

ACADEMIE SERBE DES SCIENCES ET DES ARTS

COMITE INTERACADEMIQUE DE BALKANOLOGIE
DU CONSEIL DES ACADEMIES DES SCIENCES ET DES ARTS
DE LA R.S.F.Y.

INSTITUT DES ETUDES BALKANIQUES

BALCANICA

ANNUAIRE DE L'INSTITUT DES ETUDES BALKANIQUES

XI

BELGRADE 1980.



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Beograd

TRACES OF BYZANTINE LAW INFLUENCE IN CUSTOMARY LAW OF SOME AREAS IN YUGOSLAVIA*

Since their final settling in the Balkan Peninsula, the South Slavs — up to disappearance of the Byzantine Empire, have been under definite influence of Byzant in many areas. This is also visible in the field of law, as well as, particularly, in the unwritten, namely customary law. Out of the institutes apt for study in the above mentioned respect, it is possible to single out the right of pre-emption, since this issue has been treated in relevant Yugoslav legal, historical, and ethnological literatures, including some recent works, such as that of Nikola Pavković, Petar Stojanović and Mišić.

Two main opinions are, in general, characteristic for Yugoslav literature in this respect — one according to which the right to pre-emption has its origin, first of all, in the Byzantine law (Stojan Novaković) and the other ascribing to it significant autochthonous elements (Milčić). Thus, S. Novaković considers that the custom of the right to pre-emption originated at first within the Byzantine law and that later on it was transferred in the practice of our people, wherever it was under direct Byzantine rule. Together with other Byzantine law and legal institutions it entered the written law as well in Serbian medieval state. In course of time that legal institution has spread from both sides in the practice of people becoming in such a way an unwritten custom.¹

* Report submitted at the IV International Congress of South-East European Studies, Ankara, August 13—18, 1979.

¹ Петар Стојановић, *Страни утицаји у црногорском праву*, Друштво за науку и умјетност Црне Горе, Титоград 1975, p. 115.

However, most of contemporary authors are of a different opinion. After making recent fundamental research on the issue of the right to pre-emption professor Nikola Pavković comes to the conclusion that the right of pre-emption originated at a definite level of economic and social developments of a number of agrarian societies, so that it can not be considered as a specific institution of that or other people. It is certain that the Byzantine influence could be traced more in relation to various forms and procedures of application of the right of pre-emption in our countries, while its essence can be in the same degree both Byzantine, or Serbian or, for that matter, of any other people, i.e. general.²

The other Yugoslav author, Petar Stojanović is also of almost the same opinion, while pointing out that the right to pre-emption appears with other peoples too, not only with South Slavs, including the peoples which were not at all under the Byzantine rule or influence. Because of that Novaković's view on the matter is surpassed, since the institution of pre-emption originates at the definite degree of social and legal development; it is connected with the destruction of tribal societies and structures and represents a reaction against disappearance of these structures. Byzantine legislation concerning the right of pre-emption could have been accepted, as a legal model, in Serbian countries of the time, since it corresponded to domestic needs, and thus influenced the building up and defining of an already existing unwritten custom of pre-emption.³

Otherwise, the influence of Byzantine law is visible in the first Montenegrin written laws, as well as in some instances of unwritten law in that part of Yugoslav countries. Distant and rather roughly expressed reflection of the Byzantine Cesaro-Papism, which is characteristic for the Dušan's Code is thus present in the first Montenegrin codifications in the nineteenth century. The role and significance of the clergy in the old Serbian state, as well as later on in the Montenegrin one, have been great, so that the Church lawyers, transcribers and translators of Byzantine legal-church collections introduced, through their texts into Serbia the institutions of Roman, and thus of Byzantine law. The influence of the Serbian-Byzantine system on the first Montenegrin written laws related not only to the form, but also to the substance, as well as the spirit of laws. The laws were embodied into the religious form, while in the theocratic form of government the clergy was the only literate people who, naturally, exerted their influence.⁴

² Никола Павковић, *Право прече куповине у обичајном праву Срба и Хрвата, студија из правне етнологије*, Београд 1972, р. 40.

³ П. Стојановић, *op. cit.*, footnote 11.

⁴ П. Стојановић, *op. cit.*, р. 117.

However, many issues related to the origin, system, and methodology of elaboration of the Peter and Danilo's laws in Montenegro are not explained in the legal and historical science, which is also true for the definite traces of influence of Byzantine law on these forms of legal life in that part of Yugoslav countries.

In the field of criminal law too the presence of Byzantine law is visible. Thus the penalty of cutting off the nose in Dušan's Code as far as the adultery of woman was concerned, could not be found either in Roman, or in the German or old Slavic laws. Its origins are in the Orient, together with other similar penalties of severe character.

The influence of the old Serbian and Byzantine laws is also visible in the field of the so-called agrarian provisions, which in fact represent unwritten legal customs raised to the level of the law.⁵ This refers most of all to the already mentioned right of pre-emption, and relevant provisions of the Peter and Danilo's laws are similar to the system and conception used for that institution in the Justinian's Code (article 18), although the text in Montenegrin laws is expressed more in the people's language.

Authors such as Sufflay⁶ also point out at the fact that people's customary (i.e. unwritten) law is full of relics of the medieval Byzantine-Serbian law. Traces of Byzantine law in that body of unwritten law is, for instance, existent in the littoral villages, where that law (customary law) was the basic source for regulating property law relationships. Also, many legal institutions were not received and adopted in their pure form, but they were deformed, since this corresponded to the real needs of specific domestic conditions. An important role in this respect was played by the well-known large family community, i.e. *zadruga*, which was the storehouse of the unwritten law (P. Stojanović).

On the ground of the existing literature in our country, one is able to state that both the written and the unwritten, i.e. customary law, in some areas of Yugoslavia, such as for instance Montenegro, were under influence of foreign law systems. But, in spite of that, the result in internal legislating and in the body of unwritten law in practice was a synthesis of the domestic and autochthonous unwritten law, as well as of the institutes of Roman-Byzantine and modern European law, including the shariat. It is therefore rather difficult to draw precise conclusions as to the exact instances of traces of the Byzantine law influence in the unwritten law of some areas in Yugoslavia. This short contribution is therefore but a modest attempt at summarizing some of the existing facts based on recent literature on the subject.

⁵ П. Стојановић, *op. cit.*, art. 15 of the Peter's Code and article 42 of the Danilo's Code, p. 121.

⁶ M. Sufflay, *Srbi i Arbanasi*, Beograd 1925, p. 62.

ТРАГОВИ УТИЦАЈА ВИЗАНТИЈСКОГ ПРАВА У ОБИЧАЈНОМ ПРАВУ НЕКИХ ОБЛАСТИ ЈУГОСЛАВИЈЕ

Резиме

Јужни Словени још од свог коначног досељења на Балканско полуострво па све до ишчезавања Византијског царства налазили су се под сталним и одређеним утицајем Византа. Овај феномен видљив је и у области права, а нарочито у домену неписаног, то јест обичајног права. Међу специфичним институтима правног карактера који су подобни за изучавање у вези са утицајем Византа, могуће је издвојити право прече куповине, пошто је ово питање посебно третирано у југословенској правној литератури, а такође и у историјским и етнолошким радовима, од којих су неки и новијег датума (Никола Павковић, Петар Стојановић, Мишић).

Два главна мишљења су карактеристична за југословенску литературу о овом питању — једно према коме право прече куповине има своје порекло, пре свега, у византијском праву (С. Новаковић), и друго које томе праву приписује аутохтоне елементе (Мишић). У чланку је разрађено у одређеној мери и једно и друго мишљење. Међутим, недавна дубља истраживања у вези са овим питањем указују на то да се право прече куповине појавило на одређеном степену економског и друштвеног развоја извесног броја аграрних друштава, тако да се оно не може сматрати специфичном институцијом једног или другог народа (Н. Павковић).

Примери утицаја византијског права третирани су и у општијем смислу, то јест кроз кодификацију и кроз институте обичајног права као делова већих сфера регулација. Највећи број таквих примера нађен је у литератури о црногорском обичајном праву, као и о писаном грађанском и кривичном праву (П. Стојановић, Šufflay). С тим у вези спомиње се и задруга која је представљала ризницу обичајноправних правила, тј. неписаног права.

Аутор даје и примере из области кривичног права (одсецање носа као казна предвиђена средњовековним кодификацијама, као што је Душанов законик) где је утицај византијског права свакако присутан.

Улога Цркве је такође значајна у преношењу византијског утицаја и у писано и у обичајно право југословенских земаља. Црквени правници, преписивачи и преводиоци византијских правно-црквених текстова увели су у српске институције дух римског и, на тај начин, византијског права.