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About the Subject and Method of the Development of the Republic of Macedonia Civil Code

ABSTRACT

Each epoch demands different answers to large legal questions. One of them is which method is optimal for regulating civil law relationship in these times. Systematics and content of the future Macedonian civil law codification, its subject and method of regulating it is the topic of this paper.

Key words: codification, civil law relations, civil law, subject, method, systematic of presentation

ABOUT THE CONCEPT OF THE REPUBLIC OF MACEDONIA CIVIL CODE PROJECT

The Republic of Macedonia Civil Code Project (The Ministry of Justice of the Republic of Macedonia Government, 2009, hereinafter: the RMCC Project) is conceptualised as a paper or a study on justification of the referenced codification undertaking. The fundamental notes of the RMCC development Project are followed by a historical retrospective of the European codification map and the level of the codification-related endeavours reached in the former Yugoslavia, the region of South East Europe. It is followed by elaboration of a situation of a so-called sectoral codification of the Macedonian civil law. It concludes with Annexes, sources of information and reference books used for the development of the RMCC Project study.

As it is clearly evident in the title itself, the fundamental method chosen by the Project redactors is the codifying method. Although the Project redactors advocate for a thorough, “organic” elaboration, codification to be reached through the application of the foregoing method presumes synthesis from individual to general, from specific to abstract. Practically, it is a sum of previously selected individual laws, their decomposition, re-composition and, eventually, their systematisation, entering, and integration into a rounded up, complete and unique legislative work. A code is to be developed from a sum of laws. In its general meaning, codification¹ means collection of individual laws and their

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¹ /L. Codex – Code: facere – to do, create/

arrangement and entering into a unique, systematic work. Induction is a logical method to be used in rendering conclusions, starting from individual and going to general. Deduction is the opposite procedure. As for deduction, rendering an individual judgement and conclusion from a general one through a legislative activity nowadays, in a situation of ever-present hyperinflation of regulations, general documents and laws is an uncertain undertaking. It has already been rendered elementally by political legislators and the case law and legal theory have been cornered and put on the spot. There is no political will for these regulations to be eliminated or amended under the criteria of scientific criticism and criticism of practice. Consequently, the legal theory must acknowledge the pre-existing legal situation as a realistic phenomenon which cannot be avoided and which must be considered to be objective, that is, applicable law, while the case law must apply and construe it, rather than avoid, bypass or modify it, because the law enforcement authorities cannot create law.

Owing to synergy of the reputable lawyers-theorists and enlightened absolutists, the codifying method bloomed in the most developed European countries in the late XVIII and early XIX centuries.

The commentators of the *Corpus iuris Civilis* are attributed the role of those who fragmentised this important civilian law corpus and deteriorated the idea of a uniform regulation of social relations under the beforehand set plan and in a methodical and systematic manner (Kovačević Kuštrimović and Lazić, 2008: 22). Being a basic method of legal regulation of the civil relations in the 19th and 20th centuries, codification is based on the rational school of natural law doctrine. According to the *ius naturalistic* doctrine, a just legal system comes from and rests on the principles which are revealed by reason and which originates from human nature and should be equal for all citizens. That was natural-legal rationalism of the civil law codification being the basis for the development of “perfect” laws, the closed systems containing solutions for all legal matters (Kovačević Kuštrimović and Lazić, 2008: 25).

Objections of Savigny’s followers have survived up until the present time, suggesting that codification prevents the development of law, because a code is usually a work of one generation whose ideas and concepts are anachronous to the next generation already, and also indicating that it is counterproductive for the law development and that codification also means superficiality in the regulation, because it cannot be expected for the legislators to know the entire field of law and to master it with assurance (Kovačević Kuštrimović and Lazić, 2008: 25). Historical development and importance of large civil law codifications realistically dismissed the Savigny’s warnings, which particularly refers to the French and German civil codes. However, this cannot be said for the former Yugoslav countries as well, particularly in the period of the Yugoslav

statehood which was characterised by overnormed legal regulations, and it is therefore acceptable to state that codification would have been an obstacle to the law inflation (Kovačević Kuštrimović and Lazić, 2008: 22).

The Republic of Macedonia has quite justifiably come to grips with the fundamental directions of the law development in the European countries. On one hand, it has committed itself to strengthen the national law which was codified in the 19th century in the leading European countries which currently work on its modernisation and re-codification. Noticeably, in most countries of the European Union, the legislative work is oriented to strengthening the national law, which is also followed by an opposite trend – denationalisation of the legal regulations, being referred to as harmonisation and unification of the legal regulations of the European Union as an overnational super-state (Nikolić, 2004: 10). The civil law denacionalisation proves to be a need, for the reason of strengthening the economic relations within EU, that is, for the purpose of undisturbed movement of people, commodities, capital and services. The basic directions of the overnational law development refer to the domains of contract, indemnity and real property law (Nikolić, 2004: 113) and consumer law in particular, which becomes the main regulator of unification of movement of goods (Nikolić, 2004: 114).

NOTES ABOUT THE SUBJECT MATTER AND METHODS OF THE DEVELOPMENT OF THE CC RM

This paper is intended for examination of the commitment of the CC RM Project redactors concerning the subject matter and a method of the development of the future Civil Code. It seems to be indisputable that the basic selected method is codifying. The project redactors decided to codify the most important and the most consistent part of private law against the overall area of public law. If law in general is divided to private and public, the civil law is the most important part of private law (RMCC Project, 2009: 10). The subject matter of the Project is the civil law relations which emerge and create subjective civil laws. Primarily, these are the property law relations and their derivatives and also a physical control over a thing (*corpus possessionis*), and the contractual relations and the dynamics of civil law relations. This is the basis or a core of the property law relations to which the inheritance law and family law relations, as well as intellectual law relations may be linked (RMCC Project, 2009: 13).

As for the regulation method, the CC RM Project redactors have a clear vision thereof. This is about a typical civil law regulating method according to which the civil law relations include such legal relations which are based on the following principles: equality of arms, free initiative or autonomy of will,

transferability of law, their proprietary character and a property sanction. A property sanction has been attributed an overdimensional importance relative to a civil law sanction which better indicates the possibility for a sanction to also be reflected on a person, but not in a sense of the criminal law. In principle, the civil law subject matter and method are not disputable, therefore, the subject matter and method of the civil law codification are not disputable either. The problem lies in details and the development, not in a principle. The codifiers have been tasked with selecting and summing up from a legal system which developed without the application of an integral codifying method such norms, concepts and principles which should be at the highest level of generality relative to partial and special solutions and such relations which have been established in practice and which have already been legally regulated through a range of special legal documents.

The CC RM Project redactors start from substituting a so-called phased codifying project, such as the Russian or Swiss approaches are, with an integral undertaking which would, at one stroke, secure an integral, non-controversial and relatively complete system of legal norms which are to norm and build on material and financial relations being the most important social and economic relations. This means that the redactors have agreed that a single code should encompass all principles, concepts (institutes) and civil law norms. Besides, the redactors have also agreed upon a disputable point in the Project, that is, that there is no “uniform formula” for the development of the CC RM. Actually, they believe that a success formula has neither been developed nor accepted globally, that is, that there is no good guideline for codification. As the supportive points, the redactors refer to two generally known and historically comparable codification systems – institutional and pandect. Redactors prefer the future code codification or systematisation under the pandect system. This is evident in the proposal in which codification, that is, systematisation commences with a general part. Such general part did not exist in the former Yugoslav legal system, therefore, it could not be the subject matter of succession in the newly established post-Yugoslav country. The subject of the general part of the civil code was dispersed throughout various regulations of the Yugoslav civil law, however, it has never been completed in a legislative manner, except in documents elaborating theory and in civil law textbooks. At first sight, a decision to apply the pandect system which implies a distribution of the subject matter of the civil law norms into a general part, the real property, contract, inheritance and, possibly, family laws has almost been conditioned by the already existing applicable legal status of the legal system such as the one existing in the Republic of Macedonia and other countries which emerged following the SFRY dissolution (RMCC Project, 2009: 17). The situation in

the period after the SFRY dissolution and the present time results from the legislative processes of reformation of civil law and many other regulations under the influence of the international community which aimed at regulating the material and financial market relations in the private law area, and a democratic state of law in a public law area. A frame of the legal system in which the legal regulations are reduced to the level of a law branch, and many accompanying regulations have been enacted, most frequently in a form of special laws which affect inconsistency and produce contradictions in the legal system in the respective fields of interpretation and application of law, has remained to be dominant.

Under the influence of the political-technocratic circles and under disguise of implementation of various “necessary” projects, a huge pile of regulations, general documents – most often in a form of laws, has been made. The legislators reluctantly used different forms of general documents and, as a consequence, everything – needed or not – received the appearance of law. In the process, any subject of regulation was given importance of a law, without making a selection as to which social relations deserve to be covered by law regulations, and which technical and implementing regulations may be regulated in a form of a decree, rulebook and similar. Such situation in which law and bylaw norms have been mixed makes the job of the redactors more difficult. Now, “a new page should be turned” and law and bylaw relations and regulations should be split up. Colloquially, at some places this is called a “regulatory guillotine”, which implies an intention to free the social relations from a ballast of unneeded regulations which burden the economic life and social existence. At this point, we refer to the prior note which tackles complexity of every codifying undertaking. It is likely that social circumstances did not enable the legislative processes to be conducted in a coordinated and complete manner. In the process of regulating their legal systems, post-socialist countries should, in parallel, implement codification, unification and harmonisation of their legal systems. All of these legislative methods should be harmoniously synchronised. Nowadays, after the reform period in the post-Yugoslav transition countries has gone, the legal system status is almost cemented, therefore, it will be difficult to destroy and re-built it, which proves to be necessary. Legal particularism and territorial fragmentation cannot be used as an excuse any longer. Now it concerns internal particularism existing within the legal system due to hyperinflation of non-codified regulations which, under the influence of a political will, were introduced in the legal system through an “emergency procedure”, attempting to norm only certain law relations which, at a particular point in time, suit the interests of the current legislators.

Redactors of the Macedonian Civil Code Project proceed with their work relying on the MANY Project – Harmonisation of the Republic of Macedonia Legal System with the EU Law, Skopje, 2008. In addition, the Project specially and rightfully emphasises the importance of the future codification language, which should form a successful combination of expert, legal and standard, colloquial language, on the model of the Swiss Civil Code (RMCC Project, 2009: 18). The Project redactors offer an interesting proposal for codification of both criminal law and commercial law matters (RMCC Project, 2009: 17).

Experiences of the neighbouring countries in transition vary. The former Yugoslav republic, the Republic of Slovenia, which has already joined EU has not commenced codification, nor has it the Republic of Croatia which joined EU in June 2013. It has not been done by the Republic of Montenegro or Bosnia and Herzegovina. The Republic of Serbia and the Republic of Macedonia have reached the farthest point in the process of codification of the civil law. In Hungary, the General Redaction Committee publicised in 2001 and 2002 a new concept of the development of the Hungarian Civil Code. Their guiding idea was that, along with adhering to particular changes, a new, modern and uniform civil code should be enacted and harmonised with the market economy demands and EU law. The new Hungarian Civil Code should be based on the required general legal and philosophical principles, along with the overall incorporation of all areas of the civil law, as well as the family law, labour law and the economic entity law (Jozef, 2003). Bulgarian civil law has been codified by branches.² According to Professor Gabor Hamza, the civil law continuity in Eastern Europe after the Second World War is the product of harmonisation of laws in the countries of Central and Eastern Europe which became EU members as of 1 May 2004. Drafts of the new civil codes in the Czech Republic, Hungary and Poland mark the return to the Roman legal pandectistic tradition. The same refers to the CC of SR of Russia which was enacted between 1995 and 2002.

The codifying method also has its motives having a symbolic political meaning. The very fact that a country has commenced codification of the civil law indicates a high level of legal culture, legal maturity of the country and society and also manifests the state sovereignty (RMCC Project, 2009: 17). Apart from legal-theoretic justification, the “political will” justification is also important for the development and adoption of the Civil Code of Macedonia to become a national strategic goal in order to include the Macedonian state into the family of modern democratic European countries with the established rule of law, in order to stabilise the civil law system, prevent disintegration and

² Family Code, Obligations and Contracts Act, Child Protection Act, etc.

degradation and even destruction of foundations of the civil law segment of the national law system. According to the Project redactors, the Civil Code of the Republic of Macedonia would play a stabilising role and have a central place in the overall private-law area. Special laws would be used for filling the legal gaps, rather than for regulating the principle issues of systemic importance which should, by their legal nature, solely belong to the Code (RMCC Project, 2009: 102). This can be illustrated by the following statement of Professor Aleksandar Goldštajn, on the occasion of enactment of the Yugoslav Law on Contractual Relations:

“The Law on Contractual Relations is a codifying document. By this Law, the contractual law has been codified in its entirety and the legal rules of the pre-war civil codes and commercial laws cannot apply any longer. If the Law has not covered something which has been regulated hitherto, it is to be deemed that it happened intentionally. If there are gaps in it, they cannot be filled by referring to the legal rules of the pre-war laws, however, they may be filled by the adopted interpretation methods. For example, the Law does not recognise the concept of partnership which existed in the former civil codes. This concept cannot be waived in practice, but it cannot be referred to the legal rules of the pre-war laws as well. Instead, from the aspect of the Law on Contractual Relations, partnership shall be deemed to be an untitled contract. On the other hand, the Law does not encompass the overall contractual law. Everything falling within the general part of obligations and contract and other contractual relations in the field of trade of goods and services, has been reserved for the Republic legislation and that of the Autonomous Provinces, based on the Federal Constitution (Article 281). As for non-economic entities, the contractual law regulations should be sought after outside the Law on Contractual Relations.” (Goldštajn, 1979: 15)

SOME PRINCIPAL ISSUES

The subject and the method are the basic issues of any codification undertaking. Codification optimism partly originates from an attitude that, by their nature and despite their mutual differences, the civil law relations are uniform in essence and may be reduced to the lowest common denominator with regard to relations which the subjects of these relations enter daily and through centuries. This is about a principle on the relations the citizens enter in their private lives for their personal or family existence under the circumstances of a democratic state with the established rule of law. These are the exchange and consumption relations based on equality and freedom in regulating these relations, their proprietary nature and protection. It is believed that codification of the civil law does not disturb partial regulation, but it prevents certain parts and concepts from being in contradiction with the general regulation. Instead, they have to be harmonised, adhering to the principle of legality. This would result in a more efficient protection of the civil rights, that is, human rights.

Regardless of how attractive it may be, a choice that the legislators should turn to some foreign model was futile, as we witnessed in the past historical digressions. No matter how simple it may look to turn to some great codifying work, the results are discouraging. Copies, receptions and various transcripts of foreign originals backfired on our ancestors, while the consequences and contempt are felt up until the present time. It is therefore better to blaze the trail on its own, as the CC RM Project has already done. What we find to be necessary is to identify the subject matter and method of the development and the relation between the subject matter and the method. In other words, all of the legal relations subjected to the same regulating methods (equality of arms, autonomy of will, transferability of law, proprietary character of law and a property sanction) should find their place in civil codification. The subject matter must follow these methodology units.

That means that the respective real property law and contractual law books are indisputable. These two books of the future civil code may be formed based on already existing codifications of contractual and real property laws.

The family and inheritance law, being the separate books, a private property component, may be built in the future code with all those parts which are subject to the norms derived from the referenced civil law regulating methods. It appears that dramatic reasons condition a compromise according to which the current legal forms of regulation of the family and inheritance relations in their entirety, should be mechanically entered into the future code. In our view, this is not necessary if the purity of both the method and the subject matter of regulation is to be preserved. On the other hand, special laws which regulate the parts of the family law and inheritance law which are not subject to the civil law methodology of regulation, are not excluded. Thus, for example, testamentary disposition may certainly be entered in the civil codes as a part of the book on inheritance law, however, the issue of systematisation of the legal inheritance regime is raised here. The same issue may be raised with regard to certain, even large parts of family law. All of these parts should be separated along a demarcation line separating private law from public law, that is, the area of private autonomy from public law imperative and cogent norms.

To this effect, if redactors decide to apply such selection, the intellectual property law and the related laws should also be taken into account. It should undergo deconstruction because, under our criteria, it could not be introduced as one book of the code. If redactors of the future Civil Code of the Republic of Macedonia decide to enter the copyrights and the related intellectual property law, they already dispose of partial codification of copyright and inventor patent rights. However, if they are to act in a principled manner, they should deconstruct this legal matter and, for example, split it to a book on property and

real estate law, and the remaining part should be entered into a book on obligations. This also refers to the consumer protection law. On top of all comments which were reasonably made by academic Slobodan Petrović at some time past, with regard to incorporation of the consumer law into the contractual law (Petrović, 2002: 92-93), we would also like to add that we consider consumer a part of the public order, a cogent norm, a factor limiting the freedom of entering into contracts and a foreign body relative to the principles and rules of contractual law. This is so when considered from the principle point of view. If we consider this issue pragmatically, a great foreign model could be used, such as, for instance, modernization of the German Civil Code which, through harmonization of the EU Directive on consumer protection, built the consumer law into the text of the German Civil Code.

A civil code general part concept is the codifiers' major problem. If our legislative technique continues to lean against the Swiss model which does not contain a general part in the Contractual Relations Code (1881) or the Civil Code (1912), and which is evaluated and recognised as a successful project, the general part issue would be off the agenda. Regardless of the fact that we inherited the Swiss Contractual Relations Code, our civilists predominantly find it necessary to regulate a general part. In relation to that, there are the projects of the Civil Code Committee developed back in the 60-ies of the last century, which were not adopted. Advocators for a general part note many reasons in support of the idea. The private law concept rests on the basic principles and a common regulation of the subjects of law, items and objects creating these relations, their content and protection. General elements of the civil law relations are the subjects of law, legal transactions, exercising and protection of rights. Putting all of these issues together would enable functionality of the system because many of them have currently been regulated at different places, in different laws, with many repetitions and interweaving, at different times and manners. The notion of a natural person as referred to in the system of the family law norms seems to be unrelated with the notion of a legal entity as regulated by various laws, which wrongfully indicates that these are different concepts, rather than a unique one. Our legal theory has not allocated much time to the development of the general part terms so as to establish the general elements of law which pertain to subjects and objects of law, legal transactions and legal actions, execution and exercising of rights. Regulation of the general part of the code would also be significant as the basis for harmonisation of domestic law with the EU *acquis communautaire* (Kovačević Kuštrimović and Lazić, 2008: 29). If a general part is viewed as the object of regulation, the codifiers will have to deal most with the induction method which must be applied when reaching logical conclusions, going from individual to general.

In addition, it seems that, due to non-existing civil codification in the law past and case law, the deduction method has been frustrated from being applied in rendering an individual judgement from a general one, now when we are over flooded by special laws which all regulate their own matters so that specialisation has led to total darkening of a whole and the principle, making it impossible to derive individual rules from general principles. An inductive conclusion starts from empiric (experience-related) facts and a conclusion being derived from these facts goes beyond the meaning of what these facts in themselves and for themselves mean.

HISTORICAL PERSPECTIVE AND A PROSPECTS

The commitment of the CC RM Project redactors is positive in their efforts to stimulate regional cooperation the absence of which has hitherto reflected on disintegration of the legal area of Eastern and Southeast Europe. Importance of the project of the Southeast Europe Civil Law Forum (CLF), led by a German Governmental Organisation – GIZ, should be used to a larger extent towards formulation of the best solutions for a modern civil code model. It is evident that the countries of Southeast Europe require re-codification (example of the Republic of Serbia and the Republic of Montenegro) or codification, such as in the Republic of Macedonia and other countries if they render a political decision in a manner as it was rendered by the Republic of Macedonia. It would be for the best that, following codification, a country faces and performs the law harmonisation (denationalisation) process towards creation of uniform rules.

To this effect, lawyers in the Southeast Europe face an attitude of their western colleagues indicating that admission to the European Union is conditioned by their acceptance of *acquis communautaire* entirely *en block*, in the manner in which an adhesion contract offer is accepted, because all conditions of harmonisations and coming closer to them are defined by one, economically stronger party (Nikolić, 2004: 125).

It may be concluded that the CC RM Project is based on several pillars: primarily – on reconstruction of classic civil law concepts and re-codification and codification of the civil law concept in parallel with modernization of civil law. This means – not to return to old solutions and revival of old civil codes, but to harmonise civil law with legal standards of modern West European countries and with what has been achieved, that is, with the projects of codification of the European civil law. The available projects, such as those of Landov and Barov and others, may eliminate a threat which a Macedonian legislator has to bypass, which refers to a reception of a foreign national law. If all, even those oldest and most stable European civil legislations are modernized, it would be inappropriate now to receive any national civil law.

Ideal of local lawyers may be subsumed under reaffirmation of this region concept according to which a civil code should be an original legislation written in the spirit of the European legal tradition (in modern terms, it should be developed in the spirit of modern European legal trends), but with the normative solutions which suit the environment they are made for (Nikolić, 2004: 161). Civil codification conceived and adopted in such a manner would solve the issue of the final satisfaction of the need for a comprehensive regulation of the civil law matter and eliminate the need for both the application of the legal rules from the codes written in late 18th and early 19th centuries and the judiciary improvisations aimed at filling the legal gaps (Nikolić, 2004: 173), wherein a strong support pillar for building a modern European country, a full members of the European family of nations, would be built in.

SUMMARY

In this paper, the author advocates for the future civil law codification in the Republic of Macedonia to consistently reflect the subject and the method of regulation of this matter, that is, the civil law relations. The author supports the private law nature of the civil law relations and suggests the redactors of the future CC of RM to make sure that new codification does not enter the public law field which is ruled by imperative, cogent norms. Furthermore, the author also supports an organic distribution and selection of the matter which is to be the subject of the regulation within future codification. At the same time, the author opposes to mechanical summing up of the existing special, partial codifications by which certain civil law branches have been created in a form of special laws on certain civil law relations (contractual, real property, inheritance and family), all of this being in place without the existence of a general part of the civil code.

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