SOME REMARKS CONCERNING THE RECEPTION OF BYZANTINE LAW IN MEDIAEVAL SERBIA

It is well known that Roman Law, one of the most important legacies of Antiquity, was not introduced into the Slavic countries directly by the activity of lawyers educated in Bologna or somewhere else, but indirectly through Byzantine law. This specific reception of Roman Law in Serbia began in the thirteenth century through its inclusion into the Nomokanon of St. Sava, receiving its final shape in the middle of the fourteenth century with Tzar Dushan’s legislation. But even today it is not completely clear what was the exact degree of application of Byzantine Law in Slavic countries, including Serbia, and whether it was merely a means for the obtainment of a reputation for emerging Slavic states or their rulers. Such intent is obvious enough in Tzar Dushan’s Charter, probably issued in 1346, termed by Stojan Novaković The Order of Tsar Stephan on the Legislation (цара Стефана наредба о законодавној радњи). The Tsar here states that now, after having ascended to the throne together with his wife and son, “we should make the kind of laws one
should have” (закони поставити такоже подобаєть імети). Thus, Roman (i.e. Byzantine) laws were to be introduced to the State, as otherwise the Empire would enjoy no reputation.

Essentially Serbian legal compilations are more or less strict translations of the Byzantine ones, but in several cases one can find some variations that change the sense of the text. Sometimes, provisions of Byzantine law were not in accordance with Serbian customary law, so that Serbian lawyers had to add some explications. In this paper we shall expose some of the most interesting examples.

I

The first book of Justinian’s Digest begins with the chapter entitled De iustitia et iure. It mentions there the famous fragment of Ulpian, taken from the first book of his Institutions. Ulpianus libro primo institutionum: iuri operam daturum prius nosse oportet, unde nomen iuris descendat. Est autem a iustitia appellatum; nam, ut eleganter Celsus definit, ius est ars boni et aequi. It is obvious that Ulpian thought that law (ius) was derived from justice since law (ius) is the art of good and equality. The editors of the Basilica translated this as follows: ‘Ο νόμος άπό τῆς δικαιοσύνης ώνόμασται˙ έστί γάρ νόμος τέχνη τοῦ καλοῦ καὶ ισού. Thus ius is replaced by νόμος5 with the result that Ulpian’s play on ius – iustitia is lost. It would not be like this if the editors of Basilica had traslated Roman word ius, with Greek δίκη: in Greek translation δίκη – δικαιοσύνη would be more convincing. In fact, the Byzantines had no general concept of law. The conception of ius as the body of legal rules forming the law (droit, diritto, Recht), inherited from the classical Roman tradition, had already been rejected in Justinian’s time. The most important and

1 S. Novaković, Zakonik Stefana Dušana, cara srpskog 1349 i 1354 [Code of Stephan Dushan, Serbian Tzar, of 1349 and 1354], Beograd 1898, 5 (hereinafter referred to as “ed. Novaković”); N. Radojičić, Zakonik cara Stefana Dušana 1349 i 1354 [Code of Tzar Stephan Dushan 1349 and 1354], Beograd 1960, 86. Although this text is preserved only in a late Rakovac manuscript from 1700, Radojičić, Zakonik, 145 162, proved its authenticity. S. Ćirković recently pointed out the importance of this charter in the context of Serbian Byzantine relations, see. S. Ćirković, Between Empire and Kingdom: Dušan’s State (1346 1355) Reconsidered, “Byzantium and Serbia in the 14th Century”, Athenes 1996, 115 116.


3 D. I, 1,1.

central legal concept is that of νόμος, which means law in the sense of lex, behind which the imperial legislator (νομοθέτης) is always present.6

Matheas Blastar took in his Syntagma Ulpian’s text, following the translation from the Basilica, so that Latin term ius became νόμος. When Serbian lawyers translated Syntagma, they, of course, did not compare Greek and Latin text, and in the Serbian version Ulpian’s term ius became законь (законь, νόμος, lex, la loi, la legge, das Gesetz), instead of право (право, δική, ius, droit, diritto, Recht).7 Pravo would be more convincing, because pravo – pravda (δικαιοσύνη, iustitia, justice, giustizia Gerechgtikeit) is much more similar to Ulpian’s ius – iustitia.

II

“The main distinction in the law of persons,” says Gaius, “is that all men are either free or slaves” (Et quidem summa divisio de iure personarum haec est quod omnes homines aut liberi sunt aut servi).8 Gaius’ text also found its way in Epanagoge/Eisagoge, the Greek text being as follows: Τῶν προσώπων ἄκρα διάιρεσις αὐτὴ ὅτι μὲν άνθρώπων οἱ μὲν εἰσίν ἐλεύθεροι, οἱ δὲ δούλοι.9 The fragment from Epanagoge/Eisagoge was taken by Matheas Blastar and it can be found in his Syntagma (Δ – 11).10 In the Serbian translation this would be: Је је лиць краинь раздєлєнй, сє је сть чловєкь овы оубо соуть свобод’ны, овы же рабьы.11

The definition exposes Roman concept of man (homo), because all men are considered either free or slaves. However, this distinction, taken from Roman lawyer Gaius, had a more declarative character: legal source-

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8 Gaius, Inst. I, 9. The definition was taken by the compilers of Justinian: Institut. Inst. I, 3; D. I, 5,3.
9 Epanagoge legis XXXVII, 1, ed. J. et P. Zepos, Ius Graecoromanum II, Athenis 1931, reprint Darmstadt 1964, 347. Although very small, the difference between Latin and Greek texts exist. Gaius speeks on “the main distinction in the law of Persons” (summa division de iure personarum), while the Greek text says that “the main distinction of Person such is...” (τον ἄνθρωπον ἄκρα διάιρεσις αὐτή...).
10 Γ. Α. Ράλλης Μ. Ποτλής, Μαθαίον τοῦ Βλαστάρου Σύνταγμα καὶ Στοιχείον, Athenai 1859, 236.
11 Ed. Novaković, 249. Serbian text is the strict translation of the Greek fragment.
es in mediaeval Serbia do not allow for the conclusion that the population was divided into free persons and slaves. Speaking on distinction of all persons, Serbian legal sources oppose the privileged class – vlastela (noble) to all other men (чловекъ, plural = людиє). So, the expression чловекъ (man), used by Serbian translators of Syntagma as the exact equivalent for Latin word homo and Greek άνθρωπος, in Serbian mediaeval law designates dependent person whose legal status was immutable and who does not belong to the noblemen class. That can be clearly seen from several articles of Tzar Dushan’s Law Code. Article 2 speaks on vlastele i proči ljudi (Lords and other people...) and in the article 136, among other things, it is said: My Imperial writ may not be disobeyed, to whomsoever it be sent, be it to the Lady Tsaritsa, or to the King, or to the lords, great or small, or to any man (Knjiga carstva mi da se ne presluša gde prihodi, ili ka gospoždi carici, ili ka kralju, ili ka vlastelom, velikim i malim, i vsakomu človeku).12

In the Serbian translation of Matheas Blastar’s Syntagma one can find another distinction of free men. However it is very hard to say if Mathеas Blastar was conscious of whether or not the above mentioned distinction of free men corresponded to the social circumstances of the fourteenth century Serbia. At the beginning of the chapter Y, in penal-law provision concerning the punishment of those who have insulted someone, we read: οί τοιουτός, ή πρὸς καιρὸν έξορίζονται, ή τινος κωλύονται πράγματος έντιμοι άντες εἰ δὲ ἐλεύθεροι μὲν εἶν, εύτελεῖς δὲ, ῥοπαλίζονται εἰ δὲ δουλοὶ φραγγελίζομαι, τὸ δεσπότη ὑποδίδονται.13

The fragment says that among those who are free exists a clear distinction between the privileged class called počteni (noble, gentle, honest, in Greek text έντιμοι) and sebri, in the meaning of common, vulgar, low, base (εύτελεῖς in the Greek original).14 Such a division of the

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free population was a reflection of social relations in mediaeval Serbia and was present in Serbian legal sources. Several articles of Dushan’s Law Code (art. 53, 55, 85, 94, 106) oppose sebar (commoner, εὔτελής) to nobleman, but such a division could be perfectly seen in the article 85, which proscribes penalties for Bogomilian propaganda, saying:...if he be noble let him pay one hundred perpers: and if he be not noble, let him pay twelve perpers and be flogged with sticks (...ako bude vlastelin, da plati 100 perpera, ako li bude sebar da plati 12 perper i da se bije stapići).15

The expression slave (rab, in modern Serbian rob), which was opposed in Gaius’ definition of a free man, was rarely used in Serbian legal sources. This term completely disappeared from the texts of the fourteenth and fifteenth centuries.16

III

The heading of the Πρόχειρος Νόμος (Procheiron) Chapter 32 is Περὶ φαλκιδίου.17 The Greek term φαλκιδίος originates from the lex Falcidia, promulgated in 40 BC, providing for a maximum of three quarters of a person’s estate to be bestowed as a legacy, entitling an heir to at least a quarter of the inheritance.18 Justinian’s Novella XVIII, 1, issued in 536, provided that this part had to be one third of the inheritance if a testator had up to four children, and half, if a testator had more than four children. Nevertheless, the term φαλκιδίος was not discarded.

St. Sava adopted the complete text of the Πρόχειρος Νόμος (Законь градьски in Slavonic; Chapter 55 of the Nomokanon), but Serbian lawyers translated Chapter 32 as ω ραδιδονία (On division).19 They cor-

15 Burr, 214; N. Radojčić, 59, 113. Only in the manuscript from Prizren we read and if he be not noble (ako li ne bude vlastelin) instead of if he was commoner (ako li bude sebar). See S. Novaković, 67, 197.


18 Gaius, Inst. II, 227: Lata est itaque lex Falcidia, qua cautum est, ne plus ei le gare liceat quam dodrantem, itaque necesse est, ut heres quartam partem hereditatis ha beat.

19 Nićifor Dućić, Književni radovi [Literary papers], vol. 4, Beograd 1895, 345; M. Petrović, Zakonopravilo ili Nomokanon Svetoga Save, Ilovički rukopis iz 1262 [Nomocanon of St. Sava, The Ilovica Manuscript from 1262], fototipia, Gornji Milanovac 1991, 305 b.
rectly understood the contents of the Chapter 32 (division of inheritance) and they changed the Greek heading Περί φαλκιδίου into Serbian as ωραζδελений (On division). This way the personal name of the law proposer (Roman tribune Falcidius), by intermediary reception of Roman law, became the synonym for division of inheritance.20

IV

The definition of marriage was given by famous Roman lawyer Modestinus in the first book of his Regulae (libro primo regularum) and Digest editors placed it at the very beginning of Chapter II of Book XX-III under the title De rito nuptiarum. The said definition is as follows: Nuptiae sunt coniunctio maris et feminae et consortium omnis vitae, divini et humani iuris communicatio, i.e. marriage is a conjunction of a man and woman, a lifelog union, an institution of divine and human law.21 In Justinian’s Institutions there is a similar definition: Nuptiae autem sive matrimonium est viri et mulieris coniunctio, individuam consuetudinem vitae continens, i.e. marriage is a conjunction of a husband and a wife, created to last for life.22 The definition of Ulpianus found in Book L of Digest, Chapter XVII entitled De diversis regulis iuris antiqui, also demonstrates the Roman idea of marriage: Nuptias non concubitus, sed consensus facit, i. e. the essence of marriage is not sexual relation but consent [to live in matrimony].23

Πρόχειρος Νόμος accepted Modestinus’ definition and translated it into Greek: Γάμος έστιν άνδρὸς καὶ γυναῖκος συνάφεια καὶ συγκλήρωσις πάσης ζωῆς, θείου τε καὶ άνθρωπινοῦ δικαίου κοινωνία.24 As we can see the text is literally translated and fully corresponds to the Roman concept, that marriage is a social fact, not a civil-law relation. It is interesting that neither Procheiron nor Ecloga, that preceded it, insisted on the formal proceedings of a wedding as the exclusive requirement for marriage,
which one could have considered as usual in Orthodox Byzantium. But later on, laws that were passed during the rule of Macedonian dynasty introduced innovations and inserted what was “omitted” by editors of Procheirion. Editors of Epanagoge/Eisagoge amended Modestinus’ definition of marriage by omitting the wording θείου τε καὶ ἀνθρωπίνου δικαίου κοινωνία, and by inserting the words είτε δι’ εὐλογίας είτε δι’ αὐτής στεφανωματος ή δι’ αὐτής συμβολαίου, meaning that the marriage is to be effected either by a wedding ceremony, or a blessing or literal contract. So, a wedding ceremony, blessing and secular contract were considered equal. Leo VI proceeded one step forward and his Novel 89 (issued 893) prescribed Church benediction (ἐυλογία) as an obligatory form of entering into such a contract.

The editors of Serbian legal miscellanies accepted Byzantine translations of Roman definitions of marriage. Nomokanon of St. Sava incorporated Modestinus’ definition of marriage, which had been taken from Procheirion (like the other provisions about marriage). Here is the Serbian original: Brak jest muževi i žene sčetanie i sbitije v vsej žizni. Božestvijež i človečeski pravdi obštenie. Matheas Blastar, like the translators of his Syntagma into the Serbian language, took a modified Modestinus’ definition of marriage from Epanagoge/Eisagoge, which is in Serbian as follows: Brak jest muža i ženi svekupljenije i snasledie v vsej žizni, božestvenije že i človečeskije pravini priobštenije, ljubo blagoslovenijem, ljubo venčanijem, ljubo s zapisanijem. The definition from the 9th century, which equalised a laic contract with blessing and marriage, was considered obsolete by the 14th century. Neither Matheas Blastar nor his Serbian translators incorporated in Syntagma Novels of Byzantine Emperors that required religious rites for marriage. The editors of the Law Code of

25 Chapter two of Ecloga entitled Περὶ γάμων ἐπιτετραμμένων καὶ κεκωλυμένων, πρώτου καὶ δευτέρου, ἐγγράφου καὶ ἀγγράφου, καὶ λύσεως αὐτῶν (On allowed marriages and marriage impediments, first and second, literal and without a chart, and on their dissolution) starts with following words: Συνίσταται γάμος χριστιανων, είτε ἐγγράφως είτε ἀγγράφως, μεταξύ ἁνδρός καὶ γυναῖκος τοῦ εἶναι τὴν ἥλικιν πρὸς συνάφειαν ἡμισυμμηνήν, τοῦ μὲν ἁνδρός ἀπὸ πεντεκαιδεκαετοῦς χρόνου, τῆς δὲ γυναικοῦ ἀπὸ τρισεκαδεκαετοῦς χρόνου, ἀμφοτέρων θελόντων μετὰ τῆς τῶν γονέων συναινέσεως (Marriage for Christians is either in written or in unwritten form, it is between a male and a female when they both reach the age of puberty, i.e. male from 15 and female from 13, with their acceptance and consent of parents). Ecloga II, 1, ed. L. Burgmann, Ecloga, das Gesetzbuch Leons III und Konstantinos V, Forschungen zur byzantinischen Rechtsgeschichte, Band 10. Frankfurt am Main 1983, 170. It is obvious that among the requirement for marriage neither formal proceedings of the wedding, nor religious ceremony were mentioned.


28 Ed. Dučić, 256; ed. Petrović, 270 b.

29 Ed. Novaković, 160. Although Matheas Blastar took over definition of Modestinus from Epanagoge/Eisagoge, he did not omit words θείου τε καὶ ἀνθρωπίνου δικαίου κοινωνία, which was done by the editors of Epanagoge/Eisagoge.
Stefan Dushan corrected Blastars’ “mistake” by putting articles 2 and 3 of the Code into full conformity with the Novels of Byzantine Emperors and with religious practice. We are going to quote them in a whole:

Article 2: Lords and other people may not marry without the blessing of their own archpriest or of such cleric as the archpriest shall appoint. (Vlastele i proči ljudi da se ne žene ne blagoslovivši se u svojega arhijereja, ali u teh-zi da se blagoslove koje su izbrali duhovniki arhijereji).

Article 3: No Wedding may take place without the crowning, and if it be done without the blessing and permission of the Church, then let it be dissolved (I nijedna svadba da se ne učini bez venčanija; ako li se učini bez blagoslovenija i uprošenija crkve, takovi da se razluče).30

The old Roman concept of marriage as a laic contract finally disappeared by those articles of Dushan’s Law Code, and the Christian concept of marriage as a religious secret prevailed and was fully accepted.