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Codification of Civil and Commercial Law in Bosnia and Herzegovina: Tradition, Transplantation, and Transition

ABSTRACT: *The development of civil and commercial law in Bosnia and Herzegovina has been deeply shaped by its complex political history, spanning five key periods: Ottoman rule, the Austro-Hungarian administration, the Kingdom of Yugoslavia, socialist Yugoslavia, and the post-independence era. Civil law evolved through a blend of old legal traditions and the Austrian Civil Code, while commercial law had continuity in codification, dating back to the late Ottoman period. The socialist period interrupted legal continuity, introducing new laws that partly remain in modern Bosnia and Herzegovina. Most of these socialist laws were replaced relatively quickly by new legislation. However, due to the new constitutional structure, this new civil and commercial legislation was not adopted at the state level, but at a lower – entity level. Today, civil law codification remains off the agenda, and commercial law continues to evolve in a fragmented way, leading to inconsistencies across jurisdictions. Broader constitutional and political crises continue to divert attention from crucial legal and economic reforms necessary for EU integration and international support.*

KEYWORDS: *Bosnia and Herzegovina, Yugoslavia, civil law, commercial law, private law, legal transplants, Ottoman law, Austro-Hungary, Austrian General Civil Code*

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https://doi.org/10.47078/2025.2.265-306

1. Introduction

The development of civil and commercial law in Bosnia and Herzegovina (hereafter B&H) was significantly influenced by the region's complex history. The 19th and 20th century marked a period of profound legal transformation, shaped by a succession of political regimes and shifting legal traditions. Changing the state and political framework implied legal transformation and transition, while retaining some elements of the old laws and legal traditions. These processes can be observed through five historical contexts: the periods of the Ottoman rule, Austro-Hungarian administration, Kingdom of Serbs, Croats and Slovenes/Yugoslavia, socialist Yugoslavia and the contemporary legal development related to independent B&H.

Civil and commercial law in B&H had a somewhat different concept of development. While civil law was shaped for a long time by mixing the old legal tradition (which included legal pluralism) with the Austrian General Civil Code (*Allgemeines bürgerliches Gesetzbuch* – hereafter: ABGB) as a supplementary source, Commercial law has been continuously codified since the late Ottoman period until after World War II. In socialist Yugoslavia, no separate codification of commercial law has been adopted; and the same situation prevails today. Since 1978, the Obligation Act (hereinafter: OA) has followed the monistic principle. However, the socialist period interrupted the legal continuity and allowed only the supplementary application of old law as legal principles to fill legal gaps. The socialist state turned to the creation of new laws, which partially survived within the framework of independent B&H. Most of these socialist laws were replaced relatively quickly by new legislation. However, due to the new constitutional structure, this new civil and commercial legislation was not adopted at the state level, but at a lower-entity level.

The aim of this paper is to show the development of civil and commercial law through these five periods/stages. In this sense, the structure of the work follows the aforementioned historical genesis and state frameworks within which civil and commercial development took place. In this way, it precisely adheres to the questionnaire provided by the editor. The research is based on normative, official, archival, and literary sources.

2. Late Ottoman period (1839-1878)

At the beginning of the 19th century, the legal system of B&H, as an Ottoman province (Eyalet Bosna, Vilayet Bosna), had all the characteristics of the classic Ottoman legal order. Ottoman qanun and Sharia law predominated, alongside with other legal/normative systems (religious law of Christians and Jews, customary

law), which the Ottomans recognised and maintained in the conquered territories.[1] The key role in maintaining the legal order in the province was held by the qadis, officials to whom the sultan entrusted the application of qanun and Sharia law at the local level.[2] Alongside the qadi, there were other state and quasi-judicial bodies, including the religious courts of non-Muslim communities, which applied their own religious and/or customary laws as non-state components of Ottoman legal pluralism.[3]

From the mid-19th century, Bosnia was included in the process of a comprehensive reform of the Ottoman state, legal, economic, and social order known as Tanzimat (1839-1876).[4] During this phase, the legal order of Bosnia underwent transformation, resulting in the reorganisation of the judiciary and the creation of new state legislation, while retaining non-state legal/normative systems and consular legal and judicial autonomy for foreigners. Alongside the reform of the legal order, the Ottomans also reformed legal education. In addition to madrasas, schools for training Sharia judges (established in the mid-1850s)[5] and schools for training civil servants,[6] such as those established in Bosnia,[7] a Dershane (Classroom) of law was opened at the Ministry of Justice in 1870,[8] and finally, in 1878, a Faculty of Law was established.[9]

■ *2.1. The new structure of the Ottoman judiciary in Bosnia*

The reorganisation of the Ottoman judiciary was announced by the Hatti-humayun Edict on February 18, 1856. The results of this reform can be summarised in three key measures:1. establishment of new state courts; 2. integration of non-Muslims in state judiciary; 3. introduction of the principle of appeal (except for Sharia courts).

Regular courts were established in the Bosnian Vilayet during 1865 and 1866.[10] They had general jurisdiction to resolve all criminal and civil cases that did not fall under the competence of sharia, religious, or commercial courts.[11] Regular courts were presided over by a qadi, who led a council composed of an equal number of Muslims and non-Muslims as representatives of the community.[12]

1 Imamović, 2003.
2 Ajdin, 2004, pp. 539–542.
3 Ajdin, 2004, pp. 546–550, 577–580; Barkey, 2013.
4 Aličić, 1983.
5 Palabıyık, 2015, pp. 275–276; Rubin, 2012, p. 116.
6 Palabıyık, 2015, pp. 275–276.
7 Koetschet, 1909, p. 4.
8 Rubin, 2012, p. 116.
9 Shaw and Shaw, 1977, p. 247; Palabıyık, 2015, pp. 275–276.
10 Aličić, 1983, p. 140.
11 Ustavni zakon vilajeta bosanskog, Bosanski vjestnik br. 4: 28.04.1866; br. 5: 07.05.1866; br. 6: 14.05.1866; br. 7: 21.05.1866; br. 8: 28.05.1866; br. 9: 04.06.1866; br. 10: 11.06.1866.
12 Eichler, 1889, pp. 60–61; Bosanski vjestnik, br. 8 28.05.1866; Bosanski vjestnik, br. 4, 28.04.1866, 5.

Special commercial courts were established only in larger cities.[13] Commercial courts had one president, two permanent and four non-permanent members, who were elected for a one-year term from the commercial class.[14] Sharia courts were organised at the county level (kaza) as courts where a qadi served as an individual judge. Appeals against their rulings were not permitted.[15] The reformed sharia courts were competent in matters of marriage, family, and the inheritance law of Muslims, to which Sharia law applied; however, in practice, their jurisdiction extended to other matters as well, including personal matters of non-Muslims.[16]

In addition to state courts, non-state judicial bodies with limited competences were also maintained in Bosnia. Such limited competencies were exercised by religious (ecclesiastical) courts of Christians and Jews, who applied their religious and/or customary law.[17] In Bosnia, they effectively dealt only with non-property marital matters of their members (divorce, validity of marriage, etc.). They could also carry out extrajudicial division of inheritance and mediate in resolving disputes.[18] In addition to religious courts, certain minor disputes could also be resolved by the *medžlisi*, or local and village elders (*muhtars*) in their capacity as peace courts.[19]

Another separate-autonomous judicial system that existed in Bosnia during the last phase of the Ottoman rule was the system of consular jurisdiction.[20] This system granted ambassadors and consuls of foreign states the authority to adjudicate matters between members of the state they represented, applying their own substantive and procedural law.[21]

■ *2.2. New State Legislation: transplantation of foreign law vs. codification of domestic law*

The establishment of a new judicial system within the Tanzimat was accompanied by a comprehensive legal reform. This process led to the codification, centralisation, and unification of the Ottoman state legislation.[22] Laws were created using two legislative methods: systematisation and revision of existing Ottoman law, based on Sharia and customary/qanun law, and the reception/transplantation of laws from European countries, most often from France.[23] The result of this

13 Schmid, 1914, pp. 117–118.
14 Aličić, 1983, pp. 135–139.
15 Sikirić, 1937, p. 7.
16 Ibid., p. 7.
17 Eichler, 1889, pp. 47–49.
18 Gavranović, 1973, pp. 64–66; Eichler, 1889, p. 49, 65–66; Justizverwaltung, 1880, pp. 497–498; Posilović, 1894, p. 132.
19 Gavranović, 1973, p. 60.
20 Van den Boogert, 2005.
21 Gašparović, 2009, pp. 698–701.
22 Peters, 2002, p. 88.
23 Plagemann, 2009, pp. 102–103.

comprehensive reform was dozens of new laws, codes, regulations, and orders. They all were published in the official gazette, and subsequently compiled and published in a special collection titled *Düstūr*, which was also translated into some foreign languages.[24]

In the creation and implementation of the Tanzimat legislation, civil servants and legal experts played a crucial role (often categorised as representatives of the civil (*nizamiye*) bureaucracy and sharia lawyers).[25] Among them, the most important and influential name was probably Ahmet Dževdet Pasha, who combined the roles of a qadi, Islamic reformer, and Minister of Justice.[26] In 1864, he stayed in Bosnia, where he served as a *mufetish*, leading the highest court in the Province and overseeing the implementation of the tanzimat reforms.[27] His legal profile, as a representative of the ulama, qadis, and Islamic reformers, can be seen as a reflection of the legal culture of the Tanzimat legal elite.

2.2.1. Example of the transplantation of foreign law: new commercial legislation

One of the most obvious examples of Tanzimat legislation, which relied on the transplantation of foreign law, was the new commercial legislation. It arose from the need to regulate the increasingly complex and larger trade exchanges of the Ottoman Empire with foreign states, especially after the Empire concluded free trade agreements, which led to a state of political and economic dependence on Western powers in the 19th century.[28] European consuls had called for the establishment of special commercial courts to resolve disputes between domestic and foreign traders, as well as the application of foreign commercial law.[29] Once such courts were established (as explained earlier), enacting appropriate laws was necessary.

Thus, in 1850, the Commercial Code was adopted (revised in 1860), which represented a legal transplant of the French Commercial Code from 1807,[30] followed by the Code of Procedure for Commercial Courts (1861) and the Code of Maritime Commerce (1863), which also represented the legal transplants of the French legislation.[31]

These projects were extremely important because they 'established a secure environment for the development of trade,'[32] while the legal community in the Empire recognised the reception/transplantation of foreign law as a viable option

24 Jäschke, 1954, pp. 226–227.
25 Miller, 2003, p. 172.
26 Chambers, 1973, pp. 440–464; Shaw and Shaw, 1977, pp. 64–66.
27 Krešević, 1932.
28 Rubin, 2011, p. 25.
29 Ibid., pp. 25–26.
30 Berkes, 1998, p. 162.
31 Ibid., p. 162.
32 Shaw and Shaw, 1977, p. 118.

for reforming other branches of law.[33] The application of this legislation in Bosnia has not been sufficiently researched. However, recently published studies indicate that parts of this new commercial legislation have entered practical application in Bosnia, mainly within the commercial courts during the last decade of the Ottoman rule.[34]

2.2.2. Example of the codification of domestic law: land, property, and contract law

Unlike commercial law, the field of substantive civil law has not been reformed through the transplantation of foreign models. Instead, a part of substantive civil law (specifically land, property, and contract law) was reformed through the codification of domestic law based on qanun and/or Sharia law.

One example is the Ottoman Land Law of 1858.[35] This law represented the codification of the Ottoman land law that was encountered during the Tanzimat, thereby allowing the penetration of private ownership relations in the field of land law.[36] The Land law distinguished five categories of land ownership, but essentially regulated the legal relations related to state owned land (*miri*), while private ownership (*mulk*) was only exceptionally regulated, when those properties were connected to miri land.[37] The land law became the main source of land and property law in Bosnia, supplemented by numerous other Ottoman laws, regulations, and orders after 1858. Such a status of the Ottoman land law in B&H was maintained until the mid-20th century, although it was significantly limited and modified by various legislative interventions and judicial practices in the post-Ottoman era.

Another example of the codification of domestic law within the framework of the Tanzimat was the creation of the Ottoman Civil Code *Mecelle-i ahkjām-i adliyye* or simply *Mecelle* (1869-1876).[38] The Mecelle was created out of the need for the newly established regular courts to have a code that would contribute to a unified and simplified application of law in civil matters. When the Ottomans decided to create a new civil code, the question of whether it should be based on foreign or domestic law arose. The idea of transplanting the French code was insisted upon by the French ambassador, the diplomatic community, and pro-European oriented secularists, led by the Minister of Trade Kabil Pasha, while Islamic reformists advocated for the codification of the provisions of Sharia property law.[39] In the end, it was decided that the code would be drafted based on Sharia law. This task was entrusted to a commission chaired by Ahmed Djevdet Pasha. The result of the work of this commission was the codification of the

33 Rubin, 2011, p. 26.
34 Bećić, 2022a, pp. 17–51; Bećić, 2021, pp. 143–171.
35 Imamović, 2003, pp. 177–179; Farkaš, 1891.
36 Imamović, 2003, pp. 177–178.
37 Farkaš, 1891.
38 Karčić, 1990, pp. 53–55; Medželle i ahkjami šerije (Otomanski gragjanski zakon), 1906.
39 Rubin, 2011, p. 30; Karčić, 1990, pp. 53–54.

Islamic property law of the Hanafi legal school, which contained a total of 1,851 articles, divided into an introduction and sixteen books. The introduction contains two speeches; the first provides a definition and classification of legal science, while the second comprises a total of 99 legal rules or principles of Islamic legal science. The first thirteen books contain regulations of property law (primarily contract law), while the remaining three books contain regulations of procedural law (lawsuits, evidence, and court proceedings).[40] The Mecelle did not regulate marriage, family, and inheritance laws. These branches of law remained under the same regime of personal law application: for Muslims, the applicable law was Sharia law, while for non-Muslims, it was their religious and/or customary law.

The Mecelle formally remained in force in B&H until the mid-20th century. For the practice of regular courts, this codification gradually lost its significance, especially from the second decade of the 20th century.[41] Sharia courts continued to apply it intensively, until the abolition of Sharia courts in B&H in 1946.

■ *2.3. Non-state sources of civil law: Sharia, religious (non-Muslim), and customary law*

In addition to state legislation, civil law in Bosnia during the late Ottoman period was characterised by the validity of non-state legal sources. These sources regulated numerous social relations, but they were most applied in the areas of marital, family, and inheritance law, as well as in some other fields.

Among the sources from this group, Islamic law had the most widespread application. This refers to Sharia law as a set of legal norms created by Islamic jurists through the interpretation of the main sources of Islam. In this sense, this law, which was contained in the classical works of Islamic legal science, should be distinguished from the Ottoman state legislation (qanun). It formally applied to Muslims in cases of marital and family law, as well as in the inheritance of private property (mulk). Sharia law, in this form, had general application within Sharia courts (application of the law), using legal works, commentaries, and collections of legal opinions.[42] All these sources were also used by the Sharia courts in Bosnia until their abolition in 1946.

In addition to Sharia law, the Ottoman legal system in Bosnia included the validity and application of the religious laws of non-Muslim communities through their religious courts.[43] In the Bosnian vilayet, such status was enjoyed by the Orthodox, Catholic, and Jewish communities.[44] Due to the practically minor significance of their religious courts, the application of religious law was limited to

40 Medželle i ahkjami šerije (Otomanski gragjanski zakon), 1906.
41 Bećić, 2014, p. 61.
42 Karčić, 2005, p. 103.
43 Barkey, 2013, pp. 83–107.
44 Gavranović, 1973, pp. 64–66; Eichler, 1889, pp. 47–48.

marital non-property disputes and possibly inheritances or other settlements.[45] The status of legal sources in Bosnia also included customs.[46]

3. Period of Austro-Hungarian Administration (1878–1918)

B&H had a *sui generis* legal status under the Austro-Hungarian rule. The land was jointly governed by both states of the Monarchy. The supreme legislative authority formally belonged to the Austro-Hungarian monarch.[47] However, the actual exercise of civil administration was entrusted to the Joint Ministry of Finance, which was directly carried out by the Provincial Government for B&H. After the annexation in 1908 and the adoption of the Provincial Statute in 1910, B&H received a local parliament, but the concept of governance was not significantly altered.[48]

When it came to internal legal order, the new administration maintained a large part of the existing Ottoman legal heritage. Subsequently, the new government gradually worked on its modification, abolishing some institutions and transplanting new laws from Austria-Hungary. Lawyers from Austro-Hungary played a key role in the functioning and transformation of the legal system. They were immediately appointed to all the positions in the regular courts and administration of B&H after 1878.[49] Judges from Austria-Hungary faced the challenge of applying the Ottoman civil law, which they supplemented by applying the Austrian General Civil Code from 1811 (ABGB), thereby altering the existing civil law through judicial practice.[50] On the other hand, legal experts in the executive branch were leading legislative reform projects. An example is the Judicial Commission, which was chaired by Alois Lapena, who at that time was the president of the Senate of the Supreme Court in Vienna.[51] This commission prepared some of the most important legislative projects for the government between 1881 and 1883. The lawyers in the Judiciary department of the Provincial government also played an important role in legislative reforms (prominent names are, for example, Eduard Eichler, Friedrich Kobinger, and Adalbert Shek).[52]

■ *3.1. Legal and institutional continuity and discontinuity after 1878*

The new Austro-Hungarian administration decided to maintain continuity with the existing Ottoman legal order in the country, except for those regulations that were contrary to the general legal principles and interests of the Monarchy.

45 Eichler, 1889, pp. 49, 65–66.
46 Begović, 1955, p. 190.
47 Sladović, 1916, p. 81.
48 Imamović, 2007, pp. 33–34, 21–40.
49 Bećić, 2022b, pp. 72–77.
50 Ibid., pp. 117–122.
51 Ibid., pp. 77–78.
52 Ibid., pp. 77–78.

This general principle was stipulated in the initial regulation from October 29, 1878.[53] The government then issued special orders regarding the organisation of the judiciary (Order of the Joint Ministry from December 29, 1878, Order of the Provincial Government from December 30, 1878, and Order of the Joint Ministry from January 1, 1879), through which it organised the judiciary and the functioning of the legal system.[54]

3.1.1. (Dis)continuity of the existing judiciary

In these initial orders regarding the organisation of the judiciary, the government mandated the maintenance of the existing judicial structure: regular, Sharia, religious, and consular courts. Simultaneously, important structural and organisational changes were introduced, such as the abolition of the commercial courts, the establishment of the Supreme Court, the introduction of a two-tier judicial decision-making system (including Sharia courts), the appointment of Austro-Hungarian officials/judges to head regular courts, etc.[55] Based on these principles, the government undertook a series of activities and legislative measures in the subsequent years, gradually regulating the area of the judicial system while maintaining the existing Ottoman-Tanzimat concept. This process began with the adoption of organisational and procedural regulations and was completed with the Law on the Constitution for Courts in 1913.[56]

Regular courts (county and district courts and the Supreme Court) had general jurisdiction over all criminal and civil cases, with the exception of those cases that fell under the jurisdiction of special courts.[57] The biggest change for regular courts occurred in relation to their personnel composition: Austro-Hungarian officials took the place of qadis.[58] They served as individual judges in the lowest county courts and as judicial panels in the district courts and the Supreme Court of B&H.[59]

Other courts from the late Ottoman period were also maintained, with certain organisational changes. Sharia courts, led by local qadis, were transformed into special state courts responsible for matters of Muslim marriage and family law, inheritance cases of private property (*mulk*), as well as waqf and some

53 Sammlung der für Bosnien und die Hercegovina erlassenen Gesetze, Verordnungen und Normalweisungen, I Band, Allgemeiner Theil, Wien, 1880, p. 13.
54 Sammlung der für Bosnien und die Hercegovina erlassenen Gesetze, Verordnungen und Normalweisungen, II Band, Justizverwaltung, Wien, 1881, pp. 3–18. (will be cited as Justizverwaltung).
55 Ibid., pp. 3–18.
56 Bećić, 2015, pp. 108–114.
57 Ibid., pp. 114–124.
58 Bećić, 2022b, p. 74.
59 Sladović, 1916, p. 264.

other issues.[60] The newly formed Supreme Sharia Court, composed of local qadis as well as Austro-Hungarian judges, became the appellate instance.[61]

Non-state religious courts were formally reduced to courts competent only for non-property marital matters (divorce and validity of marriage) for Christians and Jews.[62] In contrast, consular jurisdiction was abolished by the end of 1881.[63] In addition, the new administration established new special courts (e.g., military and mining), while it prescribed a special procedure for agrarian disputes before the competent administrative authorities.[64]

3.1.2. (Dis)continuity of the Ottoman legal heritage

In the Order issued on December 30, 1878, the Provincial Government stated that 'until the issuance of other regulations, the courts shall base their decisions on the existing laws and norms in the country'. It was also stipulated that 'the regulation of family, marital, inheritance, and guardianship relations will remain, as before, under the jurisdiction of individual religious communities and their laws'.[65]

The Joint Ministry of Finance, in its orders dated December 29, 1878, and January 1, 1879, mandated a series of temporary measures to establish continuity in the functioning of the judiciary, along with some significant changes.[66] When it comes to substantive civil law, the rule was: 'until new legal norms of material law are issued, the judicial authorities of both instances must adhere to the legislation that is actually in force in the country'. However, in the same provision, this rule was modified: 'if this legislation does not exist or is inapplicable or insufficient under current circumstances', the courts could 'by analogy the laws in force in Austria-Hungary'.[67] This provision has opened the door for courts to apply the Austrian General Civil Code of 1811 (ABGB) in all civil matters for which they were competent (as discussed further below).

Essentially, with this normative framework, the new government has defined three general principles for the transition, reform, and transformation of law in B&H:

1. temporary continuity of the existing law, namely Ottoman state legislation and other non-state legal/normative systems that were in force during the last phase of the Ottoman administration;
2. subsidiary/supplementary application of laws in force in Austria-Hungary, in case of inapplicability of domestic law or legal gaps;

60 Bušatlić, 1923, pp. 120–122; Karčić, 2005, pp. 20–22; Bećić, 2017b, pp. 71–72.
61 Bećić, 2017b, pp. 72–75.
62 Schmid, 1914, p. 138; Sladović, 1915, p. 28.
63 Bećić, 2022b, pp. 110–112.
64 Izvještaj o upravi Bosne i Hercegovine, 1906, p. 466.
65 Justizverwaltung, 1880, pp. 4–5.
66 Justizverwaltung, 1880, pp. 6–12; Eichler, 1889, pp. 132–135.
67 Justizverwaltung, 1880, pp. 15.

3. gradual transformation of the existing legal system through the issuance of new laws, regulations, and orders for B&H.[68]

3.1.2.1. The fate of Ottoman State Legislation

In order to enable the continuous application of Ottoman state legislation, the government ordered to determine which Ottoman laws were actually in force in B&H and to translate them into German.[69] This project resulted in the creation of German translations of the Ottoman civil legislation from the Ottoman official collection of laws (*Düstūr*), which were then published in a special collection of laws titled *Sammlung der für Bosnien und die Hercegovina erlassenen Gesetze, Verordnungen und Normalweisungen*. It includes almost all the German translations of the Ottoman state legislation with the status of valid law in the country (including the Land Law of 1858 and the complete material and formal land legislation, Ottoman commercial legislation, forest laws, various procedural regulations, etc.).[70] Some laws were omitted, such as the Ottoman criminal legislation, which was immediately replaced by new criminal laws for B&H after the occupation.[71] This collection did not include the Ottoman civil code – Mecelle, due to the scope of this code and the government's decision to wait for its French translation.[72] Moreover, in these early years, judicial practice replaced the majority of the Mecelle provisions with the supplementary application of the ABGB. However, since judicial practice has shown the need for a translation of this code, a translation into Bosnian language was made in later years.[73]

Thus, the Austro-Hungarian authorities allowed the Ottoman legislation to remain in practical application in B&H. The new administration gradually abolished, modified, and supplemented this legislation with new laws, in accordance with its needs and socio-economic, political, fiscal, and other objectives. During the forty years of administration in B&H, the Austro-Hungarian administration adopted many new laws, which were mostly the result of legal transplantation from Austro-Hungary, with appropriate modifications and adaptations; The examples include the new mining legislation from 1881, the new expropriation regulation from 1880, Law on Civil Procedure from 1883, Attorneys Act from 1883, Law on Bills of Exchange from 1883, Bankruptcy Act from 1883, Commercial Law from 1883, Land Registry Law from 1884, Law on Interest from 1907, and others.[74]

Unlike the aforementioned areas, substantive civil law remained under the Austro-Hungarian administration without fundamental legislative interventions.

68 Bećić, 2022b, p. 85.
69 Justizverwaltung, 1880, p. 8.
70 Ibid., pp. 275–498.
71 Bećić, 2016, pp. 219–244.
72 Eichler, 1889, pp. 173–174.
73 Bećić, 2014, pp. 51–66.
74 Bećić, 2023.

In the field of land, property, and contract law, the Ottoman legislation remained in force and in practical application, with the possibility of the supplementary application of the ABGB. The exception was the new Land Registry Law of 1884. It replaced the Ottoman system of title deeds (*tapu*) with the gradual introduction (1885–1910) of the Austrian land registry system (*Grundbuch*). However, the Land Registry Law confirmed the validity of the Ottoman Land Law from 1858, with certain modifications and upgrades to this Ottoman system.[75] In the area of marital, family, and inheritance laws of private ownership, non-state sources of law (Sharia law for Muslims and religious and/or customary law for non-Muslim) remained in force.

3.1.2.2. Non-state sources of civil law: Marriage, family, and inheritance law

In addition to the Ottoman state legislation, the new government maintained, throughout all forty years, other non-state components of the old civil law heritage: Sharia, religious, and customary law. Sharia law, whose application had characteristics of a colonial model, continued to be applied to marital and family matters as well as to inheritance of private ownership (*mulk*) of Muslims.[76] The Sharia courts continued to apply Sharia law according to the same sources that were valid during Ottoman times.[77]

The application of non-Muslim religious law was prescribed for non-property marital matters (divorce and the validity of marriage of non-Muslims), which fell under the jurisdiction of their religious/ecclesiastical courts.[78] All other marital, family, and inheritance matters of Christians and Jews, were assigned to the jurisdiction of regular courts in accordance with Article 1 of the new Law on Civil Procedure.[79] The government instructed the regular courts to apply the religious laws of Christians and Jews when deciding on marital and family matters.[80] Moreover, when resolving inheritance matters of the private property (mulk) of Christians and Jews, the regular courts were obliged to adhere to the local customary law that was in effect during Ottoman times.[81] However, the practice of applying religious and customary law before regular courts has been complex and challenging, revealing numerous shortcomings. Therefore, the regular courts developed a practice of supplementary application of the ABGB in these cases (marital, family, and inheritance laws).[82]

75 Bećić, 2017a, pp. 96–97.
76 Bećić, 2017b, pp. 71–72.
77 Karčić, 2005, pp. 220–223.
78 Izvještaj o upravi BiH, 1906, p. 36.
79 Bećić, 2017b, pp. 35–42.
80 Zbornik zakona i naredaba za Bosnu i Hercegovinu, Godina 1885., Sarajevo, 1885., pp. 114–116; Sladović, 1915, p. 28.
81 Zbornik zakona i naredaba za Bosnu i Hercegovinu, Godina 1885., Sarajevo, 1885., pp. 77–78.
82 Bećić, 2022b, pp. 198–213.

It should be emphasised that, in addition to the area of inheritance law, legal customs in B&H have regulated numerous other areas, such as agrarian relations,[83] commercial transactions,[84] and more.

■ *3.2. Transplantation of the ABGB and the gradual transformation of civil law*

The Austro-Hungarian administration never formally proclaimed the ABGB for B&H. However, the Code became one of the main sources of substantive civil law in the practice of regular courts soon after the establishment of the new government. The legal bases for its application were the aforementioned orders regarding the organisation of the judiciary from the end of 1878 and the beginning of 1879.[85] Although the ABGB was not explicitly mentioned in these orders, the government certainly anticipated that judicial practice would resort to this codification as a supplementary source, given that it was the only valid civil law codification in the Monarchy at that time. The courts regularly applied the legal rules of the ABGB whenever domestic regulations did not exist, were not applicable, or were insufficient for decision making. The judges of regular courts played a key role in the realisation of this model of ABGB transplantation, as representatives of the imported - new legal elite, for whom the Code was well known and accessible.[86]

The application of the ABGB as a supplementary legal source has encompassed all those matters for which the regular courts were competent. The code was primarily used in resolving issues of contract law, and to some extent in addressing certain property law questions and matters. In all such cases, the ABGB was applied parallelly with the Ottoman laws, including the Land Law of 1858 and the Mecelle, which the ABGB most often supplemented in practice.[87] In addition to issues of contract and property laws, the possibility of applying the ABGB to matters that were not regulated by Ottoman state laws, but rather by autonomous religious and/or customary law (marital property, family, and inheritance law of Christians and Jews), has been opened.[88] Additionally, the ABGB was also a supplementary source for resolving commercial disputes, in accordance with Article 1 of the new Commercial Law for B&H.[89]

Such a solution, according to which courts apply domestic law while simultaneously being able to adhere to the ABGB, has led to legal uncertainty in judicial practice, as reported by many sources.[90] The unification of judicial practice only occurred in the second decade of the 20th century. Such a change in

83 Izvještaj o upravi BiH, 1906, pp. 48–49; Sladović, 1915, pp. 8–9.
84 Bećić, 2022c, pp. 74–83.
85 Justizverwaltung, 1880, pp. 3–4, 15; Bećić, 2022b, pp. 117–119; Karčić, 2013, pp. 1030–1033.
86 Bećić, 2022b, pp. 120–122.
87 Ibid., pp. 169–184, 188–197.
88 Ibid., pp. 198–213.
89 Bećić, 2022c, pp. 74–83.
90 Pilar, 1911, p. 724; Stenografski izvještaji o sjednicama Bosansko-hercegovačkog Sabora god. 1911/12, II zasjedanje, Sarajevo, 1912, p. 78.

legal practice is particularly noticeable after the government issued the Regulation on the Limited Application of Domestic Law in 1911.[91] Since then, gradually, the application of the ABGB became the norm, while references to Ottoman law and the Mecelle became exceptions, limited to specific legal issues and institutes of domestic law.[92]

In addition to the application of the ABGB as a subsidiary law, a partial legal transplantation of it has also been carried out. The new Land Registry Law for B&H played a key role in this from 1884, which mandated the application of the ABGB in the acquisition, transfer, limitation, and termination of rights on properties registered in the new land registries.[93] Thus, following the establishment of land registries (1885–1910), parts of the ABGB gradually came into force in B&H.[94]

■ *3.3. Unfinished projects of the codification of domestic civil law*

A large part of the legal community in B&H openly advocated for the complete transplantation of the ABGB, especially after the annexation in 1908, demanding an end to the legal uncertainty caused by the simultaneous application of the Ottoman legislation and ABGB.[95] However, the Provincial Government firmly rejected such a solution. The head of the Judicial Department of the Provincial Government, Adalbert Schek, was very clear when he wrote, 'We must not, under any circumstances, introduce entirely new foreign law'.[96] The government held the view that the socio-economic, cultural, and legal development of B&H does not allow for rapid and simple codification.[97] Instead, the government has adopted the position that special circumstances in B&H require the creation of partial domestic codifications of certain areas of civil law. Such laws were supposed to mainly contain domestic customary law, into which certain parts of Austrian civil law could be incorporated.[98]

Consequently, the first drafts of family and inheritance laws were created.[99] Due to the outbreak of the First World War, these legal drafts never came into force, leaving B&H without the codification of its substantive civil law.

The drafts were created based on customary law with elements of the ABGB incorporated.[100] However, at this stage of legal development in B&H, viewing the

91 Landesregierung für Bosnien und die Hercegovina Nr. 5527 Präs., Heimisches Recht, restringierte Anwendung desselben – An alle Gerichte, Staatsanwaltschaften und die Oberstaatsanwaltschaft, Sarajevo, am 27. Oktober 1911. (Arhiv BiH, ZVS, 5527 - 4474/praes, 1911).
92 Bećić, 2022b, pp. 134–139; Ajsner, 1920, p. 11.
93 Zbornik zakona i naredaba za Bosnu i Hercegovinu, Godina 1886., Sarajevo, 1886, p. 62.
94 Bećić, 2022b, pp. 139–155.
95 Pilar, 1911, pp. 724–725.
96 Shek, 1914, pp. 1–2.
97 Izvještaj o upravi BiH, 1906, p. 34.
98 Shek, 1914, p. 6.
99 Ajsner, 1920, p. 31.
100 Ibid., p. 31.

ABGB as a completely foreign law was not justifiable, considering that it had been present in domestic legal practice for over three decades at that time. This is the context in which the decades-long application of the ABGB in judicial practice can and should be understood. Thus, the 'natural' and 'spontaneous' legal development of B&H was directed towards the civil law of the rest of the Monarchy, thereby creating the conditions for codification.[101]

■ *3.4. Transplantation of new commercial law*

Ottoman commercial law had a different fate than substantive civil law. The valid components of the Ottoman commercial legislation (the Commercial Code and the Code of Procedure for Commercial Courts) were initially maintained. The new government produced the German translations of these laws and published them in the aforementioned collection of laws from 1881.[102] Although insufficiently researched in the literature, recent studies show that certain parts of that legislation were applied by regular courts in B&H, both during the late Ottoman and early Austro-Hungarian periods.[103]

However, the government quickly decided to impose an entirely new commercial legislation for B&H. The project was entrusted to the Judicial Commission, headed by Alois Lapenna. After going through a complex legislative procedure, the drafts were enacted by the monarch during the first half of 1883. The Law on Bills of Exchange was sanctioned on April 12, 1883,[104] the Bankruptcy Act on May 26, 1883,[105] and the Commercial Law on June 7, 1883.[106] All the laws came into effect on November 1, 1883, thereby formally abolishing the Ottoman commercial law in B&H.

This new commercial legislation for B&H was created by transplanting laws from the rest of Austro-Hungary, with certain deviations and adjustments to the legal order and circumstances in B&H. The Commercial Law for B&H was created by transplanting the Hungarian Commercial Law from 1875, as the Hungarian version of the General German Commercial Code from 1861.[107] The legal text of the Law on Bills of Exchange is almost literally borrowed from the Austrian law of January 25, 1850,[108] while the Bankruptcy Act was developed based on the Hungarian (1881) and Austrian (1868) bankruptcy legislation.[109]

This new legislation has not remained as just a dead letter on paper. Recent studies have shown that the new commercial law quickly came to life in the

101 Bećić, 2022b, p. 165.
102 Justizverwaltung, 1880, p. 395.
103 Bećić, 2022a, pp. 17–51; Bećić, 2021, pp. 143–171.
104 Zbornik zakona i naredaba za BiH, Godina 1883., Sarajevo, 1883, pp. 450–476.
105 Ibid., pp. 623–677.
106 Ibid., pp. 308–439.
107 Bećić, 2024, pp. 148–153.
108 Izvještaj o upravi BiH, 1906, p. 37; Bosnischer Bote pro, 1901, p. 39.
109 Izvještaj o upravi BiH, 1906, p. 37; Bosnischer Bote pro, 1901, p. 39.

commercial and judicial practices of B&H, and that local commercial customs and the ABGB have served as supplementary sources for it.[110] The adoption of the new commercial legislation should be understood in the context of the economic goals of the Austro-Hungarian authorities. Although it did not align with the economic conditions in B&H, the aim of this legislative project was the unification of commercial law with the rest of the Monarchy, which would facilitate easier trade exchange and generally achieve the economic goals of the new administration in B&H.[111]

4. Civil and commercial private law codification in the first half of the 20th century – the period of the Kingdom of Serbs, Croats, and Slovenes/Yugoslavia (1918-1941)

■ *4.1. Continuity of civil law – legal pluralism and limited reform (unification of law)*

Following the dissolution of the Austro-Hungarian Monarchy, the Kingdom of Serbs, Croats and Slovenians, later called Kingdom of Yugoslavia, was established in 1918, unifying different regions. Each region has its own history and affiliation to different legal systems, and importantly, they have different civil law regulations.[112] In some of these regions, civil law was not codified.[113] During the existence of Kingdom Yugoslavia, the application of the ABGB has continued in B&H since the civil law has never been codified in the Kingdom of Yugoslavia. As mentioned in 3.2, the application of the ABGB was restricted in family and succession matters.

The establishment of a unified territory and legal order was a key objective of the new kingdom, yet six areas of law persisted until the advent of WWII. Thus, the work on unifying the law in general, as well as civil law, began right after the end of the First World War. The Regulation from 16th December 1919 initiated the unification of civil law; the Commission comprised prominent professors of civil law, but none of them was from B&H.[114] The ABGB was used as a model. The work resulted in the Pre-Draft Civil Code of Yugoslavia from 1934. This Draft was criticised because it had been based on the ABGB, which was the oldest civil code

110 Bećić, 2022c, pp. 74–83.
111 Bećić, 2022c, pp. 73–74.
112 Povlakić, 2011a, pp. 234–236.
113 Kovačević-Kušrtimović and Lazić, 2008, p. 77.
114 This Commission was still present in the same composition even after 1929, after King Alexander imposed a dictatorship and the Kingdom has changed its name (and organisation). For more see Mirković, 2022, p. 84.

in Europe, which was, on top of that, perceived as foreign to the national spirit[115] and due to this, was never enacted.

The influence of Austrian Law was not limited only to the implementation of the ABGB and not only in B&H. During this period, in the Kingdom of Yugoslavia some important statutes regulating civil matters were adopted under the strong influence of Austrian law. Above all, these were statutes that governed the land registers (*Grundbuch*). In those regions of the Kingdom of Yugoslavia which were parts of the Austro-Hungarian Monarchy the land registers were introduced and functioned[116] but in most parts of Serbia, as well in Macedonia and Montenegro, there existed another (ottoman) system of registering real estates. In 1930/31, three land registry acts regulating the establishment and organisation of the land registries as well as the procedure of the registration were enacted with the aim of the registration system being unified[117]. They represented an adoption of the solutions from Austrian land registry law, i.e., a reception of Austrian law.[118] While this registration system was in force in B&H since the end of the XIX century, when the first cadastre survey of B&H was conducted and land registries of Austrian / German type were established, after adopting the three mentioned laws in 1930/31, the land registries in B&H continued to be maintained in line with the new (the same) laws.

On the other hand, the codification of procedural law was more successful, with the Civil Procedure Act [*Zakon o sudskom postupku u građanskim stvarima*], based on the Austrian Civil Procedure Act from 1.8.1895, being passed in 1929.[119] The procedural law of the Kingdom of Yugoslavia was largely influenced by Austrian law. This also applies to the Enforcement and Security Proceedings Act [*Zakon o izvršnom postupku i postupku obezbjeđenja*] from 1930, which was completely influenced by the Austrian *Executionsordnung* from 1896,[120] as well as to Act on Court Proceedings in Non-contentious matters [*Zakon o sudskom vanparničnom postupku*].[121] This law unified the procedural inheritance law while the substantive

115 Marković, 1939, pp. 28–30; Orlić, 2022, p. 59.

116 Bećić, 2022b, pp. 139–154; Povlakić, 2016, pp. 497–498.

117 Zakon o zemljišnim knjigama [Law on Land Register/*Grundbuchgesetz*], Zakon o unutrašnjoj organizaciji, osnivanju i izmjeni zemljišnih knjiga [Law on organisation, establishment and replacement of the land registers/*Gesetz über innere Organisation, Anlegung und Austausch von Grundbüchern*] (1930), and Zakon o zemljišnoknjižnim diobama, otpisima i pripisima [Law on land register's divisions, separations and attributions/*Gesetz über grundbuchrechtliche Teilungen, Ab- und Zuschreibungen*] (1931).

118 Bećić, 2022b, pp. 139–152.

119 Official Gazette of the Kingdom of Yugoslavia [*Službene novine Kraljevine Jugoslavije*], N° 179- LXXV.

120 This Act was enacted in 1930, amended in 1937, and came into force in 1938.

121 Some of the scholars in the Kingdom of Yugoslavia were very critical of the transfer of the Austrian procedural law. Orlić, 2022, p. 56.

inheritance law remained different in six legal regions; in addition, there was a special personal statute for the Muslims.[122]

The reason for this difference from the codification of substantive civil law is the fact that the existence of different procedural regulations and separate court systems, each with its own supreme court in six regions, without the existence of a court of cassation for the entire state, in the Kongdom where strong unionist tendencies were gaining momentum, proved to be destructive.[123] Another factor contributing to decentralisation was the special jurisdiction granted to the Muslim population in personal, family, and succession matters, whose protection was guaranteed by the Saint-Germain agreement. The 28 June 1921 constitution (*Vidovdanski ustav*) provided for the establishment of special state Sharia courts. This was further pursued by the 1929 law on Sharia courts and judges; however, this law was never implemented.[124] However, these courts already existed in B&H in the past and have continued their work (see *supra* 2.3.).[125]

A brief overview of civil law in the Kingdom of Yugoslavia reveals that the inherited legal particularism persisted and that Austrian law continued to exert a strong influence, not only in B&H. The idea of codifying civil law failed because Austrian law served as a model, despite this very influence contributing to the successful codification of the civil procedural and land registries law. At its founding, the Kingdom of Yugoslavia inherited the legal particularism and in the field of the civil law, similarly passed it on to its successor, socialist Yugoslavia. For B&H, this period also meant continuity in the application of the ABGB and the aforementioned non-governmental sources that regulated family and inheritance matters.

■ *4.2. Commercial law*

Among the branches of law that were successfully codified/unified in the Kingdom of Yugoslavia, was commercial law. In 1937 the draft of a unified commercial law for the Kingdom was adopted in the parliament.[126] However, its application was abolished. The result was the continuity of the application of special commercial laws, which were in effect in certain regions of the Kingdom of Yugoslavia. Thus, in B&H, the Commercial Law for B&H from 1883, imposed by the Austro-Hungarian authorities, continued to be in force and applied.[127]

122 Antić, 1999, p. 29.
123 For B&H it was *Landesgericht* [*Zemaljski sud*] with its seat in Sarajevo.
124 For more about the development of the procedural law between the two World Wars see Povlakic, 2011b, pp. 206–209.
125 For more see Durmišević, 2008, p. 147.
126 Krešić and Pastović, 2018, pp. 219–282.
127 Ibid.

■ ***4.3. Notable legal figures and scholars in the period between two World Wars***

In the period between two World Wars, there were no universities and law schools in modern sense in B&H; Bosnian Herzegovinian jurists were educated abroad. Nevertheless, during this time, the High Sharia Judge School, which had the status of a law faculty for Sharia judges, was active.[128]

As mentioned above, no one lawyer from B&H has participated in the Codification commission; therefore, determining whether a certain Bosnian-Herzegovinian lawyer had contributed to the development of the codification process in the first half of 20th century is impossible.

5. Civil and commercial private law codification in the second half of the 20th century

■ ***5.1. Overview of the status of the codification of civil and commercial law***

In the years following the end of WWII and the socialist revolution, a series of regulations were adopted both on the state and federal levels, providing for measures of nationalisation, confiscation or restriction of private property, primarily targeting real estates. At that time, there were no thoughts or preparations about the codification of the civil law; it would have been premature in those turbulent times. In this early phase of establishing socialism, between 1945 and 1948, the influence of the Soviet doctrine and legislation was significant. The nationalisation process continued until 1958, albeit with less intensity. However, after 1948, after Tito declared a historical 'No' to Stalin and the Soviet Union, the influence of the Soviet doctrine significantly decreased in intensity. Former Yugoslavia was not a part of the Soviet bloc since 1948. In former Yugoslavia, private ownership on important real estates (means of production) was neither completely abolished nor prohibited, but rather limited.[129]

Since the Civil Code was not adopted in the Kingdom of Yugoslavia, relying on the old (inexistent) Civile Code was impossible. This resulted in further application of the ABGB, which took place in a specific manner; ABGB was not directly applied, but the so-called 'legal rules' contained in the ABGB and other regulations in force in the Kingdom of Yugoslavia. This was enabled by adoption of the Act on Termination of Validity of Laws that have been in force before 6 April 1941 and during the Occupation (further: Act on Termination).[130] Art. 4 of the Act on Termination prescribed the conditions under which the legal rules could be implemented – this was possible in a situation in which a legal gap existed and

128 Durmišević, 2008, p. 106–111; Karčić, 2005.

129 Stanković and Orlić, 1989, pp. 93–95; Nikolić, 2013, p. 96.

130 [*Zakon o nevažnosti pravnih propisa donesenih prije 6. aprila 1941. i za vrijeme neprijateljske okupacije*], Official Gazette of FNRY [*Službeni list FNRJ*], N° 84/1946.

relevant legal rule was not contrary to the Constitution, to mandatory rules, or the customs of the socialist state.[131]

In B&H, the legal rules contained in the ABGB were predominately applied. Applying the legal rules contained in other civil codifications being in force in Kingdom of Yugoslavia until 1941 (Serbian Civil Code or General Property Code of Montenegro)[132] as well the solution from foreign legal orders was also possible.[133] Thus, for almost thirty five years, the legal rules were applied across a wide sphere of property and obligation relationships.

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.[134] In family and succession matters, the application of the legal rules of the ABGB, church law, or sharia, which distinguished between the status of men and women within marriage, positions of male and female successors, children born in or out of wedlock, between matrimony and extramarital community etc., was not possible, since these rules were not in accordance with the new socialist principles.[135] In addition, the six 'inherited' regions with different legal orders resulted in disparate judicial practices. The complexity of the internal legal order caused legal uncertainty when determining the applicable law in family and inheritance cases involving a foreign element. These were the reasons why the codification of the family law was sought and performed very early on.[136] Simultaneously, preparations for an act regulating succession matters began, but was rejected after six preliminary drafts; this project was not finalised until 1955.[137]

The contract and tort law was codified in 1978, by enacting the Obligation Act (hereafter: OA)[138] and property law in 1980 by enacting the Act on Basic Proprietary Relationships (hereafter: ABPR).[139] These laws were passed relatively late, especially considering the time when work on their drafting began. As early as 1960, the creation of OA was entrusted to prof. Konstantinović, who in the subsequent nine years prepared an 'Outline for the Obligation Act' (*Skica za Zakon o obligacionim odnosima*).[140] Following a lengthy and in-depth public debate on the

131 For more about the implementation of legal rules see Konstantinović, 1960, p. 3; Gams and Đurović, 1990, p. 52; Rašović, 2006, p. 38; Vedriš and Klarić, 2000, p. 19; Borić, 1996, p. 52; Povlakić, 2011a, pp. 236–238, 244–246.

132 Konstantinović, 1960, p. 5.

133 Orlić, 2022, p. 67.

134 Succession Act [*Zakon o nasljeđivanju*], Official Gazette SFRY [*Službeni list SFRJ*], N° 20/1955.

135 Blagojević, 1979, p. 14.

136 Ibid.

137 Antić, 1999, p. 30.

138 Obligations Act [*Zakon o obligacionim odnosima*], Official Gazette of SFRY [*Službeni list SFRJ*], N° 29/1978, 39/1985, 45/1989.

139 [*Zakon o osnovnim vlasničkopravnim odnosima*], Official Gazette of SFRY [*Službeni list SFRJ*], N° 6/1980, 36/1990. The branch of private law where the application of legal rules has lasted the longest is the land registries law. See Povlakić, 2016, pp. 498–500.

140 Kršljanin, 2022, p. 21.

draft, the Obligation Act was passed 1978.[141] Preparations for a regulation of rights *in rem* started in the 1960s as well, but it took 20 years for the law to be passed.[142]

The Succession Act from 1955, drafted mainly by Mihajlo Konstantinović, Professor of law at Belgrade University, was under the influence of Suisse law and some aspects of the Franch law, with certain adjustments to the socialist system.[143] The contract and tort law, i.e., OA was, as mentioned above, primarily drafted as well by Mihajlo Konstantinović. He applied the 'best law approach method' and conducted extensive comparative legal research during this process[144] and simultaneously, carefully analysed the judicial praxis.[145] He was not averse to adopting foreign solutions verbatim if they were clearly and precisely formulated in a foreign source.[146] The OA borrowed legal solutions from Suisse, Franch, Italian law and from some international instruments, such as Convention relating to a Uniform Law on the International Sale of Goods and Convention relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods both signed in Hague in 1964. 'Without striving for originality at all costs, but aiming to achieve harmony in the overall design and adapt it to local circumstances, Konstantinović has approached the coordination of elements of domestic and foreign origin with great care'.[147]

The ABPR from 1980 regulated the legal relations between private persons involving private objects on which private property existed and these relationships were largely regulated in a very traditional manner, following the Austrian law to a large extent, whereas the German law influenced the regulation of possession (*Besitz*). The shift from traditional, Roman to modern, German concept of possession was proposed mainly by Slavica Krneta, professor of law at University Sarajevo.

Previously mentioned legal orders had more impact on the regulation of private law issues than Soviet doctrine or legislation. In addition to applying the legal rules from ABGB or from other legal sources that were in force in the Kingdom of Yugoslavia, judges could apply the law of a third country *auctoritate*

141 Kuštrimović-Kovačević and Lazić, 2008, p. 78.

142 More about these legislative activities Nikolić, 2013, p. 99.

143 Gavella, 2008, p. 15. Substantive succession law in B&H and other successor states of the former Yugoslavia essentially originates from 1955. At this point, some prejudices need to be revised too. This was a successful piece of codification that survived in the new circumstances with certain adjustments (for example, recognition of the succession contract, succession by partners of the same sex, etc.). In support of this statement, one may look at the example of the Republic of Croatia, where a law from 1955 remained in force until 2002. The new Croatian Law on Succession has retained all the basic principles of the former law. More about this regarding Josipović, 2009, p. 190. The same situation prevailed in Slovenia (Rudolf, 2020, p. 1423, N° 9), as well as in B&H (Povlakić, 2009a, p. 143).

144 Konstantinović, 1969, p. 7.

145 Orlić, 2020, p. 67.

146 Konstantinović, 1969, p. 7; Kršljanin, 2022, p. 22.

147 Kršljanin, 2022, p. 23; Orlić, 2022, p. 63.

rationis in the absence of a legal solution. This approach granted judges considerable freedom to develop legislation based on the civil codes of Western European countries.[148] For these reasons, according to the views expressed in the doctrine, the break from the old legal order was more pronounced in the field of public law. The private legal system was closer to the legislative standards of Western European than those of other socialist countries.[149]

As in the Kingdom of Yugoslavia, the civil code was never enacted in socialist Yugoslavia either for various reasons. First, the prevailing thought was that social relationships were in a permanent state of restructuring, not sufficiently stable to be codified. Codification was even viewed as an obstacle to the development of the legal system.[150] In the period from 1955 to 1971, an idea to codify civil law not through the adoption of a single civil code, but by passing special laws for certain parts of civil law was considered. Work on the development of a general part of civil law had commenced as well.[151] However, these efforts ended with the constitutional reforms in 1971 and 1974. These reforms led to greater decentralisation resulting in an additional obstacle to the codification process, namely, the lack of the legislative competencies of the federal state.

Despite the fact that the civil code was neither enacted nor planned in former Yugoslavia, the standard parts of a civil law were codified in ex-SFRY by separate acts. The OA and ABPR, which were enacted on a federal level, did not regulate the entire corpus of the obligation and proprietary relationships. Some issues should have been regulated by the socialistic republics (e.g., gift, partnership and borrowing agreements, then personal easements, neighbour rights, and real burdens), but they did not exercise their legislative powers. The legal rules from ABGB were applied to the issues mentioned. After the constitutional reforms from 1971 and 1974, the family and succession act, previously adopted as statute for whole State, was replaced by eight Family Acts and eight Succession Acts, enacted by six socialis republics and two autonomous regions. In B&H, the Succession Act was enacted in 1973 and amended and supplemented in 1980,[152] and the Family Act in 1979.[153] However, something was missing; a general part of the Civil Code was not adopted, and the situation remains the same today.

The majority of topics which should be covered by the general part of the civil code are regulated by separate statutes, although not completely and

148 Orlić, 2022, p. 63.
149 Nikolić, 2013, p. 96.
150 Spaić, 1971, p. 34.
151 Nikolić, 2013, p. 98.
152 Succession Act [*Zakon o nasljeđivanju*], Official Gazette SR B&H [*Službeni list SR BiH*], N° 7/1980, 15/1980.
153 Family Act [*Porodični zakon*], Official Gazette SR B&H [*Službene novine SR BiH*], N° 21/1979, 44/1989.

systematically. The general part of the civil law is, so to say, fragmented in many laws, but some parts of the puzzle are still missing.[154]

■ *5.2. Socialist legal System, post-war reconstruction, and legal reforms regarding state property*

The legal order in the former SFRY and B&H was characterised by a dichotomy between state and private ownership. While the legal relationships between private natural persons and private legal entities, as shown above, continued to be regulated in a rather traditional manner, the situation was quite different regarding the proprietary relationships on real estate which was allocated to the state/social enterprises and other socialist legal persons.[155]

During this period, commercial law predominantly regulated the relationships between socialist commercial entities, whose legal status often changed significantly. B&H underwent various stages of socialist development.

In the first phase of development (1946–1950), after the implementation of nationalisation measures, basic production means and the most important economic goods entered the fund of state ownership. During the period of centrally planned economy, socialist enterprises had very limited autonomy and the main right on allocated assets was management right (*pravo upravljanja*) This period did not last long (1946–1950). In 1950, for political reasons, the Basic Law on the Management of Economic Enterprises and Higher Economic Associations by labour collectives was adopted,[156] introducing workers' self-management, which marked the abandonment of the administrative management of the economy.

In the period between 1950 and constitutional reforms in 1971 and 1974, the state ownership evaluated into social ownership.[157] In this period, companies were working organisations and legal entities with the right to use assets in social ownership.[158] This right was the broadest property right belonging to the working organisation[159] and was protected by the constitution.[160] Based on this right, the organisation managed and disposed these assets, meaning it could transfer them to other entities and encumber them.

Far-reaching constitutional reforms were implemented in 1971 and 1974. The concept of social ownership changed, and this shift was finalised by the adoption of the Law on Associated Labour in 1976,[161] which was hailed as the constitution of

154 For more see Povlakić, 2024b, p. 309.
155 Povlakić, 2009b, p. 24.
156 [*Osnovni zakon o upravljanju privrednim preduzećima i višim privrednim udruženjima od strane radnih kolektiva*] Official Gazette SFRY [*Službeni list SFRJ*] N° 43/1950.
157 Spaić, 1971, p. 511; Gams and Đurović, 1990, p. 22; Povlakić, 2009b, p. 25.
158 Simonetti, 1998, p. 371.
159 Spaić, 1971, p. 511; Simonetti, 1998, p. 372.
160 Art. 15. of the Constitution of SFRY from 1963.
161 [*Zakon o udruženom radu*], Official Gazette SFRY [*Službeni list SFRJ*], N° 53/76, 57/83, 85/87, 40/89.

self-management and social ownership. Social ownership lost its legal status and was considered merely as an economic category. The items in social ownership belonged to everyone and to no one. As they were not subject to ownership or property rights, the entire segment of social resources was excluded from the standard ownership regime and was instead subject to special public law.[162] The working organisation had a right on disposal (*pravo raspolaganja*), which means that these units entered into market-based relationships, which the workers, the actual owners of the rights to the means of production, either individually or collectively, were unable to do.

These conceptual changes of the state/social ownership resulted in several changes to the rules governing the legal status of socialist enterprises.[163]

In the late 1980s, right before the dissolution of the country, the former socialist Yugoslavia was already undergoing significant reforms, one of which was a process of transformation of socialist enterprises into commercial companies by enacting of the Enterprise Act and Social Capital Act.[164,165] This process meant the transformation of the former socialist rights (right of management/use/disposal) that these enterprises had over their assets into property rights.[166]

Despite these significant differences in the regulation of socialist enterprises, their contractual relationships were subject to 'classic' regulations contained in laws that were in force in the Kingdom of Yugoslavia or, since 1978, subject to the OA.

The legal provisions of the repealed law of the Kingdom of Yugoslavia proved to be an obstacle to the contractual relationships between commercial enterprises. In 1954, the Main State Arbitration Board adopted the General Usances for trading goods. It was widely accepted that these were not only codified commercial customs, but rather rules that regulate obligations, typically included in civil codifications.[167] The General Usances regulated the conclusion, execution, and security of contracts, contractual liability etc. The fact that these were rules of the obligation law is evidenced by the adoption of a number of solutions contained in the Usances in the OA, and by the fact that, after its enactment, the Usances' rules regulating matters now governed by the OA will no longer apply (Art. 1107 OA).

OA provided unique rules for all the participants in contractual relations unless something else was prescribed by that law for entities involved in

162 Povlakić, 2009b, p. 25.

163 Find out more about the different phases of these developments by Džidić, 2010, pp. 51–53; Vasiljević and Radović, 2023, pp. 11–12.

164 Enterprises Act [*Zakon o preduzećima*], Offcial Gazette SFRY [*Službeni list SFRJ*], N° 40/89, 46/90; Social Capital Act [*Zakon o društvenom kapitalu*], Offcial Gazette SFRY [*Službeni list SFRJ*], N° 84/1989, 46/1990;

165 For more see Povlakić, 2009b, pp. 30–39.

166 For more on this process Povlakić, 2024a, p. 291.

167 Perović, 1978, pp. 66–67; Vodinelić, 2014, p. 114.

commercial contract; the special commercial law was never passed. By accepting the monism principle, the OA followed the Suisse model and the model of some other socialist countries. Few exceptions were made for commercial companies. Instead, some special basic principles were prescribed for them. For example, it was expressly stipulated that socialist enterprises should operate and exercise their rights and obligations in the market. In terms of the specific regulation enterprises, were and still are subject to stricter assessment, particularly with regard to the obligations of the seller and the buyer arising from a contract of sale. Moreover, the prescription period was shorter, as well as the presumption of joint liability for contractual obligations etc.

■ *5.3. Notable legal figures and scholars*

In this period, higher legal education in the B&H war reformed and the Law Faculty Sarajevo was founded in 1946, and University Sarajevo one year later. During the subsequent decades, the universities and law faculties in Banja Luka, Mostar, Bihać, Tuzla etc. followed suit. Although these law schools were established, almost until 1995, until the end of the war in B&H, the Faculty of Law of University Sarajevo was the centre for research and education in civil matters. Significant civilians researched and taught here exclusively, save for a few exceptions. They offered lectures to the students of all the other law faculties in B&H.

The situation has changed in recent decades. However, regarding the contribution of prominent legal scholars to the codification of civil law and their role in promoting legal education until the end of the socialist era in 1992, several scholars affiliated to the Law Faculty of Sarajevo must be mentioned. Almost all of them were among the first generation of professors at the Law Faculty in Sarajevo after its establishment. There were at the first place Prof. Vojislav Spaić and Prof. Slavica Krneta, both members of the Academy of Science and Art of B&H, the former a French student and the latter, a German student and inspired by German law. Both were pioneers of intellectual property rights in former Yugoslavia. The Law Faculty of Sarajevo was the first law faculty in former Yugoslavia to introduce intellectual property rights as an obligatory subject into its curriculum. The first generation of post-war civil law scholars also included Prof. Stevan Jakšić, whose research focus was contract and tort law, Prof. Samuel Kamhi, who has been an outstanding figure in the field of procedural law, Prof. Alija Silajdžić, who researched and gave lecture on Succession and Family Law. Almost all of them left behind prominent textbooks as their legacies. The first textbook in civil law (General part and property law) was published by Prof. Spaić in 1957,[168] and further editions followed. His first book on copyright law was also published in 1957.[169]

168 Spaić, 1957a.
169 Spaić, 1957b.

Reliable data on their role in the codification of specific areas that constitute the civil law could not be found. As mentioned above, some of them had concerns about whether codifying the entire civil law would be sensible, and have questioned the practicality of doing so.[170] It can be reliably asserted that Prof. Krneta was member of the expert group for drafting Act on Basic Property Relationships of former Yugoslavia, and that she was involved in the process of codifying the intellectual property rights along with Prof. Spaić; prof. Krneta was the head of the experts group for drafting statutes regulating the intellectual property in B&H as an independent state as well.[171] Prof. Nerimana Traljić has significantly contributed to the codification of the family law of Socialist Republik B&H in 1979[172] and of the Federation B&H in 2005.[173]

6. Civil and commercial private law codification in the present

■ *6.1. Transition to market economies*

After 1995, B&H went through a 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'.[174] However, for B&H as well for other countries that emerged from former Yugoslavia, the main legal challenge was not a transition from centrally planned to market economies, since the planned economy was abandoned already at the beginning of the 1950s (for more see *supra* 5.2). The biggest challenges within the transformation process in B&H is the transformation of state/social ownership, namely the prohibition on disposing state property, caused by the fact that no consensus has yet been reached at a political level on how to distribute property between the different administrative levels.[175] rather the denationalisation and clarifying of the proprietary relationships. The transition process was already launched through the constitutional reforms in former Yugoslavia and in the Socialist Republic B&H in 1989/90.[176] The relevant reforms of the proprietary order started with these constitutional

170 Spaić, 1971, p. 34.

171 Act on Copyright and Related Rights [*Zakon o autorskom pravu i srodnim pravima u BiH*], Official Gazette B&H [*Službeni glasnik BiH*] N° 7/2002 and 76/2006; Act on Industrial Property [*Zakon o industrijskom vlasništvu u BiH*], Official Gazette [*Službeni glasnik BiH*], N° 3/2002 and 29/2002.

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

173 Family law of FB&H [*Porodični zakon Federacije BiH*] Official Gazette [*Službene novine FBiH*], N° 35/2005, 41/2005 – corr., 31/2014 and 32/2019 – Decision of the Constitutional Court.

174 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.

175 Povlakić, 2024a, p. 296.

176 Povlakić, 2009b, pp. 300–301.

reforms resulting in amendments to ABPR in 1990,[177] and regarding the socialist enterprises by launching the process of privatisation of enterprises, that evaluated commercial companies.[178]

According to the Dayton Peace Agreement, which serves as the constitution of B&H, one of the reasons for its adoption was to promote general welfare and economic growth by protecting private property and promoting a market economy. However, these aims are constantly hindered by the complex state organisation. Legislative powers are divided among different levels. Specifically, these powers are shared between the State of B&H and its two entities: the Federation of B&H (hereafter: FB&H) and the Republic of Srpska (hereafter: RS).[179] The Brčko District BD B&H (hereafter: BD B&H) also has broad legislative competences. In civil law, this means that the state of B&H is not competent to enact a civil or commercial code, but its three constituents are.[180]

No discussions ensued regarding the possible adoption of civil law codification for B&H or any of its constituent parts. Regarding the codification of civil law, the situation remains the same as before the transition: the civil law is codified by separate statutes regulating different parts of civil law, except for the general part (see *supra* 5.1.).[181] The only difference is that new family, succession, and property regulations were enacted during the transition process in both entities (Federation B&H and Republic Srpska) and BD B&H;[182] only the OA, enacted in the former Yugoslavia, is still applied.[183] New statutes that regulate the status of companies

177 Official Gazette SFRY [*Službeni list SFRJ*], N° 36/1990.

178 Povlakić, 2024a, p. 291.

179 For more see Povlakić, 2010, pp. 206–207.

180 The Constitution of B&H allows for the transfer of legislative powers or provide for 'internal market' competence, but the use of these instruments depends on political will.

181 Povlakić, 2024b, pp. 299–300.

182 For more on these new private law regulations see by Povlakić, 2024b, pp. 309–327.

183 The legal basis for applying the Yugoslav Obligation Act differs in the three parts of B&H: The Federation of B&H assumed this statute by 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. In 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 Republic Srpska (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). Art. 76 of 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. But the OA has mostly remained the same in all three parts of B&H.

have been enacted in three parts of B&H as well,[184] but not the codes that regulate commercial contracts.

■ *6.2. The role of international legal assistance in codification efforts*

In the transition process, in B&H as well as in other transitional countries, the necessity of finding new legal solutions in the area of private law was enormous and was often satisfied by solutions borrowed from other legal orders. The circulation of legal models is a process that is common in all transitional countries departing from the socialist model of law and economy, and is caused by at least two reasons. First, beyond any doubt, a necessity to find fast, instant solutions for various matters in the transformation process. In developed western countries, the solutions are developed by both the legislator and doctrine and case law over a longer period of time. Countries in transition have neither the time nor need to follow the same path of development and the transfer of law from West to East is reasonable.[185] In this respect, transitional countries have an advantage because they can choose a ready-made model 'in the market', i.e., the solution that suits them best; but on the other hand, this freedom of choice may also become a hindrance. The freedom of choice should be conditioned by the specific needs and situations of each individual country. However, this freedom is often more restricted by another factor. This leads us to the second reason for reception – the decision regarding which solution to choose is often determined by prestige or even pressure by the 'donor' country or organisation.[186] Therefore, in some cases, even imposed reception occurred. B&H can be considered as a paradigmatic example of a transitional country in the region which has been exposed to different legal influences, often without domestic critical engagement.[187]

In each transitional country, the following question arises: are the state's structure, judicial system, and administrative bodies able to conduct qualitative and fast reform as well as adequately apply the same? In B&H this question became even more controversial due to the complex state organisation. It is obvious that each legislative body in B&H (14!) does not have enough capacity for such a task. Therefore, the involvement of the international community and different governmental or nongovernmental organisations in the legislative procedure in B&H was even more acute and delicate than in other transitional countries. Legal experts and institutions from various countries were involved in different

184 Company Act of FB&H [*Zakon o privrednim društvima FBiH*], Official Gazette FB&H [*Službene novine FBiH*], N° 81/2015, 75/2021; Company Act of RS [Zakon o privrednim društvima RS], Official Gazette RS [Službeni glasnik RS], N° 127/2008, 58/2009, 100/2011, 67/2013, 100/2017, 82/2019, 17/2023; Company Act of BD B&H [*Zakon o preduzećima BD BiH*], Official Gazette BD B&H [*Službeni glasnik BD BiH*], N° 49/2011, 11/2020.

185 Šarćević, 2003, p. 761; Ajani, 1998, p. 37; Ajani, 1994, pp. 1088–1105.

186 Ajani, 1998, pp. 48–49; Rehm, 2008, p. 5; Chanturia, 2008, pp. 118–119.

187 More see by Povlakić, 2010, pp. 214.

legislative projects in B&H,[188] which enormously increased the chances of the offered legal solutions being uncritically transferred from another legal system. Certain new statutes were principally prepared within a short time period,[189] by almost anonymous domestic or foreign 'experts', often without a public debate or involving domestic academics and experts, oftentimes involving lastminute changes in the Parliament. These factors had a crucial influence on the quality of the transfer.

The role of the international community in the reform process in BiH was sometimes Janus-faced. International involvement was often desperately needed but simultaneously, as already stated in the doctrine, those subjects, who will later become lenders and creditors, initiated, supported, or designed the reforms as per their own needs.[190] Technical support and the exercise of influence, together with the imposition of the legal provisions arising from the legal system of the entity providing the support, without taking care of the legal tradition or other performed reforms, oftentimes went hand in hand. For a successful transfer, on one hand, conducting the reforms partly by virtue of domestic experts is necessary, and on the other hand, managing reforms in such way as to take advantage of the different influences and coordinating them. The Succession Act from 1955 and Obligation Act from 1978 and the work of Prof. Konstantinović are perfect examples for the successful transfer of legal solutions.

It is a fortunate circumstance, that the reforms of the property law, land registry law, notary law, insolvency and partially enforcement law were undertaken with the support of one and the same subject, namely German governmental organisation Gesellschaft für internationale Zusammenarbeit (GIZ), which induced two positive effects. First, the influence of the continental European legal system, which is not completely strange to the legal system in B&H and second, the reforms were mutually coordinated to a certain extent. Nonetheless, when reform projects are conducted in such manner, certain problems can arise. Legal reforms supported by GIZ did not always mean adopting solutions from the German legal system; solutions of the Austrian law were simultaneously transferred. This sometimes resulted in contradictory solutions, or the transferred solutions were not always of the same quality, which was often caused by certain subjective aspects, such as the personality of the foreign expert appointed for leading the project, the quality of cooperation with domestic experts, the quality of domestic experts as well as the attitude of the competent ministry towards a certain project.[191] Although the role of international factors can often be critically evaluated, it also cannot be denied that, had the activities or even pressure from the international

188 Experts from the USA, Germany, Sweden, Austria etc. were involved in this process.
189 More on this issue in general Nikolić, 2008, p. 40.
190 Povlakić, 2010, pp. 235–236.
191 For more about the influence of these facts see Chanturia, 2008, p. 119.

community not subsided, certain regulations and the necessary amendments and supplements to the existent statutes would never have been adopted.

7. Instead of conclusion: future trends in legal codification

B&H is a country has not recovered after the war ended in 1995; over the past three decades, it has experienced small as well as large political and constitutional crises, and is currently facing its most challenging crisis yet. The codification of civil law is not on the agenda at the level of the State of Bosnia and Herzegovina, or at the level of its component parts (the two entities and the Brčko District of B&H). As already mentioned (see 6.1), the State of B&H does not have the requisite competences to enact the civil code, and there is definitely no political will for transferring the competences from entities to the state, which would be possible according Art. III.5 of the Constitution of B&H. In addition, the situation in the Federation B&H is complicated because, according to the Constitution of the Federation B&H, the legislative competences are divided between Federation B&H and its ten cantons. In the Republic of Srpska and in BD B&H there are no similar constitutional obstacles to enact such a codification. However, such an ambitious undertaking could not be realistically expected, especially given the circumstances. It should not be disregarded that Nord Macedonia began a codification project in 2012 without visible results. The same situation prevails in Montenegro, where the Commission for drafting the General part of civil law codification was established in 2019. The Situation in Serbia is specific; an expert group was established and a preliminary draft of the civil code was created. Over the years, this draft became the subject of a broad public discussion. Nevertheless, the Commission was dissolved in 2019. The constitutional situation in these countries is not comparable with the complex situation in B&H; despite that, the projects were not successfully completed.

Since the unsuccessful attempt to codify civil law in the Kingdom of Yugoslavia, the idea of codification was never the focus of legislators and jurists in socialist Yugoslavia, and it is not relevant in modern-day B&H. One country can undoubtedly have codified law even without an enactment of the civil code. This was demonstrated by the experience of socialist Yugoslavia, which has been inherited by present-day B&H. The problem undoubtedly lies in the fact that the general part of the civil law is not covered by a single legal text but is scattered across various laws, which naturally leads to missing pieces in the overall picture or contradictions between laws.[192] This situation must now be multiplied by three, as it applies to the two entities and the Brčko District of BiH.

192 Povlakić, 2024b, p. 307.

There are almost no private law regulations for the entire country. Exceptions include regulations governing the broad scope of intellectual property[193] and the Framework Law on Pledges;[194] the latter was adopted with strong American support. The Framework Law on Pledges, which regulates non-possessory, registered pledges on movable property and rights and provide for a single electronic register for the entire country, could serve as an indicator of the benefits that unified regulation provides in a small country with approximately three million inhabitants. Business entities, primarily banks, can easily register pledge rights on movable property, regardless of its location in B&H, as well as on all rights, which significantly facilitates business transactions.

Interestingly, the constitutional basis for adopting the Framework Law on Pledges, as well as a set of laws regulating intellectual property, is cited as Article IV.4.a) of the Constitution of B&H, which states that the Parliamentary Assembly of B&H is responsible for enacting the laws necessary for implementing the decisions of the Presidency or to perform the Assembly's functions in accordance with the Constitution. We believe that this is not an adequate constitutional basis for enacting private law regulations at the B&H level, although this does not mean that such a basis, apart from the rarely used possibility of transferring competencies from the entities to the state of B&H, does not exist. This basis is provided by Article I.4 of the Constitution of B&H, which is completely overlooked even though it opens the possibility for adopting regulations at the state level.

According to this constitutional provision there shall be freedom of movement throughout B&H, and B&H and the Entities shall not impede the full freedom of movement of persons, goods, services, and capital throughout Bosnia and Herzegovina. This competence of the State of B&H demonstrates a parallel with the internal market competence of the EU. Despite the difference in size, it is certainly possible to draw a parallel with the EU. Like the EU, B&H has only explicitly enumerated powers, and has no powers in certain areas. In both cases, the concept of a single market with four fundamental freedoms has been elevated to the status of a constitutional principle. The EU has adopted a whole range of measures in a field of private law, especially contract law based on Article 114 and 115 AEUV in order to enable a functioning of internal market.[195] To prevent efforts to harmonise private law from failing due to jurisdictional obstacles, the

193 Law on Industrial Designes [*Zakon o industrijskom dizajnu*], Law on Trademark [*Zakon o žigu*], Law on Patent [*Zakon o patentima*], Law on the Protection of Indications of Geographical Origin [*Zakon o zaštiti oznaka geografskog porijekla*], Law on the Protection of Topographies of Integrated Circuits [*Zakon o zaštiti topografije integrisanih kola]* – all published in Official Gazette of B&H [*Sluzbeni glasnik BiH*], N°53/2010), and Law on Copyright and Related Rights [*Zakon o autorskim i srodnim pravima*], Law on the Collective Management of Copyright and Related Rights [*Zakon o kolektivnom ostvarivanju autorskih i srodnih prava*], Official Gazette of B&H [*Sluzbeni glasnik BiH*], N° 63/2010.

194 Official Gazette of B&H [*Sluzbeni glasnik BiH*], N° 28/2004, 54/2004.

195 For more about these competences of the EU see Meškić and Samardžić, 2012, pp. 120–123.

functioning of the single market should serve in B&H as well as a constitutional basis for authorising certain legislative measures. Furthermore, the principle of subsidiarity can also be assumed in B&H.[196] Unfortunately, this option was never used. Even the international community did not recognise the potential of this constitutional provision.

In the period between 2002 and 2010, the international community (for example, through the projects and activities of the GIZ), has, respecting the constitutional division of legislative powers, promoted and supported the enactment of separate but in their content harmonised entity regulations. The first harmonised regulation was probably in the field of land registries.[197] The introduction of a harmonised registration system was one of the first tasks imposed on B&H by the international community after the war, and this was no coincidence.[198] A new registration system would better protect legal transactions and creditors, creating a favourable investment climate throughout B&H. The idea of creating the same conditions for business activity throughout B&H is closely linked to the free movement of capital and services. The harmonised regulation on civil procedure,[199] enforcement procedure,[200] bankruptcy,[201] notary,[202] property and other rights *in rem* followed.[203] These regulations were drafted by the experts' groups nominated by the ministries of justice of each entity.[204] This paper does not attempt to interrogate the reason for the 'climate change', but this effective approach to harmonise private law within the given constitutional framework was abandoned.

The lack of legal uniformity carries particular weight in the area of contractual transactions (general, consumer or business contractual transactions),

196 In this sense Meyer, 2013, p. 18.

197 Land Registry Act of the FB&H [*Zakon o zemljišnim knjigama FBiH*], Official Gazette FB&H [*Službene novine FBIH*], N° 58/2002; Land Registry Act of the RS [*Zakon o zemljišnim knjigama RS*], Official Gazette RS, [*Službeni glasnik RS*], N° 67/2003.

198 Povlakić, 2003, p. 231; Povlakić, 2016, p. 503.

199 Civil procedure Act of the FB&H [*Zakon o parničnom postupku FBiH*], Official Gazette FB&H [*Službene novine FBiH*], N° 53/2003, Civil procedure Act of the RS [*Zakon o parničnom postupku RS*], Official Gazette RS [*Službeni glasnik novine RS*], N° 58/2003.

200 Enforcement Procedure Act of the FB&H [*Zakon o izvršnom postupku FBiH*], Official Gazette FB&H [*Službene novine FBiH*], N°32/2003, Enforcement Procedure Act of the RS [*Zakon o izvršnom postupku RS*], Official Gazette RS [*Službeni glasnik novine RS*], N° 59/2003.

201 Bankruptcy Procedure Act of the FB&H *[Zakon o stečajnom postupku FBiH*], Official Gazette FB&H [*Službene novine FBiH*], N° 29/2003, Bankruptcy Procedure Act of the RS [*Zakon o stečajnom postupku RS*], Official Gazette RS [*Službeni glasnik RS*], N° 67/2002.

202 Notary Act of the FB&H [*Zakon o notarima FBiH*], Official Gazette FB&H [*Službene novine FBiH*], N° 45/2002, Notary Act of the RS [*Zakon o notarima RS*], Official Gazette RS [*Službeni glasnik novine RS*], N° 86/2004.

203 Property Act of the FB&H [*Zakon o stvarnim pravima FBiH*] Official Gazette FB&H [*Službene novine FBiH*], N° 66/2013, Property Act of the RS [*Zakon o stvarnim pravima RS*], Official Gazellte RS [*Službeni glasnik RS*], N° 124/2008 etc.

204 One of the authors of this paper was involved in these legislative projects, and can testify that the work of these entities' groups of experts was always harmonised and the final solutions were the results of the experts' consent.

which are fundamental to the functioning of the internal market. The business conditions are not the same across all three parts of B&H. This opens the door to forum shopping as well as abuses to the detriment of consumers, particularly due to the fact that, alongside the static Obligation Act, that, as noted above (see 6.1.) is applied in almost unchanged wording across all three parts of B&H, a range of regulations in the areas of commercial and consumer contract law are being adopted in the entities and BD B&H, creating different business conditions in various parts of B&H.

There are no discussions or attempts within the scholarly or professional community regarding the enactment of the commercial code which would regulate commercial contracts. The OA follows a monism principal, which has never been questioned. However, the fact that the same rules apply to both commercial and non-commercial contracts has led to some shortcomings in the regulation of commercial contracts. Additionally, certain commercial contracts, such as leasing and factoring contracts, are governed by specific legislation enacted at the entity level, as the OA is unified across the entire country.[205] Regarding commercial contracts, a further highly relevant example is the differing regulations on electronic documents[206] and electronic signature,[207] both topics unified in the EU[208] but differently regulated in B&H. There are some differences in regulation of the commercial matters and use of electronic documents and signatures in commercial transactions in different parts of B&H which can lead to inter-local conflicts of laws.

Simultaneously, the Obligation Act, in its original text, included provisions for resolving inter-local conflicts of laws in contractual relations (Articles 1099–1105). These provisions are still applied in their original form in BD B&H; in the RS Obligation Act, the provisions on inter-local conflict of laws have been adopted in a significantly abbreviated form, while in FB&H they have been completely repealed.[209] This means that, ultimately, there are no uniform solutions for

205 For more on these new private law regulations see by Povlakić, 2024b, pp. 309–327.

206 Electronic Document Act of FB&H [*Zakon o elektronskom dokumentu FBiH*], Official Gazette FB&H [*Službene novine FB&H*], N° 55/2013; Electronic Document Act of RS [*Zakon o elektronskom dokumentu RS*], Official Gazette RS [*Službeni glasnik RS*], N° 106/2015; Electronic Document Act of BD B&H [*Zakon o elektronskom dokumentu BD B&H*], Official Gazette BD B&H [*Službeni glasnik BD B&H*], N° 11/2020.

207 Electronic Signature Act of B&H [*Zakon o elektronskom potpisu BiH*], Official Gazette B&H [*Službeni glasnik BiH*], N° 91/2006; Electronic Signature Act of RS [*Zakon o elektronskom potpisu RS*], Official Gazette of RS *[Službeni glasnik RS*], N° 105/2015, 83/2019, Electronic Signature Act f BD B&H [*Zakon o elektronskom potpisu BD BiH*], Official Gazette BD B&H [*Službeni glasnik BD BIH*], N° 11/2020.

208 Regulation (EU) No 910/2014 of the European Parliament and of the Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC from 28.08.2014, OJ L 257/73.

209 Meškić, Duraković and Alihodžić, 2018, p. 641.

conflicts of laws in the areas of contracts and commercial contracts, which are differently regulated in three parts of B&H.

The Obligation Act remains completely untouched by the development of consumer law, which was first enacted at the state level, first in 2002 and later in 2006,[210] followed by the adoption of a Consumer Protection Act in Republika Srpska in 2012.[211] The state-level Consumer Protection Act applies in the FB&H and BD B&H. In the FB&H, work on drafting an entity-level consumer law is underway, while in the BD B&H, there is no consideration of such a law. Additionally, specific regulations implementing certain EU directives (so-called *lex specialissima*) have been adopted in FB&H and RS, but this has been entirely absent in BD BiH. The European directives are often implemented at entity level and often in different ways, even when they are full harmonisation directives.[212] This approach to aligning the national law with European law can result in discrepancies within the internal market of B&H. This cannot be a desirable outcome of the adoption of the *acquis*.

The legal framework for consumer protection, as well as commercial contract law, has become asymmetrical.[213] It should not be controversial that such a situation causes legal uncertainty and jeopardises the four market freedoms protected by the Constitution. However, there have been no wider public debates on whether Article I.4 of the Constitution of B&H could form the basis of the unified regulation of general, commercial, and consumer contract law. An attempt to pass a unified obligations law for the whole country was unsuccessful in the Parliamentary Assembly of Bosnia and Herzegovina in 2010.[214] Subsequently, the adoption of such a law was removed from the political agenda and no longer the focus of legal scholarship.

It can be concluded that the progress of reforms within the transition process in B&H as well as the fulfilment of tasks set before a candidate country for EU membership can be seriously jeopardised by the fragmented private law system.

When it comes to scholars, they possess the expertise to address the aforementioned issues and find adequate solutions. The problem is that lawmakers and politicians generally do not consult relevant scholars and professional communities on legislative projects, and there is very often no dialogue between them. Otherwise, scholars are often involved in legislative projects organised and supported by international organisations and bodies.

210 Consumer Protection Act [*Zakon o zaštiti potrošača*], Official Gazette [*Službeni glasnik BiH*] N° 17/2002, 44/2004; Consumer Protection Act [*Zakon o zaštiti potrošača*], Official Gazette [*Službeni glasnik BiH*], N° 25/2006, 88/2015.

211 Official Gazette of RS [*Službeni glasnik RS*], N° 6/2012, 63/2014, 18/2017, 90/2021.

212 Povlakić, 2019a.

213 Povlakić, 2019a, p. 169; Povlakić, 2019b, p. 24.

214 For more Povlakić, 2024b, pp. 312–313.

Furthermore, thirty years after the war ended, the constitutional organisation of the B&H is still highly discussed, which distracts the attention from other important issues.[215] Namely, these are the economic and legal reforms as preconditions for the association of B&H to the European Union or other integrations as well as for the distribution of certain international grants and support. In order to accomplish this, there are requirements set up by the international community which must be fulfilled. The legislators in B&H are often objectively unable to fulfil these requirements and often there is simply no political will to do so.

215 On the complex constitutional structure of Bosnia and Herzegovina and the problems of appointing judges, see Orlović, 2021, pp. 175–179.

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