

# CODIFICATION OF CIVIL LAW IN KOSOVO: AN ANALYSIS OF THE MAIN PRINCIPLES OF BOOK ONE – GENERAL PART OF THE KOSOVO DRAFT CIVIL CODE

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*Kosovo is in the process of civil law codification. Civil law relationships are currently regulated by special laws. After the end of the war in 1999, Kosovo's jurisdiction became complex due to the simultaneous application of different laws: the UNMIK regulations, previous laws, and the legislation adopted by the Assembly of Kosovo from 2001 onwards. Consequently, these circumstances have had an impact and caused different interpretations and inconsistent application of the laws in the same cases, which among other issues points to the need for codification. The lack of clear and uniform law implementation in court cases related to the civil law matters is also considered an issue that can be resolved by the harmonisation of civil law through a civil code. In other words, the drafting of a civil code will clean up the legal system from different laws in place. It will harmonize and bring Kosovo's legislation closer to the international standards and best practices in this area of law, which will lead to better law implementation. In this paper, questions related to the approach and model of the civil code will be discussed. Further discussion will focus on the main general principles outlined in the General Part of the Civil Code approved by the Government on 29 December 2021, which is being regulated in Kosovo for the first time. The analyses in this paper are based on a review of literature, Kosovo legislation and references to the European countries' le-*

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gislation which are used as models for some parts of the Kosovo Draft Civil Code. Finally, some conclusions are drawn regarding the questions raised concerning the model of the civil code and the general principles included in the code.

*Keywords:* Civil code; obligations; ownership; family; inheritance

## 1. INTRODUCTION

From a historical point of view, Kosovo has never had a civil code. Its legal system was part of the legal system of former Yugoslavia, i.e. the Socialist Federal Republic of Yugoslavia (hereafter SFRY), which also did not have a civil code, but only separate civil laws.<sup>1</sup> Many authors emphasized that the civil law system of the SFRY (including Kosovo) until 1989<sup>2</sup> was influenced by the Austrian legal system. In particular, the Austrian Civil Code of 1811 influenced the field of civil law relationships.<sup>3</sup> Also, it should be added that the current civil laws of Kosovo and jurisdictions of the region are influenced by Austrian and German law.<sup>4</sup> After the war in Kosovo (1998-1999) the circumstances changed in several aspects, including legal issues. Kosovo was initially placed under the UNMIK administration<sup>5</sup>, and declared its independence on 17 February 2008,

<sup>1</sup> See related special civil laws: Law of Obligations published in the Official Gazette of former Yugoslavia no. 29/78 and amendments thereto of 1985 and 1989, Official Gazette of SFRY, nos. 39/85 and 5/89; Law on Basic Property Relations, Official Gazette of the SFRY, no. 6/80; Law on Marital and Family Relations, *Gazeta Zyrtare e Kosovës* (Official Gazette of Kosovo), no. 10/84; Law of Inheritance, *Gazeta Zyrtare e Kosovës* (Official Gazette of Kosovo), no. 43/74.

<sup>2</sup> For more with regard to the property law relations in Kosovo based on the laws under Former Yugoslavia jurisdiction see Statovci, E., *Marrëdhëniet pronësore juridike në pronën e paluajtshme në Kosovë (Property-legal relations in immovable property in Kosovo)*, Prishtine, 1976, re-published in 2009. See also Karčić, F., *A Study on Legal Formalism in the Former Yugoslavia and its Successor States*, Center for Integrity in the Defense Sector (CIDS), Report, no. 1, 2020, p. 5, available at: <https://cids.no/wp-content/uploads/pdf/cids-reports/10016-cids-rapport-2020.pdf> (10 March 2022).

<sup>3</sup> See among others: Možina, D., *Harmonization of Private Law in Europe and the Development of Private Law in Slovenia*, *Juridica International*, vol. 14, 2008, pp. 173-175, available at: [https://www.juridicainternational.eu/public/pdf/ji\\_2008\\_1\\_173.pdf](https://www.juridicainternational.eu/public/pdf/ji_2008_1_173.pdf) (10 March 2022).

<sup>4</sup> Council of Europe; Jessel-Holst, Ch.; Juhart, M., *Opinion on the draft law on property rights and other real rights of the Republic of Serbia*, available at: [https://arhiva.mpravde.gov.rs/images/CoE\\_expertise\\_ReviewSebiandraft\\_Juhart\\_and\\_Jessel-Holst.pdf](https://arhiva.mpravde.gov.rs/images/CoE_expertise_ReviewSebiandraft_Juhart_and_Jessel-Holst.pdf) (10 March 2022). This law and the legal opinion given is mentioned because all the countries of former Yugoslavia had the same civil laws including Kosovo.

<sup>5</sup> United Nations Interim Administration Mission in Kosovo or UNMIK (hereafter UNMIK). For more information, see UNMIK Regulation No. 1999/1, promulgated

consolidating the state organization based on the Constitution of the Republic of Kosovo.<sup>6</sup> Consequently, changes also occurred in the field of civil law, so that special laws were enacted.<sup>7</sup> Since 1999 there has been a mixture of legislation in force<sup>8</sup>, which causes difficulties in implementation.<sup>9</sup>

A number of reports by local and international organisations have pointed out a lack of the rule of law in Kosovo, which could be due to inconsistent court interpretations of legislation or a lack of a clear approach in its implementation.<sup>10</sup> The question can be raised as to whether this is an issue of unclear laws or

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on 2 July 1999, available at: [https://unmik.unmissions.org/sites/default/files/regulations/02english/E1999regs/RE1999\\_01.htm](https://unmik.unmissions.org/sites/default/files/regulations/02english/E1999regs/RE1999_01.htm) (15 March 2022)

<sup>6</sup> See Constitution of the Republic of Kosovo, adopted on 9 April and entered into force on 15 June 2008, *Gazeta Zyrtare e Republikës së Kosovës*, K-09042008, 9 Prill 2008 (Official Gazette of the Republic of Kosovo), available at: <https://gzk.rks-gov.net/ActDetail.aspx?ActID=3702>.

<sup>7</sup> See Law No. 2004/26 on Inheritance, *Gazeta Zyrtare e Kosovës* (Official Gazette of Kosovo), no. 2005; Law No. 2004/32 on Family, *Gazeta Zyrtare e Kosovës* (Official Gazette of Kosovo), no. 4/1 September 2006; Law No. 02/L-17 for social and family services, *Gazeta Zyrtare e Kosovës* (Official Gazette of Kosovo), no. 12/01 May 2007, with changes in 2012; Law No. 03/L-154 on ownership and other real rights, *Gazeta Zyrtare e Republikës së Kosovës* (Official Gazette of the Republic of Kosovo), no. 57/4 August 2009; Law No. 04/L-077 on Obligations, *Gazeta Zyrtare e Republikës së Kosovës* (Official Gazette of the Republic of Kosovo), no. 16/19 Jun 2012; Law No. 2002/5 on the establishment of the register of immovable property rights, *Gazeta Zyrtare e Republikës së Kosovës* (Official Gazette of the Republic of Kosovo), no. 34/1 August 2008, with subsequent amendments of 2011 and 2013, *Gazeta Zyrtare e Republikës së Kosovës* (Official Gazette of the Republic of Kosovo), no. 7/10 August 2011; Law No. 04/L-013 on cadaster, *Gazeta Zyrtare e Republikës së Kosovës* (Official Gazette of the Republic of Kosovo), no. 13/11 September 2011.

<sup>8</sup> UNMIK Regulation No. 1999/24 on the Law Applicable in Kosovo, amended by Regulation no. 2000/59, Article 1.1 and 1.2: “1.1 The law applicable in Kosovo shall be: (a) The regulations promulgated by the Special Representative of the Secretary-General and subsidiary instruments issued thereunder; and (b) The law in force in Kosovo on 22 March 1989. In case of a conflict, the regulations and subsidiary instruments issued thereunder shall take precedence. 1.2 If a court of competent jurisdiction or a body or person required to implement a provision of the law determines that a subject matter or situation is not covered by the laws set out in section 1.1 of the present regulation but is covered by another law in force in Kosovo after 22 March 1989 which is not discriminatory and which complies with section 1.3 of the present regulation, the court, body or person shall, as an exception, apply that law.

<sup>9</sup> Gashi, H., *The legal conflict regarding the privatization of socially owned enterprises: Amendments to the Law on the Special Chamber of the Supreme Court, the Law on PAK and other relevant laws*, *Hanse Law Review*, vol. 8, no. 1, 2012, p. 67-68.

<sup>10</sup> See OSCE Mission in Kosovo, *Report, Property rights in Kosovo 2002-2003*, p. vi,

a lack of knowledge about how to interpret and implement the law. Be that as it may, elements of both issues are present, which is due to the fact that there is conflicting legislation in force at the same time<sup>11</sup>, compounded by a lack of professional experience of judges, and overall issues in the functioning of the judicial system.<sup>12</sup> After the war, the harmonisation of civil law through a process of codification was envisaged as a solution to distinguish the legal system of Kosovo from that of former SFRY and remove any conflicting or confusing elements thereof. Several special civil laws were approved. In this regard, harmonisation of civil law was recognized as the first step in the harmonisation and modernisation of Kosovo's legislation, and strengthening of the rule of law in Kosovo.<sup>13</sup> The reason given was that the present civil laws are fragmented and incoherent. Thus, the aim has been to consolidate civil law regulations, resolve inconsistencies and fill the gaps.<sup>14</sup> But the road to codification was unclear in terms of the model of codification and the structure of the future civil code.

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available at: <https://www.osce.org/files/f/documents/8/8/13059.pdf> (17 March 2022). The report states: "The report assesses the compliance of Kosovo's property legislation and its implementation with international human rights standards, specifically the European Convention of Human Rights (ECHR), OSCE Mission in Kosovo, *Report, Conflicting Jurisdiction in Property Disputes*, April 2009, pp. 1-2. This report emphasizes the conflict of competences and conflict of laws related to the property rights of the displaced persons. Available at: <https://www.osce.org/files/f/documents/3/6/37717.pdf> (17 March 2022).

<sup>11</sup> International Center for Transitional Justice (Albanian: Qendra Ndërkombëtare për Drejtësi Tranzicionale), *Të drejtat pronësore në Kosovë: Një trashëgimi e vështirë e shoqërisë në tranzicion*, 2009, available at: <https://www.ictj.org/sites/default/files/ICTJ-Former-Yugoslavia-Property-Rights-2009-Albanian.pdf>.

<sup>12</sup> European Commission, *Kosovo's 2015 Report*, Brussels, 10.11.2015, p. 12-13, available at: [https://ec.europa.eu/neighbourhood-enlargement/system/files/2018-12/20151110\\_report\\_kosovo.pdf](https://ec.europa.eu/neighbourhood-enlargement/system/files/2018-12/20151110_report_kosovo.pdf) (10 March 2022). See also Gashi, H.; Berisha, Q., *Property Rights and Functioning of Judicial System in Kosovo as a Precondition for Economic Development of the Country*, Acta Universitatis Danubius. Juridica, vol. 13, no. 2, 2017.

<sup>13</sup> European Union Office in Kosovo, *Support to Civil Code and Property Rights*, Press release, Pristina, 9<sup>th</sup> October 2014. The declaration states: "The EU funded Project Support to the Civil Code and Property Rights" was presented today in Pristina. The overall objective of the project is to strengthen the rule of law and harmonize Kosovo legislation with the European standards in the area of civil law and property rights. The project aims to draft a comprehensive Civil Code and to start the process of improving the overall coherency of the regulatory framework on property rights in Kosovo, in compliance with EU *Acquis* and European best practices".

<sup>14</sup> *Ibid.*

The current special laws such as the Law on Obligational Relationships (hereafter LOR), Law on Ownership and Other Real Rights (hereafter LOORR), Law on Family (hereafter LOF), Law on Inheritance (hereafter LOI), which in a later stage were included as part of the Kosovo Draft Civil Code (hereafter KDCC), have been in force as new laws since 2004. The drafting of the general part of the civil code was also one of the challenges. Codification of civil law should not be deemed an easy task, in particular due to the problem of selection of a model that suits the legal system of Kosovo. Additional difficulties arose from various social groups exerting pressure to include protection of their interests in future legislation, as well as newly emerged circumstances in the society that required regulation. In this regard, it must be emphasised that Kosovo is also obligated to approximate its legislation to the EU *acquis* and harmonise it with international conventions and best practices in this area of law.<sup>15</sup> The jurisprudence of the European Court of Human Rights (hereafter ECtHR) is also applicable in Kosovo meaning that new legislation must be drafted in line with it. Also, the Kosovo courts must take into consideration ECtHR case law in the application of the law.<sup>16</sup> All of these circumstances, directly or indirectly, created the need to consolidate the civil law regulations of Kosovo in order to create a better legal framework that will strengthen the rule of law.

The intention of this paper is to narrow down the discussion only to the challenges of finding an appropriate model of the civil code and of laying down some general principles set out in Book One – General Part. In the following part of this paper, I will first focus on the ideas concerning the need for a codification of civil law in Kosovo, highlighting the complex existing legislation and the beginnings of the discussions on the drafting of a civil code, as well as the current state of affairs. Discussions on the civil code model were one of the challenges that Kosovo had to rise to before drafting the content of the code. Thus, a further point of discussion in this paper will concern the difficulties in defining the civil code model. Another difficulty in this process was the drafting of the general part of the Civil Code. The questions were raised as to which general rules and principles should be included and how they would be selected. Therefore, I will further focus on an analysis of the general principles in terms of selection and the influence of the civil codes of European countries. In the next part, the discussion will focus on the main general principles of civil law,

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<sup>15</sup> According to the Constitution of the Republic of Kosovo, the international conventions for the protection of human rights are directly applicable. See Article 22.

<sup>16</sup> Article 53 of the Constitution of the Republic of Kosovo: “Human rights and fundamental freedoms guaranteed by this Constitution shall be interpreted consistent with the court decisions of the European Court of Human Rights”.

using references to the different legislation taken into consideration during the drafting of the KDCC. An explanation of those principles will be given from the point of view of the content of the provisions set out in the KDCC and its implications on the other parts of the Code and, ultimately, its application. I will then address the absence or ambiguity of such principles in the current legislation and how their inclusion in the general part could create a legal mechanism and improve the uniform application of the law. Finally, a conclusion will be presented based on the findings of this paper.

## 2. IDEAS FOR THE CODIFICATION OF CIVIL LAW IN KOSOVO

### 2.1. Legislative complexity

The application of different laws, non-harmonized legal concepts, and a mix of legal terminology creates a pressing need to clean up and harmonize civil law regulations. Complex legislation makes it difficult for legal and natural persons to understand their rights and obligations. It also leads to uncertain and inconsistent decision making, unfairly limits the right to a fair hearing, and restricts access to justice. The role of the law in a society is to act as a mechanism for the regulation of the life of the society and to resolve disputes.<sup>17</sup> In this regard, as mentioned above, the special laws in force have been influenced by both the laws of the countries that were part of the SFRY (Croatia, Slovenia, and North Macedonia) and those of other European countries. Thus, the Kosovo legal system includes a mixture of legislation and legal concepts. For example, the LOR is influenced by Slovenian law<sup>18</sup>, in that it has the core of the old SFRY LOR of 1978 with the socialist concepts of means of production, social property, subjects of the self-management system, and social enterprises removed.<sup>19</sup> The Law on Ownership and other Real Rights retains some legal provisions and concepts based on the Law on Basic Property Relationships of 1980<sup>20</sup>, but also includes the legal terminology and concepts of the Act on Ownership

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<sup>17</sup> For more information regarding the law and society see Harris, P., *An Introduction to Law*, Eighth edition, Cambridge University Press, Cambridge, 2016, pp. 24-25.

<sup>18</sup> See the Obligations Code of Slovenia, Official Gazette of RS, no. 83/2001, English version available at: <https://www.wipo.int/edocs/lexdocs/laws/en/si/si044en.pdf> (16 March 2021).

<sup>19</sup> For more on the harmonization of private law and the law of obligations in Slovenia see: Možina, *op. cit.* (fn. 3).

<sup>20</sup> Law on Basic Property Relations, Official Gazette of SFRY, no. 6/80, entered into force on 1<sup>st</sup> September 1980.

and Other Real Rights of Croatia, including the name of the law.<sup>21</sup> Moreover, LOORR, is also deeply influenced by the German Civil Code (hereafter BGB). This was primarily due to the assistance in drafting provided by experts from Germany, who were more familiar with the German legal concepts. Moreover, large parts of the BGB were used, and a combination of concepts and legal terminology for many legal institutes were copied.<sup>22</sup> For example, the concepts of ownership, acquisition and loss of ownership are mainly based on the German concepts, except for the principles of *separation* and *abstraction*.<sup>23</sup> These concepts were not carried over because, under Kosovo law, transfer of ownership is based on a single contract (legal title) and the means of acquisition (*modus acquirendi*). Transfer of ownership follows the *causal system* of Austrian law<sup>24</sup>, which means that it is based on contract (*iustus titulus*) and delivery in case of movable property, i.e. registration of ownership in the register in case of immovable property (*modus acquirendi*).<sup>25</sup> There are also other BGB provisions which are taken into consideration such as acquisition of ownership by a non-owner or claims for the protection of ownership and other real rights.<sup>26</sup>

<sup>21</sup> Croatian Act on Ownership and other Real Rights (*Zakon o vlasništvu i drugim stvarnim pravima*), no. 91/96 with later amendments, available at: [https://narodne-novine.nn.hr/clanci/sluzbeni/2015\\_07\\_81\\_1548.html](https://narodne-novine.nn.hr/clanci/sluzbeni/2015_07_81_1548.html) (15 May 2022).

<sup>22</sup> Gashi, H., *Acquisition and Loss of Ownership under the Law on Property and Other Real Rights (LPORR): The influence of the BGB in Kosovo Law*, *Hanse Law Review*, vol. 9, no.1, 2013, pp. 41-60.

<sup>23</sup> *Ibid.* According to Art. 18 LPORR, ownership is defined as follows: “Ownership is the comprehensive right over a thing. The owner of a thing may, unless it is not contrary to the law or the rights of third parties, deal with a thing in any manner he sees fit, in particular possess and use it, dispose of it and exclude others from any interference”. In comparison see BGB, Art. 903: “The owner of a thing may, to the extent that a statute or third-party rights do not conflict with this, deal with the thing at his discretion and exclude others from every influence...”

<sup>24</sup> For more information regarding *an abstract* and *causal system* see Bartels, S., *An abstract or a causal system*, in: Faber, W.; Lurger, B. (eds.), *Rules for the Transfer of Movables: A Candidate for European Harmonization or National Reforms?*, vol. 6, Sellier. European Law Publishers GmbH, Munich, 2008, pp. 60-63. For the causal system in Austrian law see also Faber, W., *National Report on the Transfer of Movables in Austria*, in: Faber, W.; Lurger, B. (eds.), *National Reports on the Transfer of Movables in Europe*, vol. 1, Sellier. European Law Publishers GmbH, Munich, 2008, pp. 60-61.

<sup>25</sup> Gashi, H.; Preteni, B., *Transfer of property based on the property law rules and contract law rules under forthcoming Kosovo Draft Civil Code*, *Zbornik Pravnog fakulteta Sveučilišta u Rijeci*, vol. 42, no. 1, 2021, p. 153.

<sup>26</sup> For example, Article 23 (1) of LOORR stipulates: “No good faith acquisition of ownership pursuant to Art. 22 is possible, if the property was stolen from the owner or has been lost in any other way, unless it is foreseen in Art. 33 of this law”. Compare Article 935 of BGB which stipulates: “The acquisition of ownership under §

A similar mixture of legal concepts can be found in the Law on Family and the Law on Inheritance currently in force, which are based on the old Law on Family of 1984 and the Law on Inheritance of 1977, respectively. However, these laws have also been modified with new legal concepts and terminology from German law. Examples include *engagement* as a new legal institute, the marriage property regime, parental rights, adoption, etc.<sup>27</sup> Although family legislation of the countries in the region also stems from the laws of the SFRY, the legislation of these countries does not recognize the institute of engagement.<sup>28</sup> Differences also appear in relation to other legal institutes such as legal requirements for marriage, cohabitation, adoption, orders of inheritance etc. To sum up, these current laws contain a mixture of legal concepts of various civil law jurisdictions, which is one of the reasons behind the harmonization and codification of civil law. Furthermore, case law also contains many differences in relation to the manner in which such laws are applied and confronted with different interpretations.<sup>29</sup>

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932 to 934 (it refers to the acquisition of ownership in good faith) does not occur if the thing was stolen from the owner, is missing or has been lost in any other way. The same applies where the owner was the indirect possessor if the possessor has lost the thing. These provisions do not apply to money or bearer instruments or to things that are alienated by way of public action or in an auction pursuant to § 979 (1a).”

<sup>27</sup> For example, engagement is regulated by the BGB, Art. 1297-1302. See the English version available at: [https://www.gesetze-im-internet.de/englisch\\_bgb/englisch\\_bgb.pdf](https://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.pdf). As regards comparative private law, it needs to be added that civil codes of some European countries do recognize engagement, such as the Austrian Civil Code, Art. 45-46; Swiss Civil Code, Art. 90-93; Italian Civil Code, Art. 79-81; Spanish Civil Code, Art. 42-43. On the other hand, the French Civil Code does not recognize it. See the English version available at: <https://www.fd.ulisboa.pt/wp-content/uploads/2014/12/Codigo-Civil-Francia-French-Civil-Code-english-version.pdf> (14 April 2022).

<sup>28</sup> See Family Act of Croatia (*Obiteljski zakon Republike Hrvatske*), available at: <https://www.zakon.hr/z/88/Obiteljski-zakon> (15 May 2022); Family Law of North Macedonia, *Slusben Vesnik na RM* (Official Gazette of RM), no. 80/92.

<sup>29</sup> See among others the OSCE Mission in Kosovo, *Report, Litigating Ownership of Immovable Property in Kosovo*, 2009, available at: <https://www.osce.org/files/f/documents/9/9/36815.pdf> (17 March 2022); OSCE Mission in Kosovo, *Report on conflicting jurisdictions in property disputes*, April 2009, available at: <https://www.osce.org/files/f/documents/3/6/37717.pdf> (17 March 2022).



## 2.2. Stages of civil law codification

The history of civil law codification began in 2004, when laws in this domain were drafted by the Government of Kosovo with the support of an EU project implemented by the German Technical Cooperation Agency (*Deutsche Gesellschaft für Technische Zusammenarbeit – GTZ*). At that time, decisions for the establishment of a working group for drafting the Civil Code were issued.<sup>30</sup> However, the codification process was not supported by the UNMIK, which was the final authority in Kosovo entitled to promulgate or abrogate any law. The reason for such an approach lies in the unresolved political status of Kosovo.<sup>31</sup> Although, the Interim Criminal Code was adopted in 2003, there were claims that Kosovo was not yet a state and thus not entitled to adopt codes.<sup>32</sup> Consequently, the four books planned for the Civil Code (book on obligations, book on property and other real rights, book on family, and book on inheritance) were divided and adopted as separate laws, which are still in force. The exception to special laws in force was the LOR, whose draft of 2004-2010 was not approved as a special law. Thus, another LOR was enacted in 2012<sup>33</sup>, which, as previously stated, was heavily based on and influenced by the Slovenian Obligations Code.

The idea of codifying civil laws was formally brought to the forefront again in 2014-2015, when the Ministry of Justice initiated the process of drafting of the Civil Code, and the Government established the State Commission for the Civil Code.<sup>34</sup> This process was also supported by the European Commission

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<sup>30</sup> Decision of the Government of Kosovo (Secretary General) on the formation of the working group for drafting the Civil Code of Kosovo, First Book (Law of Obligations), no. 1101/2004, dated 4 March 2004; Decision of the Government of Kosovo (Secretary General) for the Establishment of the Working Group for drafting and processing the Kosovo Family Law, no. 114/2004 dated 15 March 2004.

<sup>31</sup> Under UNMIK Regulation no.1999/1, the UNMIK, through the Special Representative of the Secretary General of the United Nations (hereafter SRSG), was the final authority in Kosovo for the promulgation of the legislation adopted by the Assembly of Kosovo. Section 1 of the Regulation states: “1. All legislative and executive authority with respect to Kosovo, including the administration of the judiciary, is vested in UNMIK and is exercised by the Special Representative of the Secretary-General”.

<sup>32</sup> The author of this paper was involved as a Government official in the drafting of the Books of Civil Code in 2004 and also took part in the discussion on these challenges.

<sup>33</sup> See Law no. 04/L-077 on Obligational Relationships, *Gazeta Zyrtare e Republikës së Kosovës* (Official Gazette of the Republic of Kosovo), no. 16/19 June 2012.

<sup>34</sup> See Government Decision on the Establishment of the State Civil Code Commis-

through a project for supporting the Civil Code (divided into two phases: Phase 1, 2014-16, and Phase 2, 2017-2020, with an extension until the end of April 2022). The first phase of the project included the preparation of many research documents and publication of the first draft of the Civil Code, which included four books, i.e., Book on Obligations, Ownership, Family, and Inheritance, but lacked Book 1 – General Part.<sup>35</sup>

Initially, competence for drafting the Code was held by the Government. Frequent changes of the government affected the legislative responsibilities regarding the Civil Code, which led to a transfer of responsibilities to the Ministry of Justice in 2017. The frequent changes in governments and ministers of justice also impacted the composition of the Civil Code working group, resulting in a delay in systematic work on the codification.<sup>36</sup> Finally, in February 2018, a consolidated working group was established at the level of the Ministry of Justice<sup>37</sup>, which, after two years of work (including the work carried out from February 2017 and the work of the consolidated working group in February 2018) and with the support of the EU-funded Project of support to the Civil Code Phase 2, managed to produce the Final Draft of the Civil Code. This Draft was opened for public consultations on 24 January 2019.<sup>38</sup> The final Kosovo Draft Civil Code (hereafter KDCC) was approved by the Government on 5 August 2020.<sup>39</sup> Consequently, this Draft was sent to the Assembly for approval on 10 August 2020 and distributed to the deputies on 11 August 2020.<sup>40</sup> It reached the phase of approval by the Assembly in the first reading. According to the rules and procedures established for the adoption of laws, laws are passed after two readings.<sup>41</sup> However, the early general election held on 14 February

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sion no. 09/18 dated 11 March 2015. The author of this paper was also a member of the Commission and an expert in other working groups from 2017-2021.

<sup>35</sup> See First Draft of Civil Code, available at: <https://md.rks-gov.net/desk/inc/media/A1CCB78F-9020-41D5-826E-14D67A90F369.pdf> (22 March 2022).

<sup>36</sup> Five Governments and five Ministers of Justice changed during the drafting of the Civil Code.

<sup>37</sup> Decision of the Ministry of Justice for the Working Group 2017, amended in January 2018 by Decision, no. 01-248, 30 January 2018.

<sup>38</sup> See Kosovo Draft Civil Code, 24 January 2019, published for public consultations, available at: <https://md.rks-gov.net/desk/inc/media/89AFEE64-B2C2-4B74-B15C-CCE8C3EC76E7.pdf> (7 March 2021).

<sup>39</sup> See Government Decision approving the Civil Code No. 02/20 dated 5 August 2020.

<sup>40</sup> See the protocol of the letter of acceptance in the Assembly of Kosovo, with number of the Draft Code, no. 07 /L-019, dated 11 August 2020 and the letter of distribution to deputies, prot.07/665/L-019.

<sup>41</sup> For more on the adoption of laws in the Assembly see the Rules of Procedure of the

2021 again affected the enactment of the Civil Code, which was returned to the new Government. After several meetings and debates of the new working group set up by the new Government, the Civil Code was approved again by the Government on 29 December 2021.<sup>42</sup> It was immediately sent to the Assembly for further proceeding of approval and was distributed to the members of the Assembly on 17 January 2022.

The final KDCC is systematized into five books with the following structure: Book 1 – General Part; Book 2 – Obligations; Book 3 – Ownership and other Real Rights; Book 4 – Family, and Book 5 – Inheritance, counting 1630 articles in total.<sup>43</sup> The KDCC of 5 August 2020 and the latest version, adopted on 29 December 2021, do not differ in terms of structure and systematization.<sup>44</sup>

### 3. CHALLENGES OF DEFINING THE CIVIL CODE MODEL

#### 3.1. Choosing the model for the codification of civil law

At the beginning of the codification process, the main challenges related to the choice of the civil code model. As pointed out above, the codification process aims at the harmonization of laws with a secure model that creates a better legal situation and increases legal certainty. That is to say, it should not create a new conflict of laws, creating further uncertainty in law implementation. The discussions focused on the question of the model of civil code to follow, i.e., the German, the Austrian, or the French, or any combined model.

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Assembly of Kosovo, dated 29 April 2010, Articles 56-59, available at: [https://www.kuvendikosoves.org/Uploads/Data/Files/6/Rr\\_K\\_RK\\_29\\_04\\_2010\\_1\\_EDbu8aqXYd.pdf](https://www.kuvendikosoves.org/Uploads/Data/Files/6/Rr_K_RK_29_04_2010_1_EDbu8aqXYd.pdf) (7 March 2021).

<sup>42</sup> Decision of the Government no. 05/52 on 29 December 2021.

<sup>43</sup> KDCC approved on 29 December 2021, available at: [https://kryeministri.rks-gov.net/wp-content/uploads/2021/12/PDF\\_Projektkodi-Civil\\_30.12.21.pdf](https://kryeministri.rks-gov.net/wp-content/uploads/2021/12/PDF_Projektkodi-Civil_30.12.21.pdf) (10 January 2022).

<sup>44</sup> However, some changes are introduced in the latest version of 29 December 2021, mostly related to Book 4 – Family, concerning the joint property regime of spouses. The articles that regulated the pre-nuptial and marriage contract were removed, while the provisions on the joint property of spouses defined in equal shares and on separate property were retained. Marriages between the ages of 16 and 18 were reconsidered and regulated in accordance with international conventions, giving the right of marriage only to those over the age of eighteen. Some additional clarifications were also introduced to Book 2 – Obligations and Book 3 – Property and Other Real Rights, but only in terms of wording, without affecting the content of the main legal institutes, which can be addressed in other papers. Finally, with regard to Book 1 – General Part, no important changes were made.

The prevailing opinion was that the current applicable laws adopted after 2004 must be taken into consideration as the basis, but followed by proper modernization and harmonization of the legal provisions with new legal institutes.<sup>45</sup> The new institutes must be included in order to avoid conflicts of law and to achieve alignment with the EU acquis and other international standards applicable in this area of law.<sup>46</sup> This approach arose out of fear that copying any single model to the letter from another legal system would have a negative impact on implementation, leading to confusion in the interpretation of laws, slowing down the process of adjudication.<sup>47</sup> Speaking in general, the codification in other European countries was a process aimed at harmonizing existing legal provisions, knowing their effects in practice.<sup>48</sup> Furthermore, the most difficult issue during the drafting process of the recent modern European civil codes was the choice of civil code model or legal family. All these countries avoided copying a single civil code model from others, but rather modified their existing laws.<sup>49</sup> Furthermore, the codification process involved considering court decisions and avoiding controversial implementation. The intention was also to modernize the legal system with new and modern legal approaches based on the latest developments in the EU countries.<sup>50</sup>

Another challenging issue discussed was the approach to the integration of the commercial contract in the civil code. This issue is not debated only in Ko-

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<sup>45</sup> Compared to the current special laws, the KDCC includes new legal institutes, such as: the general part, which is completely new and which will be discussed in chapters 4 and 5, Book 2 – Obligations includes provisions concerning unjust damage caused as a result of decisions of state institutions; provisions are laid down prescribing periodic claim (claims for electricity, water, radio-television, etc.); the deadline for the achievement of each claim (invoice) is clarified etc.

<sup>46</sup> For example, Article 4 of the KDCC determines that EU standards are sources of civil law. Another such example is Book 2 on Obligations, which reflects the EU Directive on Consumer Protection and Liability for Defective Products.

<sup>47</sup> See the Civil Code Study Document that was published on the website of the EU Funded Project “Support to the Civil Code of Kosovo”, Phase 2, available at: <https://civilcode-kosovo.org/about/?lang=en> (14 March 2022).

<sup>48</sup> For more information on the process of codification in Europe see Van Caenegem, R. C., *An Historical Introduction to Private Law*, Cambridge University Press, Cambridge, 2003.

<sup>49</sup> For more on the developments and challenges of drafting new private law and its codification in Estonia see, among others: Varul, P., *Legal Policy Decisions and Choices in the Creation of New Private Law in Estonia*, Juridical International, vol. V, 2000, pp. 104-118.

<sup>50</sup> *Inter alia*, see Kull, I., *Codification of Private Law in Estonia*, in: Rivera, J. C. (ed.), *The Scope and Structure of Civil Codes*, Springer, Heidelberg – New York – London, 2013, pp. 133-151.

sovo. This was an issue in other European countries that also faced difficulties in determining the model of civil code, including the question whether commercial contracts should be included in the civil code or regulated by a commercial code.<sup>51</sup> In this regard, it should be noted that there are always concerns and objections about the content of the law in the drafting process. In this sense, Hart pointed out, “The objections ... fall into three main groups. Some of them concern the content of laws, others/their mode of origin, and others again their range of application”. “All legal systems, at any rate, seem to contain laws which in respect of one or more of these three matters diverge from the model of general orders which we have set up”.<sup>52</sup> Obviously, these concerns were raised in the discussions during the drafting of the Civil Code in Kosovo. Perhaps it is time to learn from the experiences of other countries that have already passed the codification stage.

It is necessary to underline that despite being codified, the civil codes of European countries have not remained unchanged. Even these countries have tried to make changes because of the implementation of new EU directives and other international standards. For example, it is worth mentioning the amendment and restructuring of the French Civil Code (hereafter FCC), which entered into force on 1 October 2016, in the part concerning obligations. The primary purpose was to adapt the Code to the requirements arising from international instruments on contract and business law, the UNDRIT Principles, and the Principles of European Contract Law.<sup>53</sup> Thus, even though courts have been using and familiarizing themselves with the code for more than 200 years, the legislator has found reasons to change the code in order to adapt to the new circumstances.

In addition, the goal of codification is to regulate norms in an evolutionary way, considering the evolutionary development of the society. Consequently, it is necessary to mention that the ECtHR has played a significant role in the evolution of the interpretation of laws in many cases resolved by the Court.<sup>54</sup> In this sense, new legislation should be drafted in such a way that takes into con-

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<sup>51</sup> See among others: Csehi, Z., *Legal Persons in the New Civil Code of Hungary*, in: Menyhárd, A; Veress, E. (eds.), *New Civil Codes in Hungary and Romania*, Springer International Publishing AG, Cham, 2017, pp. 4-5.

<sup>52</sup> Hart, H. L. A., *The Concept of Law*, Oxford University Press, New York, First edition 1961, Second edition 1994, at 26.

<sup>53</sup> See Rowan, S., *New French Law on Contracts*, *International & Comparative Law Quarterly*, vol. 66, no. 4, 2017, pp. 1-2.

<sup>54</sup> Viljanen, J., *The Role of the European Court of Human Rights as a Developer of International Human Rights Law*, *Cuadernos Constitucionales de la Cátedra Fadrique Furió Ceriol*, vol. 62/63, 2008, pp. 249-265.

sideration the future of society, not only current circumstances. In this regard, some ECtHR and Court of Justice of the EU decisions directly impacted the content of the KDCC in order to modernise civil law with new legal approaches. These cases are the *Coman* case<sup>55</sup> (with regard to marriage for same-sex couples), the *Keegan* case<sup>56</sup> (with regard to the parental responsibility), the *Olsson* case<sup>57</sup> (with regard to parental rights). As concerns amended legislation, national courts and other law enforcement institutions therefore need to be more open to these novelties, rather than cling to conservative approaches, despite their experiences in practice. We are pointing this out because Kosovo courts tend to hesitate when it comes to applying the new legal solutions included in the KDCC.<sup>58</sup>

It is worth pointing out that there is no uniform model of civil law codification in Europe, including the general part of the codes, which is discussed in this paper. Therefore, looking into the structure of civil codes of European countries, differences can be observed. Codifying their civil law was seen as a confirmation of states' social identity (the influence of the French Civil Code was evident in the countries of former Napoleon's empire). However, this was also the motivation behind developing a distinct legislative structure.<sup>59</sup> States considered codes as a way to assert their independence from occupiers but also for constructing their state identity, which reflected the circumstances and social culture of each country separately.<sup>60</sup> Thus, the structure and systematization of civil codes differs between various European countries. Essential differences appear in the structure of the code and the systematization of legal matters, depending on the civil law institutions grouping system that is taken as the basis.

Finally, it must be said that even in the newer civil codes of post-communist

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<sup>55</sup> Court of Justice of the European Union Case C-673/16 *Adrian Coman and others v. Rumania*, ECLI:EU:C:2018:385. The case is related to the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States. See the case available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62016CJ0673> (17 May 2022).

<sup>56</sup> ECtHR, *Keegan v. Ireland*, App. no. 16969/90, Judgement of 26 May 1994 (Art 8; 6-1). The case concerns parental rights in relation to the adoption of a child.

<sup>57</sup> ECtHR, *Olsson v. Sweden*, App. no. 10465/83, Judgement of 24 March 1988 (Art 8). The case is related to parental rights.

<sup>58</sup> Discussions during a roundtable with judges, held on 23-25 September 2021, in the presence of the working group and the Ministry of Justice.

<sup>59</sup> Rivera, J. C., *A Comparative Approach to the Scope and Structure of Civil Codes*, in: Rivera, J. C. (ed.), *The Scope and Structure of Civil Codes*, Springer, Heidelberg – New York – London, 2013, pp. 4-5.

<sup>60</sup> Collins, H., *The European Civil Code: The Way Forward*, Cambridge University Press, Cambridge, 2008, pp. 130-131.

European countries, there are influences and inspiration from different legislations such as French, Austrian, German, Swiss, Spanish, Dutch, etc., to modify or adopt new legal institutes, as in the case of the Civil Code of the Czech Republic of 2012.<sup>61</sup> Also, the Estonian Civil Code of 2002 (hereafter ECC), although influenced by the BGB, differs in terms of the systematization of the legal provisions of the general part.<sup>62</sup> Thus, it is clear that civil codes originate from the same legal family, but not all of them have the same structure and systematization of legal provisions.

### 3.2 The current model of the Civil Code

The Ministry of Justice has declared to be in favour of the German Civil Code model with modifications to adjust to the Kosovo circumstances.<sup>63</sup> However, the working group later decided to keep the content of the Civil Code based on existing legislation such as the LOR, the LOORR, LOF, the LOI, instead of carrying out a thorough legal reform. There was additional consensus that the forthcoming Civil Code needs to have a general part that includes the principal rules and other provisions missing in the existing laws.<sup>64</sup>

As regards the structure, the KDCC follows the model of the *pandect system*<sup>65</sup>, with a similarity to the German Civil Code.<sup>66</sup> However, it cannot be said that

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<sup>61</sup> See Elischer, D.; Ondřej Frinta, O.; Pauknerová, M., *Recodification of Private Law in the Czech Republic*, in: Rivera, J. C. (ed.), *The Scope and Structure of Civil Codes*, Springer, Heidelberg – New York – London, 2013, p. 131.

<sup>62</sup> See the Estonian General Part of the Civil Code Act as amended in 2002 (hereafter EGPPCA), available at: <https://www.riigiteataja.ee/en/eli/530102013019/consolide> (10 April 2022).

<sup>63</sup> See The Concept Paper on Civil Code (Structure, Content and Model of Civil Code), in support of the working group of the Ministry of Justice, 10 July 2017.

<sup>64</sup> Minutes of meetings of the working group and discussions, in 2016, 2017, 2018.

<sup>65</sup> The civil codes in Europe are derived from Roman law. From the point of view of legal family, they are similar but differ in the systematization of the legal provisions and legal institutions. There are two types of systems: the *institutional system* which systematizes civil law into: persons (*personae*), things (*res*) and legal actions (*actiones*) and the *pandect system* that systematizes civil law into: *obligations, property, family and inheritance*. For more information regarding Roman law and the *institutional* and *pandect systems* see Puhan, I., *E drejta romake* (The Roman Law), Skopje, 1968; George Mousourakis, *Roman law*, Springer, Switzerland, 2015.

<sup>66</sup> See McGuire, M.R., *National Report on the Transfer of Movables in Germany*, in: Faber, W; Lurger, B. (eds.), *National Reports on the Transfer of Movables in Europe*, Sellier. European Law Publishers GmbH, Munich, vol. 3, 2011, p. 9. The author pointed out: “Adopting the pandectist system (*Pandektensystem*) the Civil Code is divided into

they are entirely the same in terms of content because there is a conceptual difference (most notably in the LOR and the LOORR, as well as in the well-known principle of abstraction (*abstraktionsprinzip*) and the principle of separation (*trennungsprinzip*).<sup>67</sup> Therefore, from the point of view of content, it is not possible to conclude that it is a pure German legal system, as the norms of the existing laws in force preserve the spirit of the laws of the Austrian system.<sup>68</sup> It is better to say that the KDCC is a special model with hybrid norms due to the influence of different legal bases, adapted to Kosovo circumstances and updated with new principal rules. Moreover, there is no doubt that it belongs to the Austrian and German legal family with characteristics of the *pandect system*<sup>69</sup> in terms of structure and systematization of legal provisions. It remains to be seen how such systematization of norms will function in practice and whether the goal of codification will be achieved.

In this regard, and considering the model of the KDCC, it must be kept in mind that when it comes to drafting new legislation, it has to be drafted in such a form that the new laws are accessible and foreseeable. It was also a concern of the Kosovo courts how the new legislation (Civil Code) will address current and future circumstances. The legal doctrine developed since 1980, through the influence of ECtHR cases, requires that laws be accessible and foreseeable.<sup>70</sup> Related to these criteria, the ECtHR pointed out in the *Sunday Times* case as follows: “Two of the requirements that flow from the expression ‘prescribed by law’ are (i) that the law must be adequately accessible, i.e. the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case, and (ii) that a norm cannot be regarded as ‘law’ unless formulated with sufficient precision to enable the citizen to regu-

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five books (*Bücher*): General Part (*Allgemeiner Teil*), Law of Obligations (*Schuldrecht*), Property Law (*Sachenrecht*), Family Law (*Familienrecht*) and the Law of Succession (*Erbrecht*)”.

<sup>67</sup> For more on the German legal system and the principle of separation and abstraction see: Dannemann, G.; Schulze, R., (eds.), *German Civil Code, vol. 1, Books 1-3, Article-by-Article Commentary*, Verlag C.H.Beck and Nomos, Baden Baden, Germany, 2020, p. 11.

<sup>68</sup> Such an example, and as noted above, is the model of acquisition of ownership in movables and immovables. The Kosovo law follows the *causal system* of Austrian law and not the *abstract system* of German law.

<sup>69</sup> For the civil codes and legal families influenced by the *pandect system* see: McGuire, *op. cit.* (fn. 66); Kull, *op. cit.* (fn. 50).

<sup>70</sup> Van der Sloot, B., *The Quality of Law*, JIPITEC, vol. 11, 2020, p. 163, available at: <https://www.jipitec.eu/issues/jipitec-11-2-2020/5098/vandersloot.pdf> (10 March 2022).



late his conduct”.<sup>71</sup> Thus, the drafting of new legislation must be careful and its implementation must be predictable. As stated above, not everything can be envisaged by new law. This will be the case with the KDCC as well. But an indisputable role will be played by courts in the interpretation and it remains to be seen whether the norms of the general part will be relevant to the norms set out in the special books of the Code. However, the Kosovo courts have to follow the evolution doctrine developed by the ECtHR cases as noted above, and not look to the law to foresee and describe every single case.<sup>72</sup> The future difficulties in implementation are well understood. But, the KDCC will be a new piece of legislation, and it is crucial that such new legal document, with new principal rules, be accompanied by commentaries. The interpretations and commentaries provided by scholars will help practitioners understand the true meaning of the norm. Decisions of highest courts will also play a crucial role in the unification of justice. This means that unification of practical implementation of the new Civil Code, as it happened in other countries, must be carried out in certain ways after it is adopted.

#### 4. GENERAL PROVISIONS OF THE CIVIL CODE

As stated above, Kosovo’s current legal system does not include a special law in force for the general part of civil law that includes general principles as well. The general principles of civil law are scattered across special laws. However, there is a lack of well-defined principles, such as *circulation of civil rights, sources of law, equality of parties in all civil law relations (some special laws have it, such as family law), etc.* Civil law principles have only been developed through the application of legal doctrines.<sup>73</sup> The legal doctrines, in turn, are extrapolated from special laws and comparisons to other jurisdictions with civil codes in place. As a result, debates are ongoing and questions are raised whether there should be a general part of civil law and what its content should be. The question can also be raised as to whether these fundamental rules should be included in the Civil Code, or whether they should not be generalized. Furthermore, how should

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<sup>71</sup> ECtHR, *Sunday Times v. the United Kingdom*, ECtHR Judgment (26 April 1979) Appl. no. 6538/74.

<sup>72</sup> Constitution of Kosovo, Article 53. According to this provision, the Kosovo courts are obliged to apply the case law of ECtHR in their adjudication. This provision of the Constitution means that different EU standards are applied in Kosovo regardless of whether such rights and obligations are recognized directly in Kosovo legislation or not.

<sup>73</sup> See among others see, Gams, A., *Hyrje në të drejtën civile (Introduction to civil law)*, Pristine, 1981; Galgano, F., *E drejta private (The private law)*, Luarasi, Tirana, 1999.

fundamental rules be formulated to avoid misinterpretation in implementation? The only way to answer these questions is to compare the models of other European countries' civil codes to which Kosovo's legal system is similar and how these principles are transposed into the KDCC.

The first book of the KDCC is the General Part which has 82 articles. The systematization looks similar to the BGB. The first book of the BGB contains concepts and rules that apply to all parts of it, and in most cases to the entire system of private law. As German scholars pointed out "this section contains general and abstract rules and guidelines for other sections".<sup>74</sup> Furthermore, the general part of the BGB establishes the principal rules, which includes Articles 1-240, and which are considered declarative provisions that pertain to the other books, but are also directly applicable.<sup>75</sup> It is clear that the intention of the Kosovo legislator was to have a civil code similar to the German Civil Code, including the general part, with modifications to suit the Kosovo circumstances, as stated above.<sup>76</sup> It includes fewer articles, taking into account that some legal provisions are already contained in the existing special laws. Furthermore, the selection of articles included in the General Part of the KDCC seems to be unique. In addition, it must be underlined that several models of civil code in Europe, such as the civil codes of Germany, Austria, Switzerland, Estonia, and Albania<sup>77</sup>, have been used to select some legal provisions. This approach of taking different code models during the codification was not only adopted in Kosovo's case. As noted in the relevant literature, the same process had taken place in other countries.<sup>78</sup>

The general part of the KDCC is divided into 6 chapters: Chapter 1 – General provisions, wherein despite the titles of the articles, the content includes the principal rules related to the *sources of civil law, interpretation of the law, analogy, creation of civil rights and obligations, equality and autonomy of parties, the exercise of*

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<sup>74</sup> Dannemann, G.; Schulze, *op. cit.* (fn. 67), pp. 9-10.

<sup>75</sup> Smithers, W., *The German Civil Code, Part II*, The University of Pennsylvania Law Review, vol. 51, no. 1, 1903, p. 14.

<sup>76</sup> The Minister of Justice declared in 2017 that Kosovo will have a Civil Code based on the German Civil Code Model. See paper of 20 April 2020, prot. no. 01/1670, sent to European Union Special Representative in Kosovo, since the EU funded a project to Support the Civil Code, which was in Phase 2 at the time.

<sup>77</sup> See discussions in the working Group on the Civil Code, the Concept Papers (Study Paper) published on the website of the EU Project for Support to the Civil Code of Kosovo, available at: <https://civilcode-kosovo.org/documents/?lang=en> (10 April 2022). These similarities will be illustrated for different institutions treated in sections below.

<sup>78</sup> Kull, *op. cit.* (fn. 50), p. 139.

*civil rights in good faith, prohibition of abuse of rights, prohibition of causing damage, circulation (transfer) of civil rights and obligations*; Chapter 2 – Subjects of civil law – natural and legal persons; Chapter 3 – Object of civil law – objects and animals, including personal rights; Chapter 4 – Legal transactions (legal actions); Chapter 5 – Representation; Chapter 6 – Statute of limitations.

## 5. GENERAL PRINCIPLES OF CIVIL LAW

The general part of the KDCC contains some principles known as common rules of civil law.<sup>79</sup> First of all, it is not a simple copy of any civil code of the European countries. Moreover, it is a combination of the legal provisions taken from different civil codes systematized in such a manner that they primarily fit the needs of Kosovo's legal system to fill the legal gaps. In this section, further discussions will focus only on the principal rules, such as *the sources of the law, interpretation of the law and analogy, creation of the civil rights and obligations, equality and autonomy of parties, principle of good faith and prohibition of abuse of rights, prohibition of causing damage, circulation of civil rights and obligations*. In most civil codes, these principles are known as common rules that apply to the entire civil law system. Furthermore, the principles are derived from the legal norms of civil law, i.e. from the civil codes of those countries that have codified civil legislation. However, there are differing opinions and discussions regarding the systematization of these fundamental rules in civil codes, and there are no unique models. This issue has also been debated in terms of the structure of these principles in the KDCC, which has been left to a specific model of systematization.

### 5.1. Sources of civil law

Traditionally, sources of law are divided into material sources - social circumstances that affect the creation of law (norms), and formal sources - the forms in which legal provisions are written.<sup>80</sup> Since this paper deals with formal sources and codification, it is worth noting that the formal sources of law differ in time and space, depending on the legal system of a given country. Kosovo law as a part of the civil law tradition is based on written legal provisions such as: the *constitution, laws, and bylaws*. Additionally, in the case of legal gaps, customs (*uzansa*) are also considered a source of law provided that they are not

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<sup>79</sup> See Art. 1-11 of KDCC.

<sup>80</sup> See Gams, *op. cit.* (fn. 73); Galgano, *op. cit.* (fn. 73), p. 47.

contrary to law.<sup>81</sup> There are also different opinions about *legal doctrine*<sup>82</sup>, and it has all been treated as a *subsidiary* source of law. However, recently there have also been opposing views with regard to doctrine being considered a primary source, as judges acquire knowledge during their education in the faculty of law and professional development courses.<sup>83</sup> Case law (*precedent*) is also considered a *subsidiary* source of law. Consequently, there are discussions about the sources of civil law and varying application depending on the jurisdiction.

The general part of the KDCC, Article 4, para. 1 defines the sources of civil law as follows: “The source of civil law is the constitution, the ratified agreements and international instruments, this code and other laws”. This represents a new regulation in Kosovo’s legal tradition as there was never before a law that addressed civil law sources. The KDCC goes further by defining customs as a source of civil law under certain conditions. Article 4, para. 2 and 3 provide: “In the absence of law, custom is a source of civil law only when there are legal gaps and it is not contrary to law. Custom arises from the long-term use of a type of conduct if persons involved in the trade consider it legally binding”.<sup>84</sup> Above all, the Constitution as the supreme legal act is considered a source of law. The Constitution also includes international instruments and agreements for the protection of human rights, which are presented as direct sources of law, and those have priority over national law.<sup>85</sup> It should be mentioned that, according to the Constitution of Kosovo, the jurisprudence of the ECtHR is considered a source of law, as well.<sup>86</sup> The approach set out in the KDCC is fully in line with the Constitution, i.e. the provisions of the Code have to be interpreted according to the meaning of Constitutional provisions. Any person, having exhausted the legal remedies available in regular courts, can appeal to the Constitutional Court regarding the rights laid down in the Constitution.

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<sup>81</sup> Art. 11 of LOR.

<sup>82</sup> See, among others, Ciongaru, E., *Interpretations of Legal Doctrine - Source of Law. Elements of General Theory of Law and Comparative Law*, International Journal of Research in Humanities and Social Studies, vol. 7, no. 4, 2020, pp. 1-2, available at: <https://www.ijrhss.org/papers/v7-i4/1.pdf> (7 June 2022); Raitio, J., *The source of law – doctrine and reasoning in Finland*, 78th IFLA General Conference and Assembly, 11-17 August 2012, p. 5, available at: <https://www.ifla.org/past-wlic/2012/129-rautio-en.pdf> (7 June 2022).

<sup>83</sup> For more on legal doctrine as a source of law see Radolović, A., *Pravna znanost kao izvor građanskog prava*, Zbornik Pravnog fakulteta Sveučilišta u Rijeci, vol. 41, no. 1, 2020, p. 192.

<sup>84</sup> See Art. 4 of KDCC.

<sup>85</sup> See Art. 22 of the Constitution of the Republic of Kosovo, available at: <https://gzk.rks-gov.net/ActDetail.aspx?ActID=3702> (10 May 2022).

<sup>86</sup> Art. 53 of the Constitution of Kosovo.

The same approach can be found in other jurisdictions that give priority to international conventions and the ECtHR jurisprudence.<sup>87</sup> In other words, the ECtHR with its decisions has influenced and oriented the work of the courts of states signatories to the Convention in interpreting and applying national laws in line with the Convention and decisions of the ECtHR.<sup>88</sup> Kosovo courts also are obliged to refer to the case law of the European Court of Human Rights (ECtHR)<sup>89</sup> and not just rely on the case law of local courts.

In Article 4, para. 3 of the KDCC it is clarified that trade customs will be a source of law only in case of a legal gap and in accordance with the law. The questions that immediately arise are whether any civil code of European countries has such a common rule on sources of law, and whether Kosovo should have such a rule defining sources of law. Comparatively, there are significant differences in such regulation among European countries that have civil codes in place. This accepted approach in the KDCC derives from the model of the civil code of Estonia.<sup>90</sup> Although the Estonian Civil Code is heavily influenced by German law<sup>91</sup>, the BGB does not have a specific provision referring to the sources of civil law. In a comparative perspective, there are civil codes that include sources of law but with different systematizations within the “margin” of interpretation of the law. This is the case with the Swiss Civil Code.<sup>92</sup> Alternatively, they might include a separate article on the sources of law, as is the case with the Estonian Civil Code.<sup>93</sup> In addition, according to the KDCC the rules defined by the special law on private international law will apply, referring to

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<sup>87</sup> See Borghetti, J. S., *French Law*, in: Rivera, J. C. (ed.), *The Scope and Structure of Civil Codes*, Springer, Heidelberg – New York – London, 2013, pp. 187-189; Gerards, J.; Joseph, F., *Introduction*, in: Gerards, J.; Fleurend, J. (eds.), *Implementation of the European Convention on Human Rights and of the judgments of the ECtHR in national case-law. A comparative analysis*, Intersentia, Cambridge – Antwerp – Portland, 2014, p. 1.

<sup>88</sup> *Ibid.*, pp. 6-7.

<sup>89</sup> See Art. 22 and 53 of the Constitution of the Republic of Kosovo.

<sup>90</sup> See, *inter alia*, the Estonian General Part of the Civil Code Act, Art. 2, § 2. Sources of civil law: “(1) The sources of civil law are law and custom. (2) Custom arises from long-term usage of a type of conduct if the persons involved in commerce consider it legally binding. A custom shall not change the law”. See also Art. 3 of Spanish Civil Code.

<sup>91</sup> Kull, *op. cit.* (fn. 50), pp. 133-135.

<sup>92</sup> See Art. 1 of SCC, Application of the law: “The law applies according to its wording or interpretation to all legal questions for which it contains a provision. In the absence of a provision, the court shall decide in accordance with customary law and, in the absence of customary law, in accordance with the rule that it would make as legislator. In doing so, the court shall follow established doctrine and case law”.

<sup>93</sup> See Art. 2 of EGPCCA.

the source concerning international elements.<sup>94</sup>

Considering many debates about the lack of provisions on sources of law, we can say that such a legal provision was necessary in order to create serenity in implementation. However, it should be added that this approach is not the same as that of French law, which gives judges freedom to resolve cases, even risking prosecution for denial of justice if they do not.<sup>95</sup> Also, this is not the case with the Swiss system, which orients judges towards case law and legal doctrine.<sup>96</sup> According to the KDCC, such an approach has been used to narrow the scope of the judge's work only to written norms. This is understandable given that the legal system in a new state is not yet stable, and there is concern that great freedom to resolve cases based on case law and legal doctrine may have adverse consequences in terms of incorrect application of the law.

In addition, *precedents* (court cases) are not foreseen as sources of law under the KDCC. Thus, courts cannot refer to higher court decisions to resolve cases. However, even in legal systems where this approach is formally regulated by the law, judges primarily have to rely only on the written norm to resolve a case.<sup>97</sup> Nonetheless, it should not be ruled out that high courts have a role in unifying justice and their decisions are followed by the lower courts. Although *precedents* are not formally binding, they do have a guiding influence on adjudication at the lower instances.<sup>98</sup> In this regard it is worth mentioning that the Supreme Court of Kosovo constantly issues the so-called *Mendimet Juridike* (Legal Opinions), which have an impact on the unification of case law, ensuring the rule of law.<sup>99</sup> Thus, the courts regularly take care to harmonize their legal practice and ensure equal treatment of all persons before the law and for the same claims. This is a constitutional right referred to as equal treatment determined by the

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<sup>94</sup> Art. 4, para. 4 of KDCC: "Foreign law may be applied in civil-law relations with a foreign element. The means of application, limitations and procedures are regulated by a special law".

<sup>95</sup> Art. 4 of FCC.

<sup>96</sup> Art. 1 of SCC.

<sup>97</sup> See Kull, *op. cit.* (fn. 50), p. 140.

<sup>98</sup> See among other jurisdictions that *precedent* is not formally a source of the law: Raitio, J., *op. cit.* (fn. 82), p. 5.

<sup>99</sup> See among others the Supreme Court of Kosovo, *Mendimet Juridike* (Legal Opinions), GJA – SU – A.no. 63/2016, date 01.02.2016, GJA – SU – A.no. 64/2016, date 01.02.2016, GJA – SU – A.no. 65/2016, date 01.02.2016, GJA – SU – A.no. 66/2016, date 01.02.2016, GJA – SU – A.no. 578/2016, date 11.10.2016. Through these legal opinions, the Supreme Court of Kosovo instructed other lower courts how to interpret the law, including the Law on Obligational Relationships, Law on Property and other Real Rights, Law on Civil Procedure etc.

Constitution, Articles 24 and 31.<sup>100</sup> Consequently, precedents are not formally recognised as a source of the law; however, the role of court cases cannot be ignored when it comes to the unification of implementation.

## 5.2. Interpretation of law and analogy

To answer the question of legal loopholes and how to interpret the law, rules are set out in Articles 5 and 6 of KDCC that must be interpreted in conjunction. Even in terms of interpreting the law, there was a legal gap in Kosovo's legislation because there was no guiding rule on how civil law was to be interpreted in its implementation. Under the legal doctrine developed in Kosovo, there were always explanations on how to interpret the law referring to the content of a provision, wording, the linguistic aspects, systematic interpretation, history of law, the so-called preparatory work, etc.<sup>101</sup>, but without a reference to guiding rules. These means of interpretation are well known in legal literature.<sup>102</sup> No law or civil code contains norms for each individual current or future specific case, but it should present a system that is able to resolve such cases.<sup>103</sup> Such gap in civil law must be filled by applying rules of analogy and rules of reasonableness and fairness, which are also applicable in other jurisdictions.<sup>104</sup>

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<sup>100</sup> Article 24 of the Constitution of the Republic of Kosovo, states: "1. All are equal before the law. Everyone enjoys the right to equal legal protection without discrimination. 2. No one shall be discriminated against on grounds of race, color, gender, language, religion, political or other opinion, national or social origin, relation to any community, property, economic and social condition, sexual orientation, birth, disability or other personal status. 3. Principles of equal legal protection shall not prevent the imposition of measures necessary to protect and advance the rights of individuals and groups who are in unequal positions. Such measures shall be applied only until the purposes for which they are imposed have been fulfilled". See also Article 31 [Right to Fair and Impartial Trial].

<sup>101</sup> See Gams, *op. cit.* (fn.73); Galgano, *op. cit.* (fn.73), pp. 75-77.

<sup>102</sup> Regarding different approaches on analogy and interpretation of law see: Kaptein, H.; Van der Velden, B. (eds.), *Analogy and Exemplary Reasoning in Legal Discourse*, Amsterdam University Press, Amsterdam, 2018.

<sup>103</sup> Van der Velden, B., *Analogy in the strict liability rules in the Dutch Civil Code*, in: Kaptein, H.; Van der Velden, B. (eds.), *Analogy and Exemplary Reasoning in Legal Discourse*, Amsterdam University Press, Amsterdam, 2018, p. 166.

<sup>104</sup> *Ibid.* See also Dutch Civil Code, Book 3, Article 3:12, "The principle of 'reasonableness and fairness': At determining what the principle of 'reasonableness and fairness' demands in a specific situation, one has to take into account the general accepted legal principles, the fundamental conceptions of law in the Netherlands and the relevant social and personal interests which are involved in the given situation", available at: <http://www.dutchcivillaw.com/legislation/dcctitle3301.htm> (17 May 2022).

This seems to have been the norm drafters considered when it comes to finding an orienting norm for interpreting civil law.

The issue of law interpretation has been addressed by the principal rule set in Article 5, para. 1, which stipulates: “A provision of this Code shall be interpreted in conjunction with the other provisions of the Code following the wording, spirit, and purpose of this Code”.<sup>105</sup> According to this provision, interpretation based on the textual formulation of a norm is taken into account (the content as written). Also, interpretation in conjunction with other provisions, which means systematic interpretation and connection of legal provisions with each other. This is known as the “textual interpretation” or “objective” interpretation theory. In addition, the second part of the sentence discusses “subjective” theory, which seeks to discover the spirit of the norm and the purpose for which it was created by the legislator.<sup>106</sup> In addition, Article 6, para. 1 stipulates: “In the absence of a provision governing a legal relationship, the provisions of a law governing similar relationships shall apply in this case as well, unless the regulation of the legal relationship is contrary to the general principles or purpose of the law”. This provision includes so-called *legal analogy* that consists of filling the legal gaps by using other provisions to cover a similar case. This gives judges the freedom to resolve cases by making *extended interpretations*<sup>107</sup> of the law using similar legal provisions but without going beyond the purpose of the law<sup>108</sup>, related to Article 5, and the general principles of law. This implies careful testing of the content of the norms and relevance to the case without creating new rules for the case that will go beyond the principles laid down by the law (the purpose of the law).

Paragraph 2 of Article 6 of the KDCC regulates extended legal analogy based on the overall legal jurisdiction of Kosovo. According to this provision, which stipulates: “In the absence of such a provision, the legal relationship is regulated following the general spirit of law and justice”, the law implementer must find a solution within the legal system. In comparison to some other jurisdictions, i.e., the French Civil Code, as stated above, these jurisdictions expressly provide that a judge must resolve the case within civil law, stipulating

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<sup>105</sup> See Art. 5 of KDCC.

<sup>106</sup> For the means and methods of law interpretation see: Greenberg, M., *Legal Interpretation*, *The Stanford Encyclopedia of Philosophy*, Fall edition, 2021, available at: <https://plato.stanford.edu/archives/fall2021/entries/legal-interpretation/> (8 June 2022); Galgano, *op. cit.* (fn. 73), pp. 75-77.

<sup>107</sup> Canale, D.; Tuzet, G., *Analogical reasoning and extensive interpretation*, in: Kaptein, H.; Van der Velden, B. (eds.), *Analogy and Exemplary Reasoning in Legal Discourse*, Amsterdam University Press, Amsterdam, 2018, pp. 65-86.

<sup>108</sup> Galgano, *op. cit.* (fn. 73), p. 77.



that they cannot refuse the case by invoking the absence of legal provisions.<sup>109</sup> This legal solution creates the obligation of the judge to resolve the case, despite the lack of concrete legal provisions for that case. This also increases the judge's role in creating legal rules during the interpretation. Thus, it is a "dualistic approach" to the creation of legal rules; so, in addition to the written legal norm, judges also have an active role in creating legal norms for resolving cases before the court. It should also be noted that this legal solution is provided under the Swiss Civil Code. Article 1 of SCC envisages the freedom of the judge to interpret the law, which allows both the role of implementation and creation of the legal norm during interpretation. However, the KDCC does not provide for such extended freedom for judges in establishing legal provisions as expressed in the FCC and the SCC. Furthermore, some instructions are given through a wide "margin" of interpretation under Article 5 and through analogy, envisaged in Article 6. Therefore, analogy plays a special role in the interpretation of the law and in filling the legal gaps in the field of civil law. Comparing to other jurisdictions, it can be concluded that this legal solution is taken from the Estonian Civil Code.<sup>110</sup> This constitutes an attempt to find middle ground for interpreting what is a *formal system* through the written norm and covering legal loopholes for cases that are not expressly regulated by the norm, but still require resolution. The legal concept under the KDCC approximates the German model of formality, which does not create much room for judges to rely on their cases as a source of law. However, the judges constantly interpret the law on the basis of fairness and good faith, and normally consult their case law to unify the law implementation.

### 5.3. Creation of civil rights and obligations

The first book of the KDCC contains a lengthy article that serves as a regulatory and general rule that lays down the ways civil law relationships are established.<sup>111</sup> In particular, Article 7 provides that civil rights and obligations can be created through legal relationships (contracts, wills) provided by law. Those other actions may be defined by the Code itself or by special laws. In

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<sup>109</sup> See Art. 4 of FCC: "A judge who refuses to give judgment on the pretext of legislation being silent, obscure or insufficient, may be prosecuted for being guilty of a denial of justice", <https://www.fd.ulisboa.pt/wp-content/uploads/2014/12/Codigo-Civil-Frances-French-Civil-Code-english-version.pdf> (17 May 2022).

<sup>110</sup> See Art. 4 of EGPCCA.

<sup>111</sup> See Art. 7 of KDCC: "Civil rights and obligations are created by legal affairs, events provided by law, other actions that create rights and obligations defined by law, as well as non-contractual actions".

addition, civil rights and obligations can also be created from non-contractual actions that can be referred to as unjustified enrichment and damages. It needs to be noted that obligations in the sense of the KDCC mean obligations derived from contractual and non-contractual relations; not only obligations created by unlawful actions that cause damages to others (*delicti*). The provision of Article 7 is a kind of declarative rule that describes the means of creation of civil rights and obligations. Under specific conditions such rights and obligations can be created based on rules set out in other books of the KDCC.

Compared to other jurisdictions in Europe, some civil codes include the core principles such as the Estonian Civil Code.<sup>112</sup> Also, the Swiss Civil Code contains a reference provision in the LOR that also applies to the establishment, exercise and termination of contracts, which analogously applies to other civil law relations.<sup>113</sup> A primary rule that shows how to create civil rights and obligations is a proper selection viewed through the prism of general rules. This helps the implementer to find the source of creation of rights and obligations, based on this provision with a cross reference to other books of the Code, or even specific laws. There have always been discussions and questions about how civil rights and obligations can be created. Certainly, special laws have such bases of creation, but it is sometimes difficult to identify in a simple way such means of creating civil law relations. Thus, it seems that was a concern of the drafters that *prima facie* the parties and the law implementers will see the basic rule that will direct them to the means of creation of civil law relationships.

#### 5.4. Equality and autonomy of parties

The main division of law in the European continental system is into private and public law.<sup>114</sup> Public law regulates relationships between the state and citizens, while private law regulates relationships between private persons.<sup>115</sup> This division is also recognized in other jurisdictions around the world.<sup>116</sup> Such a di-

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<sup>112</sup> See Art. 5 of EGPCCA: “Civil rights and obligations arise from transactions, events provided by law, other acts which create civil rights and obligations as prescribed by law, and from unlawful acts”. English version available at: <https://www.riigiteataja.ee/en/eli/ee/530102013019/consolide> (14 May 2022).

<sup>113</sup> See Art. 7 of SCC.

<sup>114</sup> Alpa, G.; Zeno-Zencovich, V., *Italian Private Law*, Routledge-Cavendish, New York, 2007, p. 1-4.

<sup>115</sup> Galgano, *op. cit.* (fn. 73), pp. 115-117.

<sup>116</sup> See Rosiers, N., in: Law Commission of Canada (eds.), *New perspectives on public-private divide*, UBC Press, Vancouver – Toronto, 2003, pp. vii-x; Ernest, J.; Weinrib, E. J., *The idea of private law*, Oxford University Press, Oxford, 2012, pp. 1-22.

vision is derived from Roman law. The principle of equality of the parties expresses the core principle of civil law, which also distinguishes it from public law such as administrative, criminal, financial law, etc. According to legal doctrine, these principles are also classified as characteristics or specifics of civil law that distinguish it from other legal relations such as those of public, administrative, and criminal nature.<sup>117</sup>

There are four main known principles or characteristics such as the circulation (transfer) of subjective civil rights, equality of the parties, free will (autonomy) of the parties, and property sanctions (civil law sanctions).<sup>118</sup> These general rules are also part of the civil jurisdiction in Kosovo, the same as in other countries in the region.<sup>119</sup> The question is whether it is necessary to include such principles in the general section of the Code, or whether they should be kept in separate books. It is also essential to evaluate how these principles are transposed in the KDCC. *The principle of equality* is integrated into Article 7, paragraph 2 of the general part, which provides: "Every person shall enjoy equal opportunities to civil rights and obligations, within limits set by law".<sup>120</sup> Consequently, it also remains integrated into other books specifically for particular relationships. The principle of equality ensures that all parties involved in the civil law relationships (obligations, property, family, inheritance) enjoy the same rights and duties, except for some limitations set reasonably by the law in accordance with public order. The principle of equality is also expressed in Article 12, para. 2 related to legal capacity of natural persons to enter into civil law relations. Furthermore, this can be linked to Article 54, which regulates free will in entering into legal transactions for natural and legal persons. Thus, all these rules must be interpreted in terms of connectivity. When the issue is raised as to the equality of treatment of all citizens before the law, the provisions of the KDCC and all civil rights which are recognised by it, must be interpreted in line with Article 24 of the Constitution, which prohibits discrimination based on various grounds.<sup>121</sup> Therefore, despite the fact that a special

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<sup>117</sup> Palásti, G. P., *Lecture notes on the introduction to private law*, RGSL Research Papers, no. 5, 2011, pp. 5-12; Rosiers, *op. cit.* (fn.103), pp. vii-x.

<sup>118</sup> Gams, *op. cit.* (fn. 73), p. 46; Aliu, A., *Hyrje në të drejtën civile* (Introduction to civil law), Prishtine, 2013, pp. 30-34.

<sup>119</sup> For Croatian law see Gavella, N., *Gradansko pravo i posebna pravna uređenja za određene vrste dobara*, Zbornik Pravnog fakulteta u Zagrebu, vol. 62, no. 5-6, 2012, p. 448.

<sup>120</sup> See Art. 12 of KDCC.

<sup>121</sup> See Art. 24 of the Constitution of the Republic of Kosovo, which states: "1. All are equal before the law. Everyone enjoys the right to equal legal protection without discrimination. 2. No one shall be discriminated against on grounds of race, color, gender, language, religion, political or other opinion, national or social origin, rela-

article on non-discrimination is not envisaged in the general part of the KDCC, prohibition of discrimination is guaranteed under the Constitution and also integrated in other books, such as Article 833 of Book 3 on Ownership and other Real Rights, Article 1128 of Book 4 on Family, Article 1481 of Book 5 on Inheritance.<sup>122</sup>

Another principle that finds expression in civil law relations is the autonomy of the parties' will (private autonomy) within conditions set by law (i.e., contractual relations and property law relations). The parties enjoy the autonomy (free will) to enter into contractual relationships, which is the principle of freedom of contract.<sup>123</sup> This is not specifically provided in the general part as a separate article. However, this principle can be related to the principle of equality, and in connection to other books, as in the case of concluding a contract, making a will, etc.<sup>124</sup>

### 5.5. Exercising rights and obligations in good faith

The law recognizes rights and obligations. Such rights must be exercised within the conditions provided by law. The question that always arises is: what is the limit of exercising rights? In other words, are there any limitations on

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tion to any community, property, economic and social condition, sexual orientation, birth, disability or other personal status. 3. Principles of equal legal protection shall not prevent the imposition of measures necessary to protect and advance the rights of individuals and groups who are in unequal positions. Such measures shall be applied only until the purposes for which they are imposed have been fulfilled”.

<sup>122</sup> See Art. 833, para 1, “Any physical and legal person can acquire real rights, unless otherwise provided by law”; Art. 1128, “All persons enjoy equal treatment of rights and obligations set forth in this Book. There shall be no direct or indirect discrimination against any person or persons based on sex, age, marital status, language, incapacity to judge, sexual orientation, political affiliation or convictions, ethnic origin, nationality, religion or belief, race, social origin, property, birth or any other status”; Art. 1481, para. 1, “All physical persons under the same conditions are equal in inheritance”.

<sup>123</sup> Kullerkupp, K., *Private autonomy in property law: Can the parties ‘design’ their transfer?* in: Faber, W.; Lurger, B. (eds.), *Rules for the transfer of movables: A candidate for European harmonization or national reforms?*, vol. 6, Sellier. European Law Publishers GmbH, Munich, 2008, p. 48.

<sup>124</sup> See KDCC, Book 2 – Obligations, Art. 84 (1), “Parties are free to regulate their contractual relations according to their will, subject to the limits established by mandatory provisions, public order and good custom”; book 5, inheritance, Art. 1535, para. 1, “A will implies the expression of final willpower foreseen by law, by which the decedent orders the distribution of his property after his death”.

the exercise of rights? Normally, although the law recognizes civil rights, e.g. property, contractual, family, and inheritance rights, they must be exercised in good faith (*bona fide*). Good faith is a basic concept in civil law.<sup>125</sup> Accordingly, Article 8 of the KDCC includes the rule on exercising rights and performing obligations (duties) in good faith. This principle is one of the basic principles of all civil law relations, where each party must take care of the standard of due diligence and be careful not to cause harm to others. Not only that, but good faith is usually looked at as a general rule in all civil law relations, requiring parties to act in good faith when dealing with each other<sup>126</sup> in relation to the exercise of their rights. It is further supplemented with other principal rules such as the duty to cooperate.<sup>127</sup> Good faith is also invoked in situations where persons are protected from unfavorable consequences of a legal situation, and in particular a title defect.<sup>128</sup> It finds expression in all obligations.<sup>129</sup> In addition, the parties have to prove that they acted in good faith (*bona fide*) in order to acquire certain civil rights, which in this sense also includes acquisition of ownership.<sup>130</sup> Good faith of an acquirer means that he/she does not, and is not supposed to, know that the transferor (non-owner) is not capable of transferring ownership to the acquirer<sup>131</sup>, that he/she does not know that the thing belongs to others and not to the current transferor. Furthermore, Article 8 of KDCC also specifies the prohibition of abuse of rights. No parties can use their civil rights that can harm others.

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<sup>125</sup> Mackaay, E., *Good faith in civil law systems. A legal economic analysis*, Revista Chilena de Derecho Privado, no. 18, 2012, p. 149, available at: <https://www.scielo.cl/pdf/rchdp/n18/art04.pdf> (8 June 2022).

<sup>126</sup> Palásti, *op. cit.* (fn. 117), p. 13.

<sup>127</sup> *Ibid.*

<sup>128</sup> Mackaay, *op. cit.* (fn. 125), pp. 150-151.

<sup>129</sup> See Art. 85, of KDCC, “1. Parties should act in good faith while fulfilling their obligations. 2. Good faith refers to a standard of conduct characterized by honesty, openness and consideration for the interests of the other party to an obligation”.

<sup>130</sup> For more information regarding acquisition of ownership in *good faith* see: Gomes, J. C., *Good faith acquisition – Why at all?* in: Faber, W.; Lurger, B. (eds.), *Rules for the transfer of movables: A candidate for European harmonization or national reforms?*, vol. 6, Sellier. European Law Publishers GmbH, Munich, 2008, p. 155; Clarke, A.; Kohler, P., *Property law, commentary and materials*, Cambridge University Press, Cambridge, 2005, pp. 413-414. See also Art. 28 of the LOORR, paragraph 2 states: “2. Prescription is excluded if the person, on acquiring the proprietary possession, *was not in good faith* or if he discovers during the ten-year period that he is not entitled to the ownership of the movable property”.

<sup>131</sup> See Rudolf, C.; Rijavec, V.; Keresteš, T., *National Report on the Transfer of Movables in Slovenia*, in: Faber, W.; Lurger, B. (eds.), *National Reports on the Transfer of Movables in Europe*, vol. 1, Sellier. European Law Publishers GmbH, Munich, 2008, pp. 605-606.

Considering the content of Article 8, the question can be raised as to whether this principal rule is required to be included in the general part. As for other jurisdictions, these provisions can be found in the Swiss Civil Code<sup>132</sup> and it can be concluded that it was the intention to adopt these provisions in the KDCC. It has to be underlined that such a rule exists in the applicable law, such as the LOR<sup>133</sup>, and the LOORR.<sup>134</sup> Moreover, the choice of this principle appears to have been made with the idea to serve as a means of exercising all civil rights, not only obligation and property law relationships. When such legal provisions are lacking, the provisions of the LOR are frequently interpreted and extended to apply to other civil law relationships as well.<sup>135</sup> Such an approach of extending the provisions of the LOR to other civil relations exists in other jurisdictions, such as Switzerland.<sup>136</sup> This principle is binding and must be interpreted based on another principal rule set out in Article 9 titled “Presumption of *Good Faith*”.<sup>137</sup> In all civil law relations, such as obligations, property, family, and inheritance, the parties must behave and exercise their rights in *good faith*. Abuse of a right in order to cause harm to others is prohibited. The norm’s drafters intended, it seems, that the principal norm stand out, implying that, despite the law granting rights, these rights must be exercised in good faith. For example, even though there is a right of ownership to use a thing, no one can use it so that it causes harm to another. Or, if the right is not exercised (care for the maintenance of the thing), the other party may suffer harm. This rule is further elaborated in Articles 87 and 88 of Book 2 on obligations that prevents that abuse of rights.<sup>138</sup> In court cases, the claims for certain civil rights

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<sup>132</sup> See Art. 2 and 3 of SCC.

<sup>133</sup> See Art. 4 and 5 of LO.

<sup>134</sup> See Art. 4 of the LOORR.

<sup>135</sup> See Art. 13 and 14 of LOR.

<sup>136</sup> See Art 7 of SCC: “The general provisions of the Code of Obligations, concerning the formation, performance and termination of contracts also apply to other civil law matters”.

<sup>137</sup> Art. 9, para. 1 and 2 of KDCC: “1. When the law associates any legal effect with a person’s good faith, the good faith is presumed. 2. No person may invoke the presumption of good faith if he has failed to exercise the required due diligence under certain circumstances”.

<sup>138</sup> Article 87 provides as follows: “1. It is forbidden to exercise rights from the relationship of obligations contrary to the purpose for which they are established or recognized by law. 2. Any behaviour through which the rights holder acts openly for the sole purpose of inflicting harm to another is considered to be an abuse of rights”. Article 88, para. 1 provides as follows: “Parties to an obligation must act with the diligence required by the nature of their obligations and which can reasonably be expected in the circumstance”.

are not accepted if it is known that the right does not belong to them or has been exercised in *bad faith*.<sup>139</sup> On the other hand, in cases of *good faith*, the rights can be acquired, including property rights.<sup>140</sup> The same applies in contractual relationships, which implies the performance of parties in good faith and also serves for the interpretation of contracts.<sup>141</sup> This principal rule makes sense to be placed in the general part as a general principle. However, it will inevitably be interpreted by other rules governing rights separately and test how these rights are exercised, based on conditions provided by law.

### 5.6. Prohibition of causing damage

The principle of prohibition of causing damage is regulated by Article 10 of the KDCC. This principle stipulates as follows: “Everyone should take care not to cause harm to other persons”. This rule is mainly an expression of obligations arising from contractual and non-contractual relationships. Any infliction of material and non-material damage (personal) to another creates the obligation to compensate for the damage.<sup>142</sup> Furthermore, everyone also has to take care not to cause harm to others’ personal rights, including personality rights. This principle, set in the general part, means that parties themselves should above all be careful how they behave in daily life, in any kind of legal relations, not only in obligations but also in other civil law relationships, and not cause detriment to others. Otherwise, the responsible person is obliged to give compensation for the caused material and non-material damages. This rule already exists in the current law governing obligational relations and applies *mutatis mutandis* to other civil law relationships. Apparently, it has been carried over from the LOR and set out in the general part of the KDCC to serve as a principle for all civil law relationships. This also contributes to filling any gaps

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<sup>139</sup> See Court of Appeal of Kosovo, Judgement, AC. no.4545/2015, dated 20 June 2019. In this case both the plaintiff and the defendant claim that they have rights over the foreign thing that is registered in the name of someone else. The Basic Court dismissed the claim as unfounded because the plaintiff has no evidence proving that he is registered as an owner but that he has claimed ownership in the foreign thing. The Court of Appeals also rejected the appeal. Also, the respondent did not have the right of ownership but possessed the foreign thing.

<sup>140</sup> See Basic Court of Pristina, Judgement, no. C. no.1430/18, date 4 February 2020.

<sup>141</sup> Art. 245 of LOR; Art. 157 and 242 of BGB.

<sup>142</sup> For more on contractual and non-contractual damage see Von Bar, Ch; Drobnig, U., *The interaction of contract law and tort and property law in Europe*, Sellier. European Law Publishers, Munich, 2004, p. 42-44. See also Art. 9 of LOR of Kosovo: “Every person has a duty to refrain from action that may cause harm to another”.

in compensation for the rights of the parties who have been harmed, whether materially or non-materially.

### 5.7. Transfer (circulation) of civil rights

Transfer of civil rights is one of many principles of civil law. This means that non-personal rights can be transferred to others through legal transactions (contracts, wills, public promises). Examples include transfer of property rights (transfer of ownership), obligations (transfer of claims from a contractual relationship). *Transfer of civil rights* as a principal rule is foreseen under Article 11 of the general part.<sup>143</sup> Therefore, this principle only refers to transfer of civil rights that are not inseparably linked to the person.<sup>144</sup> Establishment of such principal rule demonstrates the peculiarity of the fact that some civil rights, such as property rights, claims from obligations are transferable. Furthermore, it also serves to distinguish civil rights from rules of other branches of law, such as administrative and criminal law. It may be worth exploring whether it is necessary to establish such a rule in the general part, and whether there are jurisdictions that have these provisions. Since this concerns the process of codification, it can be justified that this rule is important to serve as a basic rule for the substantive expression of civil law relations. This provision has obviously been influenced by one of the newer civil codes in Europe, i.e., that of Estonia.<sup>145</sup> However, it must be emphasised that this principle is well known in the law and legal literature in Kosovo<sup>146</sup> and other European countries.<sup>147</sup> Such a provision

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<sup>143</sup> See Art. 11 of the KDCC: “Civil rights and obligations can be transferred from one person to another if the rights and obligations are not inseparably related to the person according to law”.

<sup>144</sup> See Art. 11 of the KDCC.

<sup>145</sup> Art. 6, par.1 of EGPPCA: “(1) Civil rights and obligations may transfer from one person to another (legal succession) if the rights and obligations are not inseparably bound to the person pursuant to law...”.

<sup>146</sup> Aliu, *op. cit.* (fn. 118); Gams, *op. cit.* (fn. 73).

<sup>147</sup> Principles of European Contract Law (2002), Art. 12:201: “A party to a contract may agree with a third person that that person is to be substituted as the contracting party. A party to a contract may agree with a third person that that person is to be substituted as the contracting party. In such a case the substitution takes effect only where, as a result of the other party’s assent, the first party is discharged”, available at: [https://www.trans-lex.org/400200/\\_pecl/](https://www.trans-lex.org/400200/_pecl/) (10 June 2022); Draft Common Frame of Reference (2009) Book III, Art. 5:302: “A party to a contractual relationship may agree with a third person, with the consent of the other party to the contractual relationship, that that person is to be substituted as a party to the relationship”, p. 268, available at: <https://sakig.pl/wp-content/uploads/2019/01/dfcr>.



set forth in the general part has a declarative nature. It shows primarily that civil rights and obligations can be transferred to other persons (through a contract, public promises, or a will), except when those are personal and inseparable from the person, e.g., *alimony, parental rights, marriage rights, personality rights, personal authorisations*, etc. The civil rights that are inseparable from the person cannot be part of circulation to other parties. Furthermore, Article 11 must be interpreted in connection with the rules set out in Book 2 – Obligations; Book 3 – Ownership and other Real Rights; some legal provisions of Book 4 – Family, which regulates the marital property regime; and Book 5 – Inheritance.

## 6. CONCLUSIONS

The KDCC is considered one of the most significant achievements in the field of legislation in that it has harmonized legislation which is scattered across several legislative and delegated acts. The KDCC does not only harmonize existing laws but also includes a new section called the General Part of the Civil Code, which contains general provisions and principles pertaining to the entire Code. Although applicable laws are oriented towards the Austrian and German legal family, it has kept the existing laws in force, harmonized them, and for the first time included a general part. The structure of the code is similar to that of the German Civil Code, which follows the *pandect system* of systematization of legal provisions. However, there are internal changes in terms of systematization and some conceptual issues.

The KDCC has 1630 articles systematized in 5 books: (i) General Part; (ii) Obligations; (iii) Ownership and other Real Rights; (iv) Family; and (v) Inheritance. Furthermore, Book 5 on Inheritance includes the transitional and final provisions, which are common rules for all the books compared to current applicable laws. Book 1 – General Part of the KDCC contains 82 articles that establish the general rules and principles of civil law. It appears that, in terms

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pdf (10 June 2022). For the transfer of the property rights see Faber, W.; Lurger, B. (eds.), *National Reports on the Transfer of Movables in Europe*, vol. 1, Sellier. European Law Publishers GmbH, Munich, 2008. For the property rights in Croatia see Josipović, T., *Croatian Property Law After EU Accession – Adjustment of property law to EU market freedoms*, *Annales de la Faculté de Droit d'Istanbul*, vol. XLVI, no. 63, 2014, pp. 31-50, available at <https://dergipark.org.tr/tr/download/article-file/7084> (10 June 2022). For property rights in Slovenia see Rudolf, C.; Rijavec, V.; Keresteš, T., *op. cit.* (fn. 131), pp. 605-60; for transfer of property, claims and contract in Hungary see Kisfaludi, A., *Transfer of Property, Claims, Rights and Contracts in the New Hungarian Civil Code*, *ELTE Law Journal*, available at: [https://eltelawjournal.hu/wp-content/uploads/2015/12/8\\_Andras\\_Kisfaludi.pdf](https://eltelawjournal.hu/wp-content/uploads/2015/12/8_Andras_Kisfaludi.pdf) (8 June 2022).

of structure, they resemble the German Civil Code; however, there is a more abbreviated structure and system, keeping only those principles that were previously lacking, while preserving the other rules in the special books of the Code. Additionally, the systematization and selection of these provisions are also based on the models of other civil codes of European countries (i.e., BGB, ABGB, SCC, ECC). Book 1 – General Part also sets out the general principles and rules for other books of the Civil Code and special civil laws in force. The selection of the principal rules is a unique model of certain core principles deemed necessary for the general part, such as *the sources of the law, interpretation of the law and analogy, creation of the civil rights and obligations, equality and autonomy of parties, principle of good faith and prohibition of abuse of rights, prohibition of causing damage, circulation of civil rights and obligations.*

It can be concluded that the first section of the KDCC has a unique structure of systematizing the main rules, which were chosen using a comparative method and tested against their absence in current legislation. Furthermore, these rules have been chosen in a way that can serve for the entire civil code. Whether or not this is the best solution will be shown during implementation. However, the enforcement phase of the Code must be supplemented with commentaries, training, and capacity building for courts in order to establish a fair and uniform administration of justice, which is also a goal of the Code. Finally, it must be pointed out that the KDCC is drafted having in mind the jurisprudence of the European Court of Human Rights. This also is an obligation which stems from Article 53 of the Constitution, and which stipulates that adjudication has to be in line with the jurisprudence of the European Court of Human Rights.

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## Sažetak

Haxhi Gashi\*

**KODIFIKACIJA GRAĐANSKOG PRAVA NA KOSOVU:  
ANALIZA GLAVNIH NAČELA KNJIGE PRVE U OPĆEM  
DIJELU PREMA NACRTU GRAĐANSKOG ZAKONIKA  
KOSOVA**

*Kosovo je u fazi kodifikacije građanskog prava. Građanskopravni odnosi uređuju se posebnim zakonima. Nakon završetka rata 1999. godine jurisdikcija Kosova postala je složena zbog istodobne primjene različitih zakona: uređaba UNMIK-a, prethodnih zakona i zakona koje je Skupština Kosova usvojila nakon 2001. godine do sada. Slijedom toga, te su okolnosti utjecale i uzrokovale različita tumačenja i primjene zakona u istim slučajevima, što među ostalim upućuje na potrebu kodifikacije. Nedostatak jasne i jedinstvene provedbe zakona u sudskim predmetima koji se odnose na građanskopravnu materiju također se smatra pitanjem koje se može riješiti usklađivanjem građanskog prava kroz Građanski zakonik. Drugim riječima, izrada Nacrta Građanskog zakonika očistit će pravni sustav od različitih zakona koji su na snazi. Uskladit će i približiti kosovsko zakonodavstvo međunarodnim standardima i najboljim praksama u ovom području prava, što će dovesti do bolje provedbe zakona. U radu će se raspravljati o pitanjima vezanim uz pristup i model kodifikacije građanskog prava. Daljnja rasprava bit će sužena na glavna opća načela navedena u Općem dijelu Građanskog zakonika koji je Vlada odobrila 29. prosinca 2021., a koji se prvi put regulira na Kosovu. Analize u ovom radu temelje se na pregledu literature, kosovskog zakonodavstva i referenci na zakonodavstvo europskih zemalja koje se koriste kao model za neke dijelove Građanskog zakonika. Naposljetku, ističu se neki zaključci vezani uz pitanja postavljena u vezi Građanskog zakonika i općih načela sadržanih u njemu.*

*Ključne riječi: Građanski zakonik; obveze; vlasništvo; obitelj; nasljedstvo*

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