THE STUDY OF BYZANTINE LAW IN THE NETHERLANDS

by

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The systematic study of Graeco-Roman or Byzantine law does not have a long history in the Netherlands and it is concentrated in one university, that of Groningen. Yet it would be wrong to take Groningen as the starting point of this paper without mentioning two scholars who have done meritorious work in opening a source of law which is written in Greek. The first of them is Viglius of Ayta, who edited in 1533 the editio princeps of the so-called Paraphrasis of Theophilus. The other is the rector of the Middelburg gymnasium, G.O. Reitz, who made a new edition of the same Paraphrasis in 1751. They are two shining jewels in the history of Dutch jurisprudence and still rouse the admiration of present-day scholars, but they fall outside the subject of this short paper, which is the modern study of Byzantine law. This modern study started with the investigations by H.J. Scheltema. But before elaborating on this 'Groningen' school, some attention should be paid to the question of what Byzantine law really is. This question forces itself upon us because up to the present day the definition of Byzantine law gives rise to much misunderstanding.

On 11 May of the year 330 AD took place with great pomp and circumstance the inauguration of a new capital of the Roman Empire. In contrast with the old Rome this second Rome was designed to have not a pagan but a Christian character. Thus instead of pagan temples Christian churches were built, consecrated to the Apostles, to the peace (Irene) and to the divine wisdom (Hagia Sophia). It is ironic to realize that nowadays hardly any sign of this Christian design remains, whereas the old, pagan Rome still bears a definitely Christian stamp.

The idea of a new imperial capital had been cherished by the emperor Constantine for a long time and it had already been decided that it would of course be called after his name: Constantinople i.e. city of Constantine. The place where the city would be founded had given the emperor more doubts than its name. At first he had toyed with the idea of making the former Troy his capital, because it was the native town of the progenitor of the Roman people, Aeneas. In the end, however, he decided in favour of a small town, strategically placed on the Bosporus between Europe and Asia. This town was called Byzantium and the names Byzantines and Byzantine have always remained current, besides the official names Constantinople or Second Rome, Oriental Rome or New Rome. Hence some historians are of the opinion that the foundation of Constantinople marks the beginning of Byzantine history, the Byzantine empire and Byzantine law.

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If, as is submitted, the foundation of the Second Rome is the most appropriate choice as the starting point for Byzantine history, then Byzantine history includes the reign of Justinian and Justinianic law can be considered as Byzantine law. Indeed this view has existed for a long time. J.C. van Oven, for example, used to refer to Justinian’s legislation as the Byzantine compilation. In most cases this designation was used with an implication of rigidity, decline and formalism, with which the word Byzantine is normally associated. The ‘Byzantine’ compilers were supposed to have behaved like bulls in the china shop of Papinian, Paulus and other ‘classical’ jurists. This judgment does not do justice to the compilers of the Justinianic legislation. To speak exclusively of ‘Byzantine’ history ignores the fact that it is also the continuation of Roman history; in other words, the foundation of Byzantium does not close the Roman Empire. For that reason it is misleading to refer to Justinian and his creation as exclusively Byzantine, because it suggests a contrast with Roman law which does not exist. The Justinianic legislation marks the end of a development of law in the Latin language and at the same time the beginning of a development in Greek. For this reason it is not surprising that the great nineteenth century Zachariä von Lingenthal preferred to speak of the latter as Graeco-Roman rather than Byzantine law.

Basilica cum scholiis

H.J. Scheltema (1906–1981) had already applied himself to the study of Greek sources of law before he became Professor of Roman law in Groningen (1945–1977). He was especially interested in the period of the emperor Justinian. In that period the legislation that was later called the Corpus Iuris took shape. Scheltema was surprised to see that the vast majority of the sources from that period were ignored by the Romanists, simply because it was written in Greek. ‘Nowadays the Romanists browse through the Byzantine material and dig up from it what happens to suit them. Such a method has little value; what we are waiting for is the Byzantinist, to make possible a more reliable method’. Ultimately Scheltema wished to reach a better understanding of the legislation and the teaching of law during the Justinianic age. As for the legislation, this consisted of texts that were mainly written in Latin. Apart from one or two words, the Institutes contain no Greek. Nor does the Digest, apart from a few fragments, in particular the introductory constitution Δεσποτεστὶ τὸν and the treatise De excusationibus, originally comprising six books and addressed by Modestinus to Egnatius Dexter. The Codex Justinianus on the contrary contains numerous Greek constitutions and the Justinianic Novels have even entirely been promulgated in Greek, with only few early exceptions. Philologically dependable editions by Mommsen, Krüger and Schöll/Kroll had already made these texts sufficiently accessible for investigation, so they were not where Scheltema focused his

4. D. 27,1,1; 2; 4; 6; 8; 10; 12; 13; 14; 15.