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Reforming Property Law in Kosovo: A Clash of Legal Orders

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The legal framework regulating property in Kosovo has been defined as 'A jumble of laws, regulations, administrative instructions, court practices and directives combine to create a complicated and seemingly impenetrable system for determining contests over immovable property ownership in Kosovo. At the highest level, international human rights standards affect property rights…'[1] As in other areas of legislation, laws addressing property issues derive from different periods in Kosovo's history, that is to say the Yugoslav time, the so-called discriminatory period of the 1990s, UNMIK's rule of the first decade of the 2000s and, finally, independent Kosovo. Laws are scattered through several legal texts, regulate different aspects of property rights, and often refer to institutions that no longer exist. This paper focuses on the specific issues affecting property law in Kosovo, a sector where international organizations and bilateral cooperation are massively intervening. While assessing legal acts in force and data collected on the field, the author argues how, for an effective reformation of the sector, a clear and coordinated strategy will have to be adopted by the two main donors which, in the next few years, will be launching several technical assistance contracts. Comparing European best practices with the proposed intervention suggested by the European Union and USAID will also give the chance to illustrate how a strict adherence to ECHR standards in the field of property, as the Constitution of Kosovo requires, will bring to light problems already seen in other European countries, that is to say a clash between domestic civil legislation on property, on the one hand, and the case-law of the European Court of Human Rights on Article 1 Protocol 1, on the other. The author will also notice that the tendency to adopt a too political approach, typical of international organizations and donors, in an area characterized by legal principles of a more technical nature, will be cause for additional confusion.

1. Introduction

Most of the norms affecting property in continental legal systems may be found in separate units of civil codes and external laws normally defined as 'special'. In the 19th century, Bosnia and Herzegovina, Croatia, Slovenia and Vojvodina, as parts of the Austro-Hungarian Empire, were under the Austrian Civil Code (ABGB).

Montenegro adopted a civil code in 1888. Serbia was the first country of the region to adopt a French oriented Civil Code in 1844.[2]

The Federal Republic of Yugoslavia, of which Kosovo was a part, did not adopt a unified civil code due to its constitutional allocation of powers between Federation and States. The main subject matters of a typical civil code used to be a shared competence between the constitutive units of the federation (property, family and inheritance) and the federal level (obligations).

The fragmentation of property laws in Kosovo is now a reflection of different historical, cultural and political traditions, making ownerships rights extremely problematic. As a region of the Turkish Ottoman Empire, Kosovo did not have land surveys. Evidence of property was based on a complex cadastral system that was a mixture of population and tax roll records. Property ownership was evidenced by a system of *tapi* (allotment certificates). Since no surveying measurements were done, the *tapi* identified the owner, property, residence of the owner, description of the parcel, boundaries, and names of adjacent parcel owners (their names, dimensions of the boundaries, and additional characteristics relevant in making the identification of the property as clear as possible, especially with regard to the adjacent properties). The *tapi* system in Kosovo was incorporated into the laws of the Kingdom of Yugoslavia. The first cadastral survey, in cooperation with the police forces and geodesy specialists, started in 1923 and ended in 1937. It had legal power after the final preparation of cadastral documents.

The native Albanians did not care to obtain ownership documents (*tapi*) for their real estate properties as they were a marginalized group. In addition, they did not register ownership titles, in order not to be liable to pay high property taxes. Therefore, upon the cadastral survey completion, the land of Albanian owners, passed from generation to generation but without valid *tapi*, was registered as state land for agricultural purposes and was made available for colonization by different ministries. Hence, many Albanian owners were deprived of ownership and possession rights in favour of Serbs, who received incentives to move to Kosovo when Turkish rule ended. At the same, time a massive influx of Albanian nationals took place after the Second World War, increasing tensions between the two ethnicities in a region that is regarded as the cradle of the Serbian Orthodox Church, traditionally one of the main land owners.

Following the removal of the autonomous status of Kosovo in 1989, there was a ten-year period of active ethnic discrimination resulting in a series of laws targeted at a particular ethnic group. The conflict of 1999 led to large-scale property damage. Many land records were destroyed, while others were removed to Serbia, starting a year before the war months in 1999. In that period and after, many unauthorized occupations of Serbian and Albanian-vacated properties took place. The restitution of land registries is currently ongoing and resulting in even more confusion since, after the withdrawal of the Serbian army, a new cadastre was developed and new proprietary titles have been entered, sometimes using counterfeited documents, as will be explained later. The confusion has been increased by the uncertain status of Kosovo under international public law, the different legal traditions (Common versus Civil Law) brought in by different donors (e.g. USAID, UNMIK, EULEX, Europeaid,

OSCE, bilateral cooperations), by the sometimes contradictory laws enacted first under the administration of the United Nations Mission for Kosovo and later by the Republic of Kosovo as proclaimed in 2008, and, finally, by the incapacity to dismantle the old socialist legislation dating back to the Federal Republic of Yugoslavia.

2. The Past Does Not Pass: The Persistence of the Socialist Regime of Ownership in Kosovo

When speaking of a clash of legal orders in Kosovo, one has to bear in mind that the first clash is between property legislation dating back to the old socialist system and the new post-communist one. In other words, 'property' in Kosovo is a synonym of three distinct concepts:

1. Property and Real Rights,
2. Socially Owned Property, inclusive of Socially Owned Enterprises and Occupancy or Residency Rights,
3. Public Property (State, state entities, municipal property, etc).

A definition of different kinds of properties is missing. Existing legislation is extremely confusing. The Constitution of Kosovo does not help in this regard. It just mentions property as a fundamental value (Article 7). Article 46 'protects property'. Finally Article 159 ('SOEs and Property') provides that '1. All enterprises that were wholly or partly in social ownership prior to the effective date of this Constitution shall be privatized in accordance with law. 2. All socially owned interests in property and enterprises in Kosovo shall be owned by the Republic of Kosovo'.

The Constitution (Article 159.2) is unclear as to the question if socially owned property still exists or whether, by operation of the Constitution itself, socially owned property has been transformed to state owned property. The wording of the constitution refers to 'socially owned interests in property and enterprises' without defining the meaning. Perhaps it should adopt a clearer wording, such as 'Socially owned property shall be owned by the Republic of Kosovo', although that is not possible due to the international status of Kosovo still to be fully addressed.

Other laws, e.g. the new Law on Property and Other Real Rights No. 2009/03-L-154 of 25 June 2009 and non-abrogated by the *lex posterior* principle provisions of antecedent laws, e.g. FRY Law on Basic Property Relations[3] of 15 September 1980, the Kosovo Law on Transfer of Real Property of 1986, and the Law on Housing Relations etc. do not shed light on the notion of different kinds of property.

2.1. Property and Real Rights

Current legislation defines property and real rights in line with continental civil codes but it needs to be coordinated with laws enacted at the time of the socialist regime. In other words, the current framework struggles to be more or less in line with European codifications, Law no. 03/L-154 on Property and other Real Rights, and non-incompatible provisions of the old socialist Federal Republic of Yugoslavia Law

on Basic Property Relations,[4] Law on Transfer of Real Property of 1986 of Kosovo, Law on Housing Relations,[5] and so on.

2.2. Socially Owned Property, Inclusive of Socially Owned Enterprises (SOE) and Occupancy or Residency Rights

Socially owned property is a 'left over' from the Yugoslav socialist system and another example of how the Law on Basic Property Relations still applies in those parts of legislation that have not been implicitly repealed by the more recent Law no. 03/L-154 on Property and other Real Rights. Despite surviving, socially owned properties established under the old FRY Law on Basic Property Relations are destined to disappear. The concept of socially owned property, which was introduced by the Federal Republic of Yugoslavia Constitution of 1974, is well explained by articles 11 and 12 FRY Law on Basic Property Relations. This law allowed more people to own, in common, objects (enterprises, buildings or houses), but granted only user rights to the land. The concept was further reinforced by the fact that the rights to the land were granted only as long as the rights attached to the object.

The notion of social ownership is extremely vast and applies to many areas, for instance, to housing relations but also to enterprises (socially owned enterprises). As far as housing relations are concerned, we see how the notion of social ownership is linked to another feature typical of the Yugoslav regime of ownership, that is to say the rights of residency. The law states that a citizen who moved into a socially owned apartment on the basis of a contract of apartment usage (Art. 2 FRY Law on Basic Property Relations) has a residential occupancy right (art. 1 FRY Law on Basic Property Relations). The content of this article is comparable with the notion of right of residency (*habitatio*) regulated by Article 264 of the Law on Property and other Real Rights. In order to better understand the concept, one has to bear in mind that at the time of Yugoslavia and after, enterprises allocated an 'occupancy right' to its workers. The allocation rights of Socially Owned Enterprises were suspended by UNMIK in 2000. Rights of disposal of these apartments are now restricted. There is no compensation scheme for socially-owned apartments which are privatized.

Residential occupancy rights are vested (Art. 9 FRY Law on Basic Property Relations) not only in the apartment user (known also as occupancy right holder), but also in his/her family household members who live together with him/her as well as the persons who are not members of the household but who remain in the same apartment. If no family household member remains in the apartment after the death of the occupancy right holder (divorced spouse, adopted person, etc), the membership of the family household of the occupancy right holder can be recognized to another person if that person has lived for at least two years with the right holder, provided that this person is not a family household member of another person.

The possession of urban construction land falling under the notion of social ownership is less than full ownership, because the right to transfer all or part of the land only exists if the object is transferred as well, and the rights to use and enjoy the land can be lost if the object ceases to exist.

Over time, the legal interpretation of the rights of the possessors, including the procedures of expropriation, has come to accept the bundle of rights attached to 'possession' closely resembles 'ownership.' Possession includes the right of the possessor to exclude others from use, the right to enjoy the property, the right to sell, give as a gift, or give as inheritance to the possessors' heirs.

Socially owned properties are under a privatization process and rights of occupancy are to be turned into lease agreement or sold. UNMIK legislation[6] provides that any right of use to property (i.e. land and buildings thereon classified as 'immovable socially owned property') registered in the name of an SOE, which is transferred to a subsidiary of the SOE as part of a reorganization or which is included in the liquidation of an SOE, is to be transformed into a leasehold upon transfer or liquidation. Such statutory leasehold shall include the right to possess, use, transfer and encumber the property to third parties (always subject to the leasehold).[7] The 99-year leasehold is created in privatizations and liquidations.[8] Transfers and encumbrances must be done in writing and must, like the transformation of a right into a leasehold, be registered.[9] A leasehold is not be affected by any change to the underlying ownership of the property and can only be expropriated under the same conditions and procedures provided for expropriation of ownership of real property.

2.3. Public Property (State, State Entities, Municipal Property, etc)

The term 'social ownership' is ambiguous and encompasses enterprise property as well as what other countries call public/state property. Public/State property is property that the government uses for its core functions, such as ministry or municipal buildings as well as property that serves for the greater public good, such as infrastructure, cultural property and airfields. However, the borders between social ownership and socially owned enterprises, on the one hand, and state, local and other public authority properties, on the other, is not specified since under current legislation there is no clear definition of what public or private property is and who administers it. The problem with public property is further complicated by municipal claims to socially owned property and the competing privatization strategies of the municipalities and the Kosovo Privatization Agency.

3. The Main Problems Affecting the Property Regime in Kosovo

The problems affecting the property regime in Kosovo may be summarized as follows:

1. The lack of a coherent scheme of ownership and other real rights within the current legislative system and an explicit abrogation of old legislation;
2. The lack of a definition of the regime (registration, purchase/selling, privatization/transfer possession into ownership) of Socially Owned Enterprises (SOEs) (enterprises and apartments);
3. The need to improve the regulatory framework of registration and legal evidence;

4. The need to enact implementing by-laws and proper rules on demolition under the current regime of construction;
5. Taxation on immovable properties of displaced people is not in line with European property tax standards;
6. Problems of implementation of the current legal framework.

3.1. The Lack of a Coherent Scheme of Ownership and Other Real Rights within the Current Legislative System and an Explicit Abrogation of Old Legislation

As has been already said, several Laws[10] regulate a sector where continental civil codes adopt only one main piece of legislation, the civil code book on property. The situation is made more difficult by the excessive tendency to use the '*abrogation tacite de la loi*' ('implicit abrogation of law'), which despite being a common feature of the continental legal tradition, is not really needed where lack of clarity of the legal framework, as it is the case for Kosovo, is a serious cause for concern. An example of *abrogation tacite de la loi*/*implicit repealing of law* may be seen in Part VI Law on Property and Other Real Rights No. 2009/03-L-154 of 25 June 2009. Part VI regulates the real security rights of pledge (*pignum*) and mortgage (*hypotheca*). It covers the same matter as, respectively, Law no. 2202/4 on Mortgages of 20/12/2002 and UNMIK/REG/2001/5, 7/2/2001 on Pledges, which, since being older regulations of the same matter, are to be regarded as implicitly repealed under the *lex posterior* principle. Despite the confusion among local and international lawyers, who sometimes consider these two pieces of legislation still to be in force,[11] it is clear that they have been repealed entirely by Part VI of the new law on property.

Another problem linked to the legislative techniques occurs in cases in which, when a law is expressly repealed, the new law, instead of abrogating entirely the old legislation, is just deleting single lines or words. The interpreter is forced to reconstruct the law in force word by word by matching several legal texts that have succeeded one another in time. A lack of consolidated versions of the law is a common feature in Kosovo and, at the same time, an urgent need. An example of such practice, affecting the registration of immovable property and real rights, may be seen in relation to Law no. 2002/5 on the Establishment of the Immovable Property Rights Register and its subsequent amendments. Subsequent amendments, by changing single words/lines of the old text, added new rights and documents subject to compulsory registration to the old text of the law.

3.2. The Lack of a Definition of the Regime (Registration, Purchase/Selling, Privatization/Transfer Possession into Ownership) of SOEs (Enterprises and Apartments)

Socially owned enterprises, a leftover of the socialist past, are in the process of being privatized. Legislation in force does not define the ownership status of assets of socially owned enterprises before privatization. In other words, rather than saying

who is the owner of socially owned enterprises in post-Yugoslav Kosovo, existing legislation prefers to focus on '*Tasks and Powers of the Kosovo Privatization Agency'* as Article 5[12] (*Enterprises and Assets Subject to the Administrative Authority of the Agency*) of the Law on the Privatization Agency of Kosovo no. 04/L-034 of 31 August 2011 reminds us.

The problems affecting the legal regime of Socially Owned Property/Socially Owned Enterprises (SOEs) are many, for example the following.

Registration Issues

Land belonging to SOEs is still registered as socially owned property with SOEs only having a right of use of such property but no ownership. This happens also because, as mentioned above, their ownership status is not clarified.

Occupancy Rights and Registration

The regime of occupancy rights deriving from socially owned properties is not clear. It has been already mentioned that a citizen who moved into a socially owned apartment on the basis of a contract of apartment usage (Art. 2 FRY Law on Basic Property Relations) has a right of usage (art. 1 FRY Law on Basic Property Relations) of the flat defined as residential occupancy right.[13] The allocation rights of SOEs were suspended by UNMIK in 2000. Rights of disposal of these apartments are now restricted. There is no compensation scheme for socially-owned apartments that are privatized.

Full ownership exists only over manmade objects such as buildings and constructions. Only user rights are given for land that is socially owned but with a privately owned house on it. The user right is transferred with any subsequent transfer of the house. Moreover, the possession of urban construction land is less than full ownership because the right to transfer all or part of the land only exists if the right to use is transferred as well. The right to use and enjoy the land can be lost if the object ceases to exist.

The result of such a confusing regime is reflected in the registration of titles. Apartments held in social ownership present difficulties in relation to determining the legitimate holder of the right of use of such an apartment and the 'owner' of the apartment. In other words certificates from the Register of Immovable Property Rights show as owner the user/possessor, whereas SOEs are the effective owners. Legislative intervention is needed, turning users/possessors into full owners registered as such.

Adverse Possession and Socially Owned Property

From a reading of norms on adverse possession and legislation on socially owned property, it is unclear if it is possible to acquire ownership of socially owned ownership through adverse possession.[14]

Public and Socially Owned Property: Concurrent Claims of Municipal Authorities and SOEs and the Law on Allocation for Use and Exchange of Immovable Property of the Municipality

Another example of deficiency in the current regime of social and public property regimes may be found when reading Article 14 (‘*Property of the Municipality’)* of Law Nr. 03/L-of 20 February 2008[15] on local government in conjunction with Article 17 (*Municipal exclusive powers*) of the same law.

Article 14 enables municipalities to own, manage, sell and lease immovable and movable properties with the exception of the sale of the land. ‘The sale of the land will be regulated by a special law’. Municipalities have to keep and maintain the Register of all movable and immovable property owned or occupied by the municipality.

This definition of municipal responsibilities[16] at times clashes with the initiatives of the Kosovo Privatization Agency (KPA) to privatize SOEs, when parts of the land and buildings used by those enterprises are needed by the municipalities to carry out its self-governance responsibilities.

Claims on SOEs assets, which are necessary to carry out the competences listed above, derive also from Article 160 paragraph 2 of the Constitution of Kosovo, at least as far as only publicly owned enterprises are concerned.

> The ownership rights in a Publicly Owned Enterprise that provides services only in a specific municipality or in a limited number of municipalities shall be the ownership rights of the concerned municipality or municipalities. Obligations related to such ownership rights shall be the obligations of the concerned municipality or municipalities.
> The Assembly of Kosovo shall, by law, identify such Publicly Owned Enterprise and the concerned municipality or municipalities having ownership rights and related obligations with respect thereto. If authorized by law, the concerned municipality or municipalities may privatize, concession or lease such a Publicly Owned Enterprise.

The above-mentioned problem has been partially addressed by Law on Allocation for Use and Exchange of Immovable Property of the Municipality no. 04/L-144 of 22 November 2012. The law repeals and succeeds in a very short period of time a short-lived Law No. 03/L-226 of 2010 on the same matter (which abrogated a previous UNMIK regulation). However the law is largely ineffective due to the lack of implementing measures.

3.3. The Need to Improve the Regulatory Framework of Registration and Legal Evidence

The transfer of immovable properties or real rights is not valid until they are duly registered on the Immovable Property Rights Register. The deed to be registered is validated either by civil courts or newly instituted notaries. In other words, the main actors involved in providing legal evidence of transfer and acquisition of property and other real rights on immovable properties are:

1. Immovable Property Rights Register within the cadastre,
2. Civil Courts,
3. Notaries.

However there are still inconsistencies and lack of clarity.

Lack of harmonization between Immovable Property Rights Registry Legislation and Property legislation

Law no. 2002/5 of 20/8/2002 on the Establishment of the Immovable Property Rights Register, together with several amending laws that followed until recently, is not harmonized with the Law on Property and Other Real Rights No. 2009/03-L-154 of 25 June 2009. Law no. 2002/5 of 20 August 2002 on the Establishment of the Immovable Property Rights Register, for instance, is not requiring registration of all the real rights mentioned by the new Law on Property (e.g. usufruct), whereas it should.

A similar lack of harmonization may be noticed between Section 2 (and Article 3 Law No.04/L –009 of 21 July 2011 on Amending and Supplementing Law No. 2002/5 on the Establishment of the Immovable Property Rights Register) and Article 30 Law No. 03/L-10 of 17 October 2008 on Notaries. Some real rights are not mentioned as subject to compulsory registration (e.g. usufruct) by Law No. 2002/5 on the Establishment of the Immovable Property Rights Register, but all of them need to be notarized according to Article 30 Law No. 03/L-10 of 17 October 2008 on Notaries.

The Relationship between the Cadastre and the Register of Immovable Property Rights is Unclear

The relevant legislation, since being the Law on Cadastre and the Law on the Registration of Immovable Property Rights, consists of two separate pieces of legislation creating the impression that cadastral records and records in the Immovable Property Rights Register are separate, although they are meant to be integrated records. This is even more evident when the two aforementioned laws are read by foreigners, since in some countries cadastre and land registries are separate and have different functions. The situation is further complicated by the fact that the Law on Immovable Property Rights Registration vests the presumption of accuracy, truthfulness and legality in the Property Rights Registry only, while there is no legal provision vesting a similar presumption in the cadastral records.

Registration of Socially Owned Apartments

Apartments held in social ownership present significant problems for the purpose of their registration, as it is difficult to determine the legitimate holder of the right of use of such an apartment and the 'owner' of the apartment. In other words, certificates from the Register of Immovable Property Rights show as owner the user/possessor, whereas SOEs are the effective owners. Legislative intervention should turn users/possessors into full owners in a way that only one category per person is registered: owners.

Registration Procedures

Procedures between Municipal Cadastral Offices (MCO) concerning the registration of property differ significantly and are not harmonized in practice. MCOs complain about lack of proper guidance and oversight by the Kosovo Cadastral Agency (KCA), while KCA complains about lack of compliance by MCO's with KCA rules and guidelines.

Administrative procedures between MCOs and other municipal departments are not integrated. Applicants for the registration of a property transaction have to

obtain confirmation of payment of municipal taxes and charges from a different municipal department before being able to register a property with a MCO. There is no pooling of information for registration purposes with the MCO that could avoid applicants being required to approach different municipal departments for a single administrative procedure, i.e. the registration of a property transaction.

3.4. The Regime of Construction is in Need of Implementing By-laws and Proper Rules on Demolition

Missing pieces of legislation, lack of clarity and a weak legal framework for demolishing illegal construction characterize the regime of construction in Kosovo. A criticized law on the legalization of illegal buildings is pending approval.

Lack of By-laws

Law No.04/L-110 of 31 May 2012 on Construction and Law No. 04/L-174 of 31 July 2013 on Spatial Planning are the main pieces of legislation regulating the sector; they need to be complemented by further legislation and sub-legal acts currently missing. The lack of implementing measures (e.g. sub-legal acts), in other words, jeopardizes a full application of the existing legal framework.

Lack of Clarity in the Existing Legal Framework may be noticed in Respect of the System of Legal Remedies, where it is not clear which Authority is Competent for Handling Complaints

The appropriate central level authority with which to file a complaint is not defined. In order to challenge administrative decisions taken in administrative procedures contemplated by construction and spatial planning legislation, one has to refer to Article 85 Law Nr. 03/L-040 of 20 December 2008 on Self-Government (Complaints of citizens) saying that 'The complaints of citizens against an administrative act of the municipal organs shall be reviewed in accordance with Law on Administrative Procedure.'

Within Law No. 02/L-28 of 22 July 2005 on Administrative Procedure, article 101.2,[17] while saying that the 'competent public administration body shall either decide to abolish or sustain the challenged administrative act,' does not specify what that 'competent public administration body' is.

Such ambiguity results in the inability of property right holders to fully enjoy an effective remedy to possible violations of their rights as they do not know where to file their complaints. The authority in charge of the legal review of administrative acts issued during the procedures regulated by the legislation on construction needs to be clarified.

The Legal Framework on Demolishing Illegal Construction is Weak

While legalization of illegal construction has been pending for a long time for approval, Law No.04/L-110 of 31 May 2012 on Construction does not refer to legislation on protection of territory (e.g. legislation for preventing natural disasters, for protecting cultural heritage, for identifying areas subject to hydro-geologic phenomena).

3.5. Taxation on Immovable Properties of Displaced Persons is Not In Line with European Property Tax Standards

Displaced people are forced to pay taxes on immovable goods which they do not have the actual disposal of. The current tax law does not differentiate between taxpayers resident in Kosovo and displaced persons whose property was illegally occupied. Furthermore, the legislation in force does not allow persons who can prove that they were not living in their property for a determined period of time the possibility of deducting taxes relating to that period. Based on the current legislation they are held liable for the taxes on property even when their immovable property has been illegally occupied regardless of whether they applied for a legal remedy.

Such practice is not in line with the European property tax principles.[18]

3.6. Problems of Implementation of the Existing Legal Framework

Lack of implementation of existing legislation has been noticed in several areas mainly in relation to:

- Construction, expropriation and privatization of private land, particular rights attached to properties (i.e. use of the properties as financial collateral) and registration.
- Poor application of the current legal framework reflected by slow processing and disposal of civil and criminal claims by courts.
- Insufficient application of civil procedural rules and lack of weighing of evidence, bringing poorly motivated decisions.
- Falsification of property documents, fraudulent property transaction and cadastral records displaced in Republic of Serbia.

These problems are amply addressed by several reports, in particular the 2013 EU Kosovo Progress Report[19] and others.[20] However, lack of implementation is also due to the lack of implementing by-laws. This happens in the fields of construction, spatial planning and registration of pledges. The Law on Allocation for Use and Exchange of Immovable Property of the Municipality also requires by-laws in order to be effective. Unfortunately, the by-laws are missing.

4. Bad Faith Adverse Possession in Kosovo: is Art. 1 Protocol 1 ECHR a Possible Solution to Evidentiary Issues or an Obstacle to Free Market Development?

The relations between the European Court of Human Rights and the notion of adverse possession of bad faith are quite tense. Many CoE Member States do not comprehend the rather negative aptitude of the Court towards the possibility of a bad-faith possessor, for instance one who forged his property titles, becoming a full owner as a result of the lapse of a certain period of time. Unfortunately the principle has been commonly accepted in different legal traditions and civil codes[21] for centuries.

The Court has noticed that the loss of ownership over immovable property through the operation of the doctrine of adverse possession may be seen as 'deprivation of possession' within the meaning of the second sentence of Article 1 of Protocol 1 to the European Convention of Human Rights. Any interference with the peaceful enjoyment of possession must strike a fair balance between the demands of the public interest and the requirements of the protection of the individual's fundamental rights.

Avoiding legal uncertainty can be considered as a legitimate public interest for the legislator to justify acquisition of property rights through adversarial possession. However, this alone does not suffice to establish that the legislation in question has struck a fair balance between individual rights and public aims.

In *J.A. Pye (Oxford) Ltd v. The United Kingdom*,[22] the European Court of Human Rights found that the application of the doctrine of adverse possession with the effect of depriving the applicants of their title to the registered land, 'imposed on them an individual and excessive burden and upset the fair balance between the demands of the public interest on the one hand and the applicants' right to the peaceful enjoyment of their possessions on the other' (Ref. 22, para 75). The Court especially noted that in systems where the owner of the immovable property can be easily identified by inspecting the immovable property register, it is questionable to what extent this kind of interference with the right to peaceful possession could be seen as necessary and proportionate.

Article 40 of Law on Property and Other Real Rights No. 2009/03-L-154 of 25 June 2009 ('A proprietary possessor acquires ownership of an immovable property, or a part thereof, after twenty (20) years of uninterrupted possession. 2. A proprietary possessor acquires ownership of an immovable property, or a part thereof, after ten (10) years of uninterrupted possession and if he is registered as the proprietary possessor in the immovable property rights register and no objection against this registration is filed during this period') has been harshly criticized for not framing the notion of bad faith adverse possession within the much stricter criteria laid down by ECtHR.[23] Concerns have also been expressed in relation to the fact that Article 40 should be tailored to poor court practices in adjudicating adverse possession cases and fraudulent property transactions, which are, unfortunately, a common feature of Kosovo.

According to the OSCE, such transactions take place using the following methods:[24] (a) with authorizations verified with a false court stamp; (b) with authorizations verified in courts outside Kosovo with a regular court stamp but by using falsified identification documents; (c) by verifying contracts before Kosovo courts using falsified identification with the name and surname of a real owner; and (d) by using falsified court judgments to register property in cadastral books. The transactions usually involve the following three parties: an alleged real owner of the property, most often a displaced person not in contact with or with no factual possession of the property; an alleged falsifier of the authorization, very often one of the parties to the sales contract; and a purchaser of the land, whether *bona fide* or not.

If, on the one hand, the notion of adverse possession of bad faith may be reformulated in the light of similar provisions of European Civil Codes, the impossibility to verify ownership titles will soon require a political solution to the problem, which

may crystallize the current situation of ownership titles. This could happen when the proprietary interests of foreign businesses, which are starting to penetrate in the region, will be challenged. In such a case the doctrine of bad faith adverse possession may be the only way out.

5. The Conflict of Legal Traditions in Kosovo

The different international organizations and donors active in Kosovo have brought with them their legal traditions and contributed to creating an even more incoherent legislative framework.

A confused aptitude in respect of the notion of real rights and the contents of a possible civil code of Kosovo is evident when reading documents such as *IPA 2013 Annual Programme: Support to the Rule of Law: 02 – 2013/02* published by the European Union.[25] This document summarizes the EU-envisaged intervention in the area of property and civil code:

> Starting from the current state of legislation and taking into account established case law and other judicial practice, the fields that will be incorporated into the civil code will include the classic areas of civil law, as for example: institutes of the general part of civil law; property law with ownership issues being the central institution of the social and legal order and property rights resulting from easement, the law on mortgage; the law on obligations; the law on inheritance; the family law, as well as other subjects closely related to classic civil rights.
>
> More specifically, the civil law codification will encompass the following laws: Law on Obligation, Laws on Family, Laws on Inheritance, Law on Mortgage, Laws related to Mediation and Arbitration, laws related to property rights (i.e. 2008 Law on Property Rights, 2012 Law on Obligatory Relationship).

Interestingly enough, there is not such a civil code within the continental legal family. It is well known that civil codes revolve around two models, the institutional one, which generally has three large parts: Law of Persons (*personae*); Law of Things (*res*); Issues common to both parts (*actiones*) and the pandectist, normally divided into a General part; Law of Obligation; Law of Real Rights; Family Law; Law of Inheritance. From a reading of the aforementioned European text, the law on mortgage seems to be a separate right other than the notion of real right (*res*) to which it belongs. Mediation and Arbitration are related to civil procedure law rather than substantial law, which is the object of civil codes.

A 'system' somewhat resembling the German Civil Code, apart from the lack of a general part, is already in place in Kosovo and is centred on four laws. These laws are: Law on Obligations No. 04/L-077 of 19 June 2012; Law on Property and other Real Rights No. 2009/03-L-154 of 25 June 2009; Law on Family No.2004/32 of 16 February 2006 and Law on Inheritance No. 2004/26 of 4 February 2005.

Whereas the Law on Property and other Real Rights closely resembles the property part of the German Civil Code, the two real rights of guarantee have been regulated autonomously by Law no. 2202/4 on Mortgages of 20 December 2002 and

UNMIK/REG/2001/5, 7 February 2001 on Pledges. These two laws are clearly based on common law models and cause not few headaches to local practitioners. The main problem with them is that they have been enacted before Part VI of Law on Property and other Real Rights No. 2009/03-L-154 of 25 June 2009, which covers the same matter as, respectively, Law no. 2202/4 on Mortgages of 20 December 2002 and UNMIK/REG/2001/5, 7 February 2001 on Pledges. Thus, UNMIK legislation is to be regarded as implicitly repealed under the *lex posterior* principle. However the confusion among local and international lawyers is high, since it is still erroneously regarded as in force according to many international lawyers.[26]

6. Conclusion

An effective property rights protection regime is essential for the economic development in Kosovo. Nevertheless, balancing human rights protection and proper adjudication of property with free market necessities is extremely difficult. The property law regime is fragmented since it results from a variety of legal texts promulgated by the various authorities administering Kosovo over the past few decades. Divisions between the European and American donors and the tendency to impose models that are alien to the continental law tradition, which Kosovo belongs to, create a clash of legal traditions and cause not few headaches for local practitioners. Poor legal education and an international law status, which is still not yet perfectly defined, complement an already complex situation.

A massive influx of financial resources in order to reform property legislation has just started in Kosovo, following the launch of two technical assistance contracts, supported respectively by USAID and Europeaid. Streamlining legislation that is in force is a necessity and should be preceded by the setting up of a strong coordination mechanism among international donors. This has to be done in order to avoid inconsistencies and overlap. The mechanism may be substantiated in a specific Memorandum of Understanding (MoU) signed by donors active in the field of property and ensuring proper communication, joint actions in respect of other stakeholders (e.g. government) and exchange of technical documents (e.g. strategic papers, cross-reference tables, draft-legislation, etc).

Any revision of property regime should also be preceded by an overall assessment of existing legislation in the light of European standards and the adoption of a clear model, although adapted to local necessities. Belonging to the former Yugoslavia, the legal regime of property in Kosovo has been influenced by Austrian- and Swiss-oriented legislation, which could be still used as a paradigm. In order to adopt a coherent approach, an overall plan for reforming the property law sector should be the basis for a reformation of the sector. The plan may consist of a list of basic principles and provide the overall structure of the new legislation/amendments to be drafted and clearly list the old legislation that will be repealed. The plan may be embodied in a piece of framework legislation.

No reform will be accepted without the proper involvement and the provision of capacity building of local authorities. Some of these authorities are understaffed, such

as the office of the Property Rights Coordinator at the Prime Minister's Office. The Coordinator has already been granted the mandate to develop relevant operational rules in the fields identified as the main areas of property with a view to ensuring coordination and cooperation with line ministries and other institutions, which need to be involved in the process. Other key players are the Ministry of Justice together with other ministries (for instance the Ministry for Spatial Development), and a working group of local experts, which started to work in October 2013.

Owing to the high number of stakeholders, political stability and a common goal among international organizations and institutions governing the region (EULEX, the Special Chamber of the Supreme Court of Kosovo on Kosovo Trust Agency Related Matters, Kosovo Property Agency (KPA), Kosovo Property Claims Commission, OSCE), some of which are in the process of being phased out, are the last but not least important aspect to be considered. This indeed could be the main challenge for a reformation of property rights in Kosovo.

References and Notes

1. Litigating ownership of immovable property in Kosovo, OSCE Prishtina, April 2009, p. 4 available at http://www.osce.org/kosovo/36815.
2. This is because German, Austrian and Swiss Civil Codes were enacted much later in light of the fact that the idea of a Civil Code was associated with the much-despised French Revolution.
3. Official Gazette SFRY, No. 6/80.
4. Official Gazette of the Socialist Federal Republic of Yugoslavia 6/1980, 30 January 1980.
5. Official Gazette of SAPK, No. 11/83, 29/86, 42/86.
6. UNMIK Regulation No. 2003/13, Sections 2–9, as amended by UNMIK Regulation No. 2004/45, Section 2, and implemented by Administrative Direction No. 2005/12, Sections 2 and 3.
7. UNMIK Regulation No. 2003/13, Section 2.1, as amended by UNMIK Regulation No. 2004/45, Section 1.
8. UNMIK Regulation No. 2003/13, Sections 1 and 3.1.
9. UNMIK Regulation No. 2003/13, Sections 3.2 and 6.
10. New Law on Property and Other Real Rights No. 2009/03-L-154 of 25 June 2009 and non-incompatible provisions of antecedent laws, e.g. FRY Law on Basic Property Relations of 15 September 1980 at Official Gazette SFRY, No. 6/80, FRY Kosovo Law on Transfer of Real Property of 1986, FRY Law on Housing Relations at Official Gazette of SAPK, No. 11/83, 29/86, 42/86, FRY Law on co-ownership of apartments Official Gazette of SAPK 42/80, 22/87, etc.
11. See CD-ROM Applicable Laws in Kosovo – Civil and Administration Field, GIZ, Prishtina 2011.
12. Law on the Privatization Agency of Kosovo no. 04/L-034 of 31 August 2011, Official Gazette of the Republic of Kosovo/ No. 19/21 September 2011, Prishtina.
13. A right that is comparable to the one regulated by Article 264 of the Law on Property and other Real Rights.
14. Under previous legislation that was not possible.
15. Official Gazette of the Republic of Kosovo 28/04.06.2008.

16. Article 17, Law No. 03/L of 20 February 2008 states that municipalities have exclusive powers in the following areas: (a) local economic development; (b) urban and rural planning; (c) land use and development; (d) implementation of building regulations and building control standards; (e) local environmental protection; (f) provision and maintenance of public services and utilities, including water supply, sewers and drains, sewage treatment, waste management, local roads, local transport, and local heating schemes; (g) local emergency response; (h) provision of public pre-primary, primary and secondary education, including registration and licensing of educational institutions, recruitment, payment of salaries and training of education instructors and administrators; (i) promotion and protection of human rights; (j) provision of public primary health care; (k) provision of family and other social welfare services, such as care for the vulnerable, foster care, child care, elderly care, including registration and licensing of these care centres, recruitment, payment of salaries and training of social welfare professionals; (l) public housing; (m) public health; (n) licensing of local services and facilities, including those related to entertainment, cultural and leisure activities, food, lodging, markets, street vendors, local public transportation and taxis; (o) naming of roads, streets and other public places; (p) provision and maintenance of public parks and spaces; (q) tourism; (r) cultural and leisure activities; (s) any matter which is not explicitly excluded from their competence nor assigned to any other authority.
17. Article 101 ('Appeal against and revocation of the administrative act') is the one we have to dwell upon: 101.1. The initiative for the abolishment of the administrative act may come from the competent body of the public administration or it may come as a consequence of appeal of the interested party. 101.2. Upon submission of appeal against the administrative act by the interested parties, the competent public administration body shall either decide to abolish or sustain the challenged administrative act.
18. In some European countries users are made responsible for paying the property tax when they use property owned by the state or when the owner is unknown. See: Richard Almy, *A Survey of Property Tax Systems in Europe* (Final draft).
19. Commission Staff Working Document Kosovo, 2013 Progress Report Brussels, 16 October 2013 SWD(2013) 416 final.
20. 'Draft Strategy Addressing Property Rights Issues of the Communities in Kosovo 2014-2016', issued by the Office of the Property Right Coordinator within the OPM. 'Fraudulent Property Transactions' OSCE Kosovo Report, Prishtina, March 2009, available at http://www.osce.org/kosovo/38523, 'Conflicting Jurisdiction in Property Disputes', OSCE Kosovo Report, Prishtina, April 2009, available at http://www.osce.org/kosovo/37717, 'Litigating Ownership of Immovable Property in Kosovo, OSCE Kosovo Report, Prishtina, April 2009, available at http://www.osce.org/kosovo/36815, 'Use of Interim Measures in Civil Proceedings in Kosovo' Issue 11, OSCE Kosovo Report, Prishtina, December 2010, available at http://www.osce.org/kosovo/74879, 'Evidentiary Procedure in Civil Cases in Kosovo', Issue 2, OSCE Kosovo Report, Prishtina, October 2011, available at http://www.osce.org/kosovo/83301, ' 'Execution of Judgments', OSCE Kosovo Report, Prishtina, January 2012, available at http://www.osce.org/kosovo/87004.
21. Stricter provisions on the bad faith adverse possession may be found in France (Articles 2229 and 2262 Civil Code); Germany (Section 900 BGB), Netherlands (Article 3:105(1) Civil Code); Sweden, Hungary, Italy, Spain etc. See *Adverse Possession, Report by the British Institute of International and Comparative Law*

for Her Majesty's Court Service, September 2006, London. Roman Law was reluctant to accept it. Only the Digestum started to ponder the idea to adopt the *usucapio rei quasi furtivae*.

22. Application no. 44302/02, Judgment of 15 November 2005.
23. See *Acquisition of Property Through Prescription and the Illegal Occupation of Immovable Property of IDPs from Kosovo*, *Further Support to Refugees and IDPs, EuropeAid/129208/C/SER/RS*, Republic of Serbia, November 2012.
24. Human Rights and Communities Department, Legal System Monitoring Section, Monthly Report – March 2009.
25. http://ec.europa.eu/enlargement/pdf/kosovo/ipa/2013/ipa_2013_pf2_support_to_the_rule_of_law.pdf.
26. See CD-ROM Applicable Laws in Kosovo – Civil and Administration Field, GIZ, Prishtina 2011. The same mistake may be found in EULEX Property Related legislation collection at https://www.google.com/#q=Property-Related+Legislation+adopted+as+from+15+June+2008+eulex or on another EULEX website at http://www.eulex-kosovo.eu/training/?id=13.

About the Author

Marco Roccia, after practising law as a lawyer in Turin, Italy, joined the University of Kent at Canterbury, UK, as associate lecturer. He worked as a legal approximation expert in several technical assistance projects. As resident advisor in the EU-funded IPA 'Support to the capacities in the Ministries of Justice in Bosnia and Herzegovina for strategic planning, aid co-ordination and European integration,' he provided support in transposing chapters 23 (Judiciary and fundamental rights) and 24 (Justice, freedom and security) of the EU *acquis* in Bosnia and Herzegovina. As team leader and key expert in 'EU Technical Assistance to the design of project in the area of Civil Code and Property Rights in Kosovo under IPA 2013', Mr. Roccia produced a general assessment of property rights and civil legislation and practice in Kosovo. He also developed a set of recommendations for reforming the sector and prepared detailed Terms of Reference for setting up a task force, which is currently implementing European Union 'IPA 2013 service contract on Civil Code and Property'.