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BORROWINGS IN THE LAW OF THE MULTIPOLAR WORLD: TOWARDS A NEW SCIENTIFIC CONSENSUS

Abundance and diversity of the modern world is reflected in the diversity of legal cultures. Each of them is unique in its own way, and at the same time they have something in common that brings them closer and allows interacting with each other. It is not only about the so-called genome of law, as it was called by V. S. Stepin[1], Academician of the Russian Academy of Sciences, but also about the practice of borrowing legal ideas, patterns and models as the manifestation of one of the patterns of global legal development. This is confirmed by the historical experience of the evolution of "civilization of law"[2].

In the history of the Russian state and law, there are many facts of large-scale borrowings of legal decisions from foreign legal systems. The modern Russian legal order was formed in the 1990s – 2000s as the result of borrowings from the Continental (Romano-German) Law and the Anglo-Saxon Law. The Soviet law arose as the result of the direct reception of the German legislation and individual provisions of the German doctrine. M. M. Speransky's activity on modernizing the Russian Empire's legislation was inspired primarily by Napoleon's codifications. Peter the Great was guided by the example of Sweden and Leibniz's ideas. Even *Russkaya Pravda* (the Russian Truth) was created, based not only on local customs, but also on the Byzantine Empire's law. There are similar examples abroad, as well. So, the basis of the Continental (Romano-Germanic) Law, inter alia, includes the Roman law to have been formed

[1] See: Stepin V. S. The value of law and the problems of forming the legal society in Russia // Philosophy of law at the beginning of the 21st century through the prism of constitutionalism and constitutional economy / Ed. by Mironov V. V., Solonin Yu. N.; edition of the Moscow-Petersburg Philosophical Club. Moscow, 2010. P. 16–27.

[2] See: Zorkin V. D. The civilization of law and the development of Russia. – 2nd ed., corr. and add. Moscow: NORMA; INFRA-M, 2016.

as the result of the interpretation of Greek sources. Even the laws by Draco and Solon contain provisions rooted in the legal orders of Mesopotamia and Western Asia.

Does this indicate the unconditional value of legal borrowings as a phenomenon of the global legal culture, a universal tool for developing national legal systems? Is it possible to consider legal borrowings as part of the national legal tradition, in particular the Russian one, or to regard the practice of borrowing as a tradition as it is? This formulation of the question opens up a new perspective in comprehending the interaction of legal tradition and legal borrowings, interpreting the nature, reproduction, and repeatability of the practice of borrowing in law. The search for answers to these questions is important in terms of the current transformation of the world order, the transition from the monocivilizational model to the multicivilizational one, and the states' focus on strengthening national and cultural identity.

The term "tradition" (from Latin. *traditio* – "transfer") has many meanings. It is used in the meanings of "a way of transferring social and cultural heritage", "steady experience of generations and epochs", "a way of social and legal regulation", "a multifunctional system of the society's adaptation to changing conditions", "a way of transferring ethnocultural information", etc.[3] Some definitions reflect their "bias" by various fields of knowledge, the focus on solving individual cognitive tasks or the emphasis on one or another property of the phenomenon under consideration. For example, some definitions emphasize the function of tradition in society, some emphasize their instrumental role, and others – their substantive side, etc. In any approach, both in everyday and professional terms, tradition remains a symbol of stability and steadiness. It is perceived as patterns of behavior that have developed in the society, which are

[3] See in detail: The Great Russian Encyclopedia of 2004–2017. The electronic resource. https://old.bigenc.ru/world_history/text/4199293; Tregulova N. P. Formation of the definition "tradition" // Bulletin of the Buryat State University. Philosophy. 2021. Issue 2. P. 79–85.

passed down from generation to generation and are connected with the history of the people or the state, as an established order, an unwritten law in behavior, in everyday life[4]. The tradition has been preserved and reproduced for centuries, regulates the behavior of people who repeat the same actions in a certain period of time, regardless of the circumstances. Therefore, it carries a regulatory capacity and a certain imperative.

It is known that Legal Science performs a practical transformative function. Its conclusions and suggestions can be perceived as a guide to action, especially if they are perceived and implemented in practice by a legislator or a law enforcement officer. The doctrinal identification of the experience of legal borrowing as a tradition means the validity of the statement that each regular reform, legal modernization should be carried out based on borrowings or through their integration into the national legal system. Recognizing the practice of borrowing as a tradition implies the attitude towards its mandatory use. This raises several questions. In particular, does this understanding of legal borrowings form an unnecessary framework and limit the discretion of the legislator in the development of the national legal system and legal order? Does it pose a threat to legal sovereignty? When cultivating this idea, do legal scholars fall into an intellectual trap, involving not only scientists, but also practitioners, lawyers, and politicians?

To a first approximation, features of a tradition are revealed when studying the practice of legal borrowing in historical and legal retrospect. However, although there are many historical facts that can be used for confirming the tradition character of legal borrowings, it is not without alternative. If we consider the phenomenon of borrowing in law at the “macro level”, we can find grounds for concluding that the practice of legal borrowing is not a tradition, but represents

[4] See in detail: Pashentsev D. A. The Russian legal tradition facing the challenges of globalization // Legal Science. 2016. No. 1. P. 29–32; Il est. Dynamics of the legal tradition in the context of the Fourth Industrial Revolution // Journal of Russian Law. 2021. No. 5. P. 5–15.

an objective process of the evolution of law, its feature or an element of the mechanism. From this point of view, borrowing can be identified as a means of the trans-civilizational development of law, integration and convergence of legal systems.

World history shows that borrowing, as a rule, occurs when a particular society (state) embarks on the path of "catching up with modernization"[5] (primarily in economic and technological development), "catching up" with its law development, in which any legal system is improved through doctrine and practice that arose earlier in a stronger legal field. But this is done not by virtue of tradition, but for other reasons – socioeconomic, political, etc., ones. An analogy with the borrowing of funds by the state to develop or save its own economy appears to be acceptable here. Such actions are carried out not because there is a tradition of taking out a loan for this purpose, but because there is a need for solving urgent government problems and obtaining a loan is one of the ways to do this.

This is exactly the situation that developed in Russia at the end of the 20th century. during the transition from socialism to capitalism, from its planned economy to market relations, when the Russian legal order needed to turn to foreign countries' experience. This made it possible to overcome the current problems of that time and provided a certain positive result. Meanwhile, the "legal transfer" that took place served as a channel for legal expansion. Currently, this fact becomes increasingly obvious. Similar scenarios continue to be implemented while modernizing the national law and order in the post-Soviet space.

The regulatory framework in field of artificial intelligence is also developing in the logic of "catching up modernization". Some legal models have already been created (the European Union Regulation on Artificial Intelligence

[5] See: Stepin V. S. Modern Civilizational Crises and the Problem of New Development Strategies. Moscow, 2018.

2024[6], acts of some other states). They are accepted in a number of countries, for example in the Republic of Kazakhstan[7]. In Russia, the regulatory framework continues to be developed, but there is no basic law yet. Various project solutions are being discussed, including those formed in foreign legal systems. Alongside this, the analysis of well-known initiatives and projects makes it possible to predict in Russia the prospect of developing an original regulatory model that ensures the balance in achieving the goals of protecting individuals, society and the state, on the one hand, and technological leadership, on the other hand. It should be noted that the Russian legal order has demonstrated immunity to the expansion of legal ideas regarding the legal personality of artificial intelligence[8]. Despite the significant number of supporters of this idea in the Russian scientific community, it has not been implemented in practice.

It is important to pay attention to the dual nature of the phenomenon of borrowing and the heterogeneity of its manifestations: on the one hand, voluntary (proactive) borrowing of legal models from other legal orders (which occurs during reception), on the other hand, the open or hidden imposition in the global or regional scale of legal patterns developed by any one legal culture. The specificity the latter is clearly demonstrated by the practice of promoting international legal standards, which are being replaced by the results of interpretation of various supranational structures: GRECO, OECD – in relation to anti-corruption standards[9], ECHR – regarding the European Convention on

[6] Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonized rules on artificial intelligence and amending Regulations (EC) No. 300/2008, (EU) No. 167/2013, (EU) No. 168/2013, (EU) 2018/858, (EU) 2018/1139 and (EU) 2019/2144 and Directives 2014/90/EU, (EU) 2016/797 and (EU) 2020/1828 (Artificial Intelligence Act). https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L_202401689

[7] See: The file on the draft Law of the Republic of Kazakhstan “On Artificial Intelligence”. https://online.zakon.kz/Document/?doc_id=34868071

[8] See in detail: Khabrieva T. Ya. Legal Problems of Artificial Intelligence Identification // Bulletin of the Russian Academy of Sciences. 2024. Vol. 94. No. 7. P. 609–622.

[9] See in detail: Khabrieva T. Ya. Corruption and law order in the focus of modern legal doctrine // Journal of Foreign Legislation and Comparative Legal Studies. 2016. No. 4. P. 5–13;

Human Rights[10]. This results in replicating not formally expressed legal provisions, but meanings presented as a legal, constitutional European heritage, in particular, in the activities of the Venice Commission of the Council of Europe, conclusions of which have not always been unbiased[11]. The tactic of legal expansion become more straightforward, which is confirmed by the factual circumstances of adopting by the UN General Assembly the Pact for the Future[12], which includes the Global Digital Treaty (September 22, 2024).

Within the theme of borrowing and legal expansion, it is necessary to consider Part 4 of Article 15 of the Constitution of the Russian Federation. It opens up a space for borrowing, fixes their justifications and mechanism. Despite the fact that now this constitutional norm must be interpreted systematically, together with the provisions of Article 79 of the Constitution of the Russian Federation, which narrows this space after adopting the amendments to the Main Law in 2020. However, the teleological interpretation of Part 4 of Article 15 of the Constitution leads to the conclusion that the purpose of its inclusion in the Constitution in 1993 was precisely to ensure the possibility of legal expansion. The fact of adopting the amendment to Article 79 of the Constitution confirms this conclusion[13].

Khabrieva T. Ya., Chernogor N. N. Strengthening the rule of law and combating corruption in the context of Eurasian integration // Social Sciences and Modernity. 2017. No. 1. P. 5–19.

[10] See: Kovler A. I. The European Convention in the international human rights protection system. Moscow: Institute of Legislation and Comparative Law under the Government of the Russian Federation: Norma: INFRAM, 2019.

[11] See: Khabrieva T. Ya. The Venice Commission as a Subject of the Law Interpretation. Moscow: Statut, 2018.

[12] Pact for the Future. The UN. September 22, 2024. https://docs.un.org/ru/A/RES/79/1

[13] See: Khabrieva T.Ya., Klishas A.A. The thematic commentary to the Law of the Russian Federation on the Amendment to the Constitution of the Russian Federation dated March 14, 2020 No. 1-FKZ “On Improving the Regulation of Certain Issues of the Organization and Functioning of Public Power”; Commentary to the Constitution of the Russian Federation (by article): given the amendments approved during the all-Russian vote on July 1, 2020 / T.Ya.Khabrieva, L.V.Andrichenko, S.B.Nanba, A.E.Pomazansky / ed.T.Ya.Khabrieva; the appeal to the readers by V.V. Putin.

Defining the phenomenology of various types of legal borrowings, establishing their correlation and interaction patterns are associated with the search for an answer to the question of the limits of borrowings and constitutional mechanisms to ensure them, as well as with the "purification" of the national law from excessive or destructive borrowings[14]. The relevant scientific task is determined by the goals of maintaining the stability of the national law and the law order. To solve it, the serious study of this problem is required, including finding the criteria that make it possible to detect and, perhaps, establish or normalize the desired limits.

The variety of borrowings in law includes "reverse" (or "returnable") legal borrowings. They are named this way by analogy with the way how philologists name words borrowed by a language from another one, and then back again, but in a different form or with a different meaning[15]. In Law, "reverse" ("returnable") borrowings are legal ideas that originally arose within the framework of a legal order, and, having been perceived in other legal orders, subsequently returned to the donor law order. An example is the so-called regulatory guillotine. There is a reason for asserting that this instrument was borrowed by foreign countries from the Russian (Soviet) experience of legal regulation. In 1975, it was stipulated in the joint Resolution of the CPSU Central Committee and the Council of Ministers of the USSR dated June 25, 1975, "On Measures for Improving Economic Legislation"[16]. Other examples can be found in European democratic states (for example, in Germany, Austria), which during the pandemic caused by the spread of the coronavirus infection COVID-19, established special regimes restricting

[14] See in detail: Bastrykin A. I. The priority of the national law over the international one is necessary. https://rg.ru/2015/04/28/bastrykin.html?utm_referrer=https%3A%2F%2Fyandex.ru%2F

[15] See, for example: Language Contacts: Short Dictionary / V. M. Pankin, A. V. Filippov. Moscow: Flinta; Science, 2011; The Oxford Guide to Etymology, by Philip Durkin, 5. Lexical borrowing, 5.1 Basic concepts and terminology. P. 212–215.

[16] See: Decisions of the Party and the Government on Economic Issues: Collection of Documents. Vol. 10. October of 1973 – October of 1975. Moscow: Politizdat, 1976.

their citizens' rights and freedoms, as well as models of public law regulation developed in other states. The practice of implementing the US President Donald Trump's election promises to stop the "artificial introduction of gender ideology" into the American community and recognize only male and female genders can also serve as a subject to be analyzed in this context.

An independent plot in the subject under consideration is the problem of "correct" and "incorrect" borrowings. In 2015, using the example of the trust institute, V. D. Zorkin showed that attempts to hastily "inculcate" "shoots" of Anglo-Saxon case law to the Russian rule-making practice, which had ever been done before neither in the imperial, nor Soviet, nor early post-Soviet periods, were far from always justified and could even be destructive[17]. Here we should return to the issue of the limits of borrowings and the constitutional mechanisms for ensuring them, as well as the "purification" of the national law from incorrect (destructive) borrowings, which was raised in the context of the analysis of Part 4 of Article 15 of the Constitution. For identifying incorrect borrowings (at the stage of planning their inclusion in the national law or already embedded ones in it), and preventing them, scientifically based identification criteria, as well as mechanisms for "filtering" foreign legal models when they are implemented in the national law order, are required.

The objects of borrowing can be very different – from legal ideas to legal structures and institutions. Research has shown that technologies of legal transformations, such as reforms and modernizations, can also be adopted and

[17] See: Zorkin V. D. Economics and Law: The New Context // Rossiyskaya Gazeta. May 22, 2014.

replicated. The study of government reforms[18] and color revolutions[19] convinces of this. This area of jurisprudence needs to be developed, for the purpose of bringing the technology of state-law transformations to a higher level, without falling under the influence of the inspirers of "color revolutions" (which is manifested in the fact that foreign legal models (standards) of "Good Governance" are imposed in the circumstances of turmoil[20]).

The theme of legal tradition and legal borrowings has significant ideological capacity. The ideas, fundamental meanings and interpretations that form its basic content can be used both for justifying the inferiority of a particular legal system, the inability of a particular society to develop its own legal models, and to assert the identity of legal cultures and legal identity. At present, it is the statement that is in demand in the practice of constitutional development, strengthening integrative formations created on the basis of equitable dialogue between states and civilizations[21].

After the collapse of the Soviet Union, the negative attitude towards ideology, the belief that it was harmful, was formed in the public and professional minds of lawyers. The reasons and the process of forming this stereotype can and even should be analyzed in the context of the expansion of legal ideas. As time passes, it becomes clear that, having been imposed on the Russian law order, this attitude was consistently embedded in the public consciousness. However, this

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[18] See: Administrative Reform in Russia: Research and Practice Guide / ed. S.E.Naryshkin, T.Ya. Khabrieva.: Kontract: INFRA-M, 2006; The Municipal Reform in the Russian Federation: the Legal and Economic Research.: Eksmo, 2010; The Reform of Science and Education: Comparative Legal and Economic-Legal Analysis / ed. T.Ya. Khabrieva.: The Russian Academy of Science; Institute of Legislation and Comparative Law under the Government of the Russian Federation; SPb: Nestor-History, 2014; Khabrieva T.Ya. The Constitutional Reform in the Modern World: monograph.: Science RAS, 2016; Khabriéva T. La réforme constitutionnelle dans le monde contemporain. Paris: «Société de législation compare», 2019; et al.

[19] See: Khabrieva T.Ya., Chirkin V.E. "Colour Revolutions" and "Arab Spring" in the Constitutional Dimension: Political and Legal Research.: IZiSP: INFRA-M, 2018.

[20] Ibid.

[21] See: Khabrieva T. Ya., Chernogor N. N. The Future of Law. Academician V. S. Stepin's Legacy and Legal Science. P. 51–73.

did not made the ideology disappear[22], which was clearly demonstrated by the so-called collective West that violated its own legal ideals and elevated the anti-Russian (Russophobic) ideology above the law.

At present, there is some awareness that it is necessary to consistently strengthen immunity to alien legal ideas, values and patterns, which the restoration and preservation of historical memory can significantly contribute to. However, we need to understand what is the legal ideology that unites Russian society. To a certain extent, it is expressed in the updated Constitution of Russia. The expediency of using the capacities of legal science to restore the "status" of legal ideology in doctrine and in practice can be explained by the fact that research is projected not only on the national law, but also on the international communication and the world order. Against the background of the continuing fragmentation of the international community, integrative processes, including those demonstrating the multipolar world ideology, are underway. A striking example is BRICS, which function, based on the ideas of equality, justice, and mutual benefit[23]. Studying the legal ideology of such entities is one of the urgent tasks of legal science[24].

The cautious attitude towards our own legal ideology has led to the fact that borrowings in the Russian law are considered by default to be a traditional way of its development and modernization. This distorted perception of the patterns of the development of domestic law and legal tradition is largely the result of the lack of scientific consensus on the interpretation of the nature and the significance

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[22] See: Khabrieva T. Ya. The Venice Commission as a Subject of the Law Interpretation. Moscow, 2018. P. 112–113.

[23] See: BRICS: Contours of the Multipolar World: a monograph / S. E. Naryshkin, T. Ya. Khabrieva, A. Ya. Kapustin et al. / ed. Academician of the Russian Academy of Sciences T. Ya. Khabrieva. Moscow: Institute of Legislation and Comparative Law under the Government of the Russian Federation, 201; Khabrieva T. Ya. BRICS as a civilizational phenomenon in terms of law and legal doctrine. https://www.lihachev.ru/chten/2024/plen/Khabrieva_TYa_2024.pdf; and others.

[24] Perhaps, in the understanding of V. A. Tumanov to be given in his works, as a theoretical construction expressing a certain legal worldview (see: Tumanov V. A. Bourgeois legal ideology: On the Criticism of Law Doctrines. Moscow: Science, 1971).

of borrowings for the Russian law order, although consensus on the issue is much needed. One should not forget that the exaltation of world experience leads to the belittling of one's own, and a special reverence for foreign legal innovations results in underestimating domestic legal culture.

Consensual principles are inherent in legal science. The tradition of developing a unified opinion on fundamental issues of jurisprudence and state studies was characteristic of Soviet jurisprudence[25]. Now it is reduced, but not completely lost. Scientific conceptions of developing Russian legislation[26], which reflect collective views on law, legislation, and the state-law field as a whole, can be given as an example of its preservation. They express the agreed opinion of scientists from the Institute of Legislation and Comparative Law under the Government of the Russian Federation on their nature, structure, and what is due and proper in law. It is about the consensus that ensures the common guidance of collective research, the internal consistency of the content of scientific and legal studies, and the integrity of the rational picture of legislation. This picture and its particular fragments are the result of mutual understanding, for example, regarding the concept of legislation, its limits, the system, the role of individual regulatory arrays in the legal system[27]. Even the structure of each of the eight

[25] Consensuality was characteristic of Russian science (see: The Annals of Russian Legal Science: in 5 volumes / resp. ed. T. Ya. Khabrieva).

[26] See: Conceptions of Developing Russian Legislation / ed. L. A. Okunkov, Yu. A. Tukhomirov, Yu. P. Orlovsky. Moscow, 1994; The Legal Reform: Conceptions of Developing Russian Legislation. 2nd ed., revised and add. Moscow, 1995; The Legal Reform: Conceptions of Developing Russian Legislation. 3rd ed., revised and add. Moscow, 1998; Conceptions of Developing Russian Legislation / ed. T. Ya. Khabrieva, Yu. A. Tukhomirov, Yu. P. Orlovsky. Moscow, 2004; Conceptions of Developing Russian Legislation / ed. T. Ya. Khabrieva, Yu. A. Tukhomirov. Moscow, 2010; Conceptions of Developing Russian Legislation / resp. ed. T. Ya. Khabrieva, Yu. A. Tikhomirov. Moscow, 2013; Conceptions of Developing Russian Legislation / resp. ed. T. Ya. Khabrieva, Yu. A. Tikhomirov. Moscow, 2014. Scientific Conceptions of Developing Russian Legislation: monograph. 7th ed. add. and revised / resp. ed. T. Ya. Khabrieva, Yu. A. Tikhomirov. Moscow, 2015; Scientific Conceptions of Developing Russian Legislation / ed. T. Ya. Khabrieva, Yu. A. Tikhomirov. 8th ed. revised and add. Moscow, 2024.

[27] See: Chernogor N. N. Conceptions of Developing Russian Legislation in the Parameters of Academic Science // Lex Russica. 2024. Vol. 77. No. 7. P. 104.

editions of the Conceptions is the result of the consensus that ended the long and acute discussion on this issue.

The consensus to have been reached within the authors' collective of the Conceptions, firstly, is open to the "outside scientific world" and can serve as the basis for expanding the circle of its participants[28]. Secondly, it has the capacity to become a kind of model for postulating doctrinal statements, conclusions and theoretical schemes in legal science and educational literature, as well as stimulate the development of the practice of working out doctrinal decisions[29]. This, in turn, can begin a new cycle in the evolution of Russian science, which is associated with changing the vector of social development – from the paradigm of an individualistic type of society to a collectivist one, and this means changing the value focus of scientific communities and research programs, ultimately reflecting changes in socio-historical relations, law and culture. It is highly likely to forecast that in the new cycle of the evolution of the legal science, the Soviet experience of organizing research activities will be in demand in terms of reaching consensus, the necessity for which is dictated by the needs of practice[30].

[28] This fact is indirectly indicated by the support of the Conceptions by the research groups of other leading scientific and educational centres. See, for example: Kropachev N. M., Arkhipov V. V., Rudokvas A. D., Rasskazova N. Yu., Olennikov S. M., Karandashov I. I., Luneva E. V., Popondopulo V. F. Review: Scientific Conceptions of Developing Russian Legislation: monograph / V. R. Avhadeev, E. G. Azarova, L. V. Andrichenko et al.; ed. T. Ya. Khabrieva, Yu. A. Tikhomirov; Institute of Legislation and Comparative Law under the Government of the Russian Federation. 8th ed., revised and add. Moscow: Norma, 2024 // Jurisprudence. 2024. Vol. 68, No. 4. P. 591–600.

[29] Chernogor N. N. Op. cit. P. 104–105.

[30] From the report by T. Ya. Khabrieva "Consensual Principles in the Conceptualization of Law as a Factor of Sustainable Development of the State" at the Plenary Session of the 10th Moscow International Legal Forum "Sustainable Development of Russia: The Legal Dimension" (Moscow, Kutafin Moscow State Law Academy, April 06, 2023).