

# Foreign Law Between "Grand Hazard" and Great Irritation: The Bulgarian Experience After 1878

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*This Article deals with legal transfer during the first decades after the foundation of the Bulgarian state in 1878, starting from the premise that law is based on communicative distinction rather than separation from society. Foreign law may therefore affect not only the native law, but also the form in which the latter is related to society. Thus legal transfer can also stimulate the (co-)evolution of law. The verification of this hypothesis is the aim of a greater project of which the present Article is a part. The Bulgarian state relied a great deal at first on traditional practices of self-government and partly upon the modern Ottoman law, both of which were acknowledged by the Provisional Russian Rule in Bulgaria. Subsequently, Western law was eclectically imported at the expense of local traditions. It seems, however, that the "precious cargo" of modern Western law was relegated at first to the periphery of society, and the courts, for the most part consisting of elected laymen, experienced great difficulties in dealing with it, when it came to their knowledge at all. This is evidenced by customary law, and by some examples related to legal reasoning and legal critique, which may suggest both the persistence of traditional structures and their irritation through the transfer of foreign law.*

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## I. PRELIMINARIES

Research on legal transplantation seems to be, more or less explicitly, based on general ideas of law and of the relation between law and society.<sup>1</sup> According to the way law and society are conceptualized, the possibility of borrowing law from one legal system into another, or from one society into another, is either denied or conceded. The more autonomous law is believed to be, the more easily it might be transplanted into a different "organism" and become part of it.<sup>2</sup> And vice versa: scholars who reject the idea of autonomy, who believe that law is embedded in environment and can be autonomous only relatively speaking, if at all, scholars who in that sense stress the "and" between law and society, are skeptical about the possibility and the success of such an undertaking. A *tertium quid* seems hardly possible in this debate.

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1 For discussions, see David Nelken, *Towards a Sociology of Legal Adaptation*, in ADAPTING LEGAL CULTURES 7 (David Nelken & Johannes Feest eds., 2001); David Nelken, *Comparatists and Transferability*, in COMPARATIVE LEGAL STUDIES: TRADITIONS AND TRANSITIONS 437 (Pierre Legrand & Roderick Munday eds., 2003) [hereinafter Nelken, *Comparatists*]; Gunther Teubner, *Rechtsirritationen: Zur Koevolution von Rechtsnormen und Produktionsregimes*, in MORAL UND RECHT IM DISKURS DER MODERNE: ZUR LEGITIMATION GESELLSCHAFTLICHER ORDNUNG 351 (Günter Dux & Frank Welz eds., 2001).

I consciously avoid the term "transplantation," since it is based on different assumptions. Yet there may be good reason to question the propriety of the term "transfer" as well. Indeed, if one adopts a systemic approach to law it becomes unclear how law can overcome the boundaries of social systems. The term could convey the misleading impression — as the metaphor of "transplantation" seems to do — that law can simply be moved from one place to another. I nevertheless use this term, conceding that it is rather the case of a complex process of (re-)constructing the *significance* of legal norms in a different context. Therefore one might better speak of re-signifying. A suggestion to that effect has been made by Marie Theres Fögen & Gunther Teubner, *Rechtstransfer*, 7 RECHTSGESCHICHTE 38, 45 (2005): "Es gibt keinen Rechtstransfer, es gibt nur unterschiedliche Grenzüberschreitungen bei der Resignifikation von Rechtsnormen."

2 It is the idea of legal autonomy that underlies Alan Watson's research on legal transplants. See, e.g., ALAN WATSON, LEGAL TRANSPLANTS (1974); Alan Watson, *Aspects of Reception of Law*, 44 AM. J. COMP. L. 335 (1996); Alan Watson, *From Legal Transplants to Legal Formants*, 43 AM. J. COMP. L. 469 (1995). Watson's assumptions on legal autonomy are primarily aimed at rejecting too simplistic conceptions of law as mirroring society. Yet for this purpose he relies, in a quite positivistic fashion, almost exclusively upon history, believing that "the truth is patent in the sources," ALAN WATSON, THE EVOLUTION OF LAW 116 (1985). He thus often becomes a victim of the same simplicity he rejects.

Yet the question may be incorrectly posed. It appears to rest upon the presumption that law and society refer to essential entities, which exist either isolated or in a causal interrelation, as the conjunction "and" indicates. Since it has to fit the ontological state of its objects, the argumentation then acquires a normative quality. At the same time it neglects the historicity of law, i.e., the simple fact that both law and the idea of autonomy depend upon historical conditions which are, as such, contingent. Recognizing this fact, one may easily admit the possibility of autonomous law, seeing it as conditional upon history, as a historical self-description, which law produces in a certain context and which is consistent with its form and function. Autonomy should be perceived then in its literal sense: it pertains to the self-generated network of operations and criteria of the law, which construct its unity, and not to the conditions of the world.<sup>3</sup> The fact that from a different viewpoint, for instance historical, psychological, or sociological, an observer may not believe in the possibility of autonomy — and he might have good reason not to do so — does not make it untrue for the legal system itself.

Following this line of reasoning, it can be argued that by dealing with law, one inevitably deals also with society. Behind this lies the assumption that law is a social system through whose operations society is also being reproduced.<sup>4</sup> Law operates, like any other social system, through communication, using the medium of meaning in order to build specific forms. In this way, law reproduces society by distinguishing itself from society. The fact that it is distinct from society, or from other communicative forms or subsystems of society, does not mean, however, that it is separate from it: the idea of "separation" or "isolation" originates in a substantial language, which is hardly appropriate in that context. Nor does it mean to indulge in the other extreme, which makes every distinction impossible, namely, in the conception of law as being an expression of the

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3 See Niklas Luhmann, *Operational Closure and Structural Coupling: The Differentiation of the Legal System*, 13 CARDOZO L. REV. 1419, 1420 (1992).

4 On law as a social system, see NIKLAS LUHMANN, DAS RECHT DER GESELLSCHAFT 34 (1993): "Einerseits ist die Gesellschaft Umwelt des Rechtssystems, andererseits sind aber alle Operationen des Rechtssystems immer auch Operationen in der Gesellschaft, also Operationen der Gesellschaft. Das Recht vollzieht Gesellschaft, indem es sich in der Gesellschaft ausdifferenziert. Es legt, anders gesagt, mit den eigenen Operationen einen eigenen Schnitt in der Gesellschaft, und erst dadurch entsteht in der Gesellschaft eine gesellschaftsinterne Umwelt des Rechts, so daß man daraufhin fragen kann, wie Einflüsse dieser Umwelt auf das Recht ausgeübt werden können, ohne daß dies dazu führte, daß Recht und Gesellschaft nicht mehr zu unterscheiden sind."

culture, character, nature, spirit or mentality of men.<sup>5</sup> In fact, this may be true to some extent for pre-modern societies in which lawmaking was not a matter of profession, but, rather, an attribute of social status. Today, however, law has reached such a high level of technical specification that it is hardly possible to see how it could speak for the entire culture or society: the language and the logic of modern law have become so specialized that they differ very much from those of social life. Yet even this distinction, though produced by the law, depends upon conditions outside the law. To give the simplest example: Without cases there could be no law.

The question, then, is not whether law depends on social environment or not: it does, simply because the idea of social environment itself is not an ontological category, but makes sense only in relation to something from which it can be distinguished. The important and far more difficult question is, rather, how law depends on society or, more precisely, how a society can tolerate and sustain such a difference "within" itself. In other words: Which societal conditions must exist in order to make the emergence of law, of some sort of law, for instance autonomous law, possible? Independence and dependence can be seen as two sides of the same coin: you cannot think of one without the other. The paradoxical question to ask therefore is: What kind of dependence makes law independent? Or, in a more practical sense: What is necessary for a highly technical law to work? — Only technicians and technique? Or perhaps also politics, market economy, science, morals? Is it, for example, sufficient to translate the German Civil Code into a foreign language and to educate people so that they can read, understand and apply it properly? But even so, how can you control what they understand, or even what they are willing to understand?

These are some of the general questions which the present Article is concerned with. I assume that there is a co-evolutionary, which means a historically variable, relation — in terms of analogy, coordination, or simultaneity, rather than causality — between law and society that not only determines the form of law, but may also be responsible for the chances and implications of legal transfer.<sup>6</sup> I conceive of law, then, as a difference. It is

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5 See Pierre Legrand, *What "Legal Transplants"?*, in ADAPTING LEGAL CULTURES, *supra* note 1, at 54. Legrand himself conceives legal rules as being cultural forms that are embedded in society and that therefore can neither "travel" nor be "transplanted."

6 With Gunther Teubner one may speak of "binding arrangements" through which law is connected with social environment. The important point is that this connection historically varies, that it is a product of co-evolution. See also Manfred Ashke, *Einheit: Theoretische Aspekte des Großtransfers von Recht und juristischem Personal*, 7 RECHTSGESCHICHTE 13, 29 (2005); Fögen & Teubner, *supra* note 1.

only one perspective, among many others, upon society and, what is crucial, of society. Viewed from this angle, the problem of legal transfer becomes much more complex than it formerly may have appeared, since it has to do not simply with comparing legal norms and systems, but with the society in which legal transfer occurs and, consequently, with the evolutionary dynamic to which it may give rise.

In order to demonstrate how I deal with this problem, I shall first draw an outline of the historical constellation in Bulgaria after independence from the Ottoman Empire, and then try to take a close look at some aspects of the history of legal transfer in that specific case. With regard to the development during the four decades between 1878 and 1918, roughly the time of my research, particular attention needs to be paid to the administrative policy that the Russian authorities applied in the occupied territories. This will also allow me to give a brief account of the preceding historical context and of the conditions under which the Bulgarians had been living for centuries and which therefore may have had some impact on their expectations at the time, as well as on future developments.

## II. THE BEGINNINGS UNDER THE PROVISIONAL RUSSIAN RULE

Let me start with the important fact that the formation of a Bulgarian state after 1878 — despite the metaphors of resurrection, awakening, revival, etc., which suggest the idea of continuity between the glorious past of medieval Bulgaria and the new state — meant, at least in historical terms, discontinuity, since a period of almost five hundred years lay between them.<sup>7</sup> Nevertheless, it was history, besides language and religion, which

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<sup>7</sup> On the conceptualization of the Bulgarian "Revival," see ROUMEN DASKALOV, *KAK SE MISLI BĂLGARSKOTO VĂZRAJDANE* (2002). One should not confuse this problem with the question of continuity between the period of Ottoman rule and the subsequent one. It can hardly be denied that the long period of Ottoman rule, during which different religious and ethnical groups coexisted, had determined the forms of social life, the culture, and the identity of those groups, including the Muslims themselves, although it may be difficult to clearly separate the autochthonic from the Ottoman elements, besides the difficulty in defining what exactly the "Ottoman" was. See Maria Todorova, *The Ottoman Legacy in the Balkans*, in *IMPERIAL LEGACY: THE OTTOMAN IMPRINT ON THE BALKANS AND THE MIDDLE EAST* 45 (L. Carl Brown ed., 1996); Wayne S. Vucinich, *Some Aspects of the Ottoman Legacy*, in *THE BALKANS IN TRANSITION: ESSAYS ON THE DEVELOPMENT OF BALKAN LIFE AND POLITICS SINCE THE EIGHTEENTH CENTURY* 81 (Charles & Barbara Jelavich eds., 1963). On the other hand, the history of not only the modern Turkish state, as the true "heir" of the Ottoman Empire, but also of the individual national states that emerged from it,

since the 18th century helped to strengthen the idea of national identity among Bulgarians, and which afterwards also served as a common ground for the formation of a state. The return to the pre-Ottoman tradition — often at the risk of inventing it — had to bridge the long interlude of the "Ottoman yoke."

After being liberated by Russian troops, the Bulgarians were intent on taking the future into their own hands and on becoming masters of their own history. Freedom, however, has two sides: it means not only to be free for something but also to be free from something. Thus the positive process of political integration in Bulgaria after 1878 was accompanied by a negative one, namely, an attempt to cast away the Ottoman past and to distinguish Bulgaria from past images. In this attempt, Western Europe would often be used and misused as the standard according to which the Bulgarian state and society were to be shaped in the future. Yet before taking the future into their own hands, the Bulgarians first had to leave it for a while in the hands of the Russians, who had already begun establishing civil order in the occupied territories during the military operations against the Turks since 1877. Following the peace treaty of Berlin in February 1878, Bulgaria was divided into two parts: the independent Bulgarian Principality with its capital Sofia, and the autonomous province of Eastern Roumelia, which remained within the Ottoman Empire until 1885. Thus, the Russians would remain temporarily in charge of only the Bulgarian Principality, whereas the Ottoman province of Eastern Roumelia first became a protectorate of the Great Powers, which also had to design its political statute ("Statut Organique"). The Bulgarian Principality stayed under provisional Russian rule till April 1879, when the constitution, prepared and proposed by an Imperial Russian commission, was enacted by the Great Assembly in the city of Tŕrnovo.<sup>8</sup> The short period of six years during which the country's two parts were separated did not lead to any significant differences between them, except of course with regard to the political organization and the civil administration. As to the judiciary, the work of the Russians in the part that afterwards became Eastern Roumelia was brought into line with the provisions

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took its own course, which allows us to speak, with no less reason, of discontinuity as well. This is not to omit the fact that the formation of a national state and identity has been concomitant with the negation of the Ottoman past, with efforts to distinguish oneself from the "rulers," but also from the neighbours: efforts that were also stimulated by the character of that rule itself, see Todorova, *supra*, at 47-48.

<sup>8</sup> See generally CYRIL E. BLACK, THE ESTABLISHMENT OF CONSTITUTIONAL GOVERNMENT IN BULGARIA 52-100 (1943).

of the Great Powers.<sup>9</sup> In any case, those differences that did ensue during that time were removed by the unification of both parts in 1885, when the constitution and the law of the Bulgarian Principality were extended to the entire territory.

The plans for the civil administration of Bulgaria after its liberation had already been developed by the Russians before the war.<sup>10</sup> For this purpose, a commission had been set up, consisting of three Russian and three Bulgarian members. It was supposed to study the political, economic, and social situation of that part of the Ottoman Empire and to collect any relevant data. In 1877 the commission published, in the form of a periodical, the so-called "Materials for the Study of Bulgaria,"<sup>11</sup> a collection of five volumes containing detailed information on education, church organization, economy, Ottoman law, judiciary, civil administration, etc. It is, however, questionable whether this information had any considerable impact on the daily practice of the Russian military authorities during the occupation. There is some evidence that suggests that the "Materials" not only remained dead letters in some cases, but that the situation in some regions was very close to lawlessness.<sup>12</sup> The Russians saw their primary task as reconstructing the civil order that had existed before the war, without undertaking radical changes.<sup>13</sup> Besides the shortage of time, there were two main reasons for this: first, since the second half of the 19th century, a large part of Ottoman law had come from Western Europe,<sup>14</sup> mainly France, which meant that there was no need to introduce any

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9 On the judicial organization in Eastern Roumelia, see generally MICHAEL MADŽAROV, *IZTOČNA ROUMELIA* 42-45 (1925).

10 See generally MARIA MANOLOVA, *NORMOTVORČESKATA DEINOST NA VREMENNOTO RUSKO UPRAVLENIE V BĂLGARIJA (1877-1879)* (2003); 3 MARIN DRINOV, *Zapiska za dejatelnosta na privremennoto rusko upravljenje v Bălgarija*, in *SĂBRANI SUČINENIJA* 141 (1915).

11 *MATERIJALY DLJA IZUČENIA BOLGARIJ. NAPEČATANY PO RAZPORJAŽENIU E. I. V. GLAVNOKOMANDUIUŠAGO DEISTVUIUŠEJU ARMEIU* (Bucharest, 1877). Unfortunately, I had no access to this document.

12 See Letter of A.A. Naryshkin to I.S. Aksakov (Sept. 4, 1877), in 2 *OSVOBOŽDENIETO NA BĂLGARIJA OT TURSKO IGO* 259, 267 (Sergei A. Nikitin et al. eds., 1964). The Russian officials were often criticized by Bulgarians for their authoritarian style. See, e.g., TODOR IKONOMOV, *MEMOARI* 265-66 (1973).

13 See Record of D.G. Anučin on the Main Principles of the Russian Civil Rule in Bulgaria (Feb. 28, 1878), in 2 *OSVOBOŽDENIETO NA BĂLGARIJA OT TURSKO IGO*, *supra* note 12, at 562.

14 The adoption of Western law in the Ottoman Empire can be seen as a precedent in which the population of the Empire, Muslims and non-Muslims, had been for the first time confronted with modern Western law. Yet this episode, though important and interesting, is beyond the scope of the present Article.

other law, especially taking into account the fact that, and this was the second reason, the Russians themselves had no other or no better law to offer. What they considered the main problem with Ottoman rule — besides the religious and political discrimination against Orthodox Christians — was not the law itself, but the failure to apply it. Therefore, it seemed sufficient to restore the former administrative institutions, placing them in the hands of Christians, and to guarantee the application of the already existing law. The rest was to be left to the people themselves. This was the position the Russian Foreign Ministry expressed in an internal letter from May 1878: "Il s'agit aujourd'hui de réaliser les bienfaits qu'elle [Turkey] promettait depuis longtemps. La même considération s'applique à la justice. Il suffirait de laisser librement fonctionner, sans y intervenir d'une manière arbitraire . . . les institutions judiciaires déjà établies."<sup>15</sup>

The principle of *laissez faire* was also adopted by the Russian jurists, who already in the beginning of 1878 published the "Provisional Rules for the Judiciary in Bulgaria."<sup>16</sup> On April 24th of that year, the Rules became valid law and, though designed to be temporary, they were left for the most part unchanged by the following statutes of 1880, 1892, and 1897. With regard to the former Ottoman law, the Rules, besides replacing the Turkish names, provided only small modifications of the form and competences of the courts. As in other cases, the principle behind this was to render justice easily accessible and inexpensive. In line with the administrative division of the Ottoman Empire, as established by the reform in 1864, the use of conciliation was retained in the village communities, whereas the judicial competence of the former town councils, which had existed since 1865, was transmitted to district courts handling civil, commercial, and penal cases in the first instance; they also served as courts of appeal for decisions of the conciliatory judges. On the next level, corresponding to the Ottoman *vilyet*, were the high courts of appeal in the last instance. On November 25th, 1878, a supreme court was established in the capital Sofia. The formerly broad jurisdiction of the different religious authorities, Muslim as well as non-Muslim, was restricted to family and religious matters only. The entire judiciary was dominated by the elective principle. According to the Rules, any male citizen aged above thirty years and owning real estate could be elected judge. As to the

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15 Record of the Ministry of Foreign Affairs on the Principles of Autonomy of Bulgaria and Its Future State Organization (May 30, 1878), in 3 OSVOBOŽDENIETO NA BĀLGARIJA OT TURSKO IGO, *supra* note 12, at 145.

16 VREMENNI PRAVILA ZA USTROISTVOTO NA SUDEBNATA ČAST V BĀLGARIJA (Plovdiv, Yanko V. Kovačev 1878).

pleading, the Rules differed from the modern Ottoman law of 1876<sup>17</sup> by allowing every adult citizen to plead in court in his own case or for a third person. This provision stayed in force in the Principality till 1898, when a statute was adopted prescribing legal qualification for advocates and judges; in Eastern Roumelia, on the contrary, it was changed by a statute already in 1883. Nevertheless, the use of advocates in courts remained non-obligatory.

It should be noted that the principle of election of judges hardly represented any considerable innovation in comparison with former practices. It conformed to the modern court organization of the Ottoman Empire, established with the *Hatt-I Hümayun* in 1856. By this decree, the traditional practice of self-rule — conceived not in a strict political sense — of the non-Muslim communities within the Empire had been acknowledged and, in some cases, even extended.<sup>18</sup> On the other hand, the principle of election was also justified by the lack of professionally trained personnel. This is not simply a matter of statistics, but has an important general and structural meaning. It suggests that the area of institutional action and authority had hardly yet been defined and differentiated by abstract functions, by business and technical competence, but relied rather upon principles of social relations.<sup>19</sup> Social criteria, based for instance on honor, social standing, wealth, family, friendship, etc., could therefore have had a strong bearing on the occupation of administrative positions.<sup>20</sup> In that sense, the lack of professionals is distinctive of the pattern of social organization, which presupposes that the personality

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17 The previous Ottoman law made no restrictions in this regard, although since the early 19th century there had been persons, Muslim and Christian, who received legal education in Western Europe. The parties were allowed to act in court on their own or to put their case into the care of relatives, friends, and other persons whom they trusted. See WLADIMIR PAPPALAVA, *DIE ADVOKATUR IN DER TÜRKEI* 26-27 (A. Simon trans., 1908).

18 See Virginia Paskaleva & Elena Grozdanova, *Über die Selbstverwaltung der Gemeinden in den bulgarischen Ländern unter osmanischer Herrschaft (15.-19. Jahrhundert)*, in *TÜRKISCHE WIRTSCHAFTS- UND SOZIALGESCHICHTE (1071-1920)*, at 257 (Hans Georg Majer & Raoul Motika eds., 1995); Maria Manolova, *Pravnoto položenie na bälgarskata obshtina prez poslednite desetiletija na Osmansko vladicestvo*, in 21 *BULLETIN DE L'INSTITUT DES SCIENCES JURIDIQUES* 183 (1967).

19 See Talcott Parsons, *The Professions and Social Structure*, 17 *SOC. FORCES* 457 (1939).

20 See, e.g., Letter of Marin S. Drinov to the People of Samokov (Feb. 14, 1878), in 2 *OSVOBOZDENIETO NA BÄLGARIJA OT TURSKO IGO*, *supra* note 12, at 528. Marinov advised the people, when electing candidates for the civil administration of their city, not to look upon person (*lize*), possession (*imot*), and family (*rod*). Instead they had to elect those who were "honest, industrious patriots and as much enlightened and developed as possible" (author's translation).

of men is largely involved in the social and institutional interactions, so that causality is attributed *ad personam* rather than to institutions.<sup>21</sup>

The impression one gains is of a peasant society, in which justice was dominated by traditional, social and religious authorities. Indeed, as in the Balkans as a whole, more than 80% of the population was engaged in agriculture,<sup>22</sup> which was almost twice the rate in Western Europe at the time.<sup>23</sup> During the following decades, the social structure changed very slowly, due mainly to the establishment of a state bureaucracy and to economic development, which opened new career paths and thus allowed some degree of social mobility. Yet the strong preponderance of the peasantry does not necessarily mean that there was no social differentiation at all.<sup>24</sup> Due to different material and economic resources, social standing and reputation, during the Ottoman period the Bulgarian communities had already developed some degree of social stratification, which since the middle of the 19th century was enhanced also through service in the Ottoman civil administration. Following the Ottoman reforms at that time, many Bulgarians were admitted to the civil service, and some of them, having first studied abroad, even achieved high rank. However, after the liberation they became, regardless of personal character and qualities, unpopular among the Bulgarians.<sup>25</sup>

It may be assumed, then, that the majority of the Bulgarian population, which means the segment living in the countryside, were chiefly conversant with the customs of their local community and with the prescriptions of

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21 On the attribution of causality, see Niklas Luhmann, *Kausalität im Süden*, 1 *SOZIALE SYSTEME* 7 (1995).

22 In 1905, for example, 82% of the entire population was engaged in agriculture. See 1 *ISTORIJA NA BÄLGARITE 1878-1944 V DOKUMENTI* 138 (Veličko Georgiev & Staiko Trifonov eds., 1994).

23 See André Armengaud, *Westeuropa*, in *EUROPÄISCHE WIRTSCHAFTS- UND SOZIALGESCHICHTE VON DER MITTE DES 19. JAHRHUNDERTS BIS ZUM ERSTEN WELTKRIEG* 304 (Wolfram Fischer ed., 1985).

24 See Nikolai Todorov, *Social Structure in the Balkans During the Eighteenth and Nineteenth Centuries*, 4 *ETUDES BALKANIQUES* 48 (1985).

25 See Report of A.P. Davidov to N.K. Girs (Dec. 17, 1878), in 3 *OSVOBOZDENIETO NA BÄLGARIJA OT TURSKO IGO*, *supra* note 12, at 357, 357-58: "Parmi les Bulgares des villes qui ont reçu de l'instruction dans les écoles indigènes il y en a plusieurs qui ont été admis sous le régime turc aux fonctions publiques et ont acquis une certaine expérience dans le maniement des affaires. Quelques-uns d'entre eux se sont assimilés les procédés turc et ne comprendraient guère les exigences d'une administration impartiale et intègre, les autres ont su résister à la corruption générale et sont restés honnêtes et bons patriotes, mais tous sont pour le moment également impopulaires et leur noms ne sortiront certainement pas des urnes électorales." See also *IKONOMOV*, *supra* note 12, at 165.

their religion. This has nothing to do with intellectual backwardness, but is indicative of a specific form of social integration.<sup>26</sup> It corresponds to the principle of religious division that had been characteristic of the Ottoman Empire for centuries and that had prevented the social and political integration of the non-Muslim population, except in cases of conversion.<sup>27</sup> Therefore one can hardly speak of "Ottoman society," but rather only of *societies* or single communities linked together under Ottoman rule. On the other hand, we should also bear in mind the animosity towards Islam dictated by the Christian authorities.<sup>28</sup> After all, the Ottoman Empire was a religious, namely, Islamic state and, despite all the reformist efforts of its enlightened elite during the late 19th century, it never established a uniform political or national identity. Religion preceded and, in the Bulgarian case, even favored the formation of a national idea. Besides family and kinship, religion was the focal point of the different ethnic groups of the Empire, the main principle on which they had been organized and on which the mechanisms of inclusion and exclusion had operated. It could also be argued that the Orthodox church to some extent made up for the extinguished political apparatus of the conquered Balkan states, whose prerogatives — for instance, in the legal sphere — had been attached to the Orthodox clergy.<sup>29</sup>

Consequently, the frontiers of law were in most cases parallel to those of religion, although the former may have been crossed much more easily than the latter, especially in cases where persons belonging to different religious groups were involved, or where using an alternative law or jurisdiction may

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26 See Holm Sundhausen, *Europa Balcanica: Der Balkan als historischer Raum Europas*, 25 GESCHICHTE UND GESELLSCHAFT 625, 645, 647 (1999).

27 See Todorova, *supra* note 7, at 47-48: "At no time, but especially in the last two centuries, did the Ottoman Empire have strong social cohesiveness or a high degree of social integration. Not only was there no feeling of belonging to a common Ottoman society but the population felt that it belonged to disparate (religious, social, or other) groups that would not converge. The Ottoman state until well into the nineteenth century was essentially a *supranational* (or, even better, nonnational) empire with strong medieval elements, where the bureaucracy seems to have been the only common institution linking, but not unifying, all the population. That the Ottoman Empire did not create an integrated society is beyond doubt; what some Balkan historians seem unable to understand is that this empire did not strive to achieve such integration."

28 The church pursued a policy of preventing its flock from converting to Islam, but also from having any contact with Muslims. It is a different question how effective this policy in fact was. See, e.g., Rossitsa Gradeva, *Turks and Bulgarians, Fourteenth to Eighteenth Centuries*, 5 J. MEDITERRANEAN STUD. 173 (1995).

29 See Todorov, *supra* note 24, at 53.

have offered greater advantages.<sup>30</sup> It may be true that the *Tanzimat* reforms in the 1860s contributed to some extent, or at least in some regions, to the establishment of universal rights applying to the entire population of the Empire, regardless of religion, and also to unifying the judiciary by providing mixed courts of elected Muslim and non-Muslim judges. Yet this was a rather late episode in Ottoman history and, at least for Bulgarians, a short one as well. I put aside the question as to the extent to which the modern Ottoman law — an earlier case of legal transfer — was implemented throughout the Empire, given the fact that there were village communities, in both the highlands and the lowlands, which remained out of the reach of the Ottoman administration. At least for the region discussed here, there are contemporary sources which, though to some degree probably tendentious, give a very negative account of the Ottoman courts, both before and after the *Tanzimat* reforms. Although it can hardly be generalized, an official report of the Russian consul in Plovdiv, Naiden Gerov, seems to be of some significance: "The new statutes that the Sultan has proclaimed almost every day," it claimed, "have found no application in practice, and the people do not wish their cases to be handled, neither by the courts nor by the city councils, according to the new provisions."<sup>31</sup> This statement, assuming it did reflect reality, may suggest that modern Ottoman law, or some parts of it, had been a rather unsuccessful "transplantation," since it met with resistance,<sup>32</sup> even stronger on the side of the Muslim population.

So far, the form of justice that the Russian Rules provided seems to have fit well not only with the actual state of Bulgarian society, but also with the national ideology of the Bulgarians, who believed in the democratic spirit of

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30 See Elena Grozdanova, *Das Kadiamt und die Selbstverwaltung der bulgarischen Gemeinden im 15. bis 18. Jahrhundert*, 7 *ETUDES HISTORIQUES* 147 (1975); Rossitsa Gradeva, *Orthodox Christians in the Kadi Courts: The Practice of the Sofia Sheriat Court, Seventeenth Century*, 4 *ISLAMIC L. & SOC'Y* 37 (1997).

31 *ARCHIV NA NAIDEN GEROV, ČAST I (1857-1870)*, at 203-06 (M.G. Popruženko ed., 1931) (author's translation).

32 This was obviously not the case in the sphere of penal law. See Milen V. Petrov, *Everyday Forms of Compliance: Subaltern Commentaries on Ottoman Law, 1864-1868*, in *SOCIETY FOR COMPARATIVE STUDY OF SOCIETY AND HISTORY* 730 (2004). The reasons for this, however, may lie not so much in the "legal knowledge" and "skills" of ordinary men "in playing the new judicial game" — as Petrov argues, *id.* at 744 — but rather in the specifics of penal law itself, which implies a different motivation and attitudes on the part of the victim, or his/her relatives, towards the "judicial game." Anyway, personal interest could in that case be of no less importance than legal knowledge and skills, which an ordinary man might seek either in legal experts or in less "ordinary" men.

the people, since they did not have an aristocracy, but who had also known the bitterness of "servitude." Of course, there was also skepticism among conservative circles whether the people were capable of leading a political life at all, since they had had none in the past five hundred years. In the discussions about the constitution of the Principality, they therefore insisted on broad prerogatives for the sovereign and on a bicameral parliament, which was considered necessary to limit and control future expressions of excessive democracy. This option was, however, rejected by the majority, which associated the idea of government primarily with self-government, an idea which was due not so much to academic learning, but to historical experience. In view of the only rudimentary social stratification and the lack of a functional differentiation of society, egalitarian and extremely liberal claims were easy to understand, though less easy to implement. First, because political action was almost unknown in a society, which, as already noted, had until then been integrated mainly upon social, ethnical and religious principles; second, because the idea of state and power had been debased through the long period of Ottoman rule. As a result, the liberation at first stressed particularism and private interests that in the years to come would often undermine public order and policy.<sup>33</sup> Establishing a legal system, which is to be seen as only one aspect of the complex state-building process, had therefore to contend not so much with the lack of educated persons — a problem which would soon be solved — but chiefly with particularism, social habits, and traditional expectations. As in other periods of history, it seems that changing the names of things did not necessarily change their meanings and the purposes people associated with them.

### III. FROM SELF-RULE TO THE RULE OF MODERN LAW

So far, I have dwelt on some general issues in order to be able to answer the question posed at the beginning of this Article, namely, how law and society were correlated in this case, or, to use Günter Teubner's term, what sort of "binding arrangements" existed between them. It is a question about the form of law, not about the existence or non-existence of law: Society without law is as impossible as law without society and history, unless one

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33 The acute problem of tax-collecting, for example, besides corruption, nepotism, partisanship, etc., may be seen as symptomatic of the fragility of the public order: a phenomenon that characterized all post-Ottoman societies in the Balkans. Apparently, the majority of the people had difficulty associating the idea of freedom, of being free from the Ottoman rulers, with duties imposed by the new ones.

believes in natural law. I will now address the other major question, i.e., how, if at all, have these arrangements been changed, modified or irritated through the transfer of foreign law into Bulgaria after 1878? Or was there an opportunity for "great hazards," in the sense of Montesquieu? While at the present stage of my research I cannot possibly offer an exhaustive answer to such a complex question, the following observations represent at least some efforts in this direction.

From my previous remarks, it should be clear that the newly established Bulgarian Principality was at first confronted with a large body of customary law, which coexisted beneath the skin of modern Ottoman law, or that portion of it which remained in force after the liberation, primarily penal and commercial law.<sup>34</sup> Given the structure of Bulgarian society, as noted above, namely, the high percentage of peasantry among the populace and the lack of functional differentiation, it can be assumed that the applicability of customary law must have been very high, at least in rural areas and also in mountain towns: the best known example may be that of Koprivštiza,<sup>35</sup> which had enjoyed a great deal of de facto autonomy from the Ottoman authorities. Moreover, since popular customs were believed to represent the people's traditional way of life and the quintessence of national identity, they soon became the subject of ethnographic and historical research, and a romantic narrative even saw in them a safe haven from a turbulent modernity.<sup>36</sup> This does not mean, however, that customary law was a product of nationalistic dreams, although it may very well have stimulated such dreams. Otherwise, one can hardly explain the popular resistance to, and the scholarly criticism of, the early Bulgarian legislation which, in pursuit of political aims and ideas, was believed to have adopted foreign law too eagerly, at the expense of national culture and traditions. In fact, the legislation, as the Russian authorities had done before,<sup>37</sup> explicitly referred to customary law.<sup>38</sup>

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34 One should take into account that the modern Ottoman legislation hardly embraced all matters of private law.

35 See MIKHAIL MADŽAROV, *SPOMENI 17-98* (Damjan Jakov 2004) (1942).

36 See, e.g., ILIA BLÄSKOV, *MEMOARI* (1976).

37 See Circular Announcement of the District Court (*oblasten sąd*) of Vidin to the Presidents of Municipal Courts (*okružni sādove*) (Jan. 11, 1879), in 3 OSVOBOŽDENIETO NA BÄLGARIJA OT TURSKO IGO, *supra* note 12, at 396. The document gives notification of the instruction given by the Russian president of the judicial council in Bulgaria, Lukijanov, providing that in cases where no will had been left the courts were to allot the inheritance according to the local customs, or, in cases in which there were no local customs, according to the customs common to all the people in the country.

38 See Mikhail Andreev, *Der Einfluß des bulgarischen Gewohnheitsrechts auf die Gesetzgebung des bulgarischen bürgerlichen Staates nach der Befreiung vom*

The phenomenon of a widespread customary law in Bulgaria as well as in the Balkans as a whole was due, as already mentioned, to the specific form and principles of Ottoman rule, which had helped to maintain, sometimes even to strengthen, traditional forms of social organization and control. Under such circumstances, law remained for the most part undistinguished from social, religious, or moral rules. Its knowledge and application were not the domain of professionals, nor did its enforcement rely upon a differentiated political apparatus, but, rather, upon the unquestioned authority of social and religious agents (elders, local notables, clergymen, etc.) and, accordingly, upon social, moral, and religious constraints. The fact remains that the Ottoman Empire — at least until the second half of the 19th century — did not establish legal professions, nor did it have secular jurists and jurisprudence, in the strict Western European and even Roman sense of these terms. Jurisdiction, for instance, was almost exclusively in the hands of religious authorities, to whom it was only one among many other functions. Law was in that case a component of functionally diffuse social structures, or in other words, instead of being technically specified and differentiated, it was socially integrated. The same applies to Bulgarian society. It can be said that law existed chiefly as custom, which for the most part was unwritten, handed down by rituals, and enforced by social and religious authorities, above all by clergymen and guilds. Moreover, one has to take into account that customs very often differed from one region to another. This had been tolerated by the Ottoman authorities, who avoided interfering with the social life of the different ethnic and religious groups, unless it put the established status quo in danger. This way local customs could survive for centuries, being almost hermetically isolated in a multiethnic context.

This constellation had begun to change in the 18th century, due to growing contacts with Western countries and to mobility within the Ottoman Empire. Moreover, changes in the economic and military structure of the Empire, attempts at modernization, sometimes under pressure from abroad, etc., showed on the whole the growing importance of the rule of law. The newly established Bulgarian Principality, which inherited a large part of Ottoman "modernity," including law, subsequently had to cope with the problem of how to establish public order in a society which until then had occupied

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*Osmanischen Joch* (1878), 16 JAHRBUCH FÜR OSTEUROPARECHT 171 (1975). The existence of customary law was a common phenomenon in all post-Ottoman states — one might mention the Montenegrin codification of customary law (and its subsequent abolishment and replacement by modern Western law).

mainly the "private" sphere; how to regulate social life that had been almost self-regulating for centuries.

The solution to the problem was not to be found in a codification of customary law, as had been the case in Montenegro, despite some attempts to study and collect Bulgarian customary law. It was Western law, first and foremost, which the "revived" Bulgarian state eagerly embraced, hoping soon to become Westernized. "The law of other countries," noted a Bulgarian jurist with regret in 1900, "lay before us prepared and in good order, so that we have only to make use of it."<sup>39</sup> Instead of inventing a new law, the answer was to take the best law that had already been invented. Legislation was considered to be the only way this could be done, the only way to achieve the desired results; it was also thought to be a panacea against backwardness.<sup>40</sup> Rapidly and in an eclectic manner, ministerial commissions, individual ministers, or even their secretaries began to study the law of neighbouring states, of Russia, Italy, France, Spain, Germany, or Switzerland, and to borrow what seemed modern and best suited. And the result often looked like a book written by a lecturer more enthralled by his own lecture than by the needs of his audience. Sometimes, a single statute combined elements of different origin; law that had been translated overnight and put rapidly into force afterwards required several amendments, due to its incompleteness, or incorrectness, or simply because it failed to yield the results it had been designed for. It seems that the belief in the effectiveness of law was greater than the possibility of enforcing it. The consequence was, as it often is in such cases, a huge discrepancy between law and social practice. Moreover, this even became a discrepancy in time, since the new law not only imposed its own technical terms, but was also being changed, amended, completed, or invalidated at a tempo that one could hardly follow. Apparently, the dynamic of lawmaking and of politics operated faster than that of society.

In December 1893, a commission that had been put in charge of amending the valid Ottoman law of property gave the following account of its work:

As main sources in drafting this law [Law of Property and Its

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<sup>39</sup> Stefan Kirov, *Neobhodimosta ot edno sistematizirano izdanie na deistvujuštite zakoni, pravilnizi i dr. pravit. rasporeždaniya, s nužnite kām tjah beležki i sravnenia*, 10 JURIDIČESKI PREGLED 589, 591 (1900) (author's translation).

<sup>40</sup> This confirms the observation of Nelken, *Comparatists*, *supra* note 1, at 457: "Legal transfers are frequently — perhaps predominantly — geared to fitting an imagined *future*. Most legal transfers are imposed, invited or otherwise adopted because the society, or at least some groups or elites within that society, seek to use law for the purposes of *change*. The goal is not to fit law to what exists but to reshape what exists through the introduction of something *different*."

Limitations] we have used the civil statutes of Italy and France, which not only with regard to property law and its limitations, but also concerning other institutes of civil law, contain the most reasonable, fair, and novel regulations on private and property rights of citizens . . . using these statutes, we never forgot that this had to suit the customs and manners of the people and meet the present economic needs of our country.<sup>41</sup>

This statement is interesting when seen in relation to concomitant efforts in the sphere of legal history, which was then scarcely distinguished from ethnology. For example, almost at the same time a Bulgarian scholar, Dimităr Marinov, published his collection of Bulgarian customary law, which he had studied in the field, under the title of "Living Antiquity."<sup>42</sup> Thinking of the concept and in terms of modern law, Marinov tried to explore, write down and systematize the "living law" in northwest Bulgaria. He conceived of his own work as being mainly ethnographical, as a contribution to the knowledge of the people's way of life, which he hoped might help the state in its legislation. Like most Bulgarian jurists of his time,<sup>43</sup> he was well acquainted with the work of Valtazar Bogišić, in particular with his "Instructions for the Description of Customs that Live among the People,"<sup>44</sup> and also with that of the Russian scholar Pavel Matveev,<sup>45</sup> whose principles he adapted to his own work. It may therefore be assumed that Marinov had, at least through the work of Bogišić,

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41 The document is available at the Bulgarian Central State Archives, *fond 173, opis 1, arhivna ediniza 438*. The translation offered here is the author's.

42 DIMITĀR MARINOV, *ŽIVA STARINA, KNIGA IV. NARODNOTO OBIČAINO PRAVO, PART I: GRAŽDANSKO PRAVO* (Akademično Izdatelstvo 1995) (1894).

43 The most prominent, besides Marinov himself, were Stefan S. Bobčev, who published several monographs and articles on Bulgarian customary law, and Petăr Odžakov. Both studied law in Russia before 1878. A historical account of the study of customary law in Bulgaria at this time is given by STEFAN S. BOBČEV, *NJAKOLKO DUMI ZA BĀLGARSKOTO OBIČAINO PRAVO* (Plovdiv, Edinstvo 1893).

44 VALTAZAR BOGIŠIĆ, *NAPUTAK ZA OPISVANJE OBIČAJA, KOI ŽIVU U NARODU* (Zagreb, Drag. Albrecht 1862). An interesting analogy may be drawn between the verb "živu" (live) in the title and the adjective "živ" (alive) in the title of Marinov's work: both seem to indicate not only the living quality of popular customs, but also the idea of something old that is still alive. Bogišić's work was translated into Bulgarian by the aforementioned Petăr Odžakov and published in Prague already in 1874.

45 PAVEL A. MATVEEV, *PROGRAMMA DLJA SOBIRANJA NARODNYCH JURIDIČESKICH OBYČAEV. GRAŽDANSKOE PRAVO* (St. Petersburg, V. Kirshbaum 1877). Matveev was also the author of a programme related to judicial litigation. See PAVEL A. MATVEEV, *PROGRAMMA DLJA SOBIRANJA NARODNYCH JURIDIČESKICH OBYČAEV. SUD I RAZPRAVA* (St. Petersburg, Pravitel'stv. senata 1879).

also some knowledge of the ideas of the German "Historische Schule," of Savigny and Puchta. His approach was obviously based on the assumption that law evolves naturally from the national character or spirit of men, whereupon customary law was the most essential and instructive portion of national life and identity, which the state should therefore consult in making new law. Thus the study of customary law played much the same role as the study of national history, language, and literature: in this way one became conscious of one's own identity and culture, whose distinctiveness often seemed to be confirmed by the comparison with the "others," be their image positive or negative.

Marinov divided his book into chapters according to the modern distinction between civil and penal law, etc. One of his questions in the civil part was whether "a term may exist which is used by the people to designate property, in contrast with possession and use?"<sup>46</sup> He could not find any such term, except for possessive pronouns and various expressions of certain activities indirectly indicating that something is owned by someone.<sup>47</sup> There are similar examples relating to inheritance, family law, obligations, and other areas of private law,<sup>48</sup> showing not only that the local customs differed very clearly from "the most reasonable, fair, and novel regulations," but that the people had difficulty understanding, and often rejected, the foreign criteria of "reasonable and fair." How, for example, could it be reasonable and fair to admit all family members, sons and daughters, to equal rights of succession? How could a deal be made valid by mutual consensus, without passing the object, without witnesses, without shaking hands, etc., as the very best and modern Statute on Obligations and Contracts, modeled on the Italian civil code of 1892, prescribed?<sup>49</sup> Why should notaries and legal documents be used in selling real estate, since they had seldom been used before, if at all, and

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<sup>46</sup> MARINOV, *supra* note 42, at 189 (no. 226).

<sup>47</sup> Cf. also Ivan A. Dragnev, *Za selsko-obštinsките sādove*, 1 SELSKI SĀDNIK 3, 12 (1892). The author, who was also publisher of the journal, considers it necessary to explain to his peasant audience exactly what the expression "property right" (in art. 10 of the "Statute on Peasant Courts") means. For this purpose, he uses possessive pronouns and also the noun *sebenie*, resp. the verb *sebja*, which is derivative of the reflexive pronoun *sebe* (*si*), corresponding to "self." See also Ivan A. Dragnev, *Pravo da sebiš nešto*, 2 SELSKI SĀDNIK 25, 25-27 (1892). The term "sobstvenost," which soon gained currency and is used to the present day, was borrowed from the Russian. See Stefan S. Bobčev, *Nešto za juridičeskija ni ezik*, 1 JURIDIČESKI PREGLED 26 (1893). Bobčev noted the lack of a uniform terminology in the Bulgarian legislation and in the legal literature of the time.

<sup>48</sup> See, e.g., Andreev, *supra* note 38.

<sup>49</sup> See on that case Krasen Stoyčev, *Bālgarskoto pravo v kraja na XIX i načaloto na XX vek: sblāsāzi meždu novi i stari pravila*, 4 PRAVNA MISĀL 3, 8-14 (2000).

since one's given word and personal reputation were enough to make the deal valid? The discrepancies between law and local customs, between legal and social or even moral standards were, in such cases, so obvious that one may doubt if the new law found any application in practice. It seems even more unlikely if one takes into account not only the routine of daily life in small traditional societies, but also the high rates of illiteracy at the time, and even the difficulties the literate may have had trying to understand the abstract and sophisticated language of the new law. It seems that many of the people simply did not know, or even did not wish to know, anything about a new statute or the new amendment of an old one. Moreover, since the number of jurists was very small, and the majority of judges and advocates — the last term having at first no technical meaning<sup>50</sup> — had no legal education and training,<sup>51</sup> one may assume that the new law was applied either seldom or in an incorrect manner. Although the historical evidence that I presently have at hand is too meager to allow for wide-ranging conclusions, we can at least regard the particular case as significant for addressing the more general problem. This is what I shall try to do in the next Part.

#### IV. THE IMPLEMENTATION OF FOREIGN LAW

It is noteworthy that during the first decades after 1878 it was precisely the judiciary that was commonly considered the Achilles heel of the new state. The problems of the courts — slowness, ignorance, corruption, partiality, partisanship, etc. — and the morals of judges and lawyers preoccupied the daily press as well as the few law journals of the time. But what seems more important to me than the popular view of the courts is the view from inside, the way in which the developing legal system reflected its own problems. This is illustrated by three examples. The first is an official report to the ministry of justice containing the results of an examination of court records

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50 The term "advocat" was first used in a statute from 1880, besides the old literary term "poverenik" (trustee). See PETKO DOBČEV, *BÄLGARSKATA ADVOKATURA* 22 (2003).

51 During the time when the Provisional Russian Rules were in force, no legal education was required, either for judges or for advocates. Eastern Roumelia made an exception in that respect, when already in 1882 a statute was issued prescribing the taking of an examination for advocates. After the unification, it was in November 1888 that a statute introduced a similar restriction on the advocacy for the first time. See DOBČEV, *supra* note 50, at 61-63.

carried out in March 1900.<sup>52</sup> It found that in most cases there was either no record book at all, or the existing one was incomplete and showed a large number of errors. The common explanations that people everywhere gave were that they simply did not sue each other, or that there was no need to go to court, or even no need for courts at all. The reasons for this were for the most part fear of getting into trouble, ignorance of the law, or ignorance of what a court is exactly and how it works, disregard of the court and its decisions, etc. I would not say that this was the common state of affairs, although I am much inclined to think so.<sup>53</sup>

The next example concerns legal reasoning. By this term, I mean not only legal argumentation, but also the decision-making of the courts. This may be a very instructive issue, for it allows us to see whether and how transferred law was applied. Moreover, from a sociological perspective it may show us what difference, if at all, law made *in* society. If my preliminary theoretical discussion is correct, then the role that legal reasons play in the court can be expected to depend upon social arrangements between law and other social structures. Hence, problems of jurisdiction may indicate structural problems within society. My evidence in that case still consists more of contemporary reports about court practice than of court documents themselves. Yet it is enough, I think, to allow for the following suggestions.

On January 19th, 1879, the legal department of the Russian Imperial authority in Bulgaria sent a letter to all district courts reminding them to publish every court decision together with the reasons on which it had been founded.<sup>54</sup> This was in conformity with the principle of publicity of the courts which had been provided by article 60 of the Provisional Rules. The letter explained that the activity of a court should be made known not only within the administration, but also to all of society, since publicity was an essential condition for dispensing correct justice. By being published, court decisions together with the grounds for the decision would obtain, so the letter, the

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52 See Bulgarian Central State Archives, *fond* 242 k, *opis* 1, *arhivna ediniza* 298.

53 It is interesting to compare these statements with a popular booklet written by a lawyer, ILIJA S. BOBČEV, *KOJA TREBA DA E PÄRVATA NI RABOTA, KOGA PAZIM PRAVATA SI?* (1903) ("What should be our first concern, when we protect our rights?"). It contains practical advice to people "who do not like to go to courts as well to those who are compelled to do so" (author's translation). Under the section "Is it bad to go to court?" one finds the common opinion of courts and lawyers: "Many of the people think that it is bad to go to advocates and courts. Of course, it is a mistake to think so." *Id.* at 4.

54 Circular Announcement of the Judicial Department of the Council of the Russian Commissar in Bulgaria to the Presidents of District Courts (Jan. 18, 1879), *in* 3 *OSVOBOŽDENIETO NA BÄLGARIJA OT TURSKO IGO*, *supra* note 12, at 406, 406-07.

force of an official truth. "Moreover," it continued, "since the country has no systematic legislation and the courts often have to decide only on the basis of common or local customs [sic], or, when these are lacking, even on the basis of personal conviction and conscience, the publication of court decisions will contribute to establishing a uniform justice and also serve as a groundwork for any future legislation."<sup>55</sup> Henceforth, court decisions had to be published in a daily newspaper.

Three months later, on March 17th, 1879, the same department sent another letter to all district courts, now commenting on already published court decisions.<sup>56</sup> "It has been noted," the letter began, "that courts did not always base their decisions on the Provisional Rules, which might not have been so difficult, if only the courts consciously applied them and read them carefully."<sup>57</sup> Apparently, the courts used to publish their decisions without giving any reasons for them or without referring to any provisions,<sup>58</sup> even when it was obvious that certain of the latter had served as guidelines. "It could be seen," the letter continued, "from the already published court decisions that the courts, in handling civil cases, have sometimes followed exactly those instructions which are clearly provided by the Provisional Rules; however, they make no reference to them."

The main problem for the courts at the time seems to have been not decision-making, but the motivation for legal decisions. The problem can easily be explained by the lack of technical knowledge and training on the part of the judges. From a historical viewpoint, however, such an explanation is insufficient if it fails to recognize that there may be different ways of making — and not making — decisions, and that arguments are not always needed. In other words, the problem may have been a structural one, due to different forms of justice and, consequently, to the different expectations people have of justice. Thus, what Russian jurists considered a failure of the courts — and we may agree with them — would also mean a different historical experience. It is even doubtful that the courts could have been expected to act otherwise, since when there is a lack of professional knowledge, social action is determined and controlled to a great extent by social expectations. And we have good reason to assume that the common expectations of men did not change overnight.

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<sup>55</sup> *Id.* (author's translation).

<sup>56</sup> Circular Announcement of the Judicial Department of the Council of the Russian Commissar in Bulgaria to the High and District Courts (Mar. 17, 1879), in 3 OSVOBOŽDENIETO NA BĂLGARIJA OT TURSKO IGO, *supra* note 12, at 512.

<sup>57</sup> *Id.* (author's translation).

<sup>58</sup> For further examples, see KONSTANTIN IREČEK, BĂLGARSKI DNEVNIK 490 (1932).

My last example relates to legal critique. The evidence in this case comes from an article written twenty years later, in 1902, by a Bulgarian jurist. The time of the Russian protectorate had long passed, and great progress had been made in almost every sphere of social life. Since 1894 there had been a law faculty at the University of Sofia, and the percentage of professionally trained jurists was two or maybe three times higher than only a few years earlier. The situation in the judiciary was becoming more and more complex — due to the increasing professionalism of the judicial organization and of judicial competence as well; due also to the increasing number of statutes, the eclectic style of their making, the lack of systematization, the continuous amendments of new law, etc. The Bulgarian legal system had achieved a modern form, and a "grand hazard" seemed to have taken place. Despite that, or maybe because of it, the problems of the judiciary grew at the same tempo. Since there were now professional jurists and, consequently, well established professional standards and sensibility, the problems of the domestic legal system became more obvious than they had been before. The judiciary was now exposed not only to public interest and curiosity, but also to professional critique. The article I have mentioned is an example of this. It briefly describes the present state of the judiciary and tries to explain the reasons for its insufficiency. Unlike many other common descriptions, which blamed the morals of judges, the political influence upon them, or the great discrepancy between law and customs, the author saw the main reasons in "the lack of legal thinking among the jurists, in the insufficient knowledge of the law, and of the science of law." In his view, the principles of Roman and modern jurisprudence had had no impact upon Bulgarian jurists, who were enlightened only by Turkish maxims of law. He discusses three basic principles of the legal profession which he considers very rare among his colleagues: first, the ability to recognize all relevant facts; second, possessing knowledge of the law that the facts may apply to; and finally, the ability to subsume the facts under the law. Needless to say, it sounds very elementary. But for this very reason it represents an impressive attempt to clearly define the proprium of legal thinking by distinguishing it from common sense. Thus it suggests the idea of how improbable law can be, and how unnatural and particular a scholastic perspective *de jure* could be, which in a different context has become so natural and universal. At the same time, this example shows that the problems of the judiciary had already been internalized, in the sense that law was already observing itself by its own criteria. We may conclude that legal reasoning was in that case not simply a question of how to use certain techniques, but also — by using techniques — how to uphold a distinction, or, to return to the beginning of my Article: how to look upon society from a perspective that is not identical

with that of society. The answer to this question in essence represents, in my view, the history of legal transfer in Bulgaria after 1878.

### CONCLUSION

The history that the present Article has offered is, of course, far from complete. There remains a good deal of empirical research still to be done. Yet at least a modest contribution has been made toward a better understanding of some aspects of the vaguely known history of legal transfer in Bulgaria after 1878. Furthermore, the Article may also be considered as a contribution to the ongoing debate about a general phenomenon, whether it is referred to as legal transfer, transplantation, or reception. The empirical observations made above support the skepticism that has already been expressed about the analytical adequacy of any of these metaphors, which seem limited in that they rest on the idea of a mechanical or organic transportation of something which can either be rejected or adopted: the alternatives correspond to the opposite conceptions of law as being either autonomous or embedded in society and culture. This Article started out from a different point of view, identifying law with a specific form of communication which reproduces society by distinguishing itself from society. The way in which this occurs, however, is not set up a priori, but varies historically, so that different forms, different modes of structural correlation between law and society may exist in different times and places. It was therefore necessary to return repeatedly to Bulgaria's pre-1878 history and to look upon some features of the social organization of the Bulgarian communities under Ottoman rule and of that rule itself. As I have been able to show, the new law did not simply replace the existing one. Local customs and, to some extent, modern Ottoman law continued to be applied. In part, this may have been due to the fact that the adoption of foreign law was dictated by the ambition to create an independent state and a modern society after Western standards, rather than by an intrinsic need to reform the existing status quo. In any case, the consequence was a great discrepancy between political program, implemented through legislation, and legal practice, which had to rely at first on the traditional forms and attitudes of laymen. It is true that many contemporary observers, in whose eyes the discrepancy between political aspirations and the actual state of society in Bulgaria seemed too huge to be overlooked, thought of the adoption of Western law in terms of resistance and integration, failure and success, loyalty to and disregard of national culture. Yet at the same time the foreign law — precisely because it was exposed to communication, because

it had to be interpreted, because it was being applied or not, criticized or praised, understood or misunderstood — stimulated a complex process of evolution in which neither the meaning of the new law nor its social environment remained the same. Law made a difference simply because it allowed society a different perspective upon itself.