PRAVNI ZAPISI, God. XIII, br. 2 (2022)
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UDK 347.235(497.11)
DOI 10.5937/pravzap0–40782

ORIGINAL SCIENTIFIC ARTICLE

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RETHINKING LAND REGISTRATION IN XXI CENTURY SERBIA

***Abstract**: In the late XX century, Serbia changed its system of land registration from the land books, that were outdated and neglected during the socialist era, to unified cadaster, the REC. Due to historical circumstances and construction of the REC system, lawmakers had to resort to unorthodox solutions to achieve the desired level of legal security. Because of unifying records of different nature (factual and legal), the REC needed to rethink the principle of legality and include the public notaries and courts in its implementation. Modernizing the registry meant that information technologies were used very broadly, making the shift to a fully electronic procedure of registration one of the main policy goals. This enabled introduction of the principle of registration by official duty, for the records to always be up to date. Mechanisms of protecting legal security provided by the registry do not function for objects under construction because they are not registered until the construction is completed. Therefore, the last unorthodox novelty was introduced: registration of buildings and apartments under construction.*

Key words: land registration, real estate cadaster, registration by official duty.

1. Introduction

Except for Vojvodina region,[1] which used to be a part of Austro-Hungarian Empire, land registration in Serbia is a heritage of the XX century. It was only in the 1930s that the then Kingdom of Yugoslavia decided to adopt the Austrian system of land registration, the land books (*Grundbuch System*, *zemljišne knjige*).[2] The system was introduced from Sava and

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1 In Vojvodina, land books system was introduced in 1855, see Živković, M., 2021, *Pravo registara nepokretnosti, opšti deo* [Land Registration Law, General Part], Pravni fakultet, Beograd, p. 30. Historical data presented in this paper are almost entirely based upon the research made in preparation of this monograph, so it shall not be cited separately in this respect.

2 Law on Land Books, *Official Gazette of the Kingdom of Yugoslavia*, No. 146-LIII/30, (slightly) amended in No. 282-XCI/1931; Law on Internal Organization, Establishing and Correcting Land Books, *Official Gazette of the Kingdom of Yugoslavia*, No.

Danube rivers southwards, but the breakout of the war in 1941 stopped its development about halfway through. Thus, more than half of today's Serbia, more precisely the southern part, retained the old deed system (*tapijski sistem*), which was inherited from the Ottoman times.[3]

The communist state that came to be after 1945 did not look at land registration in a friendly fashion. Not only was land registration, in principle, an ideological enemy – it served the interests of the landowners and potential landowners in a state that proclaimed its intention to destroy ownership as such – it was also an expensive tool, especially the land books system. Communist authorities found it absurd to have to fund an institution which was, figuratively speaking, an enemy of the state or, being more precise, which served the interests of the ideological enemies (landowners).[4] Therefore, it is no wonder that, while abrogating the complete pre-war legislation, socialist authorities decided not to continue with introduction of land books in Serbia. However, they kept the land books in the territories in which they already existed, downgrading their rules to a specific kind of soft law, that applied in principle, but did not really have to apply.[5]

The communist era led to weakening of the rules of land books and their significance. In time, after many interventions of the communist authorities in real property relations (nationalization, confiscation, expropriation, introduction of quantitative maximums of ownership of real property and similar), the registry became obsolete and, in many cases, completely outdated. This is quite understandable, because the main *raison d'ĕtre* of land registries is providing legal security for real property owners and for legal transactions in respect of real property.[6] In socialist/communist society there were not many real property owners, and real

146-LIII/30; Law on Partitions, Write-offs and Write-ins in Land Books, *Official Gazette of the Kingdom of Yugoslavia*, No. 62-XVIII/31.

3 On deed system (*tapijski sistem*) in Serbia/Yugoslavia see Živković, M., 2021, pp. 64–73.

4 Blagojević, B., *Preface* to Krstić, Đ., 1972, *Evidencija prava na nepokretnostima*, Institut za uporedno pravo, Beograd, IV ff.

5 This was done by Art. 4 of the 1946 Law on Invalidity of Legal Regulations Passed before 6 April 1941 and during Enemy Occupation, *Official Gazette of FPRY*, Nos. 86/46, 105/46 and 96/47 (mandatory interpretation). See on that in more detail: Konstantinović. M., 1957, Stara pravna pravila i jedinstvo prava [Old Legal Rules and the Unity of Law], *Anali PFB*, 4, pp. 431–437.

6 See Živković, M., 2021, p. 125; Cvetić, R., 2016, *Savremena evidencija nepokretnosti*, 2. izd., Novi Sad, Pravni fakultet, p. 9. See for Austrian law Rechberger, W., Bittner, L., 2007, *Grundbuchrecht*, 2 Aufl., facultas.wuv, Wien, p. 29; for Swiss law Zobl, D., 2004, *Grundbuchrecht*, 2 Aufl., Schulthess, Zürich-Basel-Genf, p. 38; for German law Seebach, D., Dahlkamp, C., 2016, *Praxis des Notariats*, 12 Aufl., Daubner Verlag, p. 143; for Croatian law Josipović, T., 2001, *Zemljišnoknjižno pravo*, Informator, Zagreb, p. 6.

property market basically did not exist. The ownership of most real property was "social", "everybody's and nobody's", and there was little sense in bothering to register it, even though the state provided for mandatory registration of socially owned real property.[7] So, even the most comprehensive and reliable land registration system, such as land books, was not appropriate, and after several decades it was little less than abandoned.

It was exactly in that moment that tectonic political and social changes took place. Socialism and communism were globally rejected as ideologies, and transition into democratic forms of government and market economy was set as primary goal for the new authorities. In Serbia, given the tragic and violent disappearance of Yugoslavia and civil war which accompanied its dissolution, the transition started a decade later than in other countries of the former Eastern Bloc. Practically, the real transition began in 2000, when Milošević was finally ousted from political power. Before that, during the 1990s, there were some elements of transition, but the key political decision and will for such a move was, in fact, lacking. However, even this "rump transition" that was attempted during Milošević included introduction of new land registration system, the so-called real estate cadaster (REC, unified cadaster) system, at least at the legislative level. Since funds for the introduction of the new system in real life were lacking, the old system of land books and deeds continued to be applied.

The devastating condition of land registries became painfully obvious once the authorities genuinely started the transition in 2000s. The dilemma of the new political authorities was whether to revitalize land books or to start to (really) develop the REC system, introduced during Milošević. The matter was rather urgent, because without functional land registry there could be no hypothec, and without hypothec investments are more difficult, because the credit is more scarce and less favorable for the borrower. The dilemma was finally resolved in favor of the unified cadaster

7 See Art. 1 of the Decree on Registration of Right of Ownership over State Real Property, *Official Gazette of FPRY*, No. 58/47 and Section II of the Instruction for Implementation of the Decree on Registration of Right of Ownership over State Real Property, *Official Gazette of FPRY*, No. 10/49, replaced by Art. 1 of the Law on Registration of Socially Owned Real Property, *Official Gazette of SFRY,* No. 12/65. The main reason for such legislative provision was the fact that the private owners sometimes managed to make use of land books rules to recover some of their (private) ownership from the state or 'social ownership'. The authorities recognised such practices and required mandatory registration of state/social ownership to prevent them. Nonetheless, by the very end of existence of the socialist state, social ownership remained the most outdated, untidily kept and the least registered form of ownership of real property.

(REC) system, not without significant influence of the international development organizations, primarily the World Bank.[8]

Even though the REC system was, in essence, designed back in 1988, when the first statute providing for unification of factual and legal records was passed,[9] it had several significant "makeovers". The first happened in 1996, when the simplified version of the land books rules on registration of rights was transplanted into REC legislation for the first time (prior to that there were, in fact, no special rules on rights registration in the REC system).[10] The second happened in 2009, when the new Law on State Survey and Cadaster[11] was adopted within the framework of the World Bank Real Estate and Cadaster Project. The third happened in 2015,[12] when once again thorough amendments of rules on rights registration took place. The last happened in 2018, when the Law on Procedure of Registration in the Real Estate and Lines Cadaster (hereinafter: LPR)[13] was adopted. This law, which was slightly amended a few times (for the sake of "fine tuning"),[14] is currently in force.

The old land books system exists for a couple of centuries in the (more or less) present form in Germanic legal family. It is a highly legally sophisticated land registration system with very developed and detailed legal rules, which are quite formal in nature. The system provides very high if not the highest level of legal certainty and security, not only to the registered owners, but also to legal transactions in respect of real property. Therefore, even after the new system was introduced in Serbia, the level achieved in the land books system continued to be a kind of benchmark and threshold in respect of which the potentials and results of the new system were and are measured.

In this paper we shall try to define and explain the main features of the present level of development of the REC system, always having in mind the level (primarily, of legal security) reached by the land books (in the countries of its' legal origin). Coping with the manyfold issues that

8 See Živković, M., Land Registry Regulations in Serbia: Step Forward in the Wrong Direction?, in: Milosavljević, B., Jevremović Petrović, T., Živković, M. (eds.), 2017, *Law and Transition*, Belgrade, Faculty of Law, pp. 383, 387–388.

9 Law on Survey and Cadaster and Registration of Rights in Real Property, *Official Gazette of SRS*, No. 17/88.

10 Law on Amendments of the 1992 Law on State Survey and Cadaster and Registration of Rights in Real Property, *Official Gazette of RS*, No. 12/96.

11 *Official Gazette of RS*, No. 72/09.

12 Law on Amendments of the 2009 Law on State Survey and Cadaster, *Official Gazette RS*, No. 96/15.

13 *Official Gazette of RS*, No. 41/18.

14 Amendments were published in *Official Gazette of RS*, Nos. 95/18, 31/19 and 15/20.

arose in practice, Serbian legislator, as shall be explained, sometimes had to resort to unorthodox solutions to reach the required levels of tidiness and promptness of the registry, and the levels of legal security typical for land books.

2. Main Features of the New Land Registration System in Serbia

There are many features of the current REC system in Serbia that deserve the attention of lawyers dealing with land registration. However, a few of them may be labeled as "main features" either because they are new for land registration in Serbia, or because they are a novelty in the land registration law globally. We have designated four main features of Serbian land registration law in the XXI century: unification of factual and legal data, use of information technologies, principle of registration by official duty and registration of objects under construction.

2.1. UNIFIED CADASTER

The main feature of the REC system in comparison to the land books is the fact that the registry is unified – both factual and legal data are kept by one authority, the Republic Geodetic Authority [Republički geodetski zavod, RGZ]. In the land books system, factual data were kept by land cadaster [katastar zemljišta], and legal data by the courts that kept land books. The critics of the land books system claimed that it would be more efficient if the registry would be unified, because the need to periodically adjust and co-ordinate the two databases would not be required. They also claimed that many of the disputes over real property would be easily solved by the unified registry, through the procedure of public presentation of data or the similar. The critics of the unified registry claimed that unifying two completely different registries, each with its distinctive principles and logic, would be counter-productive and, essentially, impossible: logic of one or the other would inevitably prevail.

The unification of the registry was made by, basically, merging registry of rights to land cadaster, thus making it real estate cadaster. The body competent for REC was RGZ, the authority that was previously in charge of the non-legal, land cadaster (and courts were competent for keeping land books). The applicable procedure changed from non-litigious procedure applied by the land book courts to (special) administrative procedure applied by the RGZ. The outcome was a system in which adminis-

trative body, so a part of executive power, is competent for land registry, and surveyors ultimately decide on registration of rights. Registration of rights in many cases also means acquisition of rights in real property (because registration is a means of acquisition in case of contractual transfer of rights), so surveyors in effect decide on acquisition of property rights. Even though there are lawyers working in the registry (on the issues of registration), the formality of the administrative procedure requires the head of a department to sign all individual decisions, and heads of departments of the RGZ are always surveyors, not lawyers.

To overcome this deficiency, which *in ultima linea* reduced the level of legal certainty in comparison to the land books, where a judge or similarly positioned lawyer decides on rights registration directly, the 2018 reform provided an original solution. Namely, in case the registration happens based on court decision, notarial document, or decision of other authority, the official of the cadaster can merely check if the formal requirements for carrying out a registration are met (its competence, designation of the concrete real property and persons) and does not have the authority to check the presented document on its merits (from the point of view of substantive law). In case the cadaster official is of the opinion that there is a problem with the presented document (that it is null and void), s/he must continue with registration anyway, but can inform the entity having the official duty to initiate the annulment procedure and the public attorney of its position and register a note that s/he did so along with the registration.[15] This in effect means that the guarantees of legality of the registered data are not provided solely by the registry, but also by the court, bailiff, public notary or other authority that has passed, created, confirmed or verified the document, based upon which the registration is made.[16]

Given the fact that the current solution has, in fact, passed the burden of checking the substantive legality of each registration from the RGZ to other entities – notaries, courts, bailiffs and other authorities – it is no wonder that the logical next step would be advocating for the lawyers, concretely notaries, to take over the keeping of the rights registration in the REC altogether. It should not be technically complicated, given the fact the registry is now an electronically kept database. Namely, notaries could simply be granted permission to change the legal data in the database directly (this is the technical aspect of rights registration). According to current law and practice, the notary checks both substantive and formal

15 Arts. 32 and 33 of the Law on Procedure of Registration in the Real Estate and Lines Cadaster (hereinafter: LPR).

16 In more detail: Živković, M., 2021, pp. 205–210 ("principle of legality").

conditions for registration while creating or confirming the registration documents (contracts) anyway. The RGZ officials merely re-check whether formal conditions are fulfilled. The later (re)check appears superfluous, and we are one step away from returning the decision-making power in respect of rights registration from surveyors to lawyers. Political debate and struggle of professions in this respect has already begun as these lines are written.

Needless to say, a law professor involved with land registration can only support making that extra step, because rights registration, self-evidently, belongs to the field of work of lawyers, not surveyors. In my view, if notaries get the possibility to directly decide on the registration of rights in the REC, that would mean that the registration of rights is coming back where it belongs. That would enable the return of (substantively more adequate) non-litigious procedure in land registration instead of special administrative procedure. Also, many other current issues deriving from the fact that a part of administration decides on property rights would be eliminated.

2.2. USE OF INFORMATION TECHNOLOGIES

The second main feature of the new REC system in Serbia is that it heavily relies on the use of information technologies in keeping the registry. The idea of broader use of digital technologies in the field of land registration is not new, and it exists in different systems of registration. Sweden, which has a hybrid system of land registration, started it back in the 1970s and fully transferred to digital already in 1995.[17] Austria has started to digitalize its land books decades ago,[18] and so did Germany[19] and Switzerland.[20] In England and Wales, which have a variant of the Tor-

17 See Jensen, U., 1997, Computerized Registration of Real Estate in Sweden, in: *Land Law in Action, A collection of contributions by participants in the seminar on the theme Land Reform including Land Legislation and Land Registration in Stockholm 16–17 June 1996*, MFA & KTH, Stockholm, pp. 60, 64.

18 Austria started digitalization of land books in 1980, when the *Grundbuchumstellunggesetz* (GUG) was adopted. The books were fully transferred to electronic form in 1992, and in 1999 internet access was enabled, see Rechberger, W., Bittner, L., 2007, *Grundbuchrecht*, 2 Aufl., facultas.wuv, Wien, pp. 44–48.

19 First plans for digitalization of land books in Germany were made in the 1970s, but it started in 1993, when the *Registerverfahrensbeschleunigungsgesetz* was adopted, see Schöner, H., Stöber, K., 2004, *Grundbuchrecht*, 13 Aufl. C.H. Beck, München, pp. 30–31. In the later textbooks on land books law, it is concluded that the electronically kept land books are the only 9 ones existing in practice, see Keller, U., Munzig, J. (Hrsg.), 2015, *KEHE Grundbuchrecht*, 7 Aufl., Bonn, Deutsche Notar Verlag, pp. 1244–1313.

20 The amendment of the Swiss Civil Code, the ZGB, came after working groups formed in the 1970s and 1980s completed their tasks, in 1991, when the new § 949a

rens registration system, digitalization and real time e-conveyancing was set as a policy goal back in 2001, when the reform that led to the 2002 Land Registration Act was being prepared.[21]

In Serbia, the classical land books and deed system were based upon paper documents, and were kept in analog, handwritten form. The introduction of REC system was used to promote digitalization and computerization of the registry from the very outset. Computerization was even invoked as an argument in favor of REC system, as if other systems could not be computerized as well. Be that as it may, REC was, from the very beginning in the 1990s and 2000s, kept as an electronic database (it was computerized). Requests for registration and supporting documents were, however, submitted in paper form, and all kinds of decisions of the registry were also made in analog, paper form. This changed only in 2018, when the LPR was adopted. Article 18. para. 1. of the LPR provides that "Submissions, evidence and documents in the procedure of registration in the REC are to be submitted in form of an electronic document, through e-counter". The exception is provided only for appeals and other legal remedies, and evidence submitted therewith, which can still be submitted in paper form. Also, all the decisions of the REC are passed in electronic form (Art. 38. para 4. LPR), and delivered through the e-counter, or as a print of electronic document, via registered mail, in case a party does not have a unique e-mailbox (Art. 39. paras. 1. and 2. LPR). The decisions are also published on the electronic bulletin board at the REC website.

This was a huge step in the development of the Serbian land registry, because for the first time a completely electronic procedure of registration was provided and enabled. It was coupled with the other significant novelty introduced in 2018, registration by official duty, which shall be presented separately below. During the transition period, until 31 December 2020, registration requests and supporting evidence could have been submitted in paper form. In such cases, the REC had a duty to digitalize (scan) these documents, transforming them into digital ones, and confirm the authenticity of the digitalized version by a qualified electronic signature. From then on, the procedure is continued in its digital form.[22] In the first, transitional phase of implementation of these rules (until the end of 2020), the paper requests indeed prevailed. After the transitional phase expired, in the prevailing number of cases digitalized (scanned) paper doc-

was adopted. This paragraph came into force in 1994, see: Zobl, D., 2004, *Grundbuchrecht*, 2 Aufl., Schulthess, Zürich–Basel–Genf, 117ff.

21 The Law Commission, *Land Registration for the Twenty First Century, A Conveyancing Revolution*, London, Stationary Office, 2001, Sec 1.5, p. 2.

22 Art. 59. of the LPR.

uments that were verified in accordance with the law were being used in registration procedure. Even though such documents are digitalized and can be sent to the REC via e-counter, they are not capable of enabling full use of information technology in REC procedure. The problem with this kind of documents is the fact that they are not in a form of structured data that can be subsequently used by other applications. Figuratively speaking, the REC clerk must retype the contents of such documents in the REC database. In other words, human intervention is required. In practice, during this phase, the situation was improved by the fact that public notaries sent metadata along with the sent scanned document. Such metadata can be used by other application(s) directly, so no retyping or other forms of intervention are required. In the future phase, during the 2020s, the use of genuine electronic documents may be expected. These are either documents that were originally created in electronic form or electronic copies of originally created paper documents made by the author of these paper documents. Such documents carry in them structured data that can be directly used by other applications, which could make easier many additional actions in respect of a registration: taxation of acquisition, automated change of user by the utility companies etc. With the help of metadata, the current REC is close to achieving one-stop-shop system in real property transfer even today. Namely, along with the registration of the new owner, the system automatically notifies the tax authorities for the levy of relevant taxes (turnover tax and change of taxpayer for property tax), as well as utility companies, which automatically change the name of user to the new owner of the property.[23] Currently, Serbian authorities are working on achieving interoperability of various databases kept by various authorities, with the aim of making administration simpler and more convenient for the citizens. For example, the connection between the REC and the personal data records for individuals and legal entities should enable automatic update of any change in personal registry in the REC. If the registered owner of a real property would change his name or seat (say, in the Business Registries Agency for a company), this change would automatically be implemented in the REC, no additional actions of the registered owner would be required.[24]

The full potential of the use of information technologies in land registry, by opinion of many digitalization enthusiasts, shall be the use of blockchain technology and smart contracts in this area. This would fully

23 Before the 2018 LPR, a buyer of real property had to go to two tax authorities himself, and the same applied to utilities fee collection company. The new system has therefore significantly increased convenience for parties involved in real property transactions.

24 Art. 49. paras. 1. and 2. of the LPR.

simplify the transactions in respect of real property and make many players in this area, such as real estate agents, lawyers, and notaries, superfluous. However, in my opinion this is still a matter of distant future for the Serbian REC. It should remain so, I think. The reason is that the more the use of information technology enables legal transactions with immovables to be easy, quick and without any person to act as a kind of supervisor, the less it will provide legal security and certainty in dealings with real property. And one should not forget that legal security and certainty are the reason we have land registries in the modern societies in the first place.

2.3. REGISTRATION BY OFFICIAL DUTY

The use of information technologies in operation of the REC system of land registration is coupled with the next main feature of that system in Serbia: registration by official duty. Land books and deed system were based upon the principle of disposition, which is a wider principle governing private law, rooted in the idea of party autonomy. That means that, within these systems, the person acquiring the right is free to request registration or not to request it; "no state coercion is proper in acquisition of private rights".[25] Only exceptionally land books provided for registration by official duty.[26] The principle of registration upon request was often blamed for the land books being outdated, and the advocates of the REC system explained that the principle of mandatory registration of rights will solve this issue. The idea of mandatory registration and even registration by official duty (so, without request) was borrowed from the legislation regulating land cadaster, which traditionally contained these rules (but, also traditionally, did not contain data on rights, but only factual data).[27]

The registration by official duty was contained in the first law that introduced REC system in Serbia, in 1988, but that law was never actually applied. Starting from 1992, it appears that the REC legislation turned to the idea of mandatory request under the threat of monetary fine. This meant that a person having a document enabling registration of such person's rights in the REC had the obligation to file such request. Failing to do so within the provided deadline was treated as a misdemeanor, and a fine could be imposed. However, there is no evidence of a single case such fine was indeed collected, and this solution did not contribute to

25 See Hiber, D., Konsolidacija prava svojine i zemljišnoknjižni sistem, preface for Matić, D., Đoković, T., 1998, *Zemljišnoknjižni postupak*, Pravni fakultet, Beograd, XII.

26 §§ 83–86 of the 1930 Law on Land Books of Kingdom of Yugoslavia. See in more detail Orlić, M., 2000, Uvođenje i obnavljanje zemljišnih knjiga, *Anali PFB*, 1–6/2000, 6, pp. 39–49.

27 See Živković, M., 2021, p. 199.

REC being up to date. Therefore, the legislator in 2018 decided to go back to the registration by official duty.[28] This time some other circumstances made this decision possible, before all the fact that almost all the transactions in respect of the real property that led to possibility of registration had to be made in notarial form (deed, solemnization, or legalization). Therefore, the introduction of registration by official duty meant that the notaries would have the obligation to deliver the documents, in creation/confirmation/verification of which they participated, to the REC within a short deadline. The same applies to the courts, bailiffs, and other competent authorities and organizations with public authorities when they pass a decision that triggers the possibility of registration. The delivery itself would go through the e-counter, electronically. The additional benefit of such a system is that the court, notary, or the bailiff would have their part in making sure that the registration is possible and fully correct and legal. This, as it was explained above, enabled the rearrangement of the legality principle in the REC and reduction of the tasks in respect of legality conferred to the REC officials. According to the publicly available published data, this led to acceleration in case handling by the REC, so currently a registration requires 5.26 days on average.[29]

It is difficult if not impossible to defend and justify this system from a legal point of view. Its main deficiency is the fact that, once a contract is signed, the acquiring party cannot prevent the registration, it happens completely independent from the will of such party. While it is true that in most cases the party has a clear interest to be registered as soon as the basis for registration exists, there are some other, more complex cases (say, project finance cases), in which documents apt for registration are executed, but the parties do not want them to be registered immediately – they just want the possibility of registration at the time documents are executed (this often applies to mortgage documents). This is impossible under current Serbian law, so apart from the theoretical objection (coercion in acquiring private rights) there are some situations in which this solution makes some complex projects practically impossible or more difficult to implement.

On the other hand, the benefit of such a solution is the REC being up to date and efficient and quick registration, which obviously contribute to

28 A thorough presentation of variants of the principle of mandatory registration throughout the 30+ years the REC system exists may be found in Cvetić, R., Razvojni put načela obaveznosti upisa u katastar nepokretnosti i njegovo "novo ruho", in Živković, M. (ed.), 2019, *Liber Amicorum Vladimir Vodinelić*, Pravni fakultet u Beogradu i Pravni fakultet Univerziteta Union u Beogradu, Beograd, p. 47, *passim*.

29 See http://upisnepokretnosti.rs/statistika.php where the statistics are being published. This excludes the so-called "old cases" that were initiated according to the old rules.

the increase of legal security. The problem is that Serbian legislator, due to historical circumstances, could not achieve the same result by "playing by the book" and allowing the acquiring party to decide on registration, so it decided to cut the Gordian knot and introduce automatic registration by official duty. Therefore, it seems that the decision may be justified on policy grounds, provided however that it is temporary, and that in the foreseeable future the possibility of the acquirer to opt out of automatic registration will be introduced.[30]

2.4. REGISTRATION OF OBJECTS UNDER CONSTRUCTION

Finally, possibility to register an object under construction is also one of the main new features of the REC system, which as far as I know is a rather unique and does not exist in any other land registration system in the world. To understand it, one needs to go back to some specifics of land law in Serbia (and former Yugoslavia).

Land law of most countries, irrespective of their legal family (common or civil law), is based upon the principle of unity of real property. This principle means that land and everything permanently attached to it (be it on, above, or below) is a single entity, *i.e.* subject to one ownership right pertaining to it. In other words, the situation when one person owns the land and the other owns a building erected thereon requires special arrangement, in absence of which such situation is impossible.

In these legal surroundings, the issue of an object under construction poses no specific registration-wise problem. This object, namely, is not a subject matter of a separate ownership right but is rather just a constitutive part of the land plot on which it is constructed.[31] Thus, the owner of the land plot owns the unfinished construction all along. Figuratively, the moment each brick is fastened to existing construction with plaster it becomes the ownership of the owner of the land. Therefore, there is no pressing need to register the building before the completion of construction. Also, there are no obstacles to mortgage such buildings, by simply mortgaging the land plot (which encompasses the unfinished construction).

Serbian land law, however, departed the principle of unity of real property during the socialist period (the process was completed in 1958,

30 On this line of argumentation for justification of registration by official duty in Serbian law see in detail Živković, M., 2021, pp. 200–205.

31 There are rights aimed at separating the right of ownership over land and building, such as the *Baurecht* or *droit de superficie*, but such rights do not exist in contemporary Serbian property law. Also, the issue of registration and possibility to mortgage such rights is beyond question.

when a statute was passed to nationalise all construction land in urban areas). The situation lasted all the way through 2006, when the new Constitution abandoned the provision by which construction land must be in state ownership, respectively 2009, when a statute enabled reconnection of ownership of land and buildings and return of the principle of unity of real property.

The REC, however, was designed in the period when the land and buildings were legally separated, and the problem with the buildings under construction is that they are 'invisible' in the REC until they are completed. On the other hand, given the more favourable prices, many people in Serbia opted for purchasing a building or a flat in construction. This led to serious issues in practice and violations of legal security in real property transactions in case they involved buildings under construction. The situation has become even more complicated after 2005, when the mortgage legislation allowed form registration of mortgage on buildings and flats under construction, because ownership could still not be registered before the construction was completed.

To put an end to the inherent legal insecurity in respect of dealings with the buildings under construction, the legislator decided to include the possibility of registration of objects under construction in the 2018 LPR.[32] While it is, to put it mildly, very unorthodox to include the future, non-existing real property such as buildings and flats that are to be constructed, in the real property register, the outcome should be providing the same level of legal security in dealing with buildings under construction. The registration is made based upon building permit and contract on purchase of object under construction.[33] The registration of objects under construction comes in a form of a pre-registration (*prenotatio*, predbeležba), which is a type of registration that is ordinarily limited in time; however, the pre-registration of building under construction is not limited in time.

Once the building, respectively parts thereof (flats) are registered, the rights on such buildings/parts can be registered as well, though in the form of pre-registration. These rights can be conveyed, and the new right bearers can be pre-registered instead of previous. Once the construction is completed, the pre-registered building becomes registered, and the pre-registered rights become registered.

The problem with this solution in the LPR is that the pre-registration of buildings under construction was regulated too widely. Given the

32 Art. 11. para 4. of the LPR.

33 Art. 11. para 5. of the LPR.

building permits are issued in a digital procedure in an electronic form, it was foreseen that the issuer of the building permit would by official duty send it over to the REC for pre-registration of object under construction in all cases. This, however, has led to an overload of the REC and problems with implementation of this whole solution in practice.

The reason for including the registration of buildings under construction in the REC was achieving high level of legal security in legal transactions in respect of such objects. It therefore appears that it was superfluous to require all buildings under construction to be registered by official duty. It seems a lot more prudent to provide for registration only of those buildings under construction that are made for the purpose of sale at the real property market, because only in those cases the legal security is endangered without registration. Thus, I believe registration of objects under construction should be made a condition for the possibility of their sale prior to completion of construction, and that the registration itself should be made only upon request of the investor, and not as an official duty.

3. Conclusion

Land registration appears to be somewhat more dynamic area of law as one could expect. Globally speaking, the main reason for such development is the incredible advance of information technologies, which makes the wildest dreams of a XIX century land registration lawyer actually possible. The ideal of a registry of real property that would, at any given time, contain correct and updated data on the rights over all real property, and which would also be able to register changes (transfer or changes of registered rights, or creation of new ones) instantly, in real time, is now actually technically possible. Therefore, the attempt to make this legally possible is in the root of every legislative reform in this area in the XXI century.

As for Serbia, one must admit it took a bold and innovative approach to land registration. This means that Serbian legislator did not hesitate to be very original in attempting to achieve common goals of almost all land registries: database which is always up to date, where changes are carried through relatively swiftly, and which provides for a high level of legal security in dealings with real property. The history of neglecting the land books during socialist Yugoslavia, as well as the fact that socialist Yugoslavia abandoned the principle of unity of real property, made this task more difficult compared to some other countries. This is the main reason for the originalities in Serbian land registration law, for the well-known

goals had to be achieved in a non-standard, original ways. So, the tidiness and promptness of the registry, achieved by a built-in mechanism of land books system that makes the (prudent) acquirer always register its right, thus keeping the registry up to date, had to be achieved by introduction of registration by official duty. The obvious problem with administrative body deciding on acquisition of (private) property rights in real property had to be softened by the rearranging the principle of legality by shifting a part of the responsibility to notaries, courts, bailiffs, and other authorities. The problem of lack of legal security in dealings with the objects under construction had to be tackled by including such objects in the registry, however unorthodox it may seem.

Naturally, all these novelties and originalities suffer from unclear issues and making them fulfil their original goals (*i.e.,* not letting them go astray) is not an easy task. This is why the land registration legislation shall continue to change dynamically in the near future in Serbia, until such time the required level of legal security is reached. Hopefully, only fine tuning shall have to be made, and the tectonic system changes are finally behind us.

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TRANSFORMACIJA REGISTARA NEPOKRETNOSTI U SRBIJI U XXI VEKU

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APSTRAKT

Krajem XX veka, Srbija je promenila sistem registracije nepokretnosti od zemljišnih knjiga, koje su bile neažurne i zapostavljene tokom socijalističkog perioda, u jedinstvenu evidenciju, katastar nepokretnosti. Zbog istorijskih okolnosti i ustrojstva sistema katastra nepokretnosti, zakonodavac je morao da primeni neortodoksna rešenja kako bi postigao željeni nivo pravne sigurnosti. Zbog objedinjavanja evidencija različite prirode (faktičke i pravne), jedinstvena evidencija morala je da transformiše načelo zakonitosti i uključi javne beležnike i sudove u njegovu primenu. Osavremenjavanje registra značilo je široku upotrebu informacionih tehnologija, što je učinilo uspostavljanje potpuno elektronski vođenog postupka upisa jednim od glavnih pravno-političkih ciljeva. Ovo je omogućilo i uvođenje načela upisa po službenoj dužnosti, kako bi evidencija uvek bila ažurna. Mehanizmi zaštite pravne sigurnosti koje omogućava registar ne funkcionišu kad je reč o objektima u izgradnji jer takvi objekti nisu upisani dok se izgradnja ne okonča. Otuda je uveden poslednji neortodoksni novitet: mogućnost upisa objekata u izgradnji i njihovih posebnih delova.

Ključne reči: registracija nepokretnosti, katastar nepokretnosti, upis po službenoj dužnosti.

Article History:

Received: 24 October 2022

Accepted: 25 November 2022