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Serbia was often described as “West of the East and East of the West”. Being located at Balkans, at a historical European crossroad, it served many times as a border or a buffer zone - between East and West Roman Empire in antiquity, between Ottoman and Austrian empire in Middle Ages, between West and Eastern “iron curtain” after the WW II during XX century and Tito’s era. Therefore, similar denotation “West on the East and East on the West” has not only geographical meaning. Serbia, as a relatively small country, was a battleground of diverse interests of great powers. They have affected Serbia’s turbulent history, mixing of population, perplexing three religions (Orthodox Christianity, Roman Catholic Christianity and Islam), etc. The mentioned motto has its cultural, political, religious, national, anthropological, religious, even gastronomic loading and significance. This is why the saying about ambiguous character of Serbia, launched already in 13th century by founder of the Serbian church St. Sava, has the same value even today, not only in geographical and other senses, but also in the field of law.

Due to its prominent position and historical circumstances, when Serbia achieved its independence during the second half of XIX century, Serbian legal system was developed rapidly. Quite early it offered an example of a very advanced legal systems for its time, with many significant achievements in comparative law, no matter how strongly they were influenced by other donor systems.

ROMAN-BYZANTINE INFLUENCE

The first important scene in the theater of Serbian legal history was connected to the period when both the Late Medieval Serbian state and Church were shaped. It was by the end of 12th century when Stephen Nemanja, later to be known by the monastic name St. Simeon (which he acquired at the monastery of Chilandar at Mount Athos), founded the dynasty of Nemanjic and the Serbian state itself. It was formed on the territory and

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boundaries of tired and weakened Byzantine Empire after the Fourth Crusade and s.c. Latin Empire, created in the very core of Byzantium (1204-1261). The city of Constantinople was re-captured by the Nicaean Greeks under Michael VIII Paleologus in 1261, and commerce with Venice was re-established, but the Slavic neighbors (particularly Serbs and Bulgarians) were a new mighty power. Byzantine rulers founded a smart way how to collaborate and coexist with potential enemies, how to attach Slavic rulers by inter-marriage connections and to establish a relatively coherent environment during XIII and XIV century, until the invasion of the Ottoman Turks in 1453, which marked the end of Byzantine, Serbian and Bulgarian medieval empires.

The Serbian State formally acquired "international recognition" owing to Nemanja's older son, Stephen the First Crowned, who obtained the regal crown from the Pope in 1217. His coronation was performed in the monastery of Zicha by his younger brother Rastko (later known by the monastic name St. Sava), who brought the crown from Rome.

An event of the same historical significance as the inauguration of the Serbian kingdom was the almost contemporaneous creation of the autocephalous Serbian Orthodox Church. Nemanja's younger son, St. Sava, won the Serbian Church's independence from Emperor Theodore I Lascaris and Patriarch Manuel Saranten Haritopoulos in Nicaea in 1219. In that same year, the Serbian church acquired the right to autonomously organize its internal and external relations, and St. Sava became the first Serbian archbishop. He established both the spiritual and organizational side of the Serbian Orthodoxy.

In that same year he also enacted the first Serbian legal collection - *Nomocanon*. This codification, which became known as *Krmchija*, became very popular and was later used in Russia, Bulgaria, Romania and other countries in addition to Serbia. At the time the *Nomocanon* was drafted, the relationship between church and state was organized according to the principle of symphony, in keeping with Roman-Byzantine tradition. It was edited in 1219, only four years after the Magna Charta Libertatum in England. Contrary to contemporary practice in Europe, it was written neither in Latin or Greek, but in national old Serbian language, reflecting a specific combination of Byzantine law with some elements of traditional Serbian customary law. Although some authors use to say that it was the first

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Serbian constitution (and one may read it at Wikipedia), *Nomocanon* is, as its very name denotes, basically a collection of secular and church norms in different branches of law. It does not have much to do with “constitutional” issues, as well as Magna Charta Libertatum was also not a kind of constitution *stricto sensu*. The only touch with “constitutional” matters could be detected in St. Sava’s efforts to affirm the concept of cooperation between church and state, according to the Byzantine perception of *symphony* (idea of autocephalous, independent church within the sovereign state). It became a kind of the first important legal transplant in the history of Serbian law. Even more, *St. Sava’s Nomocanon* is still today considered the important legal source and codification for the Serbian Orthodox Church.

St. Sava’s Nomocanon was mostly based upon Byzantine legal collection *Procheiron*, but it was completed and modified in many aspects. St. Sava used a number of different Byzantine nomocanons, and made a kind of collection. It consisted of 70 chapters, out of which 6 were introductory, 44 on church law and 20 dealing with secular law. It is not a simple translation and compilation of Byzantine rules, but in some parts it evidently contradicts to Byzantine civil law.

Although St. Sava did not want to contradict to previous church rules, his contribution was in the fact that he has shown a great invention in selection of the rules from various Byzantine sources. This is how we discover today particularly specific tone considering the norms on protection of poor and vulnerable members of the society (establishing social care institutions, showing particular concern for handicapped persons, widows and orphan girls, war prisoners, protection of slaves against their owner’s cruelty, protection of debtor from creditors). It strongly reflects Christian view over social justice (particularly in the chapter 4). But probably, in the second plan, trying to adapt Byzantine rules to the Serbian society, he selected those norms which reflected ancestral tribal idea of social solidarity, some of them already quite alien to the developed Byzantine law in *Procheiron* and in his time (although such rules were quite vivid in earlier Byzantine law *Nomos georgikos*, issued after the Justinian codification – in VI or VIII century). The issue of possible perplexing of Slavic and Byzantine law in *Nomocanon* is a very controversial one, and due to poor sources for early Slavic customs, it will probably remain opened for long. The prevailing attitude today is that *St. Sava’s Nomocanon* is a modification, quite original combination and compilation, but basically

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a transplant of Byzantine church and secular norms, those that will suit best to the contemporary Serbian society.

The main goal of St. Sava was evidently to introduce Roman-Byzantine law into the Serbian customary legal surrounding. This is how, already in XII century, Serbian law became strongly influenced by Byzantine legal tradition through the next centuries. All subsequent Serbian legal sources tended to be in accord with the *Nomocanon of St. Sava*. It happened broadly with the famous XIV century Code of tsar Dushan, as well as in the XIX century legislation, already in first written law during the Serbian revolution against Ottoman rule, namely in the *Laws of Priest Matija Nenadovic* of 1804, who acknowledged value and validity of the old *Nomocanon*. It is also generally accepted by the Serbian Civil Code of 1844 by delegating regulation of family matters to the law of the Serbian Orthodox Church. However, very explicitly, in regulations on legal impediments as an obstacle to valid marriage, the modern Serbian civil code explicitly refers to provisions of the *Nomocanon of St. Sava* (Art. 93).

The next step of keeping with the Byzantine tradition denoted famous and mighty Serbian *Tsar Dushan's Code*, one of the first medieval great European codifications of XIV century. It was also written in the national old Serbian language, differently than contemporary *Majestas Carolina* issued by tsar Dushan's friend, Czech king Karl IV, which was adopted in 1355. Tsar Dushan's code was firstly proclaimed at the Assembly in Skopje (now Macedonia) in 1349 (having 155 articles), and its expanded version was presented to the Assembly in Serres (now in Greece) five years latter, in 1354, with 66 additional clauses (only a year before the *Majestas Carolina*).

The Code was basically inspired by the *Nomocanon of St. Sava*, and some of the clauses were completely transferred (6, 8, 11, 101, 109, 196). However, it is a more original piece of codification, not only a simple translation. It deals with many issues that are missing in Byzantine sources. Contrary to the Byzantine models, he pays much more attention to the state organization and court procedure. More than a half of the Code is about the relationship among different social groups and the ruler, particularly between lords and the tsar. Some norms are devoted to administrative law and state administration, while only minority of norms is about the civil law (as it was mainly regulated in the *Syntagma*). In problems that it

tries to solve it seems quite close to contemporary *Majestas Carolina*, but sources do not mention any unfavorable reaction of the aristocrats as the Czech legislation had provoked.

Dushan's code is particularly famous according to few norms, often quoted today as the seed of rule of law and independent judiciary in medieval Serbia. The first article sounds very anticipating: Art. 171: "If the Tsar writes 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 an law, as written in the law, the judges shall not believe that writ, but shall only judge and act according to justice".

Art. 172 sounds even more revolutionary: "All judges shall judges according to the law, rightly, as is written in the Code, and shall not judge out of fear of the Tsar".

Those famous self-limitation clauses, restricting power of the ruler, might be a tribute that he was willing to pay and it maybe explains why the sources do not mention any unfavorable reaction of the nobles against the Code. In any case, those two norms provoked a long, never ended discussion whether they contradict to the famous Roman-Byzantine principle *princeps legibus solutus* (Dig. 31, 1, 3). Or they are again inspired by Roman-Byzantine law, but by another, less popular motto: *princeps legibus alligatus*, attributed to the tsar Theodosius II, mentioned in Cod. I, 14, in two *Novells* by Justinian, (82 and 113) and some other *Novells* and in codification by Leo VI the Wise *Basilica*, (VII, 1, 16-17). In any case, whatever was the source, the formulation "If the Tsar writes a writ either from anger or from love, or by grace for someone" can not be found in any other Byzantine text and sounds like a very original contribution of the Serbian legislator.

Following his imperial idea to be the tsar of the Greeks and Serbs, as he conquered wide territory of Byzantium, reaching at some point Athens itself, he wanted to unite Byzantine and Serbian legal system, on the ground of stable and well established Byzantine law. Although the Code of tsar Dushan is the most popular Serbian medieval legal text, which is often mentioned as a national legal symbol, it is only a part of a wider legal venture. In a more recent literature it is called *Dushan's Legislation* or *Dushan's Tripartitum*. Aside with his great Code, it encompasses other important Byzantine sources, modified to a certain extent.

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The second one was the *Law of tsar Justinian* (having no connection with the *Digest*, as the very title may suggest, but rather with a latter Byzantine law *Nomos georgikos*). This is a very short piece of legislation (33 articles only) regulated mainly use of land and agrarian issues.

The third was shortened version of the well known Byzantine legal collection from his time (1335) *Syntagma of Matheus Blasteres*, monk from Thessalonica. Tsar Dushan probably has adopted its translation in 1348, a year before the expanded version of his Code, but with many modifications. It encompassed only 94 out of 303 chapters – not more than a third of the original legal text. Nearly all church law norms were omitted (except some rules in marriage law), while mostly secular regulations were left (dealing with criminal law, property, obligations, inheritance). It was probably the most exploited part of legislation, and it is not strange that in most medieval manuscripts Dushan's Code never appears alone, but always with other two parts, having been posted as the last one.

After the fall of the Serbian independent state under the Ottoman rule in XIV century, the Serbian medieval law survived the state, and was kept within the church all through next few centuries. It was applied mostly in the field of marriage, family and inheritance law, as well as in criminal law. *St. Sava's Nomocanon* remained alive and it outlived the Serbian state and secular law. It is applied as a main legal source within the Serbian Orthodox Church even today. Also, during the subsequent centuries, *Code of Tsar Dushan* was not completely forgotten, but it was re-written many times until XVIII century (about 20 transcripts exist today, witnessing that it was in use, at least partially, many centuries after its adoption). Some of its norms were adopted by the new Serbian legal system in XIX century.

This is how Byzantine Law, mixed in everyday practice with the Serbian customary law, has survived centuries of Ottoman occupation, and came up to the XIX century.

WESTERN TRANSPLANTS AND MIXED TRADITIONS

Liberation process was initiated through the First Serbian Uprising in 1804 led by national hero Karadjordje (founder of the Karadjordjevic dynasty), when the first legislation of the new era was enacted. After breakdown of the First in 1813, the Second Serbian Uprising happened already in 1815, led by another great national figure, prince Milos Obrenovic

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(founder of the second, concurrent Serbian dynasty). During his rule Serbia became autonomous country due to his skilled diplomacy, and got quite independent status from Ottoman Empire, with its own hereditary ruler – prince Milos, recognized by the Turks. It resulted with the first Serbian Constitution enacted already in 1835. The process of independence was formally completed by the Treaty of Berlin in 1878, when independence both of Serbia and Montenegro was confirmed.

During the rule of prince Milos the first codification efforts were made both in civil and criminal law. Already in 1844 Serbia got its quite original Civil Code (SCC), among the first countries in the world (after French Code Civil of 1804, Austrian Civil Code of 1811 and Dutch Civil Code of 1838, earlier than many much more developed countries of that time).

Serbian case is one of favorite examples for Alan Watson's theory of legal transplants and his explanation of legal borrowing causes. At first, prince Milos wanted to take French Code Civil as the basis for the Serbian codification. Due to bizarre reasons (poor translation by a Greek teacher, who did not know well neither Serbian nor French, so he used German translation of the French code, and who was, finally, not a lawyer) the translation was inadequate and unreliable. Therefore in 1836 Prince Milos called upon a respectable Serbian lawyer and intellectual *Jovan Hadzic*, a city senator of Novi Sad from the province of Woiwodina, which was then a part of the Austrian Empire. His task was to make a codification upon the example of the Austrian Civil Code. German language was nearly like his mother tongue, he applied Austrian law often in his practicing lawyers office, and he had a high-quality academic background - he studied law in Vienna and graduated in 1824, while he received his *doctor iuris* title from the University of Pest in 1826.

This is how, partially due to a chance, Serbia switched from French to Austrian law in choosing its donor system, similarly as Japan has switched from French to German legal heritage. Only the reasons for the great change were different. In Serbia it was more or less a chance, combined with developing political and economic ties between Serbia and Austria, while in Japan the change was rather consequence of general mighty position of Germany after the Franco-Prussian war and of the reputation of the most modern and actual model code that was available by the end of XIX century.

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Likewise many codificators (including Japanese), Hadzic was faced with a genuine challenge: how to bring balance between traditional Serbian, mainly customary law and the modern demands, institutions and criteria. At one side he had highly developed model codes of the two leading European countries (French and Austrian). On the other hand, Serbian legal conservative and patriarchal tradition of unwritten law was strong, though it was leaned upon the rich heritage of Roman-Byzantine influence. It was nearly the same problem that *Gustave Boissonade* was faced in 1870's when he was drafted the first Japanese Criminal Code (1875)¹, and criticized for not obeying Japanese traditional values and custom.

Resistance to modernization of Serbian law in 1840's was equally strong. Hadzic's attitude towards customary law has been matter of heated disagreement in Serbian society and among prominent intellectuals. The controversial issues were mainly family organization (he was accused to endanger old fashioned, great, joint families named "zadruga", encompassing several generations living together in a community of life with joint property), as well as Hadzic's attempt to abandon discriminatory inheritance rights of daughters, and legal capacity of woman equal to that of minors.²

At the same time he had to fulfill the wish of Prince Milosh to make a short and clear codification. As a result Serbia has got in 1844 a civil codification which was mainly based upon the Austrian model, but in a quite abbreviated form (950 instead of 1502 articles in the Austrian original). However, it was not only a copy of the Austrian Civil Code, as some scholars claim. Hadzic did not simply translate and uncritically borrow legal solutions from Austria. The modifications that he made were significant. The Serbian Civil Code of 1844 was also influenced by Roman law, customary law, Church law, remnants of Sharia law, and even by some Code Civil provisions. In any case, it is clearly visible that the SCC carries Hadzic's own, personal stamp - this is evident in the code volume, partially in the system of the SCC,

¹ After many changes, Japanese Criminal Code and Code of Criminal Procedure were adopted in 1880, and entered in force in 1882. In Serbia, Criminal Code appeared much latter then the Civil Code – not before 1860 (but earlier then in Japan), influenced by Prussian Criminal Code, while Code of Criminal Procedure was adopted in 1865. Serbian Commercial Code was also adopted in 1860, while Serbian Code of Civil Procedure was adopted already in 1853.

² Contrary to Hadzic's wish, the discriminatory solutions considering inheritance rights of daughters and legal capacity of woman entered into the Code, by pressure of legislative Committee and Prince himself.

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in its language and form, and in many particular solutions distinctive than in the Austrian model code.

The issue for current generation of Serbian legal scholars is to determine in how much Hadzic and Serbian law and particular legal institutions were influenced by Roman-Byzantine tradition and by direct reception of Roman law solutions, parallel to undisputable major influence of Austrian law due to its reception as a model code.

Opposition to the SCC was again very similar to the one that met Japanese Civil Code written by *Boissonade* which was adopted in 1890. The only difference is that *Boissonade's* Code did not come into effect as it was postponed (and never more revived). Differently then in Japan, who switched from French law to German Civil Code, Serbian Civil Code of 1844 survived contemporary criticism, and stayed in force during next 100 years, until the end of the WW II and the new, communist regime, which broke off with the “capitalist” legal tradition. Nevertheless, validity of legal principles posted in the SCC were recognized in interpretation of law, so that even today in some cases courts may quote in their sentences solutions stated by SCC of 1844.

In any case, Serbian law today (particularly civil law) remains a kind of mixed legal system set up of the two main elements. However, during the process of accession to European Union, it is quite probable that the third, new element will prevail in the future, as it happens in many European countries. Until “common law of Europe” replaces national legal systems, at least in civil law matters, Serbia is still going to live mainly in accordance with its specific legal tradition, basically leaned upon the Austrian Civil Code.