S. Aličić, *Specificatio in the Law of Real Rights of the Republic of Srpska in the Light of the Roman Law*, Collection of Papers "Challenges to the legal system", E. Sarajevo 2021, pp. 436–446.

UDC/УДК 347.2
ORIGINAL SCIENTIFIC ARTICLE / *ИЗВОРНИ НАУЧНИ РАД*

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SPECIFICATIO IN THE LAW OF REAL RIGHTS OF THE REPUBLIC OF SRPSKA IN THE LIGHT OF THE ROMAN LAW

The object of this paper are the rules of the article 119 of the Law of Real Rights of the Republic of Srpska on specificatio, i. e. on the acquisition of property by change of species of a thing. These rules are subject to an ontological interpretation, in regard with the original context which they had in the Roman law, and are contrasted with the solutions of the comparative law. The scope of the paper is to offer interpretation of the text that would cover the situations that could appear in the legal praxis, and which are not explicitly regulated by the Law, and to offer possible solutions de lege ferenda.

Key words: Roman Law; Real Rights; Comparative Law; Original Acquisition of Property; *Specificatio*.

1. INTRODUCTION

The law of the countries of ex-Yugoslavia, today commonly known as Western Balkans, is a specific mixture of various norms. It makes part of the Civil law, a legal system based on Roman law, usually contraposed in legal science to the other great legal system, Common (or Anglo-American) law. Roman legal solutions were received from different sources. Germanic (austrian in the private and german in the penal law) influence are predominant. But some solutions of the roman law have been received from other sources too, most notably from German and Swiss civil code, from french law, and directly from the roman law. Moreover, other legal systems, not necessarily based on roman law, left traces, including ottoman, canon (church), and slavic consuetudinary law. More recently, some solutions have been borrowed from the common law. At the end, there are few completely original norms, without equivalent in both foreign contemporary law or in the past legislations, invented recently by the south-slavic legislators.

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One of such original norms is the rule of the article 119 of the Law of Real Rights (*Закон о стварним правима/Zakon o stvarnim pravima*) of the Republic of Srpska, one of the two entities of Bosnia and Herzegovina. This paragraph deals with the institute known as *specificatio* in civil law legislations, i. e. with the acquisition of ownership by the change of species of a thing. The text of the article in English translation follows:

Made up thing

Article 119.

(1) A person who makes up a new thing out of his own material and through his own work, acquires the right of ownership of the thing.

(2) The right of ownership over a new thing shall belong to the owner out of whose material, on the basis of a legal transaction, the thing was made by another person.

(3) Should someone make up a new thing for himself, he acquires the ownership of the thing, if he acted in good faith and if the value of the work is not higher then the value of the material.

(4) In the case from the section 3 of this article, if the value of the work and the value of the material are equal, the co-ownership shall be established.[1]

2. SPECIFICATION IN THE ROMAN LAW

Manufacturing a new thing ouf of material of another person on the basis of a contract, for example when a goldsmith promises to make a ring from the gold owned by a customer, has not ever posed particular problem: to whom belongs the ownership of a ring is prescribed by contract, or by subsidiary legal norms of the law of contracts.[2]

But, to whom shall depend a new thing made up from material belonging to another person when no contract has been concluded, is one of the most hotly debated questions in legal history, since at least two thousand years, without consensus to be reached yet. This famous dispute arose approximately at the beginning of the 1th century A. D. between two principal schools of jurisprudence in ancient Rome, Sabinan and Proculean school. The most im-

[1] *Израђена ствар. Члан 119. (1) Лице које од свог материјала својим радом изради нову ствар, стиче право својине те ствари. (2) Право својине на новој ствари припада власнику од чијег је материјала, на основу правног посла, ту ствар израдило друго лице. (3) Ако је неко од туђег материјала израдио нову ствар за себе, он на тој ствари стиче својину ако је савјестан и ако је вриједност рада већа од вриједности материјала. (4) У случају из става 3. овога члана, ако су вриједност рада и вриједност материјала једнаке, настаје сусвојина.*

[2] See for example: B. C. Stoop, "Non solet locatio dominium mutare. Some remarks on specificatio in classical Roman law," *TR*, 66/1-2/1998, 3-24; J. A. C. Thomas, "Locatio-conductio emptio-venditio und specificatio," *ZSS* 81/1964, 109-133.

portant testimony about the dispute is the famous passage from the Institutes of Gaius.[3] Other roman legal texts, in which the problem of specification is sometimes interviewed with accrescion, a similar mode of acquisition of ownership, offer additional insight to the positions of the roman jurists.[4]

Sabinians believed that the owner of material shall be the owner of the newly manufactured thing too, while Proculeans held the view that it should depend to the manufacturer. Both schools shared the position that to the other party a pecuniary indemnity should be paid, i. e. the value of the material or of the work. Also, there seems that both schools didn't take in consideration if the parties acted in good faith, or not. We don't know what was the motivation of the masters of two schools to hold separate positions. Romanists made great deal of effort to prove that the Sabinian position was based upon stoic philosophy and the Proculean one on the ideas of Aristotle. Other authors tried to find the roots of the dispute in differences in social thinking, believing that progressive Proculeans attributed greater value to the human work than conservative Sabinians. Although elaborate, this theories are not completely convincing, and remain in the domain of speculations.[5]

[3] G.2.79 *In aliis quoque speciebus naturalis ratio requiritur. proinde si ex uvis aut olivis aut spicis meis vinum aut oleum aut frumentum feceris, quaeritur utrum meum sit id vinum aut oleum aut frumentum an tuum. item si ex auro aut argento meo vas aliquod feceris vel ex tabulis meis navem aut armarium aut subsellium fabricaveris, item si ex lana mea vestimentum feceris vel si ex vino et melle meo mulsum feceris sive ex medicamentis meis emplastrum vel collyrium feceris, quaeritur, utrum tuum sit id quod feceris, an meum. quidam materiam et substantiam spectandam esse putant, id est ut cuius materia sit, illius et res, quae facta sit, videatur esse; idque maxime placuit Sabino et Cassio; alii vero eius rem esse putant, qui fecerit; idque maxime diversae scholae auctoribus visum est; sed eum quoque cuius materia et substantia fuerit, furti adversus eum, qui subripuerit, habere actionem; nec minus adversus eundem condictionem ei competere, quia extinctae res, licet vindicari non possint, condici tamen furibus et quibusdam aliis possessoribus possunt. de pupillis an aliquid a se alienare possunt.*

[4] See for example D.41.1.24; D.41.1.26pr; D.32.49.5; D.41.1.27.1. More on the difference between the two institutes in roman law see in M. J. Schermaier, „Zur Unterscheidung von Vermischung und Verarbeitung im klassischen römischen Recht," *RIDA* 39/1992, 233-257.

[5] Of very rich and elaborate literature on the topic of specification in classical roman law see for example: S. Perozzi, "Materia e species," *Scritti giuridici, I - Proprietà e possesso*, Milano 1948, 225-252; F. De Martino, "Appunti in tema di specificatio," *Scritti giuridici per il centenario della casa editrice Jovene*, 1954, 297-307; A. Mozzillo, "Note in tema di specificazione," *Scritti giuridici per il centenario della casa editrice Jovene*, 1954, 711/733; F. Wieacker, „Spezifikation; Schulprobleme und Sachprobleme," *Festschrift für Ernst Rabel 2*. Tübingen 1954, 263-292; B. Albanese, "Esegesi minime in tema di specificazione," *Labeo*, 1/1955, 166-172; Th. Mayer-Maly, „Spezifikation: Leitfälle, Begriffsbildung, Rechtsinstitut," *ZSS*, 73/1956,120-154; B. Cohen, "«Specificatio» in Jewish and Roman Law," *RIDA*, 5/1958, 225-290; A. Calonge, "Breve exégesis en materia de especificación," *Studi in onore di Giuseppe Grosso 2*, Torino 1968, 193-212; M. Balzarini, "Voce «Specificazione» (Diritto romano)," *Novissimo Digesto Italiano XVII*, Torino 1970, 1084-1087; J. Plescia, "The Case of Specification in Roman Law," *IVRA*, 24/1974, 214-221; G. Thielmann, „Zum Eigentumserwerb durch Verarbeitung im römischen Recht," *De iustitia et iure: Festgabe für*

In one of his later works (*Res cottidianae*) Gaius proposed a compromise solution: the ownership of a thing should pass to the manufacturer if the new thing could not be converted back into the original form, but not otherwise.[6] It is plausible to believe that this solution became commonly accepted in roman jurisprudence before the beginnig od the third century, when it was further developed by another famous jurisprudent, Paul, who added another requirement – good faith (*bona fides*) – for acquiring ownership by *specificatio*.[7]

Until the beginning of the XIX century, this requirement was practically unanimously accepted. Both compilers of *Corpus iuris civilis*,[8] glo-

Ulrich von Lübtow, Berlin-München 1980, 187-232; C. Ferrini, "Appunti sulla dottrina della specificazione," Opere 4, Milano 1929, 44-112; G. Impallomeni, , "Specificazione. Diritto romano," Enciclopedia del diritto vol. 43, Milano 1990, 267-270; T. Leesen,. "Produced and Bottled in Rome – Who Owned the Wine? The Controversy about Specificatio," *RIDA* 53/2006, 265-282.

[6] D.41.1.7.7 GAIUS libro secundo rerum cottidianarum sive aereorum *Cum quis ex aliena materia speciem aliquam suo nomine fecerit, nerva et proculus putant hunc dominum esse qui fecerit, quia quod factum est, antea nullius fuerat. Sabinus et Cassius magis naturalem rationem efficere putant, ut qui materiae dominus fuerit, idem eius quoque, quod ex eadem materia factum sit, dominus esset, quia sine materia nulla species effici possit: veluti si ex auro vel argento vel aere vas aliquod fecero, vel ex tabulis tuis navem aut armarium aut subsellia fecero, vel ex lana tua vestimentum, vel ex vino et melle tuo mulsum, vel ex medicamentis tuis emplastrum aut collyrium, vel ex uvis aut olivis aut spicis tuis vinum vel oleum vel frumentum. est tamen etiam media sententia recte existimantium, si species ad materiam reverti possit, verius esse, quod et sabinus et cassius senserunt, si non possit reverti, verius esse, quod nervae et proculo placuit. ut ecce vas conflatum ad rudem massam auri vel argenti vel aeris reverti potest, vinum vero vel oleum vel frumentum ad uvas et olivas et spicas reverti non potest: ac ne mulsum quidem ad mel et vinum vel emplastrum aut collyria ad medicamenta reverti possunt. videntur tamen mihi recte quidam dixisse non debere dubitari, quin alienis spicis excussum frumentum eius sit, cuius et spicae fuerunt: cum enim grana, quae spicis continentur, perfectam habeant suam speciem, qui excussit spicas, non novam speciem facit, sed eam quae est detegit.* See also: Behrends O, „Die Spezifikationslehre, ihre Gegner und die media sententia in der Geschichte der römischen Jurisprudenz" *ZSS* 112/1995, 195-238

[7] B. Santalucia, "Il contributo di Paolo alla dottrina della specificazione di mala fede," *BIDR* 72/1969, 89-138; M. J. Schermeier, „D.41.1.24 und 26 pr.: Ein Versuch zur Verarbeitungslehre des Paulus," *ZSS* 105/1988, 436-487

[8] I.2.1.25 *Cum ex aliena materia species aliqua facta sit ab aliquo, quaeri solet, quis eorum naturali ratione dominus sit, utrum is qui fecerit, an ille potius qui materiae dominus fuerit: ut ecce si quis ex alienis uvis aut olivis aut spicis vinum aut oleum aut frumentum fecerit, aut ex alieno auro vel argento vel aere vas aliquod fecerit, vel ex alieno vino et melle mulsum miscuerit, vel ex alienis medicamentis emplastrum aut collyrium composuerit, vel ex aliena lana vestimentum fecerit, vel ex alienis tabulis navem vel armarium vel subsellium fabricaverit. et post multas sabinianorum et proculianorum ambiguitates placuit media sententia existimantium, si ea species ad materiam reduci possit, eum videri dominum esse, qui materiae dominus fuerat, si non possit reduci, eum potius intellegi dominum qui fecerit: ut ecce vas conflatum potest ad rudem massam aeris vel argenti vel auri reduci, vinum autem aut oleum aut frumentum ad uvas et olivas et spicas reverti non potest ac ne mulsum quidem ad*

sators and later comentators like Donellus,[9] and even early german pandectistic, did not support the idea that a party who did not act in good faith shall be protected. But in the era of creation of first modern codifications at the end of XVIII and the beginning of XIX century, a new controversy appeared. Supported by the discovery of Veronese manuscript of the Institutes of Gaius, significant portion of authors started to put in focus the fact that early classical roman law did not require *bona fides* as a condition for acquiring ownership by specification, among them big names of legal science like Pernice, Puchta and Thibaut. At the other hand, many authors, including famous jurists like Dernburg, Girard, Moyle and Windsheid, diffended the traditional view.[10]

And there is more: some authours came to doubt that the Gaius's „middle way" was really the best, opting in favour of either Sabinian or Proculean solution. Consequently, modern codifications adopted different solutions for the problem of specification.

Austrian civil code (*Allgemeines Bürgerliches Gesetzbuch - ABGB*) adopts the rule of Gaius, according to which the solution depends upon the fact, if the conversion into the pristine form is possible and practicable, or not. In the first case, the newly made thing belongs to the owner of the material, while in the second, the parties become co-owners, while the one who acted in good faith has the right of option: to become the sole owner and pay the indemnity, or to pass full ownership to the other party and ask indemnity. If both parties acted in good faith, the party whose contribution is more worthy has this right.[11]

vinum et mel resolvi potest. quodsi partim ex sua materia. partim ex aliena speciem aliquam fecerit quisque, veluti ex suo vino et alieno melle mulsum aut ex suis et alienis medicamentis emplastrum aut collyrium aut ex sua et aliena lana vestimentum fecerit, dubitandum non est hoc casu eum esse dominum qui fecerit: cum non solum operam suam dedit, sed et partem eiusdem materiae praestavit.

[9] E. G. Lorenzen, "Specification in the Civil Law", *Yale Law Journal* 35/1/1925, 32.

[10] *Ibid*.

[11] §. 414. *Wer fremde Sachen verarbeitet; wer sie mit den seinigen vereiniget, vermengt, oder vermischt, erhält dadurch noch keinen Anspruch auf das fremde Eigenthum*. §. 415. *Können dergleichen verarbeitete Sachen in ihren vorigen Stand zurück gebracht; vereinigte, vermengte oder vermischte Sachen wieder abgesondert werden; so wird einem jeden Eigenthümer das Seinige zurück gestellet, und demjenigen Schadloshaltung geleistet, dem sie gebührt. Ist die Zurücksetzung in den vorigen Stand, oder die Absonderung nicht möglich, so wird die Sache den Teilnehmern gemein; doch steht demjenigen, mit dessen Sache der Andere durch Verschulden die Vereinigung vorgenommen hat, die Wahl frey, ob er den ganzen Gegenstand gegen Ersatz der Verbesserung behalten, oder ihn dem Anderen ebenfalls gegen Vergütung überlassen wolle. Der schuldtragende Theilnehmer wird nach Beschaffenheit seiner redlichen oder unredlichen Absicht behandelt. Kann aber keinem Theile ein Verschulden beygemessen werden, so bleibt dem, dessen Antheil mehr werth ist, die Auswahl vorbehalten.*

The French civil code (*Code civile - CC*) adopts the Sabinian rule that favours the owner of the material, regardless of good faith of artificer.[12]

The German civil code (*Bürgerliches Gesetzbuch - BGB*), on the contrary, accepts the Proculean solution that favours the artificer, also regardless of good faith. Both codes allow exceptions when the value of the labour greatly axceeds the value of the matherial, and vice-versa.[13]

Most of contemporary legislations follow either french/sabinian[14] or german/proculean model,[15] sometimes with some variations, like Swiss civil code, which, like BGB, favours the owner of material, but when the manufacturer acts in bad faith, the judge has the right to west the ownership in the new product in the owner of the material, if it seems just.[16] Few legislations adopted the solution proposed by Gaius and adopted from the later roman law, either by reception from austrian law like former Serbian civil code of 1844,[17] like Civil code of Brasil[18]

3. THE SOURCE OF THE RULE OF ARTICLE 119 OF THE LAW OF REAL RIGHTS OF THE REPUBLIC OF SRPSKA

The solution of the Law of Real Rights of the Republic of Srpska is unique. It has no parallel in either ancient or medieval legal texts, or in any of grand codifications of the modern age. But it has parallels in all of the legislations of the countries of ex-Yugoslavia. Either if they brought new laws on real rights after breakup of Yugoslavia (like Croatia),[19] or retained old laws from the period of communist rule (like Serbia),[20] their solutions are

[12] § 570 *Si un artisan ou une personne quelconque a employé une matière qui ne lui appartenait pas à former une chose d'une nouvelle espèce, soit que la matière puisse ou non reprendre sa première forme, celui qui en était le propriétaire a le droit de réclamer la chose qui en a été formée en remboursant le prix de la main-d'oeuvre estimée à la date du remboursement.* See § 571 and 572 too.

[13] § 950 *Verarbeitung (1) Wer durch Verarbeitung oder Umbildung eines oder mehrerer Stoffe eine neue bewegliche Sache herstellt, erwirbt das Eigentum an der neuen Sache, sofern nicht der Wert der Verarbeitung oder der Umbildung erheblich geringer ist als der Wert des Stoffes. Als Verarbeitung gilt auch das Schreiben, Zeichnen, Malen, Drucken, Gravieren oder eine ähnliche Bearbeitung der Oberfläche. (2) Mit dem Erwerb des Eigentums an der neuen Sache erlöschen die an dem Stoffe bestehenden Rechte.*

[14] Like the civil codes of Belgium (§§ 570-572), Luxembourg (§§ 570-572) and Louisiana (§§ 525-527).

[15] Like Italian civil code (§940).

[16] § 726.

[17] § 258.

[18] §§ 1269-1271.

[19] §§ 148-149.

[20] § 22.

essentially same, with negligent differences. It is interesting to note that the norm of the Law of real rights of the Federation of Bosnia and Herzegovina that regulates the problem of specification is *verbatim* identical like the one of the Law of Republic of Srpska, and it is systemited under the legal article with very same number – 119.

Historically, the rule of Austrian civil code has been applied in virtually all of the countries of ex-Yugoslavia, either directly in the countries that made part of the Habsburg Empire, or by reception of Austrian rules in domestic law, like was the case with the 1844,[21] with significant exception of the General property code of Montenegro, which contained a rule that clearly favored the owner of the material, regardless of good faith.[22]

But, the socialist Law on Foundations of Property Law suddenly interrupted almost a century and a half of legal tradition. At the first glance the formulation of the article 22 of this law that regulates specification may seem like an elaboration of the article 950 of BGB.[23] But, the rule of article 22 of the yugoslavian law contains an absolutely unique rule. If the cost of material is higher, the thing belongs to the owner of the material. If the cost of work is higher and if manufacturer acted in good faith, than it belongs to the manufacturer. If the values are equal, a co-ownership shall be established. Whatever the motives of the yugoslavian legislator were, it is interesting to note that this solution sounds less "socialist" then german one, which clearly favours laborer. This rule, created in the socialist Yugoslavia, is repeated without changes in the article 119 of the Law of Republic of Srpska.

4. CONCLUSION

But this solution is not only unique in the legal history and in the comparative law. It is also incredibly irrational.

South slavic jurisprudence criticized the norm, but mostly because they found that it doesn't regulate what happens if manufacturer acted in bad faith, and the problem of good faith of the owner of material hasn't been even mentioned. So they believe that it should be regulated in a more detailed manner, as proposed in the new Project of Civil Code of Serbia.[24]

[21] §§ 258, 269-274.

[22] §§ 68-69.

[23] Article 22. *Лице које од свог материјала својим радом изради нову ствар стиче право својине на ту ствар. Право својине на нову ствар припада власнику од чијег је материјала ту ствар, на основу правног посла, израдило друго лице. Ако је неко од туђег материјала својим радом израдио нову ствар, она припада њему ако је савестан и ако је вредност рада већа од вредности материјала, а ако су вредности једнаке – настаје сусвојина.*

[24] J. Tešanović, „Priraštaj – prerada", *Glasnik advokatske komore Vojvodine* 90/2019, 268, 271–272.

But I don't think that it poses a serious problem. This legal vacuum can be easily filled by interpretation of the article. This is what jurisprudence and legal praxis serve for. The lack of precision can be even an advantage, because it allows some degree of flexibility in the application of the norm. So, for now, I would put this aside.

What I find problematic is the *ratio* of the norm itself. The very idea that the parties should be forced to prove, in every single case, what costs more, work or material, is wrong. The possibility of estimation of the worth of contribution of the parties to the creation of a new thing exists in german and french code too, that's true. But this rule, first time probably proposed by François Connan in the XVI century,[25] is only an instrument to mitigate the rigidity of the established rules, and of course the burden of proof is on the party that decides to make a claim that her contribution is significantly worthier. According to the Code of Republic of Srpska, on the contrary, in every single case both the value of the material and of the work must be established. Needless to say, it could make processes longer.

And that's not all. The rule is to some extent arbitrary. On the basis of what criteria shall the judge make the estimation? Is the value in the moment of judgement relevant, or in the moment of the creation of a thing? It shouldn't pose problem according to french and german civil codes, where only a substantial difference in costs matters, but according to literal interpretation of the Law of Republic of Srpska, even a small margin of difference in value can be decisive. And of course, this offers a bigger possibility for the sentences to be abolished by appeal to higher courts – another way to make process longer.

As if this is not enough, there is a possibility of establishing a co-ownership, "the mother of disputes". Which means, probably, another trial.

The only argument in favor of this exotic legal norm is that it is "just". Indeed, yugoslavian lawgivers were known by unfortunate *fiat iustitia pereat mundus* solutions. A good example is the infamous norm of the Law on Marriage and Family Relations of 1978[26] (328) which prescribed that in the case when an accord on division of common property of spouses has not been reached, the division would be made in accord of contribution of spouses. So, many couples, though formally divorced, were forced into years of litigation, until finally the new Family Law of republic of Srpska prescribed that the property shall be divided in two equal parts, unless one of the parties proofs that his or her contribution has been significantly higher.[27]

[25] F. Connanus, *Commentariorum Iuris Civilis libri X*, Basel 1562, 243 ss.

[26] § 328.

[27] § 272-273.

Unfortunately, specification is, as it seems, much rarer in legal praxis than divorce, and the number of desperate parties and judges not big enough to assure that their laments would come to the ears of the legislators.

But sooner of later, this awkward norm shall be abolished. Shall the legislator accept solution in favor of the owner of the material, or in favor of the manufacturer, or the *media sententia* that existed in our law in not very distant past, may seem less important at the moment. All of them present certain, logical criteria as a basis for judgement, that abbreviate the duration of the processes and improve legal security. But it is certain that it in the near future it will be an interesting topic for discussion in our legal science.

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Abbreviations

1. RIDA – Revue Internationale des Droits de l'Antiquité.
2. TR – Tijdschrift voor Rechtsgeschiedenis.
3. ZSS – Zeitschrift der Savigny Stifftung.

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ИЗРАДА СТВАРИ У ЗАКОНУ О СТВАРНИМ ПРАВИМА РЕПУБЛИКЕ СРПСКЕ У СВЕТЛУ РИМСКОГ ПРАВА

Резиме

Предмет рада су правила члана 119 Закона о стварним правима Републике Српске о изради ствари (*specificatio*). Аутор их подвргава онтолошком тумачењу, на основу изворног контекста који су ова правила имала у римском праву, и упоређује их са упоредноправним решењима. Циљ рада је да се понуде могућа решења за различите ситуације које се могу јавити у судској пракси, а које словом Закона нису изричито регулисане, као и могућа решења *de lege ferenda*.

Кључне речи: *Римско право; Стварно право; Упоредно право; Оригинарно стицање својине; Израда ствари.*