

Nov 7th, 9:00 AM - 5:00 PM

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Recommended Citation

Agifi, Berat; Dukovski, Sasha; Grazhdani, Drini; and Mustafa, Myzafer, "The right of ownership of immovable property and registration under the Law on Kosovo" (2015). *UBT International Conference*. 3.
<https://knowledgecenter.ubt-uni.net/conference/2015/all-events/3>

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The right of ownership of immovable property and registration under the Law on Kosovo

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Abstract. The main purpose of the paper is analyzing legal regulation of registration of immovable property in Kosovo, using and analyzing all relevant sources in force, and the study and recognition of forms of ownership, with special emphasis on ways of acquiring ownership - as the fundamental basis for registration of those rights. Kosovo by establishing the Law on the establishment of the registry of immovable property rights developed enormously with regards to the issue of regulation of property rights as one of the fundamental human rights guaranteed by the Constitution and International Conventions. In practice, in the past often accrued that land records were neglected by the authorities that forced the former system that were not complete, which created a vacuum to the abuse of different circumstances especially in most cases from the former owners who were no longer living in the property they used to own, therefore the ownership issues were also the subject of unresolved issues of heritage and unpractical laws which stopped the transfer and registration of immovable property. In the beginning, immediately after the war ended in 1999 other consequences occurred, where there were many claimants to a certain number of real assets. As long as property rights were not clearly defined largely been due to the lack of land books which were stolen by Serbia, it was difficult to attract potential investors, and with time citizens lost investment opportunities and had difficulty in financing their businesses. Today, the market of real estate still faces numerous challenges, since a significant number of cases are arising from the lack of a clear system of functioning of the administration of property rights. Specifying and having better legal rights of ownership, and having these registrations documented have a primary importance in designing and improving the development of urban planning and infrastructure, which in this stage appears to stay in a chaotic situation, allowing space for the implementation of state reforms .

Keywords: Property, registration of immovable property, Cadastre.

1. The right of ownership of immovable property

1.1 The notion of ownership

Kosovo as sui generis country with political-economic issues and other issues such as lack of clear ownership which have its roots from the overthrow of autonomy, to the administration of orders and different laws from the international community, that the institutions who the set them themselves, failed to regulate and to define these issues to be of particular significance as the main subjects of the right of ownership.

Ownership as a subjective right of absolute character , protected by provisions of criminal law , administrative law and the provisions of civil law , and guaranteed by the Constitution of Kosovo , has a contrast to systems of many countries in the region because of undefined concise due from past events that the country went through, especially the legal vacuum , filed with discriminatory laws , the promulgation of the Law on ownership and other real rights which continued to be a problem following the consequences of senseless unawareness by international community into finding solution to these problems.

The Term ownership, as a body of civil law has a wider significance, not only in view of the thing, but also on the right as an object of legal regulation as a constitutional right of ownership as regulated by the Constitution.³¹

The importance of the property as a legal body, has the same approach that dominates the literature of time. Ownership among real rights includes more duties that the entity may exert on the object to which is potentially undefined.³² The right to ownership is absolute subjective character, which enjoys protection provisions of criminal law, administrative law and civil law provisions, and guaranteed by the highest state acts of the Constitution.

The right of ownership is a fundamental human right, included and guaranteed by numerous international documents as well as the Universal Declaration of Human Rights, the European Convention for the Protection of Human Rights and Fundamental Freedoms, etc.

According to Roman *jus civile*, civil property itself contains not only the right on a thing, but also the right to use, exploit and dispose of a thing within the limits of the law (**jus utendi, jus fruendi and jus abutendi**), where the *jus utendi* owners had the right to possession and use of property, according to *jus fruendi*, owners have the right to collect natural and civil fruits of things, while the *jus abutendi*, could destroy the thing definitely or legally, having alienated property or thereby constituting a material right to the interests of other persons.³³

The right of ownership is a real right that contains broader authorization of using such a property and availability of that certain property³⁴.

Property law and property rights of Kosovo define ownership as: ownership is the comprehensive right over a thing. The owner of a thing may, unless it is not contrary to the law or the rights of third parties, deal with the thing in any manner he sees fit, in particular possess and use it, dispose of it and exclude others from any interference, if not contrary to the law or the rights of a third party.³⁵ Intellectual property is subject to special rules.

The right of ownership is a real right that contains broader authorization of the use and availability of a thing.³⁶ Many countries support the French system to define the ownership and property rights in general.

According to the **Civil Code of the Republic of Albania** "Ownership is the right to enjoy and to possess objects freely, within the provisions of the law."³⁷

French Civil Code, Article 544, states that: right of enjoying and disposing of things in the most absolute manner, provided they are not used in a way prohibited by the laws or statutes³⁸

Swiss Civil Code stipulates as follows: The owner of an object is free to dispose of it as he or she sees fit within the limits of the law. He or she has the right to reclaim it from anyone withholding it from him or her and to protect it against any unwarranted interference.³⁹

While the Law on Property rights in Croatia states: " The right to ownership is a real right on a certain thing, which authorizes the holder of its own on that particular thing and gains rights to do what he wants with everyone else excluded from it, if it is not inconsistent with the rights of others or of the law " .⁴⁰

But if we go back in history, the origins of the definition of ownership, even though Roman lawyers did not leave any definition of ownership, they have understood this as the exclusive right to certain property or the authority forced other members of society to respect the rights of a certain property of a potential owner.⁴¹

Therefore, the right to property is a real right on a certain thing which authorizes or allows the owner the right to use its property, and act according to his wish, and exclude others, if not in contrary to

³¹ Constitution of Republic of Kosovo, Prishtinë, 2008, article 46, page 14.

³² Francesco Galgano, Private Law 1, Introduction-Property, Tiranë, 2003, page 132.

³³ Ivo Puhan, E drejta romake, Prishtinë, 1989, faqe 222

³⁴ Civil Code of Republic of Albania, Tiranë, 1998, article 832.

³⁵ Law on property and other real rights article 18.

³⁶ Abdulla Aliu, E drejta sendore (Pronësia). pg. 76. Prishtinë 2006

³⁷ Civil code of Republic of Albania, 1994. article 149.

³⁸ Civil Code, Paris, 2002, article 544.

³⁹ Code civile Suisse, Bern, 1984, article 641.

⁴⁰ Zakon o vlasnistvu i drugim stvarnim pravima. Narodne Novine, Republika Hrvatska, nr. 91/96, 68/98, 137/99, 22/00, 114/01 (2006).

⁴¹ Ante Romac, Rimsko pravo Zagreb 1994, pg. 154

the rights of others or restricted by law. The right of ownership is exclusively permanent real right on a certain thing which authorizes or allows the holder to use its property based on his/her desire in accordance prescribed by law (using the property legally)⁴². In France in the case *Samuel v Monlon and others* which accrued in 21 November of 1969 which stated that if an individual's builds within the territory of another person without consent of the party that the property was built on, has the right to demolish the building without recurring or asking for consent. This was a decision made by French courts based on article 545 and 555 of the civil code of France.⁴³

Kosovo's Constitution states that : " The right of property is guaranteed " and that " no one shall be arbitrarily deprived of property of the Republic of Kosovo or a public authority of the Republic of Kosovo may allow to expropriate the property if such expropriation is authorized by law , it is necessary and appropriate to achieve the public trust and the promotion of public interest , which is followed by the provision of immediate and adequate compensation to the person or persons whose property was expropriated⁴⁴. Also the Constitution of the Republic of Albania states that " private property may , in the cases provided by law on be expropriated for reasons of common interest" .⁴⁵ The right of ownership is subject to certain restrictions which should be implemented in accordance with the nature and overall public interest by law. The owner has the right to use the surface of land for construction if building in it is permitted, without interfering with others into using their property. An example of that can be taken the German courts, the *case BGH*, April 15 1964, which stated that "An enclosed piece of land that needs a path out can be granted such a path under certain conditions. The rules applicable on the recognition of a path may also apply to a sewer and waterway".⁴⁶ This case gives us an insight that certain individual property for the greater good needs to be intervened by others in order to establish something for the greater good.

The law on property rights in Kosovo on property rights states that: Immovable property is a part of the earth's surface that is or can be limited. Immovable property includes plants enrooted in the ground and buildings firmly connected to the ground, but do not include natural resources in the subsoil.

1.2. Immovable Property includes:

- a) A building that belongs to a person other than the owner of the immovable property on which it is built;
- b) Building unit which is regulated by Articles 57 -62;
- c) A building right which is regulated by Articles 271-281;
- d) A leasehold according to the relevant provisions on leaseholds.⁴⁷

1.2.2 Acquisition of property

The object of ownership are the things and property rights , so they can be sold or rotated from one or several owners and all this traffic is regulated by law .

Property is acquired through the certain rules defined by civil codes and other means specified by a separate law.⁴⁸

The property rights are acquired”

- **Bases on the law,**
- **Based on legal work and**
- **By inheritance, and**
- **Based on the decision of the competent state institution.**

Ownership is the factual and legal power over a property. Gaining ownership means having legal facts which recognizes the objective rights as the legal basis of ownership.

⁴² Ejup Statovci, Pronësia: Origjina dhe Zhvillimi, Prishtinë, 1983, pg. 28.

⁴³ Cases, Materials and Text on Property Law. Sjef Van Erp and Bram Akkermans. pg. 227

⁴⁴ Constitution of Republic of Kosovo article 46, paragraph 3.

⁴⁵ Constitution of Republic of Albania article 42, paragraph 3

⁴⁶ Case BGH, 15 april 1964, German Court Decision.

⁴⁷Law on property and other real rights in Kosovo article 10 p. 1-2.

⁴⁸ Civil Code of Republic of Albania pg. 59, article 163. 2003

Ownership can be acquired in two ways:

1. **The derivative ways**
2. **The original ways.**

2. Immovable Property Registers

2.1 Land Registration

The economic development are connected and based on the development of real estate and property rights to an extent that effect also the development of civilization of a society.. Keeping records of property is a result of terrestrial perennial effort and passing through various stages of development of civilization.⁴⁹

In many countries there are usually two types of land registers, These two methods have been applied in the past but also are present to this day, those methods are:

- a. Property records
- b. Tapi

This kind of division has also been made by Prof.Andrija Gams. Land records generally represent public books, of particular significance for the institutions and the citizens of the states where immovable property is registered and rights relating to that particular real estate.

2.1.1 Genesis of land records

Regards to the origin of the land records it is assumed that it dates from ancient times and since the first century, originally BC in ancient Egypt.

The Romans did not keep records of real assets in the form of records in the registry form. This was also due to the demolition of the records if any.

In the other hand in the ancient Greece during that time had current records for mortgages, which had great importance for ensuring the requirements arising from the obligations of the citizens of the then-Greek polis.

Keeping records on immovable property in any legal order is intended to the people in order to enable them to get the information and know the accurate position, expansion of a certain real estate, type and quality of land, the building which is located on the land, as well as on rights that exist on that particular immovable property.

When mentioning to the acquisition of the right of ownership of the certain thing it has been said that the right of ownership of immovable property to be acquired, in addition to the purchase contract or any other legal title to that right must also be recorded in the registry land books. The registration is not complete without registering the right of that certain thing or property in the books.⁵⁰

Depending of the tradition that a particular state has, they differentiate in land registry systems in three ways, such as:⁵¹

2.1.2 Books registry land systems

I. The French system,

II. Austrian system - the German lands of books

III. Australian system (Thorens)

⁴⁹ Abdulla Aliu, E drejta sendore (Property), Prishtinë, 2006, page 267

⁵⁰ Ibid..

⁵¹ Andrija Gams,Bazat e së drejtës reale,Prishtinë,1972 faqe,181.

3. Land Cadastre

Books that regulate modern property are based on the cadaster, where legal obligation obliges to make records on land, which contains notes on the position, shape and surface of the land parcels, the method of use (culture), the production and use as and buildings that are closely associated with them (principle superficies solo credit). individual records in the past and now, aimed scheduling easier and more accurate property tax, or tax on turnover of immovable property, offering citizens and the state itself a legal certainty, about transaction of real assets.

Identification of real estate and real rights over them is a right and need of citizens who seek legal protection for their rights of real property, and the state in this way, builds its own legal system and easier performs constitutional function of protection of property as the absolute right of natural persons, legal entities and the state itself.⁵²

3.1. Land Cadastre in Kosovo under the current Law

The Field of cadastre in Kosovo is regulated according to modern standards, in accordance with all rules and laws of the states that have the experience and tradition in the field of cadastre. When we talk about cadastre it is important to emphasize the territory and municipal boundaries.

The territory of the municipality includes the settlements of cadastral zones within the municipal boundaries.⁵³

Cadastral zones are defined by the **Law on Cadastre** No. 2003/25.

Settlements shall mean:

- Cities
- Urban neighborhoods and
- Villages.

3.1.1 Cadastre competence

Kosovo Cadastral Agency is responsible for the Cadastre:

- For the establishment and maintenance of all official records for real estate based on data measurement and land cadastre and
- To oversee the operation of extracting the cadastral and other legal acts related to cadastral activities.
- KCA is responsible for the licensing of companies and surveyors for performing cadastral surveys. The license can be granted for all cadastral measurements or specific ones.
- KCA is responsible for overseeing all activities carried out under the provisions of the law by the MCO, surveying companies and licensed surveyors.⁵⁴

3.1.2. Cadastre, Notion

Cadastre serves as the basis for registration of property rights, which creates units for parcels, buildings, parts of buildings, utilities and rebuilding cadastral information.⁵⁵

When we discussed above in relation to land registers, cadastral books we mentioned that are public land register books as a basis for the regulation of land register books in general who are maintained by administrative bodies within the MCO. Cadastre has a big importance for evidence of real estate, and land registry books have a character of legal evidence. Registration in the Cadastre, does not bring up the acquisition of real rights on immovable property.

The data recorded in the land registry books are supported on cadastral information. Nevertheless the cadastral surveys are made ex officio.⁵⁶

⁵² Andrija Gams, *Bazat e së drejtës reale*, Prishtinë, 1972 page, 181.

⁵³ Ligji për kufijjtë administrativ të komunave, article. 2

⁵⁴ Law on administrative borders of Municipalities of Kosovo article. 4

⁵⁵ Law on administrative borders of Municipalities of Kosovo, article 2, al 1.

⁵⁶ Abdulla Aliu, *E drejta sendore (Pronësia)*, Prishtinë, 2006, faqe 272

3.1.3 The content of cadastre

Cadastre comprises of:

- The records of cadastral units
- Cadastral maps and
- Cadastral document files.

All these must be in conformity with analogue and digital forms based on the ability to perform it, but are described according to the Law.⁵⁷

3.1.4. Basic cadastre units are:

1. Cadastral parcels;
2. Buildings;
3. Parts of the building, and
4. Utility.

3.2. Registration of Immovable Property Rights

To register the real estate in the register of property, which in principle first the permission should be taken from the owner or co-owner for an entry in the Register of immovable property rights.

Nevertheless to register the property the following are required:
1. A sketch (drawing) building equipped with a signature from the authority of the building, by which the partition of the building, the location and size of parts of buildings, which are in separate ownership and shared ownership (divided property) .

2. A certificate issued by the authority of the building. The law provides that division of property becomes effective, "if that divided property is registered into the immovable property rights."⁵⁸

Conclusions

- The right of ownership as an absolute right is one of the oldest bodies of civil law , where the biggest development occurred during the period of the Roman Empire under the Justinian Codification
- The right of ownership is factual and legal power over the property designated as the subjective right which entitles its holder to dispose of the thing, use, to the limits prescribed by law.
- The property rights are also protected by the state constitution, with codes, national laws and international conventions and instruments.
- Law on ownership and other property rights , the Law on the Establishment of the immovable , the law on mortgages ,and administrative guidelines for their implementation are the main sources of clearly regulated the right of ownership.
- The chaotic situation created with regard to immovable property in Kosovo resulting from the past war, especially with the lack of registry land books taken and stolen by Serbia before the war, and the concerns of stakeholders in property rights have increased attention on the importance of efficiency and effectiveness of ACA and state MCO as responsible institutions on these issues.
- Reconstruction of cadastral information in Kosovo is more than necessary, since the cadastral documentation which is stolen by Serbia has left a great void; and a big difference between text and the graphics state, ie. We have a discrepancy between the actual situation and the cadastre. Cadastre is dynamic and the changes on the ground must also be registered in the cadastral books. This situation of the cadastral came as a result of the obstacles that have been presented before the occupational of 1999 in Kosovo, with discriminatory laws, and ban the identification of actual changes through cadastral registry books.

⁵⁷ Abdulla Aliu, E drejta sendore (Pronësia), Prishtinë, 2006, article.7 al.1

⁵⁸ Ibid, Neni 62

- State agencies, KCA and the MCOs and other state bodies, should increase coordination between them to ensure a rapid management system, well incontestable in benefit of the citizens as well as mutual cooperation between local and central government. Establishing a database of data relating to immovable property by applying the same requirements as that of the European technical and professional standards, based on accepted legal terms of ownership in accordance with cartographic data.
- The most effective and faster procedure with accurate property data records, would affect transactions, reduce costs and improve the security of property rights.
- An effective solution would be to contribute in increasing the efficiency and effectiveness of the system of administration of immovable property and to increase the coordination between the MCO with AKM.
- Upon successful completion of the digitization of all data from records of property ownership, a system of online services via the Internet will be able to offer the public an easy and transparent access to digital records of each property, which will result in simplifying the procedure for registering a certain property

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