Meliha POVLAKIĆ[1]

Restitution of Nationalised or Collectivised Agricultural Lands and Forests – Bosnia and Herzegovina, Lost in Transition[2]

Abstract

In the former Socialist Republic of Bosnia and Herzegovina (hereafter: SRBH) agricultural and forest land, as important natural resources of any economy, were the subject of double restrictions. One was a result of the social attachment of property, and is immanent not only to socialistic regimes. The other restriction was the result of socialist ideology, which meant that these important economic resources could only to a limited extent be privately owned — and that everything beyond prescribed limits was nationalised. There was also a vast range of other reasons for the nationalisation of these goods.

The transformation process entailed the removal of restrictions on the extent of ownership of these properties, and this was done within the framework of the constitutional reforms in the former Yugoslavia (1989/90). Still in the SRBH, after these constitutional reforms it was clear that denationalisation and restitution should follow. In 1991 it was forbidden by law to dispose of nationalised property.

The measures of denationalisation and restitution of nationalised property are the focus of this article. First, a short analysis is given of the history of nationalisation and confiscation of property in the former Yugoslavia after the World War II. Since the end of the 20th Century (1995), Bosnia and Herzegovina (BH) has been an independent state which has performed crucial reforms within the process of transformation. But the denationalisation measures regarding agricultural and forest land are still pending. One of the reasons for that is the fact that BH is composed of three separate legal orders: Federation of Bosnia and Herzegovina, Republic of Srpska and Brčko District of BH. All three legal orders have been thoroughly analysed, since the legislative competencies for regulating denationalisation are merely given to these constituent parts of BH. Due to the political tensions and problems, it is unlikely that a framework law will be passed.

1 | Prof. dr. Meliha POVLAKIĆ, Full professor, Head of the Civil Law Chair, University Sarajevo - Law School.
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The unclear ownership of agricultural and forest land (no criterion for the division of state ownership has yet been established) led to the OHR imposing a ban on the disposal of these assets in 2022. The consequence of the long absence of restitution and the co-existence of two restraining orders, which have different reasons and follow different goals, is a lack of legal certainty.

The article concludes that in Bosnia and Herzegovina the final implementation of the transformation process in general, and restitution as a part of it, still faces many obstacles — lack of legal basis, facts established during the war, processes that are not centralised and coordinated due to the state structure, adoption of legal solutions that may jeopardise restitution in general, and restitution of agricultural land and forests as well. In brief: Bosnia and Herzegovina is still lost in transition.

Keywords: Agricultural land, forest land, restitution, privatisation, denationalisation, transformation process

1. Introduction

Agricultural land and forests are among the most important assets of any economy, and they enjoy special protection — but also impose certain obligations on their owners. In the former socialist Yugoslavia[3], and thus in the Socialist Republic of Bosnia and Herzegovina (hereafter: SRBH) as one of the six socialist republics within it, this natural resource was the subject of double restrictions. In exercising the right of ownership over these goods, the owners were restricted – the preservation of these important resources requires the owner to take certain actions and, on the other hand, to refrain from certain actions to which he would be entitled as the owner. These limitations are not characteristic of the socialist system and they still exist today in BH, as well as in comparative law, as a result of the social attachment of property.[4] The second type of restriction was a direct consequence of socialist ideology, which saw in private property the danger of perpetuating capitalist property relations. The danger was seen in the possibility of private property becoming the basis for the exploitation of other persons. The fundamental ideological commitment was that income should be earned only through work and not on the basis of ownership.[5] Therefore, the ownership of agricultural land and forests was quantitatively limited; everything above the allowed maximum was nationalised and formed a fund of agricultural land and forests in state/public ownership. After the nationalisation, the agricultural land and the forests were

3 | The state organisation and names have changed: Democratic Federative Yugoslavia (DFJ), Federal People's Republic of Yugoslavia (FNRY) and finally the Socialist Federal Republic of Yugoslavia (SFRY), but this is not a central issue here. For this reason, the term former Yugoslavia or former Socialist Yugoslavia will be used throughout this paper.

4 | Gavella 1998, 352 – 356; Gavella 2007, 347-349, 355 et seq.

5 | Gavella 1990, 22.

allocated to certain socialist legal persons or to natural persons who were not the owners of such land.

Quantitative restrictions on private property were abolished with the adoption of Amendments to the Constitutions of the former Socialist Federal Republic of Yugoslavia (hereafter: SFRY) and the SRBH in 1989 and 1990. The Amendments to the Constitution of the SFRY (1988)[6] and to the Constitution of the SRBH (1989 and 1990)[7] represented the main pillar of the property order's reform – the guarantee of the property was established, the restrictions of private property were abrogated, all types of property rights (private and state property) were declared equal.[8] The privatisation process began and restitution was seriously considered.

More than three decades after the constitutional reforms in the former Yugoslavia and the SRBH, the issue of restitution of agricultural land and forests has still not been resolved in BH. Various factors have hampered this process, but the most dominant factor is currently the political struggle in BH between the State of BH and its constituent parts (two entities: the Federation of BH and the Republic of Srpska; and the Brčko District of BH). The question of whose jurisdiction it is to decide on the distribution of these resources between different levels of government, and who owns agricultural land and forests, is the source of a deep political and constitutional crisis in BH.

This paper will show how this political situation is reflected in the failure to adopt the necessary reform laws, or in the adoption of laws that the Office of the High Representative for BH (hereafter: OHR) has had to repeal.

The questions that will be addressed in this paper are listed in the publisher's questionnaire, which defines the research topic of this paper. It is noted that some questions that were asked in the questionnaire are grouped together in one chapter, and some are answered in relation to other questions, but no separate subtitle is dedicated to them.

2. Historical background: nationalisation and collectivisation of agricultural land and forests

During World War II, two parallel processes unfolded in former Yugoslavia, including Bosnia and Herzegovina — the liberation war against the fascist occupation, and the socialist revolution. The foundations of the new socialist state were established

6 | Amendments IX-XLII to the Constitution of the SFRY [Amandmani IX – XLII na Ustav SFRJ], Official Gazette of SFRY [Službeni list SFRJ], N° 70/1988, 57/1989.

7 | Amendments XX-LVIII to the Constitution of the SRBH [Amandmani XX-LVIII na Ustav SR BiH], Official Gazette of SRBH [Službeni list SR BiH], N° 13/1989 as well as Amendments LIX-LXXX to the Constitution of the SRBH [Amandmani LIX-LXXX na Ustav SR BiH], Official Gazette of SRBH [Službeni list SR BiH], N° 21/1990.

8 | Povlakić 2009, 32 et seq.

in the period from 1941 to 1945.[9] After the end of World War II, on 31 January 1946, the first constitution of the new socialist Yugoslavia was adopted. The fundamental goals of this constitution were to give "direction of economic life and development through a general economic plan, relying on the state and cooperative economic sector, and exercising general control over the private property."[10] BH (at this time the People's Republic of Bosnia and Herzegovina) adopted its first constitution in 1947.[11] Regarding proprietary relationships, chapter IV of this constitution is particularly relevant for this research, as it outlines three forms of property: people's property (*općenarodna imovina),*[12] cooperative (zadružna imaovina) and private property. The first form, people's property, enjoyed a special status and was afforded greater protection than private property. Certain goods could only be classified as people's property — this included all mineral and other natural resources, water, sources of natural power, as well as means of air and rail transport, mail, telegraph, telephone and radio.[13] The most important means of production were placed under state control (Article 15), along with the private sector and private property in general (Article 16).

People's property was foreseen as a main pillar for state development (Article 17). It was stipulated that private property could be nationalised or restricted if deemed in the public interest (Article 19). A key principle was that land should belong to those who cultivate it. The concept that individuals were prohibited from holding large landholdings on any basis had already been firmly established (Article 20).

In the period between 1945 and 1958, based on this constitutional framework, a series of regulations were adopted both on state and federal levels. These regulations included measures of nationalisation, confiscation or restriction of private property, primarily targeting real estate, and consequently agricultural land and forests. Nationalisation of agricultural land and forests was primarily implemented through the Agrarian Reform and Colonisation Act [*Zakon o agrarnoj reformi i kolonizaciji*],[14] which nationalised agricultural and forest land beyond the permissible maximum.

This act was followed by the Act on Agricultural Land Fund of People's Property and Allocation of Land to Agricultural Organisations.[15] After the nationalisation of

9 | Spaić 1971, 499; Bećirović 2013, 83 – 85.
10 | Bećirović 2013, 87.
11 | Constitution of the People's Republic of Bosnia and Herzegovina (hereafter: PRBH)
12 | It would also be correct to have the term 'state property' for this form of ownership.
13 | Spaić 1971, 559.
14 | Official Gazette DFY [Službeni list DFJ], N° 64/1945; Official Gazette FNRY [Službeni list FNRJ], N° 16/1946, 24/1946, 99/1946, 101/1947, 105/1948, 4/1951, 19/1951 and Official Gazette SRBH [Službeni list SR BiH], N° 41/67); Agrarian Reform and Colonisation Act in PR B&H [Zakon o agrarnoj reformi i kolonizaciji u NR BiH], Official Gazette NR BH [Službeni list NR BiH] N° 2/1946, 18/1946, 20/1947, 29/1947, 14/1951 and Official Gazette SRBH [Službeni list SRBiH], N° 41/1967.
15 | [Zakon o poljoprivrednom zemljišnom fondu društvene svojine i dodjeljivanju zemlje poljoprivrednim organizacijama], Official Gazette FNRY [Službeni list FNRJ], N° 23/1953, 10/1965.

agricultural land, this statute established the Fund of State-Owned Agricultural Land, encompassing all agricultural land classified as people's property (Article 1). This included agricultural land nationalised through various measures. The land in this fund was allocated for permanent use (right to use) by the socialist agricultural organisations, according to the conditions and procedures prescribed by law (Article 7 para 2 and 3). In addition to these statutes, other laws focused primarily on punishing individuals for their collaboration with the occupying power also included provisions for the expropriation of their property. If these individuals owned agricultural land and forests, their conviction for such crimes resulted in the expropriation of agricultural land and forests as well.[16] In total, fourteen nationalisation statutes were enacted, addressing various types of property and natural and legal persons.[17] Some of these specifically targeted agricultural and forest land.

It has often been said that socialism in the former Yugoslavia had a more 'human touch' compared to other Eastern Bloc countries. This was due to Yugoslavia's break with the Soviet Union in 1948, and its divergence from Soviet-style dictatorship. This was also reflected in the property regime; private ownership of real estate and land was neither completely abolished nor prohibited, but rather limited.[18] According to the socialist doctrine of the time, private property was intended to meet the needs of individuals and their families, rather than becoming a source of exploitation.[19] As far as agricultural land was concerned, a non-farmer could own up to 3 hectares, while a farming household could own up to 10 hectares — but it was foreseen that the corresponding laws of individual socialist republics could also set this maximum higher.[20] Forest ownership limits varied across different socialist republics, depending on geographical conditions and the type of forest, depending on whether the owner was engaged in forestry activities etc.[21]. The Constitution of the SFRY from 1974 (Art. 80) guaranteed the property right on agricultural land up to 10 hectares for a farming household, and with Amendments XXIII from 1988 this maximum was increased up to 30 hectares. There was no guarantee of ownership for other natural and legal persons or goods.

16 | For example Confiscation of Property and Enforcement of Confiscation Act [Zakon o konfiskaciji imovine i o izvršenju konfiskacije], Official Gazette FNRY [Službeni list FNRJ], N° 40/1945; Transfer of Enemy Property to State Ownership and Sequestration of Property of Absent Persons Act [Zakon o prelazu u državnu svojinu neprijateljske imovine i sekvestraciji nad imovinom odsutnih osoba], Official Gazette FNRY [Službeni list FNRJ], N° 63/1946, 105/1946.

17 | All these laws are listed in Article 365 of the Property Act of the Federation BH [Zakon o stvarnim pravima FBiH], Official Gazette of the FBH [Službene novine FBiH], N° 66/2013, 100/2013. For a comprehensive and detailed description of all nationalisation measures in the former Yugoslavia see Simonetti 2004, pp. 39 – 112.

18 | Stanković/Orlić 1989, 93 – 95.

19 | In this sense Spaić 1971, 579; Stanković/Orlić 1989, 96; Simonetti 2009, 20.

20 | Stanković/Orlić 1989, 98 – 99.

21 | Ibid.; Povlakić 2009, 23.These restrictions were foreseen by the Forest Act of the SRBH [Zakon o šumama SR BiH], Official Gazette of SRBH [Službeni list SR BiH], N° 11/1978.

If a person acquired more land than permitted, the surplus above the permitted maximum was nationalised. However, a distinction was made between cases of inherited land and those where the maximum was exceeded due to an *inter vivos* legal transaction (such as a purchase, gift, etc.). In the case of inheritance, the acquirer had the right to choose which part of land to retain and a fair compensation for the expropriated surplus was paid. In contrast, any surplus acquired through transactions beyond the allowed limits was subject to expropriation without compensation.[22]

The Agricultural Land Fund of People's Property and Allocation of Land to Agricultural Organisations Act from 1953 was amended in 1965, and brought crucial changes regarding proprietary relationships on agricultural land.[23] The term 'people's property' was replaced with the term 'social property' [*društvena svojina*] (Article 27). The jurisdiction over the Agricultural Land Fund was transferred from the federal state to the socialist republics, which was also a consequence of constitutional changes in 1963 (Article 14). Municipalities were granted the authority to use this land (Article 4, 5, 6, 7, 13, 17, 18). In the land registry, this land had to be registered as 'social property' with agricultural organisations assigned the right to use this land [*pravo korištenja*] (Article 15).

Such registrations were often omitted, resulting in cases where agricultural land remained registered as the property of a former owner or as people's property without a derivative right assigned to a socialist legal entity. This has caused numerous practical problems today, including issues related to the protection of trust in the land register.[24] When only people's, state, or social property was registered without noting the rights of an agricultural organisation, courts and the State Attorney's office typically interpret this entry as confirming state ownership by BH. This interpretation overlooks the fact that, since 1965, such land should have been classified as social property, and that people's property no longer existed.[25] Moreover, the Registration of Real Estate in Social Ownership Act[26] stipulated that socially owned real estate, including agricultural land registered as people's property but lacking a specific titleholder, should be registered in favour of the municipalities (Article 4). This required a request by the municipality along with proof that the land did not belong to any other entity. As a rule, municipalities failed to do this, leading to negative consequences today. Inadequate registration has resulted in numerous disputes over land ownership.[27]

22 | Simonetti 2009, 183 – 186; Stanković/Orlić 1989, 101 – 102.
23 | Amendments on Act on Agricultural Land Fund of Poeple's Property and Allocation of Land to Agricultural Organizations [Zakon o izmjenama i dopunama Zakona o poljoprivrednom zemljišnom fondu opštenarodne imovine], Official Gazette SFRY [Službeni list SFRJ], N° 10/1965.
24 | See Simonetti 2009, 315.
25 | Povlakić 2022, 21.
26 | Official Gazette of SFRY [Službeni list SFRJ], N° 28/1977.
27 | In the doctrine, it was not disputed that, in the case of the acquisition of social property on the basis of a law or a decision of the competent authority, the registration had only a declaratory character.

3. The restitution of agricultural lands and forests within the process of the transition in Bosnia and Herzegovina

3.1. Ideological approaches to the restitution of agricultural land and forest after the abandonment of the socialist model of the state and society

Although private ownership of real estate and agricultural and forest land was permitted, large areas of agricultural land and forests were still in state or public ownership until the beginning of the 1990s. During this period, significant reforms were undertaken in the former Yugoslavia and Bosnia and Herzegovina specifically.

During the first multi-party elections in 1990, all political parties committed to enacting regulations aimed at returning property that had been taken without fair compensation. The first 'preparatory' step was undertaken in 1991 by adopting the Amendments on Real Estate Legal Transaction Act [*Zakon o prometu nepokretnosti*].[28] With this amendment, a prohibition was pronounced of the disposal of property expropriated or confiscated under various nationalisation measures between 1945 and 1958. This prohibition has mainly affected the most important real estates for a national economy, such as agricultural land, forests, construction land etc. In view of the fact that the restitution process may take a long time, a prohibition was also enacted of alienation of the properties once expropriated, which should have served to protect the former owners and should have lasted until the restitution law. The Real Estate Legal Transaction Act was shelved with the entry of the new property acts (in the Brčko District of Bosnia and Herzegovina (BDBH) in 2001; in the Republic of Srpska (RS) in 2010; and in the Federation of Bosnia and Herzegovina (FBH) in 2014).[29] Only in the FBH this prohibition has been incorporated into the Property Act of FBH, so that it remains in force there (Art. 365 – 368) and still exists by causing enormous problems in practice, especially in real estate transactions (see under 6).[30]

Instead of many, see Simonetti, 2009, 315 - 317. In most cases, the change of ownership took place ex lege, outside the land register. After several decades and several changes in the concept of people's/social/state property, which took place outside the land register, it is not possible to find out who has what rights only on the basis of an entry in the land register made decades ago. Subsequent changes in legislation, which have automatically led to changes in ownership, have very often not been recorded in the land register. The history of each registration should be checked to ensure certainty about the legal status of a property.

28 | Official Gazette of SRBH [Službeni list SR BiH], N° 38/1978, 29/1980, 4/1989, 22/1991, 21/1992, 13/1994.

29 | See footnotes 69 – 71.

30 | The ban, which has been in place for over 30 years, cannot be effective and has been circumvented in many cases. Furthermore, this prohibition and undefined relationships have jeopardised investments. On the other hand, many properties remain unused and are depreciating or falling into disrepair. A major problem is the fact that long-term renting of such properties (renting for more than five

With the dissolution of former socialist Yugoslavia and the outbreak of war in BH in 1992, the reform processes were suspended until 1995. At that point, discussions were renewed regarding the possibility of adopting regulations for the denationalisation of such land, whether through restitution or privatisation.

Legislators at various levels faced several significant issues. One of the main controversies was related to constitutional questions and jurisdictional disputes. According to the Dayton Peace Agreement, which represents the Constitution of Bosnia and Herzegovina, the country is a complex state with legislative powers divided among different levels. Specifically, these powers are shared between the State of Bosnia and Herzegovina and its two entities: the Federation of Bosnia and Herzegovina and the Republic of Srpska.[31]

Another contentious issue was determining the relevant time for the return of confiscated property. Two main scenarios were discussed: 1918, when an agricultural reform was enacted in the newly established Kingdom of Yugoslavia, affecting Muslim large landowners in particular and leading to the expropriation of large estates from the former feudal class; or the years following 1945 and the socialist revolution. No consensus was reached on this issue.

The debate also asked which type of restitution would be most appropriate: effective restitution, i.e. in-kind restitution, or a compensation mechanism. Most legislative proposals considered a combination of these two methods.

Several drafts of restitution acts were proposed in FBH, but none were accepted or enacted by the Parliament of the FBH.[32]

In the RS, two laws were adopted in 1996: the Restitution of Confiscated Real Estate Act [*Zakon o vraćanju oduzetih nepokretnosti*] (hereafter: RCREA),[33] and the Restitution of Confiscated Land Act [*Zakon o vraćanju oduzetog zemljišta*] (hereafter: RCLA).[34] These acts were repealed in 2000 by the adoption of the Restitution of Confiscated Property and Compensation Act [*Zakon o vraćanju oduzete imovine i obeštećenju*] (hereafter: RCPCA 2000),[35] which was repealed shortly afterwards by the OHR.[36] For further information on these statutes, see below under 3.2.

The OHR is entitled to impose or to repeal the legislation. The role of the OHR regarding restitution is somewhat contradictory. For instance, in 2003 the OHR implemented a law allowing the denationalisation of building land in cities and urban settlements, resulting in only partial restitution. The urban building land was mainly allocated to the owners of the buildings constructed on it, without any

years) is not allowed, so many buildings fail because investors are unable to recoup their investments in the short term.

31 | For more see Povlakić 2010, 206 - 207.

32 | Velić 2022, 74.

33 | Official Gazette of the Republic Srpska [Službeni glasnik RS], N° 21/1996.

34 | Official Gazette of the Republic Srpska [Službeni glasnik RS], N° 21/1996.

35 | Official Gazette of the Republic Srpska [Službeni glasnik RS], N° 13/2000.

36 | Official Gazette of the Republic Srpska [Službeni glasnik RS], N° 31/2000.

compensation to the former owners.[37] Similarly, the denationalisation of apartments provided by the entities, which often restricted or undermined the rights of former owners, was not questioned or halted by the OHR.[38] However, the OHR adopted a different stance regarding the general decision on restitution, which included agricultural and forest land. The OHR's position is clearly defined: natural restitution would violate the rights of the current users (some of whom had been using the properties for decades), while compensation would lead to the financial collapse of BH. Further, the OHR insisted that the legislation to regulate restitution should be enacted at the level of the state and not at the level of the entities.

These issues have hindered the adoption of regulations on restitution, both in general and specifically concerning agricultural land and forests. The issues concerning ownership of agricultural land and forests remain unsolved and undefined, with the uncertainty of restitution hanging like the sword of Damocles. Additionally, some unilateral legislative attempts by the Republic of Srpska to determine ownership of agricultural and forest land have been overturned by the Constitutional Court of BH and the OHR (see under 5).

3.2. Legal sources of restitution of agricultural and forest land after the abandonment of the socialist economic and legal order

As mentioned under 3.1, there is currently no regulation on the restitution of agricultural and forest land.

This situation has persisted for 24 years, ever since the OHR repealed the 2000 Restitution of Confiscated Property and Compensation Act in the RS. There were two attempts to address the problem of restitution in the RS, both in 1996 and 2000. These will be discussed in more detail in section 3.3. It is important to note that

37 | The Building Land Act of the Federation BH [Zakon o građevinskom zemljištu FBiH], Official Gazette of the FB&H [Službene novine Federacije BiH], N°. 25/2003, 16/2004, 67/2005. The Building Land Act of the Republic of Srpska [Zakon o građevinskom zemljištu Republike Srpske], Official Gazette of the Republic of Srpska [Službeni glasnik Republike Srpske], N° 41/2003, 86/2003. More about legal status and transformation of the proprietary relationships over urban construction land see Simonetti 2008, 331 et seq.; Povlakić 2009, 97 et seq; Povlakić, 2019, 4 et seq.

38 | The Constitutional Court of the Federation of Bosnia and Herzegovina has ruled on several occasions on the constitutionality of the Purchase of Apartments on which there is an Housing Right Act. This act regulated the privatisation of state-owned flats in the FBH. It has been complained that the holders of the housing right were discriminated against depending on whether they had the housing right in nationalised flats or in flats which were owned by the state but for other reasons than nationalisation. (U-33/05 from 19th Jully 2006, available under: https://www.ustavnisudfbih.ba/bs/open_page_nw.php?l=bs&pid=68) [04.08.2024].
It was also pointed out that the former owners of the nationalised flats are not all in the same situation, namely that the religious communities are privileged as former owners (U-28/06 from 16th May 2007, available under https://www.ustavnisudfbih.ba/bs/open_page_nw.php?l=bs&pid=93) [04.08.2024].
There were also complaints that the Islamic religious community was not treated in line with the constitutional principles (U-15/08 from 23th Jully 2008, available under: https://www.ustavnisudfbih.ba/bs/open_page_nw.php?l=bs&pid=68) [04.08.2024].

although these statutes are no longer in force, they had legal consequences during their short period of validity. There are no public statistics on which agricultural and forest lands were restituted under these provisions, to whom, and in what amounts.[39] The media has frequently reported sporadic and *ad hoc* restitutions in certain local communities, but there remains no systematic legal solution.[40]

There have also been repeated allegations in the media that restitution in the RS has been discriminatory. For instance, it has been claimed that while some land has been returned to the Orthodox Church, only a very small portion of the expropriated property on the territory of the RS has been returned to the Islamic religious community.[41] Additionally, there are accusations that the Serb population has been favoured over other property owners.[42] Due to the lack of official data, these allegations cannot be confirmed, although there are reasonable doubts that such discrimination may have occurred in some cases. For example, the RCREA stipulated that only citizens of the RS were entitled to restitution, regardless of whether they had nationalised property in the RS or FBH (Article 3). First, this excluded natural persons residing in the FBH who owned property in the RS prior to nationalisation. Secondly, legal persons were not directly included in the group of claimants. However, if this provision is interpreted to include legal entities with their seat or registration in the RS, it becomes evident that legal entities were also treated differently. This discriminatory provision was amended by the RCPCA in 2000.

A framework Restitution Act was discussed, which aimed to establish guidelines for regulation within the entities. The OHR repealed RCPCA 2000 based on the principle that at least the framework conditions for restitution should be determined at the national level. The last attempt to draft the Framework Restitution Act

39 | There is no official or reliable data on how much property has been nationalised. According to data used by the media, allegedly based on data from the relevant authorities, one million hectares of land and three million square metres of residential and commercial space are awaiting restitution. See Softić Ibrahim, Restitucija, stanica na putu ka EU na kojoj mnogi u BiH decenijama čekaju, published by Aljazeera on 27.02.2023 on https://balkans.aljazeera.net/teme/2023/8/27/restitucija-stanica-na-putu-ka-eu-na-kojoj-mnogi-u-bih-decenijama-cekaju 12.04.2024].

40 | Instead of many others see Softić Ibrahim, Restitucija, stanica na putu ka EU na kojoj mnogi u BiH decenijama čekaju, published by Aljazeera on 27.02.2023 on https://balkans.aljazeera.net/teme/2023/8/27/restitucija-stanica-na-putu-ka-eu-na-kojoj-mnogi-u-bih-decenijama-cekaju and Emir Kovačević in the programme Kontekst, published by Aljazeera, https://balkans.aljazeera.net/videos/2013/7/4/kontekst-zakon-o-restituciji-u-bih, published on 04.07.2015, updated on 16.08.2017 [12.04.2024].

41 | Softić Ibrahim, Restitucija, stanica na putu ka EU na kojoj mnogi u BiH decenijama čekaju, published by Aljazeera on 27.02.2023 on https://balkans.aljazeera.net/teme/2023/8/27/restitucija-stanica-na-putu-ka-eu-na-kojoj-mnogi-u-bih-decenijama-cekaju and AJB, Bivša država pokrala, ova neće da vrati: Restitucija, stanica na putu ka EU na kojoj mnogi u BiH decenijama čekaju published by Aljazeera on 27.08.2023
https://izdvojeno.ba/bivsa-drzava-pokrala-ova-nece-da-vrati-restitucija-stanica-na-putu-ka-eu-na-kojoj-mnogi-u-bih-decenijama-cekaju/ [both accessed on 12.04.2024].

42 | Musli Emir, Čekajući Zakon o restituciji u BiH, published on 22.08.2016about:blank at https://www.dw.com/bs/%C4%8Dekaju%C4%87i-zakon-o-restituciji-u-bih/a-19493066 [12.04.2024].

at the state level was in 2008. On October 30 of that year, the Council of Ministers of Bosnia and Herzegovina adopted a resolution to proceed with the drafting of the Framework Restitution Act. A working group held numerous meetings, considered all previous versions of the law on denationalisation that had been submitted to and rejected by parliament, and consulted with the non-governmental sector, particularly with representatives of the Interreligious Council. In 2009, a broad public debate was held. On December 3 2009, the Ministry of Justice of Bosnia and Herzegovina sought the opinions of the entities (FBH and RS) and the government of the Brčko District on the proposed law. The government of the RS was of the opinion that this law should not be enacted at the state level of BH, and that its adoption should be exclusively within the competence of the RS and the FBH. On June 6 2014, the Ministry of Justice sent the new draft version of the law again to the same recipients. While the FBH and the Brčko District submitted their opinions, the Ministry of Justice of the RS did not respond to this request.[43] Under the proposed Denationalisation Act of 2008, property confiscated between 1st January 1945 and 3rd March 2005 was to be restituted or compensated for.[44] However, this law did not receive support from the authorities in the RS.

Instead, in 2008 the draft of the Restitution Act was simultaneously proposed in the Assembly of the RS, but this law was also not adopted.[45]

3.3. Substantive and Procedural Legal Issues

As mentioned above, there were several drafts of restitution laws in the FBH, but none was adopted by its parliament. For this reason, the substantive and procedural issues will be analysed on the basis of the statutes that became positive law in the RS, even though they were later repealed. The Restitution of Confiscated Real Estate Act of the RS from 1996 (RCREA) regulated the conditions and manner of restitution of confiscated real estate and provided for the adoption of a special law to regulate in greater detail the transfer of ownership to the former owners or their legal successors (Article 1 RCREA). The subject of restitution was state property confiscated based on earlier socialist regulations or without a legal basis (Article 2 RCREA). The former owner or its legal successor had the right to demand restitution unless the former owner was given other property or received fair compensation (Articles 3 and 4 RCREA). The obligation of restitution was imposed on the legal entity that owned the nationalised property. If the nationalised property

43 | See the footnote 37.

44 | The text of this proposal cannot be found on the relevant government sites.

45 | https://www.capital.ba/ns-rs-usvojila-nacrt-zakona-o-vracanju-oduzete-imovine-i-obestecenju/#:~:text=BANJALUKA%2C%20Narodna%20skup%C5%A1tina%20Republike%20Srpske%20usvojili%20je%20danas,vra%C4%87anja%2C%20osim%20nov%C4%8Dane%20naknade%2C%20predvi%C4%91ena%20i%20naturalna%20restitucija (published on 06.11.2008) [12.04.2024].

had been alienated, this legal entity was obliged to provide another suitable property or pay compensation in cash. If the legal entity was unable to carry out the restitution in one of these ways, the RS was liable for payment (Articles 6-8 RCREA). A special commission was to be established to decide on restitution claims (Article 9 RCREA).

At the same time, the Restitution of Confiscated Land Act (RCLA) was enacted, which detailed the restitution of agricultural land. This law first listed the statutes under which agricultural land had been nationalised and confiscated, which were now subject to restitution (Article 1 RCLA). It also outlined exceptions that would render the restitution of agricultural land impossible, such as when permanent structures like buildings, stadiums or sports fields had been erected on the nationalised land, when large areas had been planted with permanent crops younger than fifteen years, when the land had been allocated to educational institutions for use (e.g. faculties, schools), or when the land had already been converted into urban construction land (Article 3 RCLA). The primary objective was to effectively return the nationalised land. If in-kind restitution was not possible, the act provided for the allocation of suitable replacement land, with specific conditions outlined in the RCLA to determine what constituted suitable replacement. As an *ultima ratio* solution, monetary compensation was provided for. In the case that the land had been designated as urban land by law or municipal decision, only monetary compensation was provided (Article 13 RCLA). If the conditions for the restitution of the nationalised land are met but it is not possible to return the entire nationalised area to all former owners, a proportionally reduced area of land will be returned to them; the procedure for this proportional restitution has been regulated (Articles 5 - 6 RCLA). When multiple heirs of the previous owner are entitled to apply for restitution, but not all of them do, the land will be returned to the heirs who did apply, in proportion to their respective shares (Article 18 RCREA). These initial statutes did not address situations involving multiple claimants or joint owners of agricultural land, nor did they provide guidelines for dividing such land.

To safeguard the restitution process, the sale of state-owned agricultural land was prohibited within five years of the laws' adoption. In 2000, these two laws were repealed with the adoption of the new Restitution of Confiscated Property and Compensation Act (RCPCA 2000).

Under the RCPCA 2000, the right to restitution was extended to any natural or legal person whose property was confiscated after 1st January 1945 without compensation, with inadequate compensation or for no legal reason (Articles 2 and 3(2) RCPCA 2000). Unlike the first laws of 1996, which granted restitution rights solely to citizens of the RS and the former Yugoslavia in case of reciprocity, the new law also included citizens of the FBH, thus eliminating the concerns about discrimination. Effective restitution is prioritised whenever feasible; if direct restitution is not possible, suitable replacement property may be provided to the former owner or monetary compensation can be offered. Effective restitution is precluded if the

property has been substantially altered and returning it would violate the rights of third *bona fidae* party (Article 7 RCPCA 2000).

If compensation is to be paid in cash, the specified amount is to be disbursed in ten equal instalments over a period of ten years (Article 16 RCPCA 2000), with the RS being liable for this compensation (Article 7 para. 3 RCPCA 2000). The value of the property to be restituted is assessed based on its condition at the time of nationalisation and its market value at the time of the compensation decision (Article 9(3) RCPCA 2000). Until the restitution decision becomes final, the parties may agree on the form of restitution and other forms of compensation in accordance with the law (Article 12 RCPCA 2000).

If the present owner acquired the property in good faith through a bilateral contract, restitution was excluded (Article 14 RCPCA 2000). Additionally, natural restitution was not permitted if the confiscated real estate was being used for state functions, or for activities in health, science, culture, education or if it was part of critical infrastructure related to energy, transport, or water supply (Article 15 RCPCA 2000). The law addressed the restitution of various types of real estate (including apartments, business premises, movable property, enterprises and land). With regard to agricultural and forest land, the law stipulated that such land would be returned to the previous owners or their legal successors (Article 19, 22 RCPCA 2000).

If the conditions for the restitution of the nationalised land are met but it is not possible to return the entire nationalised area to all former owners, a proportionally reduced area of land will be returned to them; the procedure for this proportional restitution has been regulated in the same way as by the RCLA, with an addition that a monetary compensation will be paid for the difference, unless the beneficiaries of the restitution agree otherwise (Article 20 RCPCA 2000).

In the case that claims for restitution are submitted by several persons and there is no agreement between them on the form of restitution, the amount of compensation, etc., the competent commission shall decide on this (Article 35 RCPCA 2000). However, if claims for restitution are submitted by several co-owners and there is no agreement between them on the form of restitution, the amount of compensation, etc., the claims of the co-owners whose shares make up more than half shall prevail, and if they are equal, the claims that are less burdensome for the person liable for restitution shall prevail (Article 31 RCPCA 2000).

Articles 10 to 24 of the CREA 1996 regulated the procedure for the restitution of property. The procedure for realising the restitution was regulated by Articles 27 to 40 of the RCPCA 2000, which were more detailed than the previous law. The latter provisions, which were in force, will be analysed here.

The RCPCA 2000 regulates certain specific procedural issues, while the procedural issues that are not regulated by this act are subject to the rules of general administrative procedure (Article 40 RCPCA 2000). Matters relating to restitution claims are decided by a commission, the composition of which is laid down by law

and which is appointed by the municipality (Article 27 RCPCA 2000). The restitution claims were to be filed within a prescribed period, namely one year after the law came into force. It is possible to file a claim after this deadline, but only monetary compensation can be claimed in this case. There are special rules regarding the deadline if only some of the co-owners submit the claims. In this case, the commission will invite the other co-owners to submit an application. If they fail to do so, the property will revert to the co-owners who made the request. After that, the other co-owners have no claim against the commission, but only against their co-owners to whom the land was returned (Article 30 RCPCA 2000).

The law prescribes what documents and evidence must be submitted with the application for restitution, which is primarily proof of ownership prior to the nationalisation of the property. Although many rights were not registered in the land register, and in some parts of BH there are still no trustworthy public land registers, which is a decisive proof of ownership, the RCPCA 2000 does not offer a solution for such a situation. If the applicant is unable to obtain all the necessary evidence, the competent authorities are obliged to provide assistance (Article 32 RCPCA 2000). However, it does not specify what can replace the missing land register extract, which can be a serious obstacle to the realisation of the restitution claim.

It is prescribed what elements a decision on restitution must contain. First of all, that the applicant acquires the right of ownership of the previously nationalised real estate, then requests to carry out the change of ownership in the public real estate register, meets the deadline for handing over the property, etc. (Article 36 RCPCA 2000). If a mortgage was registered after nationalisation, it should be cancelled. The RS provides security for the current unsecured claim in this case (Article 38 RCPCA 2000).

As a transitional provision, it was stipulated that the process initiated but not completed under previous restitution laws could continue, but in accordance with the new law (Article 42 RCPCA 2000).

In comparison, the 1996 and 2000 laws were of the same type and followed the same basic principles, while the 2000 law was more detailed, technically improved and, in particular, much more precise in terms of procedure, which is crucial for effective implementation of the restitution claims.

The Draft Restitution Act of the Republic of Srpska of 2008 regulates the restitution of nationalised property and its compensation to natural and legal persons whose property was confiscated forcibly, without just compensation or without legal basis after 6 December 1946, as well as the restitution procedure and the restitution authority, i.e. the Commission for Restitution. As a method of restitution, in addition to monetary compensation, the possibility of natural restitution is provided for, and the payer of compensation is the RS, i.e. the Ministry of Finance, which will ensure payment within ten years in ten equal annual instalments. The bill also provides for the restitution of agricultural land and forests.

The right to restitution is not granted to former owners who, in accordance with the law, have received fair compensation for confiscated property and rights or have received other property or rights in exchange, nor to persons whose property or rights were confiscated on the basis of a final criminal judgement for crimes which, according to international conventions, constitute war crimes, if the property and rights were acquired through the commission of such a crime.

It should be noted that all drafts and enacted laws regulating restitution issues in RS provided for effective restitution as the primary solution and compensation as a subsidiary mechanism, i.e. a combination of these two methods.

The Draft of the Restitution Act in the RS followed the solutions previously contained in the RCPCA 2000, which was repealed by the OHR. The question arises whether it is realistic to expect that a law, with the almost same content, which has already been repealed once by the OHR, will remain in force this time. It should be noted that the OHR's main objection was not to the content of the RCPCA 2000, but to the fact that the adoption of entities' laws would regulate this matter differently in different parts of BH.

4. Privatisation process regarding agricultural land and forest or state-owned/cooperation-owned agricultural enterprises

In the last years of its existence, the former socialist Yugoslavia was already undergoing significant reforms, one of which was privatisation. The process of privatisation was launched in the late 1980s, right before the dissolution of the country.[46] The process of privatisation was carried out in such a way that the workers acquired shares in the company (so-called 'internal shares') and thus became the owners of a certain percentage of the company.[47] The first series of internal shares was transferred to the workers of these companies, also as compensation for part of the wages owed to the workers. The process of transformation of the socialist enterprise into a commercial enterprise also meant the transformation of the former socialist rights (right of management/use/disposal) that these enterprises had over their assets.[48] As the rights of management/use/disposal were exclusively reserved for socialist companies, there was an *ex lege* transformation of these rights into property rights, regardless of what was registered by the land registry.[49] Any company that has been transformed into a joint-stock company or a limited

46 | For more see Povlakić 2009, 30 – 39.

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

48 | Simonetti 2009, 323 – 324.

49 | There are also opposing views. The opinion expressed here is that rights of management, use and disposal are incompatible with a company operating in the market as a capital company. In this sense Simonetti 2009, 619.

liability company since 1989/90 has ceased to be the title holder of the right of management/use/disposal by the very change of the company's form. The issuing of the internal shares shifted the socialist enterprises to the joint stock companies, called 'mixed-enterprises',[50] which were later on called the 'enterprises of mixed property'.[51] In an already 'semi-socialist' legal entity, state and private property coexisted. With the implementation of the process of acquisition of shares by employees, the share of private property in the company increased and the rights of this legal entity had to be changed.

This process was largely underway in 1992, when the dissolution of the former Yugoslavia and the independence of BH took place, and it could not be revised or turned in the opposite direction, but was rather forgotten and neglected by the post-war BH. All these measures, if properly understood, represent a reform of **property rights over the assets of these enterprise, both** in general **and of** agricultural land as well.

For the sake of this paper, it is important to note that no companies were excluded from this transformation process, including those engaged in agriculture or forestry. Additionally, no distinction was made regarding the goods owned by the companies. This means that the rights to manage, use and disposal of agricultural land and forests were transformed into property rights, regardless of whether this land had previously been denationalised from its owner. In this way, in the former Yugoslavia, agricultural land and forests could be, and indeed were, privatised. This process was later excluded by privatisation legislation of the entities of BH and BDBH.

Shortly after the end of the war (1992-1995), several acts regulating privatisation were adopted in BH. At the national level, the Framework Act on Privatisation of Enterprises and Banks in Bosnia and Herzegovina was adopted (hereafter: FPABH),[52] as well as the corresponding acts in the FBH,[53] the RS[54] and the BDBH.[55]

The FPABH regulates only some basic issues and leaves more detailed regulation of the privatisation process to the entities. Their legislation must align with the

50 | Article 3 para. 2 of the Enterprise Act, Official Gazette of SFRY [Službeni list SFRJ], N° 40/1989.
51 | Article 2 of the Amendments to the Enterprises Act, Official Gazette of SFRY [Službeni list SFRJ], N° 46/90.
52 | Official Gazette B&H [Službeni glasnik BiH], N° 14/1998, 12/1999, 14/2000, 18/2000, 16/2002.
53 | Privatisation of Companies Act [Zakon o privatizaciji preduzeća], Official Gazette of the FBH [Službene novine FBiH], N° 27/1997, 8/1999, 32/2000, 45/2000, 54/2000, 61/2001 27/2002, 33/2002, 28/2004, 44/2004, 42/2006, 4/2009.
54 | Privatisation of State Capital in Companies Act [Zakon o privatizaciji državnog kapitala u preduzećima], Official Gazette of Republic of Srpska [Službeni glasnik RS], N° 24/1998, 62/2002, 38/2003, 65/2003, 54/2005 (adjusted version) and a new Privatisation of State Capital in Companies Act, Official Gazette of Republic of Srpska [Službeni glasnik RS], N° 51/2006, 1/2007, 53/2007, 41/2008, 58/2009, 79/2011 and 28/2013.
55 | Privatisation of Companies Act [Zakon o privatizaciji preduzeća], Official Gazette BDBH [Službeni glasnik BD B&H], N° 8/2004, 19/2007, 2/2008.

framework law and be transparent and non-discriminatory. The agricultural land and forests were not mentioned in this law.

With regard to restitution, the FPABH contains a very important provision: "No process of privatisation of enterprises and banks shall prejudice the settlement of claims for restitution which may be submitted in accordance with the applicable laws on restitution, provided, however, that each Entity Law on Restitution shall exclude enterprises and banks subject to restitution, as well as their land, property and buildings, from in-kind restitution and ensure that the competent authorities provide fair compensation to all lawful claimants (Article 2 N° 3).

The implementation of privatisation and denationalisation measures can lead to a conflict of interest between different subjects.[56] The question arises of which measure – restitution or privatisation – should be prioritised? The answer is a matter of legal policy. As explained above, the FPABH favours restitution, stating that privatisation cannot prevent restitution. It is highly questionable whether these conditions prescribed by the FPABH have been correctly implemented in the entities' privatisation acts. First of all, the task of excluding the companies that will be the subject of restitution from privatisation in-kind was assigned to the restitution acts of the entities that have not yet been adopted.

The Privatisation of Companies Act of the FBH (hereafter: PCAFBH) stipulates that items designated for restitution, once communicated by the competent authority, cannot be included in the privatisation process. Moreover, companies undergoing privatisation that possess such assets are prohibited from listing them on their balance sheets prepared for privatisation. They are also not allowed to dispose of these assets and must manage them in a reasonable and professionally sound manner (Article 8 and 31 PCA FBH). However, since there were no provisions to determine which authority is responsible or which goods are to be restituted, it is possible that assets, that could later be subject to restitution, were sold during the privatisation process.

There is another problematic point in this act. It stipulates that citizens who have received certificates for compensation for the denationalised assets, which cannot be returned to their ownership and possession, are able to use these certificates as a means of payment in the privatisation process (Article 24 PCA FBH). This option only remained a possibility on paper, as no restitution certificates were issued.[57]

On the other side, in BDBH, Privatisation of Company Act (hereafter: PCA BDBH) it has been foreseen that the capital and assets of the companies subject to privatisation are exempt from restitution (Article 3 PCA BDBH). Consequently, it follows

56 | Simonetti 1997, 195.

57 | The same applies to apartments, which, according to the Privatisation of Companies Act of the FBH, should not be listed in balance sheets, and which have in the meantime been almost completely privatised in favour of the holder of the housing right. This issue will not be discussed in detail as the focus of this paper is on agricultural land and forests.

that the restitution should be performed in the form of monetary compensation, which looks aligned with the FPABH. However, the revenues generated from the privatisation of companies were not intended to be used for compensation in the restitution process. These revenues were used to primarily cover the costs of the Privatisation Office, while the rest was used to help economic development and agriculture in the district (Article 18 PCA BDBH).

The problem that privatisation could jeopardise or even render impossible the restitution in-kind at a later date is somewhat alleviated in the RS by the creation of the Fund for the Restitution of the Republic of Srpska under the Law on the Fund for the Restitution of the Republic of Srpska.[58] Under the 1998 and 2006 Acts on the Privatisation of State Capital in Enterprises (hereafter: PSCEA RS), the RS created the obligation of establishment of the fund to provide compensation to all those who are entitled to restitution of property nationalised in the period from 1946 to 1958 (Article 14 PSCEA RS). It should be noted that this fund was only set up eight years after the start of the privatisation process.

In order to provide funds for the compensation for assets which cannot be effectively restituted (*in natura*), it is foreseen that 5% of the shares in the state capital of each company shall be transferred to the Restitution Fund during the privatisation process. Accordingly, during the implementation of privatisation in the RS after 2006, 5% of the share capital of the company or the corresponding part of the money generated by the sale of the state capital of companies in which the value of this capital is less than 300,000 BAM was allocated to the fund (ca. €150,000).

The PCAFBH stipulates that the proceeds obtained from the sale of companies in the FBH, except for a portion earmarked for funding the Federation and Cantonal Agencies for privatisation, shall be transferred to a separate fund of the Development Bank of the FBH. The government of the FBH should manage this fund. The revenues generated from the privatisation process in the cantons should be governed by the government of the canton where the revenue is generated. The Development Bank of the FBH determines the purpose of the use of the federal funds, provided that 20% of the realised funds are used for the rehabilitation and insurance of the share capital of the Pension and Disability Insurance Fund and up to 15% for social assistance to employees who have lost their jobs (Article 33 PCA FBH). The legal provisions do not mention the direct allocation of funds for future restitution, and the official website of the Development Bank of the FBH does not contain any information about this fund or how the revenues were distributed.

The key focus of this paper is the question of whether agricultural land and forests can be privatised. As already mentioned, there are no provisions regulating this issue in the Framework Act on Privatisation, nor in the Act on Privatisation of Companies of BDBH. The PCAFBH does not explicitly mention agricultural land, but

58 | Official Gazette of the Republika Srpska [Službeni glasnik RS], No. 56/2006, 39/2013.

it excludes the possibility of privatising natural resources, and agricultural land is defined as such in the Agricultural Land Act.[59] Agricultural land, i.e. its value, will not be included in the balance sheets of the company to be privatised. For these reasons, the prevailing position is that the privatisation of agricultural land is not possible in the FBH.[60]

At the first glance, the RS has a better solution. The privatisation of the natural resources is not allowed here either (Article 8 PSCEA RS), but it has provided that the status (not specifically the privatisation) of agricultural land will be regulated by the special act (Article 8(2) PSCEA RS), which is still pending.

The forests enjoy a special position in the privatisation regulations of both entities (the FBH and the RS). In the FBH, if the main activity of the company is the exploitation of forests, the decision on methods, deadlines and competency of the agency for privatisation shall be made by the government of the FBH at the proposal of the Federal Privatisation Agency. This provision also applies to other state-owned strategic companies. A list of these enterprises is determined by the parliament of the FBH. The privatisation of these strategic enterprises is possible, but in accordance with the special statutes (Article 3 PCA FBH), regarding the forests no special regulation has been enacted yet.

A similar solution is offered by the PSCEARS. The state capital in companies of strategic importance shall be privatised under special privatisation programs adopted by the government of the RS with the consent of its National Assembly. One might wonder why the same solution is not being considered for agricultural land?

It should be concluded that neither the privatisation nor the restitution of agricultural and forests has been carried out in BH. In this way, the fate of the agricultural land and forests remains undetermined, which should not be seen negatively from the point of view of the former owners in the event of restitution. Namely, besides all the negative consequences that the uncertainty of ownership status entails, this land is not yet lost to restitution in kind (at least formally). As mentioned above, since 1991 there has been a disposal ban on these assets (even though the privatisation regulations of former Yugoslavia did not forbid the privatisation of the companies which had possessed such assets). However, there is currently an additional problem concerning both state-owned real estate and state-owned agricultural land and forests that is not related to privatisation or restitution but hinders these processes. If agricultural land and forests are registered as state property, they are subject to a disposal ban imposed by the OHR, which will be explain under 5 below.

59 | Article 2 of the Agricultural Land Act of the FB&H [Zakon o poljoprivrednom zemljištu FBiH], Official Gazette of the FB&H [Službene novine FBiH], N° 2/1998; Article 2 of the Agricultural Land Act of the FB&H [Zakon o poljoprivrednom zemljištu Federacije BiH], Official Gazette of the FB&H [Službene novine FBiH], N° 52/2009. Povlakić 2018, 54 – 55.
60 | For opposite point of view Povlakić 2018, 73 – 79.

5. Prohibition of disposal of state-owned property imposed by the OHR*

Since it was not possible to establish criteria for the distribution of state property between different levels of government, the OHR imposed a prohibition in 2005 on the disposal of state property, or more precisely, certain types of state property.[61] Agricultural land and forests were not explicitly included in this prohibition, and it could not be concluded from the totality of the legal provisions that these properties were also subject to the prohibition.

Among other reasons, the uncertainty regarding the title holder of agricultural land registered as state property, especially when the company that owned such land has been privatised or no longer exists, led to amendments in the Agricultural Land Act in Republic of Srpska.[62] It was prescribed that state-owned property with the right of management, use or disposal in favour of enterprises, which were the subject of privatisation upon the entry into force of this law, by force of law, shall become the property and possession of the Republic of Srpska (Art. 53 of the Agricultural Land Act). The constitutionality of this act has been challenged. The main issue in this proceeding before the Constitutional Court of BH was whether the RS had the constitutional competencies to regulate the ownership of the state-owned agricultural land in its favour by enacting that provision. The National Assembly of the RS, by responding to the constitutional claim, stated that the challenged provision exclusively relates to the agricultural land which had been used by the former state enterprises and which could not be the subject of the privatisation carried out by the RS in accordance with the PSCEARS (Article 8). The RS considered that this fact gave it the responsibility to adopt the contested provision.

In its decision U-8/19 of 6th February 2020, the Constitutional Court of BH concluded that "the challenged provision, which stipulates that the agricultural land in question, which is a public good,[63] i.e. the property of the State, becomes by force of law the property and possession of the Republic of Srpska, is incompatible with Article I(1), Article III(3)(b) and Article IV(4)(e) of the Constitution of

61 | Act on Temporary Prohibition of Disposal of State Property of Bosnia and Herzegovina [Zakon o privremenoj zabrani raspolaganja državnom imovinom], Official Gazette of B&H [Službeni glasnik BiH], N° 18/2005, 29/2006, 85/2006, 32/2007, 41/2007, 74/2007, 99/2007, 58/2008. For the problems and doubts this ban has raised in practice, see Velić 2022, 134 – 138.

62 | Official Gazette of the Republika Srpska [Službeni glasnik RS], N° 93/2009, 86/2007, 14/2010, 5/2012, 58/2019.

63 | The Constitutional Court's argument that agricultural land represents public good cannot be accepted. In the legal system of Bosnia and Herzegovina, this land has never been public good, i.e. subject to public administration and not subject to property rights. Agricultural land and forests were goods of public interest, which means that these goods can be the subject of ownership, but their owners are subject to a special regime. This was the case in the former Yugoslavia and is still the case in BH (Art. 7 and 8 PA FB&H, Art. 7 and 8 PA RS, Art. 13 and 14 PA BD B&H). For more see Povlakić in: Babić/Hašić/Medić/Povlakić/Velić 2014, 158 – 167.

Bosnia and Herzegovina, as Bosnia and Herzegovina has the exclusive responsibility to regulate the issue of state property."[64] In this regard, the Constitutional Court refers to its decision U-1/11 of 13 July 2012, in which it ruled that the criteria for the distribution of state property between different levels of government must be decided exclusively by the authorities of the State of Bosnia and Herzegovina. The Constitutional Court of BH held in this decision from 2012 that "the fact that a law on the state property has not been enacted yet does not mean that the entities may regulate, by their own laws, the issue of ownership over the state property, which has not been defined yet at the level of Bosnia and Herzegovina."[65]

In addition, the Constitutional Court of BH also notes that the agricultural land in question was not registered in any public register as the property of companies (agricultural cooperatives, cooperatives, etc.) in order to be the subject to privatisation. The land in question was registered as people's property, state or socially owned property. In conclusion, the Constitutional Court of BH reiterates that the decision in this case does not prejudge the issue of future legal regulation of state property, including agricultural land, by BH, the RS, the FBH or the BDBH.[66] The challenged legislation was repealed by this decision of the Constitutional Court of BH.[67] The same happened with the forests, as the Constitutional Court of BH declared several provisions of the Forest Act of the Republic Srpska[68] to be inconsistent with the Constitution of BH for almost the same reasons.[69]

64 | U-8/19, N° 44.
65 | U-1/11, N° 31.
66 | Here the Constitutional Court BH referred to Decision U-1/11, N° 84.
67 | This decision can be seriously criticised. The Constitutional Court of BH stated that agricultural land in the legal system of the Socialist Republic of Bosnia and Herzegovina had the status of people's property, i.e. socially owned property, which includes the right to manage, use or dispose of it. It referred to the Law of 1953 on the Agricultural Land Fund of the People's Property and the Allocation of Land to Agricultural Organisations. This law stipulated that agricultural land was the property of the people and that the agricultural organisation to which a piece of land was allocated had the right to manage it (this was land that had previously been confiscated from its owners). Taking into account the legal continuity of the State of Bosnia and Herzegovina according to Article I, paragraph 1 of the Constitution of Bosnia and Herzegovina, the Constitutional Court stated that it follows that agricultural land is state property (U-8/19, N° 37). The Constitutional Court failed to take into account that this law was amended in 1965 (Official Gazette SFRY [Službeni list SFRJ], No. 10/65). With this amendment, the term 'people's property' was replaced by the term 'social property', the right of management was replaced by the right of use, and it was the municipalities that took care of the agricultural land and allocated it to agricultural organisations. (Articles 5, 6, 7, 8, etc.). The Act on the Registration of Social Property [Zakon o uknjiženju nekretnina u društvenoj svojini], Official Gazette of the SFRY [Službeni list SFRJ], No. 28/1977, stipulated that if no socialist subject could be identified as the holder of the right of use, this right belongs to the municipalities and the municipality should be registered as the holder of the right of use (Article 4, paragraphs 2 and 3). The title holder of this land was known - it was neither the State of BH nor the RS, but the municipalities. For more information see Povlakić 2019, 24 et seq.
68 | Forest Act of Republic of Srpska [Zakon o šumama Republike Srpske], Official Gazette of RS [Službeni glasnik Republike Srpske], N° 75/2008, 60/2013 i 70/2020.
69 | U-4/21 from 23th September 2021, avaliable under: https://www.ustavnisud.ba/uploads/odluke/_bs/U-4-21-1280725.pdf [20.04.2024].

This decision of the Constitutional Court prompted the OHR to amend the Act on Temporary Prohibition of Disposal of State Property Act of Bosnia and Herzegovina,[70] by extending the prohibition of disposal to state-owned agricultural land and forest (Article 1, N° 3 and 4).

6. Was there land reform in addition to restitution?

In addition, there are other controversies and uncertainties regarding to the proprietary relationships on agricultural land and forests.

Since no restitution has been planned or carried out, and since agricultural land and forests have not been privatised but are currently subject to the double prohibition of disposal, the question arises as to whether the former socialist property relations can be abolished in another way, namely through a reform of property law. This approach to land reform has also proven to be a dead end.

A correct course of the transformation process would be to perform restitution as the first step in order to remove 'old burdens' and to have a clear situation as to which assets can be privatised. A new property law should then be adopted to regulate property rights for the future, followed by special laws to regulate the status and use of assets of particular importance (forests, agricultural land, urban building land, etc.). In BH, privatisation was carried out with almost no regard for restitution, so the new property law is based on property relations that have not been fully clarified. In addition, special laws were enacted before the property law reform and are still not harmonised with the new property law, especially in the FBH. This is not an environment for a comprehensive land reform. Moreover, the mentioned legal measures have been adopted at different levels of legislation without being harmonised with each other and then not coordinated within a particular level of legislation. As a result, property relations (in general and in relation to agricultural land and forests) are still unclear.

There are two major obstacles to the completion of the property and land reform. Firstly, these are unresolved restitution issues. Consequently, certain real estate should be retained for the former owner until the restitution is decided. Secondly, this is the issue of who owns state property or how it should be divided between different levels of government. As a consequence, the state property should be protected from unilateral action by some authorities in BH. These circumstances have led to two prohibitions of disposal that have lasted for decades and that partly overlapped. One prohibition dates from 1991 (see 3.1.) and the other, imposed by the OHR, dates from 2005; later, in 2022, the OHR has extended the prohibition on

70 | Act on amendments and supplements on the Act on Temporary Prohibition of Disposal of State Property Act of Bosnia and Herzegovina [Zakon o izmjenama i dopunama Zakona o privremenoj zabrani raspolaganja državnom imovinom], Official Gazette of B&H [Službeni glasnik BiH] N° 22/2022.

agricultural and forest land, following the decisions of the Constitutional court BH (see under 5).

In the entities of BH and the BDBH, a reform of property and other rights *in rem* was carried out. The following acts have been adopted in chronological order: Property and other right *in rem* Act of the Brčko District BH (hereafter: PABDBH);[71] Property Act of the Republic Srpska (hereafter: PARS);[72] and Property Act of the FBH (PAFBH).[73] The PARS and the PAFBH are largely harmonised, and in principle all these acts follow the regulation of property and other rights *in rem* in the Austrian Civil Code.

As mentioned above, the new property acts in the entities (FBH and RS) and BDBH were adopted without fully clarifying or revising the former socialist property relations. For these reasons, these laws contain extensive final and transitional provisions aimed at completing the transformation process and the transition from the old to the new regime of property relations. Unfortunately, in practice these provisions were often ignored and poorly understood, and on this basis numerous lawsuits were filed, which ultimately had to be decided by an appeal to the Constitutional Court of BH.[74]

The most controversial provision, identical in all three property acts, was a basic provision on the transformation of earlier social rights (Article 338 of the PAFBH, Article 324 of PARS, Article 205 of PABDBH). All former rights of socialist legal entities derived from state ownership were to be transformed into property rights. Chronologically, there was the right of management (until 1953), the right of use (1953-1971), and the right of disposal (after 1971). Each of these rights was characteristic of a particular stage in the development of the socialist system, but now they are all transformed into property rights in the same way. The basic principle of the transformation has been established: all basic rights arising from the property of the people/state/society are transformed into the right of ownership of the current holder of these rights or its successor in title, provided that the property has the capacity to be the subject of the right of ownership and unless otherwise provided by a specific legal act. The registration of these rights in the land registry, through the entry into force of the new property acts, should be considered as a the registration of the property rights.[75]

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

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

73 | Property Law of the FBH [Zakon o stvarnim pravima Federacije BiH], Official Gazette FBH [Službene novine Federacije BiH], N° 66/2013, 100/2013.

74 | Inter alia: AP-3317/17, AP-3679/17, AP-3680/17, all from 27.02.2019. More see Povlakić 2019, 24 et seq.

75 | For more see Povlakić 2018, 63 – 71.

In case law or in the interpretation or application of the property acts, it is generally considered that the conversion of these rights is not possible if the provisions of special laws provide for a different solution. The Act on Temporary Prohibition of Disposal of State Property of BH, imposed by the OHR and prohibiting the disposal of state property, is considered to be one of these special laws. This view is also shared by the Constitutional Court of BH.[76]

The same question arose with regard to agricultural land and forests, namely, whether the transformation of socialist rights to manage/use/dispose of into private property is possible or some special law prescribes something else, particularly having in mind the legislation, issued by OHR in 2005, prohibiting disposal of state-owned land. This was one of the most controversial issues in the legal system of BH, which has been decided in a large number of cases by the ordinary courts, and on which the BH Constitutional Court has also ruled on several occasions.[77] After the OHR imposed the amendments in 2022 to its regulations on the prohibition of disposal of state property, which now explicitly include agricultural land and forests in the ownership of the state (see under 5 above), any type of disposal, including privatisation, restitution or conversion of rights to manage, use and dispose of into ownership rights, is considered to be in violation of the OHR's prohibition on disposal.

In this way, an illogical situation has arisen in the legal system of BH: certain legal entities have been transformed from socialist enterprises into companies under modern commercial law (some of them as early as the end of the 1980s, see point 4), but nevertheless the rights they have over their assets (which can also be agricultural land) have in a number of cases remained registered as former socialist rights. It is not uncommon for a former socialist enterprise to be privatised, but its immovable property remains registered with the right to manage, use or dispose of it. Decades later, the planned reform and final transformation of these rights through the adoption of new property laws is now being obstructed by the legislation imposed by the OHR. On the one hand, this prohibition on disposing of state property is necessary to prevent unilateral allocations of state property by entities and other public authorities until the criterion for the division between different public authorities has been finally determined. On the other hand, the transformation process remains unfinished and reforms in general, as well as the land reform, stagnate.

At the same time, it is completely ignored that the decisive changes in the former Yugoslavia, and thus in the Socialist Republic of Bosnia and Herzegovina, already took place at the end of the 1980s. Long before the new property law was adopted, there was a reform of the former socialist companies, which automatically

76 | For example decision in the case AP–1080/18 from 28th January 2020.godine, N° 33 and 34. Available under: https://www.ustavnisud.ba/uploads/odluke/_bs/AP-1080-18-1221608.pdf [20.04.2024].
77 | Inter alia: AP-2081/19 from 15.01.2020, AP-3292/19 from 12.01.2021 and AP-1939/20 from 08.09.2021. For more see Povlakić 2022, 21 et seq.

led to the transformation of their rights to the company's assets, as mentioned above under 4.

It is a zigzag course: in the former Yugoslavia, the question of the transformation of the rights specifically related to agricultural land was not problematic, then in BH these assets were exempted from privatisation and finally by the OHR from any change in their legal status. Since the amendments to the Act on Temporary Prohibition of Disposal of State Property of BH do not contain final and transitional provisions, an additional problem has arisen, namely the question of whether the prohibition of disposal of agricultural land and forests, pronounced in 2022, has a retroactive effect. Due to the general prohibition of retroactive effect of laws and without an explicitly provided exception in the public interest, such an effect cannot be affirmed.[78]

To add to the confusion regarding agricultural land and forests, it should be noted that, in addition to the prohibition of the disposal of the state-owned property, imposed by the OHR in 2022, there is a prohibition on the sale of agricultural land and forests provided for in 1991 (see point 3.1. above), which today operates differently in the entities and the BDBH. The State Attorney's Office of BH (*Državno pravobranilaštvo BiH*) intervenes in judicial and administrative proceedings in which state-owned real estate under the prohibition of disposal are the subject of any legal transaction, aiming at protecting state property until a decision on the criterion for the distribution of such property between BH and its various parts (entities and BDBH) is made. This is exactly the purpose of the prohibition of disposal of the state property imposed by the OHR. At the same time, according to the prohibition of alienation introduced in the SRBH in 1991, it is the former owner who has a legal interest in not alienating the nationalised property until the decision on restitution has been taken.

In its decision AP-3332/21 of 23 February 2022, the Constitutional Court of BH recognised the legitimate interest of the former owner in this situation. In this case, the Municipality sold the nationalised agricultural land, which belonged to a religious community (Waqf Directorate of the Islamic Community in Bosnia and Herzegovina) before nationalisation. The Waqf Directorate attempted to intervene in the administrative and later court proceedings, arguing that it had a legal interest in the prohibition of the sale of agricultural land, which was not accepted by the competent authorities, since no restitution legislation was enacted. On the contrary, the BH Constitutional Court held that the right to a fair trial had been violated because the courts had not examined the Waqf Directorate's claims of legal interest.[79]

These facts maintain a kind of *status quo* and hinder the completion of the transformation process in BH.

78 | Against the retroactive effect also Baručija 2022, 46 – 47.
79 | AP-3332/21, N° 42.

7. Conclusion

The reform of the property system usually begins with the adoption of various denationalisation and (re)privatisation measures, which to a certain extent was also the case in BH. However, these processes did not include all the necessary measures. First of all, the restitution law was not adopted and, in addition, the privatisation processes in BH were also very slow and accompanied by many challenges, so more than thirty years after independence (1992) and the end of the war (1995), the reforms of the property law, which includes the reform of the proprietary relationships on agricultural land and forest, are still not completed.

The restitution legislation has not yet been adopted, which was usually the first stage of reform in former socialist countries. Privatisation has taken place without any certainty as to what will be the subject of restitution; it is quite possible that the property that could be the subject of restitution has already been sold to third parties in the privatisation process. Thus, any further step taken before the restitution was completed - or a decision was made that restitution would not take place - could be questionable or, after the restitution law was passed, could be the subject of litigation. Step two was taken before step one, and the reform of the property law is like a house without solid foundations.

The basic decision on whether or not to carry out restitution is still pending, which is causing various problems in Bosnia and Herzegovina. As Madl has stated from the economic point of view, the restitution is not crucial, but clarified and settled ownership relations. It is not so important who is the owner, but that someone actually is the owner.[80] Following this, restitution is not necessarily an inevitable step in the transformation process, but the decision on whether or not to carry out restitution should be the first and inevitable step for reasons of legal certainty. This step has not been taken.

Bosnia and Herzegovina is in an unsatisfactory situation with regard to restitution in general and the restitution of agricultural land and forests in particular, as the fate of agricultural land and forests remains uncertain. This is a point that is also criticised in the EU Commission's annual reports: "As regards property rights, the apportionment of property between the State and other levels of government remains one of the open issues under the '5+2' agenda for the closure of the Office of the High Representative. This requires the adoption of a state-level law, in line with jurisprudence of the Constitutional Court. Entities and cantons have legislation which is not in line with the constitutional and legal framework. There are no

80 | Madl, 1998, 598.

strategic documents that address this issue. ... There is no legislative framework on restitution claims, which are handled case by case."[81]

The above shows that in Bosnia and Herzegovina the final implementation of the transformation process in general, and restitution as a part of it, still faces many obstacles — lack of legal basis, facts established during the war, processes that are not centralised and coordinated due to the state structure, adoption of legal solutions that may jeopardise restitution in general, and restitution of agricultural land and forests as well. In brief: Bosnia and Herzegovina is still lost in transition.

81 | Brussels, 8.11.2023 SWD(2023) 691 final COMMISSION STAFF WORKING DOCUMENT Bosnia and Herzegovina 2023 Report. https://neighbourhood-enlargement.ec.europa.eu/document/download/e3045ec9-f2fc-45c8-a97f-58a2d9b9945a_en?filename=SWD_2023_691%20Bosnia%20and%20Herzegovina%20report.pdf [01.08.2024).

Bibliography

1. Babić I, Hašić E, Medić D, Povlakić M & Velić L (2014) *Komentar zakona o stvarnim pravima Federacije BiH*, Privredna štampa, Sarajevo.
2. Baručija A (2022) Stjecanje prava vlasništva dosjelošću na nekretninama u državnom vlasništvu, Domaća i strana sudska praksa, God. XIX, br. 92, april – maj – juni, pp. 38 – 51.
3. Bećirović D (2013) Zasjedanja ZAVNOBIH-a i prvi Ustav Narodne Republike Bosne i Hercegovine, *Historijska traganja*, 12, pp. 83 – 100.
4. Gavella N, Josipović T, Gliha I, Belaj V & Stipković Z (2007) *Stvarno pravo*, Drugo izmijenjeno i dopunjeno izdanje, Svezak 1. Narodne novine, Zagreb.
5. Gavella N (1998), Ograničenja prava vlasništva, *Zbornik Pravnog fakulteta Sveučilišta u Rijeci*, (1991) v. 19, br. 2 (1998), pp. 351 – 362.
6. Gavella N (1990), Pravo vlasništva (svojine) u sistemu građanskog prava s obzirom na pojavu segmentacije stvarnopravnog uređenja in: *Promjene u pravu svojine – Transformacija društvene svojine*, Zbornik radova sa jugoslovenskog savjetovanja održanog 22.- 24. novembra 1990 u Sarajevu, Sarajevo, pp.19 – 26.
7. Kovačević E (2015) in the programme Kontekst, 4. July, updated 16.08.2017, https://balkans.aljazeera.net/videos/2013/7/4/kontekst-zakon-o-restituciji-u-bih [12.04.2024].
8. Madl F (1998) Restoration of Property in the Central and Eastern European Countries in: Basedow J, Hopt K J & Kötz H (Hrsg.) Festschrift für Ulrich Drobnig zum siebzigsten Geburtstag, Verlag Mohr Siebeck, Tübingen, pp. 593 – 608.
9. Musli E (2016), Čekajući Zakon o restituciji u BiH, 22. August, https://www.dw.com/bs/%C4%8Dekaju%C4%87i-zakon-o-restituciji-u-bih/a-19493066 [12.04.2024].
10. Povlakić M (2022) Pravni status poljoprivrednog zemljišta u društvenom/državnom vlasništvu nakon donošenja zakona o izmjenama i dopunama zakona o privremenoj zabrani raspolaganja državnom imovinom, *Domaća i strana sudska praksa*, Godina XX, br. 94, oktobar – novembar – decembar 2022, pp. 12 – 41.
11. Povlakić M (2019) Pretvorba prava na gradskom građevinskom zemljištu – Neverending story?*, ZIPS,* broj 1418, Godina XL, 1. - 15. XI 2019*,* Priručnik, pp. 1 – 24.
12. Povlakić M (2018) Pretvorba prava na poljoprivrednom zemljištu, *Domaća i strana sudska praksa*, Godina XV, broj 77, juli - septembar 2018, pp. 50 do 81.

13. Povlakić M (2010) Property Law in Bosnia and Herzegovina in: Jessel-Holst Ch, Kulms R & Trunk A (Hrsg.), *Private Law in Eastern Europe*, Mohr Siebeck, Tübingen, pp. 205 – 236.
14. Povlakić M (2009) *Transformacija stvarnog prava u Bosni i Hercegovini*, Pravni fakultet Univerziteta u Sarajevu, Sarajevo.
15. Simonetti P (2009) *Prava na nekretninama*, Pravni fakultet Sveučilište u Rijeci, Rijeka.
16. Simonetti P (2008) *Prava na građevinskom zemljištu*, Pravni fakultet Sveučilište u Rijeci, Rijeka.
17. Simonetti P (2004) *Denacionalizacija*, Pravni fakultet Sveučilište u Rijeci, Rijeka.
18. Simonetti P (1997), Denacionalizacija i pretvorba prava korištenja neizgrađenog građevinskog zemljišta u društvenom vlasništvu, *Zbornik Pravnog fakulteta Sveučilišta u Rijeci*, v. 18, br. 1., 193 – 213.
19. Simonetti P (1998) Pretvorba društvenog vlasništva na nekretninama, *Zbornik Pravnog fakulteta Sveučilišta u Rijeci*, (1991) v. 19, br. 2 (1998), pp. 363 – 446.
20. Softić I (2023), Restitucija, stanica na putu ka EU na kojoj mnogi u BiH decenijama čekaju, 27 February, https://balkans.aljazeera.net/teme/2023/8/27/restitucija-stanica-na-putu-ka-eu-na-kojoj-mnogi-u-bih-decenijama-cekaju [12.04.2024].
21. Spaić V (1971), *Građansko pravo*, Pravni fakultet Univerziteta u Sarajevu, Sarajevo.
22. Stanković O & Orlić M (1989) *Stvarno pravo*, Savremena administracija, Beograd
23. Velić I (2022) *Državna imovina, Status i praksa u Bosni i Hercegovini i drugim zemljama*, Privredna štampa, Sarajevo.