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LEGAL TRANSPLANTS AND THE CODE OF SERBIAN TSAR STEPHAN DUSHAN

– A Comparative Study –

by

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Preface

This paper grew out of a series of discourses and classes conducted by Prof. Dr. Sima Avramović, Chair at the University of Belgrade School of Law. I am also grateful to the people who have assisted me in the preparation for this study. I would like to thank Prof. Dr. Oliver Antić and Prof. Dr. Saša Bovan for introducing me to various concepts of legal convergence as well as for their ideas and valuable guidance. I am especially grateful to Prof. Dr. Alan Watson, Ernest P. Rogers Chair at the University of Georgia School of Law and *doctor honoris causa* at the University of Belgrade, who's oeuvre and curriculum at our university gave me the initial impulse to explore the multifaceted nature of legal transplants.

Abstract

This Comparative Study investigates the spontaneous convergence of law in the cultural and social milieu of medieval Serbia under the reign of Tsar Stephan Urosh IV Dushan (1331–1355). It argues that legal transplants, as a means of this convergence in the Code of Dushan, constitute a fruitful source of medieval Serbia's legal development. The process of legal transplantation has long been the subject of a polarized debate in international academic circles and has generated opposing approaches to the transfer of legal regulations or entire systems of law from one country to another. The approach to diffusion herein comprises a synthesis of multiple methodologies of comparative law (and jurisprudence on the whole) supplemented with the routes of non-legal disciplines. Such interdisciplinary approach facilitates an exhaustive insight into legal transplants and their applicability as a concept of legal development. This Comparative Study offers a systematic rationalization for legal transplants in Middle-age Serbia and draws some general tendencies with regard to the overall diffusion of law.

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Introduction

In the 1970's, Scottish-American legal historian and Romanist Alan Watson[1] developed a diffusionism-based concept, according to which most changes in most legal systems occur as the result of borrowing, and therefore perceives transplanting to be the most fertile source of legal development. He originated the term "legal transplants" to designate the moving of a rule or a system of law from one country to another (*Legal Transplants: An Approach to Comparative Law,* Edinburgh, 1974).

No reader who is seeking for a consensus on the question of sustaining the argumentation of the "legal transplants" concept will find it here. The objective of this Comparative Study is to reveal the applicability of this model concerning the legislation of Serbian emperor Stephan Dushan in the 14th century. A synthesis of comparative, analytical and teleological methodology, with a sociolegal approach, turned out to be the most productive to gain a deeper insight into the phenomenon of legal transplants and their multifaceted background.

Regardless of widespread academic debates on the sustainability of legal transplants as a source of legal development,[2] they are common practice. However, the extents to which innovative written statutory laws and legal institutions are encouraged by alien paradigms often differ. Another major focal point is the question whether imported laws and institutions do comply with a specific local context.

Analyses of legal transplants in Stephan Dushan's legislation as well as strategic correlations of legal, sociological and anthropological aspects enable us to

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[1] Alan Watson, distinguished Research Professor and Ernest P. Rogers Chair at the University of Georgia School of Law, is regarded as one of the world's foremost authorities on Roman law, comparative law, legal history, and law and religion. A prolific scholar and master of more than a dozen languages, Watson has nearly 150 books and articles to his credit. He regularly serves as a distinguished lecturer at leading universities both in the United States and internationally. (www.law.uga.edu/academics/profiles/awatson.html)

[2] See, e.g., Alan Watson, *Legal Transplants: An Approach to Comparative Law*. 2nd Ed. Athens, Georgia, 1993; see also Pierre Legrand, *The Impossibility of "Legal Transplants,"* 4 Maastricht J. European & Comp. L. 111, 1997; William Ewald, *Comparative Jurisprudence (II): The Logic of Legal Transplants*, 43 American J. Comp. Law, 1995; David Westbrook, *Theorizing the Diffusion of Law: Conceptual Difficulties, Unstable Imaginations, and the Effort To Think Gracefully Nonetheless*, Harvard International Law Journal, Vol. 47, No. 2, 2006; William Twining. *Diffusion of Law: A Global Perspective*. J. Legal Pluralism 1–45, Vol. 49. For further readings, refer to the Bibliography.

recognize whether it is possible to apply this concept universally. The means of such methodology provide us with the capability of undertaking the challenge to substantiate this universality via inductive analysis and the methods of contemporary comparative legal history.

The sociolegal approach to legal transplants appears not only applicable, but also exceptionally results-oriented. With the purpose of gaining a full understanding of legal transplantation, it is essential to perceive as well as analyze this phenomenon from a perspective transcending the limits of pure comparativism. Furthermore, this approach leads us to the ultimate causes of legal transplants, in addition to identifying their material sources, genesis and other pertinent factors.

Prominent Slavist and Byzantologist at the University of Belgrade, Alexander Soloviev[3] so well noticed: "Stephan Dushan aspired to create a centralized state with a sovereign and mighty monarchic rule, but with the respect for the principle of objective legality as a common rule. It actually had been an old ideal, found in the most valuable principles of Southern Roman-Byzantine law. But this ideal was something entirely new in Northern Europe of the 14th century."[4] In an attempt to achieve this old ideal, the Serbian legislator must have been led by the precious principles of Roman-Byzantine law. Soloviev's observation seems to point in the direction of a wide sphere of diffusion and legal transplants from Roman-Byzantine to Serbian medieval law.

This paper seeks to further develop as well as analyze such and other observations, and accordingly draw conclusions relevant to the notion of legal transplants and its applicability in the Serbo-Greek Empire of the 14th century.

[3] Alexander Soloviev (1890–1971) was a prominent Slavist and Byzantologist, researcher of heraldry, philately, archeology, professor of Slavic and Roman-Byzantine law at the Universities of Belgrade and Sarajevo. Soloviev came to Yugoslavia from Russia in the 1920s with tens of thousands of other Russian immigrants. He also lived in Lvov, Poland (today in Ukraine) in the years preceding World War II. Following the communist takeover in Yugoslavia, both he and his wife were arrested and exiled from the country in 1949. He became the professor of Slavic studies at the University of Geneva (1951–1961). Soloviev has written dozens of studies on the Code of Dushan and Serbian medieval law.

[4] Sołowiew A., *Statuty Cara Stefana Duszana*, Lwów: Nakład Towarzystwa Naukowego, Drukarnia Uniwerzytetu Jagiellońskiego, 1939, p. 39

Sociolegal Approach to Legal Transplants

Pertaining to his approach to legal transplantation, Alan Watson states: "No attempt has been made to formulate a precise sociology of transplants: such an approach might be as doomed to failure as the theories of a particular pattern of development inherent in early systems of law."[5] Such attempt is neither undertaken here. A precise sociology of legal transplants would unconditionally lead to one anthropological (or other) school of thought and devalue all other pertinent factors. This would result in a deceptive and antagonistic perception of legal diffusion. It is more constructive to position the phenomenon of transplantation in a wider context instead. Legal transplants, as a social occurrence, require an interdisciplinary approach comprised of sociological, anthropological, historical and psychological methods. Once we set them in such a broadened context, we are enabled to apply the methods of comparative law to draw conclusions pertinent to the legal nature of this largely legal phenomenon. Such sociolegal approach makes it possible to acquire a consistent insight into the fundamental nature of legal transplants.

The laws of one nation are often regarded as the embodiment of its identity, tradition and cultural heritage, as well as its historical and social circumstances as an all-encompassing entity. On the other hand, since the ancient times legal transplants have been the vital, indispensable and one of the most common sources of one legal system's foundation and sustainable development. These two prerequisites may give the first impression of being contradictory, and therefore it is of crucial importance to perceive them from an interdisciplinary point of view.

The standpoint, which is based on the historical and social determination of one people's legal system, is a product of the 19th-century Romanticism and was advocated by Friedrich Carl von Savigny, German jurist and legal scholar who was one of the founders of the historical school of jurisprudence (accompanied by Romanists Hugo and Puchta). Savigny's jurisprudential standpoint was to some extent inspired by Romanticism, which appeared in form of a movement inspired by the

[5] Watson A., *Legal Transplants: An Approach to Comparative Law.* 2nd Ed. Athens, Georgia: The University of Georgia Press, 1993, pp. 102ff [hereinafter: Watson A., *Legal Transplants*]

origins of the German people and their distinctive ethos, or Volksgeist ("the spirit of a people"). Savigny claimed that language, behavior, customs and the constitution are nothing other than expressions of national awareness, which he regarded as the Volksgeist. Law is to be seen as the expression of the convictions of the people, in the same way as language, customs and practices are expressions of the people. In this manner, Savigny claimed law is not formed by individuals themselves, but is a creation of this existing and acting "spirit of a people" being immanent in each individual's consciousness.[6] On the one hand, this reveals that law is not only a product of common sense, but also importantly an extract of one nation's historical background. However, "Savigny's emphasis on the need of legal change to respect the continuity of the Volksgeist offers a pre-Darwinian concept of juristic evolution. The Volksgeist corresponds to modern notions of social rather than biological inheritance. Savigny's sense of the impotence of legislatures in the face of the restraints imposed by the Volksgeist foreshadows modern recognition of the social and psychological limits of effective legal action."[7] Windscheid and Dernburg continued Savigny's Romanist vein, leading to the "Pandektenwißenshaft".[8]

It is common that more or less every legal system originates either from Roman civil law or from the common law family. As maintained by a number of scholars, this is to be seen from the perspective of acculturation. Such approach derives from contemporary anthropological theories, strongly supported by Robert H. Lowie. According to Lowie, all cultures develop spontaneously via interpersonal communication and social interactions.[9] Transplants – not only legal but also others – appear in consequence of this cultural interaction.

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[6] "Wo wir zuerst urkundliche Geschichte finden, hat das bürgerliche Recht schon einen bestimmten Charakter, dem Volk eigentümlich, so wie seine Sprache, Sitte, Verfassung. Ja, diese Erscheinungen haben kein abgesondertes Dasein, es sind nur einzelne Kräfte und Tätigkeiten des einen Volkes, in der Natur untrennbar verbunden, und nur unserer Betrachtung als besondere Eigenschaften erscheinend. Was sie zu einem Ganzen verknüpft, ist die gemeinsame Überzeugung des Volkes, das gleiche Gefühl innerer Notwendigkeit, welches allen Gedanken an zufällige und willkürliche Entstehung ausschließt." (Savigny F. C., *Entstehnung des posivtiven Rechts,* Berlin, 1814, pp. 75–80 in Wolf E., *Grundgedanken der Historischen Rechtsschule*, Frankfurt am Main: Vittorio Klostermann, 1965, p. 3).

[7] "law, philosophy of." Encyclopædia Britannica. 2006. Encyclopædia Britannica Online. 27 Nov. 2006 <http://secure.britannica.com/eb/article-36352>.

[8] Cf. Watson A., *Op cit.*, p. 21

[9] Votson A., *Pravni transplanti*, Beograd: Pravni fakultet: 2000, p. 49

However, what does the term "legal transplants" in reality mean? What is the difference, or more specifically, is there any distinction between legal transplants, legal acculturation, diffusion, reception, transfer or import and export of laws? Are all of theses expressions only synonyms or a distinctive technical terminology? Although Alan Watson was the first to focus on these legal phenomena and explore their traits and qualities systematically, the concept of transplants – cultural as well as legal – has its roots in the 19th century.

J. V. Powell coined an interrelated expression, "acculturation", with the purpose of describing the transformation of primitive societies and their evolution to civilized communities via cross-cultural imitation.[10] Subsequently, this phrase acquired a somewhat broadened meaning. It referred to the overall upgrading and development of one culture upon another. While every system of law typifies a vital constituent of each culture, its written laws are nevertheless supposed to play an active role in this comprehensive upgrading process.

In the modern sense of the term, as stated by Norwegian psychologist Floyd Rudmin, "Acculturation refers to the processes by which individuals, families, communities, and societies react to intercultural contact. Advances in communication and transportation technologies, and increasing migration pressures due to demographic, economic, environmental, human rights, and security disparities, make acculturation one of the most important topics for applied research in cross-cultural psychology."[11] Apart from being applied in modern cross-cultural psychology, the topic of acculturation is also vital for the advancement of other social studies.

Jean Carrbonier, for instance, insists on a clear distinction between legal acculturation and reception. He argues that acculturation occurs only when one legal institution or only one law is transferred from one legal system to another, whereas

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[10] J. W. Powell is accredited for inventing the term 'acculturation' in he's 1880 report from the Bureau of American Ethnography on changes in Native American languages (Oxford Dictionary, 1989). In 1883, Powell explained that 'acculturation' refers to the psychological changes induced by cross-cultural imitation. W. J. McGee, his colleague at the Bureau of American Ethnology, defined 'acculturation' to be the processes of exchange and mutual improvement by which societies advance from savagery, to barbarism, to civilization, to enlightenment. (Rudmin, F. W. *Catalogue of acculturation constructs: Descriptions of 126 taxonomies, 1918-2003*. In W. J. Lonner, D. L. Dinnel, S. A. Hayes, & D. N. Sattler, *Online Readings in Psychology and Culture* (Unit 8, Chapter 8), (http://www.wwu.edu/~culture), Center for Cross-Cultural Research, Western Washington University, Bellingham, Washing ton, 2003)

[11] Rudmin, F. W., *Ibid*.

reception refers to adopting one entire legal system en bloc.[12] Some Serbian writers, as for instance Bozilovich,[13] take advantage of the term "legal acculturation" in the sense of reception, what – as maintained by others – can lead to linguistic misinterpretation. Nonetheless, the usage of this term with this nuance is justifiable on linguistic grounds and provided with a coherent raison d'être. Specifically, the universal meaning of acculturation is the adoption and assimilation of a foreign culture. If acculturation were present in the legal sphere, why would it not follow that we are facing the process of adoption and assimilation of a foreign legal system, whether partially or as a whole? In view of that, legal acculturation refers to both reception and legal transplants (and the overall diffusion of law).

Gabriel de Tarde established the theoretical basics of legal acculturation in his book "The Laws of Imitation" (1895). Not only did he insist on imitation as the main source of criminal behavior, but also expanded his theoretical foci on other social phenomena including legal regulations (laws, concepts and institutions).[14] He pointed out that imitation is the central principal of social organization and social relationships, and attempted to introduce the overall history of humankind as a process of imitations and counter-imitations of diverse developments. Tarde's standpoint served as a unique basis for related sociolegal theories, deriving from the diffusionism school of thought.

Diffusionism is an effort to perceive cultures in terms of the origin of their qualities and expansion from one society to another, i.e., "transplantation" of a cultural aspect from its place of origin elsewhere. There are many types of the diffusionist concept, including heliocentric diffusion, which argues that all cultures originate from one cultural center. As a perception, cultural circles are more coherent, claiming that cultures originated from a limited number of cultural centers. There is also a variety of diffusionist beliefs claiming each society is influenced by others.

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[12] Karbonije Ž., *Pravna Sociologija.* Sremski Karlovci; Novi Sad: Izdavačka knjižarnica Zorana Stojanovića, 1992, pp. 192–200

[13] Božilović N., *Globalizacija kao nova akulturacija* u Mitrović Lj. et al., *Globalizacija, akulturacija i identitet na Balkanu*, Niš: Institut za sociologiju Filozofskog fakulteta Univerziteta u Nišu i Punta, 2002, pp. 217–230ff

[14] Tarde G., *The Laws of Imitation*. 2nd Ed. Gloucester, Mass.: Peter Smith, 1962; See also Tarde G., *Social Laws: An Outline of Sociology*, Translated from the French by Howard C. Warren. Kitchener, Ontario: Batoche Books Limited, 2001.

Diffusionist studies originated in the middle of the 19th century as a means of understanding the nature of the distribution of human culture across the world. [15]

Lowie's aforementioned anthropological theory is a good model of the diffusionist perception. Lowie so well states, "Cultures mostly develop through transplants that occur in the moment of their spontaneous contact. Our civilization is, more than the others, a complex of borrowed characteristics. The individual course of events that made that complex civilization structure the way it is cannot be applied as a general plan for the development of the other cultures. That means that a concept implicating that certain nation always has to pass through certain chapters of our history before it arrives to some level of development, is not sustainable any more."[16]

Contemporary legal theory comprises two major approaches with regard to this matter. One of them, rooted in a sociological approach, claims national laws are nothing other than the mirror image of the people who constitute a nation.[17] This thesis, although being undersupplied with arguments in some of its aspects, does not exclude legal acculturation. If the legal system of one nation meets the criteria of justice and legitimacy both formally and in practice, such assertion could be conditionally accepted. This is because one system of legal regulations develops upon one nation's culture, customs and other relevant social phenomena. When sanctioned, these phenomena embody the mirror image of one nation. So therefore, once a nation is exposed to acculturation, its legal system is undergoing legal acculturation, i.e., it is acquiring a multiplicity of legal transplants.

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[15] Diffusion is the process by which one culture's attributes are transferred from one society to another, through migration, war, trade, or other intercultural interactions. During the mid-20th century studies of acculturation and cultural patterning replaced diffusion as the focus of anthropological research. Acculturation is the process of systematic cultural alteration in a society introduced by cross-cultural imitations. This change is brought under conditions of direct contact between individuals of each society. The concept of legal transplants is both acculturation- and diffusionism-based, and is permanently being developed towards a broader context, overcoming one anthropological standpoint.

[16] Lowie R. H., *Primitive Society.* 2nd Ed. New York: Liveright Publishing Corporation, 1947., p. 440

[17] Cf. supra, p. 4. Such attitude is analogous to Savigny's Volksgeist and Volksrecht, i.e., it is possible to perceive this point of view as its derivative or an effort to apply it as a deductive logic.

The second approach is based on the convergence theory,[18] whose foundations were established by Max Weber. Weber was the first to apply the convergence notion of social alterations in a legal context. His general orientation appears being individualistic and nominalistic though: Weber perceives law as an intellectual creation of jurisprudents, a reflective formation that does not depend on any social and historical background. He divided the development of law into four periods, and in each of them written statutory laws were created either by exceptional individuals, prophets, theologians[19] and professional jurisprudents, or by teams of these "experts". Laws were their personal creation – and not the creation of the society. It is apparent that Weber overemphasizes the subjective aspect of the legislative process and devalues the objective social circumstances. Perhaps that is the explanation why Weber appreciated the Roman laws that much, considering them sufficiently abstract to be applied in almost any society, regardless of its Volksgeist, cultural heritage, customs and other attributes.[20]

The convergence theory-based and sociologically rooted standpoints appear to be too prejudiced and consequently can be misleading when accepted a priori. Therefore, a combined and reciprocating approach appears to be the most constructive. The sociological approach encloses its initial hypothesis, which designates law as the embodiment of one nation. It appears that legal transplants can be excluded from this perspective as a possibility, i.e., if we facing the mirror image of a nation, some foreign body incorporated in this image can cause the image not reflect the nation any longer. In this sense, this counterthesis indicates the negation of legal transplants as a phenomenon. Assertions that legal transplants do not exist, functionally and logically do not have a justifiable line of reasoning. That would ultimately denote that discrete cultures have never interacted, that the underdeveloped

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[18] The viewpoint that societies shift (converge, come together) in the direction of a state of similarity, is a general characteristic of multiple theories of social alteration. The idea that distinctions among societies will decrease in due course can be found in many works of 18th and 19th century social theorists, from the pre-Revolutionary French philosophers through Marx, Spencer, Weber and Durkheim. The contemporary perception of convergence is that as nations achieve similar levels of economic development they will become more alike in terms of these (and other) aspects of social life.

[19]Theologians, priests and prophets played the role of lawgivers in all legal systems that were tightly connected with religion. For example, the legal systems of Moslem world are based on the words of Mohamed, the prophet of Allah. Another example are the Jewish traditional laws based on Torah.

[20] Stanković J., *Osnovi opšte sociologije prava, II deo – stvaranje prava*, Beograd, 1998, pp. 248f

societies have never attempted to evolve through imitation of the developed, and lastly that there has never been any progress in the history of humankind. Legal transplants therefore also became a subject of debate in current studies of economics. Some economists argue that the ability successfully to adapt transplanted law to local conditions has a major impact on economic development. Recent comparative economics and institutional analysis have experienced an interest focusing on efficiency of legal systems, consequences of transplantation and the politics of institutional design.[21]

More than ever, from a contemporary point of view, the denial of legal transplants turned out to be terribly unsustainable. Increased international and intercontinental trade, advanced means of communication, globalized international politics, as well as other factors of intercultural interactions being greater than ever before, facilitated the further development of legal transplants and the overall diffusion of law in the 21st century. Following this basis, as an inductive logic, the qualitative development of legal transplants (and diffusion on the whole) in the course of history is proportionate to the development of the societies being included in the legal transplantation process, whereas the quantitative development is conditioned by the degree of social interactions. Both qualitative and quantitative constituents are reciprocating though, i.e., an underdeveloped society with an inferior degree of cross-cultural interactions cannot reflect a high quantitative component and vice versa. In technical terms, however, it is certain that transplanted laws have to be compatible with the demands of the society or else will not be applied in practice.

[21] "A major step forward was taken with the hypothesis, (see, especially, Mattei and Pulitini, 1991; Mattei, 1994; Ogus, 1999) that competition between the suppliers of legal rules will significantly influence the evolution of law. If domestic industries competing in international markets and that their national legal system imposes on them higher costs than those incurred by their foreign competitors operating under a different jurisdiction, they will apply pressure on their lawmakers to reduce the costs. That demand will be strengthened by the threat of migration to the more favorable jurisdiction, assuming that there are not barriers to the freedom of establishment and to the movement of capital. Also to the extent that this is allowed by the private international law of their home jurisdiction, firms may be able to select the jurisdiction whose principles are to apply to their transactions or business. As regards supply, lawmakers are likely to respond positively to the demand from domestic industries because pressure by the latter can have a decisive influence on politicians' behavior. Lawmakers will also be motivated, particularly in small countries heavily dependent on international trade, to attract firms from other jurisdictions and multinational corporations since that should entail increased investment, demand for labor and tax revenue." (Garoupa, Nuno M. and Ogus, Anthony I., *A Strategic Interpretation of Legal Transplants*, 2003, pp. 3–4. CEPR Discussion Paper No. 4123. Available at SSRN: http://ssrn.com/abstract=480744)

Furthermore, legal transplants of the modern world are likely to dissolve in the melting pot of diffusion of law as a broad-spectrum tendency. In actual fact, they represent its legal source without which diffusion could not be even imagined. Legal transplants – as a technical constituent – are immanent in the diffusion of law. Other material sources of diffusion are related to social alterations, domestic and international politics, economic changes, and other factors relevant to the development of a society. American scholar David A. Westbrook developed a reciprocal correlation between diffusion of law and globalization as the transformation of new contexts and social spaces. "The words 'diffusion' and 'globalization' share something important. In ordinary usage, 'diffusion' means the spread of one liquid throughout a second liquid, thereby transforming the character of both. Imagine cream poured into coffee in one of those clear glass mugs that were so popular a few years back; where there had been two substances, there is a wonderful swirling and billowing, but soon there is one glass, full of a uniform liquid. The phrase 'diffusion of law' suggests that laws similarly will lose their identities and be folded into an amorphous mass, just like the coffee and cream. Diffusion suggests the fear of, to use another milky word, homogenization; the fear that our legal system, and by implication our culture, will lose whatever it is that makes it special."[22]

Although not a protagonist of comparativism, Westbrook draws some vindicated conclusions with regard to legal patterning. Namely, he is pragmatically critical of reasoning too much in geographical terms. His paper broadens the vision of diffusion within globalization and authority by drawing four models, which lead to the imagination of tomorrow's global society: imperium, fashion, system, and tribe. Westbrook's concept of diffusion is attempting to overwhelm the illusions of law being exclusively linked to the territorial state and to understand this process as a latent consequence of altering conditions in a society.[23] English scholar William Twining, who teaches a course "Globalization and Law" at the Oxford College University, commented on Westbrook. "Westbrook talks of global society, the 'City

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[22] Westbrook D., *Theorizing the Diffusion of Law: Conceptual Difficulties, Unstable Imaginations, and the Effort To Think Gracefully Nonetheless*, Harvard International Law Journal, Vol. 47, No. 2, Summer 2006, pp. 490–491

[23] For further details see Westbrook D., *Op. cit.*; cf. Twining W., *Diffusion and Globalization Discourse*, Harv. Int'l L.J., Vol. 47, No. 2, 2006, pp. 507–515 (work in response to Westbrook's paper)

of Gold', global culture, and global politics as unities. He regularly sets the global and the local in counterpoint; he recognizes, but does not stress, that most forms of legal relations and ordering take place at sub-global levels; and he tends to see diffusion of law as something happening mainly between state legal systems and countries. I am uneasy about this totalizing tendency, despite his disclaimers."[24] Twining's point of view effectively follows the deep-rooted comparativist vein. Both Westbrook's and Twining's standpoints reflect the same idea though; Twining simply remarks that Westbrook does not stress sub-global levels of diffusion, i.e., holds the geographical component in low esteem. Westbrook, however, is correct when he warns of legal diffusion within globalization leaving less space for comparativism.[25]

As Alan Watson states, transplantation of certain legal regulations and institutions has always been exceptionally common – not only in the ancient times, but through the whole course of history. Transplantation and diffusion of law largely remain the nucleus of legal development. The preponderance of transformations and innovations in the developed systems would never have occurred if there had not been any legal transplants. Owing to the strength and openness of acculturation as a latent, easy and often imperceptible process, legal transplants have always been incredibly accepted. The laws merely travel from one system to another without major barriers, and there is no field in both private and public law that is effectively resistant to such alien influence. Furthermore, legal transplants easily integrate into one system even when they come from a completely different environment.[26]

When transplanting legal regulations, however, it is crucial for the legislative body to apply appropriate methods of legal interpretation,[27] ensuring compliance with the importing system of law and a variety of other social and cultural factors. It is important to emphasize that the legal outcome of such incorporation does not always

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[24] Twining W., *Op. cit.*, p. 508ff

[25] This reasoning directly follows the discourse on qualitative and quantitative development of diffusion and the reciprocal correlation between the two constituents. See pp. 8–9

[26] Watson A., *Legal Transplants*, p. 144

[27] The purpose of interpretation of law is to identify the legal sense in the meaning of a rule. Without legal interpretation, a law or institution cannot be successfully transplanted into an other system of law. The foremost methods of legal interpretation include the following: grammatical, logical, systematic, historical, teleological, and analogy. These methods facilitate the incorporation of new legal regulations or institutions into a system of law. It is also of crucial importance to take the advantage of these methods when identifying and analyzing legal transplants in a specific context.

reflect the judicial practice and interpretation of the donor system. This can occur due to misinterpretation or not ensuring compliance with the beneficiary legal system. Changes in the law and discrete interpretation, however, more commonly result in a positive impact on the system of law. This is typically the case due to the need to adjust it to comply with the system of law and the needs of the society. "A voluntary reception or transplant almost always – always in case of a major transplant – involves a change in the law, which can be due to any number of factors, such as climate, economic conditions, religious outlook, or even chance largely unconnected either with particular factors operating with the society as a whole or with the general historical trend. Speaking broadly though, if one were trying to discover the 'Spirit of a People' from its law one should look not to the overall system but to the details where it diverges from other systems."[28]

When transplanting laws deliberately, legal transplants set off some elementary questions that have to be foreseen before implementing the transplantation process. Some of these include the following: Will the law, concept or institution be accepted in practice? Should it be modified to facilitate a consistent integration? Will it be incorporated ad semper and what are the odds that it will be rejected after some time? Will it be accepted only officially or will it be conformed effectively? Lastly, what will be the legal consequences of the transplantation on the receiving system? It is recognized that even in cases where a written statutory law (institution or legal concept) is identical within two countries, its judicial interpretation may differ due to the difference in legal tradition and practice in each country. The same factors are also compelling with regard to legal transplants being successful, which are unavoidable and have been the main factor in legal change though the whole course of history.

[28] See Watson A., *Legal Transplants*, p. 97

Historical Legal Context and Diffusion

When Stephan Dushan succeeded to the throne in 1331, the social and political circumstances of the Balkans' territories encompassed a multiplicity of alterations in various spheres, including socioeconomic, military and other pertinent factors. The glory of the mighty and irresistible thousand-year-old Byzantine Empire was fading in its agony. Once almighty, it was now on the verge of decline. In view of that, young Serbian king Stephan Dushan, the son of Stephan of Dechani, undertook the efforts to replace its remains with the rising Serbo-Greek realm. Following his enthronement, Dushan significantly expanded his territories. The Serbian land soon covered Thessaly, Epirus, Macedonia, all of modern Albania and Montenegro, a part of Bosnia, and modern Serbia to the Danube. To the present day, the Serbs consider the empire of Dushan as the Golden Age of their nation and refer to him with the epithet "Dushan the Mighty".

"Dushan's Code appeared in the times when the strengthened Serbian state entered the arena of major international politics, when its ruler – from the modest Serbian king – became the Emperor of Serbs and Greeks (Βασιλευς καί αύτοκράτωρ Σερβίας καί ΄Ρωμανίας). The new political formation brought about serious legislative work."[29] The reign of Stephan Urosh IV Dushan (1331–1355) is a time of undoubted hegemony of Serbs in the Balkans. Stephan Dushan had a clear objective to position his state as a leader in the entire region. His goal was to develop a state that will be much larger than the old Serbian national state. "But he does not bother much about the 'Yugoslav idea' – the idea of uniting all Southern Slavs, divided between Serbia, Bosnia, Croatia and Dalmatia."[30] This idea could not have been prosperous by that time, given that the religious ties were much stronger than the ethnic were. In the 14th century, it was much easier to develop a multinational state, united through one confession of faith.[31]

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[29] Sołowiew A., *Statuty Cara Stefana Duszana*, Lwów, 1939, p. 7

[30] *Ibid*.

[31] For instance, the durability of the Polish-Lithuanian kingdom as a single state – united in 1385 – was made possible owing to their shared Roman Catholic religious convictions. The Roman-Byzantine Empire also embodies such model, taking into account the multiethnicity of the Byzantine population.

Owing to his military successes with numerous conquered territories, Tsar[32] Dushan acquired the reputation as one of the greatest medieval European emperors. Regardless of the supremacy of the empire on the battlefield, the Serbian culture, art and law were almost entirely under the Byzantine influence.

Preceding Dushan, the first waves of Byzantinization took place during the reign of Stephan Nemanja. Owing to his political convictions, the Roman Catholic influences were strongly rejected, whereas the authority of the Orthodox Church and the Byzantine culture became stronger and stronger.[33] Nemanja's sons, Stephan of Dechani and Saint Sava, reaffirmed its significance. Due to the lack of sufficient evidence, it is not entirely certain how strong the Byzantine influence actually was in Serbia throughout the 13th century. However, there is no doubt that it was overwhelming in the regions that once used to belong to the Byzantine Empire and latter became a part of the Serbian state. Soloviev points out that king Milutin – the first Serbian ruler to conquer so many lands, which were under significant Byzantine cultural and legal influence – did not adjust the laws of the conquered Greek territories as well. In addition, Milutin simply confirmed the charters and the chrisobulls of the Byzantine emperors referring to them "the holy and the true-believing emperors" (**светыχ и правовѣр´ныχ царь**), what reveals the deep respect that Milutin gained for the Byzantine rulers. For example, one Milutin's charter dating back to 1300 establishes new legal institutions, but also contains some fragments that are nothing other than transplants of the Byzantine charters.

"By overtaking Southern Macedonia and entering deeper and deeper into Greek areas, the Serbs were increasingly being exposed to the influence of Greek culture. Its domination built upon its rich tradition was present in every aspect of life. In the ancient times, it was adopted by the great and victorious Roman Empire, so why would it not influence the rough Balkan Slavs. It appears that the Byzantinization of Serbs started in the 14th century and first struck the court and higher society."[34] It

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[32] In the European medieval sense of the term, *tsar* was a ruler who has the same rank as a Roman or Byzantine emperor. The word *tsar* (**царь**) is a contraction of *tsesar* (**цѣсарь**), derived from the Roman title *Caesar*, but not from its Byzantine derivative *Kaisar* (Καίσαρ). The title Tsar was also used in Serbia by two monarchs – Stephan Urosh IV Dushan and Stephan Urosh V between 1345 and 1371.

[33] See Solovjev A., *Zakonik Cara Stefana Dušana 1349 i 1354*, Beograd, 1960, p. 62 [hereinafter: Solovjev A., *Zakonik Cara Stefana Dušana*]

[34] Ćorović V., *Istorija Srba*, Niš: Zograf, 2004, p. 205

is noteworthy that the acceptance of Christianity was of crucial importance for the legal history of Slavic people. Christianity brought new social values, including different aspects of moral, political and family relations. "In the 13th and 14th century, Christian culture finally and definitely pressed out the pagan remains. Along with religion, came up the laws. The most significant certainly were the church regulations that also referred to the law of marriage[35] and family law."[36]

The first written legal source of Byzantine origin was used in Serbia at the beginning of the 13th century. After the proclamation of the autocephaly of the Serbian Orthodox Church in 1219, St. Sava issued Patriarch Photius' Nomocanon[37]. In the Nomocanon of Saint Sava (Кръмчїа), the most significant sections were canonic regulations (canons), transplanted from Procheiros Nomos, a Byzantine law collection enacted by Emperor Basil I the Macedonian,[38] and the Code of Justinian.[39] Nevertheless, the Nomocanon did not comprise only church, but also numerous civil regulations. Saint Sava's Nomocanon also included various regulations that had little to do with the church (e.g., a part of Justinian's Novellae).

As Novakovich emphasized, the written laws – civil as well as church – must have come to Serbia initially via church. It is obvious that these laws were an integral component of religion, and therefore accepted as an unconditional authority, without any possibility of modifications and further developments. However, practice has shown that modifications are at odds, depending on what the needs of a people actually are. Novakovich also finds this very important for the history of Roman law.[40] The notion of legal transplants leads us to the certainty that almost every legal

[35] Reasonable proof of the influence of Byzantine marriage law is found in the Charter of Žiča. The Charter encloses a regulation, which imposes strict penalties for offences of the Byzantine principles of the law of marriage.

[36] Solovjev A., *Zakonik Cara Stefana Dušana*, p. 58

[37] Byzantine-originating compilations of church legislation (canons) and civil laws (Greek *nomoi*). Collections of this kind are found only in Eastern law. In form and content, they reflected a tight alliance between church and state.

[38] Basil I, called the Macedonian (Βασίλειος Α΄ο Μακεδών), c. 811 – 886, was the founder of Macedonian dynasty. His reign initiated what was probably the most glorious period of Byzantine history, a period of brilliant military success, material prosperity, and cultural development. Procheiros Nomos, as a collection of Byzantine law, initiated the revitalization of Justinian's codification and the withdrawal of common law.

[39] Krstić Dj., *Translation of the Bistritsa Transcript. Serbian Culture of the 14th Century. Volume I: Dushan's Code.* [hereinafter: *Dushan's Code*] Available at: www.dusanov-zakonik.co.yu

[40] For further details see Solovjev A., *Zakonik Cara Stefana Dušana*, p. 59

system has its roots either in Roman civil law or in common law. However, in the case of Serbian medieval legal system, this reception does not seem as transparent as it was in other systems of law. The original Roman laws seem to have been enveloped in the church regulations, hidden within canonic compilations, what makes the quest for transplants and the analysis of legal patterning in this case even more challenging. Such "via church" mode of legal transplantation is a characteristic of all systems of law in societies with a tight alliance between state and church. However, the "taking apart" of national and Roman laws was an activity of the German historical school of jurisprudence. Such approach to diffusion cannot be applicable due to the complexity of social circumstances, but the German historical school used this comparative method to achieve other objectives.

Both Serbian and Greek languages were official in the empire; for instance, Tsar Dushan wrote and signed numerous charters in Greek himself. The Byzantine style of the Palaeologus epoch became dominant in the Serbian architecture, pushing gradually out the authentic mode known as the Rashka School of Architecture. The impact of the Byzantine legal system, however, was indisputably the most significant.

Since the ancient times of the Roman Empire, one of the major imperial duties was the legislative. Dushan's colossal empire required a systematically organized administration and a strong legislative system. Therefore, one of the objectives of Tsar Dushan's codification was his justification of rule and the confirmation of his right to bear the imperial crown. By proclaiming himself the Emperor of Serbs and Greeks, Dushan achieved this ambition, demonstrated his superiority and entirely subjected the Byzantine territories to his rule.

Soloviev emphasized that the southern parts of Dushan's new empire were accustomed to complying with Greek written laws and that they legitimately continued to practice this doctrine. That was the reason why Serbian judges simply had to learn more about this particular judicial system and ensure compliance with the local legal regulations.[41] Accordingly, Tsar Dushan realized the importance of developing a unique unified legal system with the jurisdiction over the entire Serbo-Greek Empire. This idea must have been considered rather innovative from a medieval and half-feudal point of view. "Western noblemen who had conquered some

[41] See (cf.) Solovjev A., *Op. cit.*, pp. 144f

Greek (Byzantine) countries did not reason in that manner. In the 13th and 14th century, conquerors from France and Venice remained faithful to their laws, and brought them along to Athens, Candia and Cyprus. Their legal system was the system of particularistic, feudal laws, meaning that all the laws referred only to them and did not concern the Greeks. Greek law was completely neglected, and the Greeks were regarded as the lower, conquered race. Only some of them were given the opportunity of receiving the 'privilegium francitatis' – the privilege of being a citizen with equal rights as the conquerors. This had never occurred in Dushan's empire. Tsar Dushan found neither national nor regional differences being significant, but tried, above all, to create a unique legal system."[42]

The first step of this lawmaking initiative was undertaken between 1347 and 1348 when Tsar Dushan visited the monasteries of the Holy Mountain.[43] Namely, the Syntagma of Matthaeus Blastares (Ματθαίος Βλαστάρης, Slavic – **Матѳей Властарь**),[44] a monk and canonist of the Esaias monastery at Thessalonica, originally written in Greek in 1335, was soon translated into Serbian-Slavonic at the order of Tsar Dushan (c. 1347).[45] The Syntagma was arranged alphabetically (Syntagma alphabeticum) and it synthesized material from earlier collections.[46] Blastares' Syntagma was not a part of any positive legal system, but a private compilation comprised of numerous canonic and civil regulations. It turned out to be an incredibly fruitful encyclopedia of the entire Byzantine law. The Syntagma predominantly regulated the rules on legal procedure and laws on state protection of the poor. Blastares' handbook reflected the idea of objective legality, the principle of a political realm rising above the interests of individuals and classes, ruled by the sovereign himself subject to the laws he had promulgated. In spite of this, the compilation was too complex for practical use, considering that it contained too many unnecessary

[42] Ćorović V., *Op. cit.*, p. 219

[43] The Holy Mountain (Greek: Άγιον Όρος) or Mount Athos is a mountain and a peninsula in northern Greece. Within contemporary Greece, it has its special status as the Autonomous Monastic State of the Holy Mountain. This world heritage site is home to twenty Eastern Orthodox monasteries. The famous Hilandar is a Serb Orthodox monastery on the Holy Mountain. It was founded in 1198 by Saint Sava and his father king Stephan Nemanja (Monk Simeon).

[44] In Western science, he is cited as Matthaeus Blastares, but it is very probable that he was of Slavic origin and that the etymology of his name derived from the Slavic root **власт**- and suffix -**арь**.

[45] The Bulgarian version appeared in the 15th century and the Russian edition in the early 16th century.

[46] Nomocanon, Procheiros Nomos, Synopsis Basilicorum and the Roman Novellae.

canonic regulations, and therefore was not entirely incorporated as an integral part of the new system. That was one of the core grounds to reduce the compilation to one third of its original content.

A. S. Pavlov believes the reduced version was issued in order to make the adopted Greek regulations applicable and appropriate for the Serbian civil courts of law. In addition, T. D. Florinski emphasizes that there was only one reason for the shortened form of the Syntagma: an effort to develop a unique Serbian codification from it.[47] The abridged Serbianized edition was published in 1348 and included only civil (secular) regulations. This version is preserved in several MSS and there is no doubt as to whether the Serbian judges were using it in southern parts of Dushan's Empire. In 1885, Pavlov became aware of Dushan's Code being always accompanied by the abridged edition of Blastares' Syntagma. He warns that the Code cannot be analyzed without considering the Syntagma, because of its regulations being immanent in the foundations of the Code. He also noticed, "Within their contents, Dushan's Code, the Syntagma and Justinian's Code have the same ordering, and the abridged Syntagma encloses more civil than canonic rules".[48]

Another Byzantine compilation was of great significance for the Serbian judges: the regulations of Justinian's Code were applied on agricultural matters. Not only were these codes appropriate for the southern parts of the empire, but their principals were also accepted in the northern, originally Serbian areas.[49] As indicated by Florinski, Justinian's Code also appears to have been somewhat modified to facilitate its incorporation into the Serbian legal system. He considers Dushan's Code no more than a Serbian supplement to the Byzantine legislation, i.e., Codex Iustiniani and the Syntagma. Fedor Fedorovich Sigel, however, regards both Blastares' Syntagma and Justinian's Code as "quasi-official legal literature" alike the one that existed in Bohemia and Poland from 14th – 16th century. On the one hand, this evokes that both of the compilations were not considered positive law, but useful

[47] T. D. Florinski originally used the term "Serbian Codification" to emphasize that the Greek regulations had to undergo a process of modifications to facilitate conformity with the Serbian medieval society and its system of law. In the case of the abridged Serbianized version of the Syntagma, that process included the elimination of its needless parts, which were mainly canonic regulations. See Solovjev A., *Zakonik Cara Stefana Dušana*, p. 4

[48] *Ibid.*

[49] Ćorović V., *Op. cit.*, p. 219

literature that was intended to educate Serbian judges. In contrast, Sigel claims: “The Code itself quickly became of secondary importance, whereas the mentioned compilations were gradually becoming more and more significant.”[50]

It is particularly captivating that such transplantations had been implemented in medieval Serbia preceding Dushan’s legislative changes. Some of the Byzantine regulations had much earlier become a part of the Serbian legal system. The first written legal source of Byzantine origin was used in Serbia already at the beginning of the 13th century. After proclamation of the autocephaly of the Serbian Orthodox Church in 1219, St. Sava issued Patriarch Photius’ Nomocanon.[51] In the Nomocanon of St. Sava, the most significant parts were canonic regulations (canons), transplanted from Procheiros Nomos and Justinian’s Code. “Taking into consideration the content of Patriarch Photius’ Nomocanon (it also includes some civil regulations), and the fact that Dushan’s Code always appears supplementary (in comparison with the Syntagma and Justinian’s Code), it seems appropriate to regard Dushan’s legislative work as additions, corrections, modifications and supplements of the Byzantine laws that had been accepted since the times of Saint Sava.”[52]

These particulars are clear signs of an undoubtedly immense impact of the Byzantine legal system on Serbian law. Certain authors so well claim: “The sources of Dushan’s codification have not been yet studied in a systematic and thorough manner, and that is the reason why a clear distinction between the reception from the Byzantine and Roman laws, traditional Serbian custom laws, and possibly institutions from some other legal systems, cannot be made with certainty.”[53] The only remark on this assertion is that the author uses the term “reception” for the act of transplanting the Byzantine regulations. If we approach this reception in a systematic manner, we will have to analyze the particular legal transplants comparatively and casuistically to acquire inductive findings. It is understood that certain regulations and not the entire Roman-Byzantine legal system were adopted and incorporated into the Serbian legal

[50] Solovjev A., *Op. cit.*, p. 5

[51] Byzantine-originating compilations of ecclesiastical legislation (canons) and civil laws (Greek *nomoi*). Collections of this kind are found only in Eastern law. In form and content, they reflected a tight alliance between church and state.

[52] Solovjev A., *Op. cit.*, p.3

[53] Ćorović V., *Op. cit.*, p. 218

system of that time. This certainly does not mean that reception was not ongoing, but that if we wish to approach this process and position ourselves in that time, it is advantageous for us to analyze legal transplants from the perspective of its development. For that reason, the term "transplantation" would be more specific in this particular effort to approach these "additions, corrections, modifications and supplements". Such point of view facilitates the examination of legal patterning, what this comparative study strives to do in the medieval Serbian context.

One more matter that is important is the medieval socioeconomic and cultural context of the Slavic peoples, which significantly differs from the Western European model. Feodor Sigel (1845 – 1921), Professor of Law at the University of Warsaw was one of Soloviev's mentors; respectful references to him are found in Soloviev's oeuvre. He is regarded as one of the foremost authorities on late 19th- and early 20th-century Slavistics. Professor Sigel, however, studied Slavic and Serbian law in the times when the Serbian jurisprudence was still not sufficiently developed. The five-century Turkish occupation of Serbia narrowed the opportunities for the development of Serbian science. Only in 1886 was the Serbian Royal Academy founded – today the Serbian Academy of Sciences and Arts. Time was when international scientists were not sufficiently acquainted with the systems of law of the Southern Slavic peoples. Therefore, he only opened some questions, which were elaborated throughout the 20th century. On the other hand, he provides a good introduction into the overall Slavic law. "The feudal institutions, spread over the whole West, had almost no part in the history of the Slavonic lands. Thus the great forces, moving the Western mediaeval society, can be either only partially (Roman Catholic Church) or not at all observed among the Slavs. The Slavonic society at its outset scarcely differed from that of the other Aryans; its organization was the same as that of the Greeks, the Romans, and the Celts... Besides, if we examine only the Slavs themselves, without comparison with other Aryans, we find that this society, at the outset with the same political and social organization, in the course of centuries was subject to very different influences, moral and material."[54]

[54] For an worthy introduction into medieval Slavic law, see Sigel F., *Lectures on Slavonic law, being the Ilchester lectures for the year 1900,* London: H. Frowde; New York: Oxford University Press, American Branch, 1902, p. 6ff (Reprinted edition published in 2001 by Batoche Books Limited, Kitchener, Ontario.) [hereinafter: Sigel F., *Lectures on Slavonic Law*]

In any case, Stephan Dushan's imperial rule was a period of far-reaching diffusion of law, for the most part influenced by the Byzantine "saint and faithful laws of faithful emperors" (theioi kai hieroi nomoi).

Transplants Analysis: Private Law

This section seeks to investigate legal transplants and diffusion in the private law of Dushan's epoch in the Serbo-Greek Empire. When recognizing the notion of legal transplants in a sociolegal and anthropological context, we are capable of analyzing the patterning thereof in the case of Tsar Dushan's legislature as well as any other legal order. It is of crucial importance to correlate legal transplants with cross-cultural patterning and other social predispositions related to convergence, divergence, acculturation and diffusion as a broad-spectrum tendency in law. Without such (and other) correlations, the mere technical being of legal transplants remains empty and pointless. The examination of legal transplants in Dushan's Code is divided into subsections by branches of law and legal institutions.

The main spheres of transplantation include both private and public law, i.e., church and ecclesial law, marriage law, civil law in general, criminal law, and regulations related to the state administration and organization of the judiciary.

Regulations on Private Law

The Code embraces a very small number of regulations on general aspects of private law. They are scattered within the text devoid of classification or systematic arrangement. Nevertheless, it would be too much to expect to find pandect generalizations and inductions therein, which appeared in Western Europe of the latter times. The question is whether and where could the supplemental regulations be found, or perhaps do the rules in the Code supplement other legal regulations. Some authors see the answer to this question in the customary law, which was applied in all cases that were not included in the Code.

The sources of the system of law were also comprised of other statute laws. Feodor Sigel suggests the following explanation: "The sources of the code are greatly

varied. The laws of previous kings, the enactments of Doushan, the treaties with neighbouring states, the privileges of the Church, nobility, cities, the canonical law, the Byzantine laws, and particularly the common law gave materials for codification. But the legislator did not intend to incorporate all these in his code, making the part not incorporated invalid; the tsar wished only to generalize some things, to strengthen others, to change a little, and also to forbid something."[55] The enhancing productive forces and social formations increased the need for the unitarization of law and pushed for the inferiorization of customary laws. The partially unified system of law, however, included other sets of laws, which supplemented Dushan's Code. Some of these rules exhaustively regulated the matters that were in a superficial manner incorporated into the Code. The judiciary must have exercised the practice to supplement the legal vacuum with other sources of law. These sources, however, were required to be in compliance with Dushan's Code.

On the other hand, the following sections of this paper seek to examine some of the material sources of the Code, identify concrete legal transplants and confirm the standpoint that customary laws, legal institutions and concepts in private law are predisposed to be transplanted through social interaction. Alan Watson so well claims that no area of private law can be designated as being extremely resistant to change as a result of foreign influence.[56]

Dolenc and other scholars assert that the regulations from the Novellae of the Byzantine Emperors were complied as if they were Serbian laws, but without specifying from which of the Novellae they transplanted. On the other hand, Namislovski mentions Nomocanon as well as Blastares' Syntagma in the context of private law, though giving the latter only a secondary significance due to its primarily canonic content. Therefore, Namislovski reckons, only the Code of Justinian can be considered a source of private law in medieval Serbia. Soloviev, however, claims that those few paragraphs of Dushan's Code can be examined exhaustively only in relation with the entire private law system elaborated in the abridged version of Blastares' Syntagma and Justinian's Code.[57]

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[55] Sigel F., *Lectures on Slavonic Law.*, p. 17

[56] Watson A., *Legal Transplants*, p. 98

[57] See Solovjev A., *Zakonodavstvo Stefana Dušana, cara Srba i Grka*, Skoplje, 1928, pp. 107ff

Church Law

Prior to any discussion of legal transplants in medieval Serbian church law, the relationship between church and state arises as a critical matter. The initial question on this subject is whether church law belongs to the sphere of private or public law. In point of fact, both answers are correct. In this paper, however, church law is discussed under the rubric of private law for the reason that the entire chapter largely faces the impact that the authority of the Orthodox Church left on the transplantation of the private law institutions. The church regulations played an active role in the development of every juridical system in Continental Europe. The immense influence of the Orthodox Church on the institutions of public law is another major topic. This branch of church law, recognized as ecclesial law, is elaborated in the chapters pertaining to public law and state administration.

In Byzantium, it is extremely difficult to distinguish church from state, statutory laws from the customary laws, ethics from dogma, and so forth. It is the same case with the Serbo-Greek Empire. Therefore, it is on the non-legal scientific disciplines to examine religious, cultural and ethical transplants in Serbia of Dushan's time. The contemporary jurisprudence is becoming increasingly conditioned by cross-cultural psychology, sociology, and anthropological and other studies. It seems that the Serbian science did not yet decidedly move toward that direction. Nevertheless, the interest in other comparative studies on this matter was hurriedly growing throughout the 20th century (and still is at the present). The acceptance of Christianity had an immense and revolutionary impact on the Slavs' pagan customs. It brought new rules and concepts, which integrated in every sphere of social life. Along with new religious "commandments" appeared the new laws, both church and civil.

As the "true-believing Tsar",[58] Dushan dedicated the first paragraphs of his code to religious matters. The normative section begins with the following: "First, concerning Christianity. In this manner shall Christianity be purged." This introductory paragraph is pursued by the other regulations of ecclesial and canonic

[58] The original heading: "Ȥакон благовервер́наго цара Стефана. вь лѣто. ҂ѕѿнз҃. иньдикта. в҃, вь празникь вьзнесеніа. мѣесеца, маїа, ка҃."(The law of the true-believing Tsar Stephan. In the year 6857, Indiction 2, at the Feast of the Ascension of our Lord, on the 21st Day of the Month of May).

nature referring to marriage, excommunication, reclaiming from Latin heresy, and the attitude of the Orthodox Church towards other religions.[59] Similar paragraphs are found at the beginning of the both versions of Blastares' Syntagma. The abridged Blastares' Syntagma became a part of the medieval Serbian system of law, but the question is which parts of it were excluded and why. As we know, the Syntagma of Matthaeus Blastares represents a compilation of ecclesial laws and is often regarded as a revision of the Nomocanon. Blastares divided the content of the Nomocanon into 24 chapters, which he supplemented with the fundamental civil regulations. Three quarters of the original version refer to ecclesial law. In contrast, the abridged version of the same compilation encloses the opposite proportion. The redactors largely removed ecclesial regulations, leaving only the most important ones, which in the new version occupied only 25% of the abridged Syntagma. The regulations on matrimonial law were almost untouched, whereas the regulations on clergymen, monasteries and moral issues were reduced to the minimum (26 out of 131). It is evident that the abridged Syntagma was primarily designated for the civil judiciary.[60]

At the beginning of the Syntagma stand the regulations on heresy and excommunication. Both of these chapters (shortened though, because some introductory parts were excluded) remained in the same place in the abridged version, along with the rules about baptizing, as the essential condition of approaching the religious community. Moreover, we see these regulations found in the same place and even arranged in more or less the same order in Dushan's Code.

The regulations concerning monks and monasteries are of special importance in the Code. This is because the monks of the Holy Mountain played an important role on the legislative council in 1349, paying a great attention to the regulations on the status and privileges of monasteries. That is the reason why the regulations of Nov. Just., 123 and 133, which have been previously excluded from the Syntagma, appear in a somewhat different form in Dushan's Code.

[59] *Dushan's Code*, § 2 – 10, **Ѡ хрїстїанстве, О доуховном дльгꙋ** (On Christianity, On Spiritual Matters)

[60] See Appendix: Table II. Comparative Analysis: Abridged Syntagma.

Marriage Law

Even in our time, the Eastern Orthodox Church respects and complies with the regulations on matrimonial law in the Syntagma. Naturally, they were compulsory in medieval Serbia. Dushan's Code itself contains, however, very few regulations on matrimonial and family law. What is the explanation for this? One the one hand, we cannot claim that the institutions of family law were exclusively arranged by local customs. The gap between the old, still half-pagan Serbian customs and the progressive laws of the Orthodox Church is very meaningful, especially when the idea of marriage is regarded as an unbreakable and eternal community. The Orthodox concept of matrimony was gradually becoming more and more accepted by the common people, inter alia, owing to the missionary activity of Saint Sava. However, it was even more important for the judges (especially those from the southern parts of the state, which once belonged to the Greek realm) to adopt this concept, because the penalties for violations of matrimonial rules were not only provided with ecclesial but also civil sanctions. This gradual process preceded the promulgation of Dushan's Code and markedly left an impact on its shaping.

There is no doubt that the model of marriage was effectively transplanted, but this concrete legal borrowing sets off some cautionary warnings. Matrimony itself does not merely represent a legal institution. Apart from legal, it has its religious, social and cultural attributes. These constituents lead us to the phenomenon of acculturation, which in this case left a greater impact than the technical aspect of transplantation of law. Dushan's Code was not compiled upon the work of the Glossators and Commentators, as other Continental legislations have (especially in Western and Central European countries). The legal changes grew out of the religious, social and cultural assimilation, and importantly of the existing legal regulations found in the southern territories, which symbolize the Byzantine legal heritage. Therefore, it would be correct to claim that the concept of marriage was definitely transplanted from the highly developed Byzantine culture to the half-pagan and half-Christianized Serbian society long before Dushan's Code was promulgated. However, it is crucial to emphasize that the new concept of matrimony came together with the new Christian way of life, not only as a legal, but also as a cultural and religious

transplant. The new concept of marriage is expressed in Modestine's definition of matrimony: "**Брак ѥсть моужа и жeньи сьвокуплѥніє и сьнаслѣдіє вь всeи жизни, божьствныѥ же и човѣчьскыѥ правины приобщеніє**".[61] This famous definition initially became a part of the Digesta, wherefrom was it transplanted to Procheiros Nomos. It was accepted in medieval Serbia since the times of Saint Sava and his Nomocanon.[62] However, it appeared for the first time as a written statutory law – and not as a canonic regulation – in the abridged version of the Syntagma.

There is a different definition referring to matrimony, which is also rooted in the Roman law: "**Брак нe eжe спати вкѹпѣ дрѹгь сь дрѹгом мѹжѹ и жeнѣ сьставлꙗѥть сe нь брачноe ихь склонѥніe.**"[63] The abridged Syntagma additionally encloses further compliance requirements for a lawful matrimony, i.e., with regard to the minimum age, the parents' approval (if necessary) and the fact that the wedding ceremony is public. However, there is no section of Blastares' Syntagma, which would even mention the blessing and permission of the church as obligatory. This is due to the Syntagma being largely based on the regulations of Procheiros Nomos from the 9th century.

In the early days of Christianity, the Christian vision of marriage as a church institution had to confront the Roman concept of matrimony as a civil contract. A long epoch had passed before the new, spiritual, canonic, concept of marriage was

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[61]Nuptiae sunt viri et mulieris conjunctio et consortium omnis vitae, divini et humani iuris communicatio. Modestinus, D.23, 3, 1=Proch. 4, 1=Basil. 28, 4, 1 It is important to mention that Matthaeus Blastares did not borrow this Modestine's definition from Procheiros Nomos but from Epanagoge where it was supplemented with "**Любо благословeніѥмь, любо вѣнчаніѥм, любо записаніѥмь.**" This part of the definition – dating from the 19th century – was considered inappropriate from the 14th-century jurisprudents' point of view, because it regarded marriage as a written contract. Such concept, applied in the Roman law, was not sustainable any more.

[62] The term "Nomocanon" (in Serbian "Zakonopravilo") derives from "nomos" – law, and "canon" – canonic regulations. These compilations comprise both civil as well as church regulations. It is well known that the Church had supremacy in all the medieval states. Its authority was a matter of dogma. "From the canonic pint of view, every commandment in the Old and New Testament was considered as law. Therefore, through the church legislation, the Roman laws of Institutiones and Digestae were combined with the ancient Hebrew laws of Moses and various ethical and philosophical ideals of the prophets, apostles and evangelists. The Church treated all of these regulations as laws and included them in its compilations along with the civil laws, mostly borrowed from Justinian's Codification." (Novaković S., *Srednjevekovna Srbija i rimsko pravo*, Beograd, 1906, p. 8)

[63] Nuptiae non viri et mulieris concubitus facit sed nuptialis eorum contentus. Proch. IV, 17=Dig. L, 17, 30

provided with an officially authorized support. Neither Justinian's Code nor Ecloga[64] and Procheiros Nomos regard nuptials as a "condicio sine qua non" of a legally recognized matrimony. In the year 1095, Byzantine Emperor Alexios I Komnenos issued a Novella proclaiming church wedding not only obligatory for free men , but for slaves too. Subsequently, in 1306, Emperor Andronicus II Palaeologus declared that no wedding could have effect without the knowledge of the priest.[65]

In view of that, it is not surprising that the blessing of the archpriest and the nuptials are obligatory for a bona fide marriage: "No lords or any other persons shall marry without the blessing of their own archpriest, or of those chosen and appointed as priests by the archpriests. And no wedding shall take place without nuptials. If any marry without the blessing and permission of the Church, such persons shall be legally separated."[66] These two paragraphs are in complete accordance with the attitude of the Greek emperors and as well as the Orthodox Church, and therefore should be regarded as a modernized adjunct to the Syntagma.

A corresponding logic is found in § 9 of Dushan's Code: "And if a half-believer[67] be found to be married to a Christian woman, let him be baptized into Christianity if he desires it. But if he refuse to be baptized, let his wife and children be taken from him, and let a part of his house be allotted to them, and let him be driven forth."[68] The social conditions in Serbia of the 14th century required transparent regulations on marriage involving the people of Eastern Orthodox and Roman

[64] The etymology of the word is a Romanization of the Greek "eklegē" (εκλεγη), meaning "a choice, selection." Ecloga ton nomon ("a choice of law") is a compilation of Byzantine law issued in 726 by Emperor Leo III the Isaurian in his name and that of his son Constantine. It is the most important Byzantine legal work following the 6th-century Corpus Iuris Civilis. The dispositions of Ecloga were influenced by the Christian Orthodox spirit as well as by the common law. This compilation constituted the fundamental guide of justice dispensation up to the days of the Macedonian emperors.

[65] Solovjev A., *Zakonodavstvo Stefana Dušana, cara Srba i Grka*, Skoplje, 1928, pp. 100–106

[66] *Dushan's Code*, § 2 and 3 (**Въластеле и прочи людїе, да не благословив´шї се оу своего архїереа или доухов´нїка, да благословет се архїереи постав´лен´нїми. Ны единь бракь да не бьеть** (sic) **без вен´чанїа. аще ли боудеть без благословенїа и оупрощенїа** (sic) **црькве. такови да разлоучет´ се.**; MS Šišatovački: § 2 and 3)

[67] In the abridged version of Blastares' Syntagma, the term "half-believer" refers to heretics as well as to Catholics. In Dushan's Code, the term "Latin" is regarded as a synonym for a half-believer, meaning a catholic. Obviously, it referred to heretics as well.

[68] *Dushan's Code*, § 9 (**И аще ѡбрѣщеть се полоуверць вьзам хрїстїан´к8. аще вьсхощеть да крьстїт се вь хрїстїан´ство. аще ли не крьстїт се. да моу се вьз´ме жена и деца, и да дасть имь дель ѡт васего именїа. а ѡнь да ѡтжденет´ се.**; MS Šišatovački: § 9)

Catholic religious convictions. Such rules were existent in Blastares' Syntagma, although not shaped in a clearly understandable form, i.e., it was not understood whether the prohibition was referring only to clergymen or to common people as well. Paragraph 9 of Dushan's Code appears as an excellent response to the demands of the people's practical needs.

So therefore, do these regulations represent an original contribution of the legislator, the "true-believing" Orthodox emperor who wanted to proceed with increasing the authority of church and expanding the field of its influence? Alternatively, could it be that he simply copied the Novellae of the Byzantine emperors from the 14th century? Both of the explanations make sense and neither of them should be disregarded as inferior. The major grounds for this lay in the overall acculturation and systemic acceptance of Christianity. This is constantly the case when social alterations – inter alia, caused by the acceptance of a religion – effect the further development of the importer's system of law. Comparative legal history, however, has shown that acculturation can appear as a latent and all-embracing process. Therefore, it is not always possible to identify a concrete importer or transplant, but only investigate the patterns of the diffusion of law.

Not only did Dushan accept the rules on marriage from Blastares' Syntagma, but also introduced several new normative novelties, which were in compliance with the strict principles of the Orthodox Church. Alan Watson claims that "reception is possible and still easy when the receiving society is much less advanced materially and culturally, though changes leading to simplification, even barbarization can be great",[69] what was often the case in the history of humankind, e.g., the vulgarization of Roman law in medieval Western Europe. Paragraphs 2, 3 and 9 of Dushan's Code reveal that the Serbian medieval church law does not correspond to this model. The transplanted rules were by no means barbarized, but progressive and highly developed. The explanation for this is found in the overwhelming impact of the Eastern Orthodox Church and its major role in all aspects of social life, including political affairs and the legislative procedure. Anyhow, the regulations that derived from the Roman-Byzantine laws, as beforehand stated, remain effective to present day in the Orthodox Church. The fact that the regulations on marriage law survived from

[69] Watson A., *Legal Transplant*s, p. 97

the 14th century to the present day in the Orthodox Church is a clear indication of a successful and sustainable transplantation of law.

In comparison with the Western European legislations of that time, the positive law of 14th-century Serbia was considered being progressive and reformist, because it followed the Rome – Byzantium – Serbia line of legal patterning. Based on the Roman-Byzantine legal tradition, the Serbo-Greek half-feudal system was ahead of the particularistic law, which was prevalent in Western Europe. A policy of allowing political formations within a state to be self-governing, without regard to what outcome this may leave on the larger body, was a largely unfamiliar model in the Serbo-Greek context.

Contract of Sale

Prior to analyzing the contract of sale in the context of Dushan's Code, it is crucial to be aware of the Byzantine system of law recognizing it as the central institution of legal circulation. It is exhaustively elaborated in Ecloga, Procheiros Nomos, Epanagoge[70] and Basilica. From a large number of legal rules, Blastares introduced only fourteen in one of the few non-canonic chapters of his Syntagma. They were referred to as "Νόμοι", what is the Greek expression for private civil laws and not church regulations. This entire chapter, entitled "**закони градсціи**" (city laws), subsequently became a part of the abridged edition of the Syntagma.

Among all enclosed institutions in the Syntagma, "caparra" in Latin, meaning earnest money, certainly had an interesting course of development in the Serbian law. It appears to be an exemplary transplant of law. The policy referring to this institution was previously a part of the Institutiones (3, 23) and must have been positive law in the Balkans a long time preceding Dushan's Code. It was introduced to the Serbs in the Nomocanon of Saint Sava. It is also mentioned in the Statute of Dubrovnik dating from the 13th century as well as in the custom laws of Southern Slavs.

[70] Epanagoge ton nomon is a legal compilation from c. 879, compiled during the reign of the Byzantine emperor Basil I. Its major significance lies in its theory of the separation of the powers of church and state. Based on the Ecloga, and the Corpus Iuris Civilis, the Epanagoge is original in those parts dealing with the rights and obligations of the emperor, the patriarch, and other lay and ecclesiastical dignitaries. The Epanagoge served as the basis for the Basilica, an extensive revision of Justinian's code initiated by the emperor Basil I and completed during the reign of his son Leo VI the Wise (886–912).

However, there is no written document, which would confirm that it was applied in the period of Dushan's reign. Nevertheless, there are certain linguistic hints, which provide evidence of this institution deriving from the Roman-Byzantine law. It is understood that earnest money was existent and popular in Serbia throughout the 14th century. While other Slavs have their own name for this institution (such as "**задатокь**"), even the contemporary Serbian language uses the Italian term "caparra", which was being used in Dubrovnik in the 14th century. However, in the Serbian version of the Syntagma stands the Greek expression "**арабоунь**" (άρραβών). It is an old term from Justinian's Code: "arrha" and it was called "aravon" or "aravun" among the Serbian people. This expression is also enclosed in the dictionaries from the 17th and 18th centuries where "caparra" is translated as "arauna", "ravna", "raona", "ramna", all of which are modifications of the Byzantine word "aravon". The word "caparra" (derived from "capere arrhas" or "cape arrham") appeared in the Mediterranean areas pressing out the older terms "arrha" as well as "άρραβών". The first written evidence with reference to the usage of the term "caparra" is a contract of sale from 1398: "Item si aliquis Pisanus vendiderit aliquem mercem per manus Trocimannorum et habuerit arrham seu caparram…." However, another even older source, a letter from 1325, also mentions this word: "…si fei lu mircat di la casa e dei per capare li perperi XX di grossi…"

Until the beginning of the 19th century, when the Italian expression "caparra" took its place, the Byzantine word "άρραβών" survived in Serbian language through all of its redactions. This fact seems to be the best proof that Byzantine legal rules (contained in Blastares' Syntagma) on the contract of sale were recognized in the medieval Serbian system of law.[71]

Gift

The institution of gift played a major role in the Byzantine system of private law in the same way as it did in the Roman law. It is found in various forms, as for instance "donatio mortis causa" and "donatio inter vivos". The gift represented one of the most common modes to acquire property. The regulations referring to this

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[71] Cf. Solovjev A., *Zakonodavstvo Stefana Dušana, cara Srba i Grka*, Skoplje, 1928, pp. 108–110

institution are unfolded in various compilations of the Ecloga, ("De donationibus per scripturam vel sine scriptura factis"), in Procheiros Nomos ("De donationibus ante nuptias", "De donationibus inter virum et uxorem", "De donationibus", "De revocandis donationibus") and in Epanagoge ton nomon.

Blastares' Syntagma, however, holds only five paragraphs on this matter, all of which were transplanted from Procheiros Nomos. That entire chapter became a part of the abridged version of the Syntagma, regulating basic questions, such as the revocation of a gift, along with "donatio immodica", a discrete form of this institution.

All of these regulations dating from the times of Justinian's reign were common in the Serbian system of law long before the codification of Tsar Dushan, owing to Saint Sava's translation of the Nomocanon. Numerous charters witness the fact that the ruler himself donated real property to monasteries, churches and noblemen. The major sources of the church's income were the estates given by either the ruler or the noblemen. The patrimonial real property could be expropriated only if the proprietor committed the crime of disloyalty.

The Serbian term for the "donatio inter vivos" was "χарисати" and it derived from the Greek expression "χαρίξειν", meaning "donation of a specified object to one person as an expression of personal affection".[72] This terminological conformity is a clear sign of the strong Roman-Byzantine influence on the medieval Serbian system of law. The terminological resemblance, nevertheless, is not enough to regard an institution as a legal transplant. It serves as an indicator of the odds though. In fact, it was transplanted from the Byzantine laws through Saint Sava's Nomocanon and being totally accepted, it continued its existence under the Serbianized version of its originally Greek name. Therefore, during his legislative activity, Dushan had to face the previously formed institutions (such as "donatio inter vivos" and "donatio mortis causa") and already established terms such as "даръ", which derived from the Greek "δωρεά", meaning "gift".

That is the reason why he dedicated only one paragraph of his code to this matter: "And all the chrysobulls and charters which my Imperialism hath granted and shall grant to anyone, those patrimonial estates shall be confirmed, as those of the previous Orthodox Tsars, and they shall have full authority over them: either to give

[72] *Ibid*., p. 115

them to the Church, or bequeath for the soul, or sell to anyone."[73] The fact that the Code mentions the term "bequeath for the soul" without any word on "donatio inter vivos" does not indicate that only "donatio mortis causa" existed as an exclusive form of the gift in Dushan's times. A charter dating from 1350 mentions both forms of this institution as equally acceptable. However, even of greater importance for this issue seems to be the part of § 40 where Dushan refers to the "previous Orthodox Tsars", definitely confirming the institution of gift being borrowed from the Byzantine legal system. The Serbian system adopted this legal institution in a simplified form in comparison with its regulation in the Roman law.

Deposit

In spite of the contract of deposit being one of the foremost agreements especially in the Middle Ages, Dushan's Code does not include a single paragraph that would deal with the general definition of this legal institution. On the other hand, the Byzantine laws enclose many exhaustively elaborated regulations on this matter. Ecloga, Epanagoge and Blastares' Syntagma (in its original and as well as abridged edition) enclose discrete chapters devoted to deposit, with the exception of Procheiros Nomos containing only two paragraphs on maintenance, which were subsequently added to the abridged version of Blastares' Syntagma.

Dushan's Code only mentions this institution in one paragraph on maintenance: "Towns are not liable for deposit, but everyone who come, shall go to the inn, either small or great shall go to the innkeeper: to hand him his horse and all his luggage for the innkeeper to keep it all. And when that guest leave, let the innkeeper hand him all that the guest hath handed him. And if anything be lost to him, let him pay it all."[74] This case is a clear example of the "depositi in iure" or "recepti

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[73] *Dushan's Code*, § 40 (**И вьси рисовоули и простаг´ме. что есть, комȣ сатворило царьство ми и что вьсхощет комȣ сьтворїти. и тезы бащине да сȣ твр´де. ꙗкоже и пр´вих правовѣр´ных царь. и да соут вол´ни ными. или под црквом дати.или за доушȣ продати комоу любо.**; MS Šišatovački: § 40)

[74] *Dushan's Code*, § 120 (**Градовомь да нѣсть | происелицѣ. развѣ кои иде жоуплꙗнинь. да ходи къ станꙗнинȣ, или маль или великь, да мȣ прѣда конь и стань въсь. Да га съблюдѣ станꙗнинь съ въсѣмь. И къда си поиде ѡн´зїи гость. да га съблюдѣ станꙗнинь въсе що мȣ боудѣ прїель. ако ли моу боудѣ що погынȣло въсе да мȣ плати.**; MS Prizrenski: § 125)

cauponum" originating from the Roman legal tradition. It is apparent that the Code mentions only this discrete case pertaining to the institution of deposit, because the legislator wanted to unify the judicial practice in this case. The remainder of the regulations is found in other sources of laws, most of all in the abridged Syntagma. This is why the lawmaker did not have the need to enclose all of these regulations, thus only regulated a case that often occurred in the real world to serve as a guideline for the judicial practice.

It is also noteworthy that one transcript of the Code dating from the 17th century does not hold any regulations on deposit borrowed from the Syntagma. Moreover, it does not even contain the original medieval term "**покладь**", hence replaces it with the Turkish word "amanet" instead.[75]

Loan and Pledge

There is only one short paragraph in Dushan's Code on the institution of pledge, which does not hold general regulations, but only refers to one particular state of affairs: "Pledges, wherever they be found, shall be redeemed".[76] This regulation was especially confirmed in an agreement with Dubrovnik from 1349, according to which no pledge was to be taken from the citizens of Dubrovnik. If already taken, it had to be returned. The fact that one did not want to take pledge as insurance was considered as an act of special affection and friendship. That has to be the reason why such agreement had already appeared in the 12th century between Kotor and Dubrovnik: "Ut pignora non sint inter Ragusium et Catarum".

Another agreement between Serbia and Dubrovnik, dating from 1357 confirms the regulation from the previous agreement from 1349, revealing that the law on pledge survived during the reign of Urosh the Weak, Tsar Dushan's son. Unfortunately, soon after the decay of Dushan's Empire social circumstances became complex and indeterminate, leading to mistrust in the society. The understandable outcome of such conditions was the fact that pledge after a short time regained its importance as a legal institution.

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[75] Solovjev A., *Op. cit.*, p. 119

[76] *Dushan's Code,* § 87 (**Ȥалоге коудє сє ѡбретают да сє ѡткоупꙋют.**; MS Šišatovački: §78)

Regarding the historical course of this institution, there is no doubt that it was transplanted from Byzantine compilations, i.e., largely Ecloga and Procheiros Nomos, and became a part of the Serbian legal system owing to the abridged version of Blastares' Syntagma. However, knowing that pledge was a common and often misused legal institution, Dushan banned its use pertaining to trade with Dubrovnik. This prohibition did not sustain a long-term success. Was it due to the transplant being deeply rooted in the Serbian legal system or because the socioeconomic conditions required so? The subsequent socioeconomic alterations required a reliable means of warranty in private law. Dushan's prohibition was a short-term obstacle for the development of pledge as such a means. The social circumstances after the decline of the Empire contributed to its comeback regardless of the incrimination in the Code of Dushan. The resistance to this legal transplant turned out to be unsustainable.

Another dilemma related to loan is the question of interest. This is the point where the connection with the original Roman law is supposed to be broken, at least from the aspect of church law. Under the influence of commandments of the Old Testament, the Orthodox Church did curse anyone who would take interest, but did not manage to overpower this institution, which was applied in everyday life.

Neither Blastares' Syntagma nor Dushan's Code mention interest in any of their paragraphs. However, some of the preserved contracts enclose terms such as Serbian "камата", which is equivalent to Greek "χάματος", meaning interest. This only proves that this institution, deriving from the Roman law, was determinate enough to maintain its existence in the receiving legal system regardless of the serious obstacles such as condemnations of the church.

Dowry: A Material Aspect of Family Law

The opponents of the notion of legal transplants repeatedly argue that family law does not seem to be suitable for legal transplants. As maintained by them, family law is the branch of civil law, which stands in the strongest relationship to the social and historical background of one nation, its ethos, representing a unique national system of regulations and customs resistant to diverse foreign impacts. Alan Watson is of differing opinion: "If... the same set of rules, say of matrimonial property, existed in very different societies as a result of borrowing (from the Visigoths to

become the law of the Iberian Peninsula in general, migrating then from Spain to California, from California to other states in the western United States), then theories based on the idea of a close relationship between law and society, which explained the rationale of the rules of one society without considering the same rules elsewhere and at other times, were suspect. Similarly puzzling were very different rules, say again of matrimonial property, in neighboring and very similar communities in, for example, medieval Germany or 19th-century cantonal Switzerland."[77]

A further reason why the logic of family law being resistant to adoption of alien paradigms is unsustainable is that this line of reasoning should be accordingly applied to all other branches of private law. To be precise, this paper has exposed examples of statutory laws and legal institutions, which are fashioned in accordance with the ethos of the people, their Volksgeist. Such examples are found in all branches of law. Moreover, the majority of these laws exemplify products of the diffusion of law, which are transplanted from a different society, but modified on account of the sprit of the people. As so well maintained by David Westbrook, "If a diffusion of law is an adoption of law, a modernization, then the law should not be imagined as a liquid, poured from one system into another. Instead, a legal system changes in accordance with what people believe to be modern, a belief often formed in view of the examples provided by other legal systems, models."[78] It follows that the logic of resistance in family law is guided by the concept of an ideal model of legal transplants. Such model, however, does not exist. If it existed, it would lead to a model of ideal diffusion, which is only possible when spreading one liquid throughout a second liquid, but not in law. The notion of ideal diffusion of law would be in the vein of engendering an ideal philosophy of law.

On the one hand, the opponents of the notion of legal transplants refer to Savigny and the perception of Volksgeist, the being wherefrom national law derived. This concept cannot be applied to the Serbo-Greek Empire of the Middle Ages, since the religious ties were much stronger than the ethnic were. It was much easier to develop a multinational state integrated through one religion than an ethnically

[77] Watson A., *Legal Transplants and European Private Law*. Electronic Journal of Comparative Law, vol 4.4, December 2000 <http://www.ejcl.org/ejcl/44/44-2.html>.

[78] Westbrook D., *Op. cit.*, p. 498

homogeneous state with a diversity of confessions of faith. On the other hand, Friedrich Carl von Savigny was a Romanist who initiated the discontinuation of the old uncritical study of Roman law. He revealed the history of Roman law from the fall of the Western Roman Empire to the early 12th century. His oeuvre illustrates how the Roman law survived in local customs, in towns, in ecclesiastical doctrines as well as scholar teachings, until its revitalization in Bologna and other Italian cities. To identify the distinctive German legal rules in the 19th-century German system of law, Savigny searched for legal transplants from Roman law.

In medieval Serbia, a branch of marriage law regulating the questions related to dowry also did not resist the strong influence of the Byzantine laws, whose authority was supported by the Orthodox Church. However, in the Byzantine Empire, there had always been a gap between the stance of the Orthodox Church, in accordance with which marriage is an eternal unity of husband and wife, and Justinian's laws proclaiming that dowry ("dos" in Roman law) had to be a part of the wife's separate property. The regulations of Blastares' Syntagma adopted Justinian's concept largely by copying it from Procheiros Nomos and they all became a part of the abridged edition as well. The wife's separate property (dowry) was called "**пракїа**", deriving from the Greek expression "προίνα" or "προίξ". It is interesting that the rules of the Syntagma were differing from the customs of the Slavs in this respect, according to which the bride would not receive any dowry from her family, but only a dress and some jewelry. In spite of that, the institution of dowry had become popular in Serbia under the inevitable impact of the Roman-Byzantine legal system preceding Dushan's codification, and it was gradually pressing out the existing Slavic customs. The Statutes of Dubrovnik and Kotor enclosed a large number of regulations related to dowry, which were more or less similar to the ones from Blastares' Syntagma. The Charter of King Milutin dating from 1300 also mentions dowry or "**пракїа**", as it was referred to in the original text. Even king Stephan Milutin himself emphasized that he received some of the southern territories from his father in law, the Byzantine Emperor Andronicus II Palaeologus, as dowry for Simonide, Milutin's fourth wife.

Due to the abridged Syntagma containing all central regulations on this matter, Dushan's Code appears as its supplement in this respect, enclosing only one

paragraph on dowry: "And slaves that anybody hath, he shall have them as his patrimonial estate, and their children as his eternal patrimony. But a slave[79] shall never be given as a dowry."[80] This regulation clearly indicates that the Roman-Byzantine custom, ordering that only female slaves can be given as dowry, was transplanted and fully adopted in the Serbian legal system. Finally, a number of charters dating from the 14th and 15th century also include some regulations on dowry, which appear to be similar to the ones that had been transplanted from the Byzantine laws, proving that the transplanted Roman institution "dos" survived in the receiving system with a different name, but with the same essence. So strong was its legal authority that neither the ancient Slavic customs nor the influence of the church could prevent its expansion.

Inheritance Law

Tsar Dushan dedicated only two paragraphs to inheritance law. Both of them speak of inheritance of the noblemen. Dushan's Code mentions neither last will nor the testament[81]. Does this indicate that institutions such as last will and testament, or at least the so-called "last words", did not exist in the Serbian system of law? This seems to be unlikely. Even the more archaic and primitive cultures with less developed legal awareness were familiar with the institution of the last words, which was used as a substitute for last will and testament with the same effect – the

[79] In Djurica Krstić's translation of the Code, the term "slave" (that could refer to both male as well as female slaves, as a general term for slaves) stands for the Serbian term "**ѡтрокь**" (meaning a male slave). However, § 46 can be understood properly only in the context of the Byzantine laws. An old Roman-Byzantine custom insisted that only female slaves could be provided as dowry. Therefore, it appears necessary to emphasize in the text of the translation that "a male slave shall never be given as dowry". Otherwise, it would mean that neither male nor female slaves could be given as dowry, which is not correct.

[80] *Dushan's Code*, § 46 (**И отроке что имаю властеле, да им´ соу оу бащин8. и ныих дѣца оу бащин8 вѣчноу да с8. а ѡтрокь оу пракию** (sic) **да се не да никогда.**; MS Rakovački: § 125)

[81] It is noteworthy that last will and testament are legal institutions typical for the common law system of medieval England. Last will refers to inheritance of res immobiles (pass by descendance), whereas the testament refers to inheritance of res mobiles (pass by distribution). The terminological difference is not so strict and significant in contemporary law. See Antić O., *Nasledno pravo*, Beograd, 2004. Being aware of the specific features of the common law system, we cannot comprehend these terms literally in the medieval Serbian system of law. However, they appear as the utmost equivalent in the English legal terminology. For that reason, they are used in this work in relatively the same sense that they used to have in common law system.

avoidance of the legal order of succession and its arrangement in accordance with the will of the deceased.[82] Therefore, it can easily be concluded that last will and testament (and perhaps other related institutions) must have been familiar to medieval Serbs as well. The fact that Dushan's Code does not regulate this matter might indicate that there had not been any need to do so, because it already had been done in the Slavic customary law. However, this presumption does not give the impression of being sustainable for the reason that a greater part of Slavic customs had been pressed out by the Orthodox Church, prohibited and anathemized as pagan. Obviously, this did not happen only to the Serbs, but also to other Slavic peoples. For example, one of the oldest Russian legal monuments, an international contract with the Byzantine Empire dating from 911, perfectly depicts the presence of Greek influence in early medieval Russia.[83] The regulations on succession were entirely arranged by the church, what was a general tendency in the medieval world.[84] Considering this, just as in marriage law it appears that the influence of the church and the patterns of religious acculturation played the most important role in the process of this transplantation. There are no preserved written documents, which enclose the institution of last will,

[82] Antić O., *Nasledno pravo*, Beograd: Pravni fakultet, 2004, p. 14

[83] This fact must have been a result of Christianization, as process of the previously described religious acculturation that took place when the Eastern Slavs embraced Orthodox faith along with Byzantine customs and legal tradition. Concerning Russian legal system, one could even draw an interesting parallel between the process of Christianization, which took place in Russia of the early Middle Ages, and the process of "legal globalization" which is presently taking place in all of the post-socialist societies of Eastern Europe. It appears that, in spite of the time gap between them, these borrowing processes have got something in common – the fact that they were initiated not by the receiver, but by the donor, primarily with political and economic purposes. As Ajani noticed: "Moreover, it is certainly true that today, in contrast to the past, reception takes place not only in the initiative of those who receive the new models, but also on that of those who propose them. Offer and demand of legal models is ruled not only by the techniques of legal expertise, but also by the political and economical decisions that govern international relations", and further more emphasized: "Prestige and political opportunity together encourage the spread of models developed by the E.U. within the whole Central and Eastern Europe." Ajani, G., *By Chance and Prestige: Legal Transplants in Russia and Eastern Europe*, American Journal of Comparative Law, Vol. 43, No. 1 (Winter 1995), pp. 93-117

[84] The fact that the Orthodox Church regulates the questions of succession did not exist only among the Slavs. It is also known that in the medieval common law system it was the duty of the Church to arrange the pass by distribution, whereas the pass by descendance was in the hands of the state. In the Middle Ages, the church also played an important role in the development and the expansion of the freedom of testation. This was because many people expressed their devotion to the Christian faith by leaving their entire property to the Church as their heir. See Antić O., *Nasledno pravo*, Beograd 2004, p. 146. In Russia, the so-called "Institution" or Charter of Saint Vladimir from the 9th century also leaves the inheritance matters to the church. According to Nevolin, the church was in charge for the inheritance matters until the 14th century and the reign of Peter the Great. See also Solovjev A., *Op. cit.*, p. 133

but the general opinion in science is that they actually existed in Serbia, just as they did in the other Balkan states and Russia. These institutions were common in the Balkans preceding Dushan's codification, e.g., written forms of last will and testament were widely held in Dalmatia since the 13th century. It was also the case in Dubrovnik of the 14th century.

It is important to bring up that the Serbian peasants lived in extended families alike the Roman consortium. The basis of the Serbs' social organization was the "zadruga", or extended family. The entire property of the zadruga, i.e., the extended family property, belonged to the family and not to its individual members. Since the extended family acts as the collective proprietor of real property, it is not likely that its members had the freedom of testation. Furthermore, one has to be aware that the legal order and state organization of feudal monarchies certainly do not represent a prosperous setting for the development of legal institutions such as the freedom of testation. The entire territory of a feudal monarchy was divided into feudal estates, which were gifted by the ruler to the noblemen who served him. However, once gifted these estates by no means could be converted into their property in the full and contemporary sense of the term, i.e., they were not entitled to alienate them or pass them by to the heirs they choose. On the other hand, the upper class of the noblemen – citizens, rich merchants and the ruler himself – were gradually adopting the "individualistic" concept of inheritance derived from the Roman-Byzantine law. Nevertheless, even in these cases only res mobiles could be passed by to the heirs.[85]

These ideas were transplanted into the Serbian legal system in Saint Sava's translation of the Nomocanon and gradually developed into an integral part of the Serbs' legal awareness. The Charter of Skopje issued by king Milutin in 1300 shows that Milutin adopted and confirmed all Byzantine laws concerning inheritance, proving that their influence must have been the strongest in the southern parts of the country. Blastares' Syntagma also encloses a great number of regulations relevant to this matter. As in other cases, Dushan's Code simply had to harmonize its content. This was done by engendering a deliberate compromise between the Slavic customary

[85] Res immobiles could almost never be alienated neither by the contract of sale or gift, nor by inheritance. However, there is one interesting case, which represents a remarkable exception. In his Nomocanon, Saint Sava mentions that the feudal estate can be sold only with the purpose of collecting money to pay the ransom for the imprisoned Serbian lords, which were probably kept as war prisoners or hostages in a foreign country.

laws and the tradition of Roman law. The efforts to combine these two normative systems, however, were a phenomenon with which was the entire medieval Europe familiar. As Watson points out: "From post-Roman times to the beginning of the modern legal age in the 18th century, the two main elements in European law were Roman law and legal custom, the learned law and the other. In large measure, the main task of lawyers of that long stretch of time was the unification or harmonization of the two strands of Roman law and custom."[86]

Indeed, the process of diffusion of Slavic customary laws and Roman law was very complex. This harmonization of written statutory law requires analyses of paradigms and concrete instances. There are only two paragraphs in the Code, which refer to inheritance. Both of the articles only speak of the inheritance of noblemen. The laws referring to inheritance of noblemen were enclosed primarily in the abridged version of Blastares' Syntagma and so represented a replica of the Byzantine laws. Paragraph 41 of Dushan's Code does not only represent a supplement to the rules of the Syntagma, but as indicated by Soloviev, it also seems to be a transplant derived from the Byzantine custom law.

To provide an accurate explanation on this matter, some terminological inaccuracies need to be corrected in this place. According to the translation of Djurica Krstich, the text of § 41 in Dushan's Code is translated in the following manner: "If a lord have children, or if he have no children, and die, and upon his death the patrimonial estate remain vacant, wherever there be found someone of his kin up to the third cousin, that one shall have his patrimonial estate"[87] It appears that this paragraph might eventually cause certain terminological misunderstandings. With the aim of preventing those, a brief explanation is required. Krstich uses the term "someone of his kin up to the third cousin" as a translation of the Serbian "**трѣтїаго братоучеда**"[88], which was transplanted as a distinctive institution of the Byzantine

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[86] Watson A., *The Evolution of Law*, Baltimore, Maryland: The Johns Hopkins University Press, 1985, p. 43

[87] *Dushan's Code*, § 41 (**Кои властелїнь имать дѣцꙋ или не имат и оумрѣть. и по нѥгове сьмр́ти баштїна поуста ѡстанеть. аште се ѡбрѣштеть, | ѡт негова рода до трѣтїаго братоучеда. ть да имат еговꙋ баштинꙋ**; MS Šišatovački: § 41)

[88] "**Братučед**" is an old Serbian term that originally means uncle's brother "**прво братучеди**" are the children of two brothers, namely, the kin of the fourth degree, and "**другo братучеди**" are the grand children of two brothers, which means kin of the sixth degree. Vuk Karadžić gives the following

laws where it was called "τρισεξάδελλφος", meaning the kin of the eighth degree. It is the last kin who is entitled to inherit the deceased noble. The term "third cousin", however, does not clearly determine the relationship between the deceased and his kin of the eighth degree.

Another specific trait concerning inheritance law in Dushan's Code is found in paragraph 48 (On Deceased Nobles), representing a perfect link between discrete legal systems. "When a noble dies his good horse and arms shall be given to the Tsar, but his great robes of pearls and golden girdle, let his son have them, and let them not be taken by the Tsar, and if he have no son, but have a daughter, let his daughter have title over them to sell or give away freely".[89] The first part of the paragraph is actually a legally recognized traditional medieval custom[90] – the horse and the arms of a nobleman being a gift of the ruler would be given back to him after the nobleman's death. However, apart from the horse and the arms of the deceased noble, the rest of his equipment (such as valuable wardrobe given to him by the Tsar as a sign of affection and appreciation) would be, compliant with the Code, given to his family. One might ask himself why certain items would while others would not be returned to the ruler. This is the point where the compromise between the two legal systems (the traditional, underdeveloped and almost barbaric custom law, and Roman law) is found. In point of fact, the second part of § 48 was obviously created under the influence of the Roman law rule referring to the revocation of a gift (revocatio donationibus). Of course, it is known that, in accordance with the Roman laws, a gift cannot be cancelled unless certain conditions, strictly specified in the law, were fulfilled. Accordingly, a ruler could not simply cancel his inter vivos gift after the death of the gifted.

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definition of this term: "**Братучед. м. Брат од стрица: прво братучеди, то су од два брата ђеца; а друго братучеди, то су ђеца првобратучеда.**" Vuk Karadžić, *Srpski rječnik (1818),* Beograd: Prosveta, 1969. Vuk Karadžić does not explain particularly the term "**трѣтїаго братоучеда**", but it seems logical that it refers to the great grand children of two brothers, or the kin of the eighth degree.

[89] *Ibid.*, § 48 (**Каде оумрѣ властелинь. конь доб́рь и ѡрѹжїе да се да царѹ. а свита велика бисер́на и злати погась да оузме сынь его, и да мѹ царь не оузме. ако ли не има сына а има дыщ'рь. да има дыщи оузети. или продати. или ѡтдати свободно.**; MS Rakovački: § 45)

[90] For example, such custom was familiar to the Vallachs in the 14th century. The statute of Erdelj from 1508 contains the following regulation: "Consuetum erat prius, quod boyaro vitam claudens, equum sellatum cum hasta castellano dare coactus fuit, si vero equo deficiebat, etiam equum dare pro ipso oportebat."

Moreover, it seems that § 48 encloses one more rule, which was transplanted from Byzantine to Serbian regulations. Being exceedingly patriarchal, Serbian customary laws did not allow the daughter of the deceased to inherit her ancestor. Conversely, under the influence of the Byzantine laws the Code gives her the right to inherit on condition that the deceased had no sons.

It is almost needless to say that this example again transparently proves how strong and influential Roman law actually was. It is often considered that the inheritance law is primarily based on the local customs that are strongly integrated in the awareness of the people, not only as legal guidelines but also as something that, as time passed by, evolved from a social norm to a rule of their internal ethical codex. Regardless of that, as Soloviev claims, paragraph 48 of Dushan's Code changed the ancient maxims of the Slavic Customs.[91] Claiming that it was actually the everlasting authority of the Roman law, which changed the ancient maxims of the Slavic customs in this case, would not be exaggerated.

Transplants Analysis: Public Law

It is a general opinion that the notion of legal transplants should be applied primarily in the sphere of private law. Several works of Alan Watson provide various precious comparative examples, but mainly in the context of private law, rarely facing public law though.[92] Perhaps one of the rare examples referring to public law is the one, which Watson provides in support of the conclusion that foreign law can be of great influence even when it is misinterpreted. In order to prove this hypothesis, he describes the impact that the common law system and British constitutionalism had on Montesquieu's understanding and creating the theory of the division of power.

It can be taken as a "praesumptio iuris et de iure" that the impact of Roman private law was overwhelming. "The western world, indeed, has been so influenced by Roman law that in many situations in most countries it is impossible to see law except in Roman terms. Thus, the basic division into public and private law: the scope

[91] Solovjev A., *Zakonodavstvo Stefana Dušana, cara Srba i Grka*, Skoplje, 1928, p. 137

[92] See Watson A., *Legal Transplants,* pp. 102ff

of the various civil codes, which largely restrict their substantive law to what was contained in Justinian's Institutions: classifications such as the law of "persons" – only very recently has the classification "family law" come to be recognized; jurisprudential constructs such as possession; particular institutions such as sale and hire and the line which divides one from another.[93] The vital determinant of such intensive reception of Roman private law was, apart from its immense authority and superb quality, the ease of use of its most valuable source: Corpus Iuris Civilis.

However, it appears that legal transplants are likely to occur in the field of public law as well. For instance, some present-day processes that are taking place in Russia and Eastern Europe can only confirm such hypothesis. As indicated by Ajani, "the influence of foreign models and their reception by the legislators of old and new post-socialist states has reached dimensions never before seen. For obvious reasons observers dwell upon sectors that are closer to business practice, but new legislation based on comparative analysis is now a common practice in all sectors of the legal system, affecting constitutional law, criminal law and legal procedure."[94] As argued in this paper, the notion of legal transplants represents a universal concept. This concept is transcending the constraints of historical and social determinants. Just as in the contemporary times, Middle-age Serbia could not remain unaffected by legal transplants in the sphere of public law.

Therefore, this chapter attempts to identify both the material sources and the outcome of legal transplants in public law of the medieval Serbo-Greek Empire, including criminal law, state administration and the judiciary.

Criminal Law

Prior to the promulgation of Dushan's Code, criminal law in Middle-age Serbia was as a type of half-feudal law with neither coherent nor systematic classification of legal institutions and concepts. The incrimination of certain acts was a result of the existing conditions and, above all, the matter of the noblemen's desire.

[93] Watson A., *Society and legal Change*, Philadelphia: Temple University Press, 2001, p. 99

[94] Ajani G., *By Chance and Prestige: Legal Transplants in Russia and Eastern Europe*, American Journal of Comparative Law, Vol. 43, No. 1 (1995), pp. 93–117

This indicates an unstable system, based on ad hoc decisions devoid of logical order and confidence. In such conditions, customary laws were of immense importance. Some of them were preserved and complied with in their original form, whereas the others were being modified along the lines of the dynamic changes of social and historical background. Considering the changes that Dushan's Code brought, the focal points are the sources and consequences of the confrontation between the two legal systems: Slavic customary law and the Byzantine statutory laws. The question is whether there was an evolution ongoing lengthy preceding Dushan's legislative reform as its culmination, or perhaps a revolution that shook the Serbian legal system in 1349. Knowing that a great deal of the customary laws survived Dushan's reform especially in the field of criminal law, essential characteristics of the old Slavic customary law and the course of its modification rise up as an important matter.

The old Slavic customs were especially specific. This seems reasonable since customary law embraces all rules for human actions, which do not reign by force of an organized political power, but only by the convictions of the social units of their necessity. How can then the authority of these convictions and ideas be erased from the minds of one community's members? In his work on customary law, Watson claims, "the total forgetting of the customary law can happen only in particular circumstances. Either the past behavior occurred very seldom in practice, in which case one must doubt whether it had ever become law as a result of common consciousness that it was law. Or the people had in this regard adopted a very different lifestyle – perhaps a result of migration – in which case it should be argued that the new practice is law not because new law has replaced old law but because law has been created for circumstances where no law existed before."[95] The latter seems to be perfectly applicable on the customs of the Southern Slavs. After their migration to the Balkans, the process of Christianization as the most effective and influential aspect of acculturation, significantly contributed to the adoption of new values, which were gradually being incorporated in all aspects of life constantly pressing out the traditional customary regulations. Referring not only to the Serbs, but also to the other Slavic peoples, Sigel also points out that the most notable change ensued in the 9th

[95] Watson A., *The Evolution of Law*, Baltimore, Maryland: The Johns Hopkins University Press, 1985, pp. 43–46

and 10th centuries, after the conversion to Christianity, when not only political, social and economic relations, but even the religious and moral ideas were completely transformed. That is how "the old legal customs, permeated by heathen conceptions, lost their power over minds, and were kept together only by the force of tradition." However, the new ideas could not be assimilated with ease. That is why the struggle between the old concepts and the new ones lasted for centuries.[96] It seems that the conflict between the old and the new ideas was particularly intense in the field of criminal law. The explanation for that can be found in the idea of criminal law as a specific effort of the community to protect the most important human values (human live in the first place) as well as its interference with moral and religious rules.

The rulers, starting with eldest son of Stephan Nemanja, Stephan the First-crowned, then king Milutin, and finally Tsar Dushan officially abrogated some of the customary laws. Along with the territorial expansion and the rising authority of the state (embodied in the monarch) came its need to interfere intensely in the areas of public interest. During the 13th century, criminal law was gradually being transferred from the sphere of private law to public law. Numerous charters (such as the Dechani Charter from 1330) contain regulations, which indicate that penalizing the culprit was no longer a private matter of the victim's family but a public concern. Such conclusion is drawn from the analysis of the development of the specific penalty known as "**враждьа**", which represented a material compensation that the family of the murderer issued to the family of the victim. Such tradition survived for centuries as a part of the Serbian customary law until the Dechani Charter adjusted it. In accordance with the Charter, the full amount of material compensation was divided between the ruler (or the Church) and the prosecutor (the family of the murdered).[97] This clearly indicates that the state, embodied in either the personality of the monarch or the Orthodox Cchurch, started to interfere in criminal matters and protect the public interests. A greater part of Dushan's Code encloses regulations on criminal law, representing a revolutionary change, which was the result of Byzantine influence on the Serbian criminal law. It adopted and introduced numerous institutions that had not

[96] Sigel F., *Lectures on Slavonic Law*, pp. 9–12

[97] Praštalo Z., *Krivično pravo Dušanovog zakonika i vizantijsko pravo* [magistarski rad], Beograd: Pravni fakultet, 1991, p. 51–53

been familiar to the Slavic customary law before their transplantation from the Byzantine law.

The Code introduces a new term for guilt – "**сьгрѣшеніє**" (sin, transgression), meaning the violation of a law or moral commandment. Soloviev reckons that the introduction of this term actually represents a result of Christianization and the acceptance of Byzantine canonic regulations.[98] Such concept of crime is in absolute accordance with the Byzantine idea that not complying with a civil regulation is at the same time an offence against the divine laws. Archaic as it is, it was based upon the convictions enclosed in the Bible, proclaiming that each law is an embodiment of God's wisdom speaking through the mouth of men. Thus, every wise man should obey the laws. In view of that, the concept of crime as a central institution of criminal law, along with other institutions of this branch of law, was developed and formed under the overwhelming influence of the Church. Such "Christianized" course of development in criminal law did not take part only in medieval Serbia but also in other medieval states that were under the pressure of the Byzantine Empire, strengthened through the impact of the Orthodox Church.

Criminal law is the component of Dushan's Codification where the class differentiation typical for medieval monarchies seems to be the most transparent. Several paragraphs of the Code show that the penalties for the same criminal act are divided into discrete categories for noblemen and the peasants. § 51 is only one of numerous examples of how this maxim was applied: "If any lord take a noblewoman by force, let both his hands be cut off and his nose be slit. But if a commoner take a noblewoman by force, let him be hanged. If he takes his own equal, let both his hands cut off and nose slit."[99] The class differentiation was disregarded only in cases of the most violent criminal acts, such as homicide (provided that the victim is a priest, a

[98] Jevtić D. et al., *Narodna pravna istorija,* Beograd: Savremena administracija, 2003, p. 58

[99] *Dushan's Code*, § 51 (**Аще кои властелинь вьз́меть властелинкѹ по силе. да моу се ѡбе роуце, ѡтсѣкоуть. и нось ѡтрѣжеть. аще ли себарь вьз́меть властелинкѹ по силе да се ѡбесїть. аще ли свою дрѹгѹ вьзметь по сїле. да моу се ѡбе роуце ѡтсекоть** (sic) **и нось ѡтрѣжеть. ѹимать дѣцѹ или не имат и оумрѣть. и по нѥгове сьмр́ти бащїна поуста ѡстанеть. се оурежеть.**; MS Šišatovački: § 48)

bishop, a monk[100], or the father, the mother, the brother or the child of the killer[101]), armed robbery and witchcraft. Another case that imposes an equal penalty regardless of their social status was the crime of arson.[102]

The influence of the Church is felt in the institution of accomplice too. It is based on the canonic idea that not only sin, but also sinful thoughts deserve to be severely penalized. Such point of view only strengthened the already existing Byzantine tendency to regard anyone who has animus auctoris or animus socii as a culprit, and to penalize the criminal intention even harsher in comparison with the factual damage. This subjective theory of guilt was transplanted into Serbian laws, which previously penalized only the objective act without evaluating the psychological, subjective intention of the accused. In view of that, Dushan's Code also adopted the Byzantine idea of accomplice. For instance, one paragraph on duel regulated the following: "In the army there shall be no quarrel. If two quarrel, let them fight, and no soldier shall help them in the fight. And if anyone start to succour them in the fight, let them be punished, both their hands be cut off."[103]

Another important trait for the development of Serbian medieval criminal law is the introduction of subjective liability. Subjective liability was a maxim of Roman criminal law that continued its existence in the Byzantine law. Being in regular contact with the Byzantine Empire, the legal systems of the Slavic rulers also gradually accepted the concept of subjective liability, transplanted from Roman law. Soloviev mentions that the first evidence of this was found in the Charter of Tsar Constantine I Tikh of Bulgaria from 1258, dedicated to the monastery of Saint George

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[100] *Ibid.*, § 93; in case that a priest, a bishop or a monk is a victim of homicide, the culprit is not responsible only for manslaughter but also for a crime against faith. That is the reason why the maximum penalty is imposed: "Whoso be found to have killed a bishop, or a monk, or priest, let him be killed and hanged."

[101] *Ibid.*, § 94 ("Whoso be found to have killed his father, or mother, or brother, or his own child, let that murderer be burnt in the fire.")

[102] *Ibid.*, § 97 (If anyone be found who hath set fire to a house, or to a threshing floor, or straw, or hay belonging to another man, out of malice, that incendiary shall be burnt in fire. If he were not found, let that village hand over the incendiary. And if it hand him not, let that village pay what the incendiary would have paid.)

[103] *Dushan's Code*, § 126 (**На воисце свадѣ да нѣсть. аще лї се сьвадїта два, да се биеата а инь никто ѡт воинїкь да имь не помажеть на пор´вицȣ | аще ли кто потечеть и попоможеть на порьвицȣ, да се кажоуть, роуце да им´ е** (sic) **ѡтсекȣ.**; MS Šišatovački: § 112)

in Skopje.[104] The Charter encloses a regulation in accordance with which the material compensation given to the family of the murdered has to be paid by the culprit only and not by the entire town or village. The Serbian king Milutin in a Charter dating from 1300 proclaimed an almost identical regulation. However, it has to be admitted that the transplantation of subjective liability was not a completely successful one. In spite of the immense importance of this legal institution, there were certain cases where it simply could not be applied. For example, some documents from the times of king Milutin show that there existed a sort of objective liability of the ruler for the acts of his men.

Dushan's legislature stands somewhere between the subjective and the objective concept of liability for a criminal act. The abridged Syntagma encloses only one regulation on this matter, which outlaws penalizing the children of the murderer for the crime committed by their father. Dushan's Code proclaims subjective liability, referring to disloyalty and "сьгрѣшеніє", where it clearly sanctions that "brother shall not pay for brother, father for son, kinsman for kinsman, if they dwell separately from the culprit in their own houses: they who have not sinned shall not pay anything: but that one who hath sinned, his household shall pay."[105] A similar regulation is found in one Byzantine charter from 1295. The presumption that the son does not live on the estate of his father, but on his separate estate, is a concept that originates from the Byzantine laws too. It was transplanted into the Serbian legal awareness along with the idea of individualization. On the other hand, the objective (collective) liability of the entire village still existed in certain cases. The most remarkable example of pure objective liability was the crime of arson: "If anyone be found who hath set fire to a house, or to a threshing floor, or straw, or hay belonging to another man, out of

[104] It is interesting that Sigel regarded Bulgaria as the country where the influence of Byzantium was felt more intensely than in other Slavic countries. Sigel F., *Lectures on Slavonic Law*, p. 16; "Although during the reign of the first tsars of Bulgaria (681–1018) the Pope sent Roman statutes to the Bulgarian people who converted to Christianity by the Pope (Responsa Nicolai I papae ad consulta Bulgarorum), it was still the influence of Byzantine law that prevailed, namely an old Bulgarian translation of the Eklogé, the source of the oldest compilation of law in a Slav language titled Zakon sudni ljudem (Law-book for the people) written in the 9th century…" (Hamza G., *Trends in the Development of Private Law in Europe: The Role of the Civilian Traditon in the Shaping of Modern Systems of Private Law*, Budapest, 2005, p. 12)

[105] *Dushan's Code*, § 55 (Ꙁа неверꙋ за васако сьгрѣшеніє. брать за брата. или тьць за сына. ꙍд родіма. кто соꙋт ꙍтдѣл´ни, ꙍт ꙍного вь своих дꙍмох. ко нѣсть сьгрѣшіль. ть да не платит, ничто. развѣ ꙍнь кои е сьгрѣшіль. тоговь и дꙍм да плати.; MS Šišatovački: § 49)

malice, that incendiary shall be burnt in fire. If he were not found, let that village hand over the incendiary. And if it hand him not, let that village pay what the incendiary would have paid"[106] Some charters that were promulgated subsequent to Dushan's Code witness the fact that the concept of objective liability was, prima facie unexpectedly, being applied even in the Southern (Greek) parts of Dushan's Empire. This was probably for the reason that even in the Byzantine legal system the strict concept of individual and subjective liability appeared to be unsustainable in the altered social conditions.[107]

The greatest divergence between the Slavic customary law and the Byzantine statutory laws was the remarkable difference between their penal systems. As already stated, the Byzantine laws regarded penal law as a public matter, whereas the Serbian laws considered it being a private matter. Regardless of this initial difference, it is evident that Tsar Dushan transplanted almost the entire Byzantine penal system into the Code, especially the death penalty via burning and hanging, crippling by cutting one's tongue, nose or ears, beating, imprisonment, and even burning one's hair.[108] These penalties are in accordance with the criminal acts enumerated in Procheiros Nomos and the Syntagma. Therefore, it would be appropriate to consider Dushan's penal system as en bloc transplantation of law, commonly recognized as reception.

The inevitable influence of religious acculturation was incredibly strong in the field of penal law as well. From the primitive and customary point of view, penalty was an equivalent for revenge and retribution. Its only objective was to reestablish the balance of justice by making the culprits suffer. However, such concept was modified under the influence of the Roman law theory of general prevention. What is more important, owing to Christianization and moralization, the theory of retribution was gradually being pressed out by the concept of special prevention, based on the canonic attitude that the culprit should redeem himself and improve his behavior. As a result

[106] *Dushan's Code*, § 97; the explanation for such strict punishment was the fact that the crime of setting fire was considered one of the hardest criminal acts. Accordingly, it is one of the cases (along with the murder of a priest, for example) where the class distinction as a criterion for measuring the punishment is completely neglected – the nobleman is punished in the same way as the slave.

[107] Solovjev A., *Op. cit.*, p. 154

[108] The penalty of burning one's hair – "**смоудьѣніє**" – was very similar to the case in the Roman-Byzantine law. It is actually a more severe penalty than cutting one's hair, what in Byzantium led to infamy. In Russia of the 12th century, Archbishop Theodor also tortured convicts in the Byzantine manner by hollowing out their eyes, and burning their hair and beards.

of this impact, numerous Slavic languages adopted expressions such as: "казьна, наказаніе", corresponding to the Latin "monstrare", "dicere", "monere", "punire". All of these terms can be found in the Slavic translation of the New Testament as well as in numerous canonic and civil regulations with the connotation of teaching, preaching and the punishment to facilitate improvement of the culprit's conduct.[109]

As a product of Christianization, a whole group of criminal acts, regarded as crimes against faith, was incorporated in Dushan's legislature. As the true-believing ruler who was determinate to resemble Greek emperors as much as possible, he considered the "holy war" against heresy as his major duty. The incrimination of crimes against faith, however, was not his original idea. Even before Justinian's reign, numerous imperators proclaimed their writs referring to this matter. For example, the imperial writ of Gratianus, Valentianus and Theodosius, which became an integral part of the Basilica, was entitled "De Summa Trinitate et fide Catholica, et ut nemo de ea publice contendere audeat". The heading clearly speaks of its content and objective. The abridged Syntagma contains most of the regulations on this matter, leaving to Dushan's Code the capacity of a supplemental source. The most important criminal acts in this section are heresy and the denial of the true Orthodox faith. These criminal acts were penalized in compliance with the legitimate church regulations.

Another field of criminal law, crimes against the state and the ruler, show a remarkable resemblance with the Roman law. All Serbian laws use one term to describe various criminal acts that belong to this group: disloyalty. The term "disloyalty" is referred to in the sense of treason and at the same time used for assassination of the ruler or the insult of his majesty, which was known in the Roman law as "crimen laese maiestatis". The abridged Syntagma and Dushan's Code enclose several regulations referring to various types of disloyalty and regard it as one of the most malicious criminal acts. Roman-Byzantine laws imposed the death penalty and confiscation of the entire property for this crime.

Although the majority of examples reveal that the Roman-Byzantine influence is overwhelming in the Code, there is one exception to this general tendency. Namely, the Byzantine laws do not contain many regulations on sexual offences. It is the result of the common conviction that every illegal sexual intercourse should be condemned,

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[109] Solovjev A., *Op. cit.*, pp 157–158

what covers taking by force as well. Procheiros Nomos mentions only the case of taking by force a woman who is under 13 years old, and the bride of another man. The Syntagma does not contain many regulations on this matter as well. In contrast, Dushan's Code encloses one significant paragraph on sexual offences, i.e., taking by force. "If any lord take a noblewoman by force, let both his hands be cut off and his nose be slit. But if a commoner take a noblewoman by force, let him be hanged; if he take his own equal, let both his hands be cut off and his nose slit."[110] It can be noticed that Dushan's penalties[111] for this criminal act are much harsher than the Byzantine. Such severe penalties for sexual offences, in conjunction with the distinctive class differentiation, appear to be borrowed from the western legal systems. For instance, the Statute of Korchula[112] contains similar regulations. It provides that if a nobleman takes a married woman by force, his head shall be cut off, but if a peasant takes a daughter of a nobleman by force, he will be hanged.[113]

The impact of the Roman-Byzantine criminal law must have certainly been overwhelming, but these fine details reveal that the transplantation appeared as a result of the interaction with the Western legal systems as well.

State Administration

The state administration and the overall organization of the authority in medieval Serbia are regarded as a half-feudal monarchy. From Plato's point of view, the Empire could be considered a timocracy, a form of state closest to his idea of a righteous state. Secular lords, as owners of the military estates, in tandem with the ruler, the supreme military commander, performed the principal military function. On the other hand, the clergy played the major religious, cultural and social roles.[114] Dushan's legislative reform caused far-reaching alterations in the sphere of public

[110] *Dushan's Code*, § 51

[111] In this case, there is no possibility to apply the traditional institution of material compensation. All penalties in this paragraph are typically Byzantine, but much harsher.

[112] Korchula (Latin Corcyra Nigra, Serbian-Slavonic: Кркарь) is an island in the Adriatic Sea, today in the Dubrovnik-Neretva province of Croatia.

[113] Solovjev A., *Op. cit.*, pp. 157–158

[114] Popović M., *Justice and Dushan's Legislature,* Facta Universitatis Scientific Journal: University of Niš, vol. 1, no. 3, 1999, pp. 295–323

law. In his effort to be regarded as the true-believing Christian Tsar, Dushan adopted numerous Byzantine ideas on public law and transplanted them into the Serbian state order, bringing notable innovations. It seems that the revolution actually occurred only in a theoretical and idealistic sense, but its importance was still immense for the legal as well as ethical awareness in Serbia. The most important philosophical impacts were related to the overall idea of justice, legitimacy and the rule of law.

Only two chapters of the abridged Syntagma enclose regulations relevant to the question of the authority of law. They are based on the concepts of Roman law and were simply translated into the Serbian-Slavonic language, unfortunately, not too successfully. One of them is the Ulpianus' concept: "Lex est communis praeceptum, virorum prudentium consultum, delictorum coercitio, communis republicae sponsio. Est etiam divinum praeceptum." The other definition is related to the practical objectives of the laws interpreted by Modestinus: "Virtus legis haec est: imperare, vetare, permittere, punire." The chapters of the original Syntagma that referred to the authority of customary law did not become a part of its abridged version.[115] The reason for this is that Dushan wanted every sphere of life to be arranged in compliance with either the canonic regulations or the secular laws.[116]

It is remarkable that a similar regulation existed in the Sudebnik, a Russian feudal codification dating from 1550, where statutory laws represented the major sources of law – their importance was standing above the customary laws, and what is more, above the ruler's charters.[117] It seems that Dushan's Code accepted the Byzantine theory of the relationship between "specialis constitutio" (meaning law in the sense of a general rule that was officially proclaimed through the legislative council) and "rescriptum" (describing the order of the emperor himself that has not

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[115] Customary laws are elaborated in the chapter of this work on criminal law, because, as already stated, customary laws had the strongest authority in the field of criminal law. This is the reason why they will not be elaborated in this place.

[116] Some of the paragraphs of Dushan's Code contain the expression "according to the laws of the holy fathers" (in the sense of canonic regulations), whereas the others simply refer "to the laws" (meaning secular laws).

[117] Soloviev finds an interesting parallel between Dushan's legislation and the Russian statutory laws of the 16th and 17th century. In that period, Russia was considered the only true Orthodox empire, "The Third Rome." Russian ruler Ivan IV, the son of Ivan III and one Byzantine princess from Palaeologus' dynasty, proclaimed his code "Sudebnik" in 1550. Knowing that Ivan IV owned a great library (which he inherited from his grandfather) fully supplied with the most remarkable books of the most eminent Roman historians and jurisprudents such as Cicero, Suetonius, Tacitus, Ulpianus, Papinianus. It is also known that he ordered the translation of Justinian's Code into Russian. See Solovjev A., *Op. cit.*, p. 83

previously been confirmed by the legislative council) too much. Several paragraphs of the Code emphasize the strength and authority of the general laws. The most important of those are certainly paragraph 171: "If the Tsar write a writ either from anger or from love, or by grace for someone, and that writ transgress the Code, and be not according to justice and the law, as written in the Law, the judges shall not believe that writ, but shall only judge and act according to justice", and paragraph 172: "All judges shall judge according to the law, rightly, as is written in the Code, and shall not judge out of fear of the Tsar."[118] Both of the paragraphs are entitled "On Justice" and it seems that they can perfectly match with Aristotle's model of universal justice, understood as legitimacy.[119] Dushan's Code repeatedly mentions the term "justice", often with different connotations: "Sometimes the word 'justice' is used to denote the law or, for example, a dispute or a lawsuit."[120] The above paragraphs were, as maintained by Radojchich, borrowed from the Byzantine law.[121] The motive for this transplantation was that Emperor Andronicus and his son were trying to reestablish the rule of law and the reputation of the courts in the underdeveloped areas of the Byzantine Empire. Their efforts, however, did not appear to bring any improvement in reality. In spite of that, the Greeks who lived in the Southern parts of Dushan's Empire tended to idealize these maxims, primarily for political reasons, and therefore Dushan had to adjust his legislation to their tacit demands. If Stephan Dushan had not conquered the Byzantine areas with the highly developed legislation, the system of law in medieval Serbia would probably have created regulations such as paragraph 171 and 172 much later.[122] Therefore, it is certain that the expected course of development of the Serbian legal order was changed. To sum up, due to the complex and overwhelming process of legal diffusion, a gradual evolution swiftly turned into a fruitful revolution, which brought various advantageous modernizations into the Serbian system of law.

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[118] *Dushan's Code*, § 167 – 168

[119] Popović M., *Op. cit.*, pp. 295–323

[120] Novaković S., *Zakonik Stefana dušana cara srpskog 1349 – 1354*, Beograd: Pravni fakultet, 2004, p. 166

[121] See Ćorović V., *Op. cit.*, p. 218

[122] Radojčić also insists on this borrowing, pointing out the Byzantine influence of "condicio sine qua non" on the development of the Serbian system of law. See Ćorović V., *Ibid.*

The Judiciary

Dushan's Code does not provide a clear picture about the judiciary in medieval Serbia. The judges, whose jurisdiction was limited to their district, are mentioned in several paragraphs, always in plural. However, their relationship with the state administration on one side and jury on the other is not completely explained. It is held that Dushan's Code established the separation between the judiciary and state administration. It would be more precise to say that being inspired by the Byzantine influence, Dushan intended to do so, but did not succeed due to the social conditions. There was not a sufficient number of educated judges that could meet Tsar Dushan's demands he announced in the Code.

There are many speculations about the institution of jury and its roots. One standpoint is based on the conjecture that the jury was a traditional institution familiar to the Slavic customary laws. On the other hand, it could have as well been accepted during the reign of king Milutin, as a legal transplant from the French legal system. The institution of jury was familiar to the Byzantine laws as well, particularly when a nobleman appeared in capacity of the defendant. The scientific arguments with regard to the origins and development of the jury as a legal institution were extremely popular after the French Revolution in 1789,[123] because one of the revolutionary requests was to establish the presence of the jury as obligatory in every European court of law. The supporters as well as the opponents of this idea often tried to find the confirmation of their opinion in legal history. Some of the Romantic Slavists perceived the jury in Dushan's Code as a traditional Slavic institution of customary law as the "court of the people". They regarded it more developed than the one that existed in France, England and Germany. On the other hand, Markovich developed a more critical approach to this question.[124] He claimed that Dushan's jury acted only in the capacity of a "collective witness" (Beweisjury) and had no influence on the verdict itself (Gerichtsjury). That was the case in England of the same epoch.

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[123] For example, Macheiovski in 1832 and Palatski in 1837; See Solovjev A., *Žene kao porotnici u Dušanovom zakoniku*, Beograd: Pravni fakultet, pp. 2–3

[124] Marković B., *Über das Serbische Schwurgericht im Vergleiche mit dem Deutschen, Französischen und Englischen Schwurgericht*, Freiburg, 1899, p. 5

Taranovski accepted and further developed the same idea on this matter.[125] The fact that Dushan's Code introduced "a jury for great matters and small ones"[126] is regarded as an outcome of the social circumstances and the still surviving impact of the Slavic customary laws.

The strong Byzantine impact is also manifest in the limitation of the practice of judicial duel.[127] According to the Code, duel or fighting is mentioned only if committed by the soldiers. In that case, the other soldiers are not allowed to interfere.[128] The judicial duel used to be a popular means of proof in the customary laws of all the Slavic peoples. The Bohemian Ordo iudicii terrae from the 14th century also mentions duel as a means of proof in its various forms: on horses, with swords, between noblemen, citizens and peasants, even between a man and a woman. Russian laws from the 13th and 14th centuries are also familiar with this institution.[129] As we can see, Dushan limited the practice of this way of proof to the minimum. This was obviously the result of Byzantization. The Byzantine statutory laws influenced by the Orthodox Church do not mention this institution in any context.[130]

Another specific way of proof with the authority of the foremost evidence was the ordeal.[131] Dushan's Code mentions the ordeal of fire in paragraph 82: "For the one

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[125] Taranovski T., *Istorija srpskog prava u Nemanjićkoj državi III*, 1935, pp. 209–218

[126] *Dushan's Code*, § 146 ("The imperial order: From now henceforwars let there be a jury for great matters and small ones. For a great matter, let there be 24 jurors and for a lesser matter, 12 jurors, and for a small matter 6 jurors. And these jurors shall not be authorized to make peace between the parties but to acquit or else convict. And let every jury be in a church, and the priest in robes shall swear them, and whatever the majority of the jury swear to and whoever they acquit, that shall be believed.")

[127] Trial by combat, trial by battle or judicial duel are names for a form of ancient as well as medieval dispute resolution rarely used today, in which two parties in the dispute fought in single combat; the winner of the fight was proclaimed to be right. In essence, it is a judicially-sanctioned duel.

[128] *Dushan's Code*, § 124

[129] See Solovjev A., *Zakonodavstvo Stefana Dušana, cara Srba i Grka*, Skoplje, 1928 , p. 216

[130] Chronicles, however, show that the duel of this sort (μονομαχία) was a common practice among the Byzantine noblemen although the law says nothing about it.

[131] Trial by ordeal is a judicial practice where the guilt or innocence of the accused is determined by subjecting them to a painful task. If either the task is completed without injury, or the injuries sustained are healed quickly, the accused is considered innocent. In medieval Europe, like trial by combat, it was considered a *judicium Dei*: a procedure based on the premise that God would help the innocent by performing a miracle on their behalf. The practice has much earlier roots however, being attested in polytheistic cultures as far back as the Code of Hammurabi, and in animist tribal societies, such as the trial by ingestion of "red water" (calabar bean) in Sierra Leone, where the intended effect is magical rather than invocation of a deity's justice. Ordeal of fire was a test that typically required that the accused walk a certain distance, usually nine feet, over red-hot ploughshares or holding a red-hot iron (Dushan's Code considers the latter as the means of proof in cases when someone is accused of robbery

who was submitted to the ordeal, there shall be no further trial or vindication. Whoever vindicates himself shall give no justification for the judges. There shall be no surety in court, and no false accusation and imprisonment for debt. There shall only be trial according to the law"[132] The ordeal of water is referred to in § 104: "Noblemen's courtiers, if any one of them commit some evil if he be a son of a fief-holder let him be judged by a jury of his father's peers; if he be a commoner, let him seize from the cauldron."[133] The Byzantine statutory laws were not familiar with the ordeals. The Byzantine customary laws of 13th and 14th century, however, respected this method of proof as a "judicium Dei". In spite of the Church's efforts to limit the usage of this barbaric means of proof,[134] the ordeal of fire (ό μύδρος) seems to have been a common practice in the Byzantine Empire. Surprisingly, in spite of being familiar to most of the Slavic peoples, this means of proof had never been mentioned in the Serbian laws until Dushan's Code introduced it. The question is whether this institution was transplanted from the Byzantine customary laws or perhaps from some other legal system. There is also the likelihood that this "judicium Dei" existed even long before, in the ancient Greek (Hellenic) tradition. One line in Sophocles' famous tragedy "Antigone", in which "ό μύδρος" (iudicium ferri candentis) is mentioned, suggests that this institution might as well have derived from the ancient Hellenic customary laws.

One of the most remarkable examples of the impact that the Byzantine legal system had on the development of the Serbian judiciary are the Code's regulations related to imprisonment. They proclaim that no man can be imprisoned without the previous writ of the emperor, showing an incredible resemblance to the major

See *Dushan's Code*, § 145). Innocence was sometimes established by a complete lack of injury, but it was more common for the wound to be bandaged and reexamined three days later by a priest, who would pronounce that God had intervened to heal it, or that it was merely festering - in which case the suspect would be exiled or executed. The Code is also familiar with the ordeal of hot water (See *Dushan's Code*, § 104). First mentioned in the 6th century *Lex Salica*, the ordeal of hot water requires the accused to dip his hand in a kettle of boiling water. It is interesting to mention that a similar practice was known in India, described in the law code of Narada.

[132] *Dushan's Code*, § 82

[133] *Dushan's Code*, § 104

[134] The prohibition of ordeals or at least the limitation of its usage was a general attitude of the Christian Church – Orthodox as well as Catholic. Priestly cooperation in trials by fire and water was forbidden by Pope Innocent III at the Fourth Lateran Council of 1215. Its effect was slow and piecemeal, and certain superstitions would linger for centuries.

principles of the Habeas Corpus Act, which was promulgates in the latter centuries. These well-developed ideas were transplanted from the Basilica, which enclosed rules such as: "Neminem oportet coniici in custodiam sine iussu magnorum iudicum Urbis Regiae, et in provinciis sine iussu rectorum earum vel defensorum locorum." It might be a bit hard to believe that these humane and highly developed ideas were completely accepted and applied in practice in medieval Serbia. However, their significance is immense, since they show that Dushan's intension was to transplant only the best principles of the Roman-Byzantine law.

Manuscripts and Redactions of Dushan's Code

The preliminary 18th- and 19th-century research conducted on Dushan's Code represented a very complex activity, since the original content of the Code was not preserved. Dozens of its transcripts, created in the latter centuries, enabled comparative legal history to acquire an accurate comprehension of the Serbian legal system of that time. These handwritten transcripts differ in the numbers of articles as well as their classification, what made it difficult to interpret the authentic legal meaning in these regulations.

Tsar Dushan's Code was promulgated on a legislative council in Skopje, on May 21, 1349. The supplement was announced five years later, in 1354. The original MSS of Dushan's Code, which were ceremonially presented on these two legislative councils, are not preserved. To this point in time, twenty-five manuscripts dating back from 14th – 19th century have been identified. Not all of the MSS discovered in the 19th and 20th century have been recorded thus far. Unsurprisingly, each of them has its particular redaction characteristics, what required numerous linguistic studies and interpretations.[135]

[135] Presently, the following transcripts of Dushan's Code are available: Struga MS, 1395 (State Library, Moscow, Cod. 29 M 1732); Athos MS, ~1418 (State Library, Moscow, Cod. 28 M 1708); Hilandar MS, 15th century (Library of the monastery of Hilandar, Cod. 300); Studenica MS, 1426/36 (Zagreb, Academy of Sciences and Arts, Cod. IV d 114); Bistrica MS, 1444/54 (State Historical Museum, Moscow, Cod. 151); Baranja MS, 1479/99 (University Library, Belgrade, Cod. 39); Prizren MS, late 15th or early 16th century (National Library of Serbia, Belgrade, Cod. 688); Hodosh MS, ~1440 (National Museum, Shafarik's collection, Prague, Cod. IX F 10); Ravanica MS, mid-17th century (National Museum, Prague, Cod. IX H 7); Sofia MS, mid-17th century (National Library St. Cyril and Methodius, Sofia, Cod. 239); Rakovac MS, 1700 (National Museum, Prague, Cod. IX D 2); Bordjosh

The comparative studies and the scientific historiography of the manuscripts of the Code commenced with Pavel Joseph Shafarik, a distinguished Slavist of the early 19th century. Shafarik began his comparative studies on Tekelija's, Rakovac and Hodosh MSS, and published his work in the Vienna Literary Annual in 1831. Dushan's Code was published for the first time in 1795, corresponding to the text of a more recent transcript, the so-called Tekelija's MS from the 18th century. It was publicized as a supplement to the fourth book of the "History of Slavic Peoples" by Jovan Rajich (Иторія разныхъ слабенскихъ народовъ а наипаче Болгаръ, Сербовъ и Хорватоъ. T. IV. Бъ Віениђ, 1795). The Rakovac MS was published in 1828 and in 1831. Shafarik is also credited for identifying the Hodosh MS. Following Shafarik, several eminent Slavic scientists continued to analyze Dushan's Code, including Stojan Novakovich, Alexander Soloviev, Nikola Radojchich, et al.

Subsequent to its appearing in Rajich's History, Tekelija's MS was translated into foreign languages. Engel translated this text into German in 1801, and forty years later, Ami Boué into French.[136] In his study on Dushan's Code, at the University of Lvov in 1939, Soloviev emphasized, "Just one hundred years ago, in 1838, a very good edition of the Code came up in the piece of Andrzej Kucharski 'Antiquissima monumenta iuris slavici'. This Polish scholar published the Hodosh text, which W. A. Maciejowski received from Shafarik, comprised of only 130 articles, which he supplemented with the fragments of the Rakovac MS. This edition, in tandem with the tremendous German illustration, resulted in a major advance in science … Polish science can be proud that it developed the finest edition of the text and the first analysis of this legal monument."[137]

MS, 17th century (Library of Matica Srpska, Novi Sad, Cod. 176); Tekelija's MS, 17th century (Library of Matica Srpska, Novi Sad, Cod. 352); Stratimirovich's MS, late 17th or early 18th century (Library of Matica Srpska, Novi Sad, Cod. 352); Kovilj MS, 1726 (Library of Matica Srpska, Novi Sad, Cod. 353, A 21); Zagreb (Pashtrovichi) MS, mid-18th century (Academy of Sciences and Arts, Zagreb, Cod. Ill a 28); Patriarchate (Karlovac) MS, 18th century (Patriarchate Library, Belgrade, Cod. 42); Karlovac MS, 1764 (National Library of Serbia, Cod. 42); Grbalj MS, 1772 (National Museum, Vrshac), Jagich's MS, mid-19th century (Library of Jagich's Seminar, Belgrade, J 1602), Bogishich's MS, mid-19th century (Bogishich's Library, Cavtat); Popinac MS, 1784/85 (Library of Matica Srpska, Novi Sad, Cod. 352, A 22). Apart from these 24 transcripts, there had also been the Rudnik (Belgrade) MS from the 17th century, which burnt in the National Library of Serbia due to the Nazi bombing on April 6, 1941. (Krstić, Dj., *Op. cit*. Available at www.dusanov-zakonik.co.yu/uvode.htm)

[136] Engel Fr., *Geschichte von Serwien und Bossnien*, Halle, 1801; Boué, A., *La Turquie d'Europe*, t. IV, Paris, 1840.

[137] Sołowiew A., *Statuty Cara Stefana Duszana*, Lwów, 1939, p. 44

Since the first publication of the Code in Rajich's History, only four MSS were published in their integral form: Tekelija's, Rakovac, Hodosh and Prizren. Florinski significantly contributed to the analysis of Dushan's Code MSS with his exhaustive multidisciplinary study written in the 1880's. Florinski added to his study the integral texts of all four MSS: Struga, Athos, Ravanica and Sofia. In various chapters of his study, he introduced new and more detailed descriptions and in-depth examination of all seventeen manuscripts of Dushan's Code that he had found, and compared their redaction variants part by part. By means of this comparative method, he presented the content and character of the unpublished Bistrica, Belgrade and Shishatovac manuscripts.

In the year 1870, Stojan Novakovich published the Prizren MS, the second complete text offered to the scientific public, which was supplemented with several articles of the Rudnik transcript. Soon after that appeared a new major edition of Dushan's Code, prepared by Konstantin Jirechek. Stojan Novakovich's edition of the Code published in the late 19th century is also noteworthy, since it encloses the Code's translation into modern Serbian language. In the introductory study, the author described twenty-two editions of Dushan's Code, what was of great importance for further editions of the Code and its translations into foreign languages.

On the eve of the World War II appeared Alexander Soloviev's edition of the Grbalj MS. That was the first time that one Montenegrin version of the Code, written in the coastal redaction, appeared. After the Second World War, V. Moshin published three new transcripts: Studenica, Zagreb and Bogishich's, and so were the coastal group of Dushan's Code MSS completed.

Nikola Radojchich's contribution to the technological and bibliographical aspects concerning Dushan's Code is particularly significant. He was the first to publish the photo-printed editions of the entire text of the Struga and Prizren MSS.

The fact that there are so many manuscripts of the Code, each containing a different order of articles and even some differing regulations, indicates that certain modifications had been made throughout the period from 14th – 19th century. Since the original content, the major institutions and the essential ideas of the Code always remained unchanged, it would be wrong to say that there are several Codes of Dushan, each of them dating from different periods and enclosing differing concepts.

Notwithstanding how small and of no consequence these modifications can appear prima facie, their importance in the context of legal transplants should not be underestimated. Namely, when assessed carefully, we notice that each of the transcripts can be regarded as a picture of its own time. The language, expressions, grammar as well as the social and historical circumstances could not remain unchanged from the 14th – 19th century, and those who copied the manuscripts must have added to each transcript a trace of the spirit of their time. There have been several debates and works on Byzantine influence that existed in medieval Serbia before the promulgation of the Code, but these changes depict a new phase of the process of legal transplantation – the one that occurred in the centuries that followed Dushan's reign. Shortly after Dushan's decease, Serbia fell under the reign of the powerful Turkish Empire. This brought a strong wave of new influences, which resulted with numerous transformations in all spheres of social life, including legal. In this context, two questions appear as the most relevant. Firstly, which of the transplants from the Roman law survived the centuries of the Turkish occupation and which of them did not succeed to face the altered social circumstances? Secondly, in which way were these regulations modified?

Legal historians disagree about the destiny of Dushan's Code during the Turkish occupation and the decline of the Serbian empire. Turkish laws tended to press out the "Christian" regulations. It seems that the latter were not being applied by the judges, but only kept in monasteries as valuable heritage from the past. However, there are some facts that might indicate that they were not completely neglected, but that their importance and practical applicability were diminished. In spite of the Turkish occupation, the Orthodox Church was given a vast autonomy and maintained its authority in the spheres of law mainly related to marriage and crimes against faith. In all these cases, the Bishops had to use the Syntagma along with certain regulations of Dushan's Code. However, it has to be emphasized that the redactions of the 17th century were intended for being used by the Serbian courts under the Turkish jurisdiction.

The regulations of the abridged Syntagma were not a separate part of the 17th-century manuscripts, i.e., a great number of its paragraphs was added to the text of the Code. Some of them were modified, whereas some novel lines supplemented the

others. The selection that was made among the regulations originating from the Byzantine laws was a result of the degradation of every social development during the Turkish occupation. The majority of the church law regulations were eliminated.[138]

There were some modifications in the law of marriage as well, e.g., the regulation on the wife of a war prisoner, or a soldier who is serving the Tsar. This regulation, so close to the reality of the conquered Serbian people, derived from the Syntagma but with slight simplifications. Namely, the wife is supposed to wait for her husband even "for a hundred years", and she can remarry only if she provides evidence of her husband's loss.[139]

It is also noteworthy that the redactions of the 17th century do not refer to the regulations of the Syntagma on the institution of deposit. One terminological difference suggests how strong and aggressive the influence of the Turkish culture actually was. To be exact, the later manuscripts do not contain the old Serbian term "**покладъ**", but use a Turkish term "amanet" instead.[140]

Another example is related to the regulations on homicide. As already stated, the crime of homicide is one of the fields where the gap between the Byzantine statutory laws and the Serbian customary laws is the most transparent.[141] In spite of Dushan's efforts and the official codification, one cannot confidently claim that the transplantation of the highly developed maxims of the Byzantine criminal law was completely successful. There are some speculations that due to the Byzantine regulations not being close to the Serbian customary laws, they were not accepted in all, but only the southern parts of the country. The fact that the Turkish reign interrupted every progress, including the prosperity of the overall legal awareness,

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[138] Only the regulations relevant to the criminal law remained – the duty of the bishop to visit the prisoners and the regulation referring to the men who escaped from imprisonment. "A prisoner kept in the Church court and who escapes to the imperial court, let him be free. Likewise, a prisoner who escapes to the Patriarch's court, let him be free." (*Dushan's Code*, § 110)

[139] Sophia MS, § 142: **Аще воинь на царьсокмь записан́ны закаснить на воисци, сто лѣть жена да имать чекати его, аще ни писанїе приимить ѡт кого, да се не оуда доньдеже истин́номь живь есть, егда же исин́но каж8т ей оумр́ль есть, и еще да чекаеть едно лѣето пак да се оудасть.**

[140] The word "amanet" is mentioned in paragraph 33 of Justinian's Code, which is in the later redactions called "the Code of Emperor Justinian".

[141] See the chapter on criminal law, p. 43

contributed to the degradation and return to the Slavic customary law.[142] This might be the reason why the redactions from the 17th century reduced a number of developed and sophisticated Byzantine criminal law regulations that were previously contained in the Syntagma. It is interesting that the same phenomenon occurred in Montenegro. The primary objective of the legislative work of the Montenegrin rulers in the first half of the 19th century, such as prince Danilo, was also based on the idea of suppressing the traditional retribution, just as the Russian rulers did in the 11th century.

Another important question is why some of the paragraphs were simply excluded from certain redactions, e.g., the reason why two equal pairs of paragraphs exist only in Rakovac MS (paragraphs 36 and 37) and Prizren MS (paragraphs 38 and 38).[143] Does this mean that they were included in the original version of Dushan's Code or that they had never been a part of the original version, but added by the later writers? Novakovich considers Prizren MS to be the closest to the original version of Dushan's Code, which, as we know, is not preserved. If we supposed that Novakovich's opinion was right, than these two paragraphs would appear to have been erased from the Code by the later writers. Was it done by the court administration while Dushan was still on the throne? On the other hand, could it have been the act of the monks that were rewriting these manuscripts in the 15th and 16th century? If it was the work of the monks, the question is whether they did it deliberately or not. There is also the possibility that the judges who found them redundant for the needs of the judicial practice abrogated these two regulations.

To conclude, there is no doubt that numerous legal transplants from the Roman-Byzantine law survived through the centuries of the historical, socioeconomic and legal changes, which were ongoing during the Turkish occupation in Serbia.

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[142] The specific penalty, i.e., the material compensation for homicide is described in the chapter on criminal law, p. 44–45

[143] Prizren MS, § 38: **И ѡт сьда и напрѣда, ждреб́ціи и коніи царства ми. да се не даваю црькवамь, ни по црьковныхь селѣх оу хранꙋ.** (From now on, the Church and the Church's villages shall not feed the horses and the foals of my Empire.); Prizren MS, § 39: **Властѣле и, властѣличикы, иже се ѡбрѣтаю оу дрьжавѣ царства ми. срьбле и грьціи, щю есть. комꙋ дало цартво ми оу бащинꙋ и оу хрисоволіи, и дрьже до сиегази сьбора. бащине да соу тврьдѣ.** (If lords and the lesser lords of my Empire, the Serbs as well as the Greeks, are given a patrimonial estate by the Emperor's chrissobull, and if they respect this council, let their estates be undoubted.)

However, while some changes in legal transplants are only terminological, the modifications of the transcripts show that they can be also essential and conceptual. As Twining says, there is no transportation without transformation. This is due to the need of every legal transplant being placed in a historical and social context. The success of the transplantation primarily depends on its authority, but the other important circumstances that might cause its modification should not be neglected.

Dushan's Code, Maiestas Carolina and Wislica Statutes

The Slavs appeared on the historical scene at the moment when the Holy Union of Christianity in the love of Christ fell in pieces and was replaced by hatred, enmity and bloodshed. The Slavs were therefore obliged to enter into one or the other confederation, each developing more and more some specific traits. Actually, it would not be wrong to say that there were two Slavic worlds – the Western and the Eastern. A multitude of circumstances made the power of the Roman Catholic Church, presented by the Pope, unlimited in the West. The western clergy, which was an exclusive social stratum, inimically disposed towards the State and its power, significantly contributing to the overwhelming domination of the church. The Western society could be described as disintegrated into clergy, aristocracy, chivalry, citizens and peasants, each portion with separate manners and customs, forms of life, rights and obligations. Quite another aspect was presented by the Eastern society. The early appearance of heresies demonstrated a necessity of a close union of state and church. The Eastern clergy were closely connected with the civil society and did not form a separate political body. Moreover, they endeavored by their own example and by preaching to unify society as much as possible. Another important factor that increased the differences between the Slavic peoples was the stream of colonization from the overpopulated West. We find Germans in Bohemia and Moravia from the most ancient times. The emigrants penetrate into Poland from the end of the 12th century. However, the Western colonization was obstructed where the hostility of the Orthodox Church towards the Latin immigrants predominated.[144] We can see that all

[144] Sigel F., *Lectures on Slavonic Law.*, pp. 10–12

the Slavic peoples participated in the process of acculturation – religious as well as legal. The described differences between them are the result on numerous "via church" transplantations that occurred during their conversion to Christianity (Roman Catholicism or Eastern Orthodoxy). In addition, the diffusion of the Slavic customary laws with the Western and Eastern legal systems, based on the pattern of transplantation of legal institutes from the highly developed societies to the underdeveloped ones, appeared as an inevitable consequence of these multinational and multi-confessional interactions. However, the question is whether there was any form of diffusion among the Slavic legal systems themselves.

From the previous chapters of this work one can easily conclude that Tsar Dushan wanted to create a strong and centralized state based on the concept of justice and legality, and reach the model of monarchia legalis. Although it seemed incredibly innovative for the circumstances of feudal Europe, this was actually an ancient ideal, expressed in the oldest Roman-Byzantine legal principles. In order to confront and prevent the expansion of the North-European feudalism and legal particularistic law, the Bohemian king Charles IV and the Polish king Kazimir the Great followed this ideal as well, drawing their inspiration from the Roman law.

The facts that Dushan promulgated his Code in 1349 and 1354, that the Bohemian king Charles IV tried the same with his Maiestas Carolina in 1350, but withdrew in 1355, and that Kazimir the Great succeeded to proclaim the Wislica Statutes in 1347 could not be taken as a pure coincidence. Having this in mind, we will try to conduct a comparative analysis of these three legal codes and draw some general conclusions on the diffusion of the Slavic legal systems and its consequences on their further development.

The Maiestas Carolina was a legal code proposed by Charles IV, Holy Roman Emperor in 1350 to govern Bohemia. It was based on previously collected legal customs, which were collected in the "Order of the Law of the Country".[145] The major

[145] There are two codes of Bohemian customary laws regarded as the most significant. The Book of the old lord of Rosemberg is a collection of old Bohemian legal customs composed for the lord of Rosemberg. It was written in the Bohemian language by a private, anonymous author from several juridicial notes and descriptions of customs, which arose at different times, and contained an exposition of civil and criminal procedure, as well as of the law of evidence in the high court snd the provincial ones. The other is the so-called „Order of the law of the country" (Ordo Iudicii Terrae), whose Bohemian edition (there is a Latin edition as well) was composed between 1344 and 1350, and

purpose of this code was to increase royal power and authority, eliminate the feudal rules, and create a strong, independent and well-organized monarchy based on the policy of the Roman Emperors (what Tsar Dushan succeeded to a certain extent). Among the provisions of Maiestas Carolina were also the sections granting the right to judge criminal cases solely to the king and others allowing the king greater control over functionaries in order to increase royal revenues. However, the Bohemian Diet resented here the loss of their own power and opposed the Code, which forced Charles IV to withdraw it in 1355. He had to announce officially that he had burnt the manuscript of the Code, and that therefore Maiestas Carolina could never come into effect.[146] Unfortunately, almost nothing is known about the reactions of the Serbian Lords to the legislative work of Tsar Dushan. However, even if he had some opponents, their efforts appeared to be a failure, since the Serbian Code was successfully promulgated.

The preserved correspondence between Tsar Dushan and Charles IV witnesses their close and friendly relationship and cooperation. In view of that, it is no surprise that the resemblance between the ideas exposed in paragraph 42 of Majestas Carolina and those contained in the famous paragraphs 171: "If the Tsar write a writ either from anger or from love, or by grace for someone, and that writ transgress the Code, and be not according to justice and the law, as written in the Law, the judges shall not believe that writ, but shall only judge and act according to justice", and paragraph 172: "All judges shall judge according to the law, rightly, as is written in the Code, and shall not judge out of fear of the Tsar"[147] of Dushan's Code is remarkable. Namely, paragraph 42 of Majestas Carolina says, "Et si dicitur regem legibus solutum esse, tamen verum est principem legibus alligatum esse" and emphasizes that a serf (peasant) can complain to the Tsar himself if the master of the Tsar's land does to him anything what is contrary to the law.[148] It is obvious that the regulation describing that

probably stands in some relation to the legislative action of Charles IV. At least some articles are almost transcribed into his proposal of Maiestas Carolina. See Sigel F., *Op. cit*., p. 49

[146] Sołowiew A., *Statuty Cara Stefana Duszana*, Lwów, 1939, p. 39

[147] *Dushan's Code*, § 171 – 172

[148] The latter part of § 42 of Maiestas Carolina is very similar to § 134 of Dushan's Code, which represents its more detailed and complex version, but with the same outcome: "No master is authorized to do anything contrary to the law to serfs within the Tsar's land; only what the Tsar has written in the Code, that shall they labour and give to their masters. If he do something illegal to his serf, the lord Tsar orders that every serf be authorized to litigate with his master, or with the tsar, or with the Lady

the judges are not supposed to judge in the fear of the Tsar has the same essence as the “princeps legibus alligatus”. What is not certain is whether Dushan was as resistant to the influence of his noblemen as he is considered to be. Could it be that the abovementioned paragraphs were not created because of Dushan’s intention to establish legality and justice in his empire, but as his surrender to the pressure of the lords’ efforts to limit his absolute power? Taking in consideration the circumstances in the Bohemian kingdom and the power that the Bohemian lords had over the king himself, such situation is not unimaginable. We should remember that many years before Dushan and Charles IV, famous John Lackland also promulgated Magna Carta Libertatum under the enormous pressure of the lords, and although unwillingly, obeyed their demands. However, the fact that the social circumstances and the position of the feudal lords (noblemen) that existed in the time of the promulgation of these two codes in Bohemia and Serbia were rather different still seems to be the most responsible for their different destinies.

The legal system of Middle-age Poland was a complex of the native common law and the German law. It was differently interpreted in different regions. The chaos gave rise to injustice in the application of the law and its enforcement, and pointed very clearly to the acute need of uniformity and of establishing a firm, well-defined judicial and administrative system. Kazimir the Great conducted a comprehensive legislative work, which culminated when he assembled a special council to Wislica in order to improve the laws. The result of their multi-year labor embodied in the Statutes of Wislica was a body of uniform[149] laws with special regard for the local conditions of the several sections of the country. According to Sigel, the Code itself

Tsaritsa, or with the Church, or with the lords of the tsar, and with anybody; he shall not be authorised to withold him from the court of the Tsar, but the judges shall judge him according to justice; And if the serf win the lawsuit against his master, let that master be not authorized to do any harm to the serf afterwards.”

[149] Kazimir’s effort to develop a uniform legal system on the entire territory of Poland is perfectly depicted in *Wislica Statutes,* § 71 (“The incendiary shall be burnt in the fire: The imperial law edifies us that the incendiary shall be burnt in the fire. If someone committed such act, even if he found shelter in a shrine, no assistence from this title shall he receive. It happens though, that such nasty people reside in the cities or villages of German law, where they can defend themselves by German law. This is how they oftenly avoid their death. We do not want the criminal to be happy about the odds. We establish: when such person is charged for arson, notwithstanding if he resides in a city or in a village, and whether under the Polish or the German law, he shall not be judged by other law than Polish, before an apposite judge. If his guilt is proven, he shall be sentenced to death.”) as well as in § 153 (“On uniform law: Since diverse people are found among our subordinates and other lesser lords, we wanted to be judged by equal law and court in both Poland Major and the Krakow lands.”).

represents more or less a collection of the customary laws exposed in a casuistic way and it seems that Kazimir's Statutes had the value of purified and written customs for the new generations.[150] On the other hand, it has to be emphasized that – as it was the case with the Serbian legal system – Poland was familiar with the Roman law as early as the 12th century. In Poland, legal acculturation occurred in a slightly different form, i.e., the students studying at Italian universities brought the Roman laws with them. In spite of being a code of feudal laws, the Statutes of Wislica appear to reflect the impact of Roman law, which later penetrated also the law of marriage and inheritance. The most probable reason for such fruitful transplantation of Roman law were the tendencies of the town courts to refer to the law of the Glossators, what was almost entirely absent from the practice of feudal noble courts applying native customs (ius terrestre). This is a consequence of the Polish estates regarding Roman law as the imperial law of the Holy Roman Empire (ius Caesarum) and believing that its reception would promote their kingdom becoming a German vassal.[151] In spite of the different forms of transplantation, Dushan's Code and Wislica Statutes have one thing in common: the fact that they were not just codifications of ancient Slavic customary laws, but also represented products of developed legal systems accomplished by borrowings from the Roman law ("ex lege imperiali clara luce nobis constant"[152]) and from canonic law ("Quoniam secundum patrum sanctorum decreta lex decerent"[153]).[154] Regardless of the similar structure of their sources (customary law, church law and Roman law), it can easily be noticed that Dushan's Code seems to have reached a higher level of abstraction and legal generalization, whereas Wislica Statutes still contained numerous casuistic regulations, what is typical for the feudal laws. Nevertheless, the similarity between some paragraphs of the Statutes of Wislica and Dushan's Code is astonishing. For example, the detailed paragraph of Wislica Statutes on arson: "The incendiary shall be burnt in the fire: The imperial law edifies us that the incendiary shall be burnt in the fire..."[155] is similar to § 97 of Dushan's

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[150] Sigel F., *Lectures on Slavonic Law.*, p. 72

[151] Hamza G., *Op cit.*, p. 10

[152] *Wislica Statutes*, § 67

[153] *Wislica Statutes*, § 69

[154] Sołowiew A., *Op. cit.*, p. 41

[155] *Wislica Statutes,* § 71

Code: “If anyone be found who hath set fire to a house, or to a threshing floor, or straw, or hay belonging to another man, out of malice, that incendiary shall be burnt in the fire. If he be not found, let that village hand over the incendiary. And if it hand him not, let that village pay what the incendiary would have paid.” The Byzantine laws also provided the penalty of death for the crime of arson by burning the incendiary, and we know that such regulations were included in the Syntagma, and as we can see from Dushan’s Code, transplanted into the Serbian legal system. There are sources showing that this cruel penalty was not close to the Slavic laws, but borrowed from the Byzantine, and that it was not applied too often.[156] Since Wislica Statutes were promulgated 25 years subsequent to Dushan’s Code, one could ask whether Kazimir III found the inspiration for the regulation on arson in the Byzantine laws, just as Dushan did, or borrowed it from Dushan’s legislative work. Even more interesting is the fact that that neither of the Codes concerns class distinctions when penalizing the culprit for this criminal act. As we have already mentioned, in Dushan’s Code the class distinction was neglected only in the case of the most violent criminal acts. The same stands for the Wislica Statutes. It cannot be surely claimed that this regulation was a result of the Byzantine influence or that it could have as well come from the Serbian legal system.

Another interesting trait in § 71 of Wislica Statutes are the following introductory words: “The imperial law edifies us that the incendiary shall be burnt in the fire...” (“Prawo cesarskie nasz poucza, że podpalacz ma być w ogniu spalony”).[157] The imperial law that the statutes refer to is most probably the law of the Roman emperors. Identical respect for the Roman laws is seen in Dushan’s Code and in both cases it is appears as a result of the effort to resemble Roman Emperors – in Kazimir’s case the Western, in Dushan’s case the Eastern. Kazimir III certainly did not have to borrow the idea of the Roman authority from Dushan, because, as we have described previously, such attitude towards the Roman laws had already existed in Poland. Perhaps he was only encouraged by the Dushan’s formulation to express it officially, what he eventually did and replaced the feudal legal system with a unified and centralized one, based on the Roman authority.

[156] See Solovjev A., *Zakonik Cara Stefana Dušana*, p. 176

[157] *Wislica Statutes,* § 71

Another comparison can be made between § 116 of Wislica Statutes On judges: "In courts of law, good judges cannot be afraid of reconciliation or punishment, appreciate gifts, they shall judge and sentence only in consideration of justice and fairness"[158] and two paragraphs of Dushan's Code dealing with the same issue. Namely, Wislica Statutes proclaim the independence of the judges and their duty to be fair-minded and objective, judging according to justness and equity. Similar ideal is exposed in the well-known § 172 of Dushan's Code, but in a slightly different way: "All the judges shall judge according to the law, rightly as is written in the Code, and shall not judge out of fear of the Tsar."[159] One terminological detail might suggest that Kazimir's model of justice was not as developed as Dushan's was. He saw it as fairness, as an individual, internal state of spirit, whereas Dushan's concept treated justice and legality as two equal entities, which certainly is a more objective point of view, characteristic for contemporary constitutions and codifications as well. In spite of these small and subtle particularities, there is no doubt that their initial ideas were essentially the same, and that is what matters in the context of diffusion. § 71 of the Wislica Statutes also mentions the prohibition for the judges to appreciate gifts, which can be taken as a more harsh version of § 107 in Dushan's Code. "A judge traveling anywhere across the imperial lands and in his own area, shall not be authorized to take a meal by force, nor anything else except gifts given him by someone of their free will."[160] We can see that Dushan allows the judges to accept the gifts provided that they were acts of free will, whereas Wislica Statutes go even further, forbidding the judges to appreciate any gifts treating them as a bribe.

These comparisons open numerous questions related to the diffusion in the Slavic legal systems. One cannot oppose that Roman law transplants had an enormously significant impact on the development of all the Slavic statutory as well as customary laws. Dushan's Code, Maiestas Carolina and Wislica Statutes are the most remarkable examples of that complex and fruitful process. Besides that, what should also be taken in consideration is the possibility of the diffusion between Serbian, Bohemian and Polish legal system. The fact that their codifications were

[158] *Wislica Statutes,* § 116

[159] *Dushan's Code*, § 172

[160] *Dushan's Code*, § 107

promulgated in the same period of time, the contacts that existed between Charles IV and Tsar Dushan, and finally, the previously analyzed similarities between some of their paragraphs indicate that the process of borrowing could have taken part among these legal systems too, significantly contributing to the creation of a new legal quality.

Conclusion and General Reflections

Amidst the disagreements and assumptions embedded in the contemporary jurisprudence, one general tendency is certain: every legal system transforms in harmony with what the society – or sometimes the lawgiver single-handedly in autocratic regimes – believes to be modern, a belief commonly formed in consideration of the paradigms provided by other systems of law. Transplantation of law is incontrovertibly a far too varied phenomenon to be reduced to a single model or archetype, what results in an increased need for diverse interdisciplinary studies thereof. More than ever, the globalizing world of the 21st century leads to an indeterminate space of diffusion of law.

Based on the findings of this study, there is no branch of law, which is resistant to legal transplantation. This paper illustrated that legal transplants remain widespread both in private and in public law. The accelerated development of the Serbian medieval state under the reign of Stephan Dushan resulted in the unavoidability and need for a new legal framework. It transpired that legal borrowings in Dushan's Code largely served as the source of legislative enhancement in the Serbo-Greek Empire. Tsar Dushan's legislature is grounded on legal transplants as a means of legal development. An astonishing number of examples from the private as well as from the public law perfectly depict the significance of the "via church" transplantations for Dushan's legal revolution that immensely contributed to the fruitful evolution of the Serbian legal system. Dushan's Empire is only one of countless models that provide sufficient argumentation with regard to the notion of legal transplants. The diffusion of law also occurred in other Slavic legal systems, which resulted in the promulgation of the Wislica Statutes and Maiestas Carolina, shortly after Dushan's Code. There is no doubt that these codifications were created

under the strong influence of the Roman law, but the interaction and the diffusion within the Slavic legal systems themselves, which developed a new legal quality, should be seriously taken in consideration. It seems sustainable that Kazimir III and Charles IV borrowed certain ideas and formulations of some paragraphs from Tsar Dushan, or were at least inspired and encouraged by his legislative success. This standpoint opens numerous further questions, which require separate comparative examination. The analyses of the relationship between the transplants and the transcripts revealed the destiny of Dushan's Code after the death of its originator. Their terminological differences, the fact that some paragraphs appear only in the older manuscripts and the change of their order in the Code suggest that the Code itself was being modified through the centuries, surrendering to the demands of the ever-changing social circumstances. Especially terminological modifications seem to be of crucial importance because they illustrate the impact of the Turkish laws, and the consequences that it caused on the Serbian legal system along with the overall diffusion of law between these two legal systems. Watson's general reflection, in which he argues, "The transplanting of individual rules or of a large part of a legal system is extremely common. This is true both of early times – witness the ancient Near East – and the present day"[161] is not only sustainable, but also turned out as a universal tendency in the development of law.

Initially in the 1970's, Alan Watson drew several major tendencies pertaining to the overall patterning of legal rules, concepts and institutions,[162] and subsequently other scholars continued this comparativist vein. Recently, William Twining elaborated the tendencies in diffusion of law outlining several specific patterns.[163] On the other hand, the research on legal transplants sets off a series of edifying warnings to avoid simplified hypotheses. This paper does not attempt to generate theses on specific patterning, but seeks to draw some general tendencies and warnings instead.

First of all, if there is no divergence between two corresponding written statutory laws (institutions or legal concepts) in two different countries, they do not

[161] Watson A., *Legal Transplants*, p. 95

[162] See *Ibid.*, p. 95–101ff

[163] See, e.g., Appendix: Table III. Diffusion of Law: A Standard Case and Some Variants (Twining W., *Diffusion and Globalization Discourse*, Harv. Int'l L.J., Vol. 47, No. 2, Summer 2006, pp. 514–515).

inevitably denote direct legal transplants. Such experience, however, often occurs in consequence of acculturation.[164]

Secondly, transplantation of law is not merely a legal derivative of the diffusionism school of thought. The concept of legal transplants represents an approach to the development of law, which is open for further debate and development via the means of manifold social studies. Research of legal borrowing as a multiparadigmatic phenomenon should be considered in a broader perspective, overcoming the framework of pure comparativism or one anthropological standpoint. It is in the nature of the social studies to enhance each other reciprocally.

Thirdly, the basic methods of comparativism independently do not position legal transplants within the frame of diffusion of law and fail to recognize the methodologies of philosophy of law, legal anthropology, intercultural psychology, sociology of law and other pertinent disciplines interrelated concerning this multifaceted phenomenon. Such failure can lead to major misconceptions in comparative studies and engender fabricated and illusory legal transplants.

Fourthly, legal transplantation and the diffusion of law in the present-day world additionally require consideration of the process of globalization. Legal patterning diverges through the whole course of history and is conditioned by the anthropological development. "Yet the words 'diffusion' and 'globalization' also connote worldviews that are fundamentally at odds. As already noted, diffusion sounds in comparison, even if it engenders a lurking fear of homogenization. But if globalization is real, and is in fact bringing hitherto discrete peoples and their laws together into a single social and legal context, then this fear is actualized, and we must wonder to what extent it makes sense to speak of things that are in some important way different and worth studying for their difference."[165]

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[164] A typical example is found in the ancient Mesopotamian cuneiform law. The Akkadian Laws of Eshnunna and the Babylonian Code of Hammurabi are in conformity with each other in some of their articles. "This legal text (the Laws of Eshnunna), upon its Akkadian origins, represents the direct forefather of the famed Code of Hammurabi, but there is no evidence of their similarities being in consequence of direct Hammurabi's borrowings from his neighbors, hence more probably the result of a similar customary basis, which was mutual for the entire Near East." (Avramović S., *Opšta pravna istorija: stari i srednji vek*, Belgrade, 2004, p. 65), Sima Avramović so well noticed. Such models are common in the overall course of history. This model leads to the concept of "indirect transplants", which occur through acculturation and not as direct legal borrowing; Cf. pp. 4–6f

[165] Westbrook D., *Op. cit.*, p. 491

Fifthly, the previous conclusion leads us to the point that the notion of legal transplants is predisposed to be misused by both past and contemporary imperialism as justification for enforced legal changes.[166]

Lastly, the European legal heritage turned out to be an excellent corpus for comparative analyses, which provide and lead to the introduction of the modern diffusion of law. The legal patterning in the Code of Stephan Dushan, the Tsar of Serbs and Greeks, the overall pan-Slavic diffusion of law, hands-on reception of the Roman-Byzantine law, as well as other historical patterns of legal convergence, are a superb model to facilitate access to the general tendencies in diffusion. This concept can be equally applied in the ancient as well as the up-to-date course of globalization.

[166] Westbrook, for example, perceives globalization indistinguishable from Americanization in the contemporary world. He claims that the U.S. Government has made clear that it intends to spread democracy on the American model and that it is willing to use the armed forces to do so. Westbrook's viewpoint has its parallels in the Roman Empire for instance, where we can find countless enforced legal transplants, which were applied in conjunction with the ius gentium. (See *Ibid.,* p. 497)

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APPENDIX

Table I. Diffusion of Law: The Case of Byzantine Law and Dushan's Code

	Byzantine Law	*Dushan's Code*	*Specific Patterning*	*Observations*
a. Church Law	Strong relationship between church and state. A model of Orthodox half-feudal monarchies where the monarch still has a stronger influence than the patriarch.	Adoption of the Byzantine model of ecclesial laws, as well as the canonic rules.	Deliberate legal transplantation as the result of religious acculturation. "Via church reception".	Successful effort of Tsar Dushan to resemble the "true-believing Byzantine Emperors".
b. Marriage Law	Canonic regulations of the Orthodox Church.	Canonic regulations of the Orthodox Church.	The result of religious acculturation. "Via church reception." (Direct one-way transfer)	Canonic regulations almost entirely pressed out the regulations of customary law.
c. Contract of Sale	Developed economic relations. The contract of sale was the central institution of legal circulation Ernest money.	No preserved written contracts as evidence. Terminological similarity shows that the idea of earnest money was adopted from the Byzantine laws.	Direct one-way transfer.	Accepted due to the economic prosperity and trade with foreign merchants.
d. Gift	Existed in the Byzantine laws in the same form that it had in the Roman law.	Terminological similarity shows remarkable resemblance with the Greek roots.	Direct one-way transfer.	A slightly simplified form. Did not completely reach the level of development that this institute had in the Roman law.
e. Deposit	Maintained the form that it used to have in the Roman law.	Mentioned in only one paragraph, but still accepted.	Direct one-way transfer.	The name of the institution was changed under the Turkish influence.
f. Pledge	A common institution of the Byzantine law.	Prohibited by the Code and by the charters referring to business with Dubrovnik.	Initially transplanted and then prohibited to avoid its misuse. The authority of the transplant overwhelmed and it survived subsequently.	Mentioned in the contracts with Dubrovnik.
g. Loan	Prohibited by the Church, but survived in practice.	Prohibited by the Church, but survived in practice. The evidence is found in the terminological similarity.	Direct "via facti" transplant.	The authority of a legal institute was stronger even than the strict laws of the Church.

h. Dowry	Not in accordance with the Church's definition of matrimony as an eternal union.	Acceptance of the Byzantine regulations.	Borrowings from the Byzantine customary laws. Direct one-way transfer.	The Byzantine customary laws pressed out the Slavic customary laws (which were not familiar with the institution of dowry).
i. Inheritance Law	A developed freedom of testation (the same as it was in the Roman law).	Limited freedom of testation: -extended family property, without the possibility of free alienation of property (especially real property), -feudal organization.	A remarkable example of the maxim “no transportation without transformation”. Combination of “via church” diffusion and modification. Direct one-way transfer.	Serbian legal system did not completely develop the freedom of testation, which existed in the Roman law. Compromises between Slavonic customary laws and Byzantine statutory laws.
j. Criminal Law	A highly developed system with modern legal institutions, but an extremely harsh penal system.	Significant, almost revolutionary improvement - central institutions such as the concept of responsibility and the penal system transplanted from the Byzantine statutory laws.	Transplants from Byzantine laws. Strong philosophical influence of the Church Penal system- “en bloc” reception.	The largest gap between the Slavic customary laws and the Byzantine statutory laws.
k. State Administration	Strong and well-organized. A close cooperation between church and state. The idea of legality.	Also close cooperation between the church and the state Very emphasized concept of legality and the supremacy of law.	The entire idea was transplanted from the Byzantine laws. Direct one-way transfer.	Dushan's intensive effort to resemble the great Byzantine Emperors (just like in the section of the church law).
l. The Judiciary	Rather complex, but developed judiciary system Various courts with discrete jurisdictions.	An effort to distinguish the judiciary from state administration.	Partial reception. Combination of Byzantine influences with some ideas of Serbian customary laws.	The actual circumstances did not permit all the Byzantine regulations to be adopted successfully (e.g. distinguishing administration and judiciary).

Table II. Comparative Analysis: The Abridged Syntagma*

Original Syntagma	Title	Original Title in Serbian-Slavonic Language		Pages		Abridged Syntagma		Pages in the Abr. Syntag.
в – 8.	On impedimenta dirimentia	О степенех брака	–	7	=	{в – 2, в – 3 / в – 4, в – 8}	–	14
г – 2.	On forcible and illegal matrimony	О брацѣхь повелѣнныихь и вьабраненныихь	–	3.5	=	г – 1	–	1.5
г – 4.	On those who marry for the second or the third time	О двоеженцехь, троеженцехь и др.	–	7	=	г – 2	–	3
г – 5.	On the woman who wants to marry for the second time	О иже вь пторыи бракь пріити хотошеи женѣ	–	1.5	=	г – 3	–	1.25
г – 6.	On disobedient wives	Ꙗко сь дващи женещимь се не подобасть власти	–	0.25	=	г – 4	–	0.25
г – 8.	On the matrimony of a female devoid of the consent of her parents	О послгающихь дѣоиць без полге родитель	–	1	=	г – 5	–	0.5
г – 9.	On the matrimony of transgressors	О брацѣхь законопрѣстꙋпнихь	–	5	=	г – 6	–	2.75
г – 12.	On the prohibition of marrying a heretic	Ꙗко не подобаѥть брака замѣновати сь сретници	–	3	=	г – 7	–	1
г – 13.	Dismissed matrimony on the grounds of guilt	Бракь от хоторихь винь раздрѣшаѥть се	–	4	=	г – 8	–	4
г – 15.	On engaged women	О женахь обрꙋчениыхь	–	6.5	=	г – 9, г – 10	–	2.25
г – 16.	On those who dismissed their wives	О иже свое жене изгьнавшихь	–	4	=	г – 11	–	0.5
г – 26.	On those whose wives are possessed by the demon	О иже женꙋ и имѵщимь бѣснꙋѥмꙋ	–	0.25	=	г – 12	–	0.5
	TOTAL			53.25		31.5		

* Source: (Adapted from) Solovjev, Aleksandar. *Zakonodavstvo Stefana Dušana cara Srba i Grka*. Skopje: Skopsko naučno društvo, 1928, p. 93.

Table III. Diffusion of Law: A Standard Case and Some Variants*

	Standard Case	*Some Variants*
a. Source-destination	Bipolar: single exporter to single importer.	Single exporter to multiple destinations. Single importer from multiple sources. Multiple sources to multiple destinations, etc.
b. Levels	Municipal legal system – municipal legal system.	Cross-level transfers. Horizontal transfers at other levels (e.g., regional, sub-state, nonstate transnational).
c. Pathways	Direct one-way transfer.	Complex paths. Reciprocal influence. Re-export.
d. Formal/ informal	Formal enactment or adoption.	Informal, semi-formal or mixed.
e. Objects	Legal rules and concepts. Institutions.	Any legal phenomena or ideas, including ideology, theories, personnel, "mentality," methods, structures, practices (official, private practitioners', educational, etc.), literary genres, documentary forms, symbols, rituals, etc.
f. Agency	Government – government.	Commercial and other non-governmental organizations. Armies. Individuals and groups: e.g., colonists, merchants, missionaries, slaves, refugees, believers, etc. who "bring their law with them." Writers, teachers, activists, lobbyists, etc.
g. Timing	One or more specific reception dates.	Continuing, typically lengthy process.
h. Power and prestige	Parent civil or common law >> less developed.	Reciprocal interaction.
i. Change in object	Unchanged minor adjustments.	"No transportation without Transformation."
j. Relation to pre-existing law	Blank slate. Fill vacuum, gaps. Replace entirely.	Struggle, resistance. Layering. Assimilation. Surface law.
k. Technical/ ideological/ cultural	Technical.	Ideology, culture, technology.
I. Impact	"It works."	Performance measures. Empirical research. Monitoring. Enforcement.

* Source: Twining, William. *Diffusion and Globalization Discourse*. Harvard International Law Journal, Vol. 47, No. 2, Summer 2006, pp. 514–515.