ПРАВОВАЯ ЖИЗНЬ: НАУЧНО-ПРАКТИЧЕСКИЕ ЗАКЛЮЧЕНИЯ, КОММЕНТАРИИ И ОБЗОРЫ

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On the application of Byzantine law in modern Bessarabia

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The article describes the application of Byzantine law in the region of Bessarabia which formed part of the Russian Empire from the early 19th century until 1917. The empire allowed the local population to apply their local laws for the regulation of their civil law relations. Due to historical reasons, these local laws were identified with the law of the Byzantine Empire which had already disappeared in 1453. The authors of the article provide a general description of the sources of Bessarabian law and then turn to case study research regarding the jurisprudence of courts on the issues of the Law of Succession in Bessarabia. They demonstrate that in interpreting the provisions of the law applicable, Russian lawyers often referred to Roman law as a doctrinal background of Byzantine law. Furthermore, they did not hesitate to identify Roman law with Pandect law. Even though the doctrine of the Law of Pandects had been created in Germany on the basis of Roman law texts, it was far from the content of the original law of the Ancient Roman Empire. The fate of the practical application of Byzantine law in Bessarabia reflects some general problems of the 'legal transplants' in the history of law and therefore provides additional materials for the theoretical study of the issues of 'legal transfer' in history and nowadays.

Keywords: private law, Byzantine law, Roman law, Bessarabian law, Russian Imperial Law, legal transplants, fideicommissum.

1. Introduction

As it normally happens in every Imperial state since Roman times, the peculiarity of private law in Old Russia consisted in the diversity of the legal systems which were applied for the regulation of private law relations in various territories of the Russian Empire. That

is why the inhabitants of such territories could live under the rules of civil law which were quite different from the provisions of the Imperial statutory law, as the latter manifested itself in the Statute-book ("*Svod Zakonov*") of the Russian Empire[1].

One such region with its own local civil law was the province of Bessarabia, nowadays the Republic of Moldova. In a posthumous 6th edition from 1897 (corrected and amended) of the manual of civil law by the most prominent pre-revolutionary Russian civil law specialist Dmitrii Meyer, one can find a general description of the situation:

> After annexation of Bessarabia by Russia under the terms of the Treaty of Bucharest of 1812[2]. the statutes previously applied there remained in vigor. These are: the *Hexabiblos* of Constantine Harmenopoulos[3], the "Law Book" (Summary of laws) of Andronakiy Donič[4], the Deed of the Prince Alexander Maurokordat[5]. The common imperial statutes became only a subsidiary source of law. The repeated attempts of the Russian government to create a special statutory-book of the local laws for Bessarabia did not have any practical result; the local legal sources are still in vigor and the governmental activity revealed itself only in promulgation of a few special statutes to replace some old national statutes in the edition of 1831 and 1854 of the official (Russian) translations of the above-mentioned sources of Bessarabian law. As far as it is concerned that part of Bessarabia, which Russia annexed under the Treaty of Berlin of 1878[6], its legal situation became just the same as that of the part which had been annexed by Russia previously (Meyer 1897, 23).

But due to the interpretation provided by the Civil Department of Cassation of the Governing Senate of the Russian Empire in its decisions 1895, No. 78 of and 1914, No. 37[7], the civil law of Romania should be applied to those territories of Bessarabia which Russia

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[1] *Statute-book of the Russian Empire.* Accessed November 20, 2020. http://www.consultant.ru/edu/student/download_books/book/svod_zakonov_rossijskoj_imperii_tom_x.

[2] *The Treaty of Bucharest was signed on 28 May 1812 between the Ottoman Empire and the Russian Empire. It ended the Russo-Turkish War of 1806–1812. Under the terms of this treaty, the Ottoman Empire ceded to Russia the region of Bessarabia, situated between the Prut and Dniester Rivers, which previously formed the eastern half of a vassal of the Ottoman Empire — the Principality of Moldavia.* Accessed November 20, 2020. http://www.hrono.info/dokum/1800dok/1812rutur.php.

[3] Constantine Harmenopoulos (1320 — ca. 1385) was one of the highest judges in the Byzantine Empire, and is well known by his *Hexabiblos* (1344–1345). It is a law book in six volumes in which he compiled a wide range of Byzantine legal sources. The *Hexabiblos* was widely adopted as a source of the law in vigor in the Balkans under the Ottoman Empire (Const. Harmenopuli. *Manuale legum, sive, Hexabiblos: cum appendicibis et legibus agrariis.* Accessed November 20, 2020. https://archive.org/details/constharmenopul00heimgoog).

[4] Andronakiy Donič (Andronache Donici (Donitch) (1760–1829) was a famous local lawyer who published his "Law Book" (Summary of the local laws) in 1814 (*Summary of the local laws.* Accessed November 20, 2020. https://www.prlib.ru/item/343408).

[5] Alexander Maurokordat (Alexandru I Mavrocordat) was a ruler (*hospodar*, that is 'lord') of Moldavia (1782–1785). He issued this deed on 28.12.1785 (Accessed November 20, 2020. https://www.prlib.ru/item/343408).

[6] The Treaty of Berlin was the final act of the Congress of Berlin (13 June — 13 July 1878). As a result of this treaty, Austria-Hungary, France, Germany, Italy, Russia, the Ottoman Empire and the United Kingdom revised the Treaty of San Stefano, which had been signed on 3 March the same year. Inter alia, under the terms of the Treaty of Berlin Romania was forced to cede Southern Bessarabia to the Russian Empire (Accessed November 20, 2020. http://www.hist.msu.ru/ER/Etext/FOREIGN/berlin.htm).

[7] Hereinafter, all judicial acts of the Civil Department of Cassation of the Governing Senate of the Russian Empire are referred to as they are available on the electronic resource "Zakon.ru". Accessed November 20, 2020. https://zakon.ru/senat.

had annexed under the terms of the Treaty of Berlin of 1878. According to the decisions of the same Civil Department of Cassation of the Governing Senate (1881, No. 14; 1885, No. 59; 1886, No. 25; 1900, No. 72; 1902, No. 9; 1909, No. 35; 1910, No. 74; 1911, No. 78; 1915, No. 49), not only the above-mentioned *Hexabiblos* should be applied in other parts of Bessarabia but also the additional sources of Roman and Byzantine law, including the *Basilics*[8]. The *Basilics* were a collection of laws completed in c. 892 AD by order of the Byzantine Emperor Leo VI the Wise in order to adapt the *Corpus Juris Civilis* of the Emperor Justinian because the latter had become outdated already.

Under the decision of the Civil Department of Cassation of the Governing Senate of 1909 No. 73 in the case of ambiguous expression in the official Russian translation of the *Hexabiblos,* the court could take into consideration the original Greek text (Guliaev 1912, 8). In one of its decisions, the Senate explains in such a way the hierarchy of the sources of private law in Bessarabia: "any trial on the civil right should be solved by the law that interpreted and protected the contested right; the local laws are applied in trials of the Bessarabia region and only if they are insufficient the common laws of the Empire are used… The Chamber considering all the circumstances must have determined what questions of law were to be resolved and after that, refer to the local norms. If these laws due to their incompleteness or cancellation could not give a direct decision of occurring legal questions it was necessary to refer to the common laws of the Empire" (Bertgoldt, 1896, 216).

2. Basic Research

2.1. General Issues of the Application of Byzantine Law in Bessarabia

Bessarabia had not been thoroughly studied by Russians until 1917. It was often assimilated to Asia or Georgia even in the documents of the 19th century. And even some officials of the Ministry of Foreign Affairs hardly knew what region the capital of Bessarabia — Kishinev — was attributed to. The Governing Senate of the Russian Empire classified Bessarabia and Moldavia as former Byzantine lands, although the power of the Byzantine Empire never reached the territories to the north of the Danube. On the other hand, many Russian people were interested in Bessarabia since it was connected with the aims of the Russian Empire's foreign policy. Originally Bessarabia was considered to be the first stage for further conquest of the Balkans and advancement to the Bosporus. Due to the ideas of Pan- Slavism that had a great influence in Russia during the 19th century, Russian writers of this period perceived the population of Bessarabia as a Romanian population which would be an obstacle for Slavic consolidation, or as Slavs who had accepted the Latin language (Kasso 1913, 228–229). On the other hand, the image of a territory of the Russian Empire where Roman law was applied in its original form attracted Russian lawyers and historians.

The period of reforms, which were taking place in Russia in the 1860s–1870s, was characterized by a great interest in foreign legal experience and especially in Roman Law as *ratio scripta*. The strict application of Roman law in one of the provinces of the Rus-

[8] Hereinafter, The *Basilics* are referred to as they are available on the electronic resource "Brill". Accessed November 20, 2020. https://referenceworks.brillonline.com/browse/basilica-online.

sian Empire stimulated sincere enthusiasm among specialists in the field of jurisprudence as well as a broad public. Many of them were very delighted to see the origins of Roman law in Bessarabian Civil Law and expressed their attitude to these traces of Roman law in Bessarabia in such words: "In all of the country's history, the legislation is fantastic as there is a celebrated Roman law with its solid origins and broad in details merged with rude mix of rules taken from customs based on impetuous sensuality and unbridled impulses of the people, and this legislation often yielded to orders and statements brought not from the people's consciousness, not from pure ideas of justice, but from greed and oppression" (Egunov 1881b, 197–198).

The charm of "a living Roman Law" was represented also in the local Bessarabian press. One of the articles of the issue No. 186 of the "*Odessky Vestnik*" (Herald of Odessa) referred to the laws of Harmenopoulos and Donič as the etalon in legislation. Even judicial procedures in Bessarabia, that "become frequent not because of passion for barratry but due to the development of a perfect individual in all social strata and a legal possibility to protect it against any unfair oppression", were idealized. Such idealization of Bessarabian Law was criticized by A. N. Egunov, a member of the codification commission (Egunov 1881a, 145–146). In his opinion, there existed only statutory provisions but not the law of Bessarabia because "any local law is lacking here at all in that sense of the term which we are used to attributing to the notion of Russian, French or Roman law" (Egunov 1881a, 146).

Egunov was so skeptical about the quality of the local law of Bessarabia because he saw that its sources "represent the *Hexabiblos* of Harmenopoulos, developed in 1345 in the ancient Greek language and badly translated once into New Greek at the end of the last century and then into Russian in 1831. At the same time as if for even greater confusion, an unnecessary and unimportant original of the *Hexabiblos* in the New Greek language was included into the edited Russian translation, while the text in ancient Greek was used in footnotes, despite the latter variant being the only one which had formal vigor in our trial" (Egunov 1881a, 146).

The abovementioned author knew well the disadvantages of the archaic *Hexabiblos,* which he described as "the most chaotic mixture of Greek and Byzantine statements, state, civil, criminal, canonic, police, building and other orders that were often controversial, often senseless and sometimes immoral" (Egunov 1881a, 148).

Egunov pointed out some examples of a completely wrong translation of the original text and made the conclusion that such legislation was "legal lawlessness". From his point of view, this situation caused the lack of a feeling of lawfulness among the local population, because it provoked its litigious madness. In regard to this, Egunov noted that "we should not forget that a certain population of Bessarabia was liberated from the ancient Turkish and Phanariotes' disgraces just 56 years ago that certainly were not able to cultivate the feeling of truth among people". He was sure that the enormous number of civil litigations in Bessarabia should not be explained by the devotion of the local population to the lawfulness, but *vice versa* (Egunov 1881a, 156). The provided quotation should be explained in the sense that the Phanariotes who are mentioned here (in other versions: Phanariots or Phanariote Greeks) were members of prominent Greek families living in Phanar — the chief Greek quarter of Constantinople where the Ecumenical Patriarchate was located. They were traditionally influential in the Turkish Ottoman Empire. Phanariote Greeks emerged as a class of moneyed Greek merchants of mostly noble Byzantine descent dur-

ing the second half of the 16th century. Phanariots occupied important positions in the administration of the Ottoman Empire's Balkan domains including the principalities of Moldavia and Wallachia

However, even skeptically minded Russian lawyers did not wish to deny the local Bessarabian law completely. Taking into account all the circumstances, they came to the conclusion that there were such provisions in it that should be transferred into the Russian Imperial civil legislation (for example, the lack of differences between the property in tail and acquired property) (Egunov 1881a, 157).

In 1812 Bessarabia became the part of the Russian Empire. The Manifesto of 1812 allowed Bessarabia to employ its own laws. It is the Manifesto that provided lawfulness to all the region's laws that were in force prior to 1812, as many Russian scholars suggested (Pergament 1905a, 15). The position was supported by the legal acts examined below.

According to the decree (21 August 1813) "About the organization of the eparchies of Khotyn and Kishinev", the former Moldavian law was to be used in the field of civil legal relations. At the same time no concrete enactments of this law were mentioned here. "The Charter about the organization of the Province of Bessarabia" of April 29th, 1818, allowed the usage of the Moldavian language and local laws in regional judicial proceedings. Courts were obliged to use "laws and customs of Moldavia". Therefore, in the case of an appeal to the highest judicial instance of the Empire, to the Second Department of the Governing Senate of the Russian Empire, it was necessary to present an abstract from the local laws and customs that had provided legal grounds for the decision of the lower court and from those laws and customs that were referred to by the appellant. The 1818 Charter was replaced by the "Institution for administration of the *oblast* of Bessarabia" of February 29th, 1828, No. 1834 which supported the application of local laws. But even here a concrete list of those laws that should be applied by the local Bessarabian courts was once again absent (Pergament 1905a, 8).

The Senate's enquiry of 1825 about the local laws applied in Bessarabia resulted in an answer of the Supreme Council on Courts which stated that there were the following sources: "1) The *Hexabiblos* of Harmenopoulos which is the book containing merely short extracts from common ancient and new legislation of Rome and *Tsar'grad* ("The city of the Tsar" — the Russian name for Constantinople. — *The present author's comment*) but written in Greek, and the Council can not confirm that the Moldavian translation is correct; 2) the Law Book published by the Moldavian *boyarin* (a high nobleman. — *The present authors' comment*) of the first echelon Donič which also represents abstracts from Roman law while some of its articles are denied by local customs that were supported by orders of the *Hospodar* (the ruler of the Old Bessarabia. — *The present authors' comment*), but even this book appeared to be insufficient in practice; 3) the Statute of the Bessarabian Region's establishment; 4) the *Sobornaya* Charter (Deed) of the *Hospodar* Alexander Mavrokordato of 28 of December 1785" (Pergament 1905a, 9).

The Governing Senate consigned the books' translation to the Asian Department of the State Board of Foreign Affairs. The translation was completed in 1828. However, the Russian translation was completed after the New Greek translation of the 18th century instead of the ancient Greek original. The comparison with the original revealed many differences from the New Greek translation in it. Therefore, the New Greek version and additions were marked by slanting letters in the Russian translation. In the margins of the text there were also definitions taken from the ancient Greek text. The Governing Senate

(its Second Department) defined that a court should take into account the strict meaning of marks in the margins (Pergament 1905a, 10)

The process of adapting and acknowledging of the local Bessarabian law was quite chaotic and occasional due to poor knowledge of local law. Therefore, the Harmenopoulos' *Hexabiblos* was translated from a bad New Greek text instead of the original.

In 1844 the general commission of regional government and chambers gave a request to the Imperial Senate to create a special commission in order to eliminate all the contradictions of local Bessarabian laws and customs. The Senate did not decide the question positively and left the published code of local laws for guidance in the Russian translation without changes — so that in cases when these laws were insufficient, courts could apply Russian laws as a subsidiary source of law according to Article 1606, part 2, volume X of the Statute Book of the Russian Empire.

The Senate accepted the interpretation of orders from Emperor Alexander I concerning the applicability of local laws in Bessarabia and underlining the necessity of applying these laws. The Governing Senate already named the above-mentioned collections of laws as the codes of local positive laws while the mentioned law books were not called laws previously (Pergament 1905a, 12). Therefore, the Senate admitted the collections to be laws.

In the meantime, the process of determining the provisions applicable in a concrete case was not straightforward from a formal legal point of view, and it often caused additional confusions in the local legal practice. For example, although the "*Sobornaya* Charter (Deed)" of 1785 was in force as a statute from the very beginning, the compilation of Donič was published only in 1814 after the enactment of the manifesto. The significance of the *Hexabiblos* of Harmenopoulos in the previous times was not also defined by its formal side, since formally the *Hexabiblos* (till 1830 when it was introduced as positive law in Greece after the declaration of its independence) was of no importance. It had been used only as a practical manual that contained the most important issues from the law of Byzantine. In regard to its practical character, the *Hexabiblos* superseded all other special collections and codes of laws. Only in those cases when the *Hexabiblos* was completely adequate to the formally binding ancient Byzantine laws did it have a formal legal character, but in the contrary cases its provisions were not binding (Pergament 1905a, 15–16).

In order to understand the fate of the *Hexabiblos* in modern times it is necessary to briefly examine the history of this book. In approximately 1345, Constantine Harmenopoulos, a Greek lawyer of the 14th century who lived during the reign of the Byzantine emperors John VI Kantakouzenos and John V Palaiologos, was a judge in the city of *Thessalonica* and compiled the so called *Procheiron*, a manual of law in six books. The number of the books later gave the compilation its generally accepted name of the *Hexabiblos* ("Six books" in Greek).

It was a private codification where the author aimed to simply expound the law in force. The basis of the Harmenopoulos's compilation was the *Proheiron* issued by the Byzantine emperor Basil I the Macedonian who reigned from 867 to 886. In addition to, this book, Harmenopoulos used the *Basilics* in sixty books. Most likely he did not use the *Basilics* in its original, but rather their "Great Synopsis" (a broad summary) and special collections (a "Small Synopsis" as well) where extracts from the *Basilics* were placed in alphabetical order (Azarevich, 1876, 300–301). Harmenopoulos also amended the *Procheiron* with some materials taken from the *Eclogae* and *Epanagogae*, the Imperial novels, and the "*Peira*" by Eustathius the Roman. The fact that while borrowing materials Har-

menopoulos used the *Synopsis* and not the *Basilics* often resulted in a distortion of the borrowed legal provisions in comparison to the original. In the short editions of *Synopsis,* the content of the text of Imperial laws sometimes was completely misrepresented. Due to these methods of the author and his way of compiling the positive law, the book of Harmenopoulos was characterized by its vagueness and inaccuracy, and the explanation and adequate interpretation of its content inevitably required use of all the mentioned sources in addition to the *scholia* (explanatory comments, either original or extracted from pre-existing commentaries, which are inserted on the margin of the manuscript of an ancient author, as glosses) and the "*Basilics*" (Pergament 1905a, 21).

The very process of developing civil legislation in Bessarabia is of great interest and it can reveal how legal transplants from Byzantine law were implemented in the local law.

Moldavian *Hospodar* Alexander I (ascended the throne in 1401) asked the Byzantine emperor to send him an exemplar of the "*Basilics*". Relying on this code Alexander compiled his own code for Moldavia and translated it into the native language. In 1646 the *Hospodar* Basil Albanus and his Great Logothete (a senior administrative title, equivalent to a minister or secretary of state in the Byzantine Empire, which applied to other states influenced by Byzantine culture) Eustratius established a new code referring to the *Basilics*. However, the successive Moldavian *Hospodars* preferred to apply the original Byzantine sources of law compared to these new Moldavian codes. These were the same *Basilics*, the *Novellae* of the emperor Justinian that were still in force, and the statutory law promulgated during the reign of other Byzantine emperors, the above-mentioned "*Synopsis*", the *Paraphrases* of the early Byzantine professor of law Theophile (which were really notes of students about his lectures on the *Institutiones* of Justinian). At the end of the 18th century, *Hospodar* Alexander Mourouzis charged his person in attendance Thomas Carras with the task of translating the *Hexabiblos* into the Moldavian language, since the Greek original and Latin translations were often difficult to understand for judges. The translation was completed in 1804. Such a late translation of *Hexabiblos* into the Moldavian language and the lack of compositions like the latest Law Book of Donič is explainable by the fact that educated Greek-Phanariotes who ruled in Moldavia considered it to be impossible to translate the provisions of Byzantine law in Moldavian due to the lack of the adequate concepts and terminology in the Moldavian language (Grama 1983, 37). This idea is quite strange because the Moldavian language is of Latin origin, and the Byzantine law was in fact Roman law translated from Latin into Greek.

However, since neither the *Hexabiblos* which was the recent acquisition in Moldavia nor the *Basilics* were the local laws, Alexander Mourouzis entrusted Carras again to compile civil and criminal codes in the order of the *Institutiones* (as they were presented in the *Paraphrases* of Theophile) relying on the *Basilics* and other monuments of Byzantine law transferred to Moldavia. Carras died in 1806 having compiled only four parts. Again, the *Basilics* served as the main source of this draft (Pergament 1905a, 23).

In addition to the *Hexabiblos*, all the mentioned monuments of Byzantine law were in force in Moldavia. But the *Basilics* had a greater importance. They were considered to be the basis of the law. "Tsars' books" (as the word *Basilics* can be translated from Greek) were applied directly, sometimes in the form of *Synopsis* or abstracts compiled in Moldavia. One of the newest extracts of this kind became the so called Law Book of Donič, that is a "*Short Collection of Statutes Derived from the Tsars' Books for the Guidance of Students With the Indications of the Title, Book, Chapter and Paragraph of the Tsars' Laws, first pub-*

lished owing to the permission of His Grace Hospodar (The Ruler of Moldavia.— *The present authors' comment*) *Voevode* (Slavonic title of the commander of an army or a governor of a province. — *The present authors' comment*) *Skarlato Alexandrovich Callimachus, and to the blessing of the Moldavian Metropolitan (Mr. Veniamin), thanks to the work and zeal of the Moldavian Boyar* (Slavonic title of a high noble. — *The present authors' comment*) *Andronakiy Donič*", in Jassy in 1814[9]. This Law Book of Donič was a practical extract from the *Basilics* (Galben 1998, 89).

Andronaky Donič (was born in approximately 1760, died in 1829) was a gentilitial *boyar*. His uncle Gabriel Callimachus was a Moldavian Metropolitan. Donič received his education in *Hospodar*'s academy of Jassy. He studied humanities and science, church service, foreign languages such as Old Greek, New Greek, Latin, French, German, and Italian. Later he studied Arabian and Turkish. He became acquainted with Roman law apparently after the guidance of Metropolitan Gabriel who sometimes was the head of the supreme judicial board of the country (*Divan*) and knew Roman-Byzantine law quite well as well as the local customs of Moldavia (Grama 1983, 20–23). There is a strong possibility that while being in different times a great *ban* (representative of the *hospodar*), *ispravnik* (a local police chief) in Tsynut, Harlaw, Dorohoy, Suchava, a great *logothete*, *postel'nik* (the supreme *boyar* rank in charge of the foreign affairs of the Moldavian principality), and then Donič acquired practical juridical knowledge as the head of the state department which oversaw civil jurisdiction over foreigners living in the principality including litigations between them and the nationals of Moldavia (Grama 1983, 22–24).

In exercising jurisdiction Donič often met difficulties in legal proceedings since the local courts used Greek and Roman law as the common law of the country. The baffling complexity of the sources of this law induced Donič to create a private codification of the civil law of Bessarabia. He thoroughly studied the monuments of Roman and Greek law in the original and selected such norms that corresponded with the demands of Moldavia's social and economic development at the beginning of the 19th century (Grama, 1983, 28).

However, Donič also studied Moldavian *hospodars'* deeds and the customs of Bessarabia when choosing the necessary elements. Consequently, one should say that Donič made not just a compilation of the *Hexabiblos* or the *Basilics*, but rather wrote an original work based on the law existing in Bessarabia at that time. To make his composition more valuable he produced it in the form of a compilation of the most authoritative law in Europe — Roman law that he knew well as a well-educated individual. But unfortunately, at the end of the day it had happened that the Law Book of Donič did not contribute much in the modernization of the sources of law in Bessarabia.

Before Bessarabia became the part of the Russian Empire the *Hexabiblos* was merely one of the monuments of Greek and Roman law that was in force in Bessarabia. It is interesting to notice that even though it was applied, it never was admitted becoming the statute. Only in the period of Russian rule did it occupy the key position, replacing the other sources of the good law of the country. However, it was the whole corpus of the men-

[9] *Short Collection of Statutes Derived from the Tsars' Books for the Guidance of Students With the Indications of the Title, Book, Chapter and Paragraph of the Tsars' Laws, first published owing to the permission of His Grace Hospodar Voevode Skarlato Alexandrovich Callimachus, and to the blessing of the Moldavian Metropolitan (Mr. Veniamin), thanks to the work and zeal of the Moldavian Boyar Andronakiy Donič.* Jassy, 1814 (The only paper version of the document is available. Accessed November 20, 2020. https://rusneb.ru/catalog/000200_000018_v19_rc_1332019).

tioned monuments of Byzantine law which formed the basis of the reception of Byzantine law in Bessarabia. Even at the beginning of the 20th century all these monuments did not lose their legal significance for Moldavia since they were useful for the interpretation of different provisions of the *Hexabiblos* (Pergament 1905a, 24–25).

At the moment of Bessarabia's annexation to the Russian Empire the *Hexabiblos*, which was not regarded as a statute but just as a compilation of local laws, was applied jointly with other monuments of the Byzantine legislation, mainly with the *Basilics*. All these sources should have been applied as they perfectly reflected the true content of the borrowed Byzantine laws. If the courts of Bessarabia found the textual reading of these sources to be unclear, insufficient, and result in controversial conclusions, they were to rely on the common sense of local laws that were in force in the Bessarabian region. And these laws, in instances of doubt, could be interpreted through the prism of their historical origin and in comparison with their sources. Therefore, from the point of view of Russian lawyers, all the compilations of Byzantine laws that had legal force in Bessarabia at the time of its annexation to the Russian Empire were to be applied only if their editions reflected correctly the real sense of Byzantine laws (Pergament 1905a, 31).

2.2. Case Study Research: Byzantine Law of Succession in Bessarabia

A close examination of the decisions of the Civil Department of Cassation of the Governing Senate dealing with the conditional testaments in Bessarabia is of great interest for our topic. A very typical case of this kind is the decision of the Civil Department of Cassation of the Governing Senate 1889 No. 22. The case was presented to the senators by senator and professor S. V. Pachman as the keynote speaker.

The dispute which finally formed the basis of the Senate's decision occurred on Ivan Sturdza's testament which is quoted in the papers of the Senate's decision. Here the testator wrote: "the manor Novoselitsa and the country estate of Marshintsy I leave by will to my nephew, Alexander Sturdza, on the condition to possess the estate left by will as a fideicommissum so that he can neither burden this estate with debts nor sell it or alienate it by any other way and the estate could be transferred without any detriment to Alexander Sturdza's children after his death. His children are called the second heirs who can enter into possession of the inheritance property after their father's death. This restriction of my nephew's rights to the estate is due to the squandering of his own estate by him in a short time and by my natural desire to protect my grandsons from the consequences of such wastefulness in the future. The possibility of the establishment of the fideicommissum is provided by the local Bessarabian laws of Donič and Harmenopoulos. Under them a testator can appoint as an heir, as the heirs for this heir, as the heirs for these heirs" (Decision of the Civil Department of Cassation of the Governing Senate of the Russian Empire. 1889. No. 22).

When the legal dispute over this will reached the Governing Senate of the Russian Empire, the latter found that unlike the common Imperial statutes, the *Hexabiblos* of Harmenopoulos allows for the sub-designation of an heir in a will. The Law Book of Donič also stated, regarding this subject, that a testator could indicate another heir to inherit after the indicated heir, and other heirs to inherit after him. In respect to the fideicommissum, which the lower courts considered to be in contradiction with the substitution, the Senate pointed out that: "in the Bessarabian laws that are compiled under an evident influence of the Roman law's origins, both concepts had a basis… The *Hexabiblos* stated

that an heir is called an heir or a fideicommissary, for example: 'I designate George to be my heir under the condition of possessing my property not forever, but to manage and protect it for my son, Fyodor'. In this case, Fyodor is called a fideicommissary and receives two thirds of the inheritance and George is called an heir and gets the remaining third of the inheritance. The fideicommissum is described as the designation of the heir according to which the latter one (a fiduciary) is obliged to transfer the inheritance to another individual (a fidecommissary) reserving for himself just a certain part of the inheritance. As a result, there is no substitution at this point in the sense of a successive transfer of inheritance to another heir in the case of the previous heir's death (*substitutio pupillaris*), since according to the legal scholarship a *fideicommissum* has an independent significance. But it does not mean that according to Bessarabian laws the condition of fideicommissum was incompatible with the substitution" (Decision of the Civil Department of Cassation of the Governing Senate of the Russian Empire. 1889. No. 22).

The Law Book of Donič states that "a person has the right to leave by will his property to one heir and to obligate him to protect it or its part for a designated heir (that part is called a fideicommissum by the law) and declare his intention and will clearly. After that a person who receives a fideicommissum cannot alienate anything from the inheritance entrusted for storage of it for another person because if he alienates anything, he is disinherited of the property left to him by will as well as in such a case if somebody designates the heir for any estate and demands him not to sell it, but to retain it for this heir's descendants" (Decision of the Civil Department of Cassation of the Governing Senate of the Russian Empire. 1889. No. 22).

"The law evidently means the substitution. That is why the Chamber's opinion[10] that the substitution is incompatible with the *fideicommissum* should be considered incorrect. Its limitations are also present in the Donič's law stating that "an heir cannot alienate" the property that should be transferred to a fidecommissary in the future. The definition "alienation", used in the law as well as in the testament cannot be explained only in the sense of alienation of the right of ownership to the given property, for it includes any disposition that ascertain restrictions on this right to the estate. While interpreting restrictions imposed on the heir's right to dispose of the inherited property, the Senate directly refers to Justinian's Law, presented in the Code[11]. There it is stated that if a law or a testator prohibits the alienation, one should take into account not only the alienation of property but also the establishment of servitude or mortgaging and perpetual lease (*emphyteusis*). Sometimes the phrase "burden with debts" was added to the word "alienation" in laws and often in testaments compiled in Greek as, for example, in the "Digests" (book 31, T. *de leg*. 188, *non vendi neque foenerari*)" (Decision of the Civil Department of Cassation of the Governing Senate of the Russian Empire. 1889. No. 22).

One can conclude from the quotations provided above that the Senate's argumentation on the subject had been totally based on the 'legal transplants' from Roman law. But from the Roman times and up to today, legal concepts such as *conditio*, *dies* and *modus* are often confused and misunderstood by testators and judges. In this regard, the opinion of the Russian practicing lawyers and judges was a reminiscent of the conflicting reasoning

[10] The Chamber was a lower court.

[11] Book IV, t. 51, law 7. — Hereinafter, such parts of the *Corpus Juris Civilis* as *Institutiones*, *Codex* and *Digesta* are referred to as they are available at the electronic resource "The Latin Library". Accessed November 20, 2020. http://thelatinlibrary.com/justinian.html.

included in the "Digests" of Justinian. In the Book 35 of the "Digests", especially devoted to conditional testaments, we find the description of the *condicio*, *dies* and *modus* as a mixture of concepts. Therefore, the very well-balanced taxonomy of Roman law, which was highly appreciated and glorified by the Russian lawyers was unusual for the Romans themselves since systematization was a fruit of the late epochs, that is of the Pandect law doctrine.

Also, the testament becomes conditional if the testator has acquired offspring after making a will. The Senate in the decision of the Civil Department of Cassation of 1905 No. 66 defined that in case of birth of a testator's child after a testament is made; when he or she is granted only a payment (*legatum*) under this testament, the validation of the testament is to be admitted under the laws of Harmenopoulos and Donič that are in force in Bessarabia.

It is provided under the laws of Harmenopoulos[12] it is provided that if a son is not mentioned in a testament, the latter can not be validated; items 2–3 of the same provision say that a testament is valid if a son is born after a testament has been validated. The provision 5 IX. 162, 173 of the *Hexabiblos* requires that testators should not exclude their sons, daughters, grandchildren and great-grandsons and great-granddaughters from a testament or should not leave them a part of the inheritance less than that which is assigned to them by law. According to the provision 35 § 26 of the Law Book of Donič, if a testator conceals his or her heirs or unreasonably deprive them of a legitimate portion of inheritance, or if a legal heir is born after a testament was made, the provision 36, 4 i. 1 of this Law Book commands parents to mention their children as their heirs in a testament, and the provision i. 2 orders parents to mention their heirs by their names granting them some property, and also to mention a *nasciturus*. But a *legatum* is not identical with a testamentary succession, "heirs by operation of law are obliged to pay testator's debts and a *legatarius* is not" (Bertgoldt, 1910, 51).

In Bessarabia, a substitution (prohibited by the Russian Imperial law) was regarded as a condition. Therefore, a peculiarity of the law of Bessarabia in comparison with the Russian Imperial law consisted in the permission of substitution. The Senate supported the application of this rule in its decisions, stating that the local laws of Bessarabia permit a substitution that is the establishment of some successive or consecutive transfer of estate from one heir to another chosen beforehand and indicated by a testator. This substitution was "a remnant of Roman law" which went through certain stages of historical development and was borrowed in various ways by legislations of different countries" (Shimanovskii 1888, 127–128).

It merits attention that in light of the legislations of that time, the Bessarabian concept of substitution was similar only to a resemble institution of the Prussian legislation which had implemented all kinds of Roman substitution. But it differed from the Austrian one in that it did not admit parent and quasi — parent substitution. It was also different from the approach to substitution in France where in spite of some rare exceptions[13], substitution was prohibited[14] and from Italy where a direct substitution was allowed while a fideicommissary substitution was prohibited[15]. The example of substitution shows how Roman law

[12] Book XXXI, t. *de leg*. 188, p. 14.

[13] Articles 1048–1051 of the *Code Civil*. Accessed November 20, 2020. https://www.legifrance.gouv.fr/codes/texte_lc/LEGITEXT000006070721.

[14] Articles 896–798 of the *Code Civil*.

[15] Article 899 *Codice Civile del 1865*. Accessed November 20, 2020. https://www.notaio-busani.it/it-IT/codice-civile-1865.aspx.

was the law in force in its local (Bessarabian) and Greek variants in Bessarabia until the collapse of the Russian Empire. The existence of such an archaic legislation and recognition of its legal force by the Russian Imperial state bodies distinguished Russia from most of the European states of the time.

The very question of substitution in the Russian Imperial law is not also so transparent. Some Russian pre-revolutionary civil law specialists found only the trace of substitution in the establishment of estates in tail (Sbitnev 1861, 250). At the same time, others denied this opinion thinking that the Russian Imperial legislation allowed for substitution (Grinevich 1867–1868, 23). The third group supposed that substitution and *fideicommissum*, even if they were admitted by law, had changed their form deriving from Roman law and therefore there was no need to introduce these institutions into the Russian legislation (Shimanovskii 1888, 130).

In representing the experience of hereditary relations in Bessarabia and pointing out the institutions based on Roman law, Russian civil law specialist M. V. Shimanovsky posed the following question in regard to Russian law: "Should we return to the period when our legislation reflected the people's ideas or should we move forward by the way of artificially created legal relations of the Russian "Statute Book", that regulates the aristocracy's relations and cannot be applied in the people's milieu; or should we establish something that really can live and be sanctioned as the origin worked out by our people's lives and other peoples' history as a result of life and action of a well-developed legislation" (Shimanovskii, 1888, 142–143). In such expressions, Russian lawyers underlined, in the manner of Savigny, the necessity of appellation to folk law, but viewed Roman law as the etalon to adhere to.

However, there were lawyers who rejected this opinion in regard to the practice of substitution in Bessarabia. The prominent civil law professor O. Ya. Pergament challenged the common opinion about the existence of substitution by the laws of Bessarabia. Revealing the lack of "any differences of principle between the well-known decree on Lopukhina's case and the local law", he concluded that: "our jurisprudence of courts on the question is a total misunderstanding" (Pergament 1905b, 34). He personally believed that the erroneous interpretation of Roman law was the main source of these practical misunderstandings in the courts. He stated that in such practically orientated discussion one should define the period of Roman law that is referred to as an argument by those Russian lawyers who were seeking for a substitution in Bessarabian law. In order to reveal the content of Roman law they also referred inter alia to the German manuals of Puchta and Baron, and to the books of other Pandectists maintaining their opinion. However, the Roman law represented by Pandectists could not be the source of reception for Harmenopoulos' Laws of Byzantine which were the subject of reception in Bessarabia and had been developed originally on the bases of Justinian's codification. The development of Roman law in the West until the Pandectists had no impact on Bessarabia. Therefore, references to Baron should be acknowledged as incorrect. Nevertheless, when Russian lawyers referred to Roman law in dogmatic and practical disputes, they implied mainly the opinions of Julius Baron and another famous representative of the Pandect law doctrine — Rudolf Sohm (Pergament 1905b, 35–36).

Bessarabian laws stated that an heir could be a real one or in case he was not really an heir, the estate should be transferred to another one who is deemed a substitute. The transfer can be simple when, for instance, a person does not inherit by will, and another person

is called an heir; and the transfer can be double when, for example, a person is an heir but dies in the time of his childhood resulting in another person becoming the heir. An heir is called just an heir or a fidecommissary, and so he is named as a delegate. For example, a testator says: "George will be my heir, but he can not inherit my property forever for he is obliged to manage and retain it for (*a lawful heir*) my son Fyodor. In this case Fyodor is called a fidecommissary and receives two thirds of the inheritance and George is called an heir and receives the remaining one third. Second heirs are allowed to be appointed from any title, for example to appoint a slave as a necessary heir or other slaves as heirs of the first slave so that one person could inherit another person or many people could inherit one person or one could inherit many people…. If a person who selects an heir for his estate thinks that this heir can refuse inheritance or die and/or he is not able to make up his own testament due to his mental state, a testator can designate another heir. He can designate one heir and the second heir to the first one, and the third heir to the second one… A person also has the right to leave by will the inheritance to an heir and obligate him to keep it or part of it for an established heir (this part is named a fideicommissum) and declare his own will clearly; a receiver of a fideicommissum is not allowed to alienate any part of a inheritance which should be kept for another person" (Grossman 1904, 217–218).

If an heir does not inherit, a substitution is named the *substitutio in primum* or *in vulgarem casum*. The double substitution is necessary if a testator defines the second heir for the case when the first one does not accept the inheritance or dies before he attains a lawful age. It is the *substitutio duplex* or *in utrum casum*. In this case *substitutio vulgaris* and *substitutio pupillaris* are linked. The substitution is "double" when there are two cases stipulated: an heir does not accept the inheritance and an heir dies before a lawful age. A lawful representative disposes property of an infant. The juridical basis to designate the second heir is the assumption that the first heir (institute) does not inherit (or he is not a proper heir). But it is not possible to indicate the heir for willful sons (*persona sui juris*) under Roman law.

O. Ya. Pergament underlined that according to the statements of Roman law *agnati proximi* were heirs sometimes even against their will. Later the *praetor* started to grant *sui heredes* the right to be released from the inheritance by the declaration of will. Since *sui heredes* are not *necessarii*, a *dominus* could be left without heirs after his death since he was not able to impose the inheritance upon other heirs. The difficult problem was resolved in such way where a testator could designate a slave as his heir, because a slave was not able to refuse. Prof. Pergament thought that his reflections on the subject should define the point of the substitution in spite of the contrary meaning of the text of the *Hexabiblos*.

Pergament believed there was no successive passing of inheritance to the second heir after the first one, because the Roman legal principle *semel heres — semper heres* was still in force. However, Pergament's interpretation of slaves' inheritance to their owner is the most contentious and strained. He makes a historical excursus into Roman law in order to refute the substitution. It is rather significant that he refers to the history of inheritance law in Roman law to solve the dogmatic question contemporary to him. But the Senate approved the local Bessarabian practice of making testaments and did not follow the contrary doctrinal conclusions of the professors of civil law and Roman law.

The law of Bessarabia provided a fideicommissum and was somehow different from its Roman prototype because the heir was able to inherit one third (not a quarter) of the inheritance. The inheritance's part was not transferred to the heir directly. However, a previous

holder of that portion of the inheritance was not appointed an heir. In this case it was not a substitution but a specific way of legacy's conveyance that developed on a peculiar ground of Roman legal relations in order to have the possibility to appoint an heir under the conditions (under *dies a quo*, *dies ad quem*, under resolutive condition) that were eliminated if the heir was designated formally. The universal fideicommissum finally established a freer form of an indirect designation of the heir in all cases of universal succession.

The fact of the impossibility to make a will is quite significant. Therefore, in the *Constitutio* of 528 Justinian decreed that in terms of inheritance, the legal status of the mentally ill person should be equal to that of minors. So, the *substitution quasi pupillaris* was formed and was also named the *substitution exemplaria* (sometimes *Iustinianea*) according to the Constitution's words "*ad exemplum pupillaris substitutionis*". Here we can notice merely the right of the ascending line's heirs being representatives to make a will and appoint other heirs for their infant children and those mentally unstable. We should stress that the words: "a testator can designate an heir to his first heir and the third heir to the second one" were interpreted vice versa by referring to Roman law.

The issue was treated by the provision of the Donič's Law Book (l.43) that addresses the designation of an heir to an unstable individual. It had been allowed only by the emperor's permission until the Constitution of 528 came into force. The Donič's second source was the fragment of *Institutiones*. 2.16. According to Pergament, Donič could not make extracts of laws that the mentioned sources did not contain and, therefore he was not able to form the provision about the determination of the further hereditary succession. The phrase "a testator can designate an heir to his first heir and the third heir to the second one" speaks about the right to establish several degrees of hereditary designation, as Harmenopoulos (the basis of Donič's work) underlines (Pergament 1905b, 39–43).

Pergament does not consider the influence of Bessarabian legal practice that used Roman and Byzantine law at compiling Donič's extracts. The latter's aim was to assemble a manual for studying the law in force. Therefore, he could ascribe the Modern Greek and Bessarabian practice to Roman and Byzantine law. Here the approach of the prof. Pergament is not dialectical, but a rigid one.

The Senate's method and juridical way of decision-making when it had to deal with the Byzantine law of Bessarabia can also be well illustrated by the so-called case of Vartik (Decision of the Civil Department of Cassation of the Governing Senate of the Russian Empire. 1909 No. 35). The case is worth noting since the Senate presented in it the patterns of practical treatment of Roman and foreign law, a contemporary legal doctrine, possible legal borrowings from abroad and their implementation in the Russian Empire.

Dmitry Vartik was an adulterine half-brother of Basil Vartik and inherited to him by operation of law. Other relatives of Basil contested Dmitry's right to be an heir for he was an adulterine son. G. Blumenfeld, author of a complete work on the Roman fideicommissum (Blumenfeld, 1912), defended Basil's interests as an advocate. On the opposite side a famous Russian advocate V. F. Plevako represented the interests of a few claimants.

The Senate decided to reveal the true content of the local Bessarabian law to check if an adulterine half-brother was allowed to inherit by operation of law. The question was examined by the Senate's reference to Harmenopoulos's and Donič's compilations, connected with the Code of Justinian (the statements of the *Hexabiblos* in the new Greek text, were quoted in the Russian translation made by the Senate's printing office in 1831 and reprinted in 1854; statements in the old Greek text were quoted in the Russian transla-

tion completed in St. Petersburg University while carrying out the case at the request of the Kishinev district court; the statements of Donič's compilation were quoted according to the Russian translation printed in the Senate's printing-office in 1831; the texts of the *Corpus juris civilis* of Justinian and of the "*Basilics*" were quoted in the Russian translation after the most recent German editions of the Latin original texts).

The Senate performed a linguistic analysis of the Russian translation and of the *Hexabiblos* in the New Greek language and detected serious divergences between them that, anyway, cannot conceal the general sense of hereditary legislation in the case of half-brothers. Therefore, the Senate rejected the application of the appropriate general provision of the Imperial common law on the subject since the case could be solved under the provisions of the local law. The Senate admitted that a blood relationship of Justinian's law was placed in the basis of Roman hereditary legislation due to the gradual dying of the agnation principle of the ancient *ius civile* in the later history of Roman law. It is well-known that in the early Roman law cognates were connected either by blood relationship (cognation) or by the artificial tie of agnation. The foundation of agnation was not the marriage of father (*paterfamilias*) and mother, but the authority of the father (*paterfamilias*). All those persons were agnatically connected together who were under the same paternal power *(patria potestas)*. The agnates were also those who have been under this power, or who might have been under it if their lineal ancestor had lived long enough to exercise his *patria potestas*. However, in the Later Roman Empire agnation disappeared, and the family law and the law of succession were already based only on cognation.

In the cognation-system the Roman legislation was based on a conjecture that relations among relatives are formed by birth in a legal marriage or in its legal kinds[16]. The Governing Senate of the Russian Empire thoroughly considered the problem of ancestry in Roman law and made the conclusion that the principle of blood relationship was so clear and consistently expressed by Roman lawyers that it should be applicable to an adulterine child if necessary. The Roman jurisprudence's logic demanded the admittance that an adulterine child was also a blood relative as a legitimate one; and the difference between them was that a legitimate child's father was his or her mother's husband while an adulterine child did not have a father in this sense. Due to this difference, a legitimate child was a cognate to his or her mother and her husband, also to all the persons connected by a blood relationship, while an adulterine child was a cognate only to his or her mother and the persons connected with her by a blood relationship. The Senate quoted the *Institutiones* as this common origin was expressed in the fragment *Inst.* III. V., § 4. The Senate considered as the common origin of Greek and Roman laws that adulterine children, according to the agnatic system of being deprived of the hereditary rights by operation of law, became cognates to their mother and her relatives (cognates) without any differences between children born in marriage and adulterine ones and therefore they acquired the right to inherit.

The Senate took into consideration some exceptions to the rule existing under the provisions of the *Codex* of Justinian[17], *Novellae*[18], *Digestae*[19], *Basilics*[20], and dealing with

[16] C. V. XXVII, § 7.
[17] C. VI. LVII, 5.
[18] Nov. XII, LXXXIX, 15.
[19] D. XXXVIII. 8, 2, X. 10, § 6.
[20] Bas. XLV. II, § 7, 9.

the cases of children who were born because of a high-ranking woman's accidental connection or adultery, incest or another type of criminal sexual relation.

The conclusion was made by the Senate that Basil's adulterine brother had the right to inherit from him. Such a conclusion was supported by opinions of many researches of Roman law in Russian and West European legal literature where under the Roman laws adulterine children inherit from their mother by kinship as the children born in marriage[21].

The Senate pointed out that Harmenopoulos's text in the old Greek on the rights of half-brothers and half-sisters should be treated on the bases of original norms of Roman law. The claimants suggested implementation of a stricter interpretation of the *Hexabiblos* in the case of adulterine children, referring to the Christian religion's influence. But the senators rejected that argument which, as it might seem, should have been received by them with respect. They suggested a punctual interpretation of original sources of Greek and Roman legal rules, since pre-Christian norms were legally binding only when they were kept original and unchanged. In this form, they must have been included in Harmenopoulos's and Donič's compilations that were admitted merely as the transmitters of the provisions of Roman law.

Blumenfeld, while acting in the interests of Dmitry, referred to the conclusions of the literature on Roman law contemporary to him and to the Civil Codes of Western Europe. His opponents contested his dependence of these sources pointing out that a literate editing of the monuments of Roman law had been made through a theoretical analysis of Roman institutions and ideas as well as through broad generalized principles, for the 'science' of Pandect law was developing in the West due to the demands of the new life and must have correlated not with abstract historical researches but with practical aims of the epoch and of the people.

The Senate disagreed with this objection *in concreto* and stated that it would be acceptable only for the interpretation of the foreign codes which accepted Roman law as their bases only as far as it correlated with local norms, opinions and requirements. The Senate also rejected the claimants' opinion that those scholars who were making their research of this issue of Roman law aimed to study Roman law itself without attempts to develop its particular provisions for their proper application under new specific conditions of a concrete place or for their compliance with the requirements of the present time. In the view of the Senate, the conclusions of those scholars who were specialized in Roman law studies were very valuable and could certainly serve to search for answers to questions regarding the practical application of the good law of Bessarabia.

Then the Senate referred to the Civil Code of Callimachus[22], compiled for Moldavia in 1816 and 1817, and to the Code of John Caradja for Wallachia of 1817[23], as well as to the Civil Code of Romanian kingdom of 1864[24]. They also stated that research of the de-

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[21] According to: Vangerow K. A. *Lehrbuch der Pandekten*. 1852. T. II, § 413; Dernburg H. *Pandekten*. 1901. T. III, § 135; Keller F. *Pandekten*. 1867. T. II, § 467; Windscheid B. *Pandekten*. 1901. T. III, § 571; Glück C. F. *Intestaterbfolge nach den Grundsätzen der ältern und neuern Römischen Rechts*. 1822. § 138 (Decision of the Civil Department of Cassation of the Governing Senate of the Russian Empire. 1909, No. 35).

[22] *Codul Calimach*, ediție critică, Editura Academiei RPR. București, 1958. Accessed November 20, 2020. http://ludingtoncitizen.ning.com/photo/albums/codul-calimach-pdf.

[23] *Codul Caragea*. Accessed November 20, 2020. https://lege5.ro/Gratuit/heztqmjt/codul-civil-din-1818-codul-caragea.

[24] *Codul Civil din 26 noiembrie 1864*. Accessed November 20, 2020. http://legislatie.just.ro/Public/DetaliiDocument/1.

velopment of the Roman law's origins in Moldavia and Wallachia that were related to it through local codes could be rather useful for a practical judicial procedure in the Russian Bessarabia. However, first of all it was necessary to consult Roman law but not the mentioned compilations. In the opinion of the Senate, the compilations of Harmenopoulos and Donič were useful but not because they contained interpretation of laws from original sources. Consequently, if the rules of these compilations are doubted, they should be explained not according to the codes of Moldavia, Wallachia and Romania but on the basis of the sources of Greek and Roman legislation.

The Latin text of the *Institutiones* edited in Germany by Kruger was used by the Senate although the claimants referred to the editions of Beck and Cujacius that were interpreted in their favor. The *Digestae* were also used as the argument[25]. The Senate believed that despite the *Hexabiblos* and the compilation of Donič had the force of law in the Bessarabian region, the provisions deriving from the *Digestae* were also binding. In addition, in order to have the local laws been interpreted correctly they should be not only explained, but also developed on the bases of those Byzantine laws that had served as their sources (Code of Justinian, *Novellae*, *Basilics*). Going further with this starting point the Senate arrived at the conclusion that according to Justinian's legislation, the problem under discussion was resolved correctly, that is in this concrete case — in favor of the defendant Dmitry. The Senate stated that the lower court (the Judicial Chamber) did not acknowledge Dmitry's rights to inherit to Basil only due to the lack of a clear indication of such possibility in the compilations of Harmenopoulos and Donič, but vise versa, there were some points in these compilations which could be understood as instructions to rule not in the defendant's favor.

According to the Senate's opinion, the lower instance (the Judicial Chamber) acknowledged a substantial logical contradiction in the interpretation of the positive law of Bessarabia, since if it found the appropriate provisions of the compilations of Harmenopoulos and Donič unclear, it must have interpreted them in the sense of their original historical sources and according to them it should have come to a positive ruling.

In the given case one can see that the Russian senators regarded Roman law as a *ratio scripta* and its pagan pre-Christian character could not undermine their position. They did not sacrifice the clearness of Roman law, considering it to be an important value, in favor of their Christian convictions and the Orthodox protective governmental policy.

3. Conclusions

At the moment of Bessarabia's annexation to the Russian Empire, the *Hexabiblos* being a practical compilation of local laws was used in this country as well as other monuments of Byzantine law, mainly the *Basilics*. The Manifesto of 1812 and other Imperial decrees gave Bessarabia the right to use the local legislation which combined all the norms of the *Basilics*. The texts of the *Hexabiblos* of Harmenopoulos and of the Law Book of Donič were binding as far as they correctly revealed the essence of norms of Byzantine law.

Russian lawyers referred to the historical method of interpretation of the Bessarabia's local laws. Due to the extreme difficulty and confusions of Bessarabian law (which was called "a juridical labyrinth") (Pergament 1905a, 25) this method was considered to be not

[25] D. XXXVIII. 8, 2.

only a true scientific way of juridical interpretation, but also the only possible and reliable practical technique. The judicial practice (including that of the Governing Senate of the Russian Empire) adhered to this method. The courts of Bessarabia in cases of dealing with unclear, insufficient, controversial local laws were to rely on the general sense of laws that were in force in the region. And these laws, in case of doubts, could be interpreted through the prism of their historical origin as well as in comparison with their historical sources.

Overall, we can say that local laws of Byzantine origin were used in Bessarabia except the districts of Izmail and Ackerman. Local laws were applied in Bessarabia in cases connected with the local people. The local laws consisted of those monuments of the Byzantine and Roman laws that were in force in Bessarabia when it formed part of the Russian Empire. The *Hexabiblos* and the Donič's Law Book were only special collections (compilations) of these laws. The application of these texts was determined by their adequacy to Byzantine and Roman laws. When there were any contradictions, unclearness and insufficiency of local legal provisions, controversial issues were solved through the general sense of the local laws. As a result, in application of the Bessarabian law one had to take into account the history and dogma of Roman and Byzantine law. The common imperial legislation was only to be used in cases of an absence of the applicable provisions of the local law.

Due to the predominantly agrarian and patriarchal origins of the law applicable, strong survivals of feudal order in it and the general lagging of Bessarabia (and of the Imperial Russia in general) behind the industrially developed countries of that time (French, Germany), Russian lawyers had to refer to foreign experience in regulating new bourgeois relations. The Russian legislators' juridical techniques were based on the achievements of Roman and foreign law. The foreign legal influence was reflected in legislation practices and legal procedures because Russian lawyers had received their education mainly studying Roman law and foreign legislation. Russian academics, judges and senators constantly expressed their respect to Roman law, Roman juridical experience and also to the contemporary 'legal science', especially to that of Germany. However, the borrowing of juridical constructions and definitions is not evidence of the direct transplantation of Roman and foreign legal institutions. We see that many traditional legal institutions acquired another focus and shade on the Russian national soil. Besides, one should not forget that the majority of the Russian Empire's population (Russian peasantry and many ethnical minorities) lived under the customary law. The question of whether folk law and the people's view of the law should be applied or if it was better to apply the centuries-old Roman and other foreign experience had remained unsolved until the beginning of the First World War, which finally resulted in the total collapse of the Russian Empire.

For more details on the application of Byzantine law in Bessarabia as a part of the Russian Empire see also: (Avenarius 2014, 467–481; Kodan, Fevralev 2012, 124–154; Kodan, Fevralev 2013; Medvedev 1995; Rudokvas, Novikov 2017, 605–608).

References

Avenarius, Martin. 2014. *Fremde Traditionen des römischen Rechts. Einfluß, Wahrnehmung und Argument des "rimskoe parvo" im russischen Zarenreich des 19. Jahrhunderts.* Göttingen, Wallstein Verlag.

Azarevich, Dmitrii I. 1876. *History of Byzantine law*. Yaroslavl', G. V. Falk Publ. (In Russian)

Bertgoldt, Gregory V. 1896. *The Statute on the Executor of Somebody's Will (Art. 1084, Vol. X, part I ed. 1887) According to the Cassation Judgements of the Governing Senate. Collection of Judgements of the Governin Senate's Civil Cassation Department*. Moscow, F. L. Schmidekke Publ. (In Russian)

Bertgoldt, Gregory V. 1910. *The Collection of Resolutions of the Governing Senate's Civil Cassation Department on Testaments. For the period of 1904–1908*. Moscow, I. K. Golubev "Pravovedenie" Publ. (In Russian)

Blumenfeld, German F. 1912. "On the History of the Family Fideicommission in Roman and Byzantine Law". *Zhurnal Ministerstva iustitsii* 3: 116–150. (In Russian)

Egunov, Aleksandr N. 1881a. "My Letter to the Editor of "Odessky Vestnik" 28 August 1868". *Mestnye grazhdanskie zakony Bessarabii*, 145–158. St. Petersburg, Moscow, Ettinger Publ. (In Russian)

Egunov, Aleksandr N. 1881b. "Adjunct V. A. Linovsky's Speech Presented at the Meeting of the Richelieu Lyceum on 21 June 1842 'About the local Bessarabian laws'". *Mestnye grazhdanskie zakony Bessarabii*, 190–247. St. Petersburg, Moscow, Ettinger Publ. (In Russian)

Galben, Andrei I. 1998. *From the history of the feudal law of Moldova in the 18th — early 19th centuries (Turkish-Phanariotic period)*. Kishinev, Ruxanda Publ. (In Russian)

Grama, Dmitrij K. 1983. *Andronaky Donič's Political and Legal Ideas*. Kishinev, Ştiinţa Publ.

Grinevich, Aleksandr A. 1867–1868. "About the Substitute or Sub-designation of Heir Under Russian Law". *Iuridicheskii Vestnik* 4: 3–27. (In Russian)

Grossman, Solomon M. 1904. *Bessarabian Local Laws. The Complete Systematical Collection of Local Bessarabian Laws of Harmenopoulos, Donič, Mavrokordat's Sobornaya Charter and manual book on marriages containing the latest legalizations and explanations*. St. Petersburg, A. G. Rosen Publ. (In Russian)

Guliaev, Aleksei M. 1912. *Russian Civil Law. Review of the Current Legislation, the Practice of Cassation of the Governing Senate, and of the Draft of Civil Code. Manual*. 3th ed. St. Petersburg, M. Stasulevich Publ. (In Russian)

Kasso, Lev A. 1913. *Russia on the Danube and the Formation of Bessarabia Region*. Moscow, A. Snegirev Publ. (In Russian)

Kodan, Sergei V., Sergei A. Fevralev. 2013. "Formation and Development of Local Law in Bessarabia within the Russian Empire (1812–1917)". *Iuridicheskie issledovaniia* 4: 230–285. (In Russian)

Kodan, Sergei V., Sergei A. Fevralev. 2012. *Local law of national regions in the legal system of the Russian Empire. The second half of the 17th — early 20th centuries.* Nota Bene Publ. (In Russian)

Medvedev, Igor P. 1995. "'Russian Harmenopoulos' and its criticism in a memo of the Bessarabian lawyer Ivan Tanskij". *Vizantiiskii vremennik* 56 (81): 193–203. (In Russian)

Meyer, Dmitrii I. 1897. *Russian Civil Law. Lectures Edited on the Base of Synopsis of Students*. 6th ed., eds Aleksandr I. Vitsyn, Adolf H. Holmsten. St. Petersburg, D. V. Chichinadze Publ. (In Russian)

Pergament, Osip Ya. 1905a. *About the Application of Local Laws of Harmenopoulos and Donič*. St. Petersburg, G. Rosen Publ. (In Russian)

Pergament, Osip Ya. 1905b. *Controversial Issues of Bessarabian Law. Essay of Exegesis of Harmenopoulos and Donič's Laws*. Odessa, Aktsionernoe Iuzhno-russkoe Obshchestvo pechatnogo dela Publ. (In Russian)

Rudokvas, Anton D., Andrej A. Novikov. 2017. "Review of the book: Martin Avenarius, Fremde Traditionen des römischen Rechts. Einfluß, Wahrnehmung und Argument des 'rimskoe pravo' im russischen Zarenreich des 19. Jahrhunderts". *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Romanistische Abteilung* 134: 601–623.

Sbitnev, Nikolai A. 1861. "About the Wills Under Russian Law". *Zhurnal Ministerstva Iustitsii* 5: 181–265. (In Russian)

Shimanovskii, Mitrofan V. 1888. *About Bessarabian Local Laws. Edition III. Family law, the Law of Succession and the Law of Contracts.* Odessa, Odesskii vestnik Publ. (In Russian)

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