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TRACES OF CUSTOMARY LAW INSTITUTE OF MONTENEGRIN HOMESTEAD

Homestead or home, as a customary law institute and a social category which used to play in the past social order in Montenegro an important role, underwent significant changes due to the developments of contemporary society in the twentieth century. The question of homestead, in terms of legal theory in the history of law has not been solved entirely, particularly in relation to the status of juridical person which pertained in the past to the household (*Kuća*), i.e. home community (*kućna zajednica*) in Montenegro, as well as regarding another institution known as cooperative (*zadruga*), which in many elements is similar to homestead. Thus N. Martinović, an expert in the field of customary Montenegrin law, states, as far as the Old Montenegro Region is concerned, that »the cooperative is somewhat different in that part of the country and it is called homestead or home community, which is still alive even today. Although official law does not recognize the homestead as a juridical person, it still exists as such in fact; it is loyal towards positive legislation, but enjoys full moral support from the old society«.¹

As an illustration of the fact that the house as a particular sociological entity exists even today in Montenegro, at least in mountainous regions, mentioned author points out the following: »If it happens that the daughter to be married (*odiva*), while using existing statutory provisions in the matter, requests, a part of the property of her home, she is exposed to reproach and scorn of her native ho-

¹ Н. Мартиновић, *Брак, сродство, род, задруга и племе*, report on activity on the research project of the Serbian Academy of Sciences and Arts in Belgrade »Social Life of the Old Montenegro«, p. 9, Belgrade, December 1974 (not published).

me«.² Author's own field research in the region of Kući in Montenegro points to the same conclusion. Moreover, the reproach and scorn mentioned above are not limited to the home itself, but go wider and include the wider family, the fraternity and the tribe — which are all traditional social formations in these parts of the Balkans. This is, in fact, a survival of the old customary law rule which competes today even with the positive legal provisions in the field of property and inheritance laws.

P. Stojanović, another expert in Montenegrin law of the past, points at inequal approach of the judicial practice in Montenegro, even in the first half of the twentieth century, as far as the fact of existing of the home community is concerned. According to that author, such attitude of the courts is but a consequence of the »general instability of the family, of mutual permeating of home collectivism and elements of contemporary, individual family unit. The reason of the process of overcoming the homestead being here so long (even up to the sixties of the present century) should be found in poor and undeveloped social conditions, in low production basis, which was objectively limited and thus unable to pave the way towards the higher forms of family organisation.«³ In relation to the above, Stojanović refers to the codification of customary law effected in this particular field through the General Property Code for Montenegro, enacted in 1888, which codification, according to a part of Yugoslav legal literature, conserved the institute of homestead, slowing down in this way development of society.

A well documented contribution to the discussion on the character of Montenegrin homestead is realized by Lj. Ćirić-Bogetić,⁴ while she submits all conceptions of that institute, particularly from the aspect of property law related to that sociological category. The analysis of that author brought her to the conclusion that the »economic evolution of Montenegrin society brought about property relations in the Montenegrin family into concordance with new conditions in the nineteenth century. In the process of disintegration of developed collectivity of the Montenegrin homestead the property relations underwent changes. In spite of strong relics of collectivism, the mobility of family property items, easy possibility of division of property, the freedom of wills, as the significant function of private property, meant not only quantitative changes within the collective ownership of the household, i.e. homestead, but also the qualitative ones. In course of last century they almost approach the re-

² Н. Мартиновић, *ibid.*

³ П. Стојановић, *Привидне противуречности одредаба Општег имовинског законика (прилог његовом проучавању)*. Анали Правног факултета у Београду, 1974, 307.

⁴ Љ. Ђурић-Богетић, *Комунице у Црној Гори у XIX и почетком XX века*, Титоград, 1966, 62.

lations of the individualistic family with the private ownership dominating. However, even with the developed process of individualisation of property rights, common ownership of the members of the home community still remains something particular. It still is not a co-ownership. . . Members of that community are strongly related, so that property relation is here of secondary nature. Towards third persons this community appears as a firm and closed entity. Undoubtedly, it has a plural character, and the property is of a common type, but still of particular kind of joint private ownership. . . It is a form which existed in the old Serbian cooperative (*zadruga*), and in the Montenegrin homestead (*kuća*). . .⁵

Contemporary research of sociological nature too in Montenegro (1974) encompassed some aspects of the topic discussed here. While treating basic characteristics of the economic foundation and social structure of traditional society in the Old Montenegro region, the sociologist N. Vujošević states that the process of depopulation of village strongly influenced the institutions of family, namely fraternity and tribe too. Family and other traditional social units are in the process of rapid transformation, which included the rules of customary behaviour, especially in the sphere of property relations.⁶

Our own field research in the region of Kući in Montenegro too revealed some relevant facts as to the existence of traces of customary law rules regarding the institute of homestead today. Many of the persons knowing old unwritten rules on the house community confirmed that there was very small number of such communities in the Kući region, although there were instances in some remote villages of existing of undivided homesteads with some twenty to twenty five members of the family. The influence of sweeping changes in society, beginning with the economic basis, in the twentieth century is visible even in folk sayings, such as the following one: »a wise master of the household should distribute the property of the house among his sons when they are at the highest degree of agreement, so that they would not start the division when the disagreement begins, mostly due to the low economic level, or as the word goes — due to bitter misfortune.«⁷

However, in some mountainous regions of Montenegro, relatively not long ago, the homestead as an entity was recognized by Yugoslav pre-war legislation (1937). This fact was not sufficiently noticed by authors dealing with the institute of Montenegrin homestead in the twentieth century. This piece of legislation is the Decree with statutory force on the management and representing of the general tribal community, fraternity and village communes in the territory

⁵ Љ. Ђурић-Богемљ, *op cit.*, 56.

⁶ Н. Вујошевић, *Трансформација породице у Старој Црној Гори — неки резултати истраживања*, 5—29, report »Social Life of the Old Montenegro« (footnote 1).

⁷ Informant N. Vujošević, judge of the Constitutional Court of Montenegro.

of jurisdiction of the Great Court in Podgorica (articles 709—714 of the General Property Code). This decree has been enacted on December 14, 1937 on the ground of point 7, paragraph 27 of the Financial Law for the 1937—38 of the pre-war Yugoslavia, and it amounts to a specific codification of customary law from the area of property communities in Montenegro, as well as to the including of some provisions of mentioned Code into the positive legal system of Yugoslavia of that time. The implementation of that Decree just before the Second World War is revealed also through the courts' practice, according to which, in many case, the household, i.e. homestead was recognized the status of juridical person, so that it even appeared at court as a litigant or party.

This explains the answers to the question as to the contemporary existence of the above category in customary and written laws in Montenegro. According to such answers, the homestead is still living in the memory of older generation, while practical behaviour in some respects too reflects the elements of it even today.

The property of the house community includes, first of all, the real property, namely arable and other lands, building and auxiliary premises for farming; movables, usually agricultural equipment and machinery, cattle and the like. Specific kind of the rights whose subject is the house, i.e. homestead, relates to its right to enjoying, i.e. utilisation of property otherwise in tribal ownership, or, as the case may be, in the ownership of the village community. This right concerned the use of pastures in the mountain, or near the village, and it was organized according to the rules of unwritten law, which was in force for centuries. Some forms of that use of mountain resources, especially grazing by sheep and cattle, are still in practice today, as they do not collide with positive statutes on use of socially-owned mountainous and forest lands.

According to previously existing unwritten (customary) law, each house, regardless of the number of its members, had an equal right, or title in using the village, the fraternity, or the tribal real property of the described kind. If all male members of the house die, namely — as it is said in that region of the country — if the house is extinguished, the female member of the house may acquire the above right of use of the mountain, provided she already obtained the property title on the house and arable land belonging to it.⁸ But this case was always treated, according to traditional patriarchal mentality, as an exception to the general rule.

A person from another village, i.e. tribe, may also exceptionally acquire the above right of use — again according to the unwritten rules of behaviour, which were sanctioned by mentioned Decree and articles 61 and 62 of the General Property Code of Montenegro, of 1888.

⁸ This case too is provided for by the 1937 Decree (provision contained in article 3, paragraph 2).

The property of the homestead, or the house, was traditionally a joint, i.e. common property, and traces of that fact are visible almost until today.⁹ Ethnological and historical-legal and other literature is abundant with treatment of that phenomenon, so that relevant notions are rather clear. Within the household community in Montenegro there exists particular type of personal property, known as »osobac« or »osobina« which is quite apart from the above mentioned joint property. Today the number of things in such type of property are more numerous than before, and include, for instance, a motor car, household equipment of industrial origin, which otherwise comes into the dowry. However, in some mountainous regions of that Yugoslav republic the tradition is still strong as to keeping all property together, so that the master of the house decides in all property matters — as the saying goes: »if a member of the house begins to separate his own property, there is no improving in the house«.¹⁰ The master of the house, in spite of that, does not rule in an absolute manner as before, but rather listens to the opinion of other male members of the house, who in our times, may be employed and thus in a way financially less dependent on the house.

A new phenomenon of sociological nature in relation to the institute of house relates to maintaining of external form of the house and not of its substantive, i.e. material side. Namely, whenever there is a need to help the house, its members who live outside it, do come in the village and effect the work needed. They also come on weekends and help in farming, although living in the nearby town, which applies also in case of disasters (fire and the like). The sons sometimes collect money and together reconstruct the old home in the village, always according to the wishes of their father — master of the house.

New times bring naturally many changes also in the character of the institute of Montenegrin house. Master of the house more and more pays attention to the opinion of the male members, so that there exists a kind of collective managing, where also the role of the wife is more accentuated — which was not the case in patriarchal social order. Thus the family becomes modernized which is dictated, first of all, by economic relations prevailing in the socialist society.

Another element of relevance is the speed of the changes, so that many a time the institutions of the unwritten rules and of tradition are present only in the consciousness of people, and not in reality and in practice.

⁹ Mirko Barjaktarović, *Forms of Ownership as Types of Traditional Institutions in Yugoslavia*, Balcanica III, Beograd, 1972, 460.

¹⁰ This was reported by an old man about eighty from the village of Kržanja, in the Kući region, who was the master of a house with more than twenty members, and a person of integrity and great reputation in the whole tribe of Kući.

Still another element is that the house is also a morale category. According to tradition, all members of the house feel as being participants of that narrow social unit; they pay attention and care for its reputation, which is effected through their behaviour. This sense of belonging to a family, to a house, is related to the feeling of belonging to fraternity, to a village and, also, to a tribe. This phenomenon is rather conspicuous even today, and seems to be very vital in all generations. Little children, for instance, still know their ancestors by name; they know the history of the family, or of the fraternity. Oral tradition is still alive and is maintained, although in modest degree, during the summer stay in the mountain, when majority of the family and of wider village community gathers for some three months, which is also a tradition in raising sheep and cattle in the Montenegrin regions.

In the present-day Montenegrin house there still exists a division of jobs, or tasks, within the house between the so-called male and female jobs. This is a well-known characteristic of the patriarchal society in these regions of the Balkans whose traces are visible even today, especially in remote villages and mountainous regions. This is a reflection of unequal position of woman in relation to man, in spite of present-day legislative approach to that side of social status. According to data collected by this author, male jobs are the following: plowing, digging up, mowing, cutting woods, gathering leaves for cattle for winter and the like, while female ones: preparing milk products, stacking hay, collecting hay, sowing etc. This categorisation of jobs differs today according to the property status of specific households, the accent being on widening the list of male jobs. But we also found cases where some male jobs were performed by women, and *vice versa* in some small families men and women worked together almost all kinds of farm jobs, except the ones which are naturally characteristic for women (such as raising children when small, weaving and the like). At some cattle-breeders' mountain settlements we also found cases of males doing typically female jobs, i.e. preparing milk products, milking sheep and the like, but this was justified by illness of the housewife.¹¹

Some sociological research in Montenegro point to significant changes in the field of division of jobs into male and female, the trend of change being in the mixing of jobs. One of the reasons for this is the lack of labour force in the village and disappearance of the traditional framework of the house with its strict division and organisation of everyday work.¹²

Manifestations of traditional close relationship in connections between the homestead, or the house, and the wider collective units,

¹¹ This case is reported in the mountain settlement near Komovi peak, in the region of Kući.

¹² H. Byjomenaš, *op. cit.*, 18—20.

such as fraternity and the tribe, are not any more visible, except in the property sphere, where there still is the institute of pre-emption, whose role is the preservation of homestead within the family, or tribe. On the other hand, members of the narrow family feel themselves also as belonging to wider units. This is manifested also in material terms, namely all people come to help to a neighbour or to a widow in need in harvest time or in building or reconstructing houses or farm buildings. Other than that, the process of disintegration of tribe is evident, but the kinship is still strong, regardless of displacement of the members of family.¹³ This relationship is rather in the intimate, internal sphere and is explained by the traditional way of thinking in the area of societal organisation in Montenegro, which is still present in a transformed appearance.

¹³ Н. Мартиновић, *op. cit.*, 10.

