

Dr. Srđan Šarkić

Professor

University of Novi Sad Faculty of Law

sarkics@nscable.net

SOME REMARKS CONCERNING THE RECEPTION OF BYZANTINE LAW IN MEDIAEVAL SERBIA

Roman law was not introduced into Slavic countries directly by the activity of lawyers educated in Bologna or somewhere else, but indirectly through Byzantine law. Essentially Serbian legal compilations are strict translations of the Byzantine ones, but in several cases one can find some variations that change the sense of the text. Sometimes provisions of Byzantine law were not in accordance with Serbian customary law, so that Serbian lawyers had to add some explications. In this paper the author exposes some of the most interesting examples.

Key words: *Byzantine law. Gaius. Nomos. Will. Marriage. Procheiron. Syntagma. Tzar Dushan's Code.*

It is well known that Roman Law, one of the most important legacies of Antiquity, was not introduced into the Slavic countries directly by the activity of lawyers educated in Bologna or somewhere else, but indirectly through Byzantine law. This specific reception of Roman Law in Serbia began in the thirteenth century through its inclusion into the Nomokanon of St. Sava, receiving its final shape in the middle of the fourteenth century with Tzar Dushan's legislation. But even today it is not completely clear what was the exact degree of application of Byzantine Law in Slavic countries, including Serbia, and whether it was merely a means for the obtainment of a reputation for emerging Slavic states or their rulers. Such intent is obvious enough in Tzar Dushan's Charter, probably issued in 1346, termed by Stojan Novaković *The Order of Tzar Stephan on the Legislation (цара Стефана наредба о законодавној радњи)*. The Tzar here states that now, after having ascended to the throne together with his wife and son, "we should make the kind of laws one

should have” (*закони поставити такоже подобаетъ имети*).¹ Thus, Roman (i. e. Byzantine) laws were to be introduced to the State, as otherwise the Empire would enjoy no reputation.²

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

I

The first book of Justinian’s *Digest* begins with the chapter entitled *De iustitia et iure*. It mentions there the famous fragment of Ulpian, taken from the first book of his *Institutions*. *Ulpianus libro primo institutionum: iuri operam daturum prius nosse oportet, unde nomen iuris descendat. Est autem a iustitia appellatum; nam, ut eleganter Celsus definit, ius est ars boni et aequi*.³ It is obvious that Ulpian thought that law (*ius*) was derived from justice since law (*ius*) is the art of good and equality. The editors of the *Basilica* translated this as follows: ‘Ο νόμος από τῆς δικαιοσύνης ὠνόμασται· ἐστὶ γάρ νόμος τέχνη τοῦ καλοῦ καὶ ἴσου.⁴ Thus *ius* is replaced by νόμος⁵ with the result that Ulpian’s play on *ius – iustitia* is lost. It would not be like this if the editors of *Basilica* had translated Roman word *ius*, with Greek δίκη; in Greek translation δίκη – δικαιοσύνη would be more convincing. In fact, the Byzantines had no general concept of law. The conception of *ius* as the body of legal rules forming the law (*droit, diritto, Recht*), inherited from the classical Roman tradition, had already been rejected in Justinian’s time. The most important and

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

² Cf. T. Taranovski, “Pravo države na zakonodavstvo [Right of the state to legislation]”, *Šišićev zbornik*, Zagreb 1929, 370–378.

³ D. I, 1,1.

⁴ Bas. II, 1,1. *Basilicorum Libri LX, series A, volumen I, textus librorum I–VIII*, ed. H. J. Scheltema et N. Van der Wal, Groningen 1955, 15.

⁵ The Byzantine editors used the term νόμος to translate the Latin word *lex* as well. Cf. D. I, 3,1 Bas. II, 1,13; D. I, 3,36 Bas. II, 1,36.

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

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

II

“The main distinction in the law of persons,” says Gaius, “is that all men are either free or slaves” (*Et quidem summa divisio de iure personarum haec est quod omnes homines aut liberi sunt aut servi*).⁸ Gaius' text also found its way in *Epanagoge/Eisagoge*, the Greek text being as follows: Τῶν προσώπων ἄκρα διαίρεσις αὐτή ὅτι μὲν ἀνθρώπων οἱ μὲν εἰσὶν ἐλεύθεροι, οἱ δὲ δοῦλοι.⁹ The fragment from *Epanagoge/Eisagoge* was taken by Matheas Blastar and it can be found in his *Syntagma* (Δ – 11).¹⁰ In the Serbian translation this would be: Исже лицъ краинице разделениѣ, се јестъ јакѡ отъ человекъ овы оубо соутъ свобод'ны, овы же рабы.¹¹

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

⁶ D. Simon, “Zakon i običaj u Vizantiji [Law and Customs in Byzantium]”, *Anali Pravnog fakulteta u Beogradu [Annals of the Faculty of Law in Belgrade]* 2/1987, 145.

⁷ *Matije Vlastara Sintagmat*, ed. S. Novaković, Beograd 1907, 421; Законь отъ правды именована се, јестъ бо хыгтрость доброму и равному. For more details see S. Šarkić, “Nóμος et ‘zakon’ dans les textes juridiques du XIVE siècle”, *Byzantium and Serbia in the 14th Century*, Athenes 1996, 257 266.

⁸ Gaius, *Inst.* I, 9. The definition was taken by the compilers of Justinian: *Iust. Inst.* I, 3; *D.* I, 5,3.

⁹ *Epanagoge legis XXXVII*, 1, ed. J. et P. Zepos, *Ius Graecoromanum II*, Athenis 1931, reprint Darmstadt 1964, 347. Although very small, the difference between Latin and Greek texts exist. Gaius speaks on “the main distinction in the law of Persons” (*summa division de iure personarum*), while the Greek text says that “the main distinction of Person such is...” (τῶν προσώπων ἄκρα διαίρεσις αὐτή...).

¹⁰ Γ. Α. Ράλλης Μ. Ποτλής, *Μαθαίων τοῦ Βλαστιάρεος Σύνταγμα κατὰ Στοιχεῖον*, Athenai 1859, 236.

¹¹ Ed. Novaković, 249. Serbian text is the strict translation of the Greek fragment.

es in mediaeval Serbia do not allow for the conclusion that the population was divided into free persons and slaves. Speaking on distinction of all persons, Serbian legal sources oppose the privileged class – *vlastela* (noblemen) to all other men (човекъ, plural = людие). So, the expression човекъ (man), used by Serbian translators of *Syntagma* as the exact equivalent for Latin word *homo* and Greek άνθρωπος, in Serbian mediaeval law designates dependent person whose legal status was immutable and who does not belong to the noblemen class. That can be clearly seen from several articles of Tzar Dushan's Law Code. Article 2 speaks on *vlastele i proči ljudi (Lords and other people...)* and in the article 136, among other things, it is said: *My Imperial writ may not be disobeyed, to whomsoever it be sent, be it to the Lady Tsaritsa, or to the King, or to the lords, great or small, or to any man (Knjiga carstva mi da se ne preslušā gde prihodi, ili ka gospoždī carici, ili ka kralju, ili ka vlastelom, velikim i malim, i vsakomu človeku).*¹²

In the Serbian translation of Matheas Blastar's *Syntagma* one can find another distinction of free men. However it is very hard to say if Math-eas Blastar was conscious of whether or not the above mentioned distinction of free men corresponded to the social circumstances of the fourteenth century Serbia. At the beginning of the chapter Y, in penal-law provision concerning the punishment of those who have insulted someone, we read: οί τοιοῦτοι, ἢ πρὸς καιρὸν ἐξορίζονται, ἢ τινοσ κωλύονται πράγματος ἐντιμοι ὄντες εἰ δὲ ἐλεύθεροι μὲν εἶεν, εὐτελεῖς δὲ, ροπαλιζονται εἰ δὲ δοῦλοι φραγγελιζόμενοι, τῷ δεσπότη ἀποδιδονται.¹³

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

¹² The English text is quoted according to the translation of Malcolm Burr, "The Code of Stephan Dušan, Tsar and Autocrat of The Serbs and Greeks", *The Slavonic (and East European) Review*, London 28/1849 50, 524; The Serbian text is quoted according to S. Novaković, 103, 227.

¹³ Ed. Πάλλης Ποτλης, 481. Old Serbian text is (ed. Novaković, 509 510): Такови или на време ζαгакають се, или некие възбранають се вешти, почтен'ни соуште; аште ли свободни оубо боудоуть, себри же палицами да биены боудоуть; аште ли раби, бичеви биемы господиноу да отдають се. Cf. T. Taranovski, "Političke i pravne ideje u Sintagmatu Vlastara [Political and legal ideas in the Blastar's Syntagma]", *Letopis Matice srpske* 317/1928, 166.

¹⁴ On the different meanings of the word *sebar* (себрь), see S. Novaković, "Die Ausdrücke себрь, поч'тень und мъроп'шина in der altserbischen Übersetzung des Syntagma von M. Blastares", *Archiv für slavische Philologie* 9/1886, 521 523; V. Mažuranić, *Prinosi za hrvatski pravno povjestni rječnik [Contributions to Croatian vocabulary of legal history]*, Zagreb 1908 1922 (fototipia Zagreb 1975), 1295 1296; P. Skok, *Etimologijski rječnik hrvatskoga ili srpskoga jezika [Etymological Vocabulary of Croatian or Serbian language]*, the new edition prepared by M. Deanović, Lj. Jonke and V. Putanec, book III, Zagreb 1973, 210. See also the article *Sebar* (Себар), in "Leksikon srpskog

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

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

III

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

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

srednjeg veka" [The Lexicon of Serbian Middle Ages], eds. S. Ćirković and R. Mihaljčić, Beograd 1999, 659 660 (R. Mihaljčić).

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

¹⁶ See S. Šarkić, "Divisione Gaiana delle persone nel diritto medievale serbo", *Zbornik radova Pravnog fakulteta u Splitu*, 43, 3 4/ 2006, 355 360.

¹⁷ *Proch.* XXXII, ed. J. et P. Zepos, *Ius Graecoromanum, vol. II*, Athenis 1931 (reprint Aalen 1962), 188 189. The Chapter contains four paragraphs.

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

¹⁹ Nićifor Dučić, *Književni radovi [Literary papers]*, vol. 4, Beograd 1895, 345; M. Petrović, *Zakonopravilo ili Nomokanon Svetoga Save, Ilovički rukopis iz 1262 [Nomokanon of St. Sava, The Ilovica Manuscript from 1262]*, fototipia, Gornji Milanovac 1991, 305 b.

rectly understood the contents of the Chapter 32 (division of inheritance) and they changed the Greek heading *Περὶ φαλκιδίου* into Serbian as *ω* *разделении* (On division). This way the personal name of the law proposer (Roman tribune Falcidius), by intermediary reception of Roman law, became the synonym for division of inheritance.²⁰

IV

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

Πρόχειρος Νόμος accepted Modestinus' definition and translated it into Greek: *Γάμος ἐστὶν ἀνδρὸς καὶ γυναικὸς συνάρφεια καὶ συγκλήρωσις πάσης ζωῆς, θείου τε καὶ ἀνθρωπίνου δικαίου κοινωνία*.²⁴ As we can see the text is literally translated and fully corresponds to the Roman concept, that marriage is a social fact, not a civil-law relation. It is interesting that neither *Procheiron* nor *Ecloga*, that preceded it, insisted on the formal proceedings of a wedding as the exclusive requirement for marriage,

²⁰ Cf. S. Šarkić, "The Concept of the Will in Roman, Byzantine and Serbian Medieval Law", *Forschungen zur byzantinischen Rechtsgeschichte, Fontes minores XI* (hrsg. L. Burgmann), Frankfurt am Main 2005, 427-433.

²¹ D. XXIII, 2,1.

²² *Iust. Inst.* I, 9,1. In the text we find *nuptiae autem sive matrimonium*. Editors used two terms for marriage (*nuptiae* or *matrimonium*).

²³ D. L, 17,30.

²⁴ *Proch.* IV, 1, ed. Zepos, 124. Πρόχειρος Νόμος accepted the forementioned definition of Ulpianus (IV, 17, ed. Zepos, 126) as well as some legal requirements for the validity of marriage: mutual consent of spouses, the age of puberty marriage able age (14 in case of male and 12 in the case of female), consent of the parents in case either party is in *potestas* (ὕπεξουσίῳ, in Serbian translation *podvlastni*), while it was not required for persons with independent status, and public wedding ceremony (IV, 2, 3, 12, 27, ed. Zepos, 125-128).

which one could have considered as usual in Orthodox Byzantium.²⁵ But later on, laws that were passed during the rule of Macedonian dynasty introduced innovations and inserted what was “omitted” by editors of *Procheiron*. Editors of *Epanagoge/Eisagoge* amended Modestinus’ definition of marriage by omitting the wording *θείου τε καὶ ἀνθρωπίνου δικαίου κοινωνία*, and by inserting the words *εἴτε δι’ εὐλογίας εἴτε δια στεφανώματος ἢ δια συμβολαίου*, meaning that the marriage is to be effected either by a wedding ceremony, or a blessing or literal contract.²⁶ So, a wedding ceremony, blessing and secular contract were considered equal. Leo VI proceeded one step forward and his *Novel* 89 (issued 893) prescribed Church benediction (*εὐλογία*) as an obligatory form of entering into such a contract.²⁷

The editors of Serbian legal miscellanies accepted Byzantine translations of Roman definitions of marriage. *Nomokanon* of St. Sava incorporated Modestinus’ definition of marriage, which had been taken from *Procheiron* (like the other provisions about marriage). Here is the Serbian original: *Brak jest muževi i žene sčetanije i sbitije v vsej žizni. Božestviježe i človečeskije pravdi obštenie*.²⁸ Matheas Blastar, like the translators of his *Syntagma* into the Serbian language, took a modified Modestinus’ definition of marriage from *Epanagoge/Eisagoge*, which is in Serbian as follows: *Brak jest muža i ženi svekupljenije i snasledie v vsej žizni, božestvenije že i človečeskije pravini priobštenije, ljubo blagoslovenijem, ljubo venčanijem, ljubo s zapisanijem*.²⁹ The definition from the 9th century, which equalised a laic contract with blessing and marriage, was considered obsolete by the 14th century. Neither Matheas Blastar nor his Serbian translators incorporated in *Syntagma* Novels of Byzantine Emperors that required religious rites for marriage. The editors of the Law Code of

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

²⁶ *Epanagoge legis* XVI, 1, ed. Zepos, vol. II, 274.

²⁷ P. Noaille, A. Dain, *Les Nouvelles de Léon VI le Sage*, Paris 1944, 295–297.

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

²⁹ Ed. Novaković, 160. Although Matheas Blastar took over definition of Modestinus from *Epanagoge/Eisagoge*, he did not omit words *θείου τε καὶ ἀνθρωπίνου δικαίου κοινωνία*, which was done by the editors of *Epanagoge/Eisagoge*.

Stefan Dushan corrected Blastars' "mistake" by putting articles 2 and 3 of the Code into full conformity with the Novels of Byzantine Emperors and with religious practice. We are going to quote them in a whole:

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

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

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

³⁰ M. Burr, 198; ed. Novaković, 8, 152. Cf. S. Šarkić, "The Concept of Marriage in Roman, Byzantine and Serbian Mediaeval Law", *Zbornik radova Vizantološkog instituta* [Collection of Papers of the Institute of Byzantology] 41/2004, 99-103.