

THE ORIGIN OF THE CIVIL LAW CODIFICATION IN EUROPE

ABSTRACT: Codification represents the regulation of a certain field (branch) of law by a comprehensive law called the Code (the Civil Code, Criminal Code, etc.). The success of codification depends on two very important conditions: the first one refers to the existence of a dedicated authority, and the second one concerns its implementation in a great country. For the purpose of research, there will be selected the national legislations in order to demonstrate, through various legal systems, how civil codes regulating the field of civil law were originated. Within the scope of this paper, in more detail, we are going to analyze the selected national legislations of France, Austria, Germany, Switzerland and Italy.

Keywords: *Codification, the Civil Code, the Service Contract, the Lease Agreement.*

1. Introduction

In the broad sense, codification is any complete legal regulation of a field of law, regardless of whether it is achieved through one or more legislative acts. In the narrow sense, codification is the regulation of a certain field (branch) of law by a comprehensive law called the Code (Civil Code, Criminal

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Code, etc.). Codification had been already present in the ancient times (Code of Hammurabi, Justinian's Codification) and in the Middle Ages (although feudalism is an epoch of uncoded and particular law), and it became especially present in the transition period from feudalism to capitalism, with the creation of national markets and centralized nation states. "Ancient history was mainly characterized by digests of law in which non-systematized legal norms were partially codified" (Krstinić & Vasiljković, 2019, p. 2).

Codification is the pinnacle of legal activity. It represents a synthesis of legal theory, practice and legal technique, it cannot be passed quickly, nor can it be amended quickly. It should provide the highest achievements in legal science, thus enabling the most efficient and most useful way of application to the social relationship circle regulated by law. In all this, it is necessary to obtain a harmonized, comprehensive, and a clear system as well. The language and style must be framed in such a way making the formulations are unique, clear and easy to understand. It is all of the aforementioned that makes codification a difficult, serious and time-consuming task, and in order to reach a functional normative system, it is necessary to make many compromises. Therefore, legislative process is painstaking and very responsible, especially in the field of civil law, which regulates many sensitive issues of everyday life. Even the codes passed in a short period of time were the result of long discussions and studies. French Civil Code (Code civil) is an example of this. It was redacted in just four months, but it is important to emphasize that its redaction was preceded by extensive and lengthy preparations in theory and practice.

The success of any codification depends on two very important conditions: the first one – existence of a dedicated authority, and the second one - its implementation in a great country. For the purposes of this research, national legislations were selected in order to demonstrate, through various legal systems, how civil codes regulating service contracts had originated. The subject of the analysis is national legislation of Austria, France, Germany, Switzerland, and Italy.

In Bosnia and Herzegovina (civil) law is not codified or unified due to the existence of different levels of legislative authority. In the current constitutional framework, unification has been done only at the aforementioned levels, but there are requirements for codification of civil law (Morait, 2015, pp. 287–307).

2. The French Civil Code

The codification of civil law in France took place in Napoleon's time. Napoleon's role in passing the *Code civil* was crucial. Realizing the fact that

France got a capital legal work, and summarizing his life's work in exile on St. Helena, Napoleon said: "My true glory is not to have won 40 battles... Waterloo will erase the memory of so many victories....but...what will live forever is my Civil Code." The first and most important code is the famous Civil Code (*Code civil*), often called the Napoleonic Code (*Code Napoleon*), which came into force on March 21, 1804. The Code contains only civil law norms in the narrow sense because commercial law was later regulated by special provisions. It is comprised of a total of 2,281 articles and it is divided into an introductory chapter and three books. The first book deals with the law of persons (Articles 5–515) and contains provisions relating to status, marital and family law. The second book deals with the law of things (Articles 516–710): the regulation of property rights - ownership, usufruct, and servitudes. The third book is entitled "Different ways of acquiring property" (Articles 711–2281) and includes the law of obligations and different types of contracts, inheritance rights, marriage and property regime between spouses, securing claims (personal and real), provisions on statute of limitations, etc. The civil procedure is regulated by a special code - *Code de procedure civile*, passed in 1806 (Popov, 2001, p. 43). In terms of style and language, *Code civil* has achieved remarkable clarity and legal technique. The astonishing fact is how the legal technique reached that degree at the very beginning of capitalist development. The language is clean, clear, safe, and briefly interpreted (Lachner & Roškar, 2014, p. 36). The sentences are short and clear, with balanced use of legal-technical terms, without theoretical generalizations and references in one article to other articles, and for which understanding legal education is not necessary.

Special attention is paid to contracts in the Civil Code. The contract represents a condition and legal expression of a commodity production. The contracting parties have full freedom with regard to the content of the contract, providing the content does not infringe the law: "An agreement concluded by law becomes law for the parties who concluded it" (Article 1134), (Šarkić, 1999, p. 237).

The *Code civil* from 1804 is still in force for it contains sufficiently general and flexible rules, and case law has been able to adapt its provisions to new needs. This is actually one of the basic contradictions of any codification. The rules must be flexible enough to be able to adapt to social development. In support of the aforementioned is the fact that no civil code has had such impact on the development of civil law in other countries as the *Code civil*. The civil law of Belgium, Luxembourg and the Netherlands has not been freed from its influence to this day. The Spanish *Codigo civile* from 1889, still

in force, is strongly influenced by the French *Code civile*, especially in the field of law of obligations (Stojanović, 2000, p. 36).

It is important to emphasize that France was a colonial power in the 19th century, and its influence in the Middle East, Oceania and Africa was great, even after the independence in these regions. For example, the Egyptian Code from 1949, while respecting the Islamic law, relies heavily on the *Code civile*. Algeria, Tunisia and Morocco are also countries whose codification is based on the French codification. The legal systems of a large number of African countries (Senegal, Mali, Niger, etc.), Latin America, and even North America were developed under the significant influence of the French law (Stanković, 2013, p. 122).

3. The Austrian Civil Code

The circumstances in which modern Austrian civil law originated were similar to those prevailing in most of the countries of Central and Western Europe in the past three centuries. Each country had its own customs and regulations which made the movement of goods, services, people and capital, difficult.

Therefore, attempts have often been made to remove or at least reduce legal particularism. It is believed the process began in the 12th century, when the first lawyers from Austria, educated at the University of Bologna, passed the knowledge of the Roman legal heritage contained in Justinian's codification. However, the reception of the Roman legal heritage was gradual and slow. Even its use in court proceedings was explicitly prohibited in certain periods. Yet after, the Roman legal heritage penetrated the legal systems of certain nations in various ways. On the other hand, it has never replaced particularism. However, the priority of state policy in order to eliminate legal particularism and create uniform rules for all who live in the territory of the Empire began with the emergence of the central government. In the middle of the 18th century, the formation of a centralized legal infrastructure began, when by order of Empress Maria Theresa, judicial areas were formed - a joint Supreme Court and a joint Ministry of Justice (Nikolić, 2011, p. 314).

In 1753, Empress Maria Theresa gave the order to start the codification, i.e. to make a code which would equalize and establish the law in the empire on solid foundations. At the same time, she explicitly demanded from the commission entrusted with the task to limit themselves to private law, leaving the existing law in force as much as possible and harmonizing the different law in the hereditary lands (provinces), as far as conditions allow. During the codification, she insisted on the application of the principles of brevity, clarity

and simplicity of the rules of conduct, as well as its natural fairness. In terms of content, the Code generally follows Roman law. The Austrian (General) Civil Code (German: *Allgemeines Bürgerliches Gesetzbuch* – ABGB) was passed in 1811, and entered into force on January 1, 1812 in all German hereditary lands of the Habsburg Monarchy (Cvetić, 2002, p. 45). The Code contains 1,502 paragraphs. It is divided into an introduction and three parts, indicating its connection with Roman, i.e. pandect law. The first part (§§ 15–284) regulates personal rights, legal and business capacity, marital and family law (Šarkić, 1999, p. 252). The second part (§§ 285–1341), due to the volume of the matter it regulates, is divided into two segments, one of which refers to real and the other to personal rights - obligations (Kovačević-Kruštimović, 1988, pp. 26–57). The section on real rights contains provisions on the possession, property rights, liens, servitudes and inheritance, while the section on personal rights includes contract law, marriage (property) contracts and liability for damages. The third part (§§ 1342–1502) contains provisions on the determination of rights and obligations, on the modification and cessation of rights and obligations, obsolescence and maintenance.

Given the breadth of the matter covered by the Code, it was considered to be relatively short (e.g. provisions on real burdens and mediation agreements are completely missing, also it contains only a few paragraphs on service contracts), so legal gaps could have been inferred. However, broad but clear formulations should have opened the way to overcoming the problem, because they left room for the creative role of the court and their later adaptation to the new situations both by the court and by legal science (Cvetić, 2002, p. 46). Amendments to the Code were made in the period from 1914 to 1916. Three revisions significantly changed the original text of the Code, so that about 180 paragraphs were reformulated, supplemented or abolished. The new formulations were inspired by the German Civil Code and covered almost all areas, especially general contract law, the right to lease, service contracts (Stojanović, 2000, p. 46).

After the World War II, extensive legislative reforms in the field of Austrian private law took place outside the Code. Nevertheless, in 1986, about 70% of the provisions of the Code were still from 1811. It is relevant to emphasize that since the 1960s, and especially the 1970s and 1980s, there have been significant reforms in the field of family law that have been incorporated into the Code, and contract law has also been significantly changed by a number of special laws (Cvetić, 2002, p. 47).

The influence of the Austrian Civil Code was great in the countries that were part of the Habsburg Monarchy. It was especially important in our area because it had been in force on the territory of Vojvodina, Croatia, Slovenia,

Slavonia, Bosnia and Herzegovina, while in Serbia ABGB was in force revised and shortened (Mirković, 2021, p. 2). The Serbian Civil Code is an abbreviated translation of the ABGB for the most part (Babić & Jotanović, 2019, p. 57). It should be noted that ABGB in Bosnia and Herzegovina was first applied to those Austrian citizens who lived in “Turkish lands”, from January 29, 1855, but since the occupation in 1878, its general application in these areas began. By adopting the so-called “war revisions” from 1914, 1915 and 1916, the Code underwent radical changes by adding certain regulations from the German Civil Code from 1896, but for Croatia and Bosnia and Herzegovina the unrevised text of the Code remained in force (Drino & Shabani, 2014, p. 10). In northern Italy, Venice and Lombardy, it was valid until unification in 1861 (Stanković, 2013, p. 122).

4. The German Civil Code

The conditions for the adoption of a single civil code in Germany were acquired by the unification of numerous kingdoms and principalities in the Second Reich in 1871. Until then, the legal particularism was a reflection of political disunity of German countries. The law valid throughout the German Empire consisted of numerous imperial laws, canon law, and as the most important part – Roman law. In Germany, Roman law was received through Justinian’s codification, commonly referred to as Pandect law (from *Pandect*, the Greek name for *Digest*). German jurists did not apply Roman law in its original form, but commented on and adapted it. In addition to the regulations applied in case law, jurists had built a general theory of civil law and law in general on the texts of Roman law. In this way, a system of law called *Usus Modernus Pandectarum* (contemporary Roman law) was created, which was to be overcome by passing a single legislation that would be valid on the country’s entire territory. In addition to numerous local rights in the territory of Germany, there were areas in which the law was codified (e.g. in 1794 the Prussian Landrecht was valid in Prussia, in Saxony the Civil Code of the Kingdom of Saxony from 1865, and in the Rhineland and the Grand Duchy of Baden the French Civil Code was valid). Therefore, the German Civil Code was passed (Glišović, 2015, pp. 223–231) on July 1, 1896, after 22 years of working on the project. It came into force on January 1, 1900, which was supposed to symbolically mark the beginning of the 20th century.

The German Civil Code (*Bürgerliches Gesetzbuch – BGB*) for the first time abandoned the institutional three-member system in order to introduce the system of Pandect law. Thus, 2,385 paragraphs, as contained in the Code, are divided into five parts, i.e. five books (Stojanović, 2000, pp. 38–40).

The novelty introduced by the German Civil Code is in the general part at the beginning of the Code which contains norms applying to other parts of the Civil Code, so unnecessary repetition of these provisions in special parts of the Code had been avoided. Special parts of the Code – law of obligations, right in rem, family and inheritance law form independent and complete units. The general part (§§ 1–240) consists of provisions referring to the subjects of civil law - natural and legal persons, general concepts of things and legal affairs, deadlines and their calculation, obsolescence, exercise and protection of rights, real and personal means of security. The second part - the law of obligations (§§ 241–853) regulates debtor-creditor relations, and consists of general rules applying to all obligations, such as sections on the content of obligations, obligations arising from the contract, cessation of the obligation, obligations with multiple debtors and creditors. A special part of the Law of Obligations includes chapters referring to certain contracts, such as sale, lease, loan, service, deposit, etc. Also, this part regulates other sources of obligations not originating from the contract: management without orders called *negotiorum gestio*, legally unjust enrichment and obligations for compensation of damages arising from illegal actions. The third part – Right in Rem (§§ 854–1296) regulates legal relations regarding things such as possession, mortgage, the right of pledge and pledge of rights, the right of pre-emption, etc. The fourth part - Family Law (§§ 1297–1921) consists of three sections: marriage, kinship and guardianship. The fifth part (§§ 1922–2385) refers to inheritance law and regulates the transfer of property in the event of death from the deceased to the heirs and includes provisions relating to intestate and testamentary succession.

In relation to the codes passed before the German Civil Code, in addition to the original systematics, it contains some other novelties such as: provisions on legal persons and types of legal persons (associations and institutions), insurance contract, third-party beneficiary contract, etc. It can be concluded that the Code is characterized by pronounced individualism and liberalism from the end of the 19th century. But, although the legislator's aspiration was to regulate civil law in a comprehensive way, to anticipate as many legal situations as possible in detail, the result was an overemphasized casuistic approach and scope. On the other hand, the Code is characterized by professional legal terminology, abstract formulations, precision and depth of thought complicated for people without legal education. In other words, it is written more as a scientific work. The Code makes extensive use of the referral technique, i.e. one paragraph refers to another or even more of them at the same time making it difficult to navigate the Code and its application in practice (Popov, 2001, pp. 47–49).

Some areas of the German Civil Code had undergone significant substantive changes, with some being made by direct intervention in its content, and some implemented through the enactment of special legislation that replaced or limited its provisions. The provisions of civil law underwent minor changes during the rule of the National Socialists, because the unlimited interpretation of the law was an important political tool for achieving the goals of National Socialism in civil law (Đorđević & Piner, 2019, p. 76).

Its influence on the latter codifications is vast, but far less than the French. Under the influence of this code, the Japanese Civil Code was drafted in 1898. Following the example of the German Code, Thailand passed the Civil Code in 1925. A draft of the Chinese Civil Code was created in China in 1930, but did not enter into force. In Brazil (1916) and Peru (1936), civil codes were adopted on the model of the German Civil Code, and it influenced the adoption of civil codes in the following European countries: Poland, Greece, Hungary and Austria (revisions from 1914, 1915 and 1916) (Stanković, 2013, pp. 118–125).

5. The Swiss Civil Code

When it became definitely clear in Switzerland, as it had been in Germany, that the adoption of a single civil code was absolutely necessary, there was no constitutional basis for its adoption. The constitutional reforms from 1874 and 1883 (Nikolić, 2002, pp. 55–64) increased the legislative competence of the federal level of government in the field of civil law, and in 1898 it was extended to the entire field of private law by referendum. However, there were other, perhaps much deeper reasons influencing the shaping of Swiss law. The Swiss Confederation consists of 26 cantons inhabited by three large ethnic groups - Germans (65%), French (18%) and Italians (10%). In Switzerland, three official languages are used in parallel: German, French and Italian. When it comes to religion, there is a distinct division between Catholics (46,1%) and Protestants (40%) where each group has its own view of the matters of legal regulation. There are many political parties in Switzerland, and the Christian Democratic People's Party, the Green Party, the Social Democratic Party, the Radical Democratic Party and the Swiss People's Party have a significant influence in the Parliament. Besides the aforementioned, as many authors state, the legislative work should reconcile the spirit of the city and the countryside, and establish a balance between a deep-rooted tradition and the need for modernization.

When Eugen Huber, a professor of German legal history and politics, began a comparative analysis of Swiss cantonal civil law, Switzerland already

had the Code of Obligations (German: *Obligationenrecht* – *OR*), therefore he drafted a Civil Code without law of obligations. After a long work and discussion, the Swiss Civil Code (*Zivilgesetzbuch* – *ZGB*) was passed in 1907, and entered into force on January 1, 1912. The systematics of the Civil Code is similar to the pandect systematics of the German Civil Code, but instead of the general part it has a short introductory part which contains the norms regarding the Code's entry into force, scope of law, the application of general provisions on other civil law, legal gaps, etc. The Code had 970 articles divided into four parts (books): the law on legal status (legal entities), family law, inheritance law and property law (Popov, 2001, p. 49). After the adoption of the Swiss Civil Code, Huber revised the existing Code of Obligations, which was adopted in 1911 and entered into force together with the Swiss Civil Code on January 1, 1912. Even during the work on the revision of the Code of Obligations, the question of the relationship between the Code of Obligations and the Civil Code was raised, i.e. whether the provisions of the Code of Obligations should be included in the Civil Code thus creating a single civil code with a single numbering. Eventually, it was decided the Code of Obligations should be considered the Book Five of the Civil Code, but to remain as special law with special numbering entitled as the "Federal Act on the Amendment of the Swiss Civil Code (Part Five: The Code of Obligations)". Many amendments have been made to the Swiss Civil Code (Konstantinović, 1982, pp. 606–616).

The Swiss Code of Obligations contains not only civil but also commercial law because there is no special commercial code in Switzerland as in most countries. The Swiss Civil Code was drafted under the predominant influence of German legislation and German legal science. Often editors sought only inspiration in these sources, and inspiration is not imitation. It is important to point out the editors of the Code of Obligations took care its content serves the interest of all citizens for it regulates relations from everyday life, society and each citizen individually. That is why care was taken to make the Code understandable for every citizen, which can be seen from the Code's language as well as the applied techniques.

Although it was compiled under the great influence of German law and based on its regulations, it differs significantly from the German Civil Code. While the German Civil Code is expressed in a very abstract way - its provisions resembling to codes - the Swiss Civil Code shows a tendency towards as much concreteness as possible. It uses short and clear formulations. Each paragraph has only one sentence expressing a completely specific thought. Furthermore, the provisions of the Swiss Civil Code do not refer in numbers to the provisions

of its other articles. In this respect, the Swiss Code of Obligations, as well as the Swiss Civil Code, are reminiscent of the French Civil Code from 1804 - an example of a clear and precise style, which one of the literary greats, Stendhal, read to improve his style (Konstantinović, 1982, pp. 614–615).

The Swiss Civil Code attracted a great deal of attention in many countries. It served as a proposal for the creation of the Civil Code in Italy in 1942 and Greece in 1940, while the influence of this code was felt in Poland, Sweden, Bulgaria, Hungary, etc. The exception was Turkey, which took over the Swiss Civil Code and the Code of Obligations in its unchanged form in 1926 (Stojanović, 2000, p. 46).

6. The Italian Civil Code

The first civil code in Italy was modeled on the French Civil Code. It was passed in 1865, and entered into force on January 1, 1866. The Italian Civil Code (Italian: *Codice civile*) from 1866 is divided into three books. The first one is on persons, the second on the goods, the property and its modifications, and the third on the ways of acquiring and transmitting property and other rights over things. What distinguishes this code from other codifications of the 19th century, and even from the French Civil Code according to which it was made, is the introductory section, the so-called *disposizioni preliminari*, which for the first time contained the norms of private international law, which was a novelty in the history of codification.

The social and economic changes made after the First World War imperatively imposed the reform of civil and commercial law in Italy. After a long period of work, the new *Codice civile* came into force on April 21, 1942, with 2,969 articles. The Code uniquely regulated both civil and commercial relations. In order not to burden the already extensive Code, the provisions of maritime law were not included, which otherwise fall under commercial law, but a new *Codice della navigazione* was drafted entering into force on the same day as the Civil Code.

The Italian Civil Code in the first chapter, i.e. in the preliminary provisions, regulates sources of law, talks about the application of the law in general, the legal interpretation, the temporal validity of the law and private international law. In addition to the preliminary provisions, the Book One contains provisions on subjects of civil law and family law. The Book Two regulates inheritance law, and also contains provisions on gifts. The Book Three contains right in rem, while the Book Four pays special attention to the law of obligations, among other things - adhesion contracts (agreements by consent). These contracts are

typical for modern economy and legal transactions. Judicial intervention was also allowed in order to adapt the contract to changed circumstances (*clausula rebus sic stantibus*). The Book Five is of particular interest for it describes the general principles of employment contracts, collective labor agreements, as well as work in companies. Also, it regulates the entire company law, business protection, trademark protection, copyright and patent law and the law against unfair competition. The Book Six is entitled “Of the Protection of Rights”, but it also contains provisions important for the entire Code, such as regulations on registers, evidence, obsolescence, etc.

The Italian Civil Code from 1942 is a modern code both in terms of its content and its legal technique. The language of the Code is precise and clear as well as its systematics.

7. Conclusion

Codification is a legal act fully and systematically regulating all important issues in certain field. The regulation of the field of civil law with one code is certainly more transparent, harmonized and complete. The term *civil code* in the sense of codification emerges in bourgeois legislation. Desiring to unify the field of civil law in all states of the “bourgeois” type, civil codes were passed.

The aim of this paper was to show how the civil codes regulating the field of civil law originated. The first code was passed in France immediately after the Revolution of 1789, and combined the ideas of the French Revolution. On the other hand, efforts to unify civil law in Austria finally bore fruit in 1811 with the publication of the General Civil Code (ABGB), which was a synthesis of received Roman law and natural-law school, but significantly more conservative than the French Civil Code. In Germany, the Civil Code (BGB) was enacted in 1896 and entered into force in 1900.

After a long work and discussion, the Swiss Civil Code (ZBG) was adopted in 1907, and entered into force on January 1, 1912. The systematics of the Civil Code is similar to the pandect systematics of the German Civil Code.

The first civil code in Italy was passed in 1865, and entered into force on January 1, 1866. It was modeled on the French Civil Code.

As the provisions of these codifications are still in force in many countries, adapted to the circumstances of the time and the needs of legal practice, we can conclude they represent the legal foundations of contemporary civil law, and therefore their importance is even greater.

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NASTANAK GRAĐANSKIH KODIFIKACIJA U EVROPI

REZIME: Kodifikacija je uređivanje neke oblasti (grane) prava jednim sveobuhvatnim zakonom koji se naziva zakonik (građanski zakonik, krivični zakonik i sl.). Uspeh svake kodifikacije zavisi od dva veoma važna uslova: prvi – da postoji jedna posvećena vlast, i drugi – da se ona realizuje u jednoj velikoj zemlji. Stoga će u cilju istraživanja navedenog predmeta biti izabrana nacionalna zakonodavstva kako bi se posredstvom različitih pravnih sistema prikazalo na koji način su nastali građanski zakonici koji regulišu građanskopravnu oblast. U okviru ovog rada detaljnije će se analizirati odabrana nacionalna zakonodavstva Francuske, Austrije, Nemačke, Švajcarske i Italije.

Ključne reči: kodifikacija, Građanski zakonik, nacionalna zakonodavstva.

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