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SYMBOLS IN CUSTOMARY LAW

Introductory Remarks

The symbols as a category in law have not been adequately treated in Yugoslav literature on the history of law, or otherwise. Moreover, this subject-matter is not of a particular interest in the contemporary legal thinking, although the literature on symbols outside the law is rather abundant.¹ To a degree this is also true of the systematic theoretical approach to the subject of customary law, where the symbolism is particularly present. However, during the last decade customary law has been studied in the Institute of Balkan Studies of the Serbian Academy of Sciences and Arts, and corresponding results have been published.²

This marginal question related to the law and neighbouring fields, however, deserves greater attention of scholars along the lines of history of law and of contemporary Balkan studies, as well as, more particularly, of the customary law.

The area of study of symbols is remarkably large since it includes quite a number of branches and activities, beginning with ethnology, anthropology

¹ E. Cassirer, *Philosophie der symbolischen Formen*, Berlin 1923—1931; E. Cassirer, *Jezik i mit*, Novi Sad 1972; B. Malinovski, *Magija, nauka i religija i druge studije*, Beograd 1971; M. Veber, *Privreda i društvo*, Beograd 1976; S. Trojanović, *Psihofizička izražavanja kod Srba, poglavito bez reči*, Srpski etnografski zbornik, knj. 52, Beograd 1935; I. Ivić, *Čovek kao animal symbolicum*, Beograd 1978; V. Pavićević, *Sociologija religije sa elementima filozofije religije*, Beograd 1980; C. Morris, *Foundations of the Theory of Signs*, Chicago 1938; K. Levi-Stros, *Divlja misao*, Beograd 1975; K. Jung, *The Symbolism of Spirit*; B. Bettelheim, *The Uses of Enchantment*, 1975.

² The Institute organized two symposia (the reports are published) and published monographs and articles on the subject.

psychology, philosophy, religion, and law and up to the theories on human behaviour and usages which are formed, for instance, in trade, in family relations, as well as in some other areas. The symbols in law, or legal symbols, both in their forms as objects and as actions which are intended to transmit to others a message with specific meaning, however, if treated more closely, provide first of all the possibilities of various associations between some basic issues of origin of legal rules, while taking into consideration many related fields of human knowledge. Contemporary studying of symbols in the area of law, i.e. of customary law, in addition to the above, may prove useful in finding out some specificities in the formation of legal consciousness in the region of the Balkans, although at the same time one should emphasize the fact that with symbols of legal character there is much more general elements, common to entire mankind, i.e. the ones connecting different cultures, growing over different geographical spaces.

The second relevant element while speaking of symbols in law, gives insight into deep roots of certain legal rules and aspects of legal behaviour which are expressed without the support of written law and which make the contents of the entire complex of customary law. Studying of symbols may accordingly point at some specific common elements of law, of the morals and, in the historical perspective, of religion — which is also a subject worth of more intensive elaboration.

In addition, studying of legal symbols — and this is the third aspect of relevance for the subject-matter discussed — may provide additional material for the field of legal ethnology, which we consider a *sui generis* history of the unwritten law. In such a way, the answers could be obtained concerning the foundations of some rudimentary legal institutes, which in course of time have developed into solutions which one might find even in contemporary written law.

These considerations on the reasons for studying symbols in law in general, and in Yugoslav customary law in particular, are aimed at renewing the interest in research into this neglected and little known matter which in such a way may become one of the elements in the mosaics of the general cultural and legal history of the peoples of the Balkan Peninsula.

Roots of Symbolism in Law and the Beginnings of Corresponding Research

Deep are the roots of symbols and early the beginnings of their use in society in general, and within the realm of law in particular, and this is witnessed already in early sources. Moreover, the law in a way even began to express its contents through symbolical actions, which took place earlier than any form of state community. Naturally, the term „law” is used here in its widest sense, since quasi-legal and „ante-legal” rules of behaviour of people did exist much prior to creation of state power.

In its external manifestations the law did not always dress its substance into the oral form, i.e. into the words and speech, or later on while develo-

ping through history, into written text. In order for the primitive and not yet sophisticated minds of undeveloped intelligence in the early stages of development of mankind to grasp the meaning of legal rules, the law had a need, just as the case was with religion, for conspicuous pictures, i.e. representations. These representations used artistic and physical signs which addressed themselves to the eyes of people and to their imagination. These things or animals, or other living creatures, assumed the term of „symbols”, i.e. of „legal symbols”. Whereof the origin of at present neglected branch of scholarly interest within the history of law, which developed in the middle of the nineteenth century particularly in France and Germany, and which was known as the „symbolism of law”.³

The subject of legal symbolism as mentioned above, was not formed as a separate branch of study in the history of law of the Yugoslav countries, so that it did not provoke adequate attention even of such scholars interested in customary law, as well as general culture of people, as was Valtazar Bogišić, except for his elaboration of particular legal customs and usages, as a result of his well-known survey published in the last quarter of the nineteenth century.⁴ In the twentieth century, however, particular attention was dedicated to symbols in law by Slovene legal writer Metod Dolenc.⁵ Legal symbols are otherwise mentioned in the studies by M. Kostrenčić,⁶ A. Solovjev,⁷ I. Jelić,⁸ A. Hudovernik,⁹ F. Marolt,¹⁰ Jakob Kelemin,¹¹ M. Barjaktarović and some others.

Historical and Theoretical Foundations of Studying Symbols in the Sphere of Law

An insight into the ancient past of mankind permits the conclusion that religion, fine arts and law — these primeval creations of man which engaged his capacities, were characterized by the great use of symbols and poetic fictions. Thus, according to Jakob Grimm and Creuzer, first legal rules, in order to be memorized more easily, had been sung and put into

³ M. Chassan, *Essai sur la Symbolique du droit, précédé d'une introduction sur la poésie du droit primitif*, Paris 1847; Reyscher, *Symbolik des germanischen Rechts*; J. Grimm, *Poesie im Recht*; J. Grimm, *Deutsche Rechtsalterthümer*, 1828; Creuzer, *Symbolik*.

⁴ Undoubtedly Bogišić did know of all mentioned works and publications, which is visible from the survey of his library in Cavtat, as well as from his marginal notes.

⁵ M. Dolenc, *Simbolična pravna dejanja in izražanja med Slovenci* (posebni odtisk iz Slovenskega pravnika, 5. let. LII, Nr. 9—10, 1938).

⁶ *Bezujetje*, *Mjesecnik* 1913, 550—556.

⁷ *Privatno-pravni ugovori XVI veka iz Poljičke župe*, *Arhiv za pravne i društvene nauke*, 1934, 398—415, as well as the remaining works in the area of history of law of Yugoslav peoples written by this well-known author.]

⁸ I. Jelić, *Krvna osveta i umir krvi u Crnoj Gori i Severnoj Albaniji*, Beograd 1926.

⁹ A. Hudovernik, *Pravni običaji slovenski*, Slovenski pravnik, 1883, 2—7.

¹⁰ F. Marolt, *Tri obredja iz Zilje*.

¹¹ *Staroslovenske pravde*, *Gl. Muz. Dr.* 1935, 47, 48.

unwritten verses. In those times people were able to conceive ideas on morals and religion, as well as to communicate in the sphere of relative abstractions primarily through figural representations and pictures, which affected the sense of sight, as well as through pantomimes.¹² Along these lines one may even speak of common primeval beginning of sculpture, religion and law, although this does not mean neglecting production and other social and material conditions which were in essence instrumental in the formation of legal orders. Priests, namely, in almost all nations of the world were the first artists, creators, and legislators. They were therefore the first to make use of symbols, both in form of material objects and of symbolical actions, and thus to dress into visible forms for unexperienced eyes of barbarians the sensitive body of first intellectual notions. Moral and religious thoughts, instead of being expressed openly, were enveloped in the forms of symbols. In such a way the picture itself much more easily found its way into the soul of man, while permeating the spirit by means of senses. The symbol and the dogma in such a way became identical.¹³

According to basic theoretical conceptions of legal symbolism — as expressed by French scholar M. Chassan — the symbol as such and in itself contains the meaning invoked by the representation (or picture) of an object or an action which are used as symbols. From that aspect symbolical form is not always entirely arbitrary, since it is not absolutely foreign to the idea which it expresses through the picture. However, since this form never entirely represents the pure idea of a particular right, as it frequently contains a series of elements having no connection at all with the idea, and as one and the same representation may often be expressed by means of various ideas — the relationship which unites the symbol with the idea is in many cases rather arbitrary. This very element makes a symbol, and especially the one belonging to the undeveloped category of symbols, in essence an ambiguous one. As far as legal symbol in its narrow sense is concerned (i.e. without the ingredient of morals and religion), however, there was a need for such form of representation of legally relevant rules or notions to be in as direct as possible a relationship with the object it had to represent, so that it could correspond to the level of consciousness and capacities of understanding of people from the early stages of development of mankind. If it were not so, people would not understand the symbol and receive the message, and the purpose of the symbolical language could not have been realized.

It was therefore necessary for the symbols in law, already at the time of their origination, to be simple, clear and specific. This, however, according to Chassan, was characteristic for the undeveloped application of legal symbols. To a degree the application of legal symbols in course of prehistory and history was developed, their original meaning gradually faded away, and while mixing during milenia and centuries with habits and usages, with religious symbols and practices, i.e. rites — assumed new meanings and

¹² Creuzer, *Symbolik*, introduction, chapter I, quoted according to Chassan, 11.

¹³ Creuzer, *op. cit.*

some kind of solemn and consecrated character. In such a way, while becoming related to beliefs and even to superstitions, and merging frequently with mythological tradition, legal symbols assumed a more precise and stronger meaning, which in a specific way affected both laymen and scholars.¹⁴

This simplicity of legal symbols, both regarding their meaning, i.e. contents, and their form, is characteristic particularly for primeval symbols which, on the other hand, could not be said for many a religious symbol, with which the emphasis is on mysteriousness and sublimity.

Legal symbolism — according to Chassan's synthesis which he constructed after studying all relevant theoretical works in the fields of law and ethnology, as well as literary and historical works — is found in judicial practice of the times past, but is also represented in legal customs, in usages, then until the present times in emblems, signs, trade names, brands, trademarks, tokens, labels and the like. Legal symbolism may be also found in legal analogies, in myths, in legal formulas and concise legal formulations, as well as rather frequently in legal fictions, which are characteristic for some branches of contemporary law.¹⁵

In its most developed form, however, legal symbol informs a man on a specific right belonging to him, or it solves some legal difficulty, or dispute at the court. In a simple sense, a legal symbol has to represent in a fictitious way some physical object or, which is more frequent, an abstract idea belonging to everyday life. Thus, for instance, a clod of soil represents a field or an acre; a tile or a key — a building; a hat means man's person; the hair style is the symbol of freedom and power, while the sceptre above which there is an open hand is the symbol of general justice; a sword is, however, a representation of criminal justice. A symbol was accordingly a figural embodiment of an action affecting everyday life.¹⁶

Independently of its connection with religion and law, the symbol has been related to plastic arts too which — while always striving towards the aesthetical and representing it to our senses, as well as attempting at idealizing the real and realizing the ideal — assumed gradually an eloquent and energetic simplicity. Both sculpture and painting do this in allegories and symbols which, however, are much more refined than legal symbols. And in spite of the paradox in saying so, one is able to find here the distant relationship between the fine arts and the law whose traces may be followed even until our days through the relics of various symbols, in spite of their losing the original meaning. In quite an elaborated theory on legal symbols, set forth by M. Chassan, their general character is emphasized, as well as their long rule, particularly in the field of customary, i.e. unwritten law. In religion, in law, in the fine arts, the same physical signs are almost always common for these three areas, although their meanings may be sometimes different.¹⁷ According to that theory, it is possible to distinguish the cate-

¹⁴ J. Grimm, *Poesie im Recht*, parag. 10 — quoted according to Chassan, 13.

¹⁵ M. Chassan, *op. cit.*, 19.

¹⁶ J. Grimm, *Deutsche Rechtsalterthümer*, 109.

¹⁷ Chassan, *op. cit.*, 15.

gory of legal mythology which may be a general one — as expressed for instance in the Nordic Saga, where law is only partially mentioned — and the legal mythology in its proper sense. After this, there follow the categories of trade mark, of legal formula and particularly of legal fictions which were always dear to law. In its „childhood”, namely, the law „played” with emblems which in fact were material fictions, while in its more developed and more „mature” stage, these were replaced by intellectual fictions, which were incorporated into the intimate poetics of law, which was characteristic for its ancient beginnings, as far as external expressions and forms of law, were concerned. Thus the uttered symbol, i.e. the one expressed by words is frequently only a transformation of the onetime real symbol.¹⁸

Legal symbols may further be classified according to their origin, then in terms of their relationship towards the object or the idea represented by them, according to their nature and, finally, according to their form. Specific classification of legal symbols is further elaborated along the following scheme: according to their origin legal symbols are either of a general character (i.e. common for the entire mankind) since they are so general that they belong to all peoples of the world, as they are addressed primarily to the sense of sight and to man's feelings — or of a national character, or specific for individual cultures, i.e. regions. According to the object, there are four kinds of symbols, namely: the ones in relation to the object which is represented (for instance, when a part of something serves to designate a whole — *pars pro toto* — a key symbolizes the entire building, the clause in contemporary construction contracts); then in relation to an action (placing arms over the grave of an assassinated, as a sign for a need of vendetta in the Albanian unwritten law, or placing blood-stained shirt on a conspicuous spot in the house, as well as burying it to mark the same intention;¹⁹ in relation to a person (gloves, hat, portrait — this kind of symbols was rather frequently used by the courts); and finally, in relation to representing with the aid of a solemn form or particularly strict ceremony (for instance, a festive dinner with strict procedure of speaking and sitting, as a sign of peaceful settlement of a dispute otherwise leading to a bloody revenge according to Albanian and Montenegrin customary law; a glass of wine to symbolize a concluded contract, etc.).²⁰

According to their nature, legal symbols are divided into several kinds, namely: silent or pantomimic, and uttered ones or audible; simple and composite ones; pure and mixed legal symbols (the latter ones were particularly in use as judicial symbols). As to their form, the symbols may be natural and artificial. Natural ones encompass parts of the nature, usually soil — which since the earliest times was a sacred element, then water, fire, animals, particularly domestic ones. Also a man, as a symbol of God, as well as his blood and hearth.²¹

¹⁸ Chassan, *op. cit.*, 41.

¹⁹ S. Dučić, *Život i običaji plemena Kuča*, 128.

²⁰ Đ. Krstić, *Pravni običaji kod Kuča*, 157.

²¹ The above classification of legal symbols is stated, with minor changes, according to mentioned work by M. Chassan, 50—65 and *passim*.

*The Survey of Most Frequent Legal Symbols in World
Customary Law*

Already in the ancient Great Collection of Legal Customs of France²² it is found that the sign for acquiring a title of a personal estate is the so-called heredity taking of a piece of turf. Thus, soil, grass, straw (particularly within the sphere of private law and the law of contracts), a branch and a whole three — all had specific legal meanings in the customary law, both in its unwritten and written forms (i.e. collections where oral tradition from the area of law was gathered). A branch, for example, served to ensure the transfer of ownership of real property as far as accessories attached to such property were concerned.

According to the old French customs also a dowry to a girl could consist only of a flower wreath, as a symbol of honesty and purity, or of only one walnut. Women in Normandy wanting to be hired as servants (a kind of labour law!) held in their hands bunches of flower, while waiting in the market-place, and the potential employer would only ask them about the price of the flowers.²³

Fruits as symbols of fertility and abundance are known in many areas of the world, and especially with the Vlachs in marriage ceremony, when hazelnuts are thrown at the newlyweds. The same custom is found in Russia too and the meaning is — „multiply yourselves and be fertile”. In the island of Corsica walnuts, hazelnuts and other fruits are thrown in front of the newlyweds, while in the Balkan Peninsula the same is done with wheat.

The category of significant symbols include also the fire, in its various forms: torch, bundle of twigs in flames and the like. Fire symbolizes occupation, ownership, family and war. Water, on the other hand, is seldom a symbol in the West, but in the East it is found as such, particularly in marriage relations. Thus, water is poured over the hands of the newlyweds. In the customs of Slavic peoples water played an important role as a symbol, particularly in the area of customary criminal law, due to the general belief that water „does not accept anything impure and sinful”. This is the basis of the ancient custom of submerging a culprit into a deep water,²⁴ as a kind of ordeal, and if the criminal rises to the surface — he is not guilty. This is also the explanation of the old saying which evokes to that kind of ordeal in Serbia, Slovenia and in other areas of South East Europe: „give me the luck — and you can bind me in a sack”.²⁵

Furthermore, the cock is a symbol of a house, a home, i.e. family (today too the figure of the cock is often found over the chimney of houses), as well as a sign of the intention to stay and to subsist in the specific place.²⁶

²² *Grand coutumier de France*.

²³ Chassan, *op. cit.*, 85.

²⁴ The motive to be found in literary work by Slovenian author Ivan Tavčar (1851—1923), *Visoška hronika*.

²⁵ M. Dolenc, *op. cit.*, 24.

²⁶ In 1463 Flemings, as allies of Frenchmen, brought by the walls of besieged Calais all their belongings, including their cocks, expressing thus their intention to remain there until the town surrendered. Quoted according to Chassan, *op. cit.*, 103.

Out of other animal symbols, one may mention the bees, as the symbol of new cities, and a white horse — the sign of domination, of suzerainty; a conqueror usually entered the city riding on a white horse, and each first of January Roman consul in a white toga rode on a white horse to the capitol and to the temple of Jupiter.

Parts of human body too had symbolical meaning in the former law. Thus, a hand or an arm were the signs of power and of authority. Whereof, already in Roman law, the institute of *emancipatio, manumissio*; furthermore, a wife falls *in manu mariti*, i.e. under the full authority of the husband. In the Middle Ages the transfer of property was effected in a solemn way by using the symbol of a hand. The hand was, namely, layed down on the movable property in case of sale and it was lifted from it by the seller. The hand is, as is known, also the symbol of alliance, friendship, fraternity and is universally accepted as such, particularly the right hand, or both hands clasped together, which meant peace among the peoples. A hand open towards the sky signifies the oath.²⁷

The foot also is a legal symbol. Putting a foot on the ground means taking possession over it. Whereof the term in Roman law *possessio*, which originated from *pes-sitio, quasi pedum positio*. Sexual organ has been a symbol too. According to Herodotus, Egiptian king Sezostris at his conquests erected columns all over the territories taken; when he took a country without battle, he would carve on such columns female sexual organs to indicate the weakness and submissiveness of peoples conjugated in such a way. In the heroic age, again according to Herodotus, only those belonging to the heroic class have been considered men, while plebeians were treated as females and „weak and feeble-minded creatures”. Accordingly, sex was also a symbol of belonging to the particular social class. Some authors see in that a trace of explanation for maenads and amazons, while others go even further when claiming that the term *mulieres* in the Code of the Twelve Tables did not mean females, but members of the lower class, i.e. slaves who were not even allowed to drink wine, as a sign of possessing the rights of citizen.

The hearth has a character of a symbol even in the criminal law of modern times. Thus according to the nineteenth century French Criminal Procedure Act, the president of the jury when announcing the verdict had to put his hand on his hearth. Blood as a spoken symbol was a sign of the high justice and also of kinship, which is at present in use in the family law of all countries. In taking oath it has figured as a real symbol — when blood of two persons was mixed mutually in order to become blood (adopted) brothers, as well as when it was, even, drank to that purpose (the old custom of Arabs, Scythians, old Scandinavians, Albanians etc.).

There exists quite a number of combined symbols, such as the following: a hand holding a sword, sceptre or a stick of commanding and justice; a ring on the finger, as a symbol of highest authority (the case of Venetian doge, Normandian dukes, bishops in the Catholic Church and the like),

²⁷ Collection of French Customary Law of Town of Reims even treats the term „hand” as equal to term „oath”. Quoted according to Chassan, *op. cit.*, 119, footnote 1.

as well as, naturally, of matrimonial fidelity; a booth on the foot; a toque over the hair; a hat or a crown on the head; belt around the waist; a veil over the face etc.

From among the symbolical objects which are particularly important and in general use at present is the flag, which started as a token of towns and areas, to be distinguished from sword which was a symbol of investiture of kings, dukes, and knights. In contemporary public and private international law, for instance, one should mention the well-known institute of the law of flag of a ship or an aircraft — as a sign of their belonging to a particular state („citizenship” of a ship).

Wheel in the criminal law field was a sign used to stigmatize a criminal who is going to be executed; such a criminal, namely, carried the wheel on his back. In the Middle Ages (not in the Antiquity, since that part of garment did not exist) glove has been a way of expressing the transfer of property and the procedure of investiture, particularly with peoples of German origin. Thus the rules of the ancient collection Saxonian Mirror defended to judges while sitting in the courtroom to wear gloves, since bare hand was a symbol of sincerity and loyalty. The ring was, as already mentioned, a sign of fidelity, even in the religion — the bishop „united” with his Church. At old Romans ring was a symbol in transferring ownership — the one who received it became successor of the one giving it. However, ring-fetters around the neck of a convict were a conspicuous symbol from the area of criminal law. A toque, a cap, helmet and hat in Rome were all the symbols of honour and freedom, and that meaning was carried over into the Middle Ages. Thus, as a sign of his power, the king stayed with his hat on, while all the others were bareheaded. The debtor came to the court bareheaded (today too), while a member of the jury who is taking oath is also without a hat and standing, but the president of the court receiving the oath is sitting with his hat on. At the moment of arresting, the hat of a man was taken off, the same action being used also as far as a veil of a woman was concerned; they lost thus in a symbolical way their honour, as well as the right to protection.

Well known symbols are also the crown and the mitre (ceremonial head-dress of a bishop symbolizing his apostolic authority). Belt was a symbol during marriage ceremony; on the first night of the marriage the husband took off his wife's belt; in defeat and taking prisoners belt is also taken off the enemy (also today); belt is a symbol of transferring property too, of dissolution of a community, of expressing respect in feudal relationships, as well as of investiture of public functionaries. The bed is a symbol in marriage law; it is thus said „children from the first or second bed”; a broken bed meant the divorce.²⁸

The list of symbols in law and of their explanation would be rather long if one should extend one's survey to wider areas of the world and to various periods. However, the above summary listing suffices to underline the significance of symbols in the history of law and, particularly, in custo-

²⁸ Major part of data on symbols and symbolical actions in this section of the article is taken from mentioned systematic work on legal symbols by M. Chassan.

mary law. It provides also some material and a stimulus for eventual further and deeper study of contemporary relics and transformations of symbols even in the written law of the present times, as well as in the legal practice. The same attention should be given to symbolical actions, but due to the scope of an article, it was not possible to treat them here in more detail.

Legal Symbols in Yugoslav Law

Almost until the period between the two world wars Yugoslav peoples made use of various symbolical sentences and sayings, in order to describe in a pregnant and concise manner some legal institutes in their customs and usages with which they met in their everyday life and work.²⁹ In many a branch of law there existed legal symbolism in various degrees. Many of these symbols to be found while studying legal past of Yugoslav and other Balkan peoples, however, were not of an autochthonous character, since they were assimilated and adopted from the customary law of other peoples, which only meant that the symbols in law were of a more universal character. However, their significance and influence in the legal practice of people were not at all less intensive due to that.

While treating the subject of sources of law in his textbook on encyclopaedia of law, F. Taranovski touches upon the category of legal symbols which he relates to customary, i.e. unwritten law: „The norms of customary law are preserved directly in the memory of people and at the initial stages of social development they are manifested only through those actions where they are realized. Actions in which norms of customary law are effected and put into practice are followed by special rites (ceremonies), so that in such a way they are transformed into legal symbols. Such symbols are, for instance, shaking hands and 'cutting through' at the sale of goods; using a clod of soil and saying 'let it be successful' for designating the transfer of property over land, etc. All these and other similar ceremonies represent not only the form of concluding legal transactions, but also a symbolic expression of a norm of customary law which regulates these legal transactions and corresponding legal relations. Together with the development of capacity for abstract thinking, the norm of customary law becomes distinguished from the legal action itself and finds its expression as a judgement which rather frequently appears in the form of sayings, which are suitable to be memorized. Thus, for instance: people are tied for tounge, and oxen for horns; warrantor — payer, my home — my freedom; ring given — wedding concluded etc.”³⁰

In addition to symbols and symbolical actions which were used by Yugoslav peoples, in current use are also legal proverbs which are sometimes sarcastic. These are relics of ancient penalties which were often cruel. However, this phenomenon is also outside the scope of the present article.

²⁹ M. Dolenc, *op. cit.*, 1.

³⁰ T. Taranovski, *Enciklopedija prava*, Beograd 1923, 181.

Symbols and symbolical actions were present, first of all, in the field of public law. Thus, with Slovenians, the well-known inauguration of the king in the Field Gosposvetško. The judges had special judging mace which was different according to different judicial districts (relevant data originate from the sixteenth century). The judge held that mace while pronouncing his verdict. Similar symbols are also noted in the eighteenth century in the area of Slovenian place Žužemberk, where judges elected by the people had maces (corresponding category are the judges elected in the present time as umpires) while adjudicating in disputes over woods and pastures, as well as over real property.

Public activity of Slovenians, according to M. Dolenc (rolls from the surroundings of Škofja Loka) was formerly full of symbolical actions and ways of expression, which was, for instance, visible in the common processions. These processions had in the late sixteenth century also the character of marking and repeated determining of land boundaries (so-called surrounding of land boundaries — *obhod*), and not only of religious ceremony. Corresponding data are found in the area of Kostanjevica, in Dolenjska area in Slovenia (seventeenth century). During such processions joint lunches have been organized. Similar collective meals, by means of which returning from mountain pastures is marked, existed still in the seventies of the twentieth century in Montenegro („*zdig*”). This custom of procession, with torches, is known in German ethnologic literature as *Umreiten*.³¹

In public places and markets in the north-western parts of our country, during market days there existed the practice known as „market or police justice”, and the corresponding symbol was the displaying in the market-place of the sword and a shield. That legal symbol too most probably is not of an autochthonous character, but is assimilated from the German customary law practice, where it is known under the terms *Schilder, Fahnen, Rolandsäulen*.

One symbol is found also in the documents of the Montenegrin Great Court (in the end of nineteenth century), and it relates to symbolical payment by means of a drink in the tribe of Kuči. The corresponding formulation was: „... only those who will labour this land shall be bound to give to their tribe at the end of each year a drink, as a sign that the land was not theirs, but common property”.³²

There are many symbols also in the area of family law in Yugoslav countries. Thus, as is known, growing a beard means the sign of masculinity, and the corresponding proverb is — „God created first of all the beard to himself”. Therefore, plucking or singeing somebody else’s beard was a severe violation of honour. The penalty for such an act was provided for by Dušan’s Code in articles 97 and 98, and corresponding institute was termed „*mehoskubina*”.³³ In Germany a man with a long hair was consi-

³¹ C. Pützfeld, *Deutsche Rechtssymbolik*, 1936, 46 and 90.

³² Order of the Montenegrin Great Court, Nr. 1165 of June 1, 1891, State Archives, Cetinje, fasc. 144/1891.

³³ The penalty was very severe: if a noble was insulted the perpetrator’s hands were to be cut off.

dered a free man („*Lass mich ungeschoren*”). A kind of revival of this old custom in many countries of the world in the middle of our century is long hair of young people.

In the relations between husband and wife there existed the institute of morning gift (*Morgengabe* — in German customary law) which formerly entered the written law too,³⁴ and according to which all what was given or promised to the wife on the first morning after wedding was considered an irrevocable gift. Furthermore, obtaining the keys of the house by the newly married woman meant her authority as a housewife. Moreover, the wife could be present when the husband sold valuable objects from the house.

The symbol of household and of a community is, as is known, the fire-place, so that in the customary law of some Slavic countries the smoke was used as a designation of the number of households — „a village numbers fifty smokes”.

Long ago people have noticed that the welfare and cohesion of the household depended also on the continuity of work of hired house help. They were sometimes compensated by payment in kind. According to unwritten rules, they were not allowed to leave their work posts whenever they wanted to. Therefore in Slovenia it was symbolically said that such person had to stay in the household at least a year, „even if he had to serve as a saw-horse”. The one not behaving like that and leaving „at the Christmas Eve” would be given only „a sleeveless shipskin coat”. On the other hand, and in a way related to the above, was a customary law rule which protected the hired household worker — noted down by M. Dolenc in Gorenjska and Notranjska in Slovenia, and according to which the one who became exhausted on someone else’s possession had a right to just compensation.³⁵ This right inspired famous Slovenian writer I. Cankar to write his novel „Servant Jernej and his Right”.

Compulsory sale of land and of other real property or movables due to insolvency is known as „the sale on the drum” (i.e. auction), which is only a verbal symbol and a relic of the former custom of making public announcements by using a drum. There are also symbolical signs by means of which trespassing is prohibited, i.e. two crossed twigs (similar road sign for marking an open railroad crossing exists today too). In the customary law of Montenegro there exists even today so-called *zabjela*, i.e. peeled off branch pinned in the ground to mark the prohibition to enter a private property. Similar role is played also by the seal across the door of a house or a church, and unauthorized removal is punishable.

In the unwritten law of contract too there exist symbols and symbolical actions which are rather generally known. Thus contracting parties when entering into a contract on sale shake hands and (in the past) even kiss each other for the success of the transaction. This ceremony is known in Slovenia as *zaključek* (conclusion) or *dokonček* and it is widely in use all over the

³⁴ Paragraph 1232 of the Slovenian General State Law of 1853.

³⁵ M. Dolenc, *op. cit.*, 17.

Balkan Peninsula. Also drinking a glass of beverage means, today too, that a transaction was successfully accomplished. Formerly the judges too had a right to such a drink, but this was expressly prohibited later on. According to medieval German law the glass of drink amounted even to an essential element of the contract on sale (*Lit*). Earnest-money is also a symbolical institute which exists in the contemporary law of contract too. According to former customary law in the Balkans there was a possibility for a party desisting the contract to restitute the entire earnest-money amount, which was done as a sign of accepting the desisting (even in the sphere of the law of marriage).

Valtazar Bogišić in his survey on legal customs recorded the following specific understanding of each other in the unwritten law of marriage: „When a young man and a girl are asked whether they would like to be married, they would express themselves through symbols; for instance, the affirmative youth was looking in front of himself and smiling, while the girl also looked in the same manner and shed a few tears; when they disagreed, they would again look ahead and barely uttered through set teeth that they did not agree with the proposal”.³⁶

While writing on the topic of land boundaries in Serbia, M. Barjaktarović particularly elaborated from the ethnological-juridical aspect the issue of some legal symbols. Thus a cross — and not only as a symbol of Christianity — was used to mark off a boundary between fields. The same role is played by a boundary stone (in Montenegro similar term is *kiljan*, although with some additional meaning), which sometimes was followed by „additional witnesses”, in fact by several smaller stones. The same way is found in the well-known collection of Albanian unwritten law — the Code of Leka Dukadini.³⁷

Conclusions

This summary review of various symbols, both objects and actions in customary law and in the law in general, points at the category of phenomena of legal character which are related to many spiritual creations and activities of man. It also shows that between the law and these creations there exists a connection which is not at first visible. Contemporary research of legal symbols in terms of Balkan studies, and particularly if realized in an interdisciplinary way, would undoubtedly provide additional contribution to the clarification of the complex of customary law. In such a way a relatively blank space would be filled out in our historical-legal studies. Symbols, although their origin is difficult to ascertain, are older than customary law. Their study could therefore also contribute to better understanding of unwritten law rules which have been developing throughout the centuries in

³⁶ Written down by archimandrite N. Dučić in 1898 in the survey on customary law. Bogišić's Library, Cavtat.

³⁷ M. Barjaktarović, *O zemljišnim medama u Srba, SAN, Posebna izd., knj. CCIII, Etnograf. inst., knj. 4, Beograd 1952, 57, 58.*

our countries. And through that it would be possible to better understand even the history of our written law. In the final analysis, the benefit of such a study of legal symbols could also be found by the legislator, since in such a way he could acquire further knowledge of our legal tradition, which would help him in the search for best solutions, as far as legislating on a local level is concerned.

СИМБОЛИ У ОБИЧАЈНОМ ПРАВУ

Резиме

О симболима у праву са историјско-правног гледишта није много писано у југословенској литератури. Међутим, ово маргинално питање за право и сродне дисциплине заслужује пажњу савременог истраживача, посебно у релацијама балканологије. Област проучавања симбола захвата велики број грана и активности, почев од етнологије и антропологије до филозофије, религије и трговинских и породичних односа. Симболи, поред тога, пружају могућност повезивања и неких основних питања настанка правних правила са многим сродним гранама човековог знања. Симболи у праву исто тако су повезани са проучавањем обичајног права и у њему се, у ствари, највише и јављају. Поред њихове специфичности за Балканско полуострво, симболи имају и много више општег и заједничког, јер се првенствено обрађају чулима човека.

Проучавање симбола може такође указати и на заједничке елементе права, морала и религије.

Веома су дубоки корени симбола и њихова примена може се пратити још у најстаријим изворима. У својим спољним манифестацијама, право није увек облачило своју садржину у усмену форму — реч или, касније у историјском развоју, у писане речи. Да би се правна правила скватила, било је потребе за уочљивим сликама, дакле, симболима. Средином XIX века настаје и теорија о симболима у праву у Француској и Немачкој и аутор излаже концепције те теорије и класификацију правних симбола и симболичких радњи.

Од југословенских аутора који су обрађивали питање симбола у праву, аутор, између осталих, помиње Доленца, Костренчића, Јелића, Соловјева, Худоверника, Маролта и Барјактаровића.

Посебан део чланка посвећен је историјским и теоријским основима за изучавање правних симбола у свету, а такође и дефиницијама одговарајућих категорија. У приказу значења најчешћих правних симбола, побројана је, пак, садржина симбола и симболичких радњи у праву, односно у обичајном праву, и то најпре у свету, а затим у југословенским земљама.

У закључку је истакнуто да је намера аутора да скрене пажњу истраживача обичајног права и историје права на ово занемарено питање. Савремено дубље изучавање правних симбола у балканолошким релацијама, нарочито ако се врши интердисциплинарно, несумњиво може дати допринос расветљавању комплекса читавог обичајног права. На тај начин попунила би се једна релативна празнина у нашој историјско-правној науци. Проучавањем симбола може се, исто тако, постићи боље разумевање неписаних правила понашања која су вековима стварана на нашем тлу. Преко тога могућно је доћи и до бољег разумевања историје нашег писаног права, а користи од оваквог изучавања може имати и сам законодавац који ће, на тај начин, боље упознати нашу правну традицију, што ће му помоћи приликом тражења решења за доношење локалних прописа.