

THE RELATIONSHIP BETWEEN CUSTOMARY AND WRITTEN  
LAWS IN THE SERBIAN AND GREEK LEGAL SYSTEMS.

Comparative law studies makes us to conclude that the general theory of sources of law — regardless of differences in overall approach to the phenomenon of customary (unwritten) law — treated legal custom as the oldest and, in fact, primeval form of positive law. Legal custom, or the result of a collective, group authority was thus also considered as a particular kind of positive law as well<sup>1</sup>. It was considered as such as the expression of that collective authority which manifested itself through a continuous behaviour of specific social group, provided the need for existing of a simultaneous consciousness of the members of the group for such behaviour. In addition to that theoretical standpoint related to custom as the source of positive law, there exists also the one according to which the ground and a basis for the compulsory character of such law is the agreement by the people, namely *consensus populi*, which is manifested not through voting procedure in the legislative activity, as is the case with the positive, written law, but tacitly, namely by means of a *tacita conventio*<sup>2</sup>.

However, new dimension and stimulation in studying phenomena of the customary law, which was approached not only as a source of law, was given by the historical school of law (first quarter of the nineteenth century). This school of thought emphasizes that the customary, unwritten law is being formed even outside the recognition by the State power, as well as that it represents an expression of the popular legal consciousness. After that line of thinking, the sociological school of law refers the primacy to free individual act of a strong and prominent individual, which act, due to the process of imitating becomes gradually a normative fact which afterwards produces a legal custom, or usage. Legal norms, according to another school, psychological one (Petražicki) represent the product of more or less naive and instinctive

1. Taranovski F., *Enciklopedija prava*, Beograd 1923, p. 175.

2. This is the conception of Roman jurisprudence which for centuries, all the way until the natural school of law in the seventeenth century, has been repeated by Western European legal theory almost without any changes. See Taranovski, *op. cit.*, p. 177.

strivings, convictions and beliefs which are spread in masses of people (mostly in the form of unwritten legal rules); on the other hand, legal norms are the product of deliberate efforts and strivings of one or more persons (legislation).

While not entering in the criticism of views of various schools of law in relation to the phenomenon of customary law, since this is not our aim within the framework of this report, we shall emphasize the following elements of importance for the subject matter reported here. The norms of customary law have been created and still are, in course of history in some areas and environments, as well as at specific degree of social, economic and cultural development. In the Balkans particularly, these unwritten rules are created and maintained even in the second half of the twentieth century, parallel to the positive written law, to which witness field research during last decade in some countries of that region (Yugoslavia, Rumania), as well as some other studies<sup>3</sup>.

At the same time, the characteristic of customary law is that its norms and rules are preserved directly in people's memory, while at the earliest degrees of development of society they are manifested only in those activities where they are realized. Such activities were usually followed by specific ceremonial actions — whose traces, after all, we are able to witness also in contemporary law, namely in the countries of the Balkan Peninsula, in Greece and Serbia too, which took the form of legal symbols<sup>4</sup>.

Particularly important phenomenon in relation to customary law as a source of law in general, is its putting down in written, in the form of collections of customary law. Thus, as is known from the history of law, the customary norms are contained in all ancient legal monuments, such as *leges barbarorum* — *Lex Salica*, *Lex Frisonum*, *Sachsen-spiegel*, *Schwabenspiegel*, *Ruska pravda*, and also in the statutes of Dalmatian towns, such as the Vinodol Statute, Poljice Statute and, to a degree, the Code of Stefan Dušan.

3. *Običajno pravo i samouprave na Balkanu i u susednim zemljama*, Zbornik radova, 1971, SANU, Balkanološki institut, posebna izdanja, knj. 1, Beograd 1974. Dj. Krstić, *Pravni običaji kod Kuća, analiza relikata, metodologija, prilozi za teoriju običajnog prava*, SANU, Balkanološki institut, posebna izdanja, knj. 7, Beograd 1979, pp. 13-22.

4. See on a concize synthesis on symbols in law: Dj. Krstić, «Symbols in Customary Law», *Balkanica* XII, 1981, pp. 117-130.

Further characteristics of the customary law are its well-known conservatism and particularism, namely factionalism — “other village - other usages”. Essential characteristic of the customary law is, accordingly, that it had its origin in the past outside the activity of State authority. However, with the development and making more modern of the State and legislation, the unwritten law too started to suffer the influence of the written, official law. This phenomenon is called in the theory of law the positivisation of customary law, and one of the ways of that positivisation is the application of unwritten rules by the state agencies, namely courts of justice. On the other hand, this process in further historical development of law assumes yet another form. Namely, legal norms created by judicial practice (case law) assume the character of norms which have been adopted by collective behaviour and by social consciousness, so that in course of time one forgets their origin through the activity of courts, so that they continue to live as norms of customary law of the general character.

The scope of a report does not allow us to enter into the analysis of theoretical views and conceptions on comparative value of legal custom and of written law in terms of the general cultural development in Balkan relations. However, undoubtedly, at this point one should note that historical school only, as mentioned at the beginning, had particularly emphasized extraordinary cultural value and, moreover, the primacy of custom — which of course was an exaggeration. According to some Russian legal writers from nineteenth century, the ideal legal order was the one where a successfully enacted statute took in course of time the form of a norm of customary law<sup>5</sup>. According to the theory of a known Polish theoretician of law Petražicki<sup>6</sup>, who studied, on the ground of data of real historical development of law, the comparative value of legal custom and written law, it was a fact that on lower levels of culture, legal custom helped to collect from generation to generation the valuable heritage of collective experience in the sphere of law. As soon as, however, the level of culture is raised, the customary law, which is in its nature a slow process, frequently bars further development. Because of that, the very forming of legal customs

5. Mihajlovski, J. V., *Očerki filosofii prava*, t. 1, deo 11.

6. Petražicki, L. I., «Stati ob običnoi pravu», *Pravo*, 1889. Contemporary review on the role of that legal scholar is successfully given in article «Aktuelnost misli Leona Petražickog u kontekstu čitavog stvaralačkog opusa njegovog», *Anali Pravnog fakulteta u Beogradu*, 3-4, Beograd 1981, pp. 261-279.

becomes more and more difficult and the unwritten law, by itself and without any external action, gives to the law its former dominant position<sup>7</sup>.

As a general conclusion of the above concize theoretical analysis, it is possible to state that the custom, as a source of law, played a specific role in almost all legal systems of the world, and particularly in the countries of the Balkan Peninsula. This conclusion determines further direction of the question of relationship between customary and written laws in the Serbian and Greek legal systems. Thus Serbian law in the period of codification of its most significant branches of law, such as the civil law, began from the general principle of sovereignty of written law. Unwritten law is recognized only rarely and by means of specific stipulation in the area of private law. According to law, unwritten law may be applied only in case of gaps in legislation which can not be resolved by using analogy. The effect of customary rules is more precizely defined in the Montenegrin General Property Code of the end of nineteenth century, which allows the implementation of such rules in cases where there are no provisions in the law itself. Much stricter is the standpoint of the Austrian Civil Code, which was valid in Croatia and Slavonia, and which rather rarely invokes the application of customs.

Such attitude of the legislator of great European codifications which influenced the law in Serbia and in other Yugoslav countries, was indicative of the attitude towards the relationship between these two types of law. It is conspicuous also in the legal system of Greece, in spite of all particularities in relation to Serbian legal system. The best way of reviewing the above relationship is a short analysis of the most significant legal monument of Greece — the Hellenic Civil Code, enacted in 1946, as far as our subject matter is concerned.

Until the entering into force of the Greek Civil Code, the civil law of Greece was mostly based on Roman - Byzantine law which represented Greek national law. Particular civil codes did exist in the Ionic islands, on Samos and on Crete, so that, as in a way was the case in Yugoslav countries, the new code unified Greek civil law. But this law was developed for centuries, and particularly after gaining inde-

7. Montrose, J., «The Use of Legal Categories in Problems Concerning Compilation of Customs and of Codification», *Rapports généraux au VIe Congrès international de droit comparé*, 1962, p. 172.

pendence. It represents a continuation of Roman - Byzantine law and of legal unwritten customary rules which were preserved in one form or another since the taking over of Constantinople, but also in an indirect way it meant the continuation of the antique and Hellenistic law. The Code, however, which is only natural, contains many new provisions for the relations and situations which were not possible to regulate by using that old legal rules.

We are going to quote here the opinion of professor of civil law of the Athens University and academician George Balis, who said in the introductory note to the Greek Civil Code the following:

"I consider that the question of whether in the Code it is possible to allow to the custom to be a source of law — may be answered in an affirmative manner. This in fact was done with a specific positive provision which is included in the General Part, by means of which the custom shall be qualified as a legal rule. To negate to the unwritten rule such a value would amount not only to ignoring the findings of science according to which the law is a fruit of historical evolution, but also to ignore the social reality of law. In fact, even in those foreign codes which ignore the custom as a source of law, its creation and domination in the regulation of relationships between individuals has been undoubtedly realized in spite of that attitude. It is the duty of doctrine to find out in every single case the degree of permitting such domination"<sup>8</sup>.

Very indicative is also the opinion of academician and professor Pan. Zepos according to whom the unwritten Greek law, which expressed the ever living Greek legal thought, was in wide use together with the written law from the Byzantine collections (Hexabiblos, Nomocanons, Syntagm of Matija Vlastar); sometimes that unwritten law was crystalized in written codifications, so that even to-day it represents a great part of authentic Greek legal history. Professor Zepos adds that after three thousand years there still is a continuity in the Greek legal thought, which is alive in strong codifications, as well as in unwritten customs and even in folklore<sup>9</sup>.

8. *Code civil Hellénique*, 2e ed., Athènes 1981, p. XXXII. The text of title and article 1 of the Greek Civil Code reads as follows: «General Principles, Chapter One — Generally on Legal Rules: Article 1: Legal rules are contained in laws and in the customs».

9. Zepos, P., *Greek Law, three lectures delivered at Cambridge and Oxford in 1946*, Athens 1949, pp. 41 and 44 (in footnotes).