LEGAL CULUTRE AND LEGAL TRANSPLANTS*
SERBIAN REPORT

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INTRODUCTION

There are very few communities in the world that are entirely isolated from the contemporary flows of the civilized world. Most of the people live in societies that are, more or less, open to exchange of information, goods, services, and capital. In such circumstances, convergence of different legal cultures is inevitable. Certain communities take over legal principles or even entire regulatory models, from other societies. This process has been ongoing from centuries, and until few decades ago it was unilateral. As a rule, legal principles and models have been transplanted from the European (more general: Western) legal tradition. Sometimes it was done voluntarily, but more often it was done under coercion in a form of pure legal colonialism. Since than, there have been major developments. In some regions, under the influence of globalization, a new, supranational regulation, with mixed features, has started to emerge. In the European Union there has been a fusion of the European continental and Anglo-American (Common law) traditions which led to the creation of the so called *Community law*. This body of law contains even some elements from the legal cultures of the Far Eastern societies. That means that the convergence is no longer unilateral or

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Eurocentric. Hence, today we can speak of a *mutual rapprochement* and of a special *interaction* between different legal cultures on a global level.

As a result of all that has been mentioned, the Serbian law should not been examined as an isolated law. In order to grasp the general picture of the causal link that connects the past, present and the future of the Serbian law, we must look at a larger context.

As a European state, Serbia has been traditionally associated with the culture of the Old Continent. Serbia's law had been evolving for centuries under a dominant influence of the Roman Law heritage and the European continental legal tradition. Almost all legal principles, that did not originated in Serbia, have been transplanted from legal systems of other European countries. In such setting, we could find answers to all of the questions that relate to the past. However, such approach is too narrow for understanding the present and for planning for the future. As it has already been said, the European law in general, which includes Serbian law as well, has been changing its physionomy under the influence of global developments. For this reason, the first part of the paper will cover the global context, as seen through the eyes of a Serbian civil law lawyer. The second part of the paper will cover the Serbian historical experiences with the reception of regulative models and individual legal institutes, while the third part of the paper will deal with the contemporary trends in that area.

I. GLOBAL CONTEXT: CONVERGENCE OF LEGAL CULTURES

1. *Historical Experience*

A. *A Higher Level of Legal Unity at a Lower Level of Social Development*

In the past, social relations were exclusively governed by moral principles and custom. Prolonged repetition of certain acts in identical or similar circumstances, shaped general rules that were accepted by members of undeveloped societies, as governing for future cases. Hence, such practical experiences of a community gave rise to original regulative systems that are very much different from today's normative corpuses created by state organs that in theory are often referred to as *artificial*.[1] Rules were not created *a priori*, rather they came about spontaneously as a result of a past experience of a community. Consequently, the application of such rules was primarily based on the belief that it is in certain situations prudent (useful) to act in accordance with the experience of past generations, and not for the fear of

[1] See, Carleton Kemp Allen, *Law in the Making*, Oxford, 1964, p. 1.

sanctions.[2] In hostile surrounding and in poverty, the fate of each individual was unbreakably tied with the fate of the whole community. That is why originally, customary law was associated with a great degree of legal consciousness. To act pursuant to custom meant to preserve internal harmony and stability of the society, hence to preserve security.

B. *Emergence of the State and Étatisation of Regulations*

In time circumstances considerably changed and the influence of custom began to wither. Production of surplus of goods and exchange of goods, spurred economic and later political integration over a wider area. New, political organization of society marked the emergence of the *state*. Organs of the state begun to take over regulative function in many areas of public and private life. As a result, the method of regulation of social relations started to change. At first, state organs enacted regulation that, for the most part, covered previously set customary rules, but later started to create their own norms. Customary law became anachronous and unfit for practical use. The customary law took long time to form and even longer time to change, while the pace of life became faster. Rapid changes in social relations sought fast change of regulative norms. The society could not wait for existing rule of the customary law to change, or a new one to be formed, through extended repetition of specific actions. Apart from that, the state needed appropriate apparatus to actively direct the development of the society, due to which its organs could not let the regulative system to develop on its own, outside of its control. The epilogue is well known. In many parts of the world, states have stretched their competences to previously unimaginable limits. State organs regulate large number of social relations, they prescribe and carry out sanctions for non-compliance with the set rules and resolve disputes that emerge within the community. However, the situation is not the same in all countries.

2. *Multicultural World and Various Legal Cultures*

The world we live in is multicultural. The culture is a multi-layer and polyvalent concept. This concept, among other things, covers the regulation of social relations. In contemporary world, each state has its own written and unwritten rules of conduct. The shaping of these rules is effected by a variety of factors ranging from historic background, available natural resources and the level of economic development, to climate conditions. Peoples that were exposed to matching or similar effects, also have similar models of

[2] First sanctions, most likely, were not geared towards spreading fear, but rather towards restitution. More on this topic in: Dušan Nikolić, *Građanskopravna sankcija - geneza, evolucija i savremeni pojam*, (*Civil law sanction – genesys, evolution and contemporary notion*), Novi Sad, 1995.

regulations of social relations. In that sphere, several levels of closeness exist between peoples. Resting on that fact, legal writers speak of the existence of separate *legal traditions*,[3] *great legal systems*[4] or *legal cultures*. The now existing comparative studies have shown that there are number of similarities between these traditions, systems and cultures. However, differences among them exist that are sometimes so great that some Western authors speak of law in radically different cultures.[5]

3. *Various Models of Regulation of Social Relations*

Legal literature most often points to the difference that exists between the *Western* (*monistic*) *model*, that was developed over the centuries in the European countries and their colonies, and the *Eastern* (*pluralistic*) *model* typical of certain Asian and African countries.

In the West, legal activity is conducted under a dominant influence of the state. State organs enact legal norms. They interpret and apply these norms according to a previously established procedure. Disputes between people are most often resolved before the court. Contrary to this, in Asian and African societies, state regulation traditionally is less important, particularly in the area of private law. In these societies, life unfolds in accordance with customary, religious and other, spontaneously created rules. Disputes are for the most part settled out-of-court. In other words, the role of state organs is minimal.[6]

A. *Eastern (Pluralistic) Model*

In China, Japan, and some other Asian countries, different models of regulations of social relations exist. Opposite to the so called *monistic or pure legal systems* of the Western countries, which almost entirely consist of norms created by the state organs, regulative norms in these countries are *pluralistic* or *multidimensional*.[7] They cover diverse regulatory clusters that consist of legislation, customary and moral rules.

In China, the predominant opinion is that people should act in accordance with the customary rules and moral principles of the community

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[3] See, *Legal Traditions and Systems*, Katz, Alan N. (ed.), New York – London, 1986.
[4] See, *The legal Systems of the World, Their Comparison and Unification*, René David (ed.), Tübingen – The Hague – Paris; Losano, Mario G., *I grandi sistemi giuridici, Introduzione ai diritti europei ed extraeuropei*, Roma – Bari, 2000.
[5] See, Barton, John H., *Law in Radically Different Cultures*, St. Paul, 1983, p. XV.
[6] See in detail, Dušan Nikolić, *Uvod u sistem građanskog prava* (*Introduction to Civil Law System*), 9th edition, Novi Sad, 2008, pp. 17-34.
[7] Tan, Poh-Ling, *Asian Legal Systems, Law, Society and Pluralism in East Asia,* Sydney – Adelaide – Brisbane – Canberra – Melbourne – Perth, 1997.

to which they belong to. State legislation, according to the traditional teaching, is only a necessary evil, unworthy of a decent man.[8] This is the reason why many areas of everyday life, almost exclusively governed by legislation in other countries, are regulated by customary rules in China.

Similar situation is found in Japan which was for centuries exposed to strong influence of Chinese culture.[9] In Japan, as in China, legal norms prescribed by the state organs have limited role. Particularly private law norms. The reason is to be found in Japan's cultural heritage and philosophy of life. It is well known that harmony in social relations (*wa*) in Japan is considered to be of the greatest value. This notion of harmony in social relations is pointed to in legal writings as an explanation for a general feeling of resentment that an ordinary Japanese feels towards each open conflict.[10] A lawsuit, participation in a litigation, public description of a conflict, even mentioning names in the courtroom are considered shameful and humiliating. That is why a great majority of Japanese opt for out-of-court, peaceful settlement of disputes through compromise that are most often reached via mediation of a third person. In such instances, customary law rules (kanshū hō) are applicable.[11] In Japan, official state proscribed law, which was accepted at the end of XIX century under the political pressure of the Western countries, is of very limited practical importance. On the other hand, the so called un-official private law customary rules are key model for regulating social relations and play a very dominant role in everyday life of people in Japan.[12] However, the fact that the importance of the official state law is marginalized does not mean that the state chose a passive approach to regulation of social relations. To the contrary. Japan has a very clearly set strategy of development in that respect. "Small percentage of litigations is the result of government politics geared towards eradication of litigation cases among the Japanese people and directed towards the creation of social peace without strong control. Accordingly, strict restriction on the number of qualified lawyers is one of the governmental policies applied".[13] In Japan, judges, public prosecutors, and lawyers can only be persons that pass

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[8] Confucianist claimed that people should be governed by *li* (ritual, custom, and a like – note. D. N.) and moral and not by law or punishment..."(Ju-Lan, Fung, *Istorija kineske filozofije*, Beograd, 1992, p. 190).

[9] Wang, Dominique T. C., *Les sources du droit japonais*, Genève, 1978, p. 21; Noda, Yosiyuki, "Comparative Jurisprudence in Japan: Its Past and Present", *The Japanese Legal System – Introductory Cases and Materials*, Hideo Tanaka (ed.), Tokyo, 2000, p. 223. Kritzer, Herbert M. (ed.), *Legal Systems of the World*, Santa Barbara – Denver – Oxford, vol. II, 2002, p. 773.

[10] Abe, Masaki, *Japan*, *Legal Systems of the World,* Santa Barbara – Denver – Oxford, vol. II, 2002, p. 779.

[11] For more detail see: Kawashima, Takeyoshi, "Dispute Settlement in Japan", *The Social Organization of Law*, Donald Black and Maureen Mileski (eds.), 1973, pp. 58-74).

[12] Rokumoto, K., *Legal Resolution of Civil Disputes*, 1971, pp. 297-298. According to: Tanaka, Hideo, *op. cit*, pp. 262-263.

[13] Abe, Masaki, *op. cit*. p. 779.

National Bar Exam that is followed by appropriate training in specialized institutions. The bar exam is organized in such manner so that in can only be passed by a small number of candidates. This is supported by a statistical data. For example in year 2000 only 1.000 out of 30.000 candidates passed his exam. The result of the current policy is a small number of qualified lawyers. In 2001, that was only 2.200 judges, 1.300 public prosecutors and 18.000 attorneys in the population of 127 million. The maintenance of such low level of lawyers authorized to provide their expertise, makes the application of official law more difficult and slows down the operation of courts. Thereby, people are indirectly stimulated to pursue traditional models of regulation of social relations and to out-of-court settlement of disputes.[14] Such government police has proven successful. Most Japanese still opt for life in harmony, in conformity with customs and moral principles, and for peaceful, out-of-court settlement of disputes.[15]

Customary rules are of a great importance in legal systems of many African societies.

B. *Western (Monistic) Model*

As stated previously, the feature of the Western model is that almost the whole area of law is regulated by rules set by organs of the state. Customary and other rules are crated by non-state actors, and only given an obligatory character if there is a state sanction to support such rules. However, the Western model is not the same everywhere. There are three types of legal systems created by the state: European Continental, Anglo-American and mixed system.

In countries of Continental Europe, the law is created through acts of legislation and, under certain conditions, by organs of executive branch of the government. General rules are enacted in the form of *statutes* and other *general legal acts*, according to a previously determined procedure and within precisely defined jurisdictions. In legal systems of European type, the statute is a primary source of law. Rules from other sources are legally binding only if their obligatory character is, directly or indirectly, prescribed by law. In most European countries the law is codified. This means that legal norms are to be found in one statute (*code, codex*) or, possibly, in several statues each of which regulates specific branch of law (*system statues*). Rules contained in statutes are general in their nature. They are formulated in such a manner as to be applicable (through deduction) to unspecified number of cases as well as to unspecified number of persons that find themselves in such situations.

[14] *Ibidem*, pp. 777-779.
[15] *Ibidem*, p. 254, ss.

Apart from that, in theory, as well as in legal practice of the countries of Continental Europe, it is common to refer to legal principles, principles of logic and to abstract legal categories. However, the law is not the same in all the countries of Continental Europe. There are differences in the substance of legal regulation, political goals, fundamental principles, particular normative solutions and system or regulation. Also, three different legal areas (Roman, Germanic, and Scandinavian) have formed on the European continent over time that, to a great extent make the harmonization and unification of the law of the European Union difficult.

In the Anglo-American legal systems legal norms are usually created through judicial practice. This law is for the most part *judge-made law*.[16] General rules of law can only be set by the higher courts. Decision of these courts are held to be *precedents*, thus legal systems of such nature are often referred to as *precedental*. Precedents bind lower courts to decide in the same manner in all future cases that are alike. Since general rules emerge as a result of a specific *case*, the Anglo-American law is said to be casuistic (in contrast to European Continental law, which is general and abstract in its nature). Precedents are created through practice of courts which have applied common law (*courts of common law*) and courts that have applied equity (*courts of equity*). Hence, there are two types of case law in countries that belong to the Anglo-American legal system. One is known as *common law* and the other as *equity law*. The Anglo-American legal systems also use statute law and other general legal acts, although very rarely. Most of the relevant social relations are governed by rules created by courts. This may lead us to get a wrong impression of the hierarchy in these legal systems. As in countries of Continental Europe, preference is given to statute laws. However, statute laws are binding only if they are not contrary to constitutional principles. This, of course, is determined by the highest courts. Such model further strengthens the position of judicial organs that anyhow have a dominant position in the process of creation of the whole legal system.[17]

Some legal systems created by the acts of the state have mixed features. They have both statute laws and other general legal acts enacted by legislature and executive, however it is possible that the highest courts can create law (through precedent decisions). Such legal systems are, on one hand close to European, and on the other to Anglo-American law. However,

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[16] It is true that we can find certain elements of judge-made law in Continental European legal systems. See: Nikolić, Dušan, "E*lements of Judge-made Law in the Serbian Legal System*", *Precedent and the Law*, Hondius, Ewoud (ed.), Bruylant, Bruxelles, 2007, pp. 437-467.

[17] Compare: Whittaker, Simon, *Precedent in English Law: A View from the Citadel* (*Precedent u engleskom pravu: pogled sa tvrdave*), Evropski pravnik / European Lawyer Journal, num. 3, 2007, str. 9-87; Sellers, Mortimer N. S., *The Doctrine of Precedent in the United States of America* (*Doktrina precedenta u Sjedinjenim Američkim Državama*), Evropski pravnik / European Lawyer Journal, num. 3, 2007, str. 89-131.

this is not a simple combination of the two legal traditions. In these systems, different normative solutions are intertwined as to create particular legal concepts and specific legal style. Such mixed legal systems exist in Scotland, Quebec, Louisiana, South African Republic, and in some other countries to a lesser degree.[18]

4. *Convergence of Different Legal Cultures in the World*

In the last couple of decades, a great progress has been achieved in the field of harmonization of legal norms in the world. The process of globalization had a great influence on that progress. Developments in the area of economy, from the point of view of the private law were of particular importance.[19] Participation in global division of labor and international trade, attraction of foreign investments, and similar processes have required national legal regulations to harmonize with supranational legal standards. Indirectly such process was facilitated by gradual emergence of global culture, which was a convenient setting for change. However, more often harmonization was facilitated directly. On some occasions convergence was spontaneous.[20] Today, convergence is a planned activity that rests on the strategy carefully prepared by numerous national and international teams of experts. There are different regional projects, as well as projections of harmonization of particular segments of law on global level.

A. *Transformation of the Eastern Model: Étatisation of Regulations*

In certain parts of the world, the role and significance of customary law has considerably changed over the course of the last years. For example, in China customary law has weakened while at the same time, the state enacted regulations has strengthened under the strong influence of economic development and intensified cooperation with other countries.

B. *Transformation of the Western Model: Towards a Non-State Regulations*

In countries with the Western legal culture a reverse process can be identified. It is obvious that, by various methods, the importance of the state regulation is being diminished, especially in the area of private law. More and more often it is spoken of overregulation and the need to decrease the

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[18] See: Zimmermann, Reinhard *et al.*, *Mixed Legal Systems in Comparative Perspective*, Oxford, 2004.

[19] See: Marciano, Alain and Josselin, Jean-Michel (eds.), *The Economics of Harmonizing European Law*, 2002.

[20] For more detail see: Nikolić, Dušan, "Konvergencija pravnih sistema u oblasti građanskog prava", *Pravni život*, October, 2002.

number of statutes and legal norms (*deregulation*).[21] At the same time, commercial and other non-state entities are urged to autonomously regulate relevant relations it particular area (*d'étatisation*).

C. *Regulation of Social Relations Outside the Direct Influence of the State*

a. Restatements in the Legal System of the United State of America

Since 1923 in the United State of America a special institute – *The American Law Institute* has been working on the advancement of legal regulation. The primary task of this institution, through the so called *Restatements of Law* was to systematize, modernize, and codify rules contained in precedent decisions, some of which are several centuries old.[22] The Institute in some cases has a considerably more creative role. Namely, the restatements are sometimes used for introduction of entirely new rules. That is the method through which certain segments of the legal system are advanced while existing loopholes in those segments are filled. The restatements are not legally binding. However, they are widely applied in practice. They are often referred to by businessman, lawyers, and even judges of the highest courts. There several reasons for that. First of all, it is beyond doubt that restatements are well excepted for the high professional and moral reputation of their creators – teams of experts composed of the most respected legal theoreticians and top-notch legal practitioners. However, good reputation of the authors would not mean a lot without an excellent work behind it. Rules given in restatements are prepared meticulously, they are well reasoned, precise in formulation, explained with appropriate commentaries, and what is particularly important, brought in line with the needs of the modern society.

American experience with the restatements is a proof that it is possible to create, outside state's influence, legal rules accepted by the society for the quality of the solution offered and not for their formal obligatory character and state's enforcement mechanisms. Similar experiences exist elsewhere in the world.

b. Soft Law in the European Union

Two opposite aspirations are noticeable in Europe. On one hand, there is a desire to preserve national law and national sovereignty, and on

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[21] Compare to: Coffee, John C., "Principles Versus Rules", *Sesquicentennial Essays of the Faculty of Columbia Law School (1858 – 2008)*, New York, 2008, pp. 48-50.

[22] See: Đajić, Sanja, "Ristejtmenti prava Američkog pravnog instituta, Evropski pravnik", *European Lawyer Journal*, num. 3, 2007, pp. 133-138.

the other side there is a need to provide higher level of legal unity in specific areas of law through harmonization and unification.[23]

The existence of harmonized, and in certain segments even uniform legal regulation is one of the crucial preconditions for creation of a strong pan-European integration. For this reason the denationalization of law is a top priority of law policy of the European Union. However, this task is very complex and delicate, first of all due to deep-rooted position that preservation of legal heritage (particularly of civil law heritage) is of utmost importance for safeguarding national sovereignty and cultural identity of every European nation. Also, denationalization means inventing new normative solutions which would serve as a compromise between European Continental and Anglo-American concept,[24] as well as between different legal circles on the Continent, particularly between Roman and Germanic law. Compromises are necessary because promotion of any national legislation into uniform law of the European Union would harshly violate the principle of equality of member states.

Among those in favor of harmonization of civil law there is no consensus as to the method of such process. Some consider that harmonization and unification should be done '*top – down*', by determining fundamental principles, normative models and enactment of uniform legislation at the level of the European Union (*centralistic model*). Others are of the opinion that harmonization should be done '*bottom-up*', through various *(non-centralized)* methods which lead towards gradual, and mostly spontaneous convergence of national legislation. If medical terminology was to be used, it could be said that the first approach was an *invasive* and the second *non-invasive*.

As early as 1970s, architects of the new European order have pointed out the need to harmonize certain segments of the private law. Among the priorities were the rules which directly referred to the problems of creation of the common market. That particular area of law covered the law on contracts and torts. However, the community organs were not vested with competences to enact uniform regulation in that particular area of law. The solution was found in the development of the so called *soft law*. Namely, the idea was to crate a regulatory model which would not be mandatory but could nevertheless serve as a guide to those that take part in contractual relations, as well as to national courts, and finally to national parliaments of the Member States. That would in tern urge the harmonization of legal

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[23] See: Basedow, Jürgen, "Private law in the international arena. From national conflict rules towards harmonization and unification", *Liber amicorum Kurt Siehr*, The Hague 2000, XXXV.
[24] See: "The Coming Together of the Common Law and the Civil Law", *The Clifford Chance – Millennium Lectures*, Oxford – Portland Oregon, 2000.

practice and mutual convergence of different legal systems. Of course, the fact that such project, at due time, could grow into the uniform European Code was not neglected.[25]

Guided by those goals, the Commission of the European Communities commenced to finance a work on preparation of the *Principles of European Contract Law*, in 1980. The project was led by the *Commission on European Contract Law*, which was headed by Danish professor Ole Lando (*Lando Commission*).

The expert team worked for twenty years. In the meantime, certain segments of the projects were made public. In 1995, the first version of the first part was presented; in 1998 the complete text of the first and the second part; and in 2002 the third part with additional chapters was presented to the public. After that, a discussion was opened on the importance and application of the principles of the European contract law which is still ongoing.[26]

In 2008, the *Study Group on a European Civil Code* and the so called Aki group (*Research Group on EC Private Law*) published the *Draft Common Frame of Reference*[27], which in part is based on an amended version of the Lando Principles. In the preface to the book it is stressed that it is "an academic, not a politically authorized text." Precisely this feature of the Draft Common Frame of Reference was a motif for discussion at the international conference titled "*Which European Contract law for the European Union*" held in October of 2008 at *La Sorbonne*. On that occasion, it was pointed out that there is no political will in Europe for the Draft to become obligatory.

c. Autonomous Regulation as an Instrument of the Convergence of Legal Cultures: *Lex Sportiva*

The structure of national and international law is particularly changing under the influence of integrative processes. More often than before new branches of law emerge that do not fit into the traditional divisions known in legal theory. They have a subject-oriented systematization

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[25] See: Blair, William and Brent, Richard, *A Single European Law of Contract*, *the future for harmonisation*, *http://www.bareuropeangroup.com/Blair_Brent-EurocontractLaw[2]htm*.

[26] See: Blase, Friedrich, *Leaving the Shadow of the Test of Practice*, *On the Future of Principles of the European Contract Law, http://cisgw3.law.pace.edu/cisg/biblio/blase*. On February 12, 2003 the European Commission published the *Action plan on a More Coherent European Contract Law*, which envisages different regulatory and non-regulatory measures for the harmonization of legal regulation (OJ C63/1 of March 15, 2003).

[27] *Principles, Definitions and Model Rules on European Private Law*, *Draft Common Frame of Reference,* Bar, Christian von *et al.* (eds.), Interim Outline Edition, Sellier, European Law Publisher, Munich, 2008.

(cover all norms which pertain to particular subject matter – specific area of life). The following branches of law have these features: Environmental Law; Computer Law; Intellectual Property Law; Health Law, etc. Among these new branches we certainly can fit Sports Law, which is clearly defined both in theory and on normative level. It is synthetic in its nature. Sports law covers variety of different principles that were until now part of constitutional, civil, administrative, criminal and other traditional branches of law.

The Sports Law contains imperative norms (*ius cogens*) that must be strictly applied, as well as a large number of *ius dispositivum*, from which subjects can derogate and regulate mutual relations in a different manner (of course, they must respect the limits set by statues and other sources of law).

Last few years it has often been spoken about non-state created rules in that area. So-called *Lex sportiva* may be crated in two separate sectors. The first sector covers the subject matter that, through authorization of the state, can be regulated by autonomous sports associations and other legal entities, and the other sector that covers the subject matter that may be regulated by discretional norms. These are two different cases. In the sector of law that the state has transferred to non-state entities, various rules may be crated that, most often automatically apply to the member of such entities and (possible) to third persons. In the other case, when the state has set general or specific rules of non-obligatory character, or has not regulated certain issue at all, parties have the possibility to chose. Sports associations may crate optional rules, such as those contained in the *Restatements* of the American Legal Institute or those belonging to the corpus of the *soft law* in European contract law. Optional rules would serve as an alternative, or supplement, to non-obligatory rules contained in statutes.[28]

Lex sportiva is increasingly being mentioned at the international conferences as one of the models which facilitate the convergence of different legal cultures and overcome national divisions. Conceptually, methodologically and teleologically, *Lex sportiva* perfectly fits into the globalization process.

5. *Globalization of Law: Convergence of Legal Cultures*

When occurrences in particular parts of the world are viewed separately it is often unclear what is at stake. However, it is possible to find certain correlation in everything. We have seen that in the countries of the

[28] This text on *Lex sprotiva* was presented as a part of Serbian national report at the IASL World Congress on Sports law held in Athens, in 2008.

Western legal cultures the development of non-state regulation and various methods for out-of-court settlement of disputes is being supported. On the other hand, on the Far East, which was characterized by a pluralistic model for a long time, the spread of influence and strengthening of state regulation is evident. The conclusion is simple. There is a gradual mutual convergence of different legal cultures. Similar processes are under way within the same civilization realms.

The change of European (Continental) model of law started in the middle of XX century. The case practice of the European Court of Human Rights in Strasbourg and the Court of European Communities in Luxembourg was of a particular importance for this process. For decades, these two institutions, in a specific manner have been creating general legal rules. This has put into question the principle of division of power that was a characteristic of the European Continental law. Critics say that this is a result of the *Americanization of European law*. On the other hand, as we have stated, the American Legal Institute has been codifying legal rules in the restatements. Simultaneously, in most of the countries belonging to the Anglo-American legal system there is increasingly more and more statutes. Having in mind these occurrences, certain American authors have described this process as the *Europeanization of American law*.[29] In the United Kingdom, which is a member of the European Union, this process has been ongoing for several decades.[30] If we take all of the above stated into consideration, it become obvious that all encompassing process of globalization, including the process of globalization of law, has considerably moved ahead. Only the question of the limits of this process remains.

6. *An Idea: One State – One Law*

In legal theory, opinions are divided on the issue of limits of globalization. Some believe, that it is an Utopian idea, while other claim that this process will sooner or later end by forming one super state with uniform law.

7. *Another Idea: Civil Society and Post-State Regulations*

In politics, and lately in everyday life, it is often spoken of *civil society*. For lack of clear definition, most people, intimately, understands this term to describe something different from the political organization of society

[29] On Americanization and Europeanization of Law, see: Bermann, George A., "Americanization and Euro-peanization of Law: Are There Cultural Aaspects?", *Sesquicentennial Essays of the Faculty of Columbia Law School (1858-2008)*, New York, 2008, pp. 20-22.

[30] See: Whittaker, Simon, *op. cit.*, p. 77.

represented by the state as an entity that has monopoly over force. This term refers to various (non-profit), communities organized around particular interests, which exist parallel and independent of the state. In certain segments of social life, the so called *non-governmental sector* cooperates with the organs of the State, by supporting various activities which contribute to more effective organization of the society, in particular when dealing with important and delicate issues, such as natural disasters, environment protection from pollution, etc. In these areas there is *coordination* and *cooperation*. However, more often civil society acts as a special *opposition* to the state organs. Different interest groups offer critical analysis of the work of the state organs and try to effect (usually) by peaceful means, the way in which social (public) interest are protected, as well as legitimate interests of individuals, before the state organs. Opposition activities sometimes turn into *confrontation*. This happens when there is a conflict of interest within the society, between a smaller social group and interest of the group that is in power. Finally, we could speak of the *competition*. The civil society often articulates and works on the fulfillment of interests that are not addressed by the state organs. Such activities exist in many areas of social life and have a tendency to spread. The state, under different influences, gives up more and more space to non-governmental sector. What is unclear are the limits of such process. As a final point, we can ask the question whether the society can function without the state. Experiences from the far past could lead us to a conclusion that something like that is possible. As it is known, before the emergence of the first states, there existed, at first primitive and later on more developed clan and tribal communities which successfully fulfilled existential needs of their members. These communities had clear and strict rules that were abided by the majority for their conviction and not for the fear of sanction. Of course, such behavior was not the result of high level of (legal) consciousness, but rather from a firm faith, or better said religious belief that one should act as generations of its predecessors have acted in the same situation. The whole order was based on specific system of values considerably different from the present ones.[31] Today, in many parts of the world there is not a sufficient level or legal consciousness, and far less adequate religious influence that could substitute a fear from state's compulsion present in the form of legal sanction. Those that effect regional and global processes are probably aware of this fact. So, what is the issue? It is beyond doubt that strengthening of the civil society leads towards shrinking of competences and gradual marginalization of national states, and to their weakening. This idea itself, is not novelty. It was evidenced, and to a certain extant experienced in the former Yugoslavia, in the period of workers' self management socialism which, among other things, was based on the Marxist teaching of *withering of the state.* Today, different actors are in play, as well as different ideological premises and considerably different

[31] For more detail see: Nikolić, Dušan, Gradanskopravna sankcija…, *op. cit.*.

goals. Architects of the new order try to facilitate global connection which is to enable unfettered flow of people, goods, services, and capital, by strengthening civil society and weakening the state.

What is it that the mankind expects at the higher level of connectedness and interdependence? In the opinion of some authors, it is a global civil society. In other words: occasional, temporary, and in some segments even permanent connection between people from all corners of the world with the goal to provide and protect common (non-profit) interests such as prevention of global worming, etc.

With good reason we should believe that global civil society could function even in today's circumstances, parallel to states and international organizations which support to existing order. It is possible to envisage a situation in which such society would coexist with the so called *global government*. However, the third option (global civil society without states and without global government) seems at this moment as a Utopia, if we have in mind the existing resources, global population, level of economic development, huge discrepancies at the level of legal conciseness of the people, etc.

Numerous scientific institutions and international organizations deal with the possible developmental scenarios. It is a very complex and responsible work. Incorrect estimates and uncalculated steps may have catastrophic consequences for the stability and development of certain regions or even to the mankind itself. Despite the high risk, the process of globalization has taken a considerable range. Its consequences are already felt in many areas and to a certain extant in the area of law.[32]

8. *Current Effect of Democratic Experimentalism – Increasing State Interventionism*

The Fall of 2008 began with a great financial shocks and increasing economic crisis. In many countries the states started to nationalize banks and large enterprises that were of special national interest. In the course of only several months a radical turn has been made from liberal towards state capitalism. State interventionalism has increased in many areas. It is with good reason that we can expect that interventionism will result in strengthening of state legal regulation.

[32] See, Nikolić, Dušan, *Civilno društvo i civilno pravo*, in: *Liber Amicorum Nikola Gavella – Građansko pravo u razvoju*, Zagreb, 2007, pp. 51- 68.

II. SERBIAN LEGAL TRADITION AND FOREIGN INFLUENCES

1. *Retrospective: Adopting Legal Models*

A. *Indo-European Roots*

Serbian legal culture extends far back into history, to the time of the old customary rules of the Indo-European peoples. This was confirmed through research done at certain European universities in the second half of the twentieth century. The research also pointed to the deep-seeded historical connections between communities living on the territory of today's Europe.

Some French authors argue that the old Indo-European societies (*les Indoeuropéens*)[33] were closely related by way of living in the same area, related languages, similar societal organization, religions and most important in this context, legal institutes. According to that, it is plausible to argue that there existed a common unwritten *Indo-European law.* Support for the argument is found in the etymological and content similarities of customary law institutes which were known to practically all ancient Indo-European societies. These institutes were gradually formed under the influence of similar religious ideas and within the confines of the same patriarchal societal organization. This similarity and first customary laws can be explained by the fact that Indo-European peoples lived under similar natural and economic conditions, which was discussed at the beginning of this text. It is, however, udisputed that customary law also developed under strong cultural influences between these peoples. This reciprocal mixing of cultures occured on several levels. In time, it brought about the development of similar guiding principles and specific customary rules of behavior.

In time, the rules of certain communities were distinguished. Several specific legal spheres of influence were formed. One of them was formed under the dominant influence of the Slavic peoples. This was confirmed through research done during the nineteenth and twentieth centuries. Comparative legal and linguistic studies point to a common origin and a high degree of similarity in customary rules.

This similarity was preserved to a great extent even after the great migration of peoples, which included the Serbs [34].

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[33] Odri, Žan, *Indoevropljani*, (Jean Haudry, *Les Indoeuropéens*), Sremski Karlovci, 1990.

[34] See in more detail, Kadlec, Karlo, *Pvobitno slovensko pravo pre X veka*, translated and revised by Feodor Taranovski, Belgrade, 1924.

B. *The First Europeanization: Reception of the Roman (Byzantine) Law*

The earliest known written information about the Serbs can be found in a Byzantine Emperor Constantine VII Porphyrogenitos document of the 10th century, entitled *De administrando imperio*. This work mentions that the Serbian people moved to the Balkans in the first half of the 7th century. En encounter with the Byzantine culture and Roman legal heritage, which occurred at that time, had a detrimental influence on the foundation and development of the law.

Initially, the Serbs lived in areas called *sklavinije.* On that territory, in the field of private law, old Slavic customs (*antiqua consuetudo*) were in use. Over time, customs gave way to written sources of law. Private law was, in part, based on the *Byzantine model*, regulated in *nomocanons*, which parallely, encompassed the norms of clerical law.[35] This was the *first reception*, and at the same time, the first *Europeanization* of the law.

Nomocanons later were adapted to the tradition and particularities of the Serbian people.

Conditions for the gradual development of autochtonous legislation in that field come about until the 9th century, when the first Serbian state during the Vlastimirović dynasty was created.[36]

Towards the end of the Middle Ages, Serbia was, according to distinguished foreign historians, " much more closer to Middle European states than Byzantine".[37]

C. *Return to Customary Law During the Time of Turkish Occupation*

Influence of Eastern culture

Serbia lost its statehood in the middle of XV century. During the Turkish occupation which lasted for several centuries, Serbian people had, for the most part lived in accordance with the customs. The *Customary law* developed under the strong influence of the Turkish authority and Eastern culture.

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[35] See in detail, Taranovski, Teodor, *Istorija srpskog prava u Nemanjićkoj državi*, vol. I-IV, Beograd, 1931-35.
[36] *Istorija naroda Jugoslavije*, Grafenauer, Bogo *et al.* (eds.), Beograd, 1953, p. 231.
[37] Jireček, Konstantin and Radonić, Jovan, *Istorija Srba (kulturna istorija, knjiga II)*, Beograd, 1984, pp. 117.

Untill the midle of XIX century, Serbs lived in large patriarchal communities called 'clans' (*porodična zadruga*).[38] The clans represents a community of people and goods in which a separate legal regime was applied. Clansmen had free disposition of only personal property (*osobina, prćija*) which in included movables of small value. Collective property, which was built up through generations, was indivisible and belonged to all members of the family. This property was managed by family elders. One segment of personal property, the so-called *stožer*[39] was inalieable and kept for future generations. The customary trust ensured the existential security and was very important for families living under Turkish occupation.

Life within the clan carried on in accordance with customary rules and decisions of the family elders. The elders held significant authority and a wide scope of power. Their decisions, to a great extent, influenced many issues concerning the every day life of the clansmen. The elders had an important role in relations with the outside world. They bought, sold and borrowed, etc., on behalf of the clan.

Relations between different communities were ordered pursuant to customary law. Disputed issues were most often resolved by agreement of the disputed clans, in accordance with custom and mediated by third parties (friends, neighbors, etcetera). In case a dispute could not be resolved, a decision was made by the Duke, based on custom and his own personal understanding of equity.

D. *The Second Europeanization: Development of Law in the Period of Uprisings. Various Foreign Influences*

As early as the First Serbian Uprising against the Turkish occupators (1804-1814), there were efforts aimed to form a modern state and to have all significant social relations ordered by law. The first courts were established during this time. However, there were no written laws in the field of civil law and therefore disputes were resolved using the old method. The courts adjudicated in accordance with custom, and if this did not exist, as dictated by equity.

The situation did not change significantly during the Second Serbian Uprising (1815-1830) under the leadership of Duke (*Knez*) Miloš Obrenović.

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[38] See, Perić, Živojin, "Kategorija porodica i porodičnih zadruga u Srpskom pravu", *Arhiv za pravne i društvene nauke*, Vol. XXXII, 1936, pp. 411-414.

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

During the uprising period, Miloš Obrenović governed according to the form of a patriarchally ordered society. He was considered father of the people or, as it used to be said in the spirit of those times, the elder of the great Serbian clan. The Duke mostly acted in accordance with tradition and customary law.[40] However, at that time in Serbia, new social relations which were not in accordance with the tradition and customs began to develop. These were decided upon by the Duke, basing his decisions on *good reasoning* and a personal understanding of justice and equity. Many considered this sort of regulating of social relation as unacceptable. Pressured by vast dissatisfication, the Duke, towards the end of the 1820s made a decision for legislative work to commence.

a. French Influence

In 1828, the Duke's Secretary asked Vuk Karadžić, a reformer of the Serbian language, to translate the French Civil Code of 1804, "word by word, to make it understandable, while the commission (…) would later chose what is suitable for the Serbs".[41] Namely, Duke was "determined to publish civil laws, that would suite the character and customs of his people".[42] The plan was to use the translations of foreign laws as a sort of guide during the legislative process, while normative solutions from the French law were only to be used were necessary. From the official correspondence that followed in 1829, it is obvious that the tasks were later changed. The Greek Georgios Zachariades, a private tutor to the *Knežević* Milan [the son of *Knez*], was entrusted with the translation of certain parts of the French Civil Code. Since the translator did not speak French, he made the translation from the German language. Also, Zachariades was not sufficiently familiar with the Serbian language, and even less with the legal terminology. All these factors contributed to the poor quality of the translation. In such circumstances it was evident that legislative work would prove to be difficult and that it would not be completed within six months, as the Duke's Secretary had planned.

A special committee was formed for reasons of expedience in enacting the civil code. However, the Committee did not have any educated lawyers among its members which rouse suspicion at the positive outcome of the whole endeavor. Certain Serbs from Austria, that were closely observing the legislative process in Serbia, also pointed at this problem of incompetence. Documents exist that indicate that there was a proposal to have the Duke send an able young man to study law in Bon, where the

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[40] See, Jovanović, Slobodan, *Političke i pravne rasprave*, Beograd, 1908 p. 279.
[41] Jovanović, Aleksa S., "Rad na *Toržestvenim zakonima*", *Arhiv za pravne i društvene nauke*, vol. VIII, num. 4, November 25, 1909, p. 17.
[42] *Idem.*

French private law was practiced at the time, and by doing so to help the education of professional lawyers that could offer their expertise to the legislative bodies, and later, to those that would be in charge of implementation of legal norms. However, only years later had Miloš Obrenović offered his support for this idea. In the meantime, the Committee continued the work in the same composition. Its members tried to grasp the meaning of legal principles contained in the French Civil Code and to have the names of those principles translated correctly into the Serbian language. However, their efforts remained futile. Even today anecdotes can be heard about the Committee whose members thought that *servitude* meant slavery, and that a pledge (*hypoteque*) meant the apothecary (pharmacy). Due to all these problems, Duke Miloš expressed public dissatisfaction when he reviewed the legislative project in 1834.

Knez knew that it is not possible to successfully complete the legislative projects without educated lawyers. On the other hand, he did not mind the composition of the Committee at the beginning since he did not have serious intention of significantly changing his way of ruling. As a result, the legislative work was continued to be carried out in the same manner to the satisfaction of all those involved. However, in 1835 an uprising broke out in Serbia (*Mileta's uprising*) as a result of continuous postponement of legislative regulation. It was only under such circumstances that Duke requested expert assistance from abroad.

b. Austrian Influence

In 1836, Austrian Consul Antun Mihanović, arrived in Belgrade to curb foreign influences in Serbia and to strengthen political, cultural, and economic ties between his home country and the Serbian people. Due to diplomatic skills, as well as to general circumstances of that time, Mihanović's stay in Serbia (1836-1838) was marked with radical shift in the Serbian legislative policy.

In 1836, Duke Miloš Obrenović, following the recommendation of his Secretary, and through the mediation of the Consul Mihanović, asked Austrian authorities to allow Vasilije Lazarević, Mayor of Zemun, and Jovan Hadžić, Senator from Novi Sad Magistrate, to cross the border and come to Serbia in order to participate in the legislative work.

Several months later, future lawmakers came to Serbia. They were first of all asked to review the material that was prepared by the Committee. Lazarević and Hadžić found that the proposed text of the civil code represented a literal translation of the French *Code civil* and that its enactment would be a great mistake because Serbia was at a much lower level of social

development than France. In their opinion, normative approaches from French law did not suit the circumstances in Serbia at the time, which, after centuries of occupation, was economically undeveloped, culturally backward, and without educated lawyers who would be capable of understanding the sense of legal norms and how to apply them suitably. In alluding to these facts, Lazarević and Hadžić proposed to the Duke that a completely new code be drafted, which would be based on custom and already existing regulations, at the same time fully taking into account the tradition and peculiarities of the Serbian people.

c. English Influence

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

d. Russian Influence

The Russian Government, that had Serbia under its protectorate, had the opposite point of view when it came to legal regulation. The Russians believed that Serbian needed the Constitution and that the basic laws regulating civil and criminal subject matter should be enacted as soon as possible. Soon after, Vaschchenko, a representative of the Russian Government arrived in Belgrade in order to spur the legislative work and to insure its consistency. Duke Miloš had no other choice than to do all that was at his power in order to speed up the process of enactment of basic laws.

e. Hadžić's Civil Code Project

In 1838 a new Committee was formed with the task of assisting the two Serbs from Austria in their legislative work. Lazarević was entrusted with the writing of the Criminal Code, while Hadžić was put in charge of the Civil Code. The writing of the draft codes was precedeed by months of preparations. From August 1838 until January 1839, Jovan Hadžić collected information on the spirit, customs, habits, and domestic circumstances of the Serbian people, from the materials he gathered from the Duke's officials. Following this period, Hadžić was hired to work on other legislative projects. He did not devote entirely to the work on the Civil Code until the middle of 1840. At that time, he concluded a contract with the Serbian government for

the preparation of the Draft code, which provided that the work would be done in two years time.

f. Reception of the Austrian Law

In the Fall of the same year, Jovan Hadžić spent time in Vienna. On that occasion, he presented the Austrian Duke Metternich with a detailed account of his legislative work and of the overall circumstances in Serbian, promising that the Serbian code would be based on the Austrian Civil Code of 1811, with the necessary adjustments of certain normative approaches. He also stated that he would endeavor to 'prove himself worthy of the trust bestowed upon him on this occasion by the Austrian Emperor and Government'. Hadžić did in fact follow through in this matter. Instead of the anticipated original code founded on national spirit and custom, Jovan Hadžić, submitted to Duke Aleksandar, in September of 1842 a text which was essentially a shortened and somewhat amended version of the Austrian Civil Code.

g. Serbian Civil Code of 1844: Consequences of the Foreign Law Reception

The draft was, with certain amendments, adopted on March 11, 1844 and come into force 14 days later under the title '*Civil Code of The Dukedom of Serbia*' (*Zakonik građanskij za knjažestvo Srbije*).

The adoption of Hadžić's project was of great historic importance. Serbia became one of the few countries in the world at that time to have a civil code. This in turn defined the basic path for the development of civil law legislation. By carrying out a partial reception of the Austrian law, Serbia had acceded to the Germanic legal sphere to which it belongs today. Finally, it should be mentioned, that acceptance of normative approaches from foreign law did in fact hasten changes in the society. Serbia began to develop in accordance with the legal standards which were dominant in Europe. Nevertheless, the Civil Code had a number of shortcomings. It is indisputable that its adoption also resulted in a series of negative effects.

The Civil Code became the subject of criticism immediately upon its publication. Citizens and Serb Layers from neighboring Austria alike were unsatisfied with certain normative approaches. The main criticism was that the Civil Code represents only a revised text of the Austrian Civil Code and that the author contributed to the dissolution and disappearance of the family *clan* [*zadruga*] with the acceptance of unsuitable normative approaches from foreign property law. Certain authors consider this to be a reason for the pauperization of Serb families and destabilization of the society as a whole, the consequences of which are felt even today. Of course, other

opinions exist among theoreticians. For example, Slobodan Jovanović, a renowned Serbian intellectual and professor at the Belgrade Faculty of Law, considered that Jovan Hadžić simply hastened a process that was otherwise inevitable.[43]

In order to alleviate the growing discord between the normative approaches and judicial practice, the Code was amended on several occasions. However, a complete revision was never carried out. Partial amendments rendered the Code that lacked systematic organization from the very beginning, even less consistent and coherent to the people. For these reasons, already by the second half of the 19th century, the dominant belief among the expert public was that entirely new code was in order.

E. *Planned Creation of Legal Elite in Serbia in the Second Half of the XIX Century. Various Western European influences*

Law making clearly pointed to the weakness of the Serbian society which, at that time, tried to integrate into the civilized circle of Europe. For the most part, the population was illiterate and uneducated. The country lacked educated lawyers. The practice that clerk's positions were bought from the state was inherited from the Turkish times and such practice left doors wide open to corruption and legal insecurity. What also lacked was the legal infrastructure for implementation of modern normative solutions from developed European countries. However, the greatest problem was that Serbia lacked intellectual elite which could steer the development of the society in the right direction. What was lacking precisely was a critical number of educated people capable of understanding the events in the neighborhood, who were able to critically analyze such events and make decisions of strategic importance on the way towards European integration. In 1839, the planned creation of the intellectual elite had begun. According to the program drafted by the Minister of education of the time, each year a certain number of state pupils were sent to leading European universities (Budapest, Vienna, Berlin, Heidelberg, Halle, Jena, Paris, Lyon, Geneva, Zurich etc.). It is estimated that up until Serbia's joining of South Slav union of peoples – The Kingdom of Serbs, Croats, and Slovenes, approximately 1,300 students of various callings were educated in this manner.[44] Most of them studied law, as the creation of legal professionals for courts and other state organs was considered to be one of the national priorities.

[43] Jovanović, Slobodan, *op. cit.*, p. 285.
[44] See, Ljubinka Trgovčević, *Planirana elita,* Belgrade, 2003.

F. *Work on the Harmonization and Unification of Law in the Kingdom Yugoslavia: A Failed Attempt at Reception*

At the time of creation of the Kingdom of Serbs, Croats and Slovenes, in 1918, the *principle of legal continuity* was applied. In all parts of the new state the implementation of existing regulations continued. The legal particularism presented itself as an obstacle for a stronger economic, commercial, and political integration of the region. For this reason, the central government, immediately following unification, began the process of developing a unified legal system. However, from the outset, priority was given to regulations in the domain of public law. A committee for the preparation of a preliminary draft of the uniform civil code was only formed in 1930. From the very beginning, it faced numerous legal and political problems. Of particular difficulty were the differences in legal development between certain territories. It is generally considered that because of this discord the working group decided to use the Austrian Civil Code of 1811 as a starting point. Moreover, it was considered that this Code was much closer to the average of law that was in force in the Kingdom, that perhaps Swiss civil law legislation or, for example, the German Civil Code of 1896. Furthermore, practically all legal territories, more or less, developed under the influence of Austrian law prior to unification. It become, directly or indirectly part of the common legal tradition. Hence, it was believed that the official reception of normative solutions from the Austrian Civil Code would cause the least resistance from the political and professional public. Predictions, however, proved to be wrong. The preliminary draft of the new civil code, better known as the *Predosnova* (Preliminary Foundation), was completed in 1934. The project was submitted to the Ministry of Justice the following year. Soon after, public discussion followed. The *Predosnova* was severely criticized.[45] The criticism was aimed towards the proposed provisions, but also against drafters decision to use the Austrian Civil Code as the base. Many considered that Swiss legislation should be used as a base, while others claimed that the country needed a completely original codification, which would equally take into account the domestic tradition and heritage of Central and Western European countries.[46] The *Predosnova* never reached the parliamentary procedure phase. Hence, World War II and the break up of the Kingdom of Yugoslavia came about without appropriate laws in the area of civil law, that is property law.

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[45] See, Eisner, Bertold and Pliverić, Mladen, *Mišljenja o predosnovi Građanskog zakonika za Kraljevinu Jugoslaviju*, Zagreb, 1937; Perić, Živojin M., *Obrazloženje §§ 1.-319. Predosnove Građanskog zakonika za Kraljevinu Jugoslaviju*, Belgrade, 1939.

[46] For more detail see, Marković, Božidar S., *Reforma našega građanskog zakonodavstva*, Beograd, 1939.

G. *An example for the European Union: Private law in Vojvodina during the First Half of the Twentieth Century - A Successful Synthesis of Two Legal Models*

The territory of today's Autonomous Province of Vojvodina held a special place within the legal system of the former Kingdom of Serbs, Croats and Slovenes (Yugoslavia). Two regulatory models fused in this territory over time. Unlike other parts of the Kingdom, legal system in Vojvodina had elements of judge-made law (characteristic of Anglo-American legal systems) and elements of statutory law (characteristic of legal systems in continental Europe).[47] The shaping of such a *mixed legal system* was influenced by, on the one hand, a specific legal heritage, and on the other, a high level of tolerance of the government at the time.

a. Heterogeneous Legal Heritage

Most of what is today known as Vojvodina was under the jurisdiction of several Hungarian provinces up until the First World War. On this territory, Hungarian customary and judge-made law, and in segments the old Verböcz Tripartite (*Tripartitum opus iuris consuetundinarii inclyti regni Hungariae*) which was drafted upon the King's request by Stephan Verböcz, high notary of the Royal Curia, was applied. Verböcz considered customary law to be the foundation of the legal system and the three types of legal sources (*fontes iuris*) which influence its development: royal directives and orders, royal privileges and judgments of the regular land courts. The *Tripartum* indicated the existence of three types of judicial decisions. Sentences (*sententia*) were judgments rendered in specific cases on the basis of existing, clearly formulated legal rules. The task of the judges was to determine the facts and implement the applicable norm. The sentence applied only to defined social relations and its participants. A second type of decisions, were the decisions (*decisio*). They were rendered in cases without any existing normative approaches, or when the norm was incomplete or ambiguous. In such cases, the judges themselves defined the legal rule. Of particular importance was the third type of decision, the so-called prejudices (*praeiudicium*), rendered by the Royal Curia (*Curia regiae*). This was actually a particular type of decision. Prejudices were rendered in cases without previously defined legal or any other type of rules. However, they were specific in that they contained principles based on which certain matters, that were previously disputed in practice, could now be resolved. Prejudices were rendered by the highest court in the country and therefore the rules contained within them were considered applicable for all future similar-type

[47] See, Nikolić, Dušan, *Privatno pravo u Vojvodini između dva svetska rata – zaostavština za Evropsku budućnost (Private Law in Vojvodina between Two World Wars – Legacy for European Future,* Zbornik Matice srpske za društvene nauke, pp. 9-20.

cases.[48] And so, in time, a separate segment of the legal system evolved with attributes of *judge-made law*. In 1769, on the order of Maria Theresa, a collection of Curia decisions was made and published under the title *Planum tabulare sive decisions curiales* in 1800. These collections were published periodically up until the end of the First World War. "Hungarian private law, therefore, was not gathered in one law, but composed of dispersed old and new legal rules. Lacunae in these rules are filled by *customary law, formed on the basis of jurisprudence and the King's judgments. The Curia, as the highest court and* in the most significant so-called *decisions*. (…) Curia decisions *must be applied by the courts as long as the Curia does not modify them*"[49] This principle was later confirmed by statutes. Moreover, the Introductory Law of Civil Procedure of 1912 stipulated that the courts are obliged to apply the Curia approaches issued by the Plenary Senate (a minimum of two-third of Curia judges) or the Senate for the Unity of the Judiciary (president and ten judges).[50] According to the aforementioned Law, all obligatory decisions had to be published in a separate collection.[51]

Hungarian private law was revoked with the Patent of 1852. Instead of this, the whole of the territory of the state applied the Austrian Civil Code of 1811. A change came about only in 1860. At that time, a special commission was formed with the task of once again introducing previous rules. In 1861, the Commission drafted conclusions on certain issues from the domain of private law. This document was adopted in Parliament, but could not be confirmed, as the King had not yet been coronatted. In order to avoid a legal vacuum, the Royal Curia on the plenary session of 23 July 1861, issued a decision whereby the conclusions had to be applied as long as the legislature did not decide otherwise.[52] With this decision, once again, albeit indirectly, its highly significant role in the creation of the legal system was confirmed. In this case, the court was placed above the Parliament and ruler.

The territory of what is today Vojvodina had three towns with the status of free royal towns: Novi Sad (*Neoplanta*), Subotica (*Maria Theresiopolis*) and Sombor (*Szombor*), which received a high degree of autonomy from emancipative acts of Maria Theresa. With the Charter on the Free Royal Town of Novi Sad of 1748, it was determined that citizenry was to independently elect twelve senators and one judge for the Magistrate (*magistratus*), as well as other town officials. The Magistrate had a very broad

[48] See in detail, Lanović, Mihajlo, *Privatno pravo tripartita,* Zagreb, 1929, p. 80, ss.
[49] Piškulić, Zvonimir and Đerd, Imre, *Osnovi privatnog prava u Vojvodini,* Beograd, 1924, p. 8.
[50] See, §75. pursuant to Article 54 of the 1912 Law according to Milić, Ivo, *Pregled madžarskog privatnog prava u poređenju sa austrijskom građanskim zakonikom,* Subotica, 1921, p. 10.
[51] Tarsulat, Franklin, *Polgári jogi határozatok tára,* Budapest 1917.
[52] The conclusions remained in force up until the collapse of the Austria-Hungarian monarchy, and were subsequently applied even later in a new legal setting.

set of competencies. On the one hand, it was the highest organ of the state administration, and on the other, a judicial body which rendered decisions in contentious, non-contentious and penal procedures. The Magistrate was authorized to adjudicate pursuant to the law, town regulations and, what is important to emphasize in this context, *according to jurisprudence that had been established in the free royal towns.*

The area along the border with the Ottoman Empire (*Vojna Krajina, Militärgrenze*) constituted a separate legal territory that was under the administrative control of the Imperial War Council in Vienna (*Hofkriegsrat*). On this territory, Austrian regulations were enforced.

b. Mixed Legal System: Synthesis of Judge-Made and Statutory Law

Vojvodina, based on the decision of the National Assembly adopted in Novi Sad on 25 November 1918, joined the Kingdom of Serbs, and just a few days later, together they joined the state union – the Kingdom of Serbs, Croats and Slovenes. From the aspect of legal regulations, the circumstances had been altered considerably. The north of Vojvodina still applied Hungarian law, while the south, on the territory of the previous Military border (*Vojna Krajina*), which previously was under the jurisdiction of several district courts all applied the *Austrian Civil Code* as *ius particulare.* And so, Vojvodina inherited a dual legal system which, on one hand, comprised norms of Hungarian customary and judge-made law and, on the other, Austrian laws.

The remnants of legal regulations were periodically supplemented or substituted with laws and bye-laws of the Kingdom of Serbs, Croats and Slovenes (Yugoslavia).

A special role in the development of Vojvodina private law was played by a division of the Belgrade Cassation Court (Division B), which was formed in 1920 in Novi Sad. Similar to the Budapest Royal Curia previously, the Division had the power to create legal rules. At first, the judges of the Cassation Court applied the rules of the old Hungarian judge-made law and the norms of the Austrian Civil Code, and later, the relevant regulations of the Kingdom of Serbs, Croats and Slovenes (Yugoslavia) as well. However, the application of the Hungarian legal heritage was rather complex. Some decisions important for practice were not officially codified, and thereby difficult to find. Besides this, a number of Hugarian decisions were rendered a few decades earlier, in significantly different circumstances, for a different territory and time, bringing up the issue of their relevance. The rules contained within them were not always suitable for existing conditions, meaning that through interpretation they needed to be adapted

to new conditions and practical uses. For all these reasons, the Novi Sad Division of the Cassation Court often created its own legal rules, citing relevant legal principles.[53] This development of private law was supported by the legal academia of time. Ivo Milić, a professor of the Subotica Faculty of Law, in the foreword of his book entitled *A Survey of Hungarian Private Law in Comparison to the Austrian Civil Code* concluded that "where positive regulations do not exist, the principles of universal, pandectist law should be applied without any reservation (…) where these do not exist either, the supreme legislature shall intervene: healthy reasoning and a sense of equity"[54] Based on that, in time, a jurisprudence was formed in Vojvodina that, along with the Austrian Civil Code and a few new regulations of the Kingdom of Serbs, Croats and Slovenes, was considered to be a source of law. A testament to this are the numerous decisions of the Cassation Court in Novi Sad rendered in a period between two World Wars. So, for example, in some of them it is stated, "*According to permanent jurisprudence*,, the father-in-law is responsible for the maintenance of a daughter-in-law only when and if his son – who does not have any sources of income – without gain works in the economy of his father's estate…";[55] "*This stance based on permanent jurisprudence is adopted by the Cassation Court, and thereby in the specific case, it is necessary to determine* whether the widow N.M. has enough as she should";[56] "*In that sense the permanent judicature of this Cassation Court is being manifested*";[57] "In pursuance with the determined facts and the accurate application of substantive law, the Appellate Court established the obligation of the defendant to pay compensation to the plaintiff, since *permanent jurisprudence has determined the legal rule according to which* …";[58] "*According to permanent jurisprudence* obligated to give compensation is the man who, by promising an honest marriage, deprives a woman of her innocence".[59]

Owing to the specific role of the Cassation Court in Novi Sad, a Vojvodina private law was formed in time, with typical attributes of a *mixed*

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[53] See, Decision of Cassation Court, B. Division in Novi Sad, G: 330/1921, in *Zbirka odluka viših sudova Kraljevine Jugoslavije*, Nika J. Ignjatović (ed.), br. XI/1931, pp. 136-138

[54] Milić, Ivo, *Pregled madžarskog privatnog prava u poređenju sa austrijskim građanskim zakonikom*, Subotica, 1921 p. 1.

[55] See, Decision of Cassation Court, B Division in Novi Sad, Rev. I, 842/1936, in *Zbirka odluka viših sudova Kraljevine Jugoslavije*, Nika J. Ignjatović (ed.), br. XIX/1939, pp. 35-36.

[56] See, Decision of Cassation Court, B Division in Novi Sad, G. I 732-933, 22 September 1938, in *Zbirka odluka viših sudova Kraljevine Jugoslavije*, Nika J. Ignjatović (ed.), br. XIX/1939, pp. 39-42.

[57] See, Decision of Cassation Court, B Division in Novi Sad, Kno 31/1937, in *Zbirka odluka viših sudova Kraljevine Jugoslavije*, Nika J. Ignjatović (ed.), br. XIX/1939, p. 44.

[58] See, Decision of Cassation Court, B Division in Novi Sad, Rev. 11, 7 June 1939, in *Zbirka odluka viših sudova Kraljevine Jugoslavije*, Nika J. Ignjatović (ed.), br. XIX/1939, p334.

[59] See, Decision of Cassation Court, B Division in Novi Sad, Rev. I, 842/1936, in *Zbirka odluka viših sudova Kraljevine Jugoslavije*, Nika J. Ignjatović (ed.), br. XIX/1939, p. 335.

legal system.[60] Within it we find elements of the so-called *judge-made law* (created through the jurisprudence of the Cassation Court), as well as elements of *statutory law* (created by the legislative authorities of the Kingdom of Serbs, Croats and Slovenes). This model proved to be very successful. It regularly kept up to date with changes in society and to a high degree satisfied the necessities of legal practice.[61]

H. *Disruption of Continuity of the Legal System of the Kingdom of Yugoslavia*

Following the end of World War II in Yugoslavia, the creation of a new legal system began. In October 1946, *Law on Nullity of Legal Regulations Enacted Prior to 6 April 1941 and during the Enemy Occupation*, was adopted.[62] Legal regulations existing before the war were nullified. However, the break-up with old order was much more obvious in public law domain than in private law since the post-revolutionary practice proved that the society cannot function without some traditional civil law principles. The Redactors of the Law made a compromise. The Regulations of the Kingdom of Yugoslavia were no longer enforced, but the legal rules contained within them could, under certain conditions, be applied even in the new legal environment. Some of these legal rules are still applied today in the field of civil law.

I. *Short-Term Influence of the Soviet Ideology:* "*Class Laws*" (*Nationalization and Collectivization*)

The field of property law was gradually and partially regulated in post-war period. Under the influence of Soviet legal doctrine, the first issues to be regulated were those that were of class character. Therefore, the following laws were enacted: 1946 - Law on Nationalization of Private Commercial Enterprises; 1953 – Law on Agricultural Land Funds and the Allocation of Land to Agricultural Organizations; 1954 – Law on Purchase and Sale of Land and Buildings; 1957 – Law on Expropriation; 1958 – Law on Nationalization of Rented Buildings and Construction Land; 1959 – Law on the Use of Agricultural Land; Law on Business Buildings and Facilities; and Law on Property on Building Segments. During that period a massive collectivization of property, mostly agricultural lands, took place. However, the process of collectivization was never fully carried due to different circumstances.

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[60] See, Jesensky, Aleksander F. and Protić, Paja J., *Privatno pravo u Vojvodini*, Sombor, 1922; Piškulić, Zvonimir and Đerd, Imre, *Osnovi privatnog prava u Vojvodini*, Beograd, 1924; Bogdanfi, Gliša and Nikolić, Nikola, *Opšte privatno pravo koje važi u Vojvodini*, Pančevo, 1925.

[61] See in detail: Gams, Andrija and Đurović, Ljiljana, *Uvod u gradansko pravo*, Beograd, 1994, p. 13, 24, ss.

[62] Law was published in Official Gazette of FNRJ, num. 86/1946.

J. *Turn in Development of Socialistic Law: Social Self-Governance and Social Ownership (Towards a Civil Society)*

A certain turn in development occurred as early as 1948, at the time of ideological clash of socialist Yugoslavia with the USSR and other member states of the Communist block. The state performed nationalization and collectivization up until the end of 1950s. However, private property was not abolished. The state determined a maximum of goods that an individual citizen could posses. There was a possibility to dispose of property in legal transactions *inter vivos* and *mortis causa*. The freedom to enter into a contract was set very wide. In 1960s, the law took an even more liberal spirit. From that point on, legal system became closer to Western European model that to that of the countries of the so called *real socialism.*

Around that time, a development of *social self-governmence* and *social property* began to develop. The fundamental idea was to give over regulation of the most of social relations to the *non-state sector*, social (nongovernmental) organizations and worker's organizations. This was in fact a form of an attempt to conduct a *deétatisation of legal regulation*. The aim was to have the society independently enact and apply rules of conduct in the form of the so called *socially agreements* or *self-governance agreements*, and the state's role was to intervene only when necessary. It is not too difficult to recognize in such strivings an idea of development of the *civil society*, which is of such value today. The society had at its disposal a property which was neither private nor state owned. It belong to everybody and, at the same time, to nobody. Structure of the economy was also very unique. It was not a *planned* economy, like in the countries belonging to the Eastern Block, but it was neither a *market* economy like in the West. A unique model of economy was developed. Namely, Yugoslavia had the so called an *agreement economy*. Territorial communities and commercial enterprises jointly determined business and development policy, without direct influence of the state. Exchange of goods took place at the free, single Yugoslav market. Classical legal regulations belonging to the field of private law were being developed parallel to the *civil society*.

L. *Another Example for the European Union: Draft for the Law on Obligations and Contracts (Yugoslav Soft Law) and the Law on Obligations of 1978 (a Suc-cessful Synthesis of Different Legal Models)*

Preparations for legislating the area of law dealing with contracts and torts began after the Second World War, in a new legal setting, which was characterized by the lack of legal regulations that often overcome by the courts which created rules for particular cases. The aim was to achieve a higher level of legal harmonization between Member States (Republics) and

to ensure a greater legal security for citizens. The Law on Contracts and Torts was created over the course of three decades. It was based on the *Draft for Law of Obligations and Contracts* written by Mihailo Konstantinović, a renowned comparative lawyer and a professor at the Belgrade Faculty of Law. The said author opted for the so called *creative codification of the law on contracts and torts*. The Draft represented a successful synthesis of a great number of original normative solutions and the best regulative models taken from comparative law (Hague Uniform Law of Sales of 1964; The Preliminary drafts of the UNCITRAL-Convention on Contracts for the International Sale of Goods; Suiss Code des obligations etc.). The *monist model* was accepted based on Swiss law as a paradigm (a single statute contains rules governing both civil and trade law).

The Draft was published in 1969. Soon after, judges, barristers and lawyers working in commerce started to rely on, formally, non-binding rules proposed by Professor Konstantinović. So, for almost a decade the Draft was what we refer to in Europe today as the *soft law*. Legal rules set by Professor Konstantinović spontaneously found their way to practice, primarily due to the high quality of the solution they offered. The fact that the Law on Contracts and Torts outlived the state for which it was created and the whole era dominated by socialist ideas, speaks of the quality of its norms.

The Law on Contracts and Torts of the Social Federal Republic of Yugoslavia entered into force in 1978. This law has outlived the state which has tragically dissolved at the beginning of the nineties of the XX century. Member States of the former Yugoslav federation continued to apply the Law as a legal source even after gaining independence. Later on, the successor states enacted their own laws regulating contracts and torts, which for the most part were based on the same legal heritage. Some lawmakers, in their commentaries and journal articles, acknowledged that they have tried to be unique and original but that it was difficult to come up with anything better. Others simply took over most of the provisions from the Law. The Republic of Serbia continued to apply the Law on Contracts and Torts with minor changes and amendments. It can be concluded that we are dealing with a legal act of particular significance for South East Europe. Also, decades of experience gathered in that region may serve well in the shaping of new, common European Union law. Circumstances in which Yugoslav law on contracts and torts had been shaped correspond with the circumstances in which the *Principles of European Contract Law* and the *Draft Common Frame of Reference*, had been created.

Many European comparative lawyers, who read the Law in its English language translation published in 1997 in Belgrade by the publishing house *Jugoslovenski pregled*, pointed out the quality of normative solutions

offered within it. Legal analysts have a common opinion that the Yugoslav Law on Contracts and Torts was considerably ahead of its time. Professor Willibald Posch, Dean of the Graz Faculty of Law (Austria), wrote on the echoes that the Law on Contracts and Torts had abroad: " Later, when translations of the YLO into English and German became available, certain truly innovative features of the law could attract the interest of comparative lawyers in Austria and elsewhere in Europe. (…) Article 30 YLO[63], at the time of its enactment, was a rare example of a provision on "negotiations and precontractual liability" and it appears as if its draftsmen had well observed case law and doctrinal statements on *culpa in contrahendo* in German and Austrian law, where this figure has been acknowledged by the courts by way of analogy to certain rules on factual situations resulting in pre-contractual liability. There is little difference between the provision of 1978 and what the Lando Commission proposed as a European principle of contract Law some 20 years later under the heading *Negotiations Contrary to Good Faith*[64]. Even more interesting is Article 133 YLO. This provision is definitely one of the first serious attempts to formulate an express statutory rule on the effects of changed circumstances in a codification of contract law: Some thirteen years prior to the enactment of article 6.258 of the New *Dutch Civil Code*[65] and more than twenty years before the new § 313 of the German Civil Code on "*Störung der Geschäftsgrundlage*"[66] entered into effect, the YLO provided innovative statutory rules on the impact of unforeseen changes of fundamental circumstances, which were decisive for both parties to conclude a contract. Articles 133 *seq.* YLO provide a useful definition of what would amount to "frustration of contract' under Anglo-American law or *Wegfall der Geschäftsgrundlage* under German and Austrian law,[67] or *Change of Circumstances*

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[63] Article 30 YLO reads as follows:
"1. The negotiations preceding the forming of a contract shall not be binding and either party may break them at will.
2. However, any party which had engaged in negotiations without intending to form a contract shall be liable for any damage resulting from the conduct of negotiations.
3. The party which had engaged in negotiations with the intention to form a contract and then abandoned such intention without a justified reason, causing damage to the other party in the process, shall also be liable for damage.
4. Unless otherwise agreed upon, each party shall bear its own costs incurred in making preparations for forming a contract, while joint costs shall be shared equally".

[64] Article 2:301 PECL, *Cf.* Lando and Beale (eds.), *Principles of European Contract Law*, Parts I and II, 2000, p. 189.

[65] *Cf.* Haanappel and MacKaay, *Nieuw Nederlands Burgerlijk Wetboek*, *Het Vermogensrecht*, Dutch, English, French, 1990; in force: January 1st, 1992.

[66] As inserted into the German Civil Code by the „Act on the Modernisation of the Law of Obligations" (Schuldrechtsmodernisierungsgesetz) BGBl I 2001, S 3137; in force: January 1st, 2002.

[67] Article 133 para.s 1 and 2 YLO read as follows: "1. In case of circumstances occurring after the conclusion of the contract, which are of the nature to render the contractual performance of one of the parties difficult or to prevent the scope of the contract to be attained, both to such an extent that it becomes obvious that the contract ceases to correspond to the

in the Principles of European Contract Law,[68] and a balanced solution to this intricate conflict between the idea of loyalty to contractual duties and the interference of unforeseen and unforeseeable changes in circumstances which the parties understood as crucial for their agreemen".[69] Professor Ewoud Hondius from Utrecht (The Nederlands), stated: "The Law on Contracts and Torts of Yugoslavia is very interesting. Various provisions from this Law, such as a provision on pre-contractual responsibility, have attracted the attention of the West".[70]

Summa summarum, one can say that, in this case, the synthesis of original national approaches and the best foreign approaches from comparative law has been a success.

2. *Retrospective: Adopting Certain Legal Institutes*

There are many legal transplants in Serbian private law. Distinction should be drawn between rules that have been taken over from the European continental law and those that originate in Anglo-American law. The latter rules sometimes to not fit into the logic of the legal system, hence the courts and the citizens are reluctant to apply them, or sometimes even reject them.

A. *An Example from the Recent Past: Introduction of Punitive Damages*

In the middle of 1990s, a set of laws regulating intellectual property has been adopted, whereby the so called *triple indemnity* (*triple damages*) has been introduced into the legal system of FR of Yugoslavia.[71] In chapter dealing with civil protection, there are provisions that prescribe that in the event when the damage was caused with intent it is allowed to seek compensation in the amount that is three times greater that the actual

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expectations of the parties and that it would be generally considered unjust to maintain it in force in the unchanged form, the party whose performance has been rendered difficult or which is prevented to attain the scope of the contract by the changed circumstances, can request that the contract be rescinded.
2. The rescission of the contract cannot be claimed if the party, which invokes the changed circumstances, should have taken these circumstances into account at the time of the conclusion of the contract or could have escaped or overcome such circumstances." Unofficial translation, used in ICC Arbitration Case No. 6281 of August 26, 1989 (Steel bars case); to be found in: *http://cisgw3.law.pace.edu/cases/896281i1.html*.

[68] Art. 6:111 PECL. *Cf.* Lando and Beale (eds.), *Principles of European Contract Law*, Parts I and II, 2000, p. 322.

[69] Posch, Willlibald, *Some Remarks on the Perception of the Yugoslav Law of Obligations Abroad*, *An Austrian Perspective*, Evropski pravnik, *European Lawyer Journal*, num. 4, 2008, pp. 47 and 48.

[70] Honidus, Ewoud, "Jugoistočna Evropa i evropsko privatno pravo", *Evropski pravnik* and *European Lawyer Journal*, num. 1, 2006, p. 22.

[71] These laws have been published in OJ of FR, num. 11, 1995.

damage and lost profit.[72] This legal principle was taken over from Anglo-American law that provides for the possibility of the injured party to ask from the toartfeasor to pay compensation which is multiple times greater that the actual damage suffered, provided that the tortuous act was done out of malice, desire to humiliate or mistreat the injured party, or as a result of violent act, etc. Sanctions for such acts are known as *punitive damages* (or: *exemplary damages*, *retributive damages*, *punitory damages*, *vindictive damages*). It is pointed out in legal writings that these damages are awarded not only to compensate the injured party but rather to *punish the defendant*.[73] On the other hand, in Serbia, as well as in many other countries of Continental Europe, damages are one of the types of civil sanction[74] aimed at restoring the position of the injured party as it were prior to the time when damaging act took place.[75] According to the Serbian Law on Contracts and Torts "While also taking into account the circumstances after the occurrence of damage, the court shall determine damages in the amount necessary to restore the material state of the person sustaining damage into the state it would have been without the damaging act or omission."[76] The concept of punitive (multiple) compensation did not find its place in practice of civil courts in Serbia, because the judges consider it to be a systematic mistake. Save for a coupe of cases, such claims were not brought by injured parties either.

B. *A New Example of Problematic Transplantation: Introduction of Family Endowments*

Serbia hes a long and rich tradition of endowments. From the very creation of the Serbian medieval state in the ninth century, members of ruling and noble families devoted segments of their property to the Church and the people. The hundreds of churches, monasteries and Church property (*metoh*) on the territory of Kosovo and Metohija and central Serbia, up to the Pannonian Plain, is evidence of this. Property has always been designated to serve the public interest. Occasionally, rulers and their families would withdraw from public life and continue their lives in monasteries which they built from their own resources. In doing so, the monastery founders (*ktitori*) joined the order of monks. They lived with other members of the brotherhood or sisterhood and devoted themselves to

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72 For more detail see, Nikolić, Dušan *Trostruka naknada štete u našem pravu*, Sudska praksa, 2/1997. Dušan Nikolić, *Punitive (exempl,ary) damages (Bunteto jellegu karterites)*, Novotni kiado, Miskolc, 2005, pp. 192-202.

73 For more detail see, Street, Harry, *Principles of the Law of Damages*, London, 1962.

74 For more detail on civil law sanctions see, Nikolić, Dušan, *Građanskopravna sankcija* (geneza, evolucija i savremeni pojam), Novi Sad, p. 99. ss.

75 This principle was introduced in Roman times, with Lex Aquilia de damno; Lex Aquiliana. For more detail on Aquilian's act see, Winiger, Bénédict, *La responsabilité aquilienne romaine – Damnum Iniuria Datum*, Genève, 1997; Winiger, Bénédict, *La responsabilité aquilienne en droit commun – Damnum Culpa Datum*, Genève – Bâle – Munich, 2002.

76 Art. 190 of the Law on Contracts and Torts.

charitable, cultural and educational work. This form of endowments was maintained through the end of Turkish occupation. Serb noble families continued to build churches and monasteries north of the Sava and Danube rivers. The numerous monasteries on Fruška Gora near Novi Sad, had particular cultural and educational importance.

Towards then end of the eighteenth and the beginning of the nineteenth century, a new, secular form of endowments was developed. Wealthy Serb attorneys, merchants, and Austrian nobles of Serb origin, donated their property to the people. Endowment funds were created to assist poor students, orphans, young farmers, tradesmen, writers, artists, scientists, etc.

a. The Traditional Concept of Endowments

Endowments always had the same goal and purpose among the Serb people. Property was designated for the benefit of others, at the expense of one's own interests and the interests of his or her family. Donors wanted to do something for which they would be remembered by the people. In Serbian, this stems from the very name of this legal institute. By establishing the endowment (*zadužbina*), the people were indebted (*zaduživa*ti *narod*) to the donor (*zadužbinar*). To indebt to him or herself and his or her family meant something completely different. Therefore, among the Serb people, an endowment was traditionally understood to be a *public endowment* – serving everyone, not only the members of an individual family.

Serbian civil law as well, it is undisputed that an endowment is a charitable institution which disposes of revenue from property the founder irrevocably designated for the achievement of certain goals that are beneficial to society[77].

b. Family Endowments

Per definitionem, family endowments are established in the interest of the members of a single or multiple specified families.[78] They are used to, for example, cover the costs of schooling, to assist financially in certain situations, etc. Since they serve for the fulfillment of the private goals of individuals, these forms of dedicating property are in theory classified into the category of so-called

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[77] See, Gams, Andrija and Đurović, Ljiljana, *Uvod u gradansko pravo,* Beograd, 1994, p. 88. Vladimir V. Vodinelić in, Stanković, Obren and Vodinelić, Vladimir V., *Uvod u gradansko pravo,* Belgrade 1996, p. 81.

[78] See, *Staudingers Kommentar zum Bürgerlichen Gesetzbuch,* Berlin 1957., Vol. 1. p. 371; Rescigno, P., *Fondazione* (dir. civ.) – *Le fondazioni familiari,* in: *Encidopedia del diritto,* Giufre editore, 1989. Vol. XVII, p. 810, ss.

private endowments.[79] Family endowments (*familienstiftung*) are commonplace within territories of the *Germanic legal sphere*. Their significance and deep roots are reflected by the fact that they were regulated even under old Prussian law and the fact that they have survived until today, despite the Nazi's desire to remove them from the legal system together with the family *fideicommissum.* Even though many consider them to be relics of the feudal system, family endowments, in that environment, will probably survive for a long time to come. Doctrine and case law offer a very simple explanation for this: that which is useful to the individual, in essence, must be useful to society as a whole ("a wealthy individual – wealthy society"). In other words, private goals, which family endowments serve, are indirectly classified under the common good. Besides this, in societies with highly developed economies, a more permanent tying up of resources to one or more families does not bring into question the high living standard or the social stability of the state.[80]

In France, along some other countries of the *Roman legal sphere*, the establishment of family endowments is not allowed. Certain theorists claim that this can be ascribed to the traditionally strong state structure that strove to impose control on the greatest number of social relations as possible, including the domain of private law, and especially relations that can influence the financial trends within a country. However, there are much deeper, historical reasons for the negative stance towards family endowments. It is well-known that the French Civil Code (*Code civil*) of 1804, originated from the French bourgeois revolution. One of the primary goals of the revolutionaries was to abolish the feudal order and to prevent its re-emergence. Private endowments and the various models of family *fideicommissa* were unacceptable because they could be used as a tool to permanently maintain the feudal aristocracy's economic power and influence in society. Besides this, these legal institutes were contradictory to the liberal spirit of a civil society, which strove to subject societal resources to market forces and to give everyone a chance to participate in their reallocation under equal conditions.[81] In accordance with current French law: "La

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[79] See in more detail, Trstenjak, Verica, *Pravne osebe,* Ljubljana, 2003, p. 369, ss.

[80] See in more detail on family endowments in countries of the Germanic legal sphere, Breitschmid, Peter and Riemer, Hans Michael, "Grundfragen der juristischen Person", *Festschrift für Hans Michael Riemer zum 65. Geburtstag*, Bern, 2007; Kirchhain, Christian, *Gemeinnützige Familienstiftung*, Frankfurt am Main, 2006; Marschner, Ernst, *Optimierung der Familienstiftung: Aus der Sicht der Begünstigten,* Wien, 2006; Lindner, Reinhold *et al.*, *Gewerbliche Stiftungen: Unterneh-mensträgerstiftung- Stiftung - Familienstiftung*, Berlin, 2004; Sorg, Martin H., *Die Faimilenstiftung,* Baden – Baden, 1984; Güggi, Bruno B., *Die Familienstiftung*, Vaduz, 1982; von Hippel, Thomas von, *Grundprobleme von Nonprofit-Organisationen (Eine zivilrechtsdogmatische, steuerrechliche und rechtsvergleichende Untersuchung über Strukturen, Pflichten und Kontrollen und wirttschaftliche Tätigkeit von Vereinen und Stiftungen*, Tübingen, 2007, pp. 245, 444.

[81] Compare, Marty, G. and Raynaud, P., "Droit civil", *Introduction generale a l'etude du droit des institutions judiciaires, les personnes,* tome I, Paris, 1956, str. 1270; Trabucchi, A., *Instituzioni di diritto civile,* Padova 1960. p.103

fondation est l'acte par lequel une ou plusieurs personnes physiques ou morales décident l'affectation irrévocable de biens, droits ou ressources à la réalisation d'une oeuvre *d'intérêt général et à but non lucratif* [emphasis D.N.]".[82]

As it was previously mentioned, Serbian civil law is traditionally tied to the Germanic legal sphere. Sufficient indicators of this is the fact that the Serbian Civil Code of 1844 was drafted based on the Austrian Civil Code of 1811, as well as the implementation of Austrian law on the territory of southern part of Vojvodina (former *Vojna Krajina*; Military Border) as late as 1945. However, private law in Serbia did not develop exclusively under Germanic influence. Many normative approaches were original, as well as some which were taken from the Roman legal sphere. So, for example, the Serbian Commercial Code of 1860 was drafted based on the French Commercial Code (*Code commerce*). This turnaround was particularly the result of the education Serb lawyers at French universities in the second half of the nineteenth and first half of the twentieth century.

The liberal ideas of French law undoubtedly also influenced the drafters of the Law on Endowments (*Zakon o zadužbinama*) of 1912. The Law contains a definition which, based on its structure, could serve as an example to editors of many modern regulations. By following the rules of logic, the Law first states what endowments are, and then, what they are not *(definitio fiat per genus proximum et differentiam specificam)*. So, according to the drafters, "charitable institutions, which are *limited to only one or more designated families, do not fall under the classification of endowments* [emphasis D.N.]".[83]

The negative stance towards family endowments is a reflection of the liberal spirit in Serbia at the time and the desire of progressive social forces to remove the relics of the feudal order. A confirmation of this position is found in the fact that only a few years later, the family *fideicommissum*, which based on its function largely coincides with family endowments, was abolished.[84]

c. Prohibition of Family Fideicommissa

Through fideicommissary substitution, the family property is placed outside the reach of legal transactions in order to secure the economic power of future generations from which heirs will originate based on the principle of *primogeniture*, *seniorat* or *majorat*. Such an heir has a similar legal status to the beneficiary. He can manage the property (as a

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[82] Loi n 87-571 du 23 juillet 1987 - Article 18, modifié par Loi n 90-559 du 4 juillet 1990 - art. 1 JORF 6 juillet 1990

[83] Art. 1, par. 2 Law on Endowments of the Kingdom of Serbia, January 14, 1912.

[84] On the functional congruence of these two institute, *Staudingers Kommentar…, op. cit.,* p. 371.

good host), reap profit and dispose of it, but cannot alienate the inherited property. He is obligated to maintain the estate intact for future generations. In this way, the family property is under the so-called *dead hand control.* This deadening of resources was contrary to the foundations of the social order of the Kingdom of Serbs, Croats and Slovenes, and so the family trust was abolished with the St. Vitus Day (Vidovdan) Constitution of June 28, 1921. In practice, however, there remain many other unsolved problems related to this civil law institute. As a result, in 1934, the Law on the Disbanding of the Family *Fideicommissum* was enacted.[85]

Fideicommissa are also prohibited by acting regulations. Pursuant to Serbia's Law on Inheritance, "any testamentary provision by which the testator designates an heir to his heir or his legatee, *as well as any one* through which the testator prohibits the alienation of the property or any right left to him".[86] Analogously, the same should apply to family endowments which, in relations to the its functions, coincides with *fideicommissa*. If not, the mentioned prohibition of *fideicommissa* would be meaningless. Family endowments could, moreover, serve the same purpose.

d. Preliminary Draft of the New Law on Endowments and Foundations

In November 2007, the Ministry of Culture of the Republic of Serbia and the Balkan Fund for Local Initiatives (NGO) formed a working group for a Preliminary Draft Law on Endowments and Foundations. The project was completed in early June 2008. Subsequently, the Preliminary Draft was opened to public discussion during which the issue of family endowments was brought up.

Normative Approach

Pursuant to the Preliminary Draft: an endowment is "a legal person without any members, the founder of which designated certain property (principal property) for the charitable realization of public (universally beneficial) or *private interests and any purpose not prohibited by the Constitution and laws* [emphasis D.N.]";[87] "An endowment and foundation are established voluntarily and *they are independent in the determination of their purpose* [emphasis D.N.]";[88] "An endowment and foundation are established for an *indefinite* or definite time

[85] Law published in "Official Papers", num. 164, 1934.
[86] Art 159, pars. 1 and 2 Law on Inheritance, *Official Gazeette of the Republic of Serbia*, num. 46, 1995.
[87] Art. 2, par. 1.
[88] Art. 5.

period. In case of irremovable doubt, *the endowment will be considered to have been established for an indefinite period of time.* [emphasis D.N.]"; "The minimal value of principal property necessary for the establishment of an endowment which functions for the *public interest is 50,000 Euro*. The minimal value principal property necessary for the establishment of an endowment which functions *for private interests is 100,000 Euro* [emphasis D.N]".[89]

The introductory note states that the acting Law on Endowments, Foundations and Funds of 1989 does not represent an adequate legal framework for the development of endowments because, among other things, it only enables the establishment of endowments for the public good and not for private goals. The approach adopted by the authors of the Preliminary Draft, "has been adopted in a large number of EU countries and can be defended with *in extenso interpretation of the right to peaceful enjoyment of possessions*, a right which is protected by the European Convention on Human Rights and Fundamental Freedoms [emphasis D.N.]" Besides this, the authors emphasize that more stringent conditions are provided for the establishment of private endowments (a greater minimal value for the principal property).

A Critique of the Proposed Approach

There are a number of reasons why it is necessary to re-evaluate the idea of introducing private and, particularly, family endowments into the legal system of the Republic of Serbia. Some of these reasons are principled in nature and relate to the historical heritage and internal logic of the legal system, while others are specific and have to do with many, legal, economic and social issues of importance for the daily life of citizens. In the spirit of European legal tradition, they should be addressed starting with the general to the specific:

With the creation of family endowments, a segment of social (national) resources is placed under *dead hand* control.

These resources are not subject to market forces.

The removal of endowment property from the total resources in the market, directly or indirectly, slows down the economic development of society, notwithstanding whether this is happening in a developed of undeveloped country.

This problem is even greater in poor societies in transition, in which there is a high degree of social inequality.

[89] Art. 9, pars 1 and 2.

If a small number of incredibly wealthy families were to establish family endowments, the majority of resources in countries undergoing transition would be under dead hand control.

The establishment of family endowments would permanently ensure the economic and social power of all current and future members of certain families.

Societal relations could be preserved as they are.

This would prevent the establishment of a middle class which is necessary for societal stability.

The majority of citizens, particularly younger generations, would lose the perspective and confidence in social institutions which have so far, at least formally, enabled everyone to participate in the reallocation of social resources.

If the largest part of social resources was transformed into endowment property under the exclusive control of individual families, there would be proportionately less resources available for the establishment of public endowments.

In the spirit of development of civil society, public endowments should in the future take care of many public interests which are currently under the state's control.

If states do not have sufficient funds in their respective budgets and public endowments are not established in the meantime, the overall development of certain societies undergoing transition and the livelihood of many of their citizens could be brought into question.

As a result, certain regions could in the long run become unstable.

The establishment of family endowments in countries undergoing transition could therefore, indirectly, negatively influence the dynamics and effects of integrative processes, which are expected to enable the linking of societies with different legal cultures, and the development of civil society.

Family endowments are not part of the Serbian tradition, neither in a cultural nor legal sense. In accordance with the principles of Serbian endowment law, the endowment property should serve the fulfillment of public interests.

For a whole century already, the Serbian legal system has had a negative stance towards *fideicommissa* and similar legal institutes, which include family endowments.

Serbia is facing economic and social problems which accompany transition, including a high level of social inequality and the lack of a middle class.

State public interest funds are quite modest, while the spirit of traditional Serbian endowment law has not been rekindled.

Under such circumstances, the liberal stance towards the establishment of family endowments which was manifested in the Preliminary Draft with the statement that anything which is not prohibited by the Constitution or the laws is allowed simply does not correspond to the reality and perspectives of the society in which the citizens of Serbia live.

The stance that "endowments are independent in determination of their purpose" is fully in accordance with the concept of endowment law, but it has a significantly different meaning with respect to the function of private endowments.

At first glance already, one cannot avoid the impression that the Preliminary Draft was written for the benefit of wealthy strata within society. The text provides that endowments can be established for an indefinite and definite period of time, immediately followed by a statement that in case of an irremovable doubt, *the endowment will be considered to have been established for an indefinite period of time.* Interestingly, the minimal amount for the establishment of a family endowment is *twice the amount* required for a public endowment, and is calculated at 100,000 Euro, which is an incredibly large amount for most citizens. Therefore, one can conclude that the establishment of family endowments would be a privilege for only some wealthy members of society. The inheritance of poor families would remain subject to legal transactions which means that it could be subject to further reallocation of societal resources.

The editors themselves concluded that private (family) endowments do not exist in all European Union countries and that their establishment could (only) be defended through *in extenso*, i.e., an extensive interpretation of the right to the peaceful enjoyment of possessions, protected by the European Convention of Human Rights and Fundamental Freedoms.

The creation of a normative template for the establishment of family endowments is not a requirement for European Union membership.

Serbia could more efficiently respond to the challenges of globalization, civil society and current world economy crisis by keeping only the traditional concept of (public) endowments, while stimulating their development at the same time.[90]

III. CURRENT TRENDS: THE THIRD EUROPEANIZATION. DECOLECTIVIZATION, DENATIONALIZATION, PRIVATIZATION, RESTITUTION AND CODIFICATION OF LAW

1. *Two Conceptions of the Europeanization of the Law in Europe*

In Western Europe, Europeanization entails the harmonization of national regulations with previously standardized supranational standards and models.

When mentioning the Europeanization of Eastern European law, western lawyers most often think of the implementation of their, community law on the territory of Eastern Europe. Entrance into the European Union does have the condition of acceptance of the *acquis communautaire* which the Western European countries created for over fifty years, by way of mutual compromise and reconciliation of national interests. Countries aspiring for membership are required to accept the community heritage in full (*en block*) and to commence with its implementation in a short period of time,[91] and even before they become members of pan-European integration. From the viewpoint of Eastern European countries, *harmonization* and *approximation* are *one-sided.* Even through the issue of accession is formally regulated with an agreement, between the European Union and the candidate, there is no mutual rapprochement of legal system whatsoever. Europe Agreements and Agreements on Stabilisation and Cooperation to a great extent remind us of classical obligation *treaty of accession*, the conditions of which are determined by one, as a rule, economically stronger side.

Europeanization carries a special meaning for lawyers in Eastern European countries. It entails the restitution of classical legal institutes which were suppressed or completely abolished during socialism (private property,

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[90] The larger part of the text on family endowments was presented as a national report during the international conference "Private Law in Eastern Europe – Autonomous Legal Developments or Legal Transplants?" held at Max - Planck Institute for Comparative Law and Private International Law in Hamburg, in 2009.

[91] See e.g. Wero, Franz, *La denationalisation du droit prive dans l'Union europenne,* and *L'Europeanisation du droit prive – vers un code civil europeen?* Fribourg, 1998, pp. 3-27.

contractual freedom, certain types of contracts, etcetera). At the same time, Europeanization denotes the modernization of law. The restitution of classical legal institutes does not mean returning to the past. As a rule, normative approaches are harmonized with legal standards existing in developed Western European countries. Codification is one of the most important trends signaling the movement towards the western model. Many countries have been adopting new or amending old civil codes. Europeanization in most Eastern European countries is comprised of the taking-over of regulatory concepts, and even specific normative solutions from the (national) legal systems of some of the Western European countries. In most cases, we are dealing with a simple massiv reception of foreign law.[92] The overall impression is that Eastern European countries often undertake measures that are not even required of them. As is generally known, entrance into the European Union entails the harmonization of domestic law with the supranational European legal standards, and not the specific normative solutions of Western European countries.

The Europeanization of certain sectors of private law in Serbia began as early as the mid-1990s. The greatest advancement was achieved in the area of intellectual property. In other sectors, this process made ground after the democratic changes in the fall of 2000. There is strong political will in Serbia to fulfill all standards necessary for EU membership, including the full implementation of the *acquis communautaire.*

Serbia's private law is being developed in a relatively new legal environment. The change which took place in the 1990s was not as great as in "countries of real socialism". The legal system of the former Socialist Federative Republic (SFR) of Yugoslavia was in many segments much closer to western legal rules than to the legal standards which were applied in Eastern Europe. As a result, the changes in the manner of thinking and regulating social relations in the former Yugoslav republics were much smaller. This is particularly the case in obligations law. The Law on Obligations has undergone only slight amendments.[93] The greatest changes took place in the area of property law.

On several occasions during the nineties of the XX century, an equality of all ownership forms was proclaimed. Constitutional provisions, as well as provisions of other laws, guarantee equal protection of social, state, private and cooperative property. At the same time, *ownership transformation*

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[92] Some authors deal with the *imitative development* of Eastern European societies. See, Ivan Berend, *Centralna i istočna Evropa 1944-1993,* Podgorica 2002, p. 11.

[93] See, Slijepčević, Ratomir M., "Origin and Characteristic Features of the Concept of the Law on Obligation Relations, Evropski pravnik", *European Lawyer Journal*, num. 4, 2008, pp. 13-28.

began. And it still lasts. One of the predominant choices is to have socially owned assets transformed into other forms of ownership. Such process represents a type of *decollectivization*. Property of non-state entities (collectives) is transferred to state or private property. The aim is to alleviate uncertainty caused by the, already mentioned, ownership concept of socially owned property, primarily the non-existence of the titular, recognizable and acceptable by the Western standards. Like in other transitional states, this process results in social division and a high degree of social uncertainty among citizens.[94]

Parallel to *decollectivization* is the process of *denationalization*. Assets owned by the state are gradually being transferred to the private ownership. This is the process of *privatization* or *re-privatization* through public auctions and other methods of sale, all in accordance with special legislation. Experts are of the predominant opinion that the sequence of actions has not been proper. Namely, Serbia has only partially undergone the process of restitution of property which was taken from its previous owners through nationalization, confiscation, and compulsory collectivization. The subject of denationalization, that is the sale are good that should be returned in accordance with special rules.

The restitution of taken property shall be regulated by a separate law. This issue is covered in *The Draft Law on Denationalization*, which was presented to the experts in Fall of 2007.

There is no doubt that described processes would have been completed with less negative effects had the whole material been regulated with one law or one code.

2. *Towards a New Serbian Civil Code*

Preparations for comprehensive regulation of the property law commenced at the end of October of 2003 when on the basis of decree of the Ministry of Finance and Economy of the Government of the Republic of Serbia a working group for work on a draft on ownership relations was formed. The work was, for the most part, completed in July of 2006. The working group made the Draft with almost seven hundred articles. It regulates the property law in detail.

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[94] For more detail see, Nikolić, Dušan, "Funţia socialâ a dreptului de proprietate privatâ (trecut, prezent, viitor)", *Pandectele Române*, Wolters Kluwer Romania, 2007, str. 69-78; Nikolić, Dušan, "Civilno društvo i civilno pravo (Civil Society and Civil Law)", *Liber Amicorum Nikola Gavella – Građansko pravo u razvoju*, Zagreb, 2007, pp. 51-68.

The Draft was written under a dominant influence of German legal circle. This conclusion can be drawn from the total number of provisions and from a detailed analysis of proposed normative solutions. Despite that, it is beyond doubt that members of the working group had in mind the legal tradition and current developmental needs, as well as, the European standards in the area of the property law.

In November 2006, the Government of the Republic of Serbia issued a resolution on the establishment of a Committee for the Drafting of a Civil Code. This defined, in principle, the development strategy of law in this area. The aim is to codify and harmonize civil law with European legal standards and the approaches adopted in international conventions.

III. CONCLUSION

A short retrospective of the most significant events in the history of the Serbian law, presented in this report, indicates that there were more successful and less successful cases of reception of legal models and institutes. Finally, some normative approaches from abroad were plainly inadequate for this level of social development. Their introduction into the legal system could create serious and longterm consequences.[95] However, this does not mean that reception should be rejected *a priori*. Based on the current experiences it may be concluded that the reception of foreign law is desirable in many cases. On the other side, reception must be harmonized with the real needs of a particular society. This applies to Serbia as well.

IV. EPILOQUE?

A unique problem is the fact that Serbia has continued to develop in the spirit of liberal capitalism during the period of global financial and economic crisis which has forced many wealthy countries to turn to state interventionism and the long-supressed state capitalism. The fact that a new time and new circumstances require new rules has been forgotten.

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[95] "Unfortunately, copying foreign law and transplanting it to different environments have not proved to be a very successful development strategy. The experience with legal transplantation over the past two hundred years has been rather dismal. Countriesthat transplanted legal systems wholesale by and large have less effective legal institutions today than countries that developed their formal law internally". Pastor, Katharina, *The Commodification of Law and the Transplant Effect*, in: *Sesquicentennial Essays of the Faculty of Columbia Law School (1858 – 2008)*, New York, 2008, p. 182.