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DOCTRINAL RECEPTION OF EUROPEAN (ROMAN) LAW TRADITION IN POST-OTTOMAN SERBIA^{*}

After the liberation from long Turkish occupation during XIX century, and some temporary influence of Sharia law, Serbia was able to turn again towards its European roots, and especially towards its rich legal tradition. The “normative” reception of the Roman law tradition could have been obtained in Serbia only upon reaching higher level of economic standards and basic legal education. Thereof, the “doctrinal” reception which included establishing certain educational institutions, language standardization, and, especially, the existence of the corresponding legal terminology, had to come first. Legal subjects at the Belgrade Higher School (established in 1808) and Lyceum (1838), was gradually developed into the “Legal department”, that would grow into the Faculty of Law. But, the other centers that influenced the general development of Serbian culture were out of borders of Serbia, in Vienna, Pest, and especially in Vojvodina (Sremski Karlovci, Novi Sad). The ideology of the new born Serbian bourgeoisie, based on Roman law principles of inviolability of private property, was opposite to the old patriarchal mentality, based on collective ownership and mutual solidarity. Anyway, so called “original accumulation of capital” was protected by regulations of the Serbian Civil Code (1844). Parallely, at the academic level, Roman Law was established as a separate subject in 1853 and was headed by professor Rajko Lešjanin. He had completed his legal studies at prestigious West European universities, like many other Serbian romanists in the XIX centuries (Mihajlo Radovanović, Dragiša Mijušković, Giga Geršić, Živko Milosavljević et al.). Apart from strong spiritual and religious connection between the Serbian and

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Russian people, Serbian intellectuals obtained not only high education, but they also brought liberal and democratic ideas in the Serbian Principality from the West.

Key words: Roman Law tradition. Belgrade Higher School. Lyceum Rajko Lešjanin. Serbian Civil Code.

It is well known that the reception of Roman law is based upon money-for-goods economic exchange, liberal market economy and private property. However, regardless of whether the reception has occurred *via facti* (in Italy, France, Holland etc.) or *via lege* (in the German states), a doctrinary shaping of certain institutions taken from antiquity, i.e. their adjustment to concrete social circumstances, takes place as a prerequisite for the reception, sometimes even a bit before a full development of the economic preconditions. It is up to jurisprudence and educational institutions to provide law professionals capable of applying a rich heritage of Roman law tradition in modern legal practice. When there were certain social and economical pre-conditions, it was necessary to become familiar with the legal system that one state wanted to implement (expert, doctrinal reception), and after that its principles could be applied in the practice (practical, normative reception).¹

The principle was also the same for medieval reception of Roman law in the European countries:

- firstly, commodity-cash economy was developed in them, based on private property (contrary to feudal separate ownership, and natural exchange), and after that they needed the laws to regulate those relations successfully;
- the fact that Roman law represented the best response to feudal legal particularism was reached at universities by the interpretation of Justinian’s Code (doctrinal reception);
- then the various law schools adjusted that law (*ius commune*), through systematic analysis, to the needs of life and it could become valid, positive law of some areas or states (normative reception).

The rule that *doctrinal* reception had to be obtained before *normative* is confirmed by legal development of modern, post-Ottoman Serbia. Namely, by expulsion of the Turkish feudal rulers, the domestic merchants and newly created landowners strengthened, and origins of the Serbian civil class were formed. This social group wanted to protect their

¹ In broader sense “reception” means taking old Roman legal concepts, that are the result of a long term Roman jurist elaboration, and applying them through medieval reception in various legal systems. Ž. Bujuklić, *Rimsko privatno pravo* [Roman Private Law], Beograd 2013, 103–104.

private property and security of its legal trade, endangered by Prince's self-will. That could be obtained by issuing constitutions and laws, and especially by regulations of the Serbian Civil Code (1844). However, in order for the new legal system (based on the reception of the Austrian Civil Code) to be applied in practice, it was first necessary to find educated experts for it. By founding the Department of Law at the Higher School, especially by implementing the Roman law courses this pre-condition was satisfied.

As far as Serbia was concerned, the process of reception (firstly doctrinal, and then normative) started rather late, and was hampered by many reasons of economic, political and cultural kind. Study of Roman law in Serbia, in fact, coincides with the history of the Faculty of Law in Belgrade, and this in turn is directly connected to the general socio-economic, political and cultural development of the Serbian nation and the painstaking process of restoration of its statehood in the last two centuries.

The same year when Napoleon promulgated the *Civil Code* (1804), Serbia merely started an uprising against Turkish occupation which lasted for centuries. During that long period of time, the rich Serbian-Byzantine legal tradition was largely abandoned and forgotten. However, the Serbian Orthodox Church inherited over time and was transferring the idea of the Serbian state and law, and in the minds of ordinary people it grew up into an epic consciousness of belonging to a powerful medieval state, especially czar Dušan's Empire of the XIV century. However, it was not enough to bridge the deep gap created by the loss of national independence and the disappearance of the intellectual elite, personified in the Serbian nobility. Dušan's famous legal Code from XIV century and many others developed medieval Serbian legal texts which were copied in the monasteries, but very few truly understood what was written in them. The discontinuity in the cultural development of the Serbian people was a natural consequence of the loss of national independence. Therefore, after the XIX century, liberation movements had to start anew.

1. RESISTANCE TO THE RECEPTION

The primary goal during the establishing of a modern Serbian state was its inclusion into the European civilization processes. By dethroning Muslim Turkish authority, the reborn state started to turn towards the Christian West, but even the Orthodox East was not spiritually as far as it was geographically. The leading idea of the rebellions was the liberation from the long-term enslavement, and when they were deciding which Empire they would be inclined to, they paid attention to which of them

supported their leading idea. Therefore, the issue of legal influences, in other words, of foreign law reception, was connected to concrete help to the participants of the uprising.

To show the loyalty to “mother Russia” the uprising leaders asked for implementation of Russian laws in 1809.² However, when the uprising was in crisis, and the expected help did not come from that side, others were asked. In order to be worth the support of big European forces, they firstly turned to Austria and started translating Austrian laws and regulations. Realizing that this help would not come, they turned to powerful Napoleon next year (1810). When they bought a copy of *Code Civil* in Ljubljana (in a way that local province governor knew that), they sent a signal that this Code would be applied in Serbia, of course, if they got political and military help from France.³ After many changes in the political orientation, Serbia finally defers to the Austrian Empire and its laws, particularly under the influence of Serbian educated jurists from Monarchy. The Austrian Civil Code is based on Roman legal tradition, and getting familiar with that was crucial for understanding and applying the Serbian Civil Code.⁴ Thereof, the more serious development of the romanistic science in Serbia would begin in the mid of the 19th century.⁵

However, in the spiritual sphere of the established Serbian Principality, there were rejections which were the result of not being familiar with that law, and the result of the conscience that followed those big changes in socio-economic relations. Therefore, fixed legal property and family relations were torn down, in other words, the existing tradition was abandoned.

² That year, a Serbian representative was sent to the czar with the order to ask for the books that have Russian law in order to find and use those appropriate for them (“ište knjige u kojima se soderžavaju zakoni Rosijski, da bi i mi izdvojili one zakone koji su za nas prilični, i po njima vladati se mogli”). That idea was supported by Konstantin Rod ofinikin, a Russian consul in Serbia (1807–1809), but his draft about the state structure in the tradition of Russian provinces (*gubernije*), was undoubtedly rejected by Karadorde. R. Ljušić, *Vožd Karadorđe* [Leader Kardorđe], Beograd 2005, 189 ss.

³ M. Pavlović, *Srpska pravna istorija* [Serbian Legal History], Kragujevac 2005, 242.

⁴ J. Danilović, “Srpski građanski zakonik i rimsko pravo”, *Sto pedeset godina od donošenja Srpskog građanskog zakonika* [Serbian Civil Code and Roman Law, A hundred and fifty years since the enactment of the Serbian Civil Code, 1844–1994], SANU, XVIII (Odeljenje društvenih nauka), Beograd 1996, 49–65; D. Knežić Popović, “Udeo izvornog rimskog prava u Srpskom građanskom zakoniku”. *Sto pedeset godina od donošenja Srpskog građanskog zakonika* [The share of the original Roman Law at the Serbian Civil Code, A hundred and fifty years since the enactment of the Serbian Civil Code], 67–78.

⁵ See S. Petrović, “Nastava rimskog prava na Liceju, Velikoj školi i univerzitetu do 1941. godine”, *Univerzitet u Beogradu 1838–1988* [Roman Law at Lyceum, Higher School and University until 1941, The University of Belgrade 1838–1988], Beograd 1988, 629–644; V. Cvetković, *Razvoj romanistike kod Srba od sredine XIX veka do sredine XX veka (neobjavljena teza)* [Development of Romanistic science among the Serbs from the middle of 19th until the middle of 20th century (unpublished dissertation)], Beograd 2009, 114.

It is not strange that the dominant opinion in Serbia was stated by a professor of the Higher School, Vladimir Karić: “ When Hungarian and Austrian jurists came to Serbia, upon its becoming a semi-dependent state, they brought with themselves all the misconceptions of Roman law, which was very harmful for our people also in Austria and Hungary, because the laws contrary to the people’s spirit and the level of education. Those jurists also brought those laws which started destroying the existing old traditional family, and the notion of uniqueness”. He said for the Serbian Code that “it was not anything more but a translation of the Austrian Civil Code, which rooted out legal terms on family and property of our people, inherited during the centuries. This abrupt transplantation of something foreign, to the Serbian spirit incomprehensive of legislature, was shown through long series of consequences, to affect the state even today. At the time when it was recommendable to collect all people’s forces in order to strengthen the state issues, which Serbia received by its resurrection after uprising, some people’s started destroying the basis of our traditional organization, family, and property, by foreign legislature. If the above mentioned were preserved, it would result in the most lucrative economic outcome and moral gain”.⁶ In those ideas, it is not difficult to recognize the repulsive attitude of Savigny’s Historical school to the implementation of Justinian’s law into modern legislature, and pleading for the evolutionary development of the genuine “national law” (*Volksrecht*).

However, a professor at Lyceum Stojan Veljković, pointed out in his opening speech, that Roman law had great significance for beginners, because it provided students with getting familiar with the principles of the existing law regulations, and discovering the inner relation between some legal terms. According to him, the biggest merit of Roman law is “ clarity, order, and virtue of its legal regulations and rules”.⁷ Gligorije (Giga) Geršić had the similar attitude. In his opening speech at the Higher School he pointed out that legal system is not just a bunch of laws and regulations, but it had to become “a logical organism of legal institutions and terms”⁸ Thereof, he criticized studying at Natural law school, which

⁶ V. Karić, *Srbija: opis zemlje, naroda i države* [Serbia: the description of Country, People, and State], Beograd 1887, 553 554. Cfr. M. Pavlović, *Srpska pravna istorija*, 324.

⁷ S. Veljkoviæ, *Beseda kojom je Stojan Veljkoviæ, doktor prava i privremeni profesor Rimskog i Kriminalnog prava u Liceju Kneževine Srbije svoje predavanje otvorio* [Oration which Stojan Veljkoviæ, doctor of law and temporary professor of Roman and Criminal Law of the Lyceum of the Principality of Serbia, opened his lecture], Beograd 1856. Cfr. V. Cvetkoviæ, 42 44. However, in his voluminous work *Objašnjenju trgov aèkog zakonika* [Explication of the Commercial Code] published in 1866, he clearly points out that some Roman principles (for example contract on partnership, *societas quaestus*) are not applicable to modern commercial societies (129 130).

⁸ G. Geršić, “Nešto o pravništvu uopšte i o potrebi rimskog prava po svesno pravništvo” [Something about the law in general and about the need of Roman Law for

proclaimed that the law could be truly obtained only on the basis of common sense. Geršić, on the contrary, considered that innate law cognition did not exist, and that reason served that an individual became “a mindful jurist” through his hard work. That kind of jurist would be the one who realized three precepts: that the legal system represented the organic whole, that it carried within itself the characteristics of the people who created it (“national principle”), and that together with them, could be changed (“historical principle”), and finally that the theory of legal system and its applying should have been in accordance – all those precepts could be found in Roman law. Also, Geršić quotes Montesquieu: “I feel that I am strong at principles, when Romans are with me”.⁹ Speaking about the greatness of Rome, he saw the sources of those high achievements in establishing the state and legal system, in the expansionist mentality, based on the selfish need to overcome other nations. It was not “pedant selfishness” based on low moral and intellectual urges, but “great selfishness” that led to reaching the highest aims. Because of that, Roman law is “the religion of selfishness” which made the most perfect legal organism in the human history.¹⁰

The ideology of the new-born Serbian bourgeoisie, somewhat spoken through the statements of one educated professor at Lyceum, was told two decades after the issuing of the Serbian Civil Code. It put its liberal egoism opposite the up-to-then patriarchal mentality, based on collective ownership and mutual solidarity. The historical sequence of events in the development of Serbia seemed to have reached its wanted aim: the *vernacular language* became standard, the *nation* started forming, *state* received independent status recognized by the big European forces (Berlin Congress 1878) and the newly created *legal system* served to implement the order and protect those who did manage to find economic security through that big historical turnover. Their privileged position, based on so-called “primal accumulation of capital” should have been protected by regulations in the Civil Code, based on Roman law regulations and un-touchable private ownership. Educated jurists and romanists got special significance through that work. At the beginning, they would acquire their knowledge only beyond the borders of their states, and during the time on newly established Serbian high-education institutions.

lawyers] “Vila”, *List za zabavu, književnost i nauku*, Beograd 1866, 695 699, 712 717, 727 733.

⁹ G. Geršić, 727 730; V. Cvetkovića, 44 ss; S. Avramovića, “Gligorije Giga Geršić, profesor pravnika fakulteta i klasičar” [Gligorije Giga Geršić, a Professor of the Faculty of Law and the Classicist], *Zbornik Matice srpske za klasične studije* 1/1998, 73 78.

¹⁰ About this V. Cvetković, 47.

2. BEGINNINGS OF THE ROMANISTIC SCIENCE AMONG SERBS

At the Higher School a number of legal subjects were taught together with Natural Law, which included the elements of Roman law. However, since the school policy was motivated by the desire that students learn primarily positive law, immediately after the said promulgation of the Civil Code, it was ordered to replace studying of the ancient Roman law with the modern civil law. Hence, the teaching of this matter as a separate subject (called Justinian's *Institutiones* and shortened *Pandecta*) will begin not before 1849/50 school year: for the *Institutiones* three classes per week in the first and the second year, and for *Pandecta* six classes per week, which made a total fund of even 12 classes. The Lyceum curricula reform of 1853/54 abolished the Natural Law, and the study of parts of Justinian *Corpus Iuris Civilis* merged in a single subject – Roman Law.¹¹

Newly established chair for Roman Law in Belgrade was headed by Rajko Lešjanin, professor who had completed his legal studies in Heidelberg and Paris.¹² He was appointed at the age of only 25, but with his education, organizational and other skills, he quickly gained compassion of his colleagues and the reputation leading to his election, after only three years, to the position of a Rector of the Lyceum. Among many duties he had assumed, he wrote the first textbook of Roman Law in Serbia, printed in 1857 under the name of *Institutes of Justinian Roman Law*. As the title implies, this work was based on Justinian's codification, but his exposure was not reduced to a simple retelling of the ancient model mentioned, but this author provided more general considerations based on the latest literature of the day (Savigny, Puchta, Vangerow, Hugo, Niebuhr, Keller et al.). Lešjanin especially refers to Hegel's fundamental book *The Basic Features of Philosophy of Law (Grundlinien der Philosophie des Rechts*, Berlin 1840) and behaves as a follower of his ideas.¹³ Thereof,

¹¹ Interestingly, in the same school year the subject with the identical name was taught in Zagreb for the first time, which was then within the Habsburg monarchy, economically and culturally in a far more developed area than the Ottoman Empire. Cfr. M. Apostolova Marševska, "Znanstvena obrada i nastava Rimskog prava na Pravnom fakultetu u Zagrebu" [Scientific Studying and Teaching of Roman Law at the Faculty of Law in Zagreb], *Zbornik Pravnog fakulteta u Zagrebu* 1/1997, 73–100, spec. 79.

¹² M. D. Simić, "Filozofsko pravna misao prof. Liceja Rajka Lešjanina" [Philosophical legal Thought of Professor at Lyceum Rajko Lešjanin], *Naučno nasleđe*, Beograd 1994, 74–81.

¹³ Jovan Sterija Popović was a supporter of natural law studies at Lyceum, the first professor of that subject, a Dimitrije Matić implemented Hegel's philosophy by his work *Načela umnog državnog prava* [Prinzipien des Vernünftigen Staatsrechts] from 1851, and by his paper: *Kratki pregled istoričnog razvitka načela prava, morala i države od najstarijih vremena do naših dana* [The Short Review on Historical Development of Prin

Lešjanin's textbook also includes the features which, strictly speaking, are in the field of theoretical aspect of law. That approach is based on the statement that the science of law is directly connected to the philosophy of law, which has to give an answer on the core question: what is actually the right idea of law? Only after that can the legal science (as positive-legal discipline) explain what exists in one state as a "law" (*legal dogmatics*), how it has developed during the time (*legal history*), and Philosophy of law gives the answer whether it has become "wise". Contrary to the Historical school, that totally rejects the philosophical concept, Lešjanin considers that an educated jurist must also have this more complex view on the existing law, having in mind that laws are not *self-sufficient* units, but the part of one "bigger organism". Lešjanin rejects to use term "natural law" (defined in very different ways by some authors) and pleads for "umno pravo" (literary: law of reason, Vernunftrecht). It is *statical* and universal—because it belongs to the mankind, while positive law is *dynamic* and national, because it is connected to certain nation. Therefore, judges must stick to the positive laws, and not to natural law, because it does not deal with the external differences. If there are no corresponding principles, the sentence must be reached using the analogy, and not using "rational law". Lešjanin is closer to the ideas of Historical school because he holds the attitude that positive ("položitelno") and natural ("umno") law do not have to coincide completely. It is confirmed by his attitude that the source of law is people's general legal consciousness about the necessity of certain way of behaving ("the law is external expression of the people's internal legal conviction"). It is, perhaps, possible to find the explanation for this eclectic, and, to some point contradictory attitude towards the phenomenon of law, in the historical and political circumstances at the time. Lešjanin acquired modern ideas from European legal-philosophical heritage, but, by accepting national peculiarities, he expressed his unwillingness to accept the existing normative practice. Namely, Turkey "gave" the Constitution from 1838 to Serbia, and after that Serbia adopted features from foreign legislation (Austrian Civil Code, Prussian Penal Code, etc).¹⁴ Thereof, Lešjanin sees the pristine idea of liberty in the original people's feeling about what is *equity* and what is *imposed compulsion* by those who govern them, especially when they are foreign occupiers. According to him, it is necessary to equalize the *law* itself with *people's liberty*.¹⁵

ciples of Law, Moral, and State, from the Ancient Times until Today], *Glasnik Društva srpske slovesnosti* 3/1851, 63 130. Cf. R. Lukić, "Jovan Sterija Popović Professor of Natural Law at Lyceum", *Anali Pravnog fakulteta u Beogradu* 1/1957, 1 14; B. Marković, *Dimitrije Matić lik jednog pravnika [Dimitrije Matić a Character of One Jurist]*, SANU, Beograd 1977, 39 42; M. D. Simić, 80.

¹⁴ M. D. Simić, 81.

¹⁵ *Ibid.*

Lešjanin's manual contained the *General introduction*, where he set out the main principles and basic concepts of human rights and freedoms, and the reasons for studying this matter: "The importance of this subject, as the science of teaching and learning, would be superfluous to discuss. It has not only historical but also its intrinsic value and virtue. It was already acknowledged by the entire educated world; for there is almost no Higher Law School in Europe today where Roman law is not taught or learned". Lešjanin pointed out that "our Civil Code for the most part consists of Roman law; and it adopted, like all other European civil codes, the principles and basis of Roman law, and by studying it and its history we learned to know and understand our own laws". In his lectures Lešjanin devoted far more space to *Institutiones* than to *Pandecta*, which forced a school inspector into to a sharp reproach: "For the third year in a row professor Lešjanin exposed a part of the Roman law, and does he think that only part of a science may be called a science?"¹⁶ He justified it by the same practice at the German, London and Budapest universities. But, it seems rather, that he was forced into this practice by the fact that *Pandecta* contained as many as fifty books and Justinian's manual only four.¹⁷ The educational level of the students at that time should not be overlooked, as they would hardly be able to keep track of such lectures – due to fair knowledge of Latin, scarce literature and appropriate manual that covers the entire matter. Lešjanin's textbook was used in the next quarter of the century, until it was replaced by Geršić's *System of Roman Private Law* (1882).

Rajko Lešjanin's role in the establishment and consolidation of Roman Law as an independent subject, at a time when Serbia has just formed its own academic institution, is invaluable. Unfortunately, he did not stay long at the Higher School. Due to his exceptional ability, he was soon appointed Secretary of the State Council and later Minister of Justice. Even from those positions he took care of the fate of Roman Law and sharply criticized the draft curriculum, which anticipated the abolition of the subject. His attitude undoubtedly had a decisive influence on the decision by the authorities to reject the proposed reform of higher education. It would be just the first battle won for the survival of this legal discipline in Serbia, but there would be many new challenges in the future.

The next significant step in bringing the Roman legal sources closer to a wider range of scholars was made by Mihailo Radovanović, who in 1864 published a translation of Justinian's *Institutiones*.¹⁸ This is actu-

¹⁶ From the letter of Chief school inspector (Platon Simonović) to Council of Lyceum. Cfr. S. Petrović, "Nastava rimskog prava", 630

¹⁷ *Ibid.*

¹⁸ O. Stanojević, "O jednom zaboravljenom prevodu Justinijanovih Institucija" [About One Forgotten Translation of Justinian's Institutions], *Glasnik Pravnog fakulteta u Kragujevcu* 1980, 275 281; O. Stanojević, "Justinijanove Institucije prvi put kod Srba",

ally a textbook supplementing Lešjanin's and enabling students to become directly acquainted with the contents of this integral source – though only in Serbian language. The decision reflected the difficult economic conditions, that made the publisher accept the most inexpensive variant. That might be an explanation why the translation was not accompanied by register of the notions, which greatly hindered the reader's convenience.

The preface summarized history of Roman codifications with special reference to Justinian's time. Translator explicitly noted that his comments were based on the works of Ortolan and Lagrange. Under their influence and at the time the dominant legal understanding of the Historical School, Radovanović had a negative attitude towards interpolations of Justinian compilers, characterizing their work as "mutilation" of classical texts, arguing that "haste does harm to the work". At that time Bluhme's explanation of how Justinian's Commission actually compiled the text of *Digesta* (sc. *Massentheorie*) was not widely accepted.¹⁹

Radovanović's translation was reviewed and approved by the School Committee, which means that both books could be officially used in the education of students. Both manuals were printed in the local printing house at a high technical level, which at the time represented a remarkable publishing endeavor. The editors were confronted with a very difficult task, because the text appears alongside the old Serbian Church Slavonic, Cyrillic, Latin, Gothic, and sometimes the Greek alphabet. The importance of this enterprise can be understood if one bears in mind that the Serbs won the right to print books only after waging their uprisings. As previously stated, the Serb literary language at this time started moving towards its official formulation and codification by Vuk Karadžić (1847), with the sharpest intellectual conflict and dispute. Rich medieval Serbian-Byzantine legal tradition was abandoned and almost forgotten, a new professional terminology has not yet been created, as indeed in other areas of spiritual life that was cut sharply by centuries of Ottoman occupation. As a result, legal writers were forced to re-invent and create the most appropriate solutions.

In this regard the contribution of Lešjanin and Radovanović was great, indeed. Many language solutions that they offered have remained until today in the usage, although many Serbian lawyers, and even the

Antičke studije kod Srba [Justinian's Institutions for the First Time with the Serbs, Serbian classical studies], SANU, Beograd 1989, 227-237; S. Mirčov, "Pravnik Mihajlo M. Radovanović i Justinijanove Institucije", *Antička kultura, evropsko i srpsko nasleđe* [Jurist Mihajlo M. Radovanović and Justinian's Institutions, Ancient culture, European and Serbian heritage], Beograd 2010, 332-338.

¹⁹ Zeitschrift der Savigny Stiftung für geschichtliche Rechtswissenschaft 4/1820, 257-472.

Romanists, do not know who their creators were. Moreover, their pioneering work was completely forgotten amidst us, and modern legal reference books and bibliographical works do not even mention their names. It was due to the fact that the *Institutiones* of Justinian appeared in modernized Serbian language some fifty years later (1912) thanks to Lujko Bakotić's effort, and that translation (for the first time accompanied by the original Latin text) completely cancelled the previous one. Bakotić was a lawyer educated in Vienna and Graz, lexicographer and diplomat. Thanks to his classical education and excellent knowledge of Latin, the translation is of high quality.

3. SERBIAN NATIONAL AWAKENING

Since 1863 the legal studies have been taking place in the restored Higher School that in 1905 will be transformed officially into the University of Belgrade. This is a period of strong national awakening of the Serbian people in which the moral and spiritual support was mostly sought in orthodox Russia and the ideas of pan-Slavonic unity. Not rarely, there were considerations along the line "whether it is good that legal life of the cultural people still rests on Roman foundations, and that these people in legal terms have not been able to stand completely on their feet, to emancipate and do away with an outdated rule of law thousand years old".²⁰ Teaching of the modern Historical school was sometimes used only to uncover *Volksgeist* of the certain nation, rather than to grasp the common values of human spirit, including those that lie down in the legal sphere.

However, the impact of Western science and education at the Belgrade Faculty of Law predominated at that time. It was accomplished through teachers trained with state scholarships abroad, through individual meetings at professional conferences, as well as through the scientific literature initially purchased independently by individual professors, and later provided by the state. During this period, Roman Law was strengthened as an autonomous legal discipline and this statement about the general progress is valuable even for it. The Law School library was enriched by the works of German, Austrian and French authors, as most of the Serbian teachers gained their legal education in those countries.²¹

²⁰ O. Stanojević, "O jednom zaboravljenom prevodu Justinijanovih *Institucija*", 278.

²¹ Many of them had a personal contact with the most distinguished people of the European legal thought. That indicates numerous dedications of recognized world authors, written in some books that were gifts for Belgrade professors, and that are kept today at the Library of the Faculty of Law.

The Serbian translations of most important books in Roman Law started appearing: Arndts, Salkowski, De Coulanges, Willems, Dernburg, etc.²² The biggest project was publishing and translating four volumes of *Pandects* of Arndts. The extraordinary extent of this book (around 1500 pages) testifies the seriousness of studying Roman law at Higher School at the end of 19th century. Karl Ludwig Arndts von Arnesberg published this extraordinary book for the first time in 1852, and during his life, there were even nine editions. After he died (1878) next editions were supplemented and adjusted by the professors of the University of Vienna (Pfaff and Hofmann), and that was pointed out in the subtitle of Serbian translation in 1890. It was published after the Czech and Italian version, which showed how widely this book was accepted in the European scientific circles. On the basis of the 13th edition, the Serbian translation was made by professors at Higher School Andra Đorđević (the first book) and Dragiša Mijušković (the other three). The last volume was published in 1896: I – *Introduction and General Part*, II – *Law of Things*, III – *Law of Obligation and Pledge*, IV – *Family and Inheritance Law*.

The scientific discussion connected to this translation gives a lot of data from that period. Fierce criticism came from the University of Zagreb, published in the distinguished legal magazine *Mjesečnik pravničkog društva u Zagrebu* (2–3/1897): Mijatović L., *A Supplement to Legal Terms within the Serbs and Croats, and the Evaluation of Serbian Translation of Pandects of Arndts*. A rapid response issued on more than one hundred pages: Mijušković, D.T. *Pandects of Arndts in the Serbian Translation and Their Critic – Dr Luka Mijatović, a Professor of Ecclesiastical Law in Zagreb*, Belgrade 1897.

Mijatović was a professor in Zagreb who got his doctorate in Vienna and taught in Zagreb Austrian civil law and Ecclesiastical Law. He was a Dean at Faculty of Law and later Rector of University of Zagreb. In the mentioned review, Mijatović gave numerous objections concerning Serbian translation of *Pandects*, but also paid most attention to differences between the Serbs and Croats in the field of legal terms (what he pointed out in the title of his article). At the very beginning of the text, and without first presenting the arguments, he reached his final judgement: “until now, we Croats, have translated better, especially when we compare Serbian translation to ours”. As an example of that he stated Baron’s and Serafini’s *Institutions of Roman Law* (translated by A.

²² L. Arndts, *Pandekte ili današnje rimsko pravo* [Pandects or Today’s Roman Law], I IV, Beograd 1890, 1479 (transl. A. Đorđević and D. T. Mijušković), K. Salkovski, *Institucije s istorijom Rimskog privatnog prava* [Institutions with the History of Roman Privae Law], Beograd 1894, 636 (transl. A. Đorđević i M. Đ. Milovanović), F. De Kulanž, *Država Staroga veka* [The Ancient State], Beograd 1895, 400 (transl. B. A. Prokić i Ž. M. Milosavljević), P. Vilems, *Rimsko javno pravo* [Roman Public Law], Beograd 1898, 701 (transl. Ž. M. Milosavljević), H. Dernburg, *Pandekte* [Pandects], vol. I, Zagreb 1900, 806 (transl. L. Kostić).

Trumbić and J. Smodlaka, respectively M. Šrepel). Mijatović doubted the value of legal terminology used by Serbian professors, and in twenty pages he wrote about “alphabetic register of errors in the translation” (p. 94). He cited a hundred German terms with Serbian translation, together with numerous exclamation and question marks by which Mijatović showed his disapproval of the given solutions. For him this translation is full of “neologisms, new words, and awkwardly translated words” (p. 92) and therefore the translators themselves “should be sorry for putting an effort in it” (p. 160). Mijatović also said that he was not sure if the authors were familiar with Bogišić’s contribution to legal terminology issues, and the achievements of the Croatian legal science, as well. According to him, they did not respect that knowledge, and worked “on their own” (p. 88). When it came to the point if the terminology from this period coincided with the Croatian, and could it be useful, Mijatović ascertained decisively: “I have to give a negative response to it” and thereof this translation “should be *a limine* rejected” (p. 92, 160).

The above conclusions were especially offensive for the main translator, professor Mijušković.²³ He found in them malicious thesis about spiritual dominance of Croats over the Serbs, and, according to him, this was more appropriate to supporters of Croat chauvinistic ideology of Starčević and Frank, and not to a university professor. Also, for a Catholic theologian *sacramentum veritatis* had to be sanctity (p. 5–6). Unfortunately, it was once again proved how the language dispute could be only a motive for pointing out allegedly deep civilization differences between these two ethnically similar nations.

Anyway, from one century historical distance, we have to well appreciate this translation, not only because of its volume, but also because of the important role of those project in Serbia at that time. Mijušković spoke thoroughly about this in his Preface, where he pointed out that Arndts in his *Pandects* exposed the law involved in the Austrian Civil Code, and, through its reception, in Serbian Code as well. He indicated that foreign manuals still had to be present in the Serbia for a long time, but with translating them they became available to a greater number of users. It was useful for all scientific fields, because the modern knowledge is more convenient for acquisition and later on for implementation in

²³ Andra Đorđević was forced to give up further translation, and teaching at High School, because he took an active part in politics, and became a minister. Dragiša Mijušković studied the history of law in Munich, Paris, Warsaw and Prague (in the class of a famous professor Zigelj) where he got a title of doctorate. At the Faculty of Law he became the first professor of History of Slavonic Law (1887–1903), and published in the field of medieval Serbian history, where one is especially prominent: “O sistemu Dušanovog zakonika” [About the System of Dušan’s Code], *Srpski pregled* 4, 5, 6 /1895. He also translated Salkovski’s *Institutions* (under the supervision of Andra Đorđević) and manual *Enciklopedija prava* [Encyclopedia of Law] by Pasquale del Giudice. Cfr. Lj. Kandić, J. Danilović, *Istorija Pravnog fakulteta*, 331–332.

everyday practice. In the field of law, for instance, he considered that the innovation was Austin's positive law philosophy (John Austin, *La philosophie du droit positif*, Paris, 1894). According to Mijušković, Russian, and especially Hungarian scientific editions also passed through the phase of planned translation of the most important scientific works, always under the supervision of the special department of their Academy of Sciences. He emphasized that it would be a good example for future Serbia. From that initial phase, it was easier to make people skillful in order to start creating original books in their own language. That higher level was reached easier if the appropriate scientific terminology was established by translating (p. IV–VI).

In his *Preface* Mijušković cited a dozen of his new words, modeled in accordance with Vuk's *Dictionary* (1852) or Daničić's *Dictionary* (*Rječnik iz književnih starina srpskih*, 1863). He himself said that those were only suggestions "whose existence life will decide" but many of them are not used today (*societas*: "ugovor skupštinstva", *hypotheca*: "podava", *legatum*: "narečenje", *emphyteusis*: "zirat" itd.). On the other hand, among the terms that he rejected as foreign (used by Demeter and his critic Mijatović), it is possible to notice some expressions that found their place in Serbian contemporary legal terminology (uknjižba, dospela menica, dostavnica, dražba, opoziv oporuka, ostavina, ostavinska rasprava, plenidba, počinitelj, podnesak, pravni lek, punomoć, zatezna kamata itd). Generally speaking, a contemporary reader can follow Mijušković's translation easily, because the language is contemporary, based on vernacular language tradition (like Vuk), along with making new legal expressions on the same basis (like Bogišić). The archaic, Church-Slavonic language did not find its place in that translation, because he managed to impose basic linguistic ideas of Vuk Karadžić. In some way, Mijušković's translation itself represents some kind of posthumous homage to that distinguished Serbian linguists.²⁴

Several decades after the appearance of Lešjanin's textbook, new original manuals of Serbian professors came to light: Gligorije (Giga) Geršić, *System of Roman Private Law – Institution* (1882)²⁵ and Živko

²⁴ Mijušković in his *Preface* (p. IV) emphasizes an important thing, that under his supervision Milovanović translated famous Ligenthal's *History of Roman Byzantine Law* (Zachariae von Ligenthal, *Geschichte des griechisch römischen Rechts*, Berlin 1877) and that the text was even ready for printing. Unfortunately, its further faith is not at all known. He also informs readers that in the field of History of Roman law it was proposed the work of Guido Padelletti (*Storia del Diritto Romano*, Roma 1878) to be translated, but from the German version, prepared and published by eminent Romanist Holzendorff (*Encyclopädie der Rechtswissenschaft* and *Rechts Lexicon*). However, this proposal was not accepted.

²⁵ Only the first book, that obtained Statutory law, was published. During twenty years of teaching at Higher School, he wrote texts from various fields of law, and from time to time he was engaged in politics. However, it remained opaque, why his textbook

Milosavljević *Roman Private Law* (1899, 1900).²⁶ They were forced under the legal rule promulgated in 1853 (renewed 1880) which obliged professors to prepare their lectures in print because “dictating” to students was strictly prohibited. Due to a small number of students, printing of textbooks was not profitable, so obviously this practice initially established itself as normal. In fact, during the first decade of the Higher School (1862–1872) about 300 students graduated from the Law School. For Serbia at the time, this was still a large number of lawyers, because it covered the territory of Belgrade Pashaluk slightly enlarged. It was not until the Congress of Berlin (1878) that Serbia expanded to some areas that belonged to the Serbian state corpus, centuries before the Ottoman occupation.

Geršić also published the *Encyclopedia of Law*, where he stated a modern attitude about anthropological foundation of the law, which was a big step forward in the Serbian juristic bibliography at the time.²⁷ Starting with the fact that the core of the legal system is in the biological and social nature of a human being, he considered that the global social order was conditioned by intellectual and cultural development of its very members.²⁸ Thereof, there are two types of facts that influence the legal system. Those are its real, “material roots” (which obtain social and biological reality), and there is an ideal, “psychological root”, which is based on a man as a conscious being. It explains why behaviour regulations can be found only with people. Since the man is a social being, in the Aristo-

remained unfinished. There he elaborated legal institutions modeled on *pandectist system*, and not on *tripartite system* represented in *Institutiones*, which was completely accepted in *Code Napoleon*.

²⁶ In the opening speech, that Milosavljević had at Higher School, at the occasion of taking over a department from his professor Geršić (1889), it could be seen that he was a supporter of Savigny’s teaching, although he was a French student. According to him, law is the “expression of people’s conscience” that during the course of time changed, “and not some constant and unchangeable system created once and *a priori* for all times and all nations”. Thereof, law transformed itself from religious and customary regulations to the so called “juristic law”. See: *Rimsko privatno pravo i njegov uticaj na evropsko zakonodavstvo i pravničko obrazovanje uopšte pristupno predavanje* [Roman Private Law and its Influence on the European Legislature and Legal Education in General – Ad mission Lecture], Beograd 1890, 25. Geršić taught other subjects apart from Roman law for two decades, and Milosavljević was the first professor who was chosen exclusively for Roman law and he would stay there for ten years. His early death prevented him from contributing more to Serbian romanistics. His textbook remained unfinished, and there is only the first book (Statutory and Family law) and the third (Inheritance law). V. Cvetković, 25, 105.

²⁷ G. Geršić, *Enciklopedija prava* (predgovor M. D. Simić) [Encyclopedia of Law (preface by M. D. Simić)], Niš 1995, I XI; Cfr. J. Hasanbegović, *O jednom antropološkom utemeljenju prava u našoj pravnoteorijskoj baštini – Gligorije Giga Geršić*, Naučno nasleđe [About One Anthropological Law Foundation in Our Legal and Theoretical legacy – Gligorije Giga Geršić], Beograd 1994, 112 118.

²⁸ G. Geršić, *Enciklopedija prava*, 52.

tle's meaning of that term (*zoon politikon*), where there is a community of people, necessarily, there is a need for some type of law (*Ubi societas, ibi ius*). And this is the primordial, ethnological and social root of law.²⁹ It influences shaping the legal system, and language, culture, art, economy, science and state, as well.³⁰ By this attitude for the first time in the Serbian legal thought, Lešjanin implemented the idea that we need sociological method for studying the law, promoted by Auguste Conte, a philosopher of positivistic orientation.³¹ In that way, Lešjanin corrected the German historical school concept in studying the phenomenon of law, and Roman law, as well. He pleaded that the subject of the legal science was exclusively the positive law, and not the one present in the human mind, like "ideal", and forever given. When he criticized the studying at Natural-law school, he quoted Jhering: "The legal system equal for all nations would be the same as general prescription for all illnesses. This is the everlasting search for the stone of wisdom, which was not sought by wise people, but by fools".³²

On the other hand, in the preface of his textbook he pointed out certain illogical issues in Savigny's theory. Considering the phenomenon of the Roman law medieval reception, Geršić reproached this school that it allowed one foreign (Roman) legal system to become the property of people whose spirit was not its origin, therefore it did not reflect the nature of that nation.³³ He did not accept the explanation that, during the time, Roman law "assimilated with the national character, that it became property of the people who received it". On the contrary, Geršić insisted that the implemented Roman law was "a foreigner" or "an intruder", and that people let it "come into their lives, and put them under its power". Finally, he concludes that Historical school "from its too subjective point of view", could not give a satisfying response, and that it was a puzzle unsolvable for the science even today.³⁴ But, this is not Geršić's criticism of the very Roman law, but of the methodological approach to its studying. How much he appreciated the legal inheritance of old Rome, showed the praise that he pointed out later, and it sounded so contemporary: "For sure, there is some big strength in that Roman law, it has to obtain some really universal legal elements, some omni applicable legal logic, when it apart from being strongly opposed, paved its way to the legal life of so many cultural nations until this century. No matter how Roman law was judged, no matter how little it was appreciated, not even the most fierce

²⁹ *Ibid.*, 28.

³⁰ *Ibid.*, 38.

³¹ D. Basta, *Pravo i sloboda* [Law and Liberty], Novi Sad 1994, 163-168.

³² G. Geršić, *Enciklopedija prava*, 58.

³³ G. Geršić, *Sistem Rimskoga privatnoga prava* [The System of Roman Private Law], Beograd 1882, VII.

³⁴ *Ibid.*, VIII.

of it's opponents cannot avoid admitting, that it has the richest history ever, that it was the only system that had such a strong influence beyond the borders of its nation, and according to this, Roman law is the unique phenomenon among all the legal systems. It would be interesting for any jurist to read it, to meet it, to find something instructive in it, to find out something peculiar and valuable, which is hidden in it".³⁵

CONCLUSION

Only upon the liberation from long Turkish occupation, Serbia could again turn towards its European roots, and especially towards its rich legal tradition. In the medieval period, Serbia was not only incorporated in it, but also contributed to the legal tradition by its legislature. Centuries-long Nemanjić's state, terminated by czar Dušan's Empire and his famous legal Code of 1349 and 1354, represented a part of rich Byzantine culture. Under the invasion of the Ottoman Empire, the proud representatives of the Serbian medieval nobility were executed, or violently turned into Islam, and the rest formed the crowd of refugees that were escaped across the rivers Sava and Danube. Successful uprisings at the beginning of the 19th century resulted in re-establishing the Serbian state, independent Church, and Serbs started to re-build own educational and cultural institutions. Thus, Serbia joined again the Christian culture circle. Its efforts to achieve state independency included the process of adopting European legal standards and acquiring its normative solutions.

However, the *normative* reception could have been obtained in Serbia only upon reaching the certain level of general legal culture. Thereof, the *doctrinal* reception which included establishing certain educational institutions, language standardization, and, especially, the existence of the corresponding legal terminology, had to come first. The greatest obstacle to this process was illiteracy. It marked common people, but also their leaders, and the Prince himself. The personnel chosen for positions in the state institutions, that is in the newly-established administrative and judicial bodies, were educated abroad and included learned Serbs from Austria. Legal education at the Higher School (established in 1808) and Lyceum (1838), was not sufficient, although it was gradually developed into the "Legal department", that would grow into the Faculty of Law. That evolution path would be finished by establishing the University of Belgrade out of these high-educational institutions in 1905.

In that process of establishing cultural and educational institutions, and legal institutions, as well, during the 19th century the decisive influence was reserved for the West-European culture, and not for the Ortho-

³⁵ *Ibid.*, VIII IX.

dox East. Apart from strong spiritual and religious connection between the Serbian and Russian people, Serbian intellectuals obtained not only high education, but they also brought liberal and democratic ideas in the Serbian Principality by studying in the West. Those ideas overflowed Europe in the 19th century. This was especially noticeable in the legal science, which received philosophical concepts of Hegel, positivism of Auguste Comte, thoughts of Natural law school and of German historical school, which Serbian intellectuals tried to implement together with the ideas of Pan Slavism and enlightenment movement of “small nations’ awakening”. The wide range of these different ideas is strongly manifested through the reception of Roman legal tradition. It firstly took the form of *doctrinal* reception (through establishing the separate Law Department within the Lyceum, publishing original textbooks, translating foreign manuals, forming legal terminology, etc.), and only later in the *normative* reception (by issuing *Serbian Civil Code* in 1844). The pro-Western spirit has caused Serbia’s most important legal code to be influenced by the *Austrian Civil Code*. However, the other legal fields were also standardized according to foreign models: *Criminal Code* (1860) according to the Prussian Code, *Commercial Code* (1860) according to the French Code, and *The Law on Criminal Court Procedure* (1865) according to the Austrian model.

Economic strength and capable intellectual elite were the decisive factor in precious exchange of different spiritual values. It was particularly manifested in the dynamic development of legal practice, in the existing normative documents, but also in the state institutions functioning, introducing political democracy and rule of law. Post-Ottoman Serbia had to pass its way of emancipation again throughout the 19th century, but even today there are numerous new challenges. Lessons from the past could be a valuable road– mark for Serbia how to approach European integrations, having in mind importance of the crucial intellectual, and particularly governing elite role.