



REFLECTIONS ON THE PRELIMINARY DRAFT OF THE SERBIAN CIVIL CODE FROM 2019*

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ABSTRACT

In its recent history, Serbia, like its predecessors, the Kingdom of SHS/ Yugoslavia and the socialist Yugoslav state, could not enact a new civil code, although numerous official and private initiatives to draft a civil code were undertaken, some even producing concrete drafts. Yet, enactment of a civil code, long after the 1844 Civil Code of the Principality of Serbia, could not be achieved because of political reasons or the division of legislative competence between the federation and federal units. On becoming a unitary state in 2006, these reasons ceased to exist. Thus, the very same year, a committee was formed by the Serbian Government tasked with preparing the draft of a prospective civil code. The committee progressively made available to the public the results of its work. The version of the draft, which can be considered final presently, was published in 2019, titled ‘Preliminary Draft of a Civil Code of the Republic of Serbia’. It has a five-partite structure, wherein a detailed general part is followed by separate books dedicated to the law of obligations, in-rem rights, family law, and inheritance law. In this chapter,

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the most important novelties proposed by the Preliminary Draft are analysed and, in some cases, critically reviewed. In the general part of the Preliminary Draft, the initiative to introduce the right to euthanasia is the most important talking point. Book II pertains to the law of obligations, convincingly relying on the Obligations Act of 1978. Book III is on in-rem rights, and Book IV deals with family law, influenced by the effective Family Law Act of 2005. Book V pertains to the branch of inheritance law, relying on the rules of the effective Inheritance Act of 1995. The most important novelties of the Preliminary Draft are subject of analysis in this paper.

Keywords: *codification of civil in Serbia, Preliminary Draft of Civil Code in Serbia, draft of a civil code.*

1. INTRODUCTION: A BRIEF OVERVIEW OF THE HISTORY OF CODIFICATION OF CIVIL LAW IN SERBIA

All Yugoslav states that ever existed in the 20th century had considered the idea of enacting a civil code and thereby unifying the civil law rules. Despite many attempts, differing in their momentum and pace, unifying the subject matter of civil law completely remained out of reach.¹ Although unification was more than desirable, civil law rules in the common South-Slavic countries differed a great deal in terms of their historical roots, style, and content, making this goal unachievable.

When the first Yugoslav state was formed after World War I, that is, the Kingdom of Serbs, Croats, and Slovenes (later named Kingdom of Yugoslavia), a prudent decision was made to retain in force the laws that were in effect in different parts of the new state. Thus, in the part of the Kingdom of SHS, which formerly belonged to the Kingdom of Serbia, the 1844 Civil Code remained in force; in the Montenegrin part, the 1888 General Property Code; and in present-day Vojvodina, the Hungarian statutes and a peculiar form of judge-made law remained in force.

1 See in more detail *Istorija nastajanja građanskog zakonodastva u Srbiji*, 2007, pp. 27–77; Orlić, 2016, pp. 317–340; Szalma, 2019, pp. 90–97; Dudás, 2013, pp. 9–17.

In the Croatian part, the ABGB remained in force, in a version that was prevailing before the 1914-1916 amendments (*Teilnovellen*), along with the autonomous Croatian law. In the Slovenian part of the Yugoslav state, the ABGB remained in force, but in a version that prevailed after the enactment of the *Teilnovellen*. Similarly, in the territory that formerly belonged to Bosnia and Hercegovina too, the ABGB remained in force concerning proprietary legal relations, while in matters of family and inheritance law, the religious rules were applied.² Therefore, as Miodrag Orlić pointedly remarked, ‘in spite of the integrity of the territory of the state, in terms of applicable law six great territories existed’.³

This did not change fundamentally overnight after World War II either, regardless of the retrograde impact of a statute adopted in 1946, which is in short labelled in the literature only as the Invalidation Act. It abrogated all sources of law that were in force on 6 April 1941 (when the Kingdom of Yugoslavia de facto lost its sovereignty), while the rules of law promulgated by the Axis powers after this date were declared invalid. As Prof. Slobodan Perović, the president of the drafting committee sharply and precisely put it, ‘this may have been the sole example when a state abrogated the entire legal system’.⁴ However, such a bold and harsh step would have done more harm than good, if applied consequently, without exceptions. To prevent this, a sort of ‘shock-absorber’ was introduced in the Invalidation Act: in concrete cases, it enabled the courts to apply the rules of law contained in the sources of law that were in force until 6 April 1941, if the judge decided that they are still applicable and their application would not be contrary to the public order of the new state. This temporary solution to the vast legal lacunae created by the Invalidation Act was labelled simply as the application of ‘old rules’ (*stara pravna pravila*). Although it seems quite paradoxical, it was true: among other things, the 1844 Serbian Civil Code was no longer in force, but the content of its rules was still being applied. In general, this method of ‘old rules’ was applicable to all former sources of law, except the Hungarian judge-made law in Vojvodina, which was considered

2 Nikolić, 2022, p. 90.

3 Orlić, 2016, p. 317.

4 Perović, 2016, p. 300.

contrary to the public order of the new socialist state, whereby courts are empowered only to apply the law, not create it.⁵ New statutes were constantly enacted; hence the systemic legal lacunae and the need for the application of 'old rules' gradually shrank. The need for unifying civil law in socialist Yugoslavia was clearly evident. The most reasonable way to achieve this goal seemed to be the enactment of a civil code, applicable on the whole territory of the Yugoslav state. By the end of the 60s in the past century, major efforts were undertaken to prepare a draft of statutes that could be easily integrated later into a single civil code.⁶ However, the constitutional amendments from 1971 and the new federal constitution from 1974 made the enactment of a civil code, comprising all major branches of civil law, virtually impossible. The subject matter of the law of obligations and property law remained in federal competence, while the constituent federal units gained competence to regulate family law and inheritance law.⁷ This division of competence remained. This is why, by the time of the dissolution of the last South-Slavic state, the State Union of Serbia and Montenegro, the definite closure of the idea of (con)federalism in the Yugoslav legal tradition, no common civil code or even a draft of it emerged. However, that by no means implies that no civil law legislation of decent quality exists. The most important of these, in the field of civil law, are the 1978 Obligations Act⁸ and the 1980 Act on the Bases of Proprietary Legal Relations,⁹ which were enacted in federal competence and are still applicable in Serbia. In matters of family and inheritance law, in line with the division of legislative competence as of 1971/1974, these two branches of civil law have been in the competence of the Republic of Serbia for some time already. The statutes in these branches of law currently effective are

5 See in detail Nikolić, 2020, pp. 187–204, 199.

6 Dudás, 2013, p. 13.

7 Ibid., p. 14.

8 Zakon o obligacionim odnosima, Službeni list SFRJ [Official Gazette of the Socialist Federal Republic of Yugoslavia], no. 29/78, 39/85, 45/89 – decision of the CC, Službeni list SRJ [Official Gazette of the Federal Republic of Yugoslavia], no. 31/93 and Službeni glasnik RS [Official Gazette of the Republic of Serbia], no. 18/2020.

9 Zakon o osnovama svojinskopравnih odnosa, Službeni list SFRJ, no. 6/80 and 36/90, Službeni list SRJ, no. 29/96, and Službeni glasnik RS, no. 115/2005.

the 2005 Family Law Act,¹⁰ and the 1995 Act on Inheritance.¹¹ These are in the literature denoted as ‘system-laws’, since they represent partial codifications, comprising the majority of rules pertaining to a given branch of civil law.¹²

2. PREPARATORY WORKS ON THE PRELIMINARY DRAFT OF THE SERBIAN CIVIL CODE (2006–2019)

In 2006, the very same year when Serbia, after almost a century of federal experience, anew became a unitary state, the government officially appointed a committee entrusted with the task of preparing the draft of a prospective civil code for Serbia.¹³

In 2007, the committee published a general report containing a lengthy scholarly article on the history of codification of civil law in Serbia and a general overview of the structure of the future civil code, wherein it identified the major legal issues to be addressed during the drafting of the text. In 2009, the first version of the book pertaining to the branch of the law of obligations was published. The remaining books, each pertaining to one of the classical branches of civil law, were finalised consecutively in the subsequent years. They have been combined into a single text in 2015. This version from 2015 contains alternative legislative proposals in relation to numerous legal institutes of major importance. The 2015 Draft was made available to the public in order to achieve the broadest possible professional and scholarly debate on its content. Several major public debates were held on the Draft: one was organised at the Faculty of Law of the University of Belgrade, one each at the Appellate Courts Novi Sad, Niš, and Kragujevac, and one organised

10 Porodični zakon, Službeni glasnik RS, no. 18/05, 72/11 and 6/15.

11 Zakon o nasleđivanju, Službeni glasnik RS, no. 46/95, 101/003 – decision of the CC and 6/15.

12 Nikolić, 2022, p. 173.

13 Odluka o obrazovanju komisije za izradu građanskog zakonika [Decision on the Formation of a Drafting Committee of a Civil Code], Službeni glasnik RS, no. 104/2006 and 110/2006 – correction.

jointly by the Appellate Court and Supreme Court in Belgrade.¹⁴ The finalised version of the Draft was submitted to the government in 2019.¹⁵ However, since then, no public statements have been made that the draft will be enacted by the General Assembly in the near future.

3. A BRIEF OVERVIEW OF THE MOST IMPORTANT NOVELTIES OF THE 2019 PRELIMINARY DRAFT OF THE CIVIL CODE

The 2019 Draft of the Civil Code follows the Pandectists' division of civil law. Book I is titled General Part, Book II is dedicated to the law of obligations, Book III to property law, Book IV to family law, and Book V to inheritance law. Incorporation was the primary method applied by the drafting committee, implying that all books departed from and utilised the rules of the existing 'system' laws.¹⁶

In this chapter, the aim is by no means to make a thorough analysis of the draft of a civil code that contains more than 2700 articles. It would be clearly unrealistic in a paper of this volume. The focus will be, thus, more on the presentation of the structure of the preliminary draft, present a general assessment of the books, and analyse only a few of the major novelties envisaged in the draft, in comparison with the existing legislation.

¹⁴ Perović, 2016, p. 307.

¹⁵ The text of the Preliminary Draft is available in Serbian at the following website: https://www.paragraf.rs/nacrti_i_predlozi/280519-prednacrt-gradjan-skog-zakonika-republike-srbije.html (Accessed: 4 March 2023).

¹⁶ Salma, 2016, p. 368.

3.1. BOOK I – GENERAL PART

Book I of the Draft is envisaged as a set of rules of general importance relevant in the application of rules of other books of the civil code.¹⁷ The General Part is strikingly detailed, comprising 163 articles grouped into two parts. After the short first part comprising the introductory rules and general principles of civil law, the second part is titled ‘Special Rules’, divided into seven chapters: Subjects of Law, Subjective Civil Rights, Property, Juridical Acts, Representation, Objects, and Passage of Time. A significant number of rules have been transposed from the 1978 Obligations Act, which, although lacking a civil code and its general part, contains a considerable number of general rules and principles. The first chapter pertaining to the subjects of law contains detailed rules on natural persons, specifying their legal capacity, capacity to contract, and capacity to be held liable for damage. Most of these have been transposed from the 2005 Family Law Act. Similarly, general rules on key legal features and various capacities of legal persons are also found in this chapter. However, only the rules on associations and foundations are regulated in detail. Unlike the Hungarian Civil Code, for example, the subject-matter of legal status of business organisations is expected to remain regulated in the separate Companies Act.¹⁸

The part titled ‘Subjective Civil Rights’ contains a detailed catalogue of fundamental civil rights. The right to human dignity is considered a primary civil right. Its position as a supreme civil right is further strengthened by the rule of the Draft, specifying that all other civil rights stem from the fundamental right to human dignity.¹⁹ The rule of the Draft that evoked the greatest interest of public opinion is the one envisaging the introduction of the right to a so-called merciful death (euthanasia). It defines it as a right of a natural person to a consensual,

17 On what is advised to be regulated in the General Part of the prospective civil code, and what should be regulated in other Books of the civil code, see Kuštrinić-Kovačević, 2009, pp. 1–24.

18 Presently, the statute pertaining to company law is the 2011 Companies Act. *Zakon o privrednim društvima*, Službeni glasnik RS, no. 36/2011, 99/2011, 83/2014, 5/2015, 44/2018, 95/2018, 91/2019 and 109/2021.

19 Preliminary Draft, art. 78, sec. 2.

voluntary, and dignified termination of his/her life, which can be performed only exceptionally, if the prescribed humane, psycho-social, and medical conditions are met.²⁰ The Preliminary Draft only intends to regulate euthanasia at a very general level. The conditions and the procedure for approving and performing euthanasia are expected to be regulated in detail by a special statute.²¹ Finally, the Draft specifies that an abuse of the right to euthanasia, in order to obtain unjustified material or other benefits, represents a ground for criminal liability.²² However, apparently, it was obvious to the drafting committee as well, that introducing euthanasia is legally extremely difficult and a socially sensitive issue. Therefore, the drafting committee inserted a comment after the proposed rules stating that owing to the complexity of performing the right to euthanasia, which has, in addition to legal and medical, psychological and social aspects as well, the drafting committee will subsequently make available to the public a definitive proposal based on the arguments of experts from various fields and professional activities, considering the proposal of the text of a special statute that shall have been prepared after the public consultations on the Preliminary Draft are closed. An eventual enactment of the Draft with the envisaged rules on euthanasia requires a corresponding change in the Criminal Code, states the drafting committee.²³ In addition, it would certainly require some constitutional amendments, as well.

3.2. BOOK II – LAW OF OBLIGATIONS

The first version of Book II, which pertains to the law of obligations, was published as early as 2009. The choice of beginning the actual work on the draft of a civil code with the law of obligations can hardly be described as surprising. The 1978 Obligations Act proved to be a lasting masterpiece of the Yugoslav legislation: it remained in force without

20 Preliminary Draft, art. 86, sec. 1.

21 Preliminary Draft, art. 86, sec. 2.

22 Preliminary Draft, art. 86, sec. 2.

23 Preliminary Draft, art. 86, in fine.

serious amendments since then in Serbia, survived all the changes in the political system and the transition from a sort of administratively planned economy to a market economy. The 1978 OA, however, did not regulate the subject-matter of the law of obligations entirely, leaving some space for the application of the 'old rules' even today. The 1978 OA in the most part followed the legislative solutions proposed by Professor Mihailo Konstantinović in 1969.²⁴ He named his legislative draft of the OA modestly as 'Sketch' for a code on obligations and contracts, but it was a full-fledged normative text, suitable to be enacted in the form of a statute. In drafting the 1978 OA, the drafters diverged from numerous solutions of the 'Sketch' on various points, most of which were assessed negatively later.

Most of the novelties envisaged by Book II of the Preliminary Draft of the Civil Code pertaining to the law of obligations, in comparison to the transposition of the text of the rules of the effective 1978 OA, represent a return to the solutions offered by Professor Konstantinović in the 1969 'Sketch'.

The structure of Book II follows the structure of the 1978 OA almost symmetrically. However, it should be considered that lacking a civil code and its general/introductory part, some of the rules of the 1978 OA, in many aspects, performed the function of the rules of a civil code, which are, in Pandectists' systematisation, usually structured into the General Part. Having a General Part in the Preliminary Draft, these rules are removed from Book II into the General Part. Mentioning only the most important, the principles of good faith, private autonomy (freedom of contract), equality of parties, prohibition of abuse of right, standards of due care, prohibition of causing damage, and prohibition of creating or abusing monopolistic position in the market from the 1978 OA are placed not in Book II, but in the General Part. As far as the general structure of Book II is concerned, no major changes are observed: Book II is divided into six parts. The first five are dedicated to the general rules of the law of obligations, while the sixth is dedicated to particular rules of a great number of nominate contracts. The first contains rules on different sources of obligations (general rules of contracts, causation of damage,

24 Konstantinović, 1996.

unjustified enrichment, benevolent intervention in another's affairs – negotiorum gestio and unilateral statements of will). The second comprises rules on the legal effects of obligations, the third on discharge of obligations, the fifth on specific types of obligations (monetary and non-monetary, obligations with multitude of objects and obligations with multitude of creditors or debtors). The fifth part contains the rules on the change of identities of the parties.

In the part pertaining to the general rules of contract law, the drafters aim to modify the list of notions that limit parties' autonomy. Presently, according to the OA, a contract must not infringe on mandatory rules, public order, or good morals.²⁵ This list of general barriers to parties' autonomy, in the General Part, is to be expanded with moral rules as such.²⁶ Similarly, the rule on the principle of freedom of contract, which is a derivative of the principle of parties' autonomy, the mentioned tri-partite set of concepts, is to be expanded by moral rules.²⁷ It is questionable whether there is a genuine need to explicitly name moral rules as a separate barrier to freedom of contract, distinct from the already existing ones, since public order (*ordre public*) and good morals (*gute Sitten*) already imply that parties must observe moral standards. The rules on contractual negotiations are also expected to be modified. Presently, a party is considered to conduct negotiations in bad faith if he/she either conducts negotiations without genuine intention to conclude the contract or withdraws from negotiations without due cause.²⁸ The OA does not specify how the parties should handle confidential information obtained from the other party during the negotiations. The Draft intends to rectify this shortcoming. It specifies that if one party has given confidential information to the other in the course of negotiations or allowed him/her to obtain them, the other party, unless otherwise agreed, may not make them available to third parties, nor use them for their own interests, regardless of whether the contract was subsequently concluded or not.²⁹ The nature and scope of the liability

25 OA, art. 10.

26 Preliminary Draft, art. 6.

27 Preliminary Draft, art. 164.

28 OA, art. 30, sec. 2.

29 Preliminary Draft, art. 172, sec. 1.

for infringement of this duty is also specified: the liability can comprise compensation for the damage caused and handing over to the injured party the benefits that the tortfeasor acquired from that violation.³⁰ In relation to precontracts, the Preliminary Draft intends to regulate the option contract explicitly,³¹ which is for the time being considered a lawful, but still innominate contract. In the part pertaining to specific legal consequences of bilateral/onerous contracts as well a range of novelties is proposed. The most notable is the proposal to revert to the concept of *lesio*, which relies on a specific mathematic threshold for determining whether the inequivalence is legally relevant, a solution that shaped the tradition of Serbian/Yugoslav law before the enactment of the 1978 OA. The concept of *lesio ultra dimidium* was supported even in the 1969 'Sketch'.³² The effective 1978 OA, however, rejected the concept of *lesio ultra dimidium* and opted for the concept of *laesio enormis*. In this understanding of *lesio*, the court is not bound by any specific mathematical threshold, but can avoid the contract if it finds the disproportion between the values of the mutual contractual obligations conspicuous.³³ The Preliminary Draft reverts to the concept of *lesio ultra dimidium* supported by Professor Konstantinović in 1969. It specifies that if there is a disparity between the obligations of the contracting parties at the time of the conclusion of the contract, that what one party has received or should receive from the other party does not represent even half of the value of what it has given to the other party, or has undertaken to give, then he/she can request to have the contract voided.³⁴ The rules on usurious contract are also expected to change. According to the effective 1978 OA, the aggrieved party may invoke the nullity of a usurious contract if the other party gains an obviously disproportionate benefit from the contract, abusing at least one of the circumstances specifically mentioned: state of necessity or difficult material condition of the other party, his/her lack of experience, recklessness, or dependence.³⁵

30 Preliminary Draft, art. 172, sec. 2.

31 Preliminary Draft, art. 189.

32 'Sketch', art. 107, sec. 1.

33 OA, art. 139, sec. 1.

34 Preliminary Draft, art. 273, sec. 1.

35 OA, art. 141, sec. 1.

This list is a closed enumeration. The Preliminary Draft intends to change it into an open enumeration, meaning that the abuse of similar, but not explicitly mentioned circumstances may also be qualified as usury.³⁶ Finally, the Preliminary Draft intends to change the concept of repudiation of an onerous contract due to non-performance of the other party's obligation. The 1969 'Sketch' proposed the transposition of the concept of fundamental breach of the contract, as an event justifying the repudiation of the contract.³⁷ It has eventually been rejected in the 1978 OA, which states only that non-performance must not concern a negligible part of the debtor's obligation.³⁸ The Preliminary Draft in this regard reverts to the solution offered by the 1969 *Sketch*. It envisages that a contract may be repudiated if the debtor's failure to perform may be qualified as fundamental breach of contract.³⁹

In the part on tort law, numerous major novelties are envisaged by the Draft. For instance, the fault in fault-based liability is defined in the OA as either intent or negligence,⁴⁰ which provides ground for different interpretations. The Draft intends to return to the solution offered by Professor Konstantinović in the 'Sketch',⁴¹ according to which fault exists if the tortfeasor fails to act as he/she should have, considering the regular course of events and what could have been expected from a reasonable and diligent person under the given circumstances.⁴² Regarding moral damage, a range of serious novelties is envisaged in the Draft. Presently, in the OA the so-called subjective understanding of moral damage is accepted, which in Yugoslav literature dates to the works of Prof. Obren Stanković from 60s of the last century.⁴³ According to this approach, infringement of personality rights is considered a compensable form of moral damage only if it manifests in bodily pain, mental suffering, or fear, whereby mental suffering is ground for pecuniary

36 Preliminary Draft, art. 274, sec. 1.

37 'Sketch', art. 94–96.

38 OA, art. 131.

39 Preliminary Draft, art. 257, sec. 1.

40 OA, art. 158.

41 'Sketch', art. 127.

42 Preliminary Draft, art. 290, sec. 1.

43 Karanikić Mirić, 2015b, p. 488.

compensation only if it stems from a closed list of possible reasons.⁴⁴ One of the major implications of this understanding is that, in general, legal persons are not entitled to claim pecuniary compensation for moral damage, since they are unable to feel bodily pain, mental suffering, or fear.⁴⁵ Legal persons may be entitled to compensation only in specific situations regulated by special statutes.⁴⁶ The Preliminary Draft proposes major novelties in this respect. First, the statutory definition of legally relevant forms of mental suffering justifies pecuniary compensation changes from a closed list to an open enumeration: instead of naming the legally relevant forms of mental suffering specifically, the Draft states that the injured party is entitled to compensation for bodily pain, fear, worry, sadness, and other forms of mental suffering.⁴⁷ Second, it explicitly declares the right of legal persons to monetary compensation for infringement of their reputation, honour, and other personality rights intrinsic to their nature.⁴⁸ Another, though indirect, consequence of the subjective understanding of moral damage is that the OA excludes the assignability and inheritability of the claim to compensation for moral damage, unless recognised in the written agreement of the parties or awarded by the court in a final, non-appealable judgement.⁴⁹ This solution seems consequent to the primary aim of the compensation, which is to provide just satisfaction to the injured party, but the practical implications are that it may produce quite unjust consequences.⁵⁰ The more severe the injuries, the more likely the injured party dies before the compensation is awarded by a non-appealable court judgement. To avoid this, the Preliminary Draft envisages a solution, according to which a claim to pecuniary compensation can be inherited if the injured party filed a lawsuit during his/her life.⁵¹

44 Karanikić Mirić, 2015b, pp. 488–489.

45 See Savčić, 2022, pp. 768–769.

46 Ibid., pp. 790–791.

47 Preliminary Draft, art. 345, sec. 1.

48 Preliminary Draft, art. 346.

49 OA, art. 204, sec. 1.

50 See in more detail Karanikić Mirić, 2015a, pp. 172–191.

51 Preliminary Draft, art. 350.

This is another example of the almost verbatim transposition of the solution offered by Professor Konstantinović as early as 1969.⁵²

In the part pertaining to specific rules of different nominate contracts, the most important novelty is that the Preliminary Draft offers detailed rules on contract on donation⁵³ and contract on loan for use⁵⁴ (*commodatum*). If the Preliminary Draft is enacted in the form of a civil code, with the envisaged rules on donation and loan for use, the last bastions for applying the ‘old rules’ in the field of law of obligations would eventually be dismantled.⁵⁵ In addition, the Preliminary Draft offers detailed rules on reinsurance contract,⁵⁶ a regulation lacking in the 1978 OA at present. Detailed rules are also present in the Preliminary Draft on factoring as a new contract-type.⁵⁷ If the Preliminary Draft reaches the stage of enactment in a form of a civil code with this content, the special Act on Factoring will most likely be set aside, or integrated into the civil code, which would have been adopted in the meantime.⁵⁸

3.3. BOOK III – PROPERTY LAW

Book III of the Preliminary Draft on property and other in-rem rights may be considered the odd one out, in comparison to the other books. While the common feature of all other books is that in the most part a single statute is used predominantly for shaping the rules of respective books, the same cannot be said of Book III. Naturally, the drafters departed from the effective Act on the Bases of Proprietary Legal Relations from 1980. However, this statute ‘*underregulated*’ the subject matter of in-rem rights, since the subject-matter of in-rem rights was always considered to be of secondary relevance by the former socialist

52 ‘Sketch’, art. 164, sec. 1.

53 Preliminary Draft, arts. 744–761.

54 Preliminary Draft, arts. 832–844.

55 Dudás, 2015, pp. 79–85.

56 Preliminary Draft, arts. 1389–1420.

57 Preliminary Draft, arts. 1589–1607.

58 Zakon o faktoringu, Službeni glasnik RS, no. 62/2013 and 30/2018.

regime.⁵⁹ This is why a great number of special statutes were adopted as of 2003 in order to fill the legal lacunae of the 1980 Act or to amend its obsolete legal solutions. To name the most notable ones, the Act on the Registration of Security Interest in Movables and Rights,⁶⁰ the Mortgage Act,⁶¹ and the Act on Financial Leasing⁶² fundamentally supplemented, or amended the rules of in-rem rights set out by the 1980 Act. The unsatisfactory state of the regulation of in-rem rights was well perceived by the legal doctrine. According to some estimates, the subject matter of in-rem rights in Serbian law is regulated in more than 70 statutes and regulations of different types.⁶³ In order to contribute to its resolution, an official draft of the Act on Property and Other In-rem Rights of the Republic of Serbia⁶⁴ was published in 2012, after almost a decade of dedicated work. A great number of distinguished scholars participated in its drafting, and its qualities were highly praised.⁶⁵ However, this draft was not officially declared as the main source in the drafting of Book III by the drafting committee.⁶⁶

Book III on property law mostly codifies the rules from the 1980 Act on Bases on Proprietary Legal Relations and the mentioned special statutes. It is divided into six parts. The first contains rules on ownership: general rules, acquisition of ownership, termination of ownership, legal remedies for the protection of ownership, modalities of ownership, adjoining landowner rights, and right to pre-emption. The second part contains rules on personal and real estate servitudes. The third part is dedicated to the right to construct a building on a third

59 For the history of codification of the rules on rights in rem see Nikolić, 2008, pp. 77–106.

60 Zakon o založnom pravu na pokretnim stvarima i pravima upisanim u registar, Službeni glasnik RS, no. 57/2003, 61/2005, 64/2006, 99/2011, 31/2019.

61 Zakon o hipoteci, Službeni glasnik RS, no. 115/2005, 60/2015, 63/2015 and 83/2015.

62 Zakon o finansijskom lizingu, Službeni glasnik RS, no. 55/2003, 61/2005, 31/2011 and 99/2011.

63 Planojević, 2016, p. 431.

64 Nacrt Zakona o svojini i drugim stvarnim pravima Republike Srbije. <https://arhiva.mpravde.gov.rs/cr/news/vesti/zakonik-o-svojini-i-drugim-stvarnim-pravima-radni-tekst.html> (Accessed: 30 January 2023).

65 See Cvetić, 2012, pp. 145–155.

66 Cvetić, 2012, p. 154.

party's lot. The fourth part contains general rules on in-rem security interests: chattel mortgage and mortgage on real estate. Additionally, in the third subchapter, the Drafting Committee left a gap to regulate the other in-rem security interests. Apparently, the possessory pledge in movables is expected to remain regulated in Book II pertaining to the law of obligations as a nominate contract (contract on pledge). Part five comprises rules on possession and their legal effects, while the last, sixth part, deals with foreigners' rights to acquire ownership.

One of the major novelties of Book III is the proposal to introduce the right to construct a building on a third party's lot.⁶⁷ It is defined as a temporarily limited in-rem right of the owner of the building on a third party's lot to be recognised as the legal owner of the existing building or to build a new building on the lot and acquire ownership over such a building.⁶⁸ Book III contains rules on adjoining landowner rights and personal servitudes, to which the '*old rules regime*' is still being applied.⁶⁹ It explicitly regulates the duties of a third party who finds another person's movable asset. Presently, it is regulated only partially in an instruction of the federal government from 1949 and applies only to movables in state property.⁷⁰ The Draft contains detailed rules on condominiums, which are presently not regulated in the 1980 Act on In-rem Rights, but in a special statute from 2016.⁷¹

3.4. BOOK IV – FAMILY LAW

Book IV predominantly relies on the rules of the effective Family Law Act of 2005 and is divided into ten parts. The first is short, comprising a few general principles and definitions. The second part is devoted to

67 Preliminary Draft, art. 1925–1948. For a detailed analysis see Planojević, 2016, pp. 431–448.

68 Preliminary Draft, art. 1925, sec. 1.

69 See for example the decision of the Serbian Supreme court, Rev 3193/2018 (neighbours' rights) and the decision of the Appellate Court in Novi Sad, Gž 4704/2013 (usufruct as personal easement).

70 See in more detail Pavićević, 2016, pp. 547–564.

71 See in more detail Cvetić, 2017, pp. 1343–1362.

conclusion, legal effects, and dissolution of marriage. The third part covers legal issues pertaining to different aspects of the relationship between children and parents. The fourth part pertains to adoption; the fifth to foster care of children; the sixth to guardianship over children; the seventh to duty of providing maintenance between spouses and partners, parents and children, and close relatives; the eighth to proprietary legal relations between spouses, partners, children and parents, and close relatives; the ninth to combating domestic violence; and the tenth to different procedural rules applicable in litigation and administrative procedure. Among the numerous novelties proposed in the Preliminary Draft, three need to be specially mentioned.

Major dilemmas emerged during the work on the Draft on how same-sex partnerships are to be regulated.⁷² Presently, same-sex partners are not allowed to conclude a marriage, nor does a legal institute for registered partnership exist in Serbia. Further, the effective FA recognises only the lasting community of a man and a woman as a de-facto partnership,⁷³ the legal consequences of which are mostly equalised with those of marriage. After several versions of the respective rule, the final version of the Draft intends to extend the concept of de-facto partnership to same-sex partnerships as well. It specifies that a de-facto partnership (cohabitation) is a lasting community of two persons of different or the same sex, between whom there is no marital impediment of consanguinity and none of them is married or cohabits with another person.⁷⁴ Since the Draft equalises the legal position of partners in cohabitation with the position of spouses in their internal relations, regardless of their gender,⁷⁵ the non-registered, de-facto partnership of two persons of the same sex would have the same legal effect as the lasting cohabitation of man and woman, hence that of marriage, if the Draft were enacted with the present content. This solution of the Draft is justified in the literature on the requirement to comply with the European Convention on Human Rights, Recommendations

72 Cvejić-Jančić, 2019, pp. 164–167.

73 FA, art. 4, sec. 1.

74 Preliminary Draft, art. 2119, sec. 1.

75 Preliminary Draft, art. 2119, sec. 2.

of the Council of Europe, case laws of the European Court of Human Rights (ECtHR), and the rules of the Serbian Act on the Prohibition of Discrimination of 2009.⁷⁶ However, due regard must be given to the fact the government has already prepared a legislative proposal of an act on lasting cohabitation of same-sex partners,⁷⁷ which was subject to a wide public debate. If the proposal is going to be enacted eventually, the mentioned rules of the Preliminary draft will surely undergo fundamental modifications.

Supporting the general endeavour to increase natality, the Draft envisages rules pertaining to surrogate motherhood (giving birth to a child on behalf of a third person), as one of the means of biomedically assisted reproduction. Surrogate motherhood opens a range of fundamental legal issues, such as, for instance, who shall be considered the mother of the child, conditions of validity of the contract on surrogate motherhood, or the effects of withdrawal of consent of the surrogate mother, which the Serbian literature called attention to not only during the drafting of the Preliminary Draft,⁷⁸ but also long before the enactment of the 2005 Family Act.⁷⁹ The Draft offers solutions to most of these critical legal issues. First, it states that the woman who according to the contract on surrogate motherhood intends to take care of the child (intended mother), regardless of whether her reproductive cells were used to impregnate another woman (surrogate mother), shall be registered in the civil register as the child's mother.⁸⁰ The father of the child is considered to be the husband or the partner of the intended mother (intended father).⁸¹ The surrogate mother cannot be a woman who is a blood relative of the intended parents, nor a woman whose germ cells have been used for impregnation. In addition, the Draft specifies that a surrogate mother cannot be a woman who has not already given birth

76 Cvejić-Jančić, 2019, p. 167.

77 <https://www.paragraf.rs/dnevne-vesti/080321/080321-vest18.html> (Accessed: 12 February 2023).

78 Cvejić-Jančić, 2015, pp. 122–135.

79 See for instance Stanić, 2001, pp. 491–507.

80 Preliminary Draft, art. 2176, sec. 1.

81 Preliminary Draft, art. 2176, sec. 2.

to a child.⁸² Logically, the Preliminary Draft excludes the legal effect of the general legal presumptions on the fatherhood and motherhood of the surrogate mother and her husband/partner (the *pater est quem nuptia demonstrant* and *mater semper certa est* presumptions).⁸³ Furthermore, the Draft excludes the possibility of challenging the legal status of intended parents as legal parents of the child, even when the germ cells of only one of them have been used for impregnation.⁸⁴ The contract on surrogate motherhood is valid only if the intended parents are spouses or partners who could not conceive a child naturally or by means of biomedically assisted reproduction, or they are advised not to conceive a child owing to the risk of the child being born with a serious hereditary illness.⁸⁵ The contract can be devised as onerous. However, the parties may specify reimbursement of only reasonable costs of the surrogate mother and only a reasonable remuneration.⁸⁶ The contract must be confirmed by a judge who is obliged to draw the parties' attention to the major legal effects of the contract, ascertain whether the required medical conditions are met, and the agreed reimbursement of costs and remuneration is moderate. If not, the judge declines confirmation of the contract.⁸⁷ A rule of major importance is when the surrogate mother refuses to deliver the child to the intended parents after giving birth to it. In such a situation, the Draft envisages the right of the intended parents to request the court to order the surrogate mother to deliver the child to them. This right is limited to three months after the child's birth.⁸⁸

The second major novelty is regarding the introduction of a so-called children's alimony fund or children's support fund, which exists in numerous European countries.⁸⁹ Quite often the alimony debtors do not fulfil their obligations, or they fulfil them irregularly, due to which

82 Preliminary Draft, art. 2179.

83 Preliminary Draft, art. 2176, sec. 3.

84 Preliminary Draft, art. 2176, sec. 4.

85 Preliminary Draft, art. 2177, sec. 1.

86 Preliminary Draft, art. 2183.

87 Preliminary Draft, art. 2178.

88 Preliminary Draft, art. 2182.

89 See in more detail Novaković, 2016, pp. 103–122.

the sustenance of the alimony creditors may be endangered. To address this serious issue in relation to child alimony, the Draft envisages the introduction of a children's alimony fund.⁹⁰ The initial assets of the fund are to be provided primarily from the state budget.⁹¹ The beneficiary of the alimony from the assets of the fund is a minor, Serbian national with permanent residence in the territory of Serbia, to whom the debtor has failed to pay alimony for at least three months without interruptions or six months with interruptions.⁹² Having paid the overdue alimony instalments to the creditor, the alimony fund gains a recourse right against the debtor.⁹³

3.5. BOOK V – INHERITANCE LAW

Book V on the law on inheritance mostly transposes the rules of the 1995 Act on Inheritance.⁹⁴ It is divided into five parts. The first contains general rules and definitions, the second rules on intestate succession, the third on testate succession, the fourth on different contract-types having legal relevance to inheritance, while the fifth deals with the acquisition of the estate by the heirs.

From the major novelties of Book V, one should definitely mention the introduction of the contract of succession, the third legal ground of inheritance, after intestate and testate inheritance.⁹⁵ The Preliminary Draft specifies that by a contract of succession, one party, the testator, obliges to bequeath his/her estate or part thereof to the other party. A contract of succession may be concluded only between spouses,⁹⁶ but the contract can also be concluded in favour of children of either

90 Preliminary Draft, art. 2306–2315.

91 Preliminary Draft, art. 2306.

92 Preliminary Draft, arts. 2307 and 2308.

93 Preliminary Draft, art. 2310.

94 Krstić, 2020, p. 165.

95 Preliminary Draft, art. 2505. For reasons for introducing the inheritance contract into Serbian law, see Vidić, 2018, pp. 389–414; Stojanović, 2003, pp. 163–179; Đurđić-Milošević, 2017, pp. 625–637.

96 Preliminary Draft, art. 2684, sec. 1.

party, their common children, their adoptees, and other descendants.⁹⁷ The contract of succession may, therefore, be concluded only between spouses and as a contract creating only unilateral obligations. This has been criticised in the doctrine, claiming that there are no justified reasons why partners and future spouses could not conclude such a contract and why it could not be devised as a contract creating mutual obligations, as well, that is, in which both parties undertake to bequeath their estate or part thereof to the other party.⁹⁸ In parallel to the introduction of the contract of succession, available only to spouses, the Draft envisages an explicit prohibition of concluding a contract on maintenance between spouses,⁹⁹ which is another novelty in comparison to the effective Act on Inheritance. Such an approach may have merits, since there is already a statutory obligation to provide maintenance between the spouses, based on their marriage. The contract on life-long maintenance between spouses, being an onerous contract, is a legal instrument by which the rules on mandatory share in estate may be circumvented.¹⁰⁰ However, other opinions are also expressed in the doctrine, which support that the possibility of concluding a contract on succession between spouses should not affect the possibility of concluding a life-long maintenance contract between them.¹⁰¹ Another critical remark formulated in relation to the rules on contract of succession is that it does not regulate the content of the contract.¹⁰² The Draft contains only rules on the subject-matter of the contract (it may relate to the whole estate of the devisor or part thereof¹⁰³) and its form (the contract must be concluded in written form, confirmed by a judge, who is obliged to draw the parties' attention to the legal effect of the contract¹⁰⁴). The Draft explicitly states that the contract is considered valid even if

97 Preliminary Draft, art. 2684, sec. 2.

98 Vidić, 2018, p. 413.

99 Preliminary Draft, art. 2702, sec. 4. See in more detail Dudás, Kovačević, 2022, pp. 19–30.

100 See Đurđić-Milošević, 2017, p. 633.

101 Krstić, 2020, p. 170.

102 Vidić, 2018, p. 413.

103 Preliminary Draft, art. 2687.

104 Preliminary Draft, art. 2686.

one or more of the descendants of the parties did not give their consent to the contract, who would be called to inheritance upon the parties' death.¹⁰⁵ This is a major difference in comparison to the contract on assignment and distribution of estate during the life of the devisor, the validity of which is conditioned on the consent of the devisors' descendants who would be called to inherit him/her.¹⁰⁶

The third major novelty in the field of the law on inheritance that needs mention in this brief overview is that the Preliminary Draft in the light of the development of biomedical sciences, extends the notion of the unborn child (*nasciturus*). The rule of the effective 1995 Inheritance Act still supports the classic concept of *nasciturus*, by prescribing that a child may inherit, if it was already conceived at the time of devisor's death, but comes to the world after his/her demise, under the condition that it is liveborn.¹⁰⁷ The Preliminary Draft intends to change this concept: a child is considered capable to inherit, even if it is not yet born, nor conceived at the time of devisor's death, under the condition that it is liveborn.¹⁰⁸ Although this novelty may be supported in general, critical remarks are also expressed saying that the Draft does not specify any time-limit in which the child should be born at the latest, which generates a great degree of legal uncertainty.¹⁰⁹ In addition, this rule may contradict the special regulations pertaining to bio-medically assisted reproduction, which indirectly forbids the use of germ cells posthumously for the purpose of giving birth to a child.¹¹⁰

4. CONCLUDING REMARKS

The endeavour to enact a civil code, although in differing pace and impact, was a hallmark across the 20th century in the Kingdom of Serbia and all Yugoslav states that had ever existed. Owing to specific historical

105 Preliminary Draft, art. 2685.

106 Preliminary Draft, art. 2691.

107 Act on Inheritance, art. 3, sec. 2.

108 Preliminary Draft, art. 2506, sec. 2.

109 Stojanović, 2012, pp. 192–193.

110 Krstić, 2020, pp. 167–168.

circumstances, a novel civil code that would replace the 1844 Code was never enacted. The realisation of this endeavour, thus, gained realistic prospects only after 2006, when Serbia finally became a unitary state anew. The very same year a committee was appointed to prepare the draft of a future civil code of Serbia. The appointing of the committee and the official initiative to commence the drafting of a civil code was received positively by scholars and practitioners alike. The results of its work have been published gradually by 2019 when the final version of the Preliminary Draft of a Civil Code for the Republic of Serbia was made available to public. The frame of this paper by no means makes it feasible to provide an overview of all of the major novelties of the Preliminary Draft. Only the ones considered the most important have been presented in short.

The Preliminary Draft follows the five-partite division of branches of civil law according to the Pandectists' school of thought. The drafting committee eventually opted to have a general part in the Preliminary Draft, defining a large number of theoretical concepts with meticulous precision. The novelty that evoked the greatest public attention and opinion is the proposal to introduce euthanasia, as the embodiment of the supreme human right, the right to human dignity. The General Part is followed by Book II dedicated to the law of obligations, which was the first draft of a legislative text offered to the public by the committee as early as 2009. The choice to prepare Book II on obligations first was unsurprising. The legislative model, which the committee departed from, the 1978 Obligations Act, demonstrated its qualities in its more than 40 years of application, even in the turbulent changing social environment. The relatively small number of legal issues that were not regulated in the 1978 OA, or were not regulated properly, could easily be remedied by reverting to the solutions offered by Professor Konstantinović in the 1969 'Sketch', which the drafting committee mostly followed. In comparison to the 1978 OA, major novelties are proposed in the Preliminary Draft in relation to contractual negotiations, precontracts, *leasio*, usury, repudiation of contract due to non-performance, concept of fault, concept of moral damage, right of legal persons to pecuniary compensation for moral damage, inheritability of a claim to compensation for moral damage, etc.

Book III on in-rem rights was among the last ones to be finalised. The aim of the drafting committee to unify the rules on in-rem rights into a single legislative text can be supported, since presently these are dispersed in a considerable number of statutes and regulations. However, a critical remark has been formulated in the doctrine that the committee should have considered the Draft of the Act on Property and Other In-rem Rights of 2012, which was highly praised not only at national level, but also by foreign scholars.

Book IV on family law integrates the rules on the effective Family Law Act of 2005. However, numerous novelties are envisaged by the Preliminary Draft of which two are noteworthy. The first is the introduction of surrogate motherhood into the Serbian law. In this pursuit, the Draft contains detailed rules on the conditions of validity of a contract on surrogate motherhood, conditions imposed on the surrogate mother and intended parents, the consequences of the refusal of the surrogate mother to deliver the child after its birth to the intended parents, etc. The second major novelty is connected to the legal regulation of same-sex partnerships. At present, same-sex partners cannot conclude a marriage, nor can their relationship be recognised as de-facto cohabitation, having mostly the same legal effects as marriage. The Preliminary Draft intends to extend the concept of de-facto cohabitation to embrace lasting cohabitation between same-sex partners as well. However, a recent legislative proposal intends to introduce registered partnership for same-sex partners. If this proposal is going to be enacted in a form of statute, the mentioned rules of the Preliminary Draft are expected to be modified.

Finally, Book V contains rules on inheritance law, which in the most part represents the transposition of the effective Inheritance Act of 1995. However, numerous novelties are proposed in the Preliminary Draft. Two have been discussed in depth in this chapter: the introduction of a contract on succession into the Serbian law and the extension of the notion of *nasciturus*, which is claimed to be necessitated by the growing availability and importance of modern biomedically assisted means of human reproduction.

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