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Legal Linguistics and Ethnological Jurisprudence in Legislative Reforms: Drafting Legislation in Montenegro

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Abstract

In the context of contemporary legislative reforms, countries that lack a comprehensive and compact corpus of national laws may choose to rely on linguistic methods and techniques inspired by the basic principles of ethnological jurisprudence. The General Property Code for the Principality of Montenegro, written by jurist Valtazar (Baltazar) Bogišić, is one of the rare examples of a legal act drafted primarily on principles that would later become the core of ethnological jurisprudence. The dogmatic teachings of this legal school of thought and its relationship to legal linguistics is summarised, and Bogišić's ideological and methodological approach to the codification of the General Property Code is reviewed. Special attention is placed on the relevance of Bogišić's approach to drafting legislation from a contemporary perspective, principally in the countries in which legislative reforms mostly rely on legal transposition: the amelioration and consolidation of national laws through a direct or indirect reliance on foreign legal concepts. The central part of Bogišić's ideological and methodological approach to legislative reforms is legal linguistics. Therefore, Bogišić's analysis of Montenegrin legal terminology and his differentiation between the three categories of legal terms appearing in the General Property Code is offered. The study concludes with recommendations for the potential application of Bogišić's approach to legislative drafting to attain more positive effects from legislative reforms.

Keywords: *acquis communautaire*, Bogišić, ethnological jurisprudence, General Property Code for the Principality of Montenegro, legal linguistics, legal transposition, legislative reforms

Introduction

Legal linguistics are a necessary and multifunctional constituent of all legislative reforms. Their role in contemporary legislative drafting exceeds the level of simple policy formulation, commonly aiming to ensure that legislation is easily comprehensible to those whom it might concern. As the law is only one of a society's constituent parts and cannot ensure the

achievement of any development on its own (Tamanaha, 2011, p. 247), legislative reforms are conditioned by the capability of lawmakers to predict how the envisaged policy will be applied in a particular social environment (Seiden & Seiden, 2008, p. 296). In that respect, legal linguistics is expected to take a proactive role, anticipating and indicating how the choice of legal terminology influences the understanding of a legal concept and its subsequent interpretation. Furthermore, it also ensures the consistent use of various legal terms across different legal branches to safeguard and strengthen the legal system's compactness and functionality. Therefore, disregarding the importance of legal linguistics for legislative reforms can lead to the creation of dysfunctional legislation incomprehensible to those who are supposed to adhere to its norms.

Nonetheless, the necessity of formulating and adopting a concise and consistent approach to drafting legislation is often suppressed for a variety of economical and time-saving reasons. This practice is especially notable in countries that lack a consolidated and functional corpus of national laws. For example, after the fall of communist regimes in ex-Yugoslav and post-Soviet countries, the newly formed states decided to undertake a set of profound legislative reforms (Petrovic, 2013, p. 1). These reforms were designed to provide a suitable basis to introduce democracy and further socio-economic development, which is still apparent in one of the ex-Yugoslav countries, Montenegro (Dauderstädt & Gerrits, 2000, p. 374). Specifically, while Montenegro unquestionably embraces European values (Penev, 2010, p. 31) and aims to create modern and functional laws (mainly through the adoption of the common rights and obligations that are binding on all Member States of the European Union (EU), (i.e., the European *acquis communautaire*; see European Commission, 2020, p. 4), such laws often fail to exceed the rudimentary phase of development, integrate fully within the country's existing legal environment and leave behind a transitory character condemned to further modifications.

Consequently, most post-independence Montenegrin laws have been amended several times, and some have been replaced entirely. Due to its ongoing accession negotiations with the EU, the essence of the legislative reforms in Montenegro is a legal transposition. Such legal transposition represents a direct and indirect transposing or introducing of legal concepts appertaining to the European *acquis communautaire* into the Montenegrin national legal system. Nonetheless, the lack of a genuine political culture rooted in a consolidated democracy (Suchocka, 2015, p. 24) significantly influences the results of those legislative reforms. Moreover, insufficient attention is placed on planning and anticipating the results of the transposition mechanisms used. In that respect, the importance of legal linguistics in achieving the most out of the legislative reforms is often unfairly neglected.

This study will discuss the use of legal linguistics, inspired by the legal doctrine of ethnological jurisprudence, to ensure the functionality and outcomes of legislative reforms in countries where legal transposition predominates all legislative reforms, such as contemporary Montenegro. Ethnological jurisprudence combines the knowledge, research methods and scientific method, from both ethnology and jurisprudence. The term was introduced in 1886 by the scholar Albert Hermann Post (Leonhard, 1934, p. 216). Ethnological jurisprudence has primarily been perceived as a theoretical science, researching the laws of 'all the peoples of the Earth' (Post, 1891, p. 34). Related research has focused chiefly on developing ethnological jurisprudence as a science (Tarkany-Szücs, 1967, p. 212) rather than potential practical reliance on its tenets; therefore, its application in the context of legislative reforms has not been sufficiently researched. One of the rare examples of ethnological jurisprudence in practice is the 1888 General Property Code for the Principality of Montenegro, authored by jurist Valtazar Bogišić – this study will present the ideological, methodological and linguistic techniques and methods used by Bogišić while preparing the General Property Code. Simultaneously, it aims to discuss whether and to what extent Bogišić's approach continues to be relevant and might offer a new perspective into contemporary legislative reforms in those countries still lacking a coherent corpus of functional domestic legislation (such as Montenegro).

To this end, the study commences with a brief overview, including some shortcomings, of the current status of legislative reforms in Montenegro. It proceeds with a discussion of the basic postulates of ethnological jurisprudence and indicates its relationship to legal linguistics. Furthermore, the ideological and methodological approach, which enabled Bogišić to establish the appropriate extent, nature and timing of legislative reforms, is presented. Bogišić's linguistic methods and the techniques used to codify the General Property Code, inspired by the canons of clarity, precision and unambiguity, are highlighted. As the study aims to promote the significance of appropriate legal terminology in ensuring the functionality and durability of legal acts resulting from legislative reforms (especially when performed through legal transposition), due reference is also made to the compatibility of Bogišić's linguistic approach with contemporary linguistic practices.

Legislative Reforms in Montenegro

The history of the Montenegrin legal system has been marked by periodic profound reconceptualisations inspired and aligned with the changes in the country's political aspirations and its overall socio-cultural reality. Until the 19th century, the Montenegrin legal system was primarily based on local customary law. Its modernisation, tailored by comparative European

civil law practices, commenced in the late 19th century. Bogišić's General Property Code, which meticulously regulated the basic postulates of Montenegrin property law and some parts of Montenegrin customary contract law, represents one of the most important legal acts from that era. Due to its success in combining the need for profound legal reforms and legal modernisation with the existing national laws and customs, the Code represents one of the rare legal acts that continued to apply throughout Montenegrin territory, even after the state officially ceased to exist in 1918.

Nonetheless, the modernisation of the Montenegrin legal system in light of European civil law practices was disrupted by the creation of a Yugoslavian state, which started to embrace communist political and legal doctrines beginning in 1945. After the dissolution of Yugoslavia in the 1990s, the collapse of the communist regime incited the country's decision to return to political and legislative reforms rooted in democracy. Thus, the history of contemporary legislative reforms in Montenegro can be traced only to three decades ago. This radical change of the basic postulates of a legal system is not specific to Montenegro, as similar patterns of democratisation through legislative reforms may be observed in other countries of the Balkans region (Dolenc, 2016, p. 125) and in the so-called EU-associated post-Soviet countries, or the countries of the former Soviet bloc that have embraced EU integration as their objective (Ordukhanyan, 2019, p. 820).

After regaining its independence in 2006, Montenegro met all the necessary preconditions for undertaking profound reforms in each area of social life (Vukčević & Bošković, 2016, p. 9), including the comprehensive overhaul of its legal system. Contemporary legislative reforms in Montenegro are predominantly marked by the legal transposition of the European *acquis communautaire*. Even the preamble of the 2007 Montenegrin Constitution reinforces that Montenegro is committed to its European integration, stating that Montenegrins share the same values and aims as the peoples of Europe (Orlandić, 2015, p. 66). Negotiations on a *Stabilisation and Association Agreement* between Montenegro and the EU started in 2006. The *Agreement* was officially signed in 2007 and came into force in 2010, after its ratification by all 27 EU Member States. Following its ratification, the accession negotiations with Montenegro officially started in 2012. Since that time, Montenegro has been trying to harmonise its domestic laws with the European *acquis communautaire*. Nonetheless, the pace of such legislative reforms has been rather slow. As a consequence, Montenegro has been engaged in one of the most prolonged negotiations with the EU. This is in part because Montenegrin legislation still fails to achieve the minimum standards of functionality and efficiency.

Despite regaining its independence more than a decade ago, drafting legislation in Montenegro (which also includes the transposition of the European *acquis communautaire*) is still mostly unregulated. In 2010 the Government of Montenegro adopted the *Rules on Legal and Technical Approach to Drafting Legislation* (*Pravno-tehnička pravila za izradu propisa*, 2010), which contain a specific chapter regulating the language, the style and the overall linguistic approach to drafting legislation in Montenegro. Nonetheless, this chapter contains only two articles in which the legislator vaguely refers to the general principles of drafting legislation. There are no references to any particular linguistic approach, or linguistic methods and techniques, that should be relied upon when preparing a particular legal act. Furthermore, the *Guidelines for Harmonizing the Regulations of Montenegro with the European Acquis Communautaire* are annexed to the *Rules*. The *Annex* merely specifies that the same legal and technical approach to drafting national legislation shall also be used to transpose the European *acquis communautaire*. However, the exact modality in which a particular legal concept should be communicated to the general public remains uncertain. Such uncertainty leaves space for simultaneous reliance on different (at times contradictory) linguistic approaches to drafting legislation. This ultimately leads to inconsistent legal terminology across various branches of Montenegrin national law.

Apart from the *Rules* and *Guidelines*, the Montenegrin ministry charged with European affairs also prepared a *Handbook for the Translation of Legal and Other Acts During the Process of European Integrations* (Vlada Crne Gore, 2012), which was initially adopted in 2010, and subsequently amended in 2012. The *Handbook* was envisaged as a tool for translators and related professionals engaged in translating legal regulations from Montenegrin into English and *vice versa*. For that purpose, it primarily explains the basic legal concepts of Montenegrin and EU law. It also contains a brief Montenegrin-to-English glossary containing the names of Montenegrin institutions, titles of the basic legal acts of the EU, titles of EU publications and a list of acronyms (Vlada Crne Gore, p. 175). Nonetheless, the *Handbook* provides no details about the linguistic approach to legal translation nor a comprehensive glossary of Montenegrin legal terminology and its actual use.

This section reveals that Montenegro still lacks a firm, compact and unanimous approach to drafting legislation. Furthermore, there are currently no official databases or glossaries that might serve as a tool for ensuring the harmonised use of legal terminology across different legal branches. Moreover, due to the country's objective to close the EU accession negotiations as soon as practically possible, the involvement and participation of the general public is often underestimated. For all those reasons, the lawmakers repeatedly fail to communicate the

European *acquis communautaire* in a comprehensible and straightforward manner, which prevents its full implementation and integration into the Montenegrin legal environment.

Ethnological Jurisprudence and Legal Linguistics in Legislative Reforms

As suggested by Bajčić (2018), every language and legal system contains specific features deriving from a particular culture and tradition. Therefore, the effectiveness of all legislative reforms, particularly those reforms adopted through legal transposition, could be enhanced through insistence on ensuring the compliance between the transposed legal concepts and the existing corpus of national laws, inspired by local culture and traditions. In that respect, the teachings drawn from ethnological jurisprudence could serve as a starting point.

Ethnological jurisprudence is founded upon a comparative-ethnological method, rejecting any system of jurisprudence founded upon the law of a single nation or a group of nations (Post, 1897, p. 642). It confronts broad categorisations of legal traditions and focuses on the systematised arrangement of numerous legal conceptions that repeat themselves among different peoples. For this reason, the ideal basis for the development of ethnological jurisprudence would be the 'monographic' treatment of the law of every single society worldwide (Post, 1891, p. 37), including an analysis of the legal customs that connect the law and members of society. Ethnological jurisprudence, as also held by Bogišić (Bogišić, 1874, p. 18), rejects the traditional perception of customs (Pigliasco, 2000, p. 6), where interest is centred solely on the segregation and separate examination of its essential elements, i.e., habit and prolonged usage. For example, Bogišić perceived customs more as self-sufficient units composed of people's internal beliefs and needs, which substitutes for the metaphysical quest to satisfy the inner desire for absolute truth.

Post (1891) stressed that ethnological jurisprudence places prominence in the law viewed as a provenance of ethnic existence. Therefore, ethnological jurisprudence holds that legal customs, conceptions and institutions initially arose from expressions of the individual legal consciousness (or jural consciousness), which relies on social instincts developed through persistent and inevitable interactions in human societies. The individual jural consciousness, i.e., the individual perception of the jural world, is a product of the social conditions and environment in which a person is raised. The individual jural consciousness changes according to social conditions, implying that people who grow up under different social conditions possess notably different juristic perceptions (Post, 1891, p. 36). On the contrary, a shared jural consciousness is a collective perception of the legal concepts and legal relationships of a determined number of individuals at one exact historical moment. Over time, the individual

perceptions of jural affairs became widely accepted by a totality of individuals, forming their shared (common) jural sense. Therefore, if ethnological jurisprudence is used in legislative reforms, its focus would not be on individual jural consciousness but rather on determining whether and how the shared jural consciousness can be altered to accept a given legal change.

The methodology suitable for ascertaining the application of legal ethnology has not been sufficiently researched to date (Tarkany-Szücs, 1967, p. 195). However, one method to determine the shared jural consciousness, as derived from Bogišić's approach, could be research into a commonly used legal vocabulary. It might be argued that for Bogišić, the research into legal vocabulary had a dual function. From one perspective, it was used as an indicator of citizens' perceptions of their jural life, indicating their jural consciousness. From the other, it served as a guideline for the materialisation of legislative reforms, i.e., to determine the adequate expression of legislative reforms in a manner that enabled or even facilitated their successful implementation within the shared jural consciousness. The focus of Bogišić's interest was not on legal vocabulary in general but, rather, on the expressions and terms suitable for prescriptive legal texts, i.e., for codification purposes.

Legal expressions and terms exist in many forms, and their use is dependent on the nature, content and purpose of a legal text. Based on their communicational and functional component, all legal texts might be delineated as: (i) prescriptive (e.g., national and international legal acts); (ii) both descriptive and prescriptive (e.g., court verdicts and administrative decisions); or (iii) descriptive (e.g., academic articles and books) legal texts (Bajčić, 2014, p. 317). In general, depending on the type of legal text, there are two major types of legal expression. One centres on simplicity and tends to induce even the most oblivious reader to apprehend the purpose of legal norms. This linguistic approach is typical for prescriptive legal texts and also represents the prevailing style in the combined descriptive and prescriptive legal texts. It aspires to achieve legal effectiveness by establishing clarity, precision and unambiguity as its objectives (Xanthaki, 2014, p. 85). In the other approach, scientific accuracy often prevails over the canons of clarity, precision and unambiguity. It characterises descriptive or non-binding legal texts (Bajčić, 2014, p. 318), aiming not to dictate and impose a proper social order but instead to examine and discuss pre-existing rules.

Legislative reforms are meant to produce prescriptive legal texts, and thus, they should result in legislation drafted in clear (Nourse & Schacter, 2002, p. 594), precise (Pigeon, 1988, p. 7) and unambiguous (Duckworth, 1977, p. 241) legal language, ascertained from the perspective of the law addressees. In prescriptive legal texts, any combination of normative and academic legal writing threatens to erode the circle of simplicity and result in dysfunctional

and inconsistent legislation, detached from the practicability and functionality it was designed to reflect. Nonetheless, it must be acknowledged that the indeterminate nature of language forces the legislature to deviate from the ideal concepts of clarity, preciseness and unambiguity and to embrace the ambiguity, vagueness and generality of specific legal terms (Cao, 2007, p. 19). For example, terms such as 'due diligence', 'reasonable men' and 'good business practices' represent widely accepted concepts where lawmakers resort to the descriptive and imaginative component of an academic writing style while intentionally leaving further scrutinization to experts' findings and the decisions of competent adjudication authorities.

Despite these sporadic pervasions between academic style and clear, precise and unambiguous legal writing, the guiding idea in prescriptive legal texts should be the simplicity of the legal expression, thus creating a functional system of acceptable social norms and human behaviours (Cao, 2007, p. 20). The further the prescriptive legal text reaches for literature-like, i.e., descriptive, linguistic rules and techniques, the more the legislation abandons its primary function of providing a system of rules (Caldwell, 2008, p. 258). Consequently, this study will be limited to presenting Bogišić's use of legal vocabulary in prescriptive legal texts and the potential reliance on his findings in the present-day context.

Bogišić's Ideological and Methodological Approach to Legislative Reforms

Several parallels may be drawn between the objectives and circumstances under which the General Property Code was prepared and contemporary legislative reforms in Montenegro. Namely, the joint nominator between Bogišić's work on the General Property Code and contemporary legislative reforms in Montenegro is the modernisation of the existing legal system by relying on comparative practices and experiences. While Bogišić's quest involved modernising the mostly customary law in a primarily rural society, the Montenegrin legislature is currently dealing with the modernisation of a post-communist society inexperienced in democratic rule.

Ideological Approach

Most of Bogišić's codification work conforms to the systematic and dogmatic teachings of ethnological jurisprudence (Strohal, 1908, p. 842). He was inspired by Charles-Louis de Secondat Montesquieu's idea that laws must not be an art of logic, as they are designed for people of mediocre understanding (Bogišić, 1888, p. 3). Therefore, Bogišić's codification was marked by a desire to create a modern but easily comprehensible code. He started from the premise that the modernisation of a legal system is preconditioned by thorough research into

the shared jural consciousness of the people of Montenegro, i.e., their traditional perception of legal concepts and relationships (Luković, 2009, p. 95). By analysing their common jural consciousness, Bogišić aspired to identify the exact extent, nature and timing of potential legal modernisation through legislative reforms. In that respect, he did not regard the underdeveloped socio-cultural context as an impediment to adopting new legal concepts if the reforms could still be successfully introduced into the shared jural consciousness.

Bogišić's reliance on the unique characteristics and customary law of the peoples of Montenegro (what will later become fundamental to ethnological jurisprudence) significantly influenced both the structure and the content of the General Property Code. The Code represented a balanced mélange of general legal rules deriving from Roman law, the 19th century's revolutionary legal tendencies and the unique features of Montenegrin jural consciousness (Bogišić, 1886, p. 4). One of the most significant differences between the Montenegrin Code and other European codifications of that time was that family and inheritance laws were not included in the codification. Bogišić claimed that family law was not civil law *strictu sensu* and that inheritance law was no more than a family law legal concept. Furthermore, codifying family and inheritance law in Montenegro would have been a virtually unfathomable quest in the 19th century. The utterly unsynchronised customary law used by different Montenegrin tribes enjoyed strong support by different factions, and thus, any intent to integrate it into a dominant legal unit would have been doomed to fail. As Poláčková and Duin (2013) observe, despite the relatively small territorial distance, there were notable cultural and ideological differences among Montenegrin tribes. Therefore, Bogišić argued that a separate codification for family and inheritance law should be created (Bogišić, 1886, p. 10).

The separation of family and inheritance law from the civil code should not be regarded as a rule but rather a manifestation of Bogišić's ideological approach. Namely, Bogišić's approach to legal codifications was founded on the premise that laws should always comply with the shared jural consciousness of its addressees. In 19th-century Montenegro, the shared jural consciousness regarding family and inheritance law was not sufficiently developed: individual jural consciousnesses was not transformed into a compact jural consciousness shared by the majority of Montenegrin inhabitants, and therefore the codification of family and inheritance law was not possible. Several parallels could be made between this approach and some contemporary practices in legislative reforms.

For example, following the initiation of the Chinese opening-up policy in the late 1970s, China primarily focused on adopting laws that would generate economic growth, which generally enhances citizens' welfare (Clarke, 2007, p. 1). Lawmakers did not focus on

promoting the establishment of legal rules typical for democratic legal regimes (such as the rule of law), as those laws are preconditioned by specific fundamental changes to the shared jural consciousness. In that respect, many Chinese authors have argued that rushed legislative reforms would also have a decelerating effect on the overall development of Chinese law (Zhang, 2016, p. 122). Only following the achievement of a more market-oriented paradigm that brought prosperity to Chinese society as a whole (Keyuan, 2006, p. 6) did Chinese lawmakers envisage reforms concerning the creation of a 'country under the rule of law' in 1999 (Morrison, 2019, p. 31). The opening-up policy influenced the opening of the Chinese market alongside the opening of the shared jural consciousness of the peoples of China. The change in social circumstances acted as a stimulus for subverting several individual jural consciousnesses and indicated that the shared jural consciousness might be prepared to integrate new legislative reforms.

Bogišić's approach to legal codification is, to a certain extent, also reflected in the EU. For example, the adoption of the new European *acquis communautaire* is preconditioned by its intelligibility with the commonly shared values set out in Article 2 of the *Treaty on European Union* (Council of the European Communities..., 1992). Those commonly shared values are part of the shared jural consciousness of all citizens of EU Member States, regardless of their socio-cultural differences. However, transposing commonly shared European values in the candidate countries (especially in the Western Balkans) remains quite challenging. Recent reports demonstrate notable differences in the perception of commonly shared European values between Member States and candidate countries (European Commission, 2012, p. 11). Therefore, the entire accession negotiations process is marked by a candidate country's capability to ensure that commonly shared European values are accepted as a part of the specific jural consciousness of its citizens. In that respect, the EU is actively involved in promoting its values in the candidate countries, to such an extent that some authors have interpreted its involvement as 'a shift from a pre-accession agenda to a Europeanisation agenda' (Barbulescu & Troncota, 2013, p. 93).

Methodological Approach

Bogišić commenced his codification work on the General Property Code by preparing questionnaires and surveys envisaged to identify the focal points of Montenegrin customary law that plausibly depicted quotidian life in Montenegro. He prepared more than 2,000 questions (Luković, 2008, p. 181), cautiously arranged them into different surveys, and aimed to approach all the people of Montenegro, regardless of their tribal affiliation. In other words, Bogišić had to adapt his questionnaires to accommodate idiosyncratic perceptions and

utilisations of the law by members of numerous tribes. In that aspect, Bogišić's standpoint outlives his era and fits some of the modern arguments for the importance of linguistic and cultural diversity, as described by Turi (2015). Furthermore, Bogišić's approach also reflects some of the basic postulates of modern ethnolinguistics, as his empirical studies indicate the interactions among linguistic, ethnocultural and ethno-psychological factors in the functioning and development of language in Montenegro, which is one of the principal objectives of ethnolinguistics (Baydak, Schariothb, & Il'yashenkoc, 2015, p. 15). Bogišić also relied on fruitful collaborations with esteemed national and international legal practitioners and theoreticians (Luković, 2008, p. 182). However, he remained a staunch supporter of the ideal that legislative reforms shall surpass the autotelic legal *l'art pour l'art,* and he promoted the creation of a functional yet sophisticated legal environment.

Contrary to Bogišić's approach, the current legislative reforms in Montenegro (in particular, the transposition of the European legislation) are implemented primarily by academics, professional public and governmental officials, without the consistent or regular involvement of the general public. It becomes questionable, therefore, how the effectiveness of a specific legal rule is predicted and achieved if its perception by the general public has not been tested prior to enactment. Moreover, in failing to consult the general public, it also becomes unclear whose perceptions are being adopted to establish the canons of clarity, precision and unambiguity. It could be argued that the clarity, precision and unambiguity ascertained solely from legal professionals or experienced linguists do not necessarily correspond to what the general public perceives as concise, straightforward and clear. Exposing the legal terminology to the general public before its adoption, as Bogišić accomplished, could contribute to achieving legal effectiveness. In that context, Montenegrin legislators could, in particular, rely on information and communication technologies to include the general public in the process of drafting legislation.

Consistent with Rašović (2018), the insistence on consolidation between Montenegrin jural consciousness and general legal principles may be found in the sixth part of the Code, where Bogišić presents a set of legal proverbs [in Montenegrin: *zakonjače*]. Those legal proverbs represent adaptations of the rules marking the entire civil law system, and originate in Roman law. However, this section does not merely translate those maxims but rather illuminates the specific subsumption of their general ideas into the Montenegrin legal tradition, culture and specific linguistic expression. Codifying the founding principles of the civil law in proverbial form made them sound more like a cultural product of the Montenegrin people. In this manner, the legal transplants were distanced from the mere 'borrowing of a bare string of

words' (Legrand, 1997, p. 121) and were enhanced with the unique socio-cultural elements of the peoples of Montenegro.

The idea of subsuming legal principles into the Montenegrin legal tradition, culture and specific linguistic expression could also be used in contemporary legislative reforms in Montenegro; namely, when transposing European legislation into the Montenegrin legal environment, Montenegro could focus more on the linguistic forms that would allow for communication of the EU law in a manner understandable to the general public. Bogišić's reliance on legal proverbs is especially important, as it allowed Bogišić to effectively communicate legal norms to the general public without changing their original ideas or essence. In the EU context, it must be underlined that the transposition of the *acquis communautaire* is not to be equated with the mere verbatim translation of legal texts. Achieving the initially agreed-upon effects should, in principle, be prioritised over the production of authentic translations, as demonstrated through the practice of the European Court of Justice: even when the Court finds that a difference in meaning as expressed in different language versions of the EU legislation exists, it will try to understand what the legal rule stands for by looking into its purpose within the more general scheme in which it operates, if the essence remains the same (Ćapeta, 2009, p. 16). Therefore, Bogišić's approach could inspire Montenegrin legislators to adopt a more creative way of transposing the EU *acquis communautaire*, which will not focus on literally translating the EU legislation but rather on ensuring its essence is widely comprehended and accepted in Montenegro.

Bogišić made use of various comparative practices and experiences. Nevertheless, while he examined and adopted several legal concepts presented in the French Civil Code (1804), the Californian Civil Code (1872) and (at that time) working drafts of the German Civil Code (1888), his reformistic and modernised work does not result in a plain replica. Arguably, Montenegrin lawmakers are currently failing to carry out one of the first steps of Bogišić's methodological approach, as Montenegrin laws are not only inspired by the laws of other European countries (primarily Croatia and Slovenia) but often demonstrate an unfounded degree of similarities with them. For example, pursuant to the official information provided by the competent Montenegrin state authorities, due to the proximity between Croatian and Montenegrin languages, the translation of the European *acquis communautaire* in Montenegro is mainly performed by directly relying on official Croatian translations and other general strategies (Ministrstvo evropskih poslova, 2018).

While comparative practices and experiences (Whelan, 1988, p. 49), especially from those countries which have already successfully completed the process of European integration,

should remain one of the starting points for the preparation of new laws, Montenegrin legislators could consider the implementation of Bogišić's methodological approach in an attempt to achieve a more comprehensible, and consequently more functional, legal framework. Montenegro could also benefit more from the EU's approach – anticipating implementation problems and facilitating legal transposition, which follows Bogišić's line of argumentation in accentuating the importance of performing an impact assessment, among others, through previous consultations with all parties concerned with a particular legal proposal (European Commission, 2017, p. 34)

The efficiency of the legislative reforms (i.e., productive work with minimal wasted efforts and expenses) embodied through legal transposition does not necessarily lead to their effectiveness (i.e., production of the desired effects; see Xanthaki, 2008, p. 9). Therefore, while legal replication is indisputably time and cost-effective (Graziadei, 2006, p. 457), it should not replace a planned, organised and consistent approach to legislative reforms, which will ultimately lead to the creation of a legal system deeply rooted in the actual needs and aspirations of society. The methodological approach used by Bogišić might serve as a starting point for discovering the shared jural consciousness of the general public, and consequently, credibly ascertaining the manner in which legal transposition might occur.

Legal Linguistics in the General Property Code

The General Property Code represents a prototype of the law drafted based on firm linguistic principles promoting clarity, simplicity and precision of legal expressions. According to Bogišić (1888), if the lawmakers want to be understandable to the people, they should use the peoples' language. Bogišić's legal vocabulary is peculiar in many ways. It exceeds everyday speech with indubitable precision but remains on the solid ground of general comprehension. The wording of the General Property Code was meticulously analysed and implemented through a prism composed of the criteria of usage, acceptance and appropriateness. As per Pi-chan Hu (2014), similar methods and techniques still represent one of the guiding principles for the differentiation between the legal terms perceivable by 'ordinary people' and those comprehensible solely by legal practitioners. Prescriptive legal texts rule the life and activities of ordinary people and must be understandable to all (Stolze, 2013, p. 5). As argued by Cao (2007), the law has a normative existence, reflecting the ideals and principles that people cherish, the purpose and aspirations they pursue and the notions they hold. Therefore, if the principal function of the law is to direct people's behaviour in society,

then the clarity, precision and unambiguity of legal expression are preconditions for achieving this goal.

Bogišić (1877) starts from the premise that concise and accurate legal terminology is the utmost goal to be achieved, fundamentally through usage of legal vocabulary easily understandable to anyone to whom it may concern. He advocates this viewpoint by comparing the study of laws with the process of learning in schools. Specifically, as he claims, professors have students who do not have, or barely have any previous knowledge on a particular topic, and thus, might be portrayed as a *tabula rasa*. Being in that position, the professors can use both books and in-person interaction to explain to their students the authentic meaning, usage and purpose of the particular material. On the other hand, lawmakers (especially in the civil law countries) have only the written communication channel at their disposal and cannot rely on any additional, informal explanations. As Bogišić remarks, even when additional commentaries and explanations of the laws are made, they are written primarily for scholars and mostly intended for scientific purposes. They are not meant to serve as explanatory notes that could clarify the meaning of specific provisions to the general public or those who must obey them. For that reason, Bogišić persists that the language in prescriptive legal texts must be precise but straightforward, understandable and unambiguous to avoid confusions and contradictions in the shared jural consciousness.

This linguistic approach to prescriptive legal texts, promoting clarity, precision and unambiguity is already used in various EU Member States and the EU itself. For example, the first general principle of the *Joint Practical Guide of the European Parliament, the Council and the Commission* (European Commission, 2015) provides that the drafting of a legal act must be clear (easy to understand and unambiguous), simple and concise (avoiding unnecessary elements) and precise (leaving no uncertainty in the mind of the reader). Bogišić's standpoint also corresponds to the second general principle of the *Joint Practical Guide*, or the common-sense principle. The common-sense principle is often perceived as a guardian of a multicultural and multilinguistic European society, which aspires to ensure the comprehensiveness of legal norms and avoid any potential disputes arising out of misleading and inadequate legal terms. It enforces some of the general principles of law, such as the equality of citizens before the law and legal certainty (as argued, for example, by the Croatian Administrative Court in the Decision no. U-I/2694/2003, as reported in; Bajčić & Stepanić, 2011, p. 770). As in Bogišić's teachings, if the laws are not entirely understandable to everyone they might concern, they leave room for abuses and the emergence of inequality and indirect discrimination in their application. Furthermore, suppose the laws are not drafted so that their application and practical

implications are easily foreseen: in that case, they cease to represent the promoters of the socially desirable behaviour and lead to confusion and contradictions among the general public.

It is also important to accentuate that Bogišić's linguistic approach does not suggest that plain language is the utmost goal to be achieved, but rather emphasises its utilitarian characteristics in bringing the legislation to the people. The call to simplify legal language within the plain language movement has occupied the area of legal linguistics worldwide (Boleszczuk, 2011, p. 68). There have been many calls for promoting plain language as the standardised legal form. However, most of these calls have been challenged for reasons ranging from legal professionals' inertia to accept and undergo change, to questioning the overall necessity of changing the current system in which the understanding of the laws is conferred chiefly to legal professionals (Butt, 2001, p. 30). More recently, the use of plain language has been regarded more as a mere tool to add clarity (Xanthaki, 2014, p. 126) and not as an attempt to convert plain language into a dogmatic imperative. In that respect, Bogišić's claims that the addressees of a certain law should not be treated as a *tabula rasa*, but on the contrary, their previous experience in legal relationships and their already existing perception of the laws need to be taken into consideration, might find relevance. Following this line of argumentation, as also argued by Xanthaki (2014), the legal terminology that already enjoys a sufficient level of clarity, precision and unambiguity must not be undermined by the mere desire to use plain language.

In the more contemporary context, dissociation from plain language should especially be allowed for those laws that are not meant for the general public, but rather for professionals. Deviations from the usage of plain legal expressions seem to be justifiable when a particular group should already be accustomed to certain terms and expressions, even if they are not familiar to the general public (e.g., usage of construction and energy terms in the laws concerning those respective industries). At the same time, some artificially created legal regimes require terminology marked predominately by neologisms. For example, EU terminology is often described as artificially created (Bajčić, 2009, p. 229), which comes as a logical consequence of the fact that the concept of the EU does not emanate from the spontaneous process of law creation, but rather represents a product of planned and joint actions for commonly shared problems, deriving from the commonly shared values and goals.

Bogišić approached legal drafting with the idea of Jean-Étienne-Marie Portalis, that it is not enough for a people to know that a law exists, but rather, that people must know and understand its contents – that is to say, laws have to be drafted in a straightforward manner and under the dual nature of the lawmaker and the people (Bogišić, 1888, p. 3). On those grounds,

Bogišić differentiated between the three categories of legal terms appearing in the General Property Code: terms that might be found in peoples' spoken language; terms borrowed from other languages (i.e., loanwords); and terms that have been, to a certain extent, independently created (i.e., neologisms). As Kordić and Barna (2019) indicate, similar categories have been identified by several German scholars in the late 19th century and still represent the main linguistic features of the German legal vocabulary in the domains of lexicology and semantics.

Terms Existing in Spoken Language

Bogišić argued that commonly used words, which are well-known to everyone, should be indisputably employed as an essential part of the legal vocabulary in prescriptive legal texts. Nevertheless, he added that it is challenging to determine those words, primarily due to the complex process to differentiate between regionally and unanimously accepted terms. Bogišić proposed that terms used solely in certain areas should be adopted if there is a justifiable need for such action and under the condition that the inhabitants from other regions are also able to fully understand their meaning. Such words are typical for regions with a strong foreign influence. Bogišić gave an example of the archaic legal terms used only in the Dubrovnik region and its surroundings (e.g., *kanjošiti* or to 'plan a misdemeanour theft'; Bogišić, 1888, p. 7) which were not widely understood and used. Nevertheless, he affirms that the widespread and well-known words should *in perpetuum* be prioritised and never artificially and unfoundedly replaced with loanwords or neologisms.

In cases where the same legal concept is known under different terms, Bogišić suggests using the statistical method, i.e., adopting the term that enjoys greater respect and use. Nonetheless, he clarifies that additional words should not be unreasonably repressed, but rather presented alongside the main term. Even though this proposal may at first seem incompatible with the initial insistence on legal precision and unambiguousness, Bogišić expounds on its actual contribution to legal clarity and unequivocalness. Namely, this approach could primarily serve to approximate the concept of one legal concept to the public by relating it to the terms with which they are already familiar. Furthermore, Bogišić also demonstrates that such additional terms tend to decrease in usage over time, and thus, cannot create any confusion in the long term. For example, he explains that the legal terms for granting a gratuitous loan [in Latin: *commodātum*] in the Montenegrin language are *posuda* and *naruč*. Nevertheless, as *posuda* became the dominant term, the term *naruč* gradually disappeared from Montenegrin language. Bogišić uses this technique in several articles of the General Property Code. For example, the concept of factual possession [in Latin: *possessiō*] is defined in Article 18 as *državina* or *posjed* and in Articles 258 and 875, a loan [in Latin: *crēditum*] is defined as

rukodaće or *zajam*. Modern Montenegrin legal linguistics confirm Bogišić's claim that less dominant terms tend to disappear over time. Therefore, as the terms *državina* and *zajam* grew more dominant, it would be rather difficult to relate the terms *posjed* and *rukodaće* to the respective legal concepts in the contemporary Montenegrin legal vocabulary.

Bogišić claimed that polysemy should be strictly avoided. One of the most typical examples of such problematic competing meanings of a single term in the Montenegrin language (to a lesser extent even today) is the term *dužnik*, which, depending on the situation, might be colloquially related both to the term debtor [in Latin: *dēbitor*] and creditor [in Latin: *crēditor*], even though its original meaning is debtor (Bogišić 1900, p. 329). The standard terms used for 'creditor' were *vjerovnik* and *povjerilac*, with the latter favoured in contemporary Montenegrin legislation. Both the terms *vjerovnik* and *povjerilac* derive from the verbs *vjerovati* or *povjerovati*, translated in English as *to believe*. Nevertheless, the general legal logic and reasoning dictate that a debtor does not always have to place his belief and confidence in the creditor (especially in extracontractual or tort relationships). Therefore, in Article 902 of the General Property Code, Bogišić introduces a new word for the creditor, *dužitelj*, in an attempt to avoid this polysemy and simultaneously to preserve legal accuracy. The proposed term derives from the verb *zadužiti*, which might be translated as 'to charge' or 'to obligate', and is intended to define a person to whom someone owes a particular action, payment or abstinence from action. The term *dužitelj* was initially widely used in the practice of Montenegrin courts (Luković, 2009, p. 236). Nevertheless, over time, it disappeared from the Montenegrin legal vocabulary.

The link between polysemy and the canons of clarity, precision and unambiguity in the context of contemporary legislative reforms should be especially addressed. From one side, as argued by Kordić (2020), polysemy enhances legal uncertainty and allows for misleading and incorrect translations in international transactions. However, the sole desire for its elimination, as demonstrated in the example of the term *dužitelj*, might not necessarily justify the artificial creation of new legal terminology, especially concerning those terms in daily use. It is also highly debatable whether a clearer, more precise and unambiguous term would serve its purpose if it is not widely acknowledged and used. As argued by Xanthaki (2008), the effectiveness of legal terms is the principal goal to be achieved, and clarity, precision and unambiguous are subordinate to this aim.

Loanwords

Bogišić attempted to avoid simple, literal translations and the usage of untranslated foreign legal terms, which he denoted as 'freaks' [in Montenegrin: *nakaze*] among legal terms (Bogišić, 1877, p. 28). He believed that translation and the usage of foreign words should be considered as a remedy reserved for those situations when the legislator cannot find a relevant term in the native language understandable to the people or when the legislator cannot create a corresponding compound term from existing words. He even argued that it would be much more efficient to adopt the foreign word without any translation. Bogišić also proposed that all Slavic languages refer to the old Slavic language (from which contemporary Montenegrin derives) to create new terms in the same manner that Romance languages draw upon Latin. This proposal could especially be beneficial and deserves further examination in the context of legal translation and the transposition of the European *acquis* into the national legislation of candidate countries such as Montenegro.

Bogišić explained that a mere literal translation erases the entire historical background preceding the creation of a term. In that manner, the new legal concept is left stripped of all theoretical justification, which eventually results in ineffective, inexpedient and confusing legislation. A preference for localism over internationalism within language purification movements has marked the recent legal linguistics in some of the ex-Yugoslav countries, such as Croatia (Bajčić, 2009, p. 222) or Slovenia (Nećak Lük, 2017, p. 61). Beginning in 1991, Croatian legal terminology went through a series of changes aiming both to prepare the country for its new socio-economic and political order and to purge loanwords (Šarčević and Čikara, 2009, p. 198). This also contributed to the return of the language to its historical roots and cultural heritage. Similar changes have also been seen in Slovenia, where a set of new laws have been adopted in order to promote the use of Slovenian in all public domains (Gliha Komac, 2017, p. 85).

Apart from the ease of understanding, as advocated by Bogišić, the insistence on the prevailing effects of the national legal vocabulary over the use of loanwords within language purification movements has several other functions. Those functions include the unifying function (i.e., consolidating a group of people speaking the same language), separation function (i.e., building and promoting national identity), prestige function (i.e., building the international reputation of a group of people speaking a standardised, internationally recognised language), participatory function (i.e., facilitating participation in cultural, scientific and other activities) and frame-of-reference function (i.e., easing the use of new, widely used standardised norms) (Požgaj Hadži & Balažic Bulc, 2015, p. 69). As explained above, language purification

tendencies should be carefully examined from the perspective of legal effectiveness, or as explained by Bogišić, the utmost need to draft legislation in a manner understandable to the people. Namely, if the loanwords are already understandable and used by the general public, their replacement within the language purification movement paradigm might incite confusion and hinder the objective of achieving legal effectiveness.

Many authors argue that in the context of the growing internationalisation and international integrations (especially among EU Member States), the usage of loanwords and internationalisms might be justified or even indispensable (Kordić, 2020, p. 251). At first, this tendency seems incompatible with Bogišić's claim that loanwords should be used as a final remedy. However, if certain legal concepts have been created for international legal transactions and affairs, such terms might be incorporated into national legal environments without translation. Nevertheless, certain conditions would have to be met in order to comply with Bogišić's linguistic approach. Firstly, such terms should designate state-of-the-art legal concepts, or in other words, they should not have any proper or relatable historical background in the legal environment in which they are being introduced. Secondly, to avoid confusion, those terms should not be translatable in the native language understandable to the people. For example, Montenegrin legislators opted to use the term *lizing*, a transcription of the English terms 'leasing'. Given the fact that this legal concept did not previously exist in Montenegrin law, and that there were no corresponding legal terms in the Montenegrin language, nor was it possible to accurately translate it or explain it with a compound term, we might conclude that the usage of loanword in the particular case was justified.

Neologisms

As the ultimate remedy, when none of the previously mentioned techniques can be used, Bogišić referred to the creation of new words. The new words should be created with the interaction of non-experts, i.e., the actual subjects of the law. Conferring the creation of the new terms entirely to legal scholars or linguists could again lead to the creation of complex legal acts, which rarely gain popular acceptance and usage. Therefore, Bogišić created a particular legal term and then exposed it to non-experts in order to ascertain whether it was comprehensible (Bogišić, 1877, p. 15). He also addressed the use of analogies and metaphors when forming a neologism and concluded that such figures of speech might be used if they are broadly understandable. As an example, he spoke about the focal word of Montenegrin legal vocabulary, the law [in Montenegrin: *pravo*], which has a metaphorical meaning and refers to the 'straight direction' or the 'correct way'.

When neologisms are used in prescriptive legal texts, they are to be thoroughly elaborated. Bogišić proposed three manners for explaining neologisms. The first is to define a neologism within one sentence directly after its first mention. The second modality is a variation of the first approach; include familiar concepts in the sentence structure where the neologism is mentioned for the first time to demystify its abstract concept. The third option is to dedicate a specific part or even an entire chapter of the code to explain new ideas and terms.

Finally, Bogišić also proposed several alternatives closely related to neologisms, but not fully appertaining to this group. He justifies the limited use of circumlocution [in Latin: *circumlocūtiō*], using long phrases and expressions to describe a legal concept instead of merely naming it. As per Šarčević and Čikara (2009), one recent example of circumlocution in the Croatian language, as proposed by Bogišić, is the transposition of the new definition of 'producers' from the European Economic Council Directive 85/374/EEC (on liability for defective products) (Council of the European Communities, 1985) in the applicable Croatian legislation as the descriptive phrase 'every person who places goods on the market' [in Croatian: *svaka osoba koja robu stavlja u promet*]. Finally, Bogišić also proposed broadening the scope of existing terms by consolidating all legal concepts that have a closely related purpose and sense into a single unit already defined by law.

Conclusion

Legislative reforms may symbolise the sophistication, amelioration and unification of various legal acts into a single, compact corpus of national laws. However, the mere necessity of legislative reforms does not necessarily justify their rushed formulation, leading to their degradation and reduction to aimless legal transformations. The appropriate formulation of legislative reforms becomes especially important in countries like Montenegro, which primarily rely on legal transposition for their legislative reforms. In that respect, Bogišić's approach to legislative reforms and legal linguistics, inspired by the basic concepts of what would later become known as ethnological jurisprudence, might still find relevance. This study provided a basis for further research into how ethnological jurisprudence, which focuses on the singular and unique perception of the law by one group of individuals, might be compatible and further contribute to contemporary legislative reform practices. Its relevance could especially be found in addressing the importance of the structure and characteristics of the national legal order, which, for example, represents an important, but still mostly under-researched issue in the framework of transposing the EU *acquis communautaire* (Steunenberg & Toshkov, 2009, p. 25). Therefore, ethnological jurisprudence could contribute to a shift from

focusing primarily on the political and economic effects of legislative reforms to analysing and concentrating more on the compatibility of transposed legislation within the existing corpus and spirit of national laws.

The first thing that arises from Bogišić's work on the General Property Code is that the pursuit of legal change, especially through legal transposition, should be ruminative and not hurried. In order to achieve highly functional legislation, the tendencies for legal replication and the precipitated transposition of laws should be replaced with intensive and cautious legal drafting. New laws need to be meticulously prepared and gradually introduced to ensure compatibility with the shared jural consciousness. Therefore, the lawmakers in those countries that are still experiencing legal transitions and engaging in the profound consolidation of national laws could pursue Bogišić's model and use legal linguistics as an indicator of the shared jural consciousness. Consequently, this approach can serve as a tool to avoid alienating the general public from newly adopted prescriptive legal texts, aiming to dictate the acceptable social norms and the desired canons of behaviour. For those purposes, lawmakers could also ensure frequent consultations with the general public, facilitated by information and communication technologies.

It must also be noted that what makes Bogišić's selection of legal vocabulary relevant from a contemporary perspective is not the reliance on plain language as such, but rather its methodological approach, which subordinates the choice of legal vocabulary to the achievement of legal effectiveness. Achieving the effectiveness of legal vocabulary has recently been a widely debated topic in legislative reforms (Xanthaki, 2008, p. 5). Therefore, Bogišić's dual perception of legal linguistics (i.e., as a tool for ascertaining the existing perception of the legal system and as a necessary instrument for achieving the successful implementation of legislative reforms) can withstand further scrutinization of the relevance and potential application of simple legal vocabulary for official purposes.

One of the most notable aspects of Bogišić's work is his meticulous research to establish concise and accurate legal terminology through the usage of legal vocabulary easily understandable to anyone it may concern. It appears debatable whether the more than decade-long research of Bogišić could be realistically performed in a modern setting. However, such research does not have to be conducted independently for each proposed law. The lawmakers could rather contemplate the adoption of general, systematic and comprehensive rulebooks or detailed, sector-specific legal databases and glossaries (Bajčić, 2009, p. 229), which would define national legal linguistic strategies and objectives but also underpin and support legislative reforms. Those glossaries should not contain only the translations of Montenegrin

legal terminology but also include explanations of their perception and usage in the current Montenegrin legal system. As argued by Ćapeta (2009), if interpreting law equated to reading dictionaries, the legal truth would be discovered by merely stating the singular meaning of each word in a phrase. However, as this is not the case, such glossaries would, among other aspects, define the purpose, the role and the perception of a particular legal concept in the entirety of national legal rules. Moreover, the clarity, precision and unambiguity of different national laws would be assured. Furthermore, those glossaries would facilitate legal approximation among various national laws (Kellerman, 2008, p. 225) and support the transposition of new legal tendencies into national legal environments.

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