CODIFICATION OF CIVIL LAW IN BOSNIA AND HERZEGOVINA

MELIHA POVLAKIĆ

ABSTRACT

This chapter offers a comprehensive analysis of the historical development and current state of civil law codification in Bosnia and Herzegovina. It underscores the profound influence of Austrian law, particularly the Austrian Civil Code, on Bosnia and Herzegovina's legal system from the Austro-Hungarian period through socialism and into the present. Despite socialist reforms after World War II that marginalized private law and emphasized state ownership, the principles of the ABGB persisted through the application of 'legal rules' from prior statutes. In the post-Yugoslav era, Bosnia and Herzegovina embarked on a transition process to reform its property system and codify civil law. However, progress has been hindered by incomplete property reforms and a complex constitutional structure that divides legislative competencies among entities and the Brčko District. This fragmentation impedes the adoption of a uniform civil code, resulting in civil law being codified in separate statutes without a general part. The chapter examines the current codification of contract and tort law, still largely governed by the Obligation Act of 1978. It also reviews recent reforms in property, succession, and family law, noting a return to foundational principles like the superficies solo cedit doctrine. Challenges remain, such as the lack of recognition

Povlakić, M. (2024) 'Codification of Civil Law in Bosnia and Herzegovina' in Veress, E. (ed.) *Codification of Civil Law: Assessment, Reforms, Options*, pp. 291–337. Budapest – Miskolc: Central European Academic Publishing. https://doi.org/10.54171/2024.ev.ccl_12

for same-sex partnerships and issues concerning the deprivation of contractual capacity for adults. Concluding, the chapter emphasizes that the evolution of civil law in Bosnia and Herzegovina is characterized by legal transfer and reception. It questions the feasibility of autonomous legal development in a globalized world, highlighting the necessity for integrating international legal principles to foster a cohesive legal system.
Keywords: *Bosnia and Herzegovina, civil law codification, Austrian Civil Code, legal transfer and reception, property law reform.*

1. INTRODUCTION

In presenting this topic, two approaches will be followed. First, a general overview is provided to present the historical development and basic information on the current legal and political/social order of Bosnia and Herzegovina (hereafter, B&H), section 2. This is essential for a better understanding of the main topic of this paper, namely, the current state of affairs in the codification of private law in Bosnia and Herzegovina (section 3).

2. A BRIEF OVERVIEW OF THE DEVELOPMENT OF MODERN PRIVATE LAW IN B&H

2.1. INTRODUCTION

The story of the historical development and current status of civil law in B&H could be surprising. The first attempt to modernise civil law in B&H was undertaken during the last decades of the Ottoman Empire governance in B&H – the so-called *Tanzimat reforms* (1839–1876 – but, these reforms were not carried out efficiently.[1] The second attempt was more successful and has given shape to the current civil law in B&H. In

1 Karčić, 2013, p. 1028.

other words, civil law in B&H under the strong influence of Austrian law, and therefore predominantly a continental European law, from the end of the 19th century until World War II. Even during socialism, the impact of Austrian law was pronounced, although only in the domain of private law based on private property (more about this under section 2.4.2). B&H never completely abandoned this legal family, although it was a part of the socialistic legal circle. One could say that the development of modern private law in B&H is a history of the influences of the Austrian Civil Code (hereinafter, ABGB) and Austrian law in general. Since the Bosnian and Herzegovinian civil law had never ceased to be part of the continental European law family, the transformation process meant an almost complete return to this legal family, with the exception of institutions and regulations that were increasingly subject to Anglo-American law.[2] The development of civil law in B&H will be traced through the various epochs.

2.2. PERIOD BETWEEN 1878 (BERLINER CONGRESS) AND 1918 (END OF THE WORLD WAR I)

This overview begins with the takeover of the governance of B&H by the Austro-Hungarian monarchy and the replacement of the Ottoman administration towards the end of the 19th century. From 1878 till 1918, B&H was a part of the Austro-Hungarian Monarchy. By the decision of the Berlin Congress, governance over B&H was transferred to the Austro-Hungarian monarchy, while the sovereignty remained with the Ottoman Empire.[3] B&H was later annexed by the Austro-Hungarian monarchy through a unilateral act (1907).

2 Anglo-American law has had a particular influence on criminal law. Civil procedural law (litigation, enforcement, and non-contentious civil procedure) was and remained under the influence of Austrian law, but the influence of Anglo-American and Scandinavian law was also noticeable here, especially in the area of basic principles of litigation proceedings. For more, see Povlakić, 2011, pp. 216, 230.

3 Art. XXV of the Berlin Peace Agreement transferred the mandate to govern B&H to the Austro-Hungarian monarchy; however, B&H remained under the sovereignty of the Sultan. Čaušević, 2005, p. 195.

The inclusion of B&H in the continental European legal circle started with the implementation of Austrian law in B&H, which happened in a rather unorthodox manner. After the transfer of governance, the Austrian-Hungarian administration issued several regulations that sent out a clear message on how courts should apply the Ottoman law in civil cases, because the latter was in force in B&H at that time, until new laws were enacted. Only under three conditions, the current Ottoman law could not be applied: if it does not exist in a specific case (legal gap), if the law offers only an inadequate solution, and if it is inapplicable due to the new and changed circumstances: in other words, provided these rules do not conflict with the provisions of the monarchy.[4] However, as a rule, the judges educated in the monarchy did not know the Turkish language or Turkish legal sources.[5] Hence, they resorted to the implementation of the ABGB *via facti,*[6] although ABGB was never officially enacted in B&H. Nevertheless, its impact on the B&H legal order was (and is) still essential. The reception of the ABGB in this epoch happened at three levels. One, the direction of reception was originally permeated by case law. Further, this code was partially and formally incorporated into the new regulations enacted specially for B&H, and after the annexation, certain parts of the ABGB were integrated into the first projects for codification of substantive civil law in B&H.[7] However, the judges and case law played the main role in the process of the reception of Austrian law.[8] The judges applied the Ottoman regulations only in exceptional cases and primarily applied the ABGB as a subsidiary source of law. To the same extent as the national structure and education of judges were

4 Karčić, 2013, p. 1030; Bećić, 2014, p. 56. The author lists these regulations.

5 The new administration has attempted to translate the laws of the Ottoman Empire from Turkish into German. See Die Sammlung für Bosnien und Herzegowina erlassener Gesetze, 1881. In addition to the newly enacted regulations, official translations of Turkish legal texts have also been published in this edition, but *Medjele* was not entirely translated. *Medjele* was gradually translated, and this process was completed in 1906. It was a translation from French, and this translation was not considered entirely suitable for official use, rather only as a source of information on the content of *Medjele*. Bećić, 2022, pp. 114, 126.

6 For more, see Karčić, 2013, p. 1029.

7 Bećić, 2022, p. 115.

8 Ibid.

heterogenic, the implementation of the law was equally heterogenic. As is said, the judges at courts of the first instance ruled by using common sense, at the second instance, in accordance with the ABGB, while the judges at the Supreme Court ruled in accordance with the *Medjele* (the statute regulating private law in the Ottoman Empire – author's note). [9]

2.3. PERIOD FROM 1918 UNTIL WORLD WAR II AND THE SOCIALIST REVOLUTION

The Kingdom of Serbs, Croats, and Slovenians, established in 1918 and later renamed as the Kingdom of Yugoslavia, had, for the first time, united South Slavic peoples into one state. These peoples had lived separately for centuries in independent states or as parts of other states, and thus in different legal systems. In addition, the economic, social, and legal development in these regions sharply differed.[10] Hence, it was not possible to create a new common legal system overnight; the task is a notoriously lengthy process. However, awareness of the importance of unifying the laws existed in the Kingdom of Yugoslavia. Therefore, a special Ministry for the Unification of Laws was established (1919–1938) with the task of drafting laws to harmonise the legislation in the entire Kingdom.[11] The process of enacting new statutes had started, and the codification of private law was planned as well, but complete harmonisation of the legislation was never achieved. The Kingdom of Yugoslavia was characterised by legal particularism during the entire period of its existence.[12] Over time several new statutes were adopted, but until then, regulations that were in force in certain parts of the Kingdom before 1918 continued to be applied. This is why during this period, in B&H, one of the six different legal areas within the Kingdom of Yugoslavia, ABGB was applied to private relationships, with exception of family

9 So Karčić, 2006, p. 98. About the influence of education and legal culture of judges on the process of the reception of ABGB in B&H see Bečić, 2022, p. 120.

10 Nikolić, 2013, p. 93.

11 Ibid., p. 92.

12 For more, see Povlakić, 2010, p. 211.

and succession matters, where the differences between different legal areas were the greatest. In family and succession matters, religious law and customs were applied. For citizens of the Islamic faith, family and succession relationships were regulated by sharia.[13]

In 1930, the process of drafting a new civil code was launched by the Ministry of Justice, but never successfully completed. The work resulted in the Draft Civil Code of Yugoslavia from 1934, which had the ABGB as a model. The key reasons to follow ABGB were the different levels of development of certain areas and the fact that there were more underdeveloped rural areas; hence, Austrian law were considered more suitable than the more modern codifications of the time such as the German or Swiss Civil Code.[14] An additional consideration was that Austrian law had an impact on a considerable part of the Kingdom.[15] In a broad-based public discussion, this Draft was criticised because it was based on the oldest civil code in Europe, which was, above all, perceived as foreign to the national spirit.[16]

Civil law has never been codified in the Kingdom of Yugoslavia; nevertheless, this was the only time a comprehensive codification was considered in Yugoslavia (and B&H). Not only was the Draft Civil Code under the influence of Austrian law but so were several other statutes, which were enacted in this Kingdom, the first being the different procedural codes.[17]

13 Karčić, 2013, p. 1029; Bećić, 2015, p. 113.

14 Nikolić, 2013, pp. 93.

15 Ibid.

16 Marković, 1939, pp. 28; Spaić, 1971, p. 73.

17 Three land registry laws were adopted in 1930 and 1931 regulating the establishment and organisation of land registries as well as the procedure of registration: Act on Land Registries [*Zakon o zemljišnim knjigama / Grundbuchgesetz*], Act on the Organisation, Establishment and Replacement of the Land Registries [*Zakon o unutrašnjoj organizaciji, osnivanju i izmjeni zemljišnih knjiga / Gesetz über innere Organisation, Anlegung und Austausch von Grundbüchern*] (1930), and Act on the Land Register's Divisions, Separations and Attributions [*Zakon o zemljišnoknjižnim diobama, otpisima i pripisima / Gesetz über grundbuchrechtliche Teilungen, Ab- und Zuschreibungen*] (1931). For more, see Povlakić, 2010a, p. 211. The Civil proceeding (litigation, enforcement and non-contentious procedure) represented the reception of the respective Austrian statutes. Povlakić, 2011, p. 206.

2.4. PERIOD AFTER WORLD WAR II AND THE SOCIALIST REVOLUTION UNTIL THE TRANSFORMATION PROCESS

2.4.1. Implementation of so-called legal rules (legal transfer)

The influence of the ABGB or Austrian law, in general, had not stopped with the socialist revolution. Immediately after the end of the war, legislative activities aimed at breaking legal continuity with the Kingdom of Yugoslavia were carried out. The result of this was the adoption of the Act on Termination of Validity of Laws adopted before 6 April 1941 and during the Occupation (hereafter, Termination Act),[18] which interrupted the continuity of the legal order of socialist Yugoslavia with the Kingdom of Yugoslavia. The regulations that had been in force in the Kingdom of Yugoslavia by 6 April 1941 went out of force, and regulations enacted during the occupation were declared null and void. However, by the provision of Art. 4. of the Termination Act, the implementation of the so-called *legal rules* contained in the regulations being in force in the Kingdom of Yugoslavia was made possible. Conditions for implementation of the legal rules were prescribed as well. The legal rules could be used in cases when a certain relationship had not been regulated by the new socialist law (legal gap), and when the relevant legal rule was not contrary to the Constitution, to mandatory rules, or the customs of the socialist state.[19]

In B&H, the legal rules contained in the ABGB or the laws of the Kingdom of Yugoslavia, which were strongly influenced by the ABGB, were applied. Thus, for almost 35 years, the legal rules were applied across a wide sphere of property and obligation relationships, until

18 Official gazette of the Federative People's Republic of Yugoslavia [*Službeni list FNRJ*], N° A84/1946.

19 For more about the implementation of legal rules see Konstantinović, 1960, p. 3; Gams and Đurović, 1990, p. 52; Rašović, 2006, p. 38; Vedriš, Klarić, 2000, p. 19; Borić, 1996, p. 52.

these branches of the law were codified.[20] The situation was different regarding family and succession law; the new family law was enacted in 1946/47, and the new succession law in 1955.[21] In family and succession matters, application of legal rules of the ABGB, church law, or sharia, which distinguished between positions of male and female successors, children born in or out of wedlock, between matrimony and extra-marital community etc., was not possible, since these rules were not in accordance with the new socialist principles.

20 In the obligation relationships, the legal rules of the ABGB were applied until the adoption of the Obligations Act [*Zakon o obligacionim odnosima*] in 1978, Official Gazette of SFRY [*Službeni list SFRJ*], N° 29/1978, 39/1985, 45/1989. In the field of property law, the legal rules were applied until the adoption of the Act on Basic Ownership Relations [*Zakon o osnovnim vlasničkopravnim odnosima*], Official Gazette of SFRY [*Službeni list SFRJ*], N° 6/1980, 36/1990. The same happened with the civil procedure. The legal rules from the Enforcement and Security Procedure Act [*Zakon o postupku izvršenja i osiguranja*] from 1938 were applied until the adoption of the Enforcement Act [*Zakon o izvršnom postupku*] in 1978, while the legal rules from the Non-litigation Procedure Act [*Zakon o vanparničnom postupku*] enacted in 1934 were applied up to 1989 when the Non-Litigation Procedure Act [*Zakon o vanparničnom postupku*], Official Gazette of the Socialist Republic of Bosnia and Herzegovina [Official Gazette of SR B&H – *Službeni list SR BiH*], N° 10/1989, was enacted. The branch of private law where the application of legal rules has lasted the longest is land registries law. The three mentioned acts regulating different aspects of the land registries (see note no. 17) i.e., the legal rules contained therein, survived the socialist Yugoslavia and continued to be applied in independent B&H; in other words, these rules were applied in the Brčko District BiH until 2001, until the enactment of the Act on the Real Estate Registry and Rights Over Real Estate [*Zakon o registru zemljišta i prava na zemljištu*], Official Gazette of BD B&H [*Službeni glasnik BDBiH*], N° 11/2001, 1/2003, 14/2003, 19/2007, 2/2008, while in the two entities they were applied up to 2002, i.e., 2003, until the enactment of two fully harmonised Land Registries Acts: Land Registries Act of the Federation B&H [*Zakon o zemljišnim knjigama FBiH*], Official Gazette FB&H [*Službene novine FBiH*], N° 58/2002, 19/2003, 54/2004 and 32/2019 – Decision of the Constitutional court of the FB&H N° U-10/15 and U-22/16 and Land Registries Act of the Republik Srpska [*Zakon o zemljišnim knjigama RS*], Official Gazette of Republic Srpska [*Službeni glasnik RS*], N° RS 67/2003, 46/2004, 109/2005, 119/2008.

21 Codification of succession law of former SFRY was enacted in 1955. The Succession Act [*Zakon o nasljeđivanju*] was a solid piece of codification. While the property, land registry, and procedural laws were influenced by Austrian law, this law was influenced by Swiss and French law, with certain adjustments to the socialist system. See Gavella, 2008, p. 15.

Despite the interruption of continuity of the legal order of the socialist Yugoslavia and the Kingdom of Yugoslavia, as mentioned before, it was possible to apply the so-called legal rules contained in the regulations that were in force in the Kingdom of Yugoslavia. In B&H, the legal rules contained in ABGB were primarily applied, but it was possible to apply the legal rules contained in other civil law codifications that were in force in other constitutive parts of the Kingdom of Yugoslavia (e.g., Serbian Civil Code or General Property Code of Montenegro). Over time, this influence of Austrian law diminished since, for example, the Succession Act, enacted in 1955, was modelled after the Swiss law in many aspects. The Obligation Act followed the best law approach and overtook legal solutions from different legal orders, such as Swiss law or CISG (more about it see *infra* 3.3). The property law, regulating proprietary relationships on privately owned assets, did not deviate significantly from the ABGB, that is, Roman law.

In the modern theory of civil law, the possibility of applying legal rules has led to the belief that the interruption in legal continuity was merely formal.[22] The older literature insisted, and argued that the continuity between the kingdom and the new socialist state was broken,[23] which was a consequence of the influence of socialist ideology.

2.4.2. The position of private law during socialism

During the decades when socialism prevailed, private law was marginalised. The legal order in the former SFRY and B&H was characterised by a dichotomy between state and private ownership. The former had a dominant role and it was better protected, but in parallel, private ownership also existed and had never been abolished, not even on immovable assets. However, on some important assets, such as on immovable

22 In this sense, see Nikolić, 2008, p. 42.

23 Spaić, 1971, p. 74. This author saw the application of 'legal rules' as an act of creation of new rules. Namely, not the statutes, which had been in force in the Kingdom were applied, but the rules developed for centuries that regulated property relations in areas where the market economy was in place. The legal basis for this manoeuvre was created by the socialist legislator. Ibid., p. 74.

assets, it was greatly restricted.[24] The legal relations between private persons involving private objects on which private property existed, to the extent it existed, were subject to the classic private legal regime with classic private law institutes mostly influenced by Austrian law.

When it came to the state/non-private enterprises and their proprietary relationships, they were subject to a completely new socialistic regulation. The concept of non-private ownership evolved in ex-SFRY from a state-directed economy and state ownership as the main form of ownership, to the concept of self-management and social ownership, to even recognising the market economy to a certain extent.[25]

The marginalisation of private law was mirrored in the scarce regulation of some institutes of property law, since the entire property law was regulated by the Act on Basic Ownership Relations[26] by only 90 legal provisions of which only 7 were devoted to mortgage. This was a consequence of the remote practical importance of some institutes (e.g., collateral law). The other rights *in rem* were scarcely regulated (real servitudes) or not regulated at all (personal servitudes, real charge). Nevertheless, if it was not a matter of state/non-private enterprises and their proprietary relationships, a private legal order existed and was subject to the classic private legal regime, with classic private law institutes that were predominantly influenced by Austrian law.

2.4.3. Codification of private law in socialistic Yugoslavia

As in the Kingdom of Yugoslavia, the civil code was never enacted in socialist Yugoslavia for various reasons. First, the prevailing thought was that social relationships are in a permanent state of restructuring, not sufficiently stable to be codified. Codification was even seen as an obstacle to the development of the legal system.[27] In the period from 1955 to 1971, an idea was considered to codify civil law not through the adoption of a single civil code, but by passing special laws for certain

24 For more about these restrictions, see Stanković, Orlić, 1989, p. 97; Gavella, 2003, p. 21.

25 Povlakić, 2009b, pp. 19–52.

26 See footnote no. 20.

27 Spaić, 1971, p. 34.

parts of civil law. Work on the development of a general part of civil law had started as well.[28] However, these efforts ended with the constitutional reforms in 1971; later, another obstacle stood in the way of adoption of civil codification, namely, the lack of legislative competencies of the federal state.

In former socialist Yugoslavia, after the first Constitution from 1946 was enacted, several constitutional reforms were undertaken (1953, 1963, 1971, and 1974). In addition, the reforms of 1989/1990 aimed at transition and abandoning the socialist legal and social model need mention.[29] The reforms of 1971 and 1974 led to a strong decentralisation of the state and transfer of new competencies to the former socialistic republics (B&H, Croatia, Macedonia, Montenegro, Slovenia, and Serbia) and autonomous regions (Kosovo, Vojvodina). According to the Constitution of 1974, the federal state was empowered to regulate basic proprietary relationships but not an entire corpus of property law. It was competent to regulate the general part of contract law and contractual and other obligation relationships in the field of trade in goods and supply of services (art. 281, no. 4). After the constitutional reform of 1971 and 1974, competence to regulate substantial and procedural succession law was transferred to the socialistic republic and autonomous regions; the same happened in the area of family law. Later, there were eight different succession and family acts in the former Yugoslavia. The division of legislative powers between the federal state and its components, socialistic republics, and autonomous regions became an obstacle to the adoption of the Civil Code.

Although the Uniform Civil Code was never enacted, and neither was it planned in former ex-Yugoslavia; although one cannot say that civil law was not codified; the standard parts of a civil code were codified in the ex-SFRY, but not combined into one code, rather they were codified by separate acts: Obligation Act and the act on basic proprietary relationships, which were enacted on a federal level, but did not regulate the entire corpus of the obligation and proprietary relationships and eight Family Acts and eight Succession Acts, enacted by each federal

28 Nikolić, 2013, p. 98.

29 For more see Povlakić, 2009b, p. 31.

state. In B&H, the Succession Act was enacted in 1973 and amended and supplemented in 1980,[30] and the Family Act in 1979.[31]

Even without the Civil Code, it is obvious that the codified parts of private law followed the pandect system. However, something was missing: a general part of the Civil Code has not been adopted.

Even if a civil code had been enacted in the former SFRY, family law would not have been part of it, as the socialist doctrine did not consider family law to be part of private civil law, which primarily regulates proprietary relationships. It was argued that the subject and method of the regulation of property and family law differ, that proprietary relationships were not primary for family law, and that protection of family and children was in the public interest, and therefore these relationships were regulated by mandatory norms, which meant the limitation of private autonomy, etc.[32]

This was the situation when B&H separated from the ex-SFRY and declared its independence. It should be mentioned here, although it has no direct bearing on the subject of civil law codification, that in 1989/90 far-reaching reforms were undertaken in the former SFRY that initiated the transition process. B&H separated from former Yugoslavia during the phase of crucial reforms being undertaken in the socialistic economy, socialist legal system, as well as in property order. The Amendments to the Constitution of the SFRY (1988)[33] and to the Constitution of the Socialistic Republic of BiH (1989 and 1990)[34] represented the

30 Succession Act [*Zakon o nasljeđivanju*], Official Gazette of SR B&H [*Službeni list SR BiH*], N° 7/1980, 15/1980.

31 Family Act [*Porodični zakon*], Official Gazette of SR B&H [*Službene novine SR BiH*], N° 21/1979, 44/1989.

32 Gams, Đurović, 1990, p. 45; Spaić, 1971, p. 46.

33 Amendments IX–XLII to the Constitution of the SFRJ [*Amandmani IX – XLII na Ustav Socijalističke Federativne Republike Jugoslavije*], Official Gazette of SFRY [*Službeni list SFRJ*], N° 70/1988, 57/1989.

34 Amendments XX–LVIII to the Constitution of the Socialist Republic Bosnia and Hercegovina [*Amandmani XX–LVIII na Ustav Socijalističke Republike Bosne i Hercegovine*], Official Gazette of SRB&H [*Službeni list SR BiH 13/1989*], as well as Amendments LIX–LXXX to the Constitution of the Socialist Republic Bosnia and Hercegovina [*Amandmani LIX–LXXX na Ustav Socijalističke Republike Bosne i Hercegovine*], Official Gazette of SR B&H [*Službeni list SR BiH 21/1990*].

main pillar of property order reform: guarantee of property was established, restrictions of private property were abrogated, and all types of property rights (private and public property) were declared equal.[35] During the war (1992–1995), this reform process was interrupted or slowed down, but nevertheless, some reforms were also undertaken during the war in different parts of B&H (the current Federation of B&H and the Republic Srpska) primarily focusing on proprietary relationships.[36]

2.5. AFTER 1995 AND UNTIL NOW

2.5.1. Transition process

After 1995, B&H went through the transition process like all other former socialist states, which is, according to some, 'one of the greatest challenges of the end of the twentieth and the beginning of the twenty-first century'.[37] Similar to most other former countries during the decades of socialism, private law in B&H law was marginalised; therefore, the essential part of this transformation process was reform of the property regime because the greatest deviations from the classical legal order of the continental European legal system were in the very area of property law[38]. The reform of property order is a main reform within the transformation process in all post socialist countries. B&H separated from former Yugoslavia during the phase of crucial reforms of the socialistic economy, socialist legal system, as well as the property order, as mentioned earlier.

35 Povlakić, 2009b, p. 32.

36 For more about the transition process and reforms of property legal order, see Povlakić, 2009b, pp. 30–70.

37 Šarčević, 2003, p. 759. After the collapse of the USSR and socialism, the changes that took place were so profound that they had no parallel in history. See, for instance, Chanturia, 2008 p. 115.

38 Gavella has spoken about 'deformations' of civil law. Gavella, 2003, p. 21; Povlakić, 2010a, p. 216.

Property system reform usually begins with the adoption of various measures of denationalisation and (re)privatisation, which was true, to a certain extent, in B&H as well. However, these processes did not include all the necessary measures and happened very slowly in B&H, facing many challenges. Hence, even 30 years after the war ended, property law reform has not yet been completed; B&H remains in a never-ending transformation process.

The rules regulating restitution have not yet been adopted, which usually happened in the first phase of reforms in former socialist countries. The decision to not implement restitution is conceivable, but such a decision should be made promptly at the beginning of the transformation process, which did not happen in B&H. Instead, since 1991, there has been a ban on the disposal of property that was expropriated under various nationalisation laws between 1945 and 1958.[39] This prohibition has mainly affected the most important real estate for a national economy, such as agricultural land, forests, construction land, etc. In former Yugoslavia, at the beginning of the 1990s, constitutional and economic reform should, logically, lead to denationalisation with restitution as the next step. Considering that this process can take longer, a prohibition on disposal of properties that were once expropriated without compensation should have served to protect former owners and should have lasted until the enacting of the restitution act. Since the Act on Real Estate Legal Transaction was repealed by the enacting of the Property Law of the Federation B&H, the regulation regarding the ban on the disposal of nationalized property, established in 1991, was completely taken over into this new Act (Art. 365–369. The existence of this long-standing ban causes

39 Act on Real Estate Legal Transaction [*Zakon o prometu nepokretnosti*], Official Gazette of SR B&H [Službeni list SR BiH], N° 38/1978, 4/1989, 22/1991.

enormous problems in practice, especially in real estate transactions.[40] The enactment of the restitution law is still pending; three decades after comprehensive constitutional reforms in former Yugoslavia (1989/90), which launched the transformation process, there is neither discussion for implementing the restitution process nor a clear decision to not conduct the process. An apt statement by Ferenc Madl should be quoted here: From the economic point of view, restitution is not crucial, but clear and settled ownership relations are. It is not so important who the owner is, but that someone actually is the owner.[41] The ownership relations in B&H are in fact still not cleared and settled!

A ban that lasts for over 30 years cannot be effective, and it was circumvented in many cases. In other cases, however, this prohibition and undefined relationships jeopardised investments. On the contrary, many properties remain unused and lost value or perished. Both did not contribute to the rule of law. B&H is still waiting for Godot, namely, that property reform is yet to be accomplished. It does not necessarily mean implementing the restitution, but a clear decision on whether the restitution will be carried out or not.

Without certainty about the subject of restitution, privatisation was carried out; it is quite possible that real estate, which could be once the subject of restitution, has already been sold to third parties in the privatisation process such that every further step undertaken before the restitution has been completed or decision rendered that the restitution would not take place (which would be a better solution considering the circumstances, could be questionable respectively, or could be, after the restitution act is passed, a subject of litigation. Step two was undertaken

40 The position of former owners in favour of whom the ban was proclaimed is uncertain; however, the same is the case of those subjects who owned certain assets for years in the former SFRY but are not allowed to dispose of them after 1991. A recent decision by the Constitutional Court B&H (hereafter: CC B&H) bears witness to this uncertainty. A municipality disposed of the land and transferred it to a third party, but the former owner (a religious community) filed an objection. The CC B&H ruled that this former owner had a legitimate interest in opposing this disposition, which the ordinary courts failed to examine. S. AP-3332/21 from 23.02.2022 [Online]. Available at: https://www.ustavnisud.ba/uploads/odluke/AP-3332-21-1319368.pdf. (Accessed: 22 October 2023).

41 In this sense, see Madl, 1998, p. 598.

before step one, as if like building a house without building a solid foundation first. There were several drafts of the Restitution law, but none had been passed by the Parliament of B&H. In the RS, two acts were enacted in 2000/2001, and revoked by the High Representative arguing that the state of B&H could not bear this burden. So far so good, but the political decision that there would be no restitution in B&H was never rendered – a pending restitution is like a Damocles sword.

Privatisation of state enterprises was a slow process burdened with significant challenges (unclear property relations, annulations of certain privatisation transfers resulting from frequent abuses, etc.). The new property acts in the entities (FB&H and RS) and BD B&H were passed without the former socialist ownership relationships having been fully clarified or revised. Instead, these acts contain extensive transitional provisions, which were intended to enable the completion of the transformation process. Unfortunately, these provisions have often been ignored in practice, poorly understood, and on this basis, numerous lawsuits have been conducted, which were ultimately decided by an appeal before the Constitutional Court of B&H.[42]

2.5.2. Legal continuity

The new independent state of B&H is the successor of the Socialist Republic of B&H (hereafter, SR B&H), which implies that the laws enacted in the former SFRY and SR B&H would continue to apply in the new state until new regulations are adopted. However, this happened in different ways in three different parts of B&H.

42 Povlakić, 2019, p. 181.

The Federation of B&H assumed a number of legal instruments of the former Yugoslavia *en bloc*[43] or by assuming certain statutes separately.[44] In the Republic Srpska, all the statutes that had been in force in ex-SFRY have been adopted into the legal system of the Republic Srpska under the condition that they were not in conflict with the constitutional order of the Republic Srpska.[45] The Statute of the Brčko District B&H provides that all statutes in force in SR B&H shall continue to apply as the statutes of the District in accordance with the Decision of the Supervisor of the Brčko District of BiH of 4 August 2006.[46]

The influence of the ABGB / Austrian law has continued in B&H even after its dissolution from ex-SFRY. The Termination Act was assumed in the Republic Srpska and BD B&H as well as all other acts that were in force in former Yugoslavia. However, in the FB&H, this act was not among the laws that were assumed from ex-SFRY, which leads to the question of whether, in case of legal gaps in the FB&H, the legal rules from the ABGB could still be applied? Their application was possible but on a different legal basis. The Act on Property Relations of the Federation BiH from 1998[47] did not regulate personal servitudes, vicinity rights, and real charge but it stipulated that with respect to those specifically listed institutes, legal rules from the ABGB may be applied

43 Act on proprietary relationships of the Federation B&H [*Zakon o vlasničkopravnim odnosima Federacije BiH*], Official Gazette of FB&H [*Službene novine FBiH*], N° 6/1998, 29/2003.

44 Ordinance with legal effect on taking over of the regulation from former SFRY [*Uredba sa zakonskom snagom o preuzimanju propisa bivše SFRJ*], Official Gazette of the Republic B&H [*Službeni list Republike BiH*], N° 2/1992), Law on confirmation of the Ordinance with legal effect on taking over of the regulation from former SFRY [*Zakon o potvrđivanju Uredbe sa zakonskom snagom*], Official Gazette RB&H [*Službeni list Republike BiH*], N° 13/1994.

45 Art. 12 of the Constitutional Law on Implementation of the Constitution of the Republic Srpska [*Ustavni zakon o sprovođenju Ustava Republike Srpske*], Official Gazette of RS [*Službeni glasnik Republike Srpske*], N° 21/1992.

46 Art. 76 of the Statute of BD B&H.

47 See footnote no. 43.

(art. 94).[48] While adopting the Obligations Act into the legal order of the FB&H, the same was stipulated for gift, partnership, and borrowing contract (*comodatum* – lat.).[49] However, the courts in the FB&H adopted decisions by applying legal rules from ABGB even when it came to other legal institutes, not just those explicitly enumerated in the Act on Property Relations FB&H and Obligation Act. With each new law passed in B&H, legal loopholes became fewer, and the need to apply legal rules from ABGB decreased.

2.5.3. A new constitutional order and state organisation

Aggression and war were stopped after the signing of the Dayton Peace Agreement in 1995, of which Annex IV represents the Constitution of B&H, which established a new state organisation. B&H is a complexly organised federal state divided into two entities: Federation B&H (hereafter also: FB&H) and Republic Srpska (hereafter also referred to as RS) and the Brčko District B&H (hereafter also referred to as BD B&H). The legislative competencies are divided between the State and its parts. The Constitution provides for the presumption of competence in favour of the entities; the competencies of the State BiH are only those that are explicitly stated in the Constitution. The competence for the regulation of civil law in general, or its part (property, contract and tort, family and succession law), is not given to the State B&H, but to the entities and BD B&H. Furthermore, the Federation B&H is divided into ten cantons, which also have some legislative competencies in the field of property law.

This is why, today, in B&H, as an independent state, it is still not possible to adopt the Civil Code; the state of B&H has no corresponding legislative powers. However, certain constitutional mechanisms would

48 After the Property Law of FB&H entered into force in 2014, there was no need to apply legal rules from the ABGB, since the mentioned institutions were now regulated by a new property law; the Law on Property and other rights *in rem* of the Republic Croatia and ABGB were models for the new regulation.

49 Art. 27 Ordinance with legal effect on taking over of the Obligation Act [*Uredba sa zakonskom snagom o preuzimanju Zakona o obligacionim odnosima*], Official Gazette [*Službeni list Republike BiH*], N° 2/1992, 13/1994).

enable the adoption of the Uniform Civil Code at the federal level, for example, according to Art. III.5 of the Constitution, a transfer of jurisdiction from the entities to the State of B&H is possible. This requires political will, which has generally been lacking until now, and this mechanism has been used extremely rarely.

Art. I.4 of the Constitution of B&H provides for freedom of movement throughout Bosnia and Herzegovina and forbids States or Entities from impeding full freedom of movement of persons, goods, services, and capital throughout Bosnia and Herzegovina. A parallel between four fundamental freedoms and the European single market can be recognised here. Further parallels are (a) B&H as well as the EU has only those legislative competencies that are explicitly provided in the Constitution B&H, respectively, in the Treaties[50] and (b) the internal market competence and undisturbed functioning of fundamental freedoms did not provide sufficient basis to bring about a European civil code. In B&H, too, the Uniform Civil Code is not expected to be adopted on this constitutional basis, but it means that the differences in legislation that may impede the free movement of persons, goods, services, and capital throughout country would not be in line with the Constitution. It could not be argued that the legislators of various legislative levels in B&H (State, entities, BD B&H, Cantons) took the prohibition prescribed in Art. I.4 seriously since all legislative levels have enacted the regulations, which is not in line with this constitutional provision; more over this provision was extremely rarely used as the constitutional basis for the adoption of the laws of the entire state. The differences in property, contract and torts, family, and inheritance law are becoming ever greater. Until about 2006, the international community made efforts and successfully supported the entities so that the parliaments of the entities

50 Art. 5 para 2 of the Treaty on European Union. For more about the principle of conferral, see Meškić, Samardžić, 2012, p. 96; Misita, 2010, p. 211. A subtle distinction should be made here: B&H existed before the entities, and there was no conferral of competences from the entities to the federal state, but, according to the Dayton Constitution, B&H was for the first time organised as a federal state, which was a compromise to negotiate a peace agreement. Nevertheless, in the end, the B&H and the EU have only these individual competences, which are listed in the Constitution of the B&H and the TEU, respectively.

pass their own acts but these acts have been mutually harmonised to a large extent[51]. Unfortunately, this trend has not been maintained, and with each subsequent amendment or supplement to certain statutes, the previously harmonised statutes have become increasingly divergent.

Regarding codification of civil law, the situation remained similar to that in ex-SFRY: parts of civil law are codified according to the Pandects system but without the general part of civil law. However, one significant difference can be noted: not only family and succession laws in all three parts of B&H, but also property and contract and tort are regulated separately. In a small state of about 3 million inhabitants, there are three separate, closely related but nevertheless different civil law legal orders.[52]

3. THE CURRENT STATE OF PLAY OF CODIFICATION OF CIVIL LAW

3.1. INTRODUCTION

The new position and role of private law and property as its central institution should have actually lead to a new attitude towards codification of civil law, but this did not happen. First, as described in section 2.5.3 the state B&H has no competence to enact the civil code. With regard to a uniform codification of civil law, the situation is comparable to the situation in former Yugoslavia. It is interesting that in none of the successor states of the ex-SFRY, where there are no constitutional reasons

51 It concerns *inter alia* the property, notary, and land registries acts of both the entities (Federation B&H and Republic Srpska).

52 It can lead to conflicts of laws in different fields of private law, whereupon Bosnian-Herzegovinian law does not provide suitable solutions for all cases of such conflicts of law. There are no conflicts of law rules in the field of contract and tort law and property law. For more, see Meškić, Duraković, Alihodžić, 2018, p. 642.

against civil codification, has the civil code been adopted.[53] However, even missing a civil code, civil law in B&H is codified – each core part of the civil law/civil codification is regulated by a separate statute, with the exception of the general part of the civil code.

3.2. GENERAL PART OF THE CIVIL CODE

Although the general part of civil law is still missing, this fact does not lead to enormous difficulties in the application of the law. The issues of natural and legal persons, legal objects, subjective rights, their enforcement, protection and termination, as well as legal transactions are not regulated in a general part of the civil code, but they are regulated, although not completely and systematically, in separate statutes. The general part of civil law is, so to say, fragmented in many laws, but some parts of the puzzle are still missing.

Obligation Act (hereafter: OA) regulates only contracts, but it stipulates that these provisions should accordingly be applied to all kinds of legal transactions (Art. 25 para. 3). The capacity of natural persons is regulated by legislation on family law[54] and partially by OA (Art. 56–59). The Family Acts regulate capacity issues such as the status of minors and of the person under tutelage. In this regard, the Family Acts substitute the non-existent codification of civil Law. All natural persons acquire, independent of their gender, a full contractual capacity on turning 18. Both genders can get contractual capacity even earlier. A minor, older than 16 years, can conclude marriage under previous approval by the court, which assessed the justified reasons. In this case, contractual capacity is achieved with the conclusion of marriage.

53 There were, or still are, projects in this direction in Serbia, North Macedonia, and Montenegro, but without a final outcome. In Serbia, an expert group was established in 2006, and it had, over the years delivered comprehensive material. Without completing this work, the project was terminated by the government in 2019. In North Macedonia, a working group was established in 2012, and codification preparation is ongoing. Montenegro started it in 2019, but many interruptions and no real continuity can be observed in these efforts.

54 Art. 134, 157 of the FA FB&H; art. 138 and 139 FA BD B&H; art. 94 and 126 FA RS.

In the Federation B&H and Brčko District B&H, the minors, older than 16 years, who become parents (or one of them) may apply in judicial procedure for approval of full contractual capacity. In this case, contractual capacity is acquired by the finality of the court decision.[55] On turning 14, minors acquire partial contractual capacity and can conclude contracts with the approval of the parents/legal guardian.[56] In the FB&H and RS it additionally means that these minors can conclude only the contracts that benefit them without creating obligations on their side.[57] In BDB&H, this is possible on turning 16.[58]

Art. 54 OA regulates some aspects of the legal and contractual capacity of legal persons. However a comprehensive and systematic regulation of legal entities is still missing. The companies are regulated in detail by Company Acts in all three parts of B&H, but all other legal persons are scarcely regulated in special statutes, and this regulation is unsystematic and incomplete; a red thread, guiding idea, is missing there.

The same applies to legal objects. While the things, claims, and goods of intellectual creation are regulated in corresponding statutes, personal goods are not. In addition, there is a lack of general provisions on what constitutes a legal object. We testify to the fact that economic development always gives rise to new legal objects, new intangible goods, which can be objects of property and/or other material or contractual relationships. It can be the pettiness of a professor, but a general regulation of legal objects could help when it comes to recognising new values or entities as new legal objects, such as data and digital assets.[59]

55 Art. 137 para. 3 and art. 355–356 FA FB&H; art. 139 para. 3 FA BD B&H.

56 Art. 157 para. 1 FA FB&H; art. 120 para. 2 FA BDB&H; art. 94 para. 1 FA RS.

57 Art. 157 para. 1 FA FB&H; art. 94 para. 1 FA RS.

58 Art. 120 para. 2 FA BDB&H. For minors under tutelage, this age is 14 years (Art. 169 para. 2 FA BDB&H). This may be a technical error on the part of the legislators, as there is no reason to treat these two categories of minors differently.

59 Here, the words of the famous French scholar Réné Savatier can be quoted: he wrote that the end of the 19th and the beginning of the 20th centuries spread to the legal dogmatic a large spectrum of intangible, immaterial goods, which were unknown until then. See Savatier, 1959, p. 122. This happened again in the 21st century with digital assets, data, etc.

3.3. CONTRACT AND TORT LAW

Contract and tort law remains regulated by Obligation Act from 1978,[60] enacted in former Yugoslavia, and transferred into the legal order of B&H; as it was mentioned under 2.5.2, the legal basis for this transfer differs in the three parts of B&H, but the regulation of contract and torts is almost the same, with only a few minor changes made in the entities of B&H[61]. In the Brčko District B&H, this Act is applied without any changes or additions. Considering that the OA has more than 1100 articles, these amendments in both entities, do not disturb the unity of the regulation of the obligation relationships in the whole B&H.

Although the OA was passed in a socialist country, it was a modern act and has paid only a small obolus to the socialist legal system.[62] This was recognised in the literature of Western European countries at the time of its enactment,[63] as well as now[64]; according to *Rüssmann,* the OA was and still is a remarkable legal creation.[65] The doctrine on the territory of the former Yugoslavia did not consider this codification as a socialistic deformation of the classical contract and torts law.[66]

60 For the history of the creation of this law, background, and sources, see Slijepčević, 2008, p. 29.

61 In the FB&H, the changes were related only to the omission of the word 'socialist', which is found in around 30 provisions of the OA. In the Republic Srpska, a few terminological adjustments to the new social organisation were made: the provisions that regulated the conflict of law between the former republics and autonomous regions in the former Yugoslavia were deleted. The scope of the law was also changed by deleting from the first article the words that the law regulates the general part of debtor relationships (without changing the content of the law). The provision on the liability of restaurateurs and hoteliers was amended (Art. 724 OA RS). The main change concerns the general prescription period, which was extended from five to ten years (Art. 371 OA RS).

62 '... but socialist elements, especially of the general part of the Law, were not so essential (and could later on be easily deleted'. Jessel-Holst, 2009, p. 167.

63 Bar von, 1981, pp. 1742.

64 See Hondius, 2006, p. 22. In a reform of contract and tort law in Germany in 2002, preparatory works included comparative research of the most advanced foreign legal orders, among them Yugoslav Obligation Act. See Jessel-Holst, 2009, p. 170.

65 Rüssmann, 2009, p. 101.

66 Gavella, 2003, p. 21, footnote no. 6.

The fact that OA survived the former Yugoslavia and has continued its existence in all successor states of the former Yugoslavia is proof of this statement. All successor states of the former Yugoslavia, except Serbia and B&H, have adopted new codes of their own, which, at least in their first version, differed only slightly from the original OA of 1978.[67]

The creator of this law is undisputedly Prof. Konstantinović from the University of Belgrade,[68] who, after years of work, presented a Sketch for the Obligation Act, which was then discussed and edited by a number of experts over the next 10 years. It has already been mentioned that in drafting the Sketch, the best law approach was followed. In other words, Prof. Konstantivnović researched and used solutions from comparative law, customs and usage, uniform international instruments, case law, and doctrine.[69] The comparison between OA and some international instruments or European projects on contract law demonstrates a large compatibility among them. For example, a great convergence is observed between the OA and PECL. It is possible to establish compatibility, for example, in the regulation of *culpa in contrahendo*, offer and acceptance, performance of contract, and even non-performance of contract, although PECL has borrowed here from Anglo-Saxon law. Here, a convergence with the Draft Common Frame of Reference (DCFR) and UNIDROIT Principles of International Commercial contracts can be recognised.[70]

The OA regulates the general part of the obligation law, contractual, and other obligation relationships; a special part of the law of obligations regulates different types of contracts. The monistic principle is followed, and OA applies to both private and commercial contracts, unless the law provides otherwise (Art. 25 para 1 and 2 OA).

The reform of the contract and torts law was initiated in 2002, but in 2010, the project was abandoned without being finalised. The last

67 For example, the Slovenian OA from 2001 contained only minor and cosmetic changes compared to the OA of 1978. In this sense Možina, 2008, p. 11. In this sense also, see Jessel-Holst, 2009, p. 164; Josipović, 2008, p. 149.

68 Prof. Mihajlo Konstantinović was the main creator of the Succession Act from 1955 too.

69 Slijepčević, 2009, p. 27.

70 For more see Povlakić, 2012, p. 147; Miladinović, 2006, p. 191.

preliminary draft of the Law on Obligations dates to 2006 and was introduced to the parliamentary procedure. The project failed in parliament due to allegedly non-existent legislative powers of the state B&H to regulate this branch of law. Two main changes were concerned with the regulation of some new types of contracts (leasing, franchising, etc.) and the incorporation of consumer protection into this law, whereby the corpus and concept of the law from 1978 were to be preserved to the greatest possible extent; the vast majority of the provisions of OA 1978 have been retained. Here, the first preliminary draft from 2003 should be mentioned, which represented a subtle incorporation of certain EU Directives into the corpus of the Obligation Act.[71]

Some consumer directives, being in force in this period, were transposed into this draft, although the first Consumer Protection Act was enacted in 2002 (hereafter: CPA 2002),[72] and the second Consumer Protection Act, which is still in use, in 2006 (hereafter: CPA 2006)[73]. At first glance, one might think that the decision to follow a codification method (regulation of consumer protection in a separate act) had been taken, but Art. 140 CPA 2002 stipulates that the provisions of arts. 48–100 of this Act are temporary until this matter was regulated in the new Obligations Act. This transitional provision considered the fact that a reform of the OA was also being carried out at the time, intending to incorporate the main consumer protection directives into the new Obligation Act. The CPA 2006 does not contain a similar provision.

The transposition of consumer directives into national law was preceded in many countries by a discussion about the method of transposition. As some 'consumer law' rules affect the core of the law of obligations, the discussion focused particularly on the question of whether a special consumer protection law should be adopted or whether the provisions of consumer protection should be incorporated into the corpus of the civil code. What is special about the case of Bosnia and

71 The credit for this goes to Professor Helmut Rüssmann, from the University of Saarland, who prepared this draft on behalf of the German association Gesellschaft fur technische Zusammenarbeit (GTZ), now Gesellschaft für internationale Zusammenarbeit (GIZ).

72 Official Gazette of B&H [*Službeni glasnik BiH*], N° 17/2002, 44/2004.

73 Official Gazette of B&H [*Službeni glasnik BiH*], N° 25/2006, 88/2015.

Herzegovina is the absence of any professional exchange or discussion on the subject.[74] Presently, neither a reform of consumer law nor OA is planned, although many new consumer protection directives have been adopted or amended since 2006.

3.4. PROPERTY LAW

Both entities (Federation B&H and Republic Srpska) and BDB&H have enacted new legislation in the field of proprietary relationships. Chronologically, they are: Property and other right *in rem* Act of the Brčko District B&H (hereafter: PLA BDB&H),[75] Property Law Act of the Republic Srpska (hereafter: PLA RS),[76] and Property Law Act of the Federation B&H (PLA FB&H).[77] PLA RS and PLA FB&H are harmonised to a large extent; two groups of experts worked together and drafted two almost identical legal texts, which were forwarded to the respective ministries. In all three parts of B&H, it was a political decision that the model for the reform of property law should be the ABGB; the reception of the Austrian property law was understood as something like 'back to the roots'. In this way, PLA BDB&H also demonstrates great convergence with the PLAs of the entities.

Between the enactment of the PLA RS (2008) and PLA FB&H (2013), several years passed, and this fact was used in the FB&H for improving the legal text: there are more detailed final and transition provisions; provisions on condominiums were modernized and revised; and an additional security right *in rem* over immovable assets was introduced (land charge).

74 For more, see Povlakić, 2010b, p. 140.

75 Property and other rights *in rem*, Act of the Brčko District B&H [*Zakon o vlasništvu i drugim stvarnim pravima Brčko Distrikta BiH*], Official Gazette of BD B&H [*Službeni glasnik BD BiH*], N° 11/2001, 8/2003, 40/2004, 19/2007, 26/2021, 44/2022.

76 Property Law of the Republic Srpska [*Zakon o stvarnim pravima Republike Srpske*], Official Gazette RS [*Službeni glasnik RS*], N° 124/2008, 58/2009, 95/2011, 60/2015, 18/2016 – Decision of the Constitutional Court, 107/2019, 1/2021 – Decision of the Constitutional Court, 119/2021 – Decision of the Constitutional Court.

77 Property Law of the Federation B&H [*Zakon o stvarnim pravima Federacije BiH*], Official Gazette FB&H [*Službene novine Federacije BiH*], N° 66/2013, 100/2013.

The main characteristics of the new property law in B&H can be summarised as follows: these Acts represent the first comprehensive codification of property law, that is, rights *in rem* in B&H; the main principles underlying these Acts are the *numerus clausus* principle, the prohibition of abuse of rights *in rem*, and the principle of property obliges, which demonstrate a social function of property as well the principle of equal treatment of the property right regardless of who the owner is, be it a public or a private person.

For the first time, in all three PLAs, the things as a subject of the rights *in rem* were regulated in detail. The new legal definition of real estate considers only the plot of land as immovable unless the law provides otherwise. The plot of land is the main legal object and everything which is by nature or mechanically connected to it represents its part and belongs to the owner of that land.[78] This was a consequence of the reestablishment of the *superficies solo cedit* principles. The (re)introduction of this principle was accompanied by the denationalisation of urban constructing land, which opened the door for the reestablishment of this principle.[79] After nearly five decades of neglect, the new property law in B&H reintroduced this principle and provided for a completely new legal definition of real estate.

The new property law in B&H accepts a liberal regime regarding the possibility that foreigners can acquire ownership of real estate. Foreigners are considered equal in terms of succession with domestic citizens, but on the basis of legal transactions, real estate can be acquired only under the condition of reciprocity. [80]

A number of changes have been introduced regarding acquisition of ownership rights *in rem* on movable and immovable assets. First is the reform of land registry law, which was implemented in both entities and

78 Art. 7 para. 2 PLA BD B&H; art. 6 para 2 PLA FB&H; art. 6 para 2 PLA RS.

79 For more about this context, see Josipović, 2003, p. 99; Simonetti, 2008, p. 417. In Croatia, the reestablishment of this principle is considered in the context of the reestablishment of the market economy and together with renewal of land registries as a precondition for modern real estate transactions. See Gavella, Josipović, Gliha, 2007, p. 86.
The same can be observed in B&H. For more, see Povlakić, 2009b, p. 98.

80 Art. 200–203 PLA BDB&H; art. 15 PLA FB&H; art. 15 PLA RS.

BD B&H at the beginning of the 21st century, while respecting legal tradition, following the Austrian and German regulation of land registers; this strengthened the role of land registers and, above all, the principles of public trust. Property law reform has followed these principles and explicitly regulates the possibility of acquiring rights *in rem* by third *bona fide* persons even in a situation where the land register is incorrect and incomplete.[81]

Condominium ownership is regulated in a new way, which is also a consequence of the principle of *superficies solo cedit*; in contrast to the previous arrangement, in the new property law within condominium, the primary ownership is on the land. Additionally, in FB&H, the reforms implemented in Austria to protect the buyer of an apartment under construction are respected.[82]

For the first time, personal servitudes, real charges, and vicinity rights are regulated in detail so that there is no more need for applying the 'legal rules' from ABGB. Besides property, real and personal servitudes, pledge, mortgage, and real charges, two additional rights *in rem*, which are building right[83] and land charge,[84] were recognised.

Owing to the fact that credit and credit guarantees have undergone a paradigm shift in the transformation process and gained a crucial role in the market economy, the law on secured transactions, that is, law on security rights over movable and immovable assets became the subject of the most significant reforms and was designed under very different influences. Further, an infrastructure, needed for the effectiveness of these rights was created: notary law, land registry law, and enforcement and insolvency procedure law. Notary law, enacted in 2002/2003 was influenced strongly by German law, enforcement law and land registry law remained under Austrian influence, and land charge was modelled on German law.[85]

Despite the fact that secured transactions law has been exposed to different influences and that the reforms in this branch of law were not

81 Povlakić, 2016, p. 520.
82 Art. 86 para 4–8 PLA FB&H.
83 Art. 298–314 PLA FB&H; art. 74–90 PLA BD B&H; art. 286–302 PLA RS.
84 Art. 186–197 PLA FB&H.
85 For more, see Povlakić, 2010a, p. 230.

enacted simultaneously and with coordination, and that a systematic approach was not followed by the legislators, there is little to complain about the legislation in this area. First, surprisingly, the regulations borrowed from different legal orders are not mutually contradictory. Although this seems like a positive assessment or a successfully performed reform, in the application of law, this is a far from optimistic picture.

A paradigmatic example of this is the land charge, the device transferred from Germany. In Germany, the credits are predominately secured by land charge; the mortgage/hypothec is not broadly applied.[86] The main reason for this is the fact that the land charge is not an accessory security right, which allows for more flexibility and overcoming of some shortcomings of accessory mortgage in the banking and credit practice. In B&H the hypothec/mortgage was traditionally strictly an accessory, which hindered some flexibility in the different legal transactions. PLAs in B&H had followed the amendment of the ABGB from 1916 (The third Novelle), which meant that the accessoriness of the mortgage had been softened. The mortgage creditor can use a registered mortgage several times, or dispose with the rank of an extinguished mortgage, or the landowner can register a new mortgage parallel to the previously registered mortgage, which, after settlement, will take the place of the first registered mortgage (an operation that allows obtaining of a new more favourable loan, which also satisfies the creditor secured by the first registered mortgage). Parallel to these novelties, the PLA in the Federation B&H foresaw the land charge from German law, where this institute was not really regulated by the statutory provisions. It was rather developed by the German doctrine, judicial, and bank practice. For a successful transfer, it was necessary to transfer the entire German 'Acquis' of the land charge. This is definitively more problematic than adopting foreign statutory provisions. This problem was recognised in the Federation B&H and by actually drafting the land

86 According to reports from the practice of land registries, the ratio of registered land charges to mortgages should be around 80% to 20%. See Leider, 2023, § 1196, point 6.

charge regulating provisions, the German *law in action* in this field was adopted.[87] Although this task was successfully fulfilled, neither bank practice nor notary has recognised the advantages of this security right in comparison to a less flexible mortgage.

A further example that the new institute and possibilities of their use for different purposes are not recognised in the practice is the building right. The building right is a legal institution that enables economic use and investment by a person other than the owner, whereby the owner retains the property on the plot. This construction is particularly recommended in cases where cities or municipalities or the church are the owners of the land, that is, legal entities that may have a legitimate interest in not letting the land out of their hands and still want to use it commercially or realise a project without investing in it themselves. Unfortunately, however, in B&H, neither the public sector nor the church recognises this right as an economically interesting legal institute,[88] not even in its new important role in the context of renewable energies.[89]

The reform of securities on movable assets primarily means the introduction of non-possessory securities into the legal system of B&H. This reform does not imply the return to the legal tradition and acceptance of the Austrian legal provisions, since the Framework Law on Register Pledge (hereafter, FLRP)[90] which is uniform for the entire country, is highly influenced by art. 9 of the United States Uniform Commercial Code. [91] The FLRP represents a complete codification of the registered pledge stipulating the requirements for the creation of the pledge right, organisation of the register, the procedure of the registration, and enforcement over personal property encumbered with

87 Some authors limit the transplantation of law to the adoption of statutory provisions, although it can also take the form of transfer of case law. See Rehm, 2008, p. 6.

88 On its economic purpose as a 'legal form of urban housing' often when a property is owned by the public sector see Baur, Stürner, 2009, § 29, point 30, p. 385.

89 The building right can enable construction of solar panels and wind turbines.

90 Official Gazette of B&H [*Službeni glasnik BiH*], N° 28/2004.

91 The same happened in Montenegro, Kosovo and Romania. More by Jessel-Holst, 2003, p. 73; Živković, 2003, p. 319; Teves, 2004, p. 43; Povlakić, 2008, p. 37. More about key features of art. 9 see by Sigman, 2004, pp. 56; Creydt, 2007, p. 51.

registered security. This law accepts the basic principles on which Art 9 UCC is based. All forms of personal property, present as well as future property (tangible and intangible), can be encumbered by registered security. Furthermore, each obligation can be secured, and this regulation applies to all types of debtors or creditors. The different security rights regulated by different laws and created in accordance with respective provisions are submitted to a uniform principle with regard to priority. In general, only the registration is relevant for their ranking. The registration does not have a constitutive effect but is crucial for the priority ranking of the different securities. In B&H, the filing notice system providing information on possible interest on some property is accepted. The database is publicly available, but only accessible under payment of prescribed fees. The procedure of registration is simple, fast, and effective. In fact, there is no procedure of registration in the sense of a court or administrative procedure. The research and registration have to be conducted by the creditor who can directly register his right, without the participation of the court, without an examination of the application *au fond*. All procedural steps have to be performed electronically. In the procedure of settlement of secured creditors, special enforcement rules apply, which are more flexible and efficient than the rules of the general enforcement procedure.

The banks in B&H use the registered pledge in practice. The feedback is positive, and apparently, this legal transplantation was successful. The non-pragmatic and functional approach of the provisions of Art 9 UCC makes them neutral and applicable in different legal systems. This regulation has already inspired different national legal orders, not only continental and common-law legal orders, but also some international documents such as Cape Town Convention on International Interest in Mobile Equipment from 2001.[92] However, the success is still incomplete since some possibilities offered by this instrument are still not recognised and used in practice.

92 Povlakić, 2008, pp. 31–32.

3.5. SUCCESSION LAW

The two entities and Brčko Districts have reformed their succession law, by enacting their own succession acts: Succession Act of the Republic Srpska (hereafter, SuccA RS),[93] Succession Act of the Federation B&H (hereafter, SuccA FB&H),[94] and Succession Act of the Brčko District B&H.[95] The SuccAFB&H and SuccA BDB&H are almost completely harmonised and regulate both substantive succession law and non-contentious procedure in succession matters whereas in the Republic Srpska the procedure in succession matters is the subject of a separate Act on non-contentious procedure.[96]

The substantive law of succession in B&H dates to 1955, when the first Succession Act was passed in socialist Yugoslavia. After the constitutional reforms in 1971 and the transfer of competencies from the federal state onto former socialistic republics and autonomous regions (*supra* 2.4.3), almost all former republics/autonomous regions have passed their own successions acts, which have followed to a great extent the Succession Act from 1955. An exception was Croatia, where this federal act was overtaken by the Act of Socialistic Republic Croatia and was enforced until 2003. This can be explained by the fact that this Act from 1955 was a solid part of a legislation that followed mainly Suisse law with few concessions to the socialist legal order.[97] Therefore, it is not surprising that, after the secession from the former Yugoslavia, former republics when passing their new inheritance acts have followed their former

93 Succession Act of the Republic Srpska [*Zakon o nasljeđivanju RS*], Official Gazette of the Republic Srpska [*Službeni glasnik RS*], N° 1/2009, 55/2009 – corr., 91/2016, 28/2019 – Decision of the Constitutional Court, 82/2019.

94 Succession Act of the Federation B&H [*Zakon o nasljeđivanju FBiH*], Official Gazette FB&H [*Službene novine FBiH*], N° 80/2014, 32/2019 – Decision of the Constitutional Court of the Federation B&H.

95 Succession Act of Brčko Distrikt B&H [*Zakon o nasljeđivanju BDBiH*], Official Gazette of the BDB&H [*Službeni glasnik BD BIH*], N° 36/2017.

96 Non-contentious Procedure Act of the Republic Srpska [*Zakon o vanparničnom postupku RS*], Official Gazette of the Republic Srpska [*Službeni glasnik RS*], N° 36/2009, 91/2016, 16/2023.

97 The author of this Act is Professor Mihajlo Konstantinović, who was the main architect in drafting OA (see *supra* section 3.3).

succession acts and have retained the principles and institutions of the previous acts which stood under the impact of the Succession Act 1955.[98] Slovenia, even 40 years after secession from the former Yugoslavia, continued to apply the Succession Act adopted in the Socialist Republic of Slovenia in 1976.[99]

It is therefore not surprising that the same situation prevailed in B&H; the new succession acts in B&H lean on the former Succession Act of the Socialistic Republic B&H and since 1955 on the existing concept of succession law, whose main principles are equality of female and male heirs, legitimate and illegitimate children, *ipso iure* succession, binding direct universal succession, voluntary succession, limited circle of legal heirs, very narrow circle of compulsory heirs, compulsory succession as *pars hereditas* but not only monetary claim, equality of legal heirs of the same degree, division of legal heirs according to the parentelic system, etc.

The most striking innovations in the new inheritance law in B&H include the expansion of the circle of legal heirs, since this circle was limited during socialism, transfer of responsibility for probate proceedings to notaries, inclusion of illegitimate partners in the circle of legal heirs in the Federation B&H and BDB&H (Art. 9 SuccA FB&H, Art. 9 SuccA BDB&H), and the introduction of the inheritance contract (Art. 126–134 SuccA FB&H, Art. 130–136 SuccA BDB&H), into which both a spouse and an unmarried partner can enter.[100] This contract should be concluded in the form of a notarial deed, which, in the Federation B&H, was declared as not in line with the constitution.[101] SuccA FB&H and SuccA BDB&H have provided for the possibility of depositing

98 For Croatia see Josipovć, 2009, p. 190. For Serbia, Szalma, 2009, p. 186; for B&H, Povlakić, 2009a, p. 142.

99 Rijavec, 2009, p. 96.; Rudolf, 2020, p. 1338, N° 9.

100 The possibility of concluding an inheritance contract is not foreseen in the RS, which raises the question of recognising such a last will disposition concluded for example in the Federation B&H in probate proceedings in the Republic Srpska, where such a contract is forbidden. For more about the interlocal conflicts of laws in succession matters, see Meškić, Duraković, and Alihodžić, 2018, p. 637.

101 Decision of the Constitutional Court of the Federation B&H U-22/16 from 04.08.2019. This decision was sharply criticised by scholars, but it remains final and binding. For this criticism instead of many, see Softić, Kadenić, 2020, p. 535.

testamentary dispositions and other last will disposals in the registers kept by the Chamber of Notaries of the Federation B&H and Judicial Commission of the BDB&H.[102]

The right to a compulsory portion deserves special attention, as this institution was at the heart of the planned reforms in German or Austrian law. Regardless of whether these reform approaches are realised, it should only be noted here that there was no similar need for reform in B&H. First, in B&H the circle of compulsory heirs has traditionally been very limited. Only spouses (or, in the new inheritance law, illegitimate partners), children, and fully adopted children are compulsory heirs without having to fulfil any additional conditions[103]. Other descendants of the deceased, parents, and siblings can only claim a compulsory portion if they are incapacitated and without means. The fulfilment of these cumulative conditions is not easy. Second, there is a wide range of grounds for disinheritance, which means that the will of the testator is more strongly respected. Third, everything that a legal heir receives from the testator during his or her lifetime as a gift or similar gratuitous attribution, with the exception of minor gifts, is counted towards the compulsory share. These three points were the focus of discussions about inheritance reform in Germany and Austria.[104] Same-sex partnerships are not recognised by new inheritance law and generally in B&H law.

3.6. FAMILY LAW

As mentioned *supra* 2.3 and 2.4, the ABGB did not exert any influence on this brunch of law either between 1918 and 1941 or after World War II. The first codification of family law and the first rules that separated family law from religion and customs were enacted in B&H, respectively, in former socialistic Yugoslavia in 1946/47, in the very early stages of

102 Art. 124 SuccA FB&H; art. 128 SuccA BD B&H. Such a register is also maintained by the Notary Chamber of the Republik Srpska.

103 Art. 28 SuccA FB&H; art. 30 SuccA RS; art. 32 SuccA BDB&H.

104 Welser, 2009, pp. 11–23; Krajcer, Philadelphy, 2009, p. 73.

the development of the socialistic system. After the first Constitution of the socialistic state was adopted in 1946, it was not possible to follow the legal tradition in this field of law since all applicable family regimes in the Kingdom of Yugoslavia have recognised gender inequality, they treated women differently from men, and illegitimate unions and children born to such unions were not recognised.

The Federal Act on Marriage from 1946 states that the husband and wife were equal within the marriage (Art. 4).[105] This Federal Act empowered the former socialistic republics (and B&H was one of them) to regulate patrimonial regime within the marriage. The Property Relationships between Spouses Act was adopted in B&H in 1950[106] providing for joint ownership for spouses. In other words, the property acquired through work during marriage was declared as joint ownership, characterised by shares that were not determined in advance and by the fact that one spouse could dispose of the shared ownership only together with the other partner and in mutual consent.

Neither cohabitation nor its eventual patrimonial consequences were regulated by this act. It was the case law that recognised the patrimonial effects of cohabitation in former socialistic Yugoslavia in the early fifties. There was a wide range of court decisions, starting from those recognising claim on the basis of unjustified enrichment by a cohabitation partner[107] to recognising the patrimonial rights (rights *in rem*); contributions comprising housekeeping or raising of children were recognised.[108] After the recognition of participation in the property in a non-marital partnership by the case law, the same provision was incorporated in the Family Law of the Socialistic Republic of Bosnia and

105 Federal Act on Marriage [*Osnovni zakon o braku*], Official gazette of the Federative People's Republic of Yugoslavia [*Službeni list FNRJ*] N° 29/1946.

106 Property Relationships between Spouses Act [*Zakon o imovinskim odnosima bračnih drugova]*, Official Gazette of the People's Republic Bosnia and Herzegovina [*Službeni list Narodne Republike Bosne i Hercegovine*], N° 32/1950.

107 A leading case was a recommendation of the former Federal Supreme Court of Yugoslavia from 4 March 1957. For more details, see Bosiljčić, 1978, points 137–144.

108 Decision of the Supreme Court of the Socialistic Republic Bosnia and Herzegovina Gzz-15/71 from 22 July 1971.

Herzegovina from 1979.[109] This Act has established the principle of full equalisation of spouses, regardless of whether they are married or not; the similar status of children born within marriage and illegitimate children was also confirmed here. The principle of 'free parenthood' was proclaimed, which meant that everyone was free to decide about whether he/she wanted to become a parent, within the marriage or out of wedlock. In general, it was a modern and liberal Act, which served as the basis for new legislation in the field of family law in B&H after the dissolution of the former SFRY.

In B&H as an independent state, three separate Family Acts were adopted: the Family Act of the Federation B&H (hereafter, FA FB&H),[110] [111] the Family Act of Brčko District of B&H (hereafter, FA BDB&H),[112] and the Family Act of the Republic Srpska (FA RS). The first dates from 2002[113] and the new one from 2023 (hereafter, FA RS)[114]. The FA BDB&H is harmonised with the FA FB&H to a large extent. The new FA RS differs from the other two FAs, but represents serious legislative work, which has considered the recognised shortcomings in the practice and has tried, mostly successful, to solve them.

The mentioned FAs regulate marriage, relationships between parents and children, adoption, tutelage, proprietary and non-proprietary relations within the family, and the actions of the competent authorities in relation to marital and family relations and tutelage. The FA FB&H represents a complete codification of substantive and procedural family law; all judicial proceedings (litigation, non-contentious, and

109 Family Act of the Socialist Republic of Bosnia and Herzegovina [*Porodični zakon Socijalističke Republike Bosne i Hercegovine*], Official Gazette of SR B&H [*Službeni list SR BiH*], N° 21/1979, 44/1989.

110 Family Act of the Federation B&H [*Porodični zakon Federacije BiH*], Official Gazette FB&H [*Službene novine FBiH*], N° 35/2005, 41/2005, 31/2014, 32/2019.

111 More about new family law in the Federation B&H: Bubić, 2005, p. 11.

112 Family Act of the Brčko District B&H [*Porodični zakon Brčko distrikta BiH*], Official Gazette BD B&H [*Službeni glasnik BD BiH*], N° 23/2007.

113 Family Act of the Republic Srpska [*Porodični zakon Republike Srpske*], Official Gazette RS [*Službeni glasnik RS*], N° 54/2002, 41/2008, 63/2014, 56/2019 – Decision of the Constitutional Court of Republic Srpska.

114 Family Act of the Republic Srpska, [*Porodični zakon Republike Srpske*], Official Gazette RS [*Službeni glasnik RS*], N° 17/2023.

enforcement proceedings) relating to family law relationships are regulated by this act.

All three Family Acts are based on the same non-discriminatory principles as the Family Act from 1979. They take a few steps forward and incorporate in the family law values and principles that are set in some international agreements such as the Convention for the Protection of Human Rights and Fundamental Freedoms, Convention on the Rights of the Child etc. The right to private and family life is among the fundamental rights that are recognised and protected by the Constitution of B&H (Art. II.3.f). Children's rights are the focus of relations between parents and children; the FAs of the Federation B&H and Brčko District B&H do not deal with parenthood rights but rather with parenthood responsibilities and duties (parental care).[115] Parental care is defined as a set of responsibilities, duties, and rights of parents aimed at protecting the personal and property rights and interests of the children. Parental care shall be exercised in the best interests of the child.[116]

Protection against family violence is one of the main principles of family law in B&H.[117] FA FB&H and FA BDB&H provide for a special proceeding in the case of family violence.[118] In addition, the autonomy of will is better recognised in the new family law. For example, the spouses may arrange their patrimonial regime by conclusion of the nuptial agreement.[119] This agreement can be concluded before marriage as a pre-nuptial agreement effective after the marriage. The autonomy of will plays a more important role in divorce and division of matrimonial patrimony. Division of matrimonial patrimony can be made by agreement or by court decision. This agreement has to be concluded as a notarial deed.[120] The spouses can conclude a written agreement on divorce within the mediation procedure. The failure of the legislator is that it did not provide for the possibility of concluding an agreement on

115 Art. 129–149 FA FB&H; art. 112–132 FA BDB&H.

116 Art. 120 para. 2 FA FB&H; art. 112 para. 2 FA BD B&H; art. 95 para. 2 FA RS.

117 Art. 4 FA FB&H; art. 3 FA BDB&H; art. 15 FA RS. For Federation B&H, see Bubić, 2005, p. 11.

118 Art. 380–382 FA FB&H; art. 288–289 FA BDB&H.

119 Art. 252 para. 2 FA FB&H; art. 229 para. 2 FA BD B&H; art. 314–327 FA RS.

120 Art. 258 para. 2 FA FB&H; art. 235 para. 2 FA BD B&H; art. 307 para. 3 FA RS.

divorce in the form of a notarial deed, as it could significantly unburden the courts. The divorce agreement must include an agreement on division of matrimonial property,[121] and this agreement must be concluded in the notarial form, etc.

One can therefore say that family law in B&H follows the basic principles of contemporary international family law.[122] However, some issues remain open or present loopholes when considering modern tendencies in family law. One of these is the possibility of deprivation of the contractual capacity of the adults. For the reasons prescribed by the law, the contractual capacity of adults may be withdrawn in its entirety within a special non-contentious proceeding.[123] It is questionable whether the possibility of depriving a major person entirely of contractual capacity is in line with protection of the fundamental right in general or especially with regard to the Convention on the Rights of Persons with Disabilities.[124] [125]

Further, same-sex partnerships are not recognised at all. Although marital and non-marital unions are equal, there is no full alignment between them; additional conditions should be met for a relationship to be recognised as a non-marital union within the meaning of the law (e.g., the co-habitation should last over a prescribed period). The right to family and right to marry, guaranteed by the Constitution B&H, comprises also the right not to marry, the right to enter and dissolve a marriage. These constitutional fundamental rights should lead to complete equalisation between marital and non-marital unions. The prescribed period of time should be abolished as potentially discriminatory and the will and intention of partners to live together in consensual union should prevail before the formal condition of time limitation. The possibility of registering non-marital unions is not foreseen; hence, enormous

121 Art. 44 para. 1 lit. b) FA FB&H.

122 More about these principles by Schwenzer, 2007, p. 711.

123 Art. 192–196 FA FB&H; art. 173–177 FA BD B&H; art. 243–248 FA RS. The FA FB&H regulates the judicial non-contentious procedure aiming at deprivation of the contractual capacity (Art. 325–339), since in the Republic Srpska and Brčko District B&H this issue is subject to the Non-contentious Proceeding Act.

124 B&H ratified this Convention on 12 March 2010.

125 For more, see Majstorović and Šimović, 2018, p. 68.

problems arise in the practice in proving the existence of these unions, which can lead to loss of proprietary and inheritance rights.[126]

The possibility for single persons or unmarried partners to adopt children is limited or subject to additional conditions. For example, this is possible only if there are special justifying reasons or if the non-marital union has lasted at least five years.[127]

4. REFORM AND LEGAL TRANSFER – INSTEAD OF A CONCLUSION

The short overview of the development of civil law in B&H and recent reforms have shown that the history of modern civil law in B&H is the history of reception and transfer of law. The B&H is no exception; the circulation of legal models and solutions is a universal process.

It is obvious that some fundamental institutes and principles of private law have a neutral nature and may exist in different social and economic patterns, which enabled legal transfer and reception of law throughout history. The former Yugoslavia and B&H are a suitable example of this process. This fact has enabled the implementation of law or 'legal rules' from statutes that were in force before 1941 in the Kingdom of Yugoslavia for more than 30 years in the socialistic Yugoslavia, as has been demonstrated *supra* 2.4.1. It appears that in certain areas of private law, the transfer or transplantation of law from one legal order to another is possible, regardless of transplant-sceptics.[128] The doctrine has already determined that there are two types of transfers. Some legal institutes are culturally deeply embedded, while others are less dependent on a certain culture and society. The transfer of the former is very difficult and seen as 'organic', while the transfer of the

126 Demirović, 2013, p. 129; Povlakić, Mezetović-Međić, 2018, p. 59.

127 Art. 102–104 FA FB&H; art. 86 para. 3 and 87 para. 4 FA FB&H; art. 179 para. 2 and 181 para. 2 FA RS.

128 Teubner believes that the term 'Legal transplant' is a misleading metaphor; in his opinion, 'legal irritant' is a better term for this phenomenon. He is also sceptical about the 'convergences thesis'. Teubner, 1998, p. 12.

latter is relatively simple and characterised as 'mechanical'.[129] In the areas of private law closer to the market (property law, law on obligations), the legal institutes are more neutral, and their transfer has been more successful, while, for instance, the institutes of the inheritance and family law have not been transferred to a large extent.[130] B&H could again be taken as an example in this respect: its legal history contains both mechanical and organic transfers.

Property law in B&H is a good example: almost all property law is based on the ABGB with the exception of the concepts of possession, condominium, and land charge, which were adopted from German law. It is fortunate that the reforms of the property law, land registry law, notary law, insolvency and, in part, enforcement law were carried out with the support of the very same subject (GTZ), which had two positive effects. First, it was an influence originating from the continental European legal system, which is not alien to the B&H legal system. Second, the reforms were to a certain extent mutually coordinated. The adoption of the rules of Art. 9 UCC in the area of security rights over movables was transferred from American law; nevertheless, these rules fit well into the B&H legal system and cannot be considered a legal irritant.

The question arises whether, in today's globalised world, characterised by a strong internationalisation of legal relationships facilitated by technological progress, communication capabilities, increased mobility, internal regional markets,[131] and activities of supra-national

129 Kahn-Freund, 1978, p. 298 et seq., as cited in Teubner, 1998, p. 17. See also Bećić, 2018, p. 38 et seq.

130 The same matrix is repeated in the European Community, where the harmonisation or unification efforts are more intense in the area of contract law (with a direct impact on the functioning of the common market) than in family or succession law, where social, moral, and cultural values are more strongly expressed. In this sense, see Verbeke, Leleu, 2011, pp. 459–479, pp. 460–462; Martiny, 2011, pp. 429–457, pp. 429–431, p. 451. However, more recent developments show that these areas of law are not anymore exclusively a matter to be regulated by national law; instead, they are under the influence of values and principles that are set in some international agreements, primarily in the agreements sourced from international human rights law. For more about these principles, see Schwenzer, 2007, pp. 711–712.

131 Kieninger, 2005, p. XI.

institutions tasked with unifying law in general, an autonomous development would be feasible or even desirable? It is hardly possible for the national law of any country to develop completely independently. The doctrine speaks of the denationalisation of private law,[132] of the integration of private law or of the need to reconstruct legal doctrines, which, in the globalised world, can no longer be confined to national frameworks.[133]

132 Ibid., p. XVI.
133 Hoecke, 2003, p. 108.

REFERENCES

von Bar, Ch. (1981) 'Deliktsrecht' in Bundesministerium der Justiz (ed.) *Gutachten und Vorschläge zur überarbeitung des Schuldrechts*, vol. II. Bonn: Bundesministerium der Justiz, pp. 1681–1778.

Baur, J., Stürner, R. (2009) *Sachenrecht*, 18th edn. München: Verlag C. H. Beck.

Bećić, M. (2014) 'Primjena Medželle u postosmanskoj Bosni i Hercegovini', *Godišnjak Pravnog fakulteta u Sarajevu*, LVII, pp. 51–65.

Bećić, M. (2015) 'Austrougarska reforma pravosuđa i građanskog postupka u Bosni i Hercegovini', *Godišnjak Pravnog fakulteta u Sarajevu*, LVIII, pp. 107–124.

Bećić, M. (2018) *Pravni transplanti i pravni pluralizam: transformacija stvarnog prava u Bosni i Hercegovini 1878–1918*, thesis. Sarajevo: unpublished.

Bećić, M. (2022) *Između orijenta i okcidenta: recepcija Općeg građanskog zakonika u Bosni i Hercegovini*. Sarajevo: Pravni fakultet Univerziteta u Sarajevu.

Borić, T. (1996) *Eigentum und Privatisierung in Kroatien und Ungarn*. Wien–Berlin: Verlag Österreich.

Bosiljčić, M. (1978) 'Zajednička svojina' in *Enciklopedija imovinskog prava i prava udruženog rada*, vol. III. Beograd: Savremena administracija, pp. 830–846.

Bubić, S. (2005) 'Nova rješenja Porodičnog zakona Federacije BiH', *Pravna misao*, pp. 3–18.

Čaušević, Dž. (2005) *Pravno politički razvitak BiH*. Sarajevo: Magistrat.

Chanturia, L. (2008) 'Recht und Transformation, Rechtliche Zusammenarbeit aus der Sicht eines rezipierenden Landes', *Rabels Zeitschrift für ausländisches und internationales Privatrecht*, 72, pp. 114–134.

Creydt, M. (2007) *Die Besicherung von Weltraumvermögenswerten*. Frankfurt am Main: Peter Lang.

Demirović, R. (2013) 'Novi pravci u pravnom regulisanju vanbračne zajednice u bosanskohercegovačkom pravu', *Zbornik radova – Naučni skup: Razvoj porodičnog prava od nacionalnog do evropskog*, pp. 113–134.

Die Sammlung für Bosnien und Herzegowina erlassener Gesetze, Verordnungen und Normanweisungen (1881), vol. II. Wien: Landesdruckerei.

Gams, A., Đurović, Lj. (1990) *Uvod u građansko pravo*. Beograd: Naučna knjiga.

Gavella, N. (2003) 'Novo hrvatsko stvarno pravo u funkciji prilagodbe pravnog poretka Republike Hrvatske europskome' in Gesellschaft für Technische Zusammenarbeit mbH (ed.) *Das Budapester Symposium, Beiträge zur Reform des Sachenrechtes in den Staaten Südosteuropas – Budimpeštanski simpozijum, Doprinos reformi stvarnog prava u državama jugoistočne Evrope*. Bremen: Edition Temmen, pp. 20–47.

Gavella, N. (2008) *Nasljedno pravo*. Zagreb: Narodne novine.

Gavella, N., Josipović, T., Gliha, I. (2007) *Stvarno pravo*, 2nd revised edn. Zagreb: Narodne novine.

van Hoecke, M. (2003) 'L'harmonisation du droit privé en Europe', *Revue européenne de droit de la consommation*, 2, pp. 106–124.

Hondius, E. (2006) 'Jugoistočna Evropa i evropsko privatno pravo', *Evropski pravnik*, 1, pp. 9–27.

Jessel-Holst, Ch. (2003) 'Reform des Mobiliarsicherheitenrechts in Südosteuropa' in Gesellschaft für Technische Zusammenarbeit mbH (ed.) *Das Budapester Symposium, Beiträge zur Reform des Sachenrechtes in den Staaten Südosteuropas – Budimpeštanski simpozijum, Doprinos reformi stvarnog prava u državama jugoistočne Evrope*. Bremen: Edition Temmen, pp. 66–81.

Jessel-Holst, Ch. (2009) 'The Yugoslaw Law on Obligations and its Effects in Germany' in Vukadinović, R. D. (ed.) *Thirty Years of the Law on Obligation – de lege lata and lege ferenda, Collection of Reports, Kragujevac, 24th–27th of September 2008*. Belgrade: German Organisation for Technical Cooperation (GTZ) GmbH, Open Regional Fund for South East Europe – Legal Reform, pp. 164–171.

Josipović, T. (2003) 'Prilagodba hrvatskog građanskopravnog poretka europskom povratkom na načelo superficies solo cedit' in Gesellschaft für technische Zusammenarbeit (ed.) *Das Budapester Symposium, Beiträge zur Reform des Sachenrechtes in den Staaten Südosteuropas – Budimpeštanski simpozijum, Doprinos reformi stvarnog prava u državama Jugoistočne Evrope*. Bremen: Edition Temmen, pp. 98–122.

Josipović, T. (2008) 'Anpassung des kroatischen Zivilrechts an europäische Standards' in Welser, R. (ed.) *Privatrechtsentwicklung in Zentral- und Osteuropa, Veröffentlichungen der Forschungsstelle für Europäische Rechtsentwicklung und Privatrechtsreform an der Rechtswissenschaftlichen Fakultät der Universität Wien*. Wien: Manzsche Verlags- und Universitätsbuchhandlung, pp. 141–158.

Josipovć, T. (2009) 'Erbrecht in Republik Kroatien' in Welser, R. (ed.) *Erbrechtsentwicklung in Zentral- und Osteuropa, Veröffentlichungen der Forschungsstelle für Europäische Rechtsentwicklung und Privatrechtsreform an der Rechtswissenschaftlichen Fakultät der Universität Wien*. Wien: Manzsche Verlags- und Universitätsbuchhandlung, pp. 189–202.

Karčić, F. (2013) 'Opšti građanski zakonik u Bosni i Hercegovini: kodifikacija kao sredstvo transformacije pravnog sistema', *Zbornik Pravnog fakulteta Sveučilišta u Zagrebu*, 63(5–6), pp. 1027–1036.

Karčić, F. (2006) *Moderne pravne kodifikacije, Predavanja i zbirka tekstova*. Sarajevo: Pravni fakultet.

Konstantinović, M. (1960) 'Stara "pravna pravila" i jedinstvo prava' in *Zbornik građanskih zakonika Stare Jugoslavije*. Titograd: Grafički zavod.

Kieninger, E.-M. (2005) 'Einführung in das Thema' in Kieninger, E.-M. (ed.) *Denationalisierung des Privatrechts, Symposium anlässlich des 70. Geburtstages von Karl Kreuzer*. Tübingen: Verlag Mohr Siebeck, pp. XI–XVI.

Krajcer, S., Philadelphy, V. (2009) 'Pflichteilrechtliche Grundsätze in verwandten Rechtsordnungen' in Welser, R. (ed.) *Die Reform des Österreichischen Erbrechts, Verhandlungen des Siebzehnten Österreichischen Juristentages*. Wien: Manzsche Verlags- und Universitätsbuchhandlung, pp. 73–79.

Madl, F. (1998), 'Restoration of Property in the Central and Eastern European Countries' in Basedow, J., Hopt, K. J., Kötz, H. (eds.) *Festschrift für Ulrich Drobnig zum siebzigsten Geburtstag*. Tübingen: Verlag Mohr Siebeck, pp. 593–608.

Majstorović, I., Šimović, I. (2018) 'Opseg lišenja poslovne sposobnosti kao pretpostavka zaštite prava i dostojanstva osoba s invaliditetom', *Ljetopis socijalnog rada*, 25(1), pp. 65–84.

Marković, S. B. (1939) *Reforma našeg građanskog zakonodavstva*. Beograd: Politika i društvo.

Martiny, D. (2011) 'Is Unification of Family Law feasible or even Desirable?' in Hartkamp, A., von Bar, C. (eds.) *Towards a European Civil Code*, 4th revised and expanded edn. Alphen aan den Rijn: Wolter Kluwer International BV, pp. 429–457.

Meškić, Z., Samardžić, D. (2012) *Pravo Evropske unije I*. Sarajevo: TDP, Deutsche Gesellschaft für internationale Zusammenarbeit (GIZ) GmbH, Otvoreni Regionalni Fond za jugoistočnu Evropu – Pravna reforma.

Meškić, Z., Duraković, A., Alihodžić. J. (2018), 'Bosnien und Herzegowina als ein Mehrrechtsstaat', *IPRax: Praxis des Internationalen Privat- und Verfahrensrechts*, 38(6), pp. 633–642.

Misita, N. (2010) *Evropska unija – osnivanje i razvoj*. Sarajevo: Revicon.

Miladinović, S. (2006) 'Zaključenje ugovora u svjetlu odredaba načela evropskog ugovornog prava', *Zbornik radova Aktualnosti građanskog i trgovačkog zakonodavstva i prakse*, 4, pp. 191–210.

Možina, D. (2008) 'Uslovi i vremenska ograničenja odgovornosti prodavca za materijalne nedostatke', *Evropski pravnik*, 1, pp. 9–27.

Münchner Kommentar zum BGB (2023), 9th edn. München: Verlag C.H. Beck.

Nikolić, D. (2008) 'Recepcija stranih pravila o porodičnim zadužbinama', *Evropski pravnik*, 3, pp. 37–53.

Nikolić, D. (2013) *Uvod u sistem građanskog prava*, 11th revised and suplemented edition. Novi Sad: Univerzitet u Novom Sadu, Pravni fakultet, Centar za izdavačku delatnost.

Povlakić, M. (2008) 'Aufbau und Funktion der Register für Mobiliarsicherheiten in Südosteuropa', *Evropski pravnik*, 1, pp. 29–76.

Povlakić, M. (2009a) 'Grundzüge des Erbrechts in Bosnien und Herzegowina' in Welser, R. (ed.) *Erbrechtsentwicklung in Zentral- und Osteuropa, Veröffentlichungen der Forschungsstelle für Europäische Rechtsentwicklung und Privatrechtsreform an der Rechtswissenschaftlichen Fakultät der Universität Wien*. Wien: Manzsche Verlags- und Universitätsbuchhandlung, pp. 141–161.

Povlakić, M. (2009b) *Transformacija stvarnog prava u Bosni i Hercegovini*. Sarajevo: Pravni fakultet Univerziteta u Sarajevu.

Povlakić, M. (2010a) 'Property law in Bosnia and Herzegovina' in Jessel-Holst, Ch., Kulms, R., Trunk, A. (eds.) *Private Law in Eastern Europe*. Tübingen: Mohr Siebeck Verlag, pp. 205–236.

Povlakić, M. (2010b) 'Die Schuldrechtsreform in Bosnien und Herzegowina und der Konsumentenschutz' in Welser, R. (ed.) *Konsumentenschutz in Zentral- und Osteuropa, Veröffentlichungen der Forschungsstelle für Europäische Rechtsentwicklung und Privatrechtsreform an der Rechtswissenschaftlichen Fakultät der Universität Wien*, vol. III. Wien: Manzsche Verlags- und Universitätsbuchhandlung, pp. 137–165.

Povlakić, M. (2011) 'Bosnien und Herzegovina' in Rechberger, W. (ed.) *Die Entwicklung des Zivilprozessrechts in Mittel- und Südosteuropa seit 1918*. Wien: Jan Sramek Verlag, pp. 203–230.

Povlakić, M. (2012) 'Culpa in contrahendo im bosnisch-herzegowinischen Recht' in Welser, R. (ed.) *Haftung aus Verschulden beim Vertragsabschluss in Zentral- und Osteuropa, Veröffentlichungen der Forschungsstelle für Europäische Rechtsentwicklung und Privatrechtsreform an der Rechtswissenschaftlichen Fakultät der Universität Wien*, vol. V. Wien: Manzsche Verlags- und Universitätsbuchhandlung, pp. 129–151.

Povlakić, M. (2016) 'Die neue Bedeutung des Grundbuchs im Transformationsprozess in Bosnien und Herzegowina' in Wudarski, A. (ed.) *Das Grundbuch im Europa des 21. Jahrhunderts*. Berlin: Duncker–Humboldt Verlag, pp. 495–532.

Povlakić, M., Mezetović-Međić, S. (2018) 'Uređenje imovinskih odnosa bračnih i vanbračnih partnera i rodna ravnopravnost', *Dani porodičnog prava, Zbornik radova, Šesti međunarodni skup, Univerzitet Džemal Bijedić u Mostaru, Pravni fakultet*, VI(6), pp. 44–68.

Povlakić, M. (2019) 'Transformacija prava na građevinskom zemljištu – Never-ending story?', *Zbornik radova sa XVII Međunarodnog savjetovanja*, vol. titled Aktualnosti građanskog i trgovačkog zakonodavstva i pravne prakse, pp. 145–191.

Rašović, Z. P. (2006) *Građansko pravo*. Podgorica: Pravni fakultet.

Rehm, G. M. (2008) 'Rechtstransplantate als Instrument der Rechtsreform und –transformation', *Rabels Zeitschrift für ausländisches und internationales Privatrecht*, 72, pp. 1–42.

Rijavec, V. (2009) 'Die Grundzüge des Erbrechts in Slowenien' in Welser, H. (ed.) *Erbrechtsentwicklung in Zentral- und Osteuropa, Veröffentlichungen der Forschungsstelle für Europäische Rechtsentwicklung und Privatrechtsreform an der Rechtswissenschaftlichen Fakultät der Universität Wien*. Wien: Manzsche Verlags- und Universitätsbuchhandlung, pp. 95–121.

Rudolf, C. (2020) 'Slowenien' in Süß, R. (ed.) *Erbrecht in Europa*, 4th edn. Bonn: Zerb Verlag.

Rüssmann, H. (2009) 'Mistakes and Misunderstandings on the Path leading to the Law on Obligation in B&H in Thirty Years of the Law on Obligation – de lege lata and lege ferenda' in Vukadinović, R. D. (ed.) *Thirty Years of the Law on Obligation – de lege lata and lege ferenda, Collection of Reports, Kragujevac, 24th–27th of September 2008*. Belgrade: German Organisation for Technical Cooperation (GTZ) GmbH, Open Regional Fund for South East Europe – Legal Reform, pp. 101–118.

Savatier, R. (1959) *Les Méthamorphoses économiques et sociales du droit privé d'aujourd'hui*. Paris: Dalloz.

Schwenzer, I. (2007) 'Grundlinien eines modernen Familienrechts aus rechtsvergleichender Sicht', *Rabels Zeitschrift für ausländisches und internationales Privatrecht*, 71, pp. 705–728.

Sigman, H. C. (2004) 'Security in movables in the United States – Uniform Commercial Code Article 9: a basis for comparison' in Kieninger, E.-M. (ed.) *Security Rights in Movable Property in European Private Law*. Cambridge: Cambridge University Press, pp. 54–80.

Simonetti, P. (2008) *Prava na građevinskom zemljištu*. Rijeka: Pravni fakultet Sveučilišta Rijeci.

Slijepčević, R. M. (2009) 'Origin and Characteristic Features of the Concept of the Law on Obligation' in Vukadinović, R. D. (ed.)*Thirty Years of the Law on Obligation – de lege lata and lege ferenda, Collection of Reports, Kragujevac, 24th–27th of September 2008*. Belgrade: German Organisation for Technical Cooperation (GTZ) GmbH, Open Regional Fund for South East Europe – Legal Reform, pp. 26–39.

Softić-Kadenić, D. (2020) 'Posljedice prakse ustavnih sudova u BiH u vezi s nadležnostima notara po pravni režim nekretnina', *Godišnjak Pravnog fakulteta u Sarajevu*, LXIII, pp. 517–551.

Spaić, V. (1971) *Građansko pravo, Opšti dio i Stvarno pravo*. Sarajevo: Univerzitet u Sarajevu.

Stanković, O., Orlić, M. (1989) *Stvarno pravo*. Beograd: Savremena administracija.

Szalma, J. (2009) 'Die Entwicklung des Erbrechts in Serbien' in Welser, R. (ed.) *Erbrechtsentwicklung in Zentral- und Osteuropa, Veröffentlichungen der Forschungsstelle für Europäische Rechtsentwicklung und Privatrechtsreform an der Rechtswissenschaftlichen Fakultät der Universität Wien*. Wien: Manzsche Verlags- und Universitätsbuchhandlung, pp. 163–187.

Šarčević, P. (2003) 'Legal Reforms in Countries in Transition', *Zbornik Pravnog fakulteta Sveučilišta u Rijeci*, Supplement 3, pp. 759–769.

Teubner, G. (1998), 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences', *The Modern Law Review*, 61, pp. 11–32.

Teves, J. (2005) *Die Mobiliarsicherheiten im deutschen und rumänischen Recht unter Einbeziehung des französischen und US-amerikanischen Mobiliarsicherungsrechts*. Münster: LIT Verlag.

Vedriš, M., Klarić, P. (2000) *Građansko pravo, četvrto izdanje*. Zagreb: Školska knjiga.

Verbeke, A.-L., Leleu, Y.-H. (2011) 'Harmonisation of the Law of Succession in Europe' in Hartkamp, A., von Bar, C. (eds.) *Towards a European Civil Code*, 4th revised and expanded edn. Alphen aan den Rijn: Wolter Kluwer International BV, pp. 459–479.

Welser, R. (2009) 'Die deutsche Erbrechtreform – ein Vorbild für Österreich?' in Welser, R. (ed.) *Die Reform des Österreichischen Erbrechts, Verhandlungen des Siebzehnten Österreichischen Juristentages*. Wien: Manzsche Verlags- und Universitätsbuchhandlung, pp. 11–23.

Živković, M. (2003) 'O reformi realnih obezbeđenja u jugoslovenskom pravu' in Gesellschaft für Technische Zusammenarbeit mbH (ed.) *Das Budapester Symposium, Beiträge zur Reform des Sachenrechtes in den Staaten Südosteuropas – Budimpeštanski simpozijum, Doprinos reformi stvarnog prava u državama jugoistočne Evrope*. Bremen: Edition Temmen, pp. 304–324.