FULFILLMENT OF PROPERTY RIGHTS IN BOSNIA AND HERZEGOVINA

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Abstract

This article aims to give an overview of the main influences on the development of property law and property rights in Bosnia and Herzegovina as well as an overview of certain current issues. As one of the main legislative influences for the development of civil law in general and property law specifically in the legal system of Bosnia and Herzegovina, the Austrian General Civil Code can be identified. However, one of the most significant events is the impact of the transformation of private property through nationalization and confiscation in the period of socialist Yugoslavia. The aftermath of such radical change and the effects of subsequent subpar solutions aimed at privatization and the transformation of ownership of the property has left significant difficulties in the fulfillment of property rights. Especially detrimental is the stalemate in the issues of restitution of property to previous owners, which is specifically interesting in the case of waqf property. Another issue is the politically charged question of state-owned property. Such a situation results in several instances of violation of human rights as well. Especially worrying is the practice of disregarding the property rights of the returnees. After the overview of the main historical points and the current situation of the fulfilment of property rights, specific issues and cases are presented. Throughout the research, the legal-historical method, together with content analysis, case study and normative methods are used. The main goals are to give an overview of the historical context and provide an analysis of the most important current issues related to the fulfillment of property rights in Bosnia and Herzegovina such as the question of state-owned property, restitution and compensations as well as issues related to rights of returnees. Finally, certain recommendations related to the main issues such as state-owned property, restitution and certain legal discrepancies related to condominium ownership rights are given.

Keywords: Property Law, Property Rights, Civil Law, Restitution, State-Owned Property

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1. Introduction

In order to give a general overview of the main points in the historical development and transformation of property law and the content of the property rights that have happened in the legal system of Bosnia and Herzegovina since the late 19th century until today, we need to understand the main political and social changes happening in that period. The first major transformation occurred in the period following the occupation and subsequent annexation of Bosnia and Herzegovina by the Austro-Hungarian Empire. Although certain legal rules and concepts existing in the previous Ottoman period remained important, the rise of influence of legal solutions found in the Austrian Civil Code represented a sort of basis for the development of property law and civil law in general. Further significant change occurred during the period of the Socialist Federative Republic of Yugoslavia which adopted the concept of socialist economy and political order conducting large-scale nationalization and confiscation significantly reducing the quantity of private property. The main concepts regarding the substance of property rights changed with the adoption of the doctrine of "self-managing socialism" (*samoupravni socijalizam*), with the introduction of the concept of societal property (*društvena imovina*). In the last years of the existence of Yugoslavia, certain changes with the aim of transformation of property rights have been undertaken, however, any activities concerning the restitution and privatization were halted by the breakup of Yugoslavia and subsequent wars. In Bosnia and Herzegovina, the war and subsequent legal structure, created following the Dayton Peace Agreement (DPA) presented new challenges which are visible primarily in the solutions related to the transformation of societal property to state-owned property and the subsequent stalemate in finding solutions related to state-owned property. Further activities in privatization brought new dilemmas. Legislative changes in the area of property law, in the first line the adoption of updated Laws on property rights represent reaffirmation of the concept of ownership as the basis of property rights and private property as the basis of economic activity. However, besides those "systemic" issues certain specific issues are visible. Another worrying aspect is the practice of disregarding of property rights of returnees, with specific legal and administrative obstacles that amount to violations of human rights.

Due to the importance and large number of the issues related to property rights, many aspects of them demanding separate research and analysis, this article aims to give a brief overview of the main topics such as the overview of the historical context, the analysis of the issue of "state-owned" property and restitution, as well as certain issues the returnee population is facing in fulfilment of their property rights. Throughout the article, the historical-legal method, together with content analysis, case study and normative method is used. Certain recommendations are given, specifically concerning the use of the term "state-owned property" and possible options to be considered related to the reform of the "state-owned" property and restitution, as well as certain recommendations related to identified deficiencies in the application of the new property law legislation, primarily related to the issues of condominium ownership rights. Solutions related to state-owned property are found to be inadequate, anachronistic and in contravention of the constitutional order, starting from the very term "state-owned" property. Further, the inactivity in

the process of restitution or payment of compensation for the previous owners of the property confiscated during the socialist period creates significant issues. The issues of returnee discrimination are concerning. Newly adopted legislation related to property has shown certain deficiencies regarding ownership of condominium rights, especially in the development phase. This article aims, following the analysis to provide certain recommendations in addressing the enumerated issues.

2. The Overview of the Transformation of Property Law and Property Rights in Bosnia and Herzegovina

2.1. Historical aspects of the development of property law in the late 19th and early 20th century

The process of legal codification of property law in the legal system applicable in the territory of Bosnia and Herzegovina can be traced to the late period of the rule of the Ottoman Empire. However, the process of legal reforms, which included the adoption of codified laws practically coincided with the start of the rule of the Austria-Hungary Empire in Bosnia and Herzegovina, first in the period of occupation and then in the period of annexation. The legal reforms in the form of the adoption of the Ottoman Land Law from 1858 and the Ottoman Civil Code (*Mecelle*), whose regulations were adopted successively in the period from 1869 until 1876, encompassing different aspects of civil law, including property rights was influential in Bosnia and Herzegovina even throughout the Austria-Hungarian rule (Čajlaković, 2009, 244). The new ruling empire, especially in the initial period relied on already existing social and legal order gradually introducing reforms. Because the majority of lawyers and judges, at least in the initial period, received legal education during the Ottoman period, and in the case of personal relations different sets of rules of customary/religious origin were applicable, during the period of the rule of Austria-Hungary, the mix of legislation, including sharia rules, *Mecelle*, customary rules and legislation introduced by the Austria-Hungary was applied. In the Ottoman period, property rights were usually divided into *erazi miri* which could be described as the property owned by the state, or under the ownership of the sovereign, with restrictive rules related to the use and disposal of such property, and *erazi mulk*, which could be described as personal property which represented private property, with specific rules applicable to *waqf* as a specific type of religiously motivated endowments made for the public use (Ćeman, 2011, 244). The quantity of *waqf* property and its importance in the Ottoman period, and in the first period of the rule of Austria-Hungary was of great importance and was a subject of many disagreements between the local population and the administration, showing a need for significant legislative activity (Čajlaković, 2009, 244).

In the later period of Austria-Hungary's rule, the most significant impact on the civil law and especially property law aspects of the legal system of Bosnia and Herzegovina was by the General Austrian Civil Code (*Allgemeines bürgerliches Gesetzbuch* - ABGB). Generally, the rules of ABGB applied at a time, a modern understanding of property rights and private property based

on general rules rooting back to the main understandings of Roman law and its adaptations. The rules of ABGB were applied by the new courts and gradually received reception in the legal system of Bosnia and Herzegovina *de facto* becoming generally applicable rule of law. Such a situation remained even in the period following the dissolution of the Austro-Hungarian Empire and the formation of the State of Serbs, Croats, Slovenes, and the period of the first Yugoslavia. The legal landscape of the Kingdom of Yugoslavia was characterized by stark legal particularization since different parts of the country had very different legal backgrounds and previously applicable legal systems and the legislative activity aimed at legal unification was rudimentary (Povlakić, 2009, 16). However, as significantly detrimental, the activities related to agrarian reform can be pointed out, especially in their discriminatory effects (Čajlaković, 2009, 246). Therefore, during that period, the application of a mixture of different rules, out of which the most prominent one being the rules of ABGB was prominent in Bosnia and Herzegovina.

2.2. *Property law and property rights in the socialist Yugoslavia*

The formation of socialist Yugoslavia after the Second World War started the process of significant changes in property law and the extent of property rights in general. The qualitative change was a stark reduction of private property rights in favor of public property. Due to the introduction of socialist economic and political order, the large-scale reduction of private property and nationalization was undertaken by the series of legislation such as the Law on Agrarian Reform and Colonization from 1946, the Law on Nationalization of Rental Buildings and Construction Land from 1958, the Basic Law on Expropriation from 1949, the Basic Law on Agricultural Land Utilization from 1959, the Decree on arrondissement from 1946, the Law on Property Rights in Business Buildings and Business Premises from 1979 and many other laws and regulations (Halilović, 2022, 16). The quantitative substance of private property was dramatically reduced, including all types of private property, together with the development of a socialist planned economic model.

The substance of property rights has also changed over time, following the changes in the constitutional order and understanding of the political and economic system. Generally, property law rules distinguish between state-owned property, private property and personal property (Povlakić, 2009, 20). Only state-owned property and personal property were enjoying constitutional recognition, while private property was considered a source of class disparities and treated unfavourably in the laws. Personal property, on the other hand, was allowed and owners were able to use and dispose of it. Personal property was understood as property for personal and family use and was under quantitative restrictions (e.g. up to 10 hectares of agricultural land or up to one house or apartment). The use of private property for acquiring profit in the market was severely restricted and even the use of immovable property for rent was subject to legal restrictions (Povlakić, 2009, 22). The main ideological idea was that the use and amassing of private property was a source of class disparity.

The understanding of state-owned property, on the other hand, was subject to changes which were reflected primarily in the Constitution itself. In the initial period of the establishment of a socialist order, the property was nationalized and considered state-owned, and the economy was administratively organized and planned. With the development of socialist society and doctrinal understandings, the state-owned property (*državna imovina*) was replaced by "societal property" (*društvena imovina*), via constitutional and legislative changes starting from 1974. The change was influenced by the development of the doctrine of "self-managing socialism" (*samoupravni socijalizam*), which was seen as an authentic socialist doctrine of former Yugoslavia incorporating the elements of workers-owned enterprises and elements of the market economy. The substance of societal property comprised of different elements or rights to conduct, use and dispose (*pravo upravljanja, korištenja i raspolaganja*) of that property (Šarčević, 2012, 31). The main theoretical premise was that workers, entering into associations of economic nature (organizations of unified labor – *organizacije udruženog rada*), as well as social or political ones, invested their labor and were entitled to use the means of production as well as the results (profits) of their labor. Therefore, theoretically and conceptually societal property and state-owned property cannot be considered as same, since, theoretically, societal property is broadly considered as property of the people or, more precisely, the property of the workers (which in turn, in modern terminology could be understood as property of citizens) and not of the state as a legal entity. The largest extent of the substance of property rights was contained in the right of disposal (*pravo raspolaganja*). In the land registry, the immovable property thus was registered as societal property with the right of disposal belonging to a certain economic enterprise or unit of government (e.g. municipality) (Šarčević, 2012, 31).

Towards the dissolution of Yugoslavia, certain changes were introduced as a sort of preparation for the transition to private ownership and market economy. Therefore, certain constitutional and legislative changes in the constitution of federation and republics as well as legislative changes recognized the equality of different types of ownership (societal, private, and personal property), removing certain quantitative restrictions on private and personal property (Mehmedović, 2011, 21). However, any further economic changes were abruptly halted by the brake out of several brutal wars encompassing several Yugoslav former republics.

2.3. *Transformation of property rights since the independence*

Following the breakout of war in Bosnia and Herzegovina and the formation of the Republic of Srpska (RS) and Federation of Bosnia and Herzegovina, who were later recognized as "entities" under the sovereignty of Bosnia and Herzegovina by the Dayton Peace Agreement and its constitutional setup, both of the entities have adopted certain legislation concerning the transformation of ownership of the societal property. The steps undertaken have created significant difficulties which are present even in the current legal and political sphere. Namely, both entities adopted similar legislation transforming societal property into "state-owned" property (Mehmedović, 2011, 27).

However, such steps can be seen as highly problematic for several reasons. The first one is the already mentioned conceptual difference between state-owned property and so-called societal property in the sense that those two are not synonyms but different societal and legal concepts altogether. Further, the very definition of "state" in adopted legislation is highly problematic, because the legislation of the Republic of Srpska recognizes it as the entity as the "state" and practically undertakes a complete usurpation of any land and property that would belong to Bosnia and Herzegovina as the state (Povlakić, 2009, 46). On the other hand, the law adopted at the level of the Republic of Bosnia and Herzegovina (later Bosnia and Herzegovina) does another dangerous operation of dividing "state-owned" property between the level of Bosnia and Herzegovina and level of Federation of Bosnia and Herzegovina (Povlakić, 2009, 48). Thus by applying the territorial approach with a vague or absent definition of "state". Therefore, it can be said that laws were aimed as a sort of political "land grab". Both laws also ignore the needs of local government and municipality city level of governance. After entering into force of the Dayton Peace Agreement, the entities enacted legislative changes in the form of Laws on basic property rights, abandoning the previous concept of "societal property" and the content of its rights (such as right of use and right of disposal). However, the previous "societal property" property in land registries is registered as "state-owned" with the certain beneficiary being identified as a holder of the right of disposal (*nosioci prava raspolaganja*), thus perpetuating the previous concept of property rights and assigning "right of disposal", whose content, as previously noted, is conceptually different and anachronistic to the new property legislation that recognizes the concept of ownership and its substantial content. Further, the transformation of the companies under "societal ownership" was to have effect only in the sense of ownership of those companies as legal entities, and not their property, which was supposed to remain as part of the property mass of the company itself (Povlakić, 2009, 51).

Following the establishment of the "Dayton" legal system, entities have entered into the process of privatization of parts of the (previously societal) now state-owned property. The privatization encompassed state-owned (previously societal-owned) companies and has more or less been completed, producing results that are largely seen as unsatisfactory. Regarding immovable property, activities aimed at denationalization and restitution of previously privately owned property that was taken by previous owners in the period of socialist Yugoslavia have been stopped by the decisions of the High Representative (Ćeman, 2011, 108).

The segments of immovable property that were subject to privatization and partial denationalization are the apartments and (partially) the property in the urban areas i.e. urban developmental property (*gradsko građevinsko zemljište*). The apartments were privatized by the holders of the right of use (*pravo korištenja*), which was largely done by the use of certificates (vouchers recognizing certain value a person has in the "societal property" as calculated by their years of employed work). The certificates could be used in the privatization of companies and flats largely speeding up the process. In that regard, there was a situation of conflict of rights of the previously nationalized apartments and property in general, because instead of restitution of property to previous owners (or compensation), the right of holders of right of use was seen as

having priority (Ćeman, 2011, 180). The holders of the right of use of the apartments that were not nationalized or taken away by previous owners, (i.e. that were built during the period of socialist Yugoslavia) thus had a "clearer" situation where there was no conflict between their claim and claim of previous owners. The situation was especially significant concerning the property (previously) belonging to religious societies as holders of various endowments, including *waqf*. The law in the Federation of B&H foresaw some sort of compensation to the previous owners by requiring that registration of the holder of a right of use, is conditional to the registration of the right of the previous owner on another property. However, such a solution was annulled by the Constitutional Court of the Federation of B&H, due to the difference in treatment between the holders of the right of use (Decision 28/06, Const. Court, 2007), *de facto* giving priority to the holders of the right of use and priority to privatization, instead of previous owners and their request for restitution or compensation.

On the other hand, entity Laws on urban development land partially de-nationalized the land in urban areas by allowing the return to previous owners of immovable property that was not taken away by the laws on nationalization but by the decisions of municipal councils if they have not been put to use as foreseen by the development plan (Povlakić, 2009, 166). Further legislative changes in RS give the possibility of the municipal governments to dispose of urban developmental land even in the case it was nationalized by laws on nationalization and not just by the decisions of the municipal council, through the decisions on the sale of land. A similar solution exists in the Federation of B&H, where municipal governments can "award" land for development and building to the investor, who, following the completion of the project becomes its owner. Such a solution, however, produces uneven results and certain arbitrary decisions by local governments which ultimately results in a practical reduction of the substance of the urban development property (Povlakić, 2009, 51).

Through privatization of companies and flats and partial denationalization of urban development land, the quantity of "state-owned" property is reduced. Further attempts at its reduction and disposal by the entities were stopped by the decisions of the High representative, by the introduction of decisions and Laws on the prohibition of disposal of state-owned property (Mehmedović, 2011, 21), in line with the decision of the Constitutional Court of Bosnia and Herzegovina, who considers that such legislation must be adopted at the state level of Bosnia and Herzegovina (Decision No U-1/11, Const. Court FBH, 2012). The Commission on State-owned Property was established with the task of drafting the state legislation and the disposal of state-owned property by issuing exemptions from the prohibition of disposal, including the property which belongs to Bosnia and Herzegovina following the succession from former Yugoslavia. However, the Commission could not come up with an agreement on the legislation, leaving the issue in the *status quo* situation (OHR statement).

Discussions over the issue of state-owned property have become a major political issue, especially in recent years. The Republika Srpska Peoples Assembly on 10 February 2022 adopted the *Law on Immovable Property Used for the Functioning of the Public Authority of the Republika Srpska* (Official Gazette of Republika Srpska, 29/22). This Law makes it possible for the part of

"state property", which is under the ownership of Bosnia and Herzegovina, to be transformed into an entity's property, including the property of the local self-government units, public companies, public institutions and other public services. The Constitutional Court of B&H concluded that the adopted entity law is in contravention of Articles I (1), III (3)(b) and IV(4)(e) of the Constitution of Bosnia and Herzegovina and that said law is unconstitutional in its entirety (Const. Court, Decision No. U-10-22, 2022). Furthermore, the Office of the High Representative (OHR) called on that, this adopted law does not affect the validity of the state-owned property disposal ban and thus, does not change this legal reality (OHR statement, 2022). Discussion of the state/public property goes back several years. In November 2020, Republika Srpska and Serbia agreed to build three hydroelectric power plants on the Drina River. For example, the construction of Buk Bijela hydroelectric power plant started in May 2021. Since the permission was granted without approval at the state level, a complaint was filed with the Constitutional Court of B&H, which ruled in July 2021, when the Constitutional Court B&H determined that rivers and riverbeds were state property (EU Commission, 2022).

On the other hand, the legislation related to property rights in both entities is updated by the introduction of new entity Laws on property rights (*Zakon o stvarnim pravima*), legislation related to land registries (*zemljišne knjige*), and legislation related to company law and state-owned companies etc. The new legislation generally gives protection to private property accepting private ownership and market economy as basic foundations. As the basis for the legislative changes, as seen in the novel Laws on Property Rights, the Austrian civil code is taken once again (Povlakić, 2009, 78). The new property rights laws introduce certain updates specifically concerning condominium rights (*etažno vlasništvo*) and the right to build (*pravo građenja*). That way, the property law legislation in Bosnia and Herzegovina has made a sort of full circle, by returning to the Austrian civil code, as its original inspiration.

2.4. *Current state of property law in Bosnia and Herzegovina and main issues in fulfillment of property rights*

Bosnia and Herzegovina currently faces numerous issues which are having a detrimental effect on the fulfillment of property rights. The number and the extent of them exceed this article, however, we can have a brief overview of certain issues which are leaving the biggest impact currently.

As stated, the basic concepts of property rights have traveled kind of a full circle by returning to the concept of private property and ownership as the basis of property rights and the Austrian civil code as a basis of legislative inspiration. The previous concepts of "societal property" (*društvena imovina*) with the substance of its right divided between separate concepts of right to conduct, use and dispose (*pravo upravljanja, korištenja i raspolaganja*) are abandoned, at least, in the norms of positive law. However, there are a lot of unresolved issues, together with certain newly created ones.

The first issue can be described as the stalemate in the efforts of denationalization and restitution or compensation (in the cases of impossibility of natural restitution) of the property that has been taken by the previous owners during the socialist Yugoslavia. Legally, restitution and compensation are strictly not required neither by the Council of Europe or European Union legal regimes, and multiple models exist in former socialist countries. However, the restitution and/or compensation are anticipated by certain legislative solutions and especially by the economy and the society itself. The *status quo* of uncertainty and inaction in regard to a sizeable mass of property has detrimental effects on economic development and investment. For example, the sheer mass of agricultural land that is not put to use and is practically "blocked", coupled with a situation of no apparent plan of the "state" for its more rational use, is staggering. Such property, if released, could be used as a catalyst for the development of agriculture and food production, which could be described as strategic resources. Further, the rights of previous owners and especially of the holders of *waqf* and other endowments are completely disregarded.

The current state of partial denationalization of urban development land (*gradsko građevinsko zemljište*) leads to discrepancies in its use and the reduction of a valuable resource belonging primarily to the local communities. One of the reasons for possible inactivity in the area of restitution and compensation is the projections of high financial burdens which would befall the state in the process. However, several models of state bonds and other solutions exist in other countries and that alone cannot be regarded as justification (Povlakić, 2009, 69). The model of restitution that favours the natural restitution of the property (i.e. the return of the property to previous owners) should be followed. Since such return and restitution in many cases is impossible, in the case of the inability of the restitution of the property, financial compensation, either in a single payment or in the form of long-term state bonds should be used.

Another major problem is the status of the state-owned property. Main issues can be identified in the conceptual approach related to the status of state-owned property. The first conceptual problem is in the very name used by legislation and policy documents. The name "state-owned" property can be described as imprecise and often misused. The first reason is because of the lack of definition of the "state", which due to its vagueness often relates to different entities, municipalities, and even enterprises that do not represent "state" in the sense of the current constitutional setup of Bosnia and Herzegovina. Therefore, the legal scholarly literature proposed a more adequate term that should be used in the form of the use of term "public property" (*javna imovina*). Further, the current manner in which state property is registered in land registries by considering it as state property with "right of disposal" (*pravo raspolaganja*) designated to certain beneficiaries is absolutely out of sync with current legislation which does not use the previous concepts of right of conducting, usage and disposal as elements and content of the "societal property". That being said, it needs to be reiterated that the concepts of "societal property" and state-owned property are not synonyms but two separate concepts altogether and following the previous doctrine of self-managing socialism (*samoupravni socijalizam*) which produced the concept of "societal property", the "society" as a title holder is not equivalent to the state as a legal entity.

Any laws regulating state-owned property need to abandon the territorial concept which considers all state-owned property situated on the territory of a certain entity as belonging to that entity thus considering the entity as filling the role of the "state". The first reason is that the "territory" of both entities is under the sovereignty of Bosnia and Herzegovina, and the inter-entity demarcation line is not considered as a border but as an "administrative delineation". Instead of a territorial approach, a functional approach (or a certain combination of the two approaches), which recognizes the user of the "public" property is recommended (Povlakić, 2009, 61). The functional approach would primarily consider the fact of who is the user of the property instead of blanket appropriation of "state-owned" property by the entity based solely on the fact that it is situated on its "territory". Therefore, it could include local communities and public enterprises as well. In that sense, the legal regulation of the concept of the user or holder of the right of disposal (*pravo korištenja*) is necessary, if their direct definition as the "owner" wants to be avoided. However, that issue is a source of much political tension and disagreement and no viable solution is in sight. Recently it has even been used to fuel separatist rhetoric in the entity of the Republic of Srpska (n1info.ba). Further issues that can be identified are the issues of divergence and general discrepancy between the data in the land registry and cadaster which needs to be brought in line.

As certain newly raised issues, the subpar solutions in the reformed Law on private property can be identified, especially in the case of condominium ownership rights (*etažno vlasništvo*). Namely, the legislative solutions in the Federation of B&H do not allow for certain protection in the phase of development and construction of new buildings. Instead, future owners of flats have to wait for the completion of construction for the separation of flats (*etažiranje*) to commence for them to be able to become owners of the individual flats (Handalić, 2021, 177). The solution created in practice of the conclusion of "contracts of joint investment" is subpar and does not give full protection. Therefore, a certain level of protection and recognition of legal status in the construction phase needs to be given to the investors. The possible solution can be found in Turkish legislation which recognizes the concept of "floor easement" or *kat irtifak*, as a sort of recognition of rights of ownership over future flats in the construction phase, which upon its full completion is transformed into condominium ownership rights *(kat mulkiyet)*.[16]

In addition to enumerated issues, the issues that returnee communities face, in the sense of obstacles in having their confiscated or destroyed property returned are alarming, together with certain legislative changes which have detrimental effects on the fulfilment of the property rights belonging to returnees.

[16] Article 1 of the Flat Ownership Law:
"Independent ownership rights may be established by the owner or co-owners of that real estate, in accordance with the provisions of this Law, on the parts of a completed building such as floors, flats, business offices, shops, stores, cellars and warehouses that are suitable for use separately and independently.
Easement rights may be established by the landowner or co-owners of the land, in accordance with the provisions of this Law, on the parts of a building that is being constructed or will be built in the future, specified in the first paragraph, as a basis for the condominium ownership that will be transferred after the building is completed."

3. Issues of the Fulfilment of Property Rights of Returnees in Bosnia and Herzegovina

The current situation of property rights in Bosnia and Herzegovina can be discussed through the evaluation of the enjoyment of individuals' rights on private properties and the legal status of public/state properties. Key concerns have arisen about the lack of updates and interconnections of the entity-level cadaster and land registry databases and no resolution has been found for ongoing repossession cases. The Commission on Real Property Rights of Displaced People and Refugees is also evaluated as an inactive branch (European Comission, 2022).

The Dayton Peace Agreement (DPA) opened up the possibility of returns, most especially the politically sensitive cross-boundary return of Bosniaks and Croats to their previous homes in the entity of Republika Srpska and Serbs to the Federation (Toal and Dahlman, 2006, 1).

During the war, Serb nationalists followed the strategy of providing non-Serb land and real estate to Serbs to preserve the demographic consequences of ethnic cleansing and genocide (Toal and Dahlman, 2006, 2). These kinds of strategies were boosted by legal instruments. Abandoned Property Act 1996 *(Zakon o korištenju napuštene imovine)* can be an example of that.

In the post-DPA period, new sort of laws and regulations were enacted to protect the property rights of the displaced people. The Restitution of the Property Act of 1998 (Law on termination of Code on use of abandoned property, 2010), which regulates the restitution of privately owned real property abandoned after 30 April 1991, abrogated the Abandoned Property Act of 1996. Other legal restorations for the property rights were tried to be achieved through the Law on Temporarily Abandoned Real Estate Owned by Citizens in the Federation of Bosnia and Herzegovina (*Zakon o privremeno napuštenim nekretninama u vlasništvu građana u Federaciji Bosne i Hercegovine)* and Law on Amendments to the Law on Termination of Application of the Law on Abandoned Residences in the Federation of Bosnia and Herzegovina "*Zakon o izmjenama i dopunama Zakona o prestanku primjene Zakona o napuštenim stanovima u Federaciji BiH".*

These amendments aimed to ease procedures and fulfil the obligations put under the Annex 7 of the DPA.[17] However, these amendments caused even more inconsistencies and burdens for the returnees. Article 35 of the *Law on Termination of Application of the Law on the Use of Abandoned Property*, Article 17 item d)of the *Law on Temporarily Abandoned Real Estate Owned by Citizens in the Federation of Bosnia and Herzegovina* and Article 18 item a) of *Law on Amendments to the Law on Termination of Application of the Law on Abandoned Apartments in the Federation of Bosnia and Herzegovina* have put an obligation of reimbursement of necessary expenses to the temporary users by the real owners. The legal provisions established that, after the

[17] "*All refugees and displaced persons have the right freely to return to their homes of origin. They shall have the right to have restored to them property of which they were deprived in the course of hostilities since 1991 and to be compensated for any property that cannot be restored to them.…The Parties shall take all necessary steps to prevent activities within their territories which would hinder or impede the safe and voluntary return of refugees and displaced persons."*

property has been returned to the owner, temporary users have the right to claim reimbursement of expenses invested in temporary residences for living (Ombudsperson Institution, 3).

Court decisions obligated returnees to pay compensation for these invested funds, and legal interest, and cover the costs of court proceedings. As these fees often surpass the value of the property as determined by the court and since the returnees do not have the financial means to collect these fees, the court chooses to resolve the monetary claims of temporary users through enforcement proceedings, including the sale of the property held by the owner. This results in the owner losing their property and beginning to doubt their right to return and their right to a home. The court decisions in this regard essentially undermined the application of Annex VII (Ombudsperson Institution, 3).

Authorities in Bosnia and Herzegovina have set up housing offices in every municipality throughout the country to ease procedures for individuals to initiate claims for property repossession. The claiming process is characterized by its administrative nature, chosen for several advantages over a judicial process. Using an administrative approach prevented the potential overload of the judicial system with a high volume of property repossession claims, which might have otherwise resulted in lengthy waiting periods for claimants seeking resolution. Furthermore, the post-conflict Bosnian court system was perceived as having ethnic biases, particularly concerning refugees and displaced persons who had experienced property deprivation through court proceedings. Overall, the local housing offices have received approximately 260,000 claims for property repossession (Prettitore, 2009, 9).

3.1. Violations of Private Property Rights of the Returnees – Case of Ms Fata Orlovic

Private property rights violations in BiH in plenty of cases could not be resolved through local remedies. Caseloads, lack of proper enforcement mechanisms, opacity around land records (Parramore, 2020, 23), long delays and inconsistent legal procedures guided citizens to seek solutions in international institutions. In particular, no solution was found for pending repossession cases. According to the 2022 European Commission report, the Commission for Real Property Claims of Displaced Persons and Refugees is inoperative (European Commission, 2022).

One landmark case that revolved around the right to return of property is the case of Fata Orlovic. The case is about Ms Orlovic and her family members, who were displaced from their home during the war and subsequently unable to return to their family residence. Article 1 of Protocol No. 1 of ECHR was the main violation of the case. Ms Orlovic and the other 13 applicants have complained that they had been prevented from effectively enjoying their possession due to an unlawfully built church that had not been removed from their land for decades.

The applicants' land was expropriated by Bratunac Municipality in 1997 without their knowledge. The expropriated land was allocated to the Drinjača Serbian Orthodox Parish for the construction of a church. In 1998, a church was built on expropriated land without the necessary

technical documentation. Later, in 2003, the Parish applied for planning permission for the church from the Spatial Planning and Housing Unit of Bratunac Municipality. In 2004, the Construction Inspectorate issued a decision to stop the use of the church. However, the Municipal Inspectorate failed to enforce this decision, and the deputy mayor intervened, advocating for a higher-level political resolution. Simultaneously, the applicants initiated restitution proceedings through the Commission for Real Property Claims of Displaced Persons and Refugees (CRPC) (Orlovic v. Bosnia and Herzegovina, 2020).

The Commission for Displaced Persons and Refugees was created according to Annex 7 of the Dayton Peace Agreement by the International Community to fully implement the right to repossession of property. It used to be called the Commission for Real Property Claims (CRPC). The job of the CRPC is to handle property claims, whether it's about getting the property back or getting compensated for it. The CRPC had three international members and six national members, and its decisions were final (Prettitore, 2003, 9). CRPC was issuing decisions about whether the claimant was the owner or occupancy right holder as of April 1992 - the start of the conflict. In the case of Fata Orlovic, on 28 October 1999 CRPC issued a decision that, Ms. Orlović's late husband, Š.O., had been the owner of the land in Konjević Polje and annulled any involuntary transfer or restriction of ownership after 1 April 1992 and Š.O.'s heirs were entitled to repossess the land (Orlovic et al. v. Bosnia and Herzegovina, 2020). However, due to the lack of CRPC's internal enforcement mechanism, the decision hadn't been applied for decades.

In 2002, Ms Orlovic initiated a civil action against the Serbian Orthodox Church in Bosnia and Herzegovina, seeking the removal of the church from her land and the restoration of the land to its original condition. The Court of First Instance initially rejected her claim in 2003, citing a lack of subject-matter jurisdiction. However, the District Court overturned this decision in 2006, leading to a re-examination of the case. During the re-examination proceedings, the other applicants joined the case, specifying the respondents as the Zvornik-Tuzla Eparchy of the Serbian Orthodox Church, the Bratunac Parish, and the Konjević Polje Parish. They sought a court order for the church's removal and transfer of the land to them within thirty days. After several adjournments and negotiations, in 2010, the applicants shifted their claim to recognize an out-of-court settlement reached in 2008. This settlement required the removal of the church within fifteen days of providing alternative land for building a new church in Konjević Polje. Subsequent court decisions, appeals, and legal cost adjustments further complicated the case, which primarily centres around property rights, church construction, and the validity of the out-of-court settlement.

On August 6, 2014, the Supreme Court rejected the applicant's appeal on points of law, noting that negotiations in 2008 between the applicants' representative and the Republika Srpska's Prime Minister and his adviser had revolved around government financial aid for the relocation of the church from the applicants' land. The Supreme Court found that no agreement had been reached between the parties, including the applicants and the Serbian Orthodox Church, upholding the lower court's conclusions. Subsequently, on October 17, 2014, the applicants lodged a constitutional appeal, citing violations of their right to the peaceful enjoyment of possessions due to the illegal construction of the church on their land. They also argued that the bishop had given

consent to the out-of-court agreement during a telephone conversation with M.D. On September 28th, 2017, the Constitutional Court of Bosnia and Herzegovina dismissed the appeal as ill-founded, with a five-to-four vote. The Constitutional Court held that the lower courts had provided clear and convincing reasons for their rulings, which were not arbitrary.

Legal discrepancies in the repossession procedure for the returnees became more difficult due to physical harassment by officers of ethnically engineered ethnicities (Toal and Dahlman, 2006, 1). While legal procedures were pursued, Ms Orlovic encountered with few physical attacks by police officers in Konjević Polje, in her family residence (Orlović et al. v. Bosnia and Herzegovina, 2020). Following the physical attack by one of the police officers in 2008, the High Representative in a press release condemned the harassment and stated that Fata Orlovic's right to private property would be respected (Press Release). In 2010 Ms Orlovic was again attacked on her property by a police officer (Orlović et al. v. Bosnia and Herzegovina, 2020).

The ECHR assessed that B&H had to protect the right of property, especially when there is a direct link between measures expected from authorities and the effective enjoyment of possessions. The applicants' right to full restitution had been established through various decisions, and the state had a positive obligation to implement these decisions and restore the applicants' property rights. However, the responsible branches of State failed to act, even authorizing the unlawfully built property to remain on the applicants' land.

The Court considered that the very long delay amounted to a refusal to enforce the binding decisions, leading to a disproportionate burden on the applicants, resulting in a violation of Article 1 of Protocol No. 1 to the Convention.

The court unanimously held that there has been a violation of Article 1 of Protocol No. 1 to the Convention, Article 6 of the Convention and the respondent State must take all necessary measures to secure full enforcement of the CRPC's decision of 1999 and the decision of the Ministry for Refugees of 2001, including in particular the relocation of the unlawfully built object from the applicants' land.

The ECHR judgment established important precedents related to property rights and restitution in post-conflict Bosnian and Herzegovinian society. The case contributed to shaping legal principles and practices for addressing property-related issues in the aftermath of conflicts, particularly in the context of the Bosnian War.

4. Conclusion

In conclusion, it may be said that property law legislation and the fulfilment of property rights in Bosnia and Herzegovina are facing numerous issues.

The development of property law legislation, and civil law in general, in the period after Bosnia and Herzegovina was incorporated into the Austro-Hungarian Empire, was under the strong

influence of the Austrian Civil Code, although certain legal rules and concepts from the Ottoman period remained significant. However, the most significant change occurred during the period of socialist Yugoslavia which saw a large-scale reduction of private property through nationalization and confiscation, intending to establish of socialist economic and societal model. During the development of socialist doctrine in Yugoslavia, an important step was the introduction of the concept of self-managing socialism (*samoupravni socijalizam*) and the concept of societal property ownership (*društvena imovina*), and the content of property rights defined as (separate) rights to conduct, use and dispose of (*prava upravljanja, korištenja i raspolaganja*).

Current issues facing property law in Bosnia and Herzegovina are mostly connected with the aftermath of the abandonment of the socialist ownership concept, or more specifically, certain inadequate solutions which followed.

The first one that can be identified is the transformation of "societal property" into "state-owned property" by the entity laws. Such transformation is problematic for several reasons; the first one being the fact that the concept of societal property and state-owned property are not synonyms. The "societal property" existed within the concept of self-managing socialism and its emanation in the sense that the content of property rights (right to conduct, use and dispose of) does not equate with the pure concept of ownership as understood by current legislation. Further, the non-definition or vague definition of "state" itself together with the territorial approach proclaiming all property on the territory of an entity as belonging to that entity is solely aimed at putting the entity in the position of the state and reducing the substance of the property belonging to Bosnia and Herzegovina, which is by the Dayton legal system the only one specifically defined as the state. The situation where the land registry recognizes certain property as state-owned giving certain beneficiaries the right of disposal is also not in line with current legislation and connects two unconnected concepts of property rights.

As a recommendation, any solution of state-owned property should use the concept of "public property" (*javna imovina*) as more precise instead of "state property" as a term which is misused in the majority of cases. Further, instead of a territorial approach, a functional approach (or some combination of the two), recognizing the user of certain "public property" could be used together with the adoption of a new definition of the "right of use" or "right of disposal" (*pravo korištenja, raspolaganja*) which is more in line with current legal conception instead of anachronistic use of legal concepts originating from socialist period. The functional approach would consider the user of the property instead of blanket appropriation of the property by the entity solely based on the fact that it is situated on its "territory". Such a functional approach would also recognize the interests of the local community and enterprises which are currently not adequately addressed. However, the issue of state-owned property is politically charged with no solution in sight.

Another issue that is not adequately treated is the issue of restitution or payment of compensation to previous owners of the property that was taken during the socialist period. The privatization of companies is practically completed with mixed results to say at least. Privatization

of apartments *de facto* favored the holders of the right of use (*pravo korištenja*) and the process of privatization itself, as compared to the process of restoration and rights of previous owners. Surely, in some of those cases, there is a conflict of "two rights", however, no compensation was given to previous owners, much of them representing the holders of previous *waqf* properties. The projections of the high cost of compensation may be one of the reasons for the stalemate; however, different concepts of long-term state bonds exist in comparative practice that could be seen as economically viable solutions. The restitution should primarily aim at natural restitution and return of the property to previous owners, however, if such return is not possible for a variety of reasons, compensation in the form of a single payment, payment in instalments, or long-term state bonds should be considered. In any case, the stalemate in which large quantities of property are "frozen" and left out of economic use is detrimental, especially if we take into account large amounts of agricultural land, for which the "state" has no organized and strategic plan of usage, which could represent significant economic resource, especially if we take food security as a strategic national goal. On the other hand, the solutions of partial denationalization of urban developmental land (*gradsko građevinsko zemljište*) are producing significant discrepancies in practice.

The new legislative changes in the form of newly adopted Laws on property rights (*Zakon o stvarnim pravima*) in both entities are based on the Austrian Civil Code and represent a sort of return to the pre-Yugoslavian "starting point". Solutions in the Laws on property can generally be described as adequate.

However, we can identify certain subpar solutions concerning the regulation of condominium rights (*etažno vlasništvo*), specifically in the regulation of condominium rights. Namely, the current solutions do not give much protection to the future owners of the flats during the construction phase, and they can only register their condominium rights after the construction is finished and the division of flats is conducted. Before that fact (which can be temporally very far away) the investors and future flat owners are practically not visible and are forced to enter into obligatory contracts (e.g. Contracts on mutual investment) instead of property rights-related contracts. A good example of a solution could be found in Turkish legislation which recognizes certain rights in the construction and investment phase through the concept of floor easement or *kat irtifak*, which, upon the completion of construction turns into condominium ownership rights.

Issues such as discrepancies between the data in the land registry and cadaster exist and need to be addressed through reforms and unifications of the cadaster/land register data.

Issues of state-owned property not being adequately solved also result in certain cases of violation of human rights as identified by the cases dealt with by the European Court of Human Rights. However, a specific issue poses the issue of treatment of property rights of returnees which is connected to the issue of discriminatory attitude towards the returnee population. The ECHR judgments established important precedents related to property rights and restitution in post-conflict Bosnian and Herzegovinian society. The case of Fata Orlovic has contributed to shaping legal principles and practices for addressing property-related issues in B&H. Further, the Republika Srpska entity government should consider waiving court fees for victims of wartime

torture to whom statutes of limitations have applied in the past; as in nearly 200 cases victims have faced confiscation of their property for non-payment, a worrying trend further infringing on their property rights (European Commission, 2022).

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