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RECEPTION AS A CONSTITUTIONAL AND LEGAL PHENOMENON

RECEPȚIA CA FENOMEN CONSTITUȚIONAL ȘI LEGAL

РЕЦЕПЦИЯ КАК КОНСТИТУЦИОННО-ПРАВОВОЙ ФЕНОМЕН

PALINCHAK Mykola* / PALINCHAK Mykola / ПАЛИНЧАК Михаил

BIELOVA Myroslava** / BIELOVA Myroslava / БЕЛОВА Мирослава

ABSTRACT:

RECEPTION AS A CONSTITUTIONAL AND LEGAL PHENOMENON

The article raises the question of understanding the concept of „reception” as one of the factors in the development of constitutional and legal thought. Various opinions of scientists about the understanding of the concept of „reception” and its influence on the formation of modern legal society were studied. In the course of researching the topic, the author considered the issue of the concept of reception, the components and signs of the researched process, the influence on the formation of the constitutional and legal idea and the consequences of its influence for Ukraine.

Doctrinal interpretations of reception as a general legal and constitutional phenomenon are of a debatable nature, which makes it possible to talk about the polysemanticity and heterogeneity of the understanding of this legal category. That is why the study of the reception and determination of the doctrinal definition of this constitutional and legal phenomenon is an urgent problem that has a range of both general theoretical and praxeological research

Keywords: concept of reception, legal and constitutional phenomenon, European integration processes, European Union.

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REZUMAT:

RECEPȚIA CA FENOMEN CONSTITUȚIONAL ȘI LEGAL

Articolul ridică problema înțelegerii conceptului de „recepție” ca unul dintre factorii de dezvoltare a gândirii constituționale și juridice. Au fost studiate diverse opinii ale oamenilor de știință despre înțelegerea

* **PALINCHAK Mykola** - doctor of Political Sciences, Professor, Faculty of International Economic Relations, „Uzhhorod National University” (Uzhhorod, Ukraine). / **PALINCHAK Mykola** – doctor în Științe Politice, Profesor, Facultatea de Relații Economice Internaționale, „Universitatea Națională Ujhorod” (Ujhorod, Ucraina). / **ПАЛИНЧАК Михаил** – доктор политических наук, профессор факультета международных экономических отношений «Ужгородского национального университета» (Ужгород, Украина). <https://orcid.org/0000-0002-9990-5314> **E-mail:** mykola.palinchak@uzhnu.edu.ua

** **BIELOVA Myroslava** – doctor of Law, Associate Professor, Faculty of Law, Department of Constitutional Law and Comparative Jurisprudence, „Uzhgorod National University” (Uzhhorod, Ukraine). / **BIELOVA Myroslava** – doctor în drept, conferențiar universitar, Facultatea de Drept, Departamentul de Drept Constituțional și Jurisprudență Comparată, „Universitatea Națională Ujhorod” (Ujhorod, Ucraina). / **БЕЛОВА Мирослава** – доктор юридических наук, доцент юридического факультета, Кафедра конституционного права и сравнительного правоведения, «Ужгородский национальный университет» (Ужгород, Украина). <https://orcid.org/0000-0003-2077-2342> **E-mail:** myroslavabelova@gmail.com

conceptului de „recepție” și influența acestuia asupra formării societății juridice moderne. În cursul cercetării temei, autorul a analizat problema conceptului de recepție, componentele și semnele procesului cercetat, influența asupra formării ideii constituționale și juridice și consecințele influenței acesteia pentru Ucraina.

Interpretările doctrinare ale receptării ca fenomen juridic și constituțional general sunt de natură discutabilă, ceea ce face posibil să se vorbească despre polisemanticitatea și eterogenitatea înțelegerii acestei categorii juridice. De aceea, studiul receptării și determinării definiției doctrinare a acestui fenomen constituțional și juridic este o problemă urgentă care are o gamă de cercetări atât teoretice generale, cât și praxeologice. Cuvinte cheie: concept de recepție, fenomen juridic și constituțional, procese de integrare europeană, Uniunea Europeană.

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РЕЗЮМЕ:

РЕЦЕПЦИЯ КАК КОНСТИТУЦИОННО-ПРАВОВОЙ ФЕНОМЕН

В статье поднимается вопрос о понимании понятия «рецепция» как одного из факторов развития конституционно-правовой мысли. Изучены различные мнения ученых о понимании понятия «рецепция» и его влиянии на формирование современного правового общества. В ходе исследования темы автор рассмотрел вопрос о понятии рецепции, составляющих и признаках исследуемого процесса, влиянии на формирование конституционно-правовой идеи и последствиях ее влияния для Украины.

Доctrинальные трактовки рецепции как общеправового и конституционного явления носят дискуссионный характер, что позволяет говорить о многозначности и неоднородности понимания данной правовой категории. Именно поэтому изучение рецепции и определение доctrинального определения этого конституционно-правового явления является актуальной проблемой, имеющей спектр как общетеоретических, так и праксиологических исследований.

Ключевые слова: концепция рецепции, правовое и конституционное явление, евроинтеграционные процессы, Европейский Союз.

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Formulation of the problem.

Modern trends in the civilizational development of society are determined by a large number of factors: global processes of transformation of social reality, the necessary development and modification of general legal and constitutional values, rationalization and optimization in the direction of achieving a balance of international (international) and domestic interests of a modern democratic state. In this process, a completely logical conclusion is the urgent need for a qualitative change in the understanding of constitutionalism, which is currently being formed in the conditions of the convergence of modern legal systems, transnational processes of the development of constitutional law and the implementation of the strategy of the life of society in the face of global challenges of humanity.

Reception as a constitutional-legal phenomenon should play an important role in the transformation of the idea and values of constitutionalism in the context of globalization and the convergence of modern legal systems. After all, traditional constitutionalism, which is the national legal and ideological achievement of a democratic state, its main task, is currently under the influence of global trends in the development of humanity, and therefore there is a need to create a system of universal constitutional norms that have a transnational and constitutional nature of action.

The purpose of the scientific article is to highlight and analyze in detail the concept of „reception” from the legal perspective of the general theoretical aspects of the interpretation of the reception of law in scientific thought, taking into account the challenges of modernity.

Analysis of recent research and publications. This topic is understudied among scientists.

however, the work of some scientists makes it possible to make a positive impression about the researched topic. In particular, the works of N.V. Verlos, I.Y. Magnovskiy, M.R. Matushchak, F. D. Finochko, E. Kharitonova, and Z.P. Melnyka are used in this work. etc.

Presenting main material.

Given the enormous influence of the reception process on the formation of the legal systems of various states, according to scientists, it is impossible not to pay attention to the ideological and theoretical prerequisites and etymological roots of the term „reception of law”.

The concept of reception is used in various fields. Regarding the right reception, they are defined in different ways, emphasizing one or another of its characteristic features. However, in each case it is emphasized that, first of all, reception is the revival of a highly developed system of law that existed before.

Reception „reception” in Latin means acceptance, and to be accepted, borrowed can be:

- a) one's own past legal experience (in this case, succession takes place);
- b) elements of other modern legal systems.¹

According to the German jurist F. Pringsheim, the concept of reception includes only voluntary, not forced, perception of another's legal culture.²

V.A. Tomsinov studies the reception of law as a process of perception in one or another state of elements of the legal system of another state.³

M. Ansel also considers the reception of law as „the most complete form of deliberate, voluntary convergence of legal systems”. Nevertheless, reception acquired the character of intentionality and voluntariness only in the second half of the 19th century. Until then, it had a forced, most often spontaneous character.⁴

Z.P. Melnyk understands legal reception as a complex process that is not limited to the mechanical transfer of certain normative provisions, but also includes the further assimilation and use of ideas, principles, institutions, etc. of the legal system of other times and other peoples, as a voluntary borrowing, and not as a forced borrowing, as one-sided borrowing, as borrowing that takes place at the initiative of the subject – the recipient, as borrowing that is possible within the framework of the interaction of more or less homogeneous legal systems.

She notes that the reception of law is a process, because individual elements move from one legal system or stage of its development to another, that is, there is a movement, as a result of which the development of law is carried out.

Two stages are distinguished: firstly, the borrowing of legal material by one legal system from another, secondly, the gradual involvement of this material in legal practice and the development of one's own national updated legal experience. That is, it is fair to see the reception of law as a process of perception, borrowing by the legal system, and the result of this loan. At the same time, the result of the reception of the law can be favorable (the received element takes root in the new legal environment) or unfavorable (the rejection of the legal element that is received).⁵

¹ Verlos N. V. Retseptsiia u konstitutsiinomu pravi Ukrainy. avtoref. dys.kand. yuryd. nauk: 12.00.02 Nats. aviats. un-t. Kyiv, 2021. 41 s. [Online]: <https://er.nau.edu.ua/bitstream/NAU/48880/5/%D0%94%D0%B8%D1%81%D0%B5%D1%80%D1%82%D0%B0%D1%86%D1%96%D1%8F%20%D0%92%D0%B5%D1%80%D0%BB%D0%BE%D1%81%20%D0%9D.%D0%92.%202021.pdf> (Visited 12.09.2023).

² Верлос Н.В. Рецепция в конституционном праве: проблемы и значения доктринальной дефиниции. [Online]: <file:///C:/Users/User/Downloads/retseptsiya-v-konstitutsionnom-prave-suschnostnaya-harakteristika-skvoz-prizmu-analiza-i-sinteza-nauchnoy-mysli.pdf>; <https://cyberleninka.ru/article/n/retseptsiya-v-konstitutsionnom-prave-suschnostnaya-harakteristika-skvoz-prizmu-analiza-i-sinteza-nauchnoy-mysli/viewer> (Visited 12.09.2023).

³ Melnyk Z.P. Retseptsiia yak zasib vdoskonalennia pravovoi systemy (teoretyko-pravovyi aspekt): avtoref. dys. kand. yuryd. nauk: 12.00.01. Kyiv, 2009, s. 8. [in Ukrainian]

⁴ Томсинов В.А. О сущности явления, называемого рецепцией римского права. М.: Издательство: «Зерцало», 2010, с. 262–279. [Online]: <http://tomsinov.com/IGPZS/reception.pdf>; http://tomsinov.com/publ/igpzs/igpzs/o_sushhnosti_javlenija_nazyvaemogo_receptiej_rimskogo_prava/4-1-0-93 (Visited 12.09.2023).

⁵ Verlos N. V. Retseptsiia u konstitutsiinomu pravi Ukrainy. avtoref. dys.kand. yuryd. nauk : 12.00.02 Nats. aviats. un-t. Kyiv, 2021. 41 s. [Online]: <https://er.nau.edu.ua/bitstream/NAU/48880/5/%D0%94%D0%B8%D1%81%D0%B5%D1%80%D1%82%D0%B0%D1%86%D1%96%D1%8F%20%D0%92%D0%B5%D1%80%D0%BB%D0%BE%D1%81%20%D0%9D.%D0%92.%202021.pdf> ; <https://www.usem.md/md/p/rmdir> ; <https://rmdir.md/> ; <https://www.usem.md/md/p/rmdir>

Domestic researchers E. O. Kharitonov and O. I. Kharitonova insist that, given the origin of the term „reception”, it is justified to use it in cases of revival, perception of the spirit, categories, foundations, concepts and basic provisions of the law of previous civilizations by subsequent civilizations at a certain stage of their development in the context of the general process of cyclic revivals.¹

M. R. Matushchak singles out among the signs of reception:

- 1) always voluntary borrowing without the use of coercive measures;
- 2) deliberate borrowing;
- 3) borrowing that takes place at the initiative of the recipient entity;
- 4) borrowing, which occurs and can be possible only in countries with uniform legal systems.²

For his part, Z.P. Melnyk singles out such essential features and generic properties of the reception of law as:

- 1) a complex process, which is not limited to the mechanical transfer of certain normative provisions, but also includes the further assimilation and use of ideas, principles, institutions, etc., of the legal system of other times and other peoples;
- 2) voluntary borrowing, not forced;
- 3) conscious borrowing;
- 4) unilateral borrowing;
- 5) borrowing that takes place at the initiative of the recipient entity;
- 6) borrowing, which is possible within the framework of the interaction of more or less homogeneous legal systems.³

Reception as a phenomenon is not identified with the essence, but serves as a form of its expression. Phenomenon is a category for designation in the subject, the process of what finds its manifestation directly, appears before use. Phenomena are dynamic, changeable, while the essence forms something preserved in spite of all changes, although the essence is stable relative to the phenomenon, it itself is also changeable. The phenomenon of reception is a reflection of the essence, the interaction of its essential qualities with external conditions and processes that can lead not only to the desired and planned results, but also to undesirable consequences.⁴

The phenomenon of reception in constitutional law also covers the process of implementation in the conditions of reforming elements of the law of another state. Therefore, reception should be considered not only as a phenomenon, but also as a process that is a set of actions (perception, assimilation and implementation) aimed at achieving a certain result – constitutional-legal modernization and development of the constitutional law system.

The content characteristic of reception is in a dynamic state and is determined by social, economic, political, historical, cultural, demographic, ecological and other factors that affect the development of constitutional legal relations, legal culture, constitutional legal awareness and, ultimately, the effectiveness of reception as a constitutional-legal phenomenon and process.⁵

Summarizing the above, we can conclude that the reception:

- 1) is essentially a constitutional-legal phenomenon and the process of perception, implementation and assimilation of foreign constitutional-legal material or international legal norms by the domestic system of constitutional law in the process of its development;

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¹ Kharytonov Ye., Kharytonova O. Vid osmyslennia retseptsii rym'skoho prava – do formuvannia zahalnoi teorii vzaiemodii pravovykh system. PravoUkrainy. 2014, No 1, s. 274–297. [in Ukrainian]

² Matushchak M. R. Sutnist retseptsii rym'skoho prava ta yii vplyv na tsyvilne pravo v Ukraini, Rosiskii Feredatsii, Frantsii ta FRN. Visnyk Odeskoho natsionalnoho universytetu. Serii Pravoznavstvo. 2013, Vyp. 2, T. 18, s. 15–25. [in Ukrainian]

³ Verlos N. V. Retseptsiia u konstytutsiinomu pravi Ukrainy. avtoref. dys.kand. yuryd. nauk. 12.00.02 Nats. aviats. un-t. Kyiv, 2021. 41 s. [Online]:

<https://er.nau.edu.ua/bitstream/NAU/48880/5/%D0%94%D0%B8%D1%81%D0%B5%D1%80%D1%82%D0%B0%D1%86%D1%96%D1%8F%20%D0%92%D0%B5%D1%80%D0%BB%D0%BE%D1%81%20%D0%9D.%D0%92.%202021.pdf> (Visited 12.09.2023).

⁴ Matushchak M. R. Sutnist retseptsii rym'skoho prava ta yii vplyv na tsyvilne pravo v Ukraini, Rosiskii Feredatsii, Frantsii ta FRN. Visnyk Odeskoho natsionalnoho universytetu. Serii Pravoznavstvo. Vyp. 2. 2013. T. 18, s. 15–25. [in Ukrainian]

⁵ Pidporyhora O. A., Kharytonov Ye. O. Rym'ske pravo : pidruchnyk / 2-he vyd. Kyiv: Yurinkom Inter, 2009. 528 s. [in Ukrainian]

2) in terms of content, it is a voluntary, forced or coercive process of perception, implementation and assimilation of various constitutional and legal material (legal norms, doctrines, ideas, concepts, principles, etc.) by the recipient country in the process of interstate interaction;

3) according to the form, it can be implemented in the order of borrowing, transfer or consensus.¹

The next stage of research is the need to determine the doctrinal definition of „reception” in constitutional law based on the identification of a number of characteristic features.

It is worth noting that the actual term definition (from Latin definition - definition) is a short logical definition that establishes the essential features of the subject or the meaning of the concept – its content and boundaries, and is a synonym of the term „definition” – a logical technique that allows:

1) formulate criteria for distinguishing the researched object from other objects (that is, specify the object), as well as specific methods of its construction and application;

2) distinguish, search for, build an object, formulate the meaning of a newly introduced or clarify the meaning of a term already existing in science.

In jurisprudence, a definition means a mental operation that reveals the meaning of legal concepts.²

The difference from other related legal categories is as follows:

1) this is an objective phenomenon of constitutional and legal reality and a long permanent process of interstate interaction;

2) may have:

a) unilateral (at the initiative of only the recipient country or the donor country);

b) bilateral (donor country – recipient country);

c) multilateral (in the process of interaction and reaching consensus with the help of international treaties: international legal norm - the recipient country (recipient countries)) character;

3) manifests itself in the perception, implementation and assimilation of diverse constitutional and legal material, both doctrinal (ideas, principles, doctrines, concepts, etc.), and normative (constitutional and legal norms, institutions, industries, etc.), as well as international legal norms;

4) it mainly has a conscious, volitional character, that is, it is implemented finally at the initiative of public authorities on the basis of normative consolidation;

5) may be voluntary, forced or coercive in nature;

6) is determined by objective necessity in the process of constitutional and legal development of the state, and not simply by the transfer of constitutional formulations;

7) is a means of constitutional-legal modernization and development of the system of constitutional law, promotes the convergence of right-wing systems. Moreover, in Ukraine it is a means of European integration;

8) has a cross-temporal character, that is, it is manifested in the perception, implementation and assimilation of foreign constitutional and legal material created in the modern or historical era;

9) can have both constructive consequences, which contribute to the development of the system of constitutional law, and destructive ones, which cause rejection and lead to constitutional and legal deformations;

10) the object of reception is mainly constitutional and legal material received from countries with a more developed system of constitutional law, where innovative constitutional institutions, norms, concepts, doctrines have been tested by time and have proven their effectiveness. International legal norms ratified by the national parliament can also be the object of reception.³

As V.V. Homonai notes, reception in law is often considered as a type of hereditary connection. The connection between legal systems within the framework of a certain historical type of law has

¹ Верлос Н.В. Рецепция в конституционном праве: проблемы и значения доктринальной дефиниции. [Online]: <file:///C:/Users/User/Downloads/retseptsiya-v-konstitutsionnom-prave-suschnostnaya-harakteristika-skvoz-prizmu-analiza-i-sinteza-nauchnoy-mysli.pdf>; <https://cyberleninka.ru/article/n/retseptsiya-v-konstitutsionnom-prave-suschnostnaya-harakteristika-skvoz-prizmu-analiza-i-sinteza-nauchnoy-mysli/viewer> (Visited 12.09.2023).

² Pidopryhora O. A., Kharytonov Ye. O. Rymyske pravo : pidruchnyk / 2-he vyd. Kyiv: Yurinkom Inter, 2009. 528 s. [in Ukrainian]

³ Mahnytskyi I.I. Zahalnoteoretychni Aspekty Interpretatsii Retseptsii Prava. 2022 rik. [Online]: <https://journal.lduvs.lg.ua/index.php/journal/article/view/1512/1387> [in Russian] (Visited 12.09.2023).

the character of reception, perception, which is based on the presence of general laws and similar conditions of development.¹

Intensification of international legal communication, economic and social globalization and other factors necessitate the convergence of national legal systems to the corresponding system of international law. In our case, these factors are even more strengthened in view of Ukraine's declared aspiration – a strategic goal – to join the European Union, where one of the defining elements is the convergence of legislation. There are a number of problems of both purely practical and theoretical nature on the way to bring the legal system of Ukraine closer to the legal system of the European Union.

For example, V.V. Homonai in his study of the understanding of reception, he cites the work of E. Annens as an example, who insists that „the most important lever for entering Greater Europe is the improvement of its legislation, the adaptation of the legal infrastructure to the main Western European norms and rules that have proven themselves in practice”.²

Today, society and the country are forced to simultaneously solve a complex set of old and new problems. The experience of the past shows that one of the most important tasks in the current conditions is to effectively, competently and scientifically substantiate the use of the institution of reception of law for the development and improvement of the legal system of Ukraine in the conditions of European integration processes.

The reception of law changes and complements the national legal system. As part of this process, there are various options for influencing the legal system, including those that improve and those that complicate its functioning.

Conclusions.

Summarizing the analyzed doctrinal interpretations of the term „reception”, it is worth summarizing that the understanding of the term is the borrowing of the standards of legal systems of other countries of the world for the implementation of new processes of society to regulate new processes of the development of democracy. The correct interpretation and understanding of the relevant forms and the path of development will help in the transformation of constitutional-right forms to more progressive ones and the introduction of new trends of ideas and social standards, which is the main way to prevent world conflicts, class inequality and regimes of totalitarianism or dictatorship.

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Contacts/Contacte/ Контакты:

PALINCHAK Mykola,

Doctor of Political Sciences, Professor,
Faculty of International Economic Relations,
„Uzhhorod National University” (Uzhhorod, Ukraine).
88000, Україна, м. Ужгород, вул. Капітульна, 26.

E-mail: mykola.palinchak@uzhnu.edu.ua

<https://orcid.org/0000-0002-9990-5314>

<https://doi.org/10.61753/1857-1999/2345-1963/2023.18-2.02>

BIELOVA Myroslava,

Doctor of Law, Associate Professor, Faculty of Law,
Department of Constitutional Law and Comparative Jurisprudence,
„Uzhgorod National University” (Uzhhorod, Ukraine).
88000, Україна, м. Ужгород, вул. Капітульна, 26.

E-mail: myroslavabelova@gmail.com

<https://orcid.org/0000-0003-2077-2342>

<https://doi.org/10.61753/1857-1999/2345-1963/2023.18-2.02>