting from the 19th century. Codes adopted by many countries in Europe were used by other countries at that time as models for creating their own state law.

The nature of law was changed by the bourgeois revolutions raging on the territory of Europe in the 18th-19th centuries, which resulted in the abolition of the feudal system, and the law in European states (starting with the bourgeois revolution in France in 1789) became the main source of Romano-Germanic legal system in Europe. Through codification, the law is brought into the system and permeated with uniform principles.

Anglo-Saxon legal family

This system developed independently, and the connection with the European continent did not have a significant impact on it. English lawyers like to emphasize the historical identity and continuity of their law.

The system of law in England is included in the Anglo-Saxon legal family, the main source of which is the rule formulated by judges and expressed in judicial precedents[2], that is, in court decisions on a specific case, which is then given binding force. The source of law is the statutory (legislative) law of parliamentary origin.

The first group of English law includes the following states: England, Northern Ireland, Canada, Australia, New Zealand, as well as the former colonies of the British Empire. Currently, about 30% of the world's population live largely guided by the basic principles of Anglo-Saxon law[3]. The second group includes America, in which English common law, being the main source of law, is almost independent. The history of English law had actually begun after the Norman conquest of England in 1066, when the burden of administering justice in the judicial system fell on the royal courts of London. Their judicial practice, consisting of the sum of the decisions taken, became a model (judicial precedent) for lower courts, this principle was laid in the foundation of common law. A precedent rule had been developed - if a court decision was made in a particular case, then all subsequent cases with similar circumstances were resolved in the same way - all courts had to be guided by a previous decision (the first on this issue). Thus, the court decision became the law for all subsequent court cases on similar issues (disputes).

[2] Kross, K., Precedent in English law (Moscow: Yrridicheskaya literature, 1985); Bogdanovskaya, IYu., Judge-made law (Moscow: Nauka, 1993); Maksimov, A.A., "Precedent as one of the sources of English law", Gosudarstvo i pravo 2 (1995): 97-102; Dolinskiy, A., Case law and features of its application in various regions of the United Kingdom (St. Petersburg: Piter, 2003).

[3] Doronina, N.G, editor. Legal responsibility: modern challenges and solutions: Materials for the VIIIth Annual scientific readings in memory of professor S.N. Bratusya (Moscow: INFRA-M, 2013), 304.

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In the modern world, English law remains a judicial right being formed by the judges themselves by judicial decisions. This, according to the authors' view, allows making common law norms more flexible and less abstract than the norms of Romano-Germanic law[4]. Thus, it is important to conclude that the limits of judiciary judgement are very wide in English law and, at the same time, they are limited by previous judicial practice on certain issues[5].

US legal system

In North America, English law was distributed by settlers from England. The customs and traditions of the local population were ignored as something alien and uncivilized. However, English law underwent significant changes in the colonies. This was due to the new conditions and, first of all, to the fact that there was no feudal system in the New World. The need to regulate the new relations that were developing in the colonies encouraged the idea to create a codified law.

The Declaration of Independence brought to the fore the idea of creating an independent American law, breaking with its English past. The adoption of the Federal Constitution of 1787 and the constitutions of the states that became part of the US was the first and important step on this path. Several states adopted criminal, criminal procedure, and civil procedure codes and prohibited references to English judicial decisions made before independence. However, there was no perception of the principles of the continental legal system in US law. Only a few states that were previously French and Spanish colonies (Louisiana, California) adopted Romance codes. The laws of most states explicitly state that the common law is valid. In general, the US developed a dualistic system similar to the English one: judge-made law in interaction with statutory law with the priority of precedent.

[4] Aparova, T,V., Precedent in modern English law and judicial law. Trudy VNIISZ 6 (1976):173-185.
[5] Gabov, A.V., Gutnikov, O.V. and Doronina, N.G., Legal Entities in Russian Civil Law, vol. 1, General Provisions on Legal Entities (Moscow: INFRA-M, 2015), 384.

Muslim legal family

Muslim law was formed in the era of the formation of feudal society in the Islamic Caliphate in the 7th-10th centuries as a system of norms expressing in religious form the will of feudal-religious nobility, sanctioned and supported by the theocratic Muslim state.

In accordance with the dogmas of Islam[6], Allah gave the right to people through his prophet Muhammad. The Muslim legal system is based on the Qur'an, which consists of divine ordinances recorded by Muhammad. In Islamic law, it is important to understand that Allah gave a person rules once and for all, and a person must observe them and cannot create own (additional to the divine) rules of behavior on Earth. At the same time, Islamic experts explain that divine revelation needs to be clarified and interpreted, and it took many centuries of painstaking work of Muslim lawyers to interpret the norms of the Qur'an.

Muslim law is a unified Islamic system of social and statutory regulation, which includes both legal norms and religious and moral postulates, as well as customs[7]. Thus, Islamic law defines the prayers that the faithful must read, the fasts that they must observe, the alms that they must give, and the pilgrimages that they must perform. Muslim law is the most vivid and complete expression of the Islamic ideology, its foundation. At present, Muslim law is applied to some extent in many countries from the Western tip of Africa to the Pacific Islands. According to various estimates, there are between 750 and 900 million people who practice Islam in the world. They make up the majority or significant portion of the population of more than 50 states.

The Qur'an, the collection of sayings of Muhammad compiled several years after his death, is the first source of Muslim law. It consists mainly of provisions of a moral nature that are too general to have the accuracy, concreteness, and certainty of legal norms.

[6] Prozorov, S.M., Islam as an ideological system (St. Petersburg: Vostochnaya literature, 2004).
[7] Syukiyainen, L.R., Doctrine as a source of Islamic law (Moscow: Istochniki prava, 1995); Syukiyainen, L.R., Sharia and Muslim legal culture (Moscow: Institut gosudarstva i prava Rossijskoj Akademii nauk, 1997).

The Qur'an teaches a Muslim, for example, to express compassion for the weak and poor, to do business honestly, not to offer bribes to judges, and to evade usury and gambling. However, the Qur'an does not specify what the legal penalties are for violating these covenants. The rules contained therein relate mainly to prayer rituals, fasting, and pilgrimage. Even when the Qur'an deals with issues of law in the proper sense, such as family relations, it does not offer a single system of general rules, but only provides solutions to several issues that Muhammad dealt with as a judge[8]. The second most important source of law is the *Sunnah* – a collection of legends about the Prophet Muhammad, about his being and behavior, a kind of result of the interpretation of the Qur'an in the first decades after the death of the prophet, reflecting the political and religious struggle around his inheritance. The third source of Muslim law is the so-called *ijma'* – the agreed conclusion of ancient jurists, experts in Islam on the duties of the faithful, which received the meaning of legal truth extracted from the Qur'an or Sunnah. *Analogy (Qiyas)* is also considered the source of Muslim law – rules for applying to new similar cases the prescriptions established by the Qur'an, Sunnah or ijma'; ijma' is much more important than other sources. The last two sources were the result of numerous Sunni and Shia law schools that had a great influence on the evolution of Muslim law. The entire system of Muslim law based on the Qur'an is usually called Sharia. There are two main reasons for the appearance of ijma' and Qiyas. First, the Qur'an was not a complete set of legal norms, and the Sunnah, on the contrary, was a set of casuistic provisions that often contradicted each other and which ordinary Muslims and judges were almost unable to understand on their own. Second, the Qur'an and Sunnah did not reflect the new relations that the dominant strata of society were interested in consolidating[9].

The Hindu right

In the modern world, Hindu law[10] is observed by 300-350 million Indians. A significant part of the Indians lives in India. Indian minorities live in Pakistan, Burma, Singapore and

[8] Gabov, A.V., Gutnikov, O.V. and Doronina, N.G., Legal Entities in Russian Civil Law.
[9] Syukiyainen, L.R., Muslim law. Questions of theory and practice (Moscow: Nauka, 1986).
[10] Krasheninnikova, N.A., Hindu law: history and modernity (Moscow: Izdatel'stvo Moskovskogo universiteta, 1982).

Malaysia, as well as in countries on the east coast of Africa (for example, Tanzania and Uganda). Thus, the rules of Hindu law are applied to all Hindus, and Hinduism itself is a complex system of religious, philosophical and social views. Hinduism is based on the doctrine of the reincarnation of souls and caste division of society. According to this teaching, Indians believe that good and bad deeds of a person committed on earth create the basis of the future existence, embodied in the soul of the deceased, determined by the moral qualities of the past life[11]. There is no doubt that traditional African law is gradually losing and, in some cases, has already lost its regulatory significance. Its norms in their social content do not fit well with the development trends of young developing states that are striving to follow the path of civilization and progress. Many millions of Africans, especially in rural areas, continue to live by old customs, avoiding recourse to state courts, preferring arbitration, and seeking reconciliation in accordance with tradition[12].

5. CONCLUSION

Increasing trends towards centralization in the development of the US and state intervention in the economy have led to a significant increase in the volume of federal legislation and expansion of law-making at the highest levels of executive structures: the president, federal services, etc. There are many codes in US law that English law does not include. Several states have civil codes, 25 states have civil procedure codes, all states have criminal codes, and some have criminal procedure codes. With the exception of Louisiana, where Romance codes are in place, codes in all other states are by no means reminiscent of European ones. The legislator seeks, first of all, to reproduce in them the previous norms created by judicial practice, to consolidate precedents, and not to create any new norms.

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[11] David, R., The main legal systems of our time.
[12] Supotaev, M.A,. Culturology and Law (based on materials from countries of Tropical Africa) (Moscow: Infra-M Forum, 1998); Supotaev, M.A., Customary Law in East Africa (Moscow: Nauka, 1989).

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