

SRĐAN ŠARKIĆ

THE CONCEPT OF MARRIAGE IN ROMAN, BYZANTINE AND SERBIAN MEDIAEVAL LAW

In this paper the author is exposing definitions of marriage that were accepted in Byzantium and mediaeval Serbia, although it was not insisted in them on wedding as a religious rite. Leo VI, at the end of the 9th century, was the first to prescribe Church benediction as an obligatory form of entering into marriage. Novels of latter Emperors placed marriage under the complete jurisdiction of the Church, but they were not incorporated in Serbian translations of Byzantine legal miscellanies (Nomokanon of St. Sabba and Syntagma of Matheas Blastares). Therefore in articles 2 and 3 of Dušan's Law Code it was prescribed that no marriage could be contracted without wedding ceremony and Church benediction.

It is well known that Roman Law, one of the most important legacies of the antiquity, was not introduced into the Slavic lands directly — by the activity of lawyers educated in Bologna, but through Byzantine law. That specific reception of Roman law in Serbia began in the 13th century through its acceptance in Nomokanon of St. Sabba and got its final form in the middle of the 14th century with Dušan's legislation. But even today we do not know with certainty what was the exact volume of application of Greco-Roman law in Slavic lands, comprising Serbia herein, and whether it was only a mean of young Slavic States or their rulers for obtaining a reputation. Such striving is clear enough in Dušan's Charter, issued probably in 1346, which was called by Stojan Novaković *The Order of Tsar Stephan on the legislative work (Cara Stefana naredba o zakonodavnoj radnji)*. The Tsar says there, now when we have the State promulgated in the Empire we should **make laws like one should have (zakoni postaviti iakože podobaet imeti)**...¹ So, Roman

¹ S. Novaković, *Zakonik Stefana Dušana cara srpskog 1349 and 1354* (further on *Zakonik*), Beograd 1898, 5; N. Radojčić, *Zakonik cara Stefana Dušana 1349 and 1354* (further on *Zakonik*), Beograd 1960, 86. Although this text is preserved only in late Rakovac manuscript from 1700, N. Radojčić, *Zakonik*, 145–162 proved its authenticity. Recently S. Ćirković pointed out the importance of this Charter in the context of Serbo-Byzantine relations in his paper reported in a scholarly meeting held in Athens, November 12–14, 1993 under the name “Byzantium and Serbia in the 14th century”. See:

(Byzantine) laws should have been introduced in the State, as otherwise, the Empire would have had no reputation.²

The problem of acceptance and application of Roman law could be studied on the examples of all legal institutes, which would be a subject for a much more detailed study. Therefore we are going to limit ourselves in this paper only on the concept of marriage as it was understood in Roman law and later on in Byzantine and Serbian mediaeval law.³

The definition of marriage was given by the famous Roman lawyer Modestinus in the first book of his *Regulae (libro primo regularum)*, and Digest editors placed it at the beginning of Chapter II of Book XXIII 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*.⁴ In Justinian's *Institutiones* there is a similar definition: *Nuptiae autem sive matrimonium est viri et mulieris coniunctio, individuam consuetudinem vitae continens*, i.e. *marriage is a conjunction of a husband and a wife, created to last for life*.⁵ The definition of Ulpianus found in Book L of *Digest*, Chapter VII 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]*.⁶

Proheiron (issued between 870 and 879 in the name of Emperors Basil I, Constantine and Leo) accepted Modestinus' definition and translated it into Greek: **Γάμος ἐστὶν ἀνδρὸς καὶ γυναικὸς συνάφεια καὶ συγκλήρωσις πάσης ζωῆς, θείου τε καὶ ἀνθρωπίνου δικαίου κοινωνία**.⁷ 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.⁸ It is interesting that neither Proheiron nor Ecloga, that preceded it, insisted on the formal proceedings of wedding as on the exclusive requirement for marriage,

S. Ćirković, *Between Empire and Kingdom: Dušan's State (1346–1355) Reconsidered*, Byzantium and Serbia in the 14th century, Athens 1996, 115–116.

² Cf. T. Taranovski, *Pravo države na zakonodavstvo*, Šišićev zbornik, Zagreb 1929, 370–378.

³ Having studied the reception of Roman law (through Byzantine law) in mediaeval Serbia, I began to research key legal institutes. As a result of that I published a paper on *The Third Yugoslav Byzantine Studies Conference*, in Kruševac, May 08–10, 2000 titled *Pojam testamenta u rimskom, vizantijskom i srpskom srednjovekovnom pravu* (The Idea of Will in Roman, Byzantine and Serbian mediaeval Law), published in *Papers of The Third Yugoslav Byzantine Studies Conference*, Beograd – Kruševac 2002, 85–90.

⁴ D. XXIII, 2,1

⁵ *Iust. Inst.* I, 9,1. In the text we find *nuptiae autem sive matrimonium*. Editors used two terms for marriage (*nuptiae* or *matrimonium*).

⁶ D. L., 17,30.

⁷ Proch. IV, 1, ed. J. et P. Zepos, *Ius graecoromanum*, vol. II, Athenis 1931 (reprinted Aalen 1962), 124. Procheiron 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 – marriageable age (14 in the case of male and 12 in the case of female), consent of the parents in case either party is in *potestas* (ὕπεξουσίῳι, 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).

⁸ M. Boras – L. Margetić, *Rimsko pravo*, Zagreb 1980, 87.

which one could have considered as usual in Orthodox Byzantium.⁹ But later on, laws that were passed during the rule of Macedonian dynasty introduced innovations and inserted what was “omitted” by editors of Proheiron. Editors of Epanagoge/Eisagoge (issued between 879 and 886 in the name of Emperors Basil I, Leo and Alexander) amended Modestinus’ definition of marriage by omitting the wording: **Θείου τε καὶ ἀνθρωπίνου δικαίου κοινωνία** (institute of divine and human law), and by inserting the words: **εἴτε δι’ εὐλογίας εἴτε διὰ στεφανώματος ἢ διὰ συμβολαίου**, meaning that the marriage is to be effected either by wedding ceremony, or blessing or literal contract.¹⁰ So, 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. We are going to quote further from this overall interesting text:

*Just as our forefathers treated with indifference the confusion that had arisen over the issue of adoption, thinking they did no negligence to that institute by effecting it without prayers or holy rites, they in the same way did not trouble themselves much with strict adherence to marriage requirements, as they accepted matrimony without the usual blessings (**τῆς νενομισμένης εὐλογίας**). But, if we could certainly excuse such reasoning on the part of our forefathers, we on the other hand, living by mercy of God in conditions much more refined and healthier, cannot excuse such negligence towards either of the aforementioned institutes.*

*Therefore, just as we have prescribed that the adoption of children must be effected by means of holy prayers (**ιεραῖς ἐπικλήσεσι**),¹¹ we are ordering as well that marriages must be enforced by witness of holy blessing (**τῆ μαρτυρία τῆς ἱεραῖς εὐλογίας**), so that if future spouses do not like to arrange their union in this way, the marriage shall be considered invalid from the beginning, and such a marriage would not have any legal effect. For there is no irreproachable state between the states of marriage and non-marriage. Are you inclining towards the state of marriage? Then, you must respect the marriage rules. Do you dislike marriage worries? In that case, you should hold to the state of non-marriage; that way you will neither pervert the rules of marriage, nor will you erroneously perform the state of non-marriage.¹²*

⁹ Chapter two of Ecloga entitled **Περὶ γάμων ἐπιτετραμμένων καὶ κεκολυμένων, πρώτου καὶ δευτέρου, ἐγγράφου καὶ ἀγράφου, 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 ἀγράφως, μεταξὺ ἀνδρὸς καὶ γυναικὸς τοῦ εἶναι τὴν ἡλικίαν πρὸς συνάφειαν ἡρμοσμένην, τοῦ μὲν ἀνδρὸς ἀπὸ πεντεκαίδεκαετοῦς χρόνου, τῆς δὲ γυναικὸς ἀπὸ τρισκαίδεκαετοῦς χρόνου, ἀμφοτέρων θελόντων μετὰ τῆς τῶν γονέων συναίνεσεως** (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. Burgman*, 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 requirements for marriage neither formal proceedings of the wedding nor religious ceremony were mentioned.

¹⁰ Epanagoge legis XVI,1, ed. *Zepos*, vol. II, 274.

¹¹ See Novel 24 of Leo VI.

¹² Text translated according to the edition of *P. Noaille et A. Dain*, Les Nouvelles de Léon VI le Sage, Paris 1944, 295–297.

It seems that notwithstanding this provision numerous weddings were not performed following religious rites. Due to that fact Emperor Alexios Komnenos issued in 1095 a Novel that prescribed Church marriage as mandatory even for slaves. Finally, in 1306 Andronicos II Palaiologos and Patriarch Athanasios issued a Novel which required that wedding should be performed in the presence of an authorised clergyman.¹³

The editors of Serbian legal miscellanies accepted Byzantine translations of Roman definitions of marriage. Nomokanon of St. Sabba incorporated Modestinus' definition of marriage, which had been taken from Proheiron (like the other provisions about marriage). Here is the Serbian original: **Brak jest muževi i žene sčetanje i sbitije v vsej žizni. Božestviježe i človečeskije pravdi obštenie.**¹⁴ Matheas Blastares, like the translators of his Syntagma into Serbian language, took a modified Modestinus' definition of marriage from Epanagoge/Eisagoge, which is in Serbian as follows: **Brak jest muža i ženi svokupljenije i snasledie v vsej žizni, božestvenije že i človečeskije pravini priobštenije, ljubo blagoslovenijem, ljubo venčanijem, ljubo s zapisanijem.**¹⁵ The definition from the 9th century, which equalised a laic contract with blessing and marriage, was considered obsolete by the 14th century. Neither Matheas Blastares nor his Serbian translators incorporated in Syntagma Novels of Byzantine Emperors that required religious rites for marriage. The editors of the Law Code of Dušan corrected such Blastares' "mistake", by putting articles 2 and 3 of the Code fully in 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 ljud 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*).¹⁶

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

¹³ A. Solovjev, *Zakonodavstvo Stefana Dušana, cara Srba i Grka*, Beograd 1928, 103 = *Klasici jugoslovenskog prava*, Book 16, Beograd 1998, 412. A. Solovjev, *Zakonik cara Stefana Dušana 1349 and 1354*, Beograd 1980, 172.

¹⁴ *Književni radovi Nićifora Dučića*, book 4, Beograd, 258; *Zakonopravilo or Nomokanon of St. Sabba*, Transcript of Ilovica 1262, Fototipia, ed. M. Petrović, Gornji Milanovac, 1991, 270b.

¹⁵ S. Novaković, *Matije Vlastara Sintagmat*, Beograd 1907, 160. Although Matheas Blastares took over definition of Modestinus from Epanagoge, he did not omit words: *institute of divine and human laws (ustanova božanskog i ljudskog prava)* which was done by the editors of Epanagoge.

¹⁶ S. Novaković, *Zakonik*, 7 and 151; 8 and 152; N. Radojčić, *Zakonik*, 43 and 90. English translation by M. Burr, *The Code of Stephan Dušan, Tsar and Autocrat of the Serbs and Greeks*, *The Slavonic (and East European) Review*, vol. 28 (1949), 198–199.

Срђан Шаркић

ПОЈАМ БРАКА У РИМСКОМ, ВИЗАНТИЈСКОМ И СРПСКОМ СРЕДЊОВЕКОВНОМ ПРАВУ

Римски правници су дефинисали брак као трајну заједницу живота између мушкарца и жене, не инсистирајући на уговорној форми. Дефиниција римског правника Модестина, која се налази у *Дигестима*, дословно је преузета у *Прохирону*, али ни *Прохирон* ни *Еклога*, која му је претходила, не захтевају венчање као обавезан услов за склапање брака, што би се у православној Византији могло сматрати уобичајеним. Редактори *Ејанагоге* су, међутим, прерадили Модестинову дефиницију додајући речи да се брак може склопити *или венчањем, или благословом, или уговором*. Тек се у *Новели 89* цара Лава VI Мудрог од 893. године захтева црквени благослов као обавезан услов за сваки брак. Ову одредбу потврдиле су и касније новеле цара Алексија I Комнина од 1095. године и Андроника II Палеолога од 1306. године.

Следећи своје византијске узоре, редактори српских правних збирки различито су поступали. *Закономправило Светог Саве* преузело је Модестинову дефиницију из *Прохирона*, док Матија Властар и његови српски преводиоци прихватају текст из *Ејанагоге*. Коначно, *Душанов законик* у члановима 2 и 3 доводи брак у потпуну сагласност са новелама византијских цара и са црквеном праксом.