



## LEGAL RECORDS OF REAL ESTATE IN BOSNIA AND HERZEGOVINA - PERSPECTIVES AND NEW TENDENCIES

*Original scientific paper*

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### ABSTRACT

*The problem of the unsettled land registry state of real estate generated the appearance of new problems, as such but also of some other nature, whereby some of them, and due to the sensitivity of the question, covered by their reach, at the level of the most complex issues in the legal system of Bosnia and Herzegovina. Under the spotlight of such problems, the paper points to possible directions reforms in the field of public real estate records and real estate rights. In order to choose the appropriate recording model, the most significant reform solutions are also presented in the paper; contained in the provisions of the new entity laws on land registers, i.e. of the law on real rights. With the same goal, the paper points out the importance of following rich legal traditions in the matter of establishing rights to real estate. In this respect, special attention is dedicated to the re-updated system of unique real estate records, as a kind of expression of completely different aspirations in this area.*

**Keywords:** *The problem of non-functionality of land registers, land register model of real estate registration, the system of unique real estate records, registration and its effects, legal rules on trust protection.*

### INTRODUCTION

With the entry into force of the new entity laws on land registers (hereinafter: ZZK FB&H/RS) the process of reforming the land registry law has begun. In the most significant reform solutions, legal rules on the obligation to register and its constitutive effect are included, i.e. legal rules on the protection of trust, as a completely new original way of acquiring rights (ZZK FB&H/RS). The aforementioned solutions were created based on the solutions of the German Land Registry rights (German Civil Code – Bürgerliches Gesetzbuch [hereinafter: BGB]). According to the model of successful functioning of land registers, these solutions aim to ensure a stable and functional land register, which would meet the needs of modern legal transactions real estate. With help of the significantly invested

financial resources, some progress has already been recorded in this regard (Povlakic, 2014; Selimovic Halilcevic, 2017). However, by entering on the force of the Law on Survey and Cadastre of the Republic of Srpska (hereinafter: ZPK RS), i.e. by drafting a preliminary draft of the Law on Surveying and Registration of Real Estate of the Federation of Bosnia and Herzegovina (further: ZIRN FB&H), the system of unique real estate records has been updated again, as a whole a new and radically different concept of public registration of real estate and rights to real estate. Moreover, the process of implementation of the mentioned system on the territory of Republic of Srpska is in the final phase. Bearing in mind the emerging problems in this process, and the frequent criticism regarding this form of transformation (Mutapcic, Djapo, & Muminovic, 2021), the paper analyzed the relevant legal

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solutions using dogmatic, sociological, teleological, and comparative legal methods (including the provisions of ZIRN FB&H), and then, in order to make an overall value judgment on this issue, their value assessment was also carried out. Also, by applying the mentioned methods, the paper analyzed the most significant land registry principles contained in the provisions of the ZZK FB&H/RS, i.e. in the provisions of the new entity laws on real rights (hereinafter: ZSP FB&H/RS), all with the aim of evaluating their overall reform potential in this area. In order to ensure the establishment of stable and functional real estate registers, ownership, as a constitutional category (in this case as off-book), and as an unsurpassed legal and civilizational value as well, it was completely ignored. Regardless of the unquestionable general interest, manifested through the ideal of stable and functional real estate registers (Medic, 2018), the position of ownership established in this way delegitimizes the implementation of the aforementioned legislative policies. After all, the established directions of legislative action will generate the appearance of a large number of legal disputes, as a result of which legal certainty, as an inviolable social value, for which the aforementioned reforms were initiated, will be further threatened. We will talk more about the mentioned questions, as the subject of research in this paper, in its continuation. The amended solutions of real law, contained in the provisions of the ZSP FB&H/RS, significantly redefined the reform solutions of land registry law. Instead of the legal rules on the obligation to register and its constitutive effect, legal rules on the declarative effect of registration (ZSP FB&H/RS) are re-introduced, which, primarily due to the manner of their implementation interpretation, contributed to the greatest extent to the process of (legal) devastation of land registers. Also, instead of the legal rule on gross negligence (ZZK FB&H/RS), characteristic of German land registry law, the legal rule on suspicion (ZSP FB&H/RS) is introduced, as a kind of expression of a redesigned and, for our circumstances, adapted legislative policy in this area. However, the legislative framework established in this way generated the appearance of different and uneven legal understandings. By applying the legal rules of *lex specialis*, i.e. *lex posterior*, preference is given to one (Mulabdic, 2018) or the other legal text (Babic et al., 2011; Babic et al., 2014; Povlakic, 2010; Weike & Tajic, 2005). Anachronistic legal solutions regarding essentially important issues are problematic for several reasons: first, such solutions potentially create a reform process,

in which, following the example of solutions from the German Land Registry Law (BGB), a search is made for enforceable and consistent reform solutions; secondly, the uneven practice in the process of applying the law, conditioned by the aforementioned legislative framework, would produce additional uncertainty in the otherwise difficult legal transaction of real estate; and thirdly, starting from the above-established (historical) role of legal rules on the declarative effect of registration, and knowing the reform potential of legal rules on the constitutive effect of registration, on the one hand, and legal rules on the protection of trust, viewed through the objective legal rule on gross negligence (ZZK FB&H/RS), on the other hand, it could be reasonably concluded that the legislator gave up on the initiated reform process, i.e., on his abandonment of the multi-decade land registry model. Just like this, the conclusion would best suit the proponents of the system of unified real estate records. However, it is not about abandoning the above-mentioned model, but about a better established legislative framework, in which, based on a more responsible attitude of later acquirers towards off-book legal facts, the implementation of legal rules on the protection of trust is ensured, and in addition, the implementation of off-book rights on real estate, which is the intention of the legislator, can be clearly stated from the legal positions - conclusions presented in the continuation of this paper. Within the framework of the established hypothesis, the paper emphasizes the significance reaffirmation of the land registry model, as the only possible direction of reform in this area, while at the same time respecting our rich legal tradition in the matter of acquiring, canceling, and limiting rights to real estate.

#### **FUNDAMENTAL LAND PRINCIPLES IN THE LIGHT OF THE REFORMS SOLUTIONS**

The principle of registration and the principle of trust are among the fundamental principles of land registry law. By prescribing their content, first through the provisions of the land registry, and then through the provisions of real law, a redesigned legal platform was established to solve one of the most sensitive issues in the legal system of Bosnia and Herzegovina - the establishment of stable and functional real estate registers. By analyzing such provisions, we will answer the problem of uneven understanding regarding registration and its effect. Also, through additional scientific research, primarily in the domain of new real law solutions, we will determine the

value and correctness of the aforementioned principles with regard to the overall reform process of the land registry law. And finally, based on the research results, we will determine the necessary directions for future legislative action in the matter of real estate acquisition, or to be more precise, in the matter of establishing stable and functional real estate registers.

### **New land registry law - adoption process and content of the most significant reform laws solutions**

The most important solutions of land registry law include the legal rules on the obligation to register and its constitutive effect, as well as the legal rules on protecting confidence in the accuracy and completeness of the land registry. In order to ensure the registration of contracted rights, the legislator prescribed registration as a substantive legal prerequisite for their acquisition (ZZK FB&H/RS). This solution significantly departs from the long-standing legislative framework in the matter of acquiring rights to real estate. According to the provisions of the Law on Ownership Relations from the 1980s (hereinafter: ZOSPO), i.e., the provisions of the Law on Ownership Relations from 1998 (hereinafter: ZOVO), registration, in principle, had only a declarative effect. In addition to the aforementioned intention of the legislator, the reasons for prescribing such a legal solution should certainly be sought in the provisions of the German land registry law, under whose influence it was created. It is known that the land register in German law functions flawlessly, thanks precisely to the decisions on the constitutive effect of the registration, i.e., the decisions on the unconditional application of the rules on the protection of trust (BGB). Even more, the entity laws on land registers were imposed by the decision of the High Representative for Bosnia and Herzegovina, according to the model of the successful functioning of land registers in the countries of the European Union, primarily in the Federal Republic of Germany, and all with the aim of economic recovery of our country and ensuring its more competitive economic position in the process of attracting large investment projects, not only domestically, but also on a broader, international level (Mutapcic et al., 2021). According to the instructions of the High Representative, the laws were adopted at the sessions of the entity legislative bodies without additional amendments. The usual changes and additions followed only after their entry into force.

In addition to the treated solution, the legislator also prescribed the obligation to register all rights, as well as the registration of all changes related to data from the land register (ZZK FB&H/RS). According to the content of this decision, contractors, i.e., acquirers of real rights on real estate, are obliged to, after they have entered into a contract, i.e. based some right on the real estate, submit the appropriate request for its implementation in the land register. It is correct to conclude that the prescribed registration obligation applies to non-registered holders (those who have already fulfilled the requirements acquisition and without registration), but also to independent, i.e. independent, qualified real estate owners (presumed owners). However, this legal solution is unsustainable from the point of view of the guaranteed freedom of contracting obligations and real relations. The emergence of a contractual or otherwise based mandatory right should depend exclusively on the will of the subjects. Precisely because of the stated reason, this legal solution was the subject of frequent disputes (Matic & Djokovic, 1998; Medic, 2018; Povlakic, 2010). The act of registration should depend on the will of the potential acquirer. By failing to register, the possibility of derivative acquisition is missed. In any case, the possibility of protecting rights is missed in the case of conscientious acquisition of the same real estate by a third party (Mutapcic & Osmanbegovic, 2021), because the legislator, in addition to the aforementioned solutions, also provided the possibility of acquiring rights on the basis of the trust protection. This legal solution belongs to the category of new original ways of acquisition. However, the legal rules on the protection of trust, also as part of the reform solutions of land registry law, were modeled on the solutions of German land registry law.

### **New real law – amended reform solutions**

With the entry into force of the ZSP FB&H/RS, the legal rules on the declarative effect of registration (ZSP FB&H/RS) were reaffirmed. In contrast to earlier real law, these rules emphasize the duty of a more responsible attitude towards off-the-book legal facts. This also provides prerequisites for the application of legal rules on trust protection - by strengthening the material legal position of the previous buyer (off-book owner instead of the independent owner of the real estate), the requirements of our rich legal tradition in this area have been met; this legislative policy also accepted the well-known fact of inaccurate and incomplete land registry entries (we emphasize

again that this fact requires an appropriate way of acting by the courts in the process of applying the law - in our circumstances often contrary to the rules on the protection of trust); ultimately, an appropriate legislative framework was provided for the transformation of the legal rule on gross negligence into the legal rule on suspicion (ZSP FB&H/RS). Therefore, searching for implementable reform solutions, the legislator redefined the legal rules on the obligation to register and its constitutive effect, on the one hand, and then, to ensure the application of legal rules on the protection of trust, as the most potent reform solutions in this area, he introduced the legal rule of doubt, on another hand, as a manifestation of a significantly higher degree of responsibility of the later acquirer according to off-book legal facts. There is no doubt that the aforementioned shortcomings of the land registry law have been eliminated by the legislative framework established in this way. Hence, the prerequisites for a smooth process of reform are provided, which is one of the basic intentions of the legislator. The most significant value of the promoted way of approaching this problem is reflected in one of the conclusions of this paper - the return to the positions of the previous real law is solely in the function of improving the overall reform process and by no means an expression of its abandonment and the introduction of some new model. However, on the basis of diametrically different understandings, in the legal system of Bosnia and Herzegovina, the system of unique real estate records has been updated again. We will talk more about the reasons for its introduction, and about the unfathomably harmful consequences of its final implementation, in the continuation of this work.

### **SYSTEM OF UNIFORM RECORDS - historical overview and new trends in the process of its establishment**

In the legal system of Bosnia and Herzegovina, the system of unique records has been updated again, as a completely new and radically different concept of recording real estate and rights to real estate. We will talk about the failed attempt to establish it in the period of the former Yugoslavia, and about the harmful consequences of its establishment in new circumstances, not only for the issue of

legal security but also for some other, much more sensitive issues, in the continuation of this paper.

### **An attempt to establish a system of unified records in the period of the former Yugoslavia**

The failed attempt to establish a system of unified records was recorded in the process of implementing the Law on Cadastre and Survey of Real Estate from 1984 (hereinafter: ZKPN). Shortly after its adoption, the republic's legislative bodies realized that the problem, generated due to decades of neglect of the land register and its fundamental principles, cannot be solved by the implementation of such a law (Mutapcic et al., 2021). We emphasize that the implementation of the ZKPN was intended to eliminate the problem of land registers not functioning. We also emphasize that the circumstances, in which the solutions of the ZKPN were implemented, were not burdened with additional problems and difficulties, and because of this the current transformation process is characterized, among other things, as an extremely sensitive legal issue. In order to protect property (in this case as off-book), as an inviolable legal and civilizational value, the legislator backed down in front of the stated values, and gave up the initiated process of implementation of the Civil Code. A simple transformation of one into a completely new concept of recording real estate, and due to the highly pronounced discrepancy between the land registry and the ownership legal status of real estate, it is simply not possible, at least not in a legal and socially acceptable way. However, with the implementation of ZPK RS, the National Assembly of the Republic of Srpska took an identical path, but this time, according to the author, with completely different intentions. By updating two diametrically different concepts of recording(s) multi-decade land registry and a system of unique real estate records/, the legal system of Bosnia and Herzegovina initiated discussions about one of the most complex, and above all, the most sensitive legal issues. We talked about the first one, the land registry, and the prospects for its reaffirmation in our previous presentations. Thus, in the continuation of this paper, we will talk about the second, the system of unified registration, and the harmful consequences of the implementation of the ZPK RS, i.e. the Draft ZIRN FB&H, in the event of its possible adoption.

## **The Law on Survey and Cadastre of the Republic of Srpska - a critical review**

The provisions of the ZPK RS provide prerequisites (we omit the legal ones for the reasons stated below) for the transformation of the land register into a system of unified records, real estate and real estate rights. Such provisions are the subject of our further exposition, primarily from the aspect of legal, but also general social unsustainability, not only of their content but also of the goals, which are realized through their implementation. We emphasize again that the implementation of the disputed provisions encroaches on the right to property as a constitutional right category, and as an inviolable legal and civilizational value, protected by the highest national and international legal acts. This thesis is based on the analysis of the provisions of ZPK RS, presented in the rest of this paper. In the process of reconciling the legal status of the land register and ownership of the real estate, the possibility of registering rights based on legally irrelevant and, from the point of view, ownership positions guaranteed by law, inadmissible evidence, such as the cadastral plan, hearing witnesses, the last state of the property, statements of the parties, etc. (ZPK RS). By implementing such procedures, real property owners could, either due to ignorance of the place and time of the real estate exhibition or due to their objective inability to participate in such procedures (due to past unfortunate events), permanently lose their off-book-based rights. Such a possibility arises from the more widely established legislative framework in the matter of acquiring, canceling, and limiting rights to real estate - through the eventual operation of the principle of trust in favour of conscientious third-party acquirers, the possibility established by law emphasizing the appeal becomes meaningless (ZPK RS). By making an incorrect entry, the presumption of original disposal/acquisition is realized, i.e., the presumption of protection of the later conscientious acquirer of the real estate. Due to the objective impossibility to on the same property two exclusive rights exist at the same time, at the moment the effects of the trust occur, the off-book holder loses his unregistered right. Precisely because of this, the harmonization procedures established by the Survey and Cadastre Act, including, of course, the problematic procedures for the protection of non-registered holders (appeal procedures) should be viewed in the light of the reform solutions presented above, contained in the provisions of the new land registry and real law. In such a way, in addition to the above-mentioned position on the pointlessness of the appeal

procedure, it is also indicated the position on the inexpediency of this method of coordination. The opinion expressed on the impossibility of transforming the land register into a model of unified records, at least not in a legal and socially acceptable way, on the one hand, and the established direction of legislative action through amended solutions of real law, as an expression of a more suitable and, for our circumstances, more functional legislative framework in the matter acquisition of rights to real estate, on the other hand, confirm this legal position. To confirm the above statements, it is important to emphasize that the provisions of the ZPK RS abolish the essentially important jurisdiction of the courts in the process of legal registration of real estate, and extremely complex tasks of the above nature are entrusted to the administrative bodies (ZPK RS). Also, by prescribing the obligation to register (ZPK RS), the question of the applicable law in the matter of acquiring rights to real estate is again brought up to date - by returning to the positions of land registry law, the solutions of real law are neglected.

## **Preliminary draft of the Law on Surveying and Real Estate Registration of the Federation of Bosnia and Herzegovina - a critical review**

The policies contested above in terms of legislative action in the matter of acquiring rights to real estate, i.e. in the part where contrary to fundamental legal values and established legal tradition, it is desired to ensure the establishment of a completely different and, in our circumstances, and for the reasons we stated above, unsustainable of the real estate registration model and real estate rights are also current in the territory of the second entity of Bosnia and Herzegovina. In terms of their content, the provisions of the ZIRN FB&H are almost identical to the provisions of the ZPK RS. Therefore, respecting the legal positions already presented, in the continuation of this work we will present the most significant criticisms. The possibility of using cadastral records as a basis for the establishment of legal records, then, the possibility of collecting relevant data on real estate based on the factual state of affairs, and then the decision on the very complex procedure of collecting real data on real estate (ZIRN FB&H), provides the prerequisites (we also fail to mention the legal reasons that we have stated before) for the forced confiscation of real estate from their off-book holders. Likewise, the legal rule on the obligation to register, i.e. the legal rule on gross negligence (ZIRN FB&H), once

again brings the question of the applicable law into practice. Also, the unlawful position of the trust principle, established in advance, is ensured by the difficult possibility of implementing the note (ZIRN FB&H). Within the framework of the envisaged solutions, an evident step forward of the legislator is determined and expressed through amended solutions of real law. In such a way, the overall process of land registry law reform is compromised. And precisely such an epilogue favours the advocates of new tendencies in this field.

### **IMPROVING THE LAND REGISTRATION MODEL AS A FINAL SOLUTION PROBLEMS**

Taking into account the indicated historical moments (the failed attempt to implement ZPKN), and certainly the position of ownership guaranteed by the constitution, actualized in the restarted process of transforming the land registry into a system of unified real estate records, we conclude that the real law solutions, as a result of the redesigned legislative framework in the matter of establishing rights to real estate, as the conditional state in which our land registers are located, are the only possible direction of reform in this area. With all this, the possibility of new legal disputes arising in the circumstances of the consistent implementation of the ZPK RS, and possibly also the ZIRN FB&H, should not be ignored, in the event of its final adoption. Only in such circumstances, the competent institutions of Bosnia and Herzegovina, including the relevant institutions of the international community, interested in the process of finally solving this problem, would be faced with an almost unsolvable problem. In order to act within the given legal framework, the established directions of legislative and overall social action, to which the research results of this paper refer, are emphasized as the only possible solution. By improving the land registry model based on the solutions of German land registry law, while at the same time respecting our rich legal tradition in this area, it is possible to contribute to solving one of the most complex, and above all, the most sensitive issues in the field of the legal system of Bosnia and Herzegovina. It is precisely in the solutions of real law that the expression of such aspirations is contained. In the framework established in this way, the thesis about the need to reaffirm the land registry model as the only possible direction of reform action is also confirmed. Anyway, all financial resources used, based on credit or donor arrangements, would be in vain. Not to mention

the most important resource –the human one. The importance of preserving the land registry model is also indicated by the circumstances under which it was introduced, back in 1884. With its introduction, the deed system was abolished as an integral part of the centuries-old rule of the Ottoman state in these areas. This form of transformation also represented the abolition of consensualism, as the dominant principle in the matter of establishing rights to real estate (Ottoman Civil Code), and the introduction of formalism (indispensable written form), and then registration (*modus aquirendi*), as a legal way of acquiring real rights to real estate (Land Ownership Law). Process the sudden transition from one to a completely different concept of public recording of real estate and real estate rights resulted in well-known problems. The contractor's low awareness of the importance of the implementation of contracted rights in the newly established real estate registers, which is a consequence of the impact of the previously abolished deed system, in which real estate rights were acquired at the time of their contracting, caused the appearance of a large number of off-book based rights. It is precisely this awareness of contractors i.e. identified as one of the causes of the unsettled state of real estate in the land register (Mutapcic, 2021). The later redefined legal rules on registration, and certainly unusual, from the aspect of legal rules characteristic of the land registry model, the way of proceeding in the process of applying the law, are just failed attempts to reconcile the aforementioned concepts of real estate registration. However, the re-actualized process of transformation, now already of the land register into a system of unified records, as a completely new and radically different concept of recording real estate and rights to real estate, characterized by the way in which the provisions of the ZPK RS are implemented, i.e. they plan to implement the provisions of the ZIRN FB&H, could result by the appearance of the same problems. The consequences of newly created/renewed problems, and due to the previously indicated sensitivity of this issue, could be even more harmful. Thus, the question of reaffirmation of the land registry model is imposed as a question of multiple social importance. The contractor's low awareness of the importance of the implementation of contracted rights in the newly established real estate registers, which is a consequence of the impact of the previously abolished deed system, in which real estate rights were acquired at the time of their contracting, caused the appearance of a large number of off-book based rights. It is precisely this awareness of

contractors i.e. identified as one of the causes of the unsettled state of real estate in the land register (Mutapcic et al., 2021). The later redefined legal rules on registration, and certainly unusual, from the aspect of legal rules characteristic of the land registry model, the way of proceeding in the process of applying the law, are just failed attempts to reconcile the aforementioned concepts of real estate registration. However, the re-actualized process of transformation, now already of the land register into a system of unified records, as a completely new and radically different concept of recording real estate and rights to real estate, characterized by the way in which the provisions of the ZPK RS are implemented, i.e. they plan to implement the provisions of the ZIRN FB&H, could result by the appearance of the same problems. The consequences of newly created/renewed problems, and due to the previously indicated sensitivity of this issue, could be even more harmful. Thus, the question of reaffirmation of the land registry model is imposed as a question of multiple social importance.

## CONCLUSION

The problem of the unsettled land registry state of real estate generated the appearance of various problems, from those in the domain of legal theory, where, not only regarding registration and its effect, but also by applying the legal rules of *lex specialis*, i.e. *lex posterior*, it tries to resolve the issue of inconsistency between land registry and real law, until the emergence of a re-actualized system of unified records, which again contains diametrically different policies of its scope: on the one hand, social acceptable policies for the establishment of stable and functional real estate registers, as a generator of the overall economic development of our country; on the other hand, legally unsustainable and socially unacceptable policies for the achievement of completely different goals, alien to democratic and legally regulated social communities. Precisely such policies unmask the real intentions of the legislator, and thus, at the same time, discredit the established direction of “reform” in this area. Its unsustainability is certainly confirmed by the failed attempts to implement ZPKN in the period of the former Yugoslavia. The highly pronounced discrepancy between the land registry and ownership legal status of real estate requires a different direction of reform action - by reaffirming the existing land registry model, it is possible to contribute to solving this problem, and real

law solutions are the most suitable way of such action. The research results confirm exactly that. It is to be expected that the Bosnian public, both scientific and professional, will recognize the importance of the promoted way of understanding this problem. The imperative to improve the land registry model is an issue of the greatest social and political importance. As the only possible direction of reform, its reaffirmation would contribute to solving the multi-decade problem in this area. On the other hand, new legal disputes would be avoided. At the same time, unwanted occurrences of a political nature would also be avoided. Also, the choice of real law, as the governing law in the matter of establishing rights to real estate, would contribute to speeding up the overall process of reform, and at the same time would contribute to unification of inconsistent legal understandings regarding registration and its effects. And finally, it is to be expected that the wider reading public, outside the circle of those mentioned above, will recognize and then, in the domain of their scope, contribute to the creation of higher quality interventionist policy in this area.

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