

Legal Basis for Acquisition of Property Right to Immovable Property under Positive Legislation in Kosovo

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Abstract

The purpose of this paper is through a combination of descriptive, comparative and analytical methodology to address the way of gaining ownership in Kosovo in order to create a critical attitude on this issue. As the most important part, the legal framework in our country and the legislations of countries that had a similar problem, which have concluded this process, have been addressed. In order to create a clear picture and to avoid the risk of deviation related to the topic, we have focused only on data from reliable official sources, as well as reliable works. On the basis of the intended purpose are defined the objectives of this paper that are related to determining the legal nature of this way of gaining ownership; as provided in domestic law; to what extent and what developments has the jurisprudence brought in terms of their treatment; how the development trend of these is presented. So, this paper tries to analyze the legal framework as well as the relations created with the property right, the difficulties that the owner in a certain period of time had with his private property, to dispose of it as he wishes, to possess and use it, and exclude others from any influence, as a result of discriminatory legislation and finally the restoration in place of the rights denied and unjustly violated to the former owners. To achieve this we will review the provisions of Law no. 03 / L-154 on Property and Other Property Rights and the Law on Basic Legal-Property Relations, regarding ownership and the aspect of court practice. This analysis will highlight the innovations contained in the Law in the field of property and property-legal relations, focusing especially on the legal gaps and shortcomings that appear here and there during the practical implementation of legal provisions that present difficulties in the work of judges and other lawyers who deal professionally with the implementation of this law.

Keywords: Ownership, legislation, acquisition of property, protection of property.

Introduction

In the polarized political context of the 1980s, when there was a political commitment of Albanians to their national rights, the implementation of the Law on Basic Legal-Property Relations and many other laws proved to be discriminatory. Any property contract concluded between members of the Albanian and Serb communities was subject to the control of state bodies and had to be approved by the property affairs directorate¹. Property transactions

¹Department of the Ministry of Finance of the Republic of Serbia.

between the Albanian and Serb communities were banned by this directorate because, according to this directorate, the ethnic composition of the population would change and this was forcing members of the Serb community to leave Kosovo.

Despite this, many Albanians and Serbs in Kosovo ignored these new laws and made contracts that did not comply with legal requirements. Albanians bought property from Serbs on the basis of 'unconfirmed contracts', which turned out to be very problematic later, when these pre-1999 transactions were tried by local courts and the international community to present a true picture of ownership. "As a result of these 'contracts', a large number of informal property transactions took place and opportunities for corruption and manipulation of abandoned properties were created during the post-conflict period."²

After the withdrawal of the state administration of Serbia, after June 1999, a very difficult situation was created regarding the issues of property rights and property conflict. Throughout this post-conflict period, Kosovo Serbs and Roma fled their properties and illegal occupants settled in abandoned houses that later bought or sold them to other persons.

Given this context, a very confusing situation was created regarding property issues and the international community faced enormous challenges in addressing the issue of property rights and property restitution in post-war Kosovo.

Throughout the post-war period, the international community established a number of institutions for the urgent treatment of this issue. Some of the institutions, such as the reformed local courts and the police, were created to be temporary, ad hoc administrative bodies, dominated by the international community. All relevant institutions mentioned above have played and continue to play a key role in property restitution issues. However, an important point to keep in mind throughout this description is the relative lack of a coordinated and cooperative approach to the issue of property restitution.

The weakness of the judicial system in civil proceedings is particularly evident in cases involving property claims. This comes as a result of many reasons. One of the main reasons is the legacy from the past regarding property issues. As a result of the political circumstances in Yugoslavia, and the legislation by which ownership was regulated, there has always been a fragile culture and practice regarding property transactions in which laws have not been complied with. Such a reality has directly affected the judicial system and its approach to the adjudication of cases.

The specific problems faced by the courts in civil proceedings relating to property transactions are numerous. One of them is the large number of unresolved cases in the courts. In 2008 alone, there were 49,100 unresolved civil cases, more than 85 percent of which concerned property.³

The Notion of Ownership

The right to property is one of the most important legal institutes of civil law in general, respectively the most important legal institute of property law in particular.⁴ The right of ownership even in the latest literature is considered a basic (main) legal-property institute⁵,

²Tawil, Tëdrejtatpronësore në Kosovë: Një trashëgimi e vështirë e shoqërisë në tranzicion (2009), Qendra Ndërkombëtare për Drejtësi Tranzicionale.

³ See Kosovo Judicial Council, Third Quarter Report, 2008.

⁴ Aliu, A. (2014) Edrejtasendore, Prishtinë pg.91.

⁵ Statovci, E. (2009). Pronësia – Origjinadhezhvillimi, Prishtinë pg.279..

respectively as a fundamental right in property law⁶. The right of ownership is a subjective right which has a more universal legal character than all other civil, respectively property rights.

In the science of civil law it has been said more than once that the right of property is a subjective right of an absolute character, since it acts against all (erga-omnes)⁷. This scientific opinion cannot stand as such, especially in the circumstances of socio-economic changes which have affected the change of content and restriction of property authorizations of the property right holder, especially in immovable property, on the grounds that the right of ownership is limited within the property authorizations which belong to the holder of the right of ownership and the legal limit. Property authorizations which belong to the property right holder are limited by positive legal provisions.⁸ Ownership is an ancient legal institute, which was born with the birth of the law itself. During the historical development, the ownership has acquired character and content according to the stages of the development of the society, depending on the change of the character of the relations in production, respectively the economic-social development.

According to Roman law, ownership contains the property authorizations of the owner to use, use and dispose of an item within the limits of the law - iusutendi, iusfruendi et iusabutendi re sua, guatenusjuris ratio patitut, respectively ownership is the full power over thing (proprietasest plena in re potestas).⁹

Also, the provisions of the Constitution guarantee the right to property; therefore, ownership is considered a constitutional category¹⁰ that does not apply to other property rights which are legal categories which are regulated only by law. According to the legal provisions of Law no. 03/L-154 on Ownership and Other Property Rights article 18, ownership is defined as follows: "Ownership is the full right to an item. The owner may dispose of the thing as he wishes, in particular to own and use it, to dispose of it and to exclude others from any influence, unless it is contrary to law or to the rights of a third party."¹¹ Meanwhile, Article 9 of the Law on Basic Legal-Property Relations states that, "A citizen may have the right of ownership over items that serve to meet his personal needs and interests, as well as the personal needs and interests of his family members. And that "The citizen, within the limits set by law, may have

⁶Galgano.F,(2006). E drejta private, Tiranë pg.220

⁷Shehu.A, (2006).Pronësia, Tiranëpg 9

⁸See: International Conference on Property Legislation and its Reform in Kosovo, organized by the Kosovo Judicial Institute in Prishtina on 28-29 June 2010, held at the Grand Hotel, where participants in this Conference were professors of civil law of the region as well as professors and assistants from the Civil Department of the Faculty of Law-UP, and from the Kosovo case law was a participant, collaborator and lecturer at the Kosovo Judicial Institute Mr. EkremAgushi, judge at the District Court in Pristina, currently a lawyer in Pristina.

⁹Galgano.F, (2006) *E drejta private, Tiranë,pg. 140.*

¹⁰ Constitution of the Republic of Kosovo, Article 46 paragraph 1, which states, "The right to property is guaranteed", paragraph 2, "Use of property is regulated by law, in accordance with the public interest" and in paragraph 3, No one will is arbitrarily deprived of property ”.

¹¹ Law no. 03 / L-154 on Ownership and Other Property Rights dated 25.06.2009 was announced by the President on 15.07.2009 and entered into force 15 days from the day of publication in the official gazette, no. 57/2009, 4 August 2009, respectively entered into force on 20 August 2009, article 18 p.3.

the right of ownership over the family residential building, the building for rest or relaxation and the apartment as a separate part of the building to meet personal and family needs. These rights from paragraphs 1 and 2, the citizen can exercise "only under the conditions and in the manner prescribed by law."¹² Meanwhile, Article 10 of the same law states that, "The citizen, within the limits set by law, may have the right of ownership over agricultural land and other land, forests and forest land, business buildings and business premises, as well as over work tools that serve for the independent exercise of personal work activities to generate income".¹³

Property - Legal Legislation

Property issues related to movable and immovable property in post-war Kosovo are regulated by the Law on Basic Legal-Property Relations and other applicable laws according to regulation no. 1999/24, on the Law in force in Kosovo¹⁴ where the courts in property cases related to movable and immovable property have decided with a court decision. With the same legal-property basis but with some differences or better to say with innovations and property advancements, a more useful harmonization has been made with the new provisions brought by Law no. 03/L-154 on Property and Other Real Rights of the Republic of Kosovo¹⁵ where for the first time the issue of property and other real rights in general is regulated. This was a need of the time and an alternative to resolving property disputes created as a result of the discriminatory legislation of Yugoslavia, with which Kosovo courts, in cases involving its ownership and certification, were facing numerous difficulties in court decision making.¹⁶

In everyday life ownership and possession are confused, and these two institutes of property law often take on the same meaning without being distinguished by their juridical-civil content. Such substantive confusions are often encountered in court practice. In disputes which have to do with the property claim for the return or surrender of the property in possession (*actio reivindicatio*) which have to do with the obligation of the respondent party to hand over to the plaintiff in possession a certain thing - immovable property where they are often encountered the following formulations:

"The defendant is obliged to hand over the possession to the plaintiff." This wording is not fair, because ownership as it is known is a legal relationship which is created between the persons-subjects of law related to an object and as such is an abstract meaning (intangible - not bodily).

Ownership is the legal power of a person-subject of law in an individually determined thing¹⁷. From this we conclude that ownership cannot be handed over because it does not represent a bodily thing, but ownership is an abstract legal meaning which contains property authorizations of a person who has the right to dispose of a certain thing freely at his own will, especially that to possess and use it as well as to exclude others from any influence which is not contrary to the law or the rights of a third person, article 18 al.1 of the Law no. 03/L-154 on Property and Other Real Rights.

Possession is the *de facto* power of a person over a certain thing, who owns and uses this thing himself (direct possession) or when the *de facto* power over a certain thing is

¹² Law on Basic Legal-Property Relations, Article 9

¹³ Ibid, Article 10

¹⁴ Law on Legal-Property Relations and other applicable laws according to regulation no. 1999/24, on the law in force in Kosovo

¹⁵ Law no. 03 / L-154 on Property and Other Real Rights of the Republic of Kosovo

¹⁶ Ibid

¹⁷ Aliu.A, (2014).E drejtasendore,Prishtinëpg 59.

exercised through another person (indirect possession) Articles 103 and 109 of the Law no. 03/L-154 on Property and Other Real Rights and when the person who possesses an item which is in his ownership is a property possessor article 110 of Law no. 03/L-154 on Property and Other Real Rights.¹⁸

Various disputed issues related to ownership, servitude, possession, mortgage, pledge and other property rights, the courts will adjudicate in accordance with the provisions of the above law and other laws applicable in the Republic of Kosovo.

The Law on Property and Other Real Rights has brought innovations related to property, servitude and other real rights. All these innovations are as a result of major changes in the character and content of property relations in post-war Kosovo.

Acquisition Of Property

Kosovo, based on its past, needs a legal framework that would enable the protection of property rights and the possibility of solving the problems created by the discriminatory legislation of Yugoslavia, for an economic development and transformation into a market economy.

Law no. 03/L-154 on Property and Other Real Rights of the Republic of Kosovo, has regulated the legal bases for acquiring the right of ownership in immovable property with the provisions of article 36 in al. 1 of this legal provision, which provides that the transfer of ownership of immovable property requires a valid legal action between the alienator and the winner as a legal basis and the registration of the change of ownership in the register of immovable property rights. This legal provision is unclear and not rightly formulated with a linguistic error which requires change and completion, because during the practical implementation it can cause ambiguity and dilemmas when adjudicating disputed issues in property disputes, because the legal action-contract is valid. for the sale and purchase of a certain immovable property, represents the legal basis for the acquisition of ownership in that immovable property, while the registration of the immovable property which has been the subject of the contract for sale and purchase represents the way to acquire the right of ownership in the immovable property. The correct wording of this provision would be that the right of ownership in immovable property is acquired on the basis of the legal action-contract and by registering the right of ownership in the relevant public register for registration of immovable property in the Republic of Kosovo. In al. 2 of the cited article the law brings a complete innovation which did not previously exist in the Law on Basic Property-Legal Relations.¹⁹

In disputed situations related to a property dispute in immovable property, the courts will approach the practical application of this provision by verifying these facts important for fair decision-making and that:

- That between the litigants there is a sales contract in written form and certified in court, notary or consular representation of the Republic of Kosovo.
- That the disputed immovable property which is the subject of the sale and purchase contract is registered in the immovable property register.

From what was stated above, it follows that these legal solutions facilitate the work of

¹⁸ Law no. 03 / L-154 on Property and Other Real Rights, Article 103, 109 and 110

¹⁹ Articles 32a-32c, Law on Immovable Property Transfer, Official Gazette of the Socialist Autonomous Province of Kosovo 45/1981 and 29/1986 (hereinafter Kosovo Law on Immovable Property Transfer), "Immovable Property Transfer Prohibited by citizens and civil legal persons who have the right to property, if the transfer of immovable property is made between citizens of different nationalities from the territory of the Socialist Autonomous Province of Kosovo."

the courts for a fair and lawful adjudication regarding the claim filed for the acquisition of the right of ownership based on the legal action-contract.

To avoid the requirement of the contract and to avoid the problems created by the past, Law no. 03/L-154 on Property and Other Real Rights of the Republic of Kosovo, Article 40 on the acquisition of ownership by prescription states that, “A person who in good faith has twenty (20) years in uninterrupted possession of an immovable property or a part of it, acquires ownership in it. The doctrine of winning prescription, which is embodied in this provision, is often applied by the courts, and through it many individuals in Kosovo acquire ownership through proof of possession for a certain period of time under certain conditions. The problems that arise have to do with the fact that Kosovo has a post-conflict legal environment where many landowners are missing or missing and that winning prescription can be an opportunity for wrongdoers to increase fraudulent transactions.

As the law as mentioned above does not contain special provisions for regulating the acquisition of the right of ownership in immovable property on the basis of an oral or written contract and not certified in court or any other competent office, I am of the opinion that all property disputes related to the acquisition of ownership in immovable property on the basis of oral and written contracts, but not certified, be resolved in accordance with the current court practice based on Article 40 of Law no. 03/L-154 on Property and Other Real Rights of the Republic of Kosovo and the provisions of Article 51, paragraphs 1,2,3,4, and Article 52, in conjunction with Article 4 of the Law on Obligations of Kosovo.²⁰

The law also does not contain special provisions for the acquisition of the right of ownership in immovable property based on the decision of the state body in the manner and conditions provided by other laws. Judicial practice regarding property disputes which are based on the acquisition of property on the basis of the decision of the state body will face dilemmas in the absence of this legal basis for the acquisition of property rights which with the Law on Basic Legal Relations - Basic Property is regulated by the provisions of Article 20 al. 2. In such legal situations, the courts will adjudicate the disputed cases according to the current practice and in accordance with other laws applicable in the Republic of Kosovo.

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- That between the litigants there is a sales contract in written form and certified in court, notary or consular representation of the Republic of Kosovo.
- That the disputed immovable property which is the subject of the sale and purchase contract is registered in the immovable property register.

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²⁰ Law no. 04 / L-077 on Obligations Relations of Kosovo, Article 51, paragraphs 1, 2, 3, 4 and Article 52, in conjunction with Article 4

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I consider that it is important to examine the legal basis of the acquisition of ownership in immovable property with a statute of limitations for winning-possession provided by the provisions of Article 40 and statute of limitations through registration, provided by the provisions of Article 41. In these legal situations which relate upon acquisition of the right of ownership on the basis of statute of limitations, the courts will fully comply with the provisions of al. 1 of the cited article, while the provision of al. 2, is unclear and this in court practice will cause dilemmas regarding the adjudication of contentious issues which relate to the acquisition of the right of ownership in immovable property on this legal basis. The ambiguity of the mentioned provision is expressed in the fact that the possession as factual power over the thing of a certain person or even property possession is not registered in the public registers for the registration of immovable.²²

What is worth emphasizing in this case, remains the duty of the courts to take care of violations of procedural law when it comes to property cases and not to make their decisions accompanied by deficient reasoning and incorrect weighting of evidence. Do not give more weight to the testimony of interested parties than the evidence established by law. The appointment of temporary representatives for the missing defendants should be done by following the appropriate procedures, especially when it comes to property cases, of the appointment of a temporary representative, as this may be a violation of human rights, in terms of standards of fair trial and property ownership.²³

Property Protection

²¹Law no. 03/L-154 on Property and Other Real Rights

²²Ibid

²³ OSCE, (2009) Review of Immovable Property Ownership Cases in Kosovo, <https://www.osce.org/files/f/documents/9/a/36816.pdf>

Due to the special legal-civil importance of the institute of property in legal science and of the legislator, an extraordinary interest has appeared in finding the most appropriate legal remedies for the protection of the right to property. Property protection is one of the most serious and complex issues that many legal systems have dealt with - civil codes, most of which have inherited the property protection system from the Roman property protection system. The Roman legal system of property protection has penetrated into modern legislation not only in terms of naming property lawsuits but also in terms of their content.²⁴

Ownership is protected by a lawsuit which is submitted to the competent court to implement the contentious procedure and to make a court decision. Property lawsuits according to the legal system applicable in Kosovo, the Law on Basic Property-Legal Relations is: restitution lawsuit - *actio reivindicatio* (Article 37), public lawsuit - *actio publiciana* (Article 41) and denial lawsuit - *actio negatoria* (Article 42).²⁵ While the Law on Property and Real Rights has superficially regulated these property lawsuits in Chapter VII, Article 93. With the provisions of the cited article, the return lawsuit is named as the request for the return of the thing. This legal provision stipulates that the owner can request the return of a certain item from anyone who does not have the right of possession. We find elements of a negative lawsuit in the provisions of Article 94 labeled as objections of the possessor, while elements of a public lawsuit are not found in the legal provisions of the Law no. 03/L-154 on Property and Real Rights. The plaintiff - the holder of the right of ownership to successfully realize the judicial legal protection with the lawsuit of return of the certain thing is obliged to prove the fact that on the thing, the return of which he requests by surrender in possession he enjoys the right of ownership. The examination of this fact in the disputed property is done with evidence which falls on the plaintiff.²⁶

In disputes of delivery - return of immovable property in possession by the possessor who possesses the immovable property without right, the plaintiff is obliged to present to the court the proof of the right of ownership in the disputed immovable property and the ownership certificate to prove the registration of this immovable property in the relevant public registers for the registration of immovable property. If the disputed immovable property, the return of which is requested by the plaintiff in possession, is not registered in the immovable property registers, then in order to prove the ownership, the plaintiff submits evidence - documents related to the manner of derivation - derivatives of gaining ownership. In court practice are presented such as: contracts for sale, various court decisions and other legal acts which certify the origin-derivatives of disputed real estate. Judicial disputes related to this lawsuit, in judicial practice are serious and complex and for this reason even in civil law science are rightly called mischievous disputes (*probaciodiabolica*).²⁷

Conclusion

From the reviews presented above regarding ownership and protection of property according to Law no. 03/L-154 on Property and Other Property Rights and the Law on Basic Legal-Property Relations, the law on property and other property rights - aspect of case law, we conclude that these legal-property issues which were previously were regulated by the Law on Legal-Property Relations, as a result of the then discriminatory legislation, which law was

²⁴Statovci.E, (2009).Mbrotjta e Pronësisë - comparative study Prishtina pg. 211.

²⁵Hetemi. M, (2002) E drejta me njohoritëthemeloretësëdrejtësafaristePrishtinë fq.190.

²⁶Agushi. A (2013) Sigurimetdheshpërblimi i demit Prishtinë

²⁷*Probaciodiabolica* (Latin: "devil's proof", "diabolical proof") is a legal requirement to achieve an impossible proof. Where a legal system would appear to require an impossible proof, the remedies are reversing the burden of proof, or giving additional rights to the individual facing the *probaciodiabolica*.

applicable to UNMIK regulation, for the law applicable in Kosovo had created insurmountable difficulties, because many de facto owners did not have a legal basis for the registration of their properties in the Register of Immovable Property Rights and the possibility to be the owner of these properties. Law no. 03/L-154 on Property and Other Property Rights and Kosovo courts that have adjudicated disputes of this nature have brought court decisions which have been applicable to case law, recognizing the actual owners the right to property and registration its in the Register of Immovable Property Rights.

So, after the war in Kosovo, the ownership and protection of property and the aspect of case law, have undergone changes in terms of new legal regulations which brought changes that were more than necessary with Law no. 03 / L-154 on Property and Other Property Rights, which in the best possible way solved many problematic issues created by the discriminatory provisions of Yugoslavia, but at the same time increasing the possibility of misuse by wrongdoers.

Finally, the paper aimed to make a reasonable contribution, in clarifying some dilemmas that were being created by these innovations, both in theory as well as in legal practice and in the work of the courts in general, offering readers the views of case law regarding the implementation of these laws.

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