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“ON THE SCIENTIFIC ELABORATION OF THE HISTORY OF SLAVIC LAW” NOW AND THEN*

Having been hired as the professor of History of Slavic Law at the Novorossiysk Faculty of Law in Odessa, famous legal historian and Montenegrinian law maker Valtazar Bogišić held his accession lecture in 1870, later published under the title “On the Scientific Elaboration of the History of Slavic Law”. In order to present the future of the new scholarly discipline he elaborates the origins, achievements, but also failings of the Historical School of Law. He points out the basic paths legal historians should follow and steps that legal history as a science should take in order to strengthen itself and remedy some of the weaknesses of the Historical School. This article compares the circumstances that Bogišić was describing to the modern ones, pointing out that some of his recommendations might have indeed been heeded a long time ago, but that some are certainly still applicable. Moreover, although considering the opinion that legal history’s days are numbered in the era of globalisation and fast legal changes is extant and widespread, the author claims that position and goals of legal historians are greatly similar to the conditions of Savigny’s and Bogišić’s time. The historical approach to law, the connecting of historical and positivist disciplines, and the ever increasing number of ways of using the achievements and methods of legal history not only in academia, but also in the creation of law, are all indicators of favourable winds for legal history once again. Of course, legal historians should not take that for granted, but must always strive for perfection, listening both to the new voices that the future brings and the reliable counsels of the past, the like of which Bogišić presented in his work.

Key words: Valtazar Bogišić. Historical School of Law. Legal History. Comparative Legal Traditions.

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1. INTRODUCTION

On March 3, 1870 in Odessa, at the Novorossiysk Faculty of Law, where he had been hired as professor of the History of Slavic Law, Valtazar Bogišić held his accession lecture remarking upon many contemporary problems of this subject, but also of legal history in general.¹ The text of the lecture was published in June 1870 in the Russian slavophile magazine *Заря* [*Dawn*]², and its' Serbian translation has later been published as *O naučnoj obradi istorije slovenskoga prava* [*On the Scientific Elaboration of the History of Slavic Law*].³ At that time, both the academic subject and the scholarly discipline from which it arose were still in their infancy. Thus, Bogišić said: "A duty befell me to give lectures in a new science, a young science that is, so to speak, acquiring its citizenship among the other sciences before our very eyes. Before me is the task to teach a subject that, it needs to be emphasised, has not yet attained sufficiently firm foundations, that is characterised by incompleteness of material, partiality and insufficient elaboration of truths in examination".⁴

The main part of the lecture contains a short review of the origins, methods and achievements of the Historical School of Law, to which Bogišić belonged himself. However, the text is not in praise – Bogišić remarks that this school had not fully succeeded in its task and that it has been suffering a crisis for some years already, in theory and literature as well as in practice.⁵ He further points out the basic orientation he believes legal historians should assume, the results that the Historical School had achieved and errors it had made, as well as the steps that legal history as a science should take in the future.⁶ In his conclusion he comments upon the future of the History of Slavic Law itself, pointing out the examples of institutions with which it could enrich the legal history of the world, concluding that it faces "the broadest field of research, with a rich reserve of new phenomena barely touched by scientific research".⁷

¹ See Valtazar Bogišić, *Izabrana djela, tom I: Opšti imovinski zakonik za Knjaževinu Crnu Goru* [*Selected Works, book I: The General Property Code for Montenegro*], Beograd Podgorica 2004a, foreword by Branko Pavićević, X XII.

² This journal dealt mainly with literature, but also with political matters, and it had been published for almost four years, from 1869 to 1872. The works of many famous Russian writers and poets – such as Tolstoy, Dostoyevski, Tyutchev, Fet, Maykov and others – were published therein, and also numerous slavophile and panslavic scholarly and political articles, including Danilevsky's famous text *Russia and Europe*. See Хронос: *Заря*, <http://www.hrono.ru/organ/rossiya/1869zarya.html>, last visited 15.09.2010.

³ V. Bogišić, "O naučnoj obradi istorije slovenskoga prava", *Izabrana djela, tom IV: Studije i članci* ["On the Scientific Elaboration of the History of Slavic Law"], *Selected Works, book IV: Studies and Articles*], Beograd Podgorica 2004d, 269.

⁴ *Ibid.*

⁵ See more closely *ibid.*, 270–275.

⁶ *Ibid.*, 277 and further.

⁷ *Ibid.*, 290.

Seemingly, this text presents nothing but interesting material to a modern legal historian – information about Bogišić’s life and work, the activity of the Historical School in Serbia and abroad – and not instructions to be followed today. The ideas of this school are obsolete, and the discipline that it had created in the Slavic world – History of Slavic Law – is no longer developing. However, is that the full meaning of that text? The goal of this paper is to compare today’s situation in the field of legal history with the one Bogišić wrote about almost a century and a half ago (albeit briefly and with some generalization) and to analyse how much has this science corrected the mistakes that he had pointed out, and how much it should still follow his advice.

2. THE HERITAGE OF THE HISTORICAL SCHOOL OF LAW

No self-regarding legal historian would omit to point out the achievements and the legacy of the Historical School of Law, and not only because it was the first to found legal history as a separate scientific discipline.⁸ Namely, a large number of European peoples owe their “national awakening” in the field of law in the XIX century, which held great importance both for legal science and political history, to this school.⁹ Without it and Savigny’s idea of the “national spirit” (*Volksgeist*) there would not have been any study of the gradual development of law, and it is quite possible that legislation would have also developed differently. For as much as the adherents of this school were opposed to the idea of codification,¹⁰ they still suggested an evolution of law at the moment when most of Europe, *nolens-volens*, practically acknowledged *Code Civil* as the unchanging *ratio scripta*. Thus this school was also opposed to legal dogmatism, opening the way for a much more thorough scientific study of law. Still, most of the aforementioned historians of today would

⁸ The School of Elegant Jurisprudence had previously created a discipline called *antiquitates iuris*, but it was still far from modern legal history.

⁹ Especially in Germany, where the school was founded, but also in other countries that accepted its achievements. See more Radmila Vasić, “Istorijska škola prava” [Historical School of Law], *Anali Pravnog fakulteta u Beogradu* [Annals of the Faculty of Law in Belgrade] 1 3/1991, particularly 62–64.

¹⁰ Although not conceptually, but rather pointing out that conditions for the creation of a correct codification, which would take into account the peculiarities of the (customary) law of its people and reflect its national spirit, still have not been met, *ibid.*, 41–108, especially 47–52. However, one must take into account that Bogišić himself did not adhere to this opinion during the creation of the General Property Code, that he “saw no necessity to wait for the folk law of Montenegro to be processed by legal science and thus ripe for codification, but codified that folk law directly, in order to stabilize it and preserve it in its original shape”, Teodor Taranovski, “Valtazar Bogišić (1834–1908), Povodom stogodišnjice njegovog rođenja in *memoriam*”, *Arhiv za pravne i društvene nauke*, [Archive for Legal and Political Sciences] 6/1934, 453.

also opine that the basic idea of this school – the “national spirit” as the only source and moving force of national laws and thus their complete autochthony – has long since been obsolete, and that most modern theories are based on its exact opposite – the mutual connections and influence of all the societies and states in the world, including all the national laws and legal systems.

If that would be directly applied to the aforementioned question, one might conclude that the modern times are truly so different from the era of the Historical School that any implication that advice from that time might still (or again) be applicable is *a priori* wrong. Many scholars – not only lawyers – consider today that the influence of this school has been only a temporary result of the romantic zeal of the XIX century, and that law and other social sciences have “attained the greatest heights and achievements when they overcame the historical orientation”.¹¹ If that view were completely accepted, further discussion of the propriety of adhering to the advice in Bogišić’s article would be futile.

Still, one can find a link between these eras that would exist not as much in the ideology and theoretical foundations of the Historical School, as much as in its *position* and the role of legal historians. As focused as this school was on the study of legal history, it did so always with conscious reference to the legal present and positive law, thus propagating a historical approach to the study of law. Savigny and the school’s other followers, including Bogišić, were lawyers first, and historians only after that; they were *legal historians*,¹² but not historians who had chosen law as a subject of their study, or even lawyers dedicated solely to history. They were lawyers who devoted themselves to the history of their discipline without losing trace of the connection between the past and the present. The primary area of their professional interest might have been history, but they perceived its doctrinary development as an essential part of the development of legal science in general. Accordingly, the job of a legal historian was not strictly segregated from a positivist’s job: on the contrary, historians observed it as a duty of their vocation to transmit the lessons of the past into the future. Hence their great interest in modern legislature – from Savigny’s writings of Germany’s (un)preparedness for codification and the conditions it would have to meet, to Bogišić’s detailed and hard work on the General Property Code of Montenegro, per-

¹¹ Sima Ćirković, “Istorija i društvene nauke”, *O istoriografiji i metodologiji*, [“History and social sciences”, *On historiography and methodology*] Beograd 2007, 269.

¹² Bogišić criticizes those of his colleagues who allow the purely descriptive approach to prevail in their works. He does also reprimand the new generation of legal historians for going into the other extreme and “overly appreciating their legal knowledge and neglecting the way of thinking of the people and its separate strata”, but that matter is outside the scope of this argument. See V. Bogišić, 2004d, 280.

formed completely in accordance and the spirit of the ideas of the Historical School.¹³

At first sight, modern (positive) law and legal history no longer coexist in such a way. For most of contemporary lawyers scientific work and practice are two separate roads as it is, and only truly great experts can walk both paths, combining a successful academic career and a legal practice, even if they are dealing in the same area of positive law in both cases. At least equally rare are those who work both in history and positive law, separately and taking turns between the two, but solely in the academic field; even they frequently have one dominant area, working in the other only from time to time. Combining efforts both in legal history and positive law practice – either in application or creation of law – or touching both subjects in one’s works simultaneously and interconnectedly is almost unimaginable for today’s average lawyer. Furthermore, legal history is increasingly – even in law schools! – considered a secondary, auxiliary and “introductory” discipline to be gradually marginalized in the education of future lawyers. With the development of law becoming ever faster, new branches of law being created and practically daily changes in the legal order, this seems to be inevitable.

Latest tendencies, however, show traces of change. Science has started recognising that, as much as the trend of internationalisation and unification of law favours the aforementioned factors, it certainly leaves space for the work of legal historians – work in the field where current and previous law, legal practice and legal history overlap. In order to assure the efficiency and use of future international or supranational law, it must take into consideration the national laws of the states that should apply it as much as possible. To pay attention only to their positive law – frequently borrowed from other systems as it is, still unfounded in practice and tradition and easily altered – is merely to stay on the surface of the problem. To achieve reliable results, legal history and tradition of those states must be studied thoroughly,¹⁴ which is a task that lawyers

¹³ However, as much work and energy Bogišić might have invested in the creation of the Code, his primary activity had always been scientific work. That is proven by a letter that he wrote to Stojan Novaković (as the Minister of Education of Serbia) in 1880, refusing to teach at the Law Faculty of the Great School in Belgrade due to his commitments in working on the Code. “I know very well that the ordered codification has distanced me for a long time from my professional work, which is my dearest doing, so thus my deepest desire is to return to it as soon as possible and devote my time, work and ambition solely to it”. Državni arhiv NR Srbije, odeljenje Ministarstva prosvete [State Archive of Serbia, Department of the Ministry of Education], F 1,33/1881; Vladimir Grujić, “O jednom pokušaju da Valtazar Bogišić postane profesor Pravnog fakulteta Velike škole u Beogradu” [“On an attempt to make Valtazar Bogišić a professor of the Law Faculty of the Great School in Belgrade”], *Anali Pravnog fakulteta u Beogradu* 3 4/1960, 366.

¹⁴ History is, thus, “divination of the present by way of the past”, see Obrad Stanojević, “O mestu istorije i rimskog prava u novom nastavnom programu” [“On the

who do not deal with history are not qualified for, at least methodologically. Thus Reinhard Zimmermann, one of today's leading experts in the area of Roman Law, but also an expert in comparative and European law asserts (with multiple references to Savigny) that an age of abandonment of the narrow and comfortable limitations of national law and the creation of a new *ius commune* is at hand, but that its construction requires the cooperation of practicing lawyers and legal scholars, which will have to focus on both national and common legal history and tradition.¹⁵ Explaining the necessity of a view into the past and a historical scientific approach, he says: "It may help us to map out, and to become aware of, the common ground still existing between our national legal systems as a result of common tradition, of independent but parallel developments, and of instances of intellectual stimulation or the reception of legal rules or concepts. At the same time, it will be able to explain discrepancies on the level of specific result, general approach, and doctrinal nuance. It is this kind of comprehension that paves the way for rational criticism and organic development of the law".¹⁶

In addition to history, legal tradition is also a key concept for understanding this opinion.¹⁷ Increasingly present in legal science, especially comparative,¹⁸ it joins history and practice, past and present. In a laconic yet complex manner, Patrick Glenn defines tradition as "the changing presence of the past".¹⁹ According to Glenn, the necessary elements of this concept are the so-called "pastness" of tradition²⁰ (meaning that it must last for a certain while before one can speak of the existence of a tradition²¹) and its existence in the present, manifested via different ways

place of history and Roman law in the new curriculum"]], *Anali Pravnog fakulteta u Beogradu* 4/1974, 504-505.

¹⁵ Reinhard Zimmermann, *Roman Law, Contemporary Law, Common Law: The Civilian Tradition Today*, Oxford University Press, New York 2004, 107-110.

¹⁶ *Ibid.*, 110.

¹⁷ Other terms, although less prominent, are also in use – such as legal culture or even legal ideology, though the latter might not be able to cover a broader range of phenomena. See e.g. David Nelken, "Legal culture", *Elgar Encyclopedia of Comparative Law* (ed. by J. M. Smits), Edward Elgar Publishing, Inc., Cheltenham 2006, 373-375, especially 374, and Roger Cotterrell, "Law and Culture: Inside and Beyond the Nation State", *Queen Mary School of Law Legal Studies Research Paper No. 4/2009*; *Retfærd: Nordisk Juridisk Tidsskrift*, vol. 31, 123/2008, 23-36 (<http://ssrn.com/abstract=1330001>), 2-4.

¹⁸ Both comparative legal *history* and modern comparative law.

¹⁹ H. Patrick Glenn, *Legal Traditions of the World: Sustainable Diversity in Law*, Oxford University Press, New York, 2000, 1-3 and further.

²⁰ Glenn uses this unusual term, created by the poet T. S. Eliot, considering it more appropriate than "age" or "history", see *ibid.*, 4-5.

²¹ *Ibid.*, 5-6. Of course, the author does not set any "minimal lasting" for the birth of a tradition, but rather remarks that such a thing must be determined in the analysis of every particular case.

of transmitting knowledge – from oldest oral tradition to modern information technology.²² Still, for the concept to be complete, one must renounce the obsolete opinion that tradition is a static image of the past²³ and accept that it can and must change if it is to be considered alive.²⁴ Seen that way, tradition is not just a bridge connecting the past and the present, but also a road that leads their common values to the future – based on notions confirmed by the passing of time, but capable of adapting to the demands of the modern age. As Glenn says, “the past is mobilized to invent a future”.²⁵

For today’s average lawyer, this may seem like a complete novelty, but is this concept that is starting to maintain a sure foothold so much different from the situation that existed in the time of Savigny and Bogišić?

Both yes and no. Just as the concept of tradition, today’s state contains both elements of the past and novelties carried on by the coming era. The increasingly active process of globalisation²⁶ and the tendency towards the uniformisation of law on both the global and regional levels lead to new needs, discovering new dimensions of comparative legal research of both legal history and positive law – or, better, without drawing artificial boundaries between them,²⁷ of the law of all the countries of the world. But the main approach – both in ideas and methodological – is not new. On the contrary, as said before, it was none other than Savigny who first advocated the historical approach in law.

Of course, one cannot claim there is any direct influence of the Historical School on today’s development: it is certainly primarily a reaction to the demands of the modern age. However, one also cannot deny that the experience of this school is there to serve as a model for those

²² See *ibid.*, 6 11.

²³ Though, of course, there are still those who consider that “*the past is different and should not be confused with the present*”, and that history is only necessary as a *magistra vitae* with whose help we can make sure not to repeat the mistakes of our ancestors. See Jonathan Rose, “Studying the Past: The Nature and Development of Legal History as an Academic Discipline”, *Journal of Legal History*, forthcoming April 30, 2010 (<http://ssrn.com/abstract=1674024>), 1 2.

²⁴ P. H. Glenn, 21 22.

²⁵ *Ibid.*, 22.

²⁶ Or, as Glenn says, globalisations; see *ibid.*, 47 50.

²⁷ Of course, whatever one might say of tradition, a certain boundary will always exist. Those drafting a statute or some other legal act will always care most about harmonizing it with the existing positive law, while history and tradition, no matter how much attention is paid to them, will always remain secondary. That is not the issue discussed here. The necessity of observing the legal system of a country as a whole that contains both positive law and the tradition based on its legal history (i.e. former legal regulations and practise) is.

lawyers who acknowledge the necessity of the historical approach today. As every good model, it shows both the good and the bad sides of this school's product, thus enabling the new generations to inherit all the meaningful results attained by their predecessors, adapting them to their needs and at the same time to learn from their mistakes.

3. CRITIQUE BY BOGIŠIĆ

3.1. The goals of legal historians

Bogišić considers that the Historical School has failed in its task and that it omitted to “point out to science all the uses that one might rightfully expect from it”.²⁸ He concludes that primarily from the state that legal science in Germany and Europe in general is in – pushed aside and its significance denied by practicing lawyers – which he attributes to insufficient efforts of the Historical School. Drawing a parallel with linguistics (which gained its scientific foundations at a similar time, and was frequently compared by Savigny to legal science), Bogišić determines three directions which legal historians should (in his opinion) adopt in addition to the simple publication of legal monuments.²⁹ According to him, historians must:

“I. Critically select source material, in whatever shape it may appear, and develop legal dogmatism.

II. Explore the elements of specific legal institutions, determine their mutual relations and relations towards other aspects of life of the people.

III. Find, through scientific comparison and critical analysis, laws in accordance with which law is born, lives, according to which it changes and dies”.³⁰

These tasks certainly stand before legal historians today as well. The first two have long since become the standard of work in this area: anyone would qualify the lack of a critical approach to source material as unprofessional, while the analysis and contextualisation of certain institutions is, more or less, the subject of every serious scientific work that concerns legal history. The determination of general laws according to which law develops may not be in the regular “job description” of legal historians, but it certainly falls into the areas they work in, especially if one turns their attention to the more significant achievements in compara-

²⁸ V. Bogišić, 2004d, 274.

²⁹ *Ibid.*, 276 277.

³⁰ *Ibid.*, 277.

tive history.³¹ Thus, Bogišić's recommendation is not obsolete;³² what, then, of the reproach that he brought upon his colleagues from his era?

3.2. The neglect of history and customary law

In the area of the first direction, Bogišić points out as a mistake of the Historical School “that its whole subject is observed almost solely from one, jurisprudential point of view”,³³ as a result of which it seems that the historian is “sacrificing himself for the sake of the lawyer – instead of both elements, the legal and the historical, flowing at an equal pace and in harmony”.³⁴ There he, above all, objects to allowing oneself to be a slave of, as he says, the fiction that every legal act automatically enters the life of the people upon publication, i.e. is acknowledged by those whom it binds and applied in practice. Bogišić claims that this fiction is useful, even necessary, to legal practitioners and theoreticians, but that to a historian “it can be very dangerous and harmful if he accepts it absolutely, because in that case even history itself appears to him as a fiction and, so to speak, a documentary lie”.³⁵ He further supports his opinion with examples, pointing out the circumstances that a legal historian should pay particular attention to.³⁶ He especially emphasizes the cases of what is later to be named legal transplants – the reception of foreign statutes and other legal acts – and the problems which might arise when introducing such norms to legal life, particularly if the reception was performed carelessly and without taking into account the peculiarities of the territory they are transplanted onto. It is there that one can see that these remarks are not so obsolete. Perhaps contemporary legal historians do not

³¹ One can certainly include there the aforementioned works of Glenn and Zimmermann regardless of the fact that they do not contain *solely* historical subjects as well as the increasingly popular, but somewhat controversial legal transplants theory of Alan Watson; see Alan Watson, *Legal Transplants: An Approach to Comparative Law*, Athens London 1993; A. Watson, *The Evolution of Western Private Law*, Baltimore 2001, especially 193 233.

³² The most one can say is that some parts of it are implied today.

³³ V. Bogišić, 2004d, *ibid.*

³⁴ *Ibid.*

³⁵ *Ibid.* Still, one might be less strict and replace the term *fiction* in this (historical) context with the word *presumption*. For a legal practitioner (or a theorist speaking of positive law) has to be aware that it is impossible for an act to be carved into the minds and legal understanding of the people right upon publication, but rightfully accepts such a fiction, because he expects it to happen sooner or later. When a historian is viewing a source of learning about law, the question is frequently whether it had reached the legal consciousness of the people and practical application *at all*. The dangers of accepting such a *presumption* aside, calling such an opinion a *fiction* would mean that the historian *a priori* accepts that this and consequently any source *had not* “come to life” in practice, but that, despite that, he takes its life as a fact for academic purposes, which would certainly be absurd and, if it were to be true, somewhat frightening.

³⁶ *Ibid.*, 277 279.

take the practical application of the acts they are studying for granted,³⁷ but it is obvious that lawyers lack a historical approach in the field of reception of foreign rules – which is more and more frequent in the modern world. Particularly when it comes to harmonizing domestic law with the international standards in some area, entire “packages” of legal rules are being taken over – frequently without any processing other than translation – without considering the circumstances under which those rules were first made and functioned in the countries that originally created them, the experience of other countries that accepted them in the meantime or the difference in the conditions under which they will have to function in the legal system of the receiving country.

Bogišić’s second remark in this area is that insufficient attention is being paid to customary law. He points out that even the material that is published “represents customs written down in centuries past”,³⁸ while nobody collects or studies modern, living legal customs.³⁹ That is exactly what Bogišić made his task, devoting a lot of efforts and many years of his life to compiling and distributing his questionnaire, processing and systematising the received answers in order to finally publish an anthology of living customs, customary law still applied by the people. The impressive results of these efforts – above all the *Anthology of Today’s Legal Customs of Southern Slavs* [*Zbornik sadašnjih pravnih običaja u Južnih Slovena*], or *Material in the Answers from Various Areas of the Slavic South* [*Građa u odgovorima iz razliĉnih krajeva slovenskog juga*], first published in 1874,⁴⁰ but also the simultaneously constructed, yet never completed, separate anthology *Legal Customs in Montenegro, Hercegovina and Albania* [*Pravni obiĉaji u Crnoj Gori, Hercegovini i Albaniji*]⁴¹ – contain priceless material for numerous legal historians even today.⁴² However, as Mihailo Konstantinović remarks about Bogišić’s

³⁷ Although the opposite tendency is interesting – extreme scepticism towards a particular source’s life in practice of its time unless data is preserved about it. Almost as if every act is considered unapplied in practice until proven otherwise.

³⁸ *Ibid.*, 280.

³⁹ Bogišić again makes a comparison with linguistics, that uses new, living words to explain old forms of the language, but also the behaviour of mythologists, “who reveal traces of belief from prechristian times in modern customs”, *ibid.*

⁴⁰ See V. Bogišić, *Izabrana djela, tom II: Građa u odgovorima iz razliĉnih krajeva slovenskog juga* [*Selected Works, book II: Material in the Answers from Various Areas of the Slavic South*], Beograd – Podgorica 2004b, VI.

⁴¹ Despite its incompleteness, this collection has been published many times, under different titles, after Bogišić’s death. See V. Bogišić, *Izabrana djela, tom III: Pravni obiĉaji u Crnoj Gori, Hercegovini i Albaniji* [*Selected Works, book III: Legal Customs in Montenegro, Hercegovina and Albania*], Beograd – Podgorica 2004c, the foreword by Tomica Nikĉević, particularly XII XIV and XX XXI.

⁴² Apart from research devoted to Bogišić’s time, for which the collected legal customs can doubtlessly be considered living and active, these collections are also very useful for the research of earlier periods, from which these customs originate.

work on recording customs “in this regard he was a forerunner amongst us – but a forerunner that almost no-one followed”.⁴³ Indeed, Bogišić’s endeavour did not inspire others to follow his lead even in his time – so how could one expect something like that much later, when the ideas of the Historical School have themselves “become history”, and its love towards customary law an issue of the past?

Or, without stopping at recording and publishing legal customs – can it even be spoken of the significance of customary law today? Maybe the growing convergence of legal systems does open new fields for the work of legal historians (or opens old ones in a new way), but will not they, even in such circumstances, deal primarily with the development of written, state-made law? Is there any place for the development of customary law in the modern time of the ever faster proliferation of normative acts?

One must consider several matters at this point. Firstly, a scholar must not be swayed by the process of globalization and unification of law and equate (even approximately) legal systems that certainly have their differences because of it. The position of customary law in the modern countries of Western Europe is by no means the same as in some countries, for example, in Africa, where it is acknowledged as one of the leading sources of law, and it is still dominant in the fields of marriage, family, inheritance and even real property law.⁴⁴ In India the validity of legal customs in many areas of law has been confirmed by many acts since the time of British rule,⁴⁵ and the 1950 Constitution of India (last revised in 2006) acknowledges the validity of all laws that had come into power before it, meaning by that “any Ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law”.⁴⁶

Apart from that, regardless of the level of general development of the society and country they are located in, there are still many communities throughout the world where customary law plays a greater role than

⁴³ Mihailo Konstantinović, “Ideje Valtazara Bogišića o narodnom i zakonskom pravu” [“The Ideas of Valtazar Bogišić about Folk and Statute Law”], *Anali Pravnog fakulteta u Beogradu* 3 4/1982, 422.

⁴⁴ See John Miles, “Customary and Islamic Law and its Development in Africa”, *African Development Bank Law for Development Review*, Vol. 1, p. 81, 2006 (<http://ssrn.com/abstract/1015783>), 102–103.

⁴⁵ For a review of the position of customary law in the normative acts of India see Nidhi Srivastava, “Customary Law and the Protection of Indigenous Knowledge in India”, *Gene Campaign Research Project on Protection of Indigenous Knowledge of Biodiversity Briefing Paper 2*, November 2004 (<http://ssrn.com/abstract/1105672>), 3–7.

⁴⁶ Part III, Article. 13.3.a of *The Constitution of India, as modified up to the 1st December, 2007*, Government of India Ministry of Law and Justice, New Delhi 2007 (<http://lawmin.nic.in/coi/coiason29july08.pdf>, 31.01.2011), 6.

in the rest of the system. It is true that those are mostly (comparatively) undeveloped communities, still on the level of tribal organisation – whose tradition Glenn calls chthonic⁴⁷ – but they should not be neglected because of that, for frequently it is they who act as guardians of old traditions abandoned by the modern society.⁴⁸ Although their customs – including, but not limited to, the legal ones – are more frequently studied by ethnologists than lawyers, they still have much to offer in the field of study of customary law. Although they are frequently *praeter* or even *contra legem*, in some states they are acknowledged by the positive law, thus increasing their significance.⁴⁹ Such practise is frequently viewed as a step in the preservation of the cultural and ethnic identity of those communities, or the equation of their legal status with that of the rest of the population. Still, in some places – although still more in legal science than practise – one can find a different, practical motivation for acknowledging the binding power of customary law, in situations where it is considered to be more efficient than state written law in certain areas. That is particularly the case in various matters relating to ecological law and environmental preservation – a problem of the modern age, but one for the solving of which the traditional “chthonic” communities are quite well equipped because of their uninterrupted harmonious relationship with nature and the environment.⁵⁰ Furthermore, there are opinions that acknowl-

⁴⁷ See P. H. Glenn, 56–58 and further. This term meant to signify the connection of those communities to nature originates from the Greek word *χθών*, earth, and the derived adjective *χθόνιος*, which signifies something located within or beneath the earth. It is interesting to remark, however, that *χθών* signifies the earth in the sense of its interior, and that the notion in ancient Greece had been related not only to fertility and abundance, but also to the underworld and its deities, so in a way it signifies the connection between life and death.

⁴⁸ See *ibid.*, 319 and further.

⁴⁹ See for example *Canada Constitution Acts, 1867 to 1982*, Constitution Act 1982, Part II, article 35, <http://laws.justice.gc.ca/eng/Const/9.html>, last visited 10.12.2010.

⁵⁰ In the aforementioned research conducted in India, the author remarks that the “sustainable use of natural resources is amply reflected in the customs of most local communities”, explains it on the examples of various rules of customary law, mostly related to the treatment of certain rare plant and animal species, and then concludes: “It is naturally imperative that local bodies and customary law be empowered, since by protecting biodiversity they contribute to the protection of IK [indigenous knowledge aut. rem.]. As a corollary, it needs to be emphasized that the extinction of local customs can thwart any attempt to restore sustainability into the modern development paradigm. National and international laws and policies, even if they do not promote, should at least refrain from adversely affecting customary laws and practices”, N. Srivastava, 1.

An article from 2008 that considers the problem of environmental protection in maritime areas of the Southern Pacific suggests that the regime of use of the areas in question and the resources inside them is left to the local customary law, which would be strengthened by governmental recognition, due to its superiority when it comes to practical efficiency. “Similarly it is unhelpful to look at the effectiveness of ‘customary laws’ as a measure of their validity because state based laws themselves often do not succeed at

edging the power of customary law via legislation is not enough for achieving the aforementioned goals, but that it would require constituting a pluralist legal system in which customary and statutory law would be equal sources. “Understood in this context, customary law is not necessarily always subordinate in the process of ‘reconciling’ two systems of law but rather is an equal system of law that may also challenge the legitimacy of aspects of the dominant legal system”, suggest Donna Craig and Elizabeth Gachenga, recognizing the introduction of such a system as a possible solution for the water resource management problem in Australia, but also many other problems on the international level.⁵¹ Still, they admit that most modern governments do not yet see this necessity and the potential value of such an approach.⁵²

The above should by no means lead to a conclusion that customary law today is reserved only for underdeveloped societies – even with acknowledging that it can solve modern problems in them. Even among the economically strongest countries there are those whose legal systems recognize it – of course, as a source of law subsidiary to statutes, but still not *de facto* irrelevant. Thus, Article 1 of the Swiss Civil Code – written at the beginning of the XX century, but still in power – directs the judge to apply customary law⁵³ if there is no solution for a particular case in the Code.⁵⁴ It plays a very significant role in the Scandinavian countries, too. For example, customary law has always been one of the main sources of law in Norway. Even today, when legislation is undoubtedly (at least quantitatively) dominant, it contains not only rules from various areas of law, but also “the rules of statutory interpretation and the rules as to the application of judicial precedents”,⁵⁵ thus significantly affecting legal

achieving much of what they aim to do. In the South Pacific there is much evidence of customary laws being more effective than state based laws specifically in the area of natural resource management; and perhaps definitional issues of what is and what is not customary law are less important than a consideration of what practices are working. There is little point in debating whether a custom is technically law or not in circumstances where it is being broadly recognised and applied by society”, Erika J. Techera, “Supporting the Role of Customary Law in Community Based Conservation”, *Macquarie Law WP* 2008 26 (<http://ssrn.com/abstract=1275603>), 6 7.

⁵¹ Donna Craig, Elizabeth Gachenga, “The Recognition of Indigenous Customary Law in Water Resource Management”, *Water Law*, vol. 20, 5 6/2010 (<http://ssrn.com/abstract=1675996>), 280. The article contains a suggestion of the legal reform that should be performed with this goal in mind.

⁵² See *ibid.*, 283 284.

⁵³ Article 1 of *The Swiss Civil Code of December 10, 1907 (Effective January 1, 1912)*, translated by Robert P. Shick, The Comparative Law Bureau of the American Bar Association, Boston 1915, 1.

⁵⁴ Which must have been rather frequently, considering the number of *lacunae iuris* in the Code.

⁵⁵ Lester B. Orfield, *The Growth of Scandinavian Law*, foreword by Benjamin F. Boyer, Union, New Jersey 2002, 170.

practice even in those areas that are completely covered by written law. Some other countries, like Sweden, act similarly to Switzerland and limit the use of customary law only to the cases of legal vacuum in statutory law.⁵⁶

The legal customs of specific communities – national or territorial – or states, however, are not the only relevant ones. They also play a very significant role in international law – in which they have long been the main, and even the only source.⁵⁷ Even today, according to the Statute of the International Court of Justice, the first source that this Court recognises are general or particular international conventions; immediately after comes “international custom, as evidence of a general practice accepted as law”.⁵⁸ Be it the ancient and all-binding *pacta sunt servanda* or a new rule of customary law created during the past decade in the diplomatic relations between two bordering countries, the rules of international customary law are applied on a daily basis, and their authority is greater than the one of their “cousins” inside any particular country. Of course, there are disagreements here as well – as anywhere in legal practice or science – so some authors think that its days as a source of international law are numbered, and that it should be eliminated due to its lack of authoritativeness, coherency and democracy.⁵⁹ Others still believe that it is one of the key factors of contemporary international law and is even necessary for the understanding of law in general.⁶⁰ Thus, the situation may

⁵⁶ *Ibid.*, 257.

⁵⁷ Today, of course, the primary significance belongs to international contracts, but that does not mean that customary law does not regulate a large number of matters. Peculiarly, some authors believe these sources to be closer that it may first appear and that they can be subject to the same interpretation rules, see Emmanuel Voyiakis, “A Theory of Customary International Law”, SSRN working paper, January 25, 2008 (<http://ssrn.com/abstract=895462>), 36–53, particularly 46–52. As the author concludes, “[j]ust as the acts and intentions of parties to a treaty provide the first materials of its interpretation but do not necessarily determine the correct interpretive result, the acts and intentions of participants to a customary practice are central to but do not exhaust the meaning of that practice. And just as international agents can be mistaken about the object and purpose of their written undertakings and commitments, they can be mistaken about the value and purpose of the customary international practices their acts contribute to”, *ibid.*, 65.

⁵⁸ Chapter II, Article 38.1.b of the *Statute of the International Court of Justice*, <http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0>, last visited 31.01.2011.

⁵⁹ Meaning by the latter the problem of the obligatory character of the general rules of international customary law for all the countries, although only some of them actually took part in their formation, see J. Patrick Kelly, “The Twilight of Customary International Law”, *Virginia Journal of International Law*, vol. 40, 2/2000 (<http://ssrn.com/abstract=1116367>), 452–453 and further.

⁶⁰ “Neglect of the phenomenon called customary law has, I think, done great damage to our thinking about law generally. Even if we accept the rather casual analysis of the subject offered by the treatises, it still remains true that a proper understanding of customary law is of capital importance in the world of today... much of international law, and

not be on a level that Bogišić would consider desirable, but it is obvious that there is still some room for devoting attention to customary law.

Bogišić's last objection made to legal historians in this area, related to the problem of neglect of the customary law, is the aforementioned exaggeration of the significance of legal knowledge and consequential neglect of the ways of thinking of other social classes and the people in general. He believes the mistake to be caused by Savigny's opinion that at a certain degree of development of culture and society people's activities separate so that the law, which was once the subject of the knowledge of the entire community is now left in the hands of lawyers as a separate stratum.⁶¹ Bogišić remarks that such an attitude is too strict, for it does not necessarily follow from the fact that lawyers are "a separate stratum of knowers of jurisprudence", that they also "have an exclusive right to the very cognition of legal relations",⁶² but that it is eminently logical that they must address members of other professions for matters concerning their fields of expertise.⁶³

Although, unfortunately, one can always find examples of the opposite, it can still be claimed that the participation of experts in writing statutes concerning their field has become a regular practice today. Contrary (understandably) to Savigny's opinion, the reason for this is the ever further development of society: the increasing number of specific and strictly professional areas in modern daily life leads to the creation and branching of new legal disciplines that require the participation of non-lawyers in their regulation. If that was necessary for commercial and bill law in Bogišić's time, what is left to say today about the regulation of health care, intellectual property, the position of individuals on the Internet or space law?

3.3. Overdescriptiveness

Inside the second recommended direction Bogišić points out that legal historians "limit their task overmuch, go no further than a simple exposition and description of the facts, and do so at the time when the needs of historical science, at the start of this century, have surpassed

perhaps the most vital part of it, is essentially customary law", Nicole Roughan, "Conceptions of Custom in International Law", (<http://ssrn.com/abstract=1072965>), 1.

⁶¹ V. Bogišić, 2004d, 280.

⁶² "Otherwise one would have to acknowledge that they know best about all the various relations of life in their full abundance, with all the microcosmical peculiarities", *ibid.*, 281.

⁶³ As a positive example that overturns Savigny's claim, Bogišić mentions the writing of the Commercial and Bill Code in Germany, in which members of the mercantile class took part along with lawyers, and whose votes had a significant influence on the decisions of the commission, *ibid.*

those limits”.⁶⁴ He reproaches them for not paying enough attention to Savigny’s opinion that the essence of law is founded in the life of the people and that it does not exist for itself, but also “to the very character of their subject”.⁶⁵ According to Bogišić, a legal historian must, apart from strictly legal facts, devote great attention to the relation of law “and all other aspects of folk life”,⁶⁶ as that is the only way to explain the evolution of specific legal institutions. Bogišić offers several examples⁶⁷ of how the understanding of the development or a concrete form of an institution requires the knowledge of other facts related to the social⁶⁸ or natural circumstances that had existed in the relevant area at the time of its creation. In the end he concludes that it is obvious “that this side of historical study of law is not only waiting for the earlier works to continue, but also needs a completely new activity”.⁶⁹

One might say that this attitude comprises a logical whole with Bogišić’s opinion on consulting the members of other vocations in the lawmaking process: both are a reflection of the inseparable connection of the legal system to other areas of social life.⁷⁰ Just as lawyers need the knowledge from the areas that they are regulating in order to do it successfully, so do the facts from the non-legal life, so to speak, affect the face of the legal order both through the normative process itself and through various external influences. A historian overlooking this interdependence could never completely explain the genesis of even a single legal rule, let alone analyse the evolution of a branch of law or an entire legal system.

What does Bogišić refer to when mentioning a “completely new activity”? Certainly not the constitution of a new scientific discipline – but, most probably, a cooperation not unlike the one that he advocated in

⁶⁴ *Ibid.*, 282. He supports his opinion with Jhering’s attitude that one should reject the positivist approach in the study of Roman Law, give a complete historic critique of this law and understand the causes of its’ evolution; he reproaches Savigny for devoting attention to a “lifeless” subject – the study of Roman Law in the Middle Ages – which has affected the views and the method of his followers.

⁶⁵ *Ibid.*, 283.

⁶⁶ *Ibid.*

⁶⁷ In particular, on the examples of acceptance of the *Lex Rhodia de iactu* in Roman law, the absence of classical forms of slavery among the Slavs, as well as the peculiarities of the family community (*zadruga*) and the understanding of property in the Slavic tribes. See *ibid.*, 283–284.

⁶⁸ Including, of course, other connected legal institutions whose forms could have affected the development of the one considered.

⁶⁹ *Ibid.*, 284.

⁷⁰ One merely views it from a positivist point of view (more specifically, the point of view of the process of creation of law), and the other from a historical one, focused on the explanation of reasons for the creation and functioning of specific legal institutions or areas.

the legislative process: the use of auxiliary disciplines in legal historical research. Whether it is performed by the experts from those areas cooperating with lawyers (again, similarly to the solution for legislation) in conducting research, by legal historians being trained, to a necessary extent, in those sciences and skills required for their work, or by merely using the results of other scientists' research, it is necessary for realisation of the aforementioned goals. General (political) history has been using these disciplines for quite some time already, acknowledging the usefulness of the "auxiliary knowledge" even in the Middle Ages,⁷¹ and its necessity during the Renaissance,⁷² while it was the German historical (not only legal!) science of the XIX century that developed the whole methodological apparatus for the use of auxiliary sciences.⁷³ The time has certainly come for legal history to use them for completion, explanation and systematization of its research.

Today one practically cannot imagine a serious work in the area of legal history without the use of numerous auxiliary sciences,⁷⁴ even if most of that use comes down to using the knowledge that they had separately attained. Regardless, overcoming the descriptive level has become the standard of every science, including legal history: any writing that merely presents facts, no matter how detailed and well-systematised, cannot be considered a serious *scientific* work, but, at best, one of summary or encyclopaedic nature. Let it not be said that science does not need such works: their existence makes study, obtaining information or staying "up to date" with scholarly achievements easier to everyone, from enthusiasts and hobbyists, across students and young scholars, to renowned experts – but they do not represent a *contribution* to it.⁷⁵ That would require the work to contain an interpretation of the facts that is new at least in some respect, or to present new arguments that could additionally confirm or refute a previously stated opinion.

⁷¹ See Ernst Brajzah, *Istoriografija: stari vek, srednji vek, novo doba* [Historiography: Ancient, Medieval & Modern], Beograd 2009, 202 212, particularly 206 207.

⁷² *Ibid.*, 264 266.

⁷³ *Ibid.*, 356 358, 362 363.

⁷⁴ From the ones more closely connected to law and legal history, such as (general) history, diplomatics, legal anthropology or epigraphy, to those that have a broader or separate area of study, but frequently relevant to legal history, such as archaeology, geography, cartography, biology, medicine, etc. Even those sciences that one would not say are (always) relevant to legal historians, like economics and statistics, are more and more present. See Daniel M. Klerman, "Statistical and Economic Approaches to Legal History", *University of Illinois Law Review* 4/2002 (http://ssrn.com/abstract_337500), 102 107, especially 102 104.

⁷⁵ With the due exception of source research works that present certain facts to the scientific public *for the first time*; they undoubtedly make their contribution to science, even if they contain no interpretation of that data, because they represent a basis for future scientific works that will deal with the explanation of the newly found facts and their placement into the scientific system.

3.4. Too narrow a field of research

The last task which Bogišić – also following the example of other social sciences, mostly linguistics – notices lying before legal history is the discovery of general laws and regularities. “It must not be allowed for legal history to be condemned to an eternal impossibility of abandoning the suffocating pile of details and various coincidences. It must not be allowed for its task to be limited only to the borders of a given people and it never being able to cross that Rubicon”, he says.⁷⁶ He obviously believes that only the discovery of general laws can lead legal history to the desired state of orderliness and systematization – and that can not be achieved if it stays solely inside national confines.⁷⁷ So Bogišić says that, in order to understand individual legal systems and discover the general truths inside them, one must: “1) *Expand* the field of legal-historical research; 2) Use *scientific* method to compare individual legal institutions.”⁷⁸

Regarding the first he mentions that legal historians have “very rarely been able to ascend to the realisation that individual institutions of special law, in its scientific interest, should be compared to the institutions of all related and neighbouring peoples”, regardless of their degrees of social development.⁷⁹ He reproaches German legal historians for seriously comparing their law only to Roman law, while observing other (neighbouring) systems only through searching them for possible traces of influence of received German law.⁸⁰ Again, Bogišić makes a comparison with linguistics, which has studied and compared all related languages, regardless of whether they are neighbouring, how widespread they are and how developed the society that uses them is, and suggests that the success of linguistics in this field should inspire legal history to use the same comparative methodology.⁸¹ He criticises the previous use of the comparative method in legal history for being akin to the old etymological research – for institutions were compared only by their outside char-

⁷⁶ V. Bogišić, 2004d, 284. He again voices Jhering’s opinion, this time one how the knowledge about the essence of Roman law increases “in the extent in which the teaching of the *nature of law* is perfected in *legally philosophical* and *empirically comparative* ways and the extent in which it is enriched with new understandings and attitudes”.

⁷⁷ As Mortimer Sellers says, “No one can really understand her or his own legal system without leaving it first, and looking back from the outside”, Mortimer N. S. Sellers, *Republican Legal Theory: The History, Constitution and Purposes of Law in a Free State*, New York 2003, 99.

⁷⁸ V. Bogišić, *ibid.*

⁷⁹ *Ibid.*, 285.

⁸⁰ Of course, led by the idea of the National spirit.

⁸¹ *Ibid.*

acteristics, without reaching “their inner nature” – which is superficial and insufficient for attaining the desired scientific goals.⁸² He then remarks that the method should be applied in the History of Slavic Law, pointing out examples of what slavic laws could do to “enrich the science”, i.e. their differentiating traits.⁸³

Bogišić’s exposition, without a doubt, presents an invitation for the use of serious comparative method, although without going so far as to serve as a basis for forming Comparative Legal History as a discipline. One should not disregard the fact that he propagates the use of this method *in favour of national laws*, i.e. as a tool with which to create general laws, which would primarily be used to advance national legal history and understand institutions of the national law in a comparative context.

But what was actually happening? It was Hegel’s idea of the “World spirit” [*Weltgeist*], followed by the birth of World History as a discipline, that paved the way for the study of general legal history. But Hegel’s world history is the embodiment of the judgement of reason, the freedom of the (world) spirit, where all that is particular – including Savigny’s national spirit – is present only as an ideal.⁸⁴ Peoples may have their own guiding ideas and principles that are incorporated into the absolute idea of the World spirit, and thus gain their place in history and the realisation of their goals within it,⁸⁵ but the focus is still on the development of mankind as a whole. General legal history, born under this influence, did not become a means to systematise national legal histories; on the contrary, it viewed them only as a part of the world legal evolution.⁸⁶ This might seem opposite to what Bogišić advocated, but it is only an idea that has gone a step further. For, despite it not being its only goal, general legal history and the laws that it discovers can be highly useful to national histories, except that there is another dimension to it – legal history from the perspective of the world as a whole.

Although it has had its ups and downs, General Legal History – albeit not unmodified – lives to see its renaissance in the globalization era as Comparative Legal Tradition, a discipline that joins the elements of the old General Legal History and (positive) comparative law. As it has been said already, the reasons for this are both academic and practical, and although one might object that they sometimes tend to hamper each other,

⁸² *Ibid.*, 285 286.

⁸³ *Ibid.*, 287 290.

⁸⁴ Georg W. F. Hegel, *Elements of the Philosophy of Right*, edited by A. W. Wood, Cambridge University Press, Cambridge 1991, 372.

⁸⁵ See *ibid.*, 372 375.

⁸⁶ Sima Avramović, “From General Legal History Towards Comparative Legal Traditions”, *Annals of the Faculty of Law in Belgrade – Belgrade Law Review* 3/2010, 12.

it is the synthesis that gives this new discipline additional strength.⁸⁷ Although the change of name is more than just terminological – because the word “tradition”, unlike “history”, implies a lasting process⁸⁸ – one should not think this discipline to be less “historical” in nature because of it. Tradition is history that goes on, the traces and consequences of which we can still see in living legal systems.⁸⁹ The former General Legal History *is* essentially changed now, but only by adding the aforementioned element of continuity, and *not* by subtracting or reducing its historical quality.

Apart from that, comparative law and legal history have more in common than one might say if observing the first as a positivistic, and the latter as a historical science. “Legal history is comparative law without travel. Historical comparisons give lawyers and legislators the distance that they need to reform and to understand the law, without the distortions of contemporary partisan conflicts, which sometimes trouble other students of comparative law,” says Sellers, explaining the relations between these two disciplines.⁹⁰ Indeed, even the classical historical approach contains a dose of comparison, particularly if one analyses not a certain point in the past, but, for example, the evolution of a certain institution in time.⁹¹ That is another argument in favour of using historical approach – and not just comparative analysis – in the study and improvement of positive law: “Legal history gives special insights into legal institutions that other comparisons cannot, because so many legal structures survive over time, put to different uses, and half-understood, but preserving fragments of previous cultures embedded like fossils in everyday legal practice”.⁹² Even without the use of the term “tradition”, this reflects its essence – the presence and preservation of the living parts of the past in today’s reality.⁹³

⁸⁷ See *ibid.*, 13 20.

⁸⁸ For the definition of tradition used here see *supra*, n. 21.

⁸⁹ *Ibid.*, 16 17.

⁹⁰ M. N. S. Sellers, *ibid.*.

⁹¹ In any case, as much as the rules of the historical method might order objectivity and forbid the historian to transpose modern attitudes into the period that he is studying, a *comparison* with similar institutions that are familiar to him still cannot be avoided and those will, in the lack of comparative historical knowledge, be the institutions of modern national law.

⁹² *Ibid.*

⁹³ Sellers, however, takes this one step further, saying: “Legal history is a special form of comparative law, because of its unique connection to the status quo. All comparisons challenge the dominant cultural consensus, but historical comparisons do this best, because they often consider the very same institutions that exist today, as once they were, when they served different masters, with different means and purposes”, *ibid.*, 100 101. Although a certain similarity in approach, that causes the aforementioned consequences,

It must again be emphasised that the modern situation is highly similar to the one that existed during the period of the Historical School's activity, except that present-day science tends to formalize and classify what used to be on the level of free academic thinking, and frequently resorts to narrow profiling in order to adapt to the demands of this era. Whether this is good or bad, time will tell.

This science – meaning both its old and new incarnations – has certainly made significant methodological progress since Bogišić's time: the connections between institutions and legal systems are being determined according to much deeper and more detailed criteria than simple outside similarity, and are not limited only to the cases of direct reception of foreign law. Unfortunately, scholars still frequently make the same mistake that Bogišić reproached them for, characteristic for the comparative approach in general – drawing conclusions that a connection exists between certain systems or institutions based only on similarity.⁹⁴ Related to that one – if nothing else, by its usual causes – is another mistake that Bogišić might not have explicitly noticed or foreseen, but that is still against his methodological recommendations: the wrong application of discovered general tendencies or regularities to those systems that cannot be subsumed within them.⁹⁵

Although Bogišić speaks of the discovery of general *laws*, this term has been intentionally omitted in the explanation above. It has long since been proven that social sciences – including law and history – cannot

cannot be denied, this opinion is too one sided, since it negates all the differences that exist between these disciplines except the temporal, i.e. the period that they study. Legal history has, to start with, long been affirmed as an independent science, while there are still debates whether comparative law is a separate science or just a method that can be used within other legal sciences. For thoughts on this subject see Borislav Blagojević, "Uporedno pravo metod ili nauka" ["Comparative Law a Method or Science?"], *Anali Pravnog fakulteta u Beogradu* 1/1953, especially 12 16, and A. Watson, (1993), 1 20, particularly 1 9. (A more detailed review of this matter would mean abandonment of the subject of this article). Watson has a far more moderate view: he believes comparative law to be "very different from legal history", *ibid.*, 102, but unimaginable without it, and also able to offer much in return, which means that these two disciplines are essentially different, but interconnected. For more details see *ibid.*, 102 106. Another fine opinion is "that legal history and comparative law are matching subjects, providing all lawyers with deeper insight into legal solutions in time or in geographical settings." Eltjo Schrage, Viola Heutger, "Legal history and comparative law", *Elgar Encyclopedia of Comparative Law* (edited by J.M. Smits), Edward Elgar Publishing, Inc., Cheltenham 2006, 405. Still, there is also the opinion that even the comparative method is not a separate method, but merely "either the dogmatic or the causal explanatory method applied to two or more laws at the same time", Radomir Lukić, "Metodi izučavanja prava" ["Methods of the Study of Law"], *Anali Pravnog fakulteta u Beogradu* 1 2/1965, 44.

⁹⁴ Sometimes such conclusions are supported by misinformation about other circumstances that could be taken as proof of such a connection.

⁹⁵ For more details see A. Watson, (1993) 12 15.

contain laws of the type that exist in natural sciences,⁹⁶ but only more or less probable and frequent causal connections, tendencies of development, statistical generalisations, regularities, etc. Still, this neither changes the meaning nor decreases the value of Bogišić's words. The term that he used does not mean that he believed that firm and unexceptional laws, such as those in physics or chemistry, will be found in legal history – no matter how much it may broaden its field and use the comparative method – but merely that he expected that in this way sufficient information about similar institutions and other phenomena in law may be gathered in order to uncover general regularities that would further help scholars conduct research in legal history. Whether they are called laws today or not is a matter of modern scholarly terminology and makes no substantial difference.

4. CONCLUSION

The Historical School may not have been active for quite some time, but the latest tendencies in law and society show that a great part of its legacy, the ideas for which its creators fought, are still – or again – alive. The historical approach in law, connecting historical and positivistic disciplines and the increasing number of suggestions to use the knowledge and methods of legal history not only in the study, but also in the making of law, all indicate favourable winds in the sails of legal history once more. Of course, good wishes and individual assessments of its usefulness are not enough for it to successfully navigate these new waters. If it wants to keep gaining strength as a discipline, it must take with it – as always when history is concerned – something new and something old: the useful innovations of the present, but also the preserved values from the past.

The first consists in accepting the achievements of modern science critically, but without prejudice. It would be equally harmful for legal history to reject the notion of tradition and the positive novelties that it brings to its field,⁹⁷ and to wholeheartedly accept everything that positivists say about it and thus soon merge into the notion of comparative law as one of its aspects, surrendering the lead to the younger – and far less developed – discipline. It must accept the tasks that are laid before it today, although some might deem them unconventional, but not at the price of neglecting – let alone forgetting – its nature and essence.

⁹⁶ See Max Weber, *The Methodology of the Social Sciences*, Glencoe 1949, 72–76 and further.

⁹⁷ Meaning primarily the continuity between the past and present that it contains, which strengthens the bond between legal history and positive law.

With that goal legal historians should keep in mind the famous classical saying that refers to history in general (*historia est magistra vitae*), take to heart the lessons of the past and learn both from the positive characteristics and the mistakes of their predecessors. As seen above, some of the mistakes of the Historical School that Bogišić had pointed out have been corrected and overcome in modern legal history, which is logical but nevertheless worthy of praise. Given the pace and direction of development of both the discipline itself and its subject, it is reasonable to assume that those mistakes will not be repeated.

Still, it was observed that this is not the case in some areas. That is primarily obvious when it comes to the attention which legal historians devote to customary law – the significance of which cannot be neglected even today – and insufficient historical analysis (frequently none) in the process of change of positive law, and especially the reception of foreign law. Bogišić's remarks are still quite valid here.

Perhaps one might say that these remarks are less relevant, and that legal history since Bogišić's time has managed to deal with all the serious flaws that he had mentioned. Even if it were so – and it is not the aim of this article to negate the significant evolution of legal history in the meantime – it would still not be a valid reason to ignore the rest of the objections or consider them irrelevant.⁹⁸ However, the question is whether one can at all claim something like that. It is dangerous to get involved in the assessment of the long-term⁹⁹ significance of any aspects of a certain science during the time in which it is being considered: that would result in the decrease of objectivity and the clouding of the broader image by ephemeral details of everyday events. It is far safer and more conscientious to make sure to remove all the observed flaws and accept all constructive advice, and let history be the judge of the results and the significance of individual actions.

⁹⁸ If nothing else, the increase of quality in the functioning of a discipline should also signify the raising of standards for further scientific work.

⁹⁹ And the short term cannot be relevant, *especially* for legal history.