

ESSENTIALS OF THE CIVIL LAW CODIFICATION PROCESS (THE CASE OF REPUBLIC OF NORTH MACEDONIA)

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Abstract

Historically, the social context of the states that sought to complete the civil law through codification referred, inter alia, to the need to build or strengthen the national unity, integrity of the state and society, economic valorization of society through economic development and, in this regard, increasing the trust in the legal system and strengthening the legal security among citizens. The process of collecting and arranging the laws that regulate social relations with property effect into a code, scientifically ordered, and promulgated by legislative authority is called civil law codification. The most significant civil law codification is the Corpus Juris Civilis, issued by the Roman Emperor Justinianus Primus and the first modern civil law codification is the French Civil Code, enacted in 1804, and still in use today in France. In the Republic of North Macedonia since its independence, the legal gaps, inconsistencies and contradictions that existed in the laws governing private matters has imposed the need of codification in the field of civil law. In 2011, the Government has established a Civil Law Codification Commission, which was supposed to prepare the Civil Code in 5 years. But after 9 years the process is not completed yet. This paper will evaluate the development of civil law codes through the ages, the characteristics of the ongoing process of civil law codification in North Macedonia, the possibility to include the family law into the Civil Code, the development of the civil law codification processes in the countries in the region and the reasons and importance for adopting a Civil Code in general and in North Macedonia specifically. The objective of these analysis is to help the process of adopting a Civil Code in North Macedonia that will integrate the norms that regulate civil law relations in one legal text in a comprehensive and systematic manner, thus obtaining a new quality in the regulation of civil law, in the direction of greater internal harmonization, compliance of the law and creating legal and economic security.

Keywords: *Civil Code, Codification Commission, Obligations, Successions, Family Law*

INTRODUCTION

Private law rules require performance of contracts and respect for another's interests, both personal and proprietary. The precise meaning of the concept of private law differs between legal systems. (Alpa, 2000; Kennedy, 2006) Since the civil law is derived from the private law, in order to be a complete system, requires ex ante, and not ex post, in the legislation and its application and scientific processing, complete and organized, non-contradictory system of concepts and rules. A civil code would supply part of the detailed articulation of an economic and social constitution for the countries. These elementary rules provide the foundation for civil

society by guiding, channeling and regulating social and economic interaction between individuals and business organizations. (Collins, 2008) The civil code is a cross-section of the existing situation in society, but a cross-section that certainly does not close the evolution of law. Functioning of a system regulated by the rules of civil law is crucial for the functioning of society as a whole. Hence, a regulated system of civil law principles, i.e. the rules contained in them are important prerequisite for the functioning of this system.

It is therefore quite difficult, almost impossible, to have a single civil code at European level, primarily because each legal system must contain authentic legal norms that govern the civil relations between citizens in a given society and there cannot be societies with identical civil codes. That is why in this paper, in addition to the review of the most influential civil codes, a review will be made of the codification processes within the European Union. Also, essential in the process of drafting a civil code is the need of it. Not every society is mature enough for the adoption of a civil code, not every state has the political and social circumstances to adopt a civil code and not every legal system has norms that regulate civil law relations that need to be integrated in a complex, complete and harmonized system. Therefore, this paper will explain the necessity of adopting a civil code in North Macedonia and the characteristics of the process of its drafting in recent years.

1. HISTORY AND DEVELOPMENT OF THE CIVIL LAW CODES

In Europe there are two different legal traditions - common law and the civil law legal tradition. The main characteristic of the civil law traditions is the written law that contains legal rules that can be applied in different legal cases. The role of the courts in the countries that have accepted the civil law legal tradition is not to pass the law, but only to apply the written law.

Other important characteristic of civil law legal tradition is the tendency for the written law to be systematically classified in one integral legal text – codification. The first known codes include the Code of Hammurabi, c.1780 BCE and the Law of the Twelve Tables called *Lex Duodecim Tabularum*. The Law of the Twelve Tables forms the foundation of the whole fabric of Roman law. 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 Roman Emperor Justinian I. (Apple & Deyling, 1995) The *Corpus Juris Civilis* was a comprehensive reduction of Roman Law to a single, written text. It was divided into basic sections familiar to those with knowledge of today's civil codes: of Persons (Family Law), of Things (Property Law), and of Obligations (Contracts and Torts). In the years following, this comprehensive text spread throughout Europe. During the period between the 11th and 15th Centuries, Roman Law was revived and studied by scholars in Italy, and some customary law was incorporated. 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 laws.¹

¹ See Code of Justinian, Encyclopedia Britannica, 2019, Available at: <https://www.britannica.com/topic/Code-of-Justinian>

As far as the modern codification of civil law is concerned, the modern codes, which seek to organize the law coherently and systematically on the basis of solidly constructed scientific and political ideas, appeared in Europe in the middle of the 18th century. Historians and jurists discern two principal historical reasons for the appearance of these codes. The first and primary one is the influence of the scientific and political ideas of the Enlightenment; the second reason relates to changes in the law that resulted from the centralization of political power and the rise of the modern national state. (Kedar, 2007)

In France, Napoleon Bonaparte spearheaded the development of the modern civil code, and its dissemination in the countries he conquered. In 1800, he appointed four distinguished lawyers that produced the Code Civil des Français (a.k.a. the Code Napoléon) in 1804 that consisted of three books and over 2000 articles. The basic structure of the Code Napoléon is as follows: General Principles: Publication, application, and effect; Book I (Arts. 7-515): Status of persons, marriage, divorce, and paternity; Book II (Arts. 516-710): Real and personal property; and Book III (Arts. 711-2281): Contracts, torts, and security Interests.²

In Germany, in 1873, a German commission was established to bring a uniform civil code to the newly-unified German state. The comprehensive German Civil Code (Bürgerliches Gesetzbuch/BGB) was approved in 1896, and it went into effect on January 1, 1900. The basic structure of the BGB is as follows: Book I: General principles, definitions, prescriptive periods, and classification of legal acts; Book II: Contracts and torts; Book III: Real and personal property; Book IV: Family law including marriage; and Book V: Law of succession, wills, etc.³

The need for harmonization in the European Union brought on a process of de-codification, creation of international law, and necessity for re-codification of civil law. The process of decodification, according to scholars, resulted from social, economic and political changes during the 20th in the European Union. All the changes on social, economic and political level demanded regulation that was enforced by passing special laws to regulate the new legal relations. These special laws are enforced together with the enforcement of the civil codes, and they usually refer to matters not regulated by the civil codes. The creation of international laws in the European Union, or more precisely European laws such as: conventions, covenants, international agreements, directives and other legal documents that bind the European countries also influenced the application of the existing civil codes (Zivkovska & Przeska, 2014). The process of decodification of the civil law in the 20th century required proliferation of additional specialized legislation, such as labor codes; delegation of authority to the executive branch; judge-made law, such as the torts/consumer protection jurisprudence in France and Germany. The changes in the legislation of European countries lead to the process of re-codification of civil law. The process of re-codification is a process that provides new legal solutions that need to be implemented in existing civil codes. The process of re-codification will ensure the modernization of the law by taking articles from recently passed special laws and incorporating such articles in the civil codes.

² See French Civil Code, Available at: <https://www.trans-lex.org/601101/ /french-civil-code-2016/>

³ See German Civil Code BGB, Available at: https://www.gesetze-im-internet.de/englisch_bgb/

2. CIVIL LAW CODIFICATION PROCESS IN THE REPUBLIC OF NORTH MACEDONIA

The first codification in North Macedonia was made in 1992, and it involved only one area of the civil law – the family law. The Family Law was codified in three acts: Law of marriage, Law on the parent – children relationship and Law on custody. (Family Law, Official Gazette of the Republic of Macedonia 80/92) In 1996 new Law on Inheritance was adopted. (Law on Inheritance, Official Gazette of the Republic of Macedonia 47/96) The provisions of this law were based on the Law on Inheritance in Yugoslavia. Macedonian Law on Obligations was adopted in 2001 and was based on the Federal Law on Obligations from 1978, but with changes and adjustments that correspondent to the new social and legal relations. (Law on Obligations, Official Gazette of the Republic of Macedonia 18/2001) The property law was partially codified with the adoption of the Law on Property and other Real Rights. (Law on Property and other Real Rights, Official Gazette of the Republic of Macedonia 18/2001) This is a general and systematic law that leaves the opportunity for some relations to be regulated with *lex specialis*. In comparison with other Western Balkan countries regarding the civil law codification, Serbia adopted the first civil law code in 1844 and in the present moment there is a new process of codification of civil law that is officially started; in Montenegro – first civil law codification was in 1888 and there is partial codification today; in Bosnia and Herzegovina there is no uniformity or a general tendency towards harmonization; and in Albania two different Civil Codes were adopted in 1928 and 1981, and the existing civil code entered into force on 1 November 1994 and consists of five parts, following the German tradition: general part, ownership and property, inheritance, obligations and contracts⁴.

The idea for drafting a Civil Code of Republic of North Macedonia was initially presented in 2009 in the Project for Drafting the Civil Code prepared by the Ministry of Justice. In 2011, a Commission for drafting the Civil Code was promulgated with Decision of the Government of Republic of North Macedonia. The Commission decided that the Code will be drafted according to the pandect system rather than the institutional system. The Commission also decided that the content of the Macedonian Civil Code will consist of 4 parts: General part; Property law; Obligations and; Successions. It was decided that the Family Law won't be a part of the Civil Code, although some national legal systems include family and domestic relations within this category, though the central focus of private law always concerns the economic and productive relations between ordinary people.

It is debatable not to codify the Macedonian Family Law, especially since the Family Law has not undergone significant reforms for more than 25 years, despite the fact that in recent decades there have been radical changes in marital and family relations in North Macedonia. Of course, it is not necessary for the Family Law to be part of the Civil Code, but if we take into account that the Inheritance Law was decided to be part of the Civil Code and the need for reforms in the Inheritance Law arises primarily from the large transformations in marital and family relations, then it is logical to conclude that the Family Law should not be left out of the Civil Code given the connection between the reforms in Family and Inheritance Law.

⁴ See Civil Code of the Republic of Albania (1994). No. 7850. Available at: <http://www.cclaw.al/wpcontent/uploads/law/The-Albanian-Civil-Code.pdf>

In 2014, the Commission prepared draft versions of Book 3 - Obligations and Book 4 – Successions within the Civil Code of the Republic of North Macedonia. Public debates and scientific conferences were organized with experts in the field of civil law-professors, judges, attorneys and others in order to discuss the draft texts, the novelties and the whole process of civil law codification in general.

In general, the Commission decided that in the process of creation of the Macedonian Civil Code, the principles of equality of the parties and the autonomy of will should be especially taken into account and the protection of those principles must be developed on a higher level than what is the case in the existing laws. Also, it was decided that the Civil Code must provide better legal and economic security of the parties that will eventually advance the stability of civil-law relations.

The novelties in Book 3 - Obligations can be considered as small in scope, however, the new systematics, incorporation of new contracts and the introduction of different legal arrangements for some agreements would satisfy the need of the parties for better regulation of the obligatory relations, acquisition of new rights and increase the protection of the rights in practice. The third book of the Civil Code that refers to the obligations is divided into six parts; part one: occurrence of obligations, part two: effects of obligations, part three: termination of obligations, part four: various types of obligations, part five: change of the creditor or the debtor, part six: separate contracts. (Draft version of the Civil Code of Republic of Macedonia Book 3 - Obligations, 2014) As far as the Book 4 – Successions is concerned, the Commission has prepared significant reforms in the inheritance legislation that refer to the introduction and detailed regulation of the inheritance contract, regulation of the legal right on inheritance of the posthumously conceived child, introduction of the possibility for the extramarital partners to appear as legal heirs, change of the legal nature of the right to a necessary part of the inheritance that will have an obligatory legal nature, introduction of the notary will, establishment of the register of wills, provision of the exclusive competence of the notaries in the field of inheritance agreements, etc. (Draft version of the Civil Code of the Republic of Macedonia Book 4 - Successions, 2014)

3. REASONS FOR CIVIL LAW CODIFICATION IN REPUBLIC OF NORTH MACEDONIA

The significance of the civil law codification is indisputable and comprehensive. Together, the legal rules integrated in the civil codes construct a framework that ensures respect for personal dignity. At the same time these rules articulate principles and values regarding fairness and justice in social and economic relations with others. By combining these elements, a Civil Code describes a web of standards that comprise an economic and social constitution for society. This framework enables individuals to interact, to create reciprocal bonds, to form associations, to mix and to be inclusive. A Civil Code also initiates a process that leads to popular acceptance of this economic and social model. Every assertion of rights and obligations arising under the private law rules of the code implies an acceptance of its standards of justice and fairness. (Chalmers, 2003) There will be many benefits for the Macedonian society if a Civil Code is adopted.

An essential benefit is the imperative to harmonize Macedonian regulations and legal practice with European *acquis communautaire*, on one hand, and the case law of the European Court of human rights, on the other hand, which by its legal force dominantly direct the Macedonian legal

order. The Civil Code would help a lot in reforming the legal system of North Macedonia after its accession into the European Union.

Thus, the ultimate and essential goal of the Civil Code is to reinforce the concept of the rule of law, which is a constant shortcoming and constant remark by the European Commission on Republic of North Macedonia⁵ and the Western Balkan countries in general.

Another element that needs to be taken into account is the effort within the European Union itself for a greater degree of harmonization of civil law, especially contract law and tort law. Despite numerous discussions and disagreements over whether the future of the European civil law should be the foundation of European continental law, especially French or German law, or Anglo-Saxon law, there are certain areas in which there are established common solutions in European secondary law, especially through European Union directives. About one hundred legal instruments of the European Union refer to civil law. When it comes to international civil law, it achieves its full meaning through direct legislative activity of international organizations, of which it is the richest activity of the European Union. The adopted standards apply directly to all Member States.

The existence of civil law codification does not deny the possibility that certain social relations and legal institutes are regulated by special laws, which, however, cannot be in conflict with the code, which is the *lex generalis*. On the other hand, a large number of regulations in one legal system opens not only the problem of their transparency but also applicability, because the regulations that are enacted rapidly, especially in transitional societies, are often in collision, and when there is a conflict within the national legal system, there is regularly a problem with the legal standards of the European Court.

According to eminent lawyers, the advantages of civil law codification significantly overcome possible shortcomings, and the advantages are: concentrated elaboration of constitutional principles of civil law; greater accessibility and easier visibility of solutions when they are in one place than when they are scattered in different laws; removal of existing ambiguities, gaps and contradictions and preventing their occurrence, and the need for compliance; formation of general legal norms valid for all or a number of parts, sparing from repeating the same norms wherever they are relevant; better visibility of the principle which permeate a number of parts, as well as a better overview of where and in which parts there are deviations from the principles required; creating a general framework and points of reference for the specific legislation.

Also, in this important area for a better quality of citizens of life for and more successful functioning of their associations, it is necessary to harmonize legal solutions with ratified international conventions, international standards, in order for the legislation in force would not be partial, incomplete and inconsistent. Therefore, the Civil the code would provide all legal subjects, both citizens and legal entities, in one complete, mutually harmonized legal act, to have a corpus of all civil subjective rights which will facilitate their application and significantly expand preventive action of civil law institutes, which are of special importance for everyday life of citizens and legal entities.

⁵ See European Commission Working Document, North Macedonia 2019 Report, Chapter 23, Available at: <https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/20190529-north-macedonia-report.pdf>

CONCLUSION

Starting from the current state of legislation in the field of civil law relations in North Macedonia, established case law and developed legal theories, all the necessary conditions have been created for the codification of civil law in the form of a Civil Code of North Macedonia.

Codified civil law legal framework will contribute to the increase of the legal and social security of all legal subjects and will also contribute to the harmonization of the civil law in North Macedonia with the European Union legislative. It will speed up the necessary integration processes which include the construction of a modern legal system in harmony with the *acquis communautaire*, that presupposes a Civil Code, which in its comprehensiveness integrates the norms that regulate civil-legal relations in a unified system without contradictions. That's an important condition for further prosperous development of North Macedonia, its citizens and legal entities.

The Civil Code will be general for all the laws that will be part of it. In this way, it will be much easier to find the legal answers and the process of adopting amendments to the laws will unfold with a slower pace and with higher level of logical reasoning. It is worth noting that in recent years in North Macedonia there has been overproduction of laws, frequent amendments and updates to the existing laws without prior analysis that created a confusion in the application of such laws by the interested parties. On the other hand, the Civil Code would deal with the laws that have not been amended since the independence of the state, partiality of the laws, non-systemic laws, many laws that contain its own general principles and provisions, which creates chaos and disorder, issues that, in certain cases, should be regulated by law, are regulated with bylaws, laws that contain two or more different solutions that govern the same issue etc. The Civil Code will facilitate the work of the ministries responsible for managing the process of harmonization of legislation. Judges competent to decide in the area of civil law would perform their duties easily since they will have a single codified set of law. All interested subjects - the academic community, the media, the researchers and others, will not seek the help of experts for finding, reading and interpreting individual laws from the civil area, but will know that there is one code that has all the answers.

They will blame me tomorrow, for absolutism and autocracy. They will wonder if the system I built marked the end of one epoch and opened another. It's a matter of political ideas, and you have them as much as you want and they often produce lawlessness. Corpus juris civilis will produce righteousness and the name Justinianus refers to justice. Therefore, I have no choice. If you want you may accuse me tomorrow for everything I did, and the others did not.

(Justinianus Primus on the Corpus Juris Civilis)

REFERENCES

1. Alpa, G. (2000). *European Community Resolutions and the Codification of Private Law*, European Review of Private Law, p. 321.
2. Apple, G. J., and Deyling P. R. (1995). *A Primer on the Civil-Law System*, Federal Judicial Center, pp: 3-16.
3. Chalmers, D. (2003). *The Reconstitution of European Public Spheres*, European Law Journal, p. 127.
4. Civil Code of the Republic of Albania. (1994). No. 7850. Available at: <http://www.cclaw.al/wpcontent/uploads/law/The-Albanian-Civil-Code.pdf>
5. Codification Commission. (2014). Draft version of the Civil Code of the Republic of Macedonia book 3 Obligations.
6. Codification Commission. (2014). Draft version of the Civil Code of the Republic of Macedonia book 4 Successions.
7. Collins, H. (2008). *The European Civil Code: The Way Forward*, Cambridge University Press, pp. 4-7.
8. European Commission Working Document, North Macedonia 2019 Report, Chapter 23, Available at: <https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/20190529-northmacedonia-report.pdf>
9. Family Law, Official Gazette of the Republic of Macedonia 80/92
10. French Civil Code, Available at: https://www.trans-lex.org/601101/_french-civil-code2016/
11. German Civil Code BGB, Available at: https://www.gesetze-im-internet.de/englisch_bgb/
12. Kedar, N. (2007). *Civil Codification, Law and Culture in a Mixed Legal System*, Bar-Ilan University Public Law and Legal Theory Working Paper No. 07-04 January, Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=957592 pp. 8-15.
13. Kennedy, D. (2006). Thoughts on Coherence, Social Values and National tradition in Private Law, in M.W. Hesselink (ed.), *The Politics of a European Code*, The Hague: Kluwer Law International.
14. Law on Inheritance, Official Gazette of the Republic of Macedonia 47/96.
15. Law on Obligations, Official Gazette of the Republic of Macedonia 18/2001.
16. Law on Property and other Real Rights, Official Gazette of the Republic of Macedonia 18/2001.
17. The Editors of Encyclopedia Britannica, Code of Justinian, Encyclopedia Britannica, inc. 2019, Available at: <https://www.britannica.com/topic/Code-of-Justinian>
18. Zivkovska, R., Przeska, T. (2014). *Codification of the Civil Law in the Republic of Macedonia*, Journal of the Faculty of Law in Nis, Serbia, 68, pp. 253-254.