Dušan NIKOLIĆ*

CODIFICATION OF CIVIL LAW IN SERBIA, MONTENEGRO AND JAPAN IN THE XIX CENTURY (A COMPARATIVE APPROACH)

1. INTRODUCTION

The codification of civil law in Serbia, Montenegro and Japan was carried out in similar circumstances. Prior to the enactment of the Code, social relations were governed by customary and moral rules. Disputes were resolved out of court, based on the decisions of family elders and in various conciliation proceedings. The changes took place in all three countries under the direct or indirect political influences and pressures of Western countries. The modernization of civil law and codification represented a kind of Europeanization or wider — westernization of legal regulations.

Circumstances and development paths were surprisingly similar. Over the course of several decades, officials from countries on the other side of the World have uttered almost identical sentences, facing the same challenges. However, the results of the codification work and their effects were not the same. An explanation for this can be found in a short essay written as part of the 150th anniversary of Columbia University in New York, which points out the following: "Countries that transplanted legal systems wholesale by and large have less effective legal institutions today then countries that developed their law internally."[1]

---

* Prof. Dr. Dr. h. c. Dušan Nikolić, University of Novi Sad, Faculty of Law

[1] Katharina Pistor, The Codification of Law and the Transplant Effect, in: Sesquicentennial Essays of the Faculty of Columbia Law School (1858–2008), Columbia Law School 2008, p. 182.

This paper analyzes the historical experiences of all three countries. It should be emphasized that this is not an academic "comparison for the sake of comparison" ("*La comparaison pour la comparaison*") but an analysis whose results could be useful to legal policy makers and legislators, who are wise enough to learn from others' mistakes but also to follow well-thought-out steps taken by others before them.

Readers will notice one major disproportion in this paper. The codification of civil law in Serbia and Japan is discussed in several tens of pages. Only a few paragraphs are dedicated to the work of Valtazar Bogišić and the General Property Code, in which the connection between the Serbian and Montenegrin legal heritage is mostly pointed out. There are several reasons for this. This small study combines the results of decades of research into the history of civil law in Serbia and comparative research into Japanese primary culture begun in 2004, during a several-month study stay at the Max-Planck Institute for Comparative Law in Hamburg. A more detailed research of the codification work of Valtazar Bogišić is yet to come. That is why the privilege and honor to speak and write about him belongs exclusively to the hosts of this international scientific symposium.

2. CODIFICATION OF CIVIL LAW IN SERBIA[2]

2.1. PRE-HISTORY OF THE CODIFICATION

2.1.1. CIVIL LAW IN MEDIEVAL SERBIA

The earliest data about the Serbs and their settlement in the Balkan Peninsula are contained in *De administrando imperio*, document of 10th century, written by the Byzantine Emperor Constantine VII Porphyrogenitus. The author states that the Serbian people moved to that territory in the first half of the 7th century. The Serbs initially lived in regions that the Byzantines called *Sklaviniae*. In that areas, in the domain of civil law, the old Slavic customs were initially applied. Conditions for the development

[2] This part of the paper is largely based on the following works: Dušan Nikolić, *Elements of Judge-made Law in the Serbian Legal System — Serbian national report*, in: *Precedent and the Law*, (Ed.: E. Hondius), Brussels, Bruylant, 2007; Dušan Nikolić, *Development of the Property Law in Serbia — Both Autonomous Legal Development and Legal transplantation*, in: *Private Law in Eastern Europe — Autonomous Developments or Legal Transplants?* (eds.: C. Jessel-Holst, R. Kulms, A. Trunk), Tubingen, Mohr Siebeck, 2010, pp. 237–267; Dušan Nikolić, *Independence and social influence of a meritorious legal elite in Serbia*, in: *Fair Reflection of Society in Judicial Systems. A Comparative Study*, (ed. Sophie Turenne), Edition: Ius Comparatum — Global Studies in Comparative Law, Springer, Berlin — Heidelberg, 2015; Dušan Nikolić, *Uvod u sistem građanskog prava*, 15th edition, Centar za izdavačku delatnost Pravnog fakulteta u Novom Sadu, Novi Sad, 2019, pp. 75–101.

of autochthonous legislation were created only when the first Serbian state was formed in the 9th century, under the Vlastimirović dynasty.[3]

Serbia was at the peak of its power in the 14th century, during the reign of Emperor Stefan Dušan from the Nemanjić dynasty. The state, which was proclaimed an empire in 1346, covered nearly two hundred thousand square kilometers. It was economically stable, culturally developed and well organized. According to a well-known Croatian historian, "The central state government was already so strong that it subjugated the centrifugal elements of the nobility and secured its unique political system, but it failed to completely liquidate the political power of the feudal oligarchy, as the later feudal absolute monarchies in the West did. But while that West was still imbued with feudal political particularism, Dušan's Serbia was already clearly on the path to the establishment of absolutism."[4] Such circumstances were favorable for creation of uniform legal regulations.

In 1349, Dušan's Code came into force. The Code was written under the influence of the Byzantine legal culture and fully corresponded to the circumstances in the then Serbia. Some very advanced normative solutions can be found in it.[5] However, the vast majority of legal norms relate to the field of public law. Civil law matters were treated only in fragments. Dušan did not go deeper into the private law relations. Most of them were still governed by the rules of customary law.

During the reign of the Nemanjić, the reception of Roman law was gradually carried out in the west of Europe. The effects of that process could be felt to some extent in Serbia as well. The influence came from the neighboring Hungary and Dubrovnik. Thanks to trade and various forms of cooperation, in some areas of civil law, a partial reception of the Roman legal heritage indirectly occurred. Some authors believe that before the end of the Middle Ages, Serbia was "much closer to the Central European countries than to the Byzantines" in terms of the development of the legal regulations.[6]

After Dušan's death in 1355, retrograde processes began. Weakened by internal divisions, Serbia lost the battle of Kosovo in 1389, and its statehood

---

[3] See: *Istorija naroda Jugoslavije,* (editors: Bogo Grafenauer, Dušan Petrović, and Jaroslav Šidak), Beograd, 1953, p. 231.

[4] Ferdo Čulinović, *Državnopravna historija jugoslavenskih zemalja XIX i XX vijeka* (Srbija, Crna Gora, Makedonija, stara Jugoslavija (1918–1941), nova Jugoslavija), Knjiga II, Zagreb, 1959, p. 7.

[5] See: Srđan Šarkić, *Srednjovekovno srpsko pravo*, Novi Sad, 1995, p. 80.

[6] Konstantin Jireček, Jovan Radonić, *Istorija Srba* (Kulturna istorija, knjiga II), Beograd, 1984, p. 117.

in the mid 15th century, when Sultan Mehmed II the Conqueror turned it into a Turkish province.

2.1.2. CIVIL LAW DURING THE TURKISH OCCUPATION

During the occupation that lasted for several centuries, the Serbian people mostly lived in accordance with the customary law. It developed under a strong influence of the Turkish authorities and the Eastern culture.

Serbs lived in large patriarchal communities called *porodična zadruga (family commune)*.[7] Like Roman *familia*, *zadruga* represented a community of people and goods in which a special legal regime was in force. The members of the zadruga freely disposed only of personal property which included movables of lesser value intended for everyday use. Collective property, which was created for generations, was indivisible and belonged to all members of the family. It was managed by the family elders. One part of the collective property, the so-called *pivot* (root, lasting property, heritage[8]) was inalienable and was preserved for the future generations. The customary fideicommissum provided the existential security and was of crucial importance for families living in the occupied territories.

Life within the zadruga took place in accordance with the customary rules and decisions of the family elders. The elders enjoyed high authority and had broad powers. Their decisions greatly influenced many aspects of the daily life of the zadruga members. The elders also played a significant role in relations with the outside world. They bought, sold, borrowed, etc., on behalf of the zadruga.

Relations between the various communities were governed by the customary law. Disputed issues were most often resolved amicably by the elders of the disputed zadrugas, in accordance with the customs and with the mediation of third parties (friends, neighbors, etc.). If the dispute could not be resolved peacefully, the decision was made by the knez (Prince) on the basis of custom and his own understanding of justice.

2.1.3. RESTORATION OF STATEHOOD AND EUROPEANIZATION OF CIVIL LAW IN THE FIRST HALF OF THE 19TH CENTURY

2.1.3.1. THE PERIOD OF THE FIRST SERBIAN UPRISING

Already at the time of the First Serbian Uprising against Turkish occupation, which started in 1804, under the leadership of Djordje

[7] See: Živojin Perić, *Kategorije porodicâ i porodičnih zadrugâ u Srpskom pravu*, Arhiv za pravne i društvene nauke, knjiga XXXII/1936, p. 411.

[8] See: Branislav Nedeljković, Istorija baštinske svojine u novoj Srbiji od kraja XVIII veka do 1931, Beograd, 1936.

Petrović-Karadjordje, there were efforts to establish a modern state and to regulate all important social relations by law.

One of the main protagonists of that idea was a Serb from Austria, Teodor Filipović, a prominent lawyer and professor of the History of Law at the University of Kharkov, who was known among the insurgents under the pseudonym Božidar Grujović. Contemporaries thought that Grujović's efforts were reasonable, but that their implementation in the circumstances of the time would have been premature. History has shown that in the periods of revolutionary turmoil, it is very difficult to create a stable legal system and order because revolution implies a completely different way of organizing and acting.[9]

Russia's representative in insurgent Serbia, Konstantin Rodofinikin, also advocated for the introduction of law. He suggested to the leader and members of the Governing Council of Serbia to adopt parts of certain Russian laws. Official preparations for the reception began as early as August 1809, when Pavle Popović was sent to Russia to look for "books that contain Russian laws, in order to extract from them the laws that are appropriate for us and by which we could be governed."[10] However, that plan was not realized because the insurgent government, apparently, did not have a serious intention to carry out the reception of Russian law.

There are data that in 1810, Karadjordje and the Council requested that a copy of the French Civil Code from 1804 be bought in Ljubljana (Today a capital of the Republic of Slovenia). Historians believe that, as in the case of Russia, it was just a skilful diplomatic move by which the insurgents wanted to secure the favor of the great powers. Approaching France was of strategic importance because it was in an alliance with Turkey at the time.[11] Gaining the favor of that, undoubtedly the most powerful, European state could have contributed to the successful end of the Serbian revolution. On the other hand, those familiar with the domestic situation undoubtedly knew that a sudden transition to written law would have destabilized the Serbian society, which for centuries lived under Turkish domination and in conditions that differed significantly from those that existed in the developed countries of Central and Western Europe.

The period of the First Serbian Uprising thus passed without concrete results in the field of codification of civil law.

---

[9] See: Leopold Ranke, *Serbien und die Türkei*, Leipzig, 1879; Dragoslav Janković, *Istorija države i prava Srbije u XIX veku*, Beograd, 1952, p. 10.

[10] According to: Dragoslav Janković, *op. cit*., p. 33.

[11] See: Budimir Košutić, *Ideja revolucije i država naroda srpskog*, Anali Pravnog fakulteta u Beogradu, 4–6/1998, p. 331.

2.1.3.2. THE PERIOD OF THE SECOND SERBIAN UPRISING

Courts were already formed in Serbia during the First Serbian Uprising. However, there were no written laws in the area of civil law, so disputes were often resolved in the old way. The situation did not change significantly during the Second Serbian Uprising, which started in 1815 under the leadership of Miloš Obrenović.

In the uprising period, Miloš Obrenović ruled according to the patterns of a patriarchal society. He was considered the father of the people or, as it could be said in the spirit of that time, the head of a large Serbian zadruga. The Prince generally acted in accordance with tradition and the customary law.[12] However, at that time, new social relations were developing in Serbia, which were not regulated by customs. The Prince decided on them, adhering to the "common sense" and his own understanding of justice and fairness. Many considered such a way of regulating social relations unacceptable. The Prince was accused of trying to avoid passing laws in order to preserve a regime based on arbitrariness.

2.1.3.2. REQUIREMENTS FOR THE LEGAL STATE AND POLITICAL PRESSURES

Over time, dissatisfaction grew so much that Miloš Obrenović was publicly requested to begin the process of creating a modern legal system by passing basic laws, among which the Civil Code was especially important. Political pressure was exerted by the Prince's comrades-in-arms from the uprising period, a small number of domestic financial elites, and representatives of foreign countries who occasionally stayed in Belgrade.

The Prince's legal policy was also criticized by Serbian intellectuals in Austria. Some of them tried to encourage the legislative process. Thus, the Timisoara lawyer Maksimilijan Simonović translated the Austrian General Civil Code of 1811 from German into Serbian and then adapted it to the circumstances that existed in the then Serbia. The text was supposed to be printed in Vienna in 1828, but the author did not get the consent of the War council.[13]

2.1.3.3. PRINCES'S LEGISLATIVE INITIATIVE

Miloš Obrenović himself saw that changes were inevitable, and he soon made the decision to begin official preparations for the adoption of the

[12] See: Slobodan Jovanović, *Političke i pravne rasprave*, Beograd, 1908, p. 279.

[13] Detailed: Aleksa Ivić, *Neuspeli pokušaj štampanja zakona za Srbiju 1828*, Arhiv za pravne i društvene nauke, vol. X, no. 5/1931, p. 361–363.

Serbian code. Many historians claim that the Prince did not have a serious intention to introduce written law. The statements of his contemporaries also indicate that. The Prince's secretary Dimitrije Davidović said that "he doesn't care about the law" and that "he loves to be without the law." Writing about domestic politics, reformer of the Serbian language, Vuk Stefanović Karadžić stated that the Prince "as soon as the word came out, that it is better to rule and manage without law (...) because, he says, that is how a man binds himself to paper, so he can do neither evil nor good."[14] On the other hand, there are records that testify to the fact that Miloš Obrenović proudly announced the imminent adoption of the *Civil Code*,[15] which was mentioned in the writings of Vuk Karadžić as *Code Milosch*. There is no doubt that the Prince liked that allusion to the French *Code Napoléon* and that he somehow saw himself in the role of a great Serbian ruler and legislator. All in all, legislative work began in Serbia in the late 1820s.

2.2. HISTORY OF THE CODIFICATION

2.2.1. THE FIRST PREPARATORY WORKS

In the year of 1828, Vuk Karadžić was invited by Dimitrije Davidović to translate the French *Civil Code* of 1804 "word for word, just to be understood, and later the commission will (...) choose what is fit for the Serbs."[16] [In this context, it should be noted that an almost identical sentence was uttered by the Minister of Justice of Japan in similar circumstances, a few decades later, on the other side of the world]. Serbian Prince was "determined to issue civil laws, according to the nature and customs of his people."[17] It was planned that translations of foreign regulations would serve as a kind of reference point in legislative work and that normative solutions from French law would be taken only to the necessary extent. From the official correspondence that followed in 1829, it can be seen that the duties were later changed. The translation of certain parts of the French *Civil Code* was entrusted to the Greek Georgi Zachariades, the teacher of Miloš's son Milan. The translator did not speak French, so he translated the text from German. In addition, Zachariades did not know enough about the Serbian

[14] According to: Dragoslav Janković, *op. cit*., p. 59.

[15] The literature cites a letter to Petar II Petrović Njegoš dated 12 November 1830, in which Prince Miloš proudly announces that the laws are already ready for printing. See: Aleksa S. Jovanović, *Rad na "toržestvenim zakonima",* Arhiv za pravne i društvene nauke, 1/1911, p. 12.

[16] Aleksa S. Jovanović, *Rad na "toržestvenim zakonima",* Arhiv za pravne i društvene nauke, 4/1909, p. 17.

[17] *Ibidem*.

language, and even less about the legal terminology. All that affected the quality of the translation. Words of Vuk Karadžić "that nothing can be understood, and in some places a man would die laughing while reading his translation", also testify to that.[18] In such circumstances, it was certain that the legislative work would not be easy at all and that it would not be completed in six months, as planned by the Prince's secretary.

In order to speed up the adoption of the Code, a special, *Legislative Commission* was formed at the suggestion of Vuk Karadžić. However, there were no educated lawyers among its members, so from the very beginning there were doubts about the positive outcome of the whole endeavor. This problem was also pointed out by some Serbs from Austria who followed the legislative work in Serbia. There are documents which show that it was proposed that Prince send a capable young man to study law in Bonn, where French private law was in force at the time, and thus encourage the creation of professional staff who could provide professional assistance to the legislature, and later to those who would be in charge of the practical application of legal norms. However, Miloš Obrenović supported the idea only a few years later. In the meantime, the Commission consisted of the same members. They tried to understand the meaning of the legal institutes contained in the French Civil Code and to correctly translate their titles (names) into Serbian, but these attempts were often unsuccessful. Even today, anecdotes are told about the Commission whose members thought that *servitude* meant *slavery*, and that a *hipoteque* in French language (English: *mortgage*) was a *pharmacy* (in Serbian: *apoteka*). Prince Miloš publicly expressed his dissatisfaction with all that, when in 1834 he reviewed the legislative projects.[19]

The Prince knew that legislative projects could not be successfully completed without educated lawyers. However, in the beginning, the composition of the Commission probably did not bother him because he did not have a serious intention to significantly change the way of governing. Legislative work had been going on for years to the satisfaction of all actors. The members of the Commission were satisfied because they were well paid. Miloš's opponents were also satisfied because they expected that the laws would be adopted sooner or later and that the Prince's arbitrariness would end. Finally, the Prince himself was satisfied with the work of the Commission, because his position did not change over the years. However, over time, dissatisfaction among the people began to grow, and with it the political pressures of those who demanded that social relations be regulated

[18] Aleksa S. Jovanović, *op. cit*, p. 258.
[19] According to: Slobodan Jovanović, *op. cit*., p. 276.

according to the model of more developed European countries. In 1835, a revolt broke out in Serbia (*Mileta's revolt*) due to the constant delay in creating the legal system. The Prince then decided to ask for professional help from abroad.

2.2.2. FOREIGN INFLUENCES

2.2.2.1. THE ENGLISH INFLUENCE

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

2.2.2.2. THE 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 the Serbs needed a constitution and that the basic laws regulating civil and criminal matters 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. Prince 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.

2.2.2.3. THE AUSTRIAN INFLUENCE

In 1836, at a suggestion of his secretary Dimitrije Davidović, and with the mediation of the Austrian Consul Antun Mihanović, Prince Miloš Obrenović asked the Austrian authorities to approve Vasilije Lazarević, the mayor of the City of Zemun, and Jovan Hadžić, senator of the Novi Sad Magistrate, to move to Serbia to participate in legislative work. A few months later, future lawmakers arrived in Serbia. They were first asked to review the material prepared by the Legislative Commission. Lazarević and Hadžić determined that the proposed text actually represents a translation of Napoleon's Code and that its adoption would be a big mistake because Serbia was at a much lower level of social development than France. In their opinion, the normative solutions from the French law did not correspond to the situation in the then Serbia, which after centuries of Turkish occupation was economically underdeveloped, culturally backward, and without educated

lawyers who would be able to understand the meaning of the legal norms and the appropriate methods of their application. Referring to those facts, Lazarević and Hadžić proposed to the Prince that a completely new code be drafted, which would be based on customs and already existing decrees, with full respect for the tradition and peculiarities of the Serbian people.

2.2.3. THE SECOND PREPARATORY WORK

In 1838, a new Legislative Commission was formed, whose members were in charge of assisting two Serbs from Austria in their legislative work. Lazarević was then entrusted with drafting the Criminal Code, and Hadžić was entrusted with drafting the Civil Code. The drafting was preceded by several months of preparations. From August 1838 to January 1839, Jovan Hadžić collected material on the national spirit, customs, habits and domestic circumstances, about which he received information from the Prince's officials. After that, he was hired to work on other legal projects. He did not fully dedicate himself to the drafting of the *Civil Code* until the middle of 1840. He then concluded a contract with the Serbian government on the drafting, which stipulated that the work would be completed within two years. It was also agreed that the author would work on that project in Novi Sad and that he would submit a report to the client every three months.

2.2.4. CIVIL CODE FOR THE PRINCIPALITY OF SERBIA

In September 1842, Jovan Hadžić handed over a text to Prince Alexander, which was basically an abbreviated and somewhat modified version of the Austrian *Civil Code*.[20] The draft was adopted with certain changes on

[20] Hadžić merged certain provisions, and omitted some altogether. Thanks to that, he managed to reduce 1502 paragraphs of the Austrian Civil Code to 950. However, the general opinion is that the summary was done with many omissions and that because of that the Serbian code, unlike the Austrian one, was insufficiently systematic, inconspicuous, and often unclear. The Civil Code for the Principality of Serbia was written according to the institutional (tripartite) system and consisted of an introduction and three parts.

The introduction contained general principles which were divided into two sections. The first was called *On Civil Laws in General*, and the second, *Basic Features of Justice and Justice in Civil Laws*.

The first part of the Code was, in the spirit of Gaius' tripartition, dedicated to the personal rights. It regulated the following issues: 1. About persons and personal rights according to their own characteristics; 2. On the rights and duties of the spouses; 3. On the rights and duties of parents and children, and 4. Guardianship.

The second part of the Code is entitled On Real Rights. However, it does not regulate only the matter of real law. There are two sections in that part of the Code. The first is dedicated to real and inherited law. It covers the following issues: 1. About things and

March 11, 1844, and entered into force fourteen days later under the name of the *Civil Code for the Principality of Serbia*.

The adoption of Hadžić's project was of great historical significance. Serbia was one of the few countries in Europe that had a civil code at the time.[21] It also determined the basic directions of development of civil legislation. Having carried out a partial reception of the Austrian law, Serbia joined the German legal circle (legal tradition) to which it still belongs today. Finally, it should be said that the adoption of normative solutions from foreign law has accelerated changes in society. Serbia began to develop in accordance with the legal standards that were valid in Central and Western Europe.

Besides all that, the Civil Code had many shortcomings.

---

rights to things; 2. On the state and the right to hold; 3. About property, i. e. property rights, especially inheritance rights; 4. About obtaining things; 5. Acquisition of things by increment and appendage; 6. On obtaining things by delivery; 7. About the pledge; 8. About servitudes; 9. On heritage; 10. About a will or bequest; 11. On the content, meaning, and interpretation of the will; 12. About how the testator can dispose of his property; 13. On the inventory of the remaining property; 14. About division; 15. On inheritance rights and relations in the zadruga, and 16. On inheritance in the absence of a legal order and legal heirs. The provisions of the second section, which dealt with the law of obligations, regulated the following issues; 17. About contracts in general; 18. About gifts; 19. About a hoard or bequest; 20. About order or service; 21. About the loan; 22. On power of attorney and record keeping; 23. About change; 24. On sale and purchase; 25. About lease; 26. About rent; 27. About partership; 28. On marriage contracts; 29. On contracts daring or gambling, and 30. On compensation for damages.

The third part was called: General determinations for personal and real rights. It regulated the following issues: 1. On the manner in which rights and obligations are determined; 2. On modification (change) of rights and obligations; 3. How rights and obligations cease, and 4. On statute of limitations. More details, with comments and references: Gojko Niketić, *Građanski zakonik Kraljevine Srbije*, protumačen odlukama odeljenja i opšte sednice Kasacionoga suda, Beograd, 1909.

[21] According to the data we have, the following European countries fo the time had original codification of civil law in the modern sense: Bavaria (*Codex Maximilianeus Bavaricus Civilis* from 1756), France (*Code civil des Français* from 1804, later known as *Code Napoleon* or *Code civil*), and Austria (*Allgemeines bürgerliches Gesetz-buch* from 1811). The French Civil Code was partially adopted by the Swiss cantons of Vaud (1819), Fribourg (1834), and Ticino (1837). In the Netherlands, the Code (Burgerlijk Wetboek) came into force in 1838, which was also, for the most part, based on normative solutions from French law. The Austrian Civil Code was partially adopted by the Swiss cantons of Bern (1826), Aargau (1828), Solothurn (1831), and Lucerne (1841). The French Code civil was entirely, and for a long time, introduced 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 fully valid in the territories that were under the Habsburg rule. The data are based on preliminary research conducted in collaboration with Dr. Nataša Hadžimanović.

The Civil Code became a subject of criticism immediately after its publication. One of the main objections was that Jovan Hadžić did not understand the true meaning of the Serbian zadruga and that by taking inappropriate normative solutions from foreign law, he contributed to the disintegration and disappearance of such communities.[22] Some authors believe that this led to impoverishment of Serbian families and destabilization of the entire society, the consequences of which are still felt today. Of course, there are different opinions in theory. For instance, Slobodan Jovanović, a famous professor of the University of Belgrade Faculty of Law believed that Jovan Hadžić only accelerated a process that was otherwise inevitable.[23] The assessment of the Code made by professor Dragoljub Arandjelović at the beginning of the 20th century is also interesting: "Our civil code is a first class legal unicum. Hardly another editor of a law could be found, with whom the inability to compile the code would be as pronounced as with the editor of our code."[24]

In order to alleviate the growing discrepancy between the normative solutions the and legal practice, the Code was amended several times.[25] However, a full audit was never performed. Partial amendments contributed to making the already insufficiently systematic Code even less clear and understendable for the people. Therefore, already in the second half of the 19th century, the prevailing opinion in the professional public was that the problem could only be solved by passing a completely new code.

2.2.5. DEVELOPMENTS

2.2.5.1. EUROPEANIZATION OF CIVIL LAW AND FOREIGN INFLUENCES IN THE SECOND HALF OF THE 19TH CENTURY

2.2.5.1.1. PLANNED FORMATION OF THE SERBIAN INTELLECTUAL AND LEGAL ELITE

Legislative work clearly pointed out the weaknesses of the Serbian society, which at that time was trying to integrate into the European civilization sphere. The population was mostly illiterate and uneducated. There were no educated lawyers in the country. There was also a lack of legal infrastructure

[22] See: Živojin Perić, *Zadružno pravo po Građanskom zakoniku Kraljevine Srbije*, Beograd, 1912; Živojin Perić, *Zadružno nasledno pravo po Građanskom zakoniku Kraljevine Srbije,* Beograd, 1913; Živojin Perić, *Porodično zadružno pravo u Crnoj Gori,* Branič, 11–12/1925, pp. 217–222; Živojin Perić, *Porodično zadružno pravo u Hrvatskoj i Slavoniji*, Arhiv za pravne i durštvene nauke, vol. XI, pp. 349–384.

[23] Slobodan Jovanović, *op. cit*, p. 285.

[24] Dragoljub Arandjelović, *Rasprave iz privatnog prava*, Beograd, 1913, p. 145.

[25] See: changes of 1864, 1869, 1872 and 1911.

for the implementation of modern normative solutions from the developed European countries. However, the biggest problem was that there was no intellectual elite in Serbia that could direct the development of the society in the right way. There was a lack of a critical mass of educated people capable of understanding the events in the environment, of thinking critically about them, and of making decisions of strategic importance on the path to European integration. As it has already been said, this was pointed out by Serbian intellectuals from Austria, but also by Vuk Stefanović Karadžić in a letter he sent to Prince Miloš Obrenović in 1832. There is no doubt that Prince was also aware of the problem. Although he himself was illiterate, and at the same time a bitter opponent of many innovations from the West, towards the end of the insurrection period, he began to send young people to study abroad.

The planned creation of the intellectual elite began only in 1839, according to a program drawn up by the then Minister of Education. Since then, every year a certain number of state cadets were sent to the leading European universities. It is estimated that around 1,300 students from various professions were educated in that way until the First World War.[26] Most of them studied law, because the creation of legal staff for the needs of the state bodies was one of the national priorities. Thanks to the good development policy, that the state has been continuously pursuing for decades, regardless of who was in power, a strong intellectual elite was created.[27] This contributed to Serbia becoming one of the leading countries in the region. Educated lawyers, and above all those who worked at the Law Department of the Lyceum, and later at the Faculty of Law in Belgrade, were well acquainted with both foreign law and domestic circumstances. They were aware of the problems that arose in the previous period due to the inconsistency of the adopted normative solutions and the real needs of the legal practice. Hence, already in the second half of the 19th century, requests emerged for a reform of the domestic private law, soon followed by the first legislative projects, this time prepared by domestic experts.

2.2.5.1.2. WEAKENING OF THE GERMAN AND STRENGTHENING OF THE FRENCH INFLUENCE

A similar development policy was pursued throughout the Balkans after the liberation from the Turkish rule. However, unlike the neighboring

[26] See: exhaustively documented work of Ljubinka Trgovčević: *Planirana elita*, Beograd, 2003.

[27] According to some estimates, as much as 70% of the Serbian elite at that time were educated at universities in Central and Western Europe. Many intellectuals were scholarship holders of the Serbian government, but there were also those who were educated at their own expense. See: Ljubinka Trgovčević, *op. cit,* p. 44.

countries which, in terms of civilization, and thus legally, were mostly connected to only one of the more developed countries of Central and Western Europe, Serbia tried to get to know the culture and the legal heritage in a much wider area, through its cadets. Serbian students were most often educated at the leading German universities in Halle, Leipzig, Jena, Heidelberg, Munich, and Berlin. A significant number of students studied in the neighboring Austria-Hungary, in Vienna, Krakow, Brno, Bratislava, and others. Meanwhile, over time, there were more and more of those who opted for law studies at the Sorbonne in Paris and at other French universities. The state even stimulated students to occasionally move from one European country to another, in order to get to know the Western culture, customs, and legal systems there as much as possible. Thus, over time, it became common for Serbian students from German universities, at the end of their studies, to transfer to the Faculty of Law in Paris. Students from Serbia were educated in slightly smaller numbers at universities in Russia. However, there were few lawyers among them because at that time Russian legal science was not sufficiently developed. (There is written data that Gligorije Trlajić, a Serb from Austria, wrote and published the first studentbook dedicated to civil law in St. Petersburg in 1810, thus laying the foundations for Russian civil law education and science. Until then, Russian civilians were educated at a specialized seminar for private law in Berlin, as well as at other universities abroad).[28] Since the 1860s, more and more students were educated at the Swiss universities, in Zurich, Geneva, and Bern. (It is interesting that Slobodan Jovanović, who later became one of the most famous professors at the University of Belgrade, also studied as a Serbian cadet at the Faculty of Law in Geneva). Before the end of the 19th century, students from Serbia enrolled en masse in French and Swiss universities. The consequences of this orientation were noticeable in legal theory, but also in legislative projects from that time. The influence of the French doctrine began to grow at the expense of the hitherto dominant German legal tradition.[29]

2.2.5.1.3. SERBIAN COMMERCIAL CODE OF 1860

A turning point in the legal policy was made by the codification of commercial law, which was carried out in the mid 19th century. In January 1860, the *Commercial Code for the Principality of Serbia* came into force, which was written in accordance with the normative solutions taken from the

[28] See: V. I. Grigorovič, *Srbi u Rusiji*, (saopštio Sava Petrović), Letopis Matice srpske, 120/1879, p. 191, etc.

[29] See: Božidar S. Marković, *O metodi u privatnom pravu*, SCI, Novi Sad, 1998.

French *Code de commerce*. In that way, the commercial law of Serbia was harmonized with the legal standards that were applied in Western Europe.[30]

2.2.5.2. DRAFT THE PROPERTY CODE FOR THE KINGDOM OF SERBIA (1908–1914)

As it was said, the Civil Code from 1844 had been criticized by the professional public since its entry into force. Initially, there was a commitment to a thorough revision of all disputed and inappropriate provisions. However, over time, the prevailing opinion was that Serbia needed a new, modern, and original code. The formation of that attitude was decisively influenced by the lawyers who studied at foreign universities. On the other hand, the political elite also had before them a positive example embodied in the *General Property Code for Montenegro*. The agreement of the profession and the politics contributed to the beginning of preparations for a reform of civil law at the end of the 19th century. However, this process took a very long time. Legislative work was started only at the beginning of the 20th century. This prompted Dragoljub Aranđelović, a professor at the Faculty of Law in Belgrade and a later law writer, to say in a critical review of the issue: "And there was time for everything, but not for the reform of the Civil Code, the cornerstone of all private law relations in the state ... "[31]

The commission for drafting the new code was formed in 1908. Its task was to normatively shape the matter of the General part, Property, Contracts, and Torts (i. e. Obligations) law.[32] Other segments, in the opinion of the editor, should have been regulated by special regulations, in order to avoid frequent amendments to the code. The reasonableness of such a solution was indicated by the experience of countries that have opted for a similar normative concept, and above all the experience of the neighboring Montenegro. The professional public rightly expected that the new code would be written on the model of modern Swiss legislation. However, the *German Civil Code* from 1896 was taken as a basis.

The project was completed in 1914, just before the beginning of the First World War. In the conditions of war, the work on the adoption of the code could not be continued, and then unification followed. Circumstances then changed significantly and the project remained unrealized.

---

[30] See: St. J. Veljković, Objašnjenje trgovačkog zakonika za knjažestvo Srbiju, Beograd, 1866.

[31] Dragoljub Aranđelović, *op. cit,* p. 145.

[32] More: Živojin Perić, *Jedan nov rad na kodifikaciji privatnog prava*, Arhiv za pravne i društvene nauke, vol. X, no. 6/1911.

2.2.5.3. UNIFICATION, LEGAL CONTINUITY, AND LEGAL PARTICULARISM

After the unification, in 1918, in the territory of the Kingdom of Serbs, Croats and Slovenes, there was a pronounced particularism in almost all areas of law. In accordance with the principle of legal continuity, the existing regulations were applied. In the territory of Serbia and today's Vardar Macedonia (in the area of the Court of Cassation in Belgrade and the courts of appeal in Belgrade and Skopje), the Civil Code from 1844 was applied.

In Montenegro (in the area of the Grand Court in Podgorica), the General Property Code for Montenegro, from 1888, was in force. In Slovenia and Dalmatia (in the area of Section B of the Zagreb Table of Seven and the appellate courts in Split and Ljubljana), the Austrian Civil Code was applied, with the so-called war novels from 1914, 1915, and 1916. In Croatia (excluding Dalmatia, Istria, and Međumurje) and Slavonia (in the sub-area of Section A of the Zagreb Table of Seven, i. e. the Bansko Table), the following were in force: unveiled Austrian Civil Code (General Civil Code), autonomous Croatian property law created before unification, and ecclesiastical (canonical) law. In Bosnia and Herzegovina (in the area of the Supreme Court in Sarajevo), the Austrian Civil Code was applied in the area of property relations, while in the area of family and inheritance law, church canons and customary rules applied to Christians, and Sharia law to Muslims.

In the area of Međumurje, Prekomurje, and Vojvodina (without Srem, and with a part of Baranja), customary and judge-made (precedent) law was applied.[33] Exception was the area of the former Military Krajina. There, as *ius particulare*, the Austrian Civil Code was applied.

2.2.5.4. PRE-DRAFT OF THE NEW CIVIL CODE (1930–1935)

A commission for drafting a unified civil code was formed in 1930 at the Ministry of Justice. From the very beginning, it was faced with a multitude of problems of both legal and political nature. Differences in the legal development of certain areas were a particular difficulty. It is believed that the working group decided to take the Austrian Civil Code from 1811 as a starting point precisely because of that inequality. Namely, it was considered that this code is much closer to the average of the law that was applied in the Kingdom, than the Swiss civil legislation or, for example, the

[33] See: Dušan Nikolić, Private Law in Vojvodina in the First Half of the 20th Century: A Functional Model of a Mixed Legal System, u knjizi: Öffnung und Wandel — Die internationale Dimension des Rechts II, Herausgeber: (eds: Tomislav Boric, Brigitta Lurger, Peter Schwarzenegger, Bernd Terlitza), Wien, LexisNexis, 2011, стр. 525–533.

German Civil Code of 1896. In addition, almost all legal sub-branches before the unification developed to a greater or lesser extent under the influence of the Austrian law. It had directly or indirectly become part of a common legal tradition. Therefore, it was expected that the official adoption of normative solutions from the Austrian Civil Code would provoke the least resistance in the political and the professional public. However, the estimates were wrong. The preliminary draft of the new Civil Code, better known as *Pre-draft*, was completed in 1934. The following year, the project was submitted to the Ministry of Justice. Shortly afterwards, a public debate was opened, which included public institutions, professional associations, and prominent individuals, most of whom were university professors, judges, and lawyers. The *Pre-draft* suffered numerous criticisms.[34] The proposed provisions were criticized, as was the determination of the legislators to take the Austrian Civil Code as a basis. Many believed that modern Swiss legislation should have been relied on,[35] and there were those who argued that the country needed an original codification, which would equally respect the domestic tradition and the heritage of the countries of Central and Western Europe.[36] The General Property Code for Montenegro was cited as a positive example. Due to these disputes, but also due to the political changes that followed the assassination of King Alexander, in Marseilles, in 1934, the *Pre-draft* never entered the parliamentary procedure.

13. Works on a single civil code in Socialist Yugoslavia (1955–1971)

After the end of the Second World War, the construction of a new legal system began in the Democratic Federal Yugoslavia. Decades of preparations for a unified and comprehensive regulation of civil law then lost their practical significance.

The *First congress of Yugoslav lawyers*, held in Belgrade in 1954, gave new impetus to the codification work. The participants in the meeting agreed that the matter of civil law should be regulated by law in its entirety and without delay. The ultimate goal was to pass a single civil code for the entire country. However, in order to eliminate the legal gaps as soon as possible,

[34] See: Bertold Eisner, Mladen Pliverić, *Mišljenja o predosnovi Građanskog zakonika za Kraljevinu Jugoslaviju*, Zagreb, 1937; Živojin M. Perić, Obrazloženje §§ 1–319. Predosnove Građanskog zakonika za Kraljevinu Jugoslaviju, Beograd, 1939.

[35] Some authors claim that the members of the Commission also had in mind some solutions from the Swiss Civil Code. See: Ferdo Čulinović, *op. cit,* p. 321.

[36] More: Božidar S. Marković, *Reforma našega građanskog zakonodavstva*, Beograd, 1939.

it was proposed to apply a method of partial codification. The idea was to pass one law for each branch of law, which could later be incorporated into a wider whole without major changes.

The most important role in the process of creating civil law in that period was played by Mihailo Konstantinović, an outstanding legal thinker and professor at the Faculty of Law in Belgrade. He was the author of Draft Basic Law on Marriage (1946); Draft Basic Law on Parent-Child Relations (1947); Draft Basic Guardianship Act (1947); Draft Adoption Act (1947); Draft Law on Compensation for Damages (1950); Draft Claims Obsolescence Act (1953); Draft Law on Inheritance (1953) and Sketch for the Code of Obligations and Contracts (1960–1969).

In this context, the special significance of the Sketch for the Code of Obligations and Contracts should be pointed out.[37] This was the guiding principle of Yugoslav legal practice. The rules of the Sketch were applied as a *soft law* until the entry into force of the Law on Obligations in 1978. It was forty years before the *Draft common frame of reference* was presented to the European public. Yugoslav legal practice reacted to the non-existence of sanctioned rules and the absence of political will to adopt a unified civil code exactly as the creators of pan-European integration, who face almost identical challenges, want today.

To the end of drafting process, a Commission for the Revision and Codification of Federal Legislation was appointed by the Federal Assembly in 1968. A year later, the Joint Commission of all chambers of the Federal Assembly for the Civil Code was appointed. However, significant constitutional changes soon followed, and with them a new redistribution of the normative competences between the Federation and the member republics, which made it impossible to adopt a single civil code.

Amendment XXX to the Constitution of the SFRY from 1963, passed in 1971, stipulated that the Federation in the field of civil law "regulates contractual and other obligatory relations in the field of trade in goods and services; regulates basic property and other basic legal relations which provide market unity, regulates basic property relations in the field of maritime, inland navigation, and air transport, regulates copyright. "[38]

The regulation of other issues was entrusted to the republics. Such a redivision of normative competence was confirmed by the 1974 Constitution

[37] See: Mihailo Konstantinović, *Skica za zakonik o obligacijama i ugovorima*, Pravni fakultet u Beogradu, Beograd, 1969.

[38] Amendment XXX, (Sl. list SFRJ, 29/1971).

of the SFRY.[39] At that time, instead of the long-awaited unified civil code, Yugoslavia received a divided civil law in eight different legal areas.

156. Epiloque

At the Ministry of Finance and Economy of Serbia, in mid-2003, a working group was formed to draft a new Law on Property Relations. Three years later, the Draft Code on Ownership and Other Property Rights was presented to the public. However, the text has not been discussed in the National Assembly so far.

In 2006, the Ministry of Justice formed the Commission for Drafting the Civil Code. Work on that project was essentially completed in 2014. The draft covers the matter of general part, property, obligation, inheritance, and family law. In the meantime, some parts of the text have been a subject of public debate.

Thanks to both the Yugoslav legal heritage and experience, erudition and vision of Professor Mihailo Konstantinović, the most important legal writter of the new era in South East Europe, and especially his sense of social equilibrium, in Serbia and other former Yugoslav republics, there is a just and well-balanced law that will be relevant and appropriate, for a long time, to the world we live in.

However, it is the fact that there are still significant gaps in the legal system of the Republic of Serbia. Especially in the domain of property, and partly in the domain of obligation law. Some of them are filled with legal rules contained in the Serbian Civil Code from 1844, which officially ceased to be valid in 1946.

3. CODIFICATION OF CIVIL LAW IN MONTENEGRO (BRIEF REMARQUES)

3.1. PRE-HISTORY OF THE CODIFICATION

Until the adoption of the General Property Code in 1888, the matter of civil law in Montenegro was regulated by customary, moral and religious rules. However, "An experienced researcher will find in the norms of this law institutions whose traces go back to oriental civilizations or to medieval Serbian-ancient-Zeta's law, and to the Byzantine version of Roman law."[40]

[39] See: art. 281, Constitution (Sl. list SFRJ, 9 /1974)..

[40] Petar Đ. Stojanović, *Nastajanje savremenog prava u Crnoj Gori (1850–1900)*, Crnogorska akademija nauka i umjetnosti i Pravni fakultet u Novom Sadu, Titograd, 1991, p. 43.

Several rules from the domain of private law were contained in the previously adopted general codes: the Code of Petar I of 1798 and the General State Code (Prince Danilo Code) of 1855.

Disputes have been resolved out of court for centuries, by tribal elders "by right and by soul."[41]

Such a model of regulating social relations was anachronistic and largely lagged behind the level of social and legal development of most European countries. Due to that, over time, various influences and pressures arose to modernize Montenegrin law.

3.2. FOREIGN INFLUENCES

Montenegro has been exposed to various foreign influences. Some of them were political, and some conceptual and ideological in nature.

The literature states that developed European countries expected that the government would be more centralized and that social relations would be regulated by legal norms.[42] Such an attitude could be explained by the aspiration of Western countries to democratize Montenegrin society and establish the so-called rule of law in which the citizens of Montenegro would have a higher degree of legal security, but also the interest of various foreign factors (today we would say: foreign investors) to know what the legal rules are, with whom they will talk (and possibly negotiate) about the legal regime and how disputes will be resolved.

The Government of Tsarist Russia, which financed preparatory and other works, had a direct political influence on the codification of civil law in Montenegro. There is authentic evidence that Valtazar Bogišić regularly submitted narrative and financial reports to the relevant ministry.[43] However, the financier did not impose or suggest normative solutions. The legislator

[41] Branko Čalija, *Valtazar Bogišić i njegov doprinos unapređenju sudstva u Crnoj Gori*, Godišnjak Pravnog fakulteta u Sarajevu, 32/1984, p. 192

[42] Compare with: Petar Đ. Stojanović, *op. cit*, p. 182. etc.

[43] In a letter to the Russian consul in Dubrovnik, Alexei Semyonovich Janin, sent on December 19 (31), 1872, by the director of the Asian Department, Petar Nikolajevic Steromukhov, it was written: is a proof of His Majesty's inexhaustible benevolence towards the Prince of Montenegro and the readiness of our government to participate in everything that can serve the benefit and well-being of Montenegro. " Cited according to: Jelena Danilović, *Valtazar Bogišić u Beogradu*, Arhiv za pravne i društvene nauke, 3/2000, p. 392. About Valtazar Bogišić's reports to the Government of Russia: Zoran P. Rašović, *(Ne)poznato o štampanju, proglašenju i primeni Opšteg imovinskog zakonika za Knjaževinu Crnu Goru u 1888. g.* in: Opšti imovinski zakonik za Crnu Goru — Zbornik radova (ed. Zoran P. Rašović), Crnogorska akademija nauka i umjetnosti, Podgorica, 2018, p. 57.

had the freedom to create and propose rules that in his opinion were in the interest of Montenegro. He did it in a correct and honorable way. Until the end, he dedicated himself to the execution of the task he accepted and to the realization of the life mission he saw in writing the Code. This is evidenced by the fact that in 1880 he refused the invitation of the Serbian authorities to start a university career at the High School (Later: University of Belgrade, as a professor of the *History of Slavic legal cultures*, with the explanation that he could not accept it because he was too busy on preparing the General Property Code for Montenegro.[44]

Valtazar Bogišić was a man of wide views and wide education. He was a true world-class intellectual. Like any other man who is aware of his qualities, he did not have to make great compromises, which means that he had freedom of thought and freedom of action. In terms of his education, ideological orientation and aspirations, he was close to the leading European intellectuals of the free spirit, and especially to the members of the German Historical Law School, whose influence was most felt in his codifying work. Valtazar Bogišić believed that the law should be in accordance with the system of values, spirit and mentality of the people. He was consistent in that to the end. That is why his codifying work was extremely appreciated among German lawyers.

3.3. HISTORY OF THE CODIFICATION

In accordance with his ideological orientations, as well as with the principles of the Historical School of Law, Valtazar Bogišić first created an analytical basis for codification work. It included a lot of empirical data obtained on the basis of a survey conducted in accordance with the Questionnaire for describing the legal customs of Montenegrins, which he formulated for that purpose.[45]

In this context, we should point out the lesser-known fact that Valtazar Bogišić collected data on the effects of the Serbian Civil Code in legal practice and that he visited Belgrade twice on that occasion, with the full support of the Serbian authorities. It was noted that he received reports from the Minister of Justice of all 17 presidents of district courts in Serbia on their experience in the application of the Serbian Civil Code of 1844, which were submitted in 1872, and that he then stated that "it would be highly desirable to use material collected in Belgrade, especially since it is the

[44] See: Jelena Danilović, *op. cit*., p. 391.

[45] See: Niko S. Martinović, Valtazar Bogišić — Upitnik ankete za opisivanje pravnih običaja Crnogoraca, Etnografski muzej Cetinje, Cetinje, 1964.

thirtieth anniversary of the observation of the legal life and court practice of the people closest to the Montenegrins."[46] More detailed analyzes of these documents would show whether and to what extent, the Serbian law at the time influenced the drafting of the Montenegrin Code, and perhaps indirectly the normative solutions of the Japanese Civil Code.[47]

3.4. EPILOQUE

The General Property Code for Montenegro is considered a masterpiece in the field of private law. As it has already been said, he received the highest marks from the leading members of the German Historical law school. However, opinions were divided within Montenegro itself. Some felt that it was retrograde (due to the implementation of the customary rules) and others that it was too progressive.

Initially, there were problems with its application in legal practice.[48]

The Code officially ceased to be valid on the basis of the Law on the Invalidity of Legal Regulations Adopted Before April 6, 1941 and During Enemy Occupation, in 1946 (at the same time as the Serbian Civil Code of 1844), but its legal rules were applied for a long time, filling legal gaps.

The General Property Code for Montenegro has been translated into French, German, Italian, Russian and Spanish.[49] He was and remains to be an inspiration to many lawmakers,[50] including those who shaped the civil law system in Japan.

---

[46] Cited according to: Jelena Danilović, *op. cit*., p. 393.

[47] On Bogišić's interest in the practical application and influence of the Serbian Civil Code, see: Niko S. Martinović, *Valtazar Bogišić — Istorija kodifikacije crnogorskog imovinskog prava*, Istorijski institut NR Crne Gore, Cetinje, 1958, p. 134. etc

[48] See: Petar Đ. Stojanović, Primjena Opšteg imovinskog zakonika za Knjaževinu Crnu Goru (1888), in: Glasnik Odjeljenja društvenih nauka Crnogorske akademije nauka i umjetnosti, Titograd, 1987, str. 7–67.

[49] See: Miodrag Orlić, *Zaostavština Valtazara Bogišića u svetskoj i srpskoj pravnoj kulturi*, u: *Opšti imovinski zakonik za Crnu Goru* — Zbornik radova (ed. Zoran P. Rašović), Crnogorska akademija nauka i umjetnosti, Podgorica, 2018, p. 138. etc.

[50] See: Ibidem; Miloš D. Luković, *Bogišićev zakonik*, Srpska akademija nauka i umetnosti — Balkanološki institut, Beograd, 2009, p. 17. etc.

4. CODIFICATION OF CIVIL LAW IN JAPAN[51]

4.1. PRE-HISTORY OF THE CODIFICATION

4.1.1. CENTRALIZATION OF GOVERNMENT AND UNIFICATION OF LAW

In the Japanese archipelago, the state organization was formed in the 5th century. Until then, there were only small, underdeveloped communities in that area, which were mostly isolated from each other. In each of these societies a special customary law arose.[52] Members of underdeveloped communities were at the same level of social development and lived in almost the same natural conditions. Therefore, the usual rules could not differ significantly. Yet some specifics existed, and it can be said that in the pre-state period there was indeed a kind of legal particularism.[53]

The process of law unification began in 604, when Taishi Shotoku, following the example of China, established a hierarchically organized and centralized state structure. Over time, the central government managed to overcome legal particularism. However, the law was still uncodified and based on customs. This indicates the fact that the state was able to ensure the application of uniform rules on its territory, but that it did not have the internal potential to create a new and modern legal system, although at that time there were already lawyers who received education in China.[54] Unification was performed by the central government determining which of the many local rules will be binding. Favoring one local community at the expense of others was creating political tensions and endangering the stability of the state. In addition, the customary rules were inappropriate as an instrument of government (they were created slowly and spontaneously, beyond the control of state bodies, changing slowly and with difficulty; they

---

[51] This part of the paper is largely based on the following works: Dušan Nikolić, *Vesternizacija japanskog privatnog prava* [*Westernization of the Japanese Private Law*], Pravni život, 10/2004, pp. 21–38; Dušan Nikolić, *Harmonizacija i unifikacija građanskog prava — Elementi za strategiju razvoja pravne regulative*, [*Harmonization and Unification of Civil Law — Elements for the Strategy for Development of Legal Regulation* — Chapter: *Double Westernization of Japanese Private Law*], Centar za izdavačku delatnost Pravnog fakulteta u Novom Sadu, Novi Sad, 2004, pp. 61–75.

[52] See.: Masaki Abe, Japan, in: *Legal Systems of the World — A Political, Social and Cultural Encyclopaedia*. (Ed.: Herbert M. Kritzer). Santa Barbara — Denver — Oxford, vol. II, p. 773.

[53] More about the early history of Japan: Carl Steenstrup, *A History of Law in Japan Until 1868*, Leiden-New York—Kebenhavn-Köln. p. 16. etc.

[54] See: Carl Steenstrup, *op. cit.,* p. 32.

were slowing down the development of the society). Therefore, the central government made the decision to modernize the legal system through the reception of foreign law.

The legal reform in the 7th century began with the translation and gradual implementation (transplantation) of Chinese codes (ritsu-ryo), based on Confucian philosophy.[55] The codes mainly referred to public law matters, while issues in the field of private law remained largely in the domain of customs, morals and traditional ways of resolving disputes with the mediation of third parties.[56] In addition, the reception was not complete. Legal norms were selectively adopted, and with the necessary adjustments. In order for the new legal regulations to be harmonized with the reality of the Japanese society, some rules of the old customary law were incorporated into the codes, as were certain regulations that had emerged in domestic legal practice. The legislature has obviously sought to create a modern, functional, and well-balanced legal system. However, the assessments were not entirely good, because the new law did not survive the political changes that soon followed.

When at the end of the seventh century, due to decadence of the imperial family, the central government weakened and the feudal structure strengthened, legal particularism took over Japan once again. Two powerful families, Taira and Minamoto, created large feudal estates on which local customary law (*honjo-ho*) was applied. Special rules, called *buke-ho*, were established for the military class (*samurai*). At the same time, the common law (*kuge-ho*) was still formally in force on the entire state territory, but its norms were selectively applied within the boundaries of the two estates. The period of the so-called period *dual feudalism* was thus marked by legal pluralism.[57] This situation did not significantly change at the beginning of the 12th century either, when the military class formed a new central government. In that period of the samurai culture, which is known as the age of *unitary feudalism*, feudal lords continued to rule according to their own rules.[58]

At the end of the 16th century, the military leader Toyotomi Hideyoshi managed to completely restore the central government during his short reign. This initiated the process of reintroducing a common (general) law. Unification was also supported by the next ruler, Tokugawa Ieyasu, establisher of the famous shogunate that marked several centuries of Japanese history.[59]

---

[55] See: Dominique T. S. Wang, *op. cit.,* pp. 21–22.
[56] See: Carl Steenstrup, *op. cit.,* p. 34.
[57] See: Dominique T. S. Wang, *op. cit*., p. 23.
[58] See: Carl Steenstrup, *op. cit*., p. 121.
[59] The Tokugawa Shogunate ruled Japan from 1603 to 1867.

By making wise political compromises, the Shogun[60] managed to consolidate his power and at the same time create conditions for strengthening of the state. Military leaders and feudal lords were granted the right to exercise full legislative and judicial power on their own territory. The principle of extraterritoriality of feudal estates was consistently respected. However, all disputes between members of different territorial communities were under the jurisdiction of the central government. As a result, common law began to suppress local customary rules. Additional impetus to the process of unification was given by the acceptance of Confucianism as the official doctrine and the enactment of codes in 1615 and 1742, which also regulated some issues in the domain of private law. The unification of legal rules was also influenced by the increasingly developed trade with the Western countries. However, during the rule of the Shogunate, the old customary rules based on moral and religious principles, folk tradition, and a unique system of court precedents played a dominant role in the field of private law.[61]

4.1.2. TWO HUNDRED YEARS OF SELF-ISOLATION

In the mid 17th century, the Shogunate closed the state borders in order to prevent mass baptism of the population and uncontrolled import of weapons. During the two hundred years of self-isolation, Japan survived without direct contact with other countries. The central government allowed only limited and strictly controlled trade with China and the Netherlands.

Many believe that this was a dark period of Japanese history, in which it fell behind the rest of the world. However, some effects, undoubtedly positive from the perspective of the Japanese society, were also achieved. Japan is the only country in East Asia that has never been colonized by a Western European country and has long managed to preserve traditional values from, as some authors say, the *invasion of the Western culture*.[62]

4.2. HISTORY OF CODIFICATION OF CIVIL LAW IN JAPAN

4.2.1. POLITICAL PRESURE

"The policy of isolation ended in 1853 with the arrival of U. S. warships. Due to the political instability that resulted from the political changes, the

[60] The original meaning of *Shogun* is an *army commander*.

[61] See: Kenzo Takayanagi, *A Century of Innovation — The Development of Japanese Law*. in: The Japanese Legal System, (Ed.: Hideo Tanaka), pp. 173–174.

[62] Ko Hasegawa, *The Structuration of Law and its Working in the Japanese Legal System*, in Proceedings of the XVI Congres de l'Academie internationale de droit comparé, (Ed.: Oliver Moreteau and Jacques Vanderlinden), Brisbane. 2002., p. 330.

Tokugawa shogunate became weak and handed over the power to the Emperor in 1867. "[63] The literature states that the new regime led by Emperor Meiji sought to promote Japan as a strong, modern, sovereign, and pro-Western monarchy, primarily to obtain a revision of the unfavorable *Treaty of Friendship* concluded by the Tokugawa Shogunate with the United States, England, France, Russia, and the Netherlands,[64] as well as to defend its independence from the imperialist aspirations of the Western countries already at the gates of the Empire.[65] The amendment of the Treaty was conditioned, among other things, by the modernization of the legal system, which many authors consider simply reduced to a pure westernization of the Japanese law.[66] Some believe that Japan had the potential to build an original and efficient system relying on the old regulations and the very good jurisprudence of the feudal period, but that the reformers did not even consider such a possibility.[67] Instead, the government, under the pressure of time and the adverse events, decided to harmonize the domestic private law with the Western one in the simplest and the fastest way possible: by completely adopting one of the European civil codes. This marked the beginning of the first Westernization, which could be called the Europeanization of Japanese law. "The rapidity of westernisation is often emphasised in general explanations of the modern Japanese legal history. A keen sense of the necessity for the introduction of the Western system was felt by contemporary Japanese officials, who were only too aware of the precarious situation in Japan, desiring to maintain its independence, but scarcely rid of colonisation by the Western powers and put under unequal treaties which deprived it of autonomy in jurisdiction and in taxation. An episode favoured by Japanese legal historians to illustrate the "hastiness" of westernisation is that of Shinpei Eto, a Minister of Justice in the early years of westernization (1872–1873). Eto tried to introduce the French Civil Code as it was, only in direct translation and without modification to the content. He is [Like Prince Miloš Obrenović in Serbia in the first half of the 19th century — D. N. note] said to have urged the translator with the phrase: "Just translate as quickly as you can, even if you mistranslate.""[68]

---

[63] Masaki Abe, *op. cit*., p. 774.

[64] Masaki Abe, *op. cit.,* p. 774; Dominique T. C. Wang, *op. cit.,* p. 25.

[65] See.: Yosiyuki Noda, Comparative jurisprudence in Japan..., p. 199.

[66] See: Yosiyuki Noda*, Comparative Jurisprudence in Japan: Its Past and Present*, in: Japanese Legal System, (Ed.: Hideo Tanaka). p. 194.

[67] See: Kenzo Takayanagi, *op. cit,* p. 174, and the work cited in: John H. Wigmore, *Panorama of the World's Legal Systems*, 1936. p. 481- 489 and 503–520.

[68] Emi Matsumoto, Lost in Translation: the Reception of German law in Japan, in: Transnational Encounters between Germany and Japan — Perceptions of Partnership in

4.2.2. FOREIGN INFLUENCES

4.2.2.1. THE DUTCH INFLUENCE

In the first years after opening up to the world, Japanese lawyers studied the Dutch law intensively. This was quite natural, because during the two hundred years of self-isolation, Japan had contacts only with the Netherlands. Already at the time of the Tokugawa Shogunate, in 1811, a special *Service for translation of the western books* (later: the *Institute for Western Studies*) was established, mainly translating texts written in Dutch.[69] Among them were several books on private law. In 1862, two young Japanese professors were sent to the Dutch city of Leiden for training. Their main task was to study Western law at the university there. Of course, the focus was on the Dutch legal system. Thanks to that study stay, notes from several courses and several university textbooks were translated into Japanese.

In such circumstances, it could be reasonably expected that the Japanese Civil Code will be written following the example of the Dutch code of 1838.[70] However, one personnel change completely altered the course of events.

4.2.2.2. THE FRENCH INFLUENCE

In the early 1870s, the Frenchmen Georges Bousquet (1872),[71] Gustave Boissonade (1873), and Benet (1873) were appointed legal advisers to the Japanese Ministry of Justice.[72] The three of them were given the task of improving the work of the courts in Tokyo and Osaka. To that end, they were allowed to actively participate in court proceedings and to propose solutions to specific disputes. The expert opinions of these advisers gained precedent power through court decisions and then became part of the customary law. French law thus indirectly began to penetrate the Japanese legal system.[73] The literature states that this was one of the main reasons why the Japanese government decided to modernize private law by adopting the French Civil Code (*Code civil de Français*, *Code Napoléon*) from 1804.[74] At that time,

---

the Nineteenth and Twentieth Centuries, (Editors: Joanne Miyang Cho, Lee M. Roberts, Christian W. Spang), Springer, p. 113.

[69] See: Yosiyuki Noda. Comparative Jurisprudence in Japan..., p. 198.

[70] The Dutch Civil Code of 1838 was modeled on the French Civil Code of 1804.

[71] See: Yosiyuki Noda, Predgovor in: Dominique T. C. Wang, p. 6.

[72] See: Kenzo Takayanagi, op. cit, p. 178.

[73] See: Tomoatsu Gorai, *Influence du Code Civil francais sur le Japon, Le Code Civil*. Livre du Centenaine, Paris, 1904, pp. 783–784.

[74] Professor Alan Watson was obviously right when he said that the choice of legal transplant often depends on individuals and chance. See: Alan Votson, *Pravni transplanti*, Beograd, 2000.

the idea of the reception of the Dutch law was definitely abandoned. However, the turn was not too great, because the Dutch Civil Code from 1838 was modeled on the French *Code civil*.

In an effort to meet the demands of the Western countries as soon as possible, the government ordered the eminent comparativist Rinsho Mitsukuri to translate the French Civil Code "as fast as possible, without regard to error". Since a full reception was planned, all that was needed was to replace the word *French* with the word *Japanese*. In all other respects, the text of the two codes had to be identical (except for possible mistakes of the Japanese translator).[75] At the first glance, this description of legislative work appears far removed from the general image of the japanese work ethics, discipline, precision, and reliability. It is hard to believe that there were such improvisations in jobs of the highest national interest. Most likely, something else was at hand. The Japanese government had only one goal in front of it. Any civil code that could satisfy the leaders of the Western countries had to be passed in a short time. It was obviously not particularly important to the Japanese which law will be transplanted and what will be written in the future code. This leads to the conclusion that from the beginning, the Government did not have a serious intention to make a substantial change in the legal system and to ensure the actual implantation of the Western law. The reception was supposed to be formal and fast. However, contrary to the expectations, the preparations took longer. The Civil Code, modeled on the French *Code Civil* by Boissonade in collaboration with Japanese lawyers, was not promulgated until 1890 (at the same time as the Commercial Code prepared by Hermann Roesler, a German legal adviser).

4.2.2.3. THE ENGLISH INFLUENCE

The Civil Code provoked violent reactions in the professional and political public. Members of the so-called *English school* considered that the French law was not the only relevant one and that in the process of modernization of the Japanese legal system, the legal systems of other countries must be taken into account, above all those of Great Britain and Germany.

At that time, dissatisfaction by a too rapid westernization was expressed as well. On that basis, the so-called *patriotic professional opposition*[76] was established, whose representatives, after several fierce parliamentary debates, managed to obtain a decision postponing the entry into force of the Code until 31 December 1896. Immediately after, a three-member code writing

[75] See: Kenzo Takayanagi, *op. cit.,* p. 174.
[76] See: Kenzo Takayanagi, *op. cit.,* p. 181.

commission was formed, consisting of the university professors Nobushige Hozumi, Masaaki Tomii, and Kenjiro Ume.

The original plan was to amend the existing Code through amendments.[77] However, the Commission later began to prepare a completely new text. From the so-called *Old Japanese Civil Code*, only a few provisions were adopted, which can be claimed to have been written on the model of the French *Code civil*.[78] In everything else, the Commission mostly followed the German law.

4.2.2.4. THE GERMAN INFLUENCE

By abandoning the original concept based on the French Civil Code with the simultaneous reception of the German law, a radical turn was made in the legal policy of Japan. The myth of the superiority of the German legal thought prevailed among the Japanese jurists. This is evidenced by the famous and often quoted claim in Japan that "no other law than the German is a (true) law."[79] This thesis was accepted even by university professors who were studying in France. It is interesting that there were those among them who did not stay in Germany, nor did they speak German. Where did this fascination come from and why was such a sharp turn in legal policy made, which the recent literature modestly calls an *inconsistency in the choice of foreign law*?[80] Some explanations can be found in the Japanese legal historiography. First of all, it should be said that the editor-in-chief of the new Civil Code, Professor Nobushige Hozumi, studied in Berlin for a while. Already then, he was impressed by the German legal culture. Evoking on a certain occasion the memory of that period of his life, the professor said: "While I was studying law in Germany, I was firmly convinced of two things. The first was the fact that legal education in Germany was far more advanced than in any other country and that without the introduction of the German legal science in our country we would never be able to keep ourselves on par with the world progress in the field of law. Second, although the German Empire was only recently established, the new civil code proclaimed by its government in order to unify the law of the federal state was already starting to be applied and the legal principles contained in that Civil Code were more modern than the French codes that this country

[77] See: Eiichi Hoshino, *Influence of French Civil Law upon the Civil Code of Japan*. in: The Japanese Legal System.." p. 223.

[78] Eiichi Hoshino exhaustively listed those parts of the Japanese Civil Code from 1898 in which the influence of the French Civil Code is visible (*op. cit.,* p. 24).

[79] Yosiyuki Noda, Comparative jurisprudence in Japan..., p. 196.

[80] Ibidem.

[i. e. Japan — note D. N.] took as a model for its law. (...) In the interest of the future development of law, we must adopt German jurisprudence. "[81]

The then German legislation developed under the dominant influence of the Historical School of Law, whose members claimed that law was the heritage of the history and the spirit of a nation. This idea was much closer to the Japanese tradition and the then political interests of Japan than the French School of Natural Law (Jusnaturalist), with its teaching on the universal rights of man and of the citizen. First of all, there was a terminological, and to some extent an ideological coincidence between the German *national spirit* and the spirit of the Japanese *national harmony*, which for centuries was the main model for regulating social relations in Japan. From the point of view of the Japanese collectivist philosophy, the German appeal to the people was more acceptable than the French, distinctly individualistic, legal concept. The German legal thought was simply somewhere between the Western individualism and the Eastern collectivism. (As such, it is still much more appealing to theorists from the Eastern countries, and in the future, for the same reasons, it could be one of the main civilizational links between the East and the West.) In addition, the thesis of the German authors that law must be a reflection of the tradition of a nation instilled more hope that the Japanese law would retain traditional values than the French positivist doctrine of a single, universal, and universally acceptable law contained in the *Code civile*. The political dimension of the choice of foreign law should not be neglected either. Germany was not among the countries that put pressure on Japan in 1853. (The German Empire was created only in 1870). Therefore, for the ruling patriotic current, the reception of the German law was more acceptable than the idea of adopting the French Civil Code. Such a choice was bearable even from the point of view of the most radical nationalists because it was less offensive to the patriotic feelings.

The choice of the foreign law also encroached on the sphere of diplomacy. The adoption of the French Civil Code could have been understood as a neglect of the strategic (or, in today's terminology: national) interests of other Western countries with which the agreement was signed. The problem could be most easily solved by transplanting the law of a neutral country. In that sense, the Japanese government made a correct and logical decision when it opted for the German law. In addition, such a choice achieved another significant effect on the diplomatic field. Germany was a new, well-organized

[81] Collected Papers of Nobushige Hozumi, 1934, pp. 617–618. According to: Yosiyuki Noda, Comparative jurisprudence in Japan..., p. 205.

state, which, like Japan, sought its place in a world in which some other Western countries played a dominant role. Reception of the German law therefore had a much deeper meaning. It marked the beginning of the strategic connection between the two countries, which was later extended to other areas.[82] "Meanwhile, the government's open affection for everything German has subtly created a favorable climate for the Germanization of the entire Japanese culture."[83]

Japanese authors point to the fact that the entire legal system was developed under a strong influence of the German legal culture: "It is widely accepted that modern Japanese law found its essential models in German law: our first modern Constitution of 1889 was principally inspired by the Prussian Constitution; our Civil Code of 1898, starting from the first draft written by a French scholar, finally chose BGB, as an example to follow."[84]

The true picture of that influence is best reflected in the Civil Code of Japan, and some aspects of its application. As was already mentioned, the editors of this code were under the dominant influence of German legal thought. Their main model was the draft of the German Civil Code from 1887, and later the new draft which was made official in 1896. (The Code for the German Empire was adopted in 1896 and entered into force in 1900). Japanese codification was performed according to the pandect system. Norms were grouped as in the German Civil Code. In addition, there is a high degree of similarity in terms of normative solutions of these two codes. The impression of the dominant influence of the German law is not diminished by the fact that some authors claim that the spirit of French, English and old Japanese law is felt in some norms.[85] However, as Nobushige Hozumi, one of the three framers of the Civil Code of 1898, said "The Japanese Civil Code may be said to be the fruit of comparative jurisprudence". The draftsmen consulted "the codes, statutes, and judicial reports of all civilized countries which existed in the English, French, German, or Italian languages, besides international treaties which have reference to the rules of private law". This included more than thirty civil codes, promulgated or in draft ... the first and second drafts of the BGB, the French Civil Code, the draft of the Belgian Code, as well as "the Swiss Federal Code of Obligations of 1881, the Spanish Civil Code of 1889, the Property Code of

[82] David Williams writes about the reasons and consequences of this rapprochement in a somewhat provocative way in his book *Japan: Beyond the End of History*, London—New York, 1994.

[83] Yosiyuki Noda, Comparative jurisprudence in Japan..., p. 204.

[84] *Emi Matsumoto, op. cit.,* p. 112.

[85] *Eiichi Hoshino, op. cit.,* p. 234.

Montenegro, the Indian Succession and Contract Acts, the Civil Codes of Louisiana, Lower Canada, and the South American Republics, the draft of the Civil Code of New York, etc."[86] The principles of English common law were also followed."[87]

The Japanese Civil Code was adopted in 1897 and came into force in 1898. This intensified the process of Germanization of civil law. Since then, a large number of students have studied in Germany. Some of them later became professors at law schools in Japan, where they continued to teach using German textbooks. Japanese judges and lawyers studied the practice of the German courts, relying on the comments of the German Civil Code, written by German authors ...[88] According to some historians, the influence was complete.[89] Similar effects were achieved in other areas of private law. The old Commercial Code of Japan from 1890, prepared by the already mentioned professor Hermann Roesler, a German adviser in the Ministry of Justice, was written in an eclectic spirit. The influence of the French Commercial Code was felt in it, but there were also many normative solutions from the German and the English law. Perhaps this is exactly what contributed to the fact that this code, unlike the old Civil Code of 1890, partially withstood the political and professional pressure of the patriotic forces that advocated the postponement of the implementation of the new regulations. At any rate, as early as 1893, the part on company law and the third book, dedicated to bankruptcy, came into force. The new Japanese Commercial Code, prepared by Ume, Okano, and Tabe, was adopted in 1899.[90] Official Japanese private law was under the complete influence of German legal thought until the end of World War II.

4.2.2.5. THE AMERICAN INFLUENCE

In accordance with the provisions of the Peace Agreement, the victorious side in World War II, led by the United States of America, established in 1951 a military administration on the entire state territory. The primary goal of the occupation was to conduct a complete demilitarization of the Japanese society and to transform Japan into a democratic, liberal state. As

[86] Nobushige Hozumi, *The New Japanese Civil Code, as Material for the Study of Comparative Jurisprudence*, 2nd and revised ed., Maruzen, Tokyo, 1912, pp. 20–23. Quoted according to: Emi Matsumoto, *op. cit.,* p. 112.

[87] *Ibidem.*

[88] *See: Kenzo Takayanagi, op. cit.,* p. 182.

[89] Zentaro Kitagawa, Theory Reception — One Aspect of the Development of Japanese Civil Law Science, in: The Japanese Legal System..., p. 239.

[90] *See: Ibidem.*

part of these activities, preparations began for a new reform of the legal system, known in the Japanese professional literature as the second Westernization or Americanization of law. The turn was extremely radical. Japanese lawyers, who had been educated for an entire century in the spirit of the European continental tradition, were suddenly confronted with a completely different, Anglo-American concept imposed by the General Command of the occupying forces. Admittedly, there were lawyers in Japan who were familiar with the *common law* system. Namely, at the end of the 19th century, a special school of English law was formed, within which comparative Anglo-American studies were organized. In addition, it should be noted that some lawyers were educated at universities in the United Kingdom and the United States.[91] However, "the dominance of the continental, and especially the German legal doctrine, which lasted more than half a century, made *common law* a dark continent for the average Japanese lawyer. "[92] In such circumstances, there was not much choice. The Japanese began to study the American law intensively.[93] This is evidenced by the fact that in the period from 1945 to 1965, six times more articles were published about the common law system than in the previous hundred years. Most of the comparative studies were related to the field of public law. Of course, not without reason. American influence was mostly felt in the domain of constitutional law, court proceedings, penal policy, etc.[94] In contrast, the norms of private law were not the subject of extensive changes. This segment of legal regulations has mostly remained in its old positions. The only exception was commercial law, which was largely revised on the model of the solutions from the common law system.[95]

4.3. EPILOQUE: THE EFFECTS OF THE FOREIGN INFLUENCE

Japan's legal system has been exposed to the Western influences for one hundred and fifty years. During that period, different role models, advisors, pressures, ideological directions, concepts, and concrete normative solutions changed. There were multiple radical turns that would be difficult for any other country to withstand. However, the Japanese society has endured all these changes without major crises and internal tensions. How

[91] More: Hideo Tanaka, *Impact of Foreign Law in Japan: American Law*, The Japanese Legal System..., p. 247.

[92] *See: Kenzo Takayanagi, op. cit.,* p. 189.

[93] See: Masanii Ito, *Impact of Foreign Law in Japan: English Law*, The Japanese Legal System..., p. 245.

[94] *See: Kenzo Takayanagi, op. cit.,* p. 173.

[95] More details: Hideo Tanaka, *op. cit.,* p. 249.

to explain this fact? A book on modern legal systems states that it has long been known that law and the legal system have a very limited role in Japan.[96]

The Japanese rarely hire lawyers, regardless of whether it is a matter of concluding a contract, compensation for damages, or resolving some other dispute in the domain of private law. The reasons for that should be sought in the cultural heritage and in the dominant philosophy of life, which has been based on Confucius' teaching for centuries. As already mentioned, Japanese culture is based on the harmony of social relations and antipathy towards any open conflict. Filing a lawsuit, actively participating in a lawsuit, and even just mentioning a name in a courtroom are considered humiliating and dishonorable for both parties. That is why the Japanese opt for out-of-court settlement of disputes with the mediation of third parties, which are carried out in accordance with the customs and the rules of morality.[97] The goal of conciliation is to establish a balance of interests through compromise and preserve each party's feeling of honor. Traditional teaching says that there must be neither winners nor losers. The Western law, on the other hand, rests on fundamentally different grounds. The litigation procedure is conceived in such a way that one party wins and the other loses the dispute.

That is why in the West, litigation is often perceived as a battle until the final victory, and in the practice of many countries, the so-called litigation for the sake of litigation is a known phenomenon, which is the complete opposite of the Japanese aspiration to harmonize social relations. Obviously, these are two different ways of thinking. The Western model of law is based on individualistic, and the Japanese, on collectivist philosophy. In the center of the first is the individual, while in the other, the central place is occupied by the social community. For this reason, the Western model of state regulation could not be an adequate replacement for the traditional methods of regulating social relations based on morality and customary rules. The traditional spirit of harmony[98] has always been considered one of the pillars of the Japanese society, and the Japanese were never ready to give it up, even when the Western pressure threatened to escalate into open colonization.

The problem was solved even then in the spirit of the Japanese tradition. In order to harmonize its relations with the Western countries, the Government of Japan made a reasonable compromise. Along with the existing original regulatory system, based on morality, customs, and centuries-old legal tradition, an artificial system of state regulation was created, following the example of the West. The form was thus satisfied while the essence basically

[96] *Masaki Abe, op. cit.,* p. 779.
[97] *Ibidem*.
[98] *Hideo Tanaka, op. cit.,* p. 261.

remained unchanged. Japan continued to live by the old rules, developing in parallel a Western model of private law, which played a negligible role in the daily lives of the citizens. This is testified to by Professor Zentiro Kitagawa, who says: "...the presented *assimilatory function* of the German legal theory was removed from the reality of the Japanese society and affected only certain aspects of law."[99] Because of that, noncritical adoption of foreign law[100] and radical changes of the state regulations did not have a significant influence on the stability of the Japanese society. Something that basically had no greater practical significance could be changed indefinitely as needed, without the risk of severe consequences.[101]

However, the Western powers also realized their interests. In Japan, a mechanism was established that enabled its citizens to exercise their rights in a Western way. Disputes between the Japanese and the foreigners were resolved before courts that tried under transplanted (Western) law.

Summa summarum, it is indisputable that the influence of the West on the development of state regulations in the field of private law was great. It could be said to be almost complete, because the Japanese government has opted for full reception of foreign models. However, the actual effects of implantation (transplantation) have been very modest in practice from the very beginning. The situation has changed significantly over time only in the sphere of commercial and economic law, but there also only in relation with the foreign element. In the domain of classical civil law, state regulation still has little influence. In that area, the Japanese continue to opt for traditional models of regulating social relations and for out-of-court settlement of disputes.

5. CONCLUSIONS

In Serbia, Montenegro and Japan, the creation of modern civil law and codification began in the 19th century. Until then, the customary and moral rules and decisions of family elders played a dominant role in the social life. In Serbia, Montenegro and Japan, the codification of civil law represented a kind of Europeanization or, more broadly, the Westernization of civil law. This process was started under direct or indirect political pressure and influence of several countries. The goal was to regulate matter of civil law

[99] *Zetiro Kitagawa, op. cit.,* p. 240.

[100] On the noncritical adoption of foreign law: Yosiyuki Noda, *Comparative Jurisprudence in Japan*..., p. 194.

[101] The gap between the normative and the real was the largest in the domain of private law. In other areas of law, state regulations are much more frequently and fully applied.

by legal norms, and not by unwritten customary rules, as was the case until then. Due to various circumstances, law was developed in all three countries under the strong influence of German legal thought and German law.

The drafting of the Code was entrusted to educated lawyers (in Serbia to Jovan Hadžić, in Montenegro to Valtazar Bogišić and in Japan to Gustav Boazonad). None of them belonged to domestic lawyers circle. Serbia and Montenegro, in principle and at the suggestion of lawmakers, decided to draft an original code that would be in line with the tradition, spirit and mentality of the people. Due to political circumstances, the reception of Western legal regulations has started in Japan. In Serbia and Montenegro, the writing of the code was preceded by empirical research. Jovan Hadžić withdrew from the agreement and drafted the Civil Code for the Principality of Serbia, which was an abridged and somewhat amended version of the Austrian Civil Code of 1811. Contray to that, Valtazar Bogišić drafted the original draft based on empirical research. In Japan, the reception of French law began first, and then German law. The writing of the code was preceded by the study of the legal regulations of different countries. Special attention is paid to the codification work of Vatazar Bogišić and the General Property Code for Montenegro.

The Serbian Civil Code entered into force in 1844. He was criticized for the reception of Austrian law, which did not correspond to the level of social development, and especially because of the destructive influence on family communities (porodična zadruga). The General Property Code for Montenegro entered into force in 1888. It received high marks from members of the German Historical School of Law, as well as among Slavic lawyers, and especially among Serbs who studied at leading European universities. Its entry into force did not cause major tensions in society. Initially, there were problems with its application in practice. The Japanese Civil Code came into force in 1898. That code also did not cause significant changes in society either.

According to research conducted at Columbia University in New York, societies that adopt foreign law progress less and more slowly than societies that independently shape their own legal regulations. Legal analysts claim that the normative solutions of the Serbian Civil Code, due to their inadequacy, greatly contributed to the impoverishment of Serbian society in the 19th century. The Japanese Civil Code did not have similar consequences, although it is based on transplanted German law, because there is legal pluralism in Japan. Legal life continues to take place under the dominant influence of legal tradition, customary and moral rules. The received right has a much smaller, and in certain spheres of social life, almost marginal significance.

The Serbian Civil Code and the General Property Code for Montenegro ceased to be valid in 1946, at the time of the creation of a new order in Socialist Yugoslavia.

In Serbia, on the basis of a special law and the free assessment of judges, the legal rules contained in the old, non valid Code from 1844 can be applied when it is necessary to fill legal lacunas. Thanks to the legal heritage from the period of the former Yugoslavia and the vision of Professor Mihailo Konstantinović, the most important lawwritter of the 20th century in Southeast Europe, certain segments of Serbian civil law have been arranged in a modern and very high quality way. Some normative solutions from the Law on Obligations (i. e. Law on Contracts and Torts) also served as a model for German lawyers during the revision of the BGB.