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## **Legal Inheritance in the Domain of Ideal and Real\***

This paper discusses customary and legislative practices and their inter-relationship in the contemporary time. Furthermore, the paper will accentuate the relationship of ideal patterns in the legislative and customary practices, in regards toward the real behavior. By doing so, the paper will reveal the possible consequences streaming from attempts to apply the ideal patterns of the customary domain in the juridical practice.

**Key words:**

institution of inheritance, customary law, civil law, regulations, juridical practice, ideal patterns

Based on ethnological and law literature review, and my own empirical data, I argue that there is a parallel application of legislative and customary regulations within the system of inheritance in the 20<sup>th</sup> century Serbia.<sup>1</sup>

The parallel existence of the customary law and legislation would not cause commotions within professionals *per se*, however, it is only that the legislation is recognized by law normative, i.e., the legislation is legitimate while the other isn't. Besides, these two systems have totally different structures, with many regulations

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<sup>1</sup> See Павковић, Ф. Никола. 1983. *Традицијско право и савремена сеоска породица*, Гласник Етнографског института САНУ XXXII, Београд, 41-46; Исти; 2003. *Porodica i seoska zajednica u Šumadiji*, Zbornik Matice srpske za društvene nauke, 114-115, Novi Sad, 223-254; Гавриловић, Љиљана. 1989. *Обичајноправно регулисање породичних односа*, Гласник Етнографског музеја из Београда, 52-53, Београд, 43-71; Крстић, Ђурица. 1979. *Правни обичаји код Куча, Анализа реликата – методологија – прилози за теорију обичајног права*, Београд. Посебна издања Балканолошког института, 7, 1979; Лукић, Радомир. 1971. *Наше ново право и сељачко друштво*, Глас Српске академије наука и уметности, CCLXXX, Одељење друштвених наука, 15, Београд, 145-159.

being in collision. I find it very important to emphasize, that in spite the collision, there are mutual, intertwining influences between the civil and customary law. That is, these legal systems are not mutually exclusive but under mutual influences, which in effect, represents the main characteristic of their relationship. Also, it is important to note that the customary law is the most represented in the domain of civil, inheritance and family law.<sup>2</sup> These are the spheres of private law, which was left out of the direct influence of the law and legislations, as examples of “public politics”.<sup>3</sup> This is the reason why the customary laws are contained for the most part within the institution of inheritance.<sup>4</sup> I addition, it is worth to note that the parallelism of the civil and customary law exists at the class of juridical practice but not in the theory of law.<sup>5</sup>

The research, which I will partially present in this paper, is in accordance with the subject and the cited theories.<sup>6</sup> Thus, I was able to analyze both legislative systems, in order to point out to foundations and their inter-relationship at the moment.<sup>7</sup> The inter-relationship between customary and law legislations is also analyzed at the level of juridical practice.<sup>8</sup> The interesting question concerns a relation between juridical and customary regulations and, on the other hand, the actual practice. This question implies, among other things, a need to understand differences be-

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<sup>2</sup> See: Крстић, Ђурица. 1972. *Савремено изучавање обичајног права – принципи и методи*, Архив за правне и друштвене науке, Проблеми републичке уставности, бр. 2, књ. XLV новог кола, Београд, 205.

<sup>3</sup> Milenković, Miloš. 2008. *Problemi konstitucionalizacije multikulturalizma – pogled iz antropologije*, *Deo prvi: o „očuvanju“ identiteta*, Етноантрополошки проблеми, Часопис Одељења за етнологију и антропологију Филозофског факултета у Београду, год. 3, св. 2 (н.с.), Београд, 46-47.

<sup>4</sup> See Гавриловић, Љиљана. 1989: 43–71

<sup>5</sup> See Гавриловић, Љиљана. 1987. *Судска пракса као начин превазилажења колизије између обичајног и позитивног права*, Етнолошке свеске, VIII, Београд – Крушевац, 141-145; Иста, 1989: 43-71.

<sup>6</sup> I have performed a fieldwork in Vranje and its surroundings in 1996-2000; the focus was the practices of the second half of the 20<sup>th</sup> century. The fieldwork assumed an application of qualitative ethnological and anthropological fieldwork – foremost interviews and participant observation. I have analyzed court archive sources (inheritance and will) and law sources, especially so *Закон о наслеђивању – са објашњењима и напоменама*, издање „Архива за правне и друштвене науке“, Београд 1955 (the first federal law in the former FNRJ); and current Inheritance Law from 1995. године (see: Тодоровић, Владимир. и Кулић, Роса. 1996. *Наследно право и ванпарнични поступак у пракси, Закон о наслеђивању са објашњењима, Закон о ванпарничном поступку са објашњењима*, „Службени Гласник“ са п.о. Београд, 1996).

<sup>7</sup> This paper deals with inheritance rights on movable and immovable properties since this is the domain of a will. Besides, the civil right and normative contain regulations on properties inheritance. This is where a difference between law and ethnological conception becomes obvious (see Pavković, F. Nikola. 1982. *Etnološka koncepcija nasleđivanja*, Етнолошке свеске, IV, Београд, 25-39).

<sup>8</sup> The term juridical practice is used to denominate a segment of law which applies legislation in order to regulate certain law or status.

tween an ideal and real mode of behavior, that is, differences in what individuals think and what they actually do.

The research was also directed toward revealing possible factors which determined an application of certain rules in inheritance, both in customary and legislative regulations. This applies foremost to type of kinship among testator and legal inheritor of something - a heir, gender of a heir, content of what is being inherited, but also the influence of law, seen in the context of “public politics”<sup>9</sup> influence.

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Inheritance Laws (in further text: IL) being in application in the second half of the 20<sup>th</sup> century Serbia regulate inheritance based on law and bequest. There are two types of basic inheritance:

1. legal, that is inheritance without a will,
2. inheritance based on a will.<sup>10</sup>

It is important to note that an individual can inherit a part of legacy/assets through will and a part through legal inheritance.<sup>11</sup> That is, IL does not exclude the possibility of parallel application of both inheritance types. However, based on the literature review and my own data, I argue that there are no differences between these two types of inheritance in regards of application of customary law, that is, the ideal patterns. Some structural differences between normative and customary law are more evident in legal type of inheritance, hence they could be better explained. That is why the focus of the paper is placed on a relationship between civil and customary law in regards legal inheritance. Blood or civil relatedness between a defunct and heir is a pre-condition in application of legal inheritance.<sup>12</sup> Legal heirs are differentiated by the class of relatedness with the defunct: closely related kin will out-pass the more distant kin and so on.<sup>13</sup> According to IL, the first class of heirs includes children and spouse of the defunct. Children (born in marriage or out of wedlock) and a respective spouse inherit equal parts.<sup>14</sup> If the defunct had no offspring - the first class is being omitted – that is, the respective spouse becomes included into the second class. The second class of heirs includes the defunct parents

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<sup>9</sup> Milenković, M. 2008: 46-47.

<sup>10</sup> See article 2 ЗН/95. in: Тодоровић, В. and Кулић, Р. 1997: 29-30; this paper discusses ruling of IL in application from 1995; regulations do not differ from the preceding IL valid through 1946-1995.

<sup>11</sup> Article 2 ЗН/95.in: Тодоровић, В. and Кулић, Р. 1997: 30.

<sup>12</sup> Legal heirs are considered to be in blood relatedness with the deceased, then heirs in civil relatedness, that is, related by adoption or spouses (Тодоровић, В. and Кулић, Р. 1997: 45)

<sup>13</sup> Недељковић, Борислав. 1940. *Првенство мушких сродника над женским у српском наследном праву, Агнатски карактер српске породице*, Правна мисао, Часопис за право и социологију, септембар-октобар 1940, Београд, 432).

<sup>14</sup> Art. 9 ЗН/95. (у: Тодоровић, В. and Кулић, Р. 1997: 48).

and their offspring (brothers and sisters of the defunct).<sup>15</sup> The third class includes grandparents and their offspring,<sup>16</sup> while the fourth class includes grand-grandparents.<sup>17</sup> IL from 1995 allowed a possibility of inheritance by the defunct grand-grand-grandparents and more distant relatives.<sup>18</sup> If the defunct has no legal heirs, the state inherits.<sup>19</sup>

Based on the above cited, it is safe to conclude that the type and closeness of relatedness are the basis dividing relatives into legal inheritance class. This has provoked a considerable attention in foreign and local legislatures.<sup>20</sup> There are two different standpoints, one arguing for limitless right to inherit regardless of the closeness of the relatedness, and the other arguing for limited right to inherit, conditioning so relatedness. This limited circle of relatives with the right to inherit is a characteristic of the most contemporary law systems.<sup>21</sup> Since the 1990's in Serbia, there is a tendency to widen the limited circle of legal heirs but only in cases of direct heirs that is ancestors.<sup>22</sup>

In legal inheritance there is also a right to represent (*ius representationis*), applied mostly when a carrier of one inheritance class dies before the defunct.<sup>23</sup> It is important to note that an individual who uses the right to represent inherits the defunct but not his/hers defunct ancestor whose place in inheritance he/she occupies. Hence, in the same class of inheritance, there could be an uncle, niece, an aunt and nephew, that is, relatives from the first and second inheritance class. This representation right appears also in the second and third class of inheritance.<sup>24</sup>

Inheritance can include movable and stationary items as well as certain rights and obligations.<sup>25</sup> Inheritance parley is a court procedure which regulates inheritance, rights and heirs, with flexible time schedule between the beginning and end. Time intervals depend on heirs, their free will and aims, according to the judges from Vranje municipality court. It is possible to complete the procedure in only one day if there is consent between the heirs about the inheritance division,

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<sup>15</sup> Art. 12 ЗН/95. (у: Тодоровић, В. and Кулић, Р. 1997: 54).

<sup>16</sup> Art 16 ЗН/95. this corresponds to 17 ЗН/74. (у: Тодоровић, В. and Кулић, Р. 1997: 58).

<sup>17</sup> Art. 19 ЗН/95. this introduced again the IV class of inheritance as provided by 20 и 21 ЗН/55. (in: Тодоровић, В. and Кулић, Р. 1997: 61).

<sup>18</sup> Art.20 ЗН/95. this possibility was provided by 22 ЗН/55. (in: Тодоровић, В. And Кулић, Р. 1997: 62).

<sup>19</sup> Art. 21 ЗН/95. (in: Тодоровић, В. and Кулић, Р. 1997: 62-63).

<sup>20</sup> See Благојевић, Борислав. 1988, *Наследно право у Југославији*, Права република и покрајина, „Савремена администрација“, 83-85.

<sup>21</sup> Ibid. 1988: 83.

<sup>22</sup> I conclude this based on comparison of IL from 1946 and 1995.

<sup>23</sup> Art. 10 ЗН/95. this special regulation of representation are being applied in cases of exclusion of exigent heirs (art. 63 ЗН/95.), in undeserving inheritance (art. 6 ЗН/95.) and in cases of waiver of inheritance (art. 213 ЗН/95.); in: Тодоровић, В. and Кулић, Р. 1997: 52-53.

<sup>24</sup> Art. 10 ЗН/95. in: Тодоровић, В. and Кулић, Р. 1997: 52-53.

<sup>25</sup> See 1 ЗН/95. in: Тодоровић, В. and Кулић, Р. 1997: 24.

which is suggested by the judge and according to law. The judge has to respect the defunct will. That is, the judge has an obligation to divide the inheritance as suggested by the respective heirs but in accordance with the legislations. This means that the judge is responsible for modulation of normative with the wishes of the heirs, which is not so difficult to achieve, at least according to the empirical sources. However, without the consent, the procedure could last forever, until a solution is found to please everybody concerned. Most of the time, the judges see that customary law stands in a way of reaching the consensus, since normative does not correspond to the customary laws. However, I take a different view since I do not consider that normative is a cause of conflict between heirs, that is, relatives in inheritance procedures. If this was the case, then conflicts would not arise in the application of only one law system, and based on my data, there are plenty.<sup>26</sup> In the next part of the paper, I will point out to the main principles of the customary law, and I suggest possible conclusions about the parallel usage of the two structurally different legal systems.

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The basic norms of the customary law determining heirs and their share of inheritance are: type of kinship and lineage between the defunct and heirs, as well as gender of heirs. In the customary law, similar as in the legal inheritance, a right to inherit is chiefly given to blood relatives. Closer related kin are given advantage over more distant ones. However, in contrast with the legal inheritance, the customary law provides a difference between blood relatives based on gender and lineage. Hence, the defunct sons have advantage, that is, male offspring. If there are no male heirs, respective daughters gain a right to inherit, and in cases without offspring, inheritance is divided among a respective spouse and brothers, that is, their male descendants. This is the case of horizontal class of inheritance. It is applied when there is a shortage of male heirs on one side.<sup>27</sup> It is clear that the customary law even in the application of horizontal class of inheritance gives advantage mostly to male relatives, that is, to the defunct brothers and their sons.<sup>28</sup> It follows that the customary law respects patrilineal type of inheritance. However, in spite that it is primary, it does not follow that it is always the only one. This type of inheritance is not possible to apply in all cases, such as in when there are no sons but only daughters. Besides, the customary law of inheritance sometimes applies some principles of matrilineal and matrilineal inheritances. Matrilineal is used in inheritance of assets which belong to a woman, that is, a respective mother. In the customary law of

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<sup>26</sup> See Ђорђевић Црнобрња, Јадранка. 2009. *Наследно-својински односи у Врањском крају у другој половини двадесетог века*, докторска дисертација, Библиотека Одељења за етнологију и антропологију Филозофског факултета у Београду, 1-250.

<sup>27</sup> Pavković, F. N. 1982: 33.

<sup>28</sup> The application of horizontal class of inheritance, as well as vertical, in the customary law is in correlation with the basic principle of the customary regulative – the deceased immovable assets is being inherited by male heirs, so it can be explained as an aim to keep a family assets within agnatic family.

inheritance, assets by women, that is, mothers are being inherited by daughters, and if a woman hasn't had any daughters, then it is inherited by respective sons. This is the case of matrilineal type of inheritance.

The customary law also takes into account when defining an heir and respective parts of inheritance, a place of residence. The principle of patrilocal residence comes into play; this principle is almost equally important as the principle of patrilineal type of inheritance. This means that a right to inherit a father's assets is given to his son or sons who resided with their respective natal family.<sup>29</sup> It follows that a son, or sons, was obligated to care for aging parents and their funeral; in return, a son acquires a right to inherit the whole assets- movable and immovable- of the defunct.<sup>30</sup> In the case of patrilocal residence of the married couple, there is a mix of the two customary law principles – patrilocality and care of one's aging parents. However, the application of the principles is not always possible, hence, there are some modifications in usage. For example, modifications are necessary when there are no male heir/offspring or when either of the respective sons do not reside with the natal family any more. In this case, as the data show, family assets are inherited by the son who cared for the parents. When there are only female heirs/offspring, matrilineal residence comes into play, and accordingly, it is the respective daughter who cares for parents and their funeral. In return, she is to inherit everything which was in the ownership of her father. However, this example of inheritance is different than classical inheritance – when a son inherits his father- not only due that a daughter inherits her father but also, and in spite of matrilocality, due to the application of patrilateral type of inheritance.

It follows that the application of certain customary law in inheritance depends greatly upon the gender of heirs. In spite that patrilocality and patrilineal types are mutually connected principles, a connection is not unbreakable, and that is, changes within one principle do not initiate automatically changes within the other. The gathered data show that possible changes in residence of a couple do not initiate changes in application of the patrilineal inheritance. This means that in inheritance – even in cases when a couple does not reside patrilocally – there is an application of patrilineal transmission of inheritable goods. A lack of male heirs/offspring results in omitting of the patrilinear transmission, that is, the patrilateral transmission takes place - the assets are inherited by daughter. Another ex-

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<sup>29</sup> See Pavković, F. Nikola. 2003. *Porodica i seoska zajednica u Šumadiji*, Zbornik Matice srpske za društvene nauke, br. 114-115, Novi Sad, 223-254.

<sup>30</sup> Based on the literature review and fieldwork data, it appears that the assets are almost always in the ownership of a father, as a consequence of the cited principles which determine marital and kin relationships in strong patriarchal ideology, as in the case of Serbia (see Gorunović, Gordana. 2006. *Marksistički model dinarske zadruga u srpskoj etnologiji*, Antropologija, Časopis Centra za etnološka i antropološka istraživanja Filozofskog fakulteta u Beogradu, broj 2, Beograd, 110-142; Ивановић, Зорица. 2008. *Антрополошка истраживања сродства – парадигме и перспективе*, докторска дисертација, Библиотека Одељења за етнологију и антропологију Филозофског факултета у Београду).

ample is when a woman adds her spouse's last name to her family name.<sup>31</sup> However, if such a woman has a brother, she does not inherit immovable family assets. Both of the mentioned principles co-exist, and both influence independently the customary law of inheritance of material goods and last names.

It follows that there are differences in the contents of inheritance among civil and customary law. That is, customary law provides possibility of inheritance of material assets, both movable and immovable, but also of social and spiritual goods.<sup>32</sup> Last name, which is treated in customary law as a basic social good, is an example of such distinction. It is important to note that last name is not inherited according to regulations of IL but in accordance with The Family Law.<sup>33</sup> However, as we will see, the problem is not in the differential determination of the inheritance content but in means according to which it is divided among heirs. It turns out that a type and lineage of relatedness between the defunct and heirs, as well, as gender of heirs, are the basic criteria which determine heirs and their respected share. In addition, rules and alignment procedure which determine shares in inheritance are different in customary law from those in normative.<sup>34</sup> To summarize, customary law considers all male descendants of the defunct as equal in inheritance of father's assets. However, as we were able to see, it often happens that brothers are not equal in inheriting family assets.<sup>35</sup> That is, in determination of heirs and share parts, several things influence inheritance: did any of the possible heirs lived in the same domicile with the defunct, care for parents or pursued an education.

Besides, in customary law, inheritance of goods is in correlation with the nature of inheritable goods. There is a connection in between assets and gender of heirs. Hence, immovable assets are inherited by male and movable assets by female relatives of the defunct. This of course does not imply that males do not inherit movable assets, that is, only immovable assets. The practice shows that a choice of heir is depended on an economic value of immovable and movable goods. Some immovable goods of a higher value, such as: a car, tractor, agricultural vehicles etc,

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<sup>31</sup> A possibility of choosing last name in marriage is present in civil but not in customary law. Keeping a family name by daughters is an example of intervention of legal toward customary law practice.

<sup>32</sup> This is ethnological conception of inheritance which differs from legal one in contents of the inheritable assets. See Pavković, F. N. 1982: 25-39.

<sup>33</sup> The current family Law is published in „Službeni Glasnik RS“, br. 18/2005. Its regulations are available at: <http://www.lawyer.co.yu/baza/gradjansko%20pravo.htm>

<sup>34</sup> Heirs belonging to the same class of inheritance should share the same amount of inheritance, according to the laws. This means that heirs from the same class are given the equal share of inheritance. Inheritance is divided equally among heirs. See more in Благојевић, Б. 1988: 186.

<sup>35</sup> The same is valid for the deceased daughters. In cases of only female descendants, an advantage in inheritance is given to a daughter who has lived with the deceased in the same domicile or who took care of parents.

based on an unwritten rule, are being inherited by son. Daughters, in contrast to sons, inherit furniture, savings etc.<sup>36</sup>

The cited above points out to some irregularities in inheritance, implying not only gender inequality but also inequality within one gender. The second issue was not discussed especially within the local legal and ethnological/anthropological literature. Hence, the gender inequality is considered as one of the main problems appearing due to the parallel application of civil and customary law. The parallelism of juridical and customary regulations brings into light all the differences between regulations and actual practice.

This practice which I observed during my fieldwork shows that in inheritance there is a wide usage of customary law regulations, that is, it is often the case that actions are taken in accordance with the general customary law regulation, summarized in this way: females who have brothers do not inherit their father's assets, or his immovable goods. These females are in obligation to be present at probate proceedings but also to waiver their own share or to renounce it to the male heirs. This renounce is a possibility given to each and every heir during the process.<sup>37</sup> In practice, this right is mostly used by female heirs. This however does not imply that women with brothers never act in accordance with legal normative, but those cases are very rare, and frequently, as shown in practice, are the consequences of conflict between a brother and sister, originated before probate proceedings. A possible conclusion is that these conflicts could solve the problem of the inequality, but they are definitely not the adequate solution to the problem. So, the practice shows that these conflicts do not lead toward more application of legal regulative in inheritance nor to more equality between genders or within one gender, but quite the opposite – they provoke other problems.

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Based on the structural characteristics of the analyzed law systems, between legal normative and customary law, there are many similarities especially so in regards to conditions to be fulfilled so that a subject could gain a right to inherit. In addition, there are other similarities and they testify on the mutual influences and intertwining of the two systems. This time, however, I would like to point out to the differences among these systems, considering that they could provide a better understanding of direction to be taken, if we want to explain why a practice is not a reflection of normative but imaginary order.

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<sup>36</sup> There is a considerable influence of economic value of assets on inheritance relationship and organization of family relations in whole. The influence of this factor is discussed in correlation with the rest of the factors and in context with societal changes and attitudes in the given social time and space.

<sup>37</sup> Goods cannot be inherited against the will of heirs. A heir has the right to waiver, and provides a negative heir statement (See Тодоровић, В. and Кулић, Р. 1997: 296-297; *Enciklopedija imovinskog prava i prava udruženog rada I-III*, Tom drugi, 1978: 360-364).



The most easily perceived difference is in the inequality of gender in inheritance. That is, civil law and normative declare equality to all heirs from the same class. This is supported by the basic principle declared by the all Constitutions in application since 1946 and further.<sup>38</sup> However, in very frequently, a practice does not correspond to normative. That is the reason why we can denominate law and normative as one level, and juridical practice as another level. This division could be seen as a consequence of disparity between law theory and practice, but also as a consequence of widely used customary law in inheritance practice.

The inequality of sexes, as well as inequality within one gender, is correlated with the disparity existing among law theory and practice; however, the parallel usage of civil and customary law in inheritance cannot be explained solely by unadjusted features of law theory and practice, which in addition is not a feature of the inheritance right solely.<sup>39</sup> That is why I have tried to understand the unadjusted features between normative and practice in inheritance in relation of ideal-real. It turned out that many individuals in inheritance procedures aim at achieving ideal patterns of behavior which exist in their respective minds.<sup>40</sup> It follows that customary law is not being used in inheritance because its rules are adjusted with societal reality, as considered by Romantic oriented researchers of customary law, but because the application of the rules allows reproduction of ideal patterns of behavior. Furthermore, the essence of the problem is not only in efforts to organize marital, family and inheritance relations in accordance with the imaginary model existing in individual minds, but it is in the assumption that these models are formed according to the values declared by patriarchal ideology.<sup>41</sup> If we try to look upon the rules of marital and kin systems, which are the foundation of customary law rules, as one of the most important societal context that reproduces ideology of gender, specific for the given society,<sup>42</sup> then the efforts to act in inheritance procedures within the framework of ideal patterns could be treated as a problem. Finally, it follows that the usage of customary law in judicial practice contributes to pertification of the existing relations and practice – which certainly cannot be considered as a positive in-

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<sup>38</sup> In article 15 in Constitution of the Republic of Serbia, in application from 2006, says that the state grants equality to both men and women and develops a politic of equal possibilities. ([http://www.parlament.sr.gov.yu/content/cir/akta/akta\\_detalji.asp?Id=382&t=Z#](http://www.parlament.sr.gov.yu/content/cir/akta/akta_detalji.asp?Id=382&t=Z#)).

<sup>39</sup> On this subject see more in Beljanski, Slobodan. 1999. *Pravo i iluzija*, Biblioteka XX vek.

<sup>40</sup> On ideal and real patterns of behavior in Serbian patriarchal society see Гавриловић, Љиљана. 2005. *Појединач и породица*, Гласник Етнографског института САНУ LIII, Београд, 197-212.

<sup>41</sup> This patriarchal ideology is characterized, among other things, by constant efforts to reinterpret basic facts of life experience, in ways which will overcome them and establish an authority of man in various domains of life and experience (Ивановић, Зорица. 2002. *На кога личе деца: сродство код Срба и принципи перцепције сличности међу сродницима*, Обичаји животног циклуса у градској средини, Посебна издања Етнографског института САНУ, књ. 48, Београд, 388).

<sup>42</sup> Gorunović, G. 2006: 129.

fluence of law and normative, as examples of “public politics”<sup>43</sup> on socio-cultural changes.

If we take the above said as the main problem aimed to be solved, then I can argue that the only direction, assumingly leading to changes in the present inheritance practice, goes from an individual toward the community. Of a special importance then, is a legitimacy achieved at the level of an individual,<sup>44</sup> that is, a connection of individual with law and customary law. This implies that possible changes in inheritance are being determined by a degree of awareness of an individual, and their attitude to face possible consequences when acting against ideal patterns imposed by the community. Thus, it is illusory to hope that civil law and regulations will be realized in reality unless there is a change in perception of inheritance rights and status by the subject. Additionally, it is not arguable that law and the rest of “public politics”<sup>45</sup> could contribute to faster changes at individual level as well as at the community level.

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## **Законско наслеђивање на релацији идеално – реално**

*Кључне речи:*

институција наслеђивања, обичајно право, грађанско право, прописи, пракса, идеални образац

Паралелном анализом обичајноправне и законодавне праксе, ауторка настоји да покаже какве су основе обичајног и грађанског права, и какав је њихов однос у савременом тренутку. У том контексту се проблематизује питање односа између идеалтипских образаца – како у законодавству тако и у обичајноправној пракси, и реалног понашања, са намером да се сагледају последице које произилазе из настојања да се обичајноправни идеалтиски образац у потпуности примени у пракси.

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<sup>43</sup> Milenković, M. 2008: 45-57.

<sup>44</sup> Гавриловић, Љ. 1989: 44, 70-71.

<sup>45</sup> Milenković, M. 2008: 45-57.

Ауторка у вези са тим констатује да се појединци приликом наслеђивања углавном руководе обичајноправним правилима, али не због тога што су та правила усклађена са друштвеном стварношћу, као што су сматрали романтичарски усмерени истраживачи обичајног права, већ зато што им примена тих правила омогућује репродукцију идеалтипских образаца понашања. То значи да су евентуалне промене у наслеђивању условљене степеном освешћености појединаца и њиховом спремношћу да се суоче са последицама које настају уколико поступају мимо идеалних модела понашања које намеће заједница. У том погледу, од посебног је значаја „легитимитет који се остварује на нивоу појединца“, како истиче Љ. Гавриловић, односно – однос појединца према закону и обичајном праву. Из овога следи да је илузорно надати се да ће се основна грађанска права и прописи реализовати у пракси уколико не дође до промена у перцепцији наследних права и положаја од стране субјеката. При том, није спорно да право и остале *јавне политике* могу да допринесу томе да се промене на нивоу појединца, а следствено томе – и на нивоу заједнице, лакше и брже спроведу.