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SIMILARITIES BETWEEN THE MECELLE AND THE GENERAL PROPRIETARY CODE OF MONTENEGRO

Both of these codes were in use on the territory of Yugoslavia. The Mecelle was, up to 1945, partially in effect as the civil code in Bosnia and Herzegovina for all citizens indiscriminately. Also, the Mecelle was applied even earlier in those parts of Yugoslavia which were attached either to Serbia or to Montenegro after the wars of 1876–1878 and the wars of 1912–1913. The General Proprietary Code was in effect in Montenegro up to 1945, on the territory it occupied after the Balkan wars.[1]

Turkish law rested for a long time on two basic sources: on the *sheriat* (Islamic regulations) and on *kanuns* (regulations issued by sultans). Such a legal system was suitable to its economic and social situation, which was expressed in the military-feudal order. This order had lasted for several centuries, but during the XVIII century it gradually started to collapse under pressures from both within and without. The subjects (raya) began to demand political, economic and religious freedom. Uprisings broke out, foreign power intervened, there were conflicts and wars, so that Turkey was forced to make certain reforms. Consequently, these reforms had to be legalized. Turkey began this work in 1839 bu issuing the *hati-sherif* (hatt-i şerîf), a decree concerning religious and political rights.

This was the beginning of legislative work in reformed Turkey. Consequently a series of laws were passed, among them the Mecelle (Collection), actually a civil code, and its 1851 regulations were gradually published in the period from 1869 to 1876. The Mecelle was written by a commission composed of the best Turkish lawyers of that time, and solutions from the Sheriat law served as material for their work.[2] This was

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[1] According to the decision of AVNOJ of February 3, 1945, all regulations which were in effect in Yugoslavia on April 6, 1941, lost their juridical force. This decision was confirmed by a Bill issued on December 23, 1948.

[2] The commission was composed of delegates of the Ministry of jurisprudence (justice), şeyhüislâm, the State Council and the Supreme Court. The president of the commission was Ahmet Cevedet, Minister of Jurisprudence. The other members of the commission were: Seid Halil Seif-ed-Din, Seid Ahmed Hulusi, Seid Ahmed Hilmi, Mehmed Emin, Ibni-Abidin Zade Ala-ed-Din.

emphasized in the report of the editorial commission given to the Grand Vizier in 1868, in which it is said, among other things, that in composing the Mecelle the commission "relied on the works of the best known lawyers of the Hanefi school who discussed those parts of the law which refer to civil-juridical affairs."[3]

Montenegro got its first code at the end of the XVIII century, under the name of "Code General for Montenegro and the Mountains". It was passed by the assembly of chiefs and seniors under Bishop Petar I at Cetinje, on October 18, 1798. This code was very short, comprising only 33 articles in which the regulations of criminal, civil and administrative law were intertwined with sayings and recommendations of a moral and religious nature.

In the middle of the XIX century Montenegro got its second code, "The Code of Danilo I, Prince and ruler of free Montenegro and the Mountains". The code was drawn up by the chiefs and seniors and proclaimed at Cetinje on April 23, 1855. This code had 95 articles, and contained regulations from various branches of law.

At the end of the XIX century, during the reign of Prince Nikola I, Montenegro got its third code, "The General Proprietary Code", which was proclaimed formally on March 25, 1888 at Cetinje. The General Proprietary Code contained 1031 reulations dealing with civil law, mostly with material and obligatory law.

At the time of the passing of the General Proprietary Code Montenegro was already a completely independent state, politically strengthened and enlarged territorially. At that time it covered about 10.000 square kilometers and had some 250.000 inhabitants. However, its economy was still undeveloped. Extensive livestock breeding and farming were the two principal branches of its economy. Crafts, trade, transportation and credit were not sufficiently developed. Montenegro, therefore, needed a code which would correspond to tis economic and social conditions, and she obtained it in the Proprietary Code. The General Proprietary Code was written by *Valtazar Bogišić,* the greatest and wisest lawyer among the Southern Slavs. Bogišić, who was at that time a professor at the law school of Odesa, started to work on this difficult task at the request of the Montenegrin and Russian governments, and the latter covered the costs of the writting of the code. Bogišić started work on this code in 1873, employing a new and unusual method writing laws. He held that the code should be an expression of national understanding of law as reflected in national legal customs. He expressed this basic thought in the following words: "The basis of the code should be composed of those regulations and institutions which are often found in the life, spirit and tradition of the nation. That which exists should be neither excluded nor changed, ex-

[3] The report was printed in the introduction to the Mecelle.

cept in case of urgent need."[4] In order to achieve this, it was necessary previously to collect Montenegrin legal customs which would then serve as material for completion of the code. Bogišić got down to this work wholeheartedly and collected voluminous materials not only in Montenegro, but in neighbouring areas as well. About this collecting of material Bogišić said the following: "In 1873, at the special desire of the Montenegrin Prince, I was ordered to go to Montenegro for the purpose of composing and codifying Montenegrin laws. On that occasion I made again a new instruction, on the basis of which I collected material not only in Montenegro, but also in Herzegovina and Arbania... i.e. in Podgorica ..."[5]

The existing legal customs thus served Bogišić as the basis and material for the writing of the code. In his work, however, he did not engage in contemplating the origin or the development of any legal custom. It was not important to him whether it was original, or appeared or developed under the foreign influence. What mattered was that a custom was alive in the people, that people observed it and that it corresponded to the people's legal consciousness; in such a case Bogišić would take it as material for preparation of the code.

The Mecelle and the Proprietary code both received great acknowledgement in their time. Both codes were translated into several foreign languages.[6]

There are certain similarities between these two codes. They are reflected: 1) in the systems of these codes, since both of them deal mainly with material and obligatory law; 2) in terminology, since for certain legal notions the Proprietary Code uses Turkish legal expressions; and 3) in solutions which are applied for certain legal institutions.

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[4] V. Bogišić: "A Few Words About the Principles and Method Adopted in the Writing of the Proprietary Code", translated from French by N. Dučić, Beograd, 1888.

[5] A commemorative publication devoted to Dr Valtazar Bogišić, Dubrovnik, 1938, p. 52 ff. Bogišić made the Proprietary Code for a much wider territory than that which Montenegro occupied at the time of writing. He made the code for greater Montenegro, which would comprise a part of the Schödra Pashalik, Herzegovina and Southern Dalmatia. Montenegro attempted to liberate and then attach to its territory these regions, and it helped and encouraged the uprisings in them. This can be felt in Bogišić's work, for he collected material for the code not only in the Montenegro of that time, but also in Herzegovina and in the Schödra Pashalik .

[6] The Mecelle has been translated into French, German, English, Arabic, Serbo-Croat, Bulgarian and Greek. The General Proprietary Code has been translated into French, Russian, German, Italian and Spanish.

1. SIMILARITIES IN SYSTEMATICS

From the technical point of view, i.e. according to its systematics and manner of treatment, the Proprietary Code was classified among the most original codes of that time. This was not easy to achieve and accomplish. To succeed in it, Bogišić had for a long time studied in Paris the old civil codes and even drafts of civil codes. However, in one basic matter he did not observe the systematics customary in the civil codes of that time. Namely, Bogišić, as a rule, never included family and hereditary law as was done in other European codes, but chiefly material and obligatory law. His attitude toward this question he defended with very convincing reasons in his treatise "On the Position of Family and Inheritance in Legal Systematics". He pointed out that the same system was accepted in the draft of the Japanese civil code, and that the Ottoman civil code, i.e. the Mecelle which was already tranlated into French, applied this system to a certain degree as well. It is important to point out here that Bogišić spoke very laudably of the Mecelle and said that "it was a very original and significant code".[7]

However, Bogišić did not carry out the above mentioned thought persistently, but made the necessary exemptions. Thus he introduced into the Proprietary Code regulations about guardianship (art. 640–674 and 960–963) which, accroding to legal systematics, belong to family law and not to proprietary law. The same was done in the Mecelle, in articles 957 – 1002 which discuss questions of business capabilities and tutorship. Likewise, Bogišić included in the Proprietary Code a chapter about kinds of evidence (art. 971–977), although this question belongs to the law of proceedings rather than to civil law. The Mecelle does the same, although in a wider scope, providing regulations concerning evidence, accusations and juridical decisions (art. 1572–1851).

There is yet another similarity between these two codes with regard to their systematics. Namely, both codes, beside particular legal rules, contain also general legal rules, legal maximes. So the Mecelle includes in its introduction general legal rules which will serve, as is said in article 1, as a means for easier "understanding and comprehending of the meaning of particular rules". There are 99 general rules listed there, which should serve as an introduction to the study of regulations and institutions mentioned in the Mecelle. And the Proprietary Code lists at the end 45 legal sayings of which it is said in the afterword that "although they can neither change nor alter the law, they can explain its reason and meaning" (art. 987–1031).

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[7] Dr V. Bogišić. "Concerning the Position of Family and Inheritance in the Legal System", Beograd 1893, p. 27, in the note.

It is said that Bogišić composed these sayings after the model of the Californian Civil Code.[8] However, for that purpose he could as well have used the Mecelle, about which Bogišić himself spoke very laudably, and which was, as we have already said, in use in those parts of Montenegro which were liberated in 1878. This last similarity between the Mecelle and the Proprietary Code was discussed earlier in our juridical writings.[9]

Besides the similarity between these two codes, there is an essential difference in the manner of treatment and shaping of the legal regulations. Bogišić deduced principles from the common law, and these principles he very skillfully and concisely shaped into legal rules. Bogišić was very careful to avoid causistics, the quoting of examples, since it decreases the conciseness and beauty of the legal text. The editors of the Mecelle acted in a different way, quoting examples along with legal rules. They accepted this manner of presentation in order to enable ordinary people to understand the content of the legal rules without difficulty. It was held that law should be understood not only by the learned, but also by ordinary people, for whom correct understanding of abstract rules is difficult without the aid of examples. Because of this the Mecelle remained rather uneven and lengthy, which was not the case with the Proprietary Code.

2. SIMILARITIES IN TERMINOLOGY

The language, a correct mode of expression and a uniform and consistent terminology, represent an important means for the understanding of a law. Bogišić payed great attention to this question. In writing the code, he was very careful about purity of language and he made enormous efforts to find a national legal expression for particular legal institutions and notions. Solovjev wrote that in his archive "we can see how many data he gathered in order to find the expression which best suited popular understanding and which would be understood by the people without the loss of any of its legal correctness."[10] And Bogišić himself said that a language is "the principal means for the understanding of a law" and pointed out that usage of foreign words in legislation should be avoided if there are suitable expressions in the national language. On that occasion he particularly emphasized that Turkish expressions should be avoided.[11] He

[8] Dr Alexander Soloviev, "Of the Life and Work of Valtazar Bogišić", Šabac 1935, p. 8 under 22.

[9] Dr Vidan Blagojević, "A Short Parallel Between the introductory part of the Mecelle and the closing part of Bogišić's Montenegrin Proprietary Code", Archive, Beograd 1938, XXXVI (LIII), No 1 and 2, pp. 81–86.

[10] Dr A. Soloviev, Ibid. p. 10.

[11] Dr V. Bogišić, "Technical Terms in Legislation", translation by N. Dučić, Beograd 1887, p. 16.

stressed this because in his time a considerable number of Turkish words were used in the national language of the great part of Montenegro. But in spite of this, Bogišić adopted certain Turkish legal expressions which had been assimilated into the national language of Montenegro, and for which he could not find a suitable or equivalent national expression. In the Proprietary Code there are indeed several Turkish expressions, or Arabic expressions which entered into the Turkish language and from it into the national language of Montenegro, such as *amanet* (keeping), arts. 390 and 882; *kesim* (leasing of livestock), arts. 322–327; *kirija* (rent), art. 878; *ortakluk* (partnership), art. 885. For this last word the Proprietary Code says: "Partnership or association is what people usually call, using a foreign word, an *ortakluk*, or *ortačina*".

The Turkish legislation of that time also employs and makes use of the mentioned expressions, and this fact, among other things, also speaks in favour of the claim that there are certain similarities in terminology between the Mecelle and the Proprietary Code.

3. SIMILARITIES OF CONTENT

There are also certain similarities between the Mecelle and the Proprietary Code with regard to otheir contents, which are reflected and perceived in certain institutions as well as in the principles on which these institutions are founded. The following institutions can be used to prove it: irrigation of lands, "podlog", leasing of lands, "kesim" and "amanet".

Irrigation of Lands. At the time of Bogišić's work on the Proprietary Code, the spring and river water in Montenegro was used for the needs of people and livestock, as well as for driving of mills, mechanical hammers and for the irrigation of land. Irrigation was perfomed to a much smaller extent than today. At that time it was practised in Bar, Crmnica, in Podgorica around the Ribnica, in Nudol (Grahovo) around the Zaslapnica, and it was being introduced also in Gornji Vasojevići, around the Lim and its tributaries.

It seems that irrigation in Montenegro did not start until Turkish times.[12] There are no data from which it could be cencluded that it was

[12] Irrigation was practised by the peoples of the East since ancient times. There are regulations about it in the Hamurabi's code, which was written about 2000 years B.C. (Dr Čeda Marković,"Hamurabi's Code", Beograd 1924, pp. 53–56). Also, there are rules about irrigation in Egyptian law. In Egypt, from 2160 to 1750 B.C., work on the enlargement of the irrigation network was carried out. (S.F. Kečekjan, "General History of Law and State", translated by B. Nedeljković, Beograd 1944, p. 44) Ancient Arabic common law also discusses the question of the use of water. Irrigation was practised many centuries before Mohammed in the Southern Arabia, as of the remains of a big dam near Marheb show. (Cl. Huart, "Histoire des Arabes", Paris 1912, I, p. 51) Much later the

practised earlier, as is the case, for example, with Macedonia, where irrigation is mentioned in the "hrisovulja" (an official document with a gold seal – Translator's note) to Sveti Đorđe Skopski in the year 1300.[13] It is known that the Turks encouraged the introduction of irrigation in certain parts of our territory. Their aim was to increase the fertility of the soil and hence to increase their incomes as well. Thus, for example, at Gornji Vasojevići, the stimulation for irrigation came from the agas of Plav and Gusinje at the middle of the XIX century.[14] At that time, under the influence of various economic factors, a change in crop rotation took place in that part. Instead of corns, people started to sow maize and to plant potato to a greater extent, because these sorts of plants, when irrigated, give much better yields per ploughing day than corns.[15]

Irrigation of the soil is one of the basic conditions for development of a more intensive agriculture in warm and dry areas where the soils are thin and rocky, as is the case in Montenegro. Irrigation is generally connected with the extensive work on the building of dams, the construction of devices for water pumping and the building of discharge and distribution channels (conduits, ditches). These works are carried out jointly, with the manpower of all those who will use the water, and at their expense. This creates the need to establish rules for participation in these works and expenses, as well as rules about the right to use water, and about the order of irrigation. In the national legal customs of Montenegro there existed such rules, which served Bogišić as material for completion of the code. Bogišić paid special attention to this question. He included in the Proprietary Code a chapter with eleven articles (arts. 122–132) on irrigation of lands.

The Mecelle also discusses this question and pays special attention to it. It is quite understandable when it is considered that the Mecelle was composed according to the Sheriat law which speaks in detail about irrigation and about the use of water in general, because water for the Moslems, in addition to everything else, has also ritual importance. The Sheriat law developed in dry and warm regions lacking water, and therefore it was necessary to determine in detail all relationships which are based on the use of water. The right to water livestock (hakk-i šefe) and the right to irriga-

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custom of irrigation can also be found among the peoples of Southern Europe, the Greeks and the Romans. (Alfred Ossig, "Römisches Wasserrecht", Leipzig 1898). These peoples took over the technique of irrigation from the peoples of the East.

[13] Dr Teodor Taranovski, "The History of Serbian Law in the State of the Nemanjas", Beograd 1935, III, p. 98.

[14] Sreten Vukosavljević, "Seoske uredbe o vodama" ("Village Regulations concerning Water"), Beograd 1947, pp. 78–79; Dr Milisav Lutovac, "Navodnjavanje u Gornjem Polimlju" ("Irrigation in Gornje Polimlje"), a special offprint from the Archive of Agricultural Sciences and Technique, Beograd 1948, p. 8.

[15] Maize and potato as cultivated plants came to Europe from America. The sowing of these plants, without which it is impossible to imagine a modern economy, became customary in our parts during the XVII and XVIII centuries.

tion (hakki-i širb) are discussed in it. The Mecelle settles these two questions in two chapters containing 17 articles (arts. 1262–1269 and 1321–1328).

The Mecelle and the Proprietary Code use the same legal solutions for the right to irrigation.[16] This can be determined by comparing the texts of the two codes. Article 122 of the Proprietary Code, which speaks about the right to use water from a public river, corresponds to article 1265 of the Mecelle; article 123 of the Proprietary Code, which discusses passage through a neighbour's land in connection with irrigation, corresponds to article 1325 of the Mecelle; article 124 of the Proprietary Code, which regulates the order of irrigation, corresponds to article 1269 in connection with article 1326 of the Mecelle; article 127 of the Proprietary Code, which discusses the question of covering the costs for cleaning and repair of waterworks, corresponds to article 1326 of the Mecelle; and article 130 of the Proprietary Code, discussing the right to use spring water, corresponds to article 1267 of the Mecelle.

As can be seen, in the mentioned regulations of the Proprietary Code and of the Mecelle the questions most discussed are those of covering the costs for building and maintenance of devices for irrigation, as well as the question of the right and order of irrigation. This correspondence between the two codes can be explained by the influence of Sheriat law. In the matters of irrigation Montenegrin common law accepted the solutions of Sheriat law, on the basis of which these relations had been discussed in Montenegro for a rather long period of time. In favour of that speaks the fact that irrigation was practised just in those parts which were liberated from Turkish rule as late as the wars of 1858–1878. It was practised in the parish towns, along the river valleys, exactly where the Turskish authority had been stabilized and the population mixed, Moslem and Christian. Another fact speaking in favour of this is that even today in the common water right of Montenegro, there is a considerable number of Turkish expressions.[17]

"Podlog". The Proprietary Code knows of two kinds of pledge of real estate: 1) "podlog", and 2) "zastava" (flag). "Podlog" is the right of the creditor to keep the pledged farm and to "cultivate it and to receive the products and income from it in exchange for the profit" (arts. 864 and 183). However, the parties can determine by agreement that a part of the

[16] The Austrian Civil Code contains two regulations about the use of water: art. 496 regulates the right of water pumping, and art. 497 regulates the right to water-works. The Serbian Civil Code contains theree regulations which settle this question, articles 359–361. Neither of the two codes, however, discusses the right to irrigation.

[17] "Fazla", the gift of water to those who do not have the right to irrigate (Lutovac, op. cit. p.19) – "Ise", verb "Uisetiti" a part of water, and "iledžilak", water which is incorrectly seized (S. Vukosavljević, op. cit. p. 95 and 151).

income and the produce of the soil can be taken for the payoff of the debt. This counting for pay-off of the debt is done only "in the case where such agreement has particularly been made" (art. 864). The "zastava" is the pledgeable right which is acquired "not by delivery , but by correct registering of the debt and the pledge in public, 'zastavne' , books" (art. 865 in connection with art. 193).

In "podlog", the pledged farm passes over to the keeping and enjoyment of the creditor, and in "zastava" the pledged farm remains with the debtor and he enjoys the income. "Podlog" is a much more difficult and unfavourable institution for the debtor than "zastava". In "podlog" the debtor isdeprived of the keeping and enjoyment of the realty, and so he comes into a dependent position in relation to the creditor. The creditor is therefore in a privileged position, he acquires the right to hold and enjoy the pledged farm and to take the yields from this farm as his income without regard to their worth. Exceptionally, if the parties so agree, one part of the income can be counted as profit, and the other part as payoff of the debt. If the debtor does not return his debt within the time-limit, the creditor may request from the court the sale of the pledged farm and thus cover his demands. It this way, the obtaining of credit is connected with very difficult conditions. The debtor as the weaker party is left at the mercy of creditors. "Podlog" is similar to the *antihreza* of Byzantine and Roman law, with only one difference, namely that the creditor, according to Justinian's legislation (VI century AD) was obliged to count the income from the pledged property in the first place as interest, the rate of which was determined by the law, and to count the rest for the payment of debt.[18] A similar solution was in effect in the mediaeval Serbian law. However, according to Dušan's code the debtor was in a more favourable position than according to Byzantine law, because he could at any time request the return of the farm, even if the creditor had sold it.[19] The XIX century European codes disagree on the question of the permissibility of *antihreza.* To ilustrate this, it is enough to mention the two best known XIX century codes, the French Civil Code of 1804 and the Austrian Civil Code of 1811. The French Civil Code permits *antihreza* mainly under the same conditions as Byzantine law (arts. 2085–2091); the Austrian Civil Code, however, explicitly forbids this institution in art. 1372, which says: "A contract by which the debtor is permitted to enjoy the yields of the pledged thing does not have any legal effect."

"Podlog" was used in Montenegrin common law even before the passing of the Proprietary code.As in many other instances, Bogišić mercly shaped popular understanding and folk customs on this subject into

[18] Dr J. Baron, "Pandekten", Leipzig 1890, p. 326; H. Dernburg, "System des römischen Rechts, Berlin 1911, pp. 504–505.

[19] Article 90 of Dušan's code.

the form of a legal regulation . He did not include in the Code any institution unless it had support in popular law and understanding. The question may be asked, where this institution came from and enter Montenegrin common law, and how it appeared just in the described form. The answer can be found in Sheriat law, which permits the debtor to enjoy the income from the pledged property without the obligation of counting it for payoff of the capital. This solution was also included in the Mecelle, in article 750, which prescribes that the debtor can, on the basis of the contract, maintain the right to "collect the fruits of the pledged thing... and that he is not obliged to count them in the payment of debt." In favour of this claim speaks also the circumstance that "podlog" is very closely connected with credit. The credit could be obtained in towns, from merchants, craftsmen and other well-off people. Towns were those places which has several thousand inhabitants, such as Cetinje, Podgorica, Nikšić, Kolašin, Bar and Ulcinj. All the towns of montenegro except Cetinje were under Turkish rule until the liberating wars of 1858–1878. Besides other inhabitants, in those towns a considerable number of Moslems lived. During the Turkish period credit was granted under the conditions and in the manner proscribed by Sheriat law. Thus Sheriat legal regulations entered into Montenegrin common law, and from there into the Proprietary Code.[20]

Giving of Land for Sharecropping. According to the Proprietary Code, this is an agreement according to which the landowner, in the name of a rental fee, receives from the sharecropper a certain part of the produce of the soil (art. 309). This is, in fact, a leasing of land in which the rent is paid with a part of the crop yield, such as one half or one third of the yield. However, the leasing of land can appear in another form, where the rent is paid in money, i.e. where, as is said in the Proprietary Code, the rent is determined by "a flat rate" (art. 279). Both kinds of lease are given a separate chapter in the Proprietary Code. This means that both types of leasing of land existed in Montenegrin common law at the time of the writing of the code.

[20] Sheriat law forbids Moslems to take interest (Koran, II, p. 275). However, this interdict was evaded in life in a roundabout way: 1) by pledging, where the creditor on the basis of the contract retains the right to enjoy the fruits of the pledged good (rehn), 2) by means of selling with the right of redemption (bej'bi'l-vefa), and 3) by means of establishing an association with unequal shares, or the giving of a certain sum for accretion (rebah) to a merchant or craftsman. I. Rušd, "Bidaja" II, p. 209; The Mecelle, art. 1058.
These ways were used by our Moslems, and they are practised even today by Moslems in other countries. France even undertook measures in Algier to restrict the right to enjoying of fruits of the creditor. M. Morand, "Edude de droit musulman," Algiers 1910, 267. In Egypt, the sheriat restriction on the giving of money for interest was, on the other hand, used by European banks. Many Moslems deposited money for keeping but did not take the interest. In that way the European banks created reserve funds. Ch. Gide, "Cours d'economie politique", Paris 1925, II, 281.

The Proprietary Code contains four regulations (arts. 309–312) about the leasing of land to a sharecropper, i.e. about the lease where the rent is paid with a part of the crop yield. In them, the validity of this agreement and the rights and duties of the lesee and the land owner are discussed. The Mecelle, as well, contains a separate chapter with 10 regulations about the leasing of land for sharecropping, in which conditions and consequences of this agreement are discussed (arts. 1431–1440). The regulations in the Mecelle and in the Proprietary Code referring to this subject matter are essentially identical. For that purpose it is sufficient to compare the regulations contained in articles 309–311 of the Proprietary Code with the regulations in articles 1431–1435 of the Mecelle.

It should not be concluded, however, that agreement about the leasing of land was known only to these two codes, or that in them it was regulated for the first time. Agreement about the leasing of lands is a very old institution which exists in both old and new laws. This agreement was known even in those laws which were in effect in the Balkans before the arrival of the Turks. Agreement about sharecropping (napolica), "half share", was known to both Roman and Byzantine law, and it was also known in Serbian mediaeval law under the name of "podoranije"[21]. It is likewise certain that in Montenegro as well land was given to sharecroppers before Turkish times, since this form of lease appears wherever great areas of land are acquired either willingly or by force by wealthy individuals who are not capable of cultivating it themselves.

In spite of this, the regulations in the Proprietary Code about sharecropping have greatest similarity with the regulations of the Mecelle F. This similarity is by no means accidental. Here, too, as in the above mentioned examples, there is a certain connection between these two codes, which has already been the subject of our discussion. To give the necessary explanation of this matter, it should in the first place be determined where in Montenegro, at the time of the issuing of this Code, it was customary too give land to sharecroppers. This phenomenon appears usually in regions in which a monetary economy is not sufficiently developed, and where there are landowners who are not capable of cultivating their land by themselves, with their own working power, thus being forced, by the concurrence of circumstances, to give the land to sharecroppers. It is difficult to suppose that the farmers of Montenegro of that time were in the habit of giving their land to sharecroppers. They did not have too much land which they could not till by themselves, especially when it is taken in consideration that peasants lived mostly in extended family units which had enough manpower to farm even greater areas of land. This type of leasing was practised mostly by town dwellers who owned land in thecoun-

[21] Dr Teodor Taranovski, op. cit. III–VI, p. 116.

try and who could not till it by themselves. As has been already said, there were not many towns in Montenegro at that time. And the majority of the Montenegrin town inhabitants were Moslems who were engaged in trades and commerce or as agas and beys lived on the income from their lands in the country. Most of them owned land in the country, which was kept and tilled by farmers, who were either "čivčije", i.e. held the land in a form of hereditary lease, or sharecroppers on the basis of an agreement about sharecropping. In favour of this it is possible to quote art. 35 of the Proprietary Code, which speaks about building and planting on agas' lands outside towns, as well as the proclamation of the Prince ruler of July 13, 1881, granting amnesty to Moslem emigrants, which says: "As for the future, you will make free arrangements with your settlers, either the old or new ones, about the quantity of tribute which they shall pay to you."[22]

The Moslems from the mentioned places certainly based their rental relationships on Sheriat law, until the attachment of these regions to Montenegro. In these parts Sheriat legal regulations in the course of time passed into common law, which in its turn served Bogišić as material for his chapter on the Proprietary Code dealing with sharecropping. This explains the similarity between the Mecelle and the Proprietary Code on this subject.

Kesim. This is a special kind of leasing of livestock. The Proprietary Code recognizes two kinds of leasing of livestock: 1) "napolica" (sharing of cattle) and 2) "kesim". In the agreement concerning "napolica" the risk of ruin of livestock occuring without the guilt of the shepherd is borne by the owner and not by the shepherd. The increase in number of cattle due to breeding is split in half, and other benefits (wool, milk, cheese and butter) are divided according to agreement or custom (arts. 313–321). On the other hand, in the agreement concerning "kesim" the shepherd who takes livestock on lease is entirely responsible for "every regression of livestock, including accident", and is obliged "to return to the owner the same number of animals that he took from him at the beginning of "kesim" (art. 322). The lesee of livestock under "kesim" has the right to all breeds and all profits and is obliged to give to the owner, according to agreement or custom, "a certain return in butter, cheese or money" (art. 324).

The agreement concerning „kesim" is of special importance for the owner, because he is sure that his capital will not be lost, and if it is lost, the lesee under "kesim" iz obliged to compensate for the damage completely. In this way the owner is protected from possible abuses by the lesee. Namely, shepherds move following the pastures and it is difficult to

[22] "Zbornik zakona i naredaba za Crnu Goru" ("A Collection of Laws and Orders for Montenegro"), 1910, p. 95. For this purpose may serve: the order of the Ministry of Internal Affairs of July 16, 1882, no. 1549 (Collection, p. 106), and the instruction of the State Council of June 28, 1883 (Collection, p. 129).

keep an eye on them; hence the possibility that the shepherd may deceive the owner by telling him that pestilence occured, or that wolves killed or haiduks grabbed so many sheep or heads of cattle. It was very difficult to determine the truth and the real situation in such cases, especialy in turbulent and insecure times. The agreement about "kesim" represented therefore the safest way to gain the upper hand and to prevent possible disputes which were very difficult to resolve.

Also, the agreement about "kesim" is to a certain degree very attractive to shepherds. To them, it is a kind of gamble, because if the times turn good and bountiful they can make a profil in a short time and become rich. For the reasons mentioned "kesim" was in earlier times the most widely practised livestock lease not only in Montenegro, but in other regions of the country as well.[23] Moslems usually resorted to this kind of agreement. By giving livestock out on "kesim" or on "nepogib" they were sure that their capital would not be lost, and that they would have their cattle fed without effort or expense, and that they would derive certain benefits in dairy products and fats which are indispensable for Moslem cuisine. They based this agreement on Sheriat law so that people in various parts of Yugoslavia, and in Montenegro, even today use the Turkish legal expression for this kind of agreement.[24] Thus the principles of Sheriat law concerning this agreement entered into Montenegrin common law, and consequently served Bogišić indirectly as material for the writing of the Proprietary Code. The same principles served directly as material for the editors of the Mecelle, in which the mentioned agreement is classified under the principles concerning association of goods or cooperation. According to the Mecelle, an agreement according to which certain unconsumable property is given to another person with a certain compensation in products is judged according to the principles of association, as in the Austrian Civil Code, and not according to the principles of lease as in the Proprietary Code.[25]

Amanet. This is a special kind of keeping, as is emphasized in article 882 of the Proprietary Code, which determines that "amanet is also keeping . . . it is usually secret and hence requires special trust in the keeper". The keeper of the "amanet" is "responsible for every carelessness" (art. 390). Beside the "amanet" the Proprietary Code speaks at length about keeping in the proper sense in articles 378–387. The Mecelle also recognizes these two kinds of keeping, keeping proper (vedia)," prop-

[23] The Serbian Civil Code also recognizes this kind of leasing of livestock, and likewise calls it "kesim"(art. 693–694).

[24] The people of Herzegovina, Montenegro and Boka denote by "kesim" the giving of land for rent for a certain quantity of crop yield. V. Bogišić, "Collection of the existing legal Customs of the Southern Slavs", Zagreb, 1874, p. 476.

[25] Article 1103 OGZ.

erty which is given to somebody for keeping" (art. 763), and "amanet"– the keeping of somebody else's property on any basis (art. 762). The keeper of the "amanet" is responsible for damage or loss of the entrusted thing, if these happen either because of his carelessness or because of his mistake (art. 768).

As can be seen, both codes recognize these two kinds of keeping. Both of them for keeping of a special kind even use the same legal expression, "amanet", and accept for it basically identical legal principles. The institution of "amanet" as well as the expression itself, Bogišić took over from the common law of Montenegro of that time and put them into the Proprietary Code. This legal expression and institution entered into the language and customs of Montenegro under the influence of Sheriat law, the solutions of which are also accpted in the Mecelle. Also, under the influence of Sheriat law, "amanet" has left a deep mark in the common law of all our regions which were under the Turkish rule for a long period of time.[26] The importance and characteristics of this institution are best reflected in the folk legal saying which can be heard in Bosnia and Herzegovina, to the effect that "the house burns but the amanet remains".

XIX century codes, the appearance of which stirred great interest in the scientific world. The success and merit of Bogišić are much greater than those of the editors of the Mecelle. A group of lawyers worked on the Mecelle relying on Sheriat law, i.e. on material which was already composed and ordered, while Bogišić worked by himself, himself collected the legal customs, classified them and transformed them into legal regulations. On the basis of this disorderly and raw material, he succeeded in creating a magnificent legal monument, which represents an expression of the national language and at the same time an expression of the legal customs of Montenegro of that time. His work can be compared to the work of a sculptor who is capable of cutting the form and expression of a living and thinking man out of the raw and rough rock.

[26] The Serbian Civil Code uses also "amanet" as its expression for keeping (art. 569).

Rezime

SLIČNOSTI IZMEĐU MEDŽELE I OPŠTEG IMOVINSKOG ZAKONIKA ZA CRNU GORU

Autor vrši poređenje između dva zakonika koji su bili na snazi u Jugoslaviji do 1945. godine. Tu on utvrđuje značajne sličnosti i objašnjava ih na osnovu uticaja islamskog prava. Naime, osmanski Građanski zakonik (Medžela) je bio izrađen prema principima islamskog prava, a Opšti imovinski zakonik za Crnu Goru prema crnogorskim običajima na koje je islamsko pravo izvršilo vidljive uticaje za vrijeme turske vladavine.

Summary

SIMILARITIES BETWEEN MEDŽELA AND THE COMMON PROPERTY CODE FOR MONTENEGRO

The author compares the two codes in affect in Yugoslavia till 1945. He finds out important similarities between the two and explains them by the influence of the Islam law. Namely, the Turkish Civil Code (Medžela) was made according to the principles of the Islam law, while the Common Property Law for Montenegro was made according to Montenegro customs which had in turn been influenced by the Islam law during the Turkish rule.