CODIFICATION OF CIVIL LAW IN SERBIA
(Historical experience and current projects)

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Abstract: The idea of codification has been present in Serbian legal thought for centuries. More intensive work on its realization has been conducted during the periods when a need for the society to accept legal standards existing in wider European area, was present. One could basically speak of three Europeanizations and three codifications of Serbian law. The middle ages period was marked by the Code of Emperor (Tsar) Dušan, of the year 1349, XIX century by the Serbian Civil Code of 1844, and the current epoch by the work on a new Civil Code, which, in terms of time, coincides with the preparations for Serbia’s entering the European Union. Major workflows of the development of civil law in Serbia, different foreign influences, challenges which law-drafters were facing, effects of legislative work, and problems which occurred following the implementation of legal regulative during certain periods, were presented in this work. Quality and final outcome of the codification effort, as suggested by examples from comparative law, quite often depended on the intellectual capacity, visions, and sense of reality of those who wrote the codes.1

Keywords: codification; civil code; legal tradition, Europeanization; Serbian Civil Code.

1. Introduction

The idea of codification2 of legal rules has been present in Serbian legal thought, for centuries. It became especially prominent during

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1 This work is dedicated to Jan Lazar, a Distinguished Slovakian Professor of Civil law who played a key role in shaping of the new Slovakian Civil Code, and who held a prominent place among the high level intelectuals, who greatly influenced the development of legal thought in Europe.
2 On the notion and types of codification see: Pio Caroni, Lecciones de historia de la codificación, Carlos III University of Madrid, 2013, pp. 27. etc.
the periods when it was necessary to adopt legal standards which were in force in broader European area. Codification was therefore, to Serbs, always something more than mere organization of legal rules into a coherent and clear source of law. It represented a complex process which led to greater rapprochement with other European countries and nations. Codification always came with partial reception of foreign regulative models, legal institutes, and even certain legal rules. It also represented an opportunity for modernization of law, and thereby, advancements in society as a whole.

Basically, it could be spoken of three Europeanizations of Serbian law, and also of three epochs in which codification of legal rules was conducted. The first one happened during the middle ages, and under influence of the Byzantine Empire. The second one followed in the mid XIX century, after liberation from centuries long Turkish occupation. The third Europeanization of Serbian law is currently being conducted. Legal regulative has been changed to conform to European legal standards, and \textit{acquis communautaire}, for years, as part of preparations for entering the European Union.

The middle ages in Serbian legal was marked by the \textit{Code of Emperor Dušan} of the year 1349, which contained very advanced normative solutions. It, however, mostly regulated the matter of public law, and was not in force for a long time, as Serbia was occupied by Turks, a few decades later. The second epoch was marked by the \textit{Civil Code} of the year 1844. At the time when it was enacted, Serbia was amongst the very few countries in Europe to have codified civil law. Normative solutions of the Serbian Civil Code, however, were not in


accordance with the level of social development. It is thought that the lawdrafter (a Serb from Austria) did not fully understand the relations in Serbia of the time, and that he, by creating normative pre-requisites for destroying of family clans, contributed to impoverishment of many families, and even the Serbian society as a whole. The Code came out of force a hundred years later, during the shaping of a new, socialist order. However, some of it’s provisions are still applied, because alternative ones have not been created in the meantime. Summa summarum, Serbia today does not have a Civil code, despite the fact that it was, in the sense of law codification, one of the leading countries in Europe, at the time.

It has been worked on a new code, for more than a hundred years. There have been several legislative projects, since the beginning of the XX century. However, due to different historical circumstances, none of these were realized in entirety. In the meantime, a so called partial codification was conducted. Namely, a systems law and several accompanying laws were enacted for every branch of law. The legal regulative in some areas of civil law is not developed enough, though.

Entering the European Union represents a new cause for modernization of civil law in Serbia, and an impulse for its (re)codification, as well. At first, that might seem contradictory. As it is known, countries which have aspirations of becoming a member are not required to have a civil code. Codification at national level even often pose a barrier for a more efficient formation of the common (supranational) law (ius commune europaeum). However, (re)codification has been conducted in many countries, while in some even completely new civil codes were created. That, on one hand, provided for the actuality and compatibility of legal regulative, while on the other, it secured legal tradition which is necessary for preserving the national identity in a complex state union.5

Two law-drafting projects are currently conducted in Serbia. Several years ago, a pre-draft of the *Code on Ownership and Other Property Rights* was written, while the pre-draft of the new *Civil Code* is currently being worked on. The law-drafters are faced with a great challenge, as they need to achieve balance between the national interests and the need for the legal regulative to be in accordance with the European standards. Besides, they are expected to propose normative solutions which will make the legal system of Serbia modern, functional and compatible with the legal systems of other countries in the region. The fact that the legal regulative needs to be in accordance with the level of social development and real needs of legal practice has to be taken into account, as well. A useful landmark for achieving that could also be found in valuable experience from the past.

2. Codification in Serbian legal history: influences, ideas and realization

2.1. Reception of the Byzantine model of codification

Serbs had an opportunity to meet codified law as early as the first half of the 7th century, when they settled on Byzantine territory. In the beginning, they lived in areas called *sklavinije*, under old Slavic cus-

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6 The earliest known written information about the Serbs can be found in a Byzantine Emperor Constantine VII Porphyrogenitos document of the 10th century, entitled *De administrando imperio*. 

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toms (*antiqua consuetudo*). However, the elders of the Serbian family communities (clans) had to be familiar with the Roman legal heritage contained in the Justinian’s codification (*Codex Iustinianus*) from VI century, to a certain extent, as they were sometimes engaged in different legal relations with the Byzantines. Over time, Serbian (Slavic) customs gave way to written sources of law. Private law was, in part, based on the *Byzantine model*, regulated in *Nomo-canons*, which parallely, encompassed the norms of clerical law.\(^7\)

**2.2. Development of an autochthonous codified law:**

*Emperor Dušan’s Code*

As early as the middle ages, Serbia had a developed and, even from today’s standpoint, advanced legal system. A special contribution to that was given by the aforementioned *Code of Emperor (Tsar) Stefan Uroš IV Dušan* of Nemanjić dynasty, of the year 1349. Several provisions of that codification testify to that fact. In one, it is stated that judges are to adjudicate freely, according to the law, without fear of the imperial government.\(^8\) In the second, the Emperor states that judges ought to adjudicate according to the law and justice even if he personally addresses them by letter requesting that someone, contrary to the law, be punished or freed of any responsibility.\(^9\) In third, it is stated that judgments had to be rendered in written form and in two copies, one of which stayed with the court and the other, delivered to the party that won the dispute. The above stated provisions indicate that there was a great sense of the necessity to provide for the rule of law and fair adjudication.

The fact is, however, that the provisions of the *Dušan’s Code* pri-

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8. See: article 172 of the Emperor Dušan’s Code.
mainly regulated questions dealing with the field of Public law. The matter related to Civil law, to a great extent remained in the domain of customs\textsuperscript{10}.

During the rule of the Nemanjić dynasty, reception of Roman law was slowly done in the Western Europe. The effects of such process could, to a certain extent, be felt in Serbia, as well. Influence came from neighboring Hungary and Dubrovnik. Towards the end of the Middle Ages, Serbia was, according to distinguished foreign historians, “much more closer to Central Europe states than Byzantine”.\textsuperscript{11}

2.3. Return to the customary law during Turkish occupation

Serbia lost its statehood in the middle of XV century. During the Turkish occupation which lasted for several centuries, Serbian people had, for the most part lived in accordance with the customs. The Customary law developed under the strong influence of the Turkish authority and Eastern culture.

Until the middle of XIX century, Serbs lived in large patriarchal communities called 'clans' porodična zadruga\textsuperscript{12} (clan). Like Roman Familia at its time, clans represents a community of people and goods in which a separate legal regime was applied.

Life within the clan carried on in accordance with customary rules and decisions of the family elders. The elders held significant authority and a wide scope of power. Their decisions, to a great extent, influenced many issues concerning the every day life of the clansmen. The elders had an important role in relations with the outside world. They bought, sold and borrowed, etc., on behalf of the clan.

\textsuperscript{10} Compare with: Aleksandar Solovjev, Zakonodavstvo Stefana Dušana, cara Srba i Grka, Skoplje 1928.


Relations between different communities were ordered pursuant to customary law. Disputed issues were most often resolved by agreement of the disputed clans, in accordance with custom and mediated by third parties (friends, neighbors, etc.). In case a dispute could not be resolved, a decision was made by the Duke, based on custom and his own personal understanding of equity.

2.4. Ideas on codification in XIX century

During the First Serbian Uprising against the Turkish occupations (1804-1814) led by Duke (Knez) Đorđe Petrović Karađorđe, there were efforts aimed to form a modern state and to have all significant social relations ordered by codified law. One of the main supporters of this idea was Teodor Filipović, an eminent Austrian attorney and Professor of history of law at the University of Charkow (Harkov), known among the rebels under the pseudonym of Božidar Grujović. Many contemporaries found Grujović’s efforts to be reasonable, but considered that their realization in the circumstances of the time would have been premature, since history has shown that it is quite difficult to create a stable legal system during periods of revolutionary upheaval and that revolutions require an altogether different mode of organization and conduct. Despite this, there are indications that in 1810 Duke Karađorđe and the government (the Sovjet) requested the purchasing of a copy of the French Civil Code (*Code civil des Français*) of 1804 in Ljubljana.

The first courts were established during this time. However, there were no written laws in the field of civil law and therefore disputes were resolved using the old method. The courts mostly adjudicated according to, and if this did not exist, as dictated by equity. Historiography has offered testimony that only the educated priest Mateja Nenadović in the municipality (nahija) of Valjevo adjudicated according one mediaeval nomo-canon (*krčmija knjiga*), and also relying on the Justinian’s laws and *Moses’s severity over the Jews*. The other mu-
nicipality applied customary law which in part was developed through the influence of jurisprudence, while a significant role in the regulation of social relations was still held by the family elders.

It was the same during the Second Serbian Uprising (1815) under the leadership of Duke Miloš Obrenović.

During the uprising period, Miloš Obrenović governed according to the form of a patriarchally ordered society. He was considered father of the people or, as it used to be said in the spirit of those times, the elder of the great Serbian clan. The Duke mostly acted in accordance with tradition and customary law. However, at that time in Serbia, new social relations which were not in accordance with the tradition and customs began to develop. These were decided upon by the Duke, basing his decisions on „good reasoning“ and a personal understanding of justice and equity. Many considered this sort of regulating of social relation as unacceptable.

The Knez’s legal policy was also criticized by Serb intellectuals in Austria. Some of them attempted to stimulate the legislative process. For example, the Timisoara attorney Maksimilijan Simonović translated the Austrian Civil Code of 1811 from German into Serbian and adjusted it to the circumstances in Serbia at the time. That was the first concrete attempt for Serbia to get a modern Civil Code. The text was supposed to be printed in Vienna in 1828, but the author did not get the consent of the Imperial War Council.

2.4.1. Different foreign influences

Pressured by vast dissatisfaction, the Duke, towards the end of the 1820s made a decision for legislative work to commence.

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2.4.1.1. French Influence

In 1828, the Duke’s Secretary Dimitrije Davidović asked Vuk Karadžić, a reformer of the Serbian language, to translate the French Civil Code of 1804, “word by word, to make it understandable, while the commission (...) would later chose what is suitable for the Serbs”\(^\text{15}\). Namely, Duke was “determined to publish civil laws, that would suite the character and customs of his people”\(^\text{16}\). The plan was to use the translations of foreign laws as a sort of guide during the legislative process, while normative solutions from the French law were only to be used were necessary. From the official correspondence that followed in 1829, it is obvious that the tasks were later changed. The Greek Georgios Zachariades, a private teacher to the Knežević Milan (the son of Knez), was entrusted with the translation of certain parts of the French Civil Code. Since the translator did not speak French, he made the translation from the German language. Also, Zachariades was not sufficiently familiar with the Serbian language, and even less with the legal terminology. All these factors contributed to the poor quality of the translation. In such circumstances it was evident that legislative work would prove to be difficult and that it would not be completed within six months, as the Duke’s Secretary had planned.

A special committee was formed for reasons of expedience in enacting the civil code. However, the Committee did not have any educated lawyers among its members which rouse suspicion at the positive outcome of the whole endeavor. Certain Serbs from Austria, that were closely observing the legislative process in Serbia, also pointed at this problem of incompetence. Documents exist that indicate that there was a proposal to have the Duke send an able young man to study law in Bonn, where the French private law was practiced at the

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\(^{16}\) Ibidem.
time, and by doing so to help the education of professional lawyers that could offer their expertise to the legislative bodies, and later, to those that would be in charge of implementation of legal norms. However, only years later had Miloš Obrenović offered his support for this idea. In the meantime, the Committee continued the work in the same composition. Its members tried to grasp the meaning of legal principles contained in the *French Civil Code* and to have the names of those principles translated correctly into the Serbian language. However, their efforts remained futile. Even today anecdotes can be heard about the Committee whose members thought that *servitude* meant slavery, and that a pledge (*hypoteque*) meant the apothecary (*pharmacy*). Due to all these problems, Duke Miloš expressed public dissatisfaction when he reviewed the legislative project in 1834.

*Knez* knew that it is not possible to successfully complete the legislative projects without educated lawyers. On the other hand, he did not mind the composition of the Committee at the beginning since he did not have serious intention of significantly changing his way of ruling. As a result, the legislative work was continued to be carried out in the same manner to the satisfaction of all those involved. However, in 1835 an uprising broke out in Serbia as a result of continuous postponement of legislative regulation. It was only under such circumstances Duke requested expert assistance from abroad.

### 2.4.2. Austrian Influence

In 1836, Austrian Consul Antun Mihanović, arrived in Belgrade to curb foreign influences in Serbia and to strengthen political, cultural, and economic ties between his home country and the Serbian people. Due to diplomatic skills, as well as to general circumstances of that time, Mihanović’s stay in Serbia (1836 – 1838) was marked with radical shift in the Serbian legislative policy.

In 1836, Duke Miloš Obrenović, following the recommendation of his Secretary, and through the mediation of the Consul Mihanović,
asked Austrian authorities to allow Vasilije Lazarević, Mayor of Zemun, and Jovan Hadžić, Senator from Novi Sad Magistrate, to cross the border and come to Serbia in order to participate in the legislative work. They were first of all asked to review the material that was prepared by the Committee. Lazarević and Hadžić found that the proposed text of the civil code represented a literal translation of the French *Civil Code* and that its enactment would be a great mistake because Serbia was at a much lower level of social development than France. In their opinion, normative approaches from French law did not suit the circumstances in Serbia at the time, which, after centuries of occupation, was economically undeveloped, culturally backward, and without educated lawyers who would be capable of understanding the sense of legal norms and how to apply them suitably. In alluding to these facts, Lazarević and Hadžić proposed to the Duke that a completely new code be drafted, which would be based on custom and already existing regulations, at the same time fully taking into account the tradition and peculiarities of the Serbian people.

### 2.4.3. English Influence

In 1837, English Consul, George Lloyd Hedges, also arrived in Belgrade with the task of limiting the political influence of Russia and promoting economic interests of his country in the Balkans. In order to gain the trust of Miloš Obrenović, and probably to promote Anglo-Saxon model of law, this foreign diplomat stated that Serbia did not need foreigners as law-drafters, nor the laws such law-drafters would write, since there is no one in the country to read and apply such laws. In his own words, Duke, being a good sovereign, was “sufficient ruler.”

### 2.4.4. Russian Influence

The Russian Government, that had Serbia under its protectorate, had the opposite point of view when it came to legal regulation. The
Russians believed that Serbian needed the Constitution and that the basic laws regulating civil and criminal subject matter should be enacted as soon as possible. Soon after, Vaschchenko, a representative of the Russian Government arrived in Belgrade in order to spur the legislative work and to insure its consistency. Duke Miloš had no other choice than to do all that was at his power in order to speed up the process of enactment of basic laws.

### 2.5. Civil Code Project

In 1838 a new Committee was formed with the task of assisting the two Serbs from Austria in their legislative work. Lazarević was entrusted with the writing of the Criminal Code, while Hadžić was put in charge of the Civil Code. The writing of the draft codes was preceded by months of preparations. From August 1838 until January 1839, Jovan Hadžić collected information on the spirit, customs, habits, and domestic circumstances of the Serbian people, from the materials he gathered from the Duke's officials. Following this period, Hadžić was hired to work on other legislative projects. He did not devote entirely to the work on the Civil Code until the middle of 1840. At that time, he concluded a contract with the Serbian government for the preparation of the Draft code, which provided that the work would be done in two years of time.

In the fall of the same year, Jovan Hadžić spent some time in Vienna. On that occasion, he presented the Austrian Duke Metternich with a detailed account of his legislative work and of the overall circumstances in Serbia, promising that the Serbian Code would be based on the Austrian Civil Code of 1811, with the necessary adjustments of certain normative approaches. He also stated that he would endeavor to “prove himself worthy of the trust bestowed upon him on this occasion by the Austrian Emperor and Government”. Hadžić did in fact follow through in this matter. Instead of the anticipated original
code founded on national spirit and custom, Jovan Hadžić, submitted to new Serbian ruler – Duke Aleksandar, in September of 1842 a text which was essentially based on Austrian Civil Code.

2.6. Serbian Civil Code of 1844

The draft was, with certain amendments, adopted on March 11, 1844 and come into force 14 days later under the title Civil Code of the Dukedom of Serbia (Zakonik građanskij za knjažestvo Srbije).

The adoption of Hadžić’s project was of great historic importance. Serbia became one of the few countries in Europe at that time to have a civil code. This in turn defined the basic path for the development of civil law legislation. By carrying out a partial reception of the Austrian law, Serbia had acceded to the Germanic legal sphere to which it mostly belongs today. Finally, it should be mentioned, that acceptance of normative approaches from foreign law did in fact hasten changes

17 According to the data in our possession, the following European countries had an original codification of civil law, in the modern sense of meaning: Bavaria (Codex Maximilianeus Bavari cus Civilis of 1756), France (Code civil des Français of 1804, later known as Code Napoleon or Code civil), and Austria (Allgemeines bürgerliches Gesetzbuch of 1811). French Civil Code was partially receipted in the Swiss Cantons of Vaud (1819), Fribourg (1834), and Ticino (1837). In 1838 in Netherlands the code came into force (Burgerlijk Wetboek), which was, for the most part, based on normative solutions of the French law. Austrian Civil Code was partially taken over by Swiss Cantons of Bern (1826), Aargau (1828), Solothurn (1831), and Lucerne (1841). The French Code Civil was in its entirety, and for a prolonged period of time, used in the territories that were under Napoleon’s rule (in Belgium, Luxembourg, Rhineland, and Baden in 1804, and in the Netherlands in 1809). The Austrian Civil Code, on the other hand, was in its entirety valid in the territories that were under the Habsburg rule. Data is based on the preliminary research conducted at the Department of Civil Law at the Geneva Faculty of Law (Departement de droit civil, Faculté de droit, Geneve) and the Max Planck Institute for Comparative and International Private Law (Max-Planck – Institut für ausländisches und internationales Privatrecht, Hamburg), in cooperation with Dr. Nataša Hadžimanović.
in the society. Serbia began to develop in accordance with the legal standards which were dominant in Europe. Nevertheless, the Civil Code had a number of shortcomings. It is indisputable that its adoption also resulted in a series of negative effects.

The Civil Code became the subject of criticism immediately upon its publication. Citizens and Serb Lawyers from neighboring Austria alike, were unsatisfied with certain normative approaches. The main criticism was that the Civil Code represents only a revised text of the Austrian *Civil Code* and that the author contributed to the dissolution

18 Hadžić combined certain provisions, while completely leaving out others. In fact, he managed to reduce the 1,502 paragraphs of the Austrian Civil Code to a total of 950. However, it is generally perceived that this was done with numerous omissions and that for this reason the Serbian code was, in contrast to the Austrian one, insufficiently systematic and often incoherent. *The Civil Code of the Dukedom of Serbia* was written according to an institutional (tripartite) system and was comprised of an introduction and three parts. The introduction contained general principles which were segmented into two parts. The first was entitled *On Civil Laws in General* and the second, *Basic Attributes of Justice and Equity in Civil Laws.*

and disappearance of the family clan [zadruga] with the acceptance of unsuitable normative approaches from foreign property law. Certain authors consider this to be a reason for the pauperization of Serb families and destabilization of the society as a whole, the consequences of which are felt even today. Of course, other opinions exist among theoreticians. For example, Slobodan Jovanović, a renowned Serbian intellectual and professor at the Belgrade Faculty of Law, considered that Jovan Hadžić simply hastened a process that was otherwise inevitable.\(^\text{19}\)

In order to alleviate the growing discord between the normative approaches and judicial practice, the Code was amended on several occasions.\(^\text{20}\) However, a complete revision was never carried out. Partial amendments rendered the Code that lacked systematic organization from the very beginning, even less consistent and coherent to the people. For these reasons, already by the second half of the 19\(^{\text{th}}\) century, the dominant belief among the expert public was that entirely new code was in order.

### 2.7. Problem with implementation of codified law in XIX century

The transition from customary to codified law was too fast, and not prepared well enough. After several centuries of Turkish occupation the population, for the most part, was illiterate and uneducated. Most

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20 See amendments of 1864, 1869, 1872 and 1911.
of the citizens were, therefore, not able to read and understand what was written in the *Civil Code*. Serbia also lacked the legal infrastructure for implementation of modern normative solutions from developed European countries. There were no educated lawyers to take up the roles of judges and attorneys at law, in accordance with the European standards of the time.

In the mid XIX century, the planned creation of the intellectual elite had begun. According to the program drafted by the Minister of education of the time, each year a certain number of state pupils were sent to leading European universities. It is estimated that up until Serbia’s joining of South Slav union of peoples – The Kingdom of Serbs, Croats, and Slovenes, approximately 1,300 Serbian students of various callings were educated in this manner. Most of them studied law, as the creation of legal professionals for courts and other state organs was considered to be one of the national priorities.

### 2.8. Serbian Commercial Code of 1860

For decades, commerce was one of the most developed branches of the Serbian economy. A class of traders began forming as early as the XVIII century and headed a new, bourgeois class that played a key role in the struggle for independence. Owing to the historical role, wealth and the influence of traders in Serbian society, commerce was governed by separate regulations. On 12 December 1859, *Knez* Miloš founded the first Commercial Court in Belgrade, while the *Commercial Code of the Serbian Dukedom* came into force on 26 January 1860. The editors of the Code primarily relied on the normative approaches found in the French *Code de commerce*. In this way, Serbian trade law was conformed to the standards existing in Western Europe.

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2.9. Pre-draft of the Property code in the Kingdom of Serbia (1908 – 1914)

As is mentioned previously, the Civil Code of 1844 was criticized among the professional public from the very moment it came into force. In the beginning, there strides were taken to carry out a thorough revision of all disputed and unsuitable provisions. However, in time, the opinion that Serbia needed a new, modern and original code pervaded. Of profound influence in the formation of such an opinion were the lawyers educated at foreign universities. On the other hand, the political elite did have before it a positive example with the General Property Code for Montenegro. The agreement of the professional public and the political elite towards the end of the XIX century was to begin preparations for the reform of civil law. However, this process took very long. Legislative work actually began only in the early XX century. This inspired Dragoljub Aranđelović, a professor of the Belgrade Faculty of Law, and later drafter, to state the following in one of his critiques on the topic, “There was time for everything, except for the reform of the Civil Code, this cornerstone of all private law relations in the state...”

The committee for the drafting of the new code was formed in 1908. Its task was to regulate the subject-matter of the general part, property law and the law of contract and torts. The remaining segments, according to the redactor’s opinion, were to be regulated by separate regulations, with a view to avoiding constant amendments to the code. The reasoning behind such a solution reflected the experiences of other countries which did opt for a similar normative concept, and primarily the experience of neighboring Montenegro.

The professional public, with good reason, expected that the new

23 Dragoljub Aranđelović, op. cit., p. 145.
24 See in detail: Živojin Perić, Jedan nov rad na kodifikaciji privatnog prava, Arhiv za pravne i društvene nauke, 6/1911.
code would be written based on the model of contemporary Swiss legislation. However, the basis was in fact the German *Civil Code* of 1896.

The project was completed in 1914, right at the outset of World War I. Further efforts on the adopting of the code could not be continued in wartime conditions. This period was followed by unification. The circumstances had significantly changed and the project remained unrealized.

### 2.10. Work on Codification of Civil Law in the Kingdom of Yugoslavia

At the time of creation of the Kingdom of Serbs, Croats and Slovenes, in 1918, the principle of legal continuity was applied. In all parts of the new state the implementation of existing regulations continued. The legal particularism presented itself as an obstacle for a stronger economic, commercial, and political integration of the region. For this reason, the central government, immediately following unification, began the process of developing a unified legal system. However, from the outset, priority was given to regulations in the domain of public law.

A committee for the preparation of a preliminary draft of the uniform civil code was only formed in 1930. From the very beginning, it faced numerous legal and political problems. Of particular difficulty were the differences in legal development between certain territories. It is generally considered that because of this discord the working group decided to use the Austrian *Civil Code* of 1811 as a starting point. Moreover, it was considered that this Code was much closer to the average of law that was in force in the Kingdom, that perhaps Swiss civil law legislation or, for example, the German *Civil Code* of 1896. Furthermore, practically all legal territories, more or less, developed under the influence of Austrian law prior to unification. It became, in some ways, part of the common legal tradition. Hence, it was be-
lieved that the official reception of normative solutions from the Austrian *Civil Code* would cause the least resistance from the political and professional public. Predictions, however, proved to be wrong. The preliminary draft of the new civil code, better known as the *Predosnova* [*Preliminary Foundation*], was completed in 1934. The project was submitted to the Ministry of Justice the following year. Soon after, public discussion followed. The *Predosnova* was severely criticized.\(^{25}\)

The criticism was aimed towards the proposed provisions, but also against drafter’s decision to use the Austrian *Civil Code* as the base. Many considered that Swiss legislation should be used as a base,\(^{26}\) while others claimed that the country needed a completely original codification, which would equally take into account the domestic tradition and heritage of Central and Western European countries.\(^{27}\) Because of these disputes, as well as the political changes that ensued following the assassination of Yugoslav King Aleksandar in Marseille in 1934, the *Predosnova* never reached the parliamentary procedure phase.

### 2.11. Development of a mixed legal system in Vojvodina: a synthesis of the judge-made law and codified statutory law

The territory of today’s Autonomous Province of Vojvodina held a special place within the legal system of the former Kingdom of Serbs,

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26 Certain authors claim that the members of the Committee took into consideration some of the solutions from the Swiss Civil Code. See: Ferdo Čulinović, *Dražavnopravna hisotrija jugoslavenskih zemalja XIX. i XX vijeka (Srbija, Crna Gora, Makedonija, Stara Jugoslavija (1918 – 1941), Nova Jugoslavija*, Knjiga II, Zagreb 1959, pp. 321.

Croats and Slovenes (Yugoslavia). Two regulatory models fused in this territory over time. Legal system in Vojvodina had elements of judge-made law and elements of statutory law.\textsuperscript{28} The shaping of such a mixed legal system was influenced by, on the one hand, a specific legal heritage, and on the other, a high level of tolerance of the government at the time.

According to the principle of the legal continuity, at first, the judges applied the rules of the old Hungarian judge-made law and the norms of the Austrian Civil Code of 1811, and later, the relevant regulations of the Kingdom of Serbs, Croats and Slovenes (Yugoslavia) as well.

A special role in the development of Vojvodina private law was played by a division of the Belgrade Cassation Court (Division B), formed in 1920 in Novi Sad, which had the power to create legal rules.\textsuperscript{29} A testimonial to that are the numerous decisions rendered in the first half of the XX century.\textsuperscript{30}

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\item\textsuperscript{29} This development of private law was supported by the legal academia of time. Ivo Milić, a professor of the Subotica Faculty of Law, in the foreword of his book entitled A Survey of Hungarian Private Law in Comparison to the Austrian Civil Code concluded that “where positive regulations do not exist, the principles of universal, pandectist law should be applied without any reservation (…) where these do not exist either, the supreme legislature shall intervene: healthy reasoning and a sense of equity”. (Ivo Milić, Pregled madžarskog privatnog prava u poređenju sa austrijskim gradanskim zakonikom, Subotica 1921, p. 1.).
\item\textsuperscript{30} For instance, in some of them it is stated: “In that sense the permanent judicature of this Cassation Court is being manifested…” Decision of Cassation Court, B Division in Novi Sad, Kno 31/1937, in: Zbirka odluka viših sudova Kraljevine Jugoslavije (editor: Nika J. Ignjatović), br. XIX/1939, p. 44.
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\end{footnotesize}
2.12. One unrealized plan on new civil code drafting (1941)

Prior to the beginning of World War II, preparations for the enactment of a new civil code were undertaken. Information about this was for decades hidden in the diary entries of Professor Mihailo Konstantinović and was not published until 1998. This document notes that a group of young civil lawyers from the Belgrade Faculty of Law (Mihailo Konstantinović, Božidar S. Marković, Mehmed Begović and Milivoje Marković) decided to draft a code that would represent an original legislative work, written in the spirit of the European legal tradition, but with normative approaches that would be suitable to the environment for which it was being enacted. However, this plan was never realized since, just a few months later, war broke out on the territory of the Kingdom of Yugoslavia.

2.13. Work on Codification of Civil Law in Socialist Yugoslavia

Following the end of World War II in Yugoslavia, the creation of a new political order and a new legal system began. In October 1946, Law on Nullity of Legal Regulations Enacted Prior to 6 April 1941 and during the Enemy occupation, was adopted. Legal regulations existing before the war were nullified. However, the break-up with old order was much more obvious in public law domain than in private law since the post-revolutionary practice proved that the society cannot function without some traditional civil law principles. The Redactors of the Law made a compromise. The Regulations of the Kingdom of Yugoslavia were no longer enforced, but the legal

33 Law was published in Official Gazette of FNRJ, № 86/1946.
rules contained within them could, under certain conditions, be applied even in the new legal environment. Some of these legal rules, contained in *Serbian Civil Code* of 1844 are still applied today, in the field of civil law.

In the first years after the Second World War an opinion prevailed that the field of civil law should be regulated by law without delay. The end task was to enact a single civil code for the whole state. However, a suggestion was to apply the method of partial codification in order to overcome leaks in law. The idea was to enact one law for each branch of law, which would later, without significant changes, be incorporated in a broader text. Hence, at the end of 1940s a set of laws regulating family matters was adopted (*The Principle Law on Marriage* (1946); *Principle Law on Relations between Parents and Children* (1947); *Basic Law on Custody* (1947); *Child Adoption Law* (1947); that were all prepared by previously mentioned Mihailo Konstantinović, distinguished professor at the Belgrade Faculty of Law. Even the laws that were enacted later were based on drafts prepared by professor Konstantinović, and those were the *Law on Statute of Limitation* (1953) and the *Inheritance Law* (1955). In 1960, the Professor was entrusted with the task of preparing a draft-law of contracts and torts. The author finished the work on this project in 1969. Few months later his “*Draft for Law on Obligations and Contracts*” was published.\(^3^4\) The author opted for the so called *creative codification of the law on contracts and torts*. The Draft represented a successful synthesis of a great number of original normative solutions and the best regulative models taken from comparative law. Judges, barristers and lawyers work in commerce started to rely on, formally non-binding rules proposed by Professor Konstantinović. The Draft represented in the period between 1969 and 1978, what we refer to in Europe today as the *soft*

The work on codification continued in other areas of civil law as well. A special committee was formed in 1964 for writing a *Pre-draft for Law on Rights in Things*, which however never became a law. At the end of sixties, the work on the general part of civil code was completed. The only thing left to be done was to harmonize regulation in force with the drafts and to unify them. For that purpose a *Committee for revision and codification of the Federal laws* was formed by the Federal Assembly in 1968. A year later the *Joint Committee of the Federal Assembly for Civil Code* was formed. Soon after, however, important constitutional changes took place which changed the delegation of jurisdictions between the federal and member-state level, which in turn made the creation of the unified civil code impossible. With Amendment XXX to the *Constitution of the SFRY* of 1963, approved in 1971, it was envisaged that the Federation would: “regulate contractual and other obligation relations dealing with the exchange of goods and services; principle ownership and other rights which provide for single market; principle ownership rights in sea-commerce, internal voyage and air traffic; and also regulates intellectual property rights.”

Regulation of other matters was delegated to the Republics. Such delegation of legislative jurisdictions was confirmed by 1974 *Constitution of SFY*. So Yugoslavia, instead of getting long awaited unified Civil Code, received unique disintegrated civil law divided into eight legal territories. Since constitutional basis for creation of a single civil code were lacking, the only thing left to do was to regulate individual segments of the civil law.

The Federation, within its competences passed the *Zakon o osnovama svojinsko-pravnih odnosa* (Law on Fundamental Property Rela-

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36 Amendment XXX, article 2, pt. 3 (OJ SFY, no. 29/1971).
tions) in 1980. This law was consequently amended on two occasions (1990 and 1996).

A working Draft of the Law on Ownership Rights and Other Related Rights over Real Estate, was completed in Serbia in 1978. After expert discussions, a conclusion was reached that the Law should cover property rights over movable things. Working version was soon after completed. The text was subsequently changed on several occasions. However, the Draft was never enacted as a law. Other member states also failed to pass required regulations falling within their respective competences before the break-down of Yugoslavia. Leaks in laws were covered with legal rules from pre-World War II legislation and by invocation of the principles of civil law.

In the meantime, in Serbia several new laws in the field of civil law came into force: the Law on Inheritance (1995); the Law on Pledge over Movable Things Recorded in the Registry (2003), the Law on Family (2005) and Law on Mortgage (2005).

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38 The Law on Fundamental Property Relations was published in Official Journal of SFRY, no. 6/1980.
41 The tekst was published in: Anali of the Belgrade Faculty of Law, 3-4/1978, pp. 231 – 299.
45 Official Journal of the Republic of Serbia, № 18/2005
3. Current codification projects

3.1. Third Europeanization of Serbian Civil law and different foreign influences

During the last few decades, the matter of civil law has been partially regulated. The draft laws were written by various drafting groups, at different times. For that reason, substantial gaps, overlaps, terminological inconsistencies, etc, are present. The laws were, with a few exceptions, written under pressure of time constrains, and current events, in order to meet the current needs and (direct or indirect) demands of the international society. When the whole law-drafting process is perceived from an appropriate time distance, an impression is gained, that many improvisations were present, and that the civil law system is not coherent, and developed enough. In legal literature, it has been stated, many times, that such a problem can be solved in an adequate manner, only by enacting a new civil code.

The work on (re)codification of civil law was initiated a few years ago, under specific circumstances. Namely, as part of preparations for becoming a member state of the European Union, Europeanization of the legal system was started in Serbia. The legal regulative in the field of civil law needs to be made to comply to the legal standards which are in force in the European Union, and the *acquis communautaire*, while on the other hand, the legal tradition has to be preserved to a possible extent. At the same time, strong foreign influences on law development exist. As in the times of enacting the first Serbian Civil Code of 1844, certain countries (and international organizations) strive to ensure that the legal institutes and normative solutions which are in accordance with their interests, get included in the legal system of Serbia. All that, to a certain extent, slows the process of codification and makes it harder.
3.2. Draft Code on Ownership and Other Property Rights

At the end of October of 2003 preparations for comprehensive regulation of the property law commenced, when on the basis of decree of the Ministry of Finance and Economy of the Government of the Republic of Serbia a working group for work on a Draft on ownership relations was formed.

The work was, for the most part, completed in July of 2006. The working group made the Draft with almost seven hundred articles. It regulates the property law in detail. Due to this reason the Draft was presented to the public with a new, more ambitious title. Instead of Draft Law, it was titled the Draft Code on Ownership and Other Property Rights.

The Draft was written under a dominant influence of German legal tradition. This conclusion can be drawn from the total number of provisions and from a detailed analysis of proposed normative solutions. Despite that, it is beyond doubt that members of the working group had in mind the legal tradition and current developmental needs, as well as, the European standards in the area of the property law.

The length of the Draft was determined by several factors. A new political, economic, and legal ambient brought about the need to regulate many issues that are not covered by existing legislation. In certain instances, a more precise regulation of relevant relations was needed. Finally, the Draft includes some of the legal principles contained in laws that address other branches of civil law.47

Such exhaustive character that sometimes borders abstract causation, to a great extent deviates from the existing under-regulation. If

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the proposed text gets adopted by the National Assembly of the Republic of Serbia, lawyers will need considerable time to get acquainted with extensive regulations. Citizens will need even more time. However, it is beyond doubt that the legal security will be raised to a much higher level.

The faith of this legislative project is unknown.

In the year 2012 the European Council (Justice and Legal Co-operation Department, Justice and Human Dignity Directorate, Directorate General of Human Rights and Rule of Law) expressed positive opinion regarding the Draft, with suggestions for about thirty changes, refinements, etc. The necessary changes were made in short time, and the competent institutions of the European Union were informed about that. However, eight years after creation of the base text, the draft has not entered the parliamentary procedure. In the meantime, the work on the new Civil Code has been intensified.

### 3.3. Pre-Draft of the Civil Code

The Commission for creation of the Civil Code, was formed in November of 2006, by the decision of the Government of the Republic of Serbia.\(^48\) The decision stated that the Commission is to create the Draft within a one year long time limit.\(^49\) and that it’s mandate ends after that.\(^50\) However, work on creation of the Code still lasts. During the past eight years, rules belonging to: 1. general part of civil law, 2. obligation law, 3. inheritance law, and 4. family law, have been formulated, while matter regarding property law still has not been regulated in greater detail.

The Commission has chosen the pandectistic systematics, influ-
enced by the German Civil Code of 1896. The Serbian Civil Code of 1844, as stated before, was written according to the tripartite model, as was the Austrian Civil Code of 1811. Such change was expected and understandable, because the pandectistic systematics was accepted at all law faculties in Serbia, decades ago, and the whole system of civil law has, in an indirect manner, been shaped in accordance with it.51.

The general part contains the usual provisions, which are of common importance to all, or multiple branches of civil law. However, one could find in it, some of the institutes that are, in most of European codes, part of other sections. The redactors of the new Serbian Civil Code gave included the provisions on possession in the general section.

The section dedicated to obligations is mostly based on the normative solutions of the Law on obligation relations (Law on Contracts and Torts) of 1978. The Commission has, to a certain extent, enhanced the text, and regulated some of the questions that have not been previously regulated.

The section dedicated to inheritance is based on the normative solutions of the Law on inheritance of 1995. The text is almost identical. Only minor changes have been made, and provisions on some new legal institutes such as the inheritance contract, were added.

The section dedicated to family relations is also mostly based on the current Law on Family, of 2005. The novelties are provisions related to formation of the alimentation fund, entering marriage in the so called church form, etc.

As stated before, the section regarding the property is also being prepared. It is important to state that the Commision for creating the Draft of the Civil Code has not expressed readiness to adopt the Draft Code on Ownership and Other Property Rights iz 2006, written by another commission.

51 For more see: Dušan Nikolić, Uvod u sistem građanskog prava [Introduction to the System of Civil Law], XI revised and supplemented edition, Novi Sad 2013.
Professional public has been presented with the parts of the Draft of the Code, which have been completed.

With respect to the fact that the legislative work has entered the final phase, it is reasonable to expect that Serbia will, 170 years after coming of the first Civil Code into force, get a new, modern, codification, which will be both in accordance with the national legal tradition, and the European legal standards.