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JOVAN HADŽIĆ, THE CREATOR OF THE SERBIAN CIVIL CODE

Jovan Hadžić, one of the most highly educated Serbs of the time, takes most of the credit for establishing the legal framework of the young Serbian country. By ratification of the Serbian Civil Code (1844), Serbia joined a company of a few countries which had their own civil codes. Undisputed is the fact that Hadžić was highly influenced by Austrian law, but he adjusted certain provisions to serve the needs of the Serbian people. In order to achieve that, he preserved certain institutes from the customary law, although he believed them to be obsolete, and the influence of Roman, French and even Turkish law can be traced as well. The provisions pertained to female children's right to succession, the issue of the family-farming cooperative, and the pre-emptive rights that represent the specificity of the Serbian Civil Code. Hadžić's work and contribution to Serbian codification have often been disputed and criticised, but it has been proved that Jovan Hadžić managed to legally regulate many issues of Serbian patriarchal society. This study will try to emphasise the role and significance of Jovan Hadžić in the codification of the Serbian Civil Code itself, its implementation into legislature, and the improvement of legal, as well as social life in general. Hadžić was an exquisite connoisseur of law, which he consciously adjusted to suit the necessities of the Serbian society of the time. The significance of his work may also be confirmed by the fact that certain provisions of the Serbian Civil Code have remained in force up to the present day.

Keywords: *Serbian Civil Code. – Austrian Civil Code. – Customary law. – Codification. – Jovan Hadžić.*

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1. JOVAN HADŽIĆ

Jovan Hadžić (1799-1869) was a famous Serbian writer, jurist, politician, and the founder of Matica Srpska. He was born in Sombor to father Nikola, a merchant, and mother Sofija (née Ćirković), a sister of the bishop of Bačka Gedeon Petrović, who was the supporter and benefactor for young Hadžić. He completed primary school in Sombor and grammar school in Karlovci. At the time, he was significantly influenced by the famous Metropolitan Stevan Stratimirović, archimandrite Lukijan Mušicki, and professor Georgije Magaraševć. The foundation for his classical education and knowledge of the Latin language was set in Karlovci, where he improved his knowledge of German language and developed interest in languages and poetry.[1]

In 1817 he started studies in Budapest, Hungary, and three years later he completed the studies of philosophy, and he also learnt mathematics, physics, and other natural sciences; Greek and Hungarian language; general and Hungarian history; aesthetics; numismatics; and other sciences.[2] After completing studies of philosophy, he started law school which he studied for three years in Budapest. He successfully attended natural, public, and general law, statistics, political sciences, Roman and criminal law.

At the time, he was already known as a poet with a pen name Miloš Svetić and a supporter of Vuk Karadžić. Hadžić graduated from the law school in Vienna, where he moved to in 1822 only to return to Pest two years later.[3] In 1826 he acquired the academic title of „all laws' doctor", with the doctoral thesis titled „On the Causes of Divorce According to the Teachings of the Eastern Orthodox Church of Christ" (*О узроцима развода брака ӣрема учењу Исѿочне ӣравославне цркве Хрисѿове*).[4] He dealt with language, history, and legal issues. As a historian, he especially dealt with the issue of the First Serbian uprising. His work in the sphere of Serbian codification is particularly important.[5]

In terms of language, due to his discussions and attitudes, he often had disputes with Vuk Karadžić. Hadžić was in favour of the common language and highly cherished Serbian national poetry but considered

1 Miraš Kićović, *Jovan Hadžić (Miloš Svetić)*, Istorisko društvo u Novom Sadu Novi Sad 1930, 4–7.

2 *Ibid.,* 12–13.

3 *Ibid.,* 14–15.

4 Jovan Hadžić, *Dissertatio inauguralis juridica de causis matrimonium dissociantibus, juxta disciplinam Orthodoxae Ecclesiae Christi Orientalis; Inauguralna pravna disertacija o uzrocima razvoda braka, prema učenju Istočne pravoslavne crkve Hristove.* Matica srpska, Novi Sad 2010, 5.

5 *Ibid.*, 2–3.

that the Serbian language should be modernised. In terms of spelling and orthography, he had a major conflict with Vuk in 1837, which lasted ten years. The articles and leaflets he published expressed his attitude against the establishment of old folk orthography. Hadžić lost much of his reputation and authority due to these conflicts and was also characterised as too pro-European and even as an Austrian exponent. This attitude, sometime later, was also transferred to his codification.[6]

Popov points out that Matica Srpska is indisputably Hadžić's most grandiose and most important work and that he clearly spotted the necessity of cultural improvement of the Serbian people and raising national awareness. It was Hadžić himself who produced the name of Matica and the rules of its operation, named „Osnova" (*Foundation*) in 1826. The above-mentioned author assessed Hadžić as quite unsuccessful in literature and linguistics but with excellence in legislature and law, a great patriot, and a successful founder and organiser of significant culture and national educational institutions.[7]

Hadžić was also well known for his charity work. He supported and financially helped many young Serbs, and among them the famous Svetozar Miletić.[8] Despite numerous discreditations and criticisms, Serbian people owe a lot to Hadžić, especially when it comes to his codification activities. By his work on codification of the Serbian Civil Code as well as on the complete legal establishment of the Serbian country, he left a significant mark on Serbian social life in the first part of the 19th century.

2. THE BEGINNINGS OF THE LEGAL FRAMEWORK OF THE PRINCIPALITY OF SERBIA

The work on establishing Serbia's legal framework was initiated during the reign of Prince Miloš, but one must emphasise that the foundations of it had already been laid down during the First Serbian Uprising (1804-1813) and destroyed once the uprising failed.[9]

6 Sima Avramović, „The Serbian Civil Code of 1844: a Battleground of Legal Traditions", *Konflikt und Koexistenz. Die Rechtsordnungen im 19. und 20. Jahrhundert, Bd. II – Serbien und BosnienHerzegowina, Max-Planck-Institut für europäische Rechtsgeschichte*, Frankfurt am Mein 2017, 379–482.

7 Čedomir Popov, „Jovan Hadžić: Osnivač Matice Srpske", Jovan Hadžić, *Inauguralna pravna disertacija o uzrocima razvoda braka, prema učenju Istočne pravoslavne crkve Hristove.* Matica srpska, Novi Sad 2010, 136–142.

8 *Ibid.,* 143.

9 A significant place during the restoration of Serbian statehood had legislative acts adopted during the First Serbian Uprising. Thus, Božidar Grujić composed *For the memory* and *A Letter* which represent legal acts on two institutes - *Praviteljstvujušči*

After the successful Second Serbian Uprising in 1815, there started a gradual renovation of Serbian statehood. New social relations of the young Serbian state were not encompassed by customary law, so Prince Miloš resolved the issues in accordance with his own grasping of justice, which could not be maintained.[10]

The circumstances in Serbia and people's displeasure forced the prince to move forward in that direction. The activities related to the creation of the constitution and other laws, especially the Civil Code, Dimitrije Davidović and Avram Garašević were then engaged on this, starting in Serbia as early as in 1827 when there was formed a „lawmaking", i.e. „lawgiving" committee that was engaged in the translation of the French civil code (*Code civil*), but Prince Miloš was displeased with its work.[11]

The members of the committee[12] were not jurists by education, so they were not able to implement this huge undertaking. The initial idea was to translate this Code in total and then to separate the provisions that suited the Serbian society, which made the job even more complicated since the rules of the *Code Civil* could not be simply adjusted to the needs of the Serbian society.[13]

Therefore, the prince was forced to ask for help from Austria, which, on its side, saw this as an opportunity to increase its influence in the Balkans. So, in May 1837 (new calendar), invited by Prince Miloš, eminent jurists from Austria, Jovan Hadžić, a senator from Novi Sad, and a captain – auditor Vasilije Lazarević, the mayor of Zemun, arrived in Serbia. They read the material that had been collected up to that moment, and two months later, they submitted a lengthy report to the prince. Apart from the assessment of the draft, they suggested the organisation of the legal framework, as well as the principles it should be based on. Hadžić and Lazarević

sovjet (governing authority) and *vožd* (the leader). They served as a foundation for constitutional and legislative acts – in 1805, 1808 and 1811. The central government of the rebellious state consisted of the leader, governing authority, the assembly and the ministries. More about that may be found: Radoš Ljušić, *Istorija srpske državnosti* II, SANU Novi Sad 2001; Vladimir Stojančević, „Srpska nacionalna revolucija i obnova države od kraja XVIII veka do 1839", *Istorija srpskog naroda* V/2, SKZ Beograd 1981; Ljubomirka Krkljuš, *Pravna istorija srpskog naroda*, Pravni fakultet Univerziteta u Beogradu, Beograd 2007.

10 Dušan Nikolić, „O Hadžićevom projektu Srpskog građanskog zakonika", Jovan Hadžić, *Inauguralna pravna disertacija o uzrocima razvoda braka, prema učenju Istočne pravoslavne crkve Hristove*, Matica srpska, Novi Sad 2010, 184.

11 Vladimir Kapor, „Jovan Hadžić kao pisac zakona u Srbiji", *Zbornik Matice srpske za društvene nauke* 61/1976, 11.

12 The members of the committee were: archpriest Matija Nenadović, princes Vasilije Popović and Pavle Radmirović, Dimitrije Davidović, and Vuk Stefanović Karadžić.

13 Ljubomirka Krkljuš, *Pravna istorija srpskog naroda*, 163.

pointed out on that occasion that the text of *Code civil* did not match the legal framework of Serbia because it had been written for people, which was quite different from the Serbian one. Miloš accepted their suggestion to create new, simple, and shorter laws for Serbia, which would serve the needs of Serbia.[14] They believed the new code must stem from the existing rules and customary law and the tradition of the Serbian people.

At the time, an English consul, George Lloyd Hodges, came to Serbia to diminish the Russian influence and increase the Anglo-Saxon one. He also pointed out to the prince that Serbia did not need foreign laws and/or lawmakers. Trying to win Miloš over for his cause, he kept repeating that a good ruler is „sufficient for everything". On the other hand, the Russian representative Vaščenko promoted the idea of the Russian government claiming that Serbia needed a constitution, as well as a criminal and a civil code.[15]

In this situation, Hadžić and Lazarević started their work and very soon divided it among themselves. Hadžić worked on the civil code and Lazarević on the criminal code and court proceedings. Apart from working on the codification, Hadžić also had a significant role in constitutional fights. He composed a constitutional draft, and in the beginning of 1839, after proclamation of the Turkish constitution, he stopped his activities related to the civil code to join the drafting of laws which would regulate the work of the State Council, as well as the ministries of justice, education, the interior and foreign affairs, and at the very end, the courts.[16]

Hadžić's work on the composition of laws moved into two directions: the direction of creation of the constitution and so-called organisational laws, and the direction of the private law sphere. The constitution was supposed to set a foundation to the young Serbian principality and then to develop it through special laws on the structure of certain types of state bodies. The civil code was supposed to lay the foundation to property and ownership relations.[17]

3. HADŽIĆ'S WORK ON THE SERBIAN CIVIL CODE

The Serbian civil code, the first codification of the rules on personal and ownership relations of the new Serbian country, which was re-established in the beginning of 19th century, was ratified on 25 March 1844. Somewhat modified, it was used on the territory of Serbia until 1945, and

14 V. Kapor, „Jovan Hadžić kao pisac", 11.

15 D. Nikolić, „O Hadžićevom projektu", 187.

16 Lj. Krkljuš, *Pravna istorija srpskog naroda*, 163.

17 V. Kapor, „Jovan Hadžić kao pisac", 10.

some provisions might still be applied when it comes to property relations. For example, the issue of personal easements was regulated by the provisions of the Serbian Civil Code, i.e. Article 331, whereas the issue of gifts was regulated by Articles 561-568.

By ratification of this Code, Serbia joined a small company of the European countries (France, Austria, the Netherlands) of the time which codified the civil rights, and Hadžić's effort invested in the composition of the Code was not a simple nor an easy task. A solution was to be found that would follow Serbian customary rules and implement legal rules of the contemporary European countries.

During the composition of the code, there prevailed an attitude that the future code had to reflect the Serbian national spirit and the specificity of our people. Therefore, Hadžić faced a complicated task to bridge the gap between modern and traditional, i.e. foreign and domestic. Foraging for a path between Serbian tradition, the prince's demands (opposing Hadžić's attitudes), and contemporary French and Austrian influences, he had to resolve a tough challenge during the composition of the Code. It was a demanding and challenging undertaking.[18]

The civil codes of the European countries were founded on Roman law, so one may conclude that not even one of them was a genuine creation in total. Each of them contained something that was already present, i.e. it was a part of general legal tradition, something that was a consequence of transplanting (reception), which was present, something that would also be obvious during Hadžić's work in Serbia.

Hadžić spent several months (August 1838 – January 1839) collecting the material and studying Serbian customs and tradition, and by the middle of 1840, he started drafting. He had a time limit of two years.[19] Since he was a Serb from Austria, he could not be completely familiar with customs and tradition in Serbia; he was helped by the committee and advised by archpriest Matija Nenadović, whose task was to point out what was in line with our customs and tradition and what opposed them.[20]

Hadžić needed permission from the Austrian authorities for his stay and work in Serbia. In 1840, he stayed in Vienna and informed Prince Metternich of these affairs, as well as that the code would be based on Austrian law with certain modifications to Serbian circumstances.

He also promised to prove himself „worthy of the highest trust placed in him by the Austrian emperor and government".[21]

18 S. Avramović, „The Serbian Civil Code", 404.

19 D. Nikolić, „O Hadžićevom projektu", 89.

20 S. Jovanović, „Jovan Hadžić", 40.

21 M. Kićović, *Jovan Hadžić (Miloš Svetić)*, 108.

There is no reliable data on the course of drafting the Code during the reign of Prince Mihailo (1840-1841). It is known that the young prince entered into an agreement with Hadžić in July 1840. A remuneration of 2000 gold ducats (one thousand immediately and the other one thousand after completion) was agreed upon. The time limit was two years. He was allowed to work in Novi Sad, but he had to submit reports on his work once every three months.[22]

The fact that once the work was completed, Hadžić notified not only Metropolitan Josif Rajačić but also the Austrian prince Metternich testified about his connections to Vienna. The Serbian government sent two copies of the Code to Austrian headquarters in Zemun, one of which was aimed for Prince Metternich himself as a sign of gratitude.[23]

Austria welcomed Hadžić's work based on the Austrian code. Kićović correctly pointed out that Hadžić unconsciously served as a weapon for enhancing the Austrian cultural influence in Serbia.[24] Due to its liberal ideas, the initial notion of adapting the French Code Civil did not suit Austria, so that was why Hadžić was supported by the official Vienna since the very beginning.

3.1. Hadžić and the reception of the Austrian Civil Code

The „lawmaking" committee started its work, as it has already been pointed out, by the translation of French laws, whereas Hadžić relied primarily on Austrian law. The French code, bearing in mind significant social differences, could not successfully be received in Serbia.

Having been educated in Austria, Hadžić was quite a connoisseur of Austrian law, so it was not a surprise to see Austrian law made a base for his work. So, by shortening and adjusting certain provisions of the Austrian Civil Code (*Allgemeines bürgerliches Gesetzbuch)* of 1811, the Serbian Civil Code was created.[25]

Prince Miloš requested Hadžić to compose a brief and clear code, modelled on the Austrian one but which would follow Serbian customs and traditions. This required the omission of certain legal institutions and institutes, as well as consolidation of several provisions into one. In order to complete this task successfully, one had to be well familiar not only with the law but also with the circumstances of the Serbian society as well.[26]

22 S. Avramović, „The Serbian Civil Code", 406.

23 M. Kićović, *Jovan Hadžić (Miloš Svetić*), 120.

24 *Ibid.*

25 Lj. Krkljuš, *Pravna istorija srpskog naroda*, 165.

26 S. Avramović, „The Serbian Civil Code", 21.

The opinion of Serbian jurists toward Jovan Hadžić was mostly negative, even condescending. The ratification of the Serbian Civil Code was followed by denials, huge criticism, and disapprovals.[27]

The first critics addressed to Hadžić were forwarded by a Serbian jurist from Austria, Pavle Šeroglić,[28] and then by law professor, Dimitrije Matić.[29] Matić criticised the fact that female offspring were excluded from succession, although it was widely known that Hadžić himself was against this provision. Besides, Šeroglić estimated that certain articles and even whole parts were transplanted from the Austrian code and that certain provisions were completely wrong, as well as that numerous paragraphs were „ruined" during transplanting by shortening, and that some important parts were not included. The final Šeroglić's mark was that this Code was „narrow and insufficient".[30] Matić also opposed the provisions limiting the female children's right to succession and gender inequality since it was not „natural justice" and „which was not envisaged by any code of any society that was even moderately educated".[31]

In the second part of 19th century, Nikola Krstić, a judge of the court of cassations, negatively assessed Hadžić's work. He posed a question of equality of male and female children, maintenance of family cooperatives, and introduction of land registers.[32] With his criticism, Krstić attracted the attention of the intelligentsia and wider public, so in 1872 he was commissioned to work on the revision of the Code, but the implementation of his draft, which was never completed, never took place.[33] At the end of the 19th and beginning of 20th century, Hadžić's work was criticised by an eminent Serbian jurist, Andra Đorđević, assessing it as „just a bad extract from the Austrian Code".[34]

Slobodan Jovanović also pointed out that the Serbian Civil Code was only a „shortened version" of the Austrian Code,[35] and this assessment

27 *Ibid.,* 14.

28 Pavle Šeroglić, „Pregled Zakonika Građanskog za knjaževstvo Serbiju 25. marta 1844. Obnarodovanog", *Bačka vila*, Novi Sad 1844, 114–187.

29 Dimitrije Matić, *Objašnjenje Građanskog zakonika za Knjažestvo srbsko*, I-IV, Belgrade 1850–1851.

30 P. Šeroglić, „Pregled Zakonika Građanskog", 114–116.

31 D. Matić, *Objašnjenje Građanskog zakonika*, 540–543.

32 Tomica Nikčević, *Postanak i pokušaj prerade Građanskog zakonika Kneževine Srbije*, Beograd 1971, 33.

33 Miodrag Orlić, „Pokušaji da se donese novi građanski zakonik", *Srpski građanski zakonik – 170 godina*, ed. Milena Polojac, Zoran S. Mirković and Marko Đurđević, Beograd 2014, 460.

34 Andra Đorđević, *Privatno pravo*, Beograd 1893, 40.

35 Slobodan Jovanović, „Jovan Hadžić", *Političke i pravne rasprave*, Beograd 1908, 45.

was welcomed by a huge number of the authors of the time, marking it as a bad and shortened translation of the Austrian source document.[36] Apart from certain criticism, Jovanović still believed that Hadžić was the most prominent person in our legislature ever. He also had in mind the fact that Hadžić operated at the time when unwritten customary rules and the prince's autocracy still prevailed. It was only at that time that written laws were introduced and the modernisation of state authorities. As the first Serbian modern lawmaker, regardless of his omissions, he set foundations for our legislature.[37] This same author frequently pointed out that they expected more from Hadžić in terms of originality and establishing of harmony between customary law and civil code as it was done in Montenegro by Valtazar Bogišić.[38]

Contemporary authors, such as Sima Avramović, had more understanding for Hadžić's omissions, taking into consideration the time and circumstances that he worked under. So, Avramović says:

> „The very fact that the Austrian source document had 1502 articles and the Serbian civil codification only 950, i.e. it is shorter by a third, confirms at the first sight the remark that the Serbian civil code is a shorter version of the Austrian civil code. It took huge intellectual efforts, a wide legal picture, and even creativity to draft a code for a low-developed country which looked upon „the older brother" but which had to be adjusted to the needs and general level of the society it was aimed for."[39]

This same author said that Hadžić added several important novelties, especially during the regulation of family cooperative issues (§507-529),[40] but some other differences were also noticed in relation to the Austrian Civil code. To that end, Hadžić pointed out that provisions of the Code were founded on „justice and rule" (§2). The difference may also be seen in Passage B, „Basic outlines of justice and rule in civil codes" (§15-35). So, in these cases, Hadžić expanded the Serbian civil code with more than thirty new rules which were not to be found in the source document.[41]

Avramović concluded that Hadžić took on a much greater undertaking than it was a pure translation and shortening of the Austrian Civil Code. Although in its major part, the Serbian Civil Code represents a

36 S. Avramović „Srpski građanski zakonik", 21.

37 S. Jovanović, „Jovan Hadžić", 277.

38 S. Jovanović, „Jovan Hadžić", *Iz naše istorije i književnosti*, 44.

39 S. Avramović, „Srpski građanski zakonik", 15–18.

40 *Građanski zakonik Kraljevine Srbije*, Geca Kon, Beograd 1934.

41 S. Avramović, „Srpski građanski zakonik", 22.

shortened version of the Austrian Civil Code, Hadžić's changes are a genuine contribution. Therefore, Hadžić may not be termed as a simple „copier", i.e. a simple tailor who only cut, rejected, or inserted certain parts of the Austrian Civil Code.[42]

Although Hadžić abandoned the French model during drafting the code, the French influence may clearly be spotted, and in some provisions, he even favoured the French *Code civil*. For example, such are the provisions envisaging that law may not have a retroactive effect (§7) or in terms of marital obligation of the spouses to be faithful and support each other (§108).

The Serbian lawmaker, following the French model, set forth that the minimal age difference between an adopter and an adoptee had to be 15 years, unlike the Austrian code, which envisaged 18 years of difference. Just like in the French Code Civil, the illegitimate offspring had no right to succession as well as the adoptees.[43]

It is curious that during the discussion on gender equality, the opponents of the Serbian Civil Code also pleaded for the French legislature, but inequality of women was more the consequence of customary law than of the French influence.

As it has already been pointed out, the influence of Roman law was indispensable, both directly and indirectly. Jovanović thought that Hadžić had a Romanist approach when it came to property rights in cooperatives, i.e. that the idea of cooperatives stemmed from Roman law and therefore opposed the national feelings and interests.[44]

Direct reception of Roman law was especially noticeable in the provisions relating to contractual law, such as issues of gifts, gift recalls, deposits, loans, and interest calculations.[45] The norms limiting the working ability of women, as well as the limited legal rights of the minor and mentally unstable persons and the acquisition of working ability of women after termination of marriage, stemmed from customary law, but they may also be connected to Roman law.[46]

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42 *Ibid.,* 22.

43 S. Avramović, „The Serbian Civil Code", 431–432.

44 Slobodan Jovanović," Jovan Hadžić, „Iz naše istorije i književnosti, Beograd 1931, 48.

45 S. Avramović, „The Serbian Civil Code", 438; Jelena Danilović, „Srpski građanski zakonik i rimsko pravo", *Sto pedeset godina od donošenja Srpskog građanskog zakonika (1844–1994)*, ur. Miodrag Jovičić. SANU, Beograd 1996, 49–66; Antun Malenica, „Rimska pravna tradicija u srpskom pravu", *Zbornik radova Pravnog fakulteta*, Novi Sad 2004, vol. XXXVIII, br. 2 tom 1, 116–138.

46 *Ibid.*

Turkish rule over Serbia, which lasted several centuries, took its toll in all spheres of social life, as well as in the sphere of codification of Serbian society. That influence was obvious through certain legal institutes as well as through legal terminology. The remnants of Turkish law, which were significantly different from the Austrian model, were obvious in the issues of property possession. For registration of the property, there was applied the deed system for acquisition and proving the ownership and intabulation registers for registering liens and mortgages.[47] The deed had become a common thing in Serbian society, and that was why it was mentioned in the Code (§946), which only confirmed that Hadžić understood that the introduction of land registers (§292) would be a slow process.[48]

From Turkish law, the institute „miljak" (a piece of land) was taken, as a form of possession of the private property, which the Austrian code was not familiar with. Pre-emptive right (§670) stems from Turkish law. The stated right was also present in other codifications but in the form of contractual obligation, whereas in the Serbian Civil Code it was envisaged as an imperative so the parties to the contract could not amend it. The influence of Turkish law may also be seen in the institutes of pre-emptive right, optional sale, and „amanet" (promise), as well as numerous terms borrowed from the Turkish language.[49]

So, apart from the Austrian influence, the Code contains traces of Roman, French, Turkish and customary law, as well as the Orthodox Canon law, which shall be dealt with later on, which still separates the Code from the Austrian model. Thus, Hadžić gave this codification a genuine air.[50]

3.2. The structure and content of the Serbian Civil Code

The Austrian Code of 1811 was to the certain extent based on Roman law, and therefore the Serbian Civil Code might be observed as „the reception of Roman law", which is reflected in its structure and content. The Serbian Civil Code, just like the Austrian and French, completely accepts the institutional system of division of the civil code into the introduction and three parts.

In the introduction to the Code, there are established legal principles, i.e. its bindingness, as well as the impossibility of reversed effect and the

47 S. Avramović, „Srpski građanski zakonik", 36.

48 Lazar Marković, *Građansko pravo, I, Opšti deo i stvarno pravo*, Beograd 1927, 390–391.

49 S. Avramović, „Srpski građanski zakonik" 37–38.

50 *Ibid*., 38.

freedom of stipulation. Apart from that, in this part there are listed the constitutional principles, i.e. the integrity of personality and possession and civil freedom.[51] With this unique and original form of the introductory part to the Code, Hadžić tried to enable its application and introduce it into the life of the young Serbian country.[52]

Avramović had special respect for the initial parts of the Code, pointing out that they had a double effect. Apart from special goals stated in the introduction, there was a specific declaration on rights and freedoms, the aim of which was to introduce more modern thoughts among mostly uneducated people. It is the already mentioned Passage B „Basic outlines of justice and rule in civil codes" (§15-35) that encompassed numerous and various questions: inviolability of private property, the right to suitable court proceedings for the protection of violated rights, the sovereignty of natural rights, ban of slavery, the principle of legal equality, and the limitation of expropriation. Apart from that, there are stated numerous principles from the sphere of private rights, and some of them had wider political influence, which was very important at the time of the transformation of Serbia from a feudal into a modern country.[53]

This specificity of the introductory part is unique in comparative legal history. As far as it is known, this is the only introduction into a civil codification that clearly stated specific political and legal necessities of people.[54]

The first part of the code contains provisions that regulate personal rights of legal and natural entities. In Chapter 1, Hadžić encompassed the rights of legal and natural entities, whereas in Chapter 2, there is regulated marital law. Chapter 3 sets forth the rights and obligations of parents and children, and Chapter 4 regulates tutoring, i.e. rights and obligations of guardians.[55]

The second part of the Code deals with property law in two passages. In Passage 1, the property right is set as complete, i.e. unlimited and absolute right, just like the one in Roman law, which meant the abandonment

51 Lj. Krkljuš, *Pravna istorija srpskog naroda*, 165.

52 Zoran Mirković, „Uvodna pravila i uvođenje u život Srpskog građanskog zakonika", *Srpski građanski zakonik – 170 godina*, Milena Polojac, Zoran S. Mirković and Marko Đurđević (ed.), Beograd 2014, 77; Valentina Cvetković-Đorđević, „Sadržina i značaj uvoda srpskog Građanskog zakonika iz 1844. godine i austrijskog Građanskog zakonika iz 1811. godine" *Perspektive implementacije evropskih standarda u pravni sistem Srbije*, knjiga 12 Stevan Lilić (ed.), Pravni fakultet Univerziteta u Beogradu, Beograd 2022, 146–156.

53 S. Avramović, „Srpski građanski zakonik", 24.

54 S. Avramović, „The Serbian Civil Code", 428.

55 *Ibid.*

of feudal institutes. Free, private property included complete breakup with feudal institutes. Further on, the Code regulates the issue of succession (legal, contractual, and testamentary). The provisions that regulate the property of a family cooperative form a special unity.[56] The explanations of obligation law are to be found in passage 2, within which there is defined a concept of the contract, contract types, as well as the criteria for contractual validity and voidness.[57]

The third part of the Code contains general provisions for property and personal rights as follows: rights, obligations, surety and pledge, modifications (amendments), and provisions on their termination. Hadžić completed this passage with provisions on prescriptive period, i.e. regulates when and how the property rights may be lost or gained by positive law and which personal rights cannot be outdated.[58]

3.3. Hadžić's provisions and customary law

The Serbian Civil Code is, in its greatest part, different from the source document in terms of the provisions dealing with female children's succession rights. Then there is the issue of family cooperatives and pre-emptive rights. The problem arose with these topics at the very beginning of Hadžić's work.[59]

The precedence in succession is given to male children over the female ones, as it had been envisaged in the very draft by the „lawmaking" committee. Hadžić and Lazarević were against this provision, and they even wrote about this in their report submitted to Prince Miloš. They thought that in the new code, this issue had to be differently regulated. The prince explained on that occasion that in Serbian society, there had been a deeply rooted custom that female children of the deceased may not inherit his property. To confirm this statement, he commissioned an opinion poll. So, on 17 December 1837, he handed over the results to Hadžić through his secretary, Jakov Živanović. The results of the opinion poll confirmed the prince's statement, so this question was considered solved.[60]

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56 http://ricl.iup.rs/2032/1/2024%20%20Common%20and%20Collective%20Property%20%20Ali%C4%8Di%C4%87%2C%20Cvetkovi%C4%87.pdf

57 Samir Aličić, Valentina Cvetković Đorđević, *Collective farming community (zadruga) in Serbian Civil Code of 1844 and the Roman law*, 2024, 33–46.

58 S. Avramović, „The Serbian Civil Code of 1844: a Battleground of Legal Traditions", 428.

59 Lj. Krkljuš, *Pravna istorija srpskog naroda*, 165.

60 Uroš Stanković, „Hiljadu osamsto četrdeset šesta – naslednopravni položaj ženske dece po treći put na dnevnom redu", *Srpski građanski zakonik – 170 godina*, ed. Milena Polojac, Zoran S. Mirković and Marko Đurđević, Beograd 2014, 408.

Regardless of the opinion poll results and the prince's references, Hadžić kept his attitude that this solution was unjust, so in his draft he made male and female children equal in terms of succession rights. On handing over the draft in 1842, he joined the committee, which was supposed to discuss this suggestion, and even then Hadžić adhered to his attitude on the female children's right of succession, although the suggestion was dismissed.[61]

That is how, by-passing Hadžić, the provision envisaging that female children can only get „usufruct right, support, provision, and decent marriage according to the existing custom" was entered into the Code (§397). Female children could be successors only in the case that there were no male children. Apart from that, a woman was made equal to a minor in terms of working ability.

It is important to repeat once again that these principles had no roots in Jovan Hadžić's ideas or beliefs but were conditioned by the beliefs and understanding of Serbian patriarchal society, i.e. patriarchal family, both small and cooperative.[62] Hadžić's opponents started criticising these provisions right after the Code's ratification, which affected his popularity in Serbia at the time.[63]

The critics neglected the fact that Hadžić himself tried to convince new prince Aleksandar I Karađorđević (1842– 1858) and the members of the State Council that it was necessary to make men and women equal in terms of succession, but they were not ready to assume the responsibility for such a great social change in the Serbian society, still highly conservative. In the urban areas, especially in Belgrade, women protested in the streets against Hadžić and discriminatory provisions in terms of the legal position of women, although he was not to be blamed for these provisions. Gender inequality remained the most frequent target for attacking Hadžić and his codification, although his attitudes concerning this issue were widely known.[64]

The legislator had to take a bow to customary law, and Stanimirović pointed out that exactly with regulating this issue there was the greatest deviation from the Austrian Civil Code.[65] Hadžić was criticised for fami-

61 *Ibid.,* 409.

62 Marko Pavlović,"Položaj žene po srpskom građanskom zakoniku", *Sto pedeset godina od donošenja Srpskog građanskog zakonika (1844–1994),* ed. Miodrag Jovičić, Beograd 1996, 210.

63 Miraš Kićović, 120.

64 U. Stanković, „Hiljadu osamsto četrdeset šesta – naslednopravni položaj ženske dece po treći put na dnevnom redu", 408.

65 Vojislav Stanimirović, „Snaga običaja – porodica u Srpskom građanskom zakoniku između starog i novog", *Sto pedeset godina od donošenja Srpskog građanskog zakonika* (*1844–1994),* ed. Miodrag Jovičić, Beograd 1996, 159.

ly cooperatives, which represented the specificity of Serbian society. They had ceased to exist in other countries long ago, but within the Serbian society, they were still the dominant family form. Therefore, it was necessary to codify its status and property relations within it, and later it was going to be shown that the lawmaker failed to regulate it in the best possible way, which, according to many authors, would have far-reaching consequences for the development of Serbian society.

Thus, the provisions dealing with family cooperatives were most often disputed, theoretically and legally, as well as for the role and place family cooperatives kept in Serbian society. Hadžić's critics pointed out that with his provisions, he only caused deterioration of family cooperatives and destruction of rural people.

The analyses of these provisions really show a contradiction in Hadžić's work. Family cooperative was first termed as a legal, „ethical" entity whose property is collective. The holder of the property rights is the association of the cooperative members, and a consent of all adult married men is necessary for disposal of the property. Everything an individual acquires is included in collective property, i.e. all property and goods in a cooperative do not belong to an individual but to everybody, regardless of the fact who acquired it or obtained (§508).

However, other articles to the Code, define this property differently, i.e. as co-ownership:

> „A member of the cooperative living in a community may incur debt only on his part of the property, and the loaners who granted the loan without the consent of the company may be compensated only out of his part, and they may not exercise rights over other parts unless they prove that the loan was invested into that house and that everybody knew of that and that they collectively enjoyed the loan and spent it." (§515).

The critics blamed Hadžić for these contradictory provisions, i.e. his ignorance of family cooperatives, namely insufficient understanding of this institute, as well as the relations and needs of Serbia of the time. However, Petrić emphasised that these principles were not an indicator of the author's ignorance or incompetence but a mirror of social contradictions and a try to preserve the customs, i.e. prevent the falling apart of the traditional institutions, i.e. cooperatives, which was imminent in further development of the Serbian society. [66]

The problem certainly arose from the fact that Hadžić was far better familiar with personal and unlimited property without taking into con-

66 Vera Petrić, „Poreklo Srpskog građanskog zakonika i njegov značaj u stvaranju pravnog sistema buržoaske Srbije", Zbornik Istorijskog muzeja Srbije 5/1968, 79–91, *https://imus.org.rs/wp-content/uploads/2016/09/z-169.pdf*.

sideration that, within a cooperative, property is collective and limited. In Serbian society, this rule had to be limited in order to protect the interest of future generations. Therefore, a cooperative had to be organised as a collective property, but starting from Roman law, Hadžić only saw a person as a property holder. Thus, Hadžić observed property from the point of view of Roman and Austrian law, solving specific issues of the Serbian society of the time, so the cooperative became „a mixture of personal belongings", i.e. simple co-ownership.[67]

Slobodan Jovanović claimed that Hadžić failed to understand the essence of the cooperative, which is little probable, because at the time it was present among the Serbian population in Austria as well, more precisely in the territory of the Military Border, but his final decisions confirmed this opinion. Still, Jovanović was the first to point out that the division of cooperatives appeared even before the Code, but its ratification only accelerated the gap-making and made the division easier. It is obvious that this gap could not be avoided because it was an inevitable result of the development of goods and a money economy.

According to that, Krkljuš pointed out that the criticism directed at Hadžić in terms of family cooperatives and their social role was unjustified.[68]

One may say that Hadžić was unjustly blamed for being someone who destroyed the economic and social welfare of Serbian society and that by the introduction of a western model, he destroyed Serbian tradition and customs as well as that he imposed a foreign code which destroyed customary law and its social institutes.[69]

It is clear that Hadžić had no choice but to find a way between and reach a compromise between traditional and contemporary approach, which was the only solution for the opposites in the Serbian society during the second half of the 19th century, although for a long time he was considered to be responsible for devastation of cooperatives and the destruction of romantic national structure.[70]

The third specificity of this Code is also related to collective property, i.e. pre-emptive rights. Hadžić also transplanted this institute from customary law and set it forth as follows:

> „These persons were members of the community or cooperative, next of kin, who would assume the right of succession in the sold property, as well as the next-door neighbours and neighbours in general." (§670)

67 S. Jovanović, „Jovan Hadžić", 48.

68 Ljubomirka Krkljuš, „Donošenje Zakonika građanskog za Kneževinu Srbiju", *Glasnik Advokatske komore Vojvodine*, 64/6, 1994, 3–12.

69 S. Jovanović, „Jovan Hadžić", *Iz naše istorije i književnosti*, 46.

70 S. Avramović, „The Serbian Civil Code", 412.

The seller assumes liability to inform the stated persons in advance, and if he fails to do so, they are entitled to rebuy the property within 30 days of the date of sale.

Unlike the Austrian code, Hadžić preserved common customs. He favoured the law but did not exclude customs and tradition.[71]

The legislator also acknowledged both customs and the Canon law when regulating marital relations. Since Hadžić's doctoral thesis was titled „About the reasons of marital divorce, according to the teaching of the Eastern Orthodox Church of Christ," it is clear that he was a connoisseur of marital and family relations. Apart from that, he was aware that the Canon law in this sphere was deeply rooted in Serbian society. Therefore, during his work on the Code, he implemented the idea he also promoted in his doctoral thesis that the authority in marital and family relations should be kept by secular authorities, but it had to be in accordance with the provisions of the Canon law.

The provisions of the Canon law in certain cases were explicitly pointed out, whereas in other cases, without any special emphasising, they were completely transplanted into the Serbian Civil Code. Thus, the influence of the Canon law took precedence over marital law provisions within the Serbian Civil Code, which was one of crucial differences from the Austrian source document. In his thesis, Hadžić indicated to different attitudes of the Orthodox and Catholic churches on certain issues of marital relations, i.e. divorce,[72] so he acknowledged these differences while drafting the Code. Whereas in the Austrian Civil Code it is pointed out that marriage is a contract between two people, in the Serbian Civil Code there is emphasised the religious character of marriage, love, and fidelity (§60). The Serbian church marriage ceremony, which was mandatory, was preceded by a premarital exam taken before the priest (§63), whereas the counterpart to this provision within the Austrian code was an announcement and a solemn declaration of the acceptance. The Austrian code stated an engagement, and the Serbian one, instead of this term, stated the conversation and agreement between a boy and a girl and their families (§61), but also the gifts were not to be found in the source document.[73]

In case of divorce, the Serbian Civil Code envisaged conversation with a priest who would try to reconcile the spouses with three trials in

71 Z. Mirković, „Uvodna pravila", 93.

72 J. Hadžić, *Dissertatio,* 45.

73 V. Stanimirović, „Snaga običaja", 154–155.

certain period, and if he failed to do so, the procedure would be ended in spiritual court, which was regulated by §98,[74] whereas the Austrian Civil Code kept the jurisdiction of the regular court for this subject matter.[75]

These are only certain provisions in which Hadžić, in marital issues, gave precedence to customary and Canon law over the Austrian source document, which proved his excellent command of this subject matter but also a respect for the Orthodox Church tradition.

3.4 Hadžić's language and style

Some critics accused Hadžić of using inadequate, imprecise, and wrong terminology in the Serbian codification. There are some notions that even the language used in the Code was too simplified, namely that it was not sufficiently specialised, although when it was necessary, he used some Latin terms along with the domestic ones.[76]

There are authors who, just like Kapor, do not agree with Hadžić's critics and consider that it was a good thing that the language used in the Code was simple and close to an ordinary person because in that way the understanding of the Code and interpretation of certain terms was made easier. At the same time, it was forgotten that some words taken from the Church Slavonic and Russian language, such as „polza" (*benefit*) or „prizrenje" (*consideration*), were widely accepted and, as such, present in the official documents.[77]

One may say that Hadžić shaped and modernised legal terminology. He gradually accustomed the people to new legal institutes and worked on their legal education. It was a serious undertaking, and therefore there had to be some serious omissions and failures, but Hadžić indisputably had an important role in this process.[78]

Hadžić's style in the Code was significantly different from the language and style used in the Austrian Civil Code. He did not directly translate the formulations from the source document, which were often hard and written in the office style, but he did his best to make them closer to an ordinary person. Trying to do so, he sometimes spoke in the second person singular:

74 *Građanski zakonik kraljevine Srbije*, Geca Kon, Belgrade, 1934.

75 S. Avramović, Srpski građanski zakonik", 35.

76 V. Vodinelić, „Sto pedeset godina kasnije: šta je još živo u Srpskom građanskom zakoniku?", Srpska akademija nauke i umetnosti, Beograd 1996, 390.

77 V. Kapor, „Jovan Hadžić", 19.

78 S. Avramović, „Srpski građanski zakonik", 40.

> „If you lose or leave the thing, your possession of it stops." (§210)

In certain articles, an effort to be expressed in a common manner may be spotted directly:

> „If an animal attacks a man or a certain possession and causes a damage, then responsible would be the one who made the animal behave in such a way or who provoked it to such behaviour or failed to control it." (§815)

In drafting of the Code, Hadžić used direct speech and often used examples and listings to make it more familiar to those directed at:

> „Tame animals, such as horses, oxen etc., geese, ducks, hens, turkeys etc., if they escape under our control, they remain in our possession, and we are entitled to reclaim them, and everybody is obliged to turn them back." (§238)

The Roman jurists used this writing technique. Thus, Hadžić acquired a significant role in the legal enlightenment of the Serbian people and the improvement of legal culture.[79]

Hadžić obviously tried to accustom the people to new legal institutes. He created Serbian civil terminology and connected Serbian civil law with European law. Instead of abstract theoretic definitions, he provided simple formulations which were adjusted to the people accustomed to unwritten and customary law.

CONCLUSION

During the first half of the 19th century, huge changes took place in Serbian history in all spheres of social life, even in the legal establishment of the country. A significant role in this process was held by the Serbs from the Habsburg monarchy and especially by Jovan Hadžić, who worked for 6 years with interruptions in the civil codification in order to finally have the Serbian Civil Code ratified in 1844. This Code was not a genuine work but, to a certain degree, a processed, adopted, and shortened version of the Austrian Civil Code. Although the objections relating to brevity and adaptation are justified, Hadžić's work had a considerable influence not only on development of Serbian law but also on the Serbian country and society in total.

The legislator legally regulated new social and economic relations, i.e., the annulment of feudal relations, strong protection of private proper-

79 Milena Polojac „Srpski građanski zakonik i odredbe o prisvajanju divljih životinja: recepcija izvornog rimskog prava", *Anali Pravnog fakulteta u Beogradu* 2/2012, 133.

ty, and development of the economy based on the trading of commodities. With all omissions and shortcoming, as well as numerous contradictions, Hadžić's work remained in force in the Kingdom of the Serbs, Croats, and Slovenes, i.e. in the Kingdom of Yugoslavia, and some provisions could be applied even after WWII and up to nowadays.

As a legislator, Hadžić significantly improved the Serbian national legal culture and development of legal terminology. With necessary respect to the specialised terminology and certain respect of the source document translation, the Code was written in common people's language, and during the first half of the 19th century, it was necessary to regulate certain property rights as well as other relations. It may be said that the creator of the Serbian Civil Code still successfully united the achievements of European coding and the Serbian tradition and customs, which, at the time, was the best possible solution for the codification of numerous issues of the young Serbian country.

Jovan Hadžić bravely entered this complicated undertaking, which was bound to include omissions and mistakes, but he still made a big step forward in the development of the Serbian civil codification, and therefore he must be paid a respect as a lawmaker, i.e. the creator of the Serbian Civil Code. Apart from the stated deficiencies and incongruities, Hadžić deserves praise and respect more than disapproval or criticism.

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ЈОВАН ХАЏИЋ, ТВОРАЦ СРПСКОГ ГРАЂАНСКОГ ЗАКОНИКА

Сажетак

Јован Хаџић, један од најобразованијих људи свог времена, заслужан је у великој мери за правно уређење младе српске државе. Доношењем Српског грађанског законика, Србија је постала једна од првих земља у Европи која је добила свој грађански законик. Неоспорно је да је Хаџић био под снажним утицајем аустријског права, али је поједине одредбе прилагодио потребама српског народа. Како би то постигао, одређене институте преузео је из обичајног права, иако их је сматрао превазиђеним, а видљиве су и примесе римског, француског, па и османског права. Посебност Српског грађанског законика, представљају одредбе којима се уређује право наслеђивања женске деце, питање породичне задруге, као и право првенствене куповине. Хаџићев рад и допринос српском праву, често је оспораван и критикован, али је доказано да је Јован Хаџић успео да правно регулише бројна питања српског патријархалног друштва. У раду ћемо настојати да истакнемо улогу и значај Јована Хаџића у самој кодификацији Српског грађанског законика,

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на његову имплементацију у законодавство и унапређење правног, али и друштвеног живота уопште. Хаџић је био изузетан познавалац права, које је свесно прилагодио потребама тадашњег српског друштва. Значај његовог рада, потврђује и чињеница да су поједине одредбе Српског грађанског законика опстале до данас.

Кључне речи: *Српски грађански законик. – Аустријски грађански законик. – обичајно право. – кодификација. – Јован Хаџић.*

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