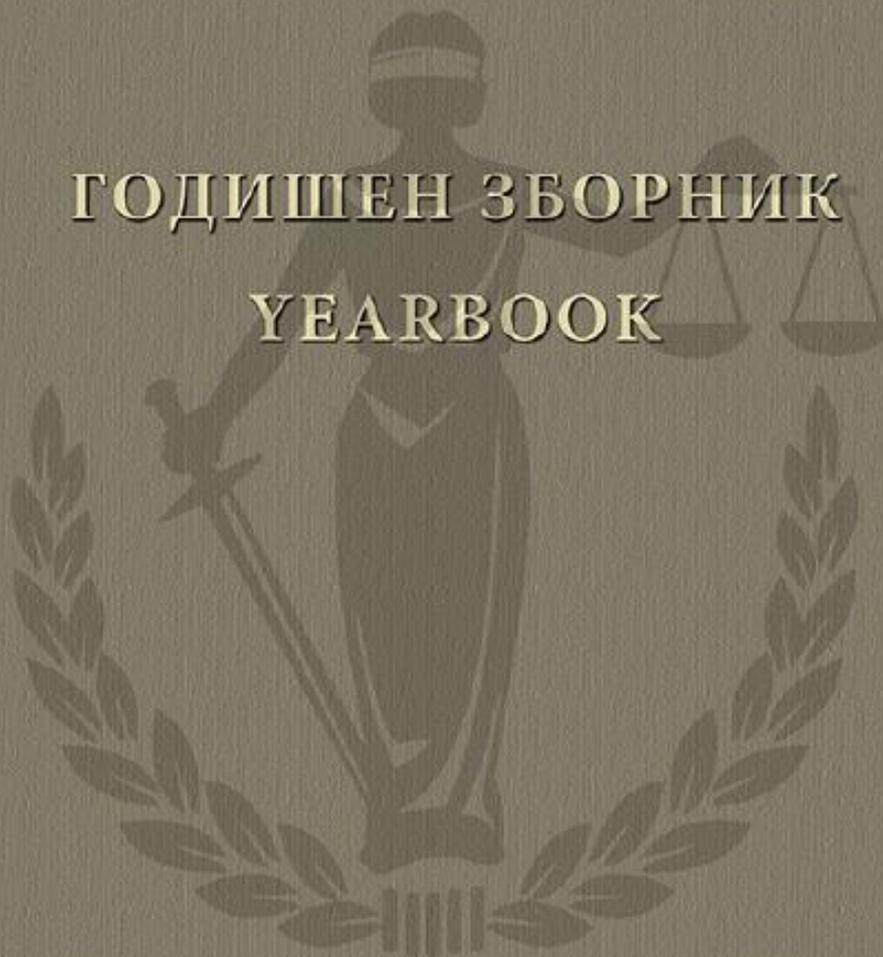


УНИВЕРЗИТЕТ „ГОЦЕ ДЕЛЧЕВ“ - ШТИП
ПРАВЕН ФАКУЛТЕТ



ISSN 1857-8713

ГОДИШЕН ЗБОРНИК
YEARBOOK



ГОДИНА 4

VOLUME IV

GOCE DELCEV UNIVERSITY - STIP
FACULTY OF LAW

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THE PROCESS OF CIVIL LAW CODIFICATION IN WESTERN BALKANS

ПРОЦЕСОТ НА КОДИФИКАЦИЈА НА ГРАЃАНСКОТО ПРАВО ВО ЗАПАДНО БАЛКАНСКИТЕ ДРЖАВИ

Abstract

The central point in this paper is the civil law and the civil law codification. The term civil law will be analyzed in narrow sense, as a part from the private law, and the process of codification will be analyzed on state level, in the European Union and on international level. The main purpose of this paper is to research among the legislation in the Western Balkan legal systems, to be more exact: the legal systems of Serbia, Montenegro, Bosnia and Herzegovina, Macedonia and Albania. This research will particularly look at the civil law regulation to see if there are civil law codifications, or an existing process of civil law codification. Since most of the Western Balkans states are former Yugoslavian republics, the legal system of Yugoslavia will also be analyzed to understand the legal heritage of the Yugoslavian republics.

Key words: civil law, codification, obligations, property, inheritance, separate laws, state level, international level.

Апстракт

Акцентот во овој труд е ставен на граѓанското право и неговата кодификација. Самиот термин граѓанско право е анализиран во потесна смисла, односно како дел од приватното право, а процесот на кодификација ќе биде анализиран на државно ниво, на ниво на Европската Унија и на меѓународно ниво. Главната цел на овој труд е да се спроведе едно истражување во рамки на легислативата во Западен Балкан, поточно во правните системи на Србија, Црна Гора, Босна и Херцеговина, Македонија и Албанија. Целта на ова истражување е да се утврди постоењето или непостоењето на кодификација на граѓанското право, или евентуално постоење на процес на кодификација на истото. Со оглед на фактот дека најголем дел од западно балканските држави се поранешни Југословенски републики во трудот свое место ќе земе и анализата на правниот систем на Југославија, со цел да се разбере правното наследство на југословенските републики.

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Клучни зборови: граѓанско право, облигационо право, кодификација, сопственост, наследување, правни системи, меѓународно ниво.

1. Civil law and the civil law codification in general

1.1. History of civil law codification

The most significant part from the area of private law is known, historically, as civil law (*ius civile*). The need for clarification comes from the fact that the term civil law has another meaning – civil law as the most widespread type of legal system in the world, applied in various forms in approximately 150 countries. It is also referred as European continental law and it is derived mainly from the Roman *Corpus Juris Civilis*. The major feature of civil law systems is that the laws are organized into systematic written codes.

The term civil law in this paper is used in the first mentioned meaning – as a part of the private law. In the past, the civil law was not separated from the criminal law. The 20th century was the century of separation of civil from criminal law although the idea and the need of civil law codification are very old. The first known codes include the The Code of Hammurabi, c.1780 BCE³ and the Law of the Twelve Tables called *Lex Duodecim Tabularum* (Law of the Twelve Tables) or simply *Duodecim Tabulae* (The Twelve Tables). The Law of the Twelve Tables: "...really forms the foundation of the whole fabric of Roman law. The importance of this code of primitive laws, whether for the Romans or for us, cannot be overestimated"⁴. Other known Roman law codifications are: Codex Gregorianus (291 AD), Codex Hermogenianus (295 AD) and Codex Teodosianus (438 AD), but the most significant codification of Roman law is *Corpus Juris Civilis*, a collection of fundamental works in jurisprudence, issued from 529 to 534 by order of Justinian I, Eastern Roman Emperor.⁵ The Roman legal tradition is a common feature of the 20th century codifications. It is the basis of each codification, as a simple reception of the legal rules of Roman law, or through conversion into new legal rules and the making of generic codes or laws⁶.

1.2. Modern civil law codifications

The phenomena of law codification in the field of civil law represent the integration of the norms that regulate civil law relations in a complex, complete and harmonized system. The codification of the civil law began at the medieval universities and lasted for centuries. At the time, the process of codification had the purpose of uniting the fragmented feudal law and to

³ The code was carved upon a black stone monument, eight feet high, and clearly intended to be reared in public view.

⁴ Johnson, Coleman-Norton & Bourne, *Ancient Roman Statutes*, Austin, 1961, pp. 9-18, n. 8 .

⁵ Stein P.: *Roman law in European history*, Cambridge University Press, 1999.

⁶ Amos S.: *The history and principles of the civil law of Rome: An Aid to the Study of Scientific and Comparative Jurisprudence*, Littleton, Colorado, 1987.

create law that regulated the relations in society in a methodical way. This purpose served the bourgeoisie's needs to make national states with one market and one law system⁷. The creators of the first civil codes enacted in the early 19th century were adherents of the Natural - Law School. Natural - Law School proclaimed the doctrine of equal rights of all people and their equality under the law. These ideas contributed to the realization of the idea of codification in the 19th century.

The first modern civil law codification is the French Civil Code⁸, known as Code Civile, enacted in 1804, and still in use today in France. The method of creating the French Code Civile was through the preparation of thirty separate laws in the civil law area which were consolidated into one law - Code Civile. Code Civil became a model for many countries that made codifications of their own private law. This code accepts the Gaius systematic, or the Institutional system that divides the private law into three areas: law of persons (personas), law of things (res) and law of lawsuits (actions). This system was adopted in the civil code of Austria, enacted in 1811⁹. On the other hand, the German Civil Code¹⁰, adopted in 1896 and entered into force in 1900, is structured according the pandectist system: general part, law of obligation, property law, family law and law of inheritance. This system was adopted later in the Swiss Civil Code of 1911.¹¹ Other modern civil codes are:

- Italian Civil Code (Codice civile) that was largely based on the French Civil Code, and entered into force in 1942;
- Turkish Civil Code of 1926 that was a full reception of the Swiss Civil Code;
- The Dutch Civil Code in 1992;
- Civil Code of the Russian Federation since 1994 and others.

1.3. The civil law codification on international level

The process of civil law codification is well known in the legislation with international character. At first, in the European Union a *Study Group on a European Civil Code*¹² was form to conduct comparative law research in private law in the various legal jurisdictions of the Member States and to produce a codified set of Principles of European Law for the law of obligations and core aspects of the law of property. On the other hand the need of common European private law was expressed in a work document called: *The private law systems in EU: Discrimination on grounds of nationality and the need for a European Civil Code*, issued in 2000¹³. This document examines, on the basis of a comparative study of legal provisions,

⁷ Enciklopedija imovinskog prava i prava udruženog rada (tom prvi), Beograd, 1978.

⁸ Code civil des Français, 1804 (Ordonnance n° 2004-164 du 20 Feb.2004).

⁹ Allgemeines bürgerliches Gesetzbuch (ABGB), 1811

¹⁰ Bürgerliche Gesetzbuch, 1896 (new version by promulgation of 2 January 2002 I 42, 2909; 2003, 738; last amended by Article 2 (16) of the statute of 19 February 2007 I 122)

¹¹ Das Schweizerische Obligationenrecht, 1911

¹² Official site <http://www.sgecc.net/pages/en/home/index.htm>

¹³ More on this document: http://www.europarl.europa.eu/workingpapers/juri/pdf/103_en.pdf, on 27 october 2013

the scope and need for the creation of a European Civil Code and the competence of the European Union to create such a code.¹⁴ Several groups are formed in EU for this purpose, covering different areas of private law. The result of their work is legal instruments known as Principles that codify different parts of the civil law. Today we know are:

- *Principles of European Contract Law*, also known as PECL, result of the work of the Commission on European Contract law (Lando commission)¹⁵
- *Principles of European Tort Law*, result of the work of The European Group on Tort Law (formerly also called "Tilburg Group")¹⁶
- *Principles of European Family Law*, result of the work of Commission of European Family law¹⁷

Apart from EU, there are global international attempts to codify areas of the civil law, like the *United Nations Convention on Contracts for the International Sale of Goods (CISG the Vienna Convention, signed in Vienna in 1980)*¹⁸ which codifies rules that govern contracts for the international sale of goods, as a significant part of the contract law, but mainly these attempts are effectuated through the work of UNIDROIT¹⁹, The International Institute for the Unification of Private Law. UNIDROIT is an independent intergovernmental organization whose purpose is to study needs and methods for modernizing, harmonizing and coordinating private and in particular commercial law as between States and groups of States and to formulate uniform law instruments, principles and rules to achieve those objectives. In this paper we are listing only part of them:

- *Convention relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods* (The Hague, 1 July 1964)²⁰
- *Unidroit Convention relating to a Uniform Law on the International Sale of Goods* from 1964²¹
- *Unidroit Principles of international commercial contracts* from 1994, 2004 and 2010 (three editions until current data)²²
- *Unidroit Convention providing a Uniform Law on the Form of an International Will* (Washington, D.C., 1973)²³
- *Unidroit Convention on International Factoring* (Ottawa, 1988)²⁴
- *Unidroit Convention on International Financial Leasing* (Ottawa, 1988)²⁵

¹⁴ See document: The private law systems in EU: Discrimination on grounds of nationality and the need for a European Civil Code available on : http://www.europarl.europa.eu/workingpapers/juri/pdf/103_en.pdf,

¹⁵ Official site http://frontpage.cbs.dk/law/commission_on_european_contract_law/, on 30 October 2013

¹⁶ Official web site of the group: <http://www.egtl.org/>, where the text of the principles is available

¹⁷ Official web site of the commission: <http://ceflonline.net/>, where the principles are available

¹⁸ Available on <http://www.cisg.law.pace.edu/cisg/text/treaty.html> on 27 October 2013

¹⁹ Unidroit's official web site is <http://www.unidroit.org>

²⁰ Available on <http://www.unidroit.org/english/conventions/c-ulf.htm> on 27 October 2013

²¹ Available on <http://www.unidroit.org/english/conventions/c-ulis.htm> on 27 October 2013

²² The third, new edition of the Principles is available in English on <http://www.unidroit.org/english/principles/contracts/principles2010/integralversionprinciples2010-e.pdf> on 27 October 2013

²³ Text available on <http://www.unidroit.org/english/conventions/1973wills/1973wills-e.htm>, on 27 October 2013

²⁴ Text available on <http://www.unidroit.org/english/conventions/1988factoring/main.htm> on 27 October 2013

²⁵ Text available on <http://www.unidroit.org/english/conventions/1988leasing/1988leasing-e.htm> on 27 October 2013

2. The codification of civil law in Western Balkans

European Union institutions and member states defined the "Western Balkans" as Southeast European area that includes countries that are not members of European Union (Serbia, Bosnia and Herzegovina, Montenegro, Kosovo, Macedonia and Albania - or Albania plus the former Yugoslavia, minus Slovenia and Croatia).²⁶ Writing about the Western Balkan civil law codifications require first a look into Yugoslavian civil law system. Yugoslavia was a country in the western part of Southeast Europe during most of the 20th century and today's western Balkan countries were part of it. Yugoslav Civil law belongs to the Germanic family of the Continental legal system. Historically, strong influences came from the General Civil Code of Austria, the German pandect division, and the Swiss Civil Code. "*French, German, and Austrian jurisprudence made an impact on Yugoslav civil law through the university careers and practice of Serbian foreign-educated lawyers*"²⁷.

The first important codification came as early as 1844, when the *Serbian Civil Code* was adopted. It remained effective in the Kingdom of Serbia and the respective part of Kingdom of Yugoslavia until 1946. Actually it represented a locally customized (by incorporating some Serbian legal customs) and abbreviated version of the General Civil Code of Austria. During the 19th century on the territory of the former Yugoslav republics, except in Macedonia, three civil codes were applied:

- *Austrian Civil Code of 1811*
- *Serbian Civil Code of 1844 and*
- *General Property Code of the Principality of Montenegro of 1888.*

Apart from this already existing civil codes that found their use into the former Yugoslavia, the federation did not achieve its own codification and therefore "*... in Yugoslavia there was neither legal uniformity nor a uniform civil code*".²⁸

The process of civil law codification took place in Yugoslavia as well but as a partial codification of the property law, law on obligations and law on inheritance that had resulted in the enforcement of several federal laws important for the civil law. These laws were:

- *Law on inheritance*, "Official Gazette FPRJ", No. 20/55;
- *Law on basic property relations*, "Official Gazette SFRY" No.6/80, 20/80 and 36/90;

²⁶ Western Balkans: Enhancing the European Perspective"Communication from the Commission to the European Parliament and the Council. 2008-03-05. Archived from the original on 9 April 2008. Retrieved 2008-04-08.

²⁷ Stanojevic O., Parivodic M.: *World law/Yugoslavia*, Jurist, July, 2000, available on 13 October 2013 on <http://jurist.law.pitt.edu/world/yugocor2.htm>

²⁸ Cserne P.:Drafting civil codes in central and eastern Europe – *A case study on the role of legal scholarship in law-making*, Pro Publico bono online, 2011, available on 15th October 2013 on <http://www.propublicobono.hu/pdf/Cserne%20P%20Tamop%201.pdf>

- *Law on obligations*, “Official Gazette SFRY “No. 29/78, 39/85 and 45/89.

As a result from all that is mentioned above, after the breakup of Yugoslavia, the successor states started from a position where the civil law was codified in separated laws, combined with the federal system which also concerned civil law because the competence of lawmaking in civil matters was shared between the republics and the federal level.

The status of most fragmented civil law among the ex-Yugoslavian republics belonged to Bosnia and Herzegovina. According to the 1995 Dayton Agreement²⁹, there is no legal uniformity in the state in civil law matters: the two entities (the Federation of Bosnia and Herzegovina and the Republic Srpska) and Brcko district have legislative competence and separate laws. The legal system of Bosnia and Herzegovina and the civil law is based on the Yugoslavian law tradition. To be more precise, on the territory of Bosnia and Herzegovina was applied the *Austrian Civil Code from 1811 (Allgemeines Bürgerliches Gesetzbuch)*. After the breakup of Yugoslavia in the area of property law in Republic Srpska still in use was the *Federal Law in basic property relations* (“Official Gazette SFRY “No.6/80)³⁰ while in the Federation of Bosnia and Herzegovina a new *Law on basic property relations* was adopted in 1998 (“Official Gazette FBiH”, br. 06/98), although these two acts don’t differ substantially.³¹ In Brcko district was adopted new *Law on property and other rights in real things* (“Official Gazette Brcko District BiH”, br.11/01, 08/03 and 40/04). With this act, the property law of Brcko District was reformed along the lines of Croatian law.³² The law of inheritance is still regulated with the *Law of inheritance* (“Official Gazette SR BiH”, No 07/80).

The area of obligations, in the entities civil law, was regulated with *the Federal Law on Obligations* that was enacted in 1978. In 2003 Draft of Law on obligations of Republic Srpska and the Federal Bosnia and Herzegovina³³ was prepared. The draft presents a thorough reform of the Federal law of obligations of 1978. It includes all the relevant decisions from the EU Directives in this area, and also regulates the relations that were not regulated with the federal law, such as lease of real estate and offices, leasing, franchise, etc.

In use are the following acts in the area of obligations:

- *Law on obligations in RS* (“Official Gazette SFRJ”, No. 29/78, 39/85, 45/89 and 57/89; Official Gazette RS, No. 17/93, 3/96, 39/03 and 74/04),
- *Law on obligations in FBiH* (“Official Gazette SFRJ”, No. 29/78, 39/85, 45/89 and 57/89;” Official Gazette FBiH”, No. 2/92, 13/93, 13/94 and 29/03).

Other legislation in the civil law area is:

- *Family Law in Republic Srpska*, “Official Gazette RS”, No. 54/02 and 41/08
- *Family Law of Federal Bosnia and Herzegovina*,” Official Gazette FBiH”, No.35/05
- *Family Law of Brcko District*, Official Gazette, “Official Gazette Brcko District BiH”, No.66/07

²⁹ More on the agreement available on 16 November 2013 on <http://www1.umn.edu/humanrts/icty/dayton/daytonaccord.html>

³⁰ Available in English on http://www.eulex-kosovo.eu/training/justice/docs/Law_on_Basic_Property_Relations.pdf on 17 October 2013.

³¹ Medić D.: *Hipoteka u budućem zakonodavstvu Bosne I Hercegovine*, Zbornik radova”Aktuelnosti građanskog I trgovačkog zakonodavstva I pravne prakse”, 6, Pravni fakultet, Mostar, 2008, page 201.

³² Ibid, page 200.

³³ Available on 17 October 2013 on <http://ruessmann.jura.uni-sb.de/BiH-Project/Data/Obligacije.pdf>

- *Law on industrial property in Bosnia and Herzegovina*, "Official Gazette BiH", No. 03/02 and 29/02
- *Law on Copyright and Related Rights in Bosnia and Herzegovina*, "Official Gazette BiH", No.07/02, 32/02 and 76/06 and others.

Analyses show that in Bosnia and Herzegovina *"There is no uniformity or a general tendency towards harmonization in the state, i.e. between entities. Up to now, the two entities have harmonized their new laws only in two particular areas (land registry, public notaries) but even this does not include the laws of the Brcko district. Thus, a new uniform civil code is clearly not on the agenda in Bosnia and Herzegovina. The most urgent and most complicated reforms concern property law which is currently a rather chaotic conglomerate of the remnants of socialist property rules and transplanted Austrian, German and US laws."*³⁴

The first codification in Montenegro is dating from 1888. It is the *General Property Code for the Principality of Montenegro (Opšti imovinski zakonik za Knjaževinu Crnu Goru)*³⁵ of 1888. The Code is known as a magnum opus of the Serbian scholar Valtazar Bogišić (1834–1908). The code was formally proclaimed on 26 April 1888 and came into force on 1 July the same year by Prince Nicolas decree. The structure of this code does not follow the Gaius systematic (the Institutional system), or the pandectist system. It doesn't include family and inheritance law, and has therefore been designated as property code. This code was in force on the territory of the Principality of Montenegro (1852 – 1910) that later became the Kingdom of Montenegro (1941-1944) in the area of the law of property and obligations. The family and inheritance relations, which were left out of this code, were regulated with the customary law. With the formation of the Federal People's Republic of Yugoslavia (FPRY) and the constitution that came into force in 1946, all the legislation was proclaimed out of force, including this code. Its' rules continued to be in use, but only as a rules of law that were in accordance with the new constitution and the new social, political and economic situation. This use of the code lasted until 1970's when in SFRJ new federal laws in the area of obligations, property and inheritance came into force³⁶.

Today, this code is part of the history of the Montenegro's legal system and Montenegro does not have civil law codification in force. The civil law areas are partially codified and regulated with the following separate laws³⁷:

- *Law on property relations*, "Off. Gazette of Montenegro" No.19/09;

³⁴ Cserne P.:Drafting civil codes in central and eastern Europe – *A case study on the role of legal scholarship in law-making*, Pro Publico bono online, 2011, available on 15th October 2013 on <http://www.propublicobono.hu/pdf/Cserne%20P%20Tamop%201.pdf>

³⁵ The original text of this code can be found in: Stupar M.: *Zbornik građanskih zakonika stare Jugoslavije*, Titograd, 1960, page 1-151.

³⁶ These laws are mentioned and listed in the report for the former Yugoslavian laws in civil law area.

³⁷ Other acts in the civil law area are the Law on State Property ("Off. Gazette of Montenegro", no. 21/09, 40/11), Law on Restitution Property Rights and Compensation ("Off. Gazette of Montenegro", no. 21/04, 49/07, 60/07, 12/07), Law on Housing and maintenance of residential buildings ("Off. Gazette of Montenegro", no. 04/11), Law on Expropriation ("Off. Gazette of Montenegro", no.55/00, 12/02, 28/06, "Fig. Gazette of Montenegro", no. 21/08), Law on Waters ("Off. Gazette of Montenegro", no. 27/07, no. 32/11), Law on Forests ("Off. Gazette of Montenegro", no. 74/10, no. 40/11).

- *Law on Obligations* “Off. Gazette of Montenegro”, no. 47/08;
- *Family Law* “Off. Gazette of Montenegro”, no. 01/07 and the;
- *Law on Inheritance* “Off. Gazette of Montenegro”, no. 74/08.

Other acts in the civil law area in Montenegro are:

- *The Law on State Property* “Off. Gazette of Montenegro”, no. 21/09, 40/11,
- *Law on Restitution Property Rights and Compensation* (“Off. Gazette of Montenegro”, no. 21/04, 49/07, 60/07, 12/07),
- *Law on Housing and maintenance of residential buildings*, “Off. Gazette of Montenegro”, no. 04/11,
- *Law on Expropriation*, “Off. Gazette of Montenegro”, no.55/00, 12/02, 28/06, “Fig. Gazette of Montenegro ”, no. 21/08,
- *Law on Waters*, “Off. Gazette of Montenegro”, no. 27/07, no. 32/11,
- *Law on Forests*, “Off. Gazette of Montenegro”, no. 74/10, no. 40/11.

In Serbia, *the Federal Law of obligations from 1978* (with a major revision in 1993) is still applicable, and in the area of property law Serbia has kept the *Law of basic property relations*³⁸ with its amendment in 1996.³⁹

There have been several new partial codifications in other legal areas between 2003 and 2005, including property law, family law, succession, company law, and labor law. They are presented with the following legislation:

- *Law on mortgage* , “Official Gazette” RS No. 115/05
- *Law on copyright and related rights*, “Official Gazette of Serbia and Montenegro” No. 61/04
- *Law on patent* , “Official Gazette of Serbia and Montenegro” No.32/04
- *Law on legal protection of designs*, “Official Gazette of Serbia and Montenegro” No. 61/04
- *Family Law*, “Official Gazette RS”, No. 18/05 and others⁴⁰.

Discussions on a new uniform civil code in Serbia started in 2002. An important argument for codification was the historical reference to the first Serbian codification from 1844 (which was itself an adaptation of the ABGB). In 2006, upon a parliamentary decision, the government appointed a commission for the drafting of a new civil code. In 2007 they published a book on the general aims of the codification and a set of questions and possible answers on diverse legal issues in order to generate public debate. In 2009 a draft of book 4 on the law of obligations was published. The Code itself is planned to follow the German model, including general rules and principles of private law (Book 1), family law (Book 2), and the law of succession (Book 3), the law of obligations (Book 4) and property law (Book 5). The drafters rely on an eclectic mix of foreign models, including European law and PECL.⁴¹

During its existence as an independent State, Albania has had two different Civil Codes. The first, adopted in 1928, was a draft prepared by a Commission of five members, which was

³⁸ Official Gazette SFRY No. 6/80

³⁹ Official Gazette SRJ No. 29/96

⁴⁰ Available on 19 October 2013, on <http://www.parlament.gov.rs/akti/doneti-zakoni/doneti-zakoni.1033.html>

⁴¹ Rad na izradi Građanskog Zakonika Republike Srbija – Izveštaj Komisije sa otvorenim pitanjima, Komisija za izradu Građanskog Zakonika, Vlada Republike Srbije, Beograd, 2007 p. 83.

strongly patterned on the French (1804 Code Civil) and Italian (1865 Codice Civile) models. The second Civil Code of Albania, adopted in 1981, was inspired by Marxist-Leninist doctrine. Technically, it contained elements of the Soviet model, but it also followed a German pattern which was also reflected in Soviet codifications. *"In consequence, at the start of the transition in 1990, very basic legal institutions were missing, such as general full legal capacity, freedom of contract and unlimited debtor's liability"*.⁴² In the early 1990s, there was a comprehensive and relatively quick legal reform in the country, with massive assistance from a large number of international organizations and foreign entities, including the IMF, the World Bank, the German, Dutch, Italian governments, the Soros Foundation, the "International Development Law Institute", the American Bar Association, and Task Force Albania set up by the Council of Europe. The drafting process of a new civil code was long and complex, at least compared to other statutes that were adopted with much haste.⁴³ The drafters relied on both previous codes but neither could be directly used. Therefore, they mainly relied on more recent Western European models (on the table the Albanian legislators had the Italian Civil Code, the Swiss Civil Code in an Italian translation, the French Civil Code, the new Dutch Civil Code in a French and English translation, the old Communist code and the IMF draft prepared by professor Ajani). *"The project stressed as particularly important the adoption of new legislation in the field of civil and commercial law for three main reasons. It is hoped that (i) it will provide the legal framework for develop a market economy, (u) it will be a guarantee of social order, and (m) that it will encourage economic cooperation with other countries and international organizations."*⁴⁴

The civil code entered into force on 1 November 1994.⁴⁵ *The Civil code of the Republic of Albania (Law No 7850 of 29 July, 1994)* is consisted of five parts, following the German tradition: general part, ownership and property, inheritance, obligations and contracts.

Other laws in the civil law area are⁴⁶:

- Law No 7892/1994 on Sponsorship
- Law No 8153/1996 on Orphans
- Law No 8312/1998 for Non-divided Agricultural Lands
- Law No 8318/1998 on Leasing the agricultural land which are State property
- Law No 8561/1999 on Expropriation of Property
- Law No 9126/2003 on explosives for civil use
- Law on leasing the agricultural land, forest land

⁴² Larouche P., Cserne P.: *National legal systems and globalization: New role, continuing relevance*, Springer, 2012, p.61

⁴³ According to <http://www.propublicobono.hu/pdf/Cserne%20P%20Tamop%201.pdf>.

⁴⁴ Stolker von C.J.J.M.: *Drafting a new Civil Code for Albania - Some personal experiences contrasted with the World Bank's Initial lessons'*, available on 22 October 2013 at https://openaccess.leidenuniv.nl/bitstream/handle/1887/1302/174_031.pdf?sequence=1

⁴⁵ Cserne P.: *Drafting civil codes in central and eastern Europe – A case study on the role of legal scholarship in law-making*, Pro Publico bono online, 2011, available on 15th October 2013 on <http://www.propublicobono.hu/pdf/Cserne%20P%20Tamop%201.pdf>

⁴⁶ These acts are available on <http://www.lexadin.nl/wlg/legis/nofr/eur/lxwealb.htm>, on 20 October 2013.

The first codification in Macedonia was made in 1992, and it involved only one area of the civil law – the family law. It resulted with the adoption of *Family Law*⁴⁷. The Family Law was codification of three acts: *Law of marriage, Law on the parent – children relationship and Law on custody*. In 1996 new *Law on Inheritance* was adopted. The provisions of this law were based on the *Law on Inheritance* in Yugoslavia.⁴⁸ Macedonian *Law on obligations was adopted in 2001 in Official Gazette RM No. 18/01*. The law was based on the Federal Law on obligations from 1978, but with changes and adjustments that suit the new social and legal relations. The new provisions in the republic Law on obligations involve changes when interest is in question, both contractual and default interest. Changes were made in the area of contracts through two approaches: firstly the legislation of some of the existing contracts mainly the contract of sale, the contract of exchange and the contract of loan was changed in order to be consistent with the changes in the property law area.⁴⁹ The second form of changes was: regulating some contracts that were not regulated in former Yugoslavian law, and also weren't regulated with Macedonian republic laws. These contracts were: the contract of association, contract of gift and contract of loan for use, while the contract for lifelong support and the contract for transfer of property during life were taken out of the Law on inheritance. Other changes were made with the novella of the *Law on obligations* in 2008, “Official Gazette RM”, No. 84/2008, mainly for Macedonian law of obligations to be consistent with the European Union Directives and modernization of the law's text. Some of the changes and additions concern the basic principles, contracting, contracting capacity, forms of contract, and especially the area of tort law where new provisions on damage and liability were brought to the Law of obligations, etc.⁵⁰ The legal doctrine in Macedonia is in stance that some questions that are regulated with the Law on obligation relations should be part of the general part of the Civil code that is planned for future and exempt from the Law mentioned above. Here we are talking about the types of civil law capacity, terms and conditions, prescription, etc.

The law of property was partially codified with the adoption of *the Law on property and other property rights*.⁵¹ This is a general and systematic law that leaves the opportunity for some questions to be regulated with *lex specialis*. Special laws in the area of property law in Macedonia are:

- *Law on privatization and lease of construction land in state property*, “Official Gazette” RM, No. 4/05
- *Law on contractual pledge*, “Official Gazette RM”, No. 5/03
- *Law on agricultural land*, “Official Gazette RM”, No. 137/07
- *Law on forests*, “Official Gazette”, No. 47/97

Other laws in the civil law area in Macedonia are:

- *Law on copyright and other related rights*, “Official Gazette RM”, No. 47/96, 03/98, 98/02, 04/05 I 131/07

⁴⁷ Official Gazette RM No. 80/92, 09/96, 19/00, 79/01, 38/04, 60/05, 33/06 and 84/08.

⁴⁸ Official Gazette FPRY No. 20/55

⁴⁹ In the property law the public property was replaced with private property

⁵⁰ More about the Novella from 2008 in Галев Г., Дабовиќ – Анастасовска Ј.: *Облигационо право*, Скопје, 2008;

⁵¹ Originally Закон за сопственост и други стварни права, Official Gazette RM, No. 18/01, 31/05 and 92/08.

- *Law on industrial property*, “Official Gazette RM”, No. 47/02, 42/03, 09/04, 39/06 and 79/07
- *Law on protection of topography of integrated circuits*, “Official Gazette”, No. 05/98 and 33/06.

The process of making the Macedonian civil code has started in 2011 with the formation of the *Commission for preparation of civil codification*. This commission was formed by the government of Macedonia and it is planned for its’ work to last five years. It is expected for the Macedonian civil code to provide modernization of the legal decisions in the civil law area and to contribute to building a consistent system of civil law. But, still ahead are many questions and decisions that the commission should resolve in order to create a civil code. Basic thing for every process of civil law codification is the choice of model of codification. There are two existing models of codification that we already mentioned: *Gaius systematic, or the Institutional system* which divides the private law into three areas: law of persons (personas), law of things (res) and law of lawsuits (actions) and *the pandectist system* which divides the civil law into five parts: general part, law of obligation, property law, family law and law of inheritance. Regarding the existing laws in Macedonian legal system which regulates the parts of law mentioned in the pandectist system, it seems like the choice of this system, or method of codification is obvious choice, but it is left for the commission to make the decision. To this we may add that the pandectist system is more modern and coherent system compared to the institutional system. Other question about the method of codification are: should family law be a part from the codification, should the industrial property law be included in the code as one of its separate parts, should the commercial contracts be separated from the civil code and be regulated will commercial code, to what extent will the international legislation, models, principles and rules be included in the text, etc. All of this questions, as well as the draft of the civil code are still in the process of seeking the answer and making a draft version of Macedonian civil code and it is soon expected for the final result to be presented, and hopefully enforced, so that Macedonia will get own civil code, for the first time in the history.

3. Concluding remarks

The process of the modern civil law codification started taking place in the legal system of separate states in the 19th century. The first modern civil law codification is the French Code Civile, enacted in 1804, and still in use today in France. This code sets up a model of codification that is accepted by other states and used as a basis for their codification. Another model of codification is set by the German civil code which differs from the French model. The codification of the civil law is a goal for the private law in the European Union and the process of codification is in progress through the work of different commissions, but the codification is achieved only partially with the sets of principles in the contract, tort and family law. At last, the process of codification has taken its’ place on the international level, but only in the form of partial codification, that is codification of contract law.

Analyses of the civil law legislation and codification in Western Balkans show two different situations: one in the former Yugoslavian republics and another in Albania. Starting with

Albania, we can say that the process of codification of civil law that took place in this country was finished long ago. On the other hand the process of codification in the former Yugoslavian republics has started from the period of the federation but is not yet completed. During the existence of Yugoslavia separate areas of civil law were codified in separate laws that were in use as a federal law in all of the republics. The civil law was codified in the *Law on basic property relations*, *Law on inheritance*, and *Law on obligations*. These three laws were the foundation on which the former Yugoslavian republics started building their own partial civil law codifications. Today, we can say that steps have been made towards codification of the civil law but only in separate areas, and not on the civil law as a branch (body) of law. From what we presented as a civil law codification in separate areas in different states we can conclude that all the states are on a similar if not same level when the codification is in question and they are facing the same dilemmas and challenges as they work towards this codification, but different results have been achieved. The process of codification has started officially in Serbia, as well as in Macedonia, and it is only an idea for Montenegro and Bosnia and Herzegovina. It seems like it is more difficult for Bosnia and Herzegovina to follow this idea, which is understandable because of the fragmentation of the civil law, the abundance and diversity of legislation in this area and the lack of their full horizontal compliance. This are some of the reasons leading to the conclusion it would be useful to seriously re-examine the possibilities, needs and expediency for civil law codification in Bosnia and Herzegovina, while Macedonia and Serbia are expecting to get new modern civil codes that will provide modernization of the legal decisions in the civil law area and to contribute to building a consistent system of civil law.

Bibliography

1. Amos S.: *The history and principles of the civil law of Rome: An Aid to the Study of Scientific and Comparative Jurisprudence*, Littleton, Colorado, 1987;
2. Bojović, J. R.: *Usvajanje teksta Opšteg imovinskog zakonika za Knjaževinu Crnu Goru*. Podgorica, 1992;
3. Cserne P.: *Drafting civil codes in central and eastern Europe – A case study on the role of legal scholarship in law-making*, Pro Publico bono online, 2011, available on 15th October 2013 on <http://www.propublicobono.hu/pdf/Cserne%20P%20Tamop%201.pdf>;
4. Enciklopedija imovinskog prava i prava udruženog rada (tom prvi), Beograd, 1978;
5. Forum za građansko pravo za jugoistočnu Evropu: *Izbor radova i analiza, Knjiga II*, Druga regionalna konferencija, Skoplje, 2012.
6. Johnson, Coleman-Norton & Bourne, *Ancient Roman Statutes*, Austin, 1961;
7. Larouche P., Cserne P.: *National legal systems and globalization: New role, continuing relevance*, Springer, 2012;
8. Medić D.: *Hipoteka u budućem zakonodavstvu Bosne I Hercegovine*, Zbornik radova "Aktuelnosti građanskog i trgovačkog zakonodavstva i pravne prakse, 6, Pravni fakultet, Mostar, 2008;
9. Rad na izradi Građanskog Zakonika Republike Srbija – Izveštaj Komisije sa otvorenim pitanjima, Komisija za izradu Građanskog Zakonika, Vlada Republike Srbije, Beograd, 2007;
10. Stanojevic O., Parivodic M.: *World law/Yugoslavia*, Jurist, July, 2000, available on 13 October 2013 on <http://jurist.law.pitt.edu/world/yugocor2.htm>;
11. Stein P.: *Roman law in European history*, Cambridge University Press, 1999;
12. Stolker von C.J.J.M.: *Drafting a new Civil Code for Albania - Some personal experiences contrasted with the World Bank's 'Initial lessons'*, available on 22 October 2013 at https://openaccess.leidenuniv.nl/bitstream/handle/1887/1302/174_031.pdf?sequence=1;
13. Stupar M.: *Zbornik građanskih zakonika stare Jugoslavije*, Titograd, 1960;
14. Western Balkans: Enhancing the European Perspective"Communication from the Commission to the European Parliament and the Council. 2008-03-05. Archived from the original on 9 April 2008. Retrieved 2008-04-08;
15. Галев Г., Дабовиќ – Анастасовска Ј.: *Облигационо право*, Скопје, 2008;