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TO THE QUESTION OF THEORETICAL BASIS OF THE ROMANO-GERMANIC LEGAL FAMILY

Abstract. The development of Kazakhstan's society in the modern period is inevitably associated with the internationalization of political, economic, cultural life, at the turn of the XX-XXI centuries. There was an intensive development of international relations, their quantitative growth and, as a result, a transition to a qualitatively new state, which is characterized by the increasing complexity of the system of transnational economic relations. In this regard, the leading trends in the development of the world economy are internationalization, globalization of world economic life and international economic integration. The most important aspect of international cooperation of states means a whole expansion of the international economic relations. There is an active process of institutionalization of new economic realities, expressed in the development of existing and the formation of new economic blocs, unions, organizations, as well as in the development of various levels of international treaties, entities. Globalization processes have shown an inability to form a fair world order, the existing injustice in the world, since they are based on the formally voluntary acceptance by all countries of the established system of organizing commodity production. At the same time, globalization demonstrates the inability of many states to build a democratic society and at the same time ensure an effective economic system.

Keywords: legal system, legal family, codification, canonical law, code, continental legal family, Roman law, doctrinal forms, reception of the Roman law, legal technique.

To the Romano-Germanic legal family are relegated the legal systems which arose in continental Europe on the basis of Roman, canon, and local legal traditions.

Concept of Romano-Germanic Legal Family. The Romano-Germanic legal family comprises legal systems created with the use of the Roman legal heritage and combining a common structure, sources of law, and similarity of conceptual and legal apparatus. The Romano-Germanic legal family has a rather extended legal history. It was formed on the basis of the study of Roman law by Italian, French, and German universities created during the twelfth- sixteenth centuries on the base of Justinian's *Corpus juris*, a legal science common to many European countries. A process occurred which has been named the "reception of Roman law" [1, P.18]. At first this reception took a doctrinal form: Roman law was not applied directly; however, its conceptual fund was studied, a rather refined structure, internal logic, and legal technique. Actually, Roman law is a nontransient value of the legal culture of mankind.

The term "Romano-Germanic" was chosen to give due to the joint efforts of the universities simultaneously of Latin and German countries. The term "continental law", and even more "civil law" used in English-language literature, gave rise to great criticism.

Forming of Romano-Germanic Legal Family. Romano-Germanic legal family historically was not the product of the activity of State power (in this it is distinctive from the forming of the English Common law), but was solely the product of a culture independent of politics. If this was to some extent true with respect to the early, doctrinal, stage of reception, it cannot be said of the next stage.

The forming of the Romano-Germanic legal family was subordinate to the common linkage of law with the economy and politics and cannot be understood without taking into account the complex process of the development of goods-monetary relations in the depths of mediaeval society, especially relations of ownership, exchange, initial accumulation, transition from extra-economic to economic coercion, and so on [2, P.23].

When in mediaeval Europe an economy in kind dominated and production for the market and trade were not widely practiced, there also was no need for Roman law. But as industry and trade - first in Italy and later in other countries - went beyond private ownership, the carefully worked-out Roman private law was restored and again acquired authority.

Roman law is the classic expression of vital conditions and conflicts of society in which private ownership is dominant. This conditioned the possibility of adapting Roman law to the goods-monetary relations developing in the depths of mediaeval Europe. Roman law is a finished law of simple goods production, and consequently - precapitalist; this law, however, consists of a large part of the legal relations of the modern era. It was that which urban dwellers needed during the period of the rise of cities and could not be found in local customary law.

The reception of Roman law led to the fact that during the Middle Ages the legal systems of European countries - their legal doctrine, legal technique - acquired a certain similarity. The influence of canon law also was to be felt.

The bourgeois revolutions changed the social nature of law, repealed mediaeval legal institutions, and transformed *lex* into the basic source of Romano-Germanic law. *Lex* was regarded as the most appropriate instrument for creating a unified national legal system in order to ensure legality in counterbalance to feudal despotism and arbitrariness. Law was an alternative to brute force, and the application of law, a war of all against all. Legal culture for all times and for all peoples helped peacefully resolve conflicts which arose.

The same circumstances which determined the important role for *lex* as the principal source of Romano-Germanic law conditioned the possibility and necessity for the codification of law. By means of codification, law leads to a system permeated by determined principles [3, P.17].

Codification imparts to law a certainty and clarity that significantly facilitates its practical use and is the logical culmination of the understanding of a legal norm and law as a whole that formed in continental Europe. Codification completes the forming of the Romano-Germanic legal family as an integral phenomenon. Especially significant was the role of French codification. The *Code Civil* also known as the Code Napoleon, of 1804 exerted a significant influence on the process of confirming the principles of Romano-Germanic law in many States of the European continent and beyond its limits. The reception of Roman law in Germany was extensively reflected in such great legislative monuments as the 1900 *Bürgerliches Gesetzbuch*. Its foundation comprised that German law which already had assimilated the achievements of Roman law. The influence of Roman law told on the structure of the German civil code.

Thus, the Romano-Germanic legal family initially formed in continental Western Europe. The greatest contribution in the creation of this system, as the name thereof testifies, was made by the legal thought and legislation of France and Germany.

The Romano-Germanic legal family achieved the greatest refinement in the Code Napoleon and the *Bürgerliches Gesetzbuch*.

But the foundations of Romano-Germanic law were also formed by the professors of law at Bologna and other Italian universities, the codifiers of Spain and Portugal, and the works of Dutch scholars B. Spinoza, H. Grotius, and the Italian C. Beccaria, among others.

With the activity of universities is linked the important role of legal scholars and of theory and doctrine in the development of the law of European States. The professors of universities transferred to judges that part of modern Roman law they did not consider themselves to be the most competent interpreters of. The ultimate results of the development of Roman law were perceived by them - its ideological- theoretical, legal-technical achievements, the working out of a structure and a series of institutions of civil law [4, P.91].

Subsequently the European States carried over their own legal system to their colonial possessions in America, Asia, and Africa. Certain States voluntarily accepted the concepts, constructions, and even whole branch blocs from Romano-Germanic law.

Dissemination of Romano-Germanic Legal Family. At present the Romano-Germanic legal family encompasses the law of the countries of continental Western Europe, the overwhelming majority of the States of Central and South America (former colonies of Spain, Portugal, and France), the law of Japan, South Korea, Indonesia, Thailand, and certain other Asian countries. The legal systems of many African States, and also countries of the Near and Middle East, gravitate towards Romano-Germanic law. In the Afro-Asian region Romano-Germanic law is in complex interaction with Muslim and customary law.

The legal systems of the Scandinavian countries occupy a special position. The majority of investigators, proceeding from the system of sources of law existing in those countries, relegate the law of the Scandinavian countries to the Romano-Germanic legal family. Certain jurists consider Scandinavian law to have a specific commonality separate both from Romano-Germanic law and the Common law.

Thus, the Romano-Germanic legal family is older, more widespread, and more influential in the modern world than the legal family of the Common law, which English and American writers recognize [5, P.58].

Romano-Germanic Legal Family consists from Public and Private Law. In all countries of the Romano-Germanic legal family, legal science combines legal norms into the same groups. We refer to the dualism of law; that is, its division into private and public, and also the demarcation of the legal firmament into branches of law. The structures of law of all countries also may be in general and as a whole encompassed by a single scheme.

In all countries of the Romano-Germanic legal system the division of law into public and private is recognized. This division, of a very general character, is basically doctrinal but nonetheless remains an important characteristic structure of Romano-Germanic law. In the most general sense one may say that those branches and institutions which determine the status and procedure for the activity of State agencies and relations of the individual to the State are relegated to public law, and the branches and institutions regulating relations between individuals, to private law [6, P.17].

It should be stressed that the peculiarities of the Romano-Germanic legal family are to be discovered most fully in the sphere of private law. In the field of public law the specific nature thereof is manifested significantly less. Private (civil) law is, in the countries of the Romano-Germanic family, the foundation of the legal system. For this reason the jurists of England and the United States often call the countries of the Romano-Germanic legal family civil-law countries.

One significant distinction between public and private law is that a large part of private law has been codified, whereas public law consists principally of constitutional and other laws not having the character of codification.

System of French Law. The branches of public law in France are:

1. constitutional law, regulating questions affecting the forms and structures of the State, organizations of the State, its supreme agencies and parliament, executive power, and the participation of citizens in government;
2. administrative law, including norms regulating the organization of State agencies not deciding purely political and judicial questions and the conditions in which State agencies effectuate their rights and impose duties on inferior agencies;
3. financial law regulating State expenses and revenues (taxation, loans, monetary legislation);
4. public international law.

Private law includes:

1. civil law proper;
2. trade law, including maritime law;
3. civil procedure law;
4. criminal law. Although by its nature criminal law belongs to public law, by tradition it is relegated to private law since many of its provisions have been worked out for the defense of relations regulated by the last.

There are special branches of law where the norms of public and private law, in essence, are closely intertwined. The most important of them are:

- 1) labor law;
- 2) agricultural law;
- 3) laws on industrial property and author's right;
- 4) air law;
- 5) forestry law;
6. mining law;
6. insurance law;
7. transport law;
8. private international law.

Private international law determines the status of foreigners, considers conflicts of laws and jurisdiction in civil cases. Although traditionally it has been considered to be a constituent element of private law, certain questions affected by it, for example, the determination of nationality, are in essence part of public law.

Civil procedure law and criminal law sometimes are singled out as sanctioning law since they ensure the implementation of private law norms. This traditional view is contested by some scholars, who relegate determined branches - trade, maritime, agricultural, air, and labor law and laws on social security and so-called sanctioning law (criminal and civil procedure law) - to a separate group of "mixed laws". Another view exists according to which civil procedure law is more closely linked with public than with private law [7, P.48].

System of German Law. In Germany the division between private and public law is reflected somewhat more weakly than in France, being reflected, in particular, in a different, compared with France, organization and competence of general, administrative, and constitutional agencies. But in its general features the scheme is similar.

In German legal science the branches of public law are regarded as:

1. constitutional law;
2. administrative law;
3. tax law;
4. criminal law;
5. criminal procedure law;
6. civil procedure law;
7. church law;
8. public international law.

The law regulating relations between State agencies is also called State law.

Private law is divided into civil law proper contained in the civil code and in auxiliary laws and the special part of private law. Trade law falls into this part, as do legislation on companies, laws on negotiable documents, author's right, competition, intellectual property (including patents), trademarks, utility models, and private international law. Sometimes labor law is considered to be an integral part of private law, but in the majority of instances it is relegated to a domain *sui generis* which is not part of either private or public law.

In the majority of European countries the classification of branches of law reminds one of Germany (Switzerland, Spain, Austria). Italy and Belgium adhere to the French scheme, as does the Netherlands, subject to the reservation that civil procedure law and law on insolvent debtors constitute a formal part of private law as distinct from a substantive part of private law, to which civil and trade law proper belong.

Publicisation of Romano-Germanic Law. The intensifying administrative law activeness of State agencies also affected relations which previously were exclusively part of private law. Thus, in the domain of agrarian relations administrative-legal regulation exerts a significant influence on the use of ownership (or long-term lease) through the introduction of land zoning, compulsory servitudes, limitations on investment, establishment of production quotas, and so on. The State has intruded into the domain of contracts - previously a sphere of private law. The institution of an obligatory contract concluded at the instruction of State agencies has emerged. The conditions of an ordinary contract also may in a number of instances be established and prescribed of an administrative act, for example, the establishment of prices and quotas.

Simultaneously with the penetration of public law into the sphere of private law, the expansion of the group of State duties, especially in the domain of social and communal services, has given rise to the reverse trend - the application of institutions and means of private law when fulfilling public-law actions. The activities of public corporations and other industrial-trade formations of State origin testify to this [8, P.13].

National Legal Systems of Romano-Germanic Family: Similarities and Distinctions. To that common in the law of all countries of the Romano-Germanic family - the sources and structure of law - should be added another, especially a common conceptual fund, that is, the similarity of basic concepts and categories on which each legal system rests, more or less uniform legal principles, including those which determine the means of judicial activity.

Characteristic of the structure of the Romano-Germanic family

are:

- a high level of abstraction of the norms of law in comparison with a norm of Anglo-American law;
- the similarity of legal terminology, work methods of jurists, and system of their professional

training;

(1) the predominance of material law over procedural;

(2) the existence of large acts of codification; that is, codes in the principal branches of law.

It is essential to draw attention to those characteristics common to all Romano-Germanic legal systems, but this does not exclude, of course, the fact that each of them has specific features.

The most material distinctiveness of national legal systems of countries of the Romano-Germanic family is to be traced in the field of administrative law. This is to be explained by the close link of that branch of law with the structure of agencies of State administration within the framework of administrative competence, which varies significantly in various countries. Administrative law is dependent upon the political and social dynamism of society more than many other branches of continental law. Finally, one should not overlook the very extensive scale of relations encompassed by that branch of law [8, P.14]. Having originated historically as “police law” called upon to secure public order, it later took under its jurisdiction virtually all spheres of State administration. The role of administrative law has especially grown under modern conditions.

The sources of Romano-Germanic Law: *Lex*. In the Romano-Germanic legal family an identical significance is imparted to various sources of law. *Lex* occupies the primary place in the system of sources of law of this family.

There are written *constitutions* in all countries of the Romano-Germanic legal family, whose norms are acknowledged to have the highest legal authority. Their authority also is manifest in the establishment by the majority of States of judicial control over the constitutionality of ordinary laws. Constitutions demarcate the law-creation competence of various State agencies and in conformity with that competence implement the differentiation of various sources of law.

Custom. The status of *custom* is distinctive in the system of sources of Romano-Germanic law. It may operate not only *assecundum lege* (in augmentation of law), but also *praeter lege* (in addition to law). Situations are possible when custom takes a position *contra lege* (against law); for example, in Italy in the law of navigation where maritime custom prevails over norms of the civil code. As a whole, however, with rare exception custom today has lost the character of an autonomous source of law [8, P.15].

Judicial practice. With regard to the question of *judicial practice* as a source of Romano-Germanic law the position of doctrine is somewhat contradictory. Notwithstanding this, one may conclude that it is possible to relegate judicial practice to the category of auxiliary sources. First of all, this affects “cassational precedent”. A cassational court is the highest instance. Therefore, in essence, a “simple” judicial decision based, for example, on analogy or on general principles passing successfully through the cassational stage may be perceived by other courts when deciding similar cases as a *de facto* precedent.

Doctrine. In the system of Romano-Germanic law *doctrine* occupies a special place, working out basic principles for structuring that legal family. Doctrine plays an important role in the preparation of laws. It also is used in law enforcement activity (in the interpretation of laws).

Thus, the law of the countries of the Romano-Germanic family is characterized by a uniform scheme of a hierarchical system of sources of law, even though within the framework of that scheme a material displacement of accent is possible.

Codification of Law. Proceeding from the fact that one of the most characteristic general features of the Romano-Germanic legal family is the codified character of law and the codes themselves occupy a special place among the sources of law, we illustrate these specific peculiarities by using the example of codes or, more precisely, the example of civil codes.

Civil Codes. Upon close consideration it is apparent that the civil codes in the countries of the Romano-Germanic legal family differ materially. One of the most significant differences is the presence or absence of a General Part. There is a General Part in the 1896 German Civil Code which contains provisions applicable to all institutions of civil law. In the classical *Code Civil* of France there is virtually no General Part but merely a brief introductory chapter concerning publication and the operation and

application of laws in general, which is significantly broader than its civil-law aspect. Its norms are rather of a constitutional character. There are no such norms in the German civil code.

We consider on a comparative plane the system of sources of law of two countries - France and Germany. We recall that French law, on one hand, and German law, on the other, served as a model on the basis of which two legal groups within the Romano-Germanic legal family are singled out: Romano, in which Belgium, Luxembourg, Holland, Italy, Portugal, and Spain fall, together with France, and Germanic, which includes Austria, Switzerland, and certain other countries, together with Germany [7, P.49].

Within the Romano-Germanic legal family the group of Roman (or Romanist) law, which is strongly reflected in French law, is distinguished from the group of Germanic law.

French Law. France has a long legal history, but the foundation of its modern system of sources of law remains the codes of the Napoleonic era, of which we have spoken in detail above. It is generally recognized that notwithstanding numerous amendments, these codes are obsolete, and in the modern stage of its legal development (from the mid-twentieth century) the country has adopted an enormous number of legal acts lying outside the limits of traditional codification.

The basic approach to putting this mass of legal acts in order in France commenced with working out codes in the form of branch collections that included both legislative and subordinate acts. Certain of them encompass a complex of measures relating to two or several branches of law but regulate relations in a specific branch of industry, the economy, or culture.

Beginning from the 1950s, dozens of such codes were enacted which by their legal nature were consolidation acts of law in force. French jurists note two aspects which distinguish those codes from the Napoleonic codifications. First, these codes did not pursue the aim of “rethinking” the aggregate of norms of a particular branch of law, but rather were directed towards the logical regrouping of legislative acts and regulations already adopted.

This new form of codification weakened the principle of the supremacy of codes in its traditional understanding. The second blow to the prestige law was inflicted by the 1958 French Constitution, which overturned the “classical” distribution of competence between the legislative and executive branches. The Constitution enumerated the group of questions within the competence of parliament and thereby limited the sphere of its legislative activity. On the contrary, the competence of governmental authorities was materially enlarged, and so too was the weight and importance of its acts within the system of sources of law [7, P.50].

The Constitution of France did not determine the system of regulatory acts; however, in practice the following types of acts of executive power exist which correspond to the internal hierarchy of public authority: ordinances, decrees, decisions, decrees, circulars, instructions, and notices. The role of ordinances is important, and the trend towards eroding the distinctions between the legal force of a law and regulatory acts can be traced with particular clarity through them.

General principles of law also are recognized in the French legal system as an autonomous source of law. The role of general principles is especially important when there are material gaps in the legislative structure. Administrative courts and the Conseil d’Etat by virtue of the uncoded nature of administrative legislation refer most often to general principles of law.

In French legal literature the sources of law are divided into two basic groups: primary (or basic) and secondary (additional). State normative acts fall into the first group. Judicial practice is relegated especially to the category of secondary (or additional) sources of law.

Judicial practice has played an important role in the development of French law, and modern legislative practice opens an even wider road for law-creation in the form of individual and general norms. From a mere interpreter of the law and unifier of own decisions - the role allotted to judicial practice by the theory of separation of powers - judicial practice today has been transformed into a source of French law (albeit additional, in the view of French writers). A judge, although not obliged to strictly follow existing practice, also retains to a certain extent the freedom of decision but nonetheless is under the strong influence of the authority of prior judicial decisions [7, P.51].

German Law. In Germany, as in France, codes are the backbone, the basis, of prevailing law. As in France, they are old, constantly changed, especially after the Second World War, when innovations introduced during the era of Nazism were excluded. However, a significant part of the changes in the law of Germany, in comparison with the prewar days, including the Weimar Republic, were made not through the codes, but with the assistance of special laws regulating various spheres of the life of society.

Unlike France, the 1949 Basic Law of the Federal Republic of Germany did not recognize for executive power the right to autonomously regulate power and prohibits the practice of decree-laws. Governmental and other subordinate acts in Germany may be issued only within the framework of the execution of laws, although in practice exceptions from this rule are encountered. Germany does not have consolidated codes of the “new type” analogous to those in France.

The role of custom in the private law of Germany is approximately the same as in France. It has significance in a narrow sphere not embraced by codification.

As regards public law, here its role is lesser than in France, as a result, first, of broader constitutional law regulation in the sphere of the operation of State law and, second, the fact that State structures of Germany have not so significant a role as in France, where the role of historically-formed usages in the sphere of constitutional law are more significant.

Judicial practice, as in France, has acquired in Germany the character of a source of law when some legal problem is unequivocally affirmed when deciding a number of analogous cases and the decision is confirmed by the authority of the highest judicial instance. However, one may speak about a more or less complete coincidence of the situation in both countries only with respect to the general judicial system.

As regards administrative law, inasmuch as in Germany it has been worked out in a legislative procedure significantly more extensively than in France, the role of judicial practice is correspondingly, in this domain, is not so significant.

Especially great differences are to be discovered in connection with the serious role which the Constitutional Court of Germany plays in State structures. Its decisions are a source of law which stands equally with a law. Its interpretation of laws is binding upon all agencies, including the courts. If an ordinary court when considering a case has doubts as to the constitutionality of the norm subject to application, it suspends the case, applies with a request to the Constitutional Court, and then decides the case in accordance with the opinion of the last.

In the conclusion we would like to note, that the Romano-Germanic Law is the base of the national legislation of the Republic of Kazakhstan and the reforms of the legal system, the democratic elections, protection of human rights and freedoms show the way of democracy in our country.

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РОМАНО-ГЕРМАНДЫҚ ҚҰҚЫҚ ЖАНҰЯСЫНЫҢ ТЕОРИЯЛЫҚ БАСТАУЛАРЫ МӘСЕЛЕСІНЕ

Аннотация. Романо-германдық құқық жанұясына жататын құқықтық жүйелер ең бірінші континентальды Европада көнегрек құқығы негізінде, сонымен қатар канондық жергілікті құқықтық әдеттерде пайда болды. Басқаша айтсақ олар Рим құқығының жалғасы болып табылады, сонымен қатар осы құқықтың басқаша жағдайларға эволюциялық ыңғайлануының жемісі. Бұл жүйелерде басымдық ролге заңға орын берілген, бірінші кезекте романо-германдық құқықтық жанұясының кодексіне басымдық беріліп, бұрынғыконтинентальды Европа елдеріндегі құқықтарға көңіл аударылып, содан кейін барлық Латын Америкасына, көпшілік жағдайларда Африканың көптеген елдеріне және Шығыс елдері мен Жапонияға тарады. Бұл процесстің себебі көптеген Европа елдерінің колонизаторлық әрекеттерімен түсіндіріледі, сонымен қатар XIX ғасырдағы осы елдердегі кодификацияның жоғарғы дәрежесіне де байланысты, осы елдердің өзіндік құқықтарын қалыптастыруға әсер етті. Континентальдық құқықтық жүйенің қалыптасуы мен дамуы тарихы ұзақ уақытта жүзеге асты. Оны жүзеге асыру Рим құқығының негізінде Италиялық, Француздық, Германдық университеттерде жасалып, XII-XVI ғасырлардағы Екінші Юстиниандық заңдарының Юстиниандық бағытының негізінде қаланды, жалпы Европалық заң ғылымын қалыптастыруға әсеретті. Бұл бағытта басты роль Италиядағы Болон университетіне иелі болды. Юстинианның кодификациясы өте түсінікті түрде жазылған піркеу қызметкерлерінің тілінде жасалды, ол ғалымдар қолданатын латын тілі болатын. Рим құқығы ертедегі дүниенің ең күшті өркениеті болып есептелетін Батыс Европа мен Қиыр Шығыста және Африка елдерінде үстемдік құрды.

Түйін сөздер: құқық жүйесі, құқық жанұясы, кодификация, канондыққұқық, кодекс, континентальды құқықтық жанұя, рим құқығы, доктринальды формалар, рим құқығы рецепциясы, заңгерліктехника.

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К ВОПРОСУ О ТЕОРЕТИЧЕСКИХ ИСТОКАХ РОМАНО-ГЕРМАНСКОЙПРАВОВОЙ СЕМЬИ

Аннотация. К романо-германской семье относятся правовые системы, возникшие первоначально в континентальной Европе на основе древнеримского права, а также канонических и местных правовых обычаев. Они как бы

продолжают римское право, являются результатом его эволюции и приспособления к новым условиям. Господствующая роль в таких системах принадлежит закону и, в первую очередь, кодексу. Романо-германская правовая семья, существовавшая первоначально в странах континентальной Европы, затем распространилась на всю Латинскую Америку, значительную часть Африки, страны Востока, Японию. Этот процесс объясняется колонизаторской деятельностью многих европейских стран, а также высоким уровнем кодификации в этих странах в XIX в., которую можно было использовать, как образец для создания собственного права. История создания и развития континентальной правовой семьи довольно длительна. Она сложилась на основе изучения римского права в итальянских, французских и германских университетах, создавших в XII-XVI вв. на базе Свода законов Юстиниана общую для многих европейских стран юридическую науку. Главная роль принадлежала Болонскому университету в Италии. Кодификация Юстиниана была изложена доходчиво и просто, на языке, которым пользовались и церковники, и ученые, - на латыни. Римское право было создано одной из самых могущественных цивилизаций древности, которая простирала свои границы практически на всю Западную Европу, а также Ближний Восток, страны Африки.

Ключевые слова: правовая система, правовая семья, кодификация, каноническое право, кодекс, континентальная правовая семья, римское право, доктринальные формы, рецепция римского права, юридическая техника.

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