

**ACQUISITION OF PROPERTY THROUGH
PRESCRIPTION
AND ILLEGAL OCCUPATION OF IMMOVABLE
PROPERTY OF IDPs FROM KOSOVO* AFTER THE 1999
CONFLICT²**

Abstract

The Law on Property and Other Real Rights, adopted by the Kosovo Assembly in 2009, changed the rules on acquisition by prescription by altering the requirements of bona fide and lawful possession existing under the previously applicable law. This brought the provisions regulating acquisitive prescription closer to the doctrine of adversarial possession, which enables acquisition of property irrespective of whether or not the person holding property knew that another person is the actual owner. The author argues that in the context of Kosovo, where the post-conflict property restitution is far from being complete and the illegal occupation of immovable property belonging to internally displaced persons (IDPs) is widespread, these changes of the doctrine of acquisitive prescription could run contrary to a number of international and domestic human rights norms.

Key words: *acquisition of property through prescription, bona fide possession, legal possession, post-1999 Kosovo, internally displaced persons (IDPs), international human rights standards;*

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² This designation is in line with the United Nations Security Council Resolution 1244/99 and the International Court of Justice (ICJ) Opinion on the Kosovo Declaration of Independence.

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1. Introduction

The aim of this paper is to examine effects of the provisions regulating acquisition of property through prescription, laid down by the Kosovo legislator in 2009, on the right to property of internally displaced persons (IDPs). The paper combines the normative method with the law in context approach given that it not only analyses relevant legal norms but it also tries to understand them in the light of the specific features of the society and group under consideration. In the first part of the paper the author looks into the process of post-conflict property repossession in Kosovo and outlines the problem of illegal occupation of IDPs' immovable property. Following that, the author compares the relevant provisions of the Law on Property and Other Real Rights from 2009 with the previously applicable rules on the acquisition through prescription. In the third part of the paper, the new legal rules are scrutinised *vis-à-vis* the applicable international human rights standards read in the light of the specific position of Kosovo IDPs. Finally, in the conclusion the author summarises the results of the conducted analysis and gives recommendations on how to remedy the identified deficiencies of the norms on acquisitive prescription.

2. Illegal occupation of immovable property belonging to IDPs from Kosovo

Illegal occupation of immovable property has been among the greatest challenges to the individual property rights in post-1999 Kosovo.³ Neither the local judicial and quasi-judicial institutions nor the international stakeholders so far have managed to adequately address this problem.⁴ The immovable property left behind displaced owners is particularly affected by the illegal occupation.⁵ Although more than fourteen years

³ See: Anti-corruption Resource Centre, *Corruption in Land Administration/Land Management in Kosovo*, 2008, available at <http://www.u4.no/publications/corruption-in-land-administration-land-management-in-kosovo/>, 2 April 2013.

⁴ Council of Europe, Report of the Council of Europe Commissioner for Human Rights' Special Mission to Kosovo, July 2009, CommDH(2009)23, p. 30. About the international stakeholders' activities targeting the illegal occupation, see, for instance, the campaign "Illegal Occupation is Not a Solution" launched in 2005 by the OSCE Mission in Kosovo at <http://www.osce.org/kosovo/46893>, 4 April 2013.

⁵ See: OSCE Mission in Kosovo, *Challenges in the Resolution of Conflict-Related Property Claims in Kosovo*, June 2011, 3; OSCE Mission in Kosovo, *Kosovo Communities Profile*, 2010, 25.

have passed since the end of the hostilities in Kosovo, the process of post-conflict property repossession has not yet been completed. Certain portion of 42,531 claims lodged before the Kosovo Property Agency⁶ - quasi-judicial body mandated with the post-conflict property repossession - is still awaiting adjudication while less than half of its decisions were implemented.⁷ Apart from the cases dealt with by the Kosovo Property Agency (KPA) a significant portion of the conflict-related property claims is awaiting adjudication before the local courts.⁸

Weak justice system and remoteness of the owners are the most common explanations for the frequent illegal occupation of the real estate of IDPs. The specific reasons are usually sought in the lenient approach of the courts towards these types of criminal offences⁹ and the underdeveloped mechanisms for the execution of the eviction orders.¹⁰ This explanation is sustained by the data on the frequency of multiple illegal occupations, in the case of which the same person(s) re-occupies real property immediately after his/her eviction from the illegally occupied property has taken place.¹¹ For instance, the Kosovo Property Agency in relation to this phenomenon reports about the cases where “the number of re-occupations and evictions has exceeded ten of the same

⁶ The Kosovo Property Agency (KPA) is an independent agency mandated to resolve, subject to the right of appeal to the Supreme Court of Kosovo, conflict-related ownership claims and right of use claims in respect of private immovable property, including agricultural and commercial property, resulting from the armed conflict that occurred between 27 February 1998 and 20 June 1999. It was established in 2006 by UNMIK Regulation 2006/10 On the Resolution of Claims Relating to Private Immovable Property, Including Agricultural and Commercial property, which was soon after amended by UNMIK Regulation 2006/50 of the same name. Since 31 December 2008 the KPA is operating under Law No. 03/L-079 adopting and amending UNMIK Regulation 2006/50 adopted by the Assembly of Kosovo on 13 June 2008.

⁷ According to the data presented at the KPA web site at http://www.kpaonline.org/ClaimsTotalDecided_caseload.asp. 1 June 2013 and in its Annual Report for 2012 (See: Kosovo Property Agency, Annual Report for 2012, p. 35, available at: <http://www.kpaonline.org/PDFs/AR2012.pdf>, 15 May 2013.

⁸ IDPs are the group with the greatest number of property related claims lodged before the regular courts, most of which are conflict related. See in: OSCE Mission in Kosovo, *Challenges in the Resolution of Conflict-Related Property Claims in Kosovo*, June 2011, 3.

⁹ Based on the insights of the author gained through her engagement in the Project “Further support to refugees and IDPs in Serbia” (*supra*, footnote 1), the main activity of which was the provision of free legal aid to IDPs in cases of illegal occupation of their immovable property in Kosovo.

¹⁰ See, for instance, Recommendations no. 4.7 and 4.8 from the First Thematic Meeting on Exercising the Rights of Internally Displaced Persons from the Territory of Kosovo, organised in July 2012 by Group 484 with the support of the OSCE Mission to Serbia, available at <http://www.osce.org/odihr/94111>, 2 March 2013. See also the annual reports of the Kosovo Property Agency available at <http://www.kpaonline.org/public.asp>, 20 September 2013.

¹¹ Also called the “serial occupation cases”.

person and property”.¹² Moreover, because of a failure of the legislator to recognize the specific needs of IDPs this group faces numerous obstacles when trying to access the justice system in Kosovo,¹³ which effectively preclude them from obtaining protection against illegal (re)occupation of their property.¹⁴

While forced eviction of Kosovo minority communities from their homes in 1999 caused their displacement,¹⁵ the illegal occupation of IDPs’ property has been among the principal reasons for them to remain in displacement fourteen years after the conflict. The illegal occupation of IDPs’ homes not only prevents their return but also undermines their overall capacity to choose between the other two durable solutions to displacement – resettlement or integration in the place of origin. According to the available statistics, almost half of IDPs from Kosovo live in poverty,¹⁶ which is at least partly caused by the expenses created through renting of the apartments or houses in the place of displacement.¹⁷ Likewise, as in many other places around the globe, the sub-standard conditions in which

¹² Kosovo Property Agency, Annual Reports for 2011 and 2012, p. 25, available at: <http://www.kpaonline.org/PDFs/AR2011.pdf> and <http://www.kpaonline.org/PDFs/AR2012.pdf>, 15 May 2013. See on this also the findings of the OSCE Mission in Kosovo from 2010: “More than ten years after the 1999 conflict, Kosovo Serbian properties remain occupied, often repeatedly re-occupied after eviction orders have been implemented following decisions by the UN Housing and Property Directorate or the Kosovo Property Agency (KPA). The Kosovo police implement eviction orders, but because the properties regularly remain empty and unprotected with the rightful owner still in displacement, the former illegal occupants re-enter the properties. [...] Arable land is also often illegally occupied or used by the majority Kosovo Albanian community, such as for the illegal cutting of wood in forest areas.”; in OSCE Mission in Kosovo, *Kosovo Communities Profile*, 2010, 25-26.

¹³ Such as the problem of legal representation, use of language, high court fees, etc.

¹⁴ On the basis of a number of indicators it could be claimed that the legal and institutional system established in Kosovo does not recognise the specific needs of IDPs in their pursuit of justice for the conflict-related property claims, which leads to their access to justice being limited. See more on this in: EU-funded Project “Further support to refugees and IDPs in Serbia”, *Access to Justice for the Internally Displaced Persons from Kosovo*, June 2012 available at http://www.pravnapomoc.org/web/Access_to_Justice.pdf and in EU-funded Project “Further support to refugees and IDPs in Serbia”, *On Certain Aspect of the Right of Access to Courts in Kosovo for the Internally Displaced Persons – Statistical Analysis*, April 2012 available at http://www.pravnapomoc.org/web/statistical_analysis.pdf

¹⁵ See for instance the UNHCR Position on the Continued Protection Needs of Individuals from Kosovo (UN High Commissioner for Refugees, “UNHCR’s Position on the Continued International Protection Needs of Individuals From Kosovo”, June 2006, para. 19, 6, available at <http://www.unhcr.org/3c3ab77b4.pdf>, 5 May 2013.

¹⁶ UNHCR and Commissariat for Refugees, *Assessment of the Needs of Internally Displaced Persons in Serbia*, February 2011.

¹⁷ While majority of the IDP households with the insufficient monthly income do own an apartment or a house in Kosovo (49%), more than half of these persons are subtenants (48.9%) or live with relatives or friends (21.6%), *Ibid.*, 3-4.

many IDPs live are leading to their social exclusion and increasing their exposure to the intergenerational perpetuation of poverty.

This paper tries to examine whether the illegal occupation, apart from being *de facto* obstacle to the recovery of their property rights and one of the main reasons for the protracted displacement of IDPs, could also become a **legal impediment** to the post-conflict property repossession in Kosovo.

3. Acquisition of property rights through prescription under the Law on Property and Other Real Rights¹⁸

The Law on Property and Other Real Rights (hereinafter “the Law on Property”), which “governs the creation, content, transfer, protection, and termination of real rights”,¹⁹ introduced an important novelty in the system of acquisition of property in 2009. Namely, the Law on Property introduced the new rules on acquisition by prescription, which are significantly different from those existing under the previously applicable law. Its relevant provisions read as follows:

“Article 40 Acquisition by Prescription

1. 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

¹⁸ For two reasons the following analysis will be based on the official text of the English version of the Law on Property and Other Real Rights, as published in the Official Gazette of Kosovo No. 57 of 4th August 2009. Firstly, many of the laws which were enacted by the Kosovo Assembly after 1999, including the Law on Property and Other Real Rights, were drafted in English with the engagement of foreign consultants working for the main international organizations present in Kosovo. Hence, the use of the method of historical interpretation of the law is only possible with the reference to the text of the English language version in which the laws was drafted. Secondly, although Serbian and Albanian are the official languages in Kosovo and these language versions of the laws should have precedence over the English text, one should not forget that the Kosovo judiciary is characterized by a significant presence of the foreign judges which in their daily work rely on the English texts of the laws. Yet, whenever there is a discrepancy between the English text of the Law on Property and Other Real Rights and its versions in the two official languages which are considered relevant for our analyses, this will be explicitly mentioned.

¹⁹ Article 1 of the Law on Property and Other Real Rights.

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.”²⁰

Under the previously applicable Law on Basic Property Relations, which was in effect in Kosovo since 1980, the acquisition of ownership on immovable property through prescription could take place under the following conditions:

“Article 28

[...] The **conscientious** and **legal holder** of the real estate, over which somebody else disposes of the property right, shall acquire the property right over such object through positive prescription after expiration of ten years.

[...] The **conscientious** holder of the real estate, over which somebody else disposes of the property right, shall acquire the property right over such an object through positive prescription after expiration of twenty years (emphasis added).”²¹

The first notable difference between the old and new provisions is that the new law introduces a notion of “**proprietary possessor**” into the rules on acquisitive prescription. The legislator does not provide definition of a “proprietary possessor of an immovable property” and uses the terms “proprietary possessor” and “proprietary possession” in a rather confusing manner. For instance, in Article 110 the proprietary possessor of movable property is defined as “[a] person possessing movable property that is *owned* by that person”. This is obviously contradictory to the above-cited Article 40, as well to the text of Article 28 that regulates the acquisition of movables by prescription:

²⁰ As evident from the cited provisions, they depart from the ordinary method of acquisition of immovable property prescribed in Article 36 of the Law on Property according to which the transfer of ownership of an immovable property requires a valid contract concluded in [...] written form [...] before a competent court or a notary public” and the registration of the change of ownership in the immovable property rights register.

²¹ Article 28 para. 2 of the Law on Basic Property Relations, *Official Gazette of the Socialist Federal Republic of Yugoslavia* 6/1980, 30 January 1980.

**“Article 28
Acquisition [of movables] by Prescription**

1. A person who has a movable property in his proprietary possession for a period of ten (10) uninterrupted years acquires ownership of the property at the end of the ten (10) year period (acquisition by prescription) if, at the beginning of the ten (10) year period, he was not aware that he was not entitled to ownership.”²²

Given this rather confusing usage of the term proprietary possessor in the Law on Property, it could be useful to make parallel to the way in which other civil law systems regulate the matter. In German Civil Code, for instance, the term “proprietary possessor” (“*eigenbesitzer*”) denotes a person who possesses an object as if it was his own (Article 872). This is different from “possessor in another’s interest” (“*fremdbesitzer*”), a notion used to denote a person who possesses an asset without the intention to own it and who acknowledges that the legal entitlement lays with the indirect possessor.²³ The same differentiation is also found in Article 27 of the Slovenian Code of Property Law²⁴ (“*lastniški posestnik*” and “*nelastniški posestnik*”), while the Polish Civil Code similarly prescribes an “owner-like” possession of the property as a requirement for the acquisition of property through prescription (Article 172).²⁵ These comparative examples as well the systemic interpretation of Article 40 of the Law on Property leads to the conclusion that the Kosovo legislator uses the term “proprietary possessor” in its standard meaning *i.e.* as “anyone acting like an owner, notwithstanding whether or not he is actually an owner”.²⁶

²² The remaining text of this article reads as follows: 2. Prescription is excluded if the person, on acquiring the proprietary possession, was not in good faith or if he discovers during the ten-year period that he is not entitled to the ownership of the movable property; 3. Upon the acquisition of ownership by prescription, all third-party rights in the movable property which arose prior to the acquisition by proprietary possession are extinguished, unless the proprietary possessor is not in good faith with regard to these rights while acquiring proprietary possession.”

²³ Civil Code in the version promulgated on 2 January 2002 (*Federal Law Gazette [Bundesgesetzblatt]* I page 42, 2909; 2003 I page 738), last amended by Article 1 of the Statute of 27 July 2011 (*Federal Law Gazette* I page 1600).

²⁴ Stvarnopravni zakonik, *Uradni list Republike Slovenije* No. 87/2002.

²⁵ Civil Code (in Polish: *Kodeks Cywilny*) of 23 April 1964, published in *Journal of Laws (Dziennik Ustaw)* No. 16, item 93, with subsequent amendments.

²⁶ Claudia Rudolf, Vesna Rijavec and Tomaž Keresteš, National Report on the Transfer of Movables in Slovenia, in Wolfgang Faber and Brigitta Lurger (eds.), *National Reports on the Transfer of Movables in Europe*, Vol. 1, European Law Publishers, 2008, 533. See also Wolfgang Faber and Brigitta Lurger, *Acquisition and Loss of Ownership of Goods*, European Law Publishers, 2011, 351 - 352.

This also ensues from the teleological reading of Article 40 that shows that a proprietary possessor is above all defined by his or her intention to exercise material control over property for his/her own benefit (*animus possidendi*), irrespective of whether he or she knew that another person is the owner of a property. The given understanding of the term “proprietary possessor” is also supported by the wording found in the Serbian language version of Articles 28 and 110 of the Law on Property, which contain the term “autonomous holder” (“samostalni držalac”).

It should, however, be noted that the Serbian text of Article 40 is entirely confusing when compared to the English version since its provisions use two completely different notions where the English text uses the term “proprietary possessor”. Namely, the first paragraph contains the word “person” (“osoba”), while the second paragraph of the same article refers both to “person” (“osoba”) and “proprietary possessor” (“vlasnički posedovatelj”):

“Član 40

Sticanje po osnovu zastarevanja

1. **Osoba** koja poverenjem ima u neprekidnom posedu dvadeset (20) godina jednu nekretninu ili deo iste, stiče vlasništvo nad njom.
2. **Osoba** koja ima u neprekidnom posedu deset (10) godina jednu nekretninu i ukoliko je isti registrovan kao **vlasnički posedovatelj** u katastru stiče vlasništvo nad nekretninom ili nekim njenim delom, ukoliko u okviru tog roka nije registrovan neki prigovor u vezi sa registracijom (emphasis added).²⁷

The same is observed in the Albanian text of Article 40:

“Neni 40

Fitimi me parashkrim

1. **Personi** i cili me mirëbesim e ka njëzetë (20) vjet në posedim të pandërprerë një paluajtshmëri ose një pjesë të saj, e fiton pronësinë në të.

²⁷ In fact, the second paragraph indicates that the term “proprietary possessor” in the Serbian text refers to the person who was registered as the proprietary possessor in the immovable property rights register.

2. **Personi** i cili e ka dhjetë (10) vjet në posedim të pandërprerë një paluajtshmëri dhe nëse ai është regjistruar si **posedues pronësor** në kadastër e fiton pronësinë në paluajtshmërinë ose në ndonjë pjesë të saj, në qoftë se brenda këtij afati nuk është regjistruar ndonjë kundërshtim lidhur me regjistrimin (emphasis added).”

As seen, the wording used in both the Serbian and Albanian texts of Article 40, which are the official texts of the Law on Property, further supports the view that Article 40 refers to a person who exercises material control over property in an autonomous manner, irrespective of whether or not that person believes to have legal title over the property in question.

The interpretation of the term “proprietary possessor” is important for understanding of the two key differences between the old and new rules on the acquisition of property through prescription. Namely, at the heart of the doctrine of acquisitive prescription, as provided in the previous law, was **bona fide and lawful character of possession**. This was clearly expressed in the notion of a “*conscientious and legal holder*” contained in Article 28 para. 2, and the notion of “*conscientious holder*” used in paragraph 4 of the same article of the Law on Basic Property Relations.²⁸ The analysis of the new rules on acquisitive prescription shows that in this regard they significantly differ from the old rules. The *lawfulness* of possession, as it seems, is no longer required because this requirement cannot be inferred from the terms “osoba”, “vlasnički posedovatelj” and “proprietary possessor”, as used in the different language versions of Article 40 of the Law on Property. As to the question whether the possession in good faith remained the requisite for the prescription under the new rules, the answer depends on the language version of the law under consideration. According to the Serbian and the Albanian text of the Law on Property, the *bona fide* character of possession is only required for the so-called “extraordinary acquisitive prescription”. On the other hand, in the English version of the same article the possession in good faith is not the condition for the acquisition of property.

Here it is argued that the departure from the type of acquisitive prescription existing under the previous law brings the new rules closer to the doctrine of adversarial possession typical of the common law jurisdictions.²⁹ Although the acquisitive prescription and the adversarial possession have the same role – to correct the differences between the

²⁸ See above, p. 5.

²⁹ For the difference between the Roman law and English law see Charles P. Sherman, *Acquisitive Prescription: Its Existing World-Wide Uniformity*, *Yale Law School Faculty Scholarship Series*, Paper 4442, 1911,152, available at: http://digitalcommons.law.yale.edu/fss_papers/4442

legal status and the factual situation – their *ratio legis* is different.³⁰ The main intention of a legislator when laying down the doctrine of acquisitive prescription is to remedy defects in title. Where a person acquired property from the non-owner believing that he or she is the owner, or where the transfer of property did not satisfy the prescribed form (for instance, the contract was not verified before the competent court or the transfer of ownership was not registered), the doctrine of acquisitive prescription, as regulated by the previous law, would provide remedy for the defects which occurred during the transfer of the right to property. On the other hand, the doctrine of adversarial possession operates through the extinction of the title of the original owner and its defining element is the adverse or hostile use of the property *vis-à-vis* the interests of the owner. Namely, adverse possession places a statute of limitation on the owner's right to bring action and enables "the occupier of a land who is not the true owner [to acquire] title to the land without consent from or compensation to the 'true' owner."³¹

Although these differences seem to be rather superfluous in the modern legal systems -characterized by the compulsory registration of property that enables an easy identification of the real estate owners - in some other settings they may have far reaching consequences. Where the ordinary "rule of law" mechanisms are ineffective, as it is often the case in the post-conflict territories, it is questionable whether the goal of ensuring legal certainty should be given primacy over the goal of preserving individual rights. The struggle of IDPs from Kosovo to repossess their properties lost as a consequence of 1999 conflict might be a good case in point. Namely, in the situation in which a legitimate owner was forcefully displaced from his/her real estate, it is hard to claim that the fact that another person is using his/her property should lead to the loss of a property title in order to safeguard the principle of legal certainty. This is even harder to argue where property of displaced owners is subject to widespread illegal occupation as described above.

³⁰ See British Institute of Comparative and International Law, *Comparative Analysis of Adverse Possession: J. A. Pye (Oxford) Ltd. v. United Kingdom*, 2006, available at http://www.biicl.org/adverse_possession/, 5 September 2013.

³¹ Bouckaert Baudewijn and Ben Depoorter, "Adverse Possession and Title Systems", in **Boudewijn Bouckaert and Gerrit De Geest (eds.)**, *Encyclopedia of Law and Economics*, Edward Elgar, 2001, 18.

4. The new system of acquisition of property through prescription and the applicable international human rights standards

After 1999 the most important international human rights instruments have been directly applicable in Kosovo by virtue of Article 1.3 of UNMIK Regulation 1999/24³², which subsequently entered into the Constitutional Framework for the Provisional Self-Governance³³ and the post-UDI Constitution of Kosovo³⁴. Among them, the European Convention of Human Rights (ECHR)³⁵ bears particular importance given that Article 53 of the post-UDI Kosovo Constitution provides that “[h]uman rights and fundamental freedoms guaranteed by this Constitution shall be interpreted consistent with the court decisions of the European Court of Human Rights”.³⁶

Hence, this part of the analysis starts from the rights guaranteed in the ECHR. In the meaning of the second sentence of Article 1 of Protocol 1 to the ECHR, loss of ownership over immovable property through the operation of the doctrine of adverse possession can be categorized as “deprivation of possession”. According to the principle of proportionality, any such interference with the peaceful enjoyment of possession must strike fair balance between the demands of public interest and the protection of fundamental rights.³⁷

The legal certainty is a legitimate public interest and hence could justify enactment of a law that enables acquisition of property rights on the basis of adversarial possession; however, this alone does not automatically provide that the legislation in question has stricken a

³² Adopted by UNMIK on 12 December 1999.

³³ Article 3 of the Constitutional Framework for the Provisional Self-Governance promulgated by the UNMIK Regulation No. 2001/9 on 15 May 2001.

³⁴ The Constitution of Kosovo adopted by the Assembly of Kosovo after the unilateral declaration of independence, on 15 June 2008.

³⁵ Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5. The ECHR is directly applicable in Kosovo by virtue of Article 22 of the post-UDI Constitution of Kosovo.

³⁶ It is also worth mentioning that three out of nine judges of the Constitutional Court of Kosovo were appointed by the International Civilian Representative, upon consultation with the President of the European Court of Human Rights, in accordance with ex-Article 152.4 of the post-UDI Constitution of Kosovo.

³⁷ Aida Grgić, Zvonimir Mataga, Matija Longar and Ana Vilfan, *The right to property under the European Convention on Human Rights: A guide to the implementation of the European Convention on Human Rights and Its Protocols*, Human Rights Handbook No. 10, Council of Europe, 2007, 14.

fair balance between the individual rights and public aims. In *J.A. Pye (Oxford) Ltd v. The United Kingdom*,³⁸ 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.”³⁹ The Court especially noted that in the systems where the owner of the immovable property can be 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.⁴⁰

The question whether the goal of ensuring legal certainty could justify deprivation of the owners of their title *i.e.* its transfer to those in unauthorised possession, deserves even more attention in a post-conflict settings. In fact, where the right to property is strongly interlinked with the post-conflict property restitution, as it is the case in Kosovo, the rules on the acquisition of property should be also analysed with respect to the international law governing application of the human rights standards in the context of mass displacement.

The UN Principles on Housing and Property Restitution for Refugees and Displaced Persons (the so-called “Pinheiro Principles”), translate the right to property into the right of “everyone who has been arbitrarily or unlawfully deprived of housing, land and/or property [to] be able to submit a claim for restitution and/or compensation to an independent and impartial body”.⁴¹ Moreover, this soft law document also recommends that in a context of mass displacement, the authorities should “[pre-empt] the formation of bona fide property” through a “constructive notice of the illegality of purchasing abandoned property”.⁴² In the similar vein, the UN Guiding Principles on Internal Displacement specify the duty of the competent authorities to assist IDPs to recover property and possessions they left behind or were dispossessed of upon their displacement.⁴³ In the European context, the Council of Europe Resolution 1708 (2010) on

³⁸ Application no. 44302/02, Judgment of 15 November 2005.

³⁹ *Ibid.*, para. 75.

⁴⁰ *Ibid.*, para. 65.

⁴¹ Principle 13.1. (E/CN.4/Sub.2/2005/17).

⁴² Principle 17.4.

⁴³ Article 29.2 of the Guiding Principles (E/CN.4/1998/53/Add.2).

Solving Property Issues of Refugees and Internally Displaced Persons⁴⁴ calls upon the responsible authorities to “guarantee timely and effective redress for the loss of access and rights to housing, land and property abandoned by refugees and IDPs without regard to pending negotiations concerning the resolution of armed conflicts or the status of a particular territory”. The Resolution 1780 (2010) emphasizes the importance of ensuring “that such redress takes the form of restitution in the form of confirmation of the legal rights of refugees and displaced persons to their property”.⁴⁵

Arguably, the application of Article 40 also violates the duties of the Kosovo authorities in the realm of the post-conflict property restitution process and return of IDPs.⁴⁶ The duty of the local authorities to provide all the necessary conditions for “the safe and dignified return of refugees and internally displaced persons and assist them in recovering their property and possession” is clearly established in the post-UDI Constitution of Kosovo.⁴⁷

The application of the doctrine of acquisitive prescription to the situation of mass displacement could also run contrary to an important international principle which requires that each victim of human rights violations should be restored as closely as possible to the conditions existing before the violations occurred. Under certain conditions, IDPs can be considered to be victims of forced displacement, which is a crime against humanity. Hence, their deprivation of the property title could be seen as violation of the right to reparation for victims of mass human rights violations. This right is elaborated in the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations

⁴⁴ Adopted by the Parliamentary Assembly of the Council of Europe (CoE) on 28 January 2010.

⁴⁵ Paras. 10.1. and 10.2.

⁴⁶ See on this: Brookings Institution – University of Bern: Project on Internal Displacement, *Protecting Internally Displaced Persons: A Manual for Law and Policymakers*, 2008, 171.

⁴⁷ Article 156. On 28 March 2012, the Government of Kosovo adopted a Decision No. 02/68 with the aim of amending the Kosovo Constitution of 2008, including its Article 156. On 15 May 2012 the Constitutional Court of Kosovo decided that the proposed deletion of Article 156 could affect the individual rights and freedoms guaranteed by the post-UDI Constitution (see Constitutional Court Decision in Case K038/12). See also Article 3a of the Law on the Protection and Promotion of the Rights of Communities No. 03/L-047 and their Members as amended by the Law on Amending and Supplementing of the Laws related to the Ending of international Supervision of Independence of Kosovo No. 04/L-115 of 31 August 2012.

of International Humanitarian Law.⁴⁸ The right to a remedy for victims of human rights violations is also provided in several other important international instruments⁴⁹, such as Article 8 of the Universal Declaration of Human Rights⁵⁰, Article 2 of the International Covenant on Civil and Political Rights (ICCPR)⁵¹ and Article 6 of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)⁵².

Furthermore, the adverse consequences for the IDP owners ensuing from Article 40 of the Law on Property could violate the principle of prohibition of discrimination.⁵³ When a law or institutional practice negatively affects the right to peaceful enjoyment of one's property only for certain segment of population and where that segment of population is defined by its specific status or ethnic origin⁵⁴, the issue of protection of property rights becomes interlocked with the issue of indirect discrimination.⁵⁵ The illegal occupation of immovable property in Kosovo and the lack of adequate access to courts affect IDPs to a greater extent than other owners thus leading to their greater vulnerability to being dispossessed of their immovable property through the operation of Article 40 of the

⁴⁸ UN General Assembly, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, Resolution adopted by the General Assembly, 21 March 2006, A/RES/60/147.

⁴⁹ The right to an effective remedy for victims of international humanitarian law are provided in Article 3 of the Hague Convention respecting the Laws and Customs of War on Land of 18 October 1907 (Convention IV), Article 91 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) of 8 June 1977.

⁵⁰ UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III).

⁵¹ UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171.

⁵² UN General Assembly, International Convention on the Elimination of All Forms of Racial Discrimination, 21 December 1965, United Nations, Treaty Series, vol. 660, p. 195.

⁵³ As defined in Article 3 of the Antidiscrimination Law No. 2004/3 of 19 February 2004. See also Article 3 of the Law No. 03/L-047 on the Protection and Promotion of the Rights of Communities and Their Members of 13 March 2008.

⁵⁴ Any practices or laws that indicate existence of discrimination on ethnic ground are always subject of a strict scrutiny test.

⁵⁵ Unless that law or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary. This definition is based on the definition contained in Article 2 para. 2 of the EU Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin ([2000] OJ L180/22), which has also served as a model of a definition of indirect discrimination contained in Kosovo Antidiscrimination Law (Law No. 2004/3) of 19 February 2004.

Law on Property.⁵⁶ Since IDPs mostly belong to minority communities,⁵⁷ the application of Article 40 without a consideration being given to the specific position of this group could in effect result in discrimination along ethnic lines. This is against the prohibition of discrimination spelled out in Article 14 and Protocol 12 to the ECHR, Article 26 of the ICCPR, Article 2 of the ICERD and Article 2 of the Kosovo Anti-discrimination Law⁵⁸. The given provisions could also become a barrier to the fulfilment of the special obligations of the local institutions “to ensure the full and effective equality of communities and their members, taking into consideration their specific needs” as prescribed in the Kosovo Law on the Protection and Promotion of the Rights of Communities and their Members.⁵⁹

5. Conclusion

The analysed norms on acquisitive prescription provide good illustration of how a misguided “transplantation” of an ordinary legal concept into a post-conflict legal environment, characterised by *inter alia* lack of rule of law and the mass displacement of population, could lead to the violation of the individual rights. As shown, the rules provided in Article 40 of the Kosovo Law on Property have the potential to become an insurmountable legal barrier for the repossession of property lost as a consequence of conflict and displacement. By not requiring that the possessor hold property lawfully and in good faith as a condition for this type of property acquisition, these rules could enable “legalisation” of illegal occupations and lead to *de facto* termination of IDPs’ right to

⁵⁶ According to Principle 29 of the UN Guiding Principles on Internal Displacement (E/CN.4/1998/53/Add.2.), IDPs who have returned or resettled “shall not be discriminated against as a result of their having been displaced”. The prohibition of discrimination on the ground of personal status is also prohibited by the provisions of Article 24 (2) of the post-UDI Constitution of Kosovo as well by Article 2 of the Antidiscrimination Law.

⁵⁷ Some 80% of the overall IDP population are of Serbian nationality, while the remaining 20% are made up of the members of RAE and Gorani communities. See e.g. Table 2 at the official web site of the Government of Serbia (GoS) at <http://www.srbija.gov.rs/kosovo-metohija/?id=20031>, 26 January 2012. Cf. 75% of Serbian nationality in the National Strategy Resolving the Problems of Refugees and Internally Displaced Persons for the period 2011-2014. When it comes to the internally internally displaced population (IIDPs), this group also includes members of the Albanian community which are in certain regions in the so-called “minority position”.

⁵⁸ The Kosovo Antidiscrimination Law clearly prohibits discrimination in all its forms, including indirect discrimination, and on all relevant grounds. Law No. 2004/3, adopted by the Kosovo Assembly on 19 February 2004.

⁵⁹ Article 1(2) of Law No. 03/L-047 on the Protection and Promotion of the Rights of Communities and their Members.

repossess their property and return to their homes. The examination of these provisions in the specific context of Kosovo has shown that their enactment might violate a number of international and domestic human rights standards.

For these reasons the paper suggests several amendments to the analysed provisions of the Law on Property. Firstly, it is suggested that Article 40 be amended in a manner that would explicitly exclude its application from the situation in which the occupation of immovable property has commenced during or after the 1999 conflict. It is proposed that this limitation remains in place until the post-conflict property restitution is effectively completed and all displacement-related issues adequately resolved. Secondly, where the occupation of immovable property has commenced before the 1999 conflict the acquisition of ownership through prescription should be allowed only if the property holder could demonstrate *bona fide* nature of his/her possession and if the court could ensure that owner or registered possessor is adequately informed about the given intention of the property holder. Thirdly, the author is of the opinion that the legislator should restore the requirement of possession in good faith, as it existed under the previously applicable law, by unambiguously requiring that the property holder be in good faith from the outset of the possession throughout its duration.

At the end it should be also said that a more systemic approach to the issues affecting the IDPs' right to property is needed in Kosovo given that the process of property restitution, which was initiated in 2000, is not over yet.

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**СТИЦАЊЕ СВОЈИНЕ ОДРЖАЈЕМ И НАСИЛНО
ЗАУЗЕЋЕ НЕПОКРЕТНЕ ИМОВИНЕ ЛИЦА
РАСЕЉЕНИХ СА КОСОВА И МЕТОХИЈЕ НАКОН
СУКОБА 1999. ГОДИНЕ**

Апстракт

Законом о власништву и другим стварним правима, донетим од стране косовских институција 2009. године, значајно се мењају услови за стицање својине одржајем. Најзначајнија промена тиче се савесности и законитости државине, као услова за стицање својине одржајем према Закону о основама својинскоправних односа из 1980. године, који је на Косову и Метохији био на снази до доношења новог закона. Према решењу садржаном у новом закону, законитост државине више уопште није услов за стицање својине одржајем док се савесност захтева само када је у питању стицање својине путем редовног одржаја. Дате промене суштински мењају институт одржаја приближавајући га законским решењима присутним у великој већини савремених европских законодавстава. Но, да ли је модернизација доктрине одржаја поједностављивањем услова за стицање права својине на непокретности у складу са општим одликама правног и својинскоправног система на Косову и Метохији? Огроман број расељених лица чије су непокретности узурпиране, неуређеност земљишно-књижних регистара и озбиљни проблеми у функционисању правосудног система успостављеног на Косову након сукоба из 1999. године само су неки од разлога за сумњу у адекватност нових одредаба. Шта више, анализирајући их у светлу релевантних међународноправних стандарда, ауторка заузима становиште да се одредбама о одржају садржаним у косовском Закону о власништву и другим стварним правима доводе у опасност нека од основних људских права расељених лица.

Кључне речи: одржај, савесна државина, законита државина, Косово након сукоба из 1999. године, интерно расељена лица, међународни стандарди за заштиту људских права.