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ARTICLES

DIMITAR ATANASOV*

History of Private Law Codification in Bulgaria

- **ABSTRACT:** *This study traces the historical development of civil and commercial private law codification in Bulgaria from the nineteenth century to the present, situating it within the broader context of legal transplantation, nation-building, and modernization. It examines the pluralistic legal order under Ottoman rule, the influence of the Tanzimat reforms, and the early reception of Western European legal models – particularly Italian, French, and German – in the decades following Bulgaria’s Liberation in 1878. Through detailed analysis of legislative efforts across distinct historical periods, including the socialist era and the post-1989 democratic transition, the study highlights the eclectic nature of legal reception in Bulgaria and argues that the resulting civil and commercial legislation is not a mere transplant but rather a creative adaptation incorporating native and innovative elements. Particular emphasis is placed on the role of codification as a vehicle for legal and institutional transformation, the debates surrounding the adoption of a national civil code, and the ongoing challenges of legal modernization in the context of EU integration and technological change.*
- **KEYWORDS:** *codification, civil code, Bulgaria, Southeast Europe*

1. Introduction

The codification of private law in Bulgaria represents one of the most complex and revealing dimensions of the country’s legal and political history. Situated at the crossroads of empires and legal cultures, Bulgaria’s legal development has been shaped by a series of profound historical ruptures and foreign influences. From the layered legal pluralism of the late Ottoman Empire to the post-Liberation adoption of Western European legal models, and to modern-day legal modernization

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in the context of EU integration and technological change, the process of building a national legal system has involved both selective borrowing and active adaptation.

This study aims to explore the evolution of Bulgarian civil and commercial private law codification from the early nineteenth century to the present, situating it within the broader context of legal transplantation, nation-building, and modernization. Through detailed analysis of legislative efforts, the study argues that the resulting Bulgarian civil and commercial legislation is heterogeneous in nature and not a mere transplant, but rather a creative adaptation of its Western models, containing original, nation-specific, and innovative elements.

Taking into account that, for various reasons discussed in the study, Bulgaria has never adopted a unified civil code, the study also examines whether a complete and coherent codification is necessary and feasible at present, or whether gradual, sector-specific reforms carried out systematically would be a more prudent option. Therefore, in what follows, the term ‘codification’ is used in a broader sense, also reflecting the creation of comprehensive area-specific laws (partial codifications), for instance in property law, the law of obligations, family law, and inheritance law.

2. The state of Civil and Commercial Private Law in the 19th Century

At the beginning of the nineteenth century, the territory of modern-day Bulgaria was still under Ottoman rule, and various sets of laws, both secular and religious, coexisted and regulated private law matters: Islamic religious law (*Sharia*); laws established by the Ottoman sultans (*kanuns*); capitulatory law governing the entry, exit, presence, and activities of non-Muslim foreigners living and/or engaging in commercial transactions in the Ottoman empire;¹ canon law of various non-Muslim religious communities, most notably that of the Eastern Orthodox Church;² and local customary law. Each of these normative systems operated in parallel, creating a pluralistic legal landscape that shaped private law matters across different social and religious groups.

During the ‘long nineteenth century,’ however, various factors, beyond the scope of this study, caused the Ottoman Empire to undergo significant administrative and legal reforms, the impact of which left a mark on the future development of private law in Bulgaria. In 1839 the Imperial Edict of Gülhane (*Gülhane Hatt-I Sherifi*) was issued, proclaiming the *Tanzimat* and the intent to reorganize the Empire. While formally grounded in *Sharia* principles, the reforms introduced the concepts of the inviolability of life, property, and honour as universal legal

1 Mughal, 2017, p. 139; Ibid, p. 146.

2 Токушев [Tokushev], 2009, p. 225.

rights applicable to Muslims and non-Muslims alike, signalling a gradual shift towards secularised legal norms.³

A key moment in the secularisation of Ottoman private law was the promulgation of the Ottoman Code of Commerce in 1850, modelled primarily on the French *Code de commerce* of 1807.⁴ This was later followed by the adoption of the Ottoman Code of Commercial Procedure in 1861 and the Ottoman Code of Maritime Commerce in 1863, both inspired by their respective French models.⁵ The establishment of commercial courts in the 1860s, outside the jurisdiction of the *Sheikh al-Islam*, marked the emergence of a secular judiciary within the Empire. This process culminated in the creation of the *Nizamiye* courts in 1864, which exercised jurisdiction over civil and criminal matters across the Empire, including, as Rubin argues, in the Bulgarian provinces.⁶ Between 1869 and 1876, the gradual enactment of the Ottoman Civil Code (*Mecelle*) further systematised civil law; however, it notably excluded family, marriage, and inheritance law, which remained under *Sharia* and the authority of the religious courts.⁷

In parallel, Bulgarian customary law continued to play an important role in regulating social and economic relations, particularly through the guild organizations (*esnafs*) and municipal authorities. As noted by Andreev and other scholars, this customary framework remained resilient throughout the Ottoman period and was later documented extensively in the collections compiled by Dimitar Marinov and Stefan Bobchev at the turn of the twentieth century.⁸ Ganev, among others, has emphasized that until the mid-nineteenth century, emerging commercial relations within Bulgarian society were governed primarily by customary law, the application of which was permitted and, in the case of the *esnafs*, explicitly regulated by Ottoman authorities.⁹

Thus, by the eve of Bulgaria's Liberation, the private law regime in the region was a unique amalgamation of Ottoman feudal and religious law, Christian canon law, and local customary law. Despite the partial and uneven implementation of the *Tanzimat* reforms in practice,¹⁰ the introduction of modern, largely French-inspired codifications and the establishment of secular judicial institutions nonetheless provided a solid foundation for the subsequent reception of

3 Berkes, 1964, p. 165.

4 Toprak, 2020, pp. 34–35.

5 Ibid.

6 Rubin, 2009, p. 66.

7 Nadolski, 1977, pp. 523–524; cf. Rubin, 2016, pp. 844–850. On the Sharia courts in Bulgaria, refer to Kojucharoff, 1939, pp. 671–680.

8 See generally, Андреев [Andreev], 1979, pp. 187–297; Милкова [Milkova], 1984, pp. 15–23; Радева [Radeva], 2023, pp. 413–424 on customary inheritance law; Ганев [Ganev], 1921, pp. 181–254, on production and guild organizations (*esnafs*) and customary law. On its influence on the later private law legislation, refer to Andreev, 1975, pp. 171–179.

9 Ганев [Ganev], 1921, pp. 264–265; Цекова [Tsekova], 2016, p. 891.

10 Kirov, 2009, p. 710; cf. Rubin, 2009, pp. 63–68.

Western, Romanist legal traditions into the emerging Bulgarian national legal system after 1878.

3. Civil and Commercial Private Law codification in the second half of the 19th century

■ 3.1. Overview and historical context

The emergence of the modern Bulgarian state in the late nineteenth century was the culmination of complex geopolitical dynamics in the Balkans, driven by the rise of national liberation movements and the shifting balance of powers in the region. The Russo-Ottoman War of 1877–1878 resulted in the Ottoman Empire's defeat and the subsequent recognition of Bulgarian autonomy. Bulgaria's independence and statehood were achieved gradually. The Treaty of Berlin (1878) established the autonomous Principality of Bulgaria under nominal Ottoman suzerainty, alongside the administratively autonomous Ottoman province of Eastern Roumelia.¹¹ In 1885, the Unification of Bulgaria was achieved through a largely peaceful revolution, bringing the two regions together under a personal union. The Tophane Agreement of 1886 formalised this arrangement, with the Ottoman Empire recognising the Prince of Bulgaria as the Governor-General of Eastern Rumelia, thereby providing *de jure* acknowledgment of the Unification. Bulgaria's complete *de jure* independence from Ottoman sovereignty was ultimately achieved in 1908, marking the full establishment of Bulgarian statehood.

Following its reinstatement, the nascent Bulgarian state faced the complex task of developing a modern legal system and constructing national legal institutions. Initially, under the terms of the Treaty of Berlin, the country remained under a Provisional Russian Administration, which laid the groundwork for the new judiciary, state administration, and the adoption of an Organic Statute. However, as noted by Jani Kirov, the Russian authorities undertook no radical legislative changes, given that much of Ottoman law had already incorporated Western influences – primarily French models – and because *'the Russians themselves had no other or no better law to offer.'*¹² The same applied to the reorganisation of the judiciary. Although the Provisional Rules for the Organisation of the Judicial Branch in Bulgaria, adopted in 1878, introduced certain changes, they largely retained the structural and procedural foundations of the Ottoman judicial system introduced during the *Tanzimat* reforms, reflecting continuity rather than a complete rupture in legal institutional development.

11 Art. 1 and Art. 13 of the Treaty.

12 Kirov, 2009, pp. 705–706.

The Constituent Assembly convened in Tarnovo, and on April 16, 1879, it enacted Bulgaria's first Constitution, establishing a constitutional monarchy.¹³ The Tarnovo Constitution '*laid the foundations of the democratic society in Bulgaria [...], conveying the spirit of liberalism through the Belgian Constitution of 1831 and the influence of the Serbian and Romanian constitutions.*'¹⁴ After the adoption of the Constitution and the election of Alexander Battenberg as the first Prince of Bulgaria, the Provisional Russian Administration, as provisioned by the Treaty, was brought to an end.¹⁵

At that time, as noted by scholars, '*the Bulgarian legal order formed [...] a conglomerate of Ottoman land law and Western judicial organization as well as rural legal customs in contract, family, and inheritance law.*'¹⁶ On that foundation, in the years that followed, Bulgaria embarked on a gradual process of adopting national legislation aimed at establishing a legal order grounded in the principles of European legal culture and free from the Islamic foundations of earlier Ottoman law.¹⁷ During the transition, significant elements of the Ottoman legal framework introduced during the *Tanzimat* era – including the *Mecelle*, the Land Code of 1858, the Code of Commerce of 1850, and the Code of Commercial Procedure of 1861 – remained in force, insofar as they were compatible with the new institutional structure and the evolving socio-economic conditions, and had not yet been formally repealed.

■ 3.2. Civil Law codification

The codification of private law in Bulgaria began, unsurprisingly, with civil law, given that the *Mecelle* – unlike Ottoman commercial legislation, which was largely modeled on French law – was deeply rooted in *Sharia* principles and, furthermore, provided no regulation of family law and virtually none on inheritance law.

Rather than adopting a comprehensive and systematic civil code, however, the Bulgarian legislature pursued a piecemeal approach, enacting partial codifications of individual branches of civil law, often lacking coherent long-term vision and a clear, well-thought-out strategy.

Following an unsuccessful attempt to codify inheritance law in 1885, a renewed effort was undertaken in 1889 under the direction of Minister of Justice Dimitar Tonchev, a prominent jurist and expert in Roman law.¹⁸ The resulting draft was primarily based on the Italian *Codice Civile* of 1865, with selected provisions

13 For an overview in English of the drafting and enacting of the Tarnovo Constitution, see Black, 1943, pp. 52–100.

14 Nikolova, 2023, p. 5. On the establishment of modern constitutionalism in Bulgaria see Belov, 2015, pp. 859–896.

15 Art. 6 and Art. 7 of the Treaty.

16 Stolleis, 2012, p. 80.

17 On the topic of establishing the new legal order in that period, see generally Karagjozova-Finkova and Takoff, 2006, pp. 129–143; Hristov, 2015, pp. 897–930.

18 Токушев [Tokushev], 2008, pp. 182–183.

drawn from the French *Code civil* of 1804,¹⁹ thereby reflecting the most modern and progressive legal principles at the time. The draft was adopted by Parliament, and in 1890 the Inheritance Act of 1890²⁰ came into force, codifying the entirety of Bulgarian inheritance law.

Two additional pieces of legislation were passed in the same year: the Guardianship Act of 1890²¹ and the Law on the Acknowledgement of Illegitimate Children, on their Legitimation and on Adoption of 1890²² – both of which were based on the French *Code civil* of 1804, with certain provisions borrowed from the Italian *Codice Civile* of 1865²³. Despite these advancements in codifying aspects of family law, the regulation of marriage and related matters remained within the domain of Eastern Orthodox canon law. The Statutes of the Bulgarian Exarchate of 1871, 1883, and 1895, respectively, served as the primary source of regulation of matrimonial affairs until 1945.²⁴

Following the codification of inheritance law in 1890, the Ministry of Justice appointed a commission to draft a new law on obligations and contracts. Drawing on the opinions of leading legal scholars at the time, the commission selected the Italian *Codice Civile* of 1865 as the primary model, arguing that it was a ‘*remarkable piece of legislation*’ that offered ‘*the most reasonable, fair, and novel regulations on private and property rights of citizens*’²⁵ and better suited the socio-economic conditions in Bulgaria compared to other potential models.²⁶ After consultations with the judiciary, state prosecutors, attorneys, and other legal experts, a revised draft was submitted to the National Assembly. Following deliberations across three parliamentary sittings²⁷ – including several amendments introduced by the commission – the Law on Obligations and Contracts was enacted in 1892²⁸. Pursuant to art. 668, the law entered into force on 1 March 1893 and repealed most prior regulations on the subject, including Ottoman law, Bulgarian customary law, and certain provisions from earlier statutes such as the Law on Mortgages, thereby functioning, in effect, as a comprehensive codification of the Bulgarian law of obligations.²⁹

In its major part, the law was derived from Book III, Titles IV to XXI of the Italian *Codice Civile* of 1865, omitting only certain titles such as Title V ‘On the

19 Фаденхехт [Fadenheht], 1929, p. 15.

20 State Gazette No. 20, dated 25.01.1890.

21 State Gazette No. 67, dated 24.03.1890.

22 State Gazette No. 9, dated 12.01.1890.

23 Токушев [Tokushev], 2008, pp. 195, 198.

24 For a more detailed overview see Токушев [Tokushev], 2008, pp. 189–194.

25 As stated in a late 1893 report of the commission charged with the amendment of Ottoman property law, cited in Kirov, 2009, pp. 714–715. The original text is in Bulgarian; the citation provided here is a translation by Jani Kirov as provided in Kirov, 2009, pp. 714–715.

26 Токушев [Tokushev], 2008, p. 177; Стоянкoва [Stoyankova], 2022, pp. 55–56.

27 An overview of the discussions is provided by Стоянкoва [Stoyankova], 2022, pp. 56–59.

28 State Gazette No. 268, dated 05.12.1892.

29 Апостолов [Apostolov], 1947, p. 14.

marriage contract' and Title VIII 'On the emphyteusis'.³⁰ However, other European models were used selectively: for instance, art. 33 on contracts for the benefit of third parties was intentionally modelled on art. 1257 of the Spanish *Código Civil* of 1889 rather than on the Italian or French equivalents.³¹ Similarly, art. 12 on the conclusion of contracts between absent parties, arts. 299–307 on rights of redemption among co-owners, neighbors, and cohabitants in real property, and the entirety of Title IX on insurance contracts (effective until the adoption of the Commerce Act of 1897) were also borrowed from the Spanish *Código Civil* of 1889.³²

While largely a faithful adaptation of the Italian model, the Law on Obligations and Contracts also incorporated original elements, deliberately deviating from the source model.³³ Notably, art. 192 omitted the requirement of liquidity as a substantive condition for the set-off of mutual debts – an intentional deviation from the Italian model.³⁴ As a result, some scholars have argued that the Law on Obligations and Contracts of 1892 was not merely a legal transplant but rather a domesticated codification, consciously adapted to the customs, needs, and traditions of Bulgarian society.³⁵

A few years later, the National Assembly enacted the Limitations Act of 1898³⁶, which too was primarily based on the Italian *Codice Civile* of 1865. The Act regulated both the prescription of claims and the limitation periods for acquiring ownership through possession.

Efforts to codify property law encountered more obstacles. Although a draft Law on Ownership and Its Limitations was prepared in 1893 and subsequently introduced to Parliament on several occasions between 1893 and 1899, it failed to gain approval until a new, substantially revised version was introduced.³⁷ The new draft was based primarily on the Italian *Codice civile* of 1865. However, various other sources were used in the drafting process. The provisions on possession and possession recovery claims were borrowed from the Spanish *Código Civil* of 1889, while selected articles were taken from the French *Code civil* of 1804 and, in some instances, even the German *Bürgerliches Gesetzbuch* (BGB). Bulgarian customary law and existing judicial practice were also taken into account. With the adoption of the Property, Ownership and Easements Act of 1904³⁸ – passed by Parliament in

30 Апостолов [Apostolov], 1947, p. 15; Тончев [Tonchev], 1929, p. 5.

31 Конов [Konov], 2021, p. 40, footnote 81.

32 Фаденхехт [Fadenheht], 1929, p. 15, footnote 1; Апостолов [Apostolov], 1947, p. 15.

33 Апостолов [Apostolov], 1947, p. 15.

34 Тончев [Tonchev], 1930, p. 116, footnote 1; Конов [Konov], 2021, pp. 40–41.

35 Стоянкoва [Stoyankova], 2022, p. 56.

36 State Gazette No. 23, dated 30.01.1898.

37 Токушев [Tokushev], 2008, p. 217.

38 State Gazette No. 29, dated 07.02.1904, CIF 01.09.1904.

1903 and entering into force on 1 September 1904 – the final remnants of Ottoman civil law in this area were officially repealed.³⁹

■ 3.3. Commercial Law codification

In contrast to the relatively early efforts to codify civil law, the codification of commercial law was not an immediate priority for the newly reestablished Bulgarian state. This is understandable, given the relatively recent codification of Ottoman commercial law, itself largely based on the French legal model.⁴⁰

Nevertheless, Bulgaria's rapid economic transformation after Liberation soon exposed the inadequacies of the inherited Ottoman commercial laws. The country's expanding trade relations, particularly with Austria-Hungary via the Danube, introduced new commercial practices and highlighted the need for modern, nationally tailored commercial legislation. Influences from Western, especially Austro-German, commercial models became increasingly pronounced, setting the stage for reform.

In response to formal complaints from merchants about the inefficiencies of the existing bankruptcy regulations,⁴¹ the Ministry of Justice appointed a commission in 1895 to prepare a draft of a new Commerce Act.⁴² The drafting process was compartmentalized: the law was divided into separate sections, each assigned to a different working group. These groups were tasked with translating into Bulgarian – and, where deemed necessary, adapting – the relevant provisions of selected foreign legislative acts. Specifically, the Hungarian Commercial Code of 1875 served as the principal source for provisions on merchant status, the commercial register, procuration, commercial agents and brokers, commercial partnerships and companies, as well as commercial transactions, including sales, commission contracts, freight forwarding, contracts of carriage, public warehouses, publishing agreements, and insurance.⁴³ The Hungarian Bill of Exchange Act of 1876 was used in drafting the section on bills of exchange and promissory notes.⁴⁴ Other sources were also consulted: for instance, provisions governing trade books and bookkeeping, public warehouses, and bonds were based on Italian, French, and Romanian legislation, while the regulation of cheques followed Romanian and Swiss models.⁴⁵ For bankruptcy law, the Italian *Codice di Commercio* of 1882 and the

39 Фаденхехт [Fadenheht], 1929, p. 14; Токушев [Tokushev], 2008, p. 217.

40 Interestingly, the first Bulgarian Law on Trademarks and Industrial Marks was enacted as early as 1892. For an overview of its adoption and comparison with the Ottoman regulations, see Koleva, 2016, pp. 130–138.

41 Ганев [Ganev], 1921, pp. 268–269.

42 Ibid., p. 269.

43 Ibid., p. 270.

44 Ibid., p. 270.

45 Кацаров [Katsarov], 1939, pp. 17–18.

Romanian Commercial Code of 1887 were used as primary sources, though with various original adaptations and modifications.⁴⁶

The commission, regrettably, did not provide detailed reasoning in writing as to why certain foreign legislation was chosen over alternatives,⁴⁷ and the final draft – compiled from disparate sections produced by different groups – suffered from a lack of editorial harmonisation. After minor revisions by a second commission, the draft was presented to Parliament,⁴⁸ where Stefan Bobchev, on behalf of the commission, acknowledged the diverse foreign sources used and emphasised the importance of this notation for interpreting the new law.⁴⁹ Debated over just three parliamentary sittings, the Commerce Act was passed and promulgated in May 1897.⁵⁰ Pursuant to Article 883, it entered into force on 1 January 1898, thereby replacing the Ottoman commercial codes.

While the Act achieved the goal of providing Bulgaria with a national commercial law, it was not without shortcomings. Scholars have observed that the principal defects of the Act lay not in the reliance on diverse foreign models as such, but rather in the failure to achieve proper synchronisation of the adopted provisions – both with the broader Roman-law-based civil law system and the Russian-influenced civil procedure framework, as well as internally within the Commerce Act itself.⁵¹

Despite the amalgamation of various source models used in drafting the law, it may reasonably be asserted that the newly adopted Bulgarian commercial law was predominantly Germanic in character. Through the intermediary of the aforementioned Hungarian legislation, the Commerce Act indirectly drew upon the *Allgemeines Deutsches Handelsgesetzbuch* (ADHGB) of 1861. Its adoption marked a fundamental transition in Bulgarian commercial law – from the earlier French-inspired Ottoman commercial law to one grounded in German legal tradition. Notably, the Commerce Act represented the first major piece of national legislation primarily based on German sources, setting a precedent that would influence the course of commercial law codification in Bulgaria for decades thereafter.

As this brief overview has shown, the codification of Bulgarian civil law in the late nineteenth century was rooted firmly in the Romanist tradition. Most legislation was based on, or closely modelled after, the Italian *Codice civile* of 1865, with selective adaptations and indigenous modifications,⁵² most notably in the Law on Obligations and Contracts. In contrast, commercial law drew heavily from

46 For a detailed overview refer to Ганев [Ganev], 1915, pp. 170–189; Кацаров [Katsarov], 1939, pp. 727–729.

47 Ганев [Ganev], 1921, p. 270.

48 The proposed draft was supplemented with provisions concerning underage and female merchants (see Ганев [Ganev], 1921, p. 270).

49 Цекова [Tsekova], 2016, p. 895.

50 For an overview of the discussions, see Цекова [Tsekova], 2016, pp. 896–900.

51 Ганев [Ganev], 1929, pp. 273–275; Кацаров [Katsarov], 1939, pp. 17–18.

52 Фаденхехт [Fadenheht], 1929, p. 15.

German legal tradition, while also incorporating elements from various Romanist sources, such as the Italian *Codice di Commercio* of 1882 and the Romanian Commercial Code of 1887. Indeed, as aptly observed by Giaro, '*[c]olorful are the sources of reception of Bulgaria.*'⁵³

This diversity of sources raised several core issues, particularly in terms of legal reception and normative transfer, as highlighted by Stolleis.⁵⁴ One significant challenge was legal translation – not merely linguistic, but also conceptual – as legal terminology had to be modernised and adapted to fit Bulgarian legal culture.⁵⁵ Additionally, the influence of religious denominations within secular law, the adaptation of diverse foreign legal models, and the persistence of ethnic and local customary law all contributed to the complexity of forming a unified national legal system.⁵⁶ Moreover, the enforcement of the new legal order took place within an emerging nation-state that in its early years lacked a well-trained legal elite and still relied heavily on Ottoman-influenced judges and respected laypersons.⁵⁷ Thus, law indeed played a key role in the process of nation-building.⁵⁸ According to Stolleis, this all resulted in a coexistence of multiple layers of law (internal legal pluralism), as well as a broader coexistence of formal legal systems, customs, and social norms – a condition of multi-normativity.⁵⁹

This heterogeneous nature of Bulgarian law, however, as observed by Apostolov, often provides an opportunity for legal science to foster a productive synthesis.⁶⁰ It should be noted that despite their foreign origins and the initial difficulties surrounding their application – indicative for initial resistance at the time of their adoption –⁶¹ the newly codified civil laws gradually took hold. As Fadenheht later observed, '*through judicial practice and actual application in economic life [they] gradually integrated into the legal consciousness of the Bulgarian people.*'⁶²

53 Giaro, 2003, p. 129. The original is in German; the translation is provided by the author.

54 Stolleis, 2012, pp. 80–81.

55 Ibid. On the developments of legal culture and terminology in Bulgaria after the Liberation, see generally Данова [Danova], 2012, pp. 201–265.

56 Stolleis, 2012, pp. 80–81.

57 Ibid.

58 Ibid.

59 Ibid.

60 Апостолов [Apostolov], 1938, p. 35. The original is in Bulgarian; the translation is provided by the author.

61 For an elaborate overview on this topic see Kirov, 2009, pp. 699–722.

62 Фаденхехт [Fadenheht], 1929, p. 16.

4. Civil and Commercial Private Law codification in the first half of the 20th Century

■ 4.1. *Historical context*

At the beginning of the twentieth century, Bulgaria experienced significant political, social, and economic upheavals. After gaining full independence from the Ottoman Empire in 1908, the country pursued national unification, which led it into the Balkan Wars (1912–1913) and World War I (1915–1918). Defeat in these conflicts, however, resulted in territorial losses, economic hardship, and political instability. Despite maintaining neutrality during the first years of World War II, by 1941 Bulgaria aligned with the Axis Powers, leading to its defeat in the war, occupation, resistance movements, and ultimately a Soviet-backed coup in 1944, which marked the beginning of a communist regime.

■ 4.2. *Civil Law codification*

Despite broader political turbulence, the codification of national private law continued during the first half of the twentieth century. Building on the work of the preceding decades, several important legislative acts were adopted that further systematized civil law.

The turn of the century saw the enactment of the Property, Ownership and Easements Act of 1904⁶³, the Law on Persons of 1907⁶⁴, and the Privileges and Mortgages Act of 1908⁶⁵, the latter replacing the earlier Mortgages Act of 1885⁶⁶. These acts continued the tradition of grounding Bulgarian civil law in the Romanist framework, drawing heavily on the Italian *Codice civile* of 1865.⁶⁷

The absence of a unified civil code did not prevent the gradual and coherent development of civil law through such partial codifications. By the mid-twentieth century, inheritance law, obligations, property rights, personal status, and aspects of family law were increasingly organised along modern, codified lines, although matrimonial law remained largely under the influence of Eastern Orthodox canon law.

■ 4.3. *Commercial Law codification*

Commercial law also evolved substantially during this period. In 1907, the regulation of cooperatives was separated from the general commercial framework through the enactment of a Cooperatives Act, modelled closely on the Hungarian

63 State Gazette No. 29, dated 07.02.1904, CIF 01.09.1904.

64 State Gazette No. 273, dated 17.12.1907, CIF 01.01.1908.

65 State Gazette No. 21, dated 26.01.1908.

66 State Gazette No. 14, dated 12.02.1885.

67 Фаденхехт [Fadenheht], 1929, p. 15.

Act of 1898 on Economic and Industrial Credit Cooperatives.⁶⁸ The Bulgarian act was later amended in 1911, introducing some original provisions – particularly concerning privileges afforded to cooperatives – into the otherwise faithful adaptation of the source.⁶⁹ In 1908, the Law on Maritime Commerce was adopted, based extensively on Book II of the Italian *Codice di commercio* of 1882, further extending the scope of national commercial legislation.⁷⁰ During that time and in the years to follow, the Commerce Act of 1898 underwent several major revisions to address both the evolving demands of commercial practice and the shortcomings of its initial reception.

The aftermath of World War I brought new commercial realities, prompting additional legislative reforms. Notable among them was the introduction of the Limited Liability Companies Act of 1924, modelled after the Austrian Limited Liability Companies Act of 1906 (itself heavily influenced by the German GmbH model). As noted by Konstantin Katsarov, a leading expert and professor of commercial law at the Universities of Sofia and Geneva, the act contained ‘*certain improvements, to a large extent quite effective, and as a result, our [Bulgarian] Limited Liability Companies Act rightfully enjoy[ed] the reputation of being one of the most novel and successful laws in this field.*’⁷¹

Further commercial codifications included the Merchant Shipping Act of 1931 (based primarily on Italian law), the Protective Concordat Act of 1932⁷² (based on German law)⁷³, and the Law on Legal Entities of 1933⁷⁴ (based on Swiss law)⁷⁵. Each of these acts reflected Bulgaria’s growing openness to diverse European legal traditions, while simultaneously striving to craft legislation suited to national needs.

■ 4.4. *Emergence of the idea to adopt a national Civil Code*

While the question of the necessity of codification consistently remained within the purview of the Ministry of Justice, the first notable institutional step towards comprehensive legal systematisation was undertaken in March 1916 with the adoption of the Law on Codification.⁷⁶ The Law established a Codification Commission within the Ministry of Justice, tasked with modernising and systematising Bulgarian legislation by harmonising and consolidating existing laws and

68 Marinova, 2021, p. 88. For a general overview of the historical development of credit cooperatives in Bulgaria during this period, see Marinova, 2021, pp. 79–94.

69 Ганев [Ganev], 1921, p. 272.

70 Ганев [Ganev], 1921, p. 273. Кацаров [Katsarov], 1939, pp. 607–608.

71 Кацаров [Katsarov], 1939, p. 267. The original text is in Bulgarian; the translation is provided by the author.

72 State Gazette No. 295, dated 29.03.1932.

73 Кацаров [Katsarov], 1939, p. 938.

74 State Gazette No. 13, dated 13.04.1933.

75 Стойчев [Stoychev], 2021.

76 State Gazette No. 48, dated 04.03.1916.

provisions governing specific legal areas into unified legislative acts (partial codes).⁷⁷ However, the Commission's early efforts were significantly hindered by World War I and its immediate aftermath.

In academic circles, the discussion on the adoption of a national civil code can be traced to several works published by the prominent jurist and civil law professor Joseph Fadenheht in the first quarter of the nineteenth century.⁷⁸ Fadenheht suggested that the next major undertaking – and a logical step in the evolution of Bulgaria's legal system – should be the unification of the various codified civil laws into a single, coherent Bulgarian Civil Code.⁷⁹ The effort should also address the inconsistencies and enforcement challenges that had emerged in practice, while aligning civil legislation more closely with the demands of modern economic life. Given the Romanist foundations of Bulgaria's existing civil laws, Fadenheht considered the adoption of a civil code modelled on the German Pandectist system to be unfeasible. Instead, he maintained that Bulgaria should continue to develop its civil law within the framework of the Roman legal tradition.⁸⁰

By the early 1930s, the idea of drafting a Bulgarian civil code was already gaining ground within the legal community.⁸¹ A key figure in the movement towards a unified Bulgarian Civil Code was Lyuben Dikov, a leading civil law scholar and professor at Sofia University. Appointed Minister of Justice in January 1935, Dikov strongly supported the initiative to create a Bulgarian Civil Code and appointed fellow jurist and professor Petko Venedikov as Secretary of the Codification Commission.⁸² Deeply influenced by German legal thought and traditions, Dikov advocated for the adoption of a pandectist civil code modelled after the German *Bürgerliches Gesetzbuch* (BGB).⁸³ Around this time, the Bulgarian translation of the BGB by Alexandar Kozhuharov was published. However, Dikov's dismissal from office in April 1935 stalled the project, despite the continued efforts by Venedikov, who remained Commission Secretary until 1941.⁸⁴ In 1941, in the midst of World War II, a new Law on the Legislation Council⁸⁵ was enacted, significantly reducing council members. Despite the constraints of wartime and the administrative changes, council members continued to defend the initiative to codify private law and adopt a national civil code.⁸⁶

77 For a brief overview on some of the members of the commission, refer to Метев [Metev], 2012, pp. 239–243; Русчев [Ruschev], 2024a, pp. 64–67.

78 Фаденхехт [Fadenheht], 1919 cited in Русчев [Ruschev], 2024a, p. 63.

79 Фаденхехт [Fadenheht], 1929, p. 16.

80 Ibid.

81 See generally, Брайков [Braykov], 2021, p. 5; Русчев [Ruschev], 2024a, pp. 66–67.

82 Русчев [Ruschev], 2024a, p. 66.

83 Dikov, 1929 cited in Русчев [Ruschev], 2024a, p. 66; cf. Hamza, 2016, p. 63.

84 Русчев [Ruschev], 2024a, p. 67.

85 State Gazette No. 28, dated 07.02.1941.

86 See generally Jerusalemov, 1941 cited in Русчев [Ruschev], 2024a, p. 67.

5. Civil and Commercial Private Law codification in the second half of the 20th Century

■ 5.1. *Historical context*

Following the end of World War II, Bulgaria came under the sphere of influence of the Soviet Union, and the country's political and legal systems were transformed into a Soviet-type authoritarian regime, while the economy transitioned from a market-based model to a centrally planned system. In 1946, Bulgaria was proclaimed a Republic, and on 12 December 1947, a new Constitution was enacted.

During the transition phase, much of the pre-existing bourgeois legislation was abrogated and supplanted by newly enacted statutes. Rather than undertaking a complete recodification of civil law, the legislature pursued a strategy of partial codification, justifying this approach by asserting that the adoption of a comprehensive civil code was premature in light of ongoing socio-economic restructuring.⁸⁷

■ 5.2. *Civil Law recodification and transition to a monistic system*

Between 1949 and 1951, the foundational elements of Bulgaria's civil law underwent systematic recodification, beginning in 1949 with the enactment of a new Inheritance Act and a new Law on Persons and Family. The process continued in 1951 with the introduction of the Law on Obligations and Contracts and the Law on Ownership.

The new Inheritance Act was drafted and expediently made into law in 1949, thereby repealing the Inheritance Act of 1890. Although the bill was discussed, voted on, and adopted by the National Assembly over the course of merely two sittings within a single week, scholarly consensus suggests that the legislative text had been thoroughly conceived and precisely drafted prior to its formal introduction.⁸⁸ Most commentators acknowledge the precise and pedantic editorial work carried out by the Legislation Committee in the brief interval between the sittings – a contributing factor to the bill's passing with overwhelming majority.⁸⁹ The Inheritance Act of 1949 remains in force today and has seen relatively few amendments over the past seventy-five years. The act has been characterised as a '*remarkably compact, classical law that has withstood the vicissitudes of its time and has given rise to relatively few conflicting interpretations.*'⁹⁰

87 For an extensive overview of the adoption of the new legislation see Русчев [Ruschev], 2024b, pp. 107–139.

88 Русчев [Ruschev], 2024b, p. 108. The motives accompanying the bill, together with an authorial notation, are published in Петров [Petrov], 2022.

89 Русчев [Ruschev], 2024b, p. 108.

90 Русчев [Ruschev], 2024b, p. 109.

In the same year, the Law on Persons and Family of 1949 was enacted with the aim of ‘comprehensively regulat[ing] the matter of personal and family law’ and repealed, among others,⁹¹ the Law on Persons of 1907, the Law on Legal Entities of 1933, the Law on Marriage, and the Law on Guardianship. Upon its adoption, the statute governed the legal status of natural persons, marriage and family relations – including issues of origin, kinship, parental rights and obligations, custody, and guardianship – as well as the general regulation of legal entities. Notably, it also introduced a systematic framework for non-profit associations and foundations. The law was conceived, at least in part, as a partial codification of Bulgarian personal law.

Although the Law on Persons and the Family formally remains in force, much of its content has been superseded by subsequent legislative acts. In 1968, the regulation of family law was transferred to a newly adopted Family Code, which was subsequently recodified in 1985 and again in 2009. In 1999, the legal framework concerning natural persons and civil status acts – such as birth, marriage, and death registrations – was transferred to the newly enacted Civil Registration Act. Similarly, the regulation of non-profit legal entities was codified in the Law on Non-Profit Legal Entities of 2001. As a result, only a limited number of provisions from the original 1949 law remain in force today, some of which are widely regarded as ‘embarrassingly outdated.’⁹²

In 1951, two of the major pieces of Bulgarian civil legislation were adopted: the Law on Ownership and the Law on Obligations and Contracts (LOC). The Law on Obligations and Contracts, adopted in 1951,⁹³ was conceived as a codifying act that would include not only the subject matter of Bulgarian law of obligations but also some institutes of the general part of a future civil code.

Unfortunately, there is neither comprehensive official data on all the members of the commission responsible for the draft, nor records of their meetings and discussions. There are, however, records of discussions in the Legislation Committee after the draft had been submitted to Parliament.⁹⁴ According to these records, legal scholars such as Alexandar Kozhuharov, Luyben Vasilev, and Zhivko Stalev contributed to the drafting process.⁹⁵ Some scholars speculate that leading experts in the field, such as Petko Venedikov and Ivan Apostolov, must have also

91 Also repealed were the Ordinance-Law on Maintenance Obligations, the Law on Missing Military and Civilian Persons during Recent Wars and Disturbances, the Law on Illegitimate Children and Adoption, the Decree of the Council of Ministers on Missing Persons.

92 See Русчев [Rushev], 2024b, pp. 109–114.

93 For a comprehensive overview on the historical context, refer to Шопов [Shopov], 2022, pp. 75–97.

94 See Иванов [Ivanov], 2021.

95 Ibid.

taken part in the process before they were dismissed from the University for political reasons.⁹⁶

After the initial draft was approved, it was submitted to Parliament with various changes proposed by the Legislation Committee.⁹⁷ The bill was discussed, voted on, and adopted by the National Assembly in a single sitting.⁹⁸ Official documents disclose that the Soviet Civil Code of 1922, the draft of a Civil Code of the Republic of Poland, and Soviet doctrine were used as main sources in the drafting of the law.⁹⁹ However, as argued by various scholars, when one compares the 1922 Soviet code with the LOC, there is little resemblance.¹⁰⁰ Meanwhile, the parallel between the texts of the LOC and the Italian *Codice civile* of 1942 ‘is so evident that it is difficult to deny.’¹⁰¹ It is worthy of mention that the choice of the Italian *Codice civile* of 1942 as a main model in drafting the LOC reflected a sense of continuity with the earlier work on the LOC of 1892, which itself was based not on the French *Code civil* of 1804, but rather on the Italian *Codice civile* of 1865.¹⁰² Despite official reports claiming the contrary, various provisions were also based on the LOC of 1892 and other Western bourgeois legislation, including the German BGB of 1900, the Swiss *Obligationenrecht* of 1911, and even the Geneva Convention Providing a Uniform Law for Cheques and the Geneva Convention Providing a Uniform Law for Bills of Exchange and Promissory Notes of 1934, even though Bulgaria was not a party to those conventions.¹⁰³

The law, however, was not a mere transplant, but rather a creative and critical adaptation. Art. 45, paragraph 2, for instance, introduced a presumption of fault on the part of the tortfeasor in all cases of delictual liability, thereby establishing a regulation that was, in many respects, ahead of its time.¹⁰⁴ Another example is art. 87, which decisively broke with the traditional view, prevalent at the time, that contract termination for non-performance must be effected through judicial intervention.¹⁰⁵

96 See Конов [Konov], 2021, p. 40, footnote 79; Иванов [Ivanov], 2021; contra: Брайков [Braykov], 2021, pp. 10–16.

97 For an overview of the changes, see Иванов [Ivanov], 2021, pp. 43–69.

98 See Stenographical Diary of the Plenary Sitting of the Seventeenth/First National Assembly, Second Session, dated 3 November 1950, pp. 104–109, available in Bulgarian at <https://www.parliament.bg/bg/plenaryst> (Accessed: 22 April 2025).

99 Stenographical Diary of the Plenary Sitting of the Seventeenth/First National Assembly, Second Session, dated 3 November 1950, p. 81, available in Bulgarian at <https://www.parliament.bg/bg/plenaryst> (Accessed: 22 April 2025).

100 Vassileva, 2020, p. 311.

101 Конов [Konov], 2021, pp. 39–40; Vassileva, 2020, pp. 314–315.

102 Конов [Konov], 2021, pp. 40–41. As noted even by foreign authors, of all the civil legislations in force in the socialist countries, the Hungarian and the Bulgarian are more markedly faithful to Romanist models, see Sacco, 1988, p. 79.

103 Иванов [Ivanov], 2021.

104 Конов [Konov], 2021, p. 42.

105 For further examples refer to Конов [Konov], 2021, pp. 41–43; Иванов [Ivanov], 2021.

The Law on Obligations and Contracts remains in force today and is widely regarded as:

the most successful and most modern Bulgarian law, one that our [Bulgarian] legal community justifiably takes pride in, to the point where it is humorously suggested that the modernisation of the law of obligations in the BGB (2002) and the Code civil (2016) took inspiration from the LOC. Of course, this is due not so much to the LOC itself, but rather to the source that the drafters of the LOC creatively, critically, and selectively followed – Book Four of the Italian Codice civile of 1942.¹⁰⁶

As Christian Takoff once noted:

While translating the Principles [of European Contract Law] into Bulgarian, throughout the nine subsequent revisions of the translation, and now as I work on a comparative analysis between the PECL and Bulgarian law, I find myself increasingly convinced that Bulgaria has a civil law which, in the brilliance of its language, rivals the Code civil; in the modernity of its solutions, in many respects surpasses the monumental Bürgerliches Gesetzbuch; through its openness, offers judges sufficient freedom; and with its laconic style and abstract formulation, ensures its own longevity.¹⁰⁷

As to the state of commercial legislation, both the Commerce Act of 1898 and the Limited Liability Company Act of 1924 were repealed in 1951, along with the entirety of the legislation governing commercial law, marking a transition to the monistic system. In the ensuing decades, the only commercial entities permitted by law were the ‘*state socialist organizations*,’ in which the state held sole ownership.¹⁰⁸ It was not until early 1989 that Decree No. 56 on Economic Activity was issued, allowing, for the first time, private entities to perform business operations.¹⁰⁹

106 Конов [Konov], 2021, pp. 39–40. The original text is in Bulgarian; the translation is provided by the author.

107 Таков [Takoff], 2005, p. 11. The original text is in Bulgarian; the translation is provided by the author.

108 Bouzeva, 2010, p. 353.

109 Ibid.

■ 5.3. *Resurface of the idea to adopt a national Civil Code*

Soon after the adoption of the partial codifications, the idea of creating a unified Civil Code resurfaced. Extensive research on the topic, published recently by Ivan Rushev, sheds light on this process.¹¹⁰

The first phase began in 1956 with the establishment of a Legal Institute at the Bulgarian Academy of Sciences, where, under the patronage of Luyben Vassilev, early discussions focused on the prospective adoption of a national civil code, its scope, and its structure. There was a general consensus that the code should include a general part addressing legal subjects, general rules on legal transactions, representation, prescription, terms, and related matters. It was proposed that the recently adopted partial codifications serve as the basis for this broader codification effort.¹¹¹

However, substantial disagreements emerged during the discussions. Scholars disagreed on fundamental issues such as whether the prospective code should be a mere compilation of existing laws or an innovative and rational codification; whether family law should be incorporated (Kozhuharov, Mevorah) or remain in a separate code (Vasilev, Stalev); and whether provisions on transportation contracts, intellectual property (given its predominantly public law character), and insurance should be included in the same codified text.¹¹² By the early 1960s, however, the project had effectively stalled. The failure of the codification initiative at the time is generally attributed to the lack of consensus on key conceptual issues, the ongoing transition of the country to the socialist legal model, and the anticipation of the Soviet Union's new civil codification.¹¹³ According to Rushev, the main reason was rather the failure to grasp the importance of the task and the subsequent lack of political will to elevate the Civil Code to a matter of state priority.¹¹⁴

A second phase commenced in 1962, when the Ministry of Justice formed a Council on Legislation and several commissions charged with drafting key legal codes: a Civil Code, a Family Code, and a Penal Code.¹¹⁵ While the Family Code and Penal Code were enacted in 1968, progress on the Civil Code was much slower.

The years leading up to the publication of the first official draft of the Civil Code (1978) by the Ministry of Justice were characterised by intensive scholarly engagement: numerous in-depth works were published by leading scholars (Vasilev, Nenova, Tadzher, Petrov, and others) on the scope and structure of the future civil code, accompanied by substantial preparatory efforts and editorial work on its individual components. A more developed scholarly consensus was

110 See Русчев [Rushev], 2024a, pp. 63–153; cf. Петров [Petrov], 2008, pp. 130–156.

111 Русчев [Rushev], 2024a, pp. 69–70.

112 Ibid., pp. 72–73.

113 For an overview of the reasons for the failure, refer to Русчев [Rushev], 2024a, pp. 73–83.

114 Ibid., p. 83.

115 Ibid., p. 84.

achieved during this period. It was generally agreed that the code should not be a simple aggregation of norms but a comprehensive and internally coherent legal act, reflecting both sound legal doctrine and the transformed socio-economic context.¹¹⁶ The code's scope became more clearly defined. Family law was excluded, in part because of the recent adoption of the Family Code of 1968. Debates persisted over the inclusion of guardianship and custodianship (with contrasting views from Tadzher and Nenova).¹¹⁷ It was generally agreed that intellectual property, transportation contracts, and private international law would not be part of the Civil Code.¹¹⁸ Leading Bulgarian jurists – including Vasilev (chair of the Legislation Committee at the National Assembly), Stalev, Tadzher, Nenova, and even experts such as Apostolov, Venedikov, and Tsonchev, who had been dismissed from the University for political reasons – played a central role in drafting the text.¹¹⁹

The drafting process of the Civil Code encountered a temporary delay following the unexpected and untimely death of Vasilev, the principal figure in the initiative, in 1971. Despite ongoing scholarly debates, particularly concerning the legislative language of the future code,¹²⁰ a complete draft was finalised and published in 1978. The structure of the code drew primarily from the German *Bürgerliches Gesetzbuch*, preferred over the Italian *Codice civile* of 1942 and the Swiss Civil Code of 1907.¹²¹ The draft received predominantly positive assessments from legal scholars at the time, including Tadzher and Pavlova.¹²² In a recent publication, despite the author's general scepticism towards codification, the draft has been characterised as '*a significant achievement of Bulgarian legislative drafting theory and practice in terms of its structure, systematics, and scope.*'¹²³ However, the draft was never submitted to the National Assembly, allegedly due to the anticipation of an impending Economic Code, which ultimately was never enacted.¹²⁴

116 Ibid., pp. 86–88.

117 Ibid., pp. 92–93.

118 Ibid., pp. 97–99.

119 Ibid., p. 102.

120 As noted in Ruschev's research Stalev advocated for accessible legislative language, while Tadzher insisted on strict legal-technical precision. Ibid., pp. 102 and following.

121 Ibid., p. 91.

122 Ibid., p. 106.

123 Петров [Petrov], 2008, p. 147. The original text is in Bulgarian; the translation is provided by the author.

124 Русчев [Ruschev], 2024a, p. 107.

6. Civil and Commercial Private Law codification after the collapse of the Soviet-type dictatorship and in the present

■ 6.1. *Historical context*

The collapse of the socialist regime in late 1989 marked the beginning of a new era in Bulgarian legal and political history. Bulgaria transitioned from a Soviet-style authoritarian state to a democratic republic with a market-based economy. A new Constitution was enacted in 1991, followed by a lengthy process of institutional reforms, restitution of nationalised property, privatisation of state assets, and recodification of both civil and re-emerging commercial law. The 1990s also marked Bulgaria's reorientation towards Europe. In 1995, Bulgaria signed its Agreement of Association with the European Communities, beginning the process of EU integration. In the late 1990s and early 2000s, a large-scale reform was launched in an attempt to ensure compliance of all Bulgarian legislation with the *acquis communautaire*, including consumer protection and company law directives.¹²⁵ On 1 January 2007, Bulgaria became a full member state of the European Union, further committing to European legal standards and traditions.

■ 6.2. *Civil Law recodification*

Because the core civil law regulation – and particularly the Law on Obligations and Contracts – was not overly ideologised and, thanks to its Italian-Romanist roots, it could be relatively easily cleansed of Soviet influence, requiring only minor amendments in 1993.¹²⁶ Property law underwent more significant reform. In 1991, the Law on Ownership was amended to eliminate the concept of socialist common property, and in 1996 new regulations on state and municipal property were introduced with the adoption of the State Property Act and the Municipal Property Act, respectively.

Efforts to adopt a comprehensive civil code, however, encountered difficulties. In 1999, a hastily compiled draft code was submitted to Parliament. The proposed code was based on the outdated draft from the 1970s, poorly patched with unsynchronised excerpts from old bourgeois legislation of the nineteenth century.¹²⁷ While the draft contained detailed regulation on acquiring ownership of detached bee swarms – a matter that might have been of importance in the nineteenth century – and other such archaic topics, it notably failed to address modern issues such as digital documents, electronic signatures, online contract formation, non-cash payments, and service contracts.¹²⁸ Unsurprisingly, the draft faced

125 See generally, Takoff, 2010, pp. 161–165; Bouzeva, 2010, pp. 353–356.

126 Takoff, 2010, pp. 151–152.

127 Попов [Popov] and Таков [Takoff], 2000, pp. 3–8; Русчев [Rushev], 2024a, pp. 110–116.

128 Ibid.

widespread criticism and ridicule for its anachronisms, lack of coherence, and failure to address contemporary legal realities, and was ultimately rejected.¹²⁹

Subsequent attempts at recodification were equally unsuccessful. In 2006, an expert group was convened to assess the feasibility of adopting a civil code, but – as Christian Takoff predicted – the group did not survive the legislature's electoral cycle.¹³⁰

Meanwhile, the harmonisation of civil and commercial legislation with EU law continued, particularly in consumer protection. While the harmonisation of commercial law was relatively successful, the same could not be said for the implementation of consumer protection rights. As Takoff critically observed, the Bulgarian consumer protection framework suffered from poor translations of EU directives, incoherence with the remaining legislation, and lack of systematic integration, resulting in a fragmented and cumbersome regulatory environment.¹³¹ He rightly characterised the adopted legislation in the area as '*regulation of enormous volume and poor quality, which has lost its systematic structure*'.¹³² Regrettably, with some exceptions and despite some improvements, this characterisation still holds true today.

In 2005, the Code of Private International Law was adopted. In 2009, a new Family Code was enacted, introducing three alternative proprietary regimes, yet largely following the previous code of 1885.

■ 6.3. Commercial Law recodification

The formation of modern commercial law began in the early 1990s with the adoption of the Commerce Act of 1991. The act was envisioned as a codification of commercial law, and its implementation unfolded in three phases: regulation of commercial companies (1991), insolvency proceedings (1994), and commercial transactions (1996). As noted by Bouzeva, various options from the world's leading models were considered and debated in 1991. Ultimately, the German model was chosen,¹³³ reflecting continuity with the earlier bourgeois commercial law, which was also predominantly rooted in German tradition. A separate Cooperatives Act was adopted in 1991, later replaced by a new one in 1998.

The 1990s and early 2000s were characterised by large-scale reforms to ensure compliance of national legislation with EU law, especially in company law. As Bouzeva observed, '*the harmonization of Bulgarian company law was a rare success in terms of quality and consistency,*' primarily attributable to a thoughtful

129 Ibid.

130 Takoff, 2010, p. 166.

131 Ibid., pp. 161–162.

132 Ibid.

133 Ibid., pp. 353–354. The German legislation is also cited as a main source – among many others – in the motives to the bill, see the excerpt in Герджиков [Gerdzhikov] et al., 2007, pp. 56–63.

interpretation of EU directives, careful study of the German approach, efforts to adapt the directives to Bulgaria's legal context and national specifics, and the use of foreign expertise, most notably from the Max Planck Institute.¹³⁴

In more recent times, several major revisions of the Commerce Act were made, implementing various EU directives and introducing reforms in registry proceedings, insolvency law, mergers and acquisitions, and even the creation of a new company type – the variable capital company.

■ 6.4. Current stand of the codification idea

In recent years, particularly after the 70th anniversary of the Law on Obligations and Contracts in 2021, the debate surrounding the future codification of Bulgarian civil law has resurfaced. A series of academic events have been organised, featuring contributions from prominent figures such as Ivan Ruschev,¹³⁵ Daniel Valtchev,¹³⁶ Trayan Konov,¹³⁷ and other respected members of the Bulgarian legal community.¹³⁸ As of 2025, within the framework of the *Legal Barometer* project, Daniel Valtchev has been actively facilitating ongoing public discussions on the subject, engaging a broad spectrum of legal scholars, practitioners, and public figures, including the current Minister of Justice, Georgi Georgiev. This renewed focus on the issue has brought forth a variety of perspectives regarding the necessity and feasibility of adopting a unified national civil code.

Trayan Konov, a leading opponent to codification, has argued against the initiative, emphasising that at present there is no compelling reason to mechanically consolidate the existing body of private law into a single codified act with continuous numbering. He further maintains that neither historical, political, nor national circumstances currently justify such an undertaking. According to Konov, Bulgarian legislative history had demonstrated prudence in ‘*not “rushing” to create a civil code at times when, from a political perspective, it might have seemed justified*’ – most notably at the end of the nineteenth century, during the establishment of the modern Bulgarian state following the Liberation, and again in the mid-twentieth century, when the fundamental civil laws that remain in force today were enacted.¹³⁹

134 Ibid., pp. 354–355. Technical assistance in preparation of statutory text in many areas such as banking legislation and foreign investments protection was also provided by the Legal Departments of the International Monetary Fund and the World Bank, see Ajani, 1995, p. 112.

135 Русчев [Ruschev], 2024a, pp. 117–153.

136 Under the Legal Barometer project in 2025 Valtchev is hosting and partaking in discussions on the topic.

137 Конов [Konov], 2021, p. 47.

138 Стоименов [Stoimenov], 2022, pp. 13–33.

139 Конов [Konov], 2021, p. 47, footnote 109. The original text is in Bulgarian; the translation is provided by the author. Similar views have been expressed by Попов [Popov] and Таков [Takoff], 2000, p. 6; Takoff, 2010, pp. 165–168.

Others, however, advocate for modernization, pointing to the fragmentation, inconsistencies, and obvious obsolescence of current civil legislation.¹⁴⁰ They emphasize the need to address inconsistent judicial interpretations of the law and call for reforms that reflect reformist trends across Europe, while also highlighting potential benefits such reforms would bring to both legal science and legal education. While some scholars, such as Ruschev, insist that the need for systematic codification is undeniable, others remain sceptical about the feasibility of a complete codification in the near future and instead advocate for gradual, sector-specific reforms carried out by expert groups, with emphasis on systematic and coherent development over time.¹⁴¹

At present, despite ongoing reformist trends across Europe and growing support within Bulgarian academic circles, it seems unlikely that such a large-scale reform will be achieved or even initiated in the near future. Nevertheless, constructive academic and institutional dialogue – while insufficient on its own – provides an excellent starting point towards modernisation and systematisation of Bulgarian private law and, eventually, towards the prospective adoption of a national civil code. To realise this ambitious goal, however, any such reform must be prioritised at the national level, with adequate funding and the inclusion of leading (including foreign) experts in the discussion and drafting process. Reforms should be preceded by comprehensive analysis and extensive discussions, ensuring that they are implemented systematically and coherently.¹⁴² Furthermore, the positive traditions of Bulgarian civil law – an original adaptation of Roman-influenced principles, enriched with numerous Germanic elements – must be preserved, while carefully and creatively adapting foreign sources.¹⁴³

7. Future Trends in Legal Codification

Due to space limitations, the following section will outline only a selected number of emerging trends in legal codification: the growing convergence between legal systems, the rise of sector-specific codifications, and the use of technologies, particularly artificial intelligence (AI) and large language models (LLMs).

■ 7.1. Growing convergence between legal systems

One of the most significant trends in contemporary legal development is the growing convergence between different legal traditions, particularly between

140 See generally, Стоименов [Stoimenov], 2022, pp. 16–30; Русчев [Ruschev], 2024a, pp. 117–148.

141 Стоименов [Stoimenov], 2022, pp. 30–33.

142 For a discussion on the topic, see Стоименов [Stoimenov], 2022, pp. 17–30; Русчев [Ruschev], 2024a, pp. 117–148.

143 Similar suggestion is made by Стоименов [Stoimenov], 2022, p. 30.

the civil law and common law systems. This phenomenon is driven by various economic, political, and even scientific factors, including globalisation, international commerce, technological advancements, and the increasing influence of comparative legal studies. An increasing number of modern codifications draw not only on a single model or tradition; instead they incorporate diverse elements from both civil and common law models, while also drawing inspiration from transnational 'soft law' instruments such as the Principles of European Contract Law (PECL) and the Draft Common Frame of Reference (DCFR).

This trend towards hybridisation challenges the classical idea of codification as the exclusive product of a singular legal tradition. Future codification efforts, including any prospective Bulgarian civil code, will likely need to embrace this pluralistic methodology, ensuring compatibility with both European and broader international legal standards.

■ 7.2. *Rise of sector-specific codifications*

Another important development is the rise of sector-specific codifications, driven by the need for tailored legal regulations that address the complexities of specific industries or sectors. Rather than seeking to comprehensively regulate all aspects of private law in a single civil code, many jurisdictions are increasingly adopting specialised codes tailored to particular fields – such as insurance, telecommunications, or financial services. Continuing technological advancements and the growing complexity of modern industries will probably lead to the continuation of this trend. However, this also creates new challenges, particularly regarding the systematic integration of specialised statutes into the broader private law structure.

The Bulgarian experience illustrates both the potential and the challenges posed by sectoral differentiation within private law. While insurance law has been relatively successfully recodified through the adoption of a dedicated, sector-specific code,¹⁴⁴ sectoral legislation in other areas remains fragmented and lacks systematic integration.¹⁴⁵ To avoid fragmentation and maintain doctrinal coherence, any future efforts to codify private law in Bulgaria must not only address the substantive modernisation of the law but also the imperative of integrating sector-specific regulations within their respective fields, while ensuring they are harmonised with the general principles of civil law.¹⁴⁶

¹⁴⁴ The Insurance Code was initially adopted in late 2005 and came into force on 1 January 2006. It was later replaced by a new code in 2015, which became effective on 1 January 2016.

¹⁴⁵ This has been the case, for instance, in the area of land ownership, use and restitution. For an overview of the agriculture land legislation and specific issues related to the ownership, use and restitution of agriculture land, see Georgiev, 2024, pp. 135–170. A more recent example would be the adoption of several legislative acts on various aspects of securities and financial instruments.

¹⁴⁶ The digital transformation presents an additional significant challenge in this regard. For an overview on the topic, see Josipović, 2022, pp. 27–53.

■ 7.3. *Use of artificial intelligence, large language models, and other emerging technologies*

Emerging technologies, particularly AI and LLMs, offer promising new tools for supporting legal codification efforts. These technologies could assist expert groups by facilitating comparative legal analysis, generating preliminary drafts, ensuring terminological and structural consistency, and even modelling potential judicial interpretations of codified norms. Moreover, AI-driven platforms could enhance public engagement in the reform process, facilitate consultations, and improve the dissemination and understanding of new legislation.

Recent studies commissioned by the European Commission have explored the integration of advanced technologies, including AI, into the EU's legislative process.¹⁴⁷ The implementation of various smart functionalities has been proposed, and it has been highlighted that '[a] well-integrated IT ecosystem with an 'Augmented LEOS [Legislation Editing Open Software]' at its core has the potential to digitally transform legislative processes and facilitate a structural change with a significant positive impact on quality, efficiency, and transparency.'¹⁴⁸

According to a recent report published in the *Financial Times*, the implementation of such technologies in legislative drafting – including the use of AI to anticipate legal changes that might be needed – is already planned and underway in the United Arab Emirates, aiming to speed up lawmaking by 70 percent.¹⁴⁹

However, as with any other tool, one must be mindful of their limitations and of potential issues such as factual inaccuracies, ethical biases, and the inability to replace human judgement in complex normative decisions. Therefore, despite their significant potential, in their current state such tools and technologies should not be used unsupervised.

147 See Palmirani et al., 2022, a report on the 2021-2022 study on 'Drafting legislation in the era of AI and digitisation', as well as Fitsilis, Mikros and Leventis, 2024, a report on the 2023-2024 follow-up study on 'Overview of Smart Functionalities in Drafting Legislation in LEOS' ('Augmented LEOS').

148 Palmirani et al., 2022, p. 5.

149 Cornish, 2025.

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USHANGI BAKHTADZE*

The Universal Protection of Human Rights and Eastern Europe: Georgia

- **ABSTRACT:** *This paper explores the development of human rights in Georgia based on the country's historical context, legal developments, and its interaction with international bodies, particularly the United Nations. It also discusses the influence of Georgia's Soviet past on human rights problems, the reforms following the Rose Revolution, and existing challenges related to implementing standards of international human rights at home. The article then provides a deeper analysis of individual cases before the UN human rights committees, marking areas where Georgia has progressed and areas in need of improvement. These findings represent the nuanced interplay of the national and international mechanisms that define human rights in Georgia.*
- **KEYWORDS:** *Georgia, Human Rights, United Nations, legal reforms*

1. Introduction

Human rights form the foundation of an equitable society and have individual dignity, freedom, and equality at their base. These belong to each individual based on the Universal Declaration of Human Rights (UDHR). In other words, this is what dignity builds upon, it constitutes the foundation for justice in human society, and it is the imperishable cornerstone on which freedom is (re)built.¹ In Georgia – a country with a rich and complicated history – an impressive process of human rights evolution is observed. This article provides an overview of the historical development, legal framework, and present state of human rights in Georgia; part

1 United Nations (1948) Universal Declaration of Human Rights.

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of this has been formed by the interaction between Georgia and the international bodies on human rights, such as the United Nations (UN).

The human rights within the context of Georgia is ever more significant. Having emerged from totalitarianism by gaining independence from the Soviet Union in 1991, Georgia had to face one of the most difficult and responsible tasks: construct a democratic state governed by the rule of law and respecting human rights.² This process was characterised by significant political and social upheaval, which in turn affected the protection and promotion of human rights.³ Central to this has been the process of bringing domestic legislation in line with the international standards of human rights upon the enactment of the 1995 Constitution, which stipulates that the international treaty of Georgia shall take precedence over domestic normative acts unless it comes into conflict with the Constitution. Moreover, Georgia was among the earliest former Eastern Bloc nations to formally acknowledge the supremacy of international law within its national legal framework.⁴ Fundamental law secures a wide range of civil, political, economic, social, and cultural rights according to the UN definition of human rights.

This article has the following aims. First, it provides an in-depth history of the development of human rights in Georgia, starting from the pre-independence period to the very significant legal and political reforms characteristic of the years following independence, which persisted for an extended period until Georgia fell under Russian rule in the early 19th century.⁵ Second, it takes a closer look at Georgia's engagement with the United Nations and its compliance with international human rights conventions and covenants. It also provides a further analysis of the human rights treaties Georgia is part of and how it implemented them at the national level.⁶

This article also reviews how international obligations in the sphere of human rights were reflected in the Constitution of Georgia and its major legislative acts. Specifically, it considers the influence of such international obligations on domestic law-making processes and outlines the key legislations reforming human rights protection in the country. It also reflects on the significant cases examined by international human rights supervisory bodies and debates the challenges Georgia has had in the fulfilment of its human rights obligations.

Women in Georgia often experience discrimination and face additional economic, social, and political challenges. Although the country has made great strides forward, the persisting human rights challenges include gender equality, minority rights, detainee treatment, and those civil society organisations, which have now begun to face new challenges due to the adoption of the controversial

2 Wheatley, 2005, p. 45.

3 Nodia, 2005, p. 60.

4 Kurdadze and Kevlishvili, 2024, p. 228.

5 Jones, 2013, p. 78.

6 United Nations Human Rights Council, 2021.

law on Transparency of Foreign Influence⁷ and increased political polarisation, especially with regard to breakaway territories.⁸ This article attempts to shed light on these challenges and make improvement recommendations.

This article thus contributes to better understanding the complex interplay between national and international human rights mechanisms by exploring the historical development and current state of human rights in Georgia. Using in-depth analysis, it informs policymakers, scholars, and human rights advocates of the critical issues and potential pathways for advancing human rights in Georgia.

2. Historical development of Human Rights in Georgia

Georgia is a country with a rich ancient heritage and yet with a relatively recent establishment as a modern state. The concept of being an ancient nation is deeply inscribed in Georgia's national identity. Georgian children learn from their young days about the historical ties of their country with ancient Greece and Rome, and that their country was one of the first countries to adopt Christianity as state religion. This Golden Age dates back to the 11th and 12th centuries of Georgia's history. Subsequently, Georgia became fragmented. The first significant political unification of the territories that now make up modern Georgia took place during the Russian Empire. Georgia and Russia share a complex historical relationship dating back centuries. Originally grounded in mutual political and economic interests, Georgia saw Russia as a strategic partner capable of safeguarding its territory against external threats. Meanwhile, Russia considered Georgia crucial for expanding and solidifying its influence across the Caucasus region and into the Middle East. Over time, these interactions shifted significantly, eventually resulting in Russia's imperial annexation of Georgia in 1801. This domination was further solidified under the Soviet regime established in 1921, which formally acknowledged Georgian sovereignty only in name.⁹ However, before 1921, there was the first period of independence for The Democratic Republic of Georgia from 1918 to 1921. Although this represents an early attempt at democratic state-building in the Caucasus, aligning itself with Western European models rather than Bolshevik socialism,¹⁰ no genuine political and institutional traditions were established on the new state's territories.¹¹

When one studies the historical development of human rights in Georgia, it is important to outline the following periods. The Soviet period deserves priority

7 European Commission for Democracy through Law (Venice Commission), 2024.

8 Amnesty International, 2020b.

9 Metreveli and Papaskiri, 2017, pp. 7–16.

10 Matsaberidze, 2014, pp. 318–324.

11 Nodia and Scholtzbach, 2006, p. 7.

because it is a baseline for analysing the nature of human rights protection in an authoritarian regime; the period after independence is to be divided into pre- and post-‘Rose Revolution’. This period shows the transformational effect that this turning point had on the trajectory of human rights in the country.

■ 2.1. *Pre-independence era*

2.1.1. *Human Rights under Soviet rule*

The Soviet rule in Georgia from 1921 to 1991 was an epoch of powerful oppression and tight control over political, social, and cultural life. This era has seriously undermined the national identity and suppressed the freedom of expression, accompanied massively by violations of human rights. For understanding the evolution of human Rights in Georgia, this era has to be analysed. The centrally planned economy and ideological domination of the communist regime created a structure of its own for understanding and implementation of human rights within the country. Compared to the contemporary understanding of these laws, in the USSR, they mostly referred to social-economic rights, such as the right to work, education, or medical care; meanwhile, the level of civil-political rights such as freedom of speech, assembly, or religion was highly limited.¹²

2.1.1.1. Political repression and control

Under the Soviet rule, far-reaching political repressions took place in Georgia. The Soviet regime did not allow any political activity to go on without close supervision, except through the Communist Party itself. No dissent had place and opposition to the regime was bluntly suppressed by imprisonment, hard labour, and death.¹³ Joseph Stalin’s Great Purge of the 1930s had to do with events in Georgia. Many among the intellectuals, political leaders, and ordinary citizens were accused of anti-Soviet activities, following which they were arrested, tortured, or executed. In sum, this was a period of terror that served to suppress any form of political opposition and create a climate of fear, stifling free expression and political dissent.¹⁴

2.1.1.2. Suppression of national identity

The Soviet Union aimed to mould its many different peoples into a single nation, often ignoring or even crushing unique local cultures and traditions. This was particular in a place like Georgia, with its rich mix of cultures.¹⁵ Specifically, in Georgia, this policy was aimed at the suppression of the Georgian language and culture. Russian was promoted as the primary language of administration

12 Sakharov, 1975, p. 123.

13 Jawad, 2005, p. 12.

14 Hammarberg, 2013, p. 18.

15 Suny, 1994, p. 78.

and higher education especially during the 1930s–1950s (e.g. the Soviet central government exerted increasing control over higher education, removing local professors and placing universities under the All-Union People’s Commissariat of Education by 1932¹⁶), causing a gradual erosion of the Georgian linguistic and cultural heritage.¹⁷ The push to make everything Russian touched every part of life, including what children were taught in school, substituting Georgian history and stories with Russian points of view. The goal was to make Georgia completely part of the Soviet Union and stop any talk of independence.¹⁸

2.1.1.3. Restrictions on freedom of expression

Freedom of speech and expression was severely curtailed in the Soviet era. The Communist Party was in control of every newspaper, radio show, or TV program. There was no tolerance towards dissent.¹⁹ Independent journalism was non-existent, and all content published was rigorously censored. The dissemination of material judged as counter-revolutionary or critical to the Soviet government was strictly forbidden, and violators were severely punished.²⁰

This carried to the arts and literature, as creative works were often obliged to embody Socialist Realism, a principle centred on the extolment of the Soviet state and all its many accomplishments. Writers, artists, and intellectuals who strayed far enough from that prescribed form became subject to persecution, imprisonment, or exile.²¹

2.1.1.4. Human Rights abuses

Gross human rights violations have been committed in Georgia during the Soviet era. The KGB used to follow up and squash any dissent. Arbitrary arrests, rape, extraction of confessions under torture etc., were all freely carried out aims to maintain regimentation and suppress any murmur of dissent.²²

One of the most significant examples of human rights violations was the treatment of political prisoners. Many Georgians, especially in the 1930s, were imprisoned in the notorious Gulag labour camps, where they faced harsh conditions, forced labour, and severe mistreatment. These camps were part of a larger system designed to eliminate political opposition and enforce Soviet ideology through fear and repression.²³

16 Ibid., p. 258.

17 Jawad, 2005, p. 15.

18 Hammarberg, 2013, p. 20.

19 Shcharansky, 1978, p. 45.

20 Jawad, 2005, p. 22.

21 Hammarberg, 2013, p. 23.

22 Ibid., p. 19.

23 Jawad, 2005, p. 31.

2.1.1.5. Resistance and dissidence

Despite the oppressive environment resistance and dissidence continued to break out in all forms. However, in the 1970s and 1980s, a dissident movement arose, with the goal to contest Soviet hegemony as well as demand greater freedoms. This was an intellectual movement, involving students and nationalists; all had to risk their lives in asking for political as well as cultural rights.²⁴ In addition, the state maintained close surveillance of the population and employed security forces to intimidate political prisoners and dissidents.²⁵

One of the most significant events during this period was 9 April 1989, peaceful protest in Tbilisi, where demonstrators demanded Georgia's independence and the protection of Georgian culture. The Soviet military's violent crackdown on the protest resulted in the deaths of 21 civilians and galvanised the Georgian independence movement, highlighting the brutal nature of Soviet repression.²⁶

As seen from the above arguments, the human rights abuses during Soviet rule in Georgia were extensive: political repression, indirect erosion of national identity, and severe restrictions on freedom of expression. However, the oppression of Georgian national sentiment became deadlocked and continued its own position of insisting on identity rather than rights and prepared an underground base for the subsequent independence movement. It is in this historical context that any challenges and progress for Georgia's post-independence human rights development must be understood.

■ 2.2. *Post-independence era*

2.2.1. *Processes of State building*

The collapse of the Soviet Union in 1991 can be regarded as the starting point of the great transformation of Georgia. Being one of the member republics, a complex way to statehood and nation-building lay ahead for the country. Definitely, Georgia's way to sovereignty was problematic, especially given the fact that the road was full of internal conflicts that would go on to characterise most of the post-independence period.²⁷ The early 1990s were marked by exceedingly severe conflicts in Abkhazia and the Tskhinvali region/South Ossetia (hereafter, Abkhazia and South Ossetia). Abkhazia declared independence in August 1992, followed by a conflict that violently expelled approximately 250,000 people, mostly ethnic Georgians, until a ceasefire was agreed to in May 1994. South Ossetia declared independence in September 1990, followed by an intense conflict between 1991 and 1992 and the loss of Tbilisi's jurisdiction over the region by the end of 1992.²⁸

24 Hammarberg, 2013, p. 25.

25 Amnesty International, 1977, p. 56.

26 Jawad, 2005, p. 35.

27 Jawad, 2005, p. 8.

28 Ibid., p. 9.

Regarding the status of these two occupied territories, Prof. Levan Aleksidze has written extensively on the related conflicts, emphasising the danger they present to the territorial integrity of Georgia. Aleksidze is of the opinion that the declaration of Abkhazia and South Ossetia as independent states is not legally valid in international law, asserting that such an action violates the sovereignty and territorial integrity of Georgia.²⁹ Aleksidze also opines that foreign aid for these separatist groups exacerbates the situation, contravening the provisions of international law that guarantee existing state frontiers.³⁰

Other areas, such as the northern valleys of Svaneti, Pankisi, and southern areas hosting Armenian and Azeri minorities have either stayed outside the central government's full control or simply rejected being part of Georgia. The Southwestern autonomous Republic of Ajara was another hurdle. Its authoritarian head, Aslan Abashidze, had developed close relations with Russia; following economic and military pressure from the central government, the Republic removed Abashidze's parallel power structure and restored full control to the central government in May 2004.³¹ Moreover, control of external borders has been a problem as well, in particularly regions such as the Pankisi gorge and the Kodori valley, which turned into shelter for international terrorists and Chechen rebels. Therefore, the loss of control was undermining Georgia's sovereignty and had severe economic losses from illegal trade and smuggling.³²

In its early years of independence, Georgia's state structures were strongly captivated by criminalised groups. The militia and partisan formations were strong and held significant power. The illegal overthrow of President Zviad Gamsakhurdia in January 1992 left national security structures in a state of anarchy, and they had to be gradually stabilised under Shevardnadze, who formed the Citizens Union of Georgia in 1993. This was achieved by a new constitution passed in August 1995, after which the country has since further stabilised itself except for the issues in the breakaway regions.³³

2.2.2. Protection of Human Rights

Reports of police brutality, death threats by state authorities against journalists, and the use of torture undermined the protection of human rights and freedoms outlined in the 1995 Constitution. International observers repeatedly reported cases of police assault and the use of electric shocks among convicts. Despite the efforts to align with European standards in preparation for accession to the

29 Aleksidze, 2008, pp. 75–92.

30 Alexidze, 2012, pp. 75–101.

31 Bielawski and Halbach, 2004, p. 3.

32 Ratiani, 2004.

33 King, 2001, p. 96.

Council of Europe in 1999, many of these reforms were subsequently watered down or reversed.³⁴

National security structures have also undergone reform with the disbandment of paramilitary groups and modernisation of the military, but many of these efforts have been derailed by widespread corruption and infiltration of informal networks. As much as there were efforts to bring the military in line with NATO standards, the national security forces were in a sorry state of affairs.³⁵ This was evident from the 2003 military expenditures which stood at a mere 1.1% of the GDP, far much less than the approximate of 2% recommended by NATO.³⁶ A high incidence of crimes and widespread corruption marked Georgia; in addition, much revenue was lost owing to smuggling and illegal trade. In Tbilisi, 23.6% of the population had been victims of crimes and 16.6% had been involved in acts of bribery in 1999.³⁷ These figures illustrate the broader sense of social distrust and inclination towards violence in Georgian society.

2.2.3. *Post-rose revolution era*

The Rose Revolution of November 2003 was a turning point for Georgia. The peaceful protests forced Shevardnadze to resign and power was transferred to Mikheil Saakashvili. What befell human rights in Georgia after this change is discussed below. We will delve into the new laws and government structures, also the arising social attitudes, and how these affected peoples' lives.

2.2.3.1. Political and legal reforms and their impact on Human Rights

The Rose Revolution set records for optimism in Georgian political life and popular hopes of reform that had been burning for years. There was hope on the streets of Tbilisi after President Saakashvili came to power and launched an expansive program of modernisation. This program sought to clean up the government, strengthen governance, and bring Georgia into the Western fold through institutions such as the European Union and NATO. Over time, it was clear that many of these reforms were tainted with strategic gamesmanship to solidify authoritarianism under the guise of democracy.³⁸

Prominent among those were the broad judicial reforms aimed to improve independence, efficiency, and transparency in the judiciary. New legislation was enacted, the court system thoroughly overhauled, and judges were to be appointed on meritocracy grounds. The expectation among legal experts was that such changes would bring in a new dawn to law and justice for an elite class of high net-worth individuals and their white-collar counterparts, as well as stringent

34 Ibid., pp. 97–98.

35 Bielawski and Halbach, 2004, pp. 105–121.

36 United Nations Development Program, 2005, p. 285.

37 Ibid., p. 297.

38 Dobbins, 2014, pp. 759–774.

anti-corruption controls. High-profile prosecutions and the purging of corrupt officials generated much media coverage, but efforts such as the establishment of the Anti-Corruption Council, as well as passing a set of three bills on anti-corruption, were particularly noteworthy during this period.³⁹

Following the Rose Revolution, a series of reforms have followed to strengthen Georgia's democratic framework and safeguards for human rights through constitutional amendments. The most significant years were 2004 and 2010. It was undoubtedly an era of intense debate and raw nerves among the state's elected officials as they redefined power, wrestling control into a more balanced, three equal branches system. Yet, despite these elevated hopes, the post-revolutionary era was also a time of worsening political polarisation.⁴⁰

2.2.3.2. Civil and political rights

The Rose Revolution was, at first, a relief for Georgia's media. However, the growing media influence and control by the state turned into the harassment of journalists.⁴¹ This period also saw the introduction of electoral reforms to ensure free and fair elections, such as setting up the Central Election Commission and amending the electoral process for credibility. These efforts were marred by allegations of electoral irregularities, especially during the 2008 and 2012 elections.⁴² Significant economic reforms were implemented to liberalise the economy, attract foreign investment, and reduce poverty. These reforms contributed to economic growth but also increased social inequality.⁴³ In healthcare and education, reforms were meant to enhance access and quality. The Universal Health Care Program implemented in 2013 introduced many positive changes to guarantee health among all residents. The educational reforms emphasised changing the curricula to make it more relevant, creating modern infrastructure, and enhancing teacher training.⁴⁴

2.2.3.3. Human Rights institutions and international engagement

The Public Defender of Georgia, created in the 1990s played a crucial role in critically evaluating human rights protection in the country. After the Rose Revolution, the office was strengthened by gaining more authority and financial resources. International organisations were actively supporting the office, thereby guaranteeing better monitoring of human rights in the country. Additionally, the adoption of the Law on the Elimination of All Forms of Discrimination in 2014 was a huge step forward for combating discrimination and promoting equality

39 Nodia, 2005, p. 87.

40 Human Rights Watch, 2018, p. 58.

41 Ibid., p. 45.

42 Popjanevski, 2006, p. 23.

43 Wheatley, 2009, p. 56.

44 Jones, 2013, p. 134.

across various grounds including race, gender, disability, and sexual orientation.⁴⁵ This period also saw a surge in civil society activism. Numerous human rights NGOs emerged, playing a crucial role in monitoring human rights, advocating for reforms, and providing legal aid to victims.

Georgia's engagement with international human rights mechanisms increased significantly. Specifically, the country ratified several international human rights treaties and actively participated in UN human rights mechanisms, including the Universal Periodic Review (UPR). The goal of EU membership became a primary target for Georgian external policy. The EU accession criteria, known as the conditionality principle, tied membership to democratisation and progress in human rights. Seeking a closer association with the EU, Georgia signed an Association Agreement with it in 2014, which includes commitments to human rights and democratic principles.⁴⁶ Georgia's interactions with the European Court of Human Rights (ECtHR) have been notable. The court has adjudicated numerous cases involving Georgia, addressing issues such as right to life, property rights, rights to a fair trial, freedom of expression, and conditions of detention. On many occasions, legislative amendments were due to rulings of the ECtHR.

2.2.3.4. Challenges and criticisms

The years following the Rose Revolution have been characterised by both advancements and ongoing challenges in the protection of human rights. While the initial optimism in public surrounding President Mikheil Saakashvili's administration was high, it soon faced significant political turmoil and criticism, particularly in relation to handling political dissent and safeguarding civil liberties, especially since 2008.

In April 2009, thousands of opposition supporters mobilised in Tbilisi, demanding Saakashvili's resignation and the announcement of early presidential elections. These protests, which persisted for two months, exposed deep-seated public frustrations and raised serious concerns about the state's commitment to human rights. As a result, human rights organisations documented numerous instances where the police used excessive force against protestors, and there were suspicious attacks on opposition activists by unidentified assailants. These incidents not only indicated the failure to uphold the right to peaceful assembly but also suggested a disturbing trend of state-sanctioned or tolerated violence against political dissenters.⁴⁷

The government's response to these protests included legislative changes that further restricted civil liberties. In July 2009, amendments to the Administrative Code increased the period of administrative detention for minor offenses,

45 United Nations Human Rights Council, 2021, p. 7.

46 Amnesty International, 2020.

47 Human Rights Watch, 2010.

a move widely criticised as excessive and likely intended to deter future demonstrations. Additionally, laws were enacted to restrict blocking roads during protests, further constraining citizens' rights to express their dissent.⁴⁸ The lack of accountability for the use of force against protestors reflected broader issues within Georgia's criminal justice system.

Judicial independence remained a critical issue, reports indicating that the judiciary often aligned with the executive, thus undermining the fairness of trials and the rule of law. This lack of independence was particularly evident in the handling of administrative detentions, where detainees were often denied due process, and in the broader criminal justice system, where allegations of torture and ill-treatment of prisoners remain rampant. For instance, in 2012, the Georgian Young Lawyers' Association released a report indicating that, over a six-month period between 2011 and 2012, it observed 520 cases at the Tbilisi City Court where judges approved every motion made by the prosecution regarding evidence admissibility, while rejecting all defence motions not backed by the prosecution. The court granted every request for pre-trial detention, and among the 113 rulings issued during this time, there was not a single acquittal.⁴⁹ This trend was visible throughout the entire period that Saakashvili's government was in power, when zero tolerance policy served as the foundation of criminal justice system.

Besides the judiciary, the state of human rights in prisons has been notably affected by the conditions within the prison system and the degree of media freedom, both of which have been significant concerns for international observers. As mentioned above, the policy of zero tolerance towards crime and the high conviction rates have led to a substantial increase in the prison population, exacerbating already poor conditions. The ombudsman's 2012 report highlighted persistent overcrowding, noting that in several prisons, inmates did not even have their own personal beds.⁵⁰ The lack of adequate space, combined with poor sanitation and insufficient access to medical care, created an environment where basic human dignity was often compromised. It is noteworthy that the abuse of human rights in Georgian prisons that gained international attention in September 2012, when graphic video footage depicting the beating and sexual abuse of prisoners was broadcast by local media, was common practice.⁵¹ Horrific videos, which showed prison guards violently assaulting inmates, underscored the broader issues of accountability and transparency within Georgia's criminal justice system. The ECtHR has consistently ruled against Georgia in cases related to inhuman or degrading treatment, further highlighting the systemic failures in ensuring the humane treatment of prisoners. For instance, in the case of *Ghavitadze v. Georgia*, the ECtHR found that the Georgian government had failed to provide adequate

48 Amnesty International, 2009.

49 Human Rights Watch, 2013.

50 Ibid.

51 Human Rights Watch, 2013.

conditions or medical care in its prisons, violating the prohibition on torture and inhuman or degrading treatment.⁵²

Another problematic direction was the freedom of media in Georgia, which presented a complex picture. While the country's print media was diverse and often critical of the government, the television broadcasting landscape was much more constrained. The nationwide television, the primary source of news for most Georgians at that time, had been dominated by the state-owned public broadcaster and pro-government station Rustavi 2. This concentration of media ownership and influence has led to significant concerns about the impartiality and independence of television news coverage.⁵³ Incidents of violence and intimidation against journalists have further marred the media environment. The closure of Imedi television and the suspension of its broadcasting license was a clear example of this and a violation of freedom of expression guaranteed both by Article 24 of the Georgian constitution and under international law.⁵⁴ Additionally, during the June 2009 protests in Tbilisi, several journalists were assaulted by the police, who confiscated their equipment and allegedly deleted footage that documented police brutality. Although the authorities later returned the equipment, the incidents raised serious concerns about the protection of press freedom and the ability of journalists to operate without fear of retribution.⁵⁵

Overall, the post-Rose Revolution era in Georgia has seen significant progress in human rights, driven by legal reforms, international engagement, and the establishment of robust human rights institutions. However, the country has faced numerous complexities and setbacks, revealing just how delicate and challenging the balance is between strengthening state institutions and preserving democratic freedoms.

2.2.4. *Current political landscape*

In October 2012, Georgia reached a crucial turning point in its political history. For the first time since gaining independence from the Soviet Union, it successfully changed its leadership through a peaceful, democratic election. The opposition coalition, Georgian Dream (GD), led by Bidzina Ivanishvili, won the election, ending the years-long dominance of the then President Saakashvili's United National Movement. This victory was a major achievement, but the election period had its difficulties. For instance, there were troubling reports of opposition supporters being harassed and intimidated, and concerns were raised about the misuse of administrative charges to detain activists.⁵⁶

52 Ghavtadze v. Georgia, App. No. 32147/05, Eur. Ct. H.R. (2007).

53 Reporters Without Borders, 2009.

54 Human Rights Watch, 2007.

55 Human Rights Watch, 2010.

56 Human Rights Watch, 2013.

With the peaceful transfer of power, a new era in Georgian history began. In its progress report, the European Neighborhood Policy (ENP) recognised Georgia's efforts towards modernisation and its pursuit of a deeper integration with the EU, particularly in areas such as anti-corruption. However, the report also pointed out ongoing challenges, including the need for more reforms to secure an independent judiciary, an effective criminal justice system, a fair electoral process, and better protection of minority rights.⁵⁷

2.2.4.1. Legislative and institutional reforms

Since GD came into power, the country has made important progress in amending its laws and institutions to better protect human rights. These changes reflect the country's commitment to honouring international human rights agreements and the principles set forth in its Constitution, which prioritises international treaties unless they conflict with constitutional laws. Significant among these reforms were the 2017–2018 constitutional amendments, which enhanced the protections of social rights, the rights of people with disabilities, children's rights, and gender equality.⁵⁸

National Human Rights Strategy (2014–2020) has been driving these changes, supported by detailed action plans. The Human Rights Inter-Agency Council, led by the Prime Minister, played a key role in ensuring that these plans are carried out, with various state agencies working in coordination. A noteworthy development in Georgia's human rights framework was the creation of the State Inspector's Service in 2019, an independent body tasked with investigating specific offenses by law enforcement and civil servants. Another important advance was the introduction of the first comprehensive strategy and action plan for the judiciary (2017–2021), aimed at fostering a more independent and transparent judicial system.

2.2.4.2. International relations and EU integration

Georgia's foreign policy has been characterised by its strong pro-Western orientation, with aspirations to join both the European Union and NATO enshrined in the Constitution, which at least on paper is a clear indication of the country's commitment to aligning with Western norms and standards. However, Georgia's path towards EU and NATO membership poses challenges stemming from territorial conflicts and Russia's strong presence in the region.⁵⁹

Despite these challenges, Georgia has made considerable efforts in aligning its domestic policies with EU standards, particularly through the 2014 Association

57 The European Neighborhood Policy (ENP) Progress Report, 2012.

58 Georgia, 2021, *National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21*. United Nations, Working Group on the Universal Periodic Review, Thirty-seventh session, 18–29 January 2021.

59 Russell, 2021, pp. 3–5.

Agreement, which has been instrumental in enhancing economic ties with the EU and has spurred many of the political and economic reforms in the country.⁶⁰ Additionally, in July 2016, the Association Agreement and Deep and Comprehensive Free Trade Area (DCFTA) between Georgia and the EU came into force, establishing a framework for closer economic and political alignment.

This led to the European Commission's Opinion in June 2022, which recommended granting candidate status to Georgia, provided that 12 key priorities were addressed. The European Council acknowledged Georgia's aspirations towards European integration and expressed its willingness to grant it candidate status, contingent on further progress. By November 2023, the European Commission recommended that Georgia be granted candidate status, recognising the country's advancements, while stressing the need for continued reforms. Finally, in December 2023, the European Council granted Georgia candidate status, marking a pivotal moment in its path toward EU membership, with the expectation that the country would continue to implement the necessary reforms.⁶¹

2.2.4.3. Protection of Human Rights and challenges

Notable human rights concerns encompass credible allegations of torture or cruel, inhuman, or degrading treatment; arbitrary arrests and detentions; significant issues regarding the independence of the judiciary, accompanied by investigations and prosecutions widely perceived as politically motivated; arbitrary or unlawful intrusions into privacy; severe restrictions on freedom of expression and press freedom, including instances of violence and threats directed at journalists; considerable interference with the rights to peaceful assembly and association; pervasive government corruption; and violent crimes or threats of violence specifically targeting lesbian, gay, bisexual, transgender, queer, and intersex individuals and activists.⁶²

The reintroduction and eventually adoption of the Law on Transparency of Foreign Influence by the Georgian parliament in May 2024, requiring certain non-governmental organisations (NGOs) and media outlets to register as 'organisations serving the interests of a foreign power', poses a serious threat to the fundamental rights in Georgia. The Venice Commission, in its urgent opinion, expressed serious concerns about a new law in Georgia, stating that it imposes undue restrictions on freedom of expression, association, and privacy. According to the Commission, these restrictions fail to meet the standards of legality, legitimacy, necessity, and proportionality outlined in the ECHR and the International Covenant on Civil and Political Rights (ICCPR). The Commission warned that this law could stigmatise and silence organisations and media outlets critical of the government, posing

60 Ibid.

61 European Union, 2024.

62 U.S. Department of State, 2023.

a threat to pluralism and democracy in the country; it thereby strongly recommended that the Georgian authorities abandon the special regime imposed by the law and, if necessary, amend existing laws in line with European standards.⁶³

Domestically, the constitutionality of the law was challenged by multiple actors. The President of Georgia refused to promulgate it and referred it to the Constitutional Court, joined by a coalition of 122 NGOs and opposition lawmakers filing separate suits. In these pending cases, the Public Defender (Ombudsman) submitted an *amicus curiae* brief to the Court, arguing that the law violates core constitutional rights.⁶⁴ The Public Defender's opinion highlighted that singling out organisations based on foreign funding and assigning them an onerous new status would stigmatise and interfere with their activities. It also raised alarm over the law's broad monitoring mechanisms – including the requirements that such NGOs hand over detailed personal data of staff and donors – which could breach the right to privacy and create an excessive administrative burden.⁶⁵ These burdens, the *amicus* noted, would 'significantly impair [organizations'] ability to effectively carry out basic activities', thus undermining the very essence of freedom of association. Georgian constitutional scholars have pointed out that the law likely conflicts with Article 24 of the Georgian Constitution (freedom of association) and possibly Article 78, which commits Georgia to European integration (the law was seen as veering away from EU norms). Moreover, the process of adoption – without broad consultations and amid strong public opposition – contradicted the principles of democratic lawmaking. Despite these warnings, the law came into effect in early August 2024 and, as of September, NGOs are required to register in a new complex registry created under this law.

As a result of this, Georgia's EU accession process has been stopped, the EU has frozen 30 million euros of assistance to Georgia, and further measures are being considered in case the situation in the country deteriorates further.⁶⁶

2.2.4.4. Summary

Since the government change in 2012, Georgia's political landscape has evolved considerably, marking the first peaceful transfer of power to the Georgian Dream coalition. While the country has made steps towards modernisation and aligning with EU standards, concerns persist about democratic practices, particularly in judicial independence and human rights. Recent reforms have aimed at enhancing human rights, but significant challenges remain, including allegations of torture, arbitrary arrests, and government corruption. The 2024 Law on Transparency of Foreign Influence has been heavily criticised for threatening the freedom of

63 European Commission for Democracy through Law (Venice Commission), 2024.

64 Pirtskhalashvili, 2024.

65 Public Defender of Georgia (Ombudsman), n.d.

66 EU Accession Process Halted Aid to MoD Frozen Relations at a Low Point Ambassador Herczyński Regrets, 2024.

expression and democracy, with the Venice Commission recommending its repeal due to its potential to silence dissent and harm democratic processes. Halting Georgia's EU accession due to the changed direction of the current government could negatively affect the country's EU and NATO accession plans, a direction that is also enshrined in the Constitution.

3. Analysing the relationship between Georgia and the United Nations: A Human Rights perspective

Since gaining independence, Georgia has faced numerous challenges, including political instability, civil war, and human rights abuses. Overcoming these issues without external help seemed impossible. As such, the UN has been instrumental in aiding Georgia's transition by offering guidance, resources, and monitoring mechanisms to improve human rights protection within the country. This section analysed the relationship between Georgia and the UN from a human rights standpoint, examining key areas of cooperation, the obstacles encountered, and the impact of UN interventions on Georgia's human rights situation.

■ 3.1. Historical context and Georgia's engagement with the UN

The relationship between Georgia and the UN commenced in 1992, just immediately after the country declared independence.⁶⁷ In the early 1990, Georgia had to contend with significant problems due to the conflicts that emanated from Abkhazia and South Ossetia. The clashes led to gross human rights violations in the forms of ethnic cleansing, forced displacement of people, and civilian maltreatment. Namely, around 250,000 people, primarily ethnic Georgians, fled Abkhazia for other parts of the country. The Abkhaz received a limited amount of support from mercenaries and volunteers, largely from the North Caucasus, and some equipment and supplies from Russian troops stationed in the area, although the Russian involvement in the fighting has been as ambivalent as it has been since the war.⁶⁸ Following the end of the war, several different phases of the peace process can be distinguished. It is useful to draw on a slightly modified version of the pattern suggested by Natalie Sabanadze, who expresses the opinion that international involvement in South Caucasian Conflict falls into three fairly distinct phases.⁶⁹ The first is essentially one of Russian dominance, while in the second the leading role of international organisations is increasingly being developed, and the third involves mounting US influence. This pattern can be loosely applied to the case of Abkhazia. Doubtless, the Russian intervention was dominant during

67 About the UN in Georgia, no date.

68 Stewart, 2003, pp. 1–31.

69 Sabanadze, 2002.

the war and in the years immediately after that. In response, the UN executed its duty by providing humanitarian relief and introducing peacekeeping forces into this territory with the sole purpose of ensuring stability and defending the affected people. However, it is important to use accurate legal terminology when discussing Abkhazia and South Ossetia. Under Georgian law and international documents, they are referred to as ‘occupied territories’ – specifically occupied by the Russian Federation – rather than independent states. This terminology is backed by international resolutions; namely, UN General Assembly resolutions explicitly mention ‘Georgian regions occupied by Russia’.⁷⁰ Georgia also regularly raises the issue in the UN Human Rights Council (HRC) and General Assembly, emphasising the duties of an occupying power under international law. Occupation framing asserts that Russia has effective control and international humanitarian and human rights obligations thereby fall to Russia. Third states and organisations (EU, OSCE etc.) consistently call for Russian withdrawal and international human rights presence in these regions. Describing Abkhazia and South Ossetia as occupied does not constitute politicised language but reflects the factual and legal reality in 2008. It brings clarity that sovereignty in Georgia is recognised even when temporarily violated and adheres to UN terminology and to Georgian legislation (e.g. Georgia’s Law on Occupied Territories in 2008).

Along with UN resolutions, Georgia sought to pursue accountability against Russia through international legal avenues. Such a case would be the International Court of Justice case *Georgia v. Russian Federation*, which was filed in 2008 under the International Convention on the Elimination of All Forms of Racial Discrimination (CERD). In this case, Georgia alleged Russia was responsible for ethnic cleansing and serious racial discrimination against ethnic Georgians in Abkhazia and South Ossetia, breaching CERD. The ICJ initially indicated provisional measures in October 2008 (ordering both parties not to aggravate the conflict and to protect civilians), demonstrating the urgency and gravity of the claims. However, in its April 2011 judgment on preliminary objections, the ICJ declined jurisdiction on a technical ground: it found that Georgia had not satisfied the prerequisite of attempting negotiations with Russia before filing the case, as required by Article 22 of CERD. The ICJ observed that Georgia only notified Russia of the dispute a few days before going to The Hague, which did not constitute a ‘genuine attempt’ at negotiation and, thus, the case was dismissed without examining its merits.⁷¹ This outcome was disappointing for Georgia, as it highlighted a gap in accountability for human rights violations in the occupied regions. Nonetheless, the *Georgia v. Russia* ICJ proceedings (along with cases before the European Court of Human Rights) drew international attention to the human rights abuses during and after

70 Ministry of Foreign Affairs of Georgia, 2024.

71 International Court of Justice (2008) ‘*Georgia v. Russian Federation*, Application of the International Convention on the Elimination of All Forms of Racial Discrimination’.

the 2008 conflict. They also underscored the importance of following procedural rules in international litigation. Georgia continues to leverage the UN frameworks – rather than the judicial ones – to keep the spotlight on the human rights situation in Abkhazia and South Ossetia via periodic resolutions and reports by the Secretary-General mandated by the General Assembly.

One of the prominent actions taken by the UN is the introduction of the United Nations Observer Mission in Georgia (UNOMIG). While this mission was primarily tasked with observing ceasefire agreements between the Georgian government and separatist forces, it also played an important role in addressing human rights concerns. Its mandate included monitoring and reporting human rights abuses in the conflict zones, which prepared the ground for more general efforts of the UN in promoting human rights and accountability in Georgia.⁷² Moreover, at the outset of 1994, the UN began to play an increasingly larger role, although the Russian influence remained strong.

■ 3.2. *UN Human Rights mechanisms and Georgia*

Over time, Georgia has been involved with various UN bodies such as the Human Rights Council and the Office of the High Commissioner for Human Rights (OHCHR). It also participated in important treaty-based committees, including those on the elimination of discrimination against women (CEDAW) and the elimination of racial discrimination (CERD).⁷³ These measures are seen as opportunities through which Georgia can harmonise its national policies with international human rights standards, an area that will be examined in this paper. For instance, according to *Gabrighidze*, the tendency of placing human rights clauses into the international treaties of Georgia was a manifestation of the adherence to fundamental international structures among which is the UN Charter. Because no serious mechanism for their execution was present, the real function of those clauses often remained weak and the majority of tools were also politically legal rather than practical in nature. This emphasises a broader problem within Georgia's cooperation with mechanisms for the protection of human rights, where adherence to standards is encouraged rather than built upon by enforceable measures through cooperation.⁷⁴

Some other important aspects of the cooperation between Georgian and the UN are, for example, the fact that Georgia is participating in the Universal Periodic Review process as a member of the peer review mechanism of the Human Rights Council. Having been part of the process for the third time already has assisted in identifying areas of concern including judicial independence, rule of law, issues dealing with treatment of IDPs, and rights of minorities.⁷⁵

72 United Nations Observer Mission in Georgia (UNOMIG), 2009, p. 9.

73 Office of the United Nations High Commissioner for Refugees (UNHCR), 2021, p. 7.

74 Gabrichidze, 2017, p. 87.

75 United Nations Human Rights Office of the High Commissioner (OHCHR), 2021.

The second important aspect of Georgia's cooperation with the UN is its attachment to achieving the actuality of the Sustainable Development Goals, especially Goals 4, 5, and 16, which emphasise gender equality, quality education, peace justice, and strong institutions, respectively. Furthermore, the UN supports this through its Development Programme (UNDP) with instrumental technical aid and awareness-raising activities that have been of considerable help to better applying human rights in Georgia.

■ 3.3. *The impact of UN interventions*

The UN has had a huge impact on the human rights policy in Georgia, but this did not come free of limitations. Its activities have paved the way to further elaborate legal and institutional basis for the protection of human rights in Georgia. The legislative changes promoted, with the support of the UN, mechanisms to prevent discrimination, promote women's and minority rights, and set up systems for redressing violations of human rights.⁷⁶ In addition, human rights monitoring and reporting have been effective in pinpointing the issues that the country has been going through and ensuring that the government is strictly adhering to the protection of human rights. Therefore, it can be said that Georgia is able to align its policy with international standards to a large extent by continuously interacting with UN human rights instruments; however, the transposition of these policies at the domestic level remains an important problem. Despite good anti-discrimination laws on paper, ethnic minorities and LGBTQ+ individuals continue to experience systemic discrimination and serious barriers in accessing legal protection. Structural inequality, social stigmatisation, and institutional bias consistently deny them access to and receipt of justice from the legal system. However, the UN support for the work of civil society organisations in Georgia has dramatically enhanced human rights work at the grassroots level.⁷⁷

■ 3.4. *Summary*

The relationship between Georgia and the United Nations has been instrumental in shaping the human rights landscape of the country. While significant progress has been made, challenges remain, particularly in the national implementation of laws and policies. UN's continued and further engagement with Georgia is essential in addressing these challenges and supporting the country's ongoing efforts to protect and promote human rights.

⁷⁶ Ibid.

⁷⁷ Ibid.

4. Georgia's legal framework: The role of UN Human Rights Conventions

In the previous section, while discussing relationship of Georgia and the UN, we mentioned that, since gaining the independence in 1991, Georgia actively engaged in international human rights by first becoming a member of the UN in 1992 and then gradually ratifying key treaties and working towards aligning domestic legislation to UN standards. This section explores the main developments on this path and how Georgia's status as a state party to the UN conventions has driven important legislative developments, challenges faced during the implementation of these obligations, and impact on the country's legal and human rights environment. This section first analyses the list of UN Conventions that Georgia is part of and then separately deals with only those UN Human Rights Conventions and Covenants that falls under the scope of this paper.

■ 4.1. Georgia's participation in UN Conventions and Covenants

Since 1991, Georgia has been seeking membership in the international community through its accession to a wide array of UN conventions and covenants on human rights, trade, environmental protection, and legal cooperation. By ratifying these conventions and acceding to them, it demonstrated its commitment to the process of harmonisation of the national legislation with the international standards for stability, development, and cooperation on both the national and international levels.

This subsection provides a broad overview of the major UN conventions and covenants that Georgia is a Party to. It brings out the involvement of the country in various international laws and policies and the extent of its undertaking of legal instruments to which its adherence has been documented. All these agreements are listed below.

Crime, Justice, and Security

Convention	Status (Ratified/Acceeded)	Date
United Nations Convention Against Transnational Organized Crime (UNTOC)	Ratified	5 September 2006
United Nations Convention Against Corruption (UNCAC)	Ratified	4 October 2008
Single Convention on Narcotic Drugs (1961)	Acceded	29 March 1994
Convention on Psychotropic Substances (1971)	Acceded	29 March 1994
United Nations Convention on the Law of the Sea (UNCLOS)	Acceded	21 March 1996

Environmental Protection and Climate Change

Convention	Status (Ratified/Acceded)	Date
United Nations Framework Convention on Climate Change (UNFCCC)	Ratified	29 July 1994
Kyoto Protocol	Ratified	16 June 1999
Paris Agreement	Ratified	2 May 2017
Convention on Biological Diversity (CBD)	Ratified	2 June 1994
Convention to Combat Desertification (UNCCD)	Ratified	23 June 1999
Vienna Convention for the Protection of the Ozone Layer	Ratified	10 June 1996
Montreal Protocol on Substances that Deplete the Ozone Layer	Ratified	10 June 1996

Trade, Economic, and Development Conventions

Convention	Status (Ratified/Acceded)	Date
United Nations Convention on Contracts for the International Sale of Goods (CISG)	Acceded	1 March 2018
United Nations Convention on the Law of the Sea (UNCLOS)	Acceded	21 February 1996
General Agreement on Tariffs and Trade (GATT/WTO membership)	Acceded	14 June 2000
Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention)	Ratified	2 June 1994

Labor and Social Standards

Convention	Status (Ratified/Acceded)	Date
ILO Forced Labour Convention (No. 29)	Ratified	9 December 1993
ILO Freedom of Association and Protection of the Right to Organise Convention (No. 87)	Ratified	3 November 1999
ILO Right to Organise and Collective Bargaining Convention (No. 98)	Ratified	23 May 1993
ILO Worst Forms of Child Labour Convention (No. 182)	Ratified	5 July 2002
Maritime Labour Convention (MLC 2024)	Ratified	14 February 2024

Health, Science, and Technology

Convention	Status (Ratified/Acceded)	Date
Framework Convention on Tobacco Control (WHO FCTC)	Ratified	15 November 2005
International Health Regulations (IHR)	Adopted	2005
Chemical Weapons Convention	Ratified	27 March 1996

Cultural and Heritage Protection

Convention	Status (Ratified/Acceded)	Date
UNESCO World Heritage Convention	Ratified	4 March 1992
UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions	Ratified	4 October 2008
Hague Convention for the Protection of Cultural Property	Acceded	23 June 1995

■ 4.2. Georgia's participation in UN Human Rights Conventions and Covenants

After becoming the member of the UN, Georgia also ratified numerous core international human rights treaties, which was a clear indication of integrating the standards enshrined in these documents into its national legal framework. As a state party, the Georgian Constitution adopted in 1995 reaffirms the universally recognised human rights and freedoms and recognises supremacy of international treaties over domestic laws. Moreover, Georgia regularly submits periodic reports to the human rights treaty monitoring bodies and pays utmost attention to the implementation of their recommendations.⁷⁸

Georgia is a member of all major international treaties. The treaties that Georgia ratified/acceded to are listed below:

1. 1951 Refugee Convention: Georgia acceded to the 1951 Refugee Convention and its 1967 Protocol on 9 August 1999.
2. 1966 International Covenant on Civil and Political Rights (ICCPR): Georgia ratified the ICCPR on 3 May 1994.
3. 1966 International Covenant on Economic, Social, and Cultural Rights (ICESCR): Georgia ratified the ICESCR on 3 May 1994.
4. 1965 International Convention on the Elimination of All Forms of Racial Discrimination (ICERD): Georgia acceded to the ICERD on 2 June 1999.
5. 1979 Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW): Georgia acceded to CEDAW on 26 May 1994.

⁷⁸ United Nations Human Rights Office of the High Commissioner (OHCHR), 2015.

6. 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT): Georgia ratified the CAT on 22 September 1994.
7. 1989 Convention on the Rights of the Child (CRC): Georgia ratified the CRC on 2 June 1994.
8. 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICMW): Georgia has not ratified the ICMW.
9. 2006 Convention on the Rights of Persons with Disabilities (CRPD): Georgia ratified the CRPD on 13 December 2013.⁷⁹

Georgia is thus bound by eight treaties from the list above. Only treaty that Georgia is not part of at the moment of writing this paper is the ICMW. Ratification of these treaties obliged Georgia to respect, protect, and fulfil the rights that are outlined in them. Therefore, a significant legislative reform path was required for Georgia to align its domestic laws with international obligations.

■ 4.3. *National implementation of key UN Human Rights instruments*

The Constitution of Georgia represents the cornerstone of the Georgian legislation. Chapter II of the Constitution covers basic principles of the universally recognised human rights and freedoms, such as freedom of speech, thought, conscience, belief and expression, inviolability of human honour and dignity, protection of property rights and prohibition of punishment without law and prohibition of torture, capital punishment (abolished in 1997) etc.⁸⁰ The constitutional amendments introduced in 2017–2018 consolidated the standards of human rights protection. The amendments have specifically focus on social rights, rights of persons with disabilities (PwDs), child rights, and gender equality.⁸¹

One of the most important developments in the legislation of Georgia was the adoption of the comprehensive anti-discrimination law on 2 May 2014, by the Parliament, reflecting Georgia's commitments under CERD and CEDAW. Georgia's national human rights institution – the Office of the Public Defender – is authorised to monitor the implementation of the law. As a result of the enactment of the law, the scope of the Ombudsman's authority, aimed at responding to the cases of discrimination, has been relatively broadened. The Ombudsman can address the recommendations to not only the state institutions, but also to the discriminating private persons.⁸² The law enabled citizens, in case of discriminative activity, to request material and non-pecuniary damage restitution from the discriminating

79 United Nations Human Rights Treaty Bodies, no date.

80 Constitution of Georgia (1995) Ch II. [Online]. Available at: <https://matsne.gov.ge/ka/document/view/30346?publication=36> (Accessed: 10 August 2024).

81 United Nations Human Rights Office of the High Commissioner (OHCHR), 2015.

82 Georgian Young Lawyers' Association (GYLA), 2014, p. 2.

person, by addressing the court to stop discriminative action and to eliminate its results.

Influenced by CEDAW, in 2006, the Law on the Elimination of Domestic Violence was adopted, making substantial commitments to address violence against women and domestic violence (DV).⁸³ Additionally, under the Sustainable Development Goals (SDGs), Georgia has also pledged to eliminate all forms of discrimination and violence against women and girls, aligning its national targets with global objectives (SDG Targets 5.1 and 5.2). In 2017, Georgia also ratified the Council of Europe Convention on preventing and combating violence against women and domestic violence (also known as the Istanbul Convention)⁸⁴ and adopted a milestone legal framework aimed at harmonising the domestic legislation (including the DV Law of 2006) based on the requirements under the Istanbul Convention.⁸⁵ Consequently, Georgia has expanded its definition and protection against gender-based violence, criminalising offenses such as female genital mutilation, forced sterilisation, stalking. The expanded legal framework covers not only criminal mechanisms but also administrative measures, with restraining/protective orders issued to ensure the safety and protection of victims. Additionally, civil mechanisms are employed to seek compensation for the damages resulting from instances of violence against women and/or domestic violence, as stipulated by procedures outlined in civil legislation.⁸⁶

As a response to obligations under the CRC Law on the Rights of the Child, the Georgian Parliament has adopted the Code of Rights of the Child in 2019. The Code is founded on the core principle that all legislative and administrative actions should be designed and carried out with the child's best interests as the top priority.⁸⁷ The Code is based on the best interest of the child and recognised all rights enshrined in the Convention on the Rights of the Child, created state systems for protection and support of children, introduced state responsibility to develop and offer to children educational, healthcare and social security programmes.⁸⁸ In terms of rights of juveniles, in 2015, the Juvenile Code of Georgia was adopted. One of the major purposes of this Code is to protect the best interests of minors in decision-making and give priority to the use of an alternative mechanism of criminal prosecution, such as diversion and mediation.⁸⁹

83 United Nations Human Rights Office of the High Commissioner (OHCHR), 2021, p. 6.

84 Council of Europe (2014) *The Council of Europe Convention on preventing and combating violence against women and domestic violence*. Istanbul.

85 United Nations Entity for Gender Equality and the Empowerment of Women (hereinafter: UN Women Country Office in Georgia). UN Women, 2020, p. 43.

86 UN Women, 2024, p. 2.

87 UNICEF (2019) *Code on the Rights of the Child – a significant landmark for every child in Georgia*. [Online]. Available at: <https://www.unicef.org/georgia/stories/code-rights-child-significant-landmark-every-child-georgia> (Accessed: 12 August 2024).

88 United Nations Human Rights Office of the High Commissioner (OHCHR), 2021, p. 6.

89 Ibid.

Finally, driven by the CAT, ICCPR, and CEDAW, Georgia has amended the Criminal Code to strengthen its capacity of protecting human rights. Worth mentioning are the amendments that have specifically criminalised acts of torture and hate crimes. In 2005, Georgia explicitly defined and criminalised torture. The definition of torture under the Criminal Code of Georgia is consistent with Article 1 of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Current Georgian legislation criminalises the crimes of torture, threat of torture, and inhuman or degrading treatment.⁹⁰

As for hate crimes, there is no separate article in the criminal code on hate crimes, rather hate motives are considered as an aggravating circumstance for the relevant crime committed. Accordingly, the amendments to the Criminal Code in 2012 introduced harsher penalties for crimes motivated by hatred (based on characteristics such as race, religion, or ethnicity), ensuring that the perpetrators of such crimes face appropriate legal consequences.⁹¹ In line with CEDAW requirements, another aggravating circumstance was added the criminal code in 2012, and any crime committed based on gender identity results in harsher penalties. Furthermore, in June 2012, domestic violence was criminalised as a separate crime and two new norms were introduced to the Criminal code – Article 126(1), which specifically defined the scope of domestic violence, and Article 11(1), which established categories of domestic violence.⁹²

Regarding refugees, Georgia has been a signatory to the Refugee Convention in 1951 and Protocol in 1967 since 1999, and adheres to international standards such as non-refoulement.⁹³ To give effect to these commitments, Georgia enacted the Law on International Protection in 2016, which has been in force since 2017, establishing criteria and processes for refugee status and humanitarian protection, and guaranteeing rights such as legal aid and protection against arbitrary expulsion. While legislative progress has been made, there are practical challenges remaining. As of February 2024, Georgia hosted 31,044 refugees, asylum seekers, stateless persons, and humanitarian status holders. Of these, there are currently 27,330 Ukrainian refugees and asylum seekers living in Georgia, as well as 1,330 refugees from other countries of origin, 896 asylum seekers, 526 stateless persons, and 962 humanitarian status holders.⁹⁴ While a Refugee Integration Centre was established in 2017 and offers language and employment support, these centres do not exist with rising asylum applications.⁹⁵ However, another problem is transparency in rejection, especially security-based rejection. Security-based rejections are secretive and thus hard to appeal; as such, they give rise to concerns about

90 United Nations Human Rights Office of the High Commissioner (OHCHR), 2010, p. 8.

91 United Nations Human Rights Office of the High Commissioner (OHCHR), 2015, p. 3.

92 *Ibid.*, p. 14.

93 United Nations High Commissioner for Refugees (UNHCR), 2021.

94 Estonian Refugee Council, 2024.

95 ECRE, 2020.

due process. In 2017, there were 300 such rejections without disclosed evidence.⁹⁶ The UNHCR and human rights organisations have also documented expulsions that could be in contravention with non-refoulement obligations. On the positive side, sustained collaboration with UNHCR, the EU, and participation in initiatives like the Global Compact for Refugees and the #IBelong campaign reflect Georgia's commitment to global action regarding the refugee situation.⁹⁷

The only convention related to human rights that Georgia has not ratified so far is the ICMW. It is unknown whether or when the country is planning to ratify or join this convention. While talking about the national implementation of human rights treaty obligations, particular attention need to be paid to the COVID-19 period, as extraordinary situations are one of the most solid tests of how certain rights are protected. In this regard, early in 2020, during the pandemic, Georgia, similar to other countries, introduced a state of emergency (March–May 2020) and general measures to secure public health. The restrictions included curfews, lockdowns, bans on gatherings, travel restrictions, and remote hearing in courts, among others. Professor Konstantine Korkelia, a distinguished international law expert in Georgia, conducted a comprehensive study of the restrictions to human rights in Georgia during COVID-19 and whether they met international standards.⁹⁸ His study focused on two principal treaties – the ICCPR and ECHR – that make provisions for derogations or limitations during a period of emergency.

Georgia's COVID-19 restrictions affected fundamental rights such as liberty, security, freedom to move around, assembly, and education. Some were in accordance with principles such as legality, necessity, and proportionality, while others lacked a basis in law or continued beyond the emergency without a reasonable explanation.⁹⁹ Derogations to the ICCPR Article 4 and ECHR Article 15 were notified to the UN and Council of Europe by the government to ensure procedural compliance. However, Georgia's Constitution does not have clear proportionality guarantees in Article 71 and legal uncertainty surrounds emergency powers.¹⁰⁰ Restrictions on gathering and movement, such as curfew and travel restrictions, had no specific time limitations and had insufficient safeguards against abuses.¹⁰¹ Moreover, education rights were particularly affected. Remote learning exposed loopholes in the law, with Article 27 of the Constitution of Georgia not allowing restrictions during a state of emergency.¹⁰² Instead, Article 26 (labour rights) was invoked by the government to shut down schools, which was a constitutional issue. Inequitable access to digital means further limited students' rights, particularly

96 Institute for Development of Freedom of Information (IDFI), 2017.

97 European Commission, 2020.

98 Korkelia, 2021.

99 Ibid., p. 6.

100 Ibid., p. 8.

101 Korkelia, 2021, p. 12.

102 Ibid., p. 11.

in rural areas.¹⁰³ Additionally, judicial oversight was in question. Remote court hearings lacked clear procedural safeguards and due process objections to fair trial rights and legal representation access were raised.¹⁰⁴ Korkelia thus recommended making proportionality explicit in Article 71, limiting emergency powers to time frames, and ensuring parliamentary oversight. Stronger legal foundations for schooling, open decision-making processes, and assurances against indefinite restrictions had to be ensured. Overall, while Georgia followed procedure, loopholes in emergency legislation led to uncertainties and human rights issues.

In addition, the situation regarding human rights in Abkhazia and South Ossetia needs to be mentioned. It might not come as a surprise that Georgia struggles to implement human rights treaties in Abkhazia and South Ossetia, regions it has not held power in since the early 1990s conflicts. It then, after the war in 2008, declared them ‘Russian-occupied territories’, a term accepted in international circles. Due to Russian-supported *de facto* governments, international observers and Georgian authorities have no access and it is impossible to exercise human rights monitoring. In international organisations, such as in UN forums, Georgia always maintains it has no jurisdiction in these regions until territorial integrity can be regained, with U.S. and UN reports confirming them to be Russian-occupied territories.¹⁰⁵

Nevertheless, under international law, Abkhazia and South Ossetia belong to Georgia and its obligations under treaties, such as those in ICCPR and ICESCR, extend to them. They must be ensured by local *de facto* authorities, according to Human Rights Watch (HRW), who posit that these guarantees apply.¹⁰⁶ However, there is a gap in protection in that local authorities do not apply rights and international monitoring does not take place. The UN General Assembly’s resolutions attesting to such a reality condemn population movements, reaffirm displaced persons’ right to return, and call for improved security and human rights.¹⁰⁷ Georgia has an issue in being able to apply protections, while international actors call upon Russia and local authorities to provide humanitarian access and ensure basic rights.

Overall, Georgia has made significant progress in enshrining human rights guarantees in constitutional reform and legislative developments. The passage of anti-discrimination acts, criminalisation of gender and violence against women, and expanded juvenile protections indicate a commitment to international human rights standards. Nevertheless, there remain difficulties, particularly in Abkhazia and South Ossetia, to which Georgia has no access to implement international obligations due to Russian-sponsored *de facto* regimes. Despite this, Georgia

103 Ibid.

104 Ibid., p. 14.

105 United Nations General Assembly, 2021.

106 Human Rights Watch, 2011.

107 United Nations General Assembly, 2021.

continues to advance towards a convergence with international human rights standards, strengthening its commitment to justice and accountability.

■ 4.4. *Institutional mechanisms*

The above-mentioned legislative changes were made possible by the robust institutional mechanisms in Georgia, which played a significant role in ensuring that international commitments are translated into effective legal protections and that the country's human rights agenda is implemented across various sectors. The next section explores the key institutional developments in Georgia that have shaped its human rights landscape.

One of the important institutions in terms of protecting of human rights is the Office of the Public Defender of Georgia (PDO), established in 1996 in line with the Paris Principles.¹⁰⁸ The PDO is an independent national human rights institution with the mandate to monitor the implementation of human rights by the local authorities.¹⁰⁹ As part of its mandate, the PDO presents annual reports to the Parliament of Georgia on all human rights issues. Additionally, it serves as the National Preventive Mechanism (NPM) under the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT) and as an Independent Anti-Discrimination Mechanism that has headquarters in Tbilisi and nine regional offices.¹¹⁰

The functions and scope of the PDO has been expanding year by year. One example is the creation of the Center for Children's Rights in 2001, focusing on the protection and promotion of children's rights in Georgia. Another is the establishment of the tolerance centre in 2005, which acts as platforms for ongoing dialogue and consultation between national minorities, religious organisations, and government institutions. Additionally, in 2014, the PDO was designated as the national institution to ensure the implementation, promotion and protection of the CRPD. The monitoring mechanism of the Public Defender, together with the PDO Department of the Rights of Persons with Disabilities, includes the Consultative Council for the Promotion, Protection and Implementation of the Convention on the Rights of Persons with Disabilities, and a monitoring group.¹¹¹

Another important institution, the Personal Data Protection Inspector, was created in 2013 and, besides overseeing the data protection practices in the country, it initially also had the functions to conduct special investigations against officials. On 1 March 2020, the independent body – the Special Investigation Service – was created. The Special Investigation Service is an independent State Investigation Authority and its main mission is an effective, timely, and

108 United Nations Human Rights Office of the High Commissioner (OHCHR), 2010, p. 4.

109 Article 3.1 of the Organic Law of Georgia on the Public Defender.

110 Congress of Local and Regional Authorities of the Council of Europe, 2021, p. 22.

111 Ibid.

independent investigation of the facts of violent crimes and ill-treatment committed by officials.¹¹²

In 2014, with the involvement of civil society and international actors, Georgia adopted an overarching and long-term Human Rights Strategy (2014–2020). Following the adoption of the strategy Human Rights Inter-Agency Secretariat was created with the aim to ensure effective implementation and monitoring of this document.¹¹³ In 2022, Georgia adopted a new comprehensive cross-sectoral Human Rights Strategy (2022–2024) aimed at embedding human rights principles into all branches of government.

Institutional measures also cover posts created within the parliament and elsewhere. For instance, along with the Gender Equality Council chaired by a Vice-Speaker of the Parliament, special posts were appointed, such as the Human Rights Advisor of the President, the Assistant to Prime Minister on Human Rights and Gender Equality Issues, and an Ambassador at Large on Human Rights within the Ministry of Foreign Affairs, who is tasked to systematically follow up on the implementation of HRC resolutions, recommendations by Special Rapporteurs and Independent Experts, and outcomes of the UPR process. The Committee on Human Rights and Civil Integration, as one of the standing committees of the Parliament of Georgia, has broad powers to monitor and evaluate the human rights situation in the country, as well as to examine individual petitions from individuals.¹¹⁴

■ 4.5. Summary

This section summarised Georgia's participation in UN treaties and, based on this participation, the legislative changes and institutional mechanisms it created. It can be inferred that Georgia has made significant efforts in aligning its laws and government with international human rights standards since becoming independent. By working closely with the United Nations and adopting new laws that protect people from discrimination, children, and women, Georgia has shown its commitment to human rights. To ensure these laws are followed, Georgia has created organisations like the PDO and other institutional mechanisms to demonstrate Georgia's dedication to upholding human rights for everyone.

112 Special Investigative Service, no date.

113 Government of Georgia, 2024.

114 United Nations Human Rights Office of the High Commissioner (OHCHR), 2015.

5. Georgia's cases before UN Human Rights Committees: An in-depth analysis

In the remaining part of this paper, attention is drawn to the Georgia's individual cases brought before UN Human Rights Committees with the aim to analyse them in a detailed manner and show the contextual challenges or shortcomings that Georgia faced on its way to build a state that takes human rights seriously. This section also demonstrates the areas where the country faced most challenges, as well as the nature and extent of human rights abuses that have occurred. Through this in-depth analysis, this paper aims to better understand the complexities of Georgia's human rights landscape and identify the key issues that need to be addressed for further progress. It is worth noting that, in total, there were 13 cases brought in front of the UN Human Rights Committees as an individual case. Only those cases that came out to be of high significance will be analysed herein, excluding those which were discontinued (three cases)¹¹⁵ or inadmissible (two cases).

■ 5.1. Individual complaints under the CAT

Case Reference: CAT/C/60/D/573/2013

Date of Decision: 12 May 2017

Complainants: D.C. and D.E., nationals of Georgia

Respondent State: Georgia

Overview

The issues concern a communication brought forth by Georgian nationals D.C., a medical doctor, and his son D.E., a diabetic, who claimed that they were subjected to brutal treatment during and after their arrest. These included physical mistreatment, threats, and acts of psychological coercion, all designed to coerce the applicants into confessing to offenses from which they assertedly absolved themselves, namely, kidnapping and the unlawful possession of ammunition and drugs. The applicants submitted that although they had lodged an extensive number of complaints with the authorities at all levels in Georgia, the State had not carried out an effective and prompt investigation into their complaints.

Admissibility

The first question was whether the communication was admissible or not. In addition, Georgia, the State party, submitted that the communication should be declared inadmissible on the grounds that the complainants had not exhausted the

¹¹⁵ In fact, there were four cases that were discontinued; however, one case under the CRC is still analysed below, as it is the most recent and significant.

domestic remedies, as the investigation of their allegations was still supposedly underway. Nevertheless, the Committee noted that the investigations had suffered from unreasonable delay, with no substantive actions taken since March 2012, considered it a delay rendering domestic remedies ineffective; it was thus able to take the communication into account under Article 22(5)(b) of the Convention.

Analysis and merits of the case

The complainants submitted that the treatment that they were subject to at the hands of the Georgian police is to be considered as torture under Article 1 of CAT and as cruel, inhuman, or degrading treatment under Article 16 of CAT. They gave detailed descriptions of the physical assaults, including beatings, throttling, and threats of being thrown out of a window. This was corroborated by the medical documentation from the temporary detention facility, which recorded injuries of the kind they complained of. The Committee took these allegations as credible and concluded that the treatment described in the complaints did amount to severe pain and suffering, reaching the threshold of torture under Article 1 of the Convention. The Committee further noted D.E. being denied insulin while in detention, a factor which contributed to the deteriorating condition of his diabetes, which amounted to cruel and inhuman treatment under Article 16.

In this case, the Committee found that the State's investigation was not prompt or impartial. The investigation had been dragging on for more than six years, without any substantive investigative actions taken after March 2012. The Committee considered this delay unacceptable and a violation of Article 12. Moreover, the Committee considered the failure by the State party to ensure the right of the complainants to bring a complaint in accordance with Article 13 of the Convention. The complainants alleged that they had been threatened and intimidated by State officials with a view to dissuading them from further complaints. These allegations were not rebutted by the State party, and the Committee concluded that Article 13 had indeed been violated in respect of Georgia's failure to provide a response to those complaints and the failure to protect the complainants from reprisals.

Committee's conclusion

The Committee found that the State of Georgia had violated numerous provisions of the Convention Against Torture. Specifically, it deemed that the treatment that the claimants were subjected to was considered torture under Article 1, and under Article 16, the State had submitted the victims to cruel and inhuman treatment. In addition, the State had failed to make a prompt and impartial investigation into those complaints in violation of Article 12 and the threats and intimidation practiced against the complainants violated their right to submit a complaint under Article 13.

■ 5.2. *Individual complaints under the CCPR*

Case: Shota Ratiani v. Georgia

Communication No.: 975/2001

Date of Views Adopted: 21 July 2005

Committee: Human Rights Committee

Overview

Shota Ratiani, a Georgian citizen and a supporter of the former President of Georgia, Zviad Gamsakhurdia, was arrested on 30 August 1995, following an alleged assassination attempt on President Eduard Shevardnadze. Ratiani was charged with high treason, attempted terrorism, and involvement in an anti-state organisation. He alleged that his arrest and subsequent trial were politically motivated due to his support for the former president. Ratiani claimed various violations of his rights under the ICCPR, including unfair trial, arbitrary detention, mistreatment, and lack of the right to appeal his conviction.

Admissibility

The Human Rights Committee examined the admissibility of the claims under the Optional Protocol to the ICCPR. The Committee declared several of Ratiani's claims inadmissible due to insufficient substantiation. These included allegations of mistreatment under Articles 7 and 10, arbitrary detention under Article 9, and violations of his fair trial rights under Article 14. Specifically, the Committee noted that Ratiani's claims were general in nature and lacked detailed information to support the allegations.

The Committee also noted that the process available to Ratiani for reviewing his conviction, a 'supervisory complaint' before the Presidium of the Supreme Court, did not meet the standards required under Article 14(5) of the Covenant, which guarantees the right to a review of conviction and sentence by a higher tribunal. The Committee emphasised that a discretionary or extraordinary remedy, such as a supervisory review, does not constitute an effective appeal mechanism as required by the Covenant.

Merits of the case

The core issue on the merits was whether Ratiani had been denied the right to appeal his conviction and sentence in violation of Article 14(5) of the ICCPR. The Committee found that the procedures available to Ratiani did not provide the requisite full review of his conviction and sentence by a higher tribunal. The Committee observed that the so-called 'supervisory complaint' process did not constitute an appeal because it was discretionary and did not involve a full review of the case as required under Article 14(5). The Committee also noted that the possibility of seeking a retrial based on new evidence or applying for 'rehabilitation' did not substitute for the right to appeal the original conviction.

Committee's conclusion

The Committee concluded that Georgia violated Shota Ratiani's right to have his conviction and sentence reviewed by a higher tribunal according to law, as required under Article 14(5) of the ICCPR. The Committee determined that the State party was obligated to provide Ratiani with an appropriate remedy, including compensation and measures to prevent similar violations in the future.

■ **5.3. Individual complaints under the CEDAW**

Case: H.H., I.H., and Y.H. v. Georgia

Communication No.: 140/2019

Date of Views Adopted: 25 October 2021

Committee: Committee on the Elimination of Discrimination against Women (CEDAW)

Overview

This case was brought before the Committee on the Elimination of Discrimination against Women (CEDAW) by H.H., I.H., and Y.H., the husband and children of the deceased, Khanum Jeiranova, a Georgian national of Azerbaijani descent. They claimed that Ms. Jeiranova had been a victim of multiple violations of her rights under the Convention on the Elimination of All Forms of Discrimination against Women, particularly under Articles 1, 2(b)–(f), and 5(a), due to the State party's failure to protect her from gender-based violence and to properly investigate her death, which they allege was the result of an 'honour' crime.

Facts of the case

On 16 September 2014, Ms. Jeiranova was forcibly taken and beaten by relatives of her husband, H.H., who suspected her of infidelity. Despite her visible injuries and pleas for help, the local authorities, including police and the village governor, failed to provide her with adequate protection or investigate the beatings. The next day, Ms. Jeiranova was found dead, hanging by a rope in a shed at her parents' home. The investigation was initially closed, concluding that she had committed suicide due to 'shameful behaviour' without properly considering the beatings or the possibility of a forced suicide or murder.

Admissibility

The State party, Georgia, challenged the admissibility of the communication, arguing that the applicants had not exhausted all domestic remedies and that the communication was inadmissible due to lack of consent from H.H. for his legal representation. The State party also questioned the applicants' victim status, particularly H.H., who had initially denied any complaints against those involved in his wife's death.

The Committee found the communication admissible, at least insofar as it was brought by the children of the deceased, I.H. and Y.H. The Committee dismissed the State party's objections, noting that the domestic criminal investigation had been unreasonably prolonged for more than six years and that the applicants had sufficiently raised issues of gender and ethnicity based discrimination before national authorities. The Committee also determined that H.H.'s children had a legitimate interest in pursuing the communication, even if H.H.'s own involvement was questionable.

Merits of the case

The Committee evaluated the merits of the case under the Convention and found several violations:

1. **Failure to Protect (Articles 2(c) and (e) read with Article 3):** The Committee found that the State party failed to provide effective protection to Ms. Jeiranova, despite clear indications that she was in imminent danger from the relatives who had previously beaten her and encouraged her to commit suicide. The authorities' decision to return her to the relatives who were implicated in her abuse was deemed a violation of her right to life and protection from gender-based violence.
2. **Failure to Investigate and Prosecute (Articles 2(b), (c), and (e) read with Article 3):** The Committee determined that the State party failed to conduct an effective investigation into Ms. Jeiranova's death. The investigation was marked by significant delays and lacked a comprehensive forensic examination. The Committee noted that this failure was compounded by the authorities' reliance on patriarchal and 'honour'-based justifications, which impeded an impartial investigation and accountability for her death.
3. **Intersectional Discrimination (Articles 2(f) and 5(a) read with Articles 1 and 3):** The Committee concluded that Ms. Jeiranova was subjected to intersecting forms of discrimination based on her gender and ethnicity. The authorities' handling of her case reflected deep-seated stereotypes and 'honour'-based norms that failed to respect her rights as a woman and member of an ethnic minority.

Committee's conclusion

The Committee found that the State party, Georgia, violated Ms. Jeiranova's rights under Articles 2(b)–(f) and 5(a) read in conjunction with Articles 1 and 3 of the Convention. The Committee recommended that Georgia conduct a prompt, thorough, and independent investigation into Ms. Jeiranova's death and prosecute and sanction those responsible.

■ 5.4. *Individual complaints under the CRC*

Case Reference: CRC/C/96/D/144/2021

Date of Decision: 24 May 2024

Complainants: Anna Arganashvili, on behalf of 57 children residing in a church-run orphanage

Respondent State: Georgia

Overview

This case involves a complaint filed by Anna Arganashvili to the UN Committee on the Rights of the Child, representing 57 children from Ninotsminda St. Nino Children's Boarding School, Georgia. The complaint alleges multiple rights violations under the CRC, including exposure to physical and psychological abuse, lack of education, and discrimination, especially against children with disabilities. The school was described as a closed facility with heavy restrictions on children's freedom and the State was accused of failing to protect their rights.

Legal issues

Admissibility: Georgia argued that the complaint was inadmissible because it was filed without the explicit consent of the children or their parents and the applicant lacked standing to represent all 57 children. However, the Committee accepted the complaint for 21 children, citing valid reasons due to their isolation and the State's refusal to grant access to the applicant.

Merits of the case

The Committee examined the State's obligations under the CRC, particularly regarding protection from violence under Articles 19 and 37(a). The complaint detailed instances of abuse, including physical punishment and neglect, particularly affecting the children with disabilities. The Committee supported these claims with reports from Georgia's PDO, which had documented ongoing violence and neglect in the institution.

The Committee concluded that the State failed to meet its obligations, inadequate investigations and delays preventing most children from accessing justice. Additionally, there were insufficient procedural safeguards, as children were not provided with legal assistance during the investigations and their voices were not sufficiently considered.

Rights of children with disabilities: The treatment of children with disabilities was a key focus, highlighting their vulnerability to abuse and neglect in the institution. The State was criticised for failing to provide appropriate care and educational opportunities, violating their rights under Article 23 of the CRC.

Procedural issues: The Committee found that the State did not conduct prompt or effective investigations into the reported abuses. Despite numerous complaints and evidence of systematic abuse, investigations were delayed, causing

many alleged offenses to become time-barred. This was deemed a violation of the State's obligations to protect children from cruel, inhuman, or degrading treatment under the CRC.

Committee's conclusion

The Committee determined that Georgia violated several provisions of the CRC, including Articles 19, 37(a), 3, 12, 20, 23, and 25.

■ **5.5. Individual complaints before the ICCPR**

Case References: CCPR/C/62/D/623/1995, CCPR/C/62/D/624/1995, CCPR/C/62/D/626/1995, CCPR/C/62/D/627/1995

Date of Decision: 6 April 1998

Complainants: Victor P. Domukovsky, Zaza Tsiklauri, Petre Gelbakhiani, and Irakli Dokvadze

Respondent State: Georgia

Overview

Various complaints were filed by Georgian and one Russian national, respectively, against alleged violations under the ICCPR. The complainants were all involved in politically sensitive situations in Georgia and argued that all of them had been subjected to illegal detention, torture, and unfair hearings. Each of the complainants had different issues to raise, and there were some who accused the authorities of denying legal representation, arbitrary arrest, and physical and psychological torture.

On these grounds, the applicants submitted that the procedure of domestic legal remedies was either unavailable or ineffective and filed complaints before the Human Rights Committee.

Admissibility

The first issue was the admissibility of the communications, particularly with regard to the exhaustion of domestic remedies. The Committee noted that the State party had not shown sufficient cooperation by leaving critical details unaddressed and failing to provide relevant documentation regarding the complainants' allegations. In light of this lack of cooperation, combined with credible evidence presented by the complainants, the Committee ruled that the communications were admissible in accordance with the Optional Protocol.

Analysis and merits of the case

Illegal detention and arrest: The complainants, particularly Domukovsky and Gelbakhiani, declared that their detention in Azerbaijan was arbitrary. The Committee considered that the State party had failed to prove the legality of such detentions. Indeed, no specific information or proof was provided to support the

claims under Georgia's declaration. The Committee considered that their detention violated Article 9(1) of the ICCPR.

Claims of torture: Each of the complainants showed evidence of torture in the form of physical beatings, psychological duress, and threats to family members. The State party, while denying the allegations, did not advance any convincing evidence to the contrary or even procedural records showing that an effective investigation of these claims had been conducted. The Committee found that the accounts by the complainant were credible; there were acts of violation under Articles 7 and 10 in the form of torture, cruel, inhuman treatment.

Right to fair trial: The complainants had also claimed that the following were violated under Article 14: denial of proper legal representation, the right to attend during trial, and being coerced to accept ex-officio counsel against their will. The Committee stressed that the right to defence is inviolable, especially in those cases where the death penalty may be imposed. Because the State failed to show that it had exercised all reasonable diligence to protect complainants' rights, the Committee found a flagrant violation of Articles 14(3)(d) and 14(5).

Violation of freedom of expression and freedom of assembly: The Committee also considered the allegations that the complainants had become victims because of their political opinion and related activities. Although the Committee did not find sufficient proof for all allegations under Articles 19 and 21, it accepted that the political environment might have contributed to the aggravation in treatment of the complainants.

Committee's conclusion

The Human Rights Committee was of the view that the State of Georgia had violated several provisions of the ICCPR, specifically:

Violation of Articles 7 and 10 for torturing and subjecting the complainants to inhuman treatment.

Violations of Article 9 (i.e. arbitrary and illegal detention) of Domukovsky and Gelbakhiani.

Violations of Article 14: Right to a fair trial, sufficient legal representation, and opportunity for defence.

The imposition of the death penalty, especially under flawed trial conditions, constituted a further contravention of Article 6 as a denial of the right to life following due process. The Committee ordered effective remedies, including the release of the complainants, underlining the need for such non-repetition measures to avoid violations in the future. This decision highlighted that states have a strict duty to comply fully with international human rights commitments on fair trial and prohibition of torture. Essentially, this case brought forth serious systemic problems regarding the legal and judicial framework of Georgia, reflecting serious violations of rights widely recognised under international law. The

decision by the Committee further supported the principle that there should be adherence to due process and individual rights under the ICCPR.

■ 5.6. *Individual complaints under the CEDAW*

Reference Case: CEDAW/C/61/D/24/2009

Date of Decision: 13 July 2015

Complainants: X and Y, nationals of Georgia

Respondent: State of Georgia

Overview

The application concerns a communication submitted by X, a Georgian woman, and her daughter, Y, for violations of their rights under the Convention on the Elimination of All Forms of Discrimination against Women. The complaint was based on domestic violence; physical, emotional, and sexual abuse by X's husband; and inaction on the part of the Georgian authorities to either investigate or provide relief concerning such abuse. The communication made them stand out in a systemic pattern of acting inactive and ineffective legal frameworks that exist in Georgia, especially concerning domestic violence and the protection of women and children.

Admissibility

The first issue was the admissibility of the case, considering that the complainants had applied to the ECtHR, which had declared that their application inadmissible. The Committee observed that, although the facts in the case before the Third Chamber of the ECtHR were similar, the grounds on which the complaints were made were different. While the ECtHR application had focused on individual impacts and did not address the issue as one of gender-based discrimination, the communication to the CEDAW Committee underlined that the failure of the state to act effectively was connected to structural gender-based discrimination. The Committee found the case admissible, distinguishing it from the previous ECtHR application.

Overview and merits of the case systemic failure to deal with domestic violence

The applicants, inter alia, provided a history of abuse from X's forced marriage after a rape, through regular physical and psychological maltreatment in the course of the marriage. The authorities' response was restricted to non-legally binding written undertakings by the husband not to use further violence. In turn, the Committee viewed such responses not resulting in criminal prosecutions as systemic failures to deal with domestic violence under Georgian Penal Code at the material time.

Gender-based discrimination

The Committee concluded that such a lack of action by the state represented gender-based discrimination. The complainants pointed out that the Georgian authorities did not take serious measures against the domestic violence committed by X's husband.

Even after repeated incidents and complaints, the authorities acted superficially to protect the perpetrator instead of the victims. This systemic inaction and lenient handling amount to discrimination under CEDAW.

Legal and institutional deficiencies

The Committee found that Georgia, at the time of the events, had an extremely weak legal framework regarding violence within the family.

Legislation that clearly criminalised domestic violence and which provided for protective measures was brought in only as late as 2006, long after most incidents took place. It showed the failure of the state to establish machinery for efficiently investigating and prosecuting domestic violence, offering protection to the victims, and handling the situation with sensitivity from a gender perspective.

It was held that this failure to protect the women against such violence, investigate the abuse appropriately, and prosecute the offender was a breach of Articles 1, 2(b)–2 (f), and 5(a) of the Convention.

Psychological and physical impact

X and Y described high levels of psychological distress, both from the abuse itself, and from the failure of state authorities to provide an effective recourse. The Committee underlined that the due diligence required from the state to prevent and combat the acts of violence added to the suffering of the victims and was a violation of the victims' rights under the Convention.

Committee's conclusion

The Committee found that the following articles of CEDAW were violated by the State of Georgia:

Articles 2(b)–2(f): The state party has failed to effectively guarantee the necessary legal protection to adopt appropriate measures to prevent or prohibit discrimination and to protect women against violence.

Article 5(a): '[F]ailing to modify social and cultural patterns of conduct to eliminate violence, including those that create the climate which contributes to, allows, and exacerbates violence against women.' The Committee recommended that the State of Georgia should:

1. Give fair compensation to the applicants for all damage suffered.
2. Strengthen the legal frameworks and mechanisms for enforcement to protect victims against domestic violence.

3. Increase training in the area of domestic violence cases for law enforcement and judicial authorities through a gender-sensitive approach.

These activities should be amplified to raise awareness to prevent gender stereotypes and raise the level of zero tolerance towards domestic violence. It finally underlined that robust and effective legislative frameworks, comprehensive protection of victims of gender-based violence, and an institutional change is urgently needed to address entrenched biases in the system.

■ 5.7. *Individual complaints under the CRC*

Case Reference: CRC/C/90/D/84/2019

Date of Decision: 1 June 2022

Complainant: N.B., a minor through counsel

Respondent State: Georgia

Overview

The case concerned a communication submitted by a minor, N.B., through her legal representatives, for the alleged violation of certain rights under the CRC. This concerns an incident in which a minor complainant was physically abused by a kindergarten teacher in Georgia and received clearly visible injuries. The communication is that the State failed to ensure the protection against such physical maltreatment, effectively investigate the given case, and hold anyone accountable.

Admissibility

The State party contested the admissibility of the complaint, arguing that domestic remedies had not been exhausted. In other words, it was their contention that the complainant had not pursued civil remedies, nor had she waited for the completion of ongoing criminal investigations. However, the Committee took note of the serious delays in the investigation, thus undermining the effectiveness of such an investigation. Moreover, because the complainant was unable to acquire the status of victim, it hampered access to further legal recourse and rendered available domestic remedies ineffective. As such, the Committee found that the case was admissible pursuant to the Optional Protocol.

Analysis and merits of the case

Substantive violations of Article 19: The Committee considered that N.B. was corporally punished by a teacher at a public kindergarten and showed visible bruises. Although the teacher denied it, a forensic medical report proved injuries compatible with the described physical mistreatment. The initial declarations of the complainant complemented the testimony from a grandparent of another child that matched the evidence in the medical report. The Committee considered that

the acts constituted a violation of Article 19 because States have the obligation to protect a child from all forms of physical or mental violence. Lack of a plausible different explanation for the injuries further implicated State's responsibility.

Procedural failures in investigation

Article 19, Paragraph 2: The Committee found procedural gaps in the State's response. While an investigation was opened, it was marked by significant delays and a lack of urgency in pursuing the relevant steps. Witnesses were not questioned until several months later and the collection of evidence was delayed. More than five years had passed since the filing of the first complaint, while the investigation remained pending without any important developments or conclusions.

The Committee considered that an efficient investigation should be timely, include child-sensitive procedures, and provide a possibility to bring about justice. The Committee held that none of the latter facts occurred in the present case. Therefore, the State failed in its procedural obligations under Article 19(2).

General legal framework and systemic issues

The complainant further maintained that the relevant legal framework of Georgia did not meet the standards for a prohibition of corporal punishment in any early childhood facilities. Although some legislative measures had been taken, the fact that the legislation did not explicitly prohibit all forms of corporal punishment meant that such incidents could still occur with impunity. The Committee thus recommended a comprehensive legal reform that clearly prohibited corporal punishment in all settings and also pointed to the broader systemic failures with respect to the protection of children from all forms of violence. Because of the issues identified in this case, it went out of its way to emphasise the measures for prevention, such as educator training and awareness-raising campaigns intended to modify societal attitudes toward corporal punishment.

Committee's conclusion

The Committee found that the State of Georgia had violated Article 19 of the Convention:

Article 19(1): Failure to protect N.B. against physical violence when she was in the care of a State institution, as was manifested by the injuries she suffered during the kindergarten session.

Article 19(2): An investigation which was incomplete, as it did not meet the standards of urgency, thoroughness, or effectiveness that might have been expected to provide a protective environment for children.

The Committee recommended that Georgia provide compensation and psychological support to alleviate the trauma caused. This should involve the strengthening of legislation to provide a clear prohibition of corporal punishment in all settings where education is provided. In addition, it shall ensure timely

and effective investigations of similar matters in the future using child-sensitive practices. It also shall start training programs for schoolteachers, police, and judiciary on child rights and protection against violence. It also needed to implement awareness-raising activities to overcome social norms that may tolerate corporal punishment for disciplining. In sum, this complaint disclosed severe lacunas in the handling of child protection issues by the Georgian system, more so from the perspective of the educational system. It was held that the findings of the Committee underscored the need to effect systemic changes in safeguarding children's rights to ensure incidents of violence are timely and suitably dealt with to avoid recurrence.

6. Conclusions

The study of human rights evolution in Georgia offers an interesting story of a country facing all the challenges of the post-Soviet transition, nation-building, and the integration into the global human rights framework. This article has gone to great lengths to trace Georgia's progress from the Soviet rule, when human rights were gravely oppressed, through the post-independence period and to the more recent times seeking to harmonise local policies with prevailing international trends.

The historical overview in the first part of the article illustrates how the experience of the Soviet rule imprinted scars on the national identity and human rights landscape of Georgia. The period of Soviet rule was characterised by serious political repressions, suppression of national identity, and gross human rights abuses. The post-Rose Revolution period, especially through political and legal reforms, was an era of democratisation and human rights protection post-independence. However, these processes have repeatedly been disturbed by drawbacks such as corruption, political polarisation, and continued occupation, along with the conflicts in Abkhazia and South Ossetia.

The next part of the article discussed Georgia's interaction with the United Nations and how, in turn, this relationship affected the country's human rights policy. However, the reactions of the UN have helped build the necessary support for a more structured legal and institutional framework in Georgia, even if the implementation of policies remains somewhat troublesome domestically. The UN provided technical support, monitored human rights violations, and supported civil society in the process of the establishment of human rights progress in Georgia.

A significant part of the discussion was dedicated to the involvement of Georgia in UN human rights conventions and its subsequent national adoption of international commitments. The extent to which the key UN treaties have been incorporated into domestic law demonstrates a resolve on the part of Georgia to

fall in line with internationally recognised standards of human rights. However, the effectiveness of these legal frameworks mainly depends on how strong the institutions which are authorised with their implementation are. Establishment of the PDO, Special Investigation Service, and other institutional mechanisms reflects the ongoing efforts in Georgia towards the strengthening of human rights protection.

A detailed scrutiny of individual cases before UN human rights committees has revealed to Georgia the practical challenges it faces in upholding its human rights commitments. These include alleged torture, discrimination cases, and the failure to protect vulnerable groups, which have evidenced gaps in the legal and institutional frames of Georgia. Human rights victories in Georgia have been ongoing but marred by political interference, judicial autonomy deficiency, and that of minority group treatment.

This paper concludes with a note regarding the current political landscape within Georgia, wherein recent, widely-criticised laws, such as the Transparency of Foreign Influence Law, have presented a new level of threats against democratic freedoms and human rights. All these developments show that one cannot deviate from democratic reform and the protection of human rights against consequences such as the suspension of its EU process. In sum, the advancement of Georgia in protecting human rights is a testament to its resilience and determination in the face of historical and modern challenges. However, this is a journey far from over. Whether human rights continue to be extended will depend on the further implementation of reforms, the building of democratic institutions, and the concomitant support by the international community. By facing the actual contemporary challenges and persisting in its values related to human rights and democracy, Georgia might be the 'city upon a hill' among Eastern European countries.

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RODOLJUB ETINSKI*

The Universal Protection of Human Rights and Eastern Europe: Montenegro

- ABSTRACT:** *Two interrelated factors determine Montenegro's relationship with the universal protection of human rights. First, regaining independence in 2006 with the intent to build a State based on democracy, the rule of law, and human rights. Second, the decision in 2008 to apply for membership in the EU. These two factors synergistically strengthen Montenegro's interest in the universal protection of human rights. Upon reestablishing its independence, Montenegro did not start from a clean slate but also did not inherit a solid foundation regarding human rights. Despite the fact that its predecessor State, Yugoslavia had entered into most UN human rights treaties, the development of human rights was heavily influenced by four decades of socialist self-management. Montenegro succeeded these treaties and acceded new UN treaties in which the predecessor State was not a party. This historical situation required that Montenegro incorporate new treaties into its national law and align it with the development of old UN treaties. Indeed, Montenegro adopted new legislation and inserted several provisions into the Constitution and various laws to give effect to the CRPD in its internal legal system. It also added many new provisions to the Constitution and laws or amended existing ones to align its internal law with the development of older treaties. The process of reforming its internal law to secure the effects of UN human rights treaties in its internal legal system has been ongoing through dialogue with UN Member States via the Human Rights Council and with experts of monitoring human rights bodies. Montenegro submitted its national reports, responded to raised questions, carefully considered all recommendations, and accepted and implemented most of them. It has served two terms as a Member of the Human Rights Council, actively participating in and contributing to its work. Montenegro's activities regarding the universal protection of human rights are integral to the broader reforms leading to its EU membership. The EU Commission has carefully considered and positively evaluated these activities.*

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- **KEYWORDS:** *human rights, universal protection, monitoring bodies, Montenegro*

1. Introduction

This article is part of a comparative study on the universal protection of human rights in Central and Eastern Europe. Similar studies have been prepared for each country in these regions. To ensure comparability, each text addresses the same set of questions, resulting in an identical structure across all articles. The system of universal protection of human rights consists of UN human rights treaties, UN Human Rights Treaty bodies (monitoring bodies), the UN Human Rights Council, and the activities of State Parties in giving effect to the treaties. The expression 'UN human rights treaties' covers two international covenants and other UN human rights conventions. The dialogue between State Parties and UN Member States through the Human Rights Council, as well as their dialogue with experts of monitoring bodies, is a dynamic source of overall progress in human rights protection. This system does not function in isolation but interacts with the national and regional legal systems.

Information on the succession and accession of Montenegro to UN human rights treaties is provided later in this article. Given the significant role of monitoring bodies as expert mechanisms for the protection of human rights in the Member States, it is important to emphasise at the outset that Montenegro has fully recognised the competence of these bodies in carrying out their monitoring and conciliatory functions. The role of such monitoring bodies is particularly crucial in the absence of a World Court of Human Rights.

Montenegro applied for EU membership in 2008, and accession negotiations commenced in June 2012. A key task for Montenegro in the accession process is to secure the European standard of the rule of law and enhance the protection of human rights. UN human rights treaties and their associated monitoring bodies have played a significant role in advancing human rights protection in Montenegro. Indeed, EU institutions have evaluated the implementation of UN human rights treaties within Montenegro's domestic law and the dialogue between Montenegro and these monitoring bodies in their reports on the country's progress in human rights protection. Consequently, the interaction between Montenegro and universal human rights protection is not an isolated process; rather, it is integral to the accession process, as universal standards of human rights are an integral part of the European system of human rights protection. Reliable evidence of Montenegro's progress in human rights protection, including significant advancements in universal human rights protection, is provided in the positive Report on the

Fulfilment of Interim Benchmarks (IBAR) in Chapters 23 and 24—relating to the rule of law and human rights—issued on 26 June 2024.

This article begins with a brief review of the historical development of human rights in Montenegro, tracing their evolution from the early establishment of the Montenegrin statehood to its reestablishment of independence in 2006. However, the primary focus is on the developments following 2006. It then examines the relationship between Montenegro and the UN from a human rights perspective. The article proceeds with information on Montenegro's succession to and accession of UN human rights treaties, followed by an analysis of how the provisions of these treaties are reflected in the Constitution and statutory laws of Montenegro. In the text, the term 'laws' refers to statutory laws passed by the Assembly of Montenegro. Some of the major legislative processes in Montenegro influenced by UN human rights treaties will be highlighted. The text concludes with a review of the *Hajrizi Dzemajl et al. v. Yugoslavia* case before the Committee against Torture. This case was chosen for two reasons; first, it is of general importance to the protection of Roma people; second, since Montenegro re-established its independence in 2006, it has not had any cases brought before monitoring bodies, except one which was discontinued.¹ The *Hajrizi Dzemajl* case occurred when Montenegro was a federal unit of the Federal Republic of Yugoslavia, but it exclusively pertains to acts by the Montenegrin authorities. Due to space considerations, abbreviations will be regularly used. Full information on national legal sources and the literature will be provided at the end of the text.

2. The historical development of human rights in Montenegro: A contextual introduction

The historical development of human rights in Montenegro has been influenced by various internal, regional, universal political, and ideological factors. The European great powers and the Ottoman Empire recognised Montenegro as an independent State at the Congress of Berlin by Article 26 of the Treaty of Berlin on 13 July 1878. Article 27 of the Treaty obliged Montenegro to prohibit discrimination based on religion regarding civil and political rights, admission to public employment, functions and honours, or the exercise of various professions. This marked the beginning of a modern independent State and the protection of religious minorities. However, Montenegro enjoyed significant autonomy under the Ottoman Empire, and its first legislative acts were adopted at the end of the eighteenth century and in the first half of the nineteenth century. Human rights were systematically protected for the first time in Montenegro by the Constitution

1 Decision of the Committee against Tortures concerning communication No. 970/2019, 30 December 2020. *M.B. v. Montenegro*, CAT/2020/970/2019, 30 December 2020.

of 1905. The first period of modern independent development ended with the establishment of the Kingdom of Serbs, Croats, and Slovenes, later known as Yugoslavia, in 1918. Montenegro remained part of Yugoslavia until 2006. Since 1946, Montenegro has been a federal unit within the Yugoslav Federation and, since 2003, a member of the State Union of Serbia and Montenegro. Following the reestablishment of its independence in 2006, Montenegro applied for EU membership in 2008 and began accession negotiations in 2012.

In sum, several periods of human rights development can be distinguished: the period of independence before 1918; the period of the Kingdom of Serbs, Croats, and Slovenes (later Yugoslavia) during 1918–1945; the period of socialist Federal Yugoslavia during 1945–1992; and the period of post-socialist Federal Yugoslavia, followed by the State Union of Serbia and Montenegro. These periods will be concisely reviewed below.

■ 2.1. *Period of independence before 1918*

The most significant legal act of this period was the Constitution pronounced by Prince (later King) Nikola in 1905. Prince Nikola was an enlightened absolutist. Human rights and freedoms were exposed in Part 14 of the Constitution. Prominent academician Mijat Šuković noted that, unlike other European constitutions, where human rights were set out in the initial parts, placing them in the 14th part of the Montenegrin Constitution seems inappropriate. However, he observed that their value should be appreciated based on content rather than placement. He said that the list of constitutional rights of Montenegrin citizens, specified in Articles 196–218 of the Constitution ‘is consistent in scope and content with the standard lists of constitutionally guaranteed rights of citizens in culturally and economically developed democratic European states at that time.’² Šuković referenced the constitutions of Belgium, Greece, Norway, Romania, Serbia, and Switzerland. The Constitution guaranteed the following rights and principles: equality before the law, right to liberty, no punishment without law, right to a fair trial, no capital punishment for political crimes except for attacks on the prince and his family, right to respect of home, no confiscation of property as a general penalty, right to property, freedom of conscience and religion, freedom of expression, freedom of the press, right to respect for communication, freedom of assembly and association, right to an effective remedy, right to renounce Montenegrin citizenship, rights of foreigners, and no extradition for political crimes. The provisions were concise and clear. The right to free elections is governed by Articles 48–50 and 52–54 of the Constitution. Article 142 declared that the judiciary in Montenegro is independent. According to Article 145, all judges were appointed by the Lord Prince (Knjaz Gospodar). They could not be transferred, dismissed, or retired except in accordance with the Law on Judges. Article 148 stated that no court or

2 Šuković, 2006, p. 58.

judicial authority could be established other than by law. According to Article 146, the courts judged and resolved disputes according to the laws of the State. The Constitution thus provided a solid foundation for the development of the rule of law and the protection of human rights. Unfortunately, it came late and had a short lifespan.

Several other legal acts preceding the Constitution guaranteed some human rights as well. The first codes, 'Stega' (Oath) from 1796 and 'Zakonik obšči crnogorski i brdski' (the General Code of Montenegro and Mounties) from 1798 and 1803, codified pre-existing customary law.³ These codes protected life and security by prohibiting arbitrary trials and arbitrary deprivation of liberty. They also protected individual and communal property.⁴ The 'Opšti zemaljski zakonik', 'Danilov zakonik' (the General Land Code, the Code of Danilo) from 1855 made further progress: it protected the spiritual and physical integrity of individuals, including honour, property, life, and liberty.⁵ The Code guaranteed equal rights for foreigners and members of religious minorities.⁶ The 'General Property Code for the Principality of Montenegro' (Opšti imovinski zakonik za Knjaževinu Crnu Goru) of 1888 governed property rights. Valtazar Bogišić, the author of the Code, combined Montenegrin tradition derived from customary law with modern European achievements in civil law. Article 16(1) protected the right to property, stating: 'Everyone's property is sacred and inviolable.'⁷

■ 2.2. *Period of the Kingdom of Serbs, Croats, and Slovenians, respectively Yugoslavia, during 1918–1945*

Montenegro was a region within the Kingdom of Serbs, Croats, and Slovenes until 1929, when the Kingdom was renamed Yugoslavia, and Montenegro became a province, called 'Zetska banovina.' During this period, Montenegro did not have separate competencies regarding the protection of human rights. Two constitutions were adopted: the first in 1921 and the second in 1931. Both constitutions dedicated Chapter 2 to fundamental civil rights and duties and Chapter 3 to social and economic provisions. The Kingdom inherited diverse legal systems and traditions from its integrated regions and faced two primary challenges: territorial disintegration and social revolution. These factors influenced the constitutional elaboration of human rights. For instance, Article 109 of the 1921 Constitution provided that the family and inheritance disputes of Muslims would be judged by State Sharia judges. Article 4 of the same Constitution abolished all nobility and titles acquired by birth. The right to association and assembly was supplemented in the 1931 Constitution with the provision: 'There can be no association on a

3 Vukčević and Čupić, 2024, p. 29.

4 Ibid.

5 Ibid.

6 Ibid.

7 Opšti imovinski zakonik za knjaževinu Crnu Goru, 2022, p. 17.

religious, tribal, or regional basis for party-political purposes, as well as for the purposes of corporal education'. This aimed to mitigate rising ethnic and religious tensions in the Kingdom. Surprisingly, Chapter 3 on social and economic provisions was radically shortened in the 1931 Constitution, which was not an appropriate constitutional response to the rising social tensions. The 1921 Constitution envisioned the Kingdom as a socially oriented state based on the rule of law. Instead of fostering this orientation, the 1931 Constitution sought solutions elsewhere, which ultimately resulted in a social revolution at the end of the Second World War.

■ 2.3. *Period of the socialist federal Yugoslavia, 1945–1992*

Montenegro, along with other republics that formed the federal units of Yugoslavia, protected human rights through their own constitutions. However, there were no significant differences between the Federal Constitution and the Republican Constitutions regarding human rights protection. All of them reflected the tensions between a new socialist ideology and standard civil and political rights. The ideological influence on human rights was not immediately apparent in the 1946 Federal Constitution and the corresponding Republican Constitutions. However, this tension emerged during the discussions on the draft of the Universal Declaration of Human Rights at the UN General Assembly in December 1948. A Yugoslav delegate stated that civil and political rights had played a role in the demolition of feudalism and that the time had come for social rights. Consequently, the new ideology shifted emphasis to social rights. The impact of this new ideology on human rights became evident in the 1963 Federal Constitution. Chapter 3 of the 1963 Constitution, dedicated to freedoms, rights, and duties, begins with Article 32, which states:

The freedoms and rights of man and citizen are an inalienable part and expression of socialist and democratic relations protected by this Constitution, in which man is freed from all exploitation and arbitrariness and through personal and joint work creates conditions for all-round development and free expression and protection of his personality and for the realization of human dignity.

A distinctive feature of the impact of socialist ideology on human rights in the Yugoslav context was the right to socialist self-management. Despite this ideological influence, all federal and republican constitutions included basic civil and political rights. Yugoslavia ratified the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) in 1967, the International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights (ICESCR) in 1971, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) in 1982,

and the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment of Punishment (CAT) in 1992. It did not accept optional protocols that establish the right to individual communication. Although political rights, particularly the right to expression, were recognised in the constitutions, they were severely restricted in practice. The concept of the rule of law was replaced by the concept of the rule of the labour class.

■ **2.4. *Period of post-socialist Federal Yugoslavia, respectively the State Union of Serbia and Montenegro***

In the late 1980s, the two main ideologies that had underpinned socialist, federal Yugoslavia – socialist self-management and unity and brotherhood – began to fail. The ideology of unity and brotherhood was replaced by a tragic armed conflict, which started first in Croatia in 1991 and, then, in Bosnia and Herzegovina in 1992. Four republics – Bosnia and Herzegovina, Croatia, Slovenia, and North Macedonia – separated, but Montenegro and Serbia remained together in the Federal Republic of Yugoslavia (FR Yugoslavia), which was established in 1992. The federation was transformed into the State Union of Serbia and Montenegro in 2003. Both the FR Yugoslavia and the Republic of Montenegro adopted new constitutions in 1992. The Federal Constitution was replaced by the Constitutional Charter of 2003, which included the Charter on Human and Minority Rights and Liberties. The 1992 constitutions of the Federation and Montenegro addressed human rights, but unlike previous practice, the constitutional texts on human rights were not identical. Instead, they were influenced by the radical change of the political and economic system, transitioning from a system of socialist self-management to political pluralism, democracy, and a market economy. The constitutions reinstated standard civil and political rights. Human rights protection was particularly advanced by the adoption of the 2003 Charter on Human and Minority Rights and Liberties. Unfortunately, the Charter was in force for only three years. Yugoslavia accessed to the 1966 Optional Protocol to the ICCPR and the 1989 Second Optional Protocol to the ICCPR on the abolition of the death penalty in 2001.

■ **2.5. *Concluding remarks on the historical background of human rights in Montenegro***

If one considers that the systematic protection of human rights in Montenegro began with the 1905 Constitution, the protection has lasted for about 120 years. In historical terms, this is not a long period. A particular problem is the lack of continuity in the protection of human rights. The 1905 Constitution, which could have provided a solid foundation for the development of human rights protection and the rule of law, was in force for only 13 years. It was replaced in the new political environment of the Kingdom of Serbs, Croats, and Slovenes by the 1921 Constitution, which also held promise regarding human rights but was in force for only 10 years. The 1931 Constitution of Yugoslavia marked a decline in human

rights protection and a significant break occurred in 1945 with the victory of the socialist revolution.

The political system of socialist self-management introduced something new on the world stage but undermined the fundamental basis of human rights – the rule of law. The concept of the rule of law was replaced by the concept of the rule of the labour class. This deviation from the standard development of human rights protection lasted over 40 years, accounting for one-third of the modern development of human rights protection in Montenegro. Consequently, when Montenegro reestablished its independence in 2006, it did not inherit a solid foundation for human rights protection or strong institutions. One of Montenegro's main tasks was to build these foundations and institutions in the process of EU accession. A symbol of the return to the constitutional foundations of 1905 is the fact that the parts dedicated to human rights in both the 1905 Constitution and the 2007 Constitution begin with a clause on equality before the law, which is one of the bases of the rule of law.

3. Relationship between Montenegro and the UN from a human rights perspective

■ 3.1. *The relationship between the Government of Montenegro and the UN Human Rights Council and monitoring bodies*

Montenegro engaged with the UN on human rights primarily through the Human Rights Council. The country places great value on international dialogue and cooperation for the promotion and protection of human rights and freedoms facilitated by the Council. Montenegro has been a member of the Council for the 2013–2015 and 2022–2024 terms. It has submitted four national reports to the Council⁸ and has also provided mid-term reports on the fulfilment of recommendations received in the previous cycles.⁹ The first national report was submitted by the Minister for Justice, who informed the Council about the comprehensive legal system reforms that began when Montenegro gained independence in 2006. The purpose of these reforms was to build a state 'based on the values of freedom, peace, tolerance, respect for human rights and freedoms, multiculturalism, democracy, and the rule of law'.¹⁰ The delegation highlighted that the new Constitution included human

8 National reports were submitted to the Human Rights Council in 2008, 2012, 2017, 2023.

9 The mid-term report of Montenegro on the implementation of recommendations were received during the second cycle of Universal Periodic Review, in 2015. The mid-term report of Montenegro on the implementation of recommendations was received during the third cycle of the Universal Periodic Review, 2021.

10 Report of the Working Group on the Universal Periodic Review: Montenegro (2009), Human Rights Council, 6 January 2009, A/HRC/10/74, p. 3.

rights and freedoms based on international instruments to which Montenegro had acceded as an independent state. The importance of minority rights and combating corruption and organised crime were also emphasised.¹¹ In the subsequent three cycles, Montenegro was represented in the Council at the ministerial level by the Minister for Human and Minority Rights. This high level of representation expresses the significance that Montenegro attributes to its cooperation with the Council.

Montenegro accepted and fulfilled most of the recommendations of the Council, which primarily focused on the ratification of UN human rights treaties, their incorporation into national law, and the adoption of national legislative acts. In the later cycles, the recommendations shifted towards improvements in practices, policies, and national institutions. The recommendations from the first cycle included, among other things: the ratification of the Optional Protocol to the CAT and the establishment of an effective national preventive mechanism accordingly; the ratification of the Convention on the Rights of Persons with Disabilities (CRPD) and its Optional Protocol; the timely submission of reports to the relevant monitoring bodies; the maintenance of efforts to reach higher human rights standards concerning freedom of the media, the functioning of the judiciary, and the situation of refugees; incorporating international human rights treaties into national law; and the adoption of a general anti-discrimination act.¹²

Montenegro has maintained an ongoing dialogue and cooperation with monitoring bodies. Although there have been occasional delays, it regularly submits periodic reports, responds to issues raised prior to reporting, participates in dialogue, and fulfils recommendations. In 2014, one of the first recommendations from the Human Rights Committee was for Montenegro to raise awareness of the Covenant among judges, lawyers, and prosecutors to ensure that its provisions are considered by national courts. The Human Rights Committee was informed that the Constitution allows international human rights treaties to be invoked directly in court, but it noted that there were only a small number of cases where the provisions of the Covenant had been considered.¹³ Indeed, the courts in Montenegro, similar to those in many other State Parties to the European Convention on Human Rights (ECHR), have more frequently invoked the ECHR and the case law of the European Court of Human Rights (ECtHR) than the ICCPR and the practice of the Human Rights Committee. This discrepancy arises from the different functions of the Committee and the ECtHR. The impact of the UN human rights treaties and monitoring bodies on internal legal systems is primarily realised through recommendations that result from monitoring the incorporation of these treaties into national law and from aligning national provisions with them, rather

11 Ibid.

12 Ibid., pp. 16–17.

13 Concluding observations on the initial report of Montenegro, Human Rights Committee, 21 November 2014, CCPR/C/MNE/CO/1, p. 2.

than from the direct application of the treaties and the invocation of views of monitoring bodies by national courts.

■ **3.2. The EU Commission, NGOs, and literature on the relation of Montenegro and UN from the perspective of human rights**

The European Commission has reiterated in its last three progress reports on Montenegro's EU accession that the country continues to maintain regular dialogue and cooperation with international human rights organisations, monitoring bodies, the United Nations, and the Council of Europe.¹⁴ In the 2022 and 2023 reports, the Commission stated that, overall, Montenegro has fulfilled its obligations of international human rights instruments and legislation.¹⁵ However, the Commission also noted delays and partial fulfilment of the recommendations from the Human Rights Council and other monitoring bodies. In its 2021 report, the Commission highlighted that Montenegro did not accept amendments to the Criminal Code aimed at eliminating the statute of limitations for criminal offenses of torture and other forms of ill-treatment, despite the recommendations of the 2018 UN Universal Periodic Review.¹⁶ The same report noted that Montenegro's legislation was not aligned with the CRPD, particularly regarding the definition of disability and that Montenegro was in the process of preparing a new Law on professional rehabilitation and employment.¹⁷ In the 2022 report, the Commission stated that the UN Committee against Torture concluded that Montenegro had only partially implemented its 2014 recommendations of strengthening legal safeguards for detainees.¹⁸ The 2023 report mentioned that Montenegro delayed submitting reports on the ICESCR and ICERD.¹⁹

The NGOs in Montenegro are approaching the UN human rights treaties in various ways. In its 2010–2011 report on human rights in Montenegro, the *Human Rights Action* NGO, based in Podgorica, began the section on the relationship between human rights treaties and Montenegro by examining the status of UN human rights treaties within Montenegrin domestic law, the right to communicate with monitoring bodies, and Montenegro's reporting obligations to these bodies.²⁰ Additionally, two other NGOs, *Severna zemlja* from Berane and *Ekvivalent* from Podgorica, published an Informer on the Rights of Persons with Disabilities in

14 Montenegro Report 2021, European Commission, Strasbourg, 19 October 2021, SWD(2021), 293/final/2, p. 28. Montenegro Report 2022, European Commission, Brussels, 12 October 2022, SWD(2022), 335/final p. 33. Montenegro Report 2023, European Commission, Brussels, 18 November 2023, SWD(2023), 694 final, p. 39.

15 Montenegro Report 2022, p. 33. Montenegro Report 2023, p. 39.

16 Montenegro Report 2021, p. 29.

17 Ibid., p. 35.

18 Montenegro Report 2022, p. 34.

19 Montenegro Report 2023, p. 39.

20 Ljudska prava u Crnoj Gori 2010–2011, 2011, pp. 58–60.

Traffic, succinctly conveying the essence of the CRPD.²¹ NGOs also monitor the implementation of recommendations issued by monitoring bodies to Montenegro. In 2022, Human Rights Action reported that Montenegro had not fulfilled the recommendation of the Committee against Torture, initially issued in 2014 and reiterated in 2022, that criminal offenses of ill-treatment should not be subject to statutes of limitations.²² Furthermore, NGOs have actively contributed to the implementation of certain recommendations. For instance, several NGOs have organised educational, recreational, and vocational activities for prisoners.²³

Montenegro's activities in the Human Rights Council have also been noted in literature. For instance, Istvan Lakatos emphasised several key activities, such as Montenegro's participation in the cross-regional core group with the USA, UK, Mauritius, and North Macedonia on resolutions concerning the human rights situation in Sri Lanka and South Sudan.²⁴ Lakatos also highlighted Montenegro's active stance on issues such as early marriage, children of parents on death row, and civil society.²⁵ According to this author, Montenegro has organised several side events on sensitive topics, including human rights situations in Ukraine, Syria, the Maldives, and Sierra Leone.²⁶

While the universal protection of human rights is not the primary focus of Montenegrin writers, it holds a significant place in the Montenegrin legal literature. Without the pretension of exhaustivity, some important studies are as follows. Nebojša Vučinić, professor at the Faculty of Law of the University of Montenegro and former judge of the ECtHR, discussed universal protection of human rights in his textbook, emphasising the role of general comments from monitoring bodies in defining the content of human rights guaranteed by UN treaties.²⁷ Ivana Jelić, professor at the same faculty, former member and Vice President of the Human Rights Committee (2014–2018) and current judge, Section President and Vice President of the ECtHR, referenced the ICCPR in her several works on political rights of minorities in Montenegro.²⁸ In their textbook on human rights, Vukčević and Čupić also referenced UN human rights treaties, particularly in their discussions of international sources.²⁹ An analysis of the international bases of the freedom of religion in Montenegro by Nikola Šaranović includes references to the Universal Declaration of Human Rights and the ICCPR.³⁰ Jelena Džankić explored policies and their implementation regarding the protection of minorities in

21 Informator o pravima lica sa invaliditetom, 2020, pp. 4–5.

22 Gorjanc Prelević and Malović, 2022, p. 36.

23 Montenegro Report 2022, p. 35.

24 Lakatos, 2017, p. 6.

25 Ibid.

26 Ibid.

27 Vučinić, 2001, p. 33.

28 Jelić, 2004, p. 142; Jelić, 2020, p. 96; Jelić and Mühler, 2022, p. 17; Jelić, 2024, p. 370.

29 Vukević and Čupić, 2024, p. 91.

30 Šaranović, 2018, p. 429.

Montenegro, focusing on Article 27 of the ICCPR.³¹ Writing on a similar subject matter, Bojan Božović and Nikola Zečević explored the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities.³² Kosana Beker analysed the CRPD in her study on deprivation of legal capacity in Montenegro.³³ Additionally, Ivana Jabučanin and Ana Stojanovski referenced the Convention on the CRC in their article on parental care and children's rights.³⁴

■ 3.3. *Concluding remarks*

Montenegro has established mutually beneficial cooperation with the UN Human Rights Council and various monitoring bodies. By serving two terms as a member of the Human Rights Council, Montenegro actively contributed to the Council's activities. Concurrently, Montenegro's legislation has greatly benefited from the recommendations put forth by the monitoring bodies. These recommendations have catalysed significant advancements in national legislation aimed at enhancing human rights protections. Despite occasional delays, Montenegro consistently submitted reports to these bodies within the designated timelines, diligently considered all recommendations received, and successfully implemented most of them.

4. Succession and accession of Montenegro to UN human rights treaties

Montenegro is a State Party to all UN human rights treaties listed in Chapter IV under the title 'Human Rights' of the Register of Multilateral Treaties and deposited with the Secretary-General; this is available on the UN Treaty Collection webpage, except the International Convention on the Protection of the Rights of All Migrant Workers and Members Their Families (ICRMW) and the 1992 Agreement establishing the Fund for the Development of the Indigenous Peoples of Latin America and the Caribbean.³⁵ Montenegro is also a State Party to the treaties listed in Chapter V of the Register relating to refugees and stateless persons.³⁶

Montenegro became a party to most UN human rights treaties by succeeding to the treaties that had previously been legally binding on the State Union of Serbia

31 Džankić, 2012, p. 43.

32 Božović and Zečević, 2021, p. 67.

33 Beker, 2017, p. 10.

34 Jabučanin and Stojanovski, 2021, p. 102.

35 United Nations Treaty Collection [Online]. Available at: https://treaties.un.org/pages/ParticipationStatus.aspx?clang=_en (Accessed: 6 August 2025).

36 The list includes the 1951 Convention Relating to the Status of Refugees, the 1967 Protocol Relating to the Status of Refugees, the 1954 Convention Relating to the Stateless Persons, and the 1961 Convention on the Reduction of Statelessness.

and Montenegro. The background and legal context of Montenegro's succession to UN human rights treaties are as follows. On 3 June 2006, the National Assembly of the Republic of Montenegro adopted the Decision on the Declaration of Independence of the Republic of Montenegro (2006 Declaration of Independence) and the Declaration of the Independent Montenegro.³⁷ Point 3 of the 2006 Declaration of Independence affirmed that the Republic of Montenegro would apply and assume responsibility for the international treaties and agreements concluded or acceded to by the State Union of Serbia and Montenegro, insofar as they pertained to Montenegro and aligned with its legal order. Montenegro was admitted to the United Nations on 28 June 2006. Following this admission, the Government of Montenegro sent a letter dated 10 October 2006 (the 2006 instrument of succession) to the UN Secretary General, which was received on 23 October 2006, being accompanied by a list of multilateral treaties deposited with the Secretary General. In this letter, the Government notified the UN Secretary General that Montenegro had decided to succeed the treaties to which the State Union of Serbia and Montenegro had been a party or signatory, as listed in the attached annex, and undertook to implement these treaties starting from 3 June 2006, the date when Montenegro assumed responsibility for its international relations. It further mentioned that Montenegro did not maintain the reservations, declarations, or objections previously made by the State Union of Serbia and Montenegro.³⁸

1. *1951 Convention Relating to the Status of Refugees*

Montenegro succeeded to the 1951 Convention Relating to the Status of Refugees on 10 October 2006.³⁹ The succession was performed through the adoption of the 2006 Declaration of Independence by the Assembly and the deposit of the 2006 instrument of succession with the UN Secretary General by the Government.

2. *1966 International Covenant on Civil and Political Rights*

Montenegro succeeded to the ICCPR on 23 October 2006.⁴⁰ The succession process involved the adoption of the 2006 Declaration of Independence by the Assembly and deposit of the 2006 instrument of succession with the UN Secretary General by the Government.

37 O.J. R. Montenegro No. 36/2006, 5. 06. 2006.

38 United Nations Treaty Collection – Multilateral Treaties Deposited with the Secretary-General [Online]. Available at: https://treaties.un.org/pages/HistoricalInfo.aspx?clang=_en#Montenegro (Accessed: 6 August 2025).

39 Convention relating to the Status of Refugees, Geneva, 28 July 1951 https://treaties.un.org/pages/ViewDetailsII.aspx?src=TREATY&mtdsg_no=V-2&chapter=5&Temp=mtdsg2&clang=_en (Accessed: 6 August 2025).

40 International Covenant on Civil and Political Rights, New York, 16 December 1966 [Online]. Available at: https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&clang=_en (Accessed: 6 August 2025).

3. *1966 International Covenant on Economic, Social and Cultural Rights*
Montenegro succeeded to the ICESCR on 23 October 2006,⁴¹ following the same succession procedure: the adoption of the 2006 Declaration of Independence by the Assembly and deposit of the 2006 instrument of succession with the UN Secretary General by the Government.
4. *1965 International Convention on the Elimination of All Forms of Racial Discrimination*
Montenegro succeeded to the CERD on 23 October 2006.⁴² The process was the same, with the adoption of the 2006 Declaration of Independence by the Assembly and deposit of the 2006 instrument of succession with the UN Secretary General by the Government.
5. *1979 Convention on the Elimination of All Forms of Discrimination Against Women*
Montenegro succeeded to the CEDAW on 23 October 2006.⁴³ The succession process was completed through the adoption of the 2006 Declaration of Independence by the Assembly and deposit of the 2006 instrument of succession with the UN Secretary General by the Government.
6. *1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*
Montenegro succeeded to the CAT on 23 October 2006,⁴⁴ through the same succession mechanism involving the adoption of the 2006 Declaration of Independence by the Assembly and deposit of the 2006 instrument of succession with the Secretary General by the Government.
7. *1989 Convention on the Rights of the Child*
Montenegro succeeded to the CRC on 23 October 2006.⁴⁵ The process involved the adoption of the 2006 Declaration of Independence by the Assembly and deposit of the 2006 instrument of succession with the UN Secretary General by the Government.

41 International Covenant on Economic, Social and Cultural Rights, New York, 16 December 1966 [Online]. Available at: https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&clang=_en (Accessed: 6 August 2025).

42 International Convention on the Elimination of All Forms of Racial Discrimination, New York, 7 March 1966 [Online]. Available at: https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-2&chapter=4&clang=_en (Accessed: 6 August 2025).

43 Convention on the Elimination of All Forms of Discrimination against Women, New York, 18 December 1979 [Online]. Available at: https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&clang=_en (Accessed: 6 August 2025).

44 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, New York, 10 December 1984 [Online]. Available at: https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4&clang=_en (Accessed: 6 August 2025).

45 Convention on the Rights of the Child, New York, 20 November 1989 [Online]. Available at: https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&clang=_en (Accessed: 6 August 2025).

8. *1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*

Montenegro succeeded to the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families by succession to the signature of Serbia and Montenegro from 11 November 2004. This succession was formalised on 23 October 2006,⁴⁶ following the adoption of the 2006 Declaration of Independence by the Assembly and deposit of the 2006 instrument of succession with the Secretary General by the Government. However, Montenegro has not yet ratified this Convention.

9. *2006 Convention on the Rights of Persons with Disabilities*

Montenegro signed the CRPD on 27 September 2007 and the instrument of ratification was deposited on 2 November 2009. The ratification process was completed following the constitutional requirements outlined in Articles 82(1, 2, and 17) and 91(1) of the Constitution. The Assembly of Montenegro adopted the Law on the Ratification of the 2006 Convention on 15 July 2009,⁴⁷ with the instrument of ratification subsequently deposited with the UN Secretary General on 2 November 2009.⁴⁸

5. Provisions of UN human rights treaties, as reflected in the Constitution and laws of Montenegro

■ 5.1. Investigative framework

Montenegro became a party to most UN human rights treaties, as previously mentioned. By accepting these treaties, Montenegro undertook an international obligation to include the effects of their provisions in its national legal system. This obligation is fulfilled by numerous provisions of the Constitution and laws. The foundational obligation of State Parties to almost all UN human rights treaties to respect and ensure to all individuals under their jurisdiction the rights guaranteed by the treaties, such as that in Article 2(1) of the ICCPR, Article 2(1) of the CRC, or Article 4(1) of the CRPD, is satisfied through Article 6(1) of the Constitution, which states: ‘Montenegro guarantees and protects rights and freedoms’.

⁴⁶ International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, New York, 18 December 1990 https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-13&chapter=4&clang=_en (Accessed: 6 August 2025).

⁴⁷ O.J. Montenegro-International Treaties, No. 2/09.

⁴⁸ Optional Protocol to the Convention on the Rights of Persons with Disabilities, New York, 13 December 2006 [Online]. Available at: https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15-a&chapter=4&clang=_en (Accessed: 6 August 2025).

The division of competences between the Constitution and laws concerning human rights is governed by Article 16(1) of the Constitution. This article stipulates that the laws, in accordance with the Constitution, regulate the *way* of the realisation of human rights and freedoms where necessary. This means that all fundamental human rights are guaranteed by the Constitution, but their methods of realisation are specified by law. Distinction between the core of a human right and its method of realisation is delicate and will not be considered here. For the subject-matter of this article, it is relevant that most textual segments of the provisions of UN treaties correspond with Constitutional provisions, some with Constitutional provisions and laws, and some only with laws. In other words, some textual segments of international provisions are not reflected in the Constitution, but only in the laws.

There are two primary modes through which international human rights provisions are effectuated in Montenegrin legal system. The first are general provisions in the Constitution that ensure the direct application of international human rights provisions within the internal legal order. The second mode operates indirectly by transferring the key components of international human rights provisions in the Constitution and/or national laws. The direct effect of UN treaties will be discussed in the subsequent section. The transfer of key components of international human rights provisions into national law does not entail the extensive adoption of their exact wording. Instead, it involves aligning certain segments of the national provisions with corresponding segments of the international provisions. The Montenegrin Constitution and laws do not replicate the entire text of UN human rights treaties for several reasons, as follows. First, Montenegro's legal framework must accommodate not only UN human rights treaties but also regional agreements, such as the ECHR. Given Montenegro's ongoing accession to the EU, the country is required to harmonise its legal system with EU standards, which sometimes exceed the minimum standards set by international human rights provisions. Second, certain international provisions, particularly those of the ICESCR, have a programmatic nature and necessitate detailed implementation in the national legislation. This required contextual adaptation rather than direct textual transfer. Moreover, Montenegro may provide higher standards of protection than those outlined in the international treaties. However, challenges may arise if an internal provision reflecting an international provision fails to fully realise its intended effect due to textual differences. Montenegro addressed this issue through constitutional provisions that uphold the direct applicability and supremacy of international treaties, which will be explored in the subsequent section.

■ 5.2. *Supremacy and direct effect of international human rights treaties in the national legal system of Montenegro*

The relationship between international treaties on human rights, including UN treaties, and national law in Montenegro is governed by Articles 17 and 9 of the Constitution. Specifically, Article 17(1) stipulates that rights and freedoms shall be exercised on the basis of the Constitution and ratified international treaties. This provision must be understood in conjunction with Article 9, which states that ratified and published international treaties, along with the generally accepted rules of international law, form an integral part of the internal legal order, have supremacy over national legislation, and are directly applicable when they regulate relations differently from domestic laws. The supremacy is under control of a specific principle of human rights treaties, as stated for example in Article 5(2) of the ICCPR, that is, that the treaties will not derogate the higher standard of a human rights envisaged by national law or another international treaty. If Montenegrin provision regulates relations differently than a UN treaty, but provides higher standard of protection, it will not be derogated by the treaty.

However, the textual formulation of Article 9 is not without challenges. One issue is that, while this article establishes the supremacy of international treaties over national legislation, it does not explicitly state supremacy over the Constitution itself. Nebojša Vučinić has cautioned that this formulation could lead to practical issues if an international treaty, particularly the ECHR, contradicts the Constitution.⁴⁹ Another concern, raised by Vučinić, is that Article 9 only provides for the direct application of international treaties when they regulate matters differently than domestic legislation. This creates ambiguity when national law does not address a particular human rights issue. Vučinić suggested that legislation, particularly a law concerning the Constitutional Court, should clarify these ambiguities.⁵⁰ However, the Law on the Constitutional Court has exacerbated this issue. Namely, Article 30(2) of the Law allows for constitutional appeals only against violations of the rights or freedoms guaranteed by the Constitution, thereby narrowing the scope of Article 17(1) which allows for the exercise of rights also based on ratified international treaties.

Despite these challenges, the prevailing interpretation in Montenegro holds that international human rights treaties are directly applicable when domestic law does not cover a disputed matter; this interpretation has gained general acceptance. The Constitutional Court of Montenegro has adopted this approach, applying the provisions of the ECHR as interpreted by the ECtHR in cases where the Constitution does not provide specific guidance. The EU Commission has praised the Constitutional Court for its application of ECtHR case law.⁵¹ This interpreta-

49 Vučinić, 2008, p. 36.

50 Ibid.

51 Montenegro Report 2021, p. 29.

tion of Article 9 of the Constitution is also followed by NGOs. For instance, in its Handbook on rights and obligations related to police work, Human Rights Action notes that Montenegrin law lacks a remedy concerning the determination of the exact moment of deprivation of liberty. This is important because the Code on Criminal Procedure obliges the police to bring a person deprived of their liberty before the State prosecutor no later than 24 hours from the moment of deprivation. Nevertheless, it advises that individuals deprived of liberty can appeal against police notifications regarding their detention based on Article 9(4) of the ICCPR and Article 5(4) of the ECHR.⁵²

The mechanism of supremacy and the direct effect of human rights treaties in Montenegro's internal law effectively addresses the potential issues stemming from incomplete textual transfer of international provisions into national legislation. In cases where domestic law is silent on a human rights issue, individuals can invoke international provisions before the Montenegrin courts that regulate the matter, thereby ensuring the comprehensive effect of these provisions in the country's legal system. This approach mitigates the concerns raised by Vučinić and others that the incomplete textual transfer of international provisions can result in incomplete effects in Montenegrin law. However, this principle applies to most provisions of UN human rights treaties but is not general. Certain provisions, such as some of the ICESCR, lack the precision necessary for direct invocation before the national courts and require specific implementation through national legislation. Consequently, these provisions will not produce direct effects in Montenegro's legal system.

■ 5.3. *Common provisions of the Constitution regarding human rights*

Relevant provisions of the Constitution and laws will be examined to identify the components of the provisions of UN treaties that are incorporated within them. This examination aims to determine how these treaties are reflected in domestic law. The analysis will adhere to the structure of the second part of the Constitution (Articles 17–81), which is devoted to human rights. This part is divided into six sections: 1) common provisions, 2) personal rights and freedoms, 3) political rights and freedoms, 4) economic, social, and cultural rights and freedoms, 5) specific minority rights, and 6) the protector of human rights. The common provisions (Articles 17–25) address issues of equality and non-discrimination, legal remedies and assistance, local self-government, and the limitation of human rights.

5.3.1. *Equality and non-discrimination*

The provisions on equality and non-discrimination are outlined in Articles 8, 17(2), 18, and 19 of the Constitution. These provisions are further developed in the Law on Gender Equality and the Law on the Prohibition of Discrimination.

52 Gorjanc-Prelević, 2024, p. 21.

Additional provisions on equality and non-discrimination can be found in other laws, such as Article 3(2) of the Law on Courts, Article 39(2) of the Law on Minorities Rights and Freedoms, Articles 8–13 of the Labour Law and Article 5 of the Law on the Professional Rehabilitation and Employment of Persons with Disabilities. The Criminal Code defines racial and other forms of discrimination as criminal offenses in Article 443.

The principle of equality is elaborated in Articles 17(2), 18, and 19 of the Constitution, which include equality before the law, gender equality, and equal protection of rights and freedoms. Similarly, the principle of equality before the courts is stated in Article 3(2) of the Law on Courts. These provisions correspond to Articles 3, 14, and 26 of the ICCPR; Article 3 of the ICESCR; Article 5 of the ICERD; Article 2(a) of the CEDAW; and Article 5 of the CRPD. Key components of these international provisions, such as ‘the equal right of men and women’, ‘equality before the courts’, and ‘equality before the law’, are integrated in the enumerated Montenegrin provisions.

The remaining national provisions address the prohibition of discrimination. The fundamental provision is laid out in Article 8 of the Constitution, which prohibits direct and indirect discrimination on any grounds and permits positive measures. The texts of general and specific provisions on the prohibition of discrimination in laws incorporate elements from various sources, including the case law of the ECtHR, UN human rights treaties, and EU anti-discrimination directives. The primary legal prohibition is articulated in Article 2 of the Law on the Prohibition of Discrimination, which forbids discrimination on any ground, provides a general definition of discrimination, and includes definitions of direct and indirect discrimination. The general definition includes terms such as ‘making legal and factual differences’, ‘unequal treatment’, ‘exclusion’, ‘restriction’, ‘giving priority’, and a comprehensive list of grounds for discrimination. The definitions of direct and indirect discrimination are heavily influenced by EU anti-discrimination directives. The law also defines specific forms of discrimination, including harassment and sexual harassment, segregation, hate speech, discrimination in the use of public facilities, discrimination in access to goods and services in both public and private sectors, and discrimination based on health, age, race, and disability. The above Montenegrin provisions effectively incorporate the provisions of UN treaties prohibiting discrimination, including Articles 20(2) and 26 of the ICCPR, Article 2(2) of the ICESCR, Articles 1 and 4 of the ICERD, Articles 1 and 4 of the CEDAW, Article 2 of the CRC, and Article 2 of the CRPD.

5.3.2. *The right to effective remedy*

Article 20 of the Constitution guarantees the right to effective remedy, stating that everyone shall have the right to legal remedy against a decision that affects their rights or legally based interests. This provision partially reflects various UN treaties provisions, including Article 2(3)(a) of the ICCPR and Article 6 of the ICERD.

However, Article 20 limits the scope of these international provisions by confining the right to challenge decisions, thereby excluding other acts that could violate human rights.

The right to effective remedy is further elaborated in Article 22 of the Law on the Prohibition of Discrimination, which grants the right to petition the Ombudsman, and in Article 24 of the Law on the right to judicial protection. These articles restrict the right to an effective remedy to acts of discrimination. Additionally, Article 177 of the Criminal Code classifies the prevention of the use of the right to an effective remedy as a criminal offense.

5.3.3. Restriction of human rights and freedoms and derogation of rights in time of public emergency

Article 24 of the Constitution specifies the conditions under which human rights can be restricted. By referring to legality and permitted aims, it aligns with the restrictions on certain rights and freedoms guaranteed by the ICCPR and CRC. Influenced by the ECHR, Article 24 adds the condition that any restriction must be necessary in an open and democratic society.

Article 25 of the Constitution addresses the derogation of certain rights and freedoms during times of public emergency, reflecting the provisions of Article 4 of the ICCPR. However, the lists of non-derogable rights and freedoms in Article 25 of the Constitution and Article 4 of the ICCPR are not identical. In addition to the rights enumerated in Article 4 of the ICCPR, Article 25 of the Constitution includes the right to a remedy, right to a fair and public trial, principle of legality, presumption of innocence, right to defence, and right to marry. Conversely, the list in Article 25 omits the prohibition of slavery and servitude and the prohibition of imprisonment due to the inability to fulfil contractual obligations.

■ 5.4. Second section of the second part of the Constitution: Personal rights and freedoms

The second section (Articles 26–44) encompasses a range of human rights related to criminal justice, biomedicine, dignity and inviolability of the person, liberty of movement and residence, the right to privacy, inviolability of the home, confidentiality of communication, protection of personal data, and the right to asylum. This section begins with an exploration of the constitutional provisions related to criminal justice, followed by an examination of the other provisions.

5.4.1. Cluster of human rights related to criminal justice

The first article in this section, Article 26, prohibits the death penalty, thereby giving effect to the 1989 Second Optional Protocol to the ICCPR. This prohibition is complete and unconditional. While the Constitution does not explicitly declare the right to life as done by Article 6(1) of the ICCPR, Articles 143–150 of the Criminal Code provide criminal protection for the right to life.

The cluster of human rights related to criminal justice includes Article 30 (detention), Article 31 (respect for personality in criminal and other proceedings), Article 32 (fair and public trial), Article 33 (principle of legality), Article 34 (more convenient provision), Article 35 (presumption of innocence), Article 36 (ne bis in idem), Article 37 (the right to defence), and Article 38 (compensation for illegal treatment). These constitutional provisions reflect those in Articles 9, 10, 14, and 15 of the ICCPR. However, the specific components of these ICCPR articles do not always exactly match the corresponding constitutional provisions, with some components appearing in other laws. Conversely, the Constitution guarantees some rights not explicitly covered by the ICCPR.

The content of Article 9 of the ICCPR on the right to liberty and Article 14 of the CRPD on the same right is divided among Article 28 of the Constitution, which relates to dignity and inviolability of the person, Article 29 on the deprivation of liberty, and Article 30 on pre-trial confinement. The two components of this right – liberty and security – are present in Articles 28 and 29. The principle of legality from Article 9(1) is stated in Article 29(2). Additionally, the right to be informed of the reasons for deprivation of liberty or criminal charges from Article 9(2) is reflected in Articles 29(2) and 30(2) of the Constitution. Article 29(2) requires that a person deprived of liberty is immediately informed of the reason and Article 30(2) mandates that an arrested person receives a reasoned decision on arrest within 24 hours. However, the right of an arrested or detained person to be promptly brought before a judge, guaranteed by Article 9(3), is not explicitly present in Articles 29 and 30. This right is included in Article 15(1) of the Code on Criminal Procedure but is restricted to criminal matters. Article 9(4) on the right of a person deprived of liberty to take proceedings before a court to decide on the lawfulness of their detention is reflected in Article 30(3) through the right to appeal against a decision on pre-trial confinement and it is again limited to criminal matters. Importantly, the prohibition of arbitrary arrest or detention from Article 9(1) does not appear in Articles 29 and 30. Given this incomplete transposition of Article 9 of the ICCPR into Montenegrin law, the direct effect of Article 9 of the ICCPR, as provided by Article 9 of the Constitution, might hold special significance.

Article 14(2) of the ICCPR on the presumption of innocence is mirrored in Article 35 of the Constitution and Article 3 of the Code of Criminal Procedure. Article 35(3) states that the court is obliged to interpret any doubts regarding guilt in favour of the accused, a provision not explicitly found in the ICCPR. Furthermore, Articles 33 and 34 of the Constitution establish a higher standard of criminal protection than Article 15 of the ICCPR regarding the principle of legality. Article 15 of the ICCPR requires that a criminal offense is defined by national or international law or by general principles of law. The term ‘law’ is used here in its generic sense, in the sense of law as a whole, including sub-statutory instruments such as government regulations and directives. By contrast, Articles 33 and 34 of the Constitution distinguish between criminal offenses and other punishable acts,

requiring that criminal offenses be defined by statutory law. This higher standard regarding the principle of legality is common among most State Parties that do not follow the common law system.

5.4.2. Dignity and inviolability of a person

Article 27 of the Constitution on biomedicine and Article 28 on the dignity and inviolability of a person reflect some provisions from Articles 7, 8, and 9 of the ICCPR. Article 28 expresses Article 17 of the CRPD and echoes Article 19 of the CRC. The first sentences of Article 7 of the ICCPR, Article 37(a) of the CRC, and Article 15(1) of the CRPD, which prohibit torture and cruel, inhuman, or degrading treatment or punishment, are incorporated into Article 28(3) of the Constitution. However, this incorporation is incomplete, as Article 28(3) addresses only forbidden treatment and not forbidden punishment. Some forms of torture are defined as criminal offenses in Article 167 of the Criminal Code. The second sentence of Article 7 of the ICCPR and Article 15(1) of the CRPD, which prohibit subjecting a person to medical or scientific experimentation without their free consent, is mirrored in Article 27(3) of the Constitution. The prohibition of slavery and servitude in Article 8 of the ICCPR and Article 27(2) of the CRPD is reflected in Article 28(4) of the Constitution.

5.4.3. Fair and public trial

Article 14(1) of the ICCPR on the right to a fair and public trial is implemented through Article 32 of the Constitution and various laws. This right is further developed in the Law on Courts, other court-related laws, and laws governing civil and criminal procedure. The first part of the third sentence of Article 14(1) of the ICCPR, which addresses the exclusion of the press and the public from a trial, corresponds to Article 314 of the Code of Criminal Procedure and Article 309 of the Law on Civil Proceedings. However, the reasons for excluding the public differ among the three provisions.

The second part of the third sentence of Article 14(1) of the ICCPR, which concerns the public announcement of a judgment, is mirrored in Article 375(1) of the Code of Criminal Procedure. The provision in Article 375(1) appears more consistent and logical compared to ICCPR's second part of the third sentence of Article 14(1). However, the reasons for excluding the press and the public from a trial and the reasons for non-publication of a judgment, as stated in the third sentence of Article 14(1) of the ICCPR, are not the same, which may seem peculiar.

5.4.4. Right to liberty of movement and freedom of choosing residence and the right to privacy, family, home, and correspondence

The right to liberty of movement and freedom of choosing residence, as guaranteed by Article 12(1,2) of the ICCPR and Article 18 of the CRPD is reflected in Article 39(1) of the Constitution. This right is also protected under Article 163 of

the Criminal Code. Article 12(3) of the ICCPR and Article 39(2) of the Constitution enumerate aims that justify restricting this right, although the aims specified in the two provisions are not entirely the same.

The right to privacy, family, home, and correspondence, as laid down in Article 17(1) of the ICCPR, Article 16 of the CRC and Article 22 of the CRPD is reflected in Articles 40–42 of the Constitution. However, these articles do not include the clause prohibiting unlawful attacks on someone's honour and reputation. The right to protection of the law against arbitrary or illegal interference in privacy, family, home, and correspondence, as foreseen in Article 17(2) of the ICCPR, is effectuated by Articles 169 and 170 of the Criminal Code concerning violations of the right to home, by Article 174 concerning the right to privacy, and by Articles 172 and 173 regarding the protection of communications.

While Article 17 of the ICCPR does not allow for the restriction of these rights, Articles 40–42 of the Constitution do enable restrictions. It is important to note that the right to privacy, family, and correspondence has not been recognised as an absolute right in any country.

■ 5.5. *Third section of the second part of the Constitution: Political rights and freedoms*

The third section encompasses Article 45 (right to election), Article 46 (freedom of thought, conscience, and religion), Article 47 (freedom of expression), Article 48 (conscientious objection), Article 49 (freedom of the press), Article 50 (prohibition of censorship), Article 51 (access to information), Article 52 (freedom of assembly), Article 53 (freedom of association), Article 54 (prohibition of association), Article 55 (prohibition of work and establishment), Article 56 (right to communicate with international organisations), and Article 57 (right to communicate with State organs). These articles, along with certain laws, reflect Articles 18–22 and 25 of the ICCPR, Articles 13 and 14 of the CRC, and Article 21 of the CRPD.

5.5.1. Right to election and the freedom of thought, conscience and religion

The right to election, as guaranteed by Article 25(b) of the ICCPR, is reflected in Article 45 of the Constitution. All components of Article 25(b) have been incorporated into Montenegrin law. The periodicity of elections and other related matters are governed by the Law on the Elections of Councillors and Members of Parliament. Articles 68, 84, and 85 of this Law give effect to Article 29 of the CRPD. The free expression of the will and the legitimacy of elections are protected by Articles 184–194 of the Criminal Code.

All components of Article 18 of the ICCPR concerning the freedom of thought, conscience, and religion are embedded in Article 46 of the Constitution, with the exception of paragraph 4, which concerns the liberty of parents to ensure the religious or moral education of their children in conformity with their own convictions. This paragraph is addressed in Articles 51, 52, and 59 of the Law on

Freedom of Religion or Belief and the Legal Status of Religious Communities. Freedom of religion is protected by Article 161 of the Criminal Code. Article 46 of the Constitution also reflects Article 14 of the CRC.

5.5.2. Freedom of expression

Article 19(1) of the ICCPR protects the freedom of opinion and Article 19(2) protects the freedom of expression. Article 19(3) defines the limits to the freedom of expression. Only paragraphs 2 and 3 are reflected in Articles 47, 49, and 51 of the Constitution. Article 47 incorporates elements from Article 19(2, 3), while Article 51 reflects Article 19(2) regarding the right to seek information. The text of Article 51 is also influenced by the case law of the ECtHR. Articles 49 and 50 of the Constitution, concerning the freedom of the press and the prohibition of censorship, express implied content of Article 19(2) of the ICCPR. The freedom of the press is further developed in the Law on Media. Articles 47 and 51 of the Constitution give effect to Article 13 of the CRC and Article 21 of the CRPD. The freedom of expression is protected by Articles 178 and 179 of the Criminal Code. The specific restrictions on the freedom of expression regarding national, racial, or religious hatred, as laid down in Article 20(1) of the ICCPR, are secured in Article 443(3) of the Criminal Code.

5.5.3. Freedom of assembly and freedom of association

The right to peaceful assembly, as recognised by Article 21 of the ICCPR and Article 15 of the CRC, corresponds with Article 52 of the Constitution. However, Article 52 requires prior notification of the competent authority. This right is further developed in the Law on Public Gathering and Public Events. Notably, Article 3 of this Law does not require prior notification for peaceful assembly as mandated by Article 52 of the Constitution. The right to peaceful assembly is protected by Article 181 of the Criminal Code.

The right to the freedom of association, guaranteed by Article 22 of the ICCPR, is reflected in Article 53 of the Constitution. Article 53 requires the registration of an association with the competent authority. Restrictions on this right, as outlined in Article 22(2) of the ICCPR, are expressed in Article 54 of the Constitution, which prohibits political organisation within state bodies. The right to the freedom of association has been further developed, among other things, in the Law on Non-Governmental Organisations.

■ 5.6. Fourth and fifth sections of the second part of the Constitution: Economic, social, and cultural rights and particular protection of minorities

The fourth section covers Article 58 (property), Article 59 (entrepreneurship), Article 60 (right to inheritance), Article 61 (rights of aliens), Article 62 (right to work), Article 63 (prohibition of forced labour), Article 64 (employee rights), Article 65 (Social Council), Article 66 (strike), Article 67 (social insurance), Article

68 (protection of persons with disabilities), Article 69 (health protection), Article 70 (consumer protection), Article 71 (marriage), Article 72 (family), Article 73 (mother and child protection), Article 74 (rights of the child), Article 75 (education), Article 76 (freedom of creation), Article 77 (science, culture, and arts), and Article 78 (protection of environmental and cultural inheritance). The content of the fourth section is influenced not only by the ICESCR, the CRC, the CRPD, and other UN treaties, but also by European conventions and EU law. As previously stated, many provisions of the ICESCR define only the legal frameworks of some rights and not the rights precisely enough to be invoked before national courts. As they are not capable of producing direct effect in national legal systems, their incorporation in national law is of particular importance. Many constitutional provisions on economic, social, and cultural rights are brief and general. Therefore, their elaborations in law are of particular significance.

The fifth section on the protection of minorities includes two articles: Article 79 (protection of identity) and Article 80 (prohibition of assimilation). They reflect Article 27 of the ICCPR and incorporate elements from the European instruments on the protection of minorities.

5.6.1. Right to work and the right to just and favourable conditions of work

Article 62 (right to work) and Article 64 (employee rights) of the Constitution correspond partly with Article 6(1) (right to work) and Article 7 (right to just and favourable conditions of work) of the ICESCR and Article 27 of the CRPD. Besides proclaiming the right to work, Article 62 of the Constitution protects the freedom to choose employment, as guaranteed in Article 6 of the ICESCR, and ensures just and humane conditions of work, thus reflecting the substance of Article 7 of the ICESCR and Article 27 of the CRPD. Article 64 of the Constitution includes some components of Article 7 of the ICESCR. Article 6(2) of the ICESCR, regarding training programs for employees, is reflected in Article 93 of the Labour Law. Article 17 of the Law further develops Article 64 of the Constitution. Article 7(a) (i) of the ICESCR, concerning equal remuneration, is incorporated into Article 99 of the Labour Law. Article 6(2) of the ICESCR, aside from the training program, has a programmatic character and should serve as guidance for the economic policy; however, it is not suitable to be directly reflected by the law. Article 27 of the CRPD, related to work and employment, is included in Article 119 of the Labour Law. Article 6(2) of the ICESCR regarding the full realisation of the right to work is echoed in the Law on Employment and Exercising Rights with Respect to Unemployment Insurance.

5.6.2. The right to social security, the right to health and protection of family

Article 67 of the Constitution states that social insurance for employees is obligatory and that the State ensures material security for individuals who are incapable of working and have no means of livelihood. The right to social security is further

elaborated in the Law on Social and Children Protection. Article 67 of the Constitution and the Law reflect Article 9 of the ICESCR, Article 27 of the CRC, and Article 28 of the CRPD. Articles 14 and 15 of the Law on Pension and Disability Insurance gives some effect to Article 28(2) of the CRPD regarding retirement benefits.

Article 69 of the Constitution guarantees everyone the right to health protection, but only children, pregnant women, the elderly, and persons with disabilities have the right to health protection from public funds. This article is further developed through the Law on Health Protection. Article 69 of the Constitution and the Law partly mirror the right to health as outlined in Article 12 of the ICESCR, Article 24 of the CRC, and Article 25 of the CRPD.

Article 72 of the Constitution provides the family with particular protection, establishes the basic obligations of parents and children regarding mutual care, and equalises the rights of children born in and out of wedlock. It partly reflects Article 10 of the ICESCR.

■ 5.7. *Concluding remarks*

The great majority of the provisions of UN human rights treaties are reflected in the Constitution and/or the laws of Montenegro. This means that the texts of the national provisions correspond with the key components of the provisions of UN treaties, ensuring their effects in the Montenegrin legal system. If some components of international provisions are not mirrored by national provisions and cannot thus take effect in the national legal system, Article 9 of the Constitution, as interpreted by the Constitutional Court, secures the direct effect of the non-transferred components of international provisions in the national legal system. In other words, Article 9 excludes the possibility of a lacuna in the effects of UN treaties in the national legal system regarding international provisions capable of producing direct effects.

6. Some major law-making processes in Montenegro influenced by UN human rights treaties

The primary legal reforms initiated following Montenegro's reestablishment of independence were directed towards aligning its legal system with the EU *acquis* as part of the EU accession process. These reforms focused on, among other objectives, strengthening the independence of the judiciary, combating corruption and organised crime, and enhancing the protection of human rights. The first two areas of reform were implemented in cooperation with the Venice Commission and the Council of Europe's Group of States against Corruption (GRECO), ensuring compliance with European regional standards. Additionally, UN human rights treaties and their associated monitoring bodies played a significant role in advancing human rights protections in Montenegro. The recommendations of these

bodies were incorporated into Montenegrin legislation through the adoption of new laws or amendments to existing legislation. These legislative developments were integral to the broader legal reform efforts during the accession process and were subject to evaluations not only by human rights monitoring bodies but also by EU institutions.

This section examines the significant impact of all UN treaties on Montenegrin legislation as detailed in Section 4. Notably, the influence of these treaties on Montenegro's legislative framework dates back to its time as part of the Federal Republic of Yugoslavia and the State Union of Serbia and Montenegro, periods during which Montenegro maintained its own legal order. These earlier impacts are relevant, as many of these laws remained in force following Montenegro's independence. Furthermore, the influence of certain UN treaties on domestic legislation often overlaps, meaning that a single treaty may have affected multiple domestic laws. The subsequent analysis will connect each piece of domestic legislation with the specific UN treaty that played a predominant role in its enactment or modification.

■ **6.1. Impact of the 1951 Convention Relating to the Status of Refugees**

The 1951 Convention Relating to the Status of Refugees had a significant impact on Montenegro's legislative framework, notably influencing the adoption of the Law on Asylum on 10 July 2006. Article 2(2) of the Law stipulates that asylum shall be granted to foreign nationals in need of international protection, in accordance with the 1951 Convention, the 1967 Protocol Relating to the Status of Refugees, and the ECHR. This law fully integrates the principles of the 1951 Convention into Montenegro's legal system. The Law was amended in 2011 to address the reunification of refugee families. Additionally, on 23 November 2006, the Government enacted the Decree on Amendments to the Decree on the Organisation and Method of Work of the Government, thereby establishing the Bureau for the Care of Refugees.

■ **6.2. Impact of the 1966 International Covenant on Civil and Political Rights**

The ICCPR had a profound impact on multiple legislative processes in Montenegro. The laws influenced by the ICCPR include, but are not limited to, the Law on Public Gatherings and Public Events, Law on Minority Rights and Freedoms, Law on Media, Law on the Freedom of Religion or Belief and the Legal Status of Religious Communities, Law on Free Access to Information, Law on Free Legal Aid, Law on the Courts, and Law on the Protector of Human Rights. The Human Rights Committee has positively evaluated the adoption of several of these laws, as well as their subsequent amendments.

■ **6.3. Impact of the 1966 International Covenant on Economic, Social and Cultural Rights**

The ICESCR significantly influenced various legislative processes in Montenegro. Key laws adopted under its influence include the Law on Pension and Disability Insurance, Law on Employment and the Exercise of Unemployment Insurance Rights, General Law on Education and Tuition, the Law on Vocational Education, Law on Higher Education, Labour Law, and Law on Health Protection.

■ **6.4. Impact of the 1965 International Convention on the Elimination of All Forms of Racial Discrimination**

The CERD primarily impacted the Law on the Prohibition of Discrimination, with additional influence on the amendments to the Criminal Code.

■ **6.5. Impact of the 1979 Convention on the Elimination of All Forms of Discrimination against Women**

The adoption of the Law on Gender Equality in Montenegro was driven by the provisions of CEDAW. Additionally, the Convention influenced the amendments to the Criminal Code.

■ **6.6. Impact of the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment**

The CAT played a key role in shaping amendments to Montenegro's Criminal Code. In 2023, Article 129 of the Criminal Code was amended to abolish the statute of limitations for the offense of torture and Article 167 was revised to incorporate the definition of torture as outlined in Article 1 of the CAT. Furthermore, the 2021 amendments introduced stricter penalties for domestic violence, ongoing family violence, and offenses threatening the safety of journalists. In 2017, the Criminal Code was also amended to criminalise various forms of violence against women, including female genital mutilation, and forced sterilisation.

■ **6.7. Impact of the 1989 Convention on the Rights of the Child**

The CRC had significant influence on Montenegro's Family Law and the Law on Social and Children Protection.

■ **6.8. Impact of the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families**

Although Montenegro succeeded the State Union of Serbia and Montenegro in signing the 1990 Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, it has not yet ratified the Convention. As a result, this Convention has not had a notable impact on Montenegro's legislative processes.

■ 6.9. *Impact of the 2006 Convention on the Rights of Persons with Disabilities*

The CRPD had a remarkable impact on Montenegro's legal system. In 2008, Montenegro adopted the Law on Professional Rehabilitation and Employment of Persons with Disabilities, even before the CRPD was ratified in 2009. In 2011, Montenegro passed the Law on the Prohibition of Discrimination of Persons with Disabilities. The 2017 Law on Spatial Planning and Construction of Buildings also shows the influence of the CRPD by addressing the right of access to public buildings through construction regulations. CRPD's impact extends to numerous other laws, including the Law on the Election of Councillors and Deputies, Law on Free Access to Information, Law on Social and Child Protection, Law on Foreigners, Law on Health Protection, Family Law, and the Criminal Code. All these laws were either adopted or amended after Montenegro ratified the CRPD.

7. Relevant case law in respect to Montenegro: Case of *Hajrizi Dzemajl et al. v. Yugoslavia*

The *Hajrizi Dzemajl* case was the only one related to Montenegro brought before the monitoring bodies. The case concerns the complete destruction of a Roma settlement located near the town of Danilovgrad, Montenegro, at a site known as Božova Glavica, in 1995.⁵³ Montenegro was then a federal unit of the FR Yugoslavia and only Montenegrin authorities were involved in the incident. Represented by the European Roma Rights Center, an NGO based in Hungary, the Humanitarian Law Center, an NGO based in Yugoslavia, and attorney Dragan Prelevic, Hajrizi Dzemajl and 64 Romani ethnicity' citizens brought their case before the Committee against Torture.

The Committee found that there was a violation of the CAT. Gloria Jean Garland, legal director of the European Roma Rights Center, described the Committee's decision as a landmark ruling, marking it as the single most important decision ever adopted by the Committee, particularly for Roma rights.⁵⁴ After the presentation of the facts of the case, the decisions of the Committee on admissibility and on the merits are considered.

■ 7.1. *The facts of the case*

Following reports that two ethnic Romani minors allegedly raped a minor ethnic Montenegrin girl, rumours spread quickly among the citizens of Danilovgrad. Later that night, around two hundred ethnic Montenegrins gathered in front of

53 Hajrizi Dzemajl et al. v. Yugoslavia (Complaint No. 161/2000) Decision of the Committee against Torture, 21 November 2002 (CAT/C/29/D/161/2000).

54 UN Committee against Torture Finds Montenegrin Authorities in Flagrant Breach of Human Rights Standards – European Roma Rights Centre [Online]. Available at: <https://www.errc.org/> (Accessed: 28 June 2024).

the police station, demanding that the Municipal Assembly expel all Roma from Danilovgrad.⁵⁵ The crowd threatened to ‘exterminate’ and ‘burn down’ the Roma and their homes.

The police responded by arresting all young men in the Roma settlement, and two of them confessed under duress that they had perpetrated the crime. The rest were released but warned by the police to leave Danilovgrad immediately due to the risk of lynching by non-Roma citizens.⁵⁶ A police officer also visited the Božova Glavica Roma settlement, ordering residents to evacuate immediately and causing panic. Most residents fled towards Podgorica, while a few remained to protect their homes and livestock.

Early the next morning, the same police officer returned with another officer, advising the remaining Roma to leave Danilovgrad, stating that no one could protect them.⁵⁷ Hours later, a group of non-Roma residents arrived at the settlement, throwing stones and breaking windows. The remaining Roma sought refuge in a cellar and eventually fled to Podgorica.⁵⁸ Later that morning, a police car patrolled the empty settlement.

In the afternoon, a second wave of several hundred non-Roma residents entered the settlement, chanting threats to evict and burn down the settlement.⁵⁹ Over four hours, the crowd completely destroyed and burned down the settlement.⁶⁰ The police present did not intervene to stop the violence or protect Romani property, only ensuring that the fire did not spread to nearby non-Roma buildings.⁶¹

Several days after the pogrom, heavy machinery from the Public Utility Company cleared the debris completely, but the Romani residents never returned.⁶² Although some participants were identified, no one was convicted due to alleged ‘lack of evidence’. Authorities failed to inform the victims of this decision, denying them the opportunity to pursue private prosecution. At the time of the Committee against Torture’s decision, criminal and civil proceedings for compensation were ongoing.

The complainants argued that the State Party violated Article 2(1) of the CAT, in conjunction with Articles 1, 16(1), and 12, 13, 14 taken alone or together with Article 16(1) of the CAT.⁶³

55 *Hajrizi Dzemažl et al. v. Yugoslavia*, paragraph 2.2.

56 *Ibid.*, paragraph 2.3.

57 *Ibid.*, paragraph 2.4.

58 *Ibid.*, paragraph 2.5.

59 *Ibid.*, paragraphs 2.6 and 2.7.

60 *Ibid.*, paragraph 2.7.

61 *Ibid.*, paragraphs 2.8 and 2.9.

62 *Ibid.*, paragraph 2.13.

63 *Ibid.*, paragraph 3.1.

■ 7.2. *Decision on the admissibility of the complaint*

The State Party contested the admissibility of the complaint, arguing that the case had been handled in accordance with national legislation and that available legal remedies had not been exhausted. The complainants countered that, given the severity of the harm suffered, criminal prosecution was the only appropriate remedy, asserting that civil or administrative remedies were insufficient. They claimed they were deprived of criminal remedy due to authorities' actions. Additionally, they urged the Committee to consider the complaint in light of the broader context of systematic police brutality and dire human rights conditions faced by Roma in Yugoslavia.

In the absence of compelling rebuttal from the State Party, the Committee ruled the complaint admissible on 23 November 2000.⁶⁴

■ 7.3. *Decision on the merits*

The Committee determined that the burning and destruction of the houses under the circumstances of the case constituted acts of cruel, inhuman, or degrading treatment or punishment.⁶⁵ The aggravating factors included the presence of some complainants still hiding in the settlement during the pogrom, the particular vulnerability of the victims, and the significant racial motivation.⁶⁶ The Committee found that the failure of the police to make any efforts to protect the Romani residents and their property amounted to 'acquiescence', as defined in Article 16 of the CAT. Article 16(1) obligates State Parties to prevent acts of cruel, inhuman, or degrading treatment or punishment when committed with the acquiescence of public officials. Given that the Committee characterised the acts of burning and destruction as falling within this category, and considering the passivity of the police officers, the Committee concluded that Yugoslavia violated Article 16(1) of the CAT.⁶⁷

Articles 10–13 of the CAT establish the various obligations of State Parties concerning torture, with Article 16(1) extending these obligations to acts of cruel, inhuman, or degrading treatment or punishment. The Committee found that Articles 12 and 13 were applicable to the facts of the case. Article 12, in conjunction with Article 16(1), mandates that a State Party must promptly and impartially investigate any acts prohibited by the CAT. Previous interpretations of Article 12 by the Committee have included identifying potential perpetrators and determining the nature and circumstances of the acts. As no individuals, including police officers, were tried in Montenegrin courts, the Committee concluded that Yugoslavia violated Article 12 of the CAT.⁶⁸ Article 13, in conjunction with Article

64 Ibid., paragraph 6.

65 Ibid., paragraph 9.2.

66 Ibid.

67 Ibid.

68 Ibid., paragraph 9.4.

16(1), obliges a State Party to ensure that any individual alleging victimisation under the acts prohibited by the CAT has the right to complain to the competent authorities. The Montenegrin authorities' failure to inform the complainants of the decision to discontinue the investigation, thereby preventing them from pursuing private prosecution, led the Committee to determine that Yugoslavia violated Article 13.⁶⁹

Regarding Article 14 of the CAT, the Committee interpreted it in light of other provisions and the object and purpose of the Convention, extending the interpretation beyond its textual limits. Article 14 specifies that a State Party must ensure in its legal system that victims of torture obtain redress and fair compensation. However, Article 16(1) does not explicitly extend Article 14 to cover the victims of acts of cruel, inhuman, and degrading treatment or punishment. Nonetheless, the Committee emphasised:

Nevertheless, article 14 of the Convention does not mean that the State party is not obliged to grant redress and fair and adequate compensation to the victim of an act in breach of article 16 of the Convention. The positive obligations that flow from the first sentence of article 16 of the Convention include an obligation to grant redress and compensate the victims of an act in breach of that provision.⁷⁰

Consequently, the Committee found that Yugoslavia violated Articles 16(1), 12, and 13 of the CAT. The Committee thus urged Yugoslavia to conduct effective criminal investigations, prosecute and punish those responsible, and provide fair compensation to the complainants.⁷¹

8. Overall conclusions

Montenegro's modern human rights journey, since its reestablished independence in 2006, commenced with a relatively short historical foundation in human rights institutions. The nation's commitment, as articulated in the preamble of its Constitution, to build a state based on the values of freedom, peace, tolerance, respect for human rights and freedoms, multiculturalism, democracy, and the rule of law set the stage for consolidating and advancing human rights – a crucial aspect of its path towards EU accession. The positive EU Commission's Interim Benchmarks (IBAR) report on rule of law and human rights of 26 June 2024 stands as substantial evidence of Montenegro's progress during this period.

⁶⁹ Ibid., paragraph 9.5.

⁷⁰ Ibid., paragraph 9.6.

⁷¹ Ibid., paragraphs 10 and 11.

UN human rights treaties, the UN Human Rights Council, and monitoring bodies have played pivotal roles in this advancement. Montenegro is a State Party to nearly all UN human rights treaties and is engaged hearty cooperation with the Human Rights Council and monitoring bodies. As a two-term member of the Council, Montenegro significantly contributed to its activities and benefited greatly from recommendations and reviews. The regular submission of reports, as well as the acceptance and implementation of recommendations underscore Montenegro's commitment to integrating international human rights standards into its legislative and institutional framework.

Montenegro fulfils its obligations under UN human rights treaties in two main ways: first, by reflecting convention rights and obligations in its Constitution and laws and, second, by ensuring the direct effects and supremacy of these treaties through Article 9 of its Constitution. Although the national courts do not frequently invoke UN treaties directly, preferring instead to reference ECHR and ECtHR case law due to differences in judicial control and conciliatory proceedings of monitoring bodies, the influence of UN treaties is substantial through the alignment of national laws as recommended by monitoring bodies.

While most of the alignment occurred during Montenegro's time as part of the FR Yugoslavia, the impact of the new UN treaties to which Montenegro acceded after regaining independence, particularly the CRPD, significantly influenced its legislative landscape. Montenegro's continuing membership of the State Union of Serbia and Montenegro in the ECHR, coupled with its small population, have contributed to a lack of cases against Montenegro before monitoring bodies. However, a historical case brought before the Committee against Torture during its federation membership underscored a significant moment in Montenegro's human rights journey.

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Small-Scaling Imprisonment in the Balkans – The ‘Holy Grail’ of Resocialisation?

- ABSTRACT:** *This study investigates the potential of small-scaled detention and transition concepts in the domain of imprisonment as the potential ‘holy grail’ of resocialisation, with a focus on the Balkans and relevant neighbouring countries. Intuitively, all the penological knowledge we have gathered so far points towards ‘small-scaling of imprisonment’ as an extremely feasible ‘new’ concept in minimising ‘detention damage’ while maximising resocialisation, thereby ultimately reducing recidivism and the overall harm of crime. Now, however plausible said assumption might intuitively seem to the enlightened penologist, it nevertheless calls for a critical scrutiny and preliminary empirical investigation. To achieve this meaningfully, one first needs to address the relevant tendencies currently shaping the penal landscape throughout Europe, particularly in the Balkans. We summarise these tendencies under the umbrella term of ‘era of penal contradiction’, in which mutually exclusive penal policies coexist and effectively undermine actual advancements in resocialisation and recidivism reduction. Said conceptual and empirical contextualisation will enable us to better understand the challenges and opportunities criminal justice systems in the Balkans face in their attempts to catch up with the rest of Europe. It is against this backdrop that small-scaled detention and transition concepts must be investigated, particularly in view of the strong and explicit support these concepts have been recently receiving from the Council of the European Union. Based on such an analysis, we conduct a first assessment of the potential of reshaping imprisonment in the Balkans in a humane and evidence-based manner based on the concept of small-scaling detention facilities.*

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- **KEYWORDS:** *penology, recidivism, penal populism, small-scale detention houses*

1. Background and introduction

The impulse and necessity of conducting the analysis in this study emerged at the occasion of the ‘European Symposium on Detention Houses’ held on 21 March 2024 in Brussels,¹ considering that the currently ongoing European policy and legislation initiatives are strongly pushing for a ‘small-scaling’ of detention facilities.² Essentially, small-scaled detention facilities are simply small(er) in terms of scale when compared to conventional prison facilities; thus, they are differentiated when it comes to the individual needs of incarcerated persons and community integrated.³ Clearly, such a conceptual (and practical) setup of small-scaled detention facilities is from its very onset far more likely to be in line with the ‘principle of normalisation’⁴ – as foreseen in the United Nations Standard Minimum Rules for the Treatment of Prisoners (Nelson Mandela Rules)⁵ and the European Prison Rules⁶ – than the setup of large-scale conventional prisons might ever be. Penological research, case studies, and ‘good practice’ reports from all over the world, particularly from Europe and the Nordic countries, provide a solid

1 Council of the European Union, 2024, p. 6:

The European Symposium on Detention Houses on 20 and 21 March 2024, organised by the RESCALED network under the auspices of the Belgian Presidency, focused on small-scale detention and detention houses. During the symposium, it was demonstrated that small-scale detention contributes to a better sense of community and better social integration and can lead to a lower recidivism rate. Such forms of detention therefore contribute to achievement of the objective of safer communities and lower criminality.

2 See Council of the European Union, 2024, and section 4.3 for more details.

3 Council of the European Union, 2024, p. 7:

Small-scale detention facilities are to be understood as structures with a smaller capacity compared to large-scale prisons. This smaller capacity can be beneficial in terms of living environment, dynamic security, social inclusions, and therefore a better atmosphere for reintegration. Detention houses – which are a form of small-scale detention – are to be understood as small-scale, differentiated, community-integrated facilities with suitable programmes focusing on social rehabilitation and reintegration, taking into account individual needs and with a focus on building autonomy and taking responsibility.

4 Penal Reform International and the Council of Europe, 2023, p. 12:

Normalisation principle: The principle of ‘normalisation’ maintains that life in prison should resemble as far as possible the positive aspects of ‘normal’ life in a free society (Rule 5). While prison life can never be exactly the same as the outside world, the prison authorities can take positive steps to create a culture and conditions which are as close to normal life as possible. On the normalisation principle, see also van de Rijt, van Ginneken and Boone, 2023.

5 United Nations Office on Drugs and Crime (UNODC), 2015.

6 For more details, see Penal Reform International and the Council of Europe, 2023.

empirical starting point to argue that ‘small-scaling’ is potentially the ‘holy grail’ of resocialisation, detention damage minimisation, and thus recidivism reduction (which are ultimate goals of enlightened criminal punishment) and that, subsequently, is a very promising approach to reducing the societal and individual harms of crime.⁷

Penological knowledge gathered thus far clearly shows that there is no empirical evidence in support of the assumption that incarceration reduces reoffending, whereby a considerable share of scientific evidence shows that incarceration may actually even contribute to reoffending.⁸ Numerous European countries, especially those that utilise the benefits of evidence-based crime policy, have, in response to said penological knowledge, been continuously re-shaping and re-scaling their prisons from places of incarceration and treatment into detention and transition houses that are spaces of normalisation and resocialisation.⁹

The Balkans,¹⁰ however, are reluctant to do so, although empirical data and prior research strongly indicate that this region of Europe provides, in many regards, solid conditions to utilise the benefits of re-scaling prisons, perhaps even more successfully than other parts of Europe. Looking at incarceration rates and

7 See, for example, the resource collections provided by RESCALED [Online]. Available at: <https://www.rescaled.org/publications/> (Accessed: 6 August 2025) and Prison Insider [Online]. Available at: <https://www.prison-insider.com/en/articles/mapping-small-scale-detention-throughout-europe> (Accessed: 6 August 2025), as well as Ugelvik and Dullum, 2012, and Johnsen, Granheim and Helgesen, 2011.

8 Petrich, Pratt, Jonson and Cullen, based on a large meta-analysis of 116 studies, found that custodial sanctions (imprisonment) have no effect on reoffending or have a weak criminogenic effect on reoffending when compared with noncustodial sanctions such as probation, whereby this effect is relatively robust across a wide variety of methodological moderators. See, for full details, Petrich, Pratt, Jonson and Cullen, 2020, as well as Villettaz, Gillieron and Killias, 2015, on their previously conducted meta-analysis that arrives at essentially the same conclusion.

9 For examples of such small-scale detention facilities, see the mapping conducted by Prison Insider [Online]. Available at: <https://www.prison-insider.com/en/articles/mapping-small-scale-detention-throughout-europe> (Accessed: 6 August 2025).

10 For the purpose of legal analysis, the definition of the Balkans is adopted from Getoš, Albrecht and Kilchling, 2014, chapter 1 (Sundhaussen). According to them, the Balkans and Southeastern Europe, while distinct in their geographical coverage, share numerous similarities. Both regions exhibit rich historical and cultural complexities, shaped by diverse ethnic and religious populations, geopolitical tensions, and economic disparities. The Balkans specifically represent a subset of Southeastern Europe, encompassing countries with historical ties to the Balkan Peninsula, including Bosnia and Herzegovina, Serbia (excluding Vojvodina) and Kosovo, Montenegro, Republic of Macedonia, Bulgaria, European part of Turkey (Eastern Thrace), Greece, and Albania. In contrast, Southeastern Europe extends beyond the Balkans, including countries such as Slovakia, Slovenia, Croatia, Vojvodina (North Serbia), Romania, Hungary, and Moldova. Despite these differences in scope, both regions share common challenges and historical legacies that contribute to their unique identities within the broader European context. Although Greece and the European part of Turkey are part of the Balkans, they are not included in the analysis due to lack of available accurate data online and of English translations of legal texts.

crime rates across Europe, one can observe data clustering into the Central and Eastern European (CEE) and Western European (WE) clusters, both differing substantially: Crime rates in WE countries are distinctly higher than those in CEE countries, while incarceration rates in WE are significantly lower than those in CEE countries.¹¹ The possible reasons for this are almost indefinite and certainly complex rather than monocausal; nevertheless, while acknowledging the current methodological challenges in comparing incarceration and crime data across time, space, and contexts, it appears that examining conventional crime in CEE and the Balkans,¹² compared to WE, might be a relatively smaller challenge. In view of this, it is extremely paradoxical to find higher incarceration rates, and it is justified, at least from an explorative point of view, to investigate whether small-scaling of detention facilities might provide for a more sensible approach to criminal punishment in the Balkans, where alternatives to conventional criminal punishment do not seem to have the same appeal as in WE. This has made it necessary to look for new alternatives to incarceration in large-scale prisons, such as small-scale detention facilities.

Basically, we pose the question of whether the Balkans, being a criminological space *sui generis*, represents a region in which the small-scale concept might be a particularly meaningful and justified new approach to punishment, and if so, why? To address this core question, we first contextualise our analysis by embedding it into what we termed as the ‘era of penal contradiction’, in which mutually exclusive penal policies coexist and effectively undermine actual advancements in resocialisation and recidivism reduction.

2. The ‘Era of Penal Contradiction’

■ 2.1. The ‘Dark Ages’ of punishment

Understanding the history and purpose of punishment in the context of resocialisation is essential as it provides insights into societal attitudes towards rehabilitating offenders across different historical periods. By tracing the evolution of punishment, from punitive measures to rehabilitation efforts, we gain a deeper understanding of the changing priorities and values regarding the approach towards offenders. Furthermore, comprehending the underlying purposes of punishment throughout history allows us to discern the overarching societal goals that have shaped resocialisation strategies, whether they prioritise deterrence, retribution, or rehabilitation. By examining historical practices and their outcomes, we can better inform present strategies for effective resocialisation and address persisting challenges or biases inherited from the past.

¹¹ Gruszczyńska and Gruszczyński, 2021, p. 1.

¹² Getoś, Albrecht and Kilchling, 2014.

The origin of punishment is unclear, but it has been present in even the most primitive societies and early history.¹³ While many theories exist, punishment is often defined as a societal act against a wrongdoer, and a widely supported theory suggests that punishment evolved from private vengeance.¹⁴ However, governments intervene to prevent the escalation of retaliation beyond acceptable limits, aiming to maintain societal order and prevent chaos.¹⁵ Punishment became more severe as societies progressed and formalised, especially during periods such as the classical civilisations and feudal times, driven by the need to consolidate power, enforce social order, and deter individuals from engaging in disruptive behaviour.¹⁶ In the 18th century, amid challenges to monarchy, efforts to reform individual offenders emerged, transitioning from religious to educational approaches and laying the groundwork for modern rehabilitation.¹⁷ At this time, Beccaria was influential for his ground-breaking ideas on criminal justice. His approach to punishment advocated for rational, necessary, and proportionate measures, arguing that any punishment exceeding absolute necessity is tyrannical and unjust.¹⁸ By promoting the idea that excessive punishments are counterproductive, he called for more humane practices, thereby reducing the overall severity of punishments.¹⁹

Moreover, Bentham’s impact on punishment highlights practical measures such as reformation, disablement, and exemplary penalties, stressing deterrence through punitive actions.²⁰ Bentham’s theory prioritises understanding offenders’ motivations and assessing inflicted pain, aiming to achieve societal and individual benefits through opportunities for rehabilitation.²¹ Following his ideas, Samuel Romilly emphasised preventive measures in the criminal justice system, advocating for reforms addressing the root causes of crime to prevent offences and reflecting a shift towards a more progressive and humane approach.²²

Another name that stands out in the evolution of punishment is that of John Howard. His efforts to reform the prison system during the 18th century shed light on the deplorable state of prisons, and he advocated for significant changes, particularly in improving the living conditions and treatment of prisoners.²³ In the late 19th century, the study of individual offenders shifted from physical measurements to psychiatric analysis, giving rise to the case history system for diagnosing

13 Stearns, 1936, p. 219.

14 Stearns, 1936, p. 219.

15 Stearns, 1936, p. 230.

16 Stearns, 1936, p. 230.

17 Stearns, 1936, p. 230.

18 Beccaria, 1764, p. 12.

19 Beccaria, 1764, p. 12.

20 Draper, 2002, pp. 16–17.

21 Draper, 2002, pp. 16–17.

22 Gregory, 1902; Carmody, 1934, chap. 2.

23 Chapman, 2013.

and treating offenders.²⁴ Elizabeth Fry's pioneering efforts in 19th century prison reform, focussing on classification, inspection, labour, education, religion, and health, hold significance in the context of resocialisation.²⁵ Advocating against solitary confinement and harsh labour, her holistic approach significantly impacted penitentiary practices, setting a precedent for more humane treatment of inmates.²⁶

This brief historical overview sheds light on the intricate relationship between the historical evolution of punishment and resocialisation. From primitive retribution to modern rehabilitation efforts, the trajectory of punishment reflects societal values, priorities, and attitudes towards offenders. Authorities such as Beccaria, Bentham, Samuel Romilly, John Howard, and Elizabeth Fry have left indelible marks on the criminal justice landscape, advocating for more rational, humane, and effective approaches to dealing with offenders. Their contributions underscore the importance of understanding the past in informing present strategies for resocialisation.

■ 2.2. *The 'Enlightenment' of resocialisation*

In the 20th century, the shift towards greater emphasis on resocialisation persisted. The period of peace following World War II enabled the establishment of international human rights frameworks, such as the Universal Declaration of Human Rights (1948).²⁷ These frameworks emphasised the dignity of the individual and the need for humane treatment, influencing penal policies globally. The trend of enlightenment and humane approaches to resocialisation is also evident in terminological frameworks. The context of resocialisation is expanding, and new terms such as rehabilitation and reintegration are being introduced. These concepts are increasingly intertwined and frequently mentioned in various international documents, resolutions, declarations, recommendations, and decisions of the European Court of Human Rights (ECtHR), as well as appear in the work of the United Nations and European institutions. The aim of this section is to untangle the terminological confusion surrounding these intertwined concepts and to present the development in the approach to resocialisation that has followed from the Enlightenment to the present day.

In the critical transition from incarceration to freedom, it is imperative that prisoners are afforded the opportunity to reintegrate into the society, an endeavour that hinges on the closely related concepts of rehabilitation, resocialisation, and reintegration. Rehabilitation – defined as 'the process of restoring a person who has offended to a crime-free life'²⁸ – is often referenced in scholarly, policy, and

24 Stearns, 1936, p. 230.

25 Cooper, 1981, pp. 681–690.

26 Cooper, 1981, pp. 681–690.

27 United Nations Department of Public Information, 1948.

28 Criminal Justice Alliance, no date.

legal contexts without a universally accepted delineation, leading to a terminological conundrum.²⁹ Complementary to this is resocialisation, or the ‘reintegration of convicted individuals into the society,’³⁰ which encapsulates the social dimension of the re-entry process. The term reintegration also surfaces in conjunction with these concepts, as referred to in the 2006 European Prison Rules.³¹ Although these are distinct concepts for which there are often no unanimous definitions, their meanings are frequently conflated in scholarly texts. In the case of *Hirst v. United Kingdom*,³² the term ‘resocialisation’ appears to be utilised interchangeably with ‘social rehabilitation’,³³ which illustrates the fluidity with which terminologies are deployed within the juridical domain, merging the distinctions between rehabilitative concepts. A possible reason for such incoherent use of terminology is that rehabilitation was a controversial concept in the past that gained its negative connotation in the context of human rights violations when it was used as a pretext for protracted periods of incarceration.³⁴

Nowadays, European penal policy prioritises rehabilitation over punishment, as affirmed by the ECtHR, which mandates member states to emphasise rehabilitation in their penal policies, considering it a compulsory aspect.³⁵ This emphasis has been reinforced in cases such as *Murray v. The Netherlands*³⁶ and *Khoroshenko v. Russia*,³⁷ where the ECtHR underscored the obligation of states to ensure effective rehabilitation measures within their criminal justice systems. A judge’s appropriate sentencing should both affirm the community’s trust in the judicial system’s fairness and promote resocialisation of the offender, aligning with current trends where resocialisation is emphasised over punitive actions in European penal policy.³⁸ The idea of resocialisation is systematically developed through European legislation, which can be traced back to 1977 in the Standard

29 Meijer, 2017, p. 145; Forsberg and Douglas, 2022, p. 124.

30 Penal Reform International, 2019.

31 Council of Europe Committee of Ministers, 2006.

32 *Hirst v. United Kingdom (2)*, ECtHR (app.74025/01), 2005.

33 Van Zyl Smit, 2018, p. 15.

34 Meijer, 2017, p. 146.

35 Meijer, 2017, p. 146.

36 *Murray v. The Netherlands*, ECtHR (app. 10511/10), 2016, paragraph 104.

37 *Khoroshenko v. Russia*, ECtHR (app. 41418/04), 2015, paragraph 121.

38 For example, the Spanish Constitution mandates that prison sentences should aim at the re-education and social rehabilitation of prisoners, as stated in Article 25, Paragraph 2; Italy’s Constitution articulates in Article 27 that the goal of punishment is transformation of the individual before their sentence concludes; the Federal Court of Germany has affirmed resocialisation as a fundamental component of the rights protected by the constitution. Arsoshvili, 2021, pp. 28–30.

Minimum Rules for the Treatment of Prisoners,³⁹ followed by other European documents such as the General Assembly Resolution 2200 A (XXI) on the International Covenant on Civil and Political Rights from 1996,⁴⁰ and Recommendation Rec(2006)2 of the Committee of Ministers to member states on the European Prison Rules.⁴¹ Thus, the trend of resocialisation is systematically developed through the practice of the ECtHR, which imposes rehabilitation as a positive obligation of the state.⁴²

European legislation does not precisely define or delineate the boundaries between resocialisation and rehabilitation; thus, this concept continues to be shaped and developed through the national laws of various countries. Consequently, a normative review must be conducted of the approaches to rehabilitation and reintegration in the legislation of Balkan and Southeastern European countries. This review aims to highlight how each country uniquely addresses the process of rehabilitating and reintegrating offenders into the society.

The Croatian legislator defines the right to rehabilitation as the offender's right to be considered, after a legally specified period, as a person who has not committed a criminal offence; at this time, the rights and freedoms of the criminal offender cannot differ from those of individuals who have not committed a criminal offense.⁴³ The detailed treatment of prisoners is regulated by the Execution of Prison Sentence Act, which does not use the term 'rehabilitation'; instead, it states that the purpose of executing a prison sentence is to prepare the offender for a life of freedom, in accordance with the law and social norms, thereby contributing to the protection of the community.⁴⁴ Furthermore, it emphasises the need for humane treatment and respect for the dignity of the person serving the prison sentence. The significance of resocialisation is also emphasised in the Croatian Criminal Code under Article 41, which states that the purpose of punishment is to express social condemnation for the committed criminal act, strengthen citizens' trust in the legal order based on the rule of law, influence both the offender

39 The so-called the Nelson Mandela Rules reference rehabilitation in 10 articles (Articles 25, 59, 88, 89, 90, 93, 96, 102, 107, and 122), covering a broad spectrum of rehabilitative aspects. These include allocating prisoners as close to their families as possible to achieve social resocialisation, safeguarding their safety and health, classifying prisoners appropriately, providing opportunity to work, ensuring time for education, and continuing to provide support even after their release from incarceration. UNDOC, 2015.

40 The International Covenant on Civil and Political Rights highlights that the primary goal of the penitentiary system should be the reformation and social rehabilitation of prisoners through appropriate treatment. General Assembly resolution 2200 A (XXI), 1996.

41 The recommendation, in its basic principles, emphasises that all forms of detention should be managed in a way that supports the reintegration of individuals who have been deprived of their liberty back into free society. Council of Europe Committee of Ministers, 2006.

42 Penal Reform International and the Council of Europe, 2023, p. 12.

43 Croatian Act on the Legal Consequences of Convictions, Criminal Records and Rehabilitation, 2022, Article 19.

44 Croatian Execution of Prison Sentence Act, 2021, Article 3.

and others to abstain from committing criminal acts, and enable the offender to reintegrate into society.⁴⁵

The Hungarian legislator does not mention the resocialisation of the perpetrator as the purpose of punishment; instead, the legislator highlights the interest in protecting society and preventing the perpetrator or any other person from committing criminal acts.⁴⁶ The purpose of rehabilitation is mentioned only in the provisions on the conditional imposition of a sentence (Article 65) and in provisions regarding work performed in amends (Article 67). Furthermore, resocialisation is referred to only in basic provisions of the Act on the Implementation of Penalties, Measures, Certain Coercive Measures, and Detention for Violations, which emphasises that the goal of punishment is to promote social integration of the convicted person and the development of law-abiding behaviour.⁴⁷

In the Serbian legal system, Article 4 of the criminal code specifies that criminal sanctions include various forms such as punishment, caution, security measures, and rehabilitation measures, and the purpose of imposing these sanctions is to prevent acts that violate or endanger the values protected by criminal legislation.⁴⁸ Under Article 97, the general concept of rehabilitation is defined as a process that erases the conviction and terminates all its legal effects, thereby reinstating the individual as someone without a criminal record. Furthermore, the Serbian Law on the Execution of Criminal Sanctions in Article 2 underlines that the sanctions are enforced to fulfil the general and specific objectives of their imposition, with the end goal of achieving successful social reintegration of the convicted individuals.⁴⁹

Under Article 103 of the Slovenian Penal Code, statutory rehabilitation results in removal of the conviction from the criminal record, cessation of the conviction’s legal repercussions, and acknowledgment that the convicted person is to be regarded as never having been found guilty.⁵⁰ Furthermore, the Slovenian legislator outlines the state’s objectives in sentencing, which include protecting the core values and principles of the legal system, affirming the unacceptability of criminal actions to offenders and the public, and ensuring the effective re-entry of offenders into the society with respect for their dignity and personal rights through the levy of suitable penalties.⁵¹

45 Croatian Criminal Code, 2024, Article 41.

46 Hungarian Act on the Legal Consequences of Convictions, Criminal Records and Rehabilitation, 2022.

47 Act on the Implementation of Penalties, Measures, Certain Coercive Measures, and Detention for Violations, 2013.

48 Serbian Criminal Code, 2019.

49 Serbian Law on Execution of Criminal Sanctions, 2020.

50 Slovenian Penal Code and Law on Amendments and Supplements to the Criminal Code, 2023.

51 Meško, Tičar and Hacin, 2020, p. 10.

The Slovak legislator does not explicitly define rehabilitation, but Article 34 of the Penal Code, under the principles for the imposition of punishments, emphasises its importance, alongside prevention, by creating conditions for educating individuals to lead orderly lives.⁵² Rehabilitation is mentioned again in the same article when determining the type and severity of the penalty, where the court is tasked with considering the individual's potential for rehabilitation.

The Romanian legislator defines two possible types of rehabilitation, statutory and judicial, in Articles 165 and 166.⁵³ Furthermore, Article 169 outlines the effects of rehabilitation as the removal of any loss of rights, prohibitions, or incapacities incurred as a result of the sentence. Rehabilitation is also considered in the context of conditions for waiving the enforcement of a penalty, where the court assesses the offender's likelihood of rehabilitation.⁵⁴ However, even though the term 'rehabilitation' is again used in this context, it may be more closely aligned with the concept of resocialisation.⁵⁵ Thus, during the probation period, the court must consider the offender's need for rehabilitation and set obligations that enhance the prospects for successful rehabilitation.⁵⁶

The legislator of Bosnia and Herzegovina refers to rehabilitative goals in Article 7, which defines the purpose of criminal sanctions.⁵⁷ Besides protecting society through the preventive influence on others to respect the legal system and deter them from committing crimes as well as preventing the offender from committing new crimes, this study emphasises encouraging the offender's resocialisation, as well as protection and satisfaction of the victim of crime. Rehabilitation is specified in Article 121, which states that after the convicted persons have served the prison sentence, they have been pardoned, or the prison sentence has expired, these persons enjoy all the rights established by the constitution, law, and other regulations, and they can acquire all the rights except those limited by a security measure or the conviction's legal consequences.

While the Criminal Code of Montenegro⁵⁸ does not specify resocialisation of the offender as a general purpose of criminal sanctions in Article 4, the Act on the Execution of Prison Sentences, Fines, and Security Measures⁵⁹ does refer to the resocialisation and reintegration of convicted persons into the society as the purpose of executing sanctions in Article 3. Furthermore, Article 118 defines rehabilitation as something that effectively erases the conviction and terminates all its

52 Slovak Penal Code, 2019.

53 Romanian Criminal Code, 2012.

54 Romanian Criminal Code, 2012, Article 80.

55 This distinction is important because resocialisation focusses on reintegration of individuals into society and development of law-abiding behaviour, which may not fully encompass the legal definition of rehabilitation as intended in the statutory framework.

56 Romanian Criminal Code, 2012, Article 87.

57 Criminal Code of Bosnia and Herzegovina, 2023.

58 Criminal Code of Montenegro, 2018.

59 Act on Execution of Prison Sentences, Fines, and Security Measures in Montenegro, 2015.

legal consequences, treating the individual as if they have never been convicted; it also distinguishes between judicial and statutory rehabilitation.⁶⁰

In the Criminal Code of Macedonia,⁶¹ Article 32 defines the purpose of sentencing as preventing the offender from committing further crimes, which indirectly includes a resocialisation element through the emphasis on correction as one of its goals. Additionally, Article 39 regarding the general rules for meting out a sentence requires the court to particularly consider the overall impact of the sentence and its consequences for the offender’s personality and his need for resocialisation. Rehabilitation is defined in Article 103, which distinguishes between statutory and court rehabilitation, noting that a rehabilitated person is considered as never having been sentenced, with no disclosure of expunged sentence details to anyone.

Kosovo’s legal framework outlines the process of rehabilitating and reintegrating offenders into the society through various articles.⁶² Article 38 of the criminal code emphasises the multifaceted purpose of punishment, aiming to prevent future criminal behaviour, rehabilitate the perpetrator, deter others from committing crimes, and provide compensation to victims or the community. Additionally, Article 96 addresses statutory rehabilitation, where a convicted person’s punishment is expunged from their record if they meet certain criteria, effectively erasing their status as convicted. Article 97 introduces judicial rehabilitation, allowing the court to expunge a punishment from the records and consider the person not convicted if specific conditions are met, including a clean record for a certain period and demonstration of positive conduct post-punishment. Furthermore, articles of this law, including Articles 54, 56, 58, 84, and 87, mention the term ‘rehabilitation’ in the context of addiction treatment.

In Bulgaria, the imposition of penalties serves three primary purposes: reforming the convicts to uphold laws and morals, preventing them from committing further crimes, and providing instructive and warning effects to the society.⁶³ It is explicitly stated that penalties should not involve physical suffering or humiliation of human dignity. Regarding rehabilitation, Article 85 stipulates that it results in the removal of the conviction and its future legal consequences, unless specified otherwise by law. Furthermore, Article 87 outlines the conditions for individual rehabilitation, where a convicted person can be rehabilitated by the court if they demonstrate good conduct and satisfy other legal conditions (not committed another crime within three years of completing their sentence, provided that they have also restored any damages caused by deliberate crimes). Additionally, Article 88 allows heirs to request rehabilitation for a deceased convicted individual if they meet the necessary criteria.

60 Criminal Code of Montenegro, 2018.

61 Republic of Macedonia Criminal Code, 2018.

62 Criminal Code of the Republic of Kosovo, 2019.

63 Penal Code of the Republic of Bulgaria, 2023, Article 36.

In Albania, the purpose of criminal penalties, as defined in Article 61 of the Criminal Code, serves multiple objectives.⁶⁴ First, it aims to punish the offender for their committed crime and isolate them for a period necessary to ensure public security. Additionally, the penalty seeks to facilitate the offender's reintegration into the society through their punishment; prevent further criminal acts; and provide compensation and protection to victims, minors, and other vulnerable individuals. Rehabilitation is specifically addressed in Chapter III, Section I of the Criminal Code, focussing on minors.⁶⁵ Rehabilitation is also mentioned in Section II, where Articles 101, 103, and 118 detail provisions for rehabilitation within the context of medical interventions and mandatory treatments for offenders. Finally, the concept of rehabilitation is outlined in Article 174, which states that individuals may be considered as having no criminal record under certain conditions. These conditions vary based on severity of the sentence imposed and the time elapsed without committing further criminal offenses following completion of the sentence.

In Moldova, the purpose of criminal punishment is to restore social equity, rehabilitate the convict, and prevent the commission of new crimes by both the convict and others, as stated in Article 61 of the Criminal Code.⁶⁶ The code explicitly states that punishment must not cause physical suffering or humiliate the convict's dignity. Rehabilitation, as a significant aspect of the criminal justice system, is mentioned in several contexts. Article 112 details judicial rehabilitation, allowing convicts to cancel their criminal history if they exhibit irreproachable behaviour and meet specific conditions. Rehabilitation is also crucial in specifying punishments and managing recidivism; Article 75 outlines that more severe punishments should only be applied when milder ones cannot achieve the rehabilitation goal. Furthermore, Article 82 considers rehabilitation in cases of recidivism, considering the convict's past behaviour and the effectiveness of previous punishments. Rehabilitation is also emphasised in the chapter on security measures, highlighting the elimination of danger and importance of rehabilitation as a preventative measure.

To summarise, resocialisation in penal policies has evolved significantly from the Enlightenment to the present day, influenced by penological knowledge, international human rights frameworks, and the European legislation. This evolution reflects a broader understanding of rehabilitation, resocialisation, and reintegration as interconnected concepts essential for the humane treatment of

64 Criminal Code of the Republic of Albania, 2023.

65 The educational measures outlined in Article 92 are designed to foster the holistic development of minors who have committed offenses or pose a risk to themselves or others. Additionally, Article 98 introduces the option of placing minors in educational-corrective care institutions when necessary, providing long-term institutional treatment to support their education, reintegration, and rehabilitation.

66 Penal Code of the Republic of Moldova, 2016.

offenders and their successful reintegration into society. Legal frameworks of several countries in the Balkans and Southeastern Europe, including Croatia, Hungary, Serbia, Slovenia, Slovakia, Romania, Bosnia and Herzegovina, Montenegro, Macedonia, Kosovo, Bulgaria, Albania, and Moldova, all recognise the significance of rehabilitation and resocialisation within their criminal justice systems. Despite variations in terminology and emphasis, these countries share the common goal of reintegrating offenders into society and preventing recidivism. Rehabilitation is often defined in legislative texts by specific criteria and procedures for expunging criminal records, enabling individuals to be recognised as not having committed a criminal offense. Additionally, the term is used to refer to the rehabilitation and reintegration processes for offenders (resocialisation). This overlap is not surprising, as terms such as resocialisation, rehabilitation, and reintegration are frequently used interchangeably in the European legislation. While some countries explicitly emphasise rehabilitation in their legal frameworks and sentencing principles, others may focus more on protection of society and prevention of future crimes. Overall, while there are similarities in recognising the importance of rehabilitation, there are also notable differences in how it is defined, implemented, and prioritised across these diverse legal systems. Each country takes a unique approach to addressing these goals, illustrating a common commitment to resocialisation as a cornerstone of modern penal policy.

■ 2.3. *The ‘Penal Populism Era’*

There is no doubt that we have come a long way from the ‘Dark Ages’ of punishment that focussed on retribution, all the way to the ‘Enlightenment’ that focusses on resocialisation and reintegration. A question arises as to whether and how this ‘enlightened’ focus of criminal punishment still accurately reflects the current penal landscape in the Balkans and Southeastern Europe, and even more so globally. Penal populism

... refers to the way in which criminals and prisoners are thought to have been favoured at the expense of crime victims, in particular, and the law-abiding public, in general. It feeds on expressions of anger, disenchantment and disillusionment with the criminal justice establishment. It holds this responsible for what seems to have been the insidious inversion of common-sensical priorities for much of the post-1945 era: protecting the well-being and security of law-abiding ‘ordinary people’, while punishing those whose crimes jeopardise this. ... penal populism is more directly tied into perceived public views about crime and punishment, as presented on their behalf by forces extraneous to government: the law and order lobbyists, victims’ rights groups and the like. Politicians have no monopoly of discourse on these matters and allow themselves to become hostages

to whatever fortune the alliance they have made with these forces then brings them.⁶⁷

Essentially, penal populism can be defined ‘as the promotion and enactment of criminal justice policy that is more focused on appealing to public opinion and electoral advantage rather than attempting to reduce crime.’⁶⁸

Throughout most of Europe, particularly Southeastern Europe and its Balkan subregion, penal populism has been steadily rising.⁶⁹ Harsher sentencing frameworks, broader criminalisation, and an increase in investigative detention are all evident penal policy trends (among others) that characterise penal populism.

In view of rising penal populism throughout the region of interest, while all countries still firmly (and at least formally) subscribe to the principle of resocialisation, reintegration, or rehabilitation as a core purpose of criminal punishment (see section 2.2), it is safe to conclude that we are living in an ‘era of penal contradiction’. On the one hand, we do not (and cannot due to the standards set by the ECtHR) give up on resocialisation as one of the core elements of criminal punishment; on the other hand, we have become far more punitive and risk-intolerant, hence inclined to approaching crime policy from not an evidence-based standpoint of reason and facts but an emotional and populist point of view. Without further assessing whether such penal populist developments are meaningful and constructive or rather insensible and counterproductive, the fact remains that they are here and, on the rise, with little indication of their demise in the near future. Thus, the matter deserves our scientific attention, and if one assesses that there is little to be achieved by advocating for reason and enlightenment in penal policy, another approach may be needed.

Here, we turn to ‘new’ concepts such as small-scaled detention facilities, which might not be a solution to efficiently tackling penal populism but could be a cure to treat its symptoms. By making detention facilities more humane, small-scaling them, and allowing for individualisation and normalisation of life in detention, we could somewhat reconcile the contradicting effects of penal

67 Pratt and Lee, 2024. According to Garland, the first one to raise the issue of ‘populist punitiveness’ was Tony Bottoms back in 1995, whereas Garland defines penal populism as ‘... a form of political discourse that, directly or by implication, denigrates the views of professional experts and liberal elites and claims instead the authority of ‘the people’ whose views about punishment it professes to express. ... Penal populism typically has a punitive, reactionary cast – which is why we often think of it as a synonym for ‘populist punitiveness’. Garland, 2022, p. 251. See also Pratt and Miao, 2022; Pratt, 2007; Garland, 2021; Pratt and Grzyb, 2023; and Grzyb, 2021, for a convincing analysis on ‘feminist penal populist discourse’ in Spain and Poland.

68 Koning and Puddister, 2024, p. 225.

69 See, for example, Boda and Bartha, 2022; Haney, 2016; Ignjatović, 2017; Nikolli, 2015; Šprem and Getoš Kalac, 2024; Getoš Kalac and Feuerbach, 2023.

populism on the one hand and the goal of resocialisation and reintegration on the other. If recidivism rates were to decline as a result while communities profit from the benefits of small-scale detention facilities, this could prove to be an actual solution to penal populism in the long run. Said assumption seems plausible but needs to be put in context of the relevant penological facts and figures, as analysed throughout section 3.

3. The Balkans: penologically relevant facts and figures

Numerous factors can indicate the current state of prisons. These encompass various aspects, including the conditions of prison infrastructure, sanitation standards, training of prison personnel, security, fair treatment of inmates, access to healthcare services including medical and mental health support, availability of programming and rehabilitation services, demographic composition of the prison population, prevalence of violence and misconduct, and share of recidivism. Additionally, factors such as probation services, re-entry support, legal frameworks, and external oversight mechanisms all reflect the effectiveness, fairness, and humanity of the prison system. The number of cases brought before the ECtHR concerning violations of human rights in prisons also serves as a significant indicator of the state of correctional facilities and the extent to which they comply with international human rights standards. However, analysing all these factors comprehensively is beyond the scope of this study. Therefore, we limit our focus to three indicators: prison populations, probation populations, and recidivism. These factors provide insights into the state of prisons and the effectiveness of criminal justice systems in Balkan and Southern European countries.

■ 3.1. Prison Populations

The following analysis utilises Eurostat data on the prison population to illustrate trends in the imposition of prison sentences. These data provide a comprehensive and standardised measure of incarceration rates across Balkan and Southeastern European countries. The prison population rate per 100,000 inhabitants is a metric that quantifies the level of incarceration in a country, calculated by dividing the total number of people in prison, which encompasses inmates who are both sentenced and awaiting trial, by the country’s total population and then scaling the result to represent a proportion per 100,000 residents.⁷⁰

⁷⁰ Eurostat, no date.

Figure 1: Prison Population Rates per 100,000 Inhabitants in Balkan and South-eastern European Countries (2012–2022)⁷¹

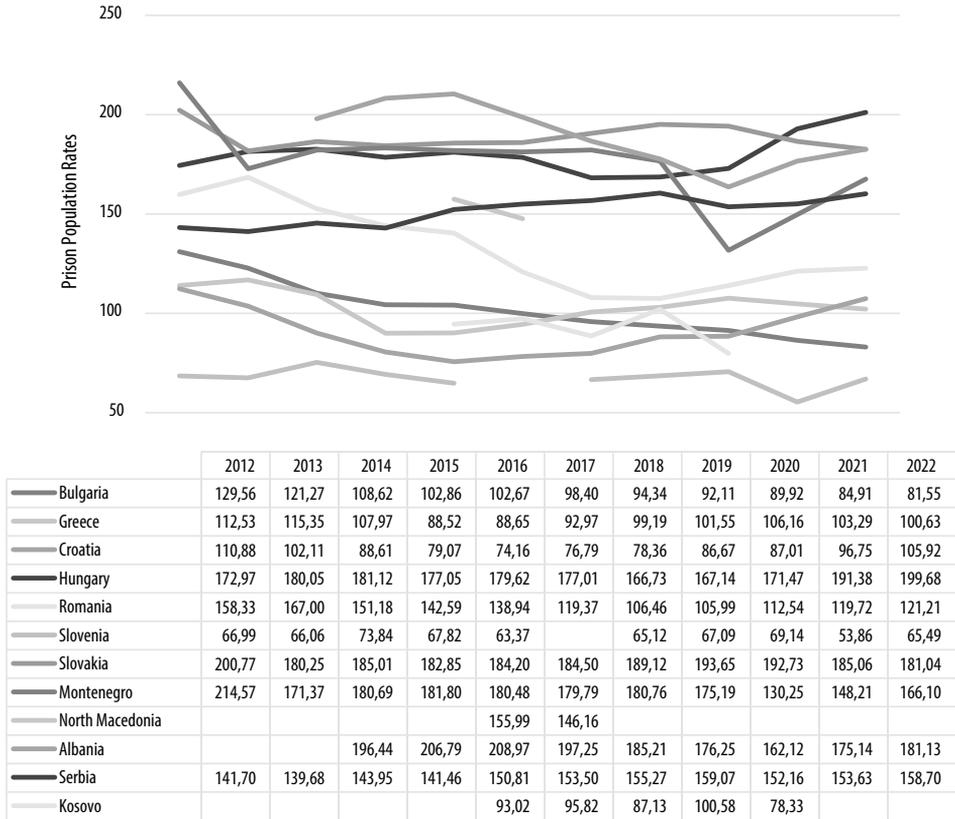


Figure 1 illustrates the prison population rates in Balkan and Southeastern European countries from 2012 to 2022 and reveals diverse trends and changes in imprisonment rates over this period. Several countries show a general decline in prison population rates. This trend is noticeable in Bulgaria, Romania, and Slovenia. For instance, Bulgaria’s rate decreased from 129.56 in 2012 to 81.55 in 2022. Romania also follows this pattern, with its rate dropping from 158.33 in 2012 to 121.21 in 2022, marking a downward trend. Slovenia, which has one of the lowest and most stable rates, saw a slight decrease from 66.99 in 2012 to 65.49 in 2022. Conversely, some countries exhibit fluctuations rather than a clear trend (Greece, Hungary, and Croatia). Greece, for example, saw a decrease from 112.35 in 2012 to 97.92 in 2014, followed by slight fluctuations, ultimately ending at 100.63

71 Moldova and Bosnia and Herzegovina are not included in this analysis due to unavailability of data for these countries.

in 2022. Hungary’s rates have varied significantly, starting at 172.97 in 2012, fluctuating over the years, and increasing to 199.68 in 2022. Similarly, Croatia’s rate remained relatively stable with minor fluctuations, starting at 110.88 in 2012 and ending at 105.92 in 2022. Slovakia and Montenegro demonstrate more stability. Slovakia experienced a decrease from 200.77 in 2012 to 181.04 in 2022, despite some intermediate fluctuations. Montenegro’s rates started high at 214.57 in 2012 and generally decreased to 155.10 in 2022. The absence of data on North Macedonia’s and Kosovo’s incarceration rates for certain years limits our understanding of the dynamics and hinders comparative assessments with other countries.

Seemingly, Albania, Montenegro, Slovakia, and Hungary have the highest rates throughout the period, while Slovenia consistently maintains the lowest rates. Overall, the tendency is towards lower incarceration rates, although attributing these changes to specific policies or events is complex without proper context. On a last note, it needs to be stressed that the period from 2016 to 2021 is marked by a decrease in prison population rates in not only Balkan and Southeastern European countries but also the vast majority of all European countries.⁷²

■ 3.2. Probation populations

In addition to the prison population rate, we can monitor the trend of mitigation by analysing the probation population rate (Figure 2). Probation can be defined as a legal mechanism wherein a court suspends the imposition or execution of a sentence, allowing the offender to remain in the community under specific conditions instead of serving time in incarceration,⁷³ and probationers are defined as persons placed under the supervision of probation agencies.⁷⁴ The content of probation is more precisely defined by European documents, specifically Appendix I to the Council of Europe’s Recommendation CM/Rec (2010)1,⁷⁵ while the Council of Europe’s Recommendation Rec(2003)22⁷⁶ further extends the scope of probation and includes conditional release (parole).⁷⁷ Probation serves as a penalty that can enhance the efficiency of the justice system without straining its resources excessively.⁷⁸ Although probation rates vary significantly across Europe (partly due to the varied methods of probation agencies), the highest rates are found in Western

72 For more details and data, see Aebi et al., 2024, p. 289.

73 Diana, 1960, p. 190.

74 Aebi, Cocco and Hashimoto, 2023, p. 14.

75 According to the Recommendation CM/Rec (2010)1 of the Committee of Ministers to Member States on the Council of Europe Probation Rules, ‘Probation relates to the implementation in the community of sanctions and measures, defined by law and imposed on an offender. It includes a range of activities and interventions, which involve supervision, guidance and assistance aiming at the social inclusion of an offender, as well as at contributing to community safety.’

76 Council of Europe Committee of Ministers Recommendation (2003)22 of the Committee of Ministers to Member States on Conditional Release (Parole), 2003.

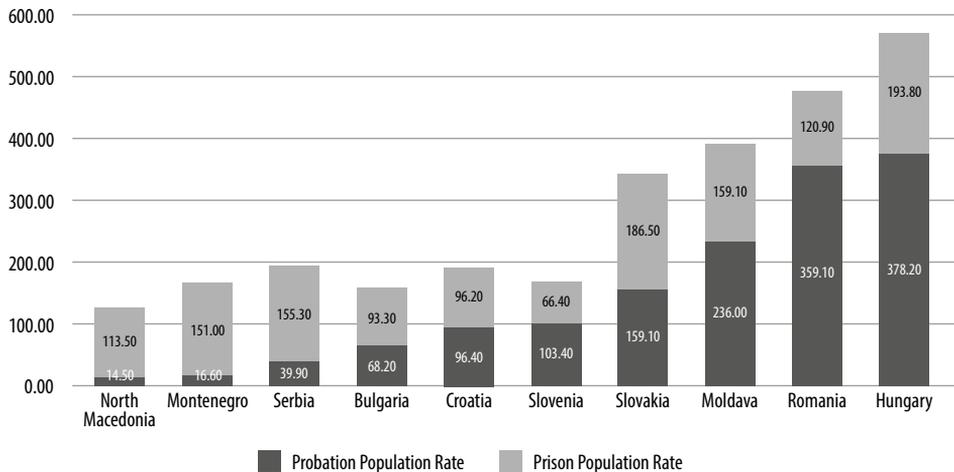
77 Aebi, Cocco and Hashimoto, 2023, p. 2.

78 Taxman and Maass, 2016, p. 188.

and Northern European countries.⁷⁹ Particularly notable are Poland, Lithuania, and Belgium, which display the highest probation population rates, while North Macedonia, Montenegro, and Serbia stand out with the lowest rates.⁸⁰

For a comprehensive understanding of probation, the probation rate must be analysed in conjunction with the prison population rate. The focus of probation research is on Balkan and Southeastern European Countries.⁸¹ The European median of 161 probationers per 100,000 inhabitants is employed to evaluate probation rates as high or low, based on data provided by probation agencies utilising a person as the unit for counting the stock of probationers.⁸²

Figure 2. Probation Population Rates per 100,000 Inhabitants in Balkan and Southeastern European Countries in 2022⁸³



⁷⁹ Aebi, Cocco and Hashimoto, 2023, p. 2.

⁸⁰ Aebi, Cocco and Hashimoto, 2023, p. 4.

⁸¹ Albania, Bosnia and Herzegovina, Greece, and Kosovo are excluded from the analysis due to unavailability of data on the prison population and probation population rates, with Bosnia and Herzegovina and Kosovo lacking data on both and Albania and Greece lacking data on the probation population rate.

⁸² Aebi, Cocco and Hashimoto, 2023, p. 2.

⁸³ Slight variations in reported prison population rates between SPACE statistics and EUROSTAT data can be attributed to differences in methodology. These discrepancies can arise from variations in data collection techniques, including criteria for defining and categorising prisoners, as well as differences in sources and frequency of data updates. SPACE statistics use stock data, which give a snapshot of the prison population at one moment (stock indicators on 31 January 2022). Furthermore, variations in the scope and coverage of data collection efforts, such as the inclusion or exclusion of specific types of facilities or individuals within the prison population, can contribute to the disparities.

According to the Council of Europe Annual Penal Statistics (or *Statistiques Pénales Annuelles du Conseil de l’Europe* [SPACE]), Croatia belongs to the group of countries with low probation rates and a low prison population rate; North Macedonia, Montenegro, and Serbia also have low probation rates but relatively high prison population rates; the Slovak Republic has a relatively high prison population rate but, at the same time, a relatively high probation population rate.⁸⁴ High probation population rates are particularly prominent in Romania, Hungary, and Moldova, which should be viewed in the context of relatively high prison population rates.⁸⁵ An explanation for the significantly lower probation rates observed in North Macedonia, Montenegro, and Serbia is that probation services in these countries lack a long history and were established relatively recently.⁸⁶ Additionally, it is interesting to note that the probation rate generally increased from 2021 to 2022, which is interpreted as the unintended consequences of the diminishing of measures introduced to reduce the pandemic spread.⁸⁷

On a final note, it needs to be stressed that the probation rate itself is a simple ‘count’ that does not provide any insight on the quality of probation services actually provided, just as the prison population rate provides no insight into the quality of incarceration in terms of prison conditions, treatment, etc. Both rates are nevertheless indicative of the different countries’ focus on either imprisonment or their alternatives (e.g. probation) in responding to crime; throughout the region, these rates can be presumed as fairly low when compared to WE and not reflective of a ‘high-crime’ region.

■ 3.3. *Recidivism*

Recidivism is analysed using national official statistical data for the Balkan and Southeastern European countries (Figures 3, 4, and 5). The trend of recidivism is compared only at the normative level, considering that the data are methodologically collected differently and thus not compatible for actual comparisons.⁸⁸ Nevertheless, it is considered significant to highlight the legislative approach to the pervasive trend of recidivism, in view of the national definition of the same trend of movement.

84 Aebi, Cocco and Molnar, 2023, p. 5.

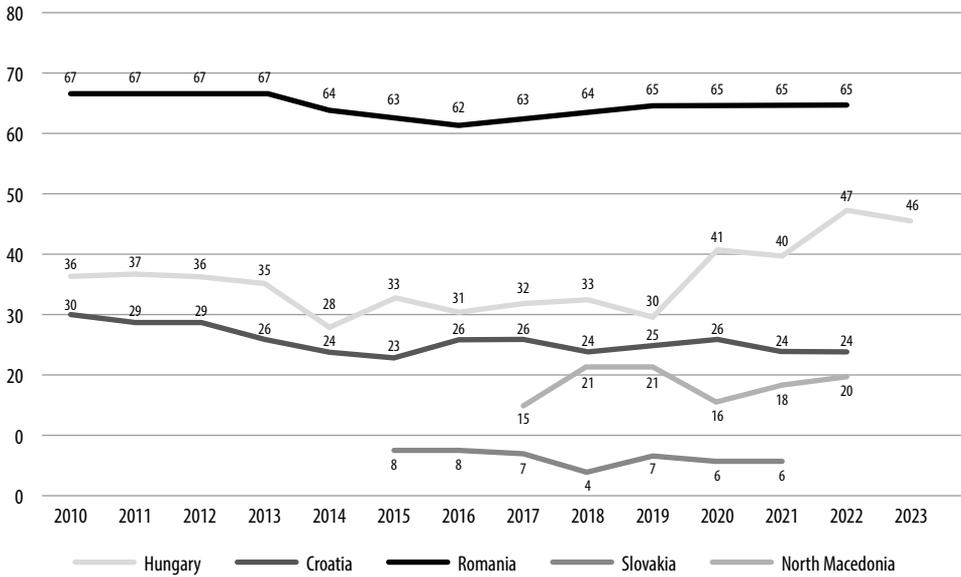
85 Aebi, Cocco and Hashimoto, 2023, p. 5.

86 Aebi, Cocco and Hashimoto, 2023, p. 4.

87 Aebi, Cocco and Hashimoto, 2023, pp. 6–8.

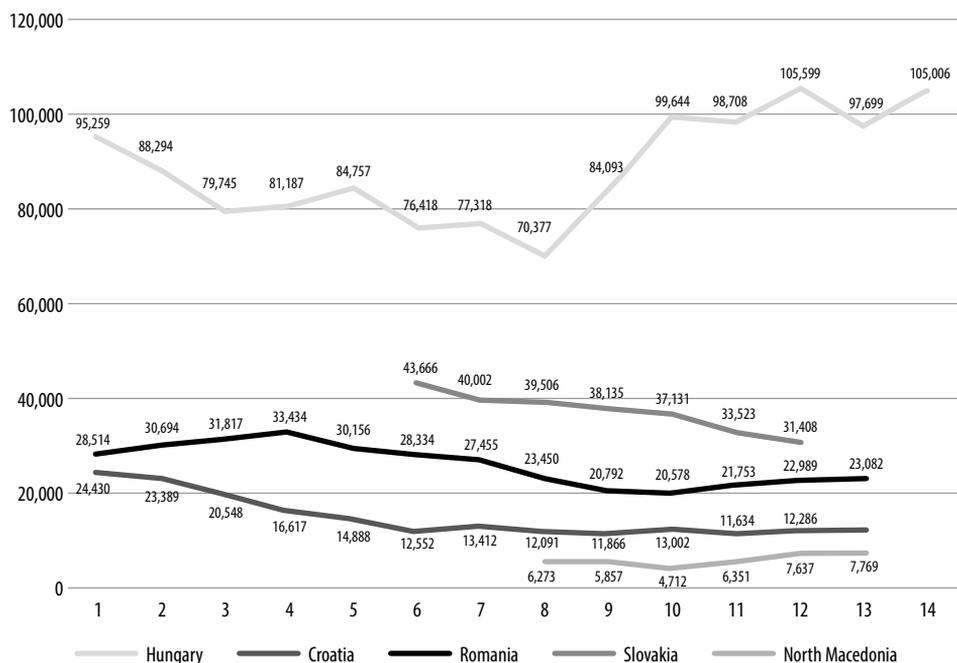
88 For more details on the methodological and practical challenges of measuring and assessing recidivism, see Getoš Kalac and Feuerbach, 2024, and the referenced literature therein.

Figure 3: Share of Recidivists in Balkan and Southeastern European Countries (2010–2023)⁸⁹



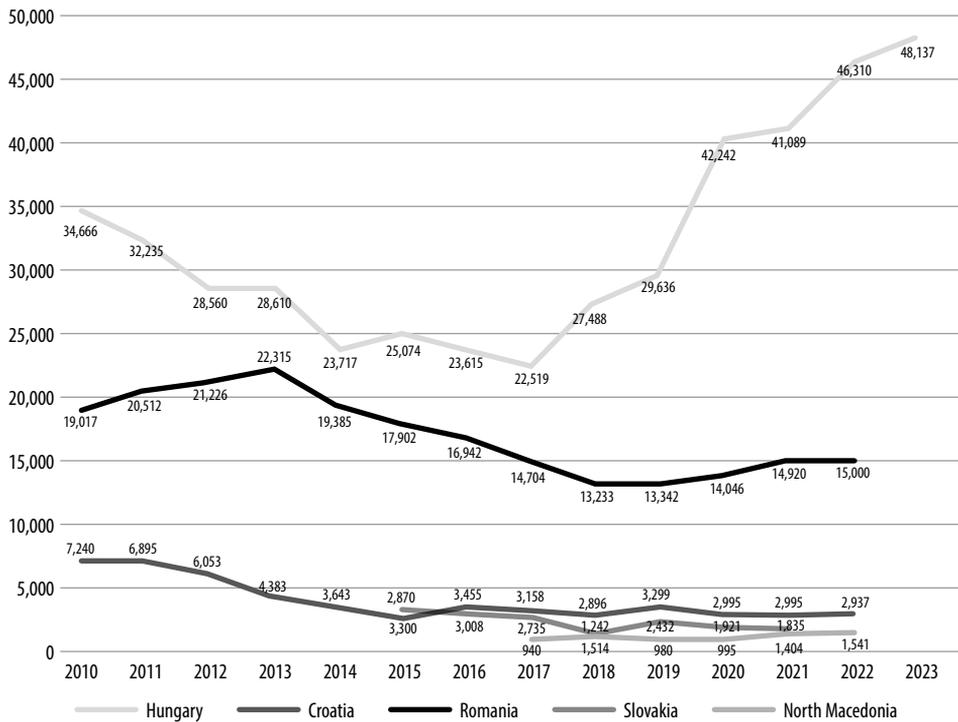
⁸⁹ Croatian Bureau of Statistics – Republic of Croatia, no date; Hungarian Central Statistical Office, no date; Republic of North Macedonia State Statistical Office, no date; Statistical Office of the SR, no date; Statistics Poland, no date; Ministerul Justiției, 2023.

Figure 4: Total Number of Adult Convicted Offenders in Balkan and Southeastern European Countries (2010–2023)⁹⁰



⁹⁰ Croatian Bureau of Statistics – Republic of Croatia, no date; Hungarian Central Statistical Office, no date; Republic of North Macedonia State Statistical Office, no date; Statistical Office of the SR, no date; Statistics Poland, no date; Ministerul Justiției, 2023.

Figure 5: Total Number of Previously Convicted Offenders⁹¹ in Balkan and Southeastern European Countries (2010–2023)⁹²



In the Hungarian legislative framework, the term ‘recidivist’ is defined to identify individuals with varying degrees of reoffending behaviour; it distinguishes between a repeat offender, not yet classed as a recidivist, who has been released for over three years since their last wilful crime, and a habitual offender who consistently commits similar crimes. A recidivist, on the other hand, is someone who has reoffended wilfully within three years of their last sentence, signalling a higher risk and tendency towards criminal activity, with further categorisations for multiple repeat offenders and violent multiple repeat offenders based on the nature and frequency of their crimes, indicating a progressively serious view of

⁹¹ In this comparative analysis, the term ‘previously convicted offenders’ encompasses various specific terms used across different countries, including recidivist, habitual recidivist, repeat offender, repeat offender with a history of violence, habitual offenders, and previously convicted perpetrators. These variations reflect differences in legal definitions and categorisations of reoffending behaviour.

⁹² Croatian Bureau of Statistics – Republic of Croatia, no date; Hungarian Central Statistical Office, no date; Republic of North Macedonia State Statistical Office, no date; Statistical Office of the SR, no date; Statistics Poland, no date; Ministerul Justiției, 2023.

repeat offenses.⁹³ Reviewing the trend in the numbers and share of recidivists⁹⁴ in Hungary, it seems that while there are yearly variances, the overall trend does not indicate a significant decrease in the number of recidivists. This stable presence of recidivism suggests that a certain segment of the criminal population consistently returns to criminal behaviour post-release. When looking at the share of recidivists relative to those with a clean criminal record, the data suggest that despite efforts of deterrence, the system has yet to significantly reduce the tendency of previously convicted individuals to reoffend. This trend highlights the ongoing challenge of recidivism and the need for effective rehabilitation and reintegration strategies.

The trend of recidivism in Croatia from 2010 to 2022 presents an initial stability followed by a decline and then slight fluctuations. The proportion of recidivists – defined not directly by the legislator but by the Croatian Bureau of Statistics as previously convicted adult offenders facing criminal penalties, ranging from imprisonment to milder measures such as judicial admonition or no sentence at all – decreased from 29.64% in 2010 to 22.86% in 2015. Subsequently, the trend exhibited minor oscillations, with the share of recidivists increasing to 26.12% in 2016 and then slowly decreasing to 23.77% by 2022. These data suggest a nuanced approach to recidivism in Croatia, with a general trend towards slight reduction, albeit with periodic increases that warrant attention for continuous improvement in criminal justice policies.

In Romanian law, recidivism is defined as the commission of a new intentional crime after a person has already been sentenced to more than one year of imprisonment or to life imprisonment, and this crime occurs before rehabilitation or expiration of the rehabilitation term.⁹⁵ The legislation makes a distinction between post-conviction recidivism, where the subsequent crime is committed before serving or being deemed to have served the sentence, and post-execution recidivism, where the crime is committed after serving the sentence but before rehabilitation.⁹⁶ The recidivism trend in Romania from 2010 to 2022 shows a persistently high proportion of recidivists, with their share among total offenders increasing slightly over time, reaching 65% in 2022. Despite a general decline in the total number of offenders, the rise in the recidivist ratio suggests that while there may be fewer individuals entering the criminal justice system, those who

93 Major, Sánta and Várkonyi, 2020, p. 24.

94 The sum of individuals in categories indicating recidivism – ‘not recidivist’, ‘recidivist’, ‘habitual recidivist’, ‘repeat offender’, and ‘repeat offender with a history of violence’ – reflects the portion of the criminal population that has previously been involved in the justice system. In the sum of these individuals, we also included a category marked as ‘not recidivist’, because these are offenders who have previously been convicted and therefore most closely reflect the criminological concept of recidivism.

95 Ministerul Justiției, 2023, p. 23.

96 Ministerul Justiției, 2023, p. 33.

do are more likely to reoffend, highlighting a critical area for policy focus and intervention.

The data on recidivism in the Slovak Republic indicate a fluctuating trend in recidivism from 2015 to 2022. It is important to note that the Slovak Republic does not have a specific legal definition for a ‘recidivist’. However, the country recognises the category of habitual offenders – individuals who have repeatedly committed the same criminal offense.⁹⁷ For the purpose of this analysis, habitual offenders are considered as recidivists. The total number of non-habitual adult offenders decreased steadily from 43,666 in 2015 to 32,203 in 2022, suggesting an overall reduction in offenses committed by new offenders. Conversely, habitual offenders peaked at 3,300 in 2015 and showed a significant drop to 1,514 in 2018, followed by a slight rise to 2,042 by 2022. The share of habitual offenders among the total fluctuated, being at a high of 7.6% in 2015, dipping to 4.0% in 2018, and rising again to 6.3% in 2022.

The North Macedonia State Statistical Office data describe the 2017 trend of recidivism in North Macedonia, which defines a previously convicted person as an adult recognised as responsible and against whom penal measures have been imposed.⁹⁸ These measures may include imprisonment, fines, educational measures, or a court reprimand, and they account for those convicted but without an imposed penal sentence.⁹⁹ The trend shows that after a rise in recidivism in 2018 to over 21%, there was a notable decrease in 2020, but the trend ascended again, reaching nearly 20% by 2022.

Recidivism trends across Hungary, Croatia, Romania, Slovakia, and North Macedonia reveal persistent challenges in reducing the share of repeat offenders. However, one should be careful in interpreting the data, as differences in legal definitions and categorisations significantly impact the results. For example, Slovakia has a relatively high number of convicted adult offenders compared to the other mentioned countries, but the share of recidivism is low. Without a deeper analysis of resocialisation programmes and legal regulations, we cannot draw definitive conclusions about recidivism. The low share of recidivists in Slovakia is clearly the consequence of a very narrow definition of habitual offenders, which includes only those who have repeatedly committed the same criminal offense. Contrastingly, Romania stands out with a high recidivism share despite having a lower total number of adult convicted offenders compared to Slovakia. Furthermore, in Hungary, the share of recidivists has remained stable. Croatia shows a general reduction in the recidivism share from 2010 to 2022, although periodic increases highlight the need for prevention policy improvement. North Macedonia

97 Statistical Office of the SR, no date.

98 For the purpose of this analysis, we consider this definition as indicative of recidivism, even though the specific term ‘recidivist’ may not be explicitly defined in North Macedonian law.

99 Republic of North Macedonia State Statistical Office, no date.

has seen fluctuating recidivism shares, with a notable decrease in 2020 followed by an increase to nearly 20% by 2022.

Although direct comparisons between these countries’ data are not possible due to differences in definitions and measurements, recidivism remains a permanent challenge in this region, underscoring the necessity for effective resocialisation and reintegration policies aimed at reducing a relapse into criminal behaviour. This is where the concept of small-scale detention facilities comes in, as it holds the promise of much more efficiently dealing with most of the (dynamic) factors that put offenders at risk of not reintegrating into the community and thus reoffending after release.¹⁰⁰

4. ‘New’ concepts and future trends

■ 4.1. *Small-scale detention facilities*

The Council of the European Union recently (on 16 June 2024) adopted a set of conclusions on ‘Small-scale detention: focusing on social rehabilitation and reintegration in society’.¹⁰¹ These conclusions, amongst other issues, state the following:

Extensive research and good practices already existing in various Member States have shown that small-scale detention facilities are a means to shape individual approaches for social rehabilitation,

¹⁰⁰ UNODC, 2018, p. 8–9:

Programmes based on desistance theory emphasize long-term change over short-term control, recognizing that progress is unlikely to be direct or continuous. The focus is on supporting offenders to see themselves in a new and more positive light, with hope for the future. The approach assumes that the successful social reintegration of an offender rests on a combination of motivation and human and social capital. ‘Human capital’ refers in part to the capacity of the individual to make changes and achieve goals. ‘Social capital’ includes factors such as employment and supportive family or other relationships. ... Preventing recidivism requires effective interventions based on an understanding of the factors that place offenders at risk and make it difficult for them to successfully reintegrate into society. Some risk factors are dynamic – meaning that they are amenable to change – whereas other (static) risk factors are not. Static risk factors do not change over time; they include aspects such as, inter alia, an offender’s gender, criminal history, age at the time of arrest or prior mental health problems. Dynamic risk factors, on the other hand, can be addressed through interventions within or outside the criminal justice system.

Even this brief overview of the key challenges in recidivism prevention demonstrates the complexity of reducing recidivism, let alone measuring the effectiveness of various intervention programmes; it also underlines the fact that certain risk factors (static) cannot be eliminated or even reduced, and thus recidivism in this sense is also not absolutely preventable, just as crime itself. Nevertheless, clearly small-scale setups of detention facilities, compared to conventional large prisons from the very onset, provide far better conditions in which dynamic risk factors are more likely to be more meaningfully addressed.

¹⁰¹ Council of the European Union, 2024.

build individual relationships and shape social interactions, and prioritise building responsibility and mutual involvement through integration in the local community. Small-scale detention facilities are to be understood as structures with a smaller capacity compared to large-scale prisons. This smaller capacity can be beneficial in terms of living environment, dynamic security, social inclusions, and therefore a better atmosphere for reintegration. Detention houses – which are a form of small-scale detention – are to be understood as small-scale, differentiated, community-integrated facilities with suitable programmes focusing on social rehabilitation and reintegration, taking into account individual needs and with a focus on building autonomy and taking responsibility.¹⁰²

At this point, we do not want to detail what the adoption of said council conclusions mean for future trends (see section 4.3) but merely demonstrate what is currently common penological knowledge, so widely affirmed that it is thus explicitly accepted and strongly endorsed by the council. Although small-scale prisons/facilities have been around for decades throughout Europe, only more recently have they been (re)discovered and energetically pushed for as a ‘new’ concept, not only by scholars and practitioners but also especially by civil society actors and policymakers. Among these civil society actors, ‘Rescaled’¹⁰³ seems to play the most active and a unifying role, bringing together practitioners, other civil society actors, scholars, and people with lived experience (particularly, former prison convicts) to broaden the scope of small-scale application throughout Europe. They define (small-scale) ‘detention houses’ as any form of deprivation of liberty that replaces a large-scale prison.¹⁰⁴ The point is to replace large-scale prisons, not to broaden incapacitation capacities. In addition to these efforts – or better said, in line with these efforts – the movement pays particular attention to include in its activities individuals with lived experience, particularly former convicts, which brings us to the next topic of the analysis at hand – convict criminology (CC).

■ 4.2. *Convict Criminology: The penological core of ‘Lived Experience’*

Lived experience refers to the personal knowledge and insights gained through first-hand involvement in particular life circumstances or events.¹⁰⁵ In the criminological context, it encompasses a wide range of individuals, including people with convictions who have gone through the legal and penal systems, victims of crime who have been directly affected by criminal activities, and family members

102 Council of the European Union, 2024, p. 7.

103 See [Online]. Available at: <https://www.rescaled.org/>.

104 For full details, see WISH EU, 2023.

105 Buck et al., 2020, p. 286.

of those who are incarcerated or have been impacted by crime.¹⁰⁶ It also includes community members from areas with high crime rates or significant interaction with the criminal justice system; criminal justice workers such as police officers, social workers, probation officers, and prison staff; and advocates and volunteers involved in criminal justice-focussed organisations. The lived-experience approach emerged from the belief that traditional scientific research was inadequate for understanding all aspects of human phenomena and had become disconnected from human experience.¹⁰⁷ By integrating the voices of those who have directly experienced the criminal justice system, CC challenges traditional perspectives and promotes more effective and humane policies and practices.

CC represents a controversial perspective within the realms of criminal justice practice and criminological study, which challenges conventional views typically held by scholars, policy formulators, and political figures, many of whom often lack direct experience with the penal system and those within it.¹⁰⁸ Advocating for a major shift, CC underscores the importance of integrating the experiences and insights of convicts into scholarly and policy discourse, emphasising that the perspectives and voices of those with lived experiences of incarceration have been systematically marginalised, if not outright ignored or misrepresented, in both academic analysis and policymaking processes addressing crime and criminal justice issues.¹⁰⁹ For a genuinely comprehensive understanding of the criminal justice system, scholars must consider not just the perspectives of its designers and implementers but also the lived experiences of those impacted by it, as such inclusive insights are essential for the formulation of truly effective policies.¹¹⁰ Prisoners often lack the opportunity to speak about their lived experiences, a vital narrative that remains largely unheard.¹¹¹ CC emphasises that rather than speaking for prisoners or interpreting their words, we should enable a process where prisoners and former prisoners can express their own narratives and analytical viewpoints.¹¹² This approach not only empowers those within the criminal justice system but also has the potential to broaden the scope of social justice by bringing to light realities and insights that can reshape our understanding and response to crime and its consequences.

CC surfaced partly from the dissatisfaction academics with incarceration histories felt towards existing conceptions of crime and its management. These scholars – known as convict criminologists – scrutinise not only the definition

106 Naser et al., 2006; Wahidin, 2006; Bertrand-Godfrey and Loewenthal, 2011; Andonov, 2013; Buck et al., 2020; Feuerbach, 2022; Lindström and Toikko, 2022; Onyeneke and Karam, 2022.

107 Mapp, 2008, p. 309.

108 Richards, Newbold and Ross, 2009, p. 356.

109 Ross, 2017, p. 243.

110 Richards, Newbold and Ross, 2009, pp. 360, 362.

111 Ross and Vianello, 2020, p. 214.

112 Brich, 2008.

and proposed solutions to the crime problem but also the profound consequences these measures have for individuals labelled as criminals.¹¹³ Moreover, they are concerned with the unprecedented incarceration rates; overcrowding of prisons; scarcity of substantive programmes both inside and outside prisons; and structural barriers that perpetuate a cyclical pattern of re-offence and re-incarceration, thereby fuelling a revolving-door syndrome within the criminal justice system.¹¹⁴ CC has endured a spectrum of criticisms from both within its community and the wider academic landscape. Critics have raised concerns about its perceived lack of objectivity; its tendency towards making broad generalisations; and doubts about the academic rigor and stature of its contributors, questioning their compatibility with the traditional benchmarks of scholarly excellence.¹¹⁵ Although convict criminologists face criticism for their subjectivity, they do not claim to be 'objective'.¹¹⁶ Acknowledging their subjective viewpoints, they leverage previous experiences and critical perspectives to enrich and sharpen their ethnographic methodologies, and they emphasise conducting face-to-face, open-ended interviews that empower prisoners to share their stories in their own voices, enabling their research to effectively challenge prevailing theories, policies, and practices and advocate for beneficial policy changes.¹¹⁷

Prison lived experience offers unique perspectives that are often inaccessible from a normative standpoint. This is illustrated by the case of Mr Andonov in Croatia, wherein a convict approach revealed systemic flaws not evident from legal texts alone.¹¹⁸ By integrating first-hand experiences of those navigating the criminal justice system, the lived experience illuminates human dimensions and challenges often overlooked by pure normative legal analyses. These insights provide valuable understanding of the real-life impacts of laws and policies. Thus, Mr Andonov, after his release from prison, funded a non-governmental organisation called 'Angelus Custos'. This organisation has been active in supporting ex-convicts, and it has also been included in the Rescaled movement, with promising initiatives currently being discussed with the Croatian Prison Administration.¹¹⁹

The life experience of prisoners is also particularly important in the context of recidivism, because this group represents offenders for whom the penal system has evidently not fulfilled its function in terms of the resocialisation of offenders

113 Jones et al., 2009, p. 152.

114 Jones et al., 2009, p. 152.

115 Ross, 2017, p. 245.

116 Jones et al., 2009, p. 158.

117 Jones et al., 2009, p. 158.

118 Mr Andonov is a former prisoner sentenced to a long prison term of 21 years. He graduated from the Law Faculty in Split while serving his prison sentence. Based on his own experience, he exposes the shortcomings of Croatian prisons. For more, see Andonov, 2013.

119 For more details, see Angelus Custos [Online]. Available at: <https://angelus-custos.hr/> (Accessed: 6 August 2025).

and protection of the community from repeated criminal acts. The United Nations Office on Drugs and Crime (UNODC) recognised this in their study, emphasising that understanding recidivism to facilitate evidence-based countermeasures is crucial for the criminal justice system, and this aligns with the United Nations system’s commitment to rehabilitation.¹²⁰ This understanding involves identifying factors that increase the likelihood of reoffending and recognising the challenges offenders face in rehabilitation and reintegration into the society, alongside developing effective, consistent, and comparable methods to measure these successes.

The research findings highlight the critical role of prisoners’ lived experiences in shaping evidence-based policies crucial for supporting rehabilitation efforts.¹²¹ While consistent responses from prisoners suggest the feasibility of effective policy implementation, the majority reported minimal skill acquisition for successful reintegration into society, underscoring the urgent need for enhanced rehabilitation programmes.¹²² Furthermore, the significance of quality over quantity in social and economic support is evident, as increased family contact and reduced association with antisocial influences emerge as key factors in reducing recidivism rates.¹²³ Additionally, prisoners expressed a pressing need for improved preparation and support during the transition from incarceration to community life, emphasising the imperative of strengthening these transitional processes for facilitating successful reintegration.¹²⁴ Lived experience provides a broad, practical understanding from various stakeholders, while CC focusses on integrating these experiences into academic and theoretical frameworks. Together, they complement each other in promoting a more comprehensive and empathetic approach to criminal justice reform. By incorporating the voices of individuals who have directly experienced the complexities of legal and penal systems, lived experience sheds light on human dimensions and challenges that may be invisible from a purely legal standpoint. Furthermore, recognising the significance of prisoners’ lived experiences is significant for addressing recidivism and supporting rehabilitation efforts, as understanding the factors contributing to reoffending and the challenges faced by offenders in reintegrating into society is essential for developing effective policies and programmes. This brings us to the last section of this study, in which we consider the most recent European Union (EU) policy initiatives and (prospective) legislation that might reflect not only the ‘lived-experience’ approach but also especially the growing trend towards small-scaling detention facilities and away from large-scale prisons.

120 UNODC, 2022, p. 8.

121 UNODC, 2022, p. 33.

122 UNODC, 2022, p. 4.

123 UNODC, 2022, p. 5.

124 UNODC, 2022, p. 5.

■ 4.3. *EU policy and legislation*

As mentioned in both sections 1 and 4.1, the Council of the European Union adopted its conclusions on ‘Small-scale detention: focusing on social rehabilitation and reintegration in society’ on 16 June 2024.¹²⁵ The conclusions were largely based on the European Symposium on Detention Houses, which was held on 20 and 21 March 2024, organised by the RESCALED network under the auspices of the Belgian Presidency and focussed on small-scale detention and detention houses:

During the symposium, it was demonstrated that small-scale detention contributes to a better sense of community and better social integration and can lead to a lower recidivism rate. Such forms of detention therefore contributes to achievement of the objective of safer communities and lower criminality.¹²⁶

Besides endorsing the small-scale concept, The Council invites the Commission and the Member States to: 29. Work closely with the Council of Europe and other relevant organisations, institutions and agencies to reflect on optimal cooperation and awareness-raising with regard to the possibility developing and using small-scale detention, including detention houses, as an alternative to large-scale detention.¹²⁷

Perhaps even more interestingly (and predictive of future trends) is the section regarding the European Commission, in which the Council of the European Union appears to be setting the stage to make small-scale detention facilities a new focus of the existing and possible future EU funds. In this regard, one can anticipate that national prison administrations might become (even more) interested in implementing (or at least piloting) small-scale approaches, as might local communities, in view of the prospective benefits. This might also lead to increased interest in the civil society sector in regions of Europe where small-scale concepts are not (high) on the agenda, such as Southeastern Europe and its subregion, the Balkans. This might thus incentivise policymakers to provide for the necessary legal framework to implement small-scale detention concepts, as successfully done most recently in Belgium.¹²⁸

Clearly, neither Croatia nor Serbia, Moldova, or Bulgaria are Belgium, and, in many respects, the (legal and penal) culture differs tremendously in this part of Europe. Nevertheless, the civil society sector plays a most important and growingly influential role in shaping penal policy in the Balkans; it should be

¹²⁵ Council of the European Union, 2024.

¹²⁶ Council of the European Union, 2024, p. 6.

¹²⁷ Council of the European Union, 2024, p. 12.

¹²⁸ For more details, see De Bie, 2024.

interesting to see whether and how a movement will develop here towards small-scale detention facilities. The necessary first building blocks have already been laid by the council conclusions.

5. Challenges and opportunities for the Balkans

In this study, we investigated whether the concept of small-scale detention facilities might be the ‘holy grail’ of resocialisation (and thus prison reform) in the Balkans. There is little doubt that, as a concept and also as a practice, ‘small-scale’ is superior to ‘large-scale’ when it comes to the principles of resocialisation and normalisation; research and best practices also highlight the advantages of said approach. Currently, when trying to analyse or even conduct basic assessments of the prospective and potential impacts of small-scaling in the Balkans, one faces lack of data and methodological pitfalls on every step of the way. Therefore, analysis of penologically relevant facts and figures is inevitably limited to a descriptive assessment of basic trends in convictions, prison populations, recidivism, and probation. Perhaps the most important finding is the most obvious and most basic one: The region, despite lower crime rates (compared to WE), has higher incarceration rates, justifying a focus on meaningful alternatives to large-scale prisons. This will counter not just crime and recidivism but perhaps even more the human suffering that comes with serving prison sentences in large-scale facilities throughout the Balkans, most of which (compared to WE) provide sub-optimal conditions, to say the least.

Thus, a preliminary analysis of the distribution and size of prisons/jails in Croatia, for example, shows that most of the existing prison capacities are already small in scale; the situation might be similar throughout Southeastern Europe, which is characterised by many small-population and small-sized countries. In that sense, the region potentially has the necessary setup already in place to allow at least the piloting of several small-scale detention facilities, ideally in several countries and applying comparable setups, while tracking their development and impact via continuous evaluation research. If combined with strategical partnerships with penal institutions and experts from other parts of Europe, where the small-scale concept has already been successfully implemented, the Balkans might potentially discover a ‘holy grail’ of resocialisation in the form of small-scale detention facilities. The future of prison reform in the Balkans indeed looks bright, whereby it will eventually be determined by political will and courage, particularly in view of rising penal populism. If, through this study, we have managed to provoke a few constructive thoughts – and perhaps opened up a discussion that might be of interest to scholars, practitioners, policymakers, civil society actors, and all those involved in creating penal policy in Southeastern Europe, particularly the Balkans – then we have fulfilled the goal of our work. However,

even if we managed to achieve none of the aforementioned, we hope to have at least spread the news about concepts and developments that have thus far been largely neglected in scholarly publications in the Balkans, while defining the basic terms and highlighting most recent EU policy and normative developments.

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YEVHEN OLEHOVYCH KHARYTONOV* –
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History of Codification in Private Law in Ukraine: Experience, Problems and Prospects

- **ABSTRACT:** *One of the initial methodological imperatives for studying private law in Ukraine is the understanding of law as a phenomenon inherent in Western European culture (civilisation), later adopted by countries belonging to other civilisations. The classical model of private law is recognised as Roman private law of the ‘classical era’, interpreted through the prism of future modernisations of worldview and legal concepts. In comparing private law within the Western and Eastern European legal traditions, the author observes that private law is an organically inherent phenomenon in Western Europe, while in Eastern Europe, it is largely considered civil law. Various factors – political history, worldview, economic development, culture, outlook and legal system – have been shaped by both Western and Eastern influences, with the author concluding that Ukraine represents a ‘frontier civilisation’, a zone of intense interaction between different cultures. This, in turn, has influenced the formation of private law. Old Ukrainian law developed in two stages. The first codified act was the Russkaya Pravda. An analysis of its provisions related to real and obligation law reveals similarities to Roman law. It can be concluded that the private law tradition in medieval Ukraine specifically reflected the competition between Eastern and Western European legal traditions with the predominance of the former based on the customary law of Kievan Rus, while the latter gained dominance when the Statutes of the Grand Duchy of Lithuania was being created.*

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Since the late nineteenth century, most of Ukraine was governed by the laws of the Russian Empire, except territories under the rule of Austria-Hungary, Poland, Romania and others, where the legislation of the respective states – reflecting the Western tradition of law – remained in force. Therefore, the Ukrainian legal tradition was shaped by Western influence. The author observes that the ‘Great European Codifications’ affected Ukrainian law differently at various stages of its modern and contemporary history, noting that the Austrian codification exerted the greatest practical and doctrinal impact on the development and codification of civil law in western Ukraine. As for areas under Russian rule, the nature of law was determined by Russian jurisprudence’s reliance on the doctrine of German law and the German experience in codifying civil law. The Soviet period was characterised by the predominance of public law norms, by which the authorities sought to neutralise the perceived threat of ‘private law excesses’ in civil law regulation. Simultaneously, while regulating relations in a society that fundamentally denied the existence of private law, many of its provisions reflected the influence of bourgeois private law, mainly the German Civil Code *Bürgerliches Gesetzbuch* (BGB) – and through it – Roman private law.

The private law of independent Ukraine is characterised by a gradual return to humanistic values: legal support for individual sovereignty, guarantees of personal rights, equalisation of the legal status of the individual and the state, and assurance of the freedom to exercise one’s rights. The Civil Code of Ukraine of 2003 can be considered an act of universal application, regulating all property and non-property relations that are within the scope of private law, and are not governed by special legislation. The process of Ukraine’s integration with the EU has necessitated the adaptation of domestic civil legislation to the European concept of private law, a process that is unfolding through ongoing recodification.

- **KEYWORDS:** private law, civil law, frontier civilisation, codification, recodification, Western European legal tradition, Eastern European legal tradition

1. The Origin of the Codification of Civil and Commercial Private Law in the Nineteenth Century

■ **1.1. Preliminary Remarks**

One of the foundational methodological imperatives in the study of private law is to understand law as a phenomenon inherent in Western European culture (civilisation), later adopted by countries from other civilisations.

The classical model of private law is the Roman private law of the ‘classical era’ (first to third centuries), now considered through the prism of evolving worldviews and legal concepts.

When evaluating the role of private law within the Western and Eastern European legal traditions, it is imperative to recognise that private law is organically inherent in Western Europe, while in Eastern Europe, it is more commonly understood and assessed as civil law.

■ 1.2. *Historical and Cultural Context*

The study of the historical and cultural context of private law codifications in Ukraine cannot begin solely with the nineteenth century. At that time, Ukraine had effectively transformed into a ‘civilisational frontier’, a ‘frontier’, a formation that began after the conquest of the Kievan Rus lands by the Tatar-Mongol horde. The concept of the ‘frontier’ was first introduced in 1893 by Professor Frederick Turner of the University of Wisconsin. Contemporary researchers typically refer to American scholar Owen Latimer’s 1940 definition, which describes the frontier as a zone of intense interaction between different ‘adjacent’ cultures.¹

Ukrainian researchers use the term ‘frontier’^{2,3}.

The authors proceed further from the understanding of the ‘frontier’ as a zone of intense interaction between different cultures – the ‘frontier of civilisations’, where, under certain conditions, specific ‘frontier civilisations’ may emerge.

The characteristic features of a frontier civilisation include the competition, interaction or mutual influence of values, which ultimately leads to the displacement of certain values by others or their symbiosis. Such competitions typically occur in a ‘peaceful manner’, as a result of which the frontier civilisation voluntarily adopts the values of a dominant culture. However, victory in the ‘competition’ between civilisations can also be achieved through the use of force, political, economic and psychological pressure. In such cases, the worldview of society is distorted, and civilisational values and interests are forcibly replaced, potentially leading to the destruction of the weaker civilisation.

Considering the ‘value basis’ of the concept of law, which aims to ensure individual sovereignty, it is imperative to emphasise the ‘Western tradition of law’, that is, the legal values, concepts, categories and institutions inherent in Western European civilisation, grounded in the worldview, culture and outlook of the Western world, which can be traced back to Greek and Roman antiquity.⁴ It is on the basis of the Western tradition of law that private law has been formed and exists as a concept inextricably linked to Western European civilisation.

1 Chornovol, 2016.

2 Chornovol, 2015.

3 Vermenych, 2024.

4 Popper, 1994.

■ 1.3. *Problems of Ukraine's Civilisational Orientation*

As a result of many factors, Ukraine, having existed for several centuries as an independent state – Kievan Rus – later transformed into a group of state entities, and even later, after losing its independence, became part of the Russian Empire, then the Soviet Union, regaining statehood only in 1991. Accordingly, its political history, worldview, economic development, culture, outlook and legal system have been strongly influenced by both the West and the East. These circumstances have shaped Ukraine's civilisational orientation and the development of its private law tradition.

Historical monuments testify to the contacts between Kievan Rus and Rome, including indirect connections through the Celts, with whom Ukrainians maintained political ties.⁵

Kyiv also had active relations with Constantinople. In the 1530s and 1540s Justinian I negotiated with the Ants, inviting them to ally with Byzantium in defending against the Bulgarians. Contacts intensified in the ninth century, when several Russo–Byzantine treaties were concluded to restore trade, disrupted by the 860 war. The Tale of Bygone Years contains the texts of four Russo–Byzantine treaties of 907–971, which comprise provisions of international, criminal and private international law, in particular, rules governing inheritance procedures for Rus who served the Byzantine emperor. These treaties reference both Byzantine law and 'Rus' laws', indicating that these legal orders were connected.

For a long time, Ukraine existed in a zone of competition between Western and Eastern Europe. In the Middle Ages, the term 'West' traditionally meant Western (Latin) Europe, located to the west of the Galicia–Volhynia principality, while 'East', depending on the situation, implied either Byzantium or Moscow.

Ukraine's cultural contacts were unique in that they were largely indirect with both the East and West. In Kievan Rus, Byzantine sources were perceived mainly through Bulgaria. Catholicism and the Counter-Reformation were established through Poland, and classicism through Russia. I. Shevchenko perceives this as a certain weakness and advises not to repeat the mistakes of the past, but establish direct contacts with the broader world at all levels.⁶

These processes developed later, facilitated by the lack of territorial unity and the division into Left Bank and Right Bank regions.

Along with the concept of Ukraine's 'East–West' place, the nation is also characterised as a 'country of borders', reflecting the influence of European tradition from the West, Russian tradition from the East, and Central Asian tradition from the South.⁷

5 Shelukhin, 1929.

6 Shevchenko, 1996, p. 7.

7 Rudnytsky, 1994.

However, it is important to note that the so-called West, East and South are represented by countries that are themselves marginal entities with rather ambiguous historical realities: Russia cannot be considered the classical East, Turkey as the South and Poland as the West. Therefore, it seems logical to discuss some general guidelines and structural elements.⁸

The problems that have arisen in this regard are multi-dimensional,⁹ most notably the influence of the Greco-Byzantine East on the spiritual tradition and the Latin West on the socio-political structures of Ukraine-Rus.¹⁰

The fact that Rus could choose between 'Greece (Byzantium) and Rome',¹¹ and opted for 'Greece' predetermined Ukraine's subsequent orientation toward Eastern European civilisation, its affinity for 'Greek-Slavic' literature and to some extent the limitation of its active interethnic relations to the Greek-Slavic world.¹²

The adoption of Christianity in its orthodox (Orthodox) form signified a political and cultural rapprochement with Byzantium, affirming Ukraine's belonging to European civilisation. With the introduction of Christianity, church structures began to evolve rapidly, and the number of monasteries increased, which further facilitated the spread of Byzantine (i.e. modernised Hellenistic) culture.

Some researchers believe that Christianity, particularly in its Eastern rite, not only had a profound influence on Ukrainian culture, but also substituted state institutions for many generations, as social movements, liberation wars and uprisings were shaped by religious influence.¹³

However, regarding the formation of Kievan Rus' civilisational orientation following the election of Orthodoxy as the state religion,¹⁴ it is worth noting that it did not immediately become a worldview, as it had to compete for a long time with local customs and traditions.¹⁵

■ 1.4. *Medieval Ukraine between East and West*

During the Mongol rule, the Moscow Kingdom, which had previously functioned as a Turkic appendage (ulus) from a civilisational perspective, began to claim the legacy of the Kyiv principality as the successor of Byzantium.¹⁶ The 'Tatar trace' receded after Ivan III's authority was recognised by Tver in 1485, when he declared himself 'Tsar of All Russia', and the imperial doctrine began to be introduced

8 Davis, 1997.

9 Karmazina, 1998.

10 Yakovenko, 1998, p. 154.

11 Malanyuk, 1995.

12 Nalyvaiko, 1998.

13 Stepovyk, 1993.

14 Filaret, 1999.

15 Morachevskiy, 1997.

16 Shyrokorad, 2004, p. 7.

into the political consciousness of society. Moscow thus asserted its claim to the position of the 'third Rome', gaining support through organisational and ideological means.

Meanwhile, in Ukrainian culture, local and Orthodox traditions coexisted competitively. On one hand, the Zaporozhian Sich was regarded in the West as a 'Cossack Christian Republic'.¹⁷

However, the Cossacks' entire ritual life, particularly the election of the ataman and foreman, reflects the influence of strong archaic folk traditions dating back centuries and bears only a tangential relationship to Christianity, primarily reflecting the existence of mythological stereotypes within the Cossacks.¹⁸

Resistance to Orthodoxy was not limited to Zaporizhzhia, but was also evident in the local worldview in general. In particular, church-sanctioned marriage introduced by the Synod in the seventeenth and eighteenth centuries, was initially met with reluctance; even after its acceptance, the final validation of the marriage union remained with folk rites.¹⁹

A critical attitude towards orthodoxy as 'Byzantium' can be observed in Taras Shevchenko's poems, where the 'Byzantine faith' is opposed to God, who transcends all interfaith competitions.²⁰

This perspective most accurately reflects the essence of the Ukrainian worldview, the vision of its place in the environment: not aligning with the Eastern or Western branches of Christianity, but embracing Christianity as such, a faith in God the Creator that does not consider man as a slave.²¹

This underlines the distinctiveness of Ukraine's civilisational orientation as a European state, one that is constantly reflecting on its worldview, and explaining why Ukraine's cultural space is designated as a 'synthesis between East and West'.²²

From the twelfth–sixteenth centuries, a situation arose when Ukraine could deviate from Eastern European civilisation and move closer to Western European civilisation. In politics, attempts towards Western reorientation are associated with the so-called Golden Horde yoke; Danylo Halytskyi closed Europe from the Juchi ulus with his possessions, which was duly recognised by the Catholic world and contributed to the acknowledgement of Ukrainian statehood by Western Europe.

It was during this period that differing approaches to the Golden Horde ('Juchi Ulus') emerged in the territories that later became Ukraine and the Moscow principality, which eventually transformed into Russia. In particular, the princes

17 Nalyvaiko, 1992.

18 Balushok, 1998.

19 *Ukrainska mynushyna*, 1994, p. 176.

20 Veretka, 1999, p. 38.

21 Kachurovskyi, 1993; Pahutiak, 1998, p. 97.

22 Lypynsky, 1995; Yakovenko, 1998, p. 154.

of Southern (Kyivan) Rus, Mykhailo of Chernihiv and Danylo of Halych, pursued a pro-Western (papist) policy in the mid-thirteenth century, supported by certain confessional circles. Notably, Metropolitan Petro Akerovych of Kyiv made a speech at the Council of Lyons in 1245, advocating for a joint crusade against the Mongols. The people also approved of this policy.

Alternatively, the princes of Northeastern Russia accepted Batu Khan's 'friendship' and avoided rapprochement with Europe. Alexander Nevsky emerged as a reliable leader of this policy. His actions are positively assessed in Russian historiography, unlike the efforts of Mikhail and Daniil.²³

In any case, the outcomes of such divergent approaches to the Juchi Ulus are well-known: for Ukraine, 120 years of Mongolian dependence were followed by integration into the European legal space, accompanied by the loss in statehood; for Mokva, it meant 240 years of obedience to Russia and the development of a strong despotic state, legal nihilism.²⁴

Attempts were later made to restore Ukraine's Western orientation, although due to geopolitical factors, the focus increasingly shifted to culture, art and religion. In particular, in the sixteenth century, Latin²⁵ and Polish poetry flourished, with their significance persisting even after the victory in the War of Liberation (1648–1656), when the Ukrainian book language gained official status. The linguistic landscape began to change only after 1705, as a result of the Russian tsar's increasing pressure on Ukraine.²⁶

In the early seventeenth century, several cultural developments aimed at rapprochement with the West. In 1632, the Kyiv–Mohyla College was established, which introduced a new, pro-Latin Baroque style of education. The Kyiv–Mohyla College became the first Ukrainian university where young people received a European-style education. In 1633, the Kyiv Cave Monastery printing house began publishing books in Polish and Latin. From the late fifteenth to the late sixteenth century, Ukraine moved away from the Byzantine tradition towards a pan-European culture.²⁷

Concurrently, a polemic unfolded between the Orthodox and Catholic churches, which in Ukraine acquired signs of social and national conflict, as reflected in the history of the Unions.²⁸

Nevertheless, the Union of Brest can be interpreted as a means of integrating East Slavic spiritual culture into European culture. In general, during the seventeenth to twentieth centuries, the Union played a positive role in developing

23 Gumilev, 1992.

24 Vovk and Otroshchenko, 1997, p. 93.

25 Yaremenko, 1987.

26 Shevchuk, 1998.

27 Shevchuk, 1999.

28 Shevchenko, 1996, p. 10; Dnistrianskyi, 1997; Khomchuk, 1997.

Ukrainian spiritual culture, while contributing to the preservation of its national identity.

■ 1.5. *The transfer of part of the Ukrainian territories to Moscow's rule*

In 1654, Moscow state entered into a military and political alliance with the Ukrainian Hetman B. Khmelnytsky, leading to Ukraine's accession to Moscow. In 1654–1657, the Hetmanate and Muscovy jointly fought for the liberation of Ukrainian territories from the Polish–Lithuanian Commonwealth. During this conflict, Moscow also attempted to annex Belarus and regain the Smolensk region. Under the separate Andrusiv Armistice of 1667, the Moscow state received the Smolensk region, Left-Bank Ukraine, Siversk land including Chernihiv and Starodub, and Kyiv – for two years – along with the adjacent territory on the right bank of the Dnipro River. Moscow–Polish relations were finally established with the signing of the ‘Eternal Peace’ treaty in 1686, under which Left-Bank Ukraine and Kyiv remained under the Moscow Kingdom. Under the terms of the treaty, Muscovy joined the ‘Holy League’ – an anti-Turkish coalition of European states that was formed during the war of Austria and the Polish–Lithuanian Commonwealth against Turkey that began in 1683.

For some time, Ukraine was perceived by Russia as a kind of bridge to Europe, particularly in the cultural field.

This perspective was reinforced by Tsar Alexei Mikhailovich's policy, which translated Moscow's Orthodox eschatological mythology as the Third Rome into a concrete political programme – to unite all Orthodox countries under his scepter and establish a new Byzantium – the Ecumenical Greek–Russian Eastern Orthodox Empire, with Moscow as its centre, and to assume the role of its emperor. The accession of Ukraine and Nikon's reforms (unification of church ritual and culture based on the Ukrainian model) could be seen as the first stage of this programme, especially since Ukraine and its Baroque culture symbolically linked Moscow not only to Greece but also to Western Europe.

The idea of ‘Kyivan heritage’ is also evident in the choice of the name ‘Russia’. As Norman Davies notes, the Moscow princes emerged from obscurity within two centuries of the Mongol invasion, appropriating the hereditary title of Grand Dukes of Vladimir in 1364. This prompted the Metropolitan of Kyiv to move his seat (residence) from Kyiv in 1300 to Vladimir on the Klyazma River and later to Moscow in 1308. Having served the Mongols in 1327 by suppressing the uprising of their main rival, the city of Tver on the Volga, Ivan Kalita and his successors, despite Dmitry Donskoy's victory over the Mongols in the Battle of Kulikovo in 1380, remained vassals of the Horde.

It was during this period that the Muscovites began referring to their state by the Greek term ‘Russia’, meaning ‘Rus’, and called themselves Russians. These

Muscovites had never ruled Kyiv, but this did not prevent them from claiming Moscow as the only legitimate heir to Kyiv's lands.²⁹

However, the significance, influence and longevity of the 'Kyivan heritage', and most importantly, its influence on Moscow's civilisational orientation, should not be exaggerated. Edward Keenan noted that when shaping his own imperial style, Ivan III deliberately avoided references to Kievan Rus, instead emphasising the kinship between Muscovy and Byzantium, and Moscow's continuity with the latter. Architects, coin minters and other specialists were invited from Renaissance Italy to transform Moscow from a provincial city into a magnificent royal residence: the buildings of the Moscow Kremlin were conceived as a carefully considered manifestation of the newly established dynasty's understanding of its essence.

■ 1.6. *The influence of the Church on the formation of legal consciousness of Ukrainians*

The events created differences in the development of legal consciousness among Ukrainians, depending on the predominance of Western or Eastern cultural elements. For centuries, the national forms of life, traditions and customs of people in the eastern part of Ukraine were assimilated by both state authorities and the Orthodox Church, which became a stronghold of social conservatism and anti-Ukrainian sentiment.

In western Ukraine, which for a long time was part of Austria-Hungary and Poland, the Greek Catholic Church helped the population preserve their individuality and maintain connections with Western culture. Accordingly, among the defining features of the population of Galicia are the historically rooted traits such as diligence, law-abidingness, managerial, determination and national patriotism, which, under qualified leadership, could form an effective basis for state building.³⁰

Being part of two empires with contrasting cultures, the Ukrainian people found themselves in a difficult situation: their cultural core was also divided into two subcultures: Eastern and Western. As a result, Ukrainians were rarely perceived as an integral entity.

Researchers have noted differences between the populations of Naddniprianshchyna and Galicia not only in language, psychology and church denominations, but also in their level of legal awareness.

Universal morality among the population of Greater Ukraine was largely preserved through deeply rooted traditions and customs. Therefore, it can be concluded that the national foundations in Naddniprianshchyna and Galicia were

29 Davies, 2000, p. 574.

30 Khomchuk, 1997.

similar, and the unifying factors among the people are particularly distinctive, partially mitigating regional differences.³¹

It would be an oversimplification to perceive confessional orientation and its influence as a West–East confrontation, assuming that Polonisation necessarily led to Catholicisation, and that geographic proximity to Russia contributed to the strengthening of Orthodoxy. It would be more accurate to characterise that Western and Eastern Christian traditions were interwoven across Ukraine.

In general, it can be concluded that while in the early Middle Ages, Kievan Rus, including Ukrainians, assimilated the Byzantine tradition, disseminating Greco–Roman culture to neighbouring territories, from the late fifteenth to the late sixteenth centuries, Ukraine became part of the broader pan-European context, a trajectory disrupted by the genocidal actions of Peter the Great.³²

After Ukraine's accession to Russia, its Western orientation, despite periodic efforts to maintain some independence, was forced to diminish, as the country was increasingly drawn into the historical development of the Russian Empire, which typologically positioned itself as the heir to Byzantium.³³

It is worth noting that Ukraine's worldview retains distinctive features and differences in the perception of Orthodoxy remain.

For example, until the middle of the seventeenth century, Moscow's culture was influenced by Byzantine, Bulgarian and Serbian cultures of the fourteenth to sixteenth centuries – the so-called 'second South Slavic influence', based on Isichism, a mystical movement in Orthodoxy that dates back to early Christianity and involves the deification of humankind through unity with God at the divine energy level. Orthodoxy in Ukraine in the sixteenth and seventeenth centuries endured the expansion of Jesuit Counter-Reformation Catholicism – placing Ukrainian culture simultaneously within the orbit of both Byzantine Orthodox and Roman Catholic cultures. This openness to external influences became a prerequisite for a new – Baroque – model of Ukrainian Orthodoxy. On one hand, it allowed Orthodoxy to be introduced into the broader pan-European cultural context, but on the other, encouraged the formalisation of spiritual life in Ukraine, distancing it from the patristic Orthodox tradition.

Ukrainian Baroque culture was based on anti-mystical intuitions, rationalism, Aristotelianism and the so-called 'second' (Counter-Reformation) scholasticism. Simultaneously, the 'second South Slavic influence' also shaped Ukrainian culture, although its duration was shorter than in the Moscow Kingdom, until the second half of the sixteenth century.³⁴

Therefore, 'Byzantine influences reached Ukrainian lands in several large waves – first through the Balkan Slavs, then directly through Byzantium, and

31 Vaskovych, 1998, p. 110.

32 Shevchuk, 1993, p. 90.

33 Shmorgun, 1998, p. 31.

34 Okara, 1999, p. 55.

after its decline, through early modern Greek literary and ecclesiastical wisdom. Byzantine influences constituted the specificity of Ukraine, but, on the other hand, made it part of a broader Eastern Christian community. This cultural and religious identity determined the political orientation in modern times. ...What allowed Ukraine to hold on to its national identity was the influence of the Catholic West... Ukrainians resisted these influences when they threatened their national and religious identity. ...The greatest paradox was that the West, which threatened to disintegrate Ukraine, ultimately became its barrier against the Russian threat and allowed Ukrainians to preserve their identity'.³⁵

■ **1.7. The first codifications of law: Russian Law and the Statutes of the Grand Duchy of Lithuania**

Old Russian law evolved in two stages. The first, dating back to the sixth–ninth centuries, marked the transition from causal to customary law, while the second (ninth–tenth centuries) from customary (oral) to written law. It includes the Russo–Byzantine treaties that enshrined the provisions of ancient Russian law of the early tenth century.

The first codified act was the Rus' Pravda. An analysis of its provisions relating to real and obligation law concluded that they are similar to Roman law. The general influence of Byzantine legal concepts on inheritance, marriage and family law is significant, indicating that while Russkaya Pravda was a product of ancient Russian lawmaking, it also reflected the influence of Roman law as transmitted through Byzantine interpretation, reworking certain principles and individual norms.

During the Mongol occupation, Ruthenian law continued to operate partially, while the influence of Byzantine law increased due in part to the role of the church.³⁶

However, the influence of Mongol customary law on Old Russian legal practice remained insignificant, and the Orthodox Christian tradition in Ukraine was still taking shape. Gradually, the Rus' Pravda was replaced by new legislation that initially resembled the Old Rus' law, but increasingly underwent modernisation.

■ **1.8. Statutes of the Grand Duchy of Lithuania**

To modernise the legislation, three statutes were enacted during the sixteenth century: the 'Old' statute in 1529, the 'Volyn' in 1566 and the 'New' statute in 1588.

The 'Old' statute was the first general code of the Lithuanian state, which also encompassed Ukraine. In terms of content and structure, it closely resembled Rus' Pravda. Therefore, it can be considered a partial reception of ancient Russian law. However, since its norms were no longer suitable for regulating the relations

³⁵ Hrytsak, 1998, p. 19.

³⁶ Lashenko, 1998.

of the developing feudal society, a commission was established in 1544 to draft a new statute.

Augustin Rotundus and Petrus Roizius, experts in law and history, played a key role in drafting the second statute of the Grand Duchy of Lithuania. Based on the Western European worldview, they advocated the expediency of using Roman law as a model and a source of auxiliary material. With their active participation, the provisions of the Old Statute were updated and various categories of Roman law were introduced.

In 1566, the second statute was adopted by the Sejm, extending its application to Volhynia, Podillia and the former Kyiv principality. Its structure and several provisions bear similarities to the Digest and the Code Justinian. In the authors' view, this represents a reception of Roman law, involving the adoption of Roman norms and rules and their adaptation to local conditions.

Roman law also influenced the 1588 statute, which regulates the relations of private land ownership, applicable to both landlords and peasants, and devoted considerable attention to contract law.

In general, the Statutes of the Grand Duchy of Lithuania emerged from a creative synthesis of existing Lithuanian legislation and judicial practice, provisions of Roman, German, Polish law, as well as the customary laws of Lithuania, Poland and Ukraine.

In general, the tradition of private law in medieval Ukraine specifically reflected the competition between Eastern and Western European legal traditions, with the former prevailing on the basis of the common law of Kievan Rus and the latter dominating during the creation of the Statutes of the Grand Duchy of Lithuania.

■ 1.9. *Eighteenth century: 'The rights by which the Little Russian people are judged'*

After Ukraine's accession to the Moscow state, the 'former rights', i.e. customary law, Polish-Lithuanian law and the Magdeburg Law, continued to be applied in the Hetmanate in accordance with the March Articles.

However, Moscow aimed to harmonise Ukrainian law with Russian law and gradually unify legislation. Therefore, a codification commission, headed by Judge General I. Borozna, was established by a decree dated 28 August 1728. After his death, the commission was led by the General Commissary Y. Lyzohub. Fifteen years later, the commission submitted a draft law in 1743, which was based on Roman and German sources, the Statutes of the Grand Duchy of Lithuania, Polish law, Ukrainian customary law and judicial practice.³⁷

The content of the 'Rights by which the Little Russian people are judged' was shaped by Roman law and its Byzantine interpretations, which is especially

37 Prava, za yakymy sudytsia malorosiiskyi narod 1743 roku, 1997.

evident in the order of presentation of the rules: marriage, guardianship, wills, inheritance by law, contracts and land matters. At the same time, Roman private law also influenced the regulation of property relations. The relevant sections distinguished between possession, ownership and easements. The legal regime of movable and immovable property was different, and the original and derivative ways of acquiring property rights were clearly defined. The right of ownership was protected through a reclamation action, identical to a vindication claim; session defense was allowed.

The influence of Roman law was also evident in the provisions on obligations, including the very concept of obligations, their classification, and the grounds for their occurrence. As in early Roman law, there was no clear distinction between public and private torts, implying that the initiation of criminal proceedings depended mainly on the will of the victim or relatives. Considerable attention was paid to contract law.³⁸

The tsarist government was dissatisfied with the draft since it differed from Russian legislation; therefore the law was never officially adopted. Meanwhile, the 'Rights by which the Little Russian people are judged' continued to be applied until the enactment of the Code of Laws of the Russian Empire, after which the use of local legislation was prohibited.

■ 1.10. 'Collection of Little Russian Rights of 1807'

Despite the creation of the imperial Code of Laws, there remained a need to update and systematise legislation that no longer met contemporary requirements, especially regarding the regulation of economic relations. Therefore, even during the compilation of the Code, the 'Collection of Little Russian Laws' was produced, with materials systematised regionally in Ukraine. On the Right Bank of Ukraine, the work was led by A. Povstansky, and on the Left Bank by F. Davidovych, under the general supervision of P. Zavadovsky.

The 'Collection of Little Russian Rights' comprised three sections, organised according to the institutional system (with some variations in the regulation of inheritance). In areas such as legal capacity, private property rights, easements, mortgages and possession, the influence of ideas inherent in bourgeois society was evident. This influence was particularly pronounced in the law of obligations, which established a well-regulated system of contracts. A characteristic feature of contract law was the principle of freedom of contract.

This reflects a high level of legal culture and technique, with the influence of Roman private law clearly evident. Not only were specific ideas, institutions and legal provisions adopted from there, but also the broader approach – marked by the richness and flexibility of the rules. In addition, the sources of the Collection of Little Russian Laws of 1807 included the Statute of the Grand Duchy of Lithuania

38 Boiko, 1999, p. 88.

(515 references), the Saxon Mirror (457 references), the Law of Helminth (224 references) and the Law of Magdeburg (58 references).

Therefore, the basis of the first draft of the Civil Code of Ukraine was essentially Lithuanian law, which itself was the product of a partial reception of Roman law in its Byzantine and Western European interpretations (derivative reception through Old Russian, German and Polish law), alongside German and Polish law, which reflected a reception of Roman law of the Western European type.

However, as the Russian government sought to abolish the existing Ukrainian legal system and extend Russian law to Ukrainian territories, in order to harmonise the legal systems of Ukraine and Russia and eliminate local peculiarities,³⁹ Ukrainian bills had little chance of being implemented.

From the late nineteenth century, most Ukrainian territories were governed by the legislation of the Russian Empire, shaped by Byzantine influences, which Russian imperial authorities attempted, largely unsuccessfully, to overcome by introducing the German concept of law.

This did not apply to the Ukrainian territories under Austria–Hungary, Poland, Romania, etc, where the legislation of the respective state was in force, reflecting Western legal traditions. Therefore, the Ukrainian legal tradition in these areas developed under Western influence.

2. Major European Codifications: Impact on Ukrainian Law

The ‘great European codifications’ that occurred mainly in the nineteenth and early twentieth centuries are of considerable interest from the perspective of using their experience, since they were carried out in circumstances relevant to Ukraine. Simultaneously, their impact varied across different parts of Ukraine and under different powers throughout its modern and contemporary history.

The Austrian codification exerted the greatest practical and doctrinal influence on the development and codification of civil law in the western Ukrainian lands.

■ 2.1. *The Austrian Code on Ukrainian lands*

It is believed that the views of Austrian legal scholars differed only slightly from those of their German counterparts.⁴⁰

However, the authors do not endorse this view. Despite the authority and influence of German jurisprudence, Austrian civil law of the eighteenth and

³⁹ Boiko, 1999, p. 240.

⁴⁰ Maidanik, 2009.

nineteenth centuries developed its own doctrine, as evidenced by the adoption of the Austrian Civil Code of 1811 (ABGB).⁴¹

The ABGB is characterised by a combination of critical rationalism and the classical values of Roman private law. Its concept and content differ significantly from the German BGB, as reflected in its structure, in the requirements to take into account the principles of natural law when determining the status of an individual, ensuring personal rights and interests. For example, § 7 contains mechanisms for addressing gaps in the law.

According to the ABGB, if neither the letter nor the spirit of the law provides a solution to the problem, the judge is obliged to refer to similar cases in which the law provides guidance, as well as to the principles of other laws related to the matter being considered. If in doubt, the judge must 'carefully weigh all the circumstances and resolve the problem on the basis of the principles of natural law'.

The ABGB's structure mirrors the Gaius' system of institutions, beginning with a brief introduction, followed by three parts regulating the legal status of the individual, rights in rem, and provisions common to personal rights and rights in rem.

Its underlying concept is deeply rooted in natural law and the ideals of the Enlightenment. It is characterised by the belief that customary law, which is largely outdated, fragmented and incomprehensible, can be replaced by a comprehensive state-sanctioned code that is logical, simple in structure and governed by clear and fair rules.

Despite its merits, the ABGB did not exert a significant influence beyond Austria. This is explained by political, historical, economic and other contextual factors.⁴²

The authors attribute this to the ABGB being ahead of its time, and although inferior in some aspects to other acts of this rank, it was conceptually more progressive. European civilisation was not yet ready to accept the natural-law concept, supplemented by the principles of Roman law, that underpinned the Austrian Code.

From the perspective of this study, it is important to assess the extent to which the ABGB concept influenced the updating (codification) of civil legislation in the Ukrainian lands.

Accordingly, it is imperative to assess the significance of the "Civil Code of Galicia of 1797" ('Civil Code for Eastern Galicia').⁴³

The 'Civil Code of Galicia of 1797' is considered one of the earliest codified acts in civil law 'not only in Ukraine or Europe, but also in the world, as an attempt

41 On the ABGB as a model codification, see Veress, 2023, pp. 196–199.

42 Zweigert and Kötz, 1998, p. 258.

43 Hrazians'kyi kodeks Vostochnoyi Halychsiyi, 1797.

to adopt the provisions of Roman private law, which took place in the Ukrainian lands'. Meanwhile, according to I. Boyko, discussions should focus on the 'Austrian Civil Code' and its testing in Eastern Galicia, rather than the 'Galician'.⁴⁴

The authors suggest that such differences arise from diverse 'historical and legal', civilisational and 'cultural' approaches to understanding the essence of similar phenomena.

From a historical and legal perspective, it is a document in the history of civil law; from the civilistic perspective, it is a product of codification, a legislative act regulating civil relations; from a cultural perspective, it embodies the legislative consolidation of the concept of private law in its natural-law interpretation; and from the perspective of legal technique, it serves as a test case for updating civil legislation to assess both its effectiveness and the adaptability of legal consciousness of the Eastern Galicia population.

It would be an exaggeration to claim that Ukrainian legal scholars contributed to shaping the doctrine of Austrian civil law. However, they played a significant role in adapting the Austrian civil law doctrine to the Ukrainian legal tradition. In particular, O.M. Ogonovskiy was the author of the first Ukrainian-language textbook on civil law in modern Ukrainian legal science.⁴⁵

Although the textbook focused on Austrian private law, his does not diminish its importance for the formation of Ukrainian civil law doctrine. S.S. Dnistriansky initially based his civil law research on the materials of Austrian legislation.⁴⁶

Later, in the 1920s and 1930s he directly examined the problems of 'Ukrainian private law'.⁴⁷

Although S.S. Dnistriansky is regarded as a representative of the sociological school of law, which attempted to weaken legal positivism by emphasising the social nature of norms and natural principles of law, he himself considered Austrian scholar A. Menger, whom he described as 'the creator of the scientific construction of the socialist state (popular workers' state)', as his predecessor.⁴⁸

Therefore, it may seem appropriate to view the development of the concept as part of the broader mainstream of legal research at that time, rather than as the creation of an original legal theory.

When assessing the influence of other European legal traditions on codifications in Ukraine, it is worth noting that the most popular model for imitation – the French Civil Code (Napoleon's Code) of 1804 – did not have a significant impact, even though the Code was extended to Poland after Napoleon's occupation. Although some Ukrainian lands were part of Poland in 1919–1939, Polish Republic

44 Boiko, 2016.

45 Romovs'ka, 2011, p. 107; Redzyk, 2004.

46 Dnistriansky, 1901; Dnistriansky, 1912; Dnistriansky, 1919.

47 Dnistriansky, 1926; Dnistriansky, 1934.

48 Koval, 2012.

policies did not provide for the organisation of codifications in the field of private law within these territories. One can only speak about a certain influence of the Napoleonic Code on the legal consciousness of the inhabitants, but even that influence was too brief to be significant.

Therefore, the Austrian tradition of private law and the codifications made in Austria were decisive in western Ukrainian lands.

With regard to Ukrainian lands under Russian rule, the development of law was determined by the fact that Russian jurisprudence was guided primarily by the doctrine of German law and the German experience in codifying civil law.

The BGB was adopted by the Union Council and approved by the Emperor in 1896. However, its enforcement was deferred until 1 January 1900, to mark the beginning of a new century with a new Civil Code.

The Code follows the pandect system, according to which it is divided into five books: general part, law of obligations, law of property, family law and inheritance law. Its key advantage is the comprehensive general part, which helps avoid repetition in regulating specific types of obligations and particular legal relationships. At the same time, the rules defining the legal status of a person were 'hidden' within the general provisions, representing a step back from the institutional system.

As a result of the debate between representatives of the Romanist (A. Thibaut et al.) and historical (K. F. von Savigny, R. von Jhering et al.) schools of private law, the BGB emerged as a symbiosis of Roman and German law. The first and second books reflect Roman influence, while the third, fourth and fifth are based on Germanic law.

The BGB includes several abstract provisions, enabling the application of its norms to relationships that arose later but remained unknown at the time the draft was prepared. However, the abstract nature of the norms and the complexity of the formulations make the Code difficult for non-lawyers to comprehend, the reason why it is often referred to as the 'code of scholars'.

An analysis of BGB's structural features shows that, while it incorporates elements of Roman law, these were significantly modified to account for the distinctiveness of 'Germanic' law, as well as the ideas of the historical school of law and the school of revived natural law. These modifications affected the structure of the Code (pandectic rather than institutional), its decisions and formulations. Nevertheless, these peculiarities do not diminish the recognition of the BGB's dual Roman and German genesis.

The German tradition also shaped the development of the doctrine of civil law in Ukrainian territories that were part of the Russian Empire. It is important to note that at this stage, the concept of 'Ukrainian civil law' remains conditional, as it was defined not by qualitative (national, subjective) features but solely by territorial characteristics, such as the place of birth, legal education, or the work

of the legal scholar. Therefore, the focus is on the Russian doctrine of civil law and the contribution of scholars who were born or worked in the Ukrainian lands.

Therefore, during the formation of the Ukrainian civil law doctrine in the eastern territories, it was influenced by civil law doctrines of the Russian Empire. Russian civil law theory, in turn, followed German legal thought up until the 1920s. This was facilitated by the depth of German research in philosophy and law, the authority of German legal scholars and the similarities in nineteenth-century Germany and Russia, where both experienced rapid economic development. This required appropriate legal support, primarily with respect to private law. Therefore, German legal scholarship held particular interest for the Russian Empire.

The adoption of BGB also held practical significance for the Russian Empire, as it informed the preparation of the draft Russian Civil Code. This raised questions regarding the essence of civil law, its foundations and the functions of civil-legal regulation. However, the development of civil law doctrine and the concept of civil legislation in the Russian Empire (including Ukrainian territories under its control at the time) remained incomplete, interrupted by the 1917 revolution. From that moment, the formation of the Soviet civil framework began, alongside the evolution of the concept of civil law within the Soviet system and the creation of Soviet civil legislation. In this context, the law was to be fundamentally 'civil' rather than 'private'. Moreover, Soviet authorities sought to equate the concepts of 'civil law' and 'civil legislation' to highlight the decisive role of the state in the creation and application of civil law norms.

During the Ukrainian liberation struggles after World War I, the concepts of law as well as civil legislation had yet to be established on Ukrainian frontier territories. One can only identify the most general principles of legal regulation in areas under Ukrainian control and those occupied by the Bolsheviks: in the first case, efforts focused on securing the rights of landowners (farmers), supporting private initiative, among others; in the second case, private property was abolished, 'war communism' was introduced and public interests were prioritised on Soviet-controlled territories.

From the outset, Soviet power vigorously destroyed the existing system of property relations and central institutions of private law. A characteristic example is the decree of the All-Russian Central Executive Committee (VTSIK) of 19 February 1918, 'On the Socialisation of Land', which declared that 'any ownership of land, subsoil, water, forests, and living forces of nature within the Russian Federative Soviet Republic is abolished forever'. However, only private ownership was abolished, with the state assuming control in its place. The abolition of private property also led to the suspension of inheritance. Specifically, inheritance was abolished in Soviet Ukraine by the Decree of 11 March 1919, and then reinstated by the Decree of 21 March 1919 (but with significant restrictions on the size of the inheritance, circle of heirs and the scope of rights that could be inherited: inherited property was transferred to heirs for use, not for ownership).

In Ukraine, the abolition of private law was somewhat delayed due to national resistance to Soviet rule. This was primarily related to state-building efforts during the Ukrainian People's Republic (UPR). However, efforts to align domestic legislation with European standards took place not only during the UPR but also under the Hetmanate of Skoropadskyi. These efforts are reflected in Pavlo Skoropadskyi's constitutional projects – the 'Letter to All Ukrainian People' and the 'Laws on the Temporary State Structure of Ukraine' of 29 April 1918 – in which private property was regarded as 'the foundation of culture and civilisation', emphasising 'full freedom of trade and ample space for private entrepreneurship and initiative'. Similarly, in the draft of the Basic State Law of the Ukrainian People's Republic in 1920, private property was proclaimed to be 'under the protection of the law'.⁴⁹

However, after the Soviet power was firmly established in Ukraine with Russia's 'help', 'civil legislation in Ukraine then developed in exactly the same way as the legislation of the RSFSR and followed the same paths, without any deviations in terms of time, as the RSFSR'.⁵⁰

The Russian Bolshevik centre controlled the Soviet national republics regardless of their status – whether independent (before the formation of the USSR) or union republics.⁵¹ This extended fully to the formation of the so-called 'republican' legal systems and the approach to reforming civil legislation, fundamentally reflecting the emergence of a new 'Soviet' frontier following the Soviet victory. From a civilisational perspective, it can be characterised as an advance of Eastern (Asian) culture, and from a legal perspective – as the imposition of public-law principles for regulating social relations across all spheres of human life. Soviet law influenced not only the Member States of the Soviet Union, but also the development of law in the so-called Soviet bloc states of Central Europe.⁵²

■ 2.2. *The First Socialist Codification*

Therefore, the early years of Soviet power were marked not so much by the creation of new civil law norms as by the dismantling of the existing system of property relations and the legal framework that governed them.

However, in 1921, the Bolsheviks were compelled to introduce the New Economic Policy (NEP) – a term used to distinguish it from the previous policy of War Communism. Like War Communism, the NEP extended beyond the realms of economic and social policies. Whereas War Communism represents the Russian Communist Party (Bolsheviks) leadership's efforts to implement the utopian ideas of the Communist Manifesto by Karl Marx and Friedrich Engels through a 'Red Guard offensive', the NEP era signified a retreat from expropriatory politics and

49 Rogozhin and Rummyantsev, 1996.

50 Landkof, 1948, p. 32.

51 Kulchytskyi, 1996, p. 31.

52 On its impact in Central Europe, see Veress, 2023, pp. 281–301.

renunciation of hopes for an immediate global communist revolution. It was characterised by the restoration of market relations, revival of economic activity and efforts to chart paths for the rapid modernisation of the USSR.⁵³

On 26 July 1922, the Decree 'On the Basic Private Property Rights of Citizens, Recognized by the Ukrainian SSR, Protected by Its Laws, and Defended by the Courts of the Ukrainian SSR' was issued. It contained practically important decisions, regulating certain types of contracts. However, it became increasingly evident that the need for the creation of a Civil Code was inevitable.

In Soviet Russia, work on the draft Civil Code began in 1922. Some scholars suggested that this was preceded by a significant preparatory period.⁵⁴ However, it is evident that such preparation could not have started before the clearly expressed 'party will'. Nevertheless, there was no need for lengthy preparation, given the marked similarities between the Civil Code of the Russian Soviet Federative Socialist Republic (RSFSR) and the draft Civil Code of the Russian Empire. In fact, the developers' task was to adapt the materials of the Code draft to contemporary needs and present them in a concise form, revised to meet the ideological requirements of the RCP(b). One particular requirement was the concentration of 'all means of production and the main instruments' in the hands of the Soviet state, the establishment of strict state control over commercial circulation and the abandonment of the main principles of private law. Additionally, the possibility of using bourgeois experience was rejected. Instead, the goal was 'not yield to the People's Commissariat for Foreign Affairs, which, by its position, pursues the policy of 'adjustment to Europe', but to fight this policy, to create a new civil law, a new attitude toward 'private' agreements'.⁵⁵ The Civil Code of the RSFSR, developed in line with these requirements, was adopted on 31 October 1922, and came into force on 1 January 1923.

The draft Civil Code followed the principles common to all Soviet republics. Therefore, the mentioned requirements were also mandatory for developing the draft Civil Code of the Ukrainian Soviet Socialist Republic (SSR), which was adopted on 16 December 1922, and entered into force on 1 February 1923.

At that time, Ukrainian legal scholars made efforts to draw on the achievements of earlier Ukrainian legal thought. In particular, the permanent commission for the study of Western Ruthenian and Ukrainian law at the Academy of Sciences of the Ukrainian SSR, chaired by Academician M.P. Vasilenko, obtained extensive materials from medieval feudal written and customary law in Ukraine. However, the commission's work was considered largely disconnected from the practical realities of the state-legal life of Soviet Ukraine. It was emphasised that

53 Kulchytskyi, 2010, p. 728.

54 Novitskaya, 1990.

55 Lenin, 1964, p. 412.

‘only documents and factual materials ... could be used to some extent in the process of scientific research work’.⁵⁶

Any attempt to draw on local historical traditions, discoveries or achievements was deemed to fail, as authorities prioritised the unification of Soviet civil codes. Therefore, at the 4th session of the 9th convocation of the All-Russian Central Executive Committee (VTSVK), alongside the adoption of the Civil Code of the RSFSR, at the initiative of the Ukrainian delegation, a decision was made to ‘entrust the Presidium of the VTSVK to address the governments of the contracting Soviet republics with a friendly proposal regarding the implementation/adoption of the codes adopted by the 4th session of the VTSVK also in their republics’.⁵⁷

At the end of November and the beginning of December 1922, the Presidium of the All-Ukrainian Central Executive Committee (VUTsVK) adopted several resolutions emphasising the necessity to develop adopt the Civil Code in Ukrainian SSR. Following a directive from the Presidium of the VUTsVK, the collegium of the People’s Commissariat of Justice (NKY) of the Ukrainian SSR, upon receiving the text of the Civil Code of the RSFSR, decided at its meeting on 2 December to use it as the basis for drafting the Ukrainian law. On 4 December 1922, the first draft of the Civil Code of the Ukrainian SSR was prepared and sent for approval to relevant departments. Given the urgency of this task, it was directly submitted to the Presidium of the VUTsVK, which adopted the version proposed by the NKY on 16 December 1922.⁵⁸ The final version of the code, as approved by VUTsVK, was reviewed by the collegium of the NKY of the Ukrainian SSR on 20 December 1922, and the text was published in official outlets in January 1923.⁵⁹

Since the ideological and methodological principles guiding their development were similar, the Civil Codes of the RSFSR and the Ukrainian SSR remained identical in structure and content. They consisted of identical sections: general part, property law, obligational law and inheritance law, and contained nearly the same number of articles: 435 in the Civil Code of the Ukrainian SSR and 436 in the RSFSR Civil Code. There were no differences in the structure of the sections and the titles of the chapters.

3. The main institutes of Civil Code of the Ukrainian SSR that defined its ‘anti-private’ essence

Some important features of individual institutes of the Civil Code of the Ukrainian SSR enabled the Soviet authorities to neutralise the threat of ‘private legal excesses’ in civil law regulation.

56 Babiy, 1984, p. 26.

57 Stenograficheskiy otchet, 1922, p. 21.

58 Usenko, 1987, p. 54.

59 ZP URSS, 1922, p. 780.

The general part contained norms dedicated to subjects, objects of rights, contracts and statutes of limitations. The subjects of civil law included citizens and legal entities (organisations). All citizens had civil capacity. However, Article 4 of the Civil Code provided for the possibility of 'court-imposed limitations on rights'. The objects of civil rights could only be property not excluded from civil circulation (Article 20). Excluded from circulation were, in particular: land, industrial, transport, and other enterprises; equipment of industrial enterprises, rolling stock of railways, sea and river vessels, and aircraft; transport, public communication structures, etc.; communal facilities (Article 22).

The section on 'Property Law' included norms related to ownership, construction rights and pledges. Article 52 of the Civil Code particularly mentioned state ownership (nationalised and municipalised), cooperative and private ownership. According to Article 54, the subject of private ownership could be any property not excluded from civil circulation. However, this democratic rule was limited by Articles 22 and 24 of the Civil Code, meaning that an entrepreneur, in practice, had no real opportunity to conduct activities based on their own initiative, free will or enterprise. Essentially, the right to private ownership was so narrowed that, ultimately, it could be considered to exist only as an exception.

To safeguard property rights, vindication and negatory claims were provided (Articles 59–61). However, former owners whose property had been expropriated under revolutionary law or transferred to the ownership of workers before 24 August 1922 had no right to reclaim the property (Note to Article 59). Therefore, regardless of the grounds for property deprivation in the early years of Soviet power, former owners had no chance of its return. To protect the right to state ownership, unlimited vindication was applied (Article 60).

Some civil law scholars recognised the existence of a separate institute of possession.⁶⁰ However, these were purely theoretical constructions, as Soviet legislation did not provide for the possibility of possessory protection.

The section of the Civil Code 'Obligational Law' in structure and logic resembled the corresponding provisions of Book Two of the German Civil Code (BGB). There were also many similarities in the content of these codes as well, with particular emphasis to contractual obligations. In particular, the conditions, procedures and the timing of contract conclusion, as well as the various types of contract, were defined in detail. As a means of securing contractual obligations, penalties (Articles 141–142) and advance payments (Article 143) were mentioned in the second chapter of this section of the Code. Notably, the conceptual approach to resolving this issue mirrored that of the BGB: the norms on pledge were included under property rights; penalties and advance payments were classified under the general categories of obligational law (more precisely, general provisions on contracts); and guarantees were listed among specific types of contracts. The

60 Kompaniyets, 1927; Venediktov, 1948.

content of the corresponding norms is also broadly similar (with the exception of ‘concisely’).⁶¹

Inheritance was possible both by law and by will, allowing certain freedom in testamentary dispositions (but with restrictions on the circle of heirs by will, requirements to comply with certain conditions in their selection and the compulsory portion).

When evaluating the first Civil Code of the Ukrainian SSR, it should be noted that while regulating relations in a society that fundamentally denied the existence of private law, it simultaneously reflected the influence of bourgeois private legislation, primarily the BGB, and through it, Roman private law.

Simultaneously, the Soviet state reserved the right to adjust the regulation of any relations without resorting to legislative changes. For this, there were effective ‘instruments’ such as Articles 1, 4 and 30 of the Civil Code, as well as Paragraph 5 of the Resolution of the Central Executive Committee of the Ukrainian SSR of 16 December 1922, ‘On the Enforcement of the Civil Code of the Ukrainian SSR’, which provided for an expansive interpretation of the Civil Code ‘in cases where it is necessary to protect the interests of the workers’ and peasants’ state and the working masses’.⁶² This created significant opportunities for subjective justice, which was evolving at that time and existed practically until the collapse of the USSR.⁶³

Finally, it should be emphasised once again that the civil codes of the Soviet republics were practically copies of the Civil Code of the RSFSR.

4. Civil Code of the Ukrainian SSR of 1963

After the abolition of the NEP,⁶⁴ the provisions of the Civil Code of the Ukrainian SSR (as well as those of other republics) became outdated. Specifically, the Code contained institutions that no longer existed in the Soviet Union in the 1930s (for example, Article 52 mentioned private property; Part III, Chapter X referred to various types of societies; and Article 15’s recognition of private institutions as legal entities, etc.). Consequently, the question of a new codification of civil law arose.

Reflecting the broader trend of reducing the independence of republics, Article 14 of the 1936 Constitution of the USSR vested the authority to issue the Civil Code under the competence of the Soviet Union. Discussions on these issues

61 Landkof, 1948, p. 378; Civil Code of the Ukrainian SSR.

62 Sobraniie uzakonenii, 1922, p. 780.

63 Chernilovsky, 1987.

64 Kulchytskyi, 1996, p. 344.

continued into the 1950s, with specific proposals put forth regarding the structure of the USSR Civil Code.⁶⁵

After the USSR Constitution was amended in 1957, the Code was no longer referred to as the Code, but rather as the Fundamentals of Civil Legislation of the USSR and the Union Republics. This change reflects the theoretical framework that had emerged from discussions on the overall system of Soviet law in general and the concept and essence of Soviet civil law in particular.

Although disputes regarding the concept and meaning of law had been ongoing even before the adoption of the first Soviet civil codes, Soviet lawyers defined the role of civil law only after its codification in the 1920s.

After the abolition of the NEP, the consolidation of planned principles in the Soviet economy, and the growing role of law as an 'organising factor' (reflecting the influence of the Eastern tradition of law), these disputes lost their relevance. The theory of a single economic law, which was conceived as a set of rules governing economic relations in Soviet society, became dominant. The term 'civil law' was removed from the curriculum and remained in scientific circulation only in its historical sense.⁶⁶

The term was revived at the first meeting of legal scholars in 1938, which sparked discussions on civil law and the concept of the USSR Civil Code. The participants concluded that civil law rules can regulate relations in the spheres of production and circulation; the subject of civil law encompassed not only property but also personal non-property relations; and that a single method of legal regulation can be applied to govern these relations.⁶⁷

The discussion continued until the early 1960s, focusing primarily on whether a separate Commercial Code should be created in addition to the Civil Code. Supporters of separating commercial law argued that the Civil Code and its 'accompanying' regulations should govern only relations involving citizens, while property relations between socialist organisations should fall within the domain of commercial law.⁶⁸ Civil law scholars proceeded from the expediency of unified regulation of property relations by the Civil Code, regardless of the composition of the parties involved.⁶⁹

The Fundamentals of Civil Legislation were adopted on 8 December 1961, marking the revival of civil legislation and its adaptation to new historical conditions. They were also aimed at updating Soviet civil legislation and initiating its new general codification. The adoption of the Fundamentals did not complete the

65 Venediktov, 1954, p. 26.

66 Ioffe, no date, p. 57.

67 O predmete sovetskogo grazhdanskogo prava, 1955, p. 57.

68 Tadevossian, 1959, p. 50.

69 Gordon, 1959, p. 68; Matveev, 1961, p. 70.

codification process but merely began it – thus representing the first stage of the codification work.⁷⁰

It was significant that during the first codification of civil legislation, the Ukrainian SSR – like other republics of the USSR – was formally free to choose a model to follow, whether the BGB or the Civil Code of the RSFSR. However, this freedom was later limited: Article 3 of the Fundamentals of Civil Legislation clearly defined the model to be followed. The civil codes of the union republics could not include provisions that contradicted the Fundamentals. They could develop and supplement the Fundamentals, but only to the extent that the regulation of a certain type of legal relationship did not fall within the competence of the USSR. As a result, the content of the Fundamentals was fully incorporated into the Civil Code of the Ukrainian SSR, which was adopted on 18 July 1963.

The main changes involved a renewal of both the content and spirit of the Code's provisions. In its general part, alongside the liberalisation of certain norms (for example, the *de facto* enshrinement in Article 4 of the Civil Code of the Ukrainian SSR of a principle known since Roman private law – 'Everything which is not prohibited by law is permitted'), some restrictions were actually strengthened. Article 5 of the Code strictly regulated the consequences of abuse of rights, establishing that civil rights were protected by law only when exercised in accordance with their purpose in a socialist society during the period of communist construction. At the same time, citizens and organisations were required not only to comply with the law but also respect the rules of socialist coexistence and the moral principles of a society building communism.

It is evident that this created broad opportunities for judicial discretion – although such discretion had to be based clearly on 'socialist legal consciousness'. Moreover, this discretionary scope was even broader than that granted by Article 1 of the 1922 Civil Code of the Ukrainian SSR, since the new provision applied not only to the exercise of property rights but also to personal non-property rights. The right of ownership was the only property right that survived in Soviet civil law. After the abolition of private property, the changes in the country's economic system, and the adoption of the new USSR Constitution, the classification of property forms was revised. The Code recognised the existence of socialist property and personal ownership of property by citizens intended to meet their material and cultural needs (Articles 87, 88). Article 89 of the Civil Code contained a definition of the concept of the right of operational management, although its essence was not disclosed.

The rules governing obligations predominated in the Soviet civil codes, particularly the Civil Code of the Ukrainian SSR of 1963. Changes to the system of obligations were influenced by multiple factors, notably the strengthening of command principles in the economy, the increasing role of planning, and the

70 Ioffe and Tolstoy, 1962, p. 4.

restriction of the parties' will and discretion in so-called economic contracts. Overall, the system of obligations of the CC of the Ukrainian SSR of 1963 in general remained largely traditional (except for the provisions related to strengthening of public law principles).

The absolute innovations of the Civil Code were the sections on copyright, the right to discovery and inventive rights, which previously had been regulated outside the scope of the Civil Code of the Ukrainian SSR of 1922.⁷¹ Segregating these rules into special sections marked a further departure from the pandect system of civil law, reflecting the logical evolution of the Soviet civil law system.

Interesting transformations occurred in inheritance law. While the Civil Code of the Ukrainian SSR of 1963 marked a step 'away from Roman and bourgeois civil law' in regulating property rights and contractual obligations, inheritance, on the contrary, drew closer to those traditions in several respects. It can be assumed that the Soviet state focused its main legal efforts on ensuring legal regulation of the planned national economy, where the remnants of 'capitalist relations' were largely eliminated by the 1930s. Instead, relations involving citizens remained largely marginalised (especially after the liquidation of private property). Therefore, some provisions of Roman and bourgeois private law were adopted, provided they did not contradict the socialist concept of allowing the possibility of succession in law.

Assessing the overall outcomes and trends in the codification of civil law in the Ukrainian SSR in the 1960s, it can be concluded that along with the increased incorporation of public law principles into civil law, and ongoing efforts to develop an original system of Soviet civil law, there was also a partial, indirect and subtle adoption of some provisions and ideas of Roman private law, as well as the acculturation of elements of Western European law.⁷²

5. Fundamentals of Civil Legislation of the USSR of 1991

The Fundamentals of Civil Legislation of the USSR of 1961, the civil codes of the Union republics adopted in the 1960s, and related regulations were designed to regulate property relations in a planned socialist economy. In general, the civil legislation of the Ukrainian SSR of 1960–1989 was characterised by the extensive introduction of public law principles into the domain of civil law. Without detracting from the achievements of Soviet civil law thought, in particular, national civil law, where such prominent scholars as M.Y. Baru, S.I. Vilnyansky, M.V. Gordon, S.N. Landkof, V.P. Maslov, G.K. Matveev, O.A. Podoprygora, A.O. Pushkin, and others worked, it should be recognised that Soviet civil law as a branch was

71 SZS USSR, 1928, p. 246.

72 Kharitonov and Kharitonova, 2020, p. 214.

actually in decline, being reduced to a set of civil legislative acts and their commentary and interpretation. In the second half of the 1970s, the USSR began to lose momentum, the national economy began to decline, and the economic slowdown and stagnation significantly impacted other areas of society.⁷³ In addition, Soviet ideologues were confronted with 'Eurocommunism', which emerged as a system of views within the largest communist parties in the capitalist world, breaking away from dogmatism, fanatical ideology and intellectual narrowness.

At the Plenum of the Communist Party of the Soviet Union Central Committee in March 1985, Perestroika, a new economic and social policy aimed at overcoming the crisis, was proclaimed, which was planned to be implemented using the capabilities of the existing social system.

This policy required legislative support and relevant theoretical research. Therefore, in the 1980s and early 1990s, the USSR turned to universal values such as 'civil society', 'the rule of law', 'individual sovereignty', 'private law' and 'market relations'. In this context, Ukrainian legal scholars examined law as an element of civilisation, exploring issues such as the legal status of an individual, the relationship between the individual and the state, the growing social and personal value of law, democratisation of society and the strengthening of the rule of law (M. I. Kozyubra, M. P. Orzikh, P. M. Rabinovych, M. V. Tsvik, etc.). The political thesis regarding the transformation of law from socialism to post-socialism emphasises a turn towards the individual, the establishment of post-socialist 'civil property', among others (although the proposed system of property forms – public, collective, personal – remained similar to the one that existed before).⁷⁴

In the early 1990s, significant progress was made in defining the foundations of the property institute, aligning it more closely with the ideas of the Western legal tradition. In studies of the legal aspects of relations between the individual, the state and society, human (citizen) rights were given prominence. It was emphasised that legal developments must advance not only from society to the individual, but also from the individual to society. The author analyses the legal prerequisites for the economic independence of an individual and examines the category of entrepreneurship, a concept that was largely absent from Soviet legal science. Simultaneously, there is a tendency in Soviet law to interpret entrepreneurial law as an updated economic law, accompanied by efforts to advance these relations beyond the scope of civil law regulation.⁷⁵ This position has been criticised (Matveev, 1992), yet the debate between 'civilists' and 'economicists' continued. Scholars also began exploring the issues of social protection of the individual in the context of establishing the rule of law and transitioning to a market

73 Gorbachev, 1988.

74 Mocherny, Dolishnyi, and Chernyak, 1991.

75 Mamutov and Gaivoronsky, 1990.

economy, and there is a growing interest in issues of justice and the enforcement of human (individual) rights, etc.⁷⁶

The USSR laws on enterprise, property, cooperation, etc. were adopted. However, much of the legislation was either declarative or, conversely, casuistic in nature. Proposals were made to create an all-Union Code of Laws, the USSR Economic Code, or to absorb the Civil Codes of the Union republics into the Fundamentals. However, these initiatives failed to take into account the political realities of the time, and therefore had little prospects of implementation.⁷⁷ Nevertheless, prior to the collapse of the USSR, an attempt was made to create the Fundamentals of Civil Law to preserve the legal framework for economic and social relations 'on an updated basis'.⁷⁸ The 1991 Fundamentals of Civil Legislation of the Union of Soviet Socialist Republics and the Republics⁷⁹ exemplified a recodification of Soviet civil legislation across two 'layers' simultaneously: the NEP era and the era of 'mature socialism' (albeit 'with a human face').

Since the USSR disintegrated in December 1991, these Fundamentals never came into force in Ukraine. Instead, Ukraine began developing its own legal doctrine and civil legislation. Ukrainian scholars have argued that new approaches require a new research methodology, an appeal to 'universal values' and, ultimately, the incorporation of achievements and ideas of Roman law and the Western European legal tradition in the formation of a new concept of Ukrainian civil law and codification.⁸⁰

6. Codification of civil law in independent Ukraine

After Ukraine declared its independence, the legislative acts of the USSR and Ukrainian SSR remained in force to the extent that they did not contradict Ukrainian legislation. The Civil Code of the Ukrainian SSR of 1963 continued to remain in force almost in full. At the same time, the range of subjects of civil law relations was expanded by the laws 'On Enterprises', 'On Business Associations', 'On Securities and the Stock Exchange', 'On the Commodity Exchange' and 'On Entrepreneurship', adopted in 1991. The law 'On Property' was also adopted, reflecting changes in views on private property and related relations in the spirit of market reforms.⁸¹

76 Sukhanov, 1989, p. 83; Khalfina, 1994; Kharitonov and Saniakhmetova, 1990.

77 Discussion of the draft Foundations of Civil Legislation, 1991.

78 Sadikov, 1991, p. 20.

79 Stefanchuk and Stefanchuk, 2009.

80 Kharitonov, 2008.

81 Transforming Property Relations: Materials of the Scientific and Practical Conference, 1997.

The general trend in these and other acts was a gradual return to humanistic values: providing legal protection for the sovereignty of the individual, establishing guarantees of personal rights, equalising the legal status of the individual and the state, ensuring the freedom to exercise one's rights, among others. There was also a partial acceptance of private law, reflected in the recognition of the need to protect individuals rights from violations (even by the state), and to restore private property rights.

The concept of developing Ukrainian legislation was based on new ideas about law, rooted in the concepts of civil society and the rule of law.⁸² According to this concept, civil legislation could be improved only through codification, which was to be carried out based on the new Constitution of Ukraine. These issues were developed, in particular, by the group responsible for drafting the Civil Code, established by the Cabinet of Ministers of Ukraine on 24 March 1992.⁸³

In the process of preparing the draft Civil Code of Ukraine, there was a debate over the advisability of creating a separate Commercial Code. Its supporters argued that the Civil Code would align with the Commercial Code, which is recognised by the legislation of many market economies.⁸⁴ Civilists argued that 'private law, which is civil law, should ... cover the legal regulation of all property market relations, including those related to entrepreneurship'.⁸⁵ Some scholars considered the creation of the Civil and Commercial Codes to be justified for practical reasons, but with a clear delineation of the subject matter of legal regulation.⁸⁶

There was also the issue of choosing models for codification. In particular, the discussion between 'civilists' and 'economicists' is also largely related to the choice of model: 'economicists' criticised 'civilists' for their reliance on Roman law;⁸⁷ they themselves favoured Soviet models for regulating economic relations.⁸⁸ During the discussion, it was noted that Ukraine's modern legal system is closest to the Romano-Germanic system, although it is significantly different from it. Concurrently, it was observed that the incorporation of elements from Anglo-Saxon law began intensifying, an objective pattern driven by the convergence of socio-political national systems across the European continent.⁸⁹ It was emphasised that all valuable achievements contained in the civil codes of Western countries should be included in the treasury of world civilisation.⁹⁰ The adoption of Roman

82 Shemschuchenko, 1996, p. 6.

83 Ukrainian Law, 1999, p. 15.

84 Znamensky, 1992, p. 46; Mamytov, 1990, p. 17; Matveev, 1992, p. 45; Chankin, 1993.

85 Shevchenko, 1996; Kuznetsova, 1996.

86 Opryshko, 1996, p. 6; Pidopryhora, 1992, p. 12.

87 Matveev, 1992.

88 Laptev, 1987; Gayvoronsky, 1990, p. 22.

89 Shemschuchenko, 1993, p. 10.

90 Bandurka, Puschkin, and Skakun, 1993, p. 48.

private law, as the primary source of most Western codifications, was also noted.⁹¹ Attention was further drawn to the provision on the relationship between international and national law, enshrined in the Law of 10 December 1991 on the effect of international treaties in Ukraine, should be taken into account.⁹²

Despite diverse opinions, several drafts of the Civil Code of Ukraine were created. The first version of the draft Civil Code of Ukraine consisted of seven chapters: 1 – General Provisions; 2 – Property Rights; 3 – Possession and Other Real Rights; 4 – Law of Obligations; 5 – Intellectual Property Rights; 6 – Inheritance Law; 7 – Private International Law. The draft Civil Code of 20 March 1996 was broader in scope, with eight books. In particular, Book 2, Personal Non-Property Rights of Individuals, and Book 6, Family Law, were added. The approach to the regulation of real rights changed, and Book 3, ‘Real Law’, was devoted to them, containing a chapter regulating the general provisions of real law, as well as two sections: ‘Property Rights’ and ‘Possession and Other Rights in Rem’. The range of relations regulated by Book 4, Intellectual Property Law, and Book 5, Law of Obligations, was expanded.

This approach was preserved in the draft Civil Code dated 26 August 1996. This version of the draft also took into account the provisions of the Constitution of Ukraine and provided more detailed regulation of various legal relationships, among other things.⁹³ The draft passed the first reading in the Verkhovna Rada of Ukraine in June 1997 and the second reading in 2000. Despite the renewed debate on the appropriateness of adopting the Commercial Code,⁹⁴ in December 2001 the Verkhovna Rada adopted the Civil Code in its entirety.

After the Civil Code was adopted, it became clear that its concept as a ‘unified code of private law’ had been undermined. In particular, a separate Commercial Code was enacted, which overlapped with the Civil Code in regulating the activities of entrepreneurs and ‘subjects of economic activity’, among others. Consequently, several issues were addressed from different legal perspectives, creating practical difficulties. The Family Code was also adopted separately, reflecting the persistence of the Eastern legal tradition in regulating family relations.

Nevertheless, the Civil Code of Ukraine can generally be regarded as an act of universal application, regulating all property and non-property relations that fall within the scope of private law that are not governed by special legislation. It is applied subsidiarily to relationships not regulated by legislative norms, based on the equal legal status of the parties involved.

91 Kharitonov, 1997, p. 269; Vasylychenko, 1996, p. 85.

92 Yegorov, 1992, p. 31.

93 Pidopryhora, 1996.

94 Mamytov, 2020; Kharitonov, 2020.

7. Future Trends in Legal Codification

Publications examining the significance of the 2003 Civil Code of Ukraine have highlighted its suitability as a foundation for modernisation civil legislation in response to contemporary challenges.⁹⁵ This allows lawmakers to focus on recodification rather than undertaking a full codification of civil legislation every time.

Ukraine's path towards integration with the European Community has posed a challenge, necessitating the adaptation of domestic civil legislation to align with the European concept of private law.

The Resolution of the Cabinet of Ministers of Ukraine 'On the Establishment of a Working Group on Recodification (Update) of the Civil Legislation of Ukraine' No. 650 dated 17 July 2019 and the corresponding Order of the Ministry of Justice of Ukraine No. 2771/7/1 dated 24 July 2019 resulted in taking this circumstance into account and transferring efforts in this area to the civil plane.

Since the realisation of these tasks is impossible without appropriate theoretical support, the study of ways and means of optimising the regulation of civil relations has become relevant in Ukraine. In this context, large-scale conferences were held on the problems of updating Ukraine's civil legislation in the context of its European integration aspirations: IX International Civil Law Forum 'Harmonization of Private Law Legislation of Ukraine with the Legislation of the EU Countries', Kharkiv, 11–12 April 2019; All-Ukrainian Scientific and Practical Conference 'Recodification of Civil Legislation and the System of Law of Ukraine in the Context of European Integration Processes', Odesa, 8–9 November 2019; All-Ukrainian Scientific and Practical Conference 'Shereshevsky Readings Recodification of Contract Law in the Context of Ukraine's Integration Development', Odesa, 6 December 2019. Relevant issues are also actively discussed by the legal community in the network.⁹⁶

Several monographs have also been published, addressing both general and specific issues related to the recodification of civil legislation in Ukraine.⁹⁷

Based on these research findings, the working group prepared proposals to introduce a number of changes to the Civil Code of Ukraine. The most important is the abolition of the Commercial Code of Ukraine, establishing the Civil Code as the sole primary source for regulating economic relations. The relevant law (On the Specifics of Regulating the Activities of Legal Entities of Certain Organizational and Legal Forms in the Transitional Period and Associations of Legal Entities) was

95 Kharitonov, 2002.

96 Spasibo-Fatyeieva, 2025.

97 Kharytonov and Kharytonova, 2019; Kharytonov and Kharytonova, 2020; Kharytonov and Kharytonova, 2021.

adopted on 9 January 2025. From the day the law comes into effect, the Commercial Code of Ukraine is deemed to have lost its validity.

Despite active debates on the legal aspects of updating Ukrainian civil legislation, issues surrounding its conceptual foundation, as well as its anthropological, 'subjective-value' aspects remain contentious. The main problems that need to be addressed in this area and the key points in the approaches to solving them are as follows:

First, the tendency to recodify is a characteristic feature of the legal existence of frontier civilisations, to which Ukraine typologically belongs. This tendency arises from the collision of legal traditions and cultures, as well as differing outlooks and values that legislators in these frontline states strive to harmonise.

Unfortunately, these factors are not always considered in states belonging to the Eastern tradition of law, which focus on a purely normative understanding of civil law, identifying it with the term 'civil law'. Meanwhile, the legal understanding, outlook and values of the population can become powerful forces either promoting or resisting the introduction of legal norms, thus achieving a positive effect of codifications and recodifications.

Therefore, when updating civil legislation, the values and related expectations of society, as well as its likely response to codification/recodification, should be considered. For example, the proposal to return the Family Code of Ukraine to the Civil Code does not sufficiently consider the distinctiveness of the national outlook. Instead, it would be necessary to update, along with the civil law, the family law of Ukraine with the appropriate adjustment to rules governing the determination of an individual's private legal status.

One of the primary objectives of updating (recodifying) civil legislation should be to define the private-legal status of the individual in a manner consistent with European standards. The existing norms of the Civil Code in this regard reflect the post-Soviet approach. Therefore, their improvement during the recodification process should be given no less attention than the regulation of contracts, among others. This approach aligns with recommendations from Western specialists for post-Soviet countries: when drafting new civil codes, these states cannot immediately reach the level of private-legal constructs that exist in Western countries, and should therefore advance gradually towards this level. Since the updating of civil legislation is proposed to be carried out primarily as a recodification, it is advisable to carefully study European concepts on this issue.

As noted by J. Smits, 'Even in the Netherlands, where with the entry into force of the new Civil Code in 1992, one could expect the clear establishment of the adopted norms, judges are given such freedom of action that these courts really shape the law. The formation of European private law by imposition does not correspond to the legal spirit of the time (*Zeitgeist*). Such imposition is a result of belief in centralized political power: the idea that the European Union can create

a single law characterized by legal certainty and predictability only through the introduction of identical texts...'⁹⁸

This suggests that the process of updating domestic civil legislation on the path to its Europeanisation is a complex and lengthy process, yet it can be entirely successful.

98 Smits, 2012, p. 219.

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A Federalism of European Integration Through the Continuous and Constant Work of the Euroregions

- **ABSTRACT:** *This study aims to analyse the economic, financial, and territorial cohesion policies of the cross-border regions of the European Union's Member States. The European Union as an organisation, which includes targeted and well-manageable regulations, constitutes an important step in the integration of a federal model for the regions, which needs further attention and development to strengthen European borders. The ongoing process of reclassifying regions, which have a border nature in the Member States of the Union, into Euroregions, is a reality that has been continuing for many years. The organisations that are formed particularly in national borders defining the features that characterise and underline an important role in the process of European integration from the nineties to the present day. Moreover, this is an evolving topic particularly for the history of European integration. This study uses a method based on comparative, doctrinal, and jurisprudential material, that attempts to provide new ideas in the sector of evolution of the law of the Union.*
- **KEYWORDS:** *Euroregions, European federalism, economic cohesion, cohesion policy, cross-border cooperation*

1. Introduction

According to Article 3 paragraph 2 of the Treaty on European Union (TEU):

the Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with

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respect to external border controls, asylum, immigration and the prevention and combating of crime.

The Union's aim is to promote its values and the well-being of its citizens.¹ Moreover, the Union shall integrate, increase, and strengthen territorial, social, and economic cohesion within its internal frontiers.²

Additionally, Article 174, paragraph 1 of the Treaty on the Functioning of the European Union (TFEU), deals with the harmonious development of the Union regions. More specifically, Article 174 of the TFEU mentions the following: 'the Union shall develop and pursue its actions leading to the strengthening of its economic, social and territorial cohesion'. Such regions are formed by rural areas and present demographic, economic, and natural disadvantages. Therefore, the Union shall aim at reducing disparities between the development levels of the various regions and the underdevelopment of the least favoured regions. According to Article 174, paragraph 3 of the TFEU, particular attention shall be paid to areas affected by industrial transition, as well as to regions '(...) which suffer from severe and permanent natural or demographic handicaps such as the northernmost regions with very low population density and island, cross-border and mountain regions'. The cohesion policy helps to ensure that there are no gaps between EU countries, as well as between different areas and regions of the same country. Thus, the cohesion policy through Structural Funds, that is, funding instruments of the European Union (EU), grants financial assistance to specific sectors, regions, or combinations of both, thus, offering advantages for all the territories of the Union, such as economic growth to create jobs, sustainable development and general protection for the environment, and smart cities, to resolve structural economic and social problems.³

Territorial cohesion represents a policy for the Union, particularly after the Treaty of Lisbon; the term territorial cohesion has been included for the first time in the Lisbon Treaty. Article 174 of the TFEU defines the Union's objective for strengthening its economic, social, and territorial cohesion, for an overall harmonious development.

A further step towards territorial cohesion was achieved through the 2014-2020 Interreg programming period. This programme played an important role in influencing many national or regional Structural Funds programmes with good practices shared by partners in their projects. Moreover, it adopted a regulation for

1 Blanke and Mangiamelli, 2021, pp. 1–41.

2 Piattoni and Polverari, 2016, pp. 8–22; Bachtler et al., 2017, pp. 38–49.

3 See also in argument for the new cohesion policy [Online]. Available at: https://ec.europa.eu/regional_policy/2021-2027_en (Accessed: 11 August 2025).

European territorial cooperation actions,⁴ to attribute in the field of economic, as well as social cohesion. Thus, Interreg is a key instrument of the Union supporting cooperation across borders through project funding. As its objective, cooperation includes finding shared solutions in fields such as energy, environment, research, as well as developing the potential of cross-border territories as a form of enlargement towards the Eastern countries.⁵ Thus, forms of cross-border cooperation are placed within the Union with the scope of strengthening and integrating projects between territories of the Member States of the Union. The Regulation 2022/613⁶ continued the above cooperation in the field of health care after the pandemic outbreak. It aims to invest money and collect resources through the REACT-EU project, helping in an exceptional way, the Member States that are in a state of economic transition primarily after the pandemic and the war outbreak in Ukraine.

The majority of internal borders and by extension Euroregions are concentrated in Central Europe.⁷ The Euroregions, analysed in the following paragraphs, have been formed and are moving in opposing directions, which are managed by the political processes of the various Member States at a European level. Euroregions are administratively decentralised⁸ which presents multilevel contradictions that generate and transmit crises. Such crises, as discussed in the following paragraphs, cause high levels of unemployment, social exclusion, and poverty, and therefore, require new forms of intervention at economic, institutional, educational, cultural, and cross-border levels.⁹

The models of territorial organisation at the domestic level are forms oriented towards a disadvantaged constitution of the territories and to the ethnic minorities that compose them. Thus, the communities that live on the border improve the economic, and social conditions of cross-border cooperation as a strategic objective that affects an area with different paths that constitute the Euroregions by restoring common socio-economic elements that promote the

4 Regulation (EU) No 1301/2013 of the European Parliament and of the Council of 17 December 2013 on the European Regional Development Fund and on specific provisions concerning the investment for growth and jobs goal and repealing Regulation (EC) No 1080/2006, OJ L 347, 20.12.2013, pp. 289–302.

5 Radaelli, 2002, pp. 105–136; Wassenberg, 2010, pp. 45–98.

6 Regulation (EU) 2022/613 of the European Parliament and of the Council of 12 April 2022 amending Regulations (EU) No 1303/2013 and (EU) No 223/2014 as regards increased pre-financing from REACT-EU resources and the establishment of a unit cost, OJ L 115, 13.4.2022, pp. 38–41.

7 Similarly, an area that was established through the cooperation of Member States of the Union was called La Grande Région, which brought together German (Saarland, Rhineland-Palatinate), Belgian (Wallonia), and French (Lorraine) territories, as well as the Grand Duchy of Luxembourg, France, Germany, and Switzerland; Wassenberg, 2007, pp. 98–100.

8 Telle, 2017, pp. 93–110, affirmed the ‘Euroregions as soft spaces’. Territorial construction depends on the ability to promote ‘coalitions with national and supranational hard spaces’.

9 Hermand, 2016b, pp. 77–86; Sonnicksen, 2022, pp. 114–133.

development of areas after creating relationships based on resources and projects in common, as in the case of Galicia and Northern Portugal.

Challenges are always open for the Euroregions, particularly in the political-administrative sector of the various Member States of the Union. Border regimes emerge as a practical and theoretical way to govern new, cross-border territories, as part of a regional question where topics of democracy, and citizenship are revalued. Realising a goal that creates a cultural identity that respects differences is the basis of the continuous challenges for the Union.

The above situation needs to be further explored, and therefore, the following paragraphs focus on the various forms of cross-border cooperation, structure of Euroregions, their importance at the European level, as well as the new strategic interventions proposed by the European Commission, on the subject under investigation.

2. Forms of cross-border cooperation in the European space

The first Euroregions were formed through a cooperation agreement between Belgium, Luxembourg, the Netherlands (in 1949), and the EuRegio (in 1958) in the Rhine area on the German-Dutch border.¹⁰ In the continental context, the Euroregions have begun and developed European regionalism as a spontaneous path of cross-border cooperation that evolves a legal framework that plays an important role at the level of the Union. It is a functional regionalism of a subnational cross-border association provided by the municipalities on the sides of the border. The Euroregions under the legal form provided for by the regulations have concluded cross-border agreements to establish cooperation.¹¹

Accordingly, the European Convention on Transfrontier Co-operation was signed in Madrid in 1980¹² with the additional protocol to further enhance cross-border cooperation at a European Level.¹³ The States concluded agreements between territorial entities and assumed competencies based on precise actions between European countries, thus, achieving and involving local, and

10 Vovenda and Plotnikov, 2011, pp. 49–55.

11 Perkmann, 2003, pp. 153–171.

12 European Outline Convention on Transfrontier Co-operation between Territorial Communities or Authorities Madrid, 21.V.1980 [Online]. Available at: <https://rm.coe.int/1680078b0c> (Accessed: 11 August 2025).

13 Additional Protocol of 9 November 1995 had as its objective the cross-border nature between European states and the right of territorial communities which conclude cross-border cooperation agreements under certain conditions; The Additional Protocol of 5 May 1998 was based on cooperation between territorial communities that were not directly bordering each other. In order to do so, the Additional Protocol of 16 November 2009 established the rules for the creation of Euroregional groups of cooperation that have legal personality (GEC).

regional realities for the borders, within framework programmes to integrate and strengthen regional, rural, urban development, environmental protection, and natural disasters' aid.

Agreements of regional character and appropriate state legislations have offered to local administrations the ground for further development of the cross-border cooperation. Consequently, European states have limited, and in some cases eliminated, obstacles concerning cross-border cooperation through a better distribution of competencies, instruments, and rules provided by such agreements and national legislation.

Many cross-border agreements have been reached for the stipulation of multilateral and/or inter-state treaties, thus creating the basis for financial support essential for cross-border cooperation. From 1990 onwards we have the Interreg programme, which has promoted European territorial cooperation¹⁴ financed by the European Regional Development Fund (ERDF),¹⁵ thus, realising actions not only between national and local actors, but also in overseas territories, as a regional and cohesion policy.¹⁶

This means that we have a manageable organisation on transnational, interregional, and ultraperipheral levels, which is affirmed through one or more of the following actions: (a) strengthening the institutional capacity of public authorities, in particular those in charge of managing a specific territory and stakeholders; (b) strengthening efficient public administration by promoting legal and administrative cooperation and cooperation between citizens, civil society actors, and institutions, particularly aiming to remove legal and other obstacles in border regions; (c) increasing mutual trust, in particular by encouraging people-to-people actions; (d) strengthening the institutional capacity of public authorities and stakeholders to implement macro-regional strategies and sea basin strategies, as well as other territorial strategies; (e) strengthening sustainable development.¹⁷ Additionally, such territorial cooperation projects form the structure of border

14 Wassenberg, Reitel and Peyrony, 2015, p. 32.

15 This body was established by Regulation (EEC) No 724/75 of the Council of 18 March 1975 establishing a European Regional Development Fund, OJ L 73, 21.3.1975, pp. 1–7, which is no longer in force, despite several amendments.

16 Lytvyn and Tyushka, 2020, pp. 146–183; Wesley, 2013, pp. 75–92; Studzieniecki, Jakubowski and Meyer, 2021, pp. 718–740.

17 Medeiros, 2011, pp. 141–158; See and compare Recitals 6–10 of the Regulation (EU) 2021/1059; Recital 14 of the Regulation (EU) 2021/1060 of the European Parliament and of the Council of 24 June 2021 laying down common provisions on the European Regional Development Fund, the European Social Fund Plus, the Cohesion Fund, the Just Transition Fund, and the European Maritime, Fisheries and Aquaculture Fund and financial rules for those and for the Asylum, Migration and Integration Fund, the Internal Security Fund, and the Instrument for Financial Support for Border Management and Visa Policy, OJ L 231, 30.6.2021, pp. 159–706.

areas governed by committees involving local actors at a higher level.¹⁸ Overall, such programmes were based on a design involving a European territorial policy, which strengthens common development strategies, the liberalisation of trade, and the economy of peripheral areas¹⁹ particularly in East Europe.²⁰

Regulation No 1082²¹ of 2006 places the existence of the Euroregions as a growth mat of a formalised structure for cross-border cooperation projects and as an instrument of the European Grouping of Territorial Cohesion (EGTC) with legal personality according to Article 1, paragraph 3, thus, allowing the funding of numerous cross-border projects and reducing the difficulties to cross-border cooperation between sub-state entities, differences between administrative systems, and businesses essential for integration projects. With the new Resolution of 15 September 2022²² the European Parliament has continued the work of the EGTC, supporting the industrial disadvantages of cross-border regions through a precise regional aid regime and a budget of approximately 0.26% for the cohesion policy of the European Union. Thus, they highlighted the challenges for cross-border

18 For the period of 2021–2027, see the Regulation (EU) 2021/1059; See Regulation (EU) No 1299/2013 of the European Parliament and of the Council of 17 December 2013 on specific provisions for the support from the European Regional Development Fund to the European territorial cooperation goal, OJ L 347, 20.12.2013, pp. 259–280; and also other information in the next site of Interreg [Online]. Available at: https://www.interregeurope.eu/sites/default/files/2024-07/Interreg_Europe_2021-2027_CP%20v3.1.pdf (Accessed: 11 August 2025).

19 Tkachenko, 2014, pp. 58–63.

20 Within the system of cross-border cooperation within Central and Eastern Europe (see in particular with the next states: PECO: Lithuania, Latvia, Estonia, Poland, the Czech Republic, Slovak Republic, Hungary, Slovenia, Romania, and Bulgaria) where, since 1989, they have created the Phare CBC Programme which represented an instrument for the application of a pre-accession strategy in the European Union for the states of this block. We also have the Tacis CBC Programme created for independent states (the NIS: Armenia, Azerbaijan, Belarus, Georgia, Kazakhstan, Kyrgyzstan, Moldova, Mongolia, Russia, Tajikistan, Turkmenistan, Ukraine, and Uzbekistan). In 2007, this project was changed by the ENPI (European Neighbourhood and Partnership Instrument); in 2014, it was revised to an ENI-European Neighbourhood Instrument; and in 2021, it was converted to a Global Europe programme according to the relevant Regulation (EU) 2021/947 of the European Parliament and of the Council of 9 June 2021 establishing the Neighbourhood, Development and International Cooperation Instrument-Global Europe, amending and repealing Decision No 466/2014/EU of the European Parliament and of the Council and repealing Regulation (EU) 2017/1601 of the European Parliament and of the Council and Council Regulation (EC, Euratom) No 480/2009 (Text with EEA relevance), OJ L 209, 14.6.2021, pp. 1–78. Additionally, in this spirit, there exists the Peace Plus Programme for Northern Ireland and the border region of Ireland which includes the counties of Louth, Monaghan, Cavan, Leitrim, Sligo, and Donegal; and a programme managed by the United Kingdom to support immigrants, small and medium-sized enterprises, for stability in the region. Despite the withdrawal of Great Britain from the European Union, the project has supported itself through the programme which will continue up to 2027.

21 Regulation (EC) No 1082/2006 of the European Parliament and of the Council of 5 July 2006 on a European grouping of territorial cooperation (EGTC), OJ L 210, 31.7.2006, pp. 19–24.

22 European Parliament resolution of 15 September 2022 on EU border regions: living labs of European integration (2021/2202(INI)), OJ C 125, 5.4.2023, pp. 114–123.

regions. Finally, the programme will be activated for the programming period of 2028-2034 and will be managed by EGTC for cross-border regions.

3. What was the structure of Euroregions?

Euroregions are the cross-border regions established at a level of the Union.²³ A Euroregion is formed by two subnational territorial entities, that is, from at least two different states.²⁴ Cooperation is an intended compromise that is used for the sides of the border and to a certain degree is institutionalised.²⁵

The objectives, constituting the cross-border cooperation initiatives, are considered marginal in territorial projects.²⁶ The Commission has referred to cross-border regions as parts of European integration.²⁷ The geographical profiles, forms of institutionalisation, and cross-border governance of such regions are variable and based on the Association of European Border Regions (AEBR). It is a cross-border cooperation that is regulated with the help of local and regional associations of border territories. Such associations participate in representative assemblies and are entities that have legal personality, such as the permanent secretariat, administrative, and resources;²⁸ or are private law entities with cross-border objectives, such as non-profit associations, which manage the territorial entities at the borders with the help of national provisions and interstate agreements.²⁹

23 Pereira Carneiro Filho, 2017, p. 7; See Recital F, paragraph 4 of the REPORT on the role of 'Euroregions' in the development of regional policy, 19.10.2005-(2004/2257(INI)).

24 Perkmann, 2003, p. 157; Medeiros, 2011, p. 143.

25 Rougier, 1999, pp. 394–396; Svensson and Nordlund, 2015, pp. 371–389.

26 Kramsch and Hooper, 2004, p. 3.

27 Communication from the Commission to the Council and the European Parliament: Boosting growth and cohesion in EU border regions, COM/2017/0534 final [Online]. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52017DC0534> (Accessed: 11 August 2025); Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions EU Border Regions: Living labs of European integration, COM/2021/393 final [Online]. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2021%3A393%3AFIN> (Accessed: 11 August 2025).

28 We speak about the Euroregion of the Spree, Neisse, Bober rivers; Frątczak-Müller and Mielczarek-Żejmo, 2019, pp. 8–34.

29 The Association Of European Border Regions (AEBR) in cooperation with the European Commission, Practical Guide to Cross-Border Cooperation, Third Edition, 2000 [Online]. Available at: <https://paperzz.com/doc/9042502/cross-border-cooperation---association-of-european-border> (Accessed: 11 August 2025) p. 62; Normally, some steps are required to be followed to create a Euroregional structure. Beginning from the time after cross-border cooperation relationships are established through citizens and private entities, thus, creating the conditions for related activities; after the regional institutions play a role in the process of creating the established network; and finally the constitution of the Euroregion for cross-border cooperation.

The agreements allow the transfer of responsibilities to a cross-border entity without overlapping the territorial entities from the management of projects within Interreg. If the agreement is of a private nature, it allows the participation of competent national authorities through Interreg. The governance structure, developed between the cross-border European states, requires the application of political agreements at different Eurolevels. Agreements of this type are signed between Member States, such as the Bayonne Treaty of 1995 between France and Spain, and the Karlsruhe Agreement of 1997 between Switzerland, Luxembourg, and Germany. These agreements contain stable and precise but difficult objectives to achieve, to better manage the Interreg programmes through the administrations involved.³⁰ Such programmes also include the European Grouping of Territorial Cooperation (EGTC)³¹ and the Euroregional Cooperation Group (ECG) together with the Third Protocol of the Madrid Convention as an act that established a cross-border legal entity.

The EGTC is independent of EU Member States, has legal capacity recognised at the regional level from Article 1, paragraph 4 of the Regulation (EC) No 1082/2006, and is based on the European Economic Interest Grouping (EEIG), a transnational cooperation body that was created in 1985.³² In EEIG they participate in at least two different Member States. According to Article 1, paragraph 2 of the Regulation (EC) No 1082/2006, its primary objective is to: ‘... facilitate and promote, in particular, territorial cooperation, including one or more of the cross-border, transnational and interregional strands of cooperation..., with the aim of strengthening Union economic, social and territorial cohesion’.³³

Article 3 of the Regulation allows an EU Member State to become a member of the EGTC.³⁴ Particularly, the EGTC must contain, within the limits of their com-

30 De Sousa, 2013, pp. 670–687.

31 See Opinion of the committee of the Regions on the proposal for a European Parliament and Council Decision on Community guidelines for the development of the trans-European transport network, OJ C 210, 14.8.1995, pp. 34–37.

32 Council Regulation (EEC) No 2137/85 of 25 July 1985 on the European Economic Interest Grouping (EEIG), OJ L 199, 31.7.1985, pp. 1–9.

33 See also in argument of territorial and Fund cohesion in: European Parliament resolution of 6 April 2022 on the start of the implementation of the 2021–2027 cohesion policy (2022/2527(RSP)), OJ C 434, 15.11.2022, pp. 28–30.

34 According to the Article 3bis of the Regulation, paragraph 1: ‘... an EGTC may be made up of members located on the territory of at least two Member States and of one or more third countries neighbouring at least one of those Member States, including its outermost regions, where those Member States and third countries jointly carry out territorial cooperation actions or implement programmes supported by the Union. For the purposes of this Regulation, a third country or an OCT shall be considered to be neighbouring a Member State, including its outermost regions, where the third country or the OCT and that Member State share a common land border or where both the third country or OCT and the Member State are eligible under a joint maritime cross-border or transnational programme under the European territorial cooperation goal, or are eligible under another cross-border, sea-crossing or sea-basin cooperation programme, including where they are separated by international waters’.

petencies under national law, EU Member States, local and regional authorities, bodies governed by public law according to the second subparagraph of Article 1(9) of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004,³⁵ and associations. The EGTC also involves two management bodies: the assembly of representatives; and the director, who represents the group acting on behalf of it.³⁶

Another typology is connected with territorial cooperation projects. For example, the EU and Council of Europe promote cross-border projects based on a model that involves the experiences of cross-border cooperation through forms of structured cooperation.³⁷

The regime of the ECG was established in the Union. It also results from the protocol of 2013 that is ratified by some states.³⁸ It is a model that is presented by different forms of association, simplified structures, and legal personality regulated by private law. It functions as an organisation, however, does not replace the cross-border cooperation which is the object of the agreement for the territorial authorities and participants. Certainly, the use of the principle of flexibility makes precise cross-border initiatives more suitable, thus, promoting ad hoc projects and strategy initiatives.

Small local councils up to state partnerships are included in the Euroregion associations. The intraterritorial structures of a diversified type are divided between Euroregions, macroregions, and mesoregions where only Euroregions have an extension that reaches 200,000 square kilometres.³⁹ Macroregions are closely connected areas with common need and challenges in the European context. They include the Baltic Sea, Danube, Adriatic-Ionian, Alpine and the Mediterranean.⁴⁰ Macroregions are distinguished from Euroregions, which usually

35 That is, '... any body: a) established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character, b) having legal personality, and c) financed, for the most part, by the State, regional or local authorities, or other bodies governed by public law; or is subject to management supervision by those bodies; or having an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities or other bodies governed by public law.'

36 European Grouping of Territorial Cooperation (EGTC), European Commission, The European Grouping of Territorial Cooperation [Online]. Available at: https://ec.europa.eu/regional_policy/policy/cooperation/european-territorial/european-grouping-territorial-cooperation_en (Accessed: 11 August 2025).

37 See also the Limited Liability European Grouping of Territorial Cooperation Karst-Bodva, which involved partners from Slovakia and Hungary.

38 We speak about Cyprus, Russian Federation, France, Germany, Slovenia, Switzerland and Ukraine.

39 Medeiros, 2013, pp. 1249–1266.

40 European Parliament resolution of 9 May 2023 on the role of cohesion policy in addressing multidimensional environmental challenges in the Mediterranean basin (2022/2059(INI)), where a investment in new infrastructures and technologies has been proposed with a precise way to recover the related material for waste and also promote the circular economy as management and limitation of plastic pollution and national waste.

refer to a transnational co-operation structure between two (or more) contiguous territories located in different European countries. Moreover, Euroregions are composed of Member States' strategies that do not establish cross-border structures. However, Eurocities, is the largest network of European cities, as they count over 200 large cities among their membership, having a precise character for the border territories. Finally, other further classifications are formed, such as urban areas, natural spaces involved in a sub-state, supra-regional type, thus, creating multilevel Euroregions such as Saarland-Moselle and Adriatic-Ionian.⁴¹

4. What is the role of Euroregions for the European Union?

Geographical disadvantages, as well as legal, social, economic, and cultural limitations, have resulted in different types of cooperation agreements. Euroregions related at a cross-border level are attempting to remove economic and social inequalities, resolve peripheral areas, and respond to social challenges, such as environment, health, and culture.⁴² The agreements, on a specific matter, represent a cooperation of a political commitment based on regular contacts between cities, which promote cultural links in an emblematic way and a coordination mechanism capable of managing crises and natural disasters.

The agreements involve local and regional authorities that provide for stable cooperation on a large-scale, such as in Germany we have Bavaria; for Italy the area of Friuli-Venezia Giulia and Lombardy; for Austria the Burgenland and Styria; for Hungary the Somogy, Vas and Zala.

The Interreg programme has solved problems and created cultural exchanges at a commercial level, thus, reducing barriers to mobilise work,⁴³ realising initiatives that favour institutional capacities to adapt administrative structures and train officials of cross-border policy to financing programmes through Structural Funds of the Union, rationalising public policies, and engaging the needs of subjects who live at borders and cross borders.⁴⁴ The lack of financial autonomy is certainly an obstacle considering that the projects depend on the government budget and the subjects are often based on political logic in harmony with various projects under consideration.

Moreover, Euroregions aim to offer specific services for territorial areas that are involved under the definition of cross-border structures such as airports,

41 Wassenberg, Reitel and Peyrony, 2015, p. 18; Camonita, Durà Guimerà and Noferini, 2020, pp. 513–540.

42 Engl and Wisthaler, 2020, pp. 467–485; Morawiec et al., 2001, pp. 56 ss.

43 Cismaş and Sabău, 2012, pp. 91–99.

44 Roche, Connan and Moulin, 2018, pp. 10–32.

hospitals, and/or transboundary parks.⁴⁵ Euroregions implement investment commitment projects, where cross-border cooperation develops relationships between suppliers and recipients, thus, improving entrepreneurship, the use of assistance programmes, business conditions, and regional economic development, which is located on the border.⁴⁶

Cross-border cooperation as a network of connections at the regional level in the economic, environmental, and social fields eliminates internal and external barriers that hinder local communities including cooperation strategies to integrate administrative procedures, religious, cultural, political, and social differences.

5. European tools strengthening Euroregions

The development of the European space through the objectives of an integration process for sustainable development is a factor of balance and competition at the European level. The outermost regions include borders where their role overcomes imbalances within the Union. The principle of subsidiarity distributes power between the central government and territorial authorities. Thus, through cross-border agreements it creates a possibility to fulfil the needs of the populations in both borders that are located.

The European legal system concerned with the Euroregions began in 1949 with the development of the community territory and continued in 1994 with

45 Wassenberg, Reitel and Peyrony, 2015, p. 71; Durà et al., 2018, p. 48. It is also worth mentioning the catalogues of 158 Euroregions that are active, whereas over 45 are not yet active, and adding cross-border structures such as the English Channel, airport of Basel, Fribourg, Mulhouse, Danube bridge, Helsinki-Tallinn tunnel, cross-border parks for the cross-border biosphere that are located in the Monviso area; Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions EU Border Regions: Living labs of European integration, COM/2021/393 final; European Parliament resolution of 14 September 2023 with recommendations to the Commission on amending the proposed mechanism to resolve legal and administrative obstacles in a cross-border context (2022/2194(INL)) [Online]. Available at: https://www.europarl.europa.eu/doceo/document/TA-9-2023-0327_EN.html (Accessed: 11 August 2025); Amended proposal for a Regulation of the European Parliament and of the Council on a mechanism to resolve legal and administrative obstacles in a cross-border context, COM/2023/790 final [Online]. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52023PC0790> (Accessed: 11 August 2025); The amendment proposal was based on making the workflow easier according to the rules set by the European Parliament and relevant resolution of 2023, considering the obstacles for a bilateral, international cooperation agreement between Member States that facilitate cross-border cooperation to dispose of administrative, legal issues of cross-border regions. The elimination remains with the domestic authorities and a cross-border coordination network as the exchange of practices of knowledge makes a continuous point of work for the coming years between the European Commission and the European Parliament.

46 Kurowska-Pysz et al., 2018, p. 182.

the communication Europe 2000+. The cooperation for the development of the European territory is based on a functional type of regulation that achieves the objectives of economic and social cohesion.

Euroregions present themselves as forms of territorial integration. Territorial integration in the European Union must be supported by suitable policy. The EU's Cohesion Policy fulfils this requirement. It helps each region reach its full potential, that is, improve its living standards and overall prosperity.

Euroregions contribute to borders and strengthen citizenship that transcends national borders.⁴⁷ The symbolic and political practice of territorial constructions represents a factor for Euroregions and challenges for actors who are involved at the domestic and European level, thus, building an institutional legitimacy for organisations through communication channels.

The European Commission has pursued objectives through the Euroregional experience as an expression of border regions' strengthening. Models of a multilevel governance are presented as an integrated approach of financial instruments and policies that are implemented in a flexible manner by the Member States.⁴⁸

The White Paper on the Future of Europe⁴⁹ has dealt with territorial cooperation, as did the 2017 Commission Communication on Growth and Cohesion in EU Border Regions,⁵⁰ thus, promoting cross-border projects to an action plan that coordinates borders and engaging initiatives, when they intervene in areas of competence of the Union through proposals and financing mechanisms.⁵¹

Cross-border cooperation in all sectors aims to overcome the obstacles of the regulated sectors of the Union, thus, coordinating and reducing the negative effects of the discontinuity of a territory from the administrative and legal perspective connected with border regions.

The different socio-economic levels of Euroregions play an important role in European integration for citizens, businesses, public authorities, and political ideas that find application in the 2017 communication, and implementing funding through the Interreg programme to a cross-border level of interoperability between electronic systems of public administrations and beyond, access to

47 Frątczak-Müller and Mielczarek-Żejmo, 2015, pp. 77–97.

48 Hermand, 2016a, pp. 97–109.

49 White Paper on the Future of Europe – Reflections and scenarios for the EU27 by 2025, COM/2017/2025 final [Online]. Available at: <https://data.europa.eu/doi/10.2775/66626> (Accessed:11 August 2025).

50 Communication from the Commission to the Council and the European Parliament – Boosting growth and cohesion in EU border regions, COM/2017/0534 final [Online]. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52017DC0534> (Accessed:11 August 2025).

51 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Better regulation for better results-An EU agenda, COM/2015/0215 final; Golberg, 2018, pp. 1–107; Simonelli and Nadina, 2021, pp. 849–860.

information, healthcare, employment for the vulnerable, social security, promotion of multilingualism, as a basis for the regions at the borders of the Union.⁵²

An open public consultation that began in 2020 has noted the first developments for border populations, as well as the negative effects that emerged from the report of 2021 owing to the pandemic. Moreover, the mechanism of public consultation has contributed to the improvement of the difficulties for inhabitants in border regions and cross-border initiatives.

The European Commission has already adopted the European Cross-Border Mechanism (ECBM)⁵³ in 2018 to carry out a legal instrument to identify practices to overcome administrative and cross-border legal obstacles.⁵⁴ Accordingly, the European Commission has followed initiatives such as solutions, which were introduced in 2019 to overcome obstacles concerning legal assistance before public authorities in border regions and beyond.⁵⁵

The European Commission as a screening method for the intensity of cross-border cooperation has contributed to the harmonisation and integration of the Euroregions.

Member States measure economic support through Structural Funds and existing agreements for the cooperation of a common legal framework. Moreover, they act effectively to administrative and legal constraints linked at the national level to control border tests as a processing act that incorporates binding acts. Finally, bilateral contacts are considered to facilitate the provisions of a national type at the cross-border level.

52 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: EU eGovernment Action Plan 2016-2020 Accelerating the digital transformation of government, COM/2016/0179 final [Online]. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52016DC0179> (Accessed:11 August 2025); Commission moves towards an effective public administration that includes, and provides end-to-end digital public services of a personalised and borderless nature. Thus, the general nature has aimed to propose effective tools and measures for border regions for citizens providing information to public authorities irrespective of their country of origin as an automatic tool of public authorities.

53 See European Parliament: Proposal for a Regulation on a Mechanism to resolve legal and administrative obstacles in a cross-border context [Online]. Available at: <https://www.europarl.europa.eu/legislative-train/spotlight-MFF/file-mff-mechanism-to-resolve-cross-border-obstacles> (Accessed:11 August 2025).

54 Proposal for a Regulation of the European Parliament and of the Council on a mechanism to resolve legal and administrative obstacles in a cross-border context, COM/2018/373 final – 2018/0198 (COD); Sielker, 2018, pp. 219–239; Chilla, 2023, pp. 140–153.

55 Similar are 2019 project to overcome the administrative obstacles of automatic mutual recognition for the qualification of doctors that hindered the operation of a hospital located in Cerdanya, that is, a Spanish-French cross-border structure in the form of the EGTC and European Parliament resolution of 11 September 2018 on boosting growth and cohesion in EU border regions (2018/2054(INI)), OJ C 433, 23.12.2019, pp. 24–30; See also b-solutions [Online]. Available at: <https://www.b-solutionsproject.com> (Accessed:11 August 2025).

6. Conclusion

As discussed in previous paragraphs, a cooperative legal presence, as well as the principle of subsidiarity, are necessary tools for further collaboration and integration of the EU Member States at a regional level and particularly in border and cross-border Euroareas.

More precisely, we noted in Article 174 that the border regions, considering their rural and geographical disparities, are places that have a different level of economic growth. Moreover, they present linguistic diversities, as well as advanced competition in several fields.

Clearly, bilateral and multilateral agreements, as well as the principle of subsidiarity, offer an opportunity for the cultivation of European border areas through pyramid-type structures at the regional level to reduce distances, economic, cultural, and political diversities and guide legal choices towards a cross-border exchange for neighbouring countries, beginning with cooperation and joint actions.

In summary, the Euroregions are recognised as a symbol of a common life. They can linearise the diversities, by adopting the legal and policy tools, as aforementioned, to succeed in a full advantageous journey of continuous nourishment through new experiences. Supranational actions likely represent the only possibility in the future European federalism, that is, a terrain of continuous European integration that carries out the principles and values of the European Union.

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Measures of Cross-Border ‘Protection of Adults’ (Guardianship, Curatorship, Incapacitation or Similar, and Register): Development of Polish Law and EU Proposals of 2023

- **ABSTRACT:** *In 2023, the EU Commission announced a proposal for an EU Regulation on the international protection of adults. In terms of EU treaties’ terminology, these are areas of judicial cooperation in civil matters. The idea of those intra-EU legal solutions generally presupposes making the Hague Convention of 2000¹ applicable in all EU Member States. The objective of this legislative initiative is to issue a supplementary EU regulation concerning domestic jurisdiction and the recognition and enforcement of foreign judgements. It is necessary to discuss and evaluate them in particular from the perspective of the current law of a Member State (e.g. Part Four of the Civil Procedure Code), as well as to indicate the global international agreements (that is, the 1905 and 2000 Hague Conventions and numerous bilateral conventions) and the Act of 2011 on Private International Law. In the current conflict-of-law state of play (e.g. in Poland, without applying the 2000 Convention), Articles 1106[1] and 1107 of the Civil Procedure Code (after the 2009 amendment) are of key importance for determining national jurisdiction (international jurisdiction of courts) in incapacitation cases and guardianship or curatorship. These cases fall within the scope of application of domestic rules on private international law. In particular, Article 13 of Private International Law, covering incapacitation, and Article 60 PIL, regarding guardianship, are crucial*

1 Convention on the International Protection of Adults, concluded on 13 January 2000 [Online]. Available at: <https://www.hcch.net/en/instruments/conventions/full-text/?cid=71> (Accessed: 8 December 2023), hereinafter the Hague Convention of 2000. Introductory remarks to the Convention after its adoption and the translation were published by Mostowik and Symolon, 2002, pp. 469 et seq. A general characterisation was provided by Juryk, 2016, pp. 27 et seq. Regarding the development of the convention area in recent years, see Frimston, 2020, pp. 226 et seq.

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for determining the applicable law in guardianship cases.

Additionally, the author identifies issues for further study on the EU proposals of 2023 versus the domestic current state of play, including implications of terminological changes, the broad scope of the 'protection measure', and the issue of linking to the 2006 UN Convention.

- **KEYWORDS:** international unification of law, measures of protection of adults, cross-border enforcement, incapacitation, guardianship, curatorship, register of vulnerable measures and persons, Polish private international law, Polish international civil procedure, EU Commission's proposals of 2023, 2000 Hague Convention, older persons

1. The idea of legislative proposals of EU Commission – Protection of adults (i.a. older persons)

In its recent documents, the EU Commission announced two legislative initiatives on 'adult protection' measures, that is, guardianship and curatorship in the case of incapacitation or limitation of capacity, public registers of such measures and other similar legal institutions, and a uniform certificate of representation in cross-border cases. They include two documents from 31 May 2023: the Proposal for an EU Regulation concerning private international law *sensu largo* (including international civil procedure and mutual assistance)² and the Proposal for a Council Decision authorising Member States to be parties to the Convention of 13 January 2000 on the International Protection of Adults.³

The idea of those intra-EU legal solutions (*lex specialis* in relation to other current global instruments) generally presupposes making the Hague Convention of 2000⁴ applicable in all EU Member States. Thus far, the Hague Convention of 2000 has entered into force in 14 countries, mainly in Europe. The second objective of this legislative initiative is to issue a supplementary EU regulation which,

2 Proposal for a Regulation of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of measures and cooperation in matters relating to the protection of adults, COM (2023) 280 final, hereinafter - COM 280 of 2023 or Draft EU Regulation.

3 Proposal for a Council Decision authorising Member States to become or remain parties, in the interest of the European Union, to the Convention of 13 January 2000 on the International Protection of Adults, COM (2023) 281 final, hereafter - COM 281 of 2023.

4 Hague Convention of 2000. Introductory remarks to the Convention after its adoption and the translation were published by Mostowik and Symolon, 2002, pp. 469 et seq. A general characterisation was provided by Juryk, 2016, pp. 27 et seq.; Mostowik, 2024, pp. 5–58. Regarding the development of the convention area in recent years, see Frimston, 2020, pp. 226 et seq.

within the material scope of 'adult protection', introduces a regional modification of the Convention (that is, concerning domestic jurisdiction and the recognition and enforcement of foreign judgements) and supplements it (mainly in the area of mutual judicial assistance and interstate cooperation) in those Convention states which are EU Member States. Hence, it is necessary to discuss and evaluate them from the perspective of the current laws of Member States (e.g. Part Four of the Civil Procedure Code),⁵ as well as to indicate the global international agreements (that is, the 1905 and 2000 Hague Conventions and numerous bilateral conventions) and the Act of 2011 on Private International Law.⁶

In terms of EU treaties' terminology, these are areas of judicial cooperation in civil matters. Therefore, before discussing individual provisions of national law (mainly private international law and the 'international' part of the Civil Procedure Code) and drafting future EU regulations, which in turn are linked to the Hague Convention of 2000, it is necessary to provide a closer overview of the key issues of jurisdiction in international cases, applicable law, the effectiveness of foreign judgements, and international cooperation of courts in civil matters. The discussion of guardianship and curatorship in the event of incapacitation or limitation of capacity and similar measures aimed at the protection of an adult in legal transactions with foreign countries, which forms a further essential part of this paper, is based on the national and international laws precisely from the perspective of the EU Commission proposals of 2023.

It should also be noted that the scope of cases in question has been subject to developments in the substantive laws (in particular civil and family codes) of individual countries in recent years, as well as outside private law⁷ and at the international level.⁸ Further *de lege ferenda* proposals and legislative initiatives should be expected, which will result from new social needs related to the increase in the number of older persons (especially in Poland, which is the consequence of the demographic crisis)⁹ and the intensification of their needs and protection in trade, including private substantive law.

5 Act of 17 November 1964 - Code of Civil Procedure, consolidated text, Dz. U. 2021 r., poz. 1805 ze zm.; hereinafter the CCP.

6 Act of 4 February 2011 - Private International Law (Dz.U. 2023 poz. 503), hereinafter: 'PIL'.

7 The legal areas where support for the older seems to be necessary in the first instance are accurately identified by Plaňavová-Latanowicz, 2019, pp. 5 et seq. and Błędowski et al., 2017, pp. 10 et seq. Numerous materials on the amendments to German law that have been introduced and proposed in this area are available on the Betreuungsgerechtstag website [Online]. Available at: https://www.bgt-ev.de/ueber_den_bgt.html (Accessed: 11 August 2025).

8 Regarding the international institutionalisation of measures to protect the rights of the older people – see Mikołajczyk, 2012, pp. 55 et seq.

9 See Urząd Statystyczny w Białymstoku, 2021.

2. Current procedural solutions in member states (example of Polish law)

■ 2.1. Code of Civil Procedure rules on jurisdiction in matters of incapacitation of an adult and guardianship or curatorship

In some EU states (that is, in Poland, where the 2000 Convention is not in force), national law is applied to the discussed matters. Article 1106[1] CCP (after the 2009 amendment) is of key importance for determining national jurisdiction (international jurisdiction of courts) in incapacitation cases.¹⁰ This article covers the establishment or revocation of (partial or total) the incapacitation of an adult, and the change of total to partial (and partial to total) incapacitation (Article 559 CCP). The decisive moment for determining the basis for jurisdiction in light of Article 1097 § 1 CCP is the moment when the proceedings are initiated. The competence of the Polish courts is determined by the circumstances (that is, Polish citizenship or the foreigner's residence in Poland) relating to the person affected by incapacitation rather than the applicant. The latter may be a foreigner or a resident abroad. National jurisdiction, unlike in custody cases, does not extend to cases of persons temporarily residing in Poland (temporary residence or simple residence). In exceptional situations, the required jurisdiction may be considered (Article 1099[1] CCP), despite the absence of these grounds for jurisdiction, if the case shows a connection with Poland.¹¹

Following the 2009 amendment to the CCP, the scope of exclusive jurisdiction in the cases in question has been reduced in domestic law, which means that the effectiveness of foreign judgements referred to in Article 1146 § 1(2) CCP has been extended. Previously, Article 1106 § 1 stipulated exclusive national jurisdiction in cases of incapacitation of Polish citizens. This applied not only to persons residing in the country but also to cases of incapacitation of Polish citizens residing abroad, which could be questionable.¹² Another type of concern was raised under the previous normative status by the new solution causing lack of domestic jurisdiction in cases of incapacitation of foreign nationals residing in Poland, which could not only be contrary to the best interest of them, but also violate the interests of Polish citizens who have civil law relations with them and, more broadly, the security of transactions.

10 See more Lubiński, 1978, pp. 98 et seq.; Ereciński, 2017, pp. 166 et seq.; Wiśniewski, 2021, p. 132.

11 Ereciński, 2017, p. 168 provides an example of the revocation or modification of incapacitation ruled by a Polish court against a foreigner who currently has neither a place of residence nor habitual stay in Poland.

12 See the decision of the Supreme Court of 6 November 1978, IV CZ 127/78, OSNCP 1979, no. 7–8, item 155.

In contrast, for the grounds of national competence (international jurisdiction of the courts) in cases related to custody and other guardianship orders in matters related to adults, Article 1107 CCP is of key importance.¹³ It refers to the appointing of a guardian or curator (Articles 590 et seq. and 599 et seq. CCP) under conditions specified in substantive law, including guardianship for a partially incapacitated person (Article 16 § 2 of the Civil Code (CC)), guardianship for a totally incapacitated person (Article 13 § 2 CC), and curatorship for a disabled person. A curator is appointed if the person needs assistance to manage all matters or matters of a particular type or matter (Article 183 of the Family and Guardianship Code),¹⁴ and curatorship is intended to protect the rights of a person who, due to absence, cannot manage his or her affairs and has no attorney (or who cannot perform his or her activities or performs them improperly; Article 184 of the FGC). This also relates to a number of other material situations of adult guardianship, which is not a homogeneous institution in Polish law and is provided for by a number of provisions in the CC, FGC, and CCP, as well as by statutes. For example, according to Article 44 of the Act on the Protection of Mental Health of 19 August 1994, a curator may be appointed for a person admitted to a psychiatric hospital, or for a mentally ill or mentally handicapped person in a social welfare home, if the person needs assistance to manage all of his or her affairs or affairs of a certain type at that time.¹⁵

However, some guardianship situations fall within the scope of other jurisdictional and procedural norms covering specific categories of civil cases. The second sentence of Article 1107 § 1 CCP states that guardianship to deal with a particular case, on the principle of *lex specialis derogat legi generali* and as in the construction of derived jurisdiction, is subject to the jurisdictional norms authoritative for those cases.¹⁶ The curatorship (curator) for the purpose of dealing with a case is referred to in Article 183 of the FGC ('individual case' versus 'the scope of the curator's duties and powers shall be determined by the court') and Article 44(1) of the Act on the Protection of Mental Health ('cases of a specific type'). Simultaneously, these provisions refer to the possibility of appointing a curator to handle all cases under the conditions specified therein, which means considering the general, non-derivative jurisdictional norm of Article 1107 CCP. Alternatively, the appointment of a curator of the estate falls within the norms of EU Regulation No. 650/2012. A separate issue is the appointment of a guardian ad litem by the adjudicating court (e.g. a curator for a party without legal capacity who has no

13 See more Ereciński, 2017, pp. 222 et seq. See more Piasecki, 2013, p. 122; Wójcik, 2020; Wiśniewski, 2021, p. 156.

14 Act of 25 February 1964 - Private International Law (Dz.U. 2023, poz. 2809), hereinafter: 'FGC'.

15 Dz. U. z 2022 r., poz. 2123.

16 A similar non-independent solution is provided for in Article 62 of the PIL, under which the guardianship for the settlement of a particular case is governed by the law of the jurisdiction to which the case is subordinated.

legal representative under Article 69 CCP). According to Article 143 CCP, a curator may be appointed to serve a pleading on a party under circumstances giving rise to the need to defend his or her rights, whose place of stay is unknown, until the party or his or her representative or attorney appears, as well as a curator for a person whose place of residence is unknown under such circumstances.

The jurisdiction provided in Article 1107 CCP is based not only on the Polish citizenship or the place of residence in Poland of the ward or the person under curatorship. It is much broader than the jurisdiction concerning incapacitation. It distinguishes between subsets of guardianship and curatorship cases (e.g. limited in terms of subject matter to real estate or in situational terms to urgent need for protection) and contains a more elaborate regulation, also considering the basis of jurisdiction in the form of residence of the concerned person (simple residence). It has to be considered in the context of various factual situations in which the guardianship court's activity is required, as well as the flexibility of its action. According to Article 570 CCP, the guardianship court may initiate proceedings *ex officio*. Pursuant to Article 569 § 2 CCP, all necessary orders may be issued *ex officio* in cases of urgency. Furthermore, considering Article 577 CCP, the guardianship court may modify its order, even a final order, if the welfare of the person concerned so requires.

The location (*situs*) of the property, that is factual circumstances indirectly related to the adult, determines the national jurisdiction over the matters relating to that property. In fact, this separate norm is relevant (as it goes beyond the fundamental jurisdictional norm in Article 1107 § 1 CCP) when a foreigner does not have his or her domicile or habitual residence in Poland, but his or her assets are located in the country, regarding which there is a need to issue an order in the interest of this foreigner. There is no limitation of this competence to real estate. In fact, this jurisdictional rule is also relevant for participants of civil law transactions in the territory and for its improvement. The doctrine emphasises the need for a court to issue such an order when the foreigner's home state or the state in which he or she has residence or habitual place of stay neglects guardianship or the law of that state does not provide adequate guardianship (e.g. the competent authorities of that state, such as the consular office, the courts, remain passive and do not make such decisions despite notification of the need for guardianship or curatorship).¹⁷ Moreover, a similar approach to international cooperation is evident in the context of the Hague Conventions of 1905 and 2000.

Under the current provisions (that is, after the amendment of the CCP in 2009), additional jurisdiction (in relation to cases of Polish citizens, foreigners residing in Poland, and property located here) is provided broadly under Article 1107 § 3 CCP in urgent cases. The first jurisdictional prerequisite of 'sufficient connection of the case with the Polish legal order' is a general formula to be clarified

¹⁷ See Ereciński, 2017, p. 226 nb 70.

in the case law. As an example, an order revoking guardianship or curatorship is indicated in a situation where the Polish court had previously established guardianship or curatorship over a foreigner who subsequently changed his or her place of residence or habitual residence by moving abroad, as well as the appointment of a guardianship for a disabled person who is a foreigner who does not have his or her place of residence or habitual stay in Poland, if there is a need for assistance to manage the affairs of such a person in Poland (Article 183 § 1 of the FGC and Article 600 of the CCP).¹⁸ The second premise is a non-permanent stay (residence) in Poland.

Similar to the regulation concerning incapacitation, the national jurisdiction extends to a Polish citizen who resides abroad. In the doctrine, according to such a solution, even before the CCP, it has been noted that sometimes the exercise of guardianship authority by Polish courts in cases of Polish citizens living abroad is unrealistic and may also be inexpedient.¹⁹ In some situations, guardianship proceedings should be an expression of quick and effective action, such as in emergency cases. However, it will not be possible to ensure such prompt and effective action if the person for whom the guardianship or curatorship is to be established resides abroad. At the same time, it is legitimately noted that the Polish court may consider that a court of another state is more competent to hear the case, but refuse to hear the case (along the lines of the Anglo-Saxon doctrine of *forum non conveniens*).²⁰ At the same time, in countries where the Hague Convention of 2000 is in force, a similar issue does not arise, as the Convention contains provisions for both countries to regulate a possibility of referral, adoption, and other forms of inter-state cooperation.

Regarding the guardianship of an absent person (e.g. Article 184 § 1 of the FGC, also in the situation of an application by a state administration body under Article 34 § 1 of the Code of Administrative Procedure), it has to be assumed that the grounds for jurisdiction (Polish citizenship or the place of residence or habitual stay of a foreigner) have to be established for the period when these circumstances concerning the adult were last known.

■ 2.2. *Code of Civil Procedure rules on the effectiveness of foreign judgements*

In the current system of domestic law, a decision of a foreign court is subject to recognition in Poland by operation of law (*ex lege*), unless stated otherwise based on an enumerative catalogue of negative premises (grounds for refusal). If a judgement is enforceable, this may take place (that is, it constitutes an enforceable title) after the declaration of enforceability, simplified in the 2009 amendment²¹

18 See Ereciński, 2017, p. 226 nb 75.

19 Lipiński, 1949, p. 72.

20 Wiśniewski, 2021, p. 158.

21 Act of 5 December 2008 amending the Act - Code of Civil Procedure and certain other acts, Dz.U. z 2008 r. Nr 234, poz. 1571; hereinafter - amendment to the CCP of 2009.

(Article 1150 CCP). In the course of these proceedings, similar circumstances to those that hinder recognition may have an inhibiting effect (Article 1146 CCP). The key circumstances justifying the refusal of recognition or declaration of enforceability are covered by the exclusive jurisdiction of Polish courts (Article 1106[1] § 2 CCP); the lack of proper service of the letter initiating the proceedings; the lack of the possibility to defend oneself; the previous pending of the same case before a domestic court; the contradiction with an earlier final judgement of a Polish court or another recognised foreign judgement in the case; and the public order clause (that is, the contradiction of recognition with the fundamental principles of the Polish legal order).

After the amendment of the CCP in 2009, the enhanced practical significance in Poland of the fact that a foreign judgement has been issued in a case is due to several circumstances in the current version of the CCP. First, it results from the introduction of the principle of automatic recognition, streamlining the enforcement of foreign judgements and reducing the grounds that may block these principles, as discussed below. It is also worth noting that in the previous normative status, the area of exclusive jurisdiction of Polish courts was broader, which constituted a barrier to the effectiveness of a foreign judgement, that is, *res judicata*. For example, according to Article 1107 § 1, such a character is ascribed to matters of guardianship and curatorship of a Polish citizen. However, a Polish court could waive the establishment of guardianship or curatorship over a Polish citizen residing or owning assets abroad if he or she had sufficient custody there. In addition, the lack of reciprocity in the country of origin of the judgement was also an important obstacle to the effectiveness of the foreign judgement. Pursuant to Article 1146 § 1 CCP, a judgement was subject to recognition on condition of reciprocity.²² Currently, the recognition and enforcement of foreign judgements in Poland is not dependent on whether Polish judgements in civil matters are effective in the foreign state in question. In addition, the effectiveness of the foreign judgement was also impeded by the foreign court's failure to apply Polish (or identical) law as the applicable law in adjudication in situations where Polish law was applicable according to the conflict of laws rules in force in Poland (review of the conflict of laws in foreign judgements). Due to this solution, there was a partial harmony (limited to situations governed by Polish law) between rulings issued in similar cases by a Polish court and foreign rulings that were effective in Poland. In accordance with Article 1146 § 1(6) CCP, a judgement was subject to recognition if, in a case in which Polish law should have been applied, that law was applied when it was made (unless the foreign law applied in the case does not differ materially from Polish law). The legislature's focus on the substantive legal result, rather than the formal properties of Polish law, was evident in the

22 This condition - in the light of Article 1150 §2 of the CCP - also referred to the declaration of enforceability of a foreign judgement.

equivalence rule adopted. According to this rule, this condition is also fulfilled in the case of the application of a foreign law, but one that is not materially different from Polish law.²³

Additionally, the number of cross-border cases substantively adjudicated by Polish courts was increased under the previous legal status, as the Polish court did not depend on the fact that the case was pending before a foreign court (that is, it did not consider the foreign pending of the case). Pursuant to Article 1098 CCP prior to its amendment in 2009, Polish courts were awarded the jurisdiction provided for in that code, even if proceedings were pending before a court of a foreign state in the same case between the same parties. Currently, according to Article 1098 § 1 and 2 CCP, if a case for the same claim between the same parties is pending before a foreign court earlier than before a Polish court, the Polish court shall suspend the proceedings. Subsequently, due to the recognition of the foreign judgement in Poland, the court discontinues such proceedings. Therefore, pending of the case before the foreign court inhibits the substantive adjudication of the case.²⁴

In the amended Code regulation, there is no requirement of reciprocity between Poland and the country of issuance of the judgement.²⁵ Moreover, the Code narrows the scope of exclusive jurisdiction, and thus this condition blocking the effectiveness of a foreign judgement will occur less frequently (Article 1146 § 1(2) CCP). The 2009 amendment to the CCP, by simplifying the mechanisms of recognition and enforcement and reducing the catalogue of grounds for refusal and the scope of exclusive jurisdiction, led to a wide 'opening of the door' to the effects of foreign judgements, including those concerning adult personal and guardianship matters.²⁶ The normative situation in other EU member states may be different, that is, foreign judgements, including those from EU member states, may be subject to closer scrutiny or their recognition may be additionally determined (e.g. by the premise of reciprocity or the convergence of conflict-of-law rules applied abroad).²⁷ Hence, they will have a different assessment of the proposed 2023 solutions aimed at introducing efficient mutual recognition and enforcement of judgements within the EU.

23 See Jodłowski, 1985, pp. 135–140.

24 Pursuant to Article 1098[1] of the CCP, the court may also suspend the proceedings if the outcome of the case depends on the outcome of foreign proceedings in a related civil case.

25 See Weitz, 2005, pp. 176 et seq.

26 See Ereciński, 2017, p. 222; Wójcik, 2020.

27 See Jodłowski, 1985, pp. 119–129.

3. Member States' current rules on law applicable (example of Polish law)

■ 3.1. Act on Private International Law rules on the incapacitation, guardianship, and custody or similar measures

In the current conflict-of-law state of play (e.g. in Poland, without applying the 2000 Convention), these discussed cases fall within the scope of application of domestic rules on private international law. Article 13 PIL, covering incapacitation,²⁸ and Article 60 PIL, regarding guardianship, are crucial for determining the applicable law in guardianship cases.²⁹ In my opinion both of the articles, applying autonomous interpretation, cover other similar measures of protection of adult (eg. limitation of capacity or assistance).

The initial draft PIL of 2011 provided the distinction between child and adult care was apparent. The plan was to abandon the solutions contained in the PIL Act of 1965, relying on a liaison of citizenship in child matters, as in adult custody matters. However, it seems that the intention was not to abandon the jurisdiction of home law altogether, in particular with regard to adult custody. The draft³⁰ includes a separate provision on incapacitation, which early on in the doctrine was included in the capacity statute, as discussed further below. What was not included was a provision for the establishment of guardianship, which was relevant not only to the child's case but also to the adult's.³¹ The guardianship provision (as well as the absence of such provision) was also relevant to adult cases. The absence of such a provision created more difficulties for adults than for children, to whom provisions for possible appropriate application (e.g. 'the use of other measures for the protection of the child') applied. In the final version of the Act, this deficiency was supplemented precisely by Article 60 PIL cited above.

Currently, incapacitation is referred to in Article 13 PIL. Paragraph 1 provides for a citizenship link, which continues the solutions of previous acts of law.³²

28 See more Pilich, 2017, pp. 295 et seq. and Pazdan, 2018, pp. 190 et seq.

29 See more Rycko, 2017, pp. 921 et seq.; Pazdan, 2018, pp. 525 et seq.

30 See Government draft Act - Private International Law, Sejm print no. 1277 (6th term of office) [Online]. Available at: <https://www.orka.sejm.gov.pl> (Accessed: 11 August 2025).

31 See Mączyński, 2007, p. 95; Ibidem, Mączyński, 2009, p. 20.

32 However, Pazdan, 1967, p. 88, advocated under the 1965 Act in favour of classifying incapacitation under the guardianship statute rather than the capacity statute ('By its very nature, incapacitation is an undertaking of a guardianship nature, its prerequisites should therefore be governed by the law applicable to guardianship (if nothing else is expressly stated in the law), furthermore that the meaning of incapacitation goes well beyond capacity. (...) On the other hand, according to the law applicable to capacity, we will determine the effect of the incapacitation on capacity, most often in connection with a specific legal act that has already been performed or is to be performed by the incapacitated person').

However, paragraph 2 refers to the Polish court applying its own law. This second solution (jurisdictional *lex fori*), in fact implying an indirect role of the rules of jurisdiction for determining the applicable law (not only based on nationality), will in practice eliminate the use of the solution described as the first one.³³

A. Mączyński emphasises, among others, that since Polish courts in an incapacitation case should always rule on the basis of Polish law, Article 13(1) has no practical significance.³⁴ While criticising the draft act, the author did not intend to withdraw from the content contained in paragraph 1, which would mean that the Polish court would apply its own law (*lex fori*). The author intended rather to remove the entire provision on incapacitation (and a similar one on declaration of death and recognition as dead), as the general provision on capacity, providing for the nationality of the person concerned, would apply to these cases.³⁵ M. Pilich emphasises that 'the unilateral conflict rule of paragraph 2 prevails according to the regulation as a whole'.³⁶ Although A. Koziół and K. Sznajder-Peroń present the claim that there is no practical significance for paragraph 1 of Article 13 PIL 'seems justified only prima facie',³⁷ they provide, for the needs of another position, an example of the application by a foreign court rather than by the Polish court concerned by the observation. Despite the fact that the situation of the foreign court's application of Polish conflict of laws (e.g., for the possible consideration of the reference), somehow 'escapes' from the problem of the application of the national law and the perspective of the Polish court, and moreover, given the current trends in private conflict of laws aimed at disregarding the *renvoi*, will occur rarely. The authors state that 'this provision then prevents a reflexive reference, counteracting the exclusion of the jurisdiction of Polish law in a case concerning a Polish citizen examined by a foreign court', and refer to the view of M. Pazdan, expressed, following the voices from the time of the discussions on the 1926 and 1965 PIL, with regard to the similarly structured Article 14 PIL, about the acknowledgement of death and confirmation of death and duplicates a similar solution for this scope of cases provided for in Article 11 PIL of 1965.³⁸ The assertion of the meaning of Article 13(1) PIL of 2011 in the context of paragraph

33 Pazdan, 1967, pp. 97–102, presents in detail the qualification problems arising when several conflict of laws rules are in force for particular elements of the life situation, that is the statute of capacity (*lex patriae*), and the statute of defects in declarations of will (*lex causae*). Such an example in the current normative status, due to a separate provision in the 2011 Act, could also be the incapacitation statute due to the fact that the norm related to the conflict of laws does not exclusively use the link of nationality, but usually provides for the jurisdiction of its own law (*lex fori*).

34 See Mączyński, 2013, pp. 729, 736.

35 Such a demand results from the opinion expressed during the legislative work – see Pazdan, 2011, pp. 93–94; Mączyński, 2013, p. 736, accuses that paragraph 2 of the solution is 'asymmetrical' and excessively favouring Polish law.

36 Pilich, 2017, p. 295.

37 Pazdan, 2018, Nb 12.

38 Pazdan, 2017, p. 129.

2 is not convincing (also with regard to the similarly structured Article 14 PIL) for theoretical and practical reasons. The issue of the examination of foreign conflict-of-law rules (e.g. Polish) by a foreign court, which decides on the basis of the jurisdiction and conflict-of-law rules in force in the country concerned, is an issue that the national legislator cannot, in fact, assume and thus even indirectly 'regulate'. If a foreign court adjudicates in the case (that is, has jurisdiction, e.g. on the basis of foreign nationality or residence of an adult in the relevant country), it will apply its own conflict-of-law rules. Even if the condition were fulfilled that in the general part they presuppose, first, an examination of foreign (here: Polish) conflict-of-law rules in order to verify the referral and, second, that they provide for the effect of a *renvoi* (that is, somehow, a return to the jurisdiction of the law of the court), this objective of 'preventing a *renvoi*' seems questionable. This could be the case if the foreign conflict-of-law rules expressed a reflexive reference in the general part and used, for example, a nationality link in the specific part, which, given the Polish nationality of an adult, would lead to Polish rules which in turn would use a residence link, precisely *in concreto* located in that country. However, this is not the case, as Polish conflict-of-law rules do not provide for a residence connecting factor in the scope concerned. In contrast, in the opposite factual situation, where the foreign conflict rules by way of a residence connecting factor lead to Poland and the adult is a citizen of a foreign state, it is paragraph 1 of Article 13 PIL in conjunction with the foreign solutions of the general part that will 'lead to' the back-referral rather than prevent it. Furthermore, in the absence of paragraph 1 of Article 13 PIL of 2011, a reflexive reference would not exist either, since paragraph 2 of Article 13 PIL of 2011 refers to the adjudication by a Polish court and unilateral application of Polish law, and does not express an abstract connecting factor that could theoretically be located in that foreign state, nor does it provide for the multilateral formula of jurisdiction *legis fori* permissible under international law.

Not all of the above reported directions of interpretation of Articles 13 and 60 PIL are convincing; therefore, a proposed way of understanding will be presented below (point 2).

It is worth noting at this point that in the provisions of the Hague Convention of 2000, unlike in the PIL, a single, broader concept of 'protection measure' is used. Simultaneously, a distinction was made, similar as according to Article 60 PIL and the 1996 Hague Convention, of the sub-scope of the 'execution' of the protection measure (e.g. action of a guardian). Considering the substantive right of the court, as well as the scope of application of the 1996 Hague Convention, it should be assumed that it applies to cases of individuals who have reached the age of 18.³⁹ At the same time, paragraphs 3 and 4 distinguish the 'execution' of

³⁹ See Rycko, 2017, pp. 921 et seq.

protective measures in a broad sense.⁴⁰ This is relevant to the specific conflict resolution, as well as from an intertemporal perspective.⁴¹

Continuing the discussion of the complex structure of Article 60 PIL and the sub-areas of matters covered by it, it should be noted that the 'enforcement of guardianship measures' is regulated differently in terms of conflict of laws, as it is governed by the law of the state of the territory where a person affected by the measures has his/her habitual place of residence (paragraph 3). Since it is a universal norm, it theoretically leads to every law worldwide. Situations related to the enforcement of measures in Poland which are subject to Polish law according to this solution are important in practice for national judicial authorities. Exclusively such unilaterally specified jurisdiction of the law for enforcement is provided for by paragraph 4 in fine of Article 60 PIL in situations where the Polish court adjudicates, if necessary, on the property of a foreigner living abroad located in Poland and in any case where the case shows sufficient connection with the Polish legal order or where there is an urgent need to grant protection to a foreigner residing in Poland (Article 1107 § 2 and 3 CCP). Such a solution is not consistent with the cases of Polish citizens or residents of Poland, which are more closely linked to the territory of Poland, and in which the enforcement of guardianship orders is covered by the 'multidirectional' conflict rule resulting from Article 60(3) PIL.

Notwithstanding the foregoing, Article 62 PIL states that the curatorship to deal with a particular case (*ad casum*) is governed by the law of the state to which the case is subject (*lex causae*). Such a solution, actually implying an accession link between a curatorship and the law applicable to the particular act on the occasion of which the curatorship is established, is similar to the conflict-of-law solutions concerning specific additional capacity requirements (Article 11(3) PIL) and the form of a legal act (Article 25 PIL). It is certainly convenient from the perspective of civil law transactions (also of third parties involved). Practical difficulties may arise in distinguishing the application of Article 62 PIL in cases of *ad hoc* curatorship from cases of permanent curatorship, as both types of curatorship may have the same substantive legal basis (e.g. stating the circumstances justifying both the establishment of a curator *ad casum* and a curator for a number of similar cases) and be similarly regulated in procedural provisions.

■ 3.2. *Proposed interpretation of provisions discussed in the doctrine*

The abovementioned interpretation of the meaning of paragraph 1 of Article 13 PIL, where paragraph 2 is in force, may not be convincing due to practical and theoretical reasons (as in matters of recognition and declaration of death, a similar explanation of the meaning of Article 11 of the 1965 PIL and its successor,

⁴⁰ See more Pazdan, 2018, pp. 527 et seq.

⁴¹ It is assumed that the 2011 PIL regulation on the enforcement of protective measures applies, after the entry into force of the new act of law, also to protective measures established earlier. See Kloda, 2014, p. 803.

Article 14 PIL). A separate issue is which of these paragraphs the legislator should ‘stop at’. The solution of the court applying its own law (which may or may not be its native law) is closer to the solution of the Hague Convention of 2000 under discussion, as discussed further below.⁴²

In contrast, Article 60 PIL, which refers to ‘guardianship or curatorship or other protective measures’, is not a ‘novelty’ in national legislation similar to Article 13 PIL. It is an expanded version of the previous PIL provisions of 1926 and 1965, except that its application, in view of the priority of the 1996 Hague Convention on Children, is limited to adult cases.

This article regulates several conflict-of-law rules, as it provides for different ways of indicating the applicable law for sub-sets of cases, including the inclusion of a linking factor. Prima facie, the linking factor of the nationality of an adult, that is, circumstances also provided for as a determinant of the law applicable to capacity (Article 11 PIL) and incapacitation (Article 13 PIL), is crucial. However, according to Article 60(2) PIL, in the event of adjudication by a Polish court, which is the essential point of reference for the application of the conflict-of-law rules of the country concerned, ‘Polish law shall be applied to a foreigner who has his/her place of residence or habitual stay in the Republic of Poland’. Moreover, according to Article 60(4) PIL, ‘in the cases referred to in Article 1107 § 2 and 3 CCP, Polish law shall apply’.

This elaborate and stylistically unwieldy wording means, as according to the shorter Article 13 PIL referred to, that if [...] a Polish court decides, Polish law shall apply. In fact, according to Article 60 PIL, the *lex fori* is therefore applicable to guardianship or curatorship or other protective measures, as it follows from the rules of procedure (Article 1107 § 1 CCP) that a Polish court will, as a general rule, adjudicate on the case of an adult who is a Polish citizen (to whom Polish law is designated as native under Article 60(1) PIL), or who has just a residence or habitual stay in Poland, as referred to in Article 60(2) PIL. In contrast, the other situations of adjudication by a Polish court, which are provided for in Article 1107 § 2 and 3 CCP and which exhaust the cases of Polish jurisdiction, are referred to in Article 60(4) PIL, which also indicates Polish law as applicable (*lex fori*). It appears that this unnecessarily elaborate structure of Article 60 PIL resulted from the fact that the provision was framed in a manner referring to the current wording of Article 1107 CCP. It would be far clearer and more consistent with the other

42 At the same time, there is no need to start the provision by saying that they apply where a Polish court is ruling, as the conflict of laws rules of the PIL generally apply in such cases.

provisions of the PIL if paragraphs 2 and 4 were taken together and in wording similar to Articles 13(2) and 14(2) PIL.⁴³

Against the expansive interpretation of Article 60 PIL, additional problems arise when a Polish court anchors its jurisdiction in the provisions of the bilateral agreements referred to above instead of Article 1107 CCP. A literal reading of Article 60(4) PIL, which refers to Article 1107 CCP, could lead to the conclusion that Polish law is not applicable in the event of their application and the occurrence of a jurisdictional situation other than that described in paragraph 2. However, such a proposal does not seem substantively justified, as it would lead to an unjustified differentiation of the situation of adults and impede the functioning of the courts and other authorities. Through paragraph 4, it seems that the legislator, with the supplementation of the draft act of law, aimed at a complete 'closing' of the application of Polish law, which it did – unfortunately, from the perspective of the validity of bilateral agreements – to the situations additionally described in Article 1107 CCP after the 2009 amendment. In fact, the solutions of the CCP were, despite the fact that this was not stated, also kept in mind when drafting paragraph 2.

4. The issue of characterization and scope of applications of national and international instruments

Considering the Hague Convention of 2000 and the 2023 EU Draft Regulation, including the issues of guardianship, curatorship, and other adult protection measures, several provisions on the applicable law are of key importance in current Polish law. This includes, above all, Articles 13 PIL and Articles 60 and 62 PIL, the latter actually providing for several conflict-of-law rules (the basic guardianship and curatorship statute and special measures for the execution of guardianship measures and curatorship *ad casum*). The capacity statute designated by Article 10 PIL is also closely linked to their outcome, as discussed below. This detailed character of the conflict-of-law rules results in the need to delimit the scopes of application, and thus the applicable law, of both provisions. It is of practical importance in those cases where these norms provide for different conflict-of-law solutions, including linking factors, for example, according to Articles 11 and

43 Rycko, 2017, pp. 921 et seq., item 9, notes that the juxtaposition of Article 60(1) and (2) of the PIL and Article 1107 § 1 of the CCP implies that a Polish court has jurisdiction to establish a guardianship or curatorship for a foreigner only in situations subject to the specific conflict of laws rule which provides for the application of Polish law. He emphasises that in the case of a foreigner residing in Poland, the basis for determining the applicable law is Article 60(2) of the PIL. In contrast, with regard to other foreigners, Article 60(1) of the PIL applies *prima facie*, although according to the provisions of Article 1107 of the CCP, it will never be applied due to the lack of domestic jurisdiction of Polish courts. Therefore, he raises doubts regarding the advisability of the wording of paragraphs 1 and 2 of the PIL instead of a unilateral conflict-of-law rule under which Polish law would apply.

13 PIL and Articles 60 and 62 PIL. If the legislator had limited itself to the adult citizenship link, the problem would be purely theoretical.

For example, the doctrine qualifies differently the necessity (obligation) to appoint a legal guardian in the event of a limitation of legal capacity. Against the backdrop of some statements, it is included in the incapacitation statute, while in others, in the guardianship statute.⁴⁴ Such a difference in approach is most evident with regard to the creation of a guardianship or similar guardianship by operation of law (e.g. as a consequence of a limitation of capacity in a specific life situation). In the doctrine, this effect is not categorised under the incapacitation statute but under the guardianship statute, which, however, raises doubts. For example, A. Koziół and P. Twardoch present the view that Article 60 PIL extends to the creation of a guardianship or application of another protective measure *ex lege*.⁴⁵ In favour of this view, they argue that the opposite solution would imply that there is a gap with regard to the aforementioned issue and, moreover, that it is also supported by historical interpretation, since these matters were covered by the hypothesis of the ‘predecessor’, that is, Article 23 PIL of 1965. However, this argumentation is not convincing, since the opposite position would not imply a gap, and historical interpretation leads to a different conclusion, since the 2011 PIL, in relation to the 1965 Act, has just added Article 11 concerning autonomously qualified incapacitation.

An additional issue is the distinction between the application of conflict-of-law rules (and thus the application of substantively applicable law, including foreign law) and the effects of the principle of *lex fori processualis*, that is, the law considered by courts and authorities as their own procedural law. By doing so, the doctrine, for example, distinguishes between the substantive power to apply for incapacitation, which is governed by the statute (substantive law) designated by the authoritative conflict-of-law rule, and the issue of mandatory participants, which is procedural in nature and as such governed by the court’s procedural law (*lex fori*).⁴⁶ This distinction is also noticeable in curatorship under substantive law and procedural curatorship, examples of which were provided earlier. The approach of the doctrine to the appointment of an interim guardian in the course of guardianship proceedings under Articles 548–551 CCP is different. It can be argued that this institution is subject to the principle of *lex fori processualis* because of the relationship of this measure to the judicial proceedings, the correct outcome of which this measure is intended to secure.⁴⁷ It is emphasised in

44 See Mączyński, 2008, pp. 736–737.

45 e.g. Pazdan, 2018, pp. 525 et seq.

46 See Pazdan, 2015, p. 614.

47 Rycko, 2017, item 15, sees the conclusion on the applicability of the national rules on the interim guardian, as in the case of the prosecutor’s standing in family cases, in the construction of the rules of necessary application. However, there appears to be no need to refer to this institution included in the general part. Similarities could, however, be sought with regard to the participation of the prosecutor in adult proceedings.

the doctrine that curatorship under procedural law did not fall within the scope of Article 23 PIL of 1965 (which should now be referred to Article 60 PIL), since the appointment of a curator in civil proceedings and his/her procedural rights and obligations are governed by the procedural rules of the seat of the court.⁴⁸ An argument can also be raised for including this institution in the statute designated by the PIL norms (e.g. the guardianship statute), arguing that the appointment of such a guardian has strictly defined substantive legal effects, serving to protect the incapacitated person in dealings with third parties.⁴⁹

The scope of application of Article 13 PIL includes the prerequisites for the establishment of partial or total incapacitation or any other similar measures linked to each other, resulting in the limitation of legal capacity and the introduction of a subject whose function is to support the adult in functioning in civil law transactions. It may be problematic to specify its effects, since, with a view to a systemic interpretation, it is also necessary to consider the scope of application of the standard on capacity and guardianship or curatorship. It is assumed that the principal effect of guardianship, which is the partial or total limitation of legal capacity, is governed by the incapacitation statute. In contrast, the capacity statute, as discussed below, is subject to the consequences of limited or no capacity. It seems that it is also necessary to consider the statute of the specific legal act, e.g. the statute of contract, to which the statute of wrongful performance (e.g. settlements of an invalid contract) may lead in terms of accession.

As paragraph 1 theoretically leads to every law worldwide, its hypothesis also includes other legal institutions than those provided for in Polish law, which fulfil a similar protective function for the adult and participants in trade (e.g. parties to legal transactions or a non-contractual relationship, e.g. a tort). As paragraph 2 will lead to the application of the constructions of Polish law in the jurisprudence of Polish courts, the scope will include the institutions provided for in the CC and FGC.⁵⁰

Theoretically, the scope of application of Article 60 PIL has to be considered broadly, as this is what the qualification of each conflict provision requires and,

48 See Ludwiczak, 1996, p. 221.

49 See Pilich, 2017, p. 297.

50 Pazdan, 2018, pp. 192 et seq., emphasise that paragraph 1 of Article 13 of the PIL has to be interpreted somewhat differently, that is, it should be considered broadly, due to its nature of demarcating the legal systems of different countries. In contrast, the scope of paragraph 2 should be determined according to *legis fori*, as this provision expresses a unilateral norm indicating only Polish law. It appears that this observation may relate not so much to the scope of application of the conflict of laws rules provided for in paragraphs 1 and 2, which are the same, but to the other aspect of the scope—that is, the scope of the indication, which refers either to foreign law or to national law. Thus, a different interpretation of the hypothesis does not occur so much before the indication and applicable law are known, but rather there is a different effect on the background of the indicated law—that is, the instruction. Regarding the two levels (stages) of determination of the scope of the conflict rule and qualification—see Mostowik, 2006, pp. 17 et seq.

moreover, the legislator has used the broad formula ‘other [than guardianship and curatorship] protective measures’. Polish law and numerous foreign normative systems provide for guardianship for a totally incapacitated person (dependent), curatorship for an adult if the guardian suffers a temporary impediment to the exercise of guardianship, curatorship for a partially incapacitated person, permanent (that is, not just for the purpose of dealing with a particular case) curatorship or another form of assistance or support for a disabled person in civil law transactions, and similar permanent legal institutions for a person staying in a hospital or care facility or an absent person. They may arise by operation of law, by a decision of a court or other authority, and, in some legal systems, also as a result of a legal act (e.g. a power of attorney or a legal act on the condition precedent of a situation requiring protection).⁵¹ An example of the ‘establishment of a protective measure’, is the authorisation to perform an act on behalf of an adult under curatorship.⁵²

At the same time, it must be noted that the instructions of paragraphs 2 and 4 of Article 60 PIL lead to the jurisdiction of Polish law if the case is heard by a Polish court or authority. This jurisprudential perspective is crucial for assessing the application of conflict-of-law rules, which, in principle, are applicable, like procedural rules, precisely in the country of their issuance (possibly participating in the international instrument in question). Hence, the instruction of the aforementioned conflict-of-law rules (scope of designation) will generally lead to the application of the legal institutions provided for in the CC and FGC.

The scope of the guardianship statute (the applicable law designated by the norm of Article 60 PIL) includes issues concerning the prerequisites for their establishment,⁵³ the manner of appointing a guardian, curator, and assistant, including his/her qualifications and the obligation to take up such a function, as well as the scope of his/her powers and duties, including the scope of representation of the adult (dependent), remuneration, and the supervision of the competent judicial or administrative authorities over their performance.⁵⁴ It also covers the modification and termination of the protective measure in a broad sense, including the rationale for changing the person of the guardian or the curator and for abolishing, revoking, or terminating the guardianship or the curatorship, and other similar order (protective measure).

In this regard, there is a diversity of opinions in the doctrine as to whether the cessation of guardianship should not be included in the scope of paragraph 1, which refers only to the establishment of the guardianship, but in the scope

51 For example, the legal solution of an adult granting a mandate of representation in the event that the former is no longer able to manage his/her own affairs (*mandat d'inaptitude*) by virtue of a unilateral legal act or contract concluded with the mandate holder, as referred to in the Explanatory Report, pp. 72 et seq.

52 Pazdan, 2018, pp. 525 et seq.

53 Regarding the qualification of the necessity (a kind of duty) of establishing legal guardianship to the incapacitation statute – see Mączyński, 2008, pp. 736–737.

54 See Walaszek, 1973, p. 264.

of paragraph 3, which refers to the exercise of the guardianship.⁵⁵ This problem does not seem to arise, as the establishment in paragraph 1 typically also means a negative decision, that is, the termination of the guardianship, the curatorship, or a similar measure due to the lack of premises (e.g. change of facts) for its continuation. Alternatively, paragraph 3 refers to exercise and not non-exercise, for example, due to termination of the guardianship or the curatorship. However, with regard to the termination of the guardianship or curatorship, a similar question arises in relation to incapacitation to the one signalled with regard to its establishment, that is, whether the effect of revoking the incapacitation or a similar protective measure extending to the termination of the guardianship or the curatorship (e.g. *ex lege*) is subject to the statute designated by Article 13 PIL or Article 60 PIL. This question should be answered in a manner consistent with the answer to the earlier question concerning the creation of the guardianship or the curatorship in connection with the establishment of the incapacitation or the taking of a similar measure to limit legal capacity.

Among the specific solutions of Polish law that will most often be appropriate, there are also examples of granting permission in more important cases of an individual under guardianship or curatorship (e.g. admission of an adult to a psychiatric hospital) and committing an alcohol-dependent person to undergo treatment in an inpatient or outpatient drug treatment facility.⁵⁶

A separate conflict-of-law rule arises from Article 60(3) PIL with regard to the 'exercise' of a guardianship or curatorship or similar custodial measure. It seems that the legislator was inspired by the wording of the Hague Conventions, including those of 1996 and 2000, where such a statute that is separate from the core statute (parental responsibility and adult protection) is provided for. Hence, for the purpose of distinguishing – sometimes not easy in practice – the situation

55 The position that the issue of termination of custody does not fall within the scope of its establishment or exercise is presented by Rycko, 2017, pp. 921 et seq., item 17.

56 See more Pazdan, 2018, pp. 525 et seq.

of the ‘execution’ of measures according to PIL, the following detailed comments on the Article of the 2000 Convention are useful.⁵⁷

In contrast, Article 62 PIL provides a special solution for curatorship to deal with a particular case, which represents *lex specialis* to Article 60 PIL. The guardianship *ad actum* is not subject to the guardianship statute but is somehow added to the case in which the curator is to act because of the close relationship between the case and the authority that has established such curatorship and the adult concerned.⁵⁸ N. Rycko accurately points out that instead of a typical conflict-of-laws rule, the legislator has prescribed the application of a different law, which must be determined on the basis of a separate conflict-of-laws rule, authoritative in the specific case.⁵⁹

The above comments on national law should be compared to the approach provided for in international law, including the 2000 Convention and the 2023 Proposals. At this point, it should be noted that, according to these international instruments, the concept of ‘protective measure’ is used to describe the hypotheses (scopes) of the jurisdictional and conflict-of-law rules, which comprehensively covers incapacitation (possibly other similar legal solutions limiting legal

57 Pazdan, 2018, pp. 525 et seq. assume that under Article 60(3) of the PIL, a problem referred to as a movable conflict may occur. The authors conclude that linking the jurisdiction of the law for the enforcement of protection measures to each habitual residence of a person affected by the measures may lead to such a movable conflict. They give an example in which an adult changes his or her habitual residence after a protection measure has been established but before the possibility of enforcing the measure has been exhausted, which is supposed to create a risk that the measure cannot be enforced after the change of statute. They subsequently propose a procedure of adaptation and a search in the law of the place of current residence of the adult for the protection measure which comes closest, so that the protection established can be exercised, or alternatively that a new protection measure be established by a Polish court. It seems that this example does not completely correspond to the 2011 PIL, which added, in relation to the 1965 PIL, paragraph 3 (which was assumed in this example), that is, the connecting factor of the place of current execution of the protection measure, and furthermore, a statute which does not use the linking factor of the habitual residence of the adult. Such a solution in the Polish normative status refers, in the light of the 1996 Hague Convention, to cases of children. Regarding adults, the meaning of current habitual residence derives from the 2000 Hague Convention, which, however, is not applicable in Poland.

58 See Walaszek, 1973, pp. 337, 340.

59 See Rycko, 2017, pp. 921 et seq., item 22. It may be questionable to conclude that this is not equivalent to classifying the curatorship in the scope of the statute governing the issue in question and that the curatorship to deal with a particular matter is subject to its own ‘separate statute, but indicated indirectly by the order to apply *legis causae*’. Indeed, there seems to be no need for a theoretical proliferation of statutes. In doing so, the author does not accept the effect that the permissibility of the choice of law applicable to the main case should result in the possibility of choosing the statute of the related curatorship. This approach should be accepted, except that it will result from the fact that curatorship is added, for example, to the law that has already been chosen. In contrast, a partial choice would not be justified, since the provision concerned refers to the addition of curatorship to the law governing the legal action (rather than a secondary disconnection of the scope in question).

capacity) and legal guardianship (or other similar institutions, e.g. curatorship, power of attorney or assistance, as well as court approval). Unlike in national laws (PIL and CCP), there is no separate regulation of these matters, mostly occurring in practice jointly, according to these normative acts. Additionally, different, broader, and cumulative treatment of the scope (hypothesis) of the conflict rule was adopted in the 1905 and 2000 Hague Conventions and the 2023 EU Proposal, which will be presented below.

5. The Hague Convention of 2000 and its potential impact on national law of EU member state

■ 5.1. Genesis and core of the 2000 Hague Convention

The issue of incapacitation and guardianship, curatorship, and similar legal institutions for adults was one of the first scopes of work of the Hague PIL Conference (at the beginning of 20th century). It resulted in the drafting of the Hague Convention of 17 July 1905 on incapacitation and analogical guardianship orders,⁶⁰ which will be explained in the following section. Several decades later, in 1979, between the Thirteenth and Fourteenth Sessions of the HCCH (Hague Conference on Private International Law), a questionnaire circulated to member states addressed the issue. The responses did not identify common practical problems regarding the protection of adults in international transactions. The February 1980 meeting of the special committee did not include this topic in the conference agenda, and no work was undertaken on a potential subsequent convention.⁶¹ The idea of revisiting the personal and property affairs of adults subject to guardianship or similar orders returned in the work of this international organisation in the last decade of the 20th century.

Pursuant to the decision of 29 May 1993, the Seventeenth Session of the HCCH decided to include the revision of the Convention of 5 October 1961 on the Jurisdiction and Applicable Law in Respect of the Protection of Minors on the agenda of the Eighteenth Session and, importantly from the perspective under discussion, the possible extension of the scope of the new Convention to the protection of incapacitated adults. However, this second subject area could not be developed in the next session (as the convention on children's affairs was considered) and was somehow 'passed' to the work of subsequent sessions.⁶²

60 Government declaration of 14 September 1929 on accession of the Republic of Poland to the Convention relating to incapacitation and analogous guardianship orders signed at The Hague, 17 July 1905, Dz.U. z 1929 r. Nr 80, poz. 598.

61 See Acts and Documents of the Fourteenth Session (1980), Volume I, Miscellaneous matters, Hague, pp. 114–147.

62 See *Akt końcowy Siedemnastej Sesji*, Part B points 1 and 2.

The HCCH Permanent Office established a special committee, and its meeting was preceded by a working group in 1997, chaired by A.V.M. Struycken, which developed a draft for discussion as part of the work of a special diplomatic committee from 20 September 1999 to 2 October 1999, working under the chairmanship of E. Clive.⁶³

The text of the Convention was adopted unanimously by the member states of the HCCH present at the plenary session on 2 October 1999. The authentic languages are English and French. The work benefited from a note on the protection of incapacitated adults prepared by Adair Dyer in September 1996; a study by M. Revillard entitled 'Les majeurs protégés en droit international privé et la pratique notariale'; a report by the Council of Europe's Specialist Group on the Protection of Incapacitated Adults and Other Vulnerable Adults by Eric Clive, at the request of the Council of Europe of 21 January 1997; and a proposal by the Swiss delegation, presented at the close of the Eighteenth Session, which transferred the provisions of the 1996 Hague Convention almost literally to adult cases.⁶⁴

The drafting of the Hague Convention of 2000 drew on the legal solutions of the Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement, and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children, adopted a few years earlier.⁶⁵ This international agreement is followed by a wide range of foreign legal transaction issues governed by the Convention, including domestic jurisdiction, applicable law, recognition and enforcement of judgements, and international cooperation.⁶⁶ However, the title is captured differently; instead of listing these areas of private international law and civil procedure, as was the case in the 1996 Convention, the title of the 2000 Convention uses the very general phrase 'protection of adults'.⁶⁷

63 Delegate of the United Kingdom. Andreas Bucher, delegate of Switzerland, Gloria F. DeGart, delegate of the United States of America, and Kurt Siehr, delegate of Germany, as well as Antonio Boggiano, delegate of Argentina, and Huang Hua, delegate of the People's Republic of China were elected as vice-chairpersons. Paul Lagarde, the French delegate, was appointed as a rapporteur. A drafting committee chaired by Kurt Siehr, delegate of Germany, a group to examine federal clauses chaired by Alegría Borrás, delegate of Spain, and a group for the preparation of model forms chaired by Marie-Odile Baur, delegate of France, were also appointed.

64 See *Explanatory Report*, pp. 41–42 and Prel. Doc. No 14 for the Eighteenth Session.

65 Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of Parental Responsibility and Measures for the Protection of Children, done at The Hague on 19 October 1996, Dz.U. z 2010 r. Nr 172, poz. 1158, OJ L 2008, No. 151, p. 39; hereinafter – 1996 Hague Convention.

66 See Frimston, 2005, p. 8.

67 The Explanatory Report, p. 45, emphasises that the title adopted 'was considered preferable to the much longer title of the Convention on the Protection of Children'. Regarding the genesis of the 2000 Hague Convention, including the link to the work on child protection and the 1996 Convention, and the activities of the 1997 Working Group chaired by Prof. Struycken – see more: Lagarde, 1996, p. 35.

The Hague Convention of 2000 is thus another international agreement drafted under the auspices of the HCCH that deals with foreign transactions in civil matters (that is, private international law and international civil procedure, or, in the EU nomenclature, 'judicial cooperation in civil matters'). A part of the scope of application of the Convention overlaps with that of its predecessor, the Hague Convention concerning incapacitation and analogical guardianship orders of 17 July 1905 (hereinafter, the Hague Convention of 1905),⁶⁸ and to the remaining extent, the cases regulated by it are subject to the solutions of the code in Poland (Part IV CCP) and the law (Private International Law),⁶⁹ indicated below.

■ 5.2. *The issue of ratification of the 2000 Convention by EU Member States (example of Poland)*

Poland signed the Convention on 18 September 2008, but ratification has not yet taken place. The plan to ratify the Hague Convention of 2000 has appeared in some statements over recent years (including on the occasion of the comprehensive consideration of changes to the substantive legal solutions for capacity limitation, incapacitation, and guardianship that would result from the ratification of the 2006 UN Convention), but action to complete this step and bring the Hague Convention of 2000 into force has not taken place.

The current normative status in Poland has been shaped since the 1920s by conventions created under the auspices of the Hague Conference on Private International Law, and in the 21st century, it has also been co-created by the EU 'Brussels' and 'Rome' regulations.⁷⁰ The proposed measures, including the accession of member states to the Hague Convention of 2000, represent a further step in the process of replacing national solutions (in full or limited situational scope) with standards derived from international agreements and EU regulations.

Following the adoption of the Hague Convention of 2000 and in the course of accession by more countries, including the EU, in the early 21st century, a suggestion appeared in the EU that member states should join. The 2010 Stockholm Programme⁷¹ states: 'The need for presenting additional proposals regarding vulnerable adults should be assessed in the light of experience gained in the application of the 2000 Hague Convention on the International Protection of Adults by Member States that are or will become parties to that Convention. Member States

68 Government declaration of 14 September 1929 on accession of the Republic of Poland to the Convention relating to incapacitation and analogous guardianship orders signed at The Hague, 17 July 1905, Dz.U. z 1929 r. Nr 80, poz. 598.

69 Act of 4 February 2011 - *Prawo prywatne międzynarodowe*, consolidated text, Dz. U. 2023 r., poz. 503; hereinafter the PIL.

70 Regarding contemporary trends in legal sources, see Czepelak, 2010, pp. 705 et seq.; Mostowik and Niedźwiedz, 2012, pp. 9 et seq.; Muir Watt, 2020, pp. 79 et seq.; von Hein, 2020, pp. 112 et seq.

71 'The Stockholm Programme: The Open and Secure Europe for the Welfare and Protection of Citizens', OJ C 2010, No. 115, p. 1.

are encouraged to join the Convention as soon as possible' (p. 10). Subsequently, in recent years, the academic and public debate has seen the idea of covering the material scope of what has been called, not quite accurately, 'adult protection' with an additional EU regulation, as it turned out, quite elaborated in COM 280 of 2023.⁷²

With regard to the EU's external competence to conclude international agreements, which is adopted in this respect after the CJEU's opinion in Case 1/03, it should be noted that, according to the second draft mentioned at the beginning (COM 281 of 2023), the Union somehow 'returns it' to the member states (that is, authorises them to ratify an international agreement). Indeed, the Hague Convention of 2000 did not include, as subsequent agreements do, a clause for participation by a regional economic integration organisation, and the Union was not a member of the HCCH at that time. In contrast, with regard to the combined application of the EU regulation and the international agreement, there is a similarity to the relationship of the Brussels IIb Regulation (and earlier Brussels IIa) and the 1996 Hague Convention and the 1980 Hague Convention, as discussed above. Additionally, in terms of this legislative and competence aspect, there is a similarity to the 1996 Hague Convention. Member states were authorised by the Council Decision of 5 June 2008 to ratify the latter in the interest of the European Community.⁷³

The proposed complex structure of the sources of law is an extension of this 'mosaic' with the participation of elements derived from an international agreement. Due to the coverage of the specific material scope (adult 'protection measures') by two normative instruments (the Hague Convention and the EU Regulation), it is intended to be similar to the current complex treatment of legal sources in the area of child custody cases, including international child abduction. In this subject area, the 1980 Hague Convention⁷⁴ (providing for a specific procedure for the return of a child to the State of residence prior to an unlawful change

72 For example, the European Parliament document entitled Protection of Vulnerable Adults – European Added Value Assessment. Study, PE 581.388, September 2016, pp. 14–16, and the public consultation from 21.12.2021–29.3.2022 entitled 'ogólnounijnna ochrona osób dorosłych szczególnej troski' [Online]. Available at: https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12965-Civil-judicial-cooperation-EU-wide-protection-for-vulnerable-adults/F_en (Accessed: 11 August 2025).

73 See Council Decision of 5 June 2008 authorising certain Member States to ratify or accede to the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children, or accession to the Convention in the interest of the European Community, and authorising certain Member States to make a declaration on the application of internal rules of Community law in this area, 2008/431/EC, OJ L 151, 11.6.2008, p. 36.

74 Convention on the Civil Aspects of International Child Abduction, done at The Hague on 25 October 1980 (Dz.U. z 1995 r. Nr 108, poz. 528).

of the place of residence) and another one, the 1996 Hague Convention⁷⁵ (containing rules on jurisdiction, applicable law, and the recognition and enforcement of decisions concerning, among others, child contact and parental authority or custody) are of relevance worldwide. These conventions were subsequently partly transposed to EU regulations and their amendments ('Brussels IIa',⁷⁶ 'Brussels IIb'⁷⁷). Partially, the Hague Conventions have been modified and supplemented in these regulations for the purposes of regional transactions. This practice of the EU legislature may be questionable from the theoretical perspective of international law and from the perspective of the practice of law application, which it does not facilitate.⁷⁸

6. Preliminary assessment of the impact of the Hague Convention of 2000 and the 2023 EU proposals

The issue of operation of the Hague Convention of 2000, as well as the amendments to it and to domestic laws of Member States, requires more detailed analysis, including a larger number of national legal systems and comparative research. However, the foregoing comments justify the preliminary position of a generally neutral or positive impact of Poland's accession to the Hague Convention of 2000, which Member States are authorised to do in the context of the draft contained in document COM No. 281 of 2023. In contrast, the additionally drafted (in the document COM No. 280 of 2023) issue of the regulation supplementing and modifying the Convention raises positive comments (in particular about the intensification of judicial assistance and international cooperation) and critical ones (e.g. about the proposed modification of the Convention rules of jurisdiction and how the provisions on recognition and enforcement of foreign judgements are drafted).

75 Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children, done at The Hague on 19 October 1996 (Dz.U. z 2010 r. Nr 172, poz. 1158), hereinafter referred to as the 1996 Hague Convention.

76 Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgements in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 (OJ L 338, p. 1, as amended), hereinafter – Regulation 2201/2003 or Brussels IIa.

77 Council Regulation (EC) No 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (OJ L 178, p. 1, as amended), hereinafter – Regulation 2019/1111 or Brussels IIb.

78 Including the problems arising from the need to distinguish between the international application of two regimes arising from such a complex structure of sources of law (the so-called conflict of conventions) concerning the same subject matter, that is, the international agreement and the EU regulation. The demarcation rules contained in Regulation 2201/2003 were not well-developed, giving rise to the need for amendments to the subsequent Brussels IIb Regulation. See: Bobrzyńska, 2021, p. 593.

Generally, the drafts can be perceived as successive steps in the process involving the inter-state unification of law, which has intensified with the increase in the number of cross-border relations and has resulted in complexity and expansion of sources of law.⁷⁹

It seems *prima facie* that the 2023 EU proposals would complicate the structure of legal sources and enlarge the ‘amount of text’ but would not, in practice, mean a fundamental change in the normative status concerning jurisdiction and conflict of law rules in situations where a Polish court adjudicates an adult case.⁸⁰ In contrast, the validity of an international agreement within a group of states would have the positive effects that the interstate unification of jurisdictional and conflict of law rules inherently brings. However, the concept of an additional EU regulation (concerning the Convention) may give rise to various comments, both positive and critical. Certainly, the assumption that it complements and modifies the Convention for the needs of the regional economic integration organisation (including the European Union) deserves a positive assessment. Such a need may be particularly justified in the area of mutual recognition and enforcement of judgements, which has initiated and is the driving mechanism of EU judicial cooperation in civil cases. Among the states of the European Union, whose participants are known to each other and which is based, among other things, on trust in the functioning of the judiciary, it is theoretically possible to regulate more than in the Hague Convention of 2000. Indeed, the Convention, with potential global effect, may involve regulation with states that have significantly different judiciary systems or features of substantive or procedural law, and sometimes even difficult to predict. Additionally, worthy of positive evaluation is, in principle, the aim of the proposal contained in COM 281/2023 to expand the circle of Convention states to include more EU states, which also means Poland’s participation in the Hague Convention of 2000. However, there are some doubts about the desire for simultaneous modification by means of the EU regulation.

Its disproportionate volume and number of provisions (despite its complementary nature) raise doubts, which must be seen as a *signum temporis* of legislation in the third decade of the 21st century. It should be redrafted, as it partly contains solutions that are both desirable for judicial cooperation between Member States and others that are unnecessary or questionable.

The idea of modifying the Hague Convention of 2000 and issuing an additional regulation ‘for internal purposes’ of the European Union (that is, relations between EU states) seems more justified in the area of mutual recognition and enforcement of judgements, mutual judicial assistance, and interstate cooperation, which has been mentioned above. In the ‘club’ of EU Member States, which

79 Regarding contemporary trends in legal sources, see Czepelak, 2010, pp. 705 et seq.; Mostowik and Niedźwiedź, 2012, pp. 9 et seq.; Szpunar, 2015, pp. 136 et seq.; Muir Watt, 2020, pp. 79 et seq.; von Hein, 2020, pp. 112 et seq.

80 See more in Mostowik, 2023, pp. 579 et seq.; Mostowik, 2024.

is well-known and based, among other things, on trust in the functioning of the judiciary, it is possible to foresee and thus regulate a little more than in the potential global circle of the Hague Convention of 2000. Certainly, the proposed European Certificate of Representation and national registers of protection measures require careful consideration, including from the perspective of the wide range of cases they are intended to cover and the organisational challenges. The chapters on judicial assistance and interstate cooperation constitute essentially the most valuable part of the draft regulation, as it is essentially in these areas that the 'added value' can be obtained for relations between Member States. One may have the impression concerning them – similar to the impression one gets after reading the provisions on recognition and enforcement – that sometimes the solutions already contained in the Hague Convention of 2000 have been unnecessarily transposed into them. This part of the draft appears to require some editorial refinement and the reduction of provisions (that is, retaining in the Regulation only those that supplement or modify the Hague Convention of 2000).

Due to the options for legislative activities described in the Impact Assessment Report on the 2023 proposals (10108/23ADD), it is reasonable to call for a change in the EU Commission's chosen course of action. It seems more rational to distinguish both planned activities (projects) under Option 4 in temporal terms. It would seem more beneficial, from the perspective of the functioning of the judiciary and the certainty of legal circulation, to first take steps to accede to the Hague Convention of 2000 and gather several years of experience of its operation between Member States. Subsequently, in the long term, it would be recommended to consider the experience of the application of the Convention within the territory of the EU and to take steps to supplement or modify the Convention rules for the needs of intra-EU judicial cooperation in civil matters. Certainly, the experience of the application of the Hague Convention of 2000 may, first, verify the thesis of the need to 'improve' its operation and, second, identify precisely the areas where this would be desirable for the benefit of adults and their guardians and cross-border civil law transactions.⁸¹

81 Hence, the position of the Polish Council of Ministers, represented by the Minister of Justice, presented in the course of the work of the parliamentary committee in August 2023, that the government has an entirely positive stance on the 'adult protection' proposals, does not seem fully justified. See Sejm [Online]. Available at: [https://orka.sejm.gov.pl/zapisy9.nsf/0/DCD0F2599A83F6BAC1258A14003D5C4B/\\$File/0415309.pdf](https://orka.sejm.gov.pl/zapisy9.nsf/0/DCD0F2599A83F6BAC1258A14003D5C4B/$File/0415309.pdf) (Accessed: 11 August 2025).

7. Identification of issues for further studies on EU proposals of 2023 versus the domestic current state of play

■ 7.1. *Implications of terminological changes and the broad scope of the ‘protection measure’*

The above detailed comments on the development of Polish law must be related to the current international situation, including the abovementioned EU proposals of 2023 (which assume the applicability of the 2000 Convention). It is worth starting with definitions and the observation that the new terminology has a much broader content than the existing institutions of civil and family law in some Member States.

The theoretical concept and substantive content of the ‘protection measure’ are of key importance for determining the scope of application of the Hague Convention of 2000 and the proposed EU Regulation (consequently, by extension, the scope of any potential changes to the national legal order should they enter into force). This concept, as intended by the Convention drafters, is meant to encompass a range of national legal institutions, sometimes widely diversified. This approach is transferred to the scope of application of the proposed EU Regulation. It should be borne in mind that, in addition to the institutions of full or partial incapacitation as well as guardianship and curatorship (or their functional equivalents), which are closer to civil law, the Convention is also intended to apply to situations at the interface with public law (e.g. placement in an institution, functioning of a representative in an area broader than civil law), and the delimitation of certain situations of application and non-application (e.g. health or safety measures) will need to be clarified in judicial practice.

The broad interpretation of the ‘protection measure’ is innovative from the national perspective, as incapacitation and guardianship or curatorship are sometimes perceived separately (both substantively and procedurally). However, from a practical perspective and with regard to the welfare of an adult, it can collectively capture the point well. A mere incapacitation or similar judgement (from a domestic perspective associated with a civil court) does not constitute a full settlement of an adult’s life issues (needs). The ‘reverse’ (a related element, necessary in civil law transactions) is somehow the assistance to the adult concerned to ‘return’ to participate in the transaction and protect him/her (e.g. with the help or through a guardian, curator, or assistant), including the operation of guardianship and curatorship institutions (associated with the family court). In modern private law, there is no ‘civil death’ of a person, while the restriction or deprivation of legal capacity is not intended to exclude a person (and his or her assets) from civil law transactions involving third parties. For these persons, such exclusion would also have negative consequences, as they would not be able, for

example, to enforce a contract, claim damages, or take care of their own economic affairs, which would *in concreto* conflict with the interests of the incapacitated person's assets.

In addition, specific problems may arise in those legal systems where, as in Poland, the two legal institutions are subject to separate adjudication processes, i.e. incapacitation or other limitation of legal capacity and the establishment of guardianship or curatorship are adjudicated separately and, moreover, both legal areas are subject to separate conflict of laws rules, as in the context of the PIL, unlike in the Hague Convention of 2000. First, the concern exists that the limitation of capacity (e.g. by way of incapacitation) will not be followed in practice by the appointment and functioning in the market of a guardian or a curator, which is a separate issue of substantive and procedural law. Second, a need then arises to separate the scope of application of the distinct conflict of laws rules which refer to incapacitation or a similar order and guardianship or curatorship or similar adult support institutions.⁸² Obviously, this problem has practical consequences when each conflict-of-law solution provides for a different indication of the applicable law, and thus the substantive law of a different country may apply to each of the aforementioned stages. Such differences occur between Article 13 and Articles 60 and 62 PIL and are not a feature of the Hague Convention of 2000, which provides for a single broader formulation of the 'protection measure'.

The 2023 proposals refer not only to the legal status of a person (e.g. partial incapacitation or similar foreign law institutions) and his/her guardian, curator, or attorney, but also to the consequences for civil law transactions with third parties (including the rights and obligations of the parties to legal transactions). Referring to the adult 'protection measures', they apply to specific solutions in national law and institutions unknown to Polish law, such as the modification of partial or assisted incapacitation. The material scope of the Hague Convention of 2000 and the proposed Regulation is broad and, from the perspective of national terminology, may be 'hidden' in practice under the concept of 'adult protection measure', which is of key importance in the proposed normative status. Referring the foregoing to the national codes, it must be indicated that the material scope of the drafts includes the establishment or revocation of partial or total incapacitation, as well as the change from total to partial and from partial to total incapacitation (Article 559 CCP). A separate reference is made to guardianship and curatorship cases (Articles 590 et seq. and 599 et seq. CC), including curatorship for a partially incapacitated person (Article 16 § 2 CC) and guardianship for a fully incapacitated person (Article 13 § 2 CC), as well as guardianship for a disabled person if that person needs assistance to manage all matters or matters of a certain type or to

82 Regarding various solutions related to the impact of a mental state other than the state giving rise to incapacitation on capacity and the performance of civil acts, see Pazdan, 1967, pp. 90 et seq.

deal with a particular matter (Article 183 of the FGC), and curatorship to protect the rights of a person who, due to absence, cannot manage his/her affairs and does not have an attorney (or who cannot perform his or her acts or performs them improperly; Article 184 of the FGC). It also covers some other material situations of adult curatorship, which is not a homogeneous institution in Polish law and is provided for by several provisions, like the CC, the FGC, the CCP, and statutes. For example, according to Article 44 of the Act on the Protection of Mental Health,⁸³ a curator may be appointed for a person admitted to a psychiatric hospital or for a mentally ill or mentally handicapped person in a social welfare home, if the person needs assistance to manage all of his/her affairs or affairs of a certain type at that time. By doing so, it must be borne in mind that some of these institutions, as well as similar ones according to foreign rights, may be subject to assessment from the broader perspective of human dignity, proportionality, and limitations of capacity and deprivation of liberty.⁸⁴

■ 7.2. *The issue of the linking in 2023 EU Proposals to the 2006 UN Convention*

The operation of the Hague Convention of 2000 is accompanied by a phenomenon wherein instruments involving public international law, including the 2006 UN Convention, are also linked in the debate on its application in civil matters abroad. Such a phenomenon can be observed with regard to the 1996 Hague Convention, the operation of which refers to the 1989 UN Convention; however, the scale of the link between both areas is incomparably more extensive. Simultaneously, one may have the impression that the debate on private international law or international civil procedure sometimes arises from public international law conventions without further examination of the actual links with private international law and international civil procedure rules. Indeed, such links occur only to a narrow extent, where substantive law (including that harmonised in individual states following, for example, accession to the 2006 UN Convention) is relevant for conflict-of-law or procedural solutions, particularly regarding the protection of fundamental principles of public policy of the forum state or the consideration of its substantive law as rules of necessary application (enforcing its jurisdiction).

Additionally, in the context of national law, there are links to ‘protection measures’ (including legal guardianship concerning children). Both personal scopes are sometimes governed by the same conflict-of-law provision (e.g.

⁸³ Act of 19 August 1994 on the Protection of Mental Health (Dz.U. z 2022 r. poz. 2123).

⁸⁴ For example, in the judgement of the European Court of Human Rights of 16 October 2012, complaint no. 45026/07, *Kędzior v. Poland*, HUDOC, the placement of a fully incapacitated person in a social welfare home, which took place in the case, was compared to a deprivation of liberty within the meaning of Article 5(1)(e) of the Convention for the Protection of Human Rights and Fundamental Freedoms, done in Rome on 4 November 1950, subsequently amended by Protocols No. 3, 5, and 8, and supplemented by Protocol No. 2 (Journal of Laws of 1993, No. 61, item 284, as amended and supplemented), hereinafter – ECHR, paragraphs 54–60 of the Explanatory Memorandum.

according to certain bilateral agreements). Such a phenomenon – common formal regulations (including common rules) projecting a common perception in substantive terms (as well as a kind of search for common instructions) – is also visible in the context of substantive law (according to Article 175 of the FGC, the provisions on the guardianship of a minor apply accordingly to the guardianship of a totally incapacitated person) and 'non-international' civil proceedings (application of the same procedural rules arising from Article 590 et seq. CCP). The difference involves the greater importance of determining the applicable law and national jurisdiction and the rights and obligations concerning the dependant, the parents (mother or father of the child), rather than the legal guardian of an adult.

■ 7.3. *The 2000 Hague Convention and 2023 EU Proposals versus current law in Member States*

The entry into force of the Hague Convention of 2000 and the 2023 proposal will mean that the national rules on conflict of laws and jurisdiction and the effectiveness of foreign judgements will no longer apply in the adult cases under discussion. Current domestic jurisdiction rules demonstrate a broad approach to the international jurisdiction of Polish courts, as jurisdiction may be determined not only by the nationality of the adult but also by his/her residence, habitual domicile, and sometimes even by his/her mere stay, location of property, or other links. National conflict-of-law rules lead to the application of Polish law for incapacitation as well as guardianship and curatorship when adjudicated by a Polish court (also when jurisdiction is based on grounds other than nationality, e.g. residence or habitual stay). In fact, it is not the exception but the rule to 'break' the universal conflict rule based on the nationality of an adult by a one-way indication of Polish law. The current domestic normative status following the 2009 amendments to the CCP is also characterised by a wide openness to (recognition or enforcement of) foreign judgements (including protection measures within the meaning of the Convention). This means that in such cases the matter will not be considered in substantive terms by the Polish courts, and thus the jurisdictional or conflict-of-law solutions applicable in Poland (including the priority of citizenship or residence as a conflict-of-law connecting factor or basis of jurisdiction) will not be relevant in practice.

Therefore, the impact of the 2023 proposals on current private international law and international civil procedure in Poland is potentially broad. Its holistic presentation requires a comprehensive approach not only from the perspective of the current national regulations (CCP – that is, non-procedural proceedings and international civil proceedings) and private international law and special laws but also the CC (that is, mainly personal law, considering, for example, the impact of the lack or limitation of the capacity of an individual on matters of property, bonds, and succession).

Substantive legal effects (due to the presumptions arising from entries) may be generated in the practice of trading by the proposed registers of protection measures. In practice, the proposed European certificate of representation and the effects of its submission when performing legal acts on behalf of an adult with a third party will also have an impact on the substantive legal relationship.

A preliminary assessment of the specific solutions contained in the Hague Convention of 2000 in the context of the current legal system in Poland leads to the conclusion that, in fact, should Poland participate in it, there would be no fundamental change in the normative status in situations of adjudication in adult matters by a Polish court, that is, in the field of jurisdiction and conflict-of-law rules. Greater differences occur between national and convention rules on the recognition and enforcement of foreign judgements and judicial cooperation (assistance). The confirmation of this preliminary conclusion requires detailed further research into the possible implementation of the Convention in the Polish legal order, but at this point, the following should be noted: key terminological issues and evaluation of the changes in the area of jurisdictional and conflict-of-law connecting factors from the perspective of the practical effect of the application of the Convention conflict-of-law rules and jurisdiction (that is, the competence of Polish courts and the application of Polish law).

Based on the above considerations, it can be noted that domestic law currently demonstrates a broad scope of jurisdiction of Polish courts under the CCP (nationality, residence and habitual residence, stay alone, location of assets, and other links). This, in turn, in view of the principle of application of one's own law, which actually stems from the PIL, implies a wide scope of application (jurisdiction) of Polish law in adult matters. Simultaneously, the far-reaching principle of recognition of the effects of foreign judgements (protection measures) by operation of law derives from national law, which is reinforced in practice by the narrow scope of exclusive jurisdiction according to the CCP after the 2009 amendment.

Domestic jurisdictional and conflict-of-law rules distinguish between partial or full incapacitation and legal guardianship or curatorship (more precisely, several legal institutions under this name), with the grounds of jurisdiction of Polish courts and authorities being broader in relation to the latter category of cases. Separate regulations may apply, in addition to the CCP and the PIL, to measures taken in relation to, for example, mental health and alcohol or drug addiction. In the context of the Convention, both incapacitation and guardianship or curatorship are covered by the more general concept of the 'protection measure', to which uniform rules of jurisdiction and conflict of laws apply, as well as those relating to the recognition of foreign judgements and international cooperation.

The effect of applying Polish law by the court, in fact, 'breaks' the universal conflict-of-law rule based on an adult's nationality (paragraph 1) by unidirectionally designating Polish law for incapacitation as well as guardianship and

curatorship when a Polish court adjudicates, including when the jurisdiction is based on grounds other than nationality (paragraph 2). A preliminary assessment of the specific solutions contained in the Hague Convention of 2000 in the context of the current normative status in Poland leads to the conclusion that, in fact, should Poland participate in it, there would be no fundamental change in the normative status in situations of adjudication in adult matters by a Polish court, that is, in the field of jurisdiction and conflict-of-law rules. Greater differences occur between national and convention rules on the recognition and enforcement of foreign judgements and on judicial cooperation (assistance).

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MELIHA POVLAKIĆ* – MEHMED BEČIĆ**

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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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 Plegemann, 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 *Düstür*, 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 Kreševljaković, 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 ahkām-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 Bečić, 2022a, pp. 17–51; Bečić, 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 građanski 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 građanski zakon), 1906.

41 Bečić, 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 Bečić, 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 Bečić, 2015, pp. 108–114.

57 Ibid., pp. 114–124.

58 Bečić, 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; Bečić, 2017b, pp. 71–72.

61 Bečić, 2017b, pp. 72–75.

62 Schmid, 1914, p. 138; Sladović, 1915, p. 28.

63 Bečić, 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 Bečić, 2022b, p. 85.

69 Justizverwaltung, 1880, p. 8.

70 Ibid., pp. 275–498.

71 Bečić, 2016, pp. 219–244.

72 Eichler, 1889, pp. 173–174.

73 Bečić, 2014, pp. 51–66.

74 Bečić, 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 Bečić, 2017a, pp. 96–97.

76 Bečić, 2017b, pp. 71–72.

77 Karčić, 2005, pp. 220–223.

78 Izvještaj o upravi BiH, 1906, p. 36.

79 Bečić, 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 Bečić, 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 Bečić, 2022c, pp. 74–83.

85 Justizverwaltung, 1880, pp. 3–4, 15; Bečić, 2022b, pp. 117–119; Karčić, 2013, pp. 1030–1033.

86 Bečić, 2022b, pp. 120–122.

87 Ibid., pp. 169–184, 188–197.

88 Ibid., pp. 198–213.

89 Bečić, 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 Bečić, 2022b, pp. 134–139; Ajsner, 1920, p. 11.

93 Zbornik zakona i naredaba za Bosnu i Hercegovinu, Godina 1886., Sarajevo, 1886, p. 62.

94 Bečić, 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 Bečić, 2022b, p. 165.

102 Justizverwaltung, 1880, p. 395.

103 Bečić, 2022a, pp. 17–51; Bečić, 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 Bečić, 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 Bečić, 2022c, pp. 74–83.

111 Bečić, 2022c, pp. 73–74.

112 Powlakić, 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 spirit¹¹⁵ 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 functioned¹¹⁶ 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 unified¹¹⁷. 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 Bečić, 2022b, pp. 139–154; Pvlakić, 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 Bečić, 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 Kingdom 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 Powlakic, 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; Powlakić, 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 vlasničkopравnim 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 Powlakić, 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 process¹⁴⁴ 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 socialist 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 organisation¹⁵⁹ 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 Powlakić, 2024b, p. 309.

155 Powlakić, 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; Powlakić, 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 Powlakić, 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*], Official Gazette SFRY [*Službeni list SFRJ*], N° 40/89, 46/90; Social Capital Act [*Zakon o društvenom kapitalu*], Official Gazette SFRY [*Službeni list SFRJ*], N° 84/1989, 46/1990;

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

166 For more on this process Powlakić, 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 1979¹⁷² 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 Powlakić, 2024a, p. 296.

176 Powlakić, 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 Powlakić, 2024a, p. 291.

179 For more see Powlakić, 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 Powlakić, 2024b, pp. 299–300.

182 For more on these new private law regulations see by Powlakić, 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 Šarčević, 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 Povolakić, 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 Powlakić, 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 that 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 to 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 the 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 North 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 Powlakić, 2024b, p. 307.

There are almost no private law regulations for the entire country. Exceptions include regulations governing the broad scope of intellectual property¹⁹³ 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 Designs [*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 Gazette 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 documents²⁰⁶ and electronic signature,²⁰⁷ both topics unified in the EU²⁰⁸ 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 of 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 Powlakić, 2019a.

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

214 For more Powlakić, 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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TINA PRZHESKA*

Towards a Unified Civil Law in North Macedonia: The Path of Codification

- **ABSTRACT:** *This study analyses the development of civil law in the Macedonian legal system and the activities directed towards civil law codification. The development of civil law is examined through several stages that coincide with significant historical events in Macedonian history. In the first stage (from the 14th to the 20th century), Macedonia was under the rule of the Ottoman Empire and subjected to the laws of the Empire. In the second stage (first half of the 20th century), Macedonia was incorporated into the Kingdom of Yugoslavia, while civil law relations were regulated by the Serbian Civil Code of 1844. The third stage (the second half of the 20th century) is the period of socialism in Macedonia, when civil law regulation was tailored to fit the socialist ideology of working-class governance and a state-operated economy. The fourth stage of development covers the end of the 20th century to the present (the 21st century). Today, North Macedonia is a democratic and independent state oriented towards a free-market economy. Civil law relations are regulated by three basic laws, one for each branch of civil law: real property is regulated by the Ownership and Other Real Rights Act of 2001, obligations are regulated by the Obligations Act of 2001, and succession is regulated by the Succession Act of 1996. In addition, there are subject-specific laws regulating particular civil law areas. At this stage in the development of the civil law system, a process of civil law codification was set in motion by the Ministry of Justice. This study presents the activities undertaken from 2009 to 2025 towards the goal of codifying civil law, their effects, and initiatives for moving forward.*

- **KEYWORDS:** *civil law, codification, real property, obligations, succession*

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1. Introduction

On the European continent, there is a widespread tradition of creating civil codes with the intention of establishing a unified and systematic set of rules governing civil law matters. This tradition is rooted in the acceptance of the Roman law tradition by European countries¹. Roman Law, as we know, produced the most famous codification, known as the *Corpus Juris Civilis*, dating from the 6th century A.D.² Following the Roman law tradition and the influence of the philosophical ideas of the Enlightenment, a wave of civil law codifications surged throughout Europe during the 19th and 20th centuries.³ Some of the most famous codifications are the French Civil Code of 1804, also known as the Napoleonic Code, and the German Civil Code of 1900.⁴ These two civil codes are considered to have had a significant influence on codifications in other European countries.

Concerning the countries in Central and Eastern Europe, scholars underline that their legal systems were also influenced by the Austrian Civil Code of 1797 (*Allgemeines Bürgerliches Gesetzbuch* – ABGB). According to scholars, many countries in that region used the Austrian Civil Code as a model for drafting civil codes for their respective legal systems.⁵

Notably, the codification of civil law is characteristic of Continental European legal systems. In Common Law legal systems, on the other hand, the process of codification has not taken root due to different approaches to regulating legal relations.⁶

There has been great emphasis on the need for the creation of civil codes due to their positive impact on legal systems, especially regarding legal certainty and security.⁷ Therefore, the question arises: What is codification, and what does it entail? Codification, in its traditional sense, refers to the act of compiling new and existing rules related to a broad domain of law into a single, comprehensive legal text, usually a book, based on a set of fundamental and coherent principles.⁸ However, codification can take on many forms, which is why scholars tend to differentiate between several types of codifications.⁹

The first type of codification is one that merges several different legal acts into a single legal text. The second type comprises old and new rules merged into

1 Merryman, 1985, p. 10; Glenn, 2004, p. 135.

2 Mousourakis, 2012, pp.78–79; O’Connor, 2012, p. 9.

3 Rivera, 2013, p. 4; O’Connor, 2012, p. 10.

4 Murillo, 2001, pp. 5–6.

5 Veress, 2023, p. 196.

6 Wagner, 1953, pp. 335–336; Bergel, 1988, p. 1076; Weiss, 2000, pp. 497–498.

7 O’Connor, 2012, p. 11.

8 Popelier, 2017, p. 254; Veress, 2023, p. 193; Zimmermann, 2012, p. 373; Weiss, 2000, pp. 449–451.

9 Weiss, 2000, pp. 466–467.

a single legal text. The third type is codification via consolidation of a legal act with all of its amendments.¹⁰

Considering the different types of codifications, scholars also differentiate between substantial and formal codification.¹¹ Substantial codification entails supplementing and amending existing regulations while also creating new rules, all merged into a single legal text that regulates a particular area of law. This kind of codification aims to unify and modify rules regulating a particular area of law, thus creating a regulation that follows changes occurring in a legal system and adheres to its needs. Substantial codification aims to accomplish a set purpose in line with some type of legal reform within the legal system.

An example of substantial codification is the creation of the French Civil Code (*Code Civil*), which repealed old regulations and implemented a civil law system based on ideas and values rooted in Enlightenment ideology promoted before and during the French Revolution of 1789.¹² The main purpose of the French Civil Code, according to scholars, was to create a modern civil law system purified from the remains of an old and restrictive legal system not in line with the principles of natural law.¹³ This is why, by definition, substantial codification or recodification includes radical changes within the legal system, which are usually part of a larger legal reform.¹⁴ Unlike substantive codification, formal codification entails collecting and formatting several different laws regulating the same area of law into a single legal text. This type of codification is also referred to as consolidation.¹⁵ Formal codification or consolidation does not include substantial changes in the codified legal text. This does not mean that consolidation can be reduced to a mere technique for adjoining several laws into one code. The process of consolidation may involve minor changes to the legal texts. These minor changes can include corrections in language and legal terms, adopting unified legal terminology, structural and systematic changes in the legal texts being consolidated, purifying the legal texts from repealed articles, and integrating amended articles.¹⁶ Consolidation improves the quality of the consolidated laws and makes their application easier. However, consolidation does not introduce any fundamental changes in the regulation.

Since the main purpose of consolidation is to facilitate the application of laws by collecting them into a single legal text (code), some scholars point out that the process of consolidation can also be carried out in Common Law systems, even though they are naturally averse to codification.¹⁷

10 Popelier, 2017, p. 254; Bergel, 1988, pp. 1076–1077.

11 Bergel, 1988, p. 1076.

12 Bergel, 1988, pp. 1074–1075.

13 Albanesi, 2017, p. 269–270; Bergel, 1988, p. 1074.

14 Albanesi, 2017, p. 269.

15 Albanesi, 2017, pp. 265–266; Bergel, 1988, p. 1076; Popelier, 2017, pp. 254–255.

16 Albanesi, 2017, pp. 275–276; Voermans, 2008, p. 4.

17 Bergel, 1988, p. 1076.

The type of codification that is carried out also affects the codification procedure. According to some scholars, substantial codification requires a formal legislative procedure to be enforced. This is because substantial codification, in its essence, represents a legal reform. Formal codification, i.e., consolidation, on the other hand, requires a purely administrative procedure in which different legal texts regulating the same area of law are put together (consolidated) into a single act-code.¹⁸ However, in practice, it is quite difficult to draw a definite line between the two procedures. Substantial codification requires a legislative procedure because it is reform-oriented, but it also requires an administrative procedure for collecting and compiling different laws from the same area of law. Formal codification, even though for the most part requiring an administrative procedure of putting together different legal acts into a single legal text, can also include modifications of the existing legal acts, such as amendments or other improvements to the quality of the text. In such cases, the codification process is not only an administrative process but must also be a legislative process.¹⁹

2. Historical evolution of the process of codification of civil law

As scholars point out, codifications have evolved with different functions and purposes over time.

During the period of Roman Law, the primary purpose of codification was to provide coexistence between the different classes. This is why laws were usually subjected to codification in times of turmoil and unrest among the population. When facing the danger of being overthrown, rulers sought legal reforms via codification to appease the masses.²⁰

In the 19th century, codifications played a crucial part in the formation of nations and national states.²¹ During this period, the codification process facilitated the pursuit of centralised legislative and political power.²² Codifications strengthened the perception of a unified state under a unified set of rules and regulations. Codification also contributed to the modernisation of legal systems, implementing new ideas based on the ideology of the Enlightenment and the interests of the so-called bourgeois class.²³

The first half of the 20th century was a period when new civil codes were introduced (e.g., the Swiss Civil Code of 1907). This was also a period of revising and amending civil codes that had been enacted during the 19th century. This

18 Poppelier, 2017, p. 255.

19 Ibid.

20 Poppelier, 2017, p. 258; Legrand, 1994, pp. 7–8.

21 Zimmermann, 2003, pp. 19–20; Zimmermann, 2012, p. 374; Weiss, 2000, pp. 467–468.

22 Poppelier, 2017, p. 258; Legrand, 1994, pp. 8.

23 Veress, 2023, pp. 193–194; Weiss, 2000, p. 452.

process was necessary due to economic and social changes that affected civil law relations.²⁴ As civil law relations evolved and transformed, civil codes also needed to adapt in order to remain relevant in regulating them.

The 20th century is also a time when, according to scholars, a de-codification era began.²⁵ Scholars identify two relevant reasons for the emergence of the de-codification process. The first reason was that 19th-century civil codes had become outdated and unable to respond to the needs of evolving civil law relations. The second reason was that civil law relations had become so diverse, due to economic and social changes in European countries, that civil codes were no longer able to regulate their diversity effectively.

The de-codification process did not necessarily render civil codes obsolete. However, it did lead to the creation of subject-specific laws (special laws) regulating particular areas of civil law. Since subject-specific laws were *lex specialis*, they derogated certain provisions of civil codes. As the number of subject-specific laws increased, skepticism regarding the effectiveness of civil codes also grew. Some scholars even claimed that the era of civil codes' domination as central piece of legislation had come to an end.²⁶

In countries with well-established traditions of codification, subject-specific laws did not eliminate the need for civil codes. Instead of abolishing civil codes, these countries began processes of recodification in order to update and amend the old codes. This naturally led to the improvement of existing civil codes.

The second half of the 20th century was also a period of codification, re-codification, and de-codification. Countries in Europe started the process of post-war recovery within their national borders while strengthening international cooperation by building institutions and organisations capable of preventing future conflicts (e.g., the United Nations and NATO). It was also a time when communist ideology inspired a new form of economic, social, and political organisation in Eastern European societies and states. European countries that embraced communist ideology began reconstructing their legal systems to accommodate new ideas on law and governance. These ideological, economic, and political changes affected civil law as well, since the concept of property and how it would be acquired and used changed significantly. Some socialist countries passed new civil codes that aligned with socialist ideology (e.g., the Czech Republic, Poland),²⁷ while others enacted new socialist laws (e.g., North Macedonia, Serbia, Croatia, Slovenia).

In contemporary legal systems, codification is used to provide legal certainty.²⁸ However, it is almost impossible for civil law relations to be regulated

24 Murillo, 2001, pp. 12–13.

25 Rivera, 2013, pp. 15–16.

26 Ibid.

27 Elischer, 2013, p. 106; Radwański, 2006, p. 10.

28 Poppelier, 2017, p. 258.

exclusively by a civil code. This is due to the fact that civil law has become a very vast area of law. Considering the complexity and breadth of civil law relations, some scholars suggest that full codification may not be an ideal solution for every country.²⁹ European countries that have codified civil law into civil codes also tend to introduce so-called mini-codes that regulate particular areas of civil law relations, such as the Rural Code (*Code rural*) and the Urban Planning Code (*Code de l'urbanisme*) of France. In European countries without codified civil law, regulation usually consists of several basic laws covering particular areas of civil law, such as property law, obligations, succession law, and even family law, alongside a significant number of subject-specific laws (e.g., North Macedonia, Serbia, Croatia, Slovenia, Montenegro, Bulgaria).

3. The influence of the legal system of the Ottoman Empire in Macedonia (14th to 20th century)

North Macedonia was part of the Ottoman Empire for over five centuries (1389–1913). During this period, the Macedonian territory was included in the Rumelia Eyalet, or Beylerbeylik of Rumeli. The Beylerbeylik was a first-level province within the Ottoman Empire, organised to govern the local population, which consisted of people from diverse ethnic and religious backgrounds.

Officially, the law governing the Ottoman Empire was Sharia law. However, Sharia law was not entirely applicable in areas where the Christian and Jewish populations resided, such as in Macedonia. Therefore, Sharia law was usually complemented with statutes called *kanuns* and local customs.³⁰ The *kanuns* were statutes issued by the Sultan and regulated matters not covered by Sharia law.³¹ Even though the *kanuns* were not part of Sharia law, they needed to be consistent with it.³²

The Ottoman Empire functioned as a feudal system in which ultimate property rights over the land belonged to the Sultan. The Sultan had the authority to award the right to use the land to different categories of feudal lords known as *sipahi*. In return, the *sipahi* granted the right to use the land were obligated to pay taxes and perform military services for the Sultan. Working the land was an obligation for the peasants living on it.³³

In Macedonia, under Ottoman rule, a classical feudal system was implemented. Property rights over the land were divided between the Sultan, feudal lords, and peasants, each with different authorisations regarding the land. The

29 Ibanesi, 2017, p. 271.

30 Матовски [Matovski], 1990, p. 14.

31 Ibid.

32 Шукарова [Shukarova] et. al., 2008, p. 132.

33 Ibid., p. 135.

Sultan held ultimate authority, meaning he had the right to distribute land for use. Feudal lords had the authority to use the land as local administrators. They were not entitled to sell or otherwise dispose of the land but were allowed to transfer the right to use it as inheritance to their male heirs. For the sons of the feudal lord to inherit the land, they were obligated to resume their father's duties, which included performing military services for the Ottoman Empire.

Peasants had the right, or more precisely, the obligation to work on the land. As scholars note, in the feudal system, peasants represented the main working force in agricultural production, which is why they were tied to the land.³⁴ They were also tied to the feudal lord they were obligated to serve. Peasants were not free to leave the land without the permission of the feudal lord. If a peasant left the land without permission, the feudal lord had the authority to capture him and bring him back. The authority of the feudal lord could last up to 15 years.

The peasants who belonged to the lower class and were of non-Muslim descent were referred to as *rayah*. Most of the people living on the territory of Macedonia were part of the *rayah*, and their main occupation was agriculture. They were given small parcels of land called *chiflik*, which they were obligated to work on and pay taxes for. Each peasant who was given a *chiflik* to work on received a deed known as *tapu*. The *tapu* represented a guarantee for the peasants that they would not be deprived of that land as long as they worked it and paid taxes regularly. With the permission of the feudal lord, peasants could pass on their *tapu* to their male descendants or transfer it to other peasants. For the *tapu* to be transferred, the recipient had to assume the obligation to pay the same taxes as their predecessor. The *tapus* issued to the Macedonian people during this period played a critical role later on, becoming a basis for establishing continuity in land ownership in the processes of denationalisation, transformation, and privatisation initiated in North Macedonia after the fall of socialism.

At the end of the 18th century and the beginning of the 19th century, the Ottoman Empire was facing a crisis that resulted in a loss of power in its conquered territories. The local feudal lords began declaring their independence from the Empire, which led to lawlessness and pillaging throughout its lands.³⁵ Facing imminent decline, the rulers of the Ottoman Empire initiated reforms of the feudal system. The influence of Western culture also played a significant role in these reforms. Initially, the reforms were directed towards restructuring the feudal system and the military. The restructuring of the feudal system affected land administration and resulted in the termination of the *sipahi* system.³⁶ Reforms directed at the military led to the abolition of the *janissaries* as a military structure.³⁷ The reforms did not result in the full abandonment of the feudal system;

34 Ibid., p. 136.

35 Ibid., p. 165.

36 Rothman, 2007, p. 82.

37 Ibid., p. 81.

however, they laid the foundation for its transformation into a system resembling the capitalism of Western European economies.

As a result of the termination of the *sipahi* system, the *chiflik* system gained momentum. However, that did not improve the position of the peasants. Lower-class peasants (*rayah*) were obligated to pay higher taxes on the land they worked. Taxes became a heavy burden and threatened their very existence. Peasants were impoverished and began to migrate into cities, where trade and crafts were starting to develop. The migration positively affected the development of cities on Macedonian territory, eventually leading to the creation of a bourgeoisie class, some of whom were of non-Muslim descent.

The period that brought the most important reforms of the feudal system within the Ottoman Empire is known as the Tanzimat period. According to scholars, this period ranged from 1839 and 1876.³⁸ The Tanzimat reform is considered to have been initiated by the Imperial Edict of Reorganisation (*Gülhane Hatt-ı Şerif*), dating from 1839. The Edict of Gülhane is considered an important document that promoted equality for all people before the laws of the Ottoman Empire.³⁹ Equality meant that all people were to have equal rights and enjoy equal treatment before the authorities. It created opportunities for people to engage in trade and contribute to the economy. As a result, significant economic development occurred within the cities.

Another important document promoting equality among all residents of the Ottoman Empire was the Sultan's Decree (*Hatt-i Humayun*) of 1856. This decree proclaimed that all residents were to have the same rights and liberties, reinforcing the idea of equality, in line with Western European principles. The benefits of these reforms were not limited to the population of Macedonia; they also had the opportunity to participate in the developing market economy, although non-Muslim populations still faced barriers despite formal equality. Political involvement in Macedonia remained exclusively reserved for the Muslim population. Among the reforms that affected the population was the abolition of tax-farming and the reform of the land tenure system, which allowed for land ownership.⁴⁰

For the people in Macedonia, the period of Tanzimat reforms represented a time of national awakening and a striving for liberation. This culminated in the Razlovci uprising of May 1876. Although unsuccessful, the uprising drew the attention of European countries to the Macedonian cause for national liberation.⁴¹ Alongside uprisings in Macedonia and Bulgaria, the Ottoman Empire also faced a power struggle between the Sultan and the Young Turks, who opposed the westernisation of the Empire. The Young Turks believed that the reforms and the modernisation of the Ottoman Empire's legal system should remain aligned with

38 Шукарова [Shukarova] et. al., 2008, pp. 165–166; Rothman, 2007, p. 81.

39 Ibid., p. 166.

40 Rothman, 2007, pp. 82–83.

41 Шукарова [Shukarova] et. al., 2008, p. 173.

the Sharia law.⁴² Despite difficulties and opposition, the reforms moved forward, resulting in the adoption of the Constitution of 1876, which defined the Ottoman Empire as a constitutional monarchy. However, this constitutional reform was abolished in 1878.⁴³ The opposition of the Young Turks eventually culminated in the revolution of 1908.⁴⁴

In 1878, after the Ottoman Empire lost the war against Russia, a peace treaty was signed – known as the Treaty of San Stefano – on January 31, 1878. Among other provisions, this treaty placed Macedonia within the independent Bulgarian state, a decision that was met with strong dissatisfaction among Macedonian intellectuals. The Treaty of San Stefano was opposed by several parties and was subsequently revised during the Berlin Congress held on July 13, 1878. Under the revision, Macedonia was left under Ottoman rule. Although the Treaty called for reforms, they were never enacted. During these negotiations, uprisings also broke out in Macedonia, the most significant being the Kresna uprising of 1878. Similar to earlier revolts, it ended unsuccessfully, leaving the Macedonian people without reforms or independence. Fighting for Macedonian interests, local intellectuals appealed to Western European countries, demanding the enforcement of Article 23 of the Berlin Treaty, which called for reforms, as well as protection of the rights of the Macedonian people.

Following the Berlin Congress, there was intense activity aimed at promoting both socio-economic reform and the national liberation of the Macedonian people. In this context, the Macedonian Revolutionary Organisation was founded in 1893. Its primary goal was the protection of Macedonian interests and the pursuit of national liberation.⁴⁵ At a congress held in Thessaloniki in 1896, a decision was made to adopt a Constitution and Rule Book to govern the Organisation's activities. These documents were written and published in 1897. The Constitution provided a framework for protecting Macedonian socio-economic interests and achieving national liberation, but it was not recognised by the Ottoman Empire.

The activities of the Revolutionary Organisation prompted the Sublime Porte to reinforce Ottoman law in Macedonia. Nevertheless, the Organisation continued its efforts, which culminated in the Ilinden uprising on August 2, 1903. The uprising was suppressed and ended on August 13, 1903. Despite its failure, it drew significant attention from Western European countries to the Macedonian cause for liberation. These countries called for immediate and substantial reforms to improve the legal and economic status of the Macedonian population. The proposed reforms targeted administration, policing, and finance, with the goal of strengthening governing institutions. However, they were never fully

42 Rothman, 2007, pp. 86–87.

43 Ibid., p. 83.

44 Rothman, 2007, p. 83; Шукарова [Shukarova] et. al., 2008, p. 207.

45 Шукарова [Shukarova] et. al., 2008, pp. 191–192.

implemented and thus did not significantly improve the position of the population in Macedonia.

The revolution initiated by the Young Turks presented another opportunity for socio-economic reforms in all the territories occupied by the Ottoman Empire, including Macedonia. For this reason, revolutionary forces in Macedonia supported the revolution. Once the Young Turks gained power in the Ottoman Empire, some political rights were recognised for the population in Macedonia, such as the right to form organisations and political parties. However, in 1909, after successfully combatting counter-revolutionary forces, the Young Turks abandoned reforms such as decentralisation and self-governance of the occupied territories. As a result, they reverted to the old system, which excluded significant socio-economic reforms, including agricultural reform.⁴⁶

Up to 1912, Macedonia had the status of a province within the Ottoman Empire. During this period, civil law relations were regulated by the *Mecelle* (*Mecelle-i Ahkâm-ı Adliyye*). The *Mecelle* was a civil code of the Ottoman Empire based on Sharia law but also influenced, both conceptually and structurally, by the French Civil Code.⁴⁷ The Ottoman Land Code of 1858 was also enforced in the area of land law.⁴⁸ Both the *Mecelle* and the Ottoman Land Code failed to reflect the cultural characteristics of the Macedonian people, which significantly influenced everyday civil law relations. For this reason, customs played a crucial role in regulating those relations as well.

In 1912, the First Balkan War began between the Ottoman Empire and the Balkan Union. It ended with a peace treaty signed on May 30, 1913. The treaty officially ended Ottoman domination in the Balkans but did not establish borders between the Balkan states. According to scholars, this was the main reason for the outbreak of the Second Balkan War on June 29, 1913.⁴⁹ The Second Balkan War also ended with a peace treaty, known as the Treaty of Bucharest, signed on August 10, 1913. Under this treaty, Macedonia was divided between Bulgaria, Serbia, and Greece. The part of Macedonia that today constitutes North Macedonia came under Serbian rule. The following year, on July 29, 1914, the First World War began.

4. The legal system of Macedonia within the Kingdom of Serbs, Croats, and Slovenians (First Half of the 20th Century)

After the First World War, a peace treaty was signed on November 27, 1919. This treaty, known as the Treaty of Paris, largely reinforced the previously signed

46 Ibid., p. 209.

47 Групча (Grupche), 1983, pp. 58–59.

48 Ibid.

49 Ibid., p. 213.

Treaty of Bucharest. At this point, the territory of North Macedonia became part of the Kingdom of Serbs, Croats, and Slovenians, later renamed the Kingdom of Yugoslavia. The Kingdom of Yugoslavia was constituted as a democratic parliamentary monarchy.⁵⁰ During this period, the Serbian Civil Code of 1844 was enforced in Macedonia, since it was considered part of Serbian territory.

According to scholars, the Serbian civil code was mainly based on the Austrian civil code,⁵¹ but it was also adapted to the cultural, economic, and social characteristics of Serbia at the time. The Civil Code consisted of introductory provisions and three parts: Part One – Persons and Family Law, Part Two – Real Property Rights, and Part Three – General Provisions on Personal and Property Rights. The introductory provisions (Arts. 1–35) set out the scope of application of the Code and the concepts of rights and justice. Part One regulated personhood, legal capacity, civil status, the rights and duties of spouses, and the rights and duties of parents and children (Arts. 36–181). Part Two was divided into two sections. The first section regulated ownership and other real property rights such as pledges and servitudes (Arts. 182–393), as well as inheritance (Arts. 394–530). The second section regulated obligations and torts (Arts. 531–826). Part Three addressed how personal and property rights were acquired, transformed, and terminated (Arts. 837–921), and also regulated prescription (Arts. 922–950).

During this period, the Macedonian people were subjected to strong propaganda aimed at assimilation. The application of the Serbian Civil Code in Macedonia – adapted to the cultural characteristics of the Serbian people – aligned with the broader assimilation policies pursued by Serbian authorities.⁵² Since the Serbian Civil Code formed part of this assimilation strategy, it did not reflect Macedonian culture and customs. For this reason, Macedonians regarded it as legislation imposed by an occupying force, and later deliberately avoided preserving continuity with it. Historical events that followed further contributed to the breaking of legal continuity.

In 1919, efforts were made to dissolve the feudal system through agrarian reform. As a result, land was distributed among the peasants who worked on it. These reforms included Macedonia as well. Evaluating the effects of the agrarian reform, scholars conclude that although it was a step towards modernisation, it did not yield the expected results, as it did not completely dissolve the feudal system.⁵³

To establish legislative unity within the Kingdom of Yugoslavia, a Commission set up by the Parliament's Legislative Council within the Ministry of Justice began drafting a new civil code that would apply to the entire territory

50 Papajorgji, 2024, p. 44. Шукарова [Shukarova] et. al., 2008, p. 225.

51 Stanković, 2014, p. 886; Popović, 2024, pp. 468–469; Zimmermann, 2003, p. 20.

52 Шукарова [Shukarova] et. al., 2008, p. 225.

53 Papajorgji, 2015, p. 45.

of the Kingdom.⁵⁴ The Commission prepared a draft of the Yugoslav Civil Code by 1935.⁵⁵

With regard to commercial law during the period of the Kingdom of Yugoslavia, it should be noted that several laws regulated trade at the time. In Serbia, the Serbian Trade Law of 1960 was enforced.⁵⁶ Since North Macedonia was part of Serbia at the time, the same law applied there. Other states within the Kingdom of Yugoslavia enforced their own trade laws (e.g., Montenegro, parts of Bosnia and Herzegovina) or applied the Austrian Commercial Code of 1862 (Slovenia, parts of Bosnia and Herzegovina) or the Hungarian Commercial Code of 1875 (Croatia).⁵⁷ The enforcement of different trade laws in different parts of the Kingdom did not contribute to the unity of the legal system. For this reason, it was decided that a new commercial code should be drafted and applied throughout the entire territory of the Kingdom of Yugoslavia. According to historical sources, work on the new Commercial Code began in 1921.⁵⁸ However, the process was interrupted in 1929 due to political turmoil and the proclamation of dictatorship. Once the political situation stabilised, work on the Commercial Code resumed, and a preliminary draft was completed by 1932. A version of the Commercial Code was adopted in 1937, but it was incomplete, as it lacked provisions on property law and obligations. Historical sources indicate that the Commercial Code was intended to be completed after the adoption of the Civil Code, which at that time remained only in draft form.⁵⁹

The new Civil Code was never implemented, nor was the Commercial Code completed, due to the outbreak of the Second World War.

5. The legal system in Macedonia after the Second World War (Second Half of the 20th Century)

By the end of the Second World War on September 2, 1945, the Macedonian state was constituted based on the decision of the Anti-Fascist Assembly of National Liberation of Macedonia, held on August 2, 1944.⁶⁰ In 1945, Macedonia, as an independent state, became part of the Federal People's Republic of Yugoslavia under the name of the People's Republic of Macedonia. The People's Republic of Macedonia adopted its first Constitution in 1946.⁶¹

54 Papajorgji, 2015, p. 45; Popović, 2024, p. 472.

55 Popović, 2024, p. 472; Mirković, 2020, pp. 270–280.

56 Vlacic, 2020, pp. 98–99.

57 Ibid.; Krešić, 20017, p. 8.

58 Vlacic, 2020.

59 Vlacic, 2020, pp. 103–104.

60 Шукарова [Shukarova] et. al., 2008, p. 282.

61 Ibid., p. 315.

This was a period when the Communist Party became the ruling party in the country; therefore, the adoption of the Constitution of 1946 marked a new era in building the socio-economic, legal, and political system based on communist ideology. During this time, the government began eliminating private ownership by converting it into state ownership. This included confiscation, expropriation, agrarian reform, and other measures intended to deprive private owners of their property. As a result, over time, the entire social and economic system became state-operated.

The newly established communist system required laws that would be in line with communist ideology. This is why, in 1946, a law⁶² was passed that abrogated all laws and regulations enforced before April 6, 1941, as well as those enforced between 1941 and 1945 while the member states of the Federation were under occupation. According to Article 1 of this law, all regulations implemented by the occupying government and their collaborators were declared non-existent. Article 2 stated that the laws and regulations enforced until April 6, 1941 had lost their validity. However, since it was necessary to maintain order, courts and government bodies were allowed to apply the provisions of these laws and regulations as informal rules, as long as they were not contrary to the Constitution of the Federation and the constitutions of its member states. Applying the abrogated laws meant they could only be used as a reference point. Still, neither the courts nor the government bodies were allowed to base their decisions directly on the abrogated law by citing it (Art. 4). The Federal Assembly and the assemblies of the member states were authorised to determine which of the previous laws and regulations could be applied with the necessary amendments (Art. 3). This law not only abrogated all laws and regulations enforced before April 6, 1941 but also prohibited new laws and regulations from being based on them (Art. 4/2). By forbidding old laws from serving as a basis for drafting new laws, the legal continuum was interrupted. This was done with the intention of establishing a new legal order with no common features with the old rules and regulations. However, that was practically impossible in civil law matters, because civil law institutions dating back to Roman law could not be eliminated even in a socialist legal system.

Regarding civil law matters, the law stated that court decisions and decisions rendered by other government bodies after April 6, 1941 could remain in force as long as they were not based on abrogated laws contrary to the new legal order. Any person who considered that their rights had been violated by such decisions in civil law matters was authorised to file a claim before the courts so that a new decision could be rendered under the governing laws. If a person was unable to file such a claim, the claim could be filed by the proper authorities (Art.

62 Zakon o nevažnosti pravnih propisa donetih pre 6. Aprila 1941. godine i za vreme neprijateljske okupacije [Law on invalidity of regulations passed before 6th of April 1941 and during enemy occupation].

7). Regarding property rights on real estate registered in the land registers, the law recognised them as valid (Art. 9). If the rights registered in the land registers were disputed under Article 7, the fact that there was a dispute was to be noted in the land registers (Art. 9/2)

In Macedonia, during the socialist period (1945–1991), civil law matters were not regulated by a civil code. In fact, there were no discussions about codifying civil law. Instead, civil law relations were regulated by three basic laws and a number of subject-specific laws. The basic laws were the Basic Real Property Relations Act (Закон за основните сопственостно-правни односи), the Obligations Act (Закон за облигациони односи), and the Succession Act (Закон за наследувањето). The Basic Real Property Relations Act was passed in 1980 and consisted of 90 articles. It regulated real property rights (ownership, servitudes, and pledge), possession, and the property rights of foreigners. It also contained provisions on the applicable law in case of conflict between the laws of member states and provinces in property relations. Obligations and torts were regulated by the Obligations Act of 1978. The Succession Act of 1973 regulated succession by law, by will, or by succession contract.

The three basic laws that regulated civil law matters reflected the new socio-economic environment in which they were applied. Terms such as ‘socialist’, ‘socialistic’, and ‘social ownership’ were used to incorporate socialistic ideology into traditional civil law institutions. The Basic Real Property Relations Act, as a law regulating property relations, reflected the new socio-economic environment by introducing the concept of social ownership. This was a particular type of ownership operated by state institutions, and ideologically it was presented as ownership belonging to everyone.⁶³ The Obligations Act was created to regulate trade and services in a system where production was socially operated and the entire economy was socially oriented. According to the Obligations Act, the parties in trade relations were labour organisations, social entities, civil organisations, and individuals. Obligations between parties had to be conducted in accordance with the Constitution, the laws, the social establishment, and socialist morality. The Succession Act also reflected socialist ideology. According to this law, real estate and production resources could not be inherited beyond the maximum limits imposed by subject-specific laws. Criminal acts directed towards undermining the working class and the working people, the independence of the state, its defence forces, and socialist development were stated as grounds for disowning an heir. People who refused to serve in the socialist army or acted against the socialist state were declared unworthy of inheritance.

During this period, there were no discussions regarding the codification of commercial law. In fact, by observing the basic laws regulating civil law, we

63 Живковска [Zhivkovska], 2005, p. 56; Групче [Grupche], 1983, p. 72; Стојановиќ [Stojanović] et. al., 1982, p. 19.

can assert that, at this time, a monistic approach was adopted. This is evident from the provisions of the Obligations Act of 1978, which stated that legal entities such as labour organisations, social entities, and civil organisations were equal participants in trade relations alongside individuals. This leads to the conclusion that the Obligations Act was equally applicable to all persons, natural or juridical, in matters of trade relations. However, it should be noted that the constitution, organisation, operational activities, and other aspects concerning the functioning of various types of legal entities were regulated by subject-specific laws.

In a state-operated economy, legal entities, including enterprises, were initially owned and operated solely by the state. Later on, during the 1950s, there was slight decentralisation of the economy, which allowed workers to participate in the management of enterprises through so-called 'work collectives'. Workers' management rights were recognised by the Constitution of the Socialist Federal Republic of Yugoslavia of 1963, which stated that workers' organisations were granted decision-making powers in the area of resource production and distribution (Art. 11). The Constitution of the Socialist Federal Republic of Yugoslavia of 1974 went even further in extending the decision-making power of the working people. Article 66 of the Constitution of 1974 stated that working people were allowed to join their labour and assets in joint labour organisations and other forms of cooperatives and enterprises. Within those organisations, they were permitted to participate in the creation and distribution of assets proportionately to their contribution. The functioning of these organisations was regulated by subject-specific laws such as the Joint Labour Act of 1976.

It should be emphasised that, even though workers were granted decision-making powers within the organisations, they were not considered their owners. The organisation and its assets were socially owned. Overall, the entire legal system at the time was adapted to an economy operated and controlled by state institutions, and civil law relations were tailored accordingly, limiting the free initiative and interests of individuals for the benefit of socialist society.

6. The legal system of North Macedonia in the present and the efforts for codification of civil law

The present legal system in North Macedonia was constructed gradually, starting in 1991, when Macedonia declared its independence and adopted a new Constitution. In the Constitution of 1991, the Republic of Macedonia was declared to be a sovereign, independent, democratic, and social state. The Constitution of 1991 cut all ties with the previously established socialist system and the concept of socialist ownership. Instead, it recognised the right of ownership as an inviolable right by declaring that the right of ownership and the right of inheritance are guaranteed to all individuals. According to the Constitution, no one can be deprived of their

ownership except in the public interest, in which case just compensation is due, no less than the market value of the expropriated property (Art. 30). The Constitution also states that one of the fundamental values of the new legal order is the protection of the right of ownership. These constitutional guarantees were put in place to ensure that no future government could unilaterally deprive individuals of their property for ideological reasons. The Constitution further proclaimed the orientation towards a free-market economy (Art. 55). These constitutional provisions became the basis for regulating the three branches of civil law – real property, obligations, and succession.

While new laws were being drafted, the rules and regulations governing civil law relations inherited from the socialist system remained in force after 1991, but only to the extent that they were not contrary to the Constitution of 1991.

Between 1991 and 2001, the Macedonian legislative branch was mainly focused on drafting laws that would regulate the transformation of socialist ownership, partly into state ownership but mostly into private ownership. As a result, various laws were passed regulating the transformation of socially owned buildings and enterprises into private ownership, the denationalisation of nationalised property, and the privatisation of nationalised construction land. These processes took a very long time to complete, and some disputes concerning them are still ongoing in the court system.

The slow transformation of socialist ownership into state or private ownership delayed the drafting of new basic laws regulating the three branches of civil law. The Succession Act was passed in 1996, while the Ownership and Other Real Rights Act and the Obligations Act were passed in 2001. These three basic laws regulating civil law relations are aligned with constitutional provisions and adapted to the free-market economy.

The Ownership and Other Real Rights Act (the Ownership Act) guarantees legal protection of all real property rights. It also provides that all types of ownership (private, state, and municipal) enjoy equal protection under the law. The Ownership Act also guarantees real property rights of foreigners.

The Obligations Act regulates obligations and torts in line with the principles of free enterprise, free initiative, and equality of all parties.

The Succession Act guarantees the right to inheritance for all persons. It provides that inheritance can be obtained by law or according to a will. Respecting the freedom of individuals to dispose of their property in case of death, the Succession Act prioritises succession by will before succession under the law.

In addition to the basic laws, many subject-specific laws regulate particular areas of civil law such as agriculture, urban planning and development, state and municipal ownership management, real securities, exploitation of minerals, consumer protection, and other areas. These subject-specific laws represent a large pool of different rules and regulations that often collide with one another and sometimes contradict the basic laws regulating civil law.

The current state of civil law regulation makes the application of all these different laws difficult, especially when there are contradictions and overlaps. The contradictions between the basic laws and the subject-specific laws are easier to overcome because the principle of *lex specialis derogat legi generali* is applied. However, this principle is not entirely applicable when two subject-specific laws regulating the same area of civil law overlap. When such overlaps occur, it is challenging for the judiciary and other state authorities to maintain consistency in applying those overlapping laws. As a result, legal certainty, legal order, and justice become severely compromised. Meanwhile, corruption and authoritarianism increase.

In that type of legal climate, legal scholars began exploring possibilities for improving the legal system, increasing legal certainty, and maintaining legal order while ensuring justice and fair treatment for all individuals. The point on which they all agree is that the laws and regulations in the area of civil law need to be amended and updated. This especially refers to the basic laws regulating property, obligations, torts, and succession. However, opinions are divided regarding how to consolidate all the laws regulating civil law matters. A larger group of legal scholars consider codification of civil law to be the best approach. There are also scholars, such as Professor Rodna Zhivkovska, who believe that codification of Macedonian civil law at this time is not the best solution. According to Professor Zhivkovska, the level of disharmony between the subject-specific laws, the rapid changes in regulation, and the need for harmonisation of Macedonian law with EU regulations represent a serious obstacle to the codification of civil law.⁶⁴

Despite concerns about the difficulties of achieving full codification of civil law due to the current state of the Macedonian legal system, there were some initial efforts to move forward with this idea. In 2009, the Ministry of Justice prepared the Project for Drafting a Civil Code of the Republic of Macedonia. The Project was publicly presented, but no concrete steps were taken at the time to advance the idea of codification. Three years later, in 2011, the idea for codification was revisited by the authorities. On this occasion, the Government rendered a decision authorising a Commission comprising a large number of legal experts in civil law, constitutional law, administrative law, and other fields to participate in drafting a version of the civil code.⁶⁵

During 2012, the Commission held several meetings at which some basic questions regarding the draft of the civil code were discussed. The discussions revolved around the content and the systematisation of the civil code.

64 Zhivkovska and Przheska, 2014, p. 261.

65 Одлука за формирање на комисија за изготвување на граѓански законик на Република Македонија, Сл. весник на РМ, бр. 4/2011. [Decision for constituting a Commission for drafting the Civil Code of Republic of Macedonia, Official Gazette of the Republic of Macedonia, number 4/2011].

Concerning the content of the civil code, the Commission members shared different ideas. One group considered that the civil code should extend to other areas of private law and not restrict itself to the traditional branches of civil law, such as property law, obligations, and succession. More precisely, this group proposed that family law and even intellectual property law should be included in the civil code. The idea of incorporating intellectual property law into the civil code was abandoned, not only because of the specific nature of intellectual property but also because it represents a dynamic area of law subject to frequent changes. As for family law, even though this branch of private law does not share many similarities with the traditional branches of civil law, it was decided that it could be included in the civil code. The argument in favour of incorporating family law into the civil code was that this is common practice for civil codes in Europe. Ultimately, it was decided that the civil code would be comprised of a general part, property, obligations, succession, and family law.

Regarding commercial law, it was concluded that the monistic approach in regulating trade relations should remain in place, since the Obligations Act of 2001 was already drafted to be equally applicable to natural and juridical persons.

When deciding on the systematisation of the civil code, the Commission concluded that the example of the German civil code should be followed. This decision was based on the fact that Macedonian laws regulating civil law matters generally followed the German legal tradition, either directly or by transplanting legal solutions from countries known to follow the German model, such as Croatia.

Following the initial discussions about the content and structure of the civil code, five working groups were formed, each tasked with working on a particular part of the civil code. The groups consisted mainly of professors, though there was an idea to consult and partially involve legal practitioners and foreign experts. The working groups largely operated independently, with no general meetings to discuss progress. Some issued working papers in 2013 outlining their ideas and views on how a particular part of the civil code should be drafted, which parts of the old regulation could be incorporated, and which needed to be changed or updated.

After this period, the activities regarding the draft civil code lost momentum due to a lack of financial and operational support from the Ministry of Justice, the main instigator of the codification process. As a result, the working groups found it difficult to continue preparing the draft. Even though activities surrounding the drafting of the civil code halted in the following years, the working groups were never officially disbanded.

After the COVID-19 pandemic, there was an attempt to revive the idea of codifying civil law. A general meeting was held in 2022 where members of the previously formed working groups, legal practitioners, and state officials were called to discuss the possibility of continuing the work. Several issues were addressed,

including the need for greater engagement and support from the authorities, the need to establish deadlines for preparing the draft, and restructuring the working groups. One issue that sparked debate was the objective obstacles to codification. A major obstacle is the instability and disharmony between the basic and subject-specific laws regulating civil law relations. As was rightfully pointed out, in a legal climate where subject-specific laws are constantly being amended, there is no relative stability in the legal system – stability that is essential for codification to succeed and for the civil code to be practically applicable.

Considering these obstacles, representatives of the Ministry of Justice faced the dilemma of whether to continue supporting the codification project initiated in 2011 or to focus instead on the goals of the subsequently adopted Strategy for Judicial Sector Reform 2017–2022. Unlike the codification project, the strategy called for adopting separate basic laws regulating the three branches of civil law, with the idea that once stability was achieved, these laws could later be merged into a single legal text – the Civil Code of the Republic of North Macedonia. This dilemma, however, was never decisively resolved by the authorities.

Three years have passed since that meeting, but no concrete steps have been taken by the authorities. Nevertheless, the working groups continued preparing drafts of the separate parts of the civil code. Some of these drafts, such as the draft Succession Act, were publicly discussed at conferences and other gatherings of scholars and legal practitioners. However, none of these drafts entered the official legislative process for adoption. Meanwhile, amendments were made to existing laws, such as the Obligations Act of 2001. Many scholars who participated in the codification project have since appealed to the Ministry of Justice to take a decisive stand on the process.

At present, scholars have put forward two proposals for how the process should continue. One group supports the continuation of full codification of civil law. Another group proposes introducing mini-codifications, such as a Property Code, Obligations Code, Family Code, and Succession Code. In the current legal climate, the latter approach appears more feasible. The Obligations Act, which already functions as a mini-codification, has recently been amended and updated. Similar work can be done with the Family Act and the Succession Act, since the working groups have already prepared amendments and updates to these laws. As for property law, it should be noted that a working group has already prepared a completely new draft of the Ownership and Other Real Rights Act, which could easily serve as the basis for a Property Code.

Despite the efforts of scholars to draw attention to the need for upgrading the civil law system in the Republic of North Macedonia – whether through full codification or mini-codifications – there appears to be little readiness on the part of the legislative branch to endorse the process. A review of the Government's Program of Activities for 2025 makes it clear that civil law codification is not currently considered a priority.

Faced with the uncertainty of when and in which direction the modernisation of civil law will continue, one can conclude that the road towards a unified and codified civil law system in North Macedonia will be long and challenging, with no clear end in sight.

7. Is codifying civil law in North Macedonia an achievable goal?

When asking whether the codification of civil law in the Republic of North Macedonia is an achievable goal, one must take into account the country's social, economic, and political climate, as well as the multitude of civil law regulations currently in force. The short answer is yes – but not under present conditions, and not within a short time frame.

For codification to succeed, the right conditions must first be established. The process should be gradual and conducted in two phases. Rushing it by skipping steps could result in a Civil Code that is impractical and unenforceable.

The first phase should focus on achieving cohesion between the basic laws regulating civil law relations and the subject-specific laws that govern particular areas of civil law by harmonising them. In the areas of obligations and succession, cohesion already exists because fewer subject-specific laws need to be harmonised with the basic laws (the Obligations Act of 2001 and the Inheritance Act of 1996). However, in the area of property law, numerous subject-specific laws must be harmonised with the Ownership and Other Real Rights Act of 2001. As noted earlier, a draft version of a new Ownership and Other Real Rights Act has been prepared and adapted to recent changes in subject-specific laws. Yet, as time passes and further amendments to subject-specific laws are introduced, the cohesion achieved so far could be lost.

For this reason, the mass production of new subject-specific laws must be halted while harmonisation with the basic laws is ongoing. Amendments to existing subject-specific laws should be made only when strictly necessary, and always in concert with the provisions of the basic laws. This applies to all areas of civil law, but especially property law, which contains the largest number of subject-specific laws.

By the end of this first phase, partial codification should be achieved through the adoption of three mini-codes: a Property code, an Obligations Code, and a Succession Code. A Family Code should also be adopted at this time, since there is general consensus that family law should be included in the codification of civil law. Importantly, this inner harmonisation must be accompanied by harmonisation with EU regulations.

It is challenging to assess the timeline of the first phase in the process of codifying civil law in the Republic of North Macedonia. It may last up to a decade, as it depends on many factors, particularly the readiness of government

institutions to provide operational support. Other contributing factors likely to slow down the completion of the first phase include impending changes within the EU resulting from economic shifts, the introduction of new technologies such as AI that require adequate regulation at the EU level, and similar developments. These will certainly have a ripple effect on civil law relations in all European countries.

Once this first phase is completed and the mini-codes have been successfully implemented in the legal system of North Macedonia for a reasonable period, the prerequisite conditions will be met for initiating the second phase. The second phase should lead to the full codification of civil law through consolidation, which will involve incorporating the existing mini-codes into a single legal text.

Concerning commercial law, as previously stated, most scholars favour the monistic approach as the more rational solution. There are strong arguments in favour of this approach, since it creates more cohesive regulation and avoids the multiplication of legal norms governing the same subject matter, such as contracts. On the other hand, valid arguments also exist in support of the dualistic approach, as it allows commercial law to be tailored to the specific needs of juridical persons. However, the dualistic approach does create parallel regulation in the area of trade relations, which may be seen as undesirable. In reality, a purely monistic approach to regulating commercial law is not possible. Even if overlapping areas are regulated within the obligations section of the Code, there will always be a need for subject-specific laws addressing areas of commercial law that must be adapted to the specific nature and needs of juridical persons.

8. Conclusion

European countries with continental legal systems tend to pursue the codification of civil law due to its positive impact in ensuring legal certainty and stability in civil law relations. Codification can take different forms, but there are generally three types: codification by merging several separate legal acts into a single legal text; codification that combines old and new rules into a single legal text; and codification through consolidation.

The functions and purposes of codifications have evolved over time. In the 19th century, codifications played a crucial role in the formation of nations and national states. The first half of the 20th century was marked by the introduction of new civil codes and the revision of old ones. In the second half of the 20th century, processes of codification, re-codification, and de-codification took place. In contemporary legal systems, codification is used to provide legal certainty and stability. European countries that have not yet codified civil law, such as North Macedonia, rely on several basic laws and many subject-specific laws regulating

different branches and areas of civil law, while simultaneously making efforts towards codification.

The evolution of the Macedonian legal system can be observed through four stages, marked by significant historical events: the period between the 14th and 20th centuries, the first half of the 20th century, the second half of the 20th century, and the present period of the 21st century.

Between the 14th and 20th centuries, Macedonia was under Ottoman rule. During this period, the classical feudal system was implemented, governed by Sharia Law, supplemented with statutes (*kanuns*) and local customs, particularly in areas where Christian and Jewish populations resided, such as the Macedonian territory. The influence of Western culture contributed to reforms within the Ottoman Empire in the 19th century. These reforms, known as the Tanzimat, were initiated by the Imperial Edict of Reorganisation (*Gülhane Hatt-ı Şerif*) of 1839, which promoted equality of all people before the laws of the Ottoman Empire. Another important document was the Sultan's Decree (*Hatt-i Humayun*) of 1856, which proclaimed that all residents of the Ottoman Empire were to enjoy the same rights and liberties. For the people in Macedonia, the Tanzimat period marked a time of national awakening and a striving for liberation.

In the first half of the 20th century, the territory of North Macedonia became part of the Kingdom of Serbs, Croats, and Slovenians, later known as the Kingdom of Yugoslavia. During this period, the Serbian Civil Code of 1844 was enforced in Macedonia. In 1919, to establish legislative unity within the Kingdom of Yugoslavia, a Commission set up by the Parliament's Legislative Council was authorised to draft the Yugoslav Civil Code. The Code was completed in 1935 but never entered into force due to the outbreak of the Second World War.

During the second half of the 20th century, Macedonia, as a constituent republic, became part of the Federal People's Republic of Yugoslavia under the name of the People's Republic of Macedonia. During this period, a socialist system was established that required new laws in line with socialist ideology. As a result, in 1946, a law was passed that abrogated all laws and regulations in force before April 6, 1941, as well as those enacted between 1941 and 1945 while the member states of the Federation were under occupation. In Macedonia, during the period of socialism (1945–1991), civil law matters were regulated by three basic laws and a wide range of subject-specific laws, all adapted to the socialist system.

The present legal system in North Macedonia was gradually constructed beginning in 1991, when Macedonia declared independence and adopted a new Constitution. The Constitution of 1991 cut all ties with the previously established socialist system and the concept of social ownership. At this time, three new basic laws were introduced regulating the three branches of civil law: property, obligations, and succession. The Succession Act was passed in 1996, while the Ownership and Other Real Rights Act and the Obligations Act were passed in 2001. These three

basic laws remain in force today. They are aligned with constitutional provisions and adapted to the free-market economy.

In 2009, the Ministry of Justice prepared a project for drafting a Civil Code of the Republic of Macedonia. Three years later, in 2011, the Government rendered a decision authorising a Commission composed of a large number of legal experts in civil law, constitutional law, administrative law, and others fields to draft a version of the Civil Code. In 2012, the Commission held several meetings discussing the content and systematisation of the Civil Code. It was decided that the Code would consist of a general part, real property, obligations, succession, and family law. After the COVID-19 pandemic, in 2022, an attempt was made to revive the idea of codification, which had lain dormant for a decade, and a general meeting was held to discuss the possibility of continuing the work.

At present, there are two proposals from scholars on how the process should continue. One group proposes the continuation of the process of codifying civil law as a whole. Another group proposes the introduction of mini-codifications, such as a Property Code, Obligations Code, Family Code, and Succession Code. In the current legal climate, the latter appears more likely to be achieved.

Gradual codification conducted in a two-phase process – drafting and enforcing separate mini-codes as a first phase, and full codification as a second phase – is a slow and time-consuming process, which is why it is met with opposition by those involved. However, if the process is rushed and objective obstacles are ignored rather than addressed, the result may be a Civil Code that is inapplicable in practice.

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The History of the Codification of Civil Law in Montenegro

- **ABSTRACT:** *The study analyzes five periods in the history of the codification of civil law in Montenegro, from the 19th century to the present. Until the second half of the 19th century, custom was the main 'regulator' of legal life. The rules created by long-standing customary practice in Montenegro were perceived in the people's awareness as legally binding. For centuries, the people of Montenegro were suspicious of novelties that seemed opposed to their ingrained forms and convictions.*

The first laws that regulated certain (limited) property-related legal relations were the Code of Petar I Petrović Njegoš of 1798 (1803) and Danilo's Code of 1855. The first civil code that codified the existing customary law in Montenegro and incorporated the achievements of contemporary jurisprudence belonging to the common law of modern nations was the General Property Code for the Principality of Montenegro of 1888, written by the renowned jurist Valtazar Bogišić. By its overall qualities, this Code represents the most accomplished legislative act among the countries of the former Yugoslavia. It remained in effect until 1946, when socialist legal relations and dominant social property were established in the former Yugoslavia.

From 1946 to the present, civil legal relations in Montenegro have been regulated by a number of laws. A deeper, substantial intervention in Montenegro's civil law will be achieved with the adoption of an integrated civil code, the drafting of which is near completion. The Code will consist of seven parts: the general part, the law of persons, family law, property law, obligation law, inheritance law, and the 45 famous legal maxims taken from the concluding part of the General Property Code for the Principality of Montenegro.

The unified civil code of Montenegro will maintain continuity with previous legislation, incorporate modern principles of civil law, and take into consideration the relevant positions of court practice in Montenegro and the European Union.

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- **KEYWORDS:** *custom, customary law, General Property Code for the Principality of Montenegro – OIZ, Prince Nikola, Valtazar Bogišić, special laws, Civil Code of Montenegro*

1. Beginnings of the codification of civil law in the 19th century

Codification of civil law has overall legal and social significance. Because of its complexity, vast scope, and reach, this work can only be undertaken by individuals of outstanding legal culture and professional expertise. Codification in this field is the most complex and extensive, and at the same time the most noble and difficult – especially the codification of such an intricate subject as civil law. When Napoleon gladly accepted that the newly promulgated civil code be named after him, he was aware that the civil code is, in every sense, the most authoritative among all other codes, which, although a book in form, actually represents a monument. For this reason, the French Civil Code is a monumental code, named after Napoleon, with an honor that no other code in France had ‘merited’.

For a long time in the history of Montenegro, unwritten rules of conduct, originating from long-standing customary practice, were in force. Montenegrin customs implied social sanctions (ridicule, contempt by the community, boycott, etc.). These social behaviours were in many ways stable and resistant to change. Many of these basic, simple customs came to be recognised as legal customs, perceived as binding, i.e., with the awareness that courts would refer to them.

In Montenegro, customary law remained for a long time the main regulator of legal life. Although a large part of these rules was not recorded in writing, customary law held almost exclusive ‘dominance’ in Montenegro’s legal life. In practice, some of these rules derogated from the provisions of the then-valid Danilo’s Code, even though they were not mentioned in it. Montenegrin judges – though not jurists by training – were often skilful in avoiding the application of legal rules when they believed these conflicted with positive custom, i.e., with justice. The state authority had no objections to such judicial reasoning, nor did it consider this practice to undermine the authority of the state and its organs. Judges, who came ‘from the people’, applied rules of customary law *contra legem*, even though they were familiar with legal rules.

Until the Berlin Congress, at which Montenegro gained international recognition, laws as general acts were rarely passed. Although legislation was an active source of law, it was not the dominant legal form at the time. Many social relations were primarily regulated by legal acts inferior in force to law. Alongside customs, a significant part of these relations was regulated by such acts as: decisions of the Assembly of Heads of Montenegro and the Highlands; Rulebooks; Conclusions of the Assembly of Elders; decisions of the council of nahias; decisions of the

judiciary; orders and edicts of the Prince; orders and decrees of the Senate; orders of dukes; company codes of conduct; proclamations of the Senate; and decisions of councils of nahia heads, among others.

Between the end of 1796 and the Berlin Congress (82 years), Montenegro enacted the following five laws: Stega (June 20 / July 1, 1796); The General Code of Montenegro and the Highlands (1797–1803); Danilo's Code (April 23 / May 5, 1885); Telegraph and Telegram Law (January 2/14, 1870); and the School Code (September 25 / October 7, 1870). During Njegoš's reign, the Laws of Paternity (May 23 / June 4, 1833) were drafted – a legal project that never came into force due to a conflict between Njegoš and its author, Ivan Ivanović Vukotić, president of the Judiciary Senate of Montenegro and the Highlands.

At the time of the Berlin Congress, three legal acts were in force in Montenegro, formally named as 'laws' or 'codes': Danilo's Code (95 articles); Law on Telegraph and Telegram (42 paragraphs); and the School Code (3 paragraphs, accompanied by the Instructions for the Chief School Supervisor and the Teachers' Law – 24 paragraphs).¹

In the first half of the 19th century, the rules of customary law were still dominant and treated as the legacy of the ancestors. Their application was considered mandatory, almost of a religious character.² In the poor Montenegrin society, law, religion, moral code, custom, and folklore were closely connected and intertwined. The people also turned to religion in search of answers to vital existential questions. However, the tribal organization of the state and its customs persisted in congruence with religious concepts. Tribal institutions and customs, the cult of ancestors, and tribal solidarity were the main regulators of social relations.³

For a long time, the people of Montenegro was suspicious of novelties, which they regarded as opposed to their native customs and beliefs. Montenegrin tribes in the border areas adopted many customs from neighbouring Turkey, Albania, and Herzegovina.⁴

From the election of Bishop Danilo Petrović Njegoš in 1697 until the establishment of secular power and the creation of the Principality of Montenegro in 1852, Montenegro was governed by Orthodox bishops of the Petrović Njegoš dynasty. They held both spiritual and secular authority. The Cetinje Metropolitanate was at the head of the church in Montenegro, and the metropolitans of Cetinje exercised both religious and political leadership.

At a time when Montenegro had the status of a 'pre-state', the Orthodox Church was one of the most powerful organisations. It shaped political and religious life as well as education. Economically, it was also a dominant force. The main religious sanctions were the threat of a curse and the punishment in the

1 Crnogorski zakonici, 1998a, pp. 167, 228 and 237.

2 Stojanović, 2009a, p. 84.

3 Ibid., p. 84.

4 Bogišić, 2004, p. 237.

'afterlife'.⁵ The General Code of Montenegro and the Highlands of 1798, amended in 1803 (the Code of Petar I Petrović Njegoš), was passed 'In the name of our Lord Savior Jesus Christ'. The struggle for national liberation was carried out under the slogan: 'For the honourable cross and the golden freedom'.

The Church owned extensive properties across almost all nahias. It held the largest fisheries, large tracts of land, vineyards, and large herds of livestock. It also collected significant revenues from leasing land in border regions (then under Turkish rule) and from leasing real estate in the coastal areas, which at the time were not part of Montenegro. Many testamentary dispositions referred to the Church. In addition to supporting the maintenance of churches and monasteries, these revenues were the main source of funding for the liberation struggle, as well as for schooling and education.

The first law in Montenegro regulating certain property-legal relations was the General Code of Montenegro and the Highlands, also known in the professional community as the Code of Petar I Petrović Njegoš. The Code was passed in 1798 at the Assembly of Heads and Elders from the Montenegrin tribes and the 'Free Region of Montenegro and the Highlands' at the Monastery Stanjevići near Budva. It initially contained 16 articles and was supplemented in 1803 with an additional 17. The Code relied heavily on customary law, with provisions predominantly in the field of criminal law.

The limited provisions on property rights in this Code addressed the exercise of the right of pre-emption over assets (houses, land, forests).⁶ The order of exercising this right was as follows: closest relatives; neighbours (pomeđaši); and finally, members of the village or tribe. Another provision concerned the protection of property rights, which was the only form of protection for restoring assets, collecting receivables, and obtaining compensation for damages.⁷ Article 30 of the Code stipulated rules for material damage compensation, while Article 31 provided for judicial protection to secure such compensation.

The General Land Code, better known as Danilo's Code, was adopted on April 23/May 5, 1855. This Code was one of the fundamental legal regulations passed by the state government in the mid-19th century. It contains 95 articles. Although most provisions dealt with criminal law, it included a larger number of property law provisions compared to the Code of Petar I Petrović Njegoš, particularly in the areas of family law and inheritance law.

The civil law provisions of Danilo's Code regulated: the exercise of the right of pre-emption;⁸ property division among relatives *inter vivos* and *mortis causa*;⁹ and certain family law matters (marriage, sanctions in cases of a wife's infidelity,

5 Stojanović, 2009a, p. 84.

6 Art. 15 of *Zakonika Opšteg crnogorskog i brdskog*.

7 Art. 16 of *Zakonika Opšteg crnogorskog i brdskog*.

8 Arts. 45 and 46 of *Opšteg zemaljskog zakonika*.

9 Arts. 47–57 of *Opšteg zemaljskog zakonika*.

divorce, and spousal support).¹⁰ Holders of the right of pre-emption over real estate were the same as in the Code of Petar I Petrović Njegoš.

From 1831 to 1879, the central state body with judicial and administrative functions was the Senate of Montenegro and the Highlands. In 1879, the Grand Court was established. Its judges played a major role in the creation of civil law rules.

In the first half of the 19th century, Montenegro had no trained lawyers. The first law graduate was Gavro Vuković, who graduated from the Law Faculty in Belgrade in 1873. Until the second half of the 19th century, judges in Montenegro were not trained in law but were selected from among the most prominent people, distinguished by their strong sense of justice.

From 1879 to 1918, the presidents of the Grand Court in Cetinje were: Božo Petrović Njegoš, Duke Đuro Matanović, Duke Đuro Cerović, Dr. Ignacij Bakotić, Dr. Lazar Tomanović, Dr. Labud Gojnić, and Dr. Milo Dožić.

2. Codification of civil law in the second half of the 19th century

After its international recognition at the Berlin Congress (July 13, 1878), a real legislative ‘boom’ occurred in the Principality of Montenegro, which, generally speaking, has remained inexplicably insufficiently studied in legal theory.¹¹ If one considers that over 100 acts, formally called ‘law’ or ‘code’, were passed within 32 years (1878–1910), and that only three laws were in effect in Montenegro at the time of the Berlin Congress, the astonishment is even greater. In Montenegrin legal history, there was possibly no comparable quantitative and qualitative ‘legislative leap’, given the situation that preceded it. Beginning with this ‘legislative leap’, Montenegro adopted dozens of laws which, at the time, represented genuine European legislative achievements. The most important among them were: the *General Property Code for the Principality of Montenegro*; the *Criminal Code for the Principality of Montenegro*; the *Expropriation Law*; the *Commercial Code*; the *Law on Election of People’s Deputies*; the *School Code*; the *Law on High Schools*; the *Law on Illegitimate Children*; the *Law on the State Library and Museum*; the *Law on the Princely Government and State Council*; the *Law on the Organization of Courts*; the *Law on Civil and Judicial Jurisdiction*; the *Law on Criminal Jurisdiction*; the *Customs Law*; the *Code of Judicial Procedure in Civil Litigation*; the *Law on the Press*; and others. In that period (1905), the first Montenegrin Constitution was also adopted. The most comprehensive legislative reforms were carried out in 1888, 1898, 1902, 1905, and 1906.

¹⁰ Arts. 68–77 of Opšteg zemaljskog zakonika.

¹¹ Stojanović, 2009a, p. 46; Stojanović, 2009c, pp. 513–516; Stojanović, 2009b, pp. 457–646; Suković, 2006, pp. 129–385.

Of all these laws, the *General Property Code for the Principality of Montenegro* (hereinafter: OIZ) should be singled out. The OIZ was adopted in 1888 (with amendments in 1898). Its author was Valtazar Bogišić, ‘a knowledgeable man of encyclopaedic erudition, polyglot, professor of Slavic law at the University of Odessa, Minister of Justice of the Principality of Montenegro, and member of many scientific societies and academies’.¹² This Code primarily contains provisions on property law and the law of obligations, which is why it is called the property code. Family and inheritance law provisions are only scarcely present.

By general opinion, this Code represents the most accomplished legislative work within the territory of the former Yugoslavia. It has been translated into six foreign languages, and many scholarly papers have been written about it in Montenegrin and foreign languages. This Code is an honour to Montenegro and to its creator. One might even say that in its history, no outsider or foreigner has bestowed upon Montenegro a spiritual creation of such value as did Valtazar Bogišić, this nobleman from Cavtat, university professor, and Montenegrin Lycurgus. The Code reflects the greatness of his legal enthusiasm and intellectual depth.

The drafting of the OIZ¹³ was carried out in two phases. The first phase, from April 1873 to June 1881, included: a) preparing a questionnaire of approximately 2,000 questions; b) conducting an extensive survey in Montenegro, Herzegovina, and northern Albania; c) reviewing previous Montenegrin laws and their application; d) collecting remnants of the old law of Grbaljska Župa and judicial documents in Paštrovići; e) studying scientific and specialist literature; f) drafting a framework of the OIZ.¹⁴

The second phase, from July 1, 1881 to the end of 1887, included: a) discussing each article of the draft at approximately 100 sessions of the Montenegrin Committee for the Inspection and Examination of the OIZ; b) composing the final text of the OIZ; c) the decree on promulgation by the Prince.¹⁵

Bogišić drew material for the Code from oral sources (by questioning prominent individuals), written sources (studying acts, protocols, and laws), and his own observations. He collected approximately 2,000 questions on the life of Montenegrins and neighbouring peoples. He reviewed archival material of the Senate, district offices, and captains’ courts. He studied the Code of Petar and the Code of Danilo, attended trials, and drew on the rich heritage and principles of Roman law, as well as on contemporary Western European legislation.¹⁶

12 Leksikon, 1995, p. 452.

13 Bojović, 1992, pp. 47–75.

14 Glas naroda, 3 (1873) 3, p. 24; Glas Crnogorca, 1 (1873) 10; Zakonska radnja g. Bogišića. Glas Crnogorca, 2 (4 X 1874) 1, pp. 1–2.

15 Stojanović, 1991, pp. 11–115; Bojović, 1992, pp. 47–75; Vojinović, 1888; Vojinović, 1889, pp. 1–109; Đorđević, 1888, no. 15–22; Martinović, 1958, pp. 220–228.

16 Pupovci, 2004, p. 254.

While drafting the OIZ, Bogišić undoubtedly relied on customary law and the legal consciousness of the Montenegrin people but also on the civil code drafts of the time. In this respect, we may particularly emphasise: the draft of the Swiss Civil Code, the cantonal codes (the Code de Grisons and the Zurich Code), the Civil Code of California, and others. The OIZ was also strongly influenced by the Ottoman *Mecelle*, specifically in terms of its system, terminology, content, and the solutions it offered for certain legal institutions. Many provisions on property and obligations law were modelled on newly adopted civil codifications.¹⁷

During the drafting of the OIZ, Bogišić established closer ties with two codification commissions in Europe: the German¹⁸ and the Swiss¹⁹. It is well known that in the second half of the 19th century, four states were engaged in similar efforts: Hungary, Germany, Russia, and Japan.²⁰ To these, the Swiss commission for the codification of the law of obligations should be added, given its scope; it began its work independently in 1868.

Bogišić was also familiar, though to a lesser extent, with the work of the Hungarian commission, which began in the early 1870s. In Russia, two commissions were established in 1883, but only the first volume was published in 1899. In Japan, the work was entrusted in 1873 to the Parisian professor Boissonade.

During the drafting of the OIZ, Bogišić frequently consulted with members of the first German commission on various issues. In this context, it is important to note the influence of the German draft civil code on the rules of private international law in the OIZ for the Principality of Montenegro. Many of these solutions remain relevant to this day.²¹

While working on the text of the OIZ, Bogišić also obtained the most recent codes of Argentina, Mexico, Guatemala, Uruguay, and California. Among these codes, the greatest influence came from the California Civil Code of 1872. In this regard, particular emphasis should be placed on the 35 Articles at the end of this Code, which contain the maxims of jurisprudence – general rules of civil law created under the influence of the final title of the Pandects, *De (diversis) regulis iuris*. These provisions of the California Civil Code partly influenced the legal maxims found at the end of the OIZ.²²

Bogišić also particularly emphasised the 35 introductory provisions of the Serbian Civil Code of 1844. What these rules and the OIZ have in common is that their primary source lies in the *regulae iuris*. However, only a small number of general rules from these two codes are similar.²³

17 Pupovci, 2004, p. 283; Rašović, 2016, p. 112.

18 Wagner, 2007; Vormbaum, 1976; Behn, 1980; Schubert, 1978; Schmoeckel, 2005.

19 Zimmermann, 1962; Zimemann, 1989, pp. 147–152.

20 Pismo Valtazara Bogišića Kostu Vojinoviću iz Petrovgrada od 3.juna 1888.godine, Bogišićev arhiv u Cavtatu, BBC, XI a; Rašović, 2016, p. 115.

21 Rašović, 2021, pp. 55–49.

22 Pupovci, 2004, p. 283; Rašović, 2016, pp. 441–474.

23 Mirković, 2014, pp. 75–103; Rašović, 2016, pp. 429–441.

It is well known that the OIZ influenced the structure of the Japanese Civil Code of 1890. Valtazar Bogišić and Macajomi-Macurata, then Vice Minister of Finance in the Japanese government, could hardly have imagined that their meeting on 5 July 1878 would spark such professional interest, lasting to this day. On that occasion, discussions were held regarding the Montenegrin experience in drafting its property code. Bogišić was also in frequent communication with Gustave Émile Boissonade, the principal foreign legal adviser and main drafter of the Japanese Civil Code and an associate professor at the Paris Faculty of Law. Similarly, during numerous meetings with Prince Nikola to report on the progress of the Montenegrin Code, Bogišić never failed to brief the ruler on the development of the Japanese Civil Code and to emphasise the influence of the OIZ's system on the Japanese codification.²⁴

Certain provisions of the OIZ were also influenced by the *Mecelle* (the Ottoman Civil Code), whose first book was adopted in 1869 and the last, the sixteenth book, in 1876. Bogišić made particular use of the solutions contained in the introductory part of the *Mecelle*, most likely because both this part and the concluding part of the OIZ were largely inspired by the *regulae iuris*. Furthermore, similarities between the two codes are evident in terms of: (1) system (more comprehensive regulation of property and obligations law); (2) terminology (certain Turkish legal terms were incorporated into the OIZ); (3) certain legal institutions (e.g., *natapanje zemlje*; *podlog* – a type of pledge; *kesim*; *napolica*; *amanet*).²⁵

A Committee was formed to meticulously review the entire basis of the Code. Its members were: legal state adviser of Imperial Russia and full university professor Dr. Valtazar Bogišić, as president and editor; and councillors Duke Đuro Matanović, member of the Grand Court and the State Council; Jagoš Radović, member of the Grand Court; and Gavro Vuković, member of the Grand Court. The notary at the first reading was Nešo Zeković, and at the second, Simo Martinić, a teacher. Gavro Vuković was the only lawyer among the councillors from Montenegro.²⁶

The OIZ contains six parts: Introductory rules and directives; On ownership and other types of rights embedded in the matter; On purchase and other major types of contracts; On contracts in general, as well as on other affairs, actions, circumstances which incur debts; On man and other possessors, as well as on his ownership and, generally, on disposal in the affairs of property; Explanations, designations, and addendums.

An injustice that has followed Bogišić's Code for decades is the often-repeated notion that it only provides provisions on property and obligation law. This does not convey the whole truth. It is true that in the OIZ, property law and

24 Matsumoto, 2020, pp. 123–163; Mitani, 2020, pp. 11–32; Rašović, 2020, pp. 33–91; Kasai, 2020, pp. 93–121.

25 Begović, 1955, pp. 33–42; Pupovci, 2004, p. 283; Rašović, 2016, pp. 474–496.

26 Martinović, 1958, p. 220; Bojović, 1989, pp. 125–145; Bojović, 1992, pp. 47–62.

obligations law are predominantly regulated, but it also regulates other property relations, although in a smaller number of provisions. However, this does not justify the unfair claim that the Code regulates only two types of relations.

Therefore, we emphasise that OIZ also regulated:

1. Constitutional relations (e.g., provisions on the effectuation of laws in general and their publication, and on the prohibition of retroactive effects of laws – the so-called ‘retrospective’ effect) – today regulated in the Constitution of Montenegro;
2. Relations with an international element (e.g., provisions on the bilateral application of national and foreign laws – today regulated by the Code on Private International Law of Montenegro);
3. Relations that in modern civil codes represent a general part of civil law (e.g., provisions on several possessors and holders of rights, provisions on property in general, etc.);
4. Family legal relations (e.g., provisions on minors and custody, birth, marriage, and death records, provisions on domestic union-household – some of which today are regulated by the Family Law of Montenegro);
5. Commercial legal relations (e.g., provisions on partnership and holding companies – a major part of these relations is now regulated by the Company Law of Montenegro);
6. Relations resulting from matters related to state property (currently regulated by the Law on State Property of Montenegro);
7. Provisions of a procedural character (e.g., provisions on declaring a missing person deceased – today regulated by the Law on Non-Litigation Procedure of Montenegro).

To conclude: the norms that regulate real legal relations (property, pledge, and servitude) and legal obligations (contracts, causation of damage, public promise of reward, unauthorised handling of another’s business, wrongful use of another’s property, etc.) are predominant in the OIZ. Other property relations are regulated to a much lesser extent, but they are nevertheless very significant.

The adoption of the second edition of the OIZ marked the year 1898. Bogišić carried out this work ‘in the same spirit and intention’ in which he compiled the first edition.²⁷ It was the only legal text passed that year. The orders of the Grand Court were the prevalent acts.

Prince Nikola proclaimed the second edition of the OIZ without a major ceremony, unlike the announcement of the first edition. He signed the Decree on the promulgation of the Code in Cetinje, on St. Sava Day, January 14, 1898. The

²⁷ Ukaz Knjaza Nikole o postavljenju Opšteg imovinskog zakonika za Knjaževinu Crnu Goru dated January 14, 1898, 2004, pp. 5 and 6.

text of the Decree first states the reasons for the enactment of the second edition of the Code:

1. The first edition of the OIZ from March 25, 1888, 'being already totally excerpted', required the 'crafting of a new one'.²⁸
2. Judicial practice recognised in the first edition, in that 'spacious legal book', 'some points which should advisably be, at earliest, subjected to thorough scrutiny and inspection, in order to be attuned to the newly arisen circumstances and needs that appeared in the meantime'.²⁹

Valtazar Bogišić, the creator of the renowned OIZ, was the most noted personality in the legal life of Montenegro in the second half of the 19th century. The OIZ promoted Bogišić as one of the most prominent legislators in Europe. By attaining the peaks of human expression in written form, the work represents an undivided, organic, and moral whole. For his lifetime, the Code remained Bogišić's capital work, incomparable to the works of others. Apart from the prevailing institutes found in other modern codes, and those of a general character, Bogišić incorporated into the Code the institutes he found in people's customs as well as those that had just been incepted. It is recorded that he also conducted legislative work for Herzegovina and Bulgaria.³⁰

Bogišić was the Minister of Justice in the Principality of Montenegro from 1893 to 1899. During his ministry in Montenegro, Bogišić issued 12 orders with the force of law meant for organising the judiciary, i.e., to enable the application of the OIZ in practice.³¹ In working on these orders, Bogišić used material from a survey on legal customs related to procedural customary law. He made amendments and addendums to the second edition of the OIZ, which was promulgated by the Decree of Prince Nikola on January 14, 1898.³² In 1894, Bogišić also drafted the Temporary Rules on Illegitimate Children, which were treated as the Law on Illegitimate Children. It mainly codified Montenegrin customary law on the basis of the conveyed survey on legal customs.³³ Bogišić also read and clarified certain abstract provisions of the OIZ to the members of the Grand Court. He organised four new district courts and carried out court inspections.³⁴ In November 1896, he submitted a Law on Theft to the Prince to be passed, which would replace corporal punishment for theft (whipping) with imprisonment.

28 *Ibid.*, pp. 5 and 6.

29 *Ibid.*, pp. 5 and 6.

30 Bojović, 1985, pp. 12–13; Solovjev, 1939, pp. 137–151; Bojović, 1985, pp. 12–13, pp. 51–65; Bojović, 1985, pp. 147–154.

31 Vuković, 1938, pp. 132–135.

32 Pejović, 1960, pp. 147–165.

33 Nikčević, 1958, pp. 470–479; Nikčević, 1960, pp. 705–738.

34 Čalića, 1984, pp. 187–198.

3. Codification of civil law in the first half of the 20th century

The most comprehensive legislative reforms in the governance and judicial authority of the Principality of Montenegro were undertaken in 1902.

The most important legislative reforms of 1902 concerned the organisation of state governance and the judiciary. The following laws were adopted:

1. Law on Princely Government and State Council (December 6/19);³⁵
2. Law on Civil Servants (December 6/19);³⁶
3. Law on Judicial Authority (December 6/19);³⁷
4. Law on the Organisation of Courts in the Principality of Montenegro (December 6/19);³⁸
5. Law on Criminal Jurisdiction (December 6/19);³⁹
6. Law on Succession to the Throne (December 6/19).⁴⁰

On the occasion of the proclamation of state reforms on St. Nicholas' Day of 1902, Prince Nikola gave a speech. He first recalled that two years earlier, at the request of the State Council, he had been given the title of Royal Highness to be passed on to his successor to the throne. At that time, he promised that he would carry out the needed reforms in state governance, which would 'improve and ensure the development of governance' on a legal basis. The first condition of state development, he said, was 'the legal structuring of the Princely Government and the State Council'. To this end, he issued an order for the law to be amended. The law, 'among other useful decrees, rightly indicates the ministerial responsibility towards the sovereign, in order to ensure better order and administration of this country'.⁴¹

Another important reform of that year concerned the administration of justice. The Prince paid utmost attention to that branch, 'adding the amendments' in order to legally 'arrange its administration'. In his speech, he stated that it was not easy to replace 'with a stroke of a pen the highest judicial body, which, almost as hereditary, has alternated at the head of justice in our homeland since the earliest times.' Since ancient times, justice had been dispensed by 'our fine heroes, dukes, serdars and country's leaders'. However, the sovereign had the last word. Justice was distributed 'under the roof and under the trees, in the open sky and

35 Crnogorski zakonici, 1998b, p. 582.

36 Crnogorski zakonici, 1998b, p. 593.

37 Crnogorski zakonici, 1998b, p. 607.

38 Crnogorski zakonici, 1998b, p. 610.

39 Crnogorski zakonici, 1998b, p. 620.

40 Crnogorski zakonici, 1998b, p. 626.

41 Glas Crnogorca, no. 49, dated December 7, 1902.

in the camps'. Prince Nikola himself had followed the same method of trial and 'acted by it many times'.⁴²

The trials

'of the justice executors showed the brightness and a common sense wisdom of highlanders, the dignity of free people and the pride of the house and the tribe; showed beautiful national costumes and shining guns in their full brilliance; were distinguished by innate eloquence and righteousness, for if it were not for it, who would then make up our heroic camp'.⁴³

In his speech, Prince Nikola expressed full gratitude and recognition 'to those old customs and people'. But he declared that the coming times demanded parting with them, as the spirit of a new era 'and the much needed development of the state today ask for other men, other heroes; heroes of science, heroes of work'. From the new justice executors, he demanded:

'to distribute justice in this way, following the law, within the designated workframe, without shiny weapons, without national costumes, but in modest, civil, and European clothes, without any blaze other than the one reflected by the golden covers of the Holy Gospel placed between two silver candlesticks on the court table, without shouting and gasping, intended anyway more for the gallery than to serve the justice, and to distribute it fiercely.'

What does it mean to dispense justice fiercely? It means 'to be consciously impregnated with the sanctity of justice; it is to be inspired by the spirit of actual written and unwritten customary laws; it means the judge's fearlessness before an arbitrary will'.⁴⁴

He had a special message for judges: 'May judge lay his head, but never his soul, not even to his Master.' Further, he recalled the provision of Art. 172 of Dušan's code: 'All judges should judge according to the code, solely by that which is written in the code, and not in fear of his words, so I say'. Such distribution of justice was his 'bequest to God'; it was, 'along with the crown, his sacred ought' – 'the beacon of the independence and crystallisation' of the Principality. He described himself as 'the intercessor of the sovereign Saint Peter, my glorious ancestor, as well as of those who were before Him and who followed after Him'.

42 Ibid.

43 Ibid.

44 Ibid.

Thus, he demanded that justice 'be and remain the milestone in this early stage of development and progress of our beloved homeland'.⁴⁵

In his speech held on St. Nicholas Day, December 6/19, 1905, before the People's Representation, Prince Nikola in his seat proclaimed the Constitution for the Principality of Montenegro. It was the first Constitution of Montenegro.

In the first half of the 20th century, the civil law in the Principality of Montenegro was regulated by the following laws:

1. General Property Code for the Principality of Montenegro (first edition, 1888);
2. General Property Code for the Principality of Montenegro (second edition, 1898);
3. Law on Public Sales of Real Estate (November 10/23, 1900);⁴⁶
4. Law on Expropriation (July 5/18, 1906);⁴⁷
5. Law on Releasing the Free Bar Pier for Public Traffic (January 31 / February 13, 1909);⁴⁸
6. Law on Division, Settlement, and Usage of Brivska Gora (February 9/22, 1910);⁴⁹
7. Law on Concession for Draining the Ulcinj Valley (March 5/18, 1910).⁵⁰

The right to insurance was regulated by the following laws:

1. Law on Insurance Companies in the Principality of Montenegro (May 27 / June 10, 1904);⁵¹
2. Law on Amendments to the Law on Insurance Companies in the Principality of Montenegro of May 27, 1904 (June 16/27, 1909);⁵²
3. Law on Amendments to the Law on Insurance Companies in the Principality of Montenegro of May 27, 1904 (June 16, 1909).⁵³

After accepting the 'proposal of the People's Representation and giving it lawfulness with his signature', Prince Nikola proclaimed 'in the name of God, our Fatherland as Kingdom, and myself as, by God's grace, the Heir King of Montenegro' in Cetinje, on the Great Lady's Day of 1910.⁵⁴

The Law on the Proclamation of the Principality of Montenegro as a Kingdom was also published in *Glas Crnogorca*. The law contained five articles.

45 Ibid.

46 Crnogorski zakonici, 1998b, p. 481.

47 Glas Crnogorca, no. 27, dated July 8, 1906.

48 Glas Crnogorca, no. 6, dated January 31, 1909.

49 Glas Crnogorca, no. 10, dated February 23, 1910.

50 Glas Crnogorca, no. 18, dated April 17, 1910.

51 Crnogorski zakonici, 1998b, p. 928.

52 Glas Crnogorca, no. 48, dated December 3, 1905.

53 Glas Crnogorca, no. 28, dated June 27, 1909.

54 Glas Crnogorca, no. 35, dated August 15, 1910.

Article 1 stated: ‘The Principality of Montenegro is proclaimed the Kingdom of Montenegro.’ Article 2 declared: ‘Prince Nikola I Petrović Njegoš is declared a successor, by the grace of God, King of Montenegro. The King and the Queen will bear the title ‘Royal Majesty’’. Article 3 was dedicated to the heir to the throne: ‘The heir to the throne, Prince Danilo, is declared heir to the Royal throne of Montenegro. The heir to the throne, the Crown Princess, and their children will bear the title of ‘Royal Highness’’. Article 4 defined the title of the children: ‘All other children of Their Majesties, male and female, receive the title ‘Royal Highness’, and the grandchildren of these children retain the title ‘Highness’’. The last article of the law referred to the day of its entry into force, including the recommendation and an order:

‘This law enters into force when signed by Prince Lord, and by it the titles of Prince, Princely, etc. are replaced with King, Royal, etc. It is recommended to our President of the Ministerial Council, the Minister of Foreign Affairs, and the representative of the Minister of Justice to promulgate this law, and to all our ministers to ensure its implementation; to the authorities we command to act according to it, and to each and everyone to obey it.’⁵⁵

The law was signed in Cetinje on August 15, 1910. On this occasion, King Nikola addressed the Montenegrins with a lauding speech.⁵⁶

Legislative activity in the Kingdom of Montenegro continued. From the proclamation of Montenegro as a Kingdom (August 15/28, 1910) until the beginning of December 1915, nearly 50 laws were passed, among them especially important ones such as the Law on Money and the Law on Ores. In 1913, the third edition of the OIZ was published, in which, compared to the second edition, three words were replaced: Prince, Principality, and Crown with King, Kingdom, and Perper, respectively.

In terms of the quality of legal solutions, this period cannot be compared, for a number of reasons (including the conditions of war), with the period of the Principality of Montenegro after its international recognition at the Berlin Congress. The latter period can rightly be described as the golden era of Montenegrin legislation.

After the end of the First World War, the Federal state of Yugoslavia was created in 1918. In the new state, preparations began for the adoption of a Civil Code, followed by discussions and polemics in legal science about the basis of the future Civil Code. The dominant opinion was that the Austrian Civil Code should serve as the main background of the future Civil Code. A smaller

⁵⁵ Glas Crnogorca, no. 35, dated August 15, 1910.

⁵⁶ Glas Crnogorca, no. 36, dated August 19, 1910.

number of theorists considered this a mistake. The renowned Professor Mihailo Konstantinović exclaimed:

‘The reference to the Austrian civil law is, from the national-political aspect, a mistake. Yugoslavia should have a Yugoslav code, created according to the needs of Yugoslavs. It should serve as one of the tools for the creation of Yugoslavia. As it happens, there is no awareness about the educational power of law in certain circumstances. It is quite understandable, but one easily forgets that it is not advisable to introduce the spirit of a collapsed order into a revolutionary creation, such as our country. Victorious Rome had a bad experience with defeated Greece. The question is simple, and it boils down to whether we want Yugoslavia to be an imitation of Austria, or a country that will have its own spirit and its own physiognomy’.⁵⁷

He continued:

‘There is a Code in our country that is very little discussed, which is one of the best in the world: it is Bogišić’s *General Property Code for Montenegro*. It was designed by our man, whose expertise in the field was exceptional, for a part of our people, and whose spirit is much more familiar to the vast majority of our people than the Austrian one’.⁵⁸

However, Yugoslavia never received its own unique civil code. On the territory of Yugoslavia at that time, legal particularism was in effect. In Montenegro the OIZ was applied; in Serbia, the Serbian Civil Code; in Croatia and Slovenia, the General Civil Code; and in Bosnia and Herzegovina, as well as in Macedonia, the Ottoman Civil Code (*Mecelle*) and customary law were applied.⁵⁹

Extensive debates arose among legal scholars and politicians in former Yugoslavia between the two world wars over what should serve as the foundation of the future civil code. It was even decided by the competent Yugoslav authorities that the Austrian Civil Code, whose application had been extended to Croatia by the imperial patent of 29 November, 1852, during the period of absolutism, would serve as the basis. Regarding property law, it was planned that only stylistic modifications would be made to the code before submitting it for enactment.

However, part of the authoritative legal doctrine advocated that the OIZ should serve as the foundation of the future Yugoslav civil code. In this respect,

57 Konstantinović, 1982a, p. 388.

58 Ibid., p. 392.

59 Veress, 2023, pp. 209–210.

Professor Mihailo Konstantinović was particularly prominent, as he believed that only in this way could Yugoslavia, in the near future, adopt a code that would meet all the requirements of a proper civil code – one that would satisfy the needs of the people ‘and be, in every respect, of the highest quality’.⁶⁰ Despite numerous efforts, Yugoslavia, both between the two world wars and in the period following the Second World War, never adopted a unified civil code.

The Law on the Nullity of Legal Provisions Adopted Before 6 April 1941 and During the Enemy Occupation, dated 23 October, 1946, determined the fate of legal provisions (laws, decrees, orders, regulations, etc.) adopted by the authorities of the occupiers and their collaborators in the territory of Yugoslavia during the occupation. These provisions were declared null and void.⁶¹ Legal provisions (laws, decrees, orders, regulations, etc.) that were in force on 6 April, 1941, also lost their legal force.⁶² Consequently, the following codes, among others, ceased to have legal effect: the OIZ, the Serbian Civil Code, the Austrian Civil Code, and the *Mecelle*.

Among the prominent legal writers of civil law in that period, the professors of the Law Faculty in Belgrade, Andra Đorđević and Živojin Perić, stand out.

4. Codification of civil law in the second half of the 20th century

After the Second World War, in socialist Yugoslavia and in Montenegro, legal continuity with the civil law of the former Yugoslavia ceased. The Law on the Invalidity of Legal Regulations passed before April 6, 1941 and During the Enemy Occupation of October 23, 1946, abolished both the legal regulations valid before April 6, 1941 and those in force during the occupation, as well as court decisions made in that period. With the adoption of this Law, legal continuity with the first Yugoslavia was broken. It stipulated that all legal norms in force up to April 6, 1941 were abolished. The OIZ, the Serbian Civil Code, and the Austrian Civil Code suffered the same fate.⁶³

However, the application of legal rules contained in the abrogated laws and other legal regulations was permitted under the following conditions: (1) in the case of a legal gap, (2) if they were not in conflict with the Constitution or other valid regulations, and (3) if they were not contrary to the principles of the constitutional order. Accordingly, the court was obliged to determine in each specific case whether the application of a particular legal rule from the abrogated law was

⁶⁰ Konstatinović, 1982, p. 392.

⁶¹ Art. 1 of Zakona o nevažnosti pravnih propisa donijetih prije 6.aprila 1941.godine i za vrijeme neprijateljske okupacije.

⁶² Art. 2 of Zakona o nevažnosti pravnih propisa donijetih prije 6.aprila 1941.godine i za vrijeme neprijateljske okupacije.

⁶³ Veress, 2023, pp. 209–210.

permitted under the Law on Invalidity. Likewise, the court had to verify whether a particular application was incompatible with the provisions of this Law. Courts could not dismiss an assessment in a general way or rely on the abstract claim ‘that a certain rule from the old law is not valid as a legal rule’, without further elaboration.⁶⁴

By allowing the application of earlier legal rules, the Law did not equate them with new regulations:

‘It gave to them the significance of material that the courts may consult in solving disputes. The courts cannot ignore them or reject them as contrary to the principles of the constitutional order without explanation, but they still do not have the force of law even when they do not contradict the principles of the constitutional order... The distinction between legal regulations and legal rules was apparently intentionally made for this purpose, although the difference itself could otherwise be questionable. The so-called legal rules are not firm rules of law, but rather flexible material available to the judge, to be used in the best possible way to fill the gap created by the collective abrogation of the legal force of all previous regulations... The weakened force of legal rules and the constitutional aspiration towards a unified legal system allow the judge to take in consideration not only the legal rules of his own area but also the legal rules of other areas’.⁶⁵

With the termination of the validity of the OIZ in 1946 – a masterpiece in legislation, acclaimed ‘in the entire legal world’ and ‘unanimously welcomed’ – the legal order of Montenegro was for a long time left without laws that could comprehensively regulate civil rights in a reliable and competent manner. This ‘vacuum’ was ‘filled’ with the legal rules of the abrogated pre-war law, which continued to be applied under the provisions of the Law on the Invalidity of Legal Regulations Passed Before April 6, 1941 and During the Enemy Occupation.

State socialist property in the former Yugoslavia was established after the Second World War. Through nationalisation and other measures, many assets became state property. The state emerged as an economic entity, and the property rights of private owners were significantly restricted.

With the entry into force of the Law on the Nationalisation of Private Business Enterprises⁶⁶, all relevant private business enterprises at the national and republican level were nationalised and transferred to state ownership in the

64 Rešenje Vrhovnog suda FNRJ, Gz 24/51 dated November 1951, Zbirka odluka vrhovnih sudova 1945-1952, vol. 1. (Beograd, 1952), no. 145, p. 160.

65 Konstantinović, 1982b, pp. 540-548.

66 Službeni list FNRJ, no. 98/46 and 35/48.

following economic sectors: 1) mining and extractive industry; 2) metallurgy; 3) oil and derivatives industry (natural and artificial); 4) natural gas industry; 5) coal processing industry; 6) railway and transport material industry; 7) machinery and tools industry; 8) shipbuilding; 9) automotive industry; 10) agricultural tools and machinery industry; 11) metal processing industry; 12) electrical industry; 13) production of electricity and gas (power and gas plants); 14) military and pyrotechnic industry; 15) wholesale chemical industry; 16) electrochemical industry; 17) metal alloys industry; 18) chemical processing of wood, matches, compressed gases, water glass, carbon black, paints, varnishes, felts and gelatin, soap and glycerine, resin, wax, cleaning grease, lubricants, and other chemical industries; 19) graphic and printing industry; 20) pulp, cellulose, paper, and paper processing industry; 21) concrete, plaster, glass, ceramics, porcelain, faience, asbestos, and refractory materials industry; 22) non-metallic minerals and stone industry; 23) leather, fur, and rubber industry (natural and artificial); 24) textile industry (natural and artificial); 25) sawmill and wood processing industry; 26) construction materials industry; 27) sugar, spirits, starch, yeast, and dextrin industry; 28) vegetable oil industry and refineries; 29) milling, pasta, and flour processing industry; 30) meat, fat, fish, fruit, vegetable, and milk processing industry; 31) mineral water (natural and artificial), soda, and ice industry; 32) other food industries; 33) tobacco and alkaloid industry; 34) brewing, alcohol, and soft drinks industry; 35) pharmaceutical industry, sanitary materials and accessories, chemical pharmaceuticals, and cosmetics; 36) construction and design; 37) forestry industry; 38) banking and insurance; 39) exploitation of spas and healing waters; 40) wholesale trade; 41) land, air, sea, river, and lake transport; 42) other transport.

From the date the Law entered into force, all private commercial warehouses of 100 tons and above, as well as private commercial and industrial cellars of three wagons and above – with their auxiliary facilities – were nationalised and converted into state property. Which warehouses and cellars were to be considered as nationalised was determined by a decision of the Government of the People's Republic, issued within three days after the Law was passed.⁶⁷

A nationalised company became a state-owned business enterprise by the act of nationalisation under the Basic Law on State-owned Business Enterprises and was required to comply with its provisions by decision of the competent government authority. A state-owned business enterprise established in this way assumed all obligations of a nationalised private enterprise up to the amount of its assets. However, the following obligations were not transferred to the state or state-owned enterprises: 1) obligations incurred from business operations outside the scope of the enterprise itself; 2) obligations incurred during the war or from working for the enemy; 3) obligations arising from illegal trade and speculation; 4) obligations resulting from the company's over-indebtedness; and 5) obligations

⁶⁷ Art. 2b of Zakona o nacionalizaciji privatnih privrednih preduzeća.

arising from contracts with employees and members of company bodies.⁶⁸ From the date the Law entered into force, all intangible properties owned by foreign citizens, institutions, or private or public legal entities were nationalised and became state property. Excluded from this were: 1) intangible property of peasants and farmers cultivating their own land; 2) residential buildings serving mainly as the owner's residence; and 3) intangible properties of diplomatic missions of foreign countries used for official purposes.

In 1946, Yugoslavia adopted the Basic Law on Marriage.⁶⁹ The central government also passed the Law on Inheritance in 1905.⁷⁰ In 1980, Socialist Yugoslavia passed the Law on the Basics of Property-Legal Relations,⁷¹ and in 1978 the Law on Obligation Relations.⁷²

The Law on Obligations is considered the best and most comprehensive legislative act in Yugoslavia after the Second World War. Its main author was Mihailo Konstantinović, Professor at the Faculty of Law in Belgrade. This law, with slight modifications, was adopted by all the former Yugoslav republics, which are today independent states. Professor Konstantinović also authored the highly regarded Law on Inheritance of 1955 and the Basic Law on Marriage of 1946. Alongside Valtazar Bogišić, many rightly consider Professor Konstantinović one of the most accomplished legislators and civil law specialists in the territories of the independent states that once formed Yugoslavia.

5. Codification of civil law in the present

After the referendum held in 2006, Montenegro became an independent state.

The Law on Property Relations, alongside the Constitution of Montenegro and international conventions and protocols, is the main source of general property-law relations. Under the conditions set forth by the Law on the Invalidity of Legal Regulations, the legal rules of former civil laws – primarily of the OIZ – may still be applied. Montenegro does not yet have a unified civil code, but one is in preparation. It is expected that its norms will comply with tradition, customs, and the extraordinary rules established in the OIZ.

The Law on Property Relations (ZOSPO) is the most important and comprehensive law in Montenegro regulating property rights and other real rights. ZOSPO 'affirms' that the right to property is the most important real right, consistent with

68 Art. 5 of Zakona o nacionalizaciji privatnih privrednih preduzeća.

69 Službeni list FNRJ, no. 29/46; 36/48; 44/51; 18/55. The revised text of this law was published in the Službeni list SFRJ, no. 28/65.

70 Službeni list FNRJ, no. 20/55.

71 Službeni list SFRJ, no. 6/80 and 36/90, Službeni list SRJ, no. 29/96.

72 Službeni list SFRJ, no. 29/78, 39/85, 45/89, Službeni list SRJ, no. 31/93, Službeni list SCG, no. 1/2003.

its treatment in comparative legislation. This can be clearly seen from a review of its basic provisions. The legislator particularly ‘sets apart’ and contrasts property rights with other, narrower real rights. This is evident in provisions such as: ‘This law regulates property rights and other real rights...’,⁷³ ‘Subjects of property rights and other real rights...’⁷⁴ ‘Objects of property rights and other real rights...’⁷⁵ ‘Property rights and other real rights are exercised...’⁷⁶ ‘It is forbidden to exercise property rights and other real rights...’⁷⁷

In the practice of the European Court of Human Rights in Strasbourg, the scope of this right has also been extended to other property rights, especially claims. This leads to the conclusion that it does not always have to concern a real right. The importance of property rights is such that the authors of ZOSPO made it a central institute. ZOSPO defines the right to property as the most complete legal possession of assets.⁷⁸ Furthermore, it lists the rights of the owner and the limits of their exercise: ‘The owner has the right to keep his asset, to use it, and to dispose of it within the limits set by law’.⁷⁹ The same article also emphasises the passive obligation of an unspecified number of third parties: ‘Everyone is obliged to refrain from infringing the property rights of another person’.

The subjects of property rights are natural persons and legal entities.⁸⁰ With regard to the objects of property rights, the legislator did not expand their scope but limited them to individually determined tangible and intangible assets.⁸¹ The Law also regulates the extent of property rights: ‘The right of the property owner includes the space above the surface and a part of the land below the surface of the real estate, unless otherwise determined by law’.⁸² The nature and purpose of assets determine the manner in which property rights are exercised. This is firmly set forth in Art. 4 of ZOSPO: ‘Property rights and other real rights are exercised in accordance with the nature and purpose of the asset, in the manner and under the conditions prescribed by law.’

The Law also provides an objective conception of the prohibition of misuse of rights: ‘It is prohibited to exercise property rights and other real rights contrary to the purpose for which they have been established or recognised by law.’⁸³

In addition to individual rights, ZOSPO emphasises the social function of property:

73 Art. 1 of Zakona o svojinsko pravnim odnosima.

74 Art. 2 of Zakona o svojinsko pravnim odnosima.

75 Art. 3 of Zakona o svojinsko pravnim odnosima.

76 Art. 4 of Zakona o svojinsko pravnim odnosima.

77 Art. 5 of Zakona o svojinsko pravnim odnosima.

78 Art. 6, para. 1 of Zakona o svojinsko pravnim odnosima.

79 Art. 6, para. 2 of Zakona o svojinsko pravnim odnosima.

80 Art. 2 of Zakona o svojinsko pravnim odnosima.

81 Art. 3 of Zakona o svojinsko pravnim odnosima.

82 Art. 8 of Zakona o svojinsko pravnim odnosima.

83 Art. 5 of Zakona o svojinsko pravnim odnosima.

‘Property obliges, and in exercising his right, the owner is obliged to act with consideration for the general interest as well as the interests of others. The property owner must not exercise his ownership right beyond the limits prescribed to all owners of such properties by this or a special law, for the protection of the interests and safety of the state, nature, the environment, and public health. If the owner of an asset is subjected to restrictions for the protection of the interests and safety of the state, nature, the environment, or public health, which require a considerable sacrifice from him but not from other owners of such assets, he has the right to compensation for expropriation’.⁸⁴

Generally, the legislator prescribes two types of restrictions on property rights: (1) in the public interest; (2) in one’s own interest (in a broader sense: private interest). Art. 10 of ZOSPO provides:

‘Property rights can be limited by law. No one can be deprived of the right to property unless required by the public interest, as determined by law or on the basis of law, including compensation that cannot be less than fair. The owner may, for a purpose not prohibited, limit or encumber his right. If the owner, by a legal act, determines a ban on the alienation or encumbrance of the asset, this ban applies to third parties if registered in the intangible property cadastre. Limitation of property rights on tangible assets to secure a claim is effective against third parties if listed in the relevant public register or if the third party was aware or could have been aware of it’.⁸⁵

In Montenegro, the matter of civil law (property law) has not yet been codified by a single civil code, but a large number of special laws and other regulations in that area have been adopted. These include, for example: the Law on Property Relations⁸⁶, Law on Obligations⁸⁷, Law on Inheritance⁸⁸, Family Law⁸⁹, Law on State Property⁹⁰, Law on Concessions⁹¹, Law on Personal Name⁹², Law on Civil Registry⁹³,

84 Art. 9 of Zakona o svojinsko-pravnim odnosima.

85 Art. 10 of Zakona o svojinsko-pravnim odnosima.

86 Službeni list CG, no. 19/2009.

87 Službeni list CG, no. 47/2008, 4/2011 – dr. zakon and 22/2017.

88 Službeni list CG, no. 74/2008 and 75/2017.

89 Službeni list CG, no. 1/2007 and Službeni list CG, no. 53/2016 and 76/2020.

90 Službeni list CG, no. 21/2009 and 40/2011.

91 Službeni list CG, no. 8/2009 and 73/2019.

92 Službeni list CG, no. 47/2008 and 40/2011.

93 Službeni list Crne Gore, no. 47/08 dated 07.08.2008, 41/10 dated 23.07.2010.

Law on the Central Population Register⁹⁴, Law on Non-litigation Procedure⁹⁵, Law on Expropriation⁹⁶, Law on State Survey and Real Estate Cadastre⁹⁷, Law on Pledge as a Means of Securing Claims⁹⁸, Law on Non-Governmental Organizations⁹⁹, Company Law¹⁰⁰, Law on Electronic Commerce¹⁰¹, Law on Securities¹⁰², Law on Bills of Exchange¹⁰³, Law on Insolvency of Business Companies¹⁰⁴, and others.

A series of Montenegrin laws regulate special legal property regimes. In this section, we will list the most important laws.

Special ownership regimes apply to intangible assets with regard to their purpose. These include construction land, agricultural land, forests, and forest land. Legal ownership relations concerning these intangible possessions are regulated by: the Law on Spatial Planning and Construction of Structures¹⁰⁵, the Law on Agricultural Land¹⁰⁶ and the Law on Forests¹⁰⁷.

Special ownership regimes apply to natural assets, flora, and fauna. These include the sea, the sea coast, islands, maritime resources, waters, water resources, water objects, protected natural resources, mineral assets, and wild species. Legal ownership relations concerning these assets are regulated by: the Law on the Sea¹⁰⁸, the Law on Maritime Property¹⁰⁹, the Law on Waters,¹¹⁰ the Law

94 Službeni list RCG, br. 49/2007 i Službeni list CG, no. 41/2010, 40/2011 and 55/2016.

95 Službeni list RCG, no. 27/2006 and Službeni list CG, no. 20/2015, 75/2018 and 67/2019.

96 Službeni list Republike Crne Gore, no. 055/00 dated 01.12.2000, 012/02 dated 15.03.2002, 028/06 dated 03.05.2006, Službeni list Crne Gore, no. 021/08 dated 27.03.2008, 030/17 dated 09.05.2017 and Zakon o izmjenama i dopunama Zakona o eksproprijaciji, Službeni list CG, no. 75/2018.

97 Službeni list RCG, no. 29/2007 and Službeni list CG, no. 32/2011, 40/2011, 43/2015, 37/2017 and 17/2018.

98 Službeni list RCG, no. 38/2002 dated 26.7.2002.

99 Službeni list CG, no. 39/2011 and 37/2017.

100 Službeni list RCG, no. 65/2020.

101 Službeni list RCG, no. 80 dated 29.12. 2004, Službeni list Crne Gore, no. 41 dated 23.07.2010.

102 Službeni list RCG, no. 59/00, 10/01, 43/05, 28/06.

103 Službeni list RCG, no. 45/05 dated 28.07.2005.

104 Službeni list RCG, no. 06/02, 01/06 and 02/07.

105 Službeni list CG, no. 64/2017, 44/2018, 63/2018, 11/2019 – amended and 82/2020.

106 Službeni list RCG, no. 15/92 dated 10.04.1992, 59/92 dated 22.12.1992, 27/94 dated 29.07.1994, 73/10 dated 10.12.2010, 32/11 dated 01.07.2011.

107 Službeni list Crne Gore, no. 074/10 dated 17.12.2010, 040/11 dated 08.08.2011, 047/15 dated 8.08.2015.

108 Službeni list Crne Gore, no. 17/07 dated 31.12.2007, 06/08 dated 25.01.2008, 40/11 dated 08.08.2011.

109 Službeni list RCG, no. 14/92 dated 03.04.1992, 59/92 dated 22.12.1992, 27/94 dated 29.07.1994. and Službeni list Crne Gore, no. 51/08 dated 22.08.2008, 21/09 dated 20.03.2009, 73/10 od 10.12.2010, 40/11 dated 08.08.2011.

110 Službeni list RCG, no. 27/2007 and Službeni list CG, br. 32/2011, 47/2011 - amended, 48/2015, 52/2016, 2/2017, 80/2017, 55/2016 and 84/2018.

on Nature Protection¹¹¹, the Law on National Parks¹¹², the Law on Mining¹¹³, and the Law on Wildlife and Hunting.¹¹⁴

Special ownership regimes apply to cultural assets, including archival, library, and museum material. Ownership relations concerning these assets are regulated by: the Law on the Protection of Cultural Property¹¹⁵, the Law on Archival Activity¹¹⁶, the Law on Library Activity¹¹⁷, and the Law on Museum Activity.¹¹⁸

Special ownership regimes apply to public roads, roads within the territories of municipalities, municipal and uncategorised roads, communal infrastructure, communal facilities, railway infrastructure, electronic communication networks and infrastructure, energy facilities, and mining facilities and plants. Ownership relations concerning these assets are regulated by: the Law on Roads¹¹⁹, Law on Communal Activities¹²⁰, Law on State Property¹²¹, Law on Railways¹²², Law on Electronic Communications¹²³, Law on Energy¹²⁴, and Law on Mining.¹²⁵

Special ownership regimes apply to ports, maritime facilities, and watercrafts (ships, yachts, and boats). Legal ownership relations concerning these objects are regulated by: the Law on State Property, the Law on Ports¹²⁶, the Law on Safety of Maritime¹²⁷, the Law on the Manner of Registration of Ships, Floating Objects, and Installations for the Production of Hydrocarbons in the Registers and on Real Rights on Ships and Installations for the Production of Hydrocarbons¹²⁸, the Law on Sea Protection Against Pollution from Vessels¹²⁹, and the Law on Yachts¹³⁰.

111 Službeni list Crne Gore, no. 054/16 dated 15.08.2016, 018/19 dated 22.03.2019.

112 Službeni list Crne Gore, no. 028/14 dated 04.07.2014, 039/16 dated 29.06.2016.

113 Službeni list Crne Gore, no. 65/08 dated 29.10.2008, 74/10 dated 17.12.2010, 40/11 dated 08.08.2011.

114 Službeni list Crne Gore, no. 052/08 dated 27.08.2008, 040/11 dated 08.08.2011, 048/15 dated 21.08.2015.

115 Službeni list Crne Gore, no. 49/10 dated 13.08.2010.

116 Službeni list Crne Gore, no. 049/10 dated 13.08.2010, 040/11 dated 08.08.2011.

117 Službeni list Crne Gore, no. 049/10 dated 13.08.2010, 040/11 dated 08.08.2011.

118 Službeni list Crne Gore, no. 49 dated August 13, 2010.

119 Službeni list CG, no. 82/2020.

120 Službeni list Crne Gore, no. 055/16 dated 17.08.2016, 074/16 dated 01.12.2016, 002/18 dated 10.01.2018, 066/19 dated 06.12.2019.

121 Službeni list CG, no. 21/2009 and 40/2011.

122 Službeni list Crne Gore, no. 27/13 dated 11.06.2013, 43/13 dated 13.09.2013.

123 Službeni list CG, no. 40 dated August 13, 2013, 56/13, 2/17.

124 Službeni list Crne Gore, no. 005/16 dated 20.01.2016, 051/17 dated 03.08.2017, 082/20 dated 06.08.2020.

125 Službeni list Crne Gore, no. 65/08 dated 29.10.2008, 74/10 dated 17.12.2010.

126 Službeni list CG, no. 51/2008, 40/2011, 27/2013 and 18/2019.

127 Službeni list CG, no. 62/2013, 6/2014, 47/2015, 71/2017, 34/2019, 77/2020.

128 Službeni list CG, no. 34/2019 dated 21.6.2019, which entered into force 29.6.2019.

129 Službeni list Crne Gore, no. 020/11 dated 15.04.2011, 026/11 dated 30.05.2011, 027/14 dated 30.06.2014.

130 Službeni list RCG, no. 46/07 dated 31.07.2007, 73/10 dated 10.12.2010, 40/11 dated 08.08.2011, 42/15 dated 29.07.2015.

Special ownership regimes apply to airspace, airports, and aircrafts. Legal ownership relations concerning these assets are regulated by: the Law on State Property, the Law on Air Traffic¹³¹, the Law on Obligations and Basics of Proprietary Right in Air Transport¹³², and the Law on Amendments to the Law on Obligations and Fundamentals of Property-Legal Relations in Air Traffic, adopted on June 26, 2018.

6. Future trends in legal codification

Since the OIZ of 1888, Montenegro has not had a unified civil code. Since its restoration as an independent state in 2006, Montenegro has continued with partial codification of civil law through the enactment of specific laws. These laws preserved continuity with earlier legislation while also following modern principles of civil law and taking into account the relevant positions of court practice in Montenegro and the European Union.

Through this partial regulation, some deficiencies have been identified, primarily concerning inconsistencies and terminological incongruities among laws. For this reason, the Government of Montenegro passed the Decision on the Establishment of the Commission for the Drafting of the Civil Code of Montenegro in 2017. Due to frequent changes in government members, especially Ministers of Justice who served as heads of the Commission, the work on drafting the Civil Code was delayed. To date, the Commission has prepared five parts of the Civil Code: the general part, property law, obligation law, inheritance law, and family law. The part related to personality rights is still to be completed, as it is intended to provide a thorough regulation of these rights to an even greater extent than in some comparative legislations.

With the Civil Code in preparation, Montenegro will regulate civil law in the most exhaustive manner. It will provide a more accurate expression of the principles and spirit of the whole, ensure greater consistency of solutions, appropriately fill legal gaps and avoid repetitions, facilitate application, and enable high-quality interpretation. The Code is expected to represent an integrated, organic, and harmonious unity.

In its work, the Commission for Drafting the Civil Code of Montenegro adhered to the following requirements, principles, and positions:

- Achieving greater legal security as the main attribute of the rule of law;
- Considering the positions of court practice for the complete and harmonious regulation of civil law matters in one code;

131 Službeni list CG, no. 30/2012, 30/2017 and 82/2020.

132 Službeni list CG, no. 18/11 and 46/14.

- Providing legal continuity with civil law norms of existing laws and with the enduringly relevant rules of the OIZ;
- Following modern comparative legal solutions (France, Germany, Italy, Hungary, the Netherlands, Poland, Czech Republic, Ukraine, Estonia, Romania, Quebec, etc.);
- Aligning with the legal acquis of the EU, ratified international conventions, and the practice of the European Court of Human Rights;
- Recognising the importance of the Civil Code for the development of legal awareness and legal culture;
- Ensuring that the Civil Code delivers a comprehensive and creative synthesis of successful solutions from existing laws, not merely by summing them up but by giving them a modern shape consistent with current legal theory and practice.

In the working materials for the future Civil Code of Montenegro, a particular novelty in terms of comprehensive regulation is the inclusion of provisions on personality rights. According to the current draft, the section dealing with personality rights will contain approximately 80 articles, making it one of the most comprehensive codifications of this matter in Europe.

The provisions on personality rights in the future Civil Code of Montenegro will cover: introductory provisions (principles); human dignity; the right to life; the right to bodily integrity; the right to health; the right to liberty; the right to honour and reputation; the right to mental integrity; the right to a name; the right to privacy; the right to private life; the right to one's image and voice; the right to the protection of personal data; the right to sexual freedom; the right to identity; the right to be forgotten; the right to piety; the right to remembrance; and the right to post-mortem protection. Furthermore, civil-law protection of personality rights is also envisaged, which may be exercised through a variety of claims. These claims are given special attention in the future Civil Code of Montenegro.

In recognition of its overall exceptionality, modernity, continuous relevance, and distinction, the seventh part of the Civil Code will most likely include 45 famous legal sayings from the end of the OIZ of 1888, created by Valtazar Bogišić.

In composing these sayings, Bogišić, in his own manner, distilled what was truly valuable from the available law and drew upon reflections from ancestral heritage, masterfully expressed in words, to integrate them into the Code while maintaining the form and rhythm of national sayings. This stylistic choice arguably makes the Code one of the most accomplished among all legal codes. The inexhaustible source of Roman law, upon which European law was built, allowed Bogišić to formulate sayings concisely, making them easily remembered and gladly quoted. Even today, the echo of Bogišić's jurisprudential sayings can be heard in academic lectures and civic studies.

Even without the eighth section of its sixth part, the OIZ would remain a remarkable Code. With this section, the Code represents a glorious creation of its author and the country for which it was enacted. Bogišić ‘dressed up’ concise, clear, and precise Latin sayings in the vernacular, giving them the most comprehensible style. He was an exceptional connoisseur of Justinian’s *Digesta* and *Codex*, Theodosian *Codex*, Gaius’ *Institutions*, and other pre-Justinian collections. Although the main sayings were placed in a separate section (the eighth section of the sixth part), the entire text of the Code resonates with them. Bogišić’s mastery allowed him to infuse enduring Roman legal principles into the vernacular. The carefully gathered results of centuries of legal experience gave the OIZ a rhythm inherent only to folk proverbs, demonstrating his literary talent, especially in folk literature.

This section remains relevant over time: it is acclaimed in academic circles and continues to inspire legal scholars and practitioners. Lawyers in these regions often refer to it as a guide in complex cases that the legislator could not have anticipated. Professors, judges, and lawyers alike attest that Bogišić’s sayings serve as a ‘compass of common legal sense’.

By communicating the *regulae iuris* in a unique manner, Bogišić contributed to the preservation of Roman law as received in these areas. He understood that Latin proverbs encapsulate collective wisdom drawn from centuries of experience. Bogišić’s legal sayings are elaborated in depth and masterfully diffused throughout the Code, neatly formulated so that they may be ‘digested’ without overburdening the reader.¹³³

Aided by Montenegro’s legal institutions and the bright minds of judges without formal schooling, Bogišić cultivated a national legal treasure. Although seemingly simple, his sayings are intricate and complex in their details. His work would have been significantly poorer without his mastery of language, and his sayings would not resonate as they do if they were not adapted to the people’s common sense.

By the end of 2025, Montenegro is expected to have the full text of the Civil Code. Its adoption is anticipated in 2026, following several readings and expert-led public discussions. This will be the second Civil Code in Montenegro’s history, the first being the acclaimed OIZ of 1888.

133 Vojinović, 1989, p. 76.

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BOJAN TUBIĆ*

The Universal Protection of Human Rights and Eastern Europe: Serbia

- **ABSTRACT:** *The Republic of Serbia is a state party to almost all major international treaties on human rights protection – both universal and regional – including UN human rights conventions and covenants. It has incorporated all of these documents into its Constitution and relevant national legislation. For example, Serbia has aligned its asylum system with relevant international standards. It has also carried out constitutional reform to further strengthen the independence of the judiciary, amended the Law on the Prohibition of Discrimination, and adopted numerous laws, strategies, and action plans related to the prevention of discrimination. Serbia regularly submits reports on the implementation of the relevant human rights treaties, as required by those treaties. It has also accepted the jurisdiction of committees established by international treaties to hear individual complaints. There are only four cases against Serbia before the Human Rights Committee, and it may be concluded that Serbia respects the human rights guaranteed by this instrument, although individuals often seek protection from the European Court of Human Rights instead of the Committee. Complaints have also been brought against Serbia before the Committee against Torture, concerning the treatment of complainants during detention, which was characterised as severe pain or suffering intentionally inflicted by public officials. Serbia has strong institutions for human rights protection, including the Constitutional Court and the Ombudsman. It can be said that the country remains determined to make further progress in democratisation, fulfil its international obligations, and achieve the highest standards of human rights.*
- **KEYWORDS:** *human rights, Serbia, UN Conventions, Human Rights Committee, Committee against Torture*

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1. Introduction

Human rights issues have been regarded as universal since the Second World War. Before that, they were considered internal matters of individual states. This study aims to elucidate how human rights protection developed in Serbia throughout history and what positive international legal norms have bound this country.

Serbia has been part of the Ottoman Empire since medieval times. After the Second Serbian Uprising (1815–1817), Serbia's autonomy or semi-independent position was confirmed by an act of the Ottoman Empire (*ferman*) in 1830. Five years later, in 1835, the first constitution, called *Sretenjski Ustav*, was enacted.¹ It was a significantly liberal constitution for its time but remained in force for only two weeks before being revoked. It was rejected by Ottoman Turkey, Austria, and Russia.² Nevertheless, this short-lived constitution in an important act, representing the first modern Serbian constitution and one of the earliest democratic constitutions in Europe. It contained a special chapter on human rights, intended to protect individuals against state authorities. Some of these rights included: prohibition of slavery, equality before the law, the principle of legality, certain aspects of the right to a fair trial, the *ne bis in idem* principle, the right to property, and freedom of religion.

A new, so-called 'Turkish constitution' was enacted in 1838. It was rigid and represented a step backward compared to its predecessor. It guaranteed only a limited set of human rights, such as freedom of trade, the right to property, freedom of religion, and certain personal rights. This constitution remained in force until 1869, when the third modern Serbian constitution was adopted. However, it did not meet the standards of its time regarding human rights protection. Political rights were formulated narrowly, such as the freedom of expression, while others, such as the freedom of the press and freedom of association, were not included at all. Personal freedom, the right to property, and freedom of religion were guaranteed. Moreover, the constitution introduced the division of power between Prince Miloš and a newly established state body, the Council (*Sovjet*). The Council was given an 'absolute veto' to block any bill proposed by the Prince, giving it great political authority. Its members sought to curtail the Prince's power as much as possible. In April 1839, Miloš was forced to promulgate a law on the Council, which further limited his legislative and executive authority.³

The next constitution, enacted in 1888 and known as the 'Radical Constitution', guaranteed more human rights than its predecessors.⁴ These provisions were broader and more detailed. For the first time, political rights were explicitly

1 Ustav Knjaževska Srbije – Sretenjski ustav, 15 February 1835, Kragujevac.

2 Svirčević, 2011, p. 584.

3 Hoare, 2024, part I.

4 Savić, 2023, p. 540.

included in the highest legal act, such as freedom of the press, freedom of assembly, freedom of association, and the right to petition and complain. Human rights were realised directly under the Constitution. This constitution was described as a 'bilateral contract between the Crown and the people', through which the king sought to show the radicals that they could not impose their views on the monarchy and that constitutional reform could only be achieved through compromise.⁵

The next constitution was enacted in 1901 and was unilaterally imposed by King Aleksandar Obrenovic. It did not contain provisions on human rights and was primarily a tool to strengthen the king's absolute power. However, it did establish a bicameral system, with the Senate as the upper chamber and the National Assembly as the lower chamber.⁶ Two years later, the king was assassinated, and the new Karadjordjevic dynasty was installed.⁷ The new National Assembly restored the 1888 Constitution, proclaiming it once again as the Constitution in 1903, with the same human rights provisions. This 'Parliamentary Constitution' established that the King and the Assembly shared legislative and budgetary powers equally. Executive power, however, remained under the exclusive authority of the head of state, who was not responsible for its exercise but carried it out through ministers whom he freely appointed and dismissed.⁸

After the First World War, a new state was created – the Kingdom of Serbs, Croats, and Slovenians – and a new Constitution (the Vidovdan Constitution)⁹ was adopted in 1921. Although there were various projects and drafts for the constitution, with very different concepts of what the parliament should look like, the version finally accepted was largely based on the Serbian Constitution of 1903, with a classical unicameral parliamentary model. In practice, however, the parliament was weak and often hampered by obstructions, while King Aleksandar Karadjordjević played the most important role.¹⁰ The Constitution proclaimed civil and political rights comparable to those guaranteed in democratic states of that period. Unlike previous constitutions, it also included social and economic provisions, such as protection of workers, the right to health for all citizens, and the right to marriage.

Due to political changes in the country, namely the establishment of King Alexander's dictatorship in 1931, a new 'September Constitution', also known as the 'Octroyed Constitution',¹¹ was adopted. Civil rights and freedoms were formulated similarly to the previous constitution. However, there were only four articles on economic and social rights, compared to 23 in the 1921 Constitution.

5 Popović, 1939, p. 85.

6 Svirčević, 2011, p. 591.

7 Tomić, 2024, p. 142.

8 Popović-Obradović, 2013, p. 176.

9 Vidovdan Constitution, 1921.

10 Kršljanin, 2020, p. 245.

11 Octroyed Constitution, 1931.

A general characteristic of this Constitution was that its provisions were mostly brief and vague. In addition, while it proclaimed fundamental rights of citizens, it simultaneously guaranteed them only ‘within the limits of the law’, meaning that freedoms and rights existed largely in principle.¹²

After the Second World War, the Communist Party of Yugoslavia established the government of the Federative People’s Republic of Yugoslavia. Its first Constitution was enacted in 1946,¹³ modelled on the 1936 Constitution of the USSR, and reflected the dominance of state property. In 1953, significant amendments were adopted through a Constitutional Law, introducing the concept of self-management into Yugoslavia’s constitutional doctrine and practice. Social property was also established as dominant. This Constitution is notable in at least two respects. First, it represented a near-complete transplantation of a political structure previously foreign to Yugoslavia, bearing little resemblance to earlier Yugoslav constitutions. Second, it addressed not only the political structure but also socio-economic aspects of society to an unusual degree for a fundamental law.¹⁴

A new constitutional text was adopted in 1963, based on the same principles.¹⁵ In 1974, the last socialist constitution was enacted.¹⁶ This Constitution marked the completion of Yugoslavia’s constitutional reform and granted the republics greater decentralisation. Article 1 described the Yugoslav Federation as a ‘state commonwealth of voluntarily united peoples and their socialist republics’. Simultaneously, Article 224 defined the Federation as ‘an association of citizens, peoples and nationalities in which they secure their historical direct interests through joint democratic agreement’.¹⁷ The Constitution preserved social property and self-management and introduced significant changes in the country’s territorial structure. Human rights and freedoms were limited by the interests of socialist society. It proclaimed freedom of scientific, cultural, and artistic work, and required education to be based on scientific socialism. It also guaranteed social security and, notably, protection and improvement of the environment.

The next constitution in Serbia was adopted in 1990, following the collapse of the communist system. It included almost all individual and political rights and freedoms. Socio-economic rights and freedoms were listed but left to legislation to define in detail.¹⁸ With this Constitution, Serbia reestablished the liberal-democratic model. However, it did not explicitly define the legal nature of the relationship between voters and their elected representatives. This lack of clarity caused numerous problems in the functioning of the National Assembly between

12 Jevtić, 1988, p. 117.

13 Constitution of 1946.

14 Dragnich, 1946, p. 420.

15 Constitution SFRY, 1963.

16 Constitution SFRY, 1974.

17 Popovych, Topolnytska, and Telep, 2023, p. 104.

18 Constitution of 1990.

1990 and 2006. It was expected that a new constitution would resolve the question of the parliamentary mandate, but this did not happen.¹⁹ This was the constitution of one federal state – the Federal Republic of Yugoslavia – which adopted its own Constitution in 1992.²⁰ That Constitution included the same human rights and freedoms, with the addition of abolishing the death penalty in Yugoslavia. This abolition did not become Serbia's international obligation until 2004, when the European Convention on Human Rights and its additional protocols entered into force for Serbia and Montenegro, then a single state,²¹ which represents an international agreement between states to protect individuals whose rights have been violated.²²

The Federal Republic of Yugoslavia ceased to exist in 2003, when a new state – Serbia and Montenegro – was created through the adoption of the Constitutional Charter.²³ This marked the end of Yugoslavia after 74 years. An integral part of the Charter was the Charter on Human Rights,²⁴ which guaranteed the same civil, political, economic, social, and cultural rights as the Constitution of Serbia of 1990. The Charter established a State Union of Serbia and Montenegro and, importantly, allowed Montenegro to hold a referendum on independence after three years.

In 2006, Montenegro left the State Union of Serbia and Montenegro, and in the same year Serbia adopted a new Constitution,²⁵ which is still in force. This Constitution has two main characteristics. First, although newly enacted, it cannot be truly regarded as a new constitution. Second, it had a primarily political aim.²⁶ Nevertheless, it is a modern constitution that guarantees a full range of contemporary human rights and freedoms, in line with ratified international human rights conventions, as will be discussed in the following chapters.

2. UN Human Rights Conventions in Serbia

Serbia is a party to the following UN human rights Conventions and Covenants:²⁷

1. Convention relating to the Status of Refugees;
2. International Covenant on Civil and Political Rights;

19 Marković, 2013, p. 49.

20 Constitution of FRY, 1992.

21 Krivokapić, Krstić, and Paunović, 2018, p. 95.

22 Petrović, 2001, p. 20.

23 Constitutional Charter of Serbia and Montenegro, Official Gazette of Serbia and Montenegro, no. 1/03.

24 Charter on Human Rights, Official Gazette of Serbia and Montenegro, no. 6/03.

25 Constitution of the Republic of Serbia, Official Gazette of the Republic of Serbia, Nos. 98/2006 and 115/2021.

26 Marković, 2006, p. 5.

27 United Nations Treaty Collection, no date.

3. International Covenant on Economic, Social, and Cultural Rights;
4. International Convention on the Elimination of All Forms of Racial Discrimination;
5. Convention on the Elimination of All Forms of Discrimination against Women;
6. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;
7. Convention on the Rights of the Child;
8. International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families;
9. Convention on the Rights of Persons with Disabilities;
10. International Convention for the Protection of All Persons from Enforced Disappearance.

3. The 1951 Convention relating to the Status of Refugees

Since the Socialist Federal Republic of Yugoslavia ratified the 1951 Convention relating to the Status of Refugees in 1967, Serbia became a successor to the Convention in 2001. Serbia also ratified the 1967 Protocol. Yugoslavia was one of the 26 states that sent representatives to the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, held in Geneva from 2 to 25 July 1951, at which the Convention was drafted and signed.²⁸ The 1951 Refugee Convention made lasting contributions to the international legal regime on refugee rights, including a single universal definition of 'refugee' and the core principles of non-discrimination, non-penalisation,²⁹ and non-refoulement.³⁰

Yugoslavia actively participated in drafting the Convention, with some of its proposed amendments adopted. For example, in Article 6 of the Convention, Yugoslavia proposed: 'After the words "and subsequently returned there", insert: until the date of entry into force of this Convention'.³¹ Moreover, the importance of the Refugee Convention for Serbia can be seen in the fact that it influenced the adoption of the Law on Asylum in the Republic of Serbia and the Law on Asylum and Temporary Protection, even though the Convention does not explicitly provide for the right to asylum.³²

28 Weiss, 1995, p. 12.

29 Davinić, 2013, p. 23; Janmyr, 2021.

30 Raičević, 2018, p. 185; Beogradski centar za ljudska prava, 2020.

31 Weiss, 1995, p. 60.

32 International Organization for Migration – Mission to Serbia, 2012, p. 56.

4. The 1966 International Covenant on Civil and Political Rights

The Socialist Federal Republic of Yugoslavia signed the Covenant on 8 August 1967 and ratified it on 2 June 1971. Serbia succeeded to the Covenant in 2001.

The Human Rights Committee is the United Nations treaty body responsible for overseeing the implementation of the International Covenant on Civil and Political Rights (ICCPR). It does so by considering State reports, individual complaints, and inter-State complaints, as well as preparing general comments, substantive statements, and general discussions on topics addressed in the ICCPR. Currently, 174 States are parties to the ICCPR.

The Human Rights Committee consists of 18 independent experts elected for a four-year term by States Parties to the ICCPR.³³ Each member must be a national of a State Party, of high moral character, and possess recognised competence in the field of international human rights.³⁴ No more than one national from any State may serve on the Committee.³⁵

One year after the ICCPR's entry into force, each State Party must submit a report to the Human Rights Committee detailing the status of implementation of the Covenant's provisions.³⁶ After the initial report, States submit periodic reports when requested by the Bureau of the Committee. On the basis of these reports, replies to the list of issues, and input from civil society, the Committee prepares its concluding observations.³⁷

In March 2024, the delegation of the Republic of Serbia presented its report on the implementation of the International Covenant on Civil and Political Rights.

5. The 1966 International Covenant on Economic, Social and Cultural Rights

The Socialist Federal Republic of Yugoslavia signed the Covenant on 8 August 1967 and ratified it on 2 June 1971. Serbia succeeded to the Covenant in 2001.

The Committee on Economic, Social and Cultural Rights (CESCR) was established to oversee the implementation of the Covenant³⁸ through its consideration

33 International Covenant on Civil and Political Rights, United Nations, Treaty Series, vol. 999, p. 171 and vol. 1057, p. 407, Arts. 28, 32.

34 Ibid., Art. 28.

35 Currently, one of the members of the Committee is a Serbian national. That is Prof. Tijana Šurlan, judge of the Constitutional Court of Serbia.

36 International Covenant on Civil and Political Rights, Art. 40.

37 Etinski, Djajic, and Tubic, 2024.

38 International Covenant on Economic, Social and Cultural Rights, New York, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3.

of State reports, individual complaints, inter-State complaints, and inquiries, as well as by preparing general comments.

Initially, States must submit a report on implementation two years after acceding to the ICESCR. Following the initial report, periodic reports are requested every five years. In July 2019, the Chairs of the human rights treaty bodies agreed that the CESCR would adopt a standard eight-year reporting cycle.

The CESCR may consider individual complaints alleging violations of rights protected under the ICESCR if the State considered is a party to the First Optional Protocol to the ICESCR (adopted 10 December 2008; entered into force 5 May 2013).³⁹ Serbia ratified this Protocol on 22 September 2023.

The CESCR has been authorised to accept individual complaints since May 5 2013, provided that the requirements set out in Articles 1 through 4 of the Optional Protocol are met. Currently, 29 states have ratified the Optional Protocol.

6. The 1965 International Convention on the Elimination of All Forms of Racial Discrimination

The Socialist Federal Republic of Yugoslavia signed the Convention on 15 April 1966 and ratified it on 2 October 1967. Serbia succeeded to the Convention in 2001.

The Committee on the Elimination of Racial Discrimination (CERD) was established for the implementation of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) through its consideration of State reports, individual complaints, inter-State complaints, and early-warning and urgent procedures, as well as its preparation of general comments. This is also an instrument that is widely accepted, with 182 States parties.

The CERD is composed of 18 independent experts who are elected for a term of four years,⁴⁰ with membership considering an equitable geographical distribution of principal legal systems.

State parties are required to submit an initial report within one year after acceding to the ICERD, and later to submit regular periodic reports on how rights are being implemented every two years. With regard to Serbia, the Committee noted that the report covered the period from 1992 to 2008, including the period of great loss and gross violations of human rights in the former Yugoslavia prior to 2000.⁴¹

39 Optional Protocol to the International Covenant on Social, Economic and Cultural Rights, New York, 10 December 2008, United Nations, Treaty Series, vol. 2922, p. 29. Doc. A/63/435; C.N.869.2009.TREATIES-34 of 11 December 2009.

40 International Convention on Elimination of All Forms of Racial Discrimination, New York, 21 December 1965, United Nations, Treaty Series, vol. 660, p. 195, Art. 8.

41 United Nations, 2011, p. 1.

7. The 1979 Convention on the Elimination of All Forms of Discrimination against Women

Since the Socialist Federal Republic of Yugoslavia ratified the Convention on the Elimination of All Forms of Discrimination against Women in 1982, Serbia became a successor to that Convention in 2001.

The Committee on the Elimination of Discrimination against Women was created for the implementation of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)⁴² through its consideration of State reports, individual complaints, inter-State complaints, and inquiry requests, as well as its preparation of general recommendations, statements, and general discussions. At present, 189 States are parties to CEDAW.

The Committee on the Elimination of Discrimination against Women is composed of 23 independent experts on women's rights who are elected for a term of four years.⁴³

State parties are required to submit an initial report within one year after acceding to CEDAW, and then to submit regular periodic reports on how rights are being implemented every four years, or at the request of the Committee.⁴⁴

Article 29 of CEDAW provides a mechanism for States to resolve inter-State disputes concerning the interpretation or application of the Convention.⁴⁵ However, the Committee does not have a mechanism in place for urgent interventions.

The Committee on the Elimination of Discrimination against Women may consider individual complaints that allege a violation of an individual's rights under CEDAW if the State is a party to the Optional Protocol to CEDAW.⁴⁶ Articles 2 through 4 of the Optional Protocol set out the Committee's criteria for considering an individual complaint. At present, 115 States are parties to the Optional Protocol.

8. The 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

The Socialist Federal Republic of Yugoslavia signed and ratified the Convention on 18 April 1989 and 10 September 1991, with the following declaration:

42 Convention on the Elimination of All Forms of Discrimination against Women, New York, 18 December 1979, United Nations, Treaty Series, vol. 1249, p. 13.

43 Ibid., Art. 17.

44 Ibid., Art. 18.

45 Ibid., Art. 29.

46 Optional Protocol to the Covenant on the Elimination of All Forms of Discrimination against Women, New York, 6 October 1999, United Nations, Treaty Series, vol. 2131, p. 83.

‘Yugoslavia recognises, in compliance with article 21, paragraph 1 of the Convention, the competence of the Committee against Torture to receive and consider communications in which one State Party to the Convention claims that another State Party does not fulfil the obligations pursuant to the Convention;

Yugoslavia recognises, in conformity with article 22, paragraph 1 of the Convention, the competence of the Committee against Torture to receive and consider communications from or on behalf of individuals subject to its jurisdiction who claim to be victims of a violation by a State Party of the provisions of the Convention.’

Serbia became a successor to the Convention in 2001.

The Committee Against Torture (CAT) was established to supervise and protect the implementation of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment⁴⁷ (‘Convention against Torture’) through its consideration of State reports, individual complaints, inter-State complaints, and inquiry requests, as well as its preparation of General Comments, statements, reprisal letters, and general discussions. At present, 174 States are parties to the Convention against Torture.

The CAT consists of 10 independent experts who are elected for a term of four years by States parties to the Convention.⁴⁸ Each member must be a national of a State party, of high moral character, and have recognised competence in the field of international human rights.⁴⁹

State parties are required to submit an initial report within one year after acceding to the Convention against Torture, and thereafter to submit regular periodic reports every four years on how rights are being implemented.

The CAT may consider individual complaints that allege a violation of an individual’s rights under the Convention against Torture if the State has made the necessary declaration under Article 22 of the Convention, which also identifies the requirements any complaint must meet in order to be considered by the Committee.⁵⁰

47 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, New York, 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85.

48 *Ibid.*, Art. 17.

49 Kelly, 2009.

50 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Art. 22.

9. The 1989 Convention on the Rights of the Child

The Socialist Federal Republic of Yugoslavia signed the Convention on 26 January 1990 and ratified it on 3 January 1991 with the following reservation:

‘The competent authorities (ward authorities) of the Socialist Federal Republic of Yugoslavia may, under article 9, paragraph 1 of the Convention, make decisions to deprive parents of their right to raise their children and give them an upbringing without prior judicial determination in accordance with the internal legislation of the SFR of Yugoslavia.’

Serbia succeeded to the Convention in 2001.

The Committee on the Rights of the Child (CRC) oversees implementation of the Convention on the Rights of the Child (‘the Convention’)⁵¹ and its Optional Protocols on the involvement of children in armed conflict⁵² and on the sale of children, child prostitution, and child pornography,⁵³ through its consideration of State reports and inquiry requests, and its preparation of general comments, substantive statements, and general discussion days. Currently, 196 States are parties to the Convention.

The CRC consists of 18 independent experts who are elected for a term of four years by States parties to the Convention.⁵⁴ Each member must be a national of a State party, of high moral character, and have recognised competence in the field of international human rights.

Initially, a State must present a report two years after acceding to the Convention. After the initial report, a State must submit periodic reports every five years. Reports shall not exceed 120 pages. The reporting system requires each State party to submit: (1) a common core document, which provides general information about the reporting State, a framework for protecting human rights, and information on non-discrimination and equality, and (2) a treaty-specific document, which provides specific information on the implementation of the Convention and its Optional Protocols, as well as any national laws or policies taken to implement them.⁵⁵

51 Convention on the Rights of the Child, New York, 20 November 1989, United Nations, Treaty Series, vol. 1577.

52 Optional Protocol on the Involvement of Children in Armed Conflict, 25 May 2000, United Nations.

53 Optional Protocol on the sale of children, child prostitution and child pornography, 25 May 2000, United Nations.

54 Convention on the Rights of the Child, p. 3, Art. 43.

55 Molloy, 2024.

Following the submission of a periodic report, the CRC first engages in a pre-session working group, where it drafts a list of issues to send to the State party. The State party must then respond with additional information if requested. At the session, the CRC engages in a constructive dialogue with a representative of the State party about the list of issues and concerns. The Committee elects two of its members to act as ‘country rapporteurs’ to lead the discussion.

The final phase of the process is for the CRC to draft and adopt concluding observations, which normally include: an introduction, positive aspects, factors and difficulties impeding the Convention’s implementation, principal subjects of concern, and suggestions and recommendations. The concluding observations also request dissemination of the information within the State party and submission of additional information on specific points mentioned in the observations. A provisional due date for the next periodic report is also provided.

Article 12 of the Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure⁵⁶ sets out a mechanism for a State party to complain about violations committed by another State party to the Convention. This procedure is broad in scope, as it does not require individual child victims to come forward. However, both States concerned must have made declarations accepting the procedure; otherwise, the complaint will not be considered.

As of April 2014, the CRC may consider individual complaints alleging a violation of an individual’s rights under the Convention or its Optional Protocols if the State is a party to a separate agreement establishing a complaints procedure. Article 7 of the Optional Protocol details the admissibility requirements for communications.⁵⁷ Currently, 52 States are parties to the Optional Protocol. Serbia has not yet ratified it; however, on 28 February 2012 Serbia signed the Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure, which includes a provision on individual complaints.⁵⁸

10. The 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families

The Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, also known as the Committee on Migrant Workers (CMW), oversees implementation of the International Convention on the

⁵⁶ Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure, New York, 19 December 2011, United Nations, Treaty Series, vol. 2983, p. 135.

⁵⁷ *Ibid.*, Art. 7.

⁵⁸ *Ibid.*, Art. 5.

Protection of the Rights of All Migrant Workers and Members of Their Families.⁵⁹ It considers State reports and inter-State complaints, and also prepares general comments and substantive statements. Currently, 59 States are parties to the Convention. Serbia is not among them, as it has not yet ratified the Convention. Serbia signed it in 2004.

11. The 1990 International Convention on the Rights of Persons with Disabilities

The Committee on the Rights of Persons with Disabilities (CRPD) oversees implementation of the Convention on the Rights of Persons with Disabilities⁶⁰ through its consideration of State reports, individual complaints, early-warning and urgent actions, and inquiry requests, as well as its preparation of general comments and general discussion days. At present, 191 States are parties to the Convention, including Serbia, which signed the Convention on 17 December 2007 and ratified it on 31 July 2009.

States parties are required to submit an initial report within two years of acceding to the Convention and then submit regular periodic reports every four years on the implementation of rights.

The CRPD may consider individual complaints alleging a violation of rights under the Convention if the State has ratified the Optional Protocol to the Convention on the Rights of Persons with Disabilities.⁶¹ Currently, 106 States are parties to the Optional Protocol. Serbia has ratified the Protocol; however, no case has yet been discussed before the Committee against Serbia.

12. Incorporation of UN Covenants and Conventions into Serbian Law

■ 12.1. Convention relating to the Status of Refugees

The 1951 Refugee Convention influenced the adoption of the Law on Asylum and Temporary Protection in the Republic of Serbia, adopted in 2018.⁶² This law defines

59 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, New York, 18 December 1990, United Nations, Treaty Series, vol. 2220, p. 3.

60 Convention on the Rights of Persons with Disabilities, New York, 13 December 2006, United Nations, Treaty Series, vol. 2515, p. 3.

61 Optional Protocol to the Convention on the Rights of Persons with Disabilities, New York, 13 December 2006, United Nations, Treaty Series, vol. 2518, p. 283. Doc.A/61/611.

62 Law on Asylum and Temporary Protection in the Republic of Serbia, Official Gazette of the Republic of Serbia, No. 24/2018. The Law on Asylum was adopted in 2007, but as Serbia adopted the Law on Asylum and Temporary Protection in 2018, the Law on Asylum is no longer in force.

the principles, conditions, and procedures for granting and terminating asylum, as well as the status, rights, and obligations of asylum seekers and persons granted asylum in the Republic of Serbia.⁶³

The law has brought the Serbian asylum system closer to relevant international and EU standards, leading to improvements such as ensuring merits-based assessment of all asylum claims and introducing enhanced procedural guarantees for persons with specific needs (e.g., recognition of gender-based refugee claims and child-specific claims). However, state-funded interpretation in the asylum procedures and free legal aid are not yet independent. They require strengthening through the adoption of missing bylaws and improved harmonisation and integration.⁶⁴

Moreover, the Constitution of the Republic of Serbia states that generally accepted rules of international law and ratified international treaties form an integral part of the national legal system and should be applied directly.⁶⁵ Article 57 of the Constitution prescribes that every foreigner has the right to seek asylum.⁶⁶

■ 12.2. *International Covenant on Civil and Political Rights*

Serbia carried out a constitutional reform during the reporting period to further strengthen the independence of the judiciary. In 2018, the State adopted the Law on the Planning System to regulate the creation and monitoring of public policies. It also amended the Law on the Prohibition of Discrimination and adopted numerous laws, strategies, and action plans related to the prevention of discrimination.

To promote gender equality, the State adopted the 2021 Law on Gender Equality and began implementing the 2021–2030 Strategy for Gender Equality along with its action plan. Since the adoption of the Law on the Prevention of Domestic Violence in 2016, significant efforts have been made to improve the work of all actors in the domestic violence protection system. Intensive work is ongoing to establish a single central record of cases of domestic violence. The work of the Council for the Prevention of Domestic Violence is also of great importance. After the tragic events in Belgrade on 3 and 4 May last year, the Government adopted a set of emergency measures, including amendments to the Criminal Code and the Law on Arms and Ammunition, to prevent similar tragedies.

Promising efforts have also been made to build the capacity of prison officers in the fields of deprivation of liberty and the prohibition of torture. The Government has improved the capacities of the Protector of Citizens, the national preventive mechanism.

63 International Organization for Migration – Mission to Serbia, 2012, p. 56.

64 United Nations High Commissioner for Refugees, 2023, Human Rights' Compilation Report, Universal Periodic Review: Fourth Cycle, 43rd Session.

65 Constitution of the Republic of Serbia, Official Gazette of the Republic of Serbia, Nos. 98/2006 and 115/2021, Art. 16, para. 2.

66 *Ibid.*, Art. 57.

It can be said that Serbia remained determined to achieve further progress in democratisation, the fulfillment of international obligations, and the attainment of the highest standards of human rights.

The Human Rights Committee concluded its consideration of the fourth periodic report of Serbia on implementation of the provisions of the International Covenant on Civil and Political Rights (ICCPR).⁶⁷

The Human Rights Committee may consider individual complaints alleging violations of rights under the ICCPR if the State is a party to the First Optional Protocol to the ICCPR, which establishes the complaints mechanism.⁶⁸ Articles 1 through 5 of the Optional Protocol identify the requirements for the Committee's consideration of individual complaints.⁶⁹ Currently, 116 States are parties to the Optional Protocol, which entered into force for Serbia on 6 December 2001.

The following section of this study presents cases brought before the Committee against Serbia.

In one case, a communication was submitted by Z.S. in September 2023 concerning the suspension of payments for pension and disability insurance. In July 2024, the Committee decided to discontinue consideration of this communication due to loss of contact with the author.⁷⁰

In another case, the author was Dobrivoje Mladenović, a national of the Republic of Serbia, who claimed that the State party had violated his rights under Article 14 (1), read alone and in conjunction with Article 26 of the Covenant. The Committee found that the author had not demonstrated, for the purpose of admissibility, that the decision of the Constitutional Court was manifestly arbitrary or erroneous, or amounted to a denial of justice. Accordingly, the Committee declared this aspect of the communication under Article 14 (1) of the Covenant inadmissible under Article 2 of the Optional Protocol.⁷¹

The third case dealt with Communication No. 1355/2005 submitted by the Humanitarian Law Center, a non-governmental organisation that monitors and investigates human rights violations in Serbia. It submitted the complaint on behalf of X, a minor born in 1992, a citizen of Serbia. The author claimed violations of articles 7, 17, and 24, paragraph 1, each taken alone and read in conjunction with article 2, paragraphs 1 and 3, of the Covenant by Serbia.

In the absence of express authorisation, the author should provide evidence that it has a sufficiently close relationship with the child to justify acting without

67 CCPR/C/SRB/CO/4: Concluding observations on the fourth periodic report of Serbia.

68 First Optional Protocol to the International Covenant on Civil and Political Rights (adopted 16 December 1966; entered into force 23 March 1976).

69 *Ibid.*, Arts. 1 to 5.

70 Decision adopted by the Committee under the Optional Protocol, concerning communication No. 4318/2023, adopted by the Committee at its 141st session (1–23 July 2024).

71 Decision adopted by the Committee under the Optional Protocol, concerning communication No. 2869/2016.

such authorisation. The Committee notes that the author acted as counsel for the child in the domestic proceedings between January and August 2003, with several interruptions. Since the author ceased to represent the child in the domestic proceedings in August 2003, it has had no contact with him, his legal guardian, or his parents. In such circumstances, the Committee cannot even assume that the child does not object, let alone consent, to the author proceeding with a communication to the Committee. Consequently, notwithstanding that the Committee is gravely disturbed by the evidence in this case, it is precluded by the provisions of the Optional Protocol from considering the matter since the author has not shown that it may act on the victim's behalf in submitting this communication. Accordingly, the Committee decided that the communication was inadmissible under article 1 of the Optional Protocol.⁷²

The fourth case discussed Communication No. 1180/2003, submitted by Zeljko Bodrožić, a Yugoslav national. He claimed to be a victim of a breach by Serbia and Montenegro of his rights under article 19 of the Covenant.⁷³

The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol, stated that, in accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy, including quashing of the conviction, restitution of the fine imposed on and paid by the author, restitution of court expenses paid by him, and compensation for the breach of his Covenant right. The State party was obliged to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the Covenant. It was also requested to publish the Committee's Views.

■ 12.3. *International Covenant on Economic, Social and Cultural Rights*

The Constitution of Serbia contains economic, social, and cultural rights under Section Two – Human and Minority Rights and Freedoms.⁷⁴ All international standards regarding the right to work,⁷⁵ right to strike,⁷⁶ right to healthcare,⁷⁷ social protection,⁷⁸ pension insurance,⁷⁹ and others have been applied in the Constitution. It could be said that the Republic of Serbia has accepted rights relevant and prescribed in the Covenant.

72 Communication No. 1355/2005.

73 Communication No. 1180/2003.

74 Constitution of the Republic of Serbia, Constitution of the Republic of Serbia, Official Gazette of the Republic of Serbia, Nos. 98/2006 and 115/2021.

75 Ibid., Art. 60.

76 Ibid., Art. 61.

77 Ibid., Art. 68.

78 Ibid., Art. 69.

79 Ibid., Art. 70.

Serbia has adopted a number of laws in the field of economic, social, and cultural rights,⁸⁰ in particular:

- a. The Employment Act (2005);⁸¹
- b. The Strike Law (1996);⁸²
- c. The Family Act (2005);⁸³
- d. The Law on Employment and Unemployment Insurance (2009);⁸⁴
- e. The Law on Professional Rehabilitation and Employment of Persons with Disabilities (2009);⁸⁵
- f. The Law on Employment of Foreigners (2014);⁸⁶
- g. The Law on Social Protection (2011);⁸⁷
- h. The Law on Healthcare (2019);⁸⁸
- i. The Law on Financial Support to the Family with Children (2017);⁸⁹
- j. The Law on Pension and Disability Insurance (2003);⁹⁰
- k. The Law on the Protection of Persons with Mental Illness (2013);⁹¹
- l. The Law on the Education System Foundations (2017).⁹²

80 Milenković, 2010, pp. 18–19.

81 Employment Act, Official Gazette of the Republic of Serbia, Nos. 24/2005, 61/2005, 54/2009, 32/2013, 75/2014, 13/2017- Decision of the Constitutional Court, 113/2017 and 95/2018 – authentic interpretation.

82 The Strike Law, Official Gazette of the Federal Republic of Yugoslavia, No. 29/96 and Official Gazette of the Republic of Serbia, Nos. 101/2005 – other law and 103/2012 – Decision of the Constitutional Court.

83 Family Act of the Republic of Serbia, Official Gazette of the Republic of Serbia, Nos. 18/2005, 72/2011 – other law and 6/2015.

84 Law on Employment and Unemployment Insurance, Official Gazette of the Republic of Serbia, Nos. 36/2009, 88/2010, 38/2015, 113/2017, 113/2017 – other law and 49/2021.

85 Law on Professional Rehabilitation and Employment of Persons with Disabilities, Official Gazette of the Republic of Serbia, Nos. 36/2009, 32/2013 and 14/2022 – other law.

86 Law on Employment of Foreigners, Official Gazette of the Republic of Serbia, Nos. 128/2014, 113/2017, 50/2018, 31/2019 and 62/2023.

87 Law on Social Protection, Official Gazette of the Republic of Serbia, Nos. 24/2011 and 117/2022 – Decision of the Constitutional Court.

88 Law on Health Care, Official Gazette of the Republic of Serbia, Nos. 25/2019 and 92/2023 – authentic interpretation.

89 Law on Financial Support to the Family with Children, Official Gazette of the Republic of Serbia, Nos. 113/2017, 50/2018, 46/2021 – Decision of the Constitutional Court, 51/2021 – Decision of the Constitutional Court, 53/2021 – Decision of the Constitutional Court, 66/2021, 130/2021, 43/2023 – Decision of the Constitutional Court, 62/2023, 11/2024 – Decision of the Constitutional Court and 79/2024.

90 Law on Pension and Disability Insurance, Official Gazette of the Republic of Serbia, Nos. 34/2003, 64/2004 – Decision of the Constitutional Court, 84/2004 – other law, 85/2005, 101/2005 – other law, 63/2006 – Decision of the Constitutional Court, 5/2009, 107/2009, 101/2010, 93/2012, 62/2013, 108/2013, 75/2014, 142/2014, 73/2018, 46/2019 – Decision of the Constitutional Court, 86/2019, 62/2021, 125/2022, 138/2022, 76/2023 i 94/2024.

91 Law on Protection of persons with mental illness, Official Gazette of the Republic of Serbia, No. 45/2013.

92 Law on the Education System Foundations, Official Gazette of the Republic of Serbia, Nos. 88/2017, 27/2018 – other law, 10/2019, 27/2018 – other law, 6/2020, 129/2021 and 92/2023.

■ 12.4. *International Convention on the Elimination of All Forms of Racial Discrimination*

CERD notes the Constitution of 2006, which contains a commendable chapter guaranteeing the protection of the rights of national minorities and includes provisions prohibiting discrimination in line with article 1 of the Convention.⁹³

CERD notes with appreciation that the Criminal Code of 2005 contains anti-discrimination provisions.⁹⁴

CERD also notes with appreciation the adoption of a number of laws aimed at preventing or combatting discrimination, including:

- a. The Law on National Minorities Councils (2009);⁹⁵
- b. The Law on the Prohibition of Discrimination (2009);⁹⁶
- c. The Law on Gender Equality (2009);⁹⁷
- d. The Law on Social Housing (2009);⁹⁸
- e. The Law on Offences (2013);⁹⁹
- f. The Law on the Prevention of Violence and Improper Conduct at Sports Events (2007 and 2009);¹⁰⁰
- g. The Law on the Ombudsman (2021);¹⁰¹
- h. The Law on the Prevention of Discrimination against Disabled Persons (2006);¹⁰²

93 Constitution of the Republic of Serbia, Official Gazette of the Republic of Serbia, Nos. 98/2006 and 115/2021, Chapter 3.

94 Criminal Code of the Republic of Serbia, Official Gazette of the Republic of Serbia, Nos. 85/2005, 88/2005, 107/2005, 72/2009, 111/2019, 121/2012, 104/2013, 108/2014, 94/2016, 35/2019 and 94/2024, Art. 387.

95 The Law on National Minorities Councils of the Republic of Serbia, Official Gazette of the Republic of Serbia, Nos. 72/2009, 20/2014 – Decision of the Constitutional Court, 55/2014 and 47/2018.

96 The Law on the Prohibition of Discrimination of the Republic of Serbia, Official Gazette of the Republic of Serbia, Nos. 22/2009 and 52/2021.

97 The Law on Gender Equality of the Republic of Serbia, Official Gazette of the Republic of Serbia, No. 52/2021.

98 The Law on Social Housing, Official Gazette of the Republic of Serbia, Nos. 24/2011 and 117/2022 – Decision of the Constitutional Court.

99 The Law on Offences, Official Gazette of the Republic of Serbia, Nos. 65/2013, 13/2016, 98/2016 – Decision of the Constitutional Court, 91/2019, 91/2019 – other law and 112/2022 – Decision of the Constitutional Court.

100 The Law on Prevention of Violence and Improper Conduct at Sport Events, Official Gazette of the Republic of Serbia, Nos. 90/2007, 72/2009 – other law, 111/2009, 104/2013 – other law and 87/2018.

101 The Law on the Ombudsman, Official Gazette of the Republic of Serbia, No. 105/2021.

102 The Law on Prevention of Discrimination against Disabled Persons, Official Gazette of the Republic of Serbia, Nos. 33/2006 and 13/2016.

i. The Law on the Protection of Rights and Freedoms of National Minorities (2002).¹⁰³

Serbia has adopted a number of programmes and plans to prevent discrimination against persons belonging to national minorities, including through the 2009 National Strategy for the Promotion of the Position of Roma and increased opportunities for persons belonging to national minorities to learn their languages in certain areas of Serbia.

Serbia has also made efforts to support and promote understanding and tolerance among national minorities living in the Autonomous Province of Vojvodina.¹⁰⁴

The CERD may consider individual complaints that allege a violation of an individual's rights under the ICERD if the State party has made the necessary declaration under article 14 of the ICERD,¹⁰⁵ which also identifies the basic requirements a complaint must satisfy to be considered by the Committee.

Several cases were brought before the CERD. One of them was initiated by Communication No. 29/2003. The petitioner was Dragan Durmic, a national of Serbia and Montenegro and of Romani origin. He claimed to be a victim of violations by Serbia and Montenegro of article 2, paragraph 1 (d), read together with article 5 (f), as well as articles 3, 4 (c), and 6 of the International Convention on the Elimination of Racial Discrimination. The petitioner was legally represented by the Humanitarian Law Center and the European Roma Rights Center.

The Committee concluded that the State party had failed to examine the petitioner's arguable claim of a violation of article 5 (f). In particular, it failed to investigate his claim promptly, thoroughly, and effectively. Consequently, article 6 of the Convention was violated.

The Committee recommended that the State party provide the petitioner with just and adequate compensation commensurate with the moral damage he suffered. It also recommended that the State party take measures to ensure that the police, public prosecutors, and the Court of Serbia and Montenegro properly investigate accusations and complaints related to acts of racial discrimination, which should be punishable by law according to article 4 of the Convention.

The Committee asked to receive information from the Republic of Serbia about the measures taken in light of the Committee's Opinion. The State party was also requested to widely disseminate the Committee's Opinion.¹⁰⁶

103 The Law on the Protection of Rights and Freedoms of National Minorities, Official Gazette of the SRJ, No. 11/2002, Official Gazette of the Serbia and Montenegro, No. 1/2003, Official Gazette of the Republic of Serbia, Nos. 72/2009 – other law, 97/2013 – Decision of the Constitutional Court and 47/2018.

104 United Nations, 2011, p. 2.

105 International Convention on Elimination of All Forms of Racial Discrimination, New York, 21 December 1965, United Nations, Treaty Series, vol. 660, Art. 14.

106 Communication No. 29/2003.

■ 12.5. *Convention on the Elimination of All Forms of Discrimination against Women*

Article 15 of the Constitution of the Republic of Serbia stipulates that the State shall guarantee equality between women and men and shall develop a policy of equal opportunities.¹⁰⁷ Moreover, Article 60, paragraph 3, states that women, young people, and persons with disabilities shall be afforded special protection at work and special working conditions in accordance with the law.¹⁰⁸ The National Assembly shall ensure equality and representation of different genders and members of national minorities in accordance with the law.¹⁰⁹

Some of the most important documents relating to gender aspects of human rights, security, and violence against women are the Strategy for Preventing and Combating Gender-Based Violence against Women and Domestic Violence 2021–2025¹¹⁰ and the Strategy for Preventing and Combating Trafficking in Human Beings, Especially Women and Children, and Protecting the Victims 2017–2022.¹¹¹ These documents represent Serbia's strategy for promoting gender equality.¹¹²

■ 12.6. *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*

Article 25, paragraph 2, of the Constitution of the Republic of Serbia states that no one shall be subjected to torture, inhuman or degrading treatment or punishment, or to medical or other experiments without free consent.¹¹³

Article 26 provides:

‘No person may be kept in slavery or servitude.

All forms of human trafficking are prohibited.

Forced labour is prohibited. Sexual or financial exploitation of a person in unfavorable position shall be deemed forced labour.

Labour or service of persons serving a sentence of imprisonment, if based on voluntariness with financial compensation; labour or service of military personnel; or labour or services during war or a state of emergency in accordance with measures prescribed on the

107 Constitution of the Republic of Serbia, Official Gazette of the Republic of Serbia, Nos. 98/2006 and 115/2021.

108 Ibid., Art. 60, para. 3.

109 Ibid., Art. 100, para. 2.

110 Strategy for Preventing and Combating Gender-Based Violence against Women and Domestic Violence, Official Gazette of the SRJ, No. 47/21.

111 Strategy for Preventing and Combating Trafficking in Human Beings, Especially Women and Children and Protecting the Victims, Official Gazette of the SRJ, No. 77/17.

112 The Gender Equality Strategy for the period 2021-2030, 2022.

113 Constitution of the Republic of Serbia, Official Gazette of the Republic of Serbia, Nos. 98/2006 and 115/2021, Art. 25, para. 2.

declaration of war or state of emergency, shall not be considered forced labour.¹¹⁴

Several complaints have been brought against Serbia before the CAT. In one case, the complainant was Jovica Dimitrov, a Serbian citizen of Roma origin, residing in Serbia and Montenegro. He claimed to be a victim of violations of articles 2, paragraph 1, read in connection with articles 1; 16, paragraph, 1; and 12, 13, and 14, taken alone and/or read in connection with article 16, paragraph 1, of the Convention. He was represented by two non-governmental organisations.¹¹⁵

The Committee noted the complainant's description of the treatment he suffered during detention, which constitutes severe pain or suffering intentionally inflicted by public officials in the context of a criminal investigation, as well as his sister's statement and a medical report. It also noted the State party's failure to adequately address the claim or respond to the allegations. In these circumstances, the Committee concluded that the facts, as submitted, constitute torture within the meaning of article 1 of the Convention.

Concerning the alleged violations of articles 12 and 13, the Committee noted that the Public Prosecutor did not request a preliminary investigation until 34 months after the criminal complaint was filed on 7 November 1996, and no further action was taken. The State party did not contest this claim. The Committee also noted that the failure to inform the complainant of the investigation results prevented him from pursuing a 'private prosecution'. Thus, the State party failed to comply with its obligations under articles 12 and 13.

The Committee further noted that the absence of criminal proceedings deprived the complainant of the possibility of filing a civil suit for compensation. Since the State party did not contest this allegation and significant time had passed, the Committee concluded that Serbia also violated its obligations under article 14.

The Committee urged the Republic of Serbia to conduct a proper investigation and, in accordance with Rule 112, paragraph 5, of its rules of procedure, to inform the Committee within 90 days of the steps taken.

In the second case, the complainant was Dragan Dimitrijevic, a Serbian citizen of Roma origin born on 7 March 1977. He claimed violations by Serbia and Montenegro of articles 2, paragraph 1, read in conjunction with article 1; article 16, paragraph 1; and articles 12, 13, and 14, taken alone and/or together with article 16, paragraph 1.¹¹⁶

The complainant was arrested on 27 October 1999 at his home in Kragujevac, Serbia, in connection with the investigation of a crime. He was taken to the

114 *Ibid.*, Art. 26.

115 Communication No. 171/2000.

116 Communication No. 207/2002.

local police station, where he was handcuffed to a radiator and beaten by several police officers, some of whom the complainant knew by their first names or nicknames. The officers kicked and punched him all over his body while insulting his ethnic origins and cursing his 'gypsy mother'. One of the officers struck the complainant with a large metal bar. Some time later, the officers unfastened him from the radiator and handcuffed him to a bicycle. Then they continued punching and beating him with their nightsticks and the metal bar. At one point, the complainant began bleeding from his ears, yet the beating continued until he was released the same day.

The complainant alleged violations by the State party of article 2, paragraph 1, in connection with article 1, and of article 16, paragraph 1 of the Convention. The Committee noted in this respect the complainant's description of the treatment he was subjected to while in detention, which can be characterised as severe pain or suffering intentionally inflicted by public officials in the context of a criminal investigation, as well as the written testimonies of witnesses to his arrest and release provided by the complainant. The Committee also noted that the State party had not contested the facts as presented by the complainant, which occurred more than five years earlier. In these circumstances, the Committee concluded that due weight must be given to the complainant's allegations and that the facts, as submitted, constitute torture within the meaning of article 1 of the Convention.

Concerning the alleged violations of articles 12 and 13 of the Convention, the Committee noted that the public prosecutor never informed the complainant whether an investigation was being or had been conducted after the criminal complaint was filed on 31 January 2000. It also noted that the failure to inform the complainant of the results of any such investigation effectively prevented him from pursuing 'private prosecution' of his case before a judge. In these circumstances, the Committee considered that the State party failed to comply with its obligation under article 12 of the Convention to carry out a prompt and impartial investigation wherever there are reasonable grounds to believe that an act of torture has been committed. The State party also failed to comply with its obligation under article 13 to ensure the complainant's right to complain and to have his case promptly and impartially examined by the competent authorities.

Moreover, the Committee noted the complainant's allegations that the absence of criminal proceedings deprived him of the possibility of filing a civil suit for compensation. In view of the fact that the State party had not contested this allegation and given the passage of time since the complainant initiated legal proceedings at the domestic level, the Committee concluded that the State party also violated its obligations under article 14 of the Convention in the present case.

The Committee, decided that there was a violation of articles 2, paragraph 1, in connection with article 1, 12, 13, and 14 of the Convention. It also urged the State party to conduct a proper investigation into the facts alleged by the complainant

and to inform it, within 90 days from the date of the transmittal of this decision, of the steps taken.

In the third case, the complainants were Slobodan Nikolić and his wife, Ljiljana Nikolić, nationals of Serbia and Montenegro. They claimed that the State party's alleged failure to conduct a prompt and impartial investigation into the circumstances of their son's death constituted a violation by Serbia and Montenegro of articles 12, 13, and 14 of the Convention.¹¹⁷

The Committee considered that there were reasonable grounds for the State party to investigate the complainants' allegation that their son was tortured prior to his death. The main question was whether there had been an adequate investigation of the events preceding the death of N. N., in line with article 12 of the Convention.

The deputy public prosecutor stated, before the autopsy, that he would not initiate criminal proceedings *ex officio*, as he considered the death an accident, and he did not examine any of the witnesses. Moreover, the investigating judge entrusted the same forensic experts who had conducted the autopsy to address the alleged inconsistencies in their own autopsy report, rather than engaging another institution to perform a forensic examination. On the basis of these facts, the Committee concluded that the investigation of the circumstances of the complainants' son's death was not impartial and therefore constituted a breach of article 12 of the Convention.

The Committee also held that the national courts dismissed the complainants' appeals without addressing their arguments and, by doing so, failed to examine the case impartially. This constituted a violation of article 13 of the Convention.

Article 21 of the Convention against Torture provides a mechanism for States to complain about violations of the Convention made by another State.¹¹⁸ However, this procedure for inter-State complaints has never been used.

Article 30 of Convention against Torture provides a mechanism for States to resolve inter-State disputes concerning the interpretation or application of the Convention, through negotiations, arbitration, or referral of the dispute to the International Court of Justice.¹¹⁹

In another case against Serbia, the CAT concluded in 2017 that Serbia's deportation of the complainant to Turkey constituted a violation of article 3 of the Convention against Torture.¹²⁰ The complainant, Cevdet Ayaz, was a Turkish national of Kurdish origin, born in 1973. At the time of submission of the communication, he was in danger of being extradited to Turkey. He claimed that his

117 Communication No. 174/2000.

118 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, New York, 10 December 1984, United Nations, Treaty Series, vol. 1465, Art. 21.

119 *Ibid.*, Art. 30.

120 Communication No. 857/2017.

extradition would amount to a violation by Serbia of article 3, read in conjunction with article 15, of the Convention. On 12 March 2001, Serbia had made the declaration under article 22 of the Convention.

On 11 December 2017, the CAT requested the State party to refrain from expelling the complainant to Turkey while it considered his complaint. On 5 November 2018, the State party informed the Committee that the request for interim measures was not brought to the attention of the Ministry of Justice of Serbia in time to prevent the complainant's extradition, as the request was delivered on 18 December 2018, while the decision on the complainant's extradition had been taken on 15 December 2018.

At the time of submission of the present communication, the complainant claimed that his extradition to Turkey would constitute a violation of his rights under article 3 of the Convention against Torture, as he had been sentenced in Turkey to 15 years' imprisonment for a politically motivated crime on the basis of a confession extracted under torture. He further claimed that the risk of torture and ill-treatment was even greater in Turkey following the attempted military coup in July 2016, as those perceived to be political opponents of the current regime had been subjected to torture and other ill-treatment, as well as incommunicado detention and inhumane conditions in overcrowded prisons.

The CAT, acting under article 22 (7) of the Convention against Torture, found that the facts before it constituted a violation by the State party of article 22 of the Convention against Torture, due to its failure to cooperate with the CAT in good faith. This failure prevented the CAT from effectively examining the present communication, with regard to Serbia's non-compliance with the CAT's request of 11 December 2017 for interim measures not to extradite the complainant and his forcible removal to Turkey on 25 December 2017.

Another case was filed in 2019,¹²¹ in which the complainants were Milunka Cubrilov, Jasmina Cubrilov Jovic, and Marina Cubrilov, nationals of Serbia, born on 6 October 1948, 29 July 1974, and 15 December 1981, respectively. They are the widow and daughters of Bozidar Cubrilov, of undetermined nationality, who was born in 1948 and died on 16 June 1996. The applicants claimed that Serbia infringed their rights under articles 6, 12, 13, 14, and 16 of the Convention against Torture, as well as the rights of Bozidar Cubrilov under article 13 of the Convention. Although not explicitly invoked, the communication also raised issues under article 2 of the Convention against Torture.

The CAT noted the complainants' allegations that: (a) Bozidar Cubrilov was beaten, including on the head, by police officers upon his arrest and during his detention, which resulted in his death on 16 June 1996; (b) the Serbian authorities failed to adequately investigate the treatment inflicted on Bozidar Cubrilov or hold those responsible accountable; (c) Bozidar Cubrilov and his family members

121 Communication No. 939/2019.

were denied the opportunity to lodge a complaint or to have the case promptly and impartially investigated; (d) the Serbian authorities failed to compensate the complainants for the failure to investigate.

In light of the above, the Committee concluded that there has been no prompt and impartial investigation into the torture and death of Bozidar Cubrilov, in violation of article 12 of the Convention against Torture. The CAT also concluded that the judicial authorities of the State party failed to fulfill Serbia's obligation to take effective measures to prevent acts of torture under article 2 of the Convention against Torture. In addition, the CAT found that Serbia had failed to fulfill its duty under article 13 of the Convention against Torture to ensure that Bozidar Cubrilov and the complainants had the right to submit a complaint and to have his case investigated promptly and impartially by the competent authorities. However, in light of the facts before the CAT concerning the treatment inflicted on Bozidar Cubrilov and the complainants' claims for compensation, the Committee found insufficient basis to conclude that Serbia had violated its obligations under article 14 of the Convention against Torture.

■ 12.7. *Convention on the Rights of the Child*

According to the Constitution of the Republic of Serbia, the family, and mothers and children, enjoy special protection, under which children without parental care and mentally or physically handicapped children are protected. Children under 15 years of age may not be employed, nor may children under 18 years of age be employed in jobs detrimental to their health or morals.¹²² Children born out of wedlock have the same rights and obligations as children born in wedlock.¹²³ Education is available to all on equal terms, and primary education is compulsory and free, in accordance with the law.¹²⁴

The Constitution stipulates that everyone has the right to healthcare. Children, pregnant women, and older persons have the right to healthcare funded from public revenue when they cannot realise that right on other grounds, while other persons have that right under conditions determined by law.¹²⁵

Many important laws have been adopted in Serbia in the field of child protection, the most important of which are the following:

- a. The Family Act (2005);¹²⁶
- b. The Act on Juvenile Offenders and Protection of Minors in Criminal Proceedings (2005);¹²⁷

¹²² Ibid., Art. 66.

¹²³ Ibid., Art. 64, para. 4.

¹²⁴ Ibid., Art. 71.

¹²⁵ Ibid., Art. 68.

¹²⁶ Family Act of the Republic of Serbia, Official Gazette of the Republic of Serbia, Nos. 18/2005, 72/2011 – other law and 6/2015.

¹²⁷ Act on Juvenile Offenders and Protection of Minors in Criminal Proceedings of the Republic of Serbia, Official Gazette of the Republic of Serbia, No. 85/2005.

c. The Law on the Education System Foundations (2017).¹²⁸

International organisations dealing with children (UNICEF, Save the Children, the World Bank) play a dual role in Serbia: some implement programmes and projects (UNICEF, Save the Children) and provide financial, logistical, and personnel support to local NGOs and state agencies and services, while others mainly finance reforms carried out within state services (World Bank). Their support has contributed to many successes in implementing the Convention.¹²⁹

■ **12.8. International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families**

Some argue that Serbia has laid the groundwork for effective migration governance by acceding to various international conventions on the protection of migrants' rights, including the Convention on the Rights of the Child, the Convention relating to the Status of Refugees, and the Conventions on Statelessness. This is one of the reasons why Serbia has not ratified this Convention.¹³⁰

However, Serbia has adopted two conventions of the specialised agency of the International Labour Organisation (ILO) dealing with the status of migrant workers: the ILO Migration for Employment Convention (No. 97, 1949) and the ILO Convention concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers (No. 143, 1975).

■ **12.9. Convention on the Rights of Persons with Disabilities**

The Constitution of the Republic of Serbia stipulates that any direct or indirect discrimination based on any ground, in particular mental or physical disability, is prohibited.¹³¹ Moreover, persons with disabilities are entitled to special protection at work and special working conditions in accordance with the law.¹³² Persons with disabilities, war veterans, and victims of war are afforded special protection under the law.¹³³

As mentioned above, in 2006 Serbia adopted the Law on Prevention of Discrimination against Persons with Disabilities, which aims to prohibit discrimination, emphasise the need to respect the human rights and dignity of persons with disabilities, ensure their inclusion in all spheres of social life on an equal basis,

128 Law on the Education System Foundations, Official Gazette of the Republic of Serbia, Nos. 88/2017, 27/2018 – other law, 10/2019, 27/2018 – other law, 6/2020, 129/2021 and 92/2023.

129 Koalicija nevladinih organizacija iz Srbije pod koordinacijom Centra za prava deteta, 2008, p. 14.

130 Migration Governance Snapshot: the Republic of Serbia, 2018.

131 Constitution of the Republic of Serbia, Official Gazette of the Republic of Serbia, Nos. 98/2006 and 115/202., Art. 21, para. 3.

132 Ibid., Art. 60, para. 5.

133 Ibid., Art. 60, para. 5.

and involve them in all decision-making processes concerning their rights and obligations.

13. Conclusion

It can be concluded that all the conventions are widely ratified and acceptable to almost all countries in the world. However, the decisions of the committees are not binding, which affects the influence of these treaties on the position of human rights in member states.

Serbia has accepted almost all universal conventions guaranteeing human rights and has incorporated into its Constitution and legislation the norms from these instruments. There is also wide acceptance of the jurisdiction of the committees established by these treaties. There are only four cases against Serbia before the Human Rights Committee, which suggests that Serbia respects the human rights envisaged in this document. However, given the significantly larger number of applications before the ECtHR concerning the same rights also envisaged in the Covenant, it can be concluded that individuals prefer seeking protection from the European Court of Human Rights rather than Committee. Serbia is a stable country with strong institutions for human rights protection, including the Constitutional Court and the Ombudsman as the most important ones.

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REVIEWS

CHIARA PIZI*

A Critical and Comparative Instrument of Contemporary Public Law: Review of the French Yearbook of Public Law

- **ABSTRACT:** *The French Yearbook of Public Law aims to serve as an innovative publishing project for rethinking French public law in the global context, by overcoming the self-referentiality of its dogmatic tradition. Created under the editorship of Philippe Cossalter, the project is based on an authentic comparative vocation and an epistemologically ambitious methodology. The 2023 edition stands out for its rich dossier on climate change, approached from an interdisciplinary and multilevel perspective, as well as a comparative law section analysing normative transformations in European legal systems. The Yearbook closes with theoretically significant contributions on executive power and administrative procedure. The Yearbook thus establishes itself as a space for legal reflection capable of interrogating the challenges of the Anthropocene and reviving the transformative function of public law.*
- **KEYWORDS:** *French public law, legal comparison, climate change, environmental constitutionalism, Anthropocene, comparative law, governance, European administrative law, legal epistemology, democratic participation*

1. A research project between tradition and innovation

The *French Yearbook of Public Law*, based on the Chair of French Public Law at Saarland University (Lehrstuhl für französisches öffentliches Recht – LFOER), and edited by Professor Philippe Cossalter, emerged from a dual scholarly and political urgency: to overcome the traditional self-referentiality of French public law doctrine and to give it new meaning within the global legal debate. Edited by Cossalter with the support of scholars with a high comparatist profile such

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as Professors Jean-Bernard Auby, Giacinto della Cananea and Dominique Custos, the yearbook positions itself as a genuine editorial bridge between two worlds that often remain mutually indifferent: francophone public law and the English-speaking international community.

The Yearbook's underlying premise is clearly defined: French public law, in its dogmatic structure and jurisprudential developments, sometimes remains 'impervious' to the foreign gaze. This distance presents itself not only as linguistic – evidenced by the absence of English as a scholarly medium – but also cultural: the myth of the exemplariness of the French model as an isolated case continues to produce inevitable isolation. The *Yearbook* therefore aims to bridge precisely this distance, with a threefold objective: to provide English-speaking jurists with privileged access to French public law; to present the most pregnant developments in foreign public law to French jurists; and, finally, to promote a genuine *inter-legal* dialogue, nourished by a comparative methodological approach.

The project is grounded in a clear methodological intuition: legal comparison cannot be reduced to an exercise in exegesis and synthesis of norms, but must deeply interrogate models and categories. Hence the choice to employ the English language as a site of confluence – and sometimes conflict – between heterogeneous paradigms. The goal is not to uncritically export French law, nor to subsume it into the Anglo-Saxon mainstream, but to problematise both in a dialectic of mutual recognition. The operational headquarters of FYPL – the Lehrstuhl für französisches öffentliches Recht at the University of Saarland – thus takes on the appearance of a true laboratory of transition, in which the continental-style tradition is fearlessly exposed to the twists and turns of global law. The yearbook integrates brilliant researchers (such as Enrico Buono and Jasmin Hirry-Lesch) and invites jurists in the scholarly community to react and contribute, expanding the academic horizon through horizontal models of editorial cooperation.

However, we believe that the main merit of the initiative lies elsewhere: in understanding that the international opening of legal doctrine is achieved through the construction of conceptual tools that generate problematisations, and thus responsibilities. The *FYPL* is one such tool: a critical prism that is not just a publishing project, but a concrete step toward an epistemological re-establishment.

2. Public law and the climate crisis: the core of the 2023 Dossier

The 2023 edition of the French Yearbook of Public Law is distinguished by an abundant dossier devoted to *Public Law and Climate Change*, flanked by sections featuring dense historical, methodological, and comparative contributions.

In his opening contribution ‘The Future of the French Model of Public Law in Europe’¹, Sabino Cassese sets out with rigor and clarity the origins of the French administrative model, tracing its contemporary evolutions, including its adaptation to European influences. Updating a valuable 2011 contribution, the article reflects on the tension between institutional particularism and universalism of law. Against the backdrop of the crisis of French *grandeur juridique*, the author invites the jurist to recover what that model can still teach, namely the clear delimitation of categories, the rigor of procedures, and the centrality of administrative jurisdiction.

In his contribution, ‘Conceptual and Linguistic Surprises in Comparative Administrative Law’, Jean-Bernard Auby² accompanies us amongst the ‘surprises’ of comparison in the field of administrative law, including seemingly identical concepts that conceal deep asymmetries. The entire contribution conveys, with an ironic gaze, an implicit defense of comparative methodology, to be understood as a critical tool capable of showing the cultural aporias and resistances one may encounter in translation and legal *transplants*.

The introduction of the dossier ‘Public Law and Climate Change’ is edited by Jean-Bernard Auby and Laurent Fonbaustier³, who clearly present the objective and methodological approach of the dossier. The authors both specify that the dossier aims to address the relationship between public law and the climate crisis, from a multilevel perspective and with an interdisciplinary slant. The approach of each section is therefore twofold: one functional, investigating how law can adapt to the crisis; the other conceptual, identifying which categories may hinder such adaptation.

In his contribution ‘Climate Change in International Law. The Paris Agreement. A Renewed Form of States’ Commitment?’, Sandrine Maljean-Dubois⁴ advances a lucid analysis of the genesis and structure of the Paris Agreement. Born in a complex negotiating context of innovation, the author observes that this agreement transcends the rigidities of the Kyoto Protocol, skillfully combining flexibility and legal binding force, bottom-up and top-down approaches, hard and soft law. The contribution thus offers an effective reflection on the evolution of international law toward more adaptive and inclusive forms that can reinvent legal normativity in a transformative context such as the climate crisis.

Emilie Chevalier’s article ‘European Union law in times of climate crisis: change through continuity’⁵ admirably investigates the repercussions of climate challenges on European Union administrative law. The author highlights a paradox: in the face of the disruptiveness of climate change, the Union’s legal

1 Cassese, 2023.

2 Auby, 2023.

3 Auby and Fonbaustier, 2023.

4 Maljean-Dubois, 2023.

5 Chevalier, 2023.

architecture remains formally stable, while developing new tensions and adaptations that enhance its flexibility, albeit without rupture. While acknowledging the regulatory vitality of Union law, Chevalier lucidly questions the adequacy and effectiveness of its regulatory and governance instruments, reflecting more broadly on the limits of administrative law's resilience.

In his contribution 'Transnational Climate Change Law. A case for reimagining legal reasoning?', Yseult Marique⁶ advances an original exploration of climate change law from a transnational perspective as a space for legal re-imagination. Highlighting the intertwining of legal systems, normative sources, and social practices, Marique's dense reflection invites a rethinking of legal reasoning as a practical, ethical, and regulatory tool for dealing with global emergencies, with necessary attention to the future of climate normativity.

Laurent Fonbaustier and Juliette Charriere's article 'Analysis of constitutional provisions concerning climate change'⁷ provides a detailed overview, in comparative perspective, of the growing role of constitutional law in combating climate change. Indeed, the contribution lucidly reflects on the promises and frailties of climate constitutionalism. The normative force of the constitution and the high level of judicial protection it can guarantee, stands as a potentially adequate alternative. This innovative perspective is also presented in its limitations, which lie in the frequent vagueness of the provisions that increase dependence on bold interpretations by the courts.

Ivano Alogna, in his article 'Increasing Climate Litigation: A Global Inventory'⁸ analyses the rise of climate litigation globally as a response to public policy inertia and a space for action and pressure. Through a rigorous analysis of emblematic case studies, the contribution acutely illustrates the growing prominence of courts in climate governance, an effective solution in the face of frequent public policy inertia.

Christian Huglo's contribution 'Climate change litigation: efficiency'⁹ offers a clear and relevant summary of the challenges climate change poses to traditional legal concepts and categories. Building on a properly scientific analysis, Huglo highlights the complexities that arise in trying to translate mitigation and adaptation strategies into legal terms, which are often faced with political, ethical and economic limitations and inertia.

In a regulatory framework that often shows its structural inadequacy in the face of ecological emergency, Marta Torre-Schaub reflects with finesse on the role of the judge, who is called upon not only to apply the law, but to interpret it boldly in the face of the novelty of climate litigation as a cross-cutting legal phenomenon. The article 'Climate Change Litigation and Legitimacy of Judges

6 Marique, 2023.

7 Charriere and Fonbaustier, 2023.

8 Alogna, 2023.

9 Huglo, 2023.

Toward a ‘wicked problem’: Empowerment, Discretion and Prudence¹⁰ thus offers a dense interpretive reading of climate judgment, to be understood as an evolving space of environmental justice.

Laurent Fonbaustier and Renaud Braillet’s contribution with ‘Could national judges do more? State deficiencies in climate litigations and actions of judges’¹¹ acutely investigates the delicate balance between judicial power and the legislative function in a context of global climate emergency. Through the timely analysis of various pronouncements – especially those of constitutional courts – the authors highlight the propulsive role of judges who, while not substituting for the legislature, urge appropriate actions consistent with international climate obligations.

Remaining in the realm of climate governance, Delphine Misonne’s article ‘Global climate governance turning translocal’¹² sharply unmasks the inadequacy of centralist rhetoric, instead valuing imitative practices and networks among cities, local authorities and territories. What emerges, therefore, is a sophisticated reading of European climate law that becomes, for the sake of effectiveness, increasingly *trans-local* and networked, bypassing the gaps in the Paris Agreement and resorting to *de facto* binding bottom-up strategies.

Turning to the American context, Daniel Etsy’s contribution ‘America’s climate change policy: Federalism in action’¹³ acutely reconstructs the climate change approach of American federalism, in which states and municipalities often intervene subsidiarily in the face of federal inaction with regulatory tools such as reduction targets, incentives and regional carbon prices. Accordingly, Etsy points out the risks of adopting these instruments in terms of unequal and intermittent climate governance.

By contrast, even in the heart of Europe’s most centralised state, France, local climate law seems to break against certain contradictions. This is what Camille Mialot points out in his article ‘Local policies on climate change in a centralized state: The Example of France’¹⁴, in which he rigorously traces the regulatory gaps and policy failures against pollution and artificialisation in the face of inertia among the various levels of government and territorial fragmentation.

As for the relationship between climate and democracy, in his article ‘Subjective Rights in Relation to Climate Change’, Alfredo Fioritto¹⁵ questions the compatibility of subjective rights and climate imperatives that question their relevance. The answer the author offers is positive: subjective rights can survive if they are reinterpreted within an evolutionary perspective that adapts to the needs

10 Torre-Schaub, 2023.

11 Fonbaustier and Braillet, 2023.

12 Misonne, 2023.

13 Etsy, 2023.

14 Mialot, 2023.

15 Fioritto, 2023.

of the community, in the context of ecological crisis. Fioritto then puts forward the innovative proposal of raising the Italian category of legitimate interests as a privileged legal device for rethinking individual law from an ecological and relational perspective.

Emmanuel Slautsky's contribution, 'Overcoming Short-Termism in Democratic Decision-Making in the Face of Climate Change: a Public Law Approach'¹⁶ continues along the theme of rethinking legal institutions from an ecological perspective. The author acutely suggests an institutional regeneration of public law, advancing evolutionary and innovative proposals that overcome short-term decision-making to revive democracy as a pillar of intergenerational responsibility.

In the vein of regenerating democracy in a context of climate emergency, Delphine Hedary's contribution 'The Citizens' Climate Convention: A new approach to participatory democracy, and its effectiveness on changing public policy'¹⁷ rigorously and clearly lays out the case study of the French Citizens' Climate Convention, analysing its operation and normative scope, and investigating its effectiveness in guaranteeing citizens' concrete influence in decision-making.

The dossier concludes with a dense and ambitious essay by Auby and Fonbaustier¹⁸, introduced by a crucial question: can public law consider itself up to the challenges posed by the Anthropocene? In a veritable *call to arms*, the editors sharply acknowledge that it not only requires time to adapt tools and institutions, but also to come to terms with a systemic crisis that overwhelms law in a broad sense. In a much-needed warning, the authors lucidly call for a rewriting of public law in light of the ecological emergency and not just as a regulatory tool, but as an agent of ontological, and therefore institutional as much as cultural, transformation.

3. European public law to the test of comparison

The *French Yearbook of Public Law* also devotes an entire section to comparative law, pointing to the most recent and innovative developments in the major European legal systems. The intent stated in the introduction is clear: it is intended to provide a reasoned map of the main constitutional, legislative and jurisprudential developments in France, Spain, Italy, Germany and the United Kingdom. The authors have skilfully manage to dodge the risks of mere exegesis and informative appendix, managing to provide the reader with a truly heuristic device that allows them to access a dynamic legal geography of the relationships between administration, courts and fundamental freedoms. The objective is fully achieved, through an

16 Slautsky, 2023.

17 Hedary, 2023.

18 Auby and Fonbaustier, 2023.

expository coherence that combines narrative clarity and high analytical rigor. Administrative law is thus read as a mirror of normative transformations in the framework of multilevel constitutionalism on the one hand, and in the time of pandemic and ecological crisis on the other. Proficiently combining positive data with theoretical framing, this section represents one of the most valuable and systematic components of the entire volume. It is a valuable tool for comparatists interested in contrasting models of administration and administrative justice in a Europe exposed to the well-known vulnerabilities of our time.

The ‘Miscellaneous’ section closes the Yearbook with two valuable contributions by Giacinto della Cananea.

The first one is a brilliant and accurate review of the volume ‘Democracy and Executive Power’ by Susan Rose-Ackerman¹⁹, a fundamental text for those who intend to analyse the decision-making processes of public administrations within contemporary democracies. Indeed, this book brings together years of reflection on the deep nexus between legality, democracy and executive power. ‘Democracy and Executive Power’ defends a vision of executive power as a dynamic space, not to be feared: a power that can legally structure itself in a manner consistent with its democratic accountability. With lucid and critical comparative approach, Rose-Ackerman traverses the United States, the United Kingdom, France and Germany, weaving together the major themes of the complex relationship between law and politics, procedure and participation, judge and administration. Continuing along the path of such reflection is della Cananea’s second contribution, ‘A Comparative Research on the Common Core of Administrative Laws in Europe’²⁰, a fine contribution that aims to investigate, from a comparative perspective, assonances and dissonances between administrative legal experiences in the European context, with a particular focus on administrative procedure.

4. A (new) legal grammar of transformation

In a context in which public law is called upon to confront against the vulnerabilities of our time, the *French Yearbook of Public Law* emerges as a necessary critical device, a laboratory of legal reflection, and an exercise in epistemic openness. Its function goes beyond the mere collection of contributions of high scholarly authority, neither in the meritorious effort of linguistic translation, nor cultural dissemination of French law to the English-speaking world. Its most significant merit is to offer the jurist a space for innovative thinking, in which comparison is not the goal or an end, but a suitable means to interrogate the resilience of

19 della Cananea, 2023a.

20 della Cananea, 2023b.

traditional normative models, the potential plasticity of categories, and the aptitude of law to confront the instability of the present.

Against the backdrop of crises that transcend the boundaries of individual legal systems – the climate crisis, the fragmentation of institutions, the erosion of democracies – the yearbook assumes a role of vigilance and proposal at once: it does not merely document and describe change, but invites people to manage and engage with it through innovative legal instruments that are both transnational and inclusive.

The purpose of the *French Yearbook of Public Law* is as ambitious as it is imperative: to rescue public law from the temptation of disciplinary closure and to return it to an evolutionary function capable of generating new grammars of legality. With an awareness of the necessity of this goal, the *Yearbook's* authors and editors have succeeded not only in formulating his vision, but in making it a reality, demonstrating that even in law it is possible for thinking to take on the task and responsibility of transforming the world, rather than merely explaining it.

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