

Studien zur  
europäischen Rechtsgeschichte

Veröffentlichungen des  
Max-Planck-Instituts  
für europäische Rechtsgeschichte  
Frankfurt am Main

Band 248

Rechtskulturen des  
modernen Osteuropa.  
Traditionen und Transfers  
Herausgegeben von  
Zoran Pokrovac  
Band 5



Vittorio Klostermann  
Frankfurt am Main  
2010

## Rechtswissenschaft in Osteuropa

Studien zum 19. und frühen  
20. Jahrhundert

Herausgegeben von Zoran Pokrovac



Vittorio Klostermann  
Frankfurt am Main  
2010



scholars studied diverse fields of law, carefully introducing theories and views that had matured in other European countries. By doing so they provided for the differentiation of a legal sphere with a progressive complexity in its different parts, and especially in scientific research.

Independent Poland in the period of 1918–1939 was represented by legal scholars, who saw themselves in the tradition of 19<sup>th</sup> century science: Fryderyk Zoll, Karol Lutostański, Ignacy Koschembar-Łyskowski, Roman Longchamps de Berier, Jan Wasilkowski and Maurycy Allerhand – in the fields of civil and commercial law; and also Jan Jakub Litauer, Franciszek Ksawery Fierich and Kamil Stefko – in the field of civil procedure. Besides these, Edmund Krzymuski, Aleksander Mogilnicki and Stanisław Emil Rapaport represent the field of criminal suit as well as a group of creators of the most modern contemporary criminal code among whom we find Juliusz Makarewicz and Waclaw Makowski. All of them were educated at the turn of the century and regarded themselves as beneficiaries of the heritage of their 19<sup>th</sup> century ancestry. During a period of twenty years of Polish independence after World War I, when nationalism seemed to be further on the way towards being a strong motivating factor, they were aiming to catch up with modernisation by working on a cohesive juridical system, which should be based on legal ideas rooted in the previous century. It seems that the tension between “Western” influences of modernisation and “Polish” national identity predominantly continued to define legal science in Poland.

Arkadiusz Bereza, Grzegorz Smyk, Wiesław P. Tekely (Lublin)

347.01(497.16)(091)  
973 Bogišić, B.

## West to East – East to West: Baltazar Bogišić and the English School of Historical and Comparative Jurisprudence (H. S. Maine, F. Pollock, P. Vinogradoff)

Introduction – II. State of Research and Literature – III. Circulation of Ideas in 19<sup>th</sup> century Europe: National and Comparative Studies and Slavonic Scientists – IV. Baltazar Bogišić: Research and Codification Activities – V. Baltazar Bogišić and Henry S. Maine – 1. Henry S. Maine: Research and Codification Activities – 2. Baltazar Bogišić and Henry S. Maine: Correspondence and Influences – VI. Baltazar Bogišić and Frederick Pollock – 1. Frederick Pollock: Research and Journalistic Activities – 2. Baltazar Bogišić and Frederick Pollock: Correspondence and Reports in *The Law Quarterly Review* – VII. Baltazar Bogišić and Paul G. Vinogradoff – 1. Paul G. Vinogradoff: Career and Research Activities – 2. Baltazar Bogišić and Paul G. Vinogradoff: Reception and Criticism – VIII. Conclusion

### I Introduction

The study of transfers of modern ideas and institutions on European soil usually focuses on a matrix with a “Western” centre which is relatively clearly differentiated and a receptive, primarily “Eastern”, periphery. The centre appears as the generator of certain processes whilst the periphery is marked by the fundamental and practically sole issue of the method of taking over transferred ideas and institutions.<sup>1</sup> Although this scheme is not a mere reflection of either the West’s political “hegemony” or its “hegemony” in the field of ideas, and is indeed based on historical realities, the underlying story is nevertheless more complex.

1 On the relationship between the centre and periphery in the context of a transfer of institutions into the Croatian legal system see Dalibor Čepulo, Building of the Modern Legal System in Croatia 1848–1918 in the Centre-Periphery Perspective, in: Tomasz Giaro (ed.), *Modernisierung durch Transfer im 19. und frühen 20. Jahrhundert*, Frankfurt a. M. 2006, pp. 47–91, here pp. 47–48, 88–91. I would like to thank Ms. Ana Juretić for her thorough work on the translation of this text into English.

The research and scholarly communication of Baltazar Bogišić (1834–1908) is an interesting fragment of the history of transfers of ideas which, owing to Bogišić's double influence, renders the picture more complex. Baltazar Bogišić – a native of the Dubrovnik region which was part of the then Austrian province of Dalmatia, and which today forms part of the Republic of Croatia – grew up and was educated within the fold of a “Western” tradition but associated his activities with the “East”. Bogišić took the fundamental ideas of the German Historical School of Law as the starting point for his studies which he then extended to South Slavonic regions and Russia. Bogišić's studies focused on customary law of the wider South Slavonic area and as professor at the University of Odessa, as the author of the *General Property Code* for the Orthodox Principality of Montenegro, he worked as a Russian government official, mainly in Paris. The results of Bogišić's studies and codification work on the South Slavonic territory continually attracted considerable attention in the East and also – in a different manner – in the West. Bogišić's influence depended on both cultural and political orientations and features of certain settings and persons; his influence also covers the diverse fields of his activities, ranging from legislation, legal history, history, sociology, to ethnology and linguistics. Nevertheless, Bogišić's views were always held in esteem, frequently also uncritically accepted, and are mirrored in his exceptionally ramified correspondence with the most prominent personalities in the fields of science and culture of his day. The width of Bogišić's interests and his multilingualism – besides his mother tongue he fluently spoke Italian, German, French, Russian and read English – stimulated and facilitated his widespread communication activities.

Bogišić's complex scholarly habit, his various and fruitful activities, a multitude of contacts with some of the most notable personalities of his day, and the detailed and systematised materials he left – in particular his voluminous correspondence – are a permanent incentive to study this individual, exceptional in every respect, who joined the “centre” and “periphery” in both directions.

This article explores the communication, at first sight unexpected, between Bogišić and those three English lawyers who succeeded one another as professors on the Chair of Historical and Comparative Jurisprudence at Corpus Christi College, University of Oxford, from 1869 to 1925. All three were acquainted with and used the results of Bogišić's studies, while Bogišić stayed in touch with all three of them. Bogišić briefly kept up a correspondence with Henry S. Maine, developed a long friendship with Frederick Pollock, and made Paul Vinogradoff's acquaintance.

These were intriguing relationships, not only because of the cultural and linguistic distance between the participants but also for their opting for

relatively divergent directions of jurisprudential studies and types of legal culture, with the Russian Paul Vinogradoff (Pavel Gavrilovich Vinogradov) standing somewhat apart. This relationship appears interesting not least because it sheds a light on the works of all four scholars, each of whom contributed in their own way to the development of the disciplines of legal history and comparative law in Europe; it also highlights the ways in which they influenced one another. They belonged to the wider strands of thought which played a major role in the development of social sciences during the 19<sup>th</sup> and 20<sup>th</sup> centuries. The analysis of this relationship will give insights as to the development and transfers of ideas during the formative period of modern social sciences. More specifically, the communication between Bogišić and the lawyers at Oxford, the famous centre for Slavonic studies at that time, will be viewed in the context of wider English-South Slavonic cultural relations.<sup>2</sup>

To elucidate a number of aspects of these relationships, at first the state of research on Bogišić will be portrayed. Then, the circulation of ideas in the period during which Bogišić and the Oxford lawyers maintained contact, giving a background to their relationships will be briefly outlined before Baltazar Bogišić will be presented. Afterwards, in separate chapters, each devoted to one of the Oxford lawyers, research positions of each of them and their respective communication with Bogišić will be briefly depicted, diagnosing Bogišić's influence. Maine and Pollock's letters and other written communication to Bogišić as well as fragments of published writings on Bogišić and research by all three lawyers will serve to illustrate the relationship between Bogišić and the three lawyers. Bogišić's acquaintance with the works of the three lawyers will then be analysed. The article will place a far stronger accent on Bogišić's reception by scholars of the “centre”. One should note the multilayered and interesting but relatively modest contents of source materials.

2 The emphasis on “lawyers at Oxford” is intentional. Precisely at the time of Henry S. Maine's arrival at Oxford, this University, the first in England, started holding lectures on Slavonic studies and later became the traditional and important centre for Slavonic studies. See Vladimir Filipović, *Englesko-hrvatske književne veze* [English-Croatian Literary Ties], Zagreb 1972, pp. 172–192. It is entirely possible that this atmosphere had an effect on Bogišić's reception. Indeed, a whole series of coincidences points to the possibility of the environment exerting such an influence on H. S. Maine (see here, n. 46).

Information on the important English lawyers Henry S. Maine, Frederick Pollock and Paul G. Vinogradoff may be found in numerous books, mostly easily available to the contemporary reader as well as in their works, frequently also published in contemporary editions. It should be mentioned that, with the exception of the works in Croatian listed later in the article, the relevant bibliography indicates that Baltazar Bogišić's relationship with all three Oxford lawyers has not yet been explored.

More information will be given on the works and materials relating to Baltazar Bogišić since he is not nearly as well-known a personality on the contemporary European scientific scene as the aforementioned three are.

There are numerous papers on Baltazar Bogišić, published in various European languages. Among these prevail, understandably, works published in South Slavonic countries, i.e., countries that emerged after the break-up of Yugoslavia, especially Croatia, Montenegro and Serbia. Nonetheless, research on Bogišić was carried out both during his lifetime and afterwards in various European countries and the United States.<sup>3</sup>

An extensive monograph by Werner G. Zimmermann entitled *Valtazar Bogišić 1834-1908: Ein Beitrag zur Südslavischen Geistes und Rechtsgeschichte im 19. Jahrhundert* (1962)<sup>4</sup> provides a synthetic overview of Bogišić's work. An exhaustive treatment of Bogišić's activities can be found in comprehensive biographies of Bogišić, accompanied by critical bibliographies and published in proceedings, biographical lexicons and encyclopaedias both on the territory of former Yugoslavia and abroad. These include material that relates to Bogišić's anniversaries and contains more extensive obituaries.<sup>5</sup>

3 See a bibliography of works by Baltazar Bogišić and literature on him in: Vinko Foretić, Bogišić, Baltazar, in: *Hrvatski biografski leksikon I* [Croatian Biographical Lexicon], Zagreb 1984, pp. 77-80, here pp. 79-80, Lujo Bakotić, Bibliografija djela Dra Valtazara Bogišića [Bibliography of Works by Dr. Valtazar Bogišić], in: *Spomenica Dra Valtazara Bogišića o tridesetogodišnjici njegove smrti* [Memorial on the Thirty Year of Death of Dr. Valtazar Bogišić], Dubrovnik 1938, pp. 21-32.

4 Werner G. Zimmermann, *Valtazar Bogišić 1834-1909: Ein Beitrag zur Südslavischen Geistes- und Rechtsgeschichte im 19. Jahrhundert*, Wiesbaden 1962.

5 Here we single out: Foretić, Bogišić (n. 3); Surja Pupovac, *Valtazar Bogišić: život i djelo* [Valtazar Bogišić: Life and Work], Podgorica 2004; Stane Đivanović, *Baltazar Bogišić 1834-1908*, Cavtat 1984; Karel Kadlec, Valtazar Bogišić, in: *Časopis Musea Království Českého* [Journal of the Czech Royal Museum] (Prag) 77 (1903), pp. 127-145, 291-306; Ivan Strohal, Dr. Valtazar Bogišić, in: *Ljetopis Jugoslavenske akademije znanosti i umjetnosti*, [Annals of the Yugoslav Academy of Sciences and Arts] 23 (1908), pp. 80-140; Ivan

Many works treat different aspects of Bogišić's activities, most of which relate to the Montenegrin *Opšti imovinski zakonik* (General Property Code) and to a collection of legal customs.<sup>6</sup>

Another very interesting research topic is Bogišić's exceptionally voluminous correspondence which may be viewed either as an exchange of ideas between prominent individuals or as part of a wider cultural transfer. Numerous monographs and articles cover Bogišić's communication with important personalities from South Slavonic, Slavonic and other European countries.<sup>7</sup> Several works explore a modest English "fragment" of Bogišić's

Strohal, Valtazar Bogišić, in: *Mjesečnik Pravnika društva u Zagrebu*, [Monthly of the Law Society of Zagreb] 34 (1908), pp. 841-870; Vatroslav Jagić, Dr. Balthasar Bogišić, in: *Archiv für slavische Philologie*, 30 (1909), pp. 314-315; Zoran Pokrovac, "Bogišić, Baltazar," in: *Juristen: ein biographisches Lexikon; von der Antike bis zum 20. Jahrhundert*, ed. by Michael Stolleis, München, 2001.

6 E.g., Niko S. Martinović, *Valtazar Bogišić, I, Istorija kodifikacije crnogorskog imovinskog prava* [Valtazar Bogišić, Vol. I, History of Codification of Montenegrin Property Law], Cetinje 1958; Niko S. Martinović, Valtazar Bogišić – Upitnik ankete za opisivanje pravnih običaja Crnogoraca [Valtazar Bogišić – Questionnaire of the Survey for Describing Legal Customs of Montenegrins], in:  *Glasnik Etnografskog muzeja na Cetinju* [Journal of the Ethnographic Museum in Cetinje], 4 (1964), pp. 9-64; Tomica Nikčević, O naučnom metodi V. Bogišića i njegovoj raspravi "Metod i sistem kodifikacije imovinskog prava u Crnoj Gori" [On the Scientific Method of V. Bogišić and his Written Discourse "Method and System of Codification of Property Law in Montenegro"], in: Valtazar Bogišić, *Metod i sistem kodifikacije imovinskog prava u Crnoj Gori* [Method and System of Codification of the Property Law in Montenegro], Beograd 1967, 1-31; Hodimir Širotković, Bogišićevi pravni prinosi [Bogišić's Legal Contributions], in: *Dubrovnik* 6 (1995), pp. 139-144. See also the selective bibliography of works on the General Property Code in the Bogišić archives in Cavtat in Martinović, Valtazar Bogišić (n. 6), pp. 278-294 and the corresponding archive materials in *Zbirka Baltazara Bogišića* [The Baltazar Bogišić Collection] in Cavtat under the number 386 E I 1/7. A rich material from the international conference on Baltazar Bogišić at Zagreb and Cavtat in 2008 will be published in *Baltazar Bogišić i kultura sjećanja* [Baltazar Bogišić and Memory Culture], Zagreb 2009 (in print).

7 Viktor Novak, *Valtazar Bogišić i Franjo Rački. Prepiska (1866-1893)* [Valtazar Bogišić and Franjo Rački. Correspondence (1866-1893)], Beograd 1960; J. Sližiński, Veze Valtazara Bogišića s Poljacima [Links between Baltazar Bogišić and Poles], in: *Anali Historijskog instituta JAZU u Dubrovniku* [Annals of the Historical Institute of the Yugoslav Academy of Sciences and Arts in Dubrovnik] 6-7 (1959), 337-347; Ivo Perić, Iz prepiske Božidara Petranovića s Baltazarom Bogišićem [From Božidar Petranović's Correspondence with Baltazar Bogišić], in: *Zadarska revija* [Zadar's Review] 11 (1962), pp. 141-147; Ivo Mardešić, Bogišićeva korespondencija s W. R. Morfillom [Bogišić's Correspondence with W. R. Morfill], in: *Zadarska revija*, [Zadar's Review] 23 (1974), pp. 282-285; D. Pejović, Iz prepiske V. Bogišića u pripremi drugog

correspondence. The author's article *Baltazar Bogišić i engleska škola povijesne i poredbene jurisprudencije* (H. S. Maine, F. Pollock, P. Vinogradoff) (1995) [Baltazar Bogišić and the English School of Historical and Comparative Jurisprudence (H. S. Maine, F. Pollock, P. Vinogradoff)],<sup>8</sup> parts of which have also been used in this amended and revised article, refers to Bogišić's contacts with the English scholars. In 2001 the author edited copies of letters of Henry S. Maine and Frederick Pollock to Bogišić, published in two articles in cultural journals in Dubrovnik.<sup>9</sup> Bogišić's English "fragment" also includes letters of the English Slavonic scholar and man of letters, William S. Morfill, to Bogišić which were also published in one Croatian journal.<sup>10</sup>

This research is based on both archival and published material. The reconstruction of Bogišić's studies and codification work has been eased by his "Autobiography".<sup>11</sup> Also, numerous writings of him are published in several languages in various editions as well as works of his contemporaries who circulated Bogišić's results, translated into foreign languages.<sup>12</sup> The initial and basic materials for this research consist of letters of Henry S. Maine

izdanja Opšteg imovinskog zakonika [From the Correspondence of V. Bogišić during Preparation of the Second Edition of the General Property Code], in: *Istorijski zapisi* [Historical Scripts] 13 (1960), pp. 14–165.

- 8 Dalibor Čepulo, *Baltazar Bogišić i engleska škola povijesne i poredbene jurisprudencije* (H. S. Maine, F. Pollock, P. Vinogradoff) [Baltazar Bogišić and the English School of Historical and Comparative Jurisprudence (H. S. Maine, F. Pollock, P. Vinogradoff)], in: *Zbornik Pravnog fakulteta u Zagrebu* [Collected Papers of Zagreb Law Faculty] 45 (1995), pp. 317–348.
- 9 Dalibor Čepulo, *Pisma Sir Henryja S. Mainea i Sir Fredericka Pollocka Baltazaru Bogišiću* [Letters of Sir Henry S. Maine and Sir Frederick Pollock to Baltazar Bogišić], in: *Dubrovnik, Nova serija* [Dubrovnik, New series] 12 (2001), pp. 161–174; Dalibor Čepulo, *Kratka pisma Sir Henryja S. Mainea i Sir Fredericka Pollocka Baltazaru Bogišiću* [Short Letters of Sir Henry S. Maine and Sir Frederick Pollock to Baltazar Bogišić], in: *Dubrovački horizonti* [Dubrovnik's Horizons] 32 (2001), pp. 35–39.
- 10 Mardešić, *Bogišićeva korespondencija* (n. 7).
- 11 Bogišić's autobiography was published in the yearbook *Dubrovnik* in 1900, 1901 and 1902, while in 1938 it was published in integral form. Dr. Valtazar Bogišić, *Autobiografija* [Dr. Valtazar Bogišić, Autobiography] (Reprinted from the calendar "Dubrovnik" for the years 1900, 1901, 1902), in: *Spomenica Dra Valtazara Bogišića o tridesetogodišnjici njegove smrti* [Memorial to Valtazar Bogišić], *Dubrovnik* 1938, pp. 57–134. The first two concepts for the autobiography may be found in the mentioned *Spomenica* from p. 35 to p. 55.
- 12 See Bogišić's bibliography in Bakotić, *Bibliografija* [Bibliography] (n. 3) and Foretić, *Bogišić* (n. 3), and in addition to this we single out the recent publication *Bogišić, Valtazar: Izabrana djela, I-IV*, [Bogišić, Valtazar: Selected Works] ed. by Branko Pavičević et al., Podgorica 2004. Bogišić's writings form the basis of this study and are listed in notes below.

and Frederick Pollock to Baltazar Bogišić which were presented to the public in the two aforementioned papers. These letters form part of Bogišić's extant correspondence of over 10000 letters with 1481 persons and represent just a small portion of the rich *Baltazar Bogišić Collection* in Cavtat. This institution is an almost inexhaustible source for carrying out research on Bogišić and his contemporaries with whom he maintained contact.<sup>13</sup>

The second type of materials relies on scientific and journalistic works by Maine, Pollock and Vinogradoff which disclose their authors' acceptance of Bogišić's studies. A considerable amount of these materials is preserved in the *Baltazar Bogišić Collection* in Cavtat.

What was Bogišić's relationship with each of the three lawyers? Bogišić's library in Cavtat and in his works were analysed as to how frequently references were made to the Oxford lawyers and what was their possible influence on Bogišić. An indirect search was carried out in Bogišić's letters to Maine and Pollock and Paul Vinogradoff's correspondence. It seems, however, that Maine and Pollock did not keep any letters from Bogišić, while Bogišić, in all likelihood, never kept up a correspondence with Vinogradoff.<sup>14</sup> Although Bogišić's letters to Maine and Pollock would considerably supplement this analysis, the fact that their recipients most probably did not keep them is an indication in itself.

### III *The Circulation of Ideas in 19<sup>th</sup> century Europe: National and Comparative Studies and Slavonic Scholars*

Bogišić and the three Oxford scholars were active at a time which was a turning point in the development of modern social sciences; this also partly marked their communication. One aspect of these developments was the emergence of two relatively opposing tendencies in legal science: the maturing

- 13 The *Baltazar Bogišić Collection* in Cavtat was founded by his sister Marija Bogišić-Pohl in 1909. The collection consists of a museum housing various collections, a library holding 15000 books and brochures, 200 magazines, 164 manuscripts and 165 maps, and a rich archive part of which contains the already mentioned correspondence of Bogišić. Here the author would like to thank Ms. Stana Đivanović, the long-time manager of the Collection, for her unfailing support for this research on Bogišić's heritage.
- 14 As early as 1994 R. J. Crampton, archivist at Oxford's *St. Edmund Hall College*, perused at my request Maine, Pollock and Vinogradoff's correspondence in the *Bodleian Library* in Oxford but found no letters from Bogišić there. Neither did Christine Butler, the archivist at *Corpus Christi College*, find them at that college. I would like to thank both, especially R. J. Crampton, for their kind assistance.

of the German Historical School of Law and reflections of the comparative method in legal studies.

The basic tenets of the German Historical School of Law<sup>15</sup> were definitely formulated in 1814 when the polemics on the need for and possibilities of codification of the German law reached its culmination. Friedrich Carl von Savigny (1781–1854) and his disciples contrasted the organic and evolutionary approach with the abstractions and universality of the theories of natural law and won recognition for the study of national history in the context of the search for traditional values. This school was grounded in the tenets on the unique *Volksgeist* as the basis for the national law, and on the three-stage development of law with the scientifically treated codification as its final stage. These tenets brought to the forefront the need to study national legal history which until then had been neglected. Thus, a sketch of the three-stage development of law established a framework for legislative activities. On the other hand, the study of the *Volksgeist* reduced the importance of comparative studies, whilst putting an emphasis on the traditional popular law hampered by efforts of modernisation in legislation.

The tenets of the German Historical School of Law provided a sound basis for intellectual offshoots of Slavonic national romanticist movements. These tenets were mostly also accepted by scholars of Slavonic legal history. These studies, largely carried out in a Slavophile spirit, thrived from the first quarter of the 19<sup>th</sup> century.<sup>16</sup> The emphasis on the national content of law and culture, which had to be reconstructed through the study of history, provided the ground work for ideas for the romantically inclined intellectual elite of Slavonic nations. These nations were mostly going through the process of constructing their modern cultural and political identities; its missing parts were to be found by studying history. This knowledge, acquired through the study of history, was meant to be useable in the building of contemporary institutions in a national spirit. Organic and evolutionist theories, on the other hand, represented a methodological framework for carrying out studies and legislative activities.

15 On Friedrich C. von Savigny's Historical School of Law see, for example, J. Constantinesco, *Les débuts du droit comparé en Allemagne*, in: *Miscellanea W. J. Ganshof van der Meersch, Tome II*, Bruxelles-Paris 1972, pp. 740–744; Julius Stone, *Social Dimensions of Law and Justice*, Stanford 1966, pp. 86–111; F. Taranovski, *Uvod u istoriju slovenskih prava* [Introduction to the History of Slavonic Laws], Beograd 1922, pp. 18–31.

16 On the beginnings, the directions of development, but also on the reasons for the decline of the Slavophile influence in Bohemia, Poland and Russia see Taranovski, *Uvod* (n. 15), pp. 159–170 ff.

The reconstruction of a particular Slavonic legal tradition which would have been comparable with the Germanic and German law as an important determinant of the German cultural and political tradition was especially important. The direction of studies undertaken by a considerable number of Slavonic scholars was characterised by the conviction that at some time in the past some special and developed Slavonic law must have existed. That old Slavonic law presumably became neglected and disappeared primarily owing to a German political and cultural domination. This is why the task of the Slavonic cultural elite was to search the present for the surviving elements of the national tradition and to reconstruct these contents within their historical context. The said interest among some members of these elite was ultimately focused on the affirmation of more narrow national identities as part of the wider Slavonic entity. However, a considerable number of scholars placed the emphasis on a unique Slavonic law and Slavonic identity. The latter line of thought and course of action, called Slavophile, received support from the Russian government. It approached the issue from the perspective of a political gain – as the leader and patron of Slavonic nations through which it would break out of isolation and realise its political interests in a wider area. With this goal in mind, Russia counted on the Slavonic nations which had been under the yoke of the Austro-Hungarian and Ottoman Empires, i.e., on the Orthodox states of Bulgaria, Serbia and Montenegro now liberated from Ottoman rule. This policy saw Odessa as the centre for the Balkan countries. In this multicultural city with a strong Jewish influence students from Balkan countries were to be educated in the Slavophile spirit. Books, financial support and other forms of assistance for cultural activities were provided and movements against the Ottoman rule supported.<sup>17</sup>

The Russian government strove to inaugurate the Slavophile movement in Russia by adopting the University Regulation of 1863 which, among other things, provided for setting up Slavonic legal history studies at Russian universities. In this context the Chair of Slavonic Legal History was established at the University of Odessa and Baltazar Bogišić was the first professor appointed in 1869. However, owing to the resistance put up by the liberally oriented Russian scholars, these efforts of the Russian government did not yield any lasting results. Although the Russian liberal intelligentsia recognized the need for the study of certain Slavonic national histories, its members were unfavourably disposed to Slavophile ideas. This included the idea of organis-

17 On Slavophiles (especially Russian) and their relationship with the Balkans, on foreign policy correlations of this relationship and Russian interests as well as on the importance of Odessa as a Slavophile centre see Martinović, Baltazar Bogišić (n. 6.), pp. 11–24 ff.

ing studies and lectures on the history of the Slavonic law as a whole. Partly as a consequence of their resistance, the chairs of Slavonic legal history were dissolved and annexed to the chairs of Russian legal history, following the University Regulation of 1884. The only exceptions were the chair in Odessa – which existed only provisionally since Baltazar Bogišić formally held the post there until his retirement – and the chair in Warsaw, established in 1873.<sup>18</sup> However, chairs of Slavonic legal history were established and became operational in the 19<sup>th</sup> and even 20<sup>th</sup> centuries at several faculties and law schools in other Slavonic centres: 1877 in Belgrade, 1899 in Prague (Karl Kadlec), 1920 in Ljubljana and 1922 in Subotica.<sup>19</sup> Although in 1868 it was planned that *History of Slavonic Law* would become an “ancillary” subject at the Faculty of Law in Zagreb, this idea never became a reality because of the existence of another, obligatory, subject named *General Legal History*.<sup>20</sup>

Yet, from the beginning of the 19<sup>th</sup> century the comparative directions of study started to develop alongside Savigny’s school. Soon the comparative method also found its place in legal studies in which it was regarded as unique and was applied to both contemporary and past legal systems. These were the beginnings of the discipline of comparative law which gradually split up into two fields: the disciplines of comparative law and comparative legal history. In France the emergence and development of these disciplines was followed by a developed institutionalised scientific and educational basis at universities and an emphasis placed on a comparative level of study. A similar orientation did not appear at German universities but the activities of a significant number of representatives of the comparative strand, who were mostly focused on the study of history, compensated the absence of the institutional grounding (e.g., Eduard Gans, Josef Kohler and Albert Post).<sup>21</sup>

There were reflections of these movements in England as well although – owing to the specificity of the English legal environment – they manifested

18 Taranovski, Uvod (n. 15), pp. 170–172, 182–190.

19 Taranovski, Uvod (n. 15), pp. 170–172, 182–190.

20 Dalibor Čepulo, Legal Education in Croatia from Medieval Times to 1918: Institutions, Courses of Study and Transfers, in: *Juristenausbildung in Osteuropa bis zum Ersten Weltkrieg*, hg. von Zoran Pokrovac, Frankfurt a.M. 2007, pp. 81–151, here pp. 120–122.

21 On the beginnings of modern comparative law studies in social disciplines in France and Germany, and especially on their legal historical and comparative historical dimension see Constantinesco, *Les débuts* (n. 15), pp. 737–764; Harold C. Gutteridge, *Comparative Law*, Cambridge 1949, pp. 1–22, 27–29; Konrad Zweigert and Hein Kötz, *Introduction to Comparative Law*, Vol. I. *The Framework*, Oxford 1987 (translated from German), pp. 8–10, 48–58; Konrad Zweigert and Kurt Siehr, Ihering’s Influence on the Development of Comparative Legal Method, in: *The American Journal of Comparative Law*, 19 (1971), pp. 215–231.

themselves in a particular way. Henry S. Maine with his work *Ancient Law* (1861)<sup>22</sup> heralded the school of historical and comparative jurisprudence. It was given a solid institutional basis through Maine’s appointment to the Chair of the same name established in 1869 at Corpus Christi College at the University of Oxford.<sup>23</sup> This Chair of Historical and Comparative Jurisprudence represented the core of development of comparative legal history and comparative law in England and Maine was given the opportunity to further formulate his tenets. In 1883 Maine was succeeded by Frederick Pollock, who in turn was replaced by Paul G. Vinogradoff in 1903 who then held the chair until his death in 1925. On account of their strong personalities as scholars and building on the basis provided by Maine these Oxford lawyers made significant contributions. On account of the significance of their work these three Oxford lawyers occupy an important place in the development of the disciplines of comparative law, legal history and sociology of law, reaching far beyond the boundaries of England.

#### IV Baltazar Bogišić: Research and Codification Work

Baltazar (Baldo, Valtazar) Bogišić<sup>24</sup> was born on 20 December, 1834 in Cavtat, a town near Dubrovnik, where he completed his elementary educa-

22 Henry S. Maine, *Ancient Law, its connection with the early history of society and its relation to modern ideas*, London 1861.

23 The term “school” is used tentatively here, in the sense of a relatively consistent set of theoretical and methodological attitudes propounded and applied in research work by a group of scholars during a relatively longer period of time and with their resulting influence on the state and development of corresponding disciplines. I believe that the work of these three Oxford professors on historical and comparative jurisprudence may in this sense be called a “school”. It should be noted that at first J. Stone, too, singled out Maine’s strand as a special “school” that existed parallelly to Savigny’s. However, he later altered his stance and treated both “schools” as separate strands of a unique sociological “historical school”. Nonetheless, he continued to occasionally employ the term “school” for both Savigny’s and Maine’s strand. See Stone, *Social Dimensions* (n. 15), p. 7, n. 2; Julius Stone, *Law and the Social Sciences in the Second Half Century*, Minneapolis 1966, pp. 4, 8. Similarly, W. Friedmann also singled out Savigny’s Historical School and the comparative and ethnological strand of legal interpretation as separate “movements” of “historical jurisprudence”. Even so, this difference is not of crucial importance for the basic purpose of this paper. See Wolfgang Friedmann, *Legal Theory*, London 1960, pp. 158–172.

24 The very question concerning the real name and the origin of Baltazar Bogišić sparks off controversies, albeit to a certain extent imposed, regarding his identity. Although, owing to its irrelevance to this article this issue will not be dealt with more specifically, the reader’s attention should nevertheless be drawn to it. – According to the latest research carried out by Niko Kapetanić and Nenad Vekarić of the Institute of Historical Sciences of the Croatian



tion. In 1859 he obtained his secondary school diploma in Venice.<sup>25</sup> In the same year he began his law studies in Vienna but later on studied in Berlin and

Academy of Sciences and Arts in Dubrovnik, Bogišić was born into a family of the Roman Catholic tradition descending from the Dubrovnik region and was baptised in a Roman Catholic Church in Cavtat. At his christening he was given three names, namely Baldo, Antun and Petar. Baldo, derived from Baltazar, is a frequent and traditional name in the Dubrovnik region. Bogišić started using the name Baltazar when he left Dubrovnik. The Eastern Orthodox form Valtazar is almost certainly the result of his numerous contacts with individuals and peoples of the Orthodox religion but also of his existential links with the Orthodox world. Thus Bogišić appears under the names Baldo, Baltazar and Valtazar. Viewed realistically, the issue concerning Bogišić's identity is complex and cannot be unambiguously pinpointed. He grew up and received his education on the territory and within the cultural sphere of Western tradition, both of which formed an integral part of the shaping of the Croatian national identity during the 19th century and he might, therefore, be regarded as a Croatian lawyer. On the other hand, Bogišić himself did not have a subjective feeling of national affiliation and was, alongside his regional identity, most probably closest to some kind of an undefined South Slavonic and maybe even a wider Slavonic affiliation. In the spirit of one perspective of understanding his epoch, he regarded Croats and Serbs as a "binominal tribe", i.e., "a single branch of our large ethnic family"; Bogišić, *Autobiografija* (n. 11), p. 106. However, Bogišić, like one faction of Dubrovnik's political elite, stressed political "Serbianism" as one aspect of the Pan-Slavonic identification and opposition to Austria at a time when the small Republic of Ragusa had irreversibly disappeared. This, in fact, is understandable if one takes into account the reached stage of formation and recognisability of the Serbian national identity and the proclaimed Serbian state which had the ambition to frame the regional policy with the assistance of Russia with which Bogišić had kept existential ties. Because of his work on the Montenegrin Code Bogišić was sometimes also perceived as a Montenegrin. In the spirit of the genetic theory a certain number of contemporary Serbian researchers define Bogišić as a Serbian scholar referring to the so-called – in all likelihood nonexistent – tradition of the origin of Bogišić lineage from "Ancient Serbia". The issue concerning Bogišić's name and the origin of his lineage from the Dubrovnik region down to the beginning of the 15<sup>th</sup> century and even earlier was reconstructed in detail in: Niko Kapetanić and Nenad Vekarić, *Podrijetlo Balda Bogišića* [Baltazar Bogišić's Origin], in: *Hereditas rerum croaticarum ad honorem Mirko Valentić* [Inheritance of the Croatian Past, In Honour of Mirko Valentić], ed. by Aleksandar Buczinsky and Stjepan Matković, Zagreb 2003, pp. 69–74. On the political, and not ethnic, identity of the so-called Serb Catholics in Dubrovnik see Ivo Banac, *Vjersko "pravilo" i dubrovačka iznimka. Geneza dubrovačkog kruga Srba katolika* [Religious "Rule" and the Dubrovnik Exception. Genesis of the Dubrovnik Circle of Serb Catholics], in: *Dubrovnik*, 33 (1990), pp. 179–210. See also Dalibor Čepulo, *Baltazar Bogišić u hrvatskom pravnom i kulturnom kontekstu* [Baltazar Bogišić in the Croatian legal and cultural context], in *Baltazar Bogišić i kultura sjećanja* (n. 6).

<sup>25</sup> The data on Bogišić were obtained from the following works: Bogišić, *Autobiografija* (n. 11); Živanović, *Baltazar Bogišić* (n. 11); Foretić, *Bogišić* (n. 3);

Munich, as well as in Paris, Gießen and Heidelberg where he also attended lectures on philosophy, philology and history. He completed his studies in philosophy in Gießen in 1862 by a doctoral thesis on the Slavonic and German history and in 1865 obtained his doctorate in law at the end of his studies in Vienna. In 1863 he started working in the Slavonic department of the Viennese Court Library where he met numerous Slavonic and German scholars. In this function he soon started laying the foundations for a study on the customary law of Slavs. On this topic he published two papers in Zagreb which were soon translated into several Slavonic languages.<sup>26</sup> As early as 1867 he was appointed a full member of the Yugoslav Academy of Sciences and Arts in Zagreb (which today is the Croatian Academy of Sciences and Arts). Within the framework of this institution he carried out and published an extensive study *kućno* on customary law in the South Slavonic lands, placing an emphasis on the *zadruga* (communal joint family).<sup>27</sup> Owing to their originality and numerous points of interest these results met with a notable reception among the scientific community both in the West and East although there were also some rare critical reactions.<sup>28</sup> It seems that the main

Strohal, *Dr. Valtazar Bogišić* (n. 5); Strohal, *Valtazar Bogišić* (n. 5); Martinović, *Valtazar Bogišić* (n. 6); Novak, *Valtazar Bogišić* (n. 7); Spomenica *Valtazara Bogišića* (n. 11); Taranovski, *Uvod* (n. 15), pp. 172–176, Zimmermann, *Valtazar Bogišić* (n. 4); Hodimir Sirotković (ed.), *Svečani skup u povodu 150-obljeticne rođenja akademika Baltazara Bogišića* [Solemn Gathering on the Occasion of the 150<sup>th</sup> Anniversary of the Birth of the Academy member Baltazar Bogišić], Zagreb 1986.

<sup>26</sup> Baltazar Bogišić, *O važnosti sakupljanja narodnijeh pravnih običaja kod Slovena* [On the Importance of Collecting Popular Legal Customs of Slavs], in: *Književnik* [Literary Man] (Zagreb), 4 (1866), pp. 1–47, 161–241, 408–476 and as a special brochure: *Baltazar Bogišić, Pravni običaji u Slovena* [Legal Customs of Slavs], Zagreb 1867; Baltazar Bogišić, *Naputak za opisivanje pravnijeh običaja koji u narodu žive* [Instruction on how to Describe Legal Customs Living among People], in: *Književnik* (Zagreb), 4 (1866).

<sup>27</sup> The Yugoslav Academy of Sciences and Arts in Zagreb published for the purpose of Bogišić's study a detailed survey in the Cyrillic and Latin script and distributed it via institutions and individuals over a wide area of the Slavonic south. The results of the study were published in the Academy's edition under the title *Zbornik sadašnjih pravnih običaja u južnih Slovena. Knjiga I. Gragja u odgovorima iz različitih krajevah slavenskoga juga* [Miscellany of the Current Legal Customs of South Slavs. Volume I. Materials of Responses from Various Parts of the Slavonic South], Zagreb 1874.

<sup>28</sup> See the reactions of professor Jaromír Haňel from Zagreb and Fedor Leontovič from Kiev with their main criticism about the questionable quality of Bogišić's study on the current state of legal customs and their transposition into history. Jaromír Haňel, *Zbornik sadašnjih pravnih običaja u južnih Slovena. Knjiga prva. Gragja u odgovorima iz različitih krajeva slovenskoga juga. Osnovao, skupio i uredio B. Bogišić. Na sviet izdala Jugoslavenska akademija znanosti i*

channels through which Bogišić's studies were for the first time introduced to the Western public were two articles by Vincenz Klun published in the German journal *Ausland* in 1874<sup>29</sup> and articles which Bogišić's friend Fedor Demelić<sup>30</sup> published in the French *Revue de droit international et de législation comparée* in 1876 and later compiled in a brochure published in Paris in 1877.<sup>31</sup> In 1877 and 1878 a series of journals of mostly professional character from several western and eastern countries reported on the results of Bogišić's study.<sup>32</sup> Also of importance for Bogišić's reputation in the West was his work *De la forme dite "inokosna" de la famille rurale chez les Serbes et les Croates* dating from a much later period and published in *Revue de droit international et de législation comparée* in 1884 and as a special brochure in

umjetnosti. U Zagrebu 1874. Monumenta historico-juridica slavorum meridionalium [Miscellany of the Current Legal Customs of the South Slaves by Baltazar Bogišić edited in Zagreb 1974], in: *Mjesečnik Pravičnoga društva u Zagrebu* [Monthly of the Law Society of Zagreb], 1 (1875), pp. 118-112; Valtazar Bogišić, Na "Ocjenu" Zbornika sadašnjih pravnih običaja u južnih Slovena [Response to the "Critique" of Collected Papers on Current Legal Customs of South Slavs], in: *Pravo* (Split) 5 (1877), pp. 34-65; Valtazar Bogišić, Nekoliko riječi prigodom najnovijega člancića g. Hañela o Zborniku pravnih običaja [A Few Words on the Occasion of the Latest "Article" by Mr. Hañel on Miscellany of the Current Legal Customs], in: *Pravo* (Split), 6, 1879, pp. 380-381; Po navodu stary g. Leontovića: Zametki o razradioke obyčnago prava [On the occasion of the remarks of Mr. Leontović: Notes on the Preparation of the customary law], in: *Žurnal Ministerstva narodnogo prosvješćenija* [Journal of the ministry of the people's education], Moskva 1880. For the last article see under the title Valtazar Bogišić, O obradi običajnoga prava [Valtazar Bogišić, On the Treatment of Customary Law], in: Valtazar Bogišić, *Pravni članci i rasprave* [Legal Articles and Discourses], Beograd 1927, pp. 51-96. See also here, n. 64. See also Dalibor Čepulo, Baltazar Bogišić i Pravni facultet a Zagrebu: izazovi i suradnja [Baltazar Bogišić and the Faculty of Law in Zagreb: challenges and cooperation], in: Baltazar Bogišić: kultura sjećanja (n. 6).

- 29 Vincenz Klun, Das Gewohnheitsrecht der Südslaven, in: *Ausland*, n. 50 and 51 from 1874. See Spomenica (n. 11), p 48.
- 30 During Bogišić's studies in Vienna Fedor Demelić (Buda, 15 October, 1832 - Vienna, 7 May, 1900) and Bogišić were members of the Slavonic society "Slovanska beseda" [slavonic word]. Later Demelić became a civil servant at the Austrian Ministry of Foreign Affairs and a Cabinet adviser. See Bogišić, *Autobiografija* (n. 11), 81.
- 31 Fedor Demelić, *Le droit coutumier des Slaves Méridionaux d'après les recherches de M. V. Bogišić*, 1-2, Paris 1876-1877. All articles by Demelić that appeared in issues 4-6 *Revue des législations anciennes et modernes* in 1876 were brought together in this brochure.
- 32 Bogišić, *Autobiografija* (n. 11), pp. 48-49.

Paris.<sup>33</sup> Only afterwards this publication was translated in St. Petersburg, Zagreb and Belgrade.<sup>34</sup>

Thus, early on Bogišić's work on Slavonic legal customs attracted wide attention and in 1869 he was appointed the first Professor of the History of Slavonic Laws in Odessa where he took up his assignment in 1870. Soon afterwards he established a Slavonic library in Odessa, with the aim of making it an intellectual centre of the Slavonic peoples. Bogišić as its first director, also acquired Russian citizenship, was to ensure the influence of the Russian Ministry of Foreign Affairs and the Slavophile movements and prevent the West from exerting its influence in Slavonic countries. It seems, however, that, owing to its political dimension, the library's existence was a matter of dispute from the moment of its inception, which led to its closure upon Bogišić's departure.<sup>35</sup>

Already in the period leading up to his arrival at Odessa, Bogišić had formed his entire methodological position on accepting the positions of the German Historical School of Law but also on a certain critical separation from them. Thus, Bogišić argued for the applying of the comparative method and for starting extensive research into different legal systems within the framework of a search for the patterns of legal development. He requested that legal manifestations must be studied at the sources, in relation not only to other legal institutions, but also in regard to environmental conditions. He claimed that contemporary laws should be created on the basis of established legal customs, after these had been determined and compared with the customs of other nations. Bogišić criticised the abstractions and limitations of Savigny's tenets. He believed that codification ought to be adjusted to concrete environmental circumstances and should originate from the living law and less from the legislator's ability and authority. Furthermore, since Bogišić believed that in certain environments customary law well preserved the remnants of the oldest legal provisions, he insisted that an emphasis should be placed not only on the study of customary law throughout history but also on the study of contemporary customary law. Bogišić explained his dedication to the study of the history of Slavonic laws by the cultural specificity of its corresponding Slavonic institutions. The study of these laws should contribute to the general science of law and affirm the values of the

33 Valtazar Bogišić, *De la forme dite "inokosna" de la famille rurale chez les Serbes et les Croates*, in: *Revue de droit international et de législations comparée*, Paris 1884.

34 Bogišić, *Autobiografija* (n. 11), pp. 116.

35 Bogišić, *Autobiografija* (n. 11), pp. 89-90, 92. On the political background of the Slavonic library see Martinović, Valtazar Bogišić (n. 6), p. 24.

Slavonic institutions as being comparable with the institutions of Western laws. Bogišić therefore regarded South Slavonic laws as the most appropriate subject of scientific interest since they had best preserved the *zadruga*. Bogišić considered the *zadruga* as a primordial and self-grown general Slavonic institution. He also believed that the *zadruga* and legal customs of the most distant past were best preserved on those South Slavonic territories under Ottoman rule that were isolated from Western influences.<sup>36</sup>

Bogišić remained at his university function in Odessa for only two years. The small, now independent principality of Montenegro territorially expanded and began the consolidation process of its institutions which were for the most part of tribal origin. At that time Montenegro decided to draft its property code. To this end the Montenegrin prince Nicholas employed the services of Baltazar Bogišić, already well-established and a native of the neighbouring Dubrovnik region. Prince Nicholas turned to the Russian Tsar Alexander II, called "Emperor Guardian of Slavism and Orthodoxy", who took upon himself the funding of the project and charged Bogišić with its implementation. In 1873 Bogišić left for Montenegro where he carried out additional studies on customary law. In 1874 he left for Paris to study his collected materials, went on study trips and further pursued his research and codification activities until the completion of the project in 1888. His work was interrupted by the Russo-Turkish war of 1877 when he was assigned as a civil servant of the Russian government to the Russian civil administration in Bulgaria.<sup>37</sup> Apart from this interruption, Bogišić devoted fifteen years of his life in Paris to the framing, at the Russian government's expense, of the *Code*

of this small and backward Balkan state, visiting Montenegro only occasionally.

At this time, according to Bogišić's words, he was being offered either the chair of legal history or the chair of Roman law at the faculties of law at the universities of Zagreb (1872, 1874 and 1882), Odessa (1875 and 1884) and Moscow (1888) as well as at the Great School in Belgrade (1877), and before at the Kiev and Russian University in Warsaw and at the Zagreb Academy of Legal Sciences, which was a predecessor of the University. It seems that Bogišić's greatest wish was to hold lectures in Zagreb, despite having been offered posts at three Russian faculties. However, he was insulted by the arrogant tone of the government of Croatia, and therefore, despite his friends' urgings, refused the post.<sup>38</sup>

In 1881 the first reading of the *Code* took place in Cetinje, the capital of Montenegro, and the second and third in 1885. The entire project was completed on 25 March, 1888 when the *Opšti imovinski zakonik za knjaževinu Crnu Goru* (General Property Code for the Principality of Montenegro) was promulgated with great ceremony. The Code came into force on 1 July, 1888. Its codification was in principle based on the positions of the German Historical School of Law. Yet, Bogišić departed from Savigny's position on the systematisation of law as a prerequisite for codification, by stating that there were certain exceptions to this rule to which the means ought to be adjusted.<sup>39</sup> The so-called *Danilov zakonik* (Danilo's Code) which had been adopted in Montenegro in 1855 by the previous ruler was for the most part, and despite its harshness, not being applied. As a consequence, Bogišić based his codification directly on patriarchal legal customs of kinship-

36 On Bogišić's methodological views see Martinović, Valtazar Bogišić (n. 6), pp. 183–185 ff. On the originality of Bogišić's method see Nikčević, Metod (n. 6). Cf. Valtazar Bogišić, *O naučnoj razradotkje istorii slavjanskago prava* [On the Scientific Elaboration of the History of the Slavonic Law], Petrograd 1870; Valtazar Bogišić, A propos du code civil de Montenegro; quelques mots sur les principes et la méthode adoptés pour sa confection, in: *Revue de droit international et de législations comparée*, Paris 1886; See also Valtazar Bogišić, *Metod i sistem kodifikacije imovinskog prava u Crnoj Gori* [The Method and System of Codification of Property Law in Montenegro], Beograd 1967.

37 For the purpose of studying customary law and consulting experts Bogišić visited Venice, Vienna, Zagreb, Belgrade, Budapest, Berlin, London, Heidelberg, Prague, Munich, Marienbad, St. Petersburg and Montenegro, in most cases several times, during the period from 1873 to 1886. See Bogišić's chronological report for the period from 1873 to 1886, in: Valtazar Bogišić, *Opšti imovinski zakonik za Knjaževinu Crnu Goru* [The General Property Code for the Principality of Montenegro], Podgorica 2004, pp. 295–297.

38 With the founding of the University in Zagreb in 1874 Zagreb Academy of Legal Sciences was transformed into the Faculty of Law. Bogišić was invited to apply for a position in 1867, 1870 and 1871 through the regular procedure of competition but he thought that someone of his standing should not find himself in a position of begging for admittance, that special conditions should apply to him which would guarantee his status and a secure position. Bogišić expressed an interest for later invitations as well but it seems that the issue of his position being secure was of great importance to him. Bogišić, *Autobiografija* (n. 11), pp. 60–61, 94–97; Novak, Valtazar Bogišić (n. 7), pp. 135–136, 146–148, 151, 179, 183–185, 202, 203–204, 214, 215, 230–231, 232–233; Hodimir Sirotković, Baltazar Bogišić i Jugoslavenska akademija [Baltazar Bogišić and the Yugoslav Academy], in: Sirotković, Svečani skup (n. 25), p. 13. See also Čepulo, Pravni fakultet (n. 28).

39 On the methodological base for the framing of the Montenegrin Code see Bogišić, A propos (n. 34). Cf. also Martinović, Valtazar Bogišić (n. 6), pp. 183–185 ff and Nikčević, Metod (n. 6).

tribal origin.<sup>40</sup> He tried to retain as much as possible the vernacular language and the manner of expression close to the people but also wanted to include Montenegrin “judges” none of whom had a professional legal education. The final chapter provides a systematisation and treatment of popular proverbs which were to serve as the interpretative basis and also formed part of the *General Property Code*. Due to the originality of the framing method used, the *Code* attracted the attention of the foreign scientific community already at the time of its setup. Its promulgation was noted in newspapers and journals in various European countries.<sup>41</sup> Shortly after its promulgation the *Code* was translated into several foreign languages<sup>42</sup> and various learned societies discussed or reported on it.<sup>43</sup> Upon the completion of the *Code* Bogišić left for Russia where he refused the Chair of Roman Law in Moscow and for health reasons applied for retirement, which he was granted in 1890, and then returned to Paris. Owing to his research and his codification work Bogišić became a member of the Yugoslav Academy of Art and Sciences in Zagreb, the Serbian Learned Society, the Société de législation comparée, the Institut international de sociologie and other learned societies.

After his retirement Bogišić continued his studies in Venice and other cities on the Adriatic coast. In 1893, however, he became Minister of Justice of Montenegro, a position which entitled him to three and a half months of annual leave when he saw fit and to fully-paid official trips. He filled this function until 1899. In 1898 he made minor revisions to the second edition of the *Code*. Again he mostly lived in Paris and died in 1908 in the Adriatic port of Rijeka (Fiume) on his journey to Cavtat.

40 In 1855 the Montenegrin Princ Danilo passed the so-called Danilo's Code that represented an attempt at extending the central authority versus the Montenegrin tribal system and customary law. This law also included a limited reception of Roman law and the breaking up of old tribal institutions. However, in practice customary law was still considered the applicable law and applied *praeter legem* and even *contra legem*. This is why Bogišić, when collecting information on applicable law, focused all his efforts on customary law. Martinović, Valtazar Bogišić (n. 5), pp. 168–172, 182–183.

41 See the bibliography listed here, n. 6 and Bogišić, Autobiografija (n. 11), pp. 120–123.

42 *Opšti imovinski zakonik za knjaževinu Crnu Goru* [The General Property Code for the Principality of Montenegro], Cetinje 1888, 1898, 1913; Beograd 1927; Cetinje 1980; Podgorica 2004; *Code général des Biens, pour la principauté de Monténégro de 1888*, Paris 1892; *Allgemeines Gesetzbuch über Vermögen für das Fürstenthum Montenegro*, Berlin 1893; *Código general de los Bienes de Montenegro*, Madrid 1893; *Codice civile per Montenegro*, Spalato 1900; *Obščij imuščestvennij zakonnik” dlja Knjažestva Černogorskogo*, St. Peterburg 1901.

43 Bogišić, Autobiografija (n. 11), pp. 121–123.

## V Baltazar Bogišić and Henry S. Maine

### 1 Henry Sumner Maine: Research and legislative activities

Sir Henry Sumner Maine (1822–1888) is one of those personalities of the 19<sup>th</sup> century who both through their work and indirectly, through their followers, strongly influenced the shaping of modern legal thought in England and Europe.<sup>44</sup> In 1854 Maine resigned from his position as Professor of Civil Law in Cambridge to teach Roman law to future lawyers at the London's Inns of Court. Soon he expressed his opposition to the dominant ahistorical conceptions of the development of natural law as well as to Bentham's and Austin's utilitarian conceptions. His treatment of Roman law in the English setting, where Roman law never took root, also determined his comparative position. While Friedrich Carl von Savigny and his German followers studied the “bringing into line” of the received Roman law and the German *Volksgeist*, Maine had to explain the narrow similarities that existed between institutions of common law and Roman law, despite their development in different temporal and national settings. Such a comparative approach prompted Maine to look for general directions of legal development and to formulate the base for the discipline of historical jurisprudence. The remarkable success of Maine's work *Ancient Law* (1861), in which he mostly focused on Greek and Roman legal institutions, but also frequently referred to the law of the Hindus, earned him recognition. Maine soon received an appointment as a legal member of the Council in India, where he was credited with codifying law in this area of British legal authority. From this perspective he gained experience in the existence of different and similar legal systems and how to compare their mutual influence. This experience further broadened the horizons of his studies. His subsequent studies encompassed, alongside Hindu law, Breton, German, Anglo-Saxon, Hebrew and Slavonic laws and revealed his strong interest in living legal antiquities. Maine's methodological position severed the link with the mysticism of Savigny's “spirit of the people”

44 On H.S. Maine see Friedmann, *Legal Theory* (n. 23), pp. 164–170; Guttridge, *Comparative Law* (n. 21), pp. 3, 27, 63; E. Adamson Hoebel, Maine, Henry Sumner, in: D.L. Sills (ed.), *International Encyclopaedia of the Social Sciences*, New York-London 1968, vol. 9, pp. 530–532; Frederick Pollock, The History of Comparative Jurisprudence, in: *Journal of Society of Comparative Legislation*, 5 (1903), pp. 74–89, here pp. 75, 86–87; Lawrence Rosen, Foreword in: Henry S. Maine, *Ancient Law*, (reprint of the 1864 edition), 1986, pp. vii–xviii.; Stone, *Social Dimensions* (n. 15), pp. 119–141; Zweigert – Kötz, Introduction (n. 21), pp. 9, 57–58; Paul Vinogradoff, The Teaching of Sir Henry Maine, in: Herbert Albert Laurens Fisher (ed.), *The Collected Papers of Paul Vinogradoff*. Vol. II, Oxford 1928, pp. 173–189.

that rendered a comparison impossible. Instead, the core of Maine's research efforts consisted of the comparative and historic search for the predominance of certain types of institutions which he formulated in his famous tenet "from status to contract". Since by tradition he was orientated towards the study of common law as it was being shaped by case law as law in action, Maine also linked the study of legal institutions with the development of the social environment. In 1869, with his appointment as the first Professor of the Chair of Historical and Comparative Jurisprudence his comparative and historical approach obtained a strong institutional developmental framework. The significance of both Maine and his successors, Pollock and Vinogradoff, justifies the assessment that Maine's appointment to this chair was a significant date in the development of legal history and comparative law in England and Europe.<sup>45</sup>

An additional dimension of Maine's comparative approach was the strengthening of Slavonic studies at Oxford at the time of his arrival: upon his arrival Slavonic studies in England were established and developed. In 1870 lectures started, which were to develop into separate Slavonic studies in 1889.<sup>46</sup> Furthermore, W.R. Morfill was the first lecturer and one of the pioneers of Slavonic studies with whom Baltazar Bogišić carried on a correspondence on folk poetry in 1891 and 1892 and to whom he gave a gift of several books including *Zbornik sadašnjih pravnih običaja u južnih Slovena* [Miscelany of the Current Legal Customs of South Slavs] (1874).<sup>47</sup> It was perhaps this atmosphere at Oxford and even Morfill himself which served as channels through which Maine became acquainted with Bogišić's work.<sup>48</sup>

45 It was F. Pollock himself who asserted that the full recognition of the new branch of legal science may best be dated at 1869 when the *Société de la législation comparée* was founded in Paris and when H.S. Maine was appointed as the first Professor of Historical and Comparative Jurisprudence at Oxford University, Pollock, *The History* (n. 44), p. 86. L. Neville Brown terms the period 1869-1918 in the development of comparative law in England "Maine's period", L. Neville Brown, *A Century of Comparative Law in England: 1869-1969*, in: *The American Journal of Comparative Law*, 19 (1971), pp. 232-254, here p. 232. J. Stone speaks of a strong influence which the historical approach had on Maine and his followers in the English legal thought, Stone, *Social Dimension* (n. 15), p. 119.

46 Filipović, *Englesko-hrvatske* (n. 2), pp. 172-92. Comp. Bogišić (n. 27).

47 Mardešić, *Bogišićeva korespondencija* (n. 7), pp. 282-285.

48 It is worth mentioning that the third cycle of Morfill's lectures, given in 1883, was called "Political Institutions and Laws of the Slavs", see Filipović, *Englesko-hrvatske* (n. 2), p. 173. It seems entirely probable that Morfill relied on Bogišić's results when delivering these lectures. Maine himself had presented Bogišić's results a few years earlier.

## 2 Henry Summer Maine and Baltazar Bogišić: Correspondence and Influence

Maine's contacts with Bogišić were entirely conditioned by his comparative interest in the development of Slavonic laws. These laws were of interest to Maine since he believed that because of their relative isolation from foreign influences they retained those institutions which reflected the history of the development of legal institutions of Indo-European peoples. A further reason is linked to the fact that Maine was a representative of the "patriarchal theory" which was based on the thesis of the absolute power of the head of family. Maine was especially interested in the development of the basic social unit, from the primitive kinship group through various types of family, to the modern state. This is why he took a special interest in *patria potestas* and institutions of family law.

These were precisely the points Maine came across in Bogišić's works even before the two of them began their brief correspondence. As early as December 1877<sup>49</sup> in his article "South Slavonians and Rajpoots", published in the journal *The Nineteenth Century* Maine made extensive use of the just translated results of Bogišić's studies on the communal joint family. He had obtained them through some German articles which contained passages of Bogišić's studies as well as through the mentioned scientific review by Fedor Demelić.<sup>50</sup> In this article Maine aimed at comparing related institutions of different offshoots of Indo-European peoples and presented in great detail the results of Bogišić's studies on legal institutions of South Slavonic communal joint families as well as the results of studies on related legal institutions of Indian Rajpoots, translated by the British colonial civil servant Alfred Lyall.<sup>51</sup> In both cases Maine opted for results which were obtained by researchers and

49 Henry S. Maine, *South Slavonians and Rajpoots*, in: *The Nineteenth Century*, 2 (1877), pp. 796-819. This article was also published in French in 1879 under the title *De l'organisation juridique de la famille chez les Slaves du Sud et les Rajpoots*, in *Revue générale de droit* (Paris) and as a separate brochure in Paris in 1880.

50 Demelić, *Le droit coutumier* (n. 31).

51 Sir Alfred Lyall (1835-1911) was a man of letters and a high-ranking civil servant in the British colonial administration in India. Lyall was closely acquainted with Frederick Pollock who held him in high esteem. See Marc Anthony DeWolfe Howe, *The Pollock - Holmes Letters. Vol. I*, Cambridge 1942, pp. 89, 222 and Marc Anthony DeWolfe Howe, *The Pollock - Holmes Letters. Vol. II*, Cambridge 1942, pp. 40, 60, 144, 189, 190, 247. Later Pollock included Lyall among the persons important for the development of the discipline of comparative law, see Pollock, *The history* (n. 44), p. 87).

whom he regarded as excellent and reliable.<sup>52</sup> Maine explained his interest in the studies on the South Slavonic legal institutions by the fact that their development in an Islamic environment had been hindered, but not modified, by the influence of oriental legal institutions, which is why their contemporary forms also reproduced ancient law. In this sense he placed a particular importance on communal joint families of South Slavs and compared them with joint family and village communities in India. The greatest portion of Maine's article, based entirely on the results of Bogišić's studies, gives a description of communal joint families of South Slavs. Maine explicitly refers to Bogišić's theoretical scepticism with regard to Georg Puchta's stance on the necessity of resolving the conflict between codified law and the customary law by that same method of interpretation.<sup>53</sup> Maine briefly introduced Bogišić as a native of Dubrovnik, a member of the Academy of Sciences in Zagreb, as professor in Odessa, preparing the Montenegrin property code. In carefully chosen words he commented on the significance of Bogišić's studies and stressed his erudition. Maine expressed regret at the language barrier as well as surprise at the existence of cultural institutions in the regions in question.<sup>54</sup> The sincerity of Maine's enthusiasm for Bogišić is also corroborated by the fact that his work was published only a year after the publication of an article by Fedor Demelić, i.e., in the same year in which Demelić's brochure containing Bogišić's results was published.

Bogišić had the opportunity to contact Maine during his study trip to London in the summer of 1880, a trip he made in order to study common law.<sup>55</sup> It was most probably the above article by Maine which prompted

52 Maine, *South Slavonians* (n. 49), pp. 800, 812.

53 Maine, *South Slavonians* (n. 49), p. 811.

54 "The law or the custom which regulates these institutions has lately been subjected to a close examination by an eminent man of learning whose writings are still obscured by that unfortunate veil of language which hides Slavonian literature from this generation of Englishmen. The name of Professor Bogišić which is connected with several places with which, now of all times, we should least expect to have literary associations. He is native of Ragusa; his last work is published by the Academy of Sciences at Agram [Zagreb]; he is professor in the University of Odessa; and he has codified the laws of Montenegro. The results of his investigations are only known to me through some German translations of passages in them, and through a summary of portion of them by M. Fedor Demelic. Nothing, in my opinion, can exceed their instructiveness", Maine, *South Slavonians* (n. 49), p. 800.

55 Whilst preparing the General Property Code during his summer holidays of 1880, Bogišić spent six weeks in London for the purpose of studying common law. As he explained in his report to Prince Nicholas of 21 July, 1881, he made the trip to London because England, just like Montenegro, was a country of customary law. However, immediately afterwards he stated that the common

Bogišić to visit the author himself and, since he did not find him, decided to send him a letter. In early September Maine courteously replied to Bogišić from the Belgian summer resort Spa that "there are few persons in whose enquiries and results I feel a livelier intellect than in yours, and it would give me very sincere pleasure to make your personal acquaintance". Maine also expressed regret for not being able to visit Bogišić (most probably in Paris) because of his wife's and son's health and expressed hope that there would be another opportunity upon his return to England.<sup>56</sup> This first courteous contact between Maine and Bogišić was, respectively, in English and French, as would be the case with all future contacts.<sup>57</sup>

As early as 11 October of the same year Maine sent his next letter from London, apologising for not having been able to pass through Paris. He expressed regret at having "again missed an opportunity of seeing and conversing with a scholar in whose researches I am so deeply interested". However, this was not a courteous letter. Maine apologised for being limited to those works of Bogišić which had been published in French and German

law, like the French *coutumes*, "was not something which we were accustomed to call the customary-law". Even so, it seems that the trip was not made in vain since Bogišić concluded that, after all, common law was based on "real customary law" and that it opened up opportunities for the study of "numerous issues of biology" well as of forms of law and its links with other legal sources, in particular laws. Zimmerman, Valtazar Bogišić (n. 4), pp. 188-89; Martinović, Valtazar Bogišić (n. 6), p. 219.

56 This first letter by Maine dated 4 July, 1880 was sent from a summer resort in Spa. It follows from the letter that Bogišić had previously called on Maine in London and that, since he had not found him, had written him a letter in which he referred to an article of Maine written in English. See Maine's letter of 4 September, 1880. See in Čepulo, *Pisma* (n. 9), p. 166. It is reasonable to assume that the article in question was the above mentioned article by Maine to which Bogišić frequently referred both in his autobiographical writings and elsewhere. Bogišić, *Autobiografija* (n. 11), pp. 48, 108.

57 At the end of his first letter dated 4 September, 1880 Maine specifically pointed out that he answered Bogišić in English because Bogišić referred to his article written in English. Such an explanation was probably necessary for the very reason that Bogišić had not written to Maine in English. That the correspondence was carried on in French on the part of Bogišić and English on the part of Maine becomes clear from the next letter of Maine dated 11 September, 1880 in which he apologised again for replying in English and begged Bogišić to understand this as the only way he could be entirely sure that he stated his questions with precision. However, Maine also asked Bogišić to write to him, as before, in French because he could not understand a letter in Bogišić's language. Finally, in his last letter dated 22 September, 1880 Maine thanked Bogišić for his permission to write to him in English. For all three letters see Čepulo, *Pisma* (n. 9), pp. 166-168.

since he did not know any Slavonic languages and stated that he was seeking answers to several questions concerning the law of status, family law and inheritance law. Maine was primarily interested in comparisons between the oldest institutions relating to relationships within the family community, in particular with regard to institutions that were more strongly intertwined with authority. He was most interested in paternal power and especially in whether Bogišić's studies confirmed the thesis about the strong and absolute power of the father or grandfather in the family of the North and South Slavonians, which is what Maine had heard. He was also interested in whether the statement that the eldest member of a South Slavonic family was in charge of the household, even when families lived separately, was true. Maine wanted to know whether paternal power survived in the case of a number of families living together in a community or whether this power was absorbed by the authority of the community chief. Concerning inheritance law matters he was eager to learn about the ways in which power was distributed, for example whether when a father and mother died without sons any part of the inheritance went to the children of daughters, sisters or other female relatives. He also wanted to verify Bogišić's claim that women were provided for by marriage-portions and that neither they nor their descendants had any share in the inheritance. This subject matter was of special interest to Maine since, according to his statements, it pointed to a close resemblance between the Slavonic family and the ancient Roman (agnatic) family. This then also renders his question concerning the introduction of children into Slavonic families from without, either by adoption or any similar process, understandable.<sup>58</sup>

Bogišić obviously replied very soon to Maine's questions. In doing so he, in all likelihood, pointed to the fact that the paternal power among the South Slavs was less markedly pronounced than Maine expected, as may be seen by the following letter by Maine of 22 October, 1880. Maine thanked Bogišić for the information that helped him resolve some serious doubts. He stated his effort to collect as many information as possible on the strong resemblance he thought existed between the South Slavic and the Hindu law as the reason for his interest in Bogišić's studies. Apparently, Bogišić had informed Maine about *potestas parentium* since Maine mentioned that he had found similarities between this institution and the paternal power among Hindus, despite the fact that the latter is, strictly seen, closer to the *patria potestas* of the Romans. Thus, Maine pointed out that the mother was often the most

58 Maine's letter dated 11 September, 1880. See in Čepulo, Pisma (n. 9), pp. 166–167.

powerful person in the household and that in some parts of India she had, at her husband's death, the usufruct of the family property for life. To corroborate this further he also mentioned the limitation imposed on the power of the father in certain Indian provinces in the sense that the father had to obtain the consent of his sons if he wanted to divide or alienate the family property and also pointed to the possibility of his being deposed because of his incapability. Maine pointed out more instances of resemblance between Indian and South Slavonic institutions, for example the husband of a sole daughter coming to live in the household with her father and mother. Maine concluded this terse argumentation with the hypothesis that in most ancient societies' paternal power was less strict than was commonly supposed and that its strictness among Romans and Hindus stemmed from its having been defined by law pronounced at a very early time when it encompassed some other characteristics as well.<sup>59</sup>

The three letters exchanged over a brief period were an *ad hoc* scientific discourse. However, they show that Maine was acquainted with Bogišić's work and testify to Maine's sincere respect towards Bogišić. This short-lasting and occasional correspondence and its content leads the author to assume that Bogišić and Maine never personally met. The *ad hoc* character of this correspondence probably explains why neither author discussed codification problems, despite the fact that both of them were authorities in this field. Maine was already famous for his codification work in India while Bogišić's framing of the Montenegrin code was known to the scientific community.

The insights which Maine gained through his correspondence with Bogišić proved especially useful to him in formulating certain positions in his subsequently published works. The influence of this correspondence on Maine's review of the East European communal joint family in his second major work *Early Law and Custom* (1883) is apparent.<sup>60</sup> In the chapter "Theories of Primitive Society" Maine referred to the goals set in *Ancient Law*. He stated that he had achieved them in a manner now possible in 1861 since before he had lacked any serious and thorough studies on which he could base his positions to give a more complete picture. When enumerating the studies on the laws of different peoples and the authors whose works he regarded as trustworthy, Maine highlighted the importance of Slavonic law and usage following his emphasis of the importance of the law of Hindus. Maine stated that in 1861 he had become familiar with Slavonic law chiefly

59 Maine's letter dated 22 September, 1880. See in Čepulo, Pisma (n. 9), pp. 167–168.

60 Henry S. Maine, *Early Law and Custom. Chiefly Selected from Lectures Delivered at Oxford*, Delhi 1883 (reprinted edition, New Delhi 1985).

from the books of Haxthausen but that Slavonic law was now becoming “a more trustworthy subject of study through the labours of Prof. Bogišić”.<sup>61</sup> Further on in the same chapter Maine briefly repeated certain contents of the article “South Slavonians and Rajpoots”, described again Bogišić’s career and reiterated his respect for him, all of which he had already done in the above mentioned article. However, he modified some of his positions he had stated there and it is obvious that this was the result of his correspondence with Bogišić. In a separate note Maine explicitly specified that it was from the correspondence with Bogišić that he learnt that the power of the father was stronger among Russians than among South Slavonians, and that among the latter it was stronger on the coast than inland. He further stated that in some parts of these countries sons ceased to be subject to their father’s power when they married but that in this case marriage seemed to imply a severance from the paternal domicile. According to Maine, this was the earliest form of Roman emancipation.<sup>62</sup> The brief correspondence between Maine and Bogišić had proven fruitful as expressed in *Early Law and Custom*. Since this book contains a selection of Maine’s lectures delivered at Oxford, it is reasonable to assume that Maine presented the contents of Bogišić’s studies to his students as well.

Finally, Bogišić was, not surprisingly, also familiar with Maine’s works which formed part of his book collection.<sup>63</sup> Nevertheless, in his scholarly work Bogišić referred to Maine only incidentally. He stated Maine’s authority as an argument in favour of the validity of his positions in a polemic with Jaromír Haňel, Professor of General Legal History at the Faculty of Law at Zagreb, Czech by origin, and with Fedor Leontovič, Professor of Russian Legal History at the University of Kiev. They both questioned Bogišić’s study

61 Maine, *Early Law* (n. 60), p. 194.

62 Maine, *Early Law* (n. 60), p. 244, n. 2.

63 The following three works by Maine are listed in the catalogue of the Collection of Baltazar Bogišić in Cavtat: Henry S. Maine, *Ancient Law*, London 1880; Henry S. Maine, *Etudes sur l’ancien droit et la coutume primitive*, Paris 1884; Henry S. Maine, *Etudes sur l’histoire des institutions primitives*, Paris 1880; Henry S. Maine, *Etudes sur l’histoire du droit*, Paris 1899.

64 To the criticism directed at the study of the current state of legal customs and at their shift towards the past Bogišić also replied with the rhetorical question as to whether in this case works such as those of Maine, Lubbock, Taylor and Mac Lennan would make sense. He also emphasised that in 1874 Maine had accepted the results of his study. See Bogišić, Na “Ocjenu” (n. 28), p. 59; Bogišić, Nekoliko riječi (n. 28), pp. 380–381; Bogišić, O obradi (n. 28), p. 81

on customary law of 1874.<sup>64</sup> On the whole, however, it seems that Bogišić, in his focus on Slavonic laws, did not use the results of Maine’s studies to any greater extent.

In conclusion, Bogišić’s relationship with Maine was characterised by Maine’s respect for and the use of Bogišić’s studies on the communal joint family and South Slavonic legal customs which were in accordance with his line of research. This is apparent in some of Maine’s major works from the scope and use of Bogišić’s results shortly after they were published, as well as from the subsequent inclusion of Bogišić’s insights which he gained from the correspondence and from carefully chosen words which Maine dedicated to Bogišić. Maine’s interest in Bogišić developed from their partly related and partly divergent, but nonetheless complementary, research position which rendered this relationship possible. The two scholars were brought together by their focus on customary law, the particular significance which they attached to the study of the social environment of law and their conviction that it was possible to draw conclusions on the historic development of legal customs from a study of their current position. Both scholars expressed an extraordinary interest in the South Slavonic communal joint family – Maine in the context of his acceptance of the “patriarchal theory” and Bogišić in the context of his interest, instigated by Slavophilism, in the *zadruga* as “the most primeval” Slavonic institution.

Both Bogišić and Maine were in favour of a broad scope of study on the patterns of legal developments. What attracted Maine’s interest in Bogišić’s studies was the fact that they provided him with an element for global comparison and synthesis, being valuable in coming from a cultural area to which he attached great scientific importance and which, due to linguistic and cultural obstacles, was inaccessible to both him and Western scholars. It is obvious that Maine himself did not know this area well. His work was shaped by typical stereotypes immersed in a surprise at the existence of cultural institutions in the South Slavonic lands which he could not tell apart. However, abundant evidence demonstrates Maine’s respect for Bogišić as a scholar and the considerable attention he paid to Bogišić.

When seen from a different angle, one may argue that although it is obvious that Bogišić was familiar with Maine’s more influential pieces of writing, dating from as early as Bogišić’s student days, his scholarly work, in all likelihood, was not influenced to any greater extent by Maine’s positions. They held different research positions: while Bogišić’s studies on the institutions of the Slavonic laws were of immediate value to Maine as a precondition for a synthesis, Maine’s results were of no immediate use to Bogišić’s studies. The similarity between Bogišić’s and Maine’s methodological viewpoints stems more likely from the influence of other authors such as for example



by the influence of Bogišić's professor Ihering and his comparative stance. Maine's writings displayed a more narrow thematic and geographical focus and were linguistically and culturally remote. Yet, a more focused examination of their relationship might perhaps change this impression. It is nevertheless surprising that the relationship Maine – Bogišić exclusively developed in the field of legal history without touching on any comparative law issues. This is all the more surprising in that both lawyers are counted among the few who distinguished themselves in the field of the codification of law. Maine's interest in this brief and only to a limited degree motivated correspondence lay exclusively in issues of legal history.

## VI Baltazar Bogišić and Frederick Pollock

### 1 Frederick Pollock: Research and Journalistic Activities

Baltazar Bogišić's written communication and relationship with Sir Frederick Pollock was entirely different from his correspondence with Maine. In parallel with their personal acquaintance and occasional meetings Bogišić and Pollock carried on a friendly communication over a long stretch of time. Their scientific interest was more modestly expressed in their letters but Pollock closely followed the results of Bogišić's studies in those works in French and German which published notes or short debates on them. His interest in positive law and comparative law with regard to the Montenegrin General Property Code prevailed.

Although he was the successor to Henry S. Maine at the Chair of Comparative Jurisprudence in Oxford from 1883 to 1903,<sup>65</sup> Pollock adopted Maine's sensitivity towards the historical and comparative dimension. His interests focused on the study of English law and showed a preference for legal institutions over a sociological dimension. In this respect, Pollock departed somewhat from Maine's wide interest in the basic directions of the development of law and his more prominently expressed sociological approach. This probably stemmed from Pollock practicing as barrister from 1871 to 1883. However, Pollock also gave legal occurrences which he linked with complex considerations of the social environment. On the basis of this

65 On Frederick Pollock see Andreas B. Schwarz, *Sir Frederick Pollock und die englische Rechtswissenschaft*, Istanbul 1951 (offprint from the *Annales de la Faculté de Droit d'Istanbul* 20, 1951, 1); Guttridge, *Comparative Law* (n. 21), pp. 27–28, 73; Zweigert and Kötz, *Introduction* (n. 21), pp. 57–58.

approach Pollock wrote works on English legal history which for a long time remained pivotal in the study of English law.<sup>66</sup> Despite the fact that his major contributions were in legal history, Pollock regarded the disciplines of legal history and comparative law as identical and even as interchangeable concepts. He devoted considerable and lasting efforts to advancing research and to building institutions in the field of comparative law. Both dimensions of his work were noticeable in his publication over many years in the journal *The Law Quarterly Review* of which he was one of the founders and the first editor (1884–1919), which up to nowadays is one of the most prestigious English law journals. Pollock was famous both for his work as its editor and as author of a series of articles and notes on the problems of comparative law and legal history.

### 2 Frederick Pollock and Baltazar Bogišić: Correspondence and Reports in *The Law Quarterly Review*

The developments described above partly shaped the relationship between Pollock and Bogišić. Although it is unclear how they met, it is certain that this took place before 1884, as is proven by Pollock's New Year greeting card to Bogišić dated 1 January, 1884. In this card Pollock replied to the news of Bogišić's stay in Paris and inquired after him, while the intimate tone of the letter testifies to their friendly relationship.<sup>67</sup>

In the period preceding their next contact a shorter, unsigned review of Bogišić's work *De la forme dite "Inokosna" de la famille rurale chez les Serbes et les Croates* was published at the beginning of 1885 in the issue of the

66 Of special importance is *History of English Law before the Time of Edward I. I-II* (1895) which Pollock co-authored with Frederick W. Maitland, although Pollock's works *Principles of Contract at Law and in Equity* (1876), *A Digest of the Law of Partnership* (1877) and *The Law of Torts* (1887) were also used for a long time.

67 Since the letter was written in Cyrillic script and the Ekavian variant spoken in Serbia, it can be assumed that it was "Mr. Hristić" who wrote the letter for Pollock, mentioned in the letter as the person who brought the news on Bogišić. Pollock informed Bogišić that he had returned to England since it was easier for him to earn his "livelihood" there alluding probably to his appointment as a Professor of Common Law at the Inns of Court. See De Wolfe Howe, *The Pollock – Holmes Letters* (n. 51), p. 32, n. 3. Pollock, nevertheless, stated that he would continue visiting Paris and enquired after Bogišić: "Kako ste mi vi? Smem se kladiti da ste sve bolji i bolji junak. Ako će, ako, – to vam i žele svi iskreni prijatelji i poštovači." [How are you? I bet you are becoming an ever greater hero. And that's what all your sincere friends and admirers wish you.] Pollock's letter of 1 January, 1884, see in Čepulo, *Kratka pisma* (n. 9), pp. 36–37.

newly launched *The Law Quarterly Review*. Pollock (probably) sent a copy of this issue, inscribed “With the Editors’ Compliments”<sup>68</sup> to Bogišić and it can be assumed that Pollock was also the author of the review,<sup>69</sup> who specially emphasised the differentiating features of the South Slavonic community. He holds in particular that inheritance, as it existed in the West and Roman law, was unknown to this community. On the other hand, the author compared the urban family with the Roman or West-European family, as opposed to the community which he regarded as more similar to the joint family of Hindu law. According to Pollock the purpose of Bogišić’s study was meant as a warning to rulers against errors of that kind which had – despite their best intentions – been made by British legislators and settlement officers in India.<sup>70</sup> This statement reveals to which extent English law and the British legal system, as well as a narrow perception of the results of studies on South Slavonic laws, lay at the heart of Pollock’s approach. It is a tendency which will become apparent in subsequent reviews of and comments on Bogišić’s writings.

It can be assumed that the above mentioned subject was a topic of conversation over dinner at the Pollocks’, to whom Bogišić was invited during his stay in London in early May 1885. At this point Pollock also invited Bogišić to visit him at Corpus Christi College and to a meeting of The Law Club.<sup>71</sup> They most probably met in a similar manner later in Paris where Pollock went for a visit one summer.<sup>72</sup>

68 The mentioned issue exists in Bogišić’s library in Cavtat.

69 This claim is based on the fact that in the first issue of *The Law Quarterly Review*, as well as in later ones, Pollock published a whole series of short reviews and notes which he signed with his initials while the subsequent shorter contributions were not signed. However, even if Pollock was not the author of the above note – which is not very likely – the fact remains that he included it in the first issue of the journal he had just launched and of which he was the editor. Frederic Pollock’s initials were “F. P.”. *The Law Quarterly Review. Index to Volumes 1–90*, London 1975, p. XIII. (cf. here n. 74 and 75).

70 De la forme dite “Inokosna” de la famille rurale chez les Serbes et les Croates. Par V. Bogišić. Paris 1884, 8 vols., in: *The Law Quarterly Review*, 1 (1885), p. 118.

71 Pollock’s letter of 3 May, 1885, Čepulo, *Kratka pisma* (n. 9), p. 37.

72 In this letter Pollock invited Bogišić to dine with him and his wife. It is not possible to infer the year from the stamp on the letter. Pollock’s letter from Paris of 22 August, year unknown, see: Čepulo, *Kratka pisma* (n. 9), pp. 37–38. Neither was it possible to determine the date on the basis of Pollock’s correspondence with Holmes in which no mention was made of a journey across France in August of that unknown year. DeWolfe Howe, *The Pollock – Holmes Letters* (n. 51).

In the meantime Bogišić finished his work on the *General Property Code*. The promulgation of the Montenegrin Code in 1888 was taken note of by the European public and even reported by the English press.<sup>73</sup> The English scientific community was apprised of the *Code* and of Bogišić’s work by several writings published over the next couple of years in Pollock’s *The Law Quarterly Review*. Pollock himself published several shorter articles on the *Code*. In an unsigned note that appeared in an issue published as early as July 1888 Pollock reacted to a false statement “in a book published shortly before on Montenegro” concerning the fact that Bogišić, “un Monténégrin distingué et érudit”, had for several years been engaged on framing a *Code* for Montenegro, which was still not ready. The author of the note asserted that Bogišić was not a Montenegrin and that the “Civil Code of Montenegro” had already been promulgated and published and that he hoped to give an account of it as soon as a French translation was accessible. He mentioned in passing that those who were anxious for the codification of Hindu or Muslim law in India should note that Bogišić had deliberately abstained from

73 In a short note in the issue 9 May, 1888 of *The Times* the reporter singled out the exceptionally ceremonious promulgation, the gratitude expressed to Russian Tsar Alexander II and Alexander III, who were regarded as the protectors of the Slav race, and the eulogies for Bogišić. In the issue of 11 May, 1888 the correspondent for the Parisian *Galignani Messenger* referred to a note from the Vienna correspondent in English on the great attention paid by the Viennese journals to Prince Nicholas I’s speech with strong Panslavonic overtones. A year after the promulgation of the *Code* the London publication *The Academy* in its issue of 9 March, 1889 published a short review of Bogišić’s *Quelques mots sur les principes et la méthode suivis dans la Codification du Droit Civil du Monténégro. Lettre a un Ami*. Paris 1888. I. Pavlovitch, the author of this review, praised the *Code*’s originality of both form and content, which made it unique in Europe, and singled out a few methodological tenets of Bogišić. He expressed regret at the fact that the *Code* was not available to the Western reader and went on to say that Bogišić was a Serb by birth and a native of Dubrovnik, that he had studied in Austria, Germany and France, that he was a professor in Odessa and a member of the Institut de France and that he was known in England through the works of Henry S. Maine who had frequently quoted him when explaining the juridical institutions of the South Slavs. Excerpts from these journals form part of Bogišić’s library in the Collection of Baltazar Bogišić in Cavtat and can be found under the number 386 E I 1/7.

74 *The Law Quarterly Review*, 4 (1888), p. 372. The conclusion that Pollock was the author of this unsigned note is based on the following three facts: during his editorship Pollock wrote the majority of reviews and notes in *The Law Quarterly Review*; its shorter ones he did not sign; Pollock referred to the contents of the said note in the next issue’s review which he signed with his initials F. P. (cf. here n. 75); the contents of the note reveal that it was obviously written by someone who knew Bogišić well.

codifying South Slavonic customs which governed the internal management and economy of Montenegrin families.<sup>74</sup>

In 1888 Pollock fulfilled his promise and wrote a review of the Montenegrin *Code*, drawing on a French translation of the *Code* and on two accompanying publications. This was a unified review of a French translation of the Montenegrin *Code*, of P. Dareste's commentary on the *Code* and of Bogišić's brochure on the method he adopted for drawing up the *Code*. Pollock published his review in *The Law Quarterly Review* in October 1888, shortly after the appearance of these publications.<sup>75</sup> Pollock here gave a concise overview of the *Code's* structure with the remark that due to the language barrier the full text of the *Code* remained unknown to him but that he had relied on explanations given to him by the author himself. In an attempt to draw certain conclusions for English law Pollock, in several digressions, compared the *Code* with English legal practice. In a comparative spirit he mentioned that the knowledge of institutions of *supona* and *sprega*<sup>76</sup> might perhaps lead to a more in-depth knowledge of England in the Age of Domesday Book of 1086. Pollock again pointed out that Bogišić abstained from codifying those customs which related to the internal order of the South Slavonic family or rather communal joint family. He stated that, in relation to the outer world, this community appeared as a corporate person and that the difference between its common property and its members' peculiar property was very carefully observed. Bogišić pointed out the similarity between corporate and individual responsibility for wrongful acts of the members of this community on the one hand and on the other hand for the institution of the master's responsibility for the acts of his servants under common law. He

75 (F. P.), *The Montenegrin Code of Law of Property*. Tsetinje. 1888. Paris; *Le nouveau code civil du Montenegro*. Par R. Dareste. Paris. 1888; *Quelques mots sur les principes et la méthode suivis dans la codification du droit civil au Montenegro*. Par V. Bogišić. Paris. 1888, in: *The Law Quarterly Review*, 4 (1888), pp. 465–466.

76 *Supona* is a contract on cooperation in agriculture according to which peasants bring together all cattle, divide it into species and decide on the herdsman for each of the species. The fruits and costs (of the herdsman) are distributed among all *suponiks* (members of the *supona*). *Sprega* means cooperation between peasants in the joint ploughing of the land of all *sprežniks* (members of the *sprega*) by bringing together harness cattle. The aim is also to cultivate the land of those peasants who do not have enough cattle of their own. The land of one *sprežnik* is ploughed on one day while that of another the next day. The peasant who contributes more cattle than another is entitled to proportionately more ploughing time on his land. Ivan Beuc, *Povijest država i prava na području SFRJ* [The History of States and Laws on the Territory of SFRY], Zagreb 1989, pp. 304–305.

compared limitations in acquiring land ownership rights with the *de migran-tibus* rule and public burdens on land with the medieval English *servitium*. He drew the reader's attention to the last chapter of the *Code* dealing with the interpretation, definitions and supplemental provisions by pointing to Bogišić's independence in defining a structure by using the conditions of his undertaking as his guide. Pollock in particular noted that Bogišić, probably for the first time in actual legislation, had applied in the chapter on the legal personality a theory developed by professor (Thomas E.) Holland.<sup>77</sup> He also mentioned that much of the last chapter, i.e. the sayings and provisions intended to explain the meaning of the *Code*, if not all, was approved by the experience and practice of the Parliamentary Counsel's Office. Although obviously only superficially acquainted with the *Code* and the legal system of Montenegro, Pollock expressed hope that the Montenegrin tribunals would not get entangled in the refinements of mixed fact and law, apparently alluding to the problems of the English judiciary. At the end Pollock jokingly remarked that the *Code* had no provisions on bankruptcy and wished the population of Montenegro that such an act not be adopted any time soon.

Bogišić and Pollock probably found an opportunity to discuss the General Property Code during, if not prior to, Pollock's stay in Paris, as is stated in the letter sent to Bogišić from Paris on 3 October, 1892.<sup>78</sup> In this letter Pollock – who had arrived in Paris a few days earlier with his wife and daughter – enquired as to whether Bogišić was in Paris. He expressed regret at the death of (Joseph) Renan<sup>79</sup> while remarking that he himself had just returned from a funeral of an old family friend. Pollock somewhat disparagingly and in passing criticised the conception of German authors of *Volksfriede* and “et d'autres *Volks-*” stating that this represented “la fantaisie pure” for Anglo-Saxon law. This criticism was certainly not intended as a message to Bogišić who was essentially grounded in Savigny's positions.

In support of the conclusion on Pollock's high regard for Bogišić the following note, unsigned, but again probably Pollock's in *The Law Quarterly Review* of 1893 may be stated. In this note the author pointed out that several years ago a partial account of the Montenegrin *Code*, the work of Baltazar

77 The person in question is probably Sir Thomas Erskine Holland (1835–1920), a famous Professor of International Law and Diplomacy at Oxford (1874–1910), who also took part in the launching of the *The Law Quarterly Review*.

78 The letter was written on a sheet of paper with the imprinted logo of the hotel *Chatham* in Paris. In the letter Pollock enquired if Bogišić was in Paris. See Pollock's letter of 3 October, 1892, Čepulo, Pisma (n. 9), p. 168.

79 The person in question is probably the French philosopher and historian Joseph Renan (1823–1892) who died on 2 October, 1892, i.e., a day before Pollock wrote his letter.

Bogišić, and in some respects the most original modern code, was given in that journal. From this laconic piece of news one learns that the French Ministry of Justice published a complete French translation of the *Code* and that its interest was apparent already at first sight. In a mood of optimism with respect to Bogišić and preoccupied by his simultaneous interest for both English law and the comparison of laws, Pollock compared Bogišić with Henry de Bracton. Pollock noted that in the matter of possession Bogišić openly dared what Bracton had nearly dared six centuries before, i.e., he declared that several persons may possess the same thing simultaneously and severally according to their respective limited interests.<sup>80</sup>

From the time this note was written until 1904 no records exist on any contacts between Pollock and Bogišić. However, a more extensive review of the General Property Code in *The Law Quarterly Review* of January 1897 written, according to the French translation, by H.A.D. Philips, a British administrative officer in Bengal, deserves attention. Philips presented the Montenegrin *Code* entirely from the viewpoint of an English colonial civil servant, taking into account the needs for and possibilities of codification of civil law in India. In his article Philips first explained that the Montenegrin law, like common law and some other laws remained outside the sphere of influence of Roman legal traditions. He continued expounding the method and the main characteristics of the *Code*. He drew the readers' attention to the fact that the *Code* did not cover relationships in the realm of family law and succession law and that customs were explicitly declared a subsidiary legal source. Philips went on to elaborate and comment on certain provisions, in particular compared them with the law in Bengal and India and suggested that some of these could be incorporated into Indian law. He devoted particular attention to the last chapter of the *Code* that contains explanations, definitions and supplementary provisions. He highlighted this as yet another feature which differentiated the *Code* from other similar continental European legal acts which began with such chapters instead of relegating them to the end. The author's satisfaction with the empirical nature and inductive method of framing the *Code* is expressed by an extensive list of proverbs from this part of the work. Philips pointed out that the *Code* was also peculiar because it was not the result of work of a legal commission, but of the "remarkable intelligence and energy of a single man". The author concluded his article by remarking that the commission for framing a civil code for India

80 The unsigned note see in *The Law Quarterly Review*, 9 (1893), p. 22.

81 H. A. D. Philips, The Code of Property of Montenegro, in: *The Law Quarterly Review*, 13 (1897), pp. 70–84. This article is accompanied by the remark that

– if it were ever appointed – would obtain many useful hints and much valuable material from the General Property Code.<sup>81</sup>

In the meantime Bogišić and Pollock probably made contact, what may be inferred from the intonation of Pollock's letter of 2 November, 1904. In this letter Pollock informed Bogišić that he was sending him ("au codificateur qui a su ne pas briser avec l'histoire") a slim volume of lectures which he had delivered during his trip to the United States of America in the previous year.<sup>82</sup> Pollock stressed that his aim was to evaluate the continuity of certain principles during the long development of common law. However, he obviously was not entirely satisfied with the result since he remarked that the overview was as gloomy as the conditions of his tour of American law schools but that he thought it would not do harm to history. This incidental remark also reveals that Bogišić and Pollock attended the celebration of the Code civil in Paris.<sup>83</sup>

A short letter to Bogišić of 30 July, 1906, points to another likely personal contact between Bogišić and Pollock in England. In this letter Pollock depicted a somewhat anecdotal situation on the occasion of assigning hosts who would accommodate guests of the congress on sociology. Then, by pure chance, Pollock himself was picked out to be Bogišić's host. He, therefore, asked Bogišić to inform him of the time of his arrival and expressed satisfaction at the prospect of seeing him.<sup>84</sup>

A letter written in Italian which Pollock, probably after his journey across Italy, sent from Paris on 6 October, 1906 also dates from the same year. He complained of a bad cold and in an entirely jocular tone poured invectives at Federigo da Ossonia Tuonanasuccio (Frederic Trumpeting Nose of Oxford), also known as "il Trombone" – who was obviously Pollock himself<sup>85</sup> – who tried his hand at "quella benedetta arte di diritto inglese, chi si e una cosa molto meravigliosa" but who only left few treatises that maybe were not worth remembering.<sup>86</sup>

Pollock's final and most extensive letter of 4 August, 1907 refers to the last face-to-face contact in England between Bogišić and Pollock. In this letter

the Ministry of Justice in Paris published a French translation of the General Property Code and that it was easily accessible.

82 The book in question is probably Frederick Pollock's *The Expansion of the Common Law*, London 1904. See De Wolfe Howe, *The Pollock – Holmes Letters*, I (n. 51), p. 112.

83 Pollock's letter of 2 November, 1904; Čepulo, Pisma (n. 9), pp. 168–169.

84 Pollock's letter of 30 July, 1906; Čepulo, Kratka pisma (n. 9), pp. 38.

85 This was the year when Pollock travelled across Italy with his wife and caught a bad cold. See De Wolfe Howe, *The Pollock – Holmes Letters*, I (n. 51), p. 34.

86 Pollock's letter of 6 October, 1906. Čepulo, Kratka pisma (n. 9), pp. 38–39.

Pollock told Bogišić that he was staying with his family at a country house in a village and invited him to pay them a visit. He also informed him of a tiring journey planned for the ensuing week and of the fact that he was going to compare Hobbes' and Locke's social contract theories and add a supplement on Jean-Jacques Rousseau in his lectures for scientific researchers of both sexes at Oxford. Pollock accompanied the invitation for Bogišić to spend the weekend with his family with detailed directions for the historical sites by which Bogišić was going to pass and mentioned American lawyers whom Bogišić would meet.<sup>87</sup> A letter which Pollock sent to Bogišić's sister Marija Bogišić-Pohl on Bogišić's death – prior to this letter Pollock had managed to send Bogišić a short and cordial letter wishing him a happy New 1907 – proves that Bogišić had taken up this invitation.<sup>88</sup>

In the already mentioned and more extensive letter of 2 November, 1908, which Pollock sent to Marija Bogišić-Pohl on Bogišić's death, Pollock described himself as a good friend of Baltazar Bogišić and mentioned that they had known each other for some twenty years, ever since before 1885 when they had first met. He added that they had met only occasionally, several times in Paris, twice in England. He emphasised that in the summer of 1907 Bogišić had spent several days at his country house and described one of their conversations during which Bogišić had confided to him that he had been thinking of doing a, probably more extensive, study on popular proverbs. He said that Bogišić had been "too scientific" a spirit to regard this study as final and that he had merely been looking for a framework which he could fill up with new material. Bogišić's assessment that he, Pollock, understood the said project better than other people with whom Bogišić had discussed it was considered by Pollock a special honour. In his letter Pollock

87 Pollock in particular drew Bogišić's attention to Guildford and Godalmiz, small places recorded in the Domesday Book itself; he mentioned Egerton Castle, an author of historical novels living in their neighbourhood and added that he would also introduce him to his friends, American lawyers, on the occasion of the international law congress in Portland. The letter was written in a train at a London railway station, apparently on his departure to the country house. See Pollocks letter of 4 August, 1907, Čepulo, Pisma (n. 9), pp. 169–170.

88 This was a picture postcard sent by Pollock from Bramshott Lane in December 1907 containing the following short note: "F. P. (non ancora spiegati i vitelli romani) omnia fausta ... MCMVII", i.e., "No explanation has yet been found for the vitelli romani. Best wishes [...]". The expression "vitelli romani" (Roman calves) stands for the wanton Roman youth but the meaning of the message remains unclear to me. This was most probably an internal joke. Pollock's letter of December 1907, Čepulo, Kratka pisma [Short Letters] (n. 9), pp. 39.

acknowledged that, because he did not know the language, he could only follow those works of Bogišić that had been translated or had appeared or in scientific reviews but that this was the reason why he and Bogišić had frequently talked in French. He again expressed his deep respect for Bogišić's extraordinary and cosmopolitan spirit, coupled with an unobtrusive and immense erudition as well as a kind nature and pointed to the masterful features of the General Property Code.<sup>89</sup>

Pollock took note of Bogišić's death in an obituary published in *The Law Quarterly Review*, in which he stated that the comparative study of legal institutions had suffered a heavy loss by the death of one of its most genial and cosmopolitan scholars. Pollock briefly listed the basic data of Bogišić's private and professional life: that he had been a native of Dubrovnik, that he had spoken "Servian" and Italian by birth, and Russian, that he had had a perfect command of French and probably also of German, and that he had read English. He singled out – incorrectly stating the name of the chair – that Bogišić had been a Professor of Historical and Comparative Jurisprudence at Odessa and had afterwards been occupied by his work on the Montenegrin Code, that he had then become the Montenegrin Minister of Justice during which time he had played a key role in framing the Queen of Italy's marriage settlement, and finally went on to stress Bogišić's love for Paris. Pollock expressed regret at the fact that, because of the language barrier, Bogišić's writings were not accessible to the Western reader and remarked that the Montenegrin Code was an acknowledged masterpiece. He also related an anecdote that Bogišić had told him about some Muslim friend of Bogišić who was in authority in part of the territory of Macedonia and who without anyone's objection administered the General Property Code within his jurisdiction.<sup>90</sup>

There is no doubt that Bogišić was well acquainted with Pollock's works with whom he shared an undeniable interest in the legal dimension of research

89 Pollock's letter to Marija Bogišić-Pohl of 2 November, 1908, Čepulo, Pisma, pp. 170–171. Condolences to Marija Pohl-Bogišić were also conveyed by a certain H.G. Woods who said that he had met Bogišić at the Pollocks' in Haslemere a year before and that he had hoped to develop this friendship. Letter by H.G. Woods, The Baltazar Bogišić Collection in Cavtat, Korespodencija poslije Bogišićeve smrti [Correspondence After Bogišić's Death], p. 91.

90 F. P., *The Law Quarterly Review*, 25 (1909), pp. 8–9.

91 Zimmerman, Valtazar Bogišić (n. 4), p. 285.

and broad knowledge.<sup>91</sup> In addition to the friendly character of their relationship, what bears further testimony to this are Pollock's books in Bogišić's library<sup>92</sup> and the extant notes on English law and, in part, on Pollock's writings<sup>93</sup> which Bogišić took in London in 1907. However, it was probably due to differences in interests, the different natures of common law and the Montenegrin customary law as well as the language barrier that Bogišić did not refer to Pollock.

If viewed in its entirety, the relationship between Bogišić and Pollock differed significantly, and not just in length and intensity, from the relationship between Bogišić and Maine. The scientific contents of this relationship relied on the different focal points of Pollock's scientific interests and on the fact that Bogišić had already singled himself out as the author of the General Property Code. The first and foremost characteristic of this relationship was its long duration and repeated friendly contacts pointing to their good mutual understanding. As regards the subject matter, Pollock's contacts with Bogišić were almost entirely coloured by his interest in comparative law. This interest found its expression in Pollock's reviews of and commentaries on the General Property Code, while the only review by Pollock which dealt with a different topic (the problem of the *inokosna* family) dates from the period before Bogišić finished his work on the *Code*. Another point of interest is the fact that Pollock always approached Bogišić's work from the perspective of English law. Both in his review of the mentioned work on the *inokosna* family and, even more so, in his articles on the General Property Code Pollock considered Bogišić's work from a largely pragmatic point of view, looking for parallels and more or less direct conclusions to be drawn for English law. This, of course, adds interest to Pollock's accounts. Nonetheless, they are all characterised by brevity and terseness. Their contents reveal that the subject

matter was not entirely within the author's grasp and even display a considerably superficial approach that was not entirely free from incorrect details. In fact, – despite paying compliments to Bogišić's works in these accounts – Pollock neither showed a full understanding nor appreciated the true worth of Bogišić's work. If one takes into account their friendly relationship and Pollock's sincere respect for Bogišić, the reasons therefore should probably be sought precisely in Pollock's focus on English law, in some kind of easy-going approach in a colonial manner.

Research into customary law carried out by continental lawyers was of interest to Pollock because of the possibility for direct comparison with English law. This is why in his writings he highlighted and valued especially these elements of Bogišić's work. In this sense (the focus on unwritten law and legal practice), and despite Bogišić's continental origin, his being a follower of Savigny's Historical School of Law and his focus in research on topics from the Slavonic cultural circle, the two authors shared a similar scientific foundation. Nevertheless, Pollock never took the effort to consider and evaluate more comprehensively and seriously the issue concerning Bogišić's classification – be it by adopting an entirely utilitarian approach as H. A. D. Philips had done from the colonial civil servant's point of view. Even so, Pollock's occasional but unflagging activities of informing the English scientific community about Bogišić's work testifies to his respect and sympathies for Bogišić, which must have brought Bogišić's work closer to the interested audience.

In contrast to these clearly visible endeavours by Pollock to draw Bogišić closer to the English public, there are no elements – disregarding the obviously equally friendly relationship – that would enable us to evaluate in a similar fashion Bogišić's relationship to Pollock. Pollock's work held no direct interest for Bogišić and the latter was in no position, nor was there any real need, to try to acquaint his public with the works of the famous English lawyer. Disregarding the fact that Bogišić and Pollock probably talked about a broad range of related scientific topics and the fact that Bogišić was obviously familiar with Pollock's works and took an interest in them, it is difficult to detect a more important influence of Pollock on Bogišić. Yet, bearing in mind the systematic nature of the contacts between them, it might just be possible to assume that Pollock stimulated certain previously existing interests of Bogišić and were common to both of them.

92 The following works by Pollock are listed in the Baltazar Bogišić Library catalogue in the Baltazar Bogišić Collection Cavtat: *Introduction à l'étude de la science politique*, Paris 1893; F. Pollock & J. W. Maitland, *The History of English Law I-II*, Cambridge 1898; *The Land Laws*, London 1887; *Introduction and Notes to Sir H. Maine's "Ancient Law"*, Cambridge 1906; *The Expansion of the Common Law*, London 1904.

93 In three notebooks Bogišić kept fairly detailed notes on the book by Pollock and Maitland, *The History of the English Law*. See in: The Baltazar Bogišić Collection in Cavtat, Bogišić's Archives, XXXIV, 5, O engleskim zakonima [On English Laws]. See also the notes which Bogišić apparently took at various London libraries, in: The Baltazar Bogišić Collection in Cavtat, Bogišić's Archives, XIV, 16, "Historique d'une codification i naučni dnevnik" [Historique d'une codification and the Scientific Diary].

## 1 Paul G. Vinogradoff: Career and Research Activities

Bogišić's works were also known to Sir Paul G. Vinogradoff, the third and only professor of the historical and comparative jurisprudence at Oxford with whom, it seems, Bogišić did not keep up a correspondence<sup>94</sup> in spite of the fact that they knew each other personally.<sup>95</sup>

Paul Gavrilovitch Vinogradoff, or Pavel Gavrilovich Vinogradov<sup>96</sup> as was his real name, was a man with an unusual destiny which also formed his scientific career and position to a certain extent. Since his student days in Moscow Vinogradoff belonged to the liberal circle of Russian thinkers who were politically orientated towards the West and who fostered a sceptical relationship to prevailing Slavophile ideas. In this spirit Vinogradoff regarded England in particular as the source of the ideals of the rule of law and other liberal institutions. This was one of the reasons why, after having finished his studies and several study trips to European countries, he chose England to start working on his thesis. At a time when the development of legal history was mostly based on comprehensive works on comparative law, Vinogradoff made his name as the author of *Villeinage in England*. In his work he tackled the problem concerning the origin of the English *manor* from the viewpoint of

94 Bogišić's correspondence also contains an extant letter of some Vinogradov. See Pismo Vinogradova [Letter by Vinogradov], See in the Baltazar Bogišić Collection in Cavtat, Bogišić's correspondence, V, VI6. However, in this letter of 1871 a professor of Russian at the Tačačeska *Gymnasium* asked Bogišić, obviously at the time of the latter's stay in Odessa, for a letter of recommendation that would expedite his departure for a study trip to Austrian and Prussian *gymnasija*. The mentioned Vinogradov is probably the author of the book P. Vinogradov, *Kratkaja slavjanskaja grammatika* [The short Slavonic Grammar], Moscow 1865, to be found in the inventory of Bogišić's library. No traces of Paul G. Vinogradoff are found in the catalogues of Bogišić's correspondence and library, be they in the form of monographs or letters.

95 In one review of Bogišić's work Vinogradoff explicitly mentioned his oral communication with the author. See P. V. – A propos du code civil du Montenegro. Quelques mots sur les principes et la méthode adoptés pour sa confection. Lettre a un ami, par V. Bogisic, Paris, 1886, p. 463. – Etude sur le nouveau code civil du Montenegro et sur l'importance des principes suivis par l'auteur de ce code en matiere de codification, par C. Dickel. Amtsrichter à Berlin, traduit par J. Brissaud, professeur à la Faculté de Droit de Toulouse, Paris, 1891, (Extrait de la revue générale du Droit), in: *Revue critique de histoire et de littérature* No. 40, 5. octobre 1891.

96 On P. Vinogradoff see Carlton Kemp Allen, *Law in the Making*, Oxford 1958, pp. 83 ff; Herbert Albert Laurens Fisher, *Memoirs*, in: *The Collected Papers* (n. 44), pp. 3–74; Stone, *Social Dimensions* (n. 15), pp. 141–147.

a specialist on the Russian village community. Based on archive material he concluded that the *manor* had its roots in the English village community, thus revising the then prevailing belief that it was feudal in origin. He then embarked on a successful career at the University of Moscow, participating in the movement for the implementation of the education reform as well as in the movement of local self-government units (*zemstva*). In 1901, as a result of his opposition to government policies, he left Russia and was elected Corpus Professor of Jurisprudence at Oxford upon Pollock's departure. By adopting a comparative method and the viewpoint on the interdependence of legal and social factors, and by embracing the need for the exploration of legal antiquities Vinogradoff continued for the most part in Maine's footsteps. Similarly to Maine, his research was framed by his quest for a wide-ranging alignment between social and legal developments. He, however, held that this alignment should be sought through a multilinear evolution. By contrast to Maine and following the lead given by F. W. Maitland, he aimed at a more in-depth study of individual cases, rules and institutions and defined legal history as a study into the life of legal ideas in their surroundings. It is worth noting that in his lectures at Oxford Vinogradoff dealt with both historical jurisprudence and the comparative law of modern states. The sheer number of published works contributed to his position as a leading authority on English medieval history of the day. However, he also explored topics relating to the legal history of antiquity and the modern period as well as issues of jurisprudence. Towards the end of his life Vinogradoff started working on *Outlines of Historical Jurisprudence* (1920–22)<sup>97</sup> which was meant to be his magnum opus. In this work his aim was to deal with the materials relating to the fields of legal history and contemporary law according to the types or stages of legal evolution. Before his death he finished no more than the first two volumes of the said work (Introduction and Tribal Law and The Jurisprudence of the Greek City) in which he also gave a very concise account of Bogišić's studies. Even so, it seems that Vinogradoff's attitude towards Bogišić's work was influenced by both his scientific and political convictions and experiences.

## 2 Baltazar Bogišić and Paul G. Vinogradoff: Reception and Scepticism

The first note testifying to Vinogradoff and Bogišić's contact is Vinogradoff's joint commentary on Bogišić's work *A propos du code civil du Montenegro*

97 Paul Vinogradoff, *Outlines of Historical Jurisprudence*, London, New York 1920–22.

(1886) and Carl Dickel's work *Etude sur le nouveau code civil du Montenegro* (1891).<sup>98</sup> The review is of special interest since, although it is full of praise for Bogišić's work, it contains certain reservations which can be attributed to Vinogradoff's scientific and political views. Vinogradoff did not review these books at all but instead published a commentary on the Montenegrin Code. He was among the few who also expressed certain doubts about its adoption. His initial claim that the legislations of Slavonic countries broke with the tradition of customary law and that Montenegro, which had preserved the oldest Slavonic institutions – as exemplified by laws such as those allowing for the blood feud and private wars and not representing a threat to the ancient popular law – was the only exception following the same line of reasoning. This is why Vinogradoff termed the General Property Code the gift of modernisation from Prince Nicholas I to the Montenegrins. Vinogradoff undertook the assessment of its value by having only indirect information at his disposal since he stated that he had not read the act, although he had insight into it. Namely, Vinogradoff stated that Bogišić had provided him with an analysis of the Code and its partial literal translation as well as with an oral commentary, while Dickel's brochure contained an outline of its contents. According to Vinogradoff the best and most original feature of the Code was Bogišić's appreciation of the importance of customary law. He, therefore, stated that Bogišić was the only European legal expert-legislator who approached popular law from a scientific perspective. By way of illustration he stated that the chapter on the family which makes the reader believe that he is reading "une šuvre antique" as a result of Bogišić wisely avoided to engage in the modernisation of primitive law. In contrast to this, in the part on possession and the theory on elements concerning obligations of Roman law are nevertheless visible. However, following this description and praise for Bogišić Vinogradoff actually took issue with the framing of the Code "sur l'avis du plus sage des jurisconsultes" and a small number of advisers instead of it being based on an agreement between Prince Nicholas and his people or a larger number of noblemen convened in Cetinje. This was in accordance with the somewhat pathetically expressed stance that it was the people who knew the traditions better than either Prince Nicholas or the experts and that they should be called upon to modify and formulate the ancient law. Vinogradoff illustrated this by the example of Prince Danilo, who, in 1855 together with the heads of the people, had promulgated a code in Cetinje.<sup>99</sup>

98 P. V., A propos (n. 95).

99 Such an interpretation of the Danilo's Code is definitely not complete. Cf. Martinović, Valtazar Bogišić (n. 6), pp. 168 ff.

while a popular element such as this one was not present in any shape or form in the General Property Code. Vinogradoff pointed out that "l'éminent M.B." had admittedly given him "des garanties sérieuses" but went on to say that Bogišić took the place of the heads of the people and the people themselves with whom he was, nevertheless, completely open. Vinogradoff, of course, relativised these "guarantees" and advocated a stable and modern legal order. Thus, his conclusion that tomorrow there would be no Bogišić while the General Property Code based on a new legislative method would still exist was in agreement with this line of reasoning. Nevertheless, Vinogradoff concluded his article by observing that not even Montenegro, after having adopted the General Property Code, was any longer different from the other Slavonic countries. Since the article is in general very positively disposed to Bogišić, this mild dissonance seems all the more conspicuous in spite of it probably being equally indicative.

It is clear from Vinogradoff's review of the Statute of Ragusa and from the first volume of *Outlines of Historical Jurisprudence* that he followed and appreciated Bogišić's works. In a more extensive review entitled "The Customs of Ragusa" in *The Law Quarterly Review* of April 1905, Vinogradoff presented *Liber Statutorum Ragusii* (1904) edited by K. Jireček and B. Bogišić and published by the Yugoslav Academy of Sciences and Arts in Zagreb.<sup>100</sup> Following the initial remark that the significance of certain legal enactments need not stand in direct relation to the size and political importance of the states which formulated and enforced them, Vinogradoff briefly outlined the history of Dubrovnik. He then presented the most interesting provisions of the Statute of Ragusa, pointing to enactments derived from the Roman law as well as to the authentic ones. He called the reader's attention to the Slavonic substratum, especially in the field of penal law (*vražda*), and congratulated B. Bogišić and K. Jireček, the acknowledged authorities in such matters, for their editorial work.<sup>101</sup>

Bogišić also found the place in Vinogradoff's never completed capital work *Outlines of Historical Jurisprudence*.<sup>102</sup> In the chapter on Indo-European

100 *Liber statutorum civitatis Ragusii compositus anno 1272 cum legibus aetate posteriore insertis ediderunt V. Bogišić et C. Jireček*. Monumenta historico-iuridica slavorum meridionalium, vol. IX, Zagrabiae 1904.

101 "It is needless to say that the editors, M.M. Bogišić and Jireček, have performed their work with all possible care and al learning which fully answers to their authority in such matters", in: Paul Vinogradoff, The Customs of Ragusa, *The Law Quarterly Review*, 21 (1905), pp. 179–183.

102 Paul Vinogradoff, *Outlines of Historical Jurisprudence. Volume One. Introduction. Tribal Law*, Oxford 1920.



Culture Vinogradoff addressed, as a separate unit, the subject matter of the joint family and within the latter that of the Slavonic communal joint family which he was well acquainted with, due to his knowledge of Russian history: in his presentation of the South Slavonic community he mainly used Bogišić's research results. He concluded this part with a concise overview of Bogišić's views taken from Bogišić's article published in the Moscow *Žurnal Ministerstva Narodnago Prosvješćenija*<sup>103</sup> (Journal of the Ministry of the People's Education) on customs regulating community management and the role of the father. Later in this chapter Vinogradoff referred to the results of Bogišić's data collection for South Slavonic lands and highly valued the results of his study. However, it is interesting to note that Vinogradoff termed these regions – obviously without a true understanding of their multiethnic nature – “districts inhabited by the Serbian race”.<sup>104</sup> As many as fifteen years after Bogišić's death and after an even longer period of time since the study had been undertaken and its results published Vinogradoff adhered to the results of Bogišić's study in that part which he intended to be his magnum opus.<sup>105</sup>

Thus, viewed in its entirety, Vinogradoff's relationship to Bogišić was the most interesting and relevant, although maybe the least prominent from the quantitative perspective. Certainly of great significance is the fact that Vinogradoff was Russian and therefore had a more direct and complete knowledge that was accompanied by related experience of the problems addressed by Bogišić. Of course, of the three Oxford lawyers, Vinogradoff was the one who understood Bogišić's contribution best. The relationship between Bogišić and Vinogradoff most probably relied on a to a certain degree similar scientific basis – as was the case with Maine. That particularly refers to Vinogradoff's general orientation towards historical studies, his appreciation of the importance of the influence of the social environment and his comparative approach to legal historic issues. Vinogradoff's modest treatment of the Montenegrin *Code* may be accounted for by the fact that his primary scientific interest was not directed at comparative legal issues and probably also by his critical stance towards Slavophilism and the authoritarian forms of government in Slavonic countries. It would be difficult to disregard the fact that Vinogradoff's liberally-rooted critical remarks on the

codification of Montenegrin customs were somewhat one-sided and oversimplified, namely his words of praise for the consensual element present in the adoption of the technically primitive and draconian code of the authoritarian Prince Danilo. Even so, Vinogradoff's slight reservations brought him far nearer to achieving an understanding of the Montenegrin reality than was the case with Romantic idealisations and flawed understanding of English and other European scientists. However, the friendly relationship between the two as well as Vinogradoff's praise of Bogišić in this and the other two works demonstrate that Vinogradoff respected Bogišić's research. This is proven by Vinogradoff's use of Bogišić's studies for a longer period of time even after Bogišić's death.

It is nevertheless surprising that Bogišić, so inclined to debate, did not, or so it seems, carry on a correspondence with Vinogradoff despite their personal acquaintance. It is also unusual that Bogišić's library does not contain a single work by Vinogradoff.

### VIII Conclusion

Baltazar Bogišić carried on a correspondence with all three professors who were the first to hold the Chair of Historical and Comparative Jurisprudence at Oxford University. Yet, apart from the scientific determinants, the nature of their relationship also depended on personal factors. Therefore, despite having certain characteristics in common, each of the three cases may be distinguished by a relatively different type of contact.

While the Oxford lawyers showed a considerable interest in Bogišić's studies, the influence exerted in the opposite direction does not deserve serious consideration. Such a reception of Bogišić in Oxford was possible because of the comparable scientific foundation which affiliated Bogišić to the evolutionary, empirical and organic tradition of English legal thought. This also indicates a complementarity between the German Historical School of Law and the English representatives of historical and comparative jurisprudence with regard to their reinterpretation of the national orientated study within a comparative framework and with a view to gaining insight into the general development of law. As a whole, it seems that this relationship confirms the closeness indicated at the beginning of the two different lines of study. What facilitated the complementarity of this relationship was Bogišić's critical stance on the adoption of certain attitudes of Savigny and, even more so, his emphasis on the comparative approach. This is why the representatives of historical and comparative jurisprudence in England, much like other European scholars, must have found the information that had originated in such an interesting but distant and not easily accessible area and

103 Vinogradoff, *Outlines* (n. 100), pp. 268–271. The article in question was Bogišić's rejoinder in the polemic with Fedor Leontović “Po povodu stat'i g. Leontoviča: Zametky o razrabotke obyčnago prava”. See here, n. 28.

104 Vinogradoff, *Outlines* (n. 102), p. 271.

105 Zimmermann pointed out that Vinogradoff was among the few who continued to be guided by Bogišić's studies even after his death. Zimmermann, *Valtazar Bogišić* (n. 6), p. 284.

that was reaching them in a form and manner that were, respectively, familiar to them and immediately usable, interesting.

The significance of Bogišić's influence ought to be evaluated within the same context. It is quite clear that this influence did not extend to the fundamental orientations of the representatives of English historical and comparative jurisprudence. Instead, it was limited to the noting down of the results of Bogišić's studies and their incorporation into syntheses or to attempts at drawing lessons from Bogišić's legislative work within their own and already formed scientific systems. For the English lawyer Bogišić represented an exceptionally important (and probably the most important) source for the South Slavonic and even, more generally, Slavonic laws. The very act of putting them to good use was conditioned on the recipients' different orientations. Thus, while it is possible to claim that it was Vinogradoff who best understood Bogišić's studies and legislative work, it was Maine who highlighted their value in the most significant way and in whose opus they occupy the most important place. It also seems that Bogišić's results found their reflection in Maine's lectures to students. When observed in their entirety, it goes without saying that some of the most notable contemporary English legal historians were familiar with the results of Bogišić's research and legislative work and circulated them within the interested English and European academic circles.

In contrast to Bogišić's distinctly noticeable presence in the works and interests of the English lawyers, the latter's works, despite their importance and prominence, found at best a pale reflection in Bogišić's opus. This might be due to the fact that Bogišić's theoretical structure within the framework of the continental legal thought had already been completed. Even more important was that his interests were confined in subject matter to Slavonic laws, which provided for only a very restricted direct use of research results of English lawyers'.

Finally, it seems that the broader study of Bogišić's correspondence might shed some light on the exceptionally interesting fragments which are important for the reconstruction of the scientific channels of communication between European legal scientists in the second half of the 19<sup>th</sup> century. It is in precisely this sense that Baltazar Bogišić may be regarded as a topic of pan-European interest.

Dalibor Čepulo (Zagreb)

## Charakteristika und Tendenzen der ungarischen Rechtswissenschaft im »langen 19. Jahrhundert«

I. Forschungsstand und Literatur – II. Die Rechtswissenschaft im Zeitalter des ständischen Rechts (bis 1848) – 1. Die Verbindungen zwischen Rechtswissenschaft und Rechtsunterricht: Wissenschaftliche Arbeiten von Juraprofessoren – 2. Transfer der Staatenkunde aus Deutschland – 3. Sprache der wissenschaftlichen Abhandlungen nach 1790 – 4. Zusammenfassungen des ungarischen ständischen Rechts im 19. Jahrhundert – 5. Kodifikation und Rechtswissenschaft von 1790 bis 1848 – 6. Reformjuristen und ausländische Modelle – 7. Die Förderung der nationalsprachigen Rechtswissenschaft durch die Ungarische Akademie der Wissenschaften – 8. Die Historische Schule in Ungarn vor 1848 – 9. Beginn der modernen Rechtswissenschaft – III. Die Rechtswissenschaft während des Neoabsolutismus – 1. Generationswechsel in der Rechtswissenschaft – 2. Juristische Enzyklopädien und Vernunftrecht – 3. Historismus in Ungarn – 4. Öffentliches Recht – 5. Einheimische Tradition und österreichisches Gesetzesrecht: Privatrechtswissenschaft der 1860er Jahre – IV. Rechtswissenschaft im Zeitalter des Dualismus 1867–1918 – 1. Kodifikation und Rechtsvergleichung – 2. Neue Plattformen der rechtswissenschaftlichen Debatten – 3. Schulen der Privatrechtswissenschaft – 4. Wissenschaft des öffentlichen Rechts in Ungarn – 5. Rechtsphilosophie – 6. Die Historische Schule im Dualismus – V. Fazit

Die Geschichte der Rechtswissenschaft in Ungarn im 19. Jahrhundert lässt einen langen Weg von den Kommentaren zum ständischen Recht bis zur Entstehung der nationalen Rechtsliteratur der Moderne erkennen. Sowohl zeitgenössische ungarische Beobachter als auch gegenwärtige Rechtshistoriker aus Österreich und Deutschland stellten fest, dass die Entstehung der ungarischen Rechtswissenschaft relativ spät eingesetzt hat. Ernő Nagy äußerte sich über die Entwicklung der Wissenschaft des öffentlichen Rechts in Ungarn und begründete dessen Entstehung mit der fremden Herrschaft in Ungarn.<sup>1</sup> Diese These steht im Einklang mit Überlegungen von Werner Ogris und Michael Stolleis im Hinblick auf die späte Entstehung der Rechtswissenschaft in Ungarn.<sup>2</sup>

- 1 Ernő Nagy, *A közjog tudományos műveléséről* [Über die wissenschaftliche Bearbeitung des öffentlichen Rechts], Budapest 1902, S. 10.
- 2 Werner Ogris, Diskussionsbeitrag zu Michael Stolleis' Vortrag »Innere Reichsgründung durch Rechtsvereinheitlichung 1866–1880«, in: *Rechtsvereinheits-*