

Legal Aspects on the Creation of a Modern Cadastre in Kosovo

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Key words: Cadastre, Land Law, Legal, Real Property, Ownership.

ABSTRACT

Kosovo Cadastral Agency (KCA) was founded in June 2000 in and can be regarded as an mapping and cadastral authority. One of the most urgent issues is to create a real property rights register in Kosovo. The legal base for this task is weak. All relevant acts in this field are from the socialist period and ill suited to fit to a market economy. There is no clear definition either of real property or of ownership. It is not clear if private ownership to land exists or if there only is a kind of strong use-right. A special problem constitutes the concept of “social ownership”, which only existed in former Yugoslavia. It can be interpreted as that the land was owned by all and nobody. Ownership rights are more problematic than in most other parts of former Yugoslavia as “Land Books” never were introduced in the province. Because of that “owners” to land mostly have to be derived from so called possession lists, principally aimed for taxation purposes and not necessarily showing the owner. The situation is not facilitated from the unclear constitutional situation and is further complicated as a lot of people fled or were driven away during and after the war in 1998/1999. The need for clear definitions and the introduction of private ownership is urgent. Therefore a new modern legislation must be adopted.

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1. INTRODUCTION

This paper deals with the challenge to provide Kosovo with a modern legal framework in the real property field. A special emphasis is devoted to the introduction of a modern legal register. A special problem in solving these urgent questions depends on the unclear constitutional situation. Who can, will or dares take controversial decisions?

It shall be noted that conclusions and proposed measures in this paper show the author's own opinion.

2. REASONS FOR CREATING A REAL PROPERTY RIGHTS REGISTER IN KOSOVO

Security in ownership is a prerequisite for a functioning land market. Real property rights must be registered and the information easily accessible. The authorities should guarantee the content of the register.

There is no register of real property rights in Kosovo. Even with the establishment of a real property rights register, it would for the time being not be possible to guarantee other than limited parts of it due to obscurities in ownership. The register will until the content is fully reliable serve as a compilation of existing real property rights and will be a base for the implementation of necessary changes in the land legislation. The register will also constitute the core of a unified register, where all important data on land can be collected.

What are needed to create a dynamic land market is that the concept of real property is defined and that the ownership issues are solved. This will consequently demand a transitional law, which defines ownership and states how the transition from collective into private ownership will be implemented. In connection with the transitional law the question on restitution must be solved. Real property also ought to be defined in an amendment to Law on Basic Property Relations. A Real Property Rights register can provide the information needed for this process. With the register as a base ownership rights could be given to the possessors¹ after a certain period, during which it should be possible to claim better right to the real property. When that period has passed the authorities can guarantee the rights that are not disputed.

3. KOSOVO CADASTRAL AGENCY (KCA)

Kosovo Cadastral Agency was founded in the June 2000. The Agency is a state authority responsible for matters relating to the reestablishment of the cadastral information system in

¹ The term possessor will be discussed later in this paper

Kosovo. Another task for KCA is to supervise and educate the staff of the Municipal Cadastral Offices (MCO).

KCA shall also initiate changes in the legislation concerning real properties and real property rights.

4. PRESENT LEGAL SITUATION

Kosovo's autonomy within the former Republic of Yugoslavia (strictly within Serbia) was abolished in 1989. From that year the province was governed as an integrated part of Serbia. This situation lasted to the end of the war in 1999 when Kosovo was transferred into a UN protectorate with unclear national status. Formally it is a part of Serbia but governed by UN and, since the elections in November, also a domestic parliament with limited power. New regulations must be confirmed in New York before they are adopted. Altogether this creates a complicated system for decision-making. The unclear constitutional situation has also caused other problems. The UN authorities are reluctant to decide anything that could influence on the rights of the state of Serbia. Unfortunately questions about ownership and property rights are within this field.

When UN took control over Kosovo laws adopted during the period from 1989 to 1999 were abolished on the ground that they were discriminatory. According to UNMIK² regulation No 1999/24 the applicable law in Kosovo shall be:

- a) The regulations promulgated by the Special Representative of the Secretary-General and subsidiary instruments thereunder; and
- b) The law in force in Kosovo on 22 March 1989.

If laws and regulations are contradictory the regulations have precedence.

If proved non-discriminatory laws from the period 1989-1999 can be used to regulate issues not covered by the present laws or regulations. One problem is that laws in the real property sector have been used in a discriminatory way though they formally are not discriminatory. There is also from the Albanian side a reluctance to accept laws from this period, as they were never adopted by any political body with Albanian representation.

A result of the described situation is that the UN takeover in fact meant that Kosovo was provided with a communist legislation ten years after the formal fall of the communist system. Property laws in Kosovo are thus all relicts from the communist period. The most important laws in the field of Real properties and cadastres can exemplify this:

- Law on Basic Property Relations (1980)
- Law on Transfer of Real Property (1981, amended 1986 and 1988)
- Law on Registration of Real Properties in Real Ownership (1971)
- Law on Surveying and Land Cadastre (1980)
- Law on Expropriation (1978, amended 1986 and 1989)

² United Nations Interim Administration Mission in Kosovo

- Law on Land for Construction (1980, amended 1986)
- Law on Forests (1987)
- Law on Agriculture Land (1984)
- Law on Redistribution of Agriculture Lands (1987)
- Law on Measurements and Land Cadastre (1980)
- Law on Housing Relations (1983, amended 1986)

To this can be added that the Law on Regular Courts was adopted in 1978. To govern and oversee the judicial system the Administrative Department of Justice was established in March 2000 through a regulation³.

To summarise the main laws in Kosovo are outdated and ill suited for a system based on market economy principles. This will be discussed further in this paper. There is an urgent need for new legislation, especially a Land Code or Land Law. A transitional law that secures ownership rights and makes privatisation of public land possible is also a necessity.

5. DEFINITIONS

The central law on real property issues is Law on Basic Property Relations from 1980. The law states that property right can exist both over real estate and other legal entities. It deals with both real and loose properties. Unfortunately the difference between them is not clear and it is sometimes difficult to judge what kind of property the law is talking about.

In Kosovo domestic law a clear definition of real property is non-existent. Ideally this should be decided in a Land Code, which also should deal with legislation for transactions, leases, servitudes, mortgages and related issues. The problem with the lack of definition is among other things that different definitions risk to be created by different authorities, which can cause confusion. There is a clear need to decide on one basic definition.

An interpretation of the domestic law indicates that land, buildings and apartments and perhaps also fittings to those are to be regarded as real property. This interpretation is also what has been used in the new proposal for a real property rights register. Due to rules of ownership and use rights this is probably the only practical solution.

Concerning land parcels it is unclear if a parcel is to be regarded as a real property of its own or if a real property can consist of two or more parcels. There are indications on both interpretations but probably the single parcel alternative is the proper one.

The connection between land and building should be clarified. It is now possible to sell the building without selling the land under it. The only exception is if the building is situated on so called socially owned land⁴. In that case the use right to the land must be transferred together with the building.

³ UNMIK Regulation 2000/15

⁴ Socially owned land can mostly not be sold, see under ownership below.

6. OWNERSHIP AND POSSESSION

Present situation concerning real property rights in Kosovo is unclear. Real property itself is not defined in domestic law. Ownership rights exist to buildings and flats and probably also to private land, even if this is not quite clear. A big part of the land is socially owned. On this kind of land only use rights exist.

Law on Basic Property Relations is the most important law regarding real property issues. It contains rules about rights to ownership, use, mortgages and tenure. It also contains the basic provisions for how to acquire these rights. More detailed rules are to be found in other laws and bylaws. But nowhere is a clear definition of what real property really is.

The law states that citizens, associations of citizens and other civil legal entities can be holders of property rights and that property rights can exist both over real property and other material objects. The problem is to define what ownership really means.

It is obvious that ownership exists over manmade objects like buildings and constructions, but when we come to land it becomes more complicated. According to the law property rights can exist to among other things land and buildings. It also states that a citizen can hold the property right over objects, house, summerhouse and flat that serve to satisfy his or the family's personal needs and interests as well as over agricultural land, woods and forestland to gain personal income.

But is holding a property right to a real property the same as ownership? Other provisions indicate that the term holding of a property right not is the same as ownership but instead is a very strong use right. Thus there are special rules for so called abandoned properties and ruined properties. In these cases the properties will be transferred into public ownership. But as long as the possessor/owner uses the property according to its purpose, the right to occupy the land is almost identical with ownership to it. The holder of a property right has the right to possess, use and dispose the property as long as others property rights are not violated. In some sections of the law the word landowner is also used.

It is also necessary to discuss the problems connected with socially owned or public land. Social ownership, introduced through the FRY⁵ constitution of 1974, is a diffuse concept unique for former Yugoslavia. Theoretically it means that an abstract legal entity owns the asset or the land and that natural persons and legal entities only are users. In practise public land is mostly regarded as state owned land. The socially owned land is mostly managed by municipalities or socially owned enterprises as possessors.

One problem is that as long as the land has no formal owner, only users, it is very difficult to transfer it to new owners. This can only be done under special conditions prescribed by law. For example can land for construction in urban areas not be sold, only leased. With the exception for some special rules for agricultural land⁶ socially owned land can only be sold when there is no use for it according to the decided purpose and then only after a public

⁵ Federal Republic of Yugoslavia

⁶ Agricultural land can be sold only if the money is used to buy new agricultural land

auction. Most land for urban development consists of construction land. A person who wants to build a house can therefore only get a use right for the land around the building. This use right will then follow the building and will exist as long as the building is not ruined or abandoned. Residential buildings with more than two apartments are also regarded as being in social ownership and cannot be privately owned. With regard to the very big private houses that are now constructed specially in Pristina this rule can hardly be fully applied.

Rules for adverse possession are very generous. A conscientious and legal holder of a real property will acquire the property right after three years and a conscientious but not legal one after ten years. Together with the rules concerning abandoned and ruined properties it is easy to get the suspicion that one of the motives for the rules have been to give the state easy access to real properties belonging to people who by different reasons left the country.

Restitution of nationalized land to the original owner is another complication that must be considered. There are no provisions for restitution. In spite of this the courts have in some cases returned land to previous owners.

Information of possessor/user is to be found in the cadastral records but is not an evidence of ownership right to the land. What is then the legal value of the existing cadastre and can it in the lack of land books be used as a first step to assure ownership rights? Probably it can at least constitute the basis for a registration of ownership.

7. PRESENT REGISTRATION OF REAL PROPERTY RIGHTS

According applicable law (the old legislation from FYR) real property rights concerning land shall be registered in the Land Book. The law is describing in detail how this shall be done. Unfortunately the Land Book was never introduced in any part of Kosovo, which means that no register of ownership to land exists.

As no Land Book is available the Land Cadastre, which is managed by the MCOs, has got a central role to prove ownership. The cadastre contains lists of users of the different parcels, so called possession lists. But only the users (possessors) are registered in the Land Cadastre. A possessor may thus be a person who has both ownership right and possession right over a real property or only possession right. In spite of that the possessor is not necessarily the owner of the land he is mostly regarded as owner in real property transactions.

Anyhow, the lists are used to confirm ownership and are requested by the courts to certify ownership in connection with transfer of land. The applicant must visit the Municipal Cadastral Authority (MCO) to get an excerpt from the possession list. The excerpt shall then be enclosed to the transfer document that is handed in to the court.

In other words, the possessors are regarded as owners in connection with real property transactions. However, the possession lists have never been intended to show the owner, only the present user and this mainly for taxation purposes. It is therefore no guarantee that the possessor is the real owner. Obviously there is a clear risk that the wrong person is the seller, especially as the courts only check the identity of the seller and buyer. As long as natural

persons lack ID numbers it is also difficult to no who is the real possessor as many people have identical names.

Concerning buildings and flats there are in principle no registers at all, even if some municipalities have registers of apartments. It is anyhow unclear how reliable these registers are. Contracts are approved and archived at the courts but there is no registration.

Servitudes and mortgages are established in the same way as property transfers. An agreement made by concerned owners is verified and archived by the court. Any special registers are not to be found. Due to the obscurities in ownership and the underdeveloped banking system mortgages are yet not very usual. There is also extremely difficult to evict someone for not repaying debts secured by a mortgage.

8. PROPOSED REAL PROPERTY RIGHTS REGISTER AND ITS CONSEQUENCIES

Together with other interested authorities KCA has drafted a proposal to a real property rights register for Kosovo. Hopefully this will be decided upon in the beginning of 2002. The property rights register will be the first "Land Book" in Kosovo and constitute the legal part of the cadastre. The register shall be run by the MCOs under the supervision by KCA.

Property rights are in the proposed register defined as:

- a. Ownership
- b. Mortgages
- c. Servitudes
- d. Rights of use of socially owned land.

These rights shall all be included in the register.

It is also stated that real property rights may be held by natural persons and legal entities.

The reason for including rights of use of socially owned properties depends on the fact that this use right is very strong and that the can, at least if the right is connected with ownership to a building, be transferred together with the building on it. Concerning privately owned residential houses the use right must be transferred together with the building.

9. WILL THE REGISTER BE A LEGAL REGISTER THAT CAN BE GUARANTEED BY THE AUTHORITIES?

Against described background it is evident that the register will not be fully legal until the ownership issues are solved in a reliable way. The question is how this problem can be solved.

It must also be added that the issues on ownership are even more complicated in Kosovo mainly due to the war in 1998-1999. During the war a lot of ethnic Albanian fled and their

properties were sometimes demolished. The same happened after the war but this time it was the Serbs and Romas who had to flee. Abandoned properties were if not destroyed taken over by other ethnic groups. In many cases this has been done without any formal transactions, which means that the occupation is illegal. People have also in several cases been forced to sell their properties, sometimes to unrealistic low prices. This process is still going on even if UN authorities try to prevent it.

It is quite obvious that the register itself cannot solve the legal issues, at least not if the register shall be in use early enough to be of any value for the reconstruction of Kosovo. A sporadic registration will by far take too long time.

What is needed is a transitional law that provides the tool for a systematic registration and a transfer of possession rights into ownership. The law should also be possible to use for privatisation of socially owned land. Following problems ought to be solved:

- Possessors should be regarded as owners to land. To make this possible in a smooth way the possession should be transferred into ownership after a certain period. The possession lists should be published and people would have the possibility to claim better right to the real property. The lists are probably rather reliable so the method should hopefully function well. Transformation should take place automatically. Adjudication will then take place where claims have been made. Other methods like referring the unclear cases to the courts are probably too expensive and slow.
- For buildings no registers exist. To check who is the owner documents have to be traced in the archives of the courts. The same procedure is valid concerning apartments but here some municipalities have lists. The accuracy of these lists is unclear. If regarded as relatively reliable they could be used in the same way as the possession lists. List of dwellers in buildings and apartments are under establishing. These lists are purely for taxation purposes and are not any proof of ownership, in fact not even for the use right. Perhaps those lists could be used as a preliminary base for deciding of ownership. Certainly such a procedure will need a longer period for claims.

10. NECESSARY MEASURES

The real property rights register shall be implemented as soon as possible even if it will take long time before it is fully legal. Ideally the legislation concerning real property and real property rights should be adopted first, but this should mean that no register would exist for many years. Instead the “wrong order” must be used and the register can then be an important tool to facilitate the privatisation process.

It should be stressed that registration does not, in any way, hinders the possibility to claim better right to a real property or limits the possibility to make claims according to a future transitional law.

A transitional law must to be efficient make it possible to:

- Transfer possession right into ownership right after a prescribed period
- Through a simplified process decide on ownership to buildings and flats
- Transfer use rights to socially owned land into private ownership, at least concerning residential houses.

There should be a time-period of 2-5 years for claims. The longer time is probably needed for buildings and apartments. As long as the claim period is functioning the register will not be fully reliable.

If there are disputes, these must be solved before a final registration. However, a preliminary registration can be made based on today's list but with a note that possession is unclear or that a dispute is pending. In these cases an adjudication procedure must take place.

If socially owned land shall be privatised it may be necessary to decide the area and its borders. The provisions in present law for this are very general.

The work with the issues above can be expected to demand a lot of work. It will probably be too much work for the ordinary courts to do this. The solution can be to create a special commission or commissions for solving these problems. The commissions could consist of people from the courts, MCO, local inhabitants and so on. Due to the special conditions in Kosovo some international participation will probably be necessary. A possibility to appeal against the decision of the commission must be possible.

If there are no claims the possession lists shall automatically constitute a list of ownership to land. Provided that usable lists could be produced for buildings and flats the same procedure should be used for them.

Public land used by socially owned enterprises constitutes a special problem. Often are these entities no longer producing anything. Sometimes the State of Serbia is the owner in practice. If socially owned enterprises and similar entities possess more land than they use for their activities, perhaps the needed area should be separated from the rest and the surplus be transferred to another public body. It might be necessary to have special rules for different kind of enterprises.

The best solution regarding public land could have been to transfer it into state-owned property during the transitional phase. Unfortunately this is not possible in Kosovo due to political reasons caused by the complicated constitutional situation.

The question about restitution must also be solved. Land illegally occupied from 1989 will certainly be given back to the original owner, sometimes with some compensation to the present user. But there are other questions that must be decided in this connection:

- Shall land confiscated by the communist regime also be restituted or compensated?
- Shall also earlier confiscations of land from ethnic Albanians be compensated?
- Shall compensation be made in kind or in money?
- Who shall pay the compensation and how?

- Who shall decide in what form compensation shall be done?
- For how long period shall it be possible to claim restitution?

All these questions must be answered. Experience can be drawn from other transitional countries, especially in the Balkan area. However, these issues must depend on the general opinion in Kosovo.

11. CONCLUDING REMARKS

The whole set of laws regarding land, land rights, planning and building, use of land and the administration of land need to be revised. This should be done in two steps. First the tools for an efficient land administration system should be established and thereafter the laws.

A Land Code should be the ultimate objective for a real property law reform, but it is possible to start the process of privatisation with a transitional law and amendments to the existing ones. Contradictory passages must be changed or abolished. In this process the proposed real property rights register will play an important role.

It is time for the UN to take its responsibility and create the legal means to live up to their own guidelines for countries in transition form 1996. Kosovo is a UN protectorate but is at the same time one of the last places in Europe lacking a modern legislation in the real property rights field.

BIOGRAPHICAL NOTES

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