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THE INFLUENCE OF ROMAN LAW ON THE CONTRACT LAW OF THE OTTOMAN EMPIRE: THE EXAMPLE OF THE SALES CONTRACT

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Abstract

When referring to Roman law and the law of the Ottoman Empire, it seems prima facie that these two legal systems do not have much in common. Roman law is the legal system that was valid in the Roman state from its establishment until the fall of the Western Roman Empire. The law of the Ottoman Empire was based on Sharia law, and it was a set of legal rules related to religion whose main goal was to regulate relations in the Islamic community. The paper aims to assess to what extent Roman law influenced the secular law of the Ottoman Empire, by focusing on the sales contract as the contract that was most frequently concluded in practice. Upon examining the definition and essential elements of this contract, and the rights and obligations of the contracting parties, the paper shows that Roman law, as a universal legal creation, had a considerable impact on the law of the Ottoman Empire.

Key words: Roman law, Sharia law, Mecelle, sales contract.

УТИЦАЈ РИМСКОГ ПРАВА НА УГОВОРНО ПРАВО ОТОМАНСКЕ ИМПЕРИЈЕ: ПРИМЕР КУПОПРОДАЈНОГ УГОВОРА

Апстракт

При помену термина римско право и право отоманске империје, на први поглед делује да између њих не може да стоји знак једнакости, а ни да је једно право имало утицај на друго. Римско право је правни систем који је важио у римској држави почев од њеног оснивања до пада Западног римског царства. Право отоманске империје има свој основ у шеријатском праву, а представља скуп правних правила везаних за религију чији је основни циљ регулисање односа у исламској заједници. Рад треба да покаже у којој је мери римско право утицало на световно право Отоманске империје. Изабран је купопродајни уговор, као уговор који се најчешће закључује у пракси. Кроз обраду, дефиниције и особине

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уговора, те права и обавеза уговорних страна увидеће се да је римско право, као универзална правна творевина, утицало и на право Отоманске империје.

Кључне речи: римско право, шеријатско право, Мецела, купопродајни уговор.

INTRODUCTION

Prima faciae, it seems that Roman law and the law of the Ottoman Empire do not have much in common. As the basic source of the European-continental legal tradition, Roman law was the legal system that was valid in the Roman state from the founding of the city of Rome in 754 or 753 BC until the fall of the Western Roman Empire in 476, i.e. until the death of Emperor Justinian in 565. The law of the Ottoman Empire had its source in Sharia law, a set of legal rules related to religion whose main goal was to regulate relations in the Islamic community. The concept of Sharia law includes religious rules (*fiкh*) and secular rules (*kanuni*). The same conclusion may be drawn if we look at the sources of these two legal systems. The sources of Roman law in the material sense (*fontes iuris essendi*) were: customs (*consuetudines*), laws (*leges*), magisterial edicts (*edicta magistratuum*), discretionary opinions and other activities of eminent jurists (*responsa prudentium, iurisprudentia*), senate opinions (*senatus consulta)* and imperial constitutions (*constitutiones principum*). Sharia regulations can be classified into two categories: religious law in the narrow sense, i.e. rules related to religion and the performance of rituals, and secular rules of a legal and political nature. According to the hierarchy of legal documents, the sources of Sharia law are the Qur'an, Hadith (Sunnah), Ijma-ul-ummat, Qiyas, Adeth, and Er-rei (Андрић, 2006, p. 100). Therefore, one cannot find the slightest common denominator between them, let alone the possible influence of Roman law on the contract law of the Ottoman Empire. However, these two legal systems still have common points – the territory owned by these two empires, the same civilizational aspirations, and the applicable law that influenced further developments.

The Ottoman Empire – the Byzantine Empire – the Roman Empire

The Ottoman Empire was created on the ruins of the Byzantine Empire, which was conquered by the Ottoman Turks on May 29, 1453. The Eastern Roman Empire, i.e. the Byzantine Empire, began its independent life with the final fall of the Western Roman Empire and the previous division of the Roman Empire by Theodosius in the 4th century AD. The collapse of the Byzantine Empire and the Ottoman domination over the largest part of the Mediterranean and this part of Europe had a huge civilizational impact, causing a tectonic change in state and social relations. Yet, taking a closer look at the character of the Ottoman Empire, it may be concluded that there was no final break with the Roman-Byzantine tradition.

Like the Roman Empire and its successor Byzantium, the Ottoman Empire aspired to become a global empire. Any empire aspiring to ensure its long-term subsistence can never be a civilizational unifier, but only a civilizational successor. The rulers of the Ottoman Empire perceived themselves as the successors of Roman emperors. Emir I Osman dreamt of being the heir to the Roman Empire. After the conquest of Constantinople, Mehmed II, the Conqueror, declared himself the new 'Caesar of Rome' (*Kaysar-i Rum*). The first administrative division of the Ottoman Empire also points to these aspirations. Initially, the Ottoman Empire was divided into Rumelia and Anatolia *beylerbeyliks*.[1] After being conquered by the Ottoman Turks, the European territories inhabited by Christians were first called Rumelia (derived from the Turkish transcription of the term Rome and Romei, i.e. the Byzantine Empire). The tendency to cherish the Byzantine tradition was also evident in the Ottoman 'millet' system[2], which provided a significant degree of autonomy to religious communities (Muslims, Christians and Jews), recognising the rights of peoples of common cultural heritage (the People of the Book). The Patriarch of Constantinople was treated as a high dignitary of the empire. The theocratic features of the Ottoman Empire were based on favouring Islam and Muslims as a privileged religious community, but the functioning of the entire social system and the specific type of feudalism were based on a specific type of religious tolerance, guaranteeing the rights of members of other millets, particularly in terms of property rights. The entire Christian population in the Empire was initially called *Rum-Millet* (*millet-i Rûm*), i.e. the Roman nation (Encyclopaedia Britannica online).[3] Culturally, it is also interesting that Islam adopted face covering from Byzantium; although it was not called *feredja ijar* back then, Byzantine women used face-veils after marriage.

In the period of its ascent, the Ottoman Empire was a pragmatic state which embraced the tradition of Roman private law. After reaching the zenith, any system begins to decline. Yet, both the ascent to the zenith and the subsequent downfall are accompanied by a system based on law. It is wrong to compare the Ottoman Empire in its rise and at the peak of its power with the Turkish Empire in decline. As an illustration, we may refer to the expulsion of Sephardic Jews by the Spanish Inquisition and their relocation to the territory of the Ottoman Empire, which was a more tolerant state in terms of religion than Western European states at the time.[4] Another illustration may be the criminal punishment in the Serbian medie-

[1] A *beylerbeylik* or *pashalik* was an administrative area headed by a beylerbeg or pasha;
[2] A *mille*t was an autonomous religious community in the Ottoman Empire;
[3] Encyclopaedia Britannica online (2023). Eastern Orthodoxy (Christianity); https://www.britannica.com/topic/Eastern-Orthodoxy/Orthodoxy-under-the-Ottomans-1453-1821#ref64189
[4] See: Đorđević, M. (2008). Status of the Gypsies in the Ottoman Empire (1451-1807*), Časopis Teme br. 1* (str. 51-56), Niš;

val state. Namely, Dušan's Code envisaged the most severe punishment of death penalty for the assembly of *sebars* (commoners) in local communities. In the Ottoman Empire, the legal system nourished the institution of village assemblies, which were granted judicial powers, and the control over this type of self-government was entrusted to the millet-basha and church authorities (Mitić, 2023, p. 151).

Prima facie, the cessation of nurturing this tradition may be linked to the period of decline in the power of the Ottoman Empire, when it became the 'sick man on the Bosphorus,' with the concerted efforts of European powers to tear the Empire apart. However, the aspirations for reforms, especially in the mid-19th century, indicate that parts of the Ottoman elite understood the need to 'Europeanise' the Empire. That process included the 'Europeanisation' of Ottoman law, which resulted in the adaptation of received Roman law and the introduction of the institutes from European civil codes. In the second half of the 19th century, the Ottoman state implemented a system of reforms known as the Tanzimat (*tanzīmāt-i hayriye),* which means 'beneficial decrees' (Smailagić, 1990, p. 592). The Tanzimat was introduced in order to establish the principle of equality among Ottoman subjects. This led to the emergence of new regular courts that needed a civil code on the basis of which they could act. It also gave rise to the idea of the need to codify civil law (Karčić, 2006, p. 95).

The Civil Code, officially called *Mecelle-i ahkjām-i adliyye* (Collection of legal rules), was published in the period between 1869 and 1876. *Mecelle* is the first official codification of Sharia law in history, covering contracts, tors and some civil procedure principles. The special importance of *Mecelle* is reflected in its application in parts of the territory of the Kingdom of Serbs, Croats and Slovenes, which was a unitary state with six different legal areas. In Bosnia and Herzegovina, as one of these areas, the *Mecelle* was valid during the Austro-Hungarian administration as 'land law,' and Sharia courts applied it until their ultimate abolition in 1946 (Mitić, 2023).

THE INFLUENCE OF ROMAN LAW ON THE SALES CONTRACT IN MECELLE

Mecelle, the Civil Code of the Ottoman Empire, was divided into an introduction and sixteen books, containing 1,851 articles. The introduction included two speeches: the first one provided the definition and classification of legal science; the second one contained 99 legal rules of Islamic jurisprudence (*Fiqh*). Books 1-13 contained legal provisions on the law of civil obligations, mostly on property-related rights. Books 14-16 regulated civil procedure law (Medželle i ahkjami šerije, 1906). Apart from the legal rules on Sharia law, where some parts may be said to include general provisions, *Mecelle* largely reflects the application of the casuistic method. By

providing a large number of examples, the framers of *Mecelle* endeavoured to enable laymen to understand the provisions. Another distinctive feature is the lack of systematicity, which in a way corresponds to the legislative technique of the Ottoman Empire.

The influence of Roman law on the development of the law of the Ottoman Empire will be illustrated by examining the *Mecelle* provisions on the contract of sale, which was the most commonly used type of contract in practice.

Features of the Contract of Sale

In *Mecelle,* the contract of sale is regulated in Book 1 (Sale), which includes the Introduction (on common terms relating to sale) and seven Chapters. The related provisions are contained in Articles 101-403.

Mecelle define sales (*beï*) as a mutual exchange of goods. Thus, a distinction is made between a complete (*munakid*) and an incomplete (*ghaïr i munakid*) sale (*Medželle i ahkjami šerije*, 1906, Art. 105). A complete sale (*beï munakid*) is where there is *inikad*. *Inikad* is a concluded contract or a legal bond of an offer and acceptance which produces legal consequences. It is further divided into a valid sale (*sahih*), a voidable sale (*anfechtbar, fasid*), a sale called *beï nafiz,*[5] and a suspended sale (*mevkuf*) (Medželle, Art. 106). An incomplete sale (*beï ghairi munakid*) is defined as an invalid sale (Medželle, Art. 107). A sale is valid or permitted (*beï sahih, beï djaiz*) if it is lawful, i.e. if its basis and method of acquisition are in accordance with the law (Medželle, Art. 108). A voidable sale (*fasid*) is the sale which is valid in its legal ground, but the method of acquisition is invalid. While such a sale is otherwise complete, it is illegal due to some extraordinary circumstances (Medželle, Art. 109). A void sale (*beï batil*) is the one whose legal ground is invalid. (Medželle, Art. 110). A suspended sale (*beï mavkuf*) is the one which depends on another's consent or authority, such as a sale by non-owners (Medželle, Art. 111). A sale called *beï nafiz* does not depend on the right or authority of a third party. It can be permanent (*lazim bindrud*) and non-permanent (*ghaïri lazim)* (Medželle, Art. 114-115).

Therefore, *Mecelle* indirectly defined the sales contract as a mutual exchange of goods. In Roman law, the contract of sale was defined as a *bona fidei* consensual contract by which one contracting party (seller, *venditor*) undertakes to hand over to the other contracting party (buyer, *emptor*) a certain thing (*merx*), and the other contracting party undertakes to pay a price (*pretium*) for it. Looking at the two definitions, we still cannot come to the conclusion whether the Roman law influenced the Ottoman one. Let us look into the major features of the contract of sale.

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[5] *Nafiz* was a sale that was valid without the consent of a third party. The terms that could be used are: passing, no objection or perfect sale;

The legislator did not envisage a mandatory form of contracts of sale; thus, the contract could be concluded both in oral and in written form. The contract could also be concluded with a demonstrative gesture, which has a specific meaning for the contracting party, for example in case it is entered by a mute person. The sale could also be concluded with conclusive actions, for example, if the customer gave the baker money and the baker handed him the bread without saying a word. The contract existed in the event that the buyer requested a piece of meat from the seller for a certain amount of money and the seller simply handed it over to him and took the money for the specific amount and type of meat. Thus, the contract was informal.

The contract of sale was bilaterally binding because it entailed specific rights and obligations for both contracting parties. The basic obligation of the buyer was to pay the price, while the main obligation of the seller was to hand over the item.

The sales contract was onerous. The buyer was obliged to pay the price for the thing he acquired under the contract, and the seller was entitled to receive money for the thing he sold.

Commutativity can also be one of the features of this contract because it assumes that the contracting party obligations are determined at the moment of concluding the contract. Regardless of the possibility of increasing or decreasing the price after the conclusion of the contract, and possible obligations that may arise thereof, the main obligations and the mutual positions of the contracting parties are determined at the moment of concluding the contract.

Therefore, all features of the contract of sale in the Ottoman law (except consensuality which will be discussed later) are the same as in the Roman *emptio-venditio*: these contracts are informal, bilaterally binding, onerous, and commutative.

The Essential Elements of the Contract of Sale

In Book 1 (Chapter 1), *Mecelle* prescribed the essential elements of a contract of sale.

A sales contract is created by an offer and the acceptance of an offer (*Medželle i ahkjami šerije,* 1906, Art. 167). The offer and the acceptance of the offer are expressed by using words that are commonly employed for concluding a sales contract according to the local custom. With those words, the contract is legally perfected (Medželle, Art. 168). Does this perhaps mean that the contract is verbal? Before jumping to conclusions, let us look at the other articles. It is interesting that *Mecelle* stipulates that verbs in the past tense are used for the offer and acceptance of the offer. For example, the seller says: 'I sold you this item for 100 groschi,' and the buyer replies: 'And I took it.' The sale will occur when the seller says: 'I gave' or 'I handed over,' and when the buyer responds: 'I agreed' or 'I

accepted' (Medželle, Art. 169). On the basis of the above, we may observe a similarity with *stipulatio*, the only difference being that the equivalence in the question and the answer was not required here; while there is certainly a requirement to agree on the offer and accept,[6] some other verb could be used, and it had to be in the past tense. Now, we seem to be closer to the conclusion that it was a verbal contract, but let us explore further. In connection with the rule that words must be in the past tense, the legislator also allowed the use of a form that can refer to both the present and the future tense, such as 'I sell' and 'I buy,' whereby the intention of the contracting parties had to be expressed by using the verb in the present tense rather than in the future tense. *Mecelle* expressly states that a contract cannot be concluded through words used in the future tense, such as 'I will buy' or 'I will sell,' because in this way the contracting parties make a simple promise.

Therefore, although this contract resembles the Roman *stipulatio* and, thus, a verbal contract, it cannot be concluded that this contract belongs to that group of contracts. Namely, *stipulatio* represents a strictly formal agreement which is created on the basis of ritual words, which are certainly a relic of the past for modern conditions. As for the question of whether the contract of sale was a verbal contract, we can see that it could be concluded in both written and oral form. Therefore, we cannot say that it was a verbal contract.

Although *Mecelle* prescribed that the essential elements of this contract are the offer and the acceptance of the offer, the subsequent chapter contains provisions on the object of sale and the price of sale. This further leads to the conclusion that the essential elements (*essentialia negotii*) are identical with those stipulated in Roman law: object (*res*) and price (*pretium*).

The Object of Sale (res)

Book 1 (Chapter 2) of *Mecelle* contains provisions on the conditions and properties concerning the subject matter of sale. The object of sale must exist, be possible and have a specific material value - *mali mutekavi* (*Medželle i ahkjami šerije*, 1906, Articles 197-200). Another requirement refers to the material perception of the object by the buyer, which is not an absolute requirement, but its fulfilment depends on the circumstances of the specific case.

It is stated on the Mecelle that "The object of sale must exist (at the time of the contract)" (Medželle, Art. 197). It may be interesting to analyse

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[6] *Mecelle* contains a special chapter on the agreement of acceptance with the offer, which is regulated casuistically in order to make it clear to the layman. *See*: Book 1, Chapter 1, Section 2: Agreement of Acceptacne with Offer (International Islamic University Malaysia (2005);

this provision more closely. First, does the requirement for the existence of the object refer to the moment of conclusion or the moment of the fulfilment of the contract? The answer to this question also gives an answer to the question about its legal nature. If it refers to the moment of concluding the contract, then we can talk about a real sale. On the other hand, if the request refers to the moment of fulfilling the contract, then we can talk about consensual sale. Although it can be concluded at first glance that the object of sale must exist at the time of concluding the contract, the provisions relating to the place of delivery and those relating to the destruction of the object before delivery speak in favour of the fact that the object of the contract must exist at the time of its fulfilment. This leads to the conclusion that the contract is consensual. Namely, the legislator prescribed that the sale of a thing that does not exist is null and void, such as the sale of the fruit of a tree that has not yet grown on the tree (Medželle, Art. 205). On the other hand, the sale of fruit that has grown and is fully visible on the tree is valid, regardless of whether it is fit for consumption or not (Medželle, Art. 206). This would then mean that the sale of future things is null and void, specifically *emptio spei*. Does this mean that the consensual contract hypothesis is incorrect? However, the sale of collective things, such as fruits, flowers, leaves and vegetables which do not grow and ripen simultaneously, in a condition where only a part of those things have ripened, is valid both in terms of the items that have ripened and the items which have not (Medželle, Art. 207). Thus, *Mecelle* regulates *emptio rei speratae*.

The next requirement prescribed by the legislator was that the object must be possible to deliver, i.e. capable of being delivered (Medželle, Art. 198). The sale of things that cannot be delivered is void, such as the sale of a boat that has sunk into the sea and cannot be retrieved, or the sale of a runaway animal that cannot be caught and handed over (Medželle, Art. 209).

The object of sale must have a specific material value; otherwise, it is null and void (Medželle, Art. 199 and Art. 211). Yet, the next article is unclear; it stipulates that the sale is voidable in case when someone buys some object with a thing that has no material value (Medželle, Art. 212). This probably refers to the possibility of subsequent price specification both by the contracting parties themselves and by a third party.

The object of sale must be made known to the buyer (Medželle, Art. 200). Namely, the buyer has to be familiarised with the object of sale by providing the description of its properties and the state of affairs that distinguishes it from other things (Medželle, Art. 201). In case the object of sale is present at the sale meeting place, a hand gesture is sufficient. (Medželle, Art. 202). However, if the object of sale is already known to the buyer, there is no need for detailed description and particularisation (Medželle, Art. 203). If the object of sale has already been shown by the appropriate gesture by the seller, he cannot deliver another item instead of

the one shown, even if they are identical in all characteristics (Medželle, Art. 204). The sale of things whose nature is unknown or undisclosed to the purchaser is voidable (Medželle, Art. 213).

Roman law did not specify the conditions that the thing should meet, but it stipulated that they could be things in legal circulation (*res in commercio*), and that they could be movable, immovable, individually determined, and generic. But, essentially, if we look at the object as an essential element, we may come to the conclusion that there is no significant difference between the object of sale in Roman law and in *Mecelle*. It is true that *Mecelle* prescribed the requirement that the object must exist, which is not prescribed in Roman law because it is possible to sell things that have yet to come into existence; on the other hand, in *Mecelle,* this condition was not prescribed as an absolute condition, because the legislator allowed one type of sale - *emptio rei speratae*. The reason for the absence of *emptio spei* may lie in the old customary rules. Namely, in Ottoman law, some kind of petty fraud of the seller in relation to the buyer was allowed for centuries; thus, *Mecelle* may have aimed to eradicate such a phenomenon.

Price (*pretium*)

The second essential element of the contract of sale is the price, which must meet the conditions stipulated in *Mecelle*. The price must be determined and known.

It is stated that: "The price must be determined at the time of sale" (*Medželle i ahkjami šerije*, 1906, Art. 237, par. 1). The legislator used the same sentence structure as in the object of sale. The same question arises: should the price be determined at the time of concluding the contract or at the time of fulfilment. A brief provision does not provide enough information, but a special chapter of *Mecelle*[7] is dedicated to the increase and decrease of the price after concluding the contract. On the other hand, the legislator predicted that if the price was not determined, the sales contract would be voidable (Medželle, Art. 237, par. 2). The provisions related to the object stipulate that the object must exist at the time of the contract's fulfilment; thus, the legislator is most unlikely to have foreseen different conditions for both essential elements (object and price). Additional confusion is caused by the provision that prescribes the voidability of the contract in case of a failure to determine the price. Therefore, the price most likely had to be determined at the moment of fulfilment, because the contracting parties have the possibility to raise or lower the price, as well as to increase the quantity of things that are the object of sale. Anyway, the contracting parties would certainly have to give their consent.

[7] *See:* Book 1, Chapter 4, Section 2: Increase and Decrease in the price and the thing sold after the conclusion of the contract (International Islamic University Malaysia, 2005);

The price must be known at the time of sale (Medželle, Art. 238). It is known when it is visible, and if it is not, it is ascertained by describing its quantity and quality (Medželle, Art. 239). In case gold or silver coins of different types are minted in a certain location and a sale contract is concluded for a certain amount of gold coins in general without specifying the type, the contract is voidable (Medželle, Art. 240). If the price is stipulated in money (piastres/groschi), then it can be paid in any type of currency, provided that its circulation is not prohibited (Medželle, Art. 241). The price that is determined in a specific currency must be paid in the specified currency. Thus, if the agreed payment is in English pounds, French francs, Turkish lira, gold mejidi, silver mejidi or rial, then the payment of the price must be made in the stipulated currency (Medželle, Art. 242). Considering that it referred to replaceable items, the price does not have to be paid in specifically indicated denominations (banknote or coin); it may be substituted by another of the same type (Medželle, Art. 243). Instead of paying the stipulated sum by using a single banknote/coin, payment may be made in fractions (its component parts), in line with the local customs. For example, if the price is to be paid in medjidies of twenty piastres (groschi), instead of using a single medjidies of twenty piestres, payment may be made with its component parts (fractions) of ten and five piestres (groschi). In line with prevailing local customs in Constantinople, it would not be possible to give the fractions of forty and two instead of medjidies of twenty piestre (Medželle, Art. 244).

Roman law prescribed the following conditions that the price had to fulfil: it had to be expressed in money (*numerata pecunia*); it had to be determined (*pretium certum*); it had to be true (*pretium verum*); it had to be fair (*pretium iustum*), but only from the post-classical era onwards. In comparison, *Mecelle* prescribed only two requirements: the price had to be determined and it had to be made known to the buyer. Therefore, both Roman law and *Mecelle* prescribed the condition of definiteness. At first glance, it can be concluded that this is the only similarity. However, taking a closer look at the condition that refers to the price that is known, and it is known if it is visible, i.e. if its quantity and quality are described, then that condition refers to the requirement of truth. In fact, *pretium verum* existed if the parties seriously thought that the price should be paid for a certain thing, i.e. if the contract was not apparent. *Mecelle* did not state anywhere that the price must be in money. However, the previously discussed examples refer to money and even determine the method of payment. Therefore, this condition also exists. Yet, there is no condition of fairness. *Pretium iustum* did not exist in all periods of Roman law, but was introduced only in the post-classical era due to general decadence, and until then there was the possibility of smaller frauds. The same situation exists in *Mecelle*.

The Legal Effect of the Contract of Sale

The Buyer. The main obligation of the buyer is to pay the price. The buyer is first obliged to pay the price and only then is the seller obliged to deliver the sold item to the buyer (*Medželle*, 1906, Art. 262). Apart from the provisions on price as an essential element and the rule on the contracting party that is obliged to fulfil its obligation first, *Mecelle* does not contain further rules relating to price. Quite a number of provisions refer to the right of the seller to retain the object of sale in case the buyer does not pay the price or postpones the payment (*Medželle,* Art. 278-284).[8]

Therefore, if the buyer does not pay the price in a cash sale, the seller has the authority to retain the item until the buyer pays the full price (Medželle, Art. 278). When the object of sale are collective things, the seller may retain the goods even though a separate price has been stipulated for each individual article (Medželle, Art. 279). The seller's retention right remains even if the buyer provides a security for the claim in the form of a pledge or a guarantee (Medželle, Art. 280). On the other hand, the seller will not have the right to retain the item if he delivers the item to the buyer before receiving the price. Nor will he be able to demand the return of the thing until the price is paid (Medželle, Art. 281). The seller also loses the right of retention in case the seller instructs a third party to receive payment of the price from the buyer (Medželle, Art. 282). In the case of a sale on credit, the seller will not be able to keep the thing; he must deliver it to the buyer immediately and wait for the payment of the price by the buyer on due date (Medželle, Art. 283). The seller also loses the right of retention even if, after the sale, he allows the buyer to pay the price within a certain period (Medželle, Art. 284). After paying the price by due date, the second obligation of the buyer is to receive the sold item.

The obligations of the buyer in Roman law largely correspond to the obligations of the buyer in the Ottoman law, but there are slight differences. In Roman law, the contracting parties are obliged to fulfil their obligations simultaneously. Under the Ottoman civil code *Mecelle,* the buyer is first obliged to pay the stipulated amount of money, and only then is the seller obliged to deliver the sold thing (Medželle, Art. 262).

The Seller. The seller is obliged to deliver the item only after the buyer has paid the price. Delivery of the sold item is performed upon the seller's permission for the buyer to receive the item without hindrance (Medželle, 1906, Art. 263). As soon as the item is delivered, the buyer is considered to have received it (Medželle, Art. 264). The method of delivery depends on the type of item (Medželle, Art. 265). As in other provisions, the method of delivery is regulated casuistically. Thus, if the buyer stands on the land or observes it from nearby, the sold item will be deemed to have been delivered at the moment when the seller allows the buyer to take the

[8] These rules will be presented in this subheading even though they do not refer to the obligations of the buyer;

delivery (Medželle, Art. 266). This provision reflects the Roman-law rule *traditio longa manu,* which also provides for the delivery of immovable property that is locked with a key (Medželle, Art. 271). Delivery of movable property is performed *a manu in manu,* either by placing it in the immediate vicinity of the buyer or by showing it and allowing the buyer to take it (Medželle, Art. 274).

When it comes to the place of delivery, the item must be delivered in the place where the object was at the time when the contract of sale was concluded. For example, if a person from Mount Tekfur Dag sells wheat to a person living in Constantinople, the seller will deliver the wheat in Tekfur Dag, and he cannot be forced to deliver it in Constantinople (Medželle, Art. 285). In case the buyer does not know where the object of sale is located and receives information about that place after the contract has been concluded, then he has an option: he may choose to cancel the sale and terminate the contract, or he may receive the sold item in the place where it was at the time the contract was concluded (Medželle, Art. 286). Delivery of property that was sold under the condition of delivery at a specific place must be performed in accordance with that condition (Medželle, Art. 287).

Delivery costs related to the sold item shall be borne by the seller, such as the fees for exchanging, counting or weighing money (Medželle, Art. 288). However, the buyer will bear the delivery-related costs if the items have been sold *en bloc*[9] (Medželle, Art. 290, par. 1).

The seller is also obliged to protect the object of sale against material defects. This issue is regulated in Chapter 6, Section 6: Options due to Defect (Medželle, Articles 336-355). The object of sale must be without any defect. If some long-standing defect is detected upon the unconditional sale of some property, the buyer has two options: he can either refuse to accept the item, or accept it and pay the agreed price. However, the buyer cannot keep the property and reduce the price on account of the defect. It is *hiar-i aïb*, i.e. the right to choose due to defects (Medželle, Art. 337). The legislator also envisaged the presence of *aïb-mâna*; this defect includes any fault that leads to a depreciation in price of the property as established by the competent expert (Medželle, Art. 338). It is interesting that *Mecelle* stipulates that any defect, which occurs after the sale has been concluded and before the delivery of item, while it is still in possession the seller, produces the same effect as a long-standing defect, i.e. it provides the buyer with the option to terminate the contract (Medželle, Art. 340), provided that the buyer did not know about the defect. Namely, if the seller presents the state of property (including a defect) to the buyer and the buyer accepts it with the defect, then he has no right to choose on account of such defect (Medželle, Art. 341). The seller will have no option on account of any defect if he waived responsibility for any claim on account of any defect (Medželle, Art. 342). The buyer loses the right to opt due to a defect if,

[9] Tr. *götürü,* a collective sale *en* bloc, items sold as a lump quantity for a lump sum;

after learning about the defect, he uses the item in a manner indicating the exercise of the right of ownership (Medželle, Art. 344).

The obligations of the seller are also regulated in Chapter 6, Section 1: Contractual Options pertaining to the right of choice arising from the the misdescription of contractual properties of the object of sale. It refers to both ordinary and special properties of the object of sale which the seller claimed to be pertinent to the object but which turned out not to be present. Like in the previous case, the buyer has two options: he can either cancel the sale and refuse to accept the item or accept the item and pay the agreed price (Medželle, Art. 300-301). This option is called *hiar-i-vassf*, the right of choice for misdescription of certain properties of the sold object.[10] For example, if the object of sale is a cow that was sold to give milk and it turns out to be dry, the buyer has the right of choice (Medželle, Art. 310).

Roman law prescribed the following obligations of the seller: custody of the item and responsibility for it until the time of delivery; delivery of the item for peaceful enjoyment; liability for legal defects (protection against eviction); and liability for material (physical) defects. At first glance, it can be seen that the obligations to deliver the thing and liability for material defects are identical in Roman law and in *Mecelle*, while the other two are not recognised in *Mecelle.* Let us first consider the similarities. In terms of delivery of the object of sale, Roman law required that the item was to be delivered for peaceful enjoyment, while *Mecelle* envisaged that the item was to be delivered to the owner. The concept of delivery for peaceful enjoyment was a consequence of different socio-economic circumstances in Roman law. It was aimed at enabling the peregrines to acquire property, equalizing quirite and praetorian property, encompassing provincial lands by applying the same sale formula, etc. As for the method of delivery, Roman law left this issue to the autonomy of the will of the contracting parties; in case they failed to regulate this issue, immovable property was delivered in the place where it was located and movable property was delivered in the domicile of the seller. In *Mecelle*, the method of delivery was slightly modified; as a rule, the object of sale was to be delivered in the place where the thing was at the time of the conclusion of the contract.

Liability for material defects was envisaged both in Roman law and in *Mecelle*. The conditions laid down in Roman law were also present in *Mecelle*: defects entail flaws due to which the item cannot be properly used or its value is significantly reduced; these defects already existed at the time of sale; they are covert and inconspicuous defects rather than flaws that are clearly visible or immediately noticeable by some indications; the buyer was unaware of those defects nor could he have noticed them with due reasonable care. The only difference relates to the fact that under Roman law the buyer had the right to terminate the contract or reduce the price, while *Mecelle* allowed the buyer either to refuse to accept the item or to accept the defect and

[10] See: Book1, Chapter 6, Section 2: Options for Misdescription (Medželle, Art. 310-312);

pay the agreed price. *Prima facie,* it seems that *Mecelle* does not envisage any protection against eviction. However, looking at the introductory provisions of Chapter 7, Section 1, which prescribes the types of sales, we may draw a different conclusion. In particular, a suspended sale depends upon the rights and consent of a third party (Medželle, Art. 368); the buyer was indirectly protected in a similar way. The seller's right of retention of things until the moment of delivery and responsibility for such items were regulated within the protection against material defects. Therefore, it may be concluded the obligations envisaged in the two laws are the same.

CONCLUSION

Starting from the initial premise that the contract of sales in the Ottoman law was a verbal contract due to the words that are spoken when making and accepting the offer, over the possibility that it was a real contract due to the properties of the item itself as an essential element, we come to the conclusion that it was still a consensual contract. This conclusion is supported by the presented analysis of the obligations of the contracting parties, especially the seller's obligation to deliver the object of sale. This is confirmed by the provision that prescribes that the receipt of goods in case of sale is not one of the essential elements that delivery should be performed immediately after the conclusion of the contract (*Medželle*, Art. 262).

Therefore, if we look at the characteristics of the contract of sales, the essential elements, and the rights and obligations of the contracting parties, we come to the conclusion that the contract of sale in *Mecelle* corresponds to the Roman *emptio-venditio*. The *Mecelle* editors preserved the foundations of Roman law by envisaging the same features of this contract, prescribing the same essential elements and, in some places, almost the same requirements for each of them, prescribing the same obligations of the buyer and the seller and, in some places, the same (legal) requirements which, in case of failure to fulfil them, may give rise to liability. This further means that Roman law influenced the contract law of the Ottoman Empire. The answer to the question of how Roman law influenced the provisions of the *Mecelle* should be sought in the way this code was developed and its legal nature. The *Mecelle* was created during the period of Tanzimat, when the Ottoman state implemented a system of reforms aimed at Westernising Ottoman law, in addition to its secularisation and modernisation. Many authors believe that the Mecelle is, in fact, a secular codification inspired by European ideas, specifically French ones.

On the other hand, if we look at some of the former Serbian civil codes, specifically the General Property Code for the Principality of Montenegro

(1888)[11], which was created after the Ottoman Civil Code *Mecelle*, we may identify the impact of *Mecelle* on the General Property Code. The impact is reflected in the systematics of the code, terminology, and individual legal solutions. Neither code regulated family law and inheritance law relations. Both codes contained legal statements. Although Valtazar Bogišić endeavoured to use Serbian terminology which would be comprehensible to the local population, the General Property Code still included a lot of Turkish terms, such as *ortakluk* (partnership), *amanet* (amenat), *kesija, kirija* (rent), etc.

It is evident that sales contracts have great similarities, regardless of time and spatial distance. It only confirms the basic premise that law exists because of people and their relations, and that certain relations will be regulated in a similar way, regardless of time and spatial distance. Essentially, man and his need to establish, change or terminate legal relations by the declarations of his free will is the foundation of every relationship. In the opinion of Valtazar Bogišić, possible differences, or better yet – specifics exist because there are no general institutions that could be fully suitable for all societies and environments, and because the power of the law shall not and may not come from the authority and bare power of the legislator, but from the power of the people and the specific conditions of each time.

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[11] Baltazar Bogišić (1989). Opšti imovinski zakonik za Knjaževinu Crnu Goru (General Property Code for the Principality of Montenegro, 1888), drugo izmijenjeno izdanje, Državna štamparija na Cetinju.

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УТИЦАЈ РИМСКОГ ПРАВА НА УГОВОРНО ПРАВО ОТОМАНСКЕ ИМПЕРИЈЕ: ПРИМЕР КУПОПРОДАЈНОГ УГОВОРА

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Резиме

Рад под називом „Утицај римског права на уговорно право Отоманске империје пример купопродајног уговора“ показује и доказује да је римско право универзална творевина. Иако су ова два права важила у различитим временским периодима, и на наизглед различитим територијама, очигледан је утицај римског права на уговорно право Отоманске империје. Уколико се дубље погледа држава на чијој територији је настала Отоманска империја – Византија, а даље погледа и основ настанка Византије – Римска империја, онда може да се примети да прекида римске традиције није ни било. То је могло да се види кроз особине уговора где је купопродајни уговор у Мецели преузео особине римског emptio-venditio. Купопродајни уговор у Мецели је консенсуалан, неформалан, комутативан, теретан и обострано-обавезујући. Иста ситуација постоји код његових битних елемената (essentialia negotii). Мецела не само што је одредила исте битне елементе – ствар и цену, већ су код цене (негде не директно, али свакако суштински) преузети и услови које је испуњавала римска pretium. У Мецели је непосредно стипулисан услов одређености, док је услов истинитости садржан у услову којег Мецела назива познатост. Иако нигде директно није прописано да цена треба да буде у новцу, Мецела у складу са нормативном техником, на самим примерима то потврђује. Ствар као битан елемент одговара римском појму (res). Иако римско право није прописало услове које би ствар требало да испуњава, а Мецела јесте, суштинска разлике не постоји. Тачно је да је Мецела прописала услове да предмет мора постојати, а тај услов не постоји у римском праву јер је могућа продаја ствари које тек треба да настану. С друге стране, Мецела овај услов није поставила апсолутно, већ је била могућа једна врста купопродаје emptio rei speratae. Обавезе уговорних страна, продавца и купца одговарају обавезама venditor-a и emptor-a. Купац је био у обавези да исплати цену и прими ствар. Међутим, купац у Мецели има обавезу да прво преда новац, а тек онда следи обавеза продавца да преда ствар, за разлику од римског права где су уговорне стране у обавези да своје обавезе изврше истовремено. Мецеле су прописале исте обавезе продавца, али са извесним модификацијама. Продавац је био у обавези да преда ствар и да одговара за материјалне недостатке ствари. Иако се нигде директно не помиње заштита од евикције, она је садржана у уводним поглављима које се односе на врсте купопродаје. Чување ствари до тренутка предаје и одговорност за њу је регулисана у оквиру заштите од материјалних недостатака. Рад је показао да одлично постављени римски темељи, не сачињавају само основу европско-континенталног система, већ могу да утичу и на системе који су настали на нешто другачијим основама, па и онде где је верски елемент био доминантна карактеристика изградње правног система.