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ON CERTAIN ASPECTS OF THE SYSTEM OF TAXATION OF IMMOVABLE PROPERTY IN KOSOVO AND PROPERTY RIGHTS OF INTERNALLY DISPLACED PERSONS

The immovable property tax system established in Kosovo after the 1999 conflict could serve as a useful case study of the way in which the public policies could negatively affect the returns process. The paper examines legal framework regulating the immovable property tax in Kosovo vis-à-vis its effects on internally displaced persons' property rights and their prospects of return. The relevant legislation is analysed through the prism of the limited capacity of internally displaced persons (IDPs) from Kosovo to use their immovable property in the place of origin and with regards to its compatibility with the applicable international human rights standards. The author argues that although the imposition of immovable property tax is a legitimate restriction of the right to property, this goal should not be pursued in a way that could aggravate vulnerability of displaced persons and further undermine their prospects of return.

Key words: *displacement, post-conflict property repossession, return, immovable property tax, protection of IDPs, proportionality test, indirect discrimination*

INTRODUCTION

Post-conflict property repossession is not an end in itself. When dispossessions by physical treats, fear, intimidation and other methods used during the civil conflicts are finally remedied, a number of other steps must be taken to enable those who were forcefully displaced to restart their lives. Public policies play an important role in that process. Without the competent

authorities paying attention to the specific needs of the displaced population in every aspect of their policy and practice, property repossession is less likely to lead to the sustainable return. In fact, a public policy that ignores the specific features of the life in displacement can reverse results of the property repossession.

The immovable property tax system re-established in Kosovo after the conflict could serve as a useful case study of the way in which the public policies could negatively affect the returns process. This paper analyses the legal framework regulating the immovable property tax in Kosovo with regards to its effects on internally displaced persons' property rights and their prospects of return. The author argues that although the collection of immovable property tax is a legitimate restriction of the right to property, this goal should not be pursued in a way that could aggravate vulnerability of displaced persons and further undermine their prospects of return.

The relevant legislation is first examined through the prism of the limited capacity of internally displaced persons (IDPs) from Kosovo to use their immovable property in the place of origin. Here, by analysing several displacement-related obstacles to the effective enjoyment of IDPs in their rights over immovable property, the paper shows that the property tax system established in Kosovo could lead to indirect discrimination of this group. In the second part of the paper, the property tax law is examined vis-à-vis its compatibility with the applicable international standards. In light of these observations several recommendations on how to remedy the identified deficiencies of the immovable property tax system in Kosovo are brought forward in the conclusion.

1. Re-establishment of the immovable property tax system in the post-conflict Kosovo

The basis of the system of taxation of immovable properties in the post-conflict Kosovo was laid down by the United Nations Mission in Kosovo (UNMIK). Already in 2001, UNMIK enacted basic rules and initiated a municipal pilot programme for the imposition of taxes on immovable property.¹ In 2003 a comprehensive legal framework for the taxation of immovable property was set.² The system of collection of property taxes so established was based on a decentralized model of tax collection where each municipality sets its own tax goals and a method of collecting tax revenues.

¹ UNMIK Regulation 2001/23 on the Pilot Program for Imposition of Taxes on Immovable Property in Kosovo, brought on 29 September 2001.

² UNMIK Regulation 2003/29 on Taxes on Immovable Property in Kosovo, brought on 5 September 2003.

Although the complete revenues from the immovable property taxes were to be retained and used by municipalities, the system was not effective. For instance, in 2006 only one municipality met its tax revenue targets, while thirteen municipalities collected less than one-half of planned revenues.³ In the same year only one per cent of the total public revenue was generated through the immovable property tax collection.⁴

After several attempts aimed at establishing a functional system of collection of property taxes, in 2010 the decentralized model of tax administration was replaced with a top-to-bottom approach. The new system introduced a unified method of tax collection to be applied by all municipalities. The municipal property tax offices were authorised to collect revenues on their own only if they had met the prescribed requirements.⁵ In addition to this a Kosovo-wide survey was initiated in the same year with the objective of collecting data on all registered properties.⁶

Although the substantive tax norms remained in essence the same as set by UNMIK, only after these organisational changes the true effects of the tax policy created in Kosovo could be observed. The increased efficiency of property tax collection revealed several aspects of the newly established tax system that could have far reaching negative consequences on the position of IDPs.

³ Despite the fact that in 2005 the Provisional Institutions of Self-Governance in Kosovo adopted the Incentive Grant for the Property Tax, which provided for additional monies to be distributed from the central government to the municipalities that reached their 2006 revenue targets. See more on this in: Melinda Bair, *Tax Policy as a Mechanism to Secure Kosovo's Independence: A Proposal to Reform the UNMIK Tax Regulations*, available at <http://pbosnia.kentlaw.edu/melinda-bair-ROLXFinalBair.htm> (last accessed on 6 September 2012).

⁴ Information found in a brief description of the SIDA Project for the improved property tax collection in Kosovo, available at: <http://www.sida.se/English/Countries-and-regions/Europe/Kosovo/Programmes-and-projects1/Improved-Property-Tax-Collection-in-Kosovo/> (last accessed on 6 September 2012).

⁵ Otherwise, the tax-collection process should be run centrally by the Immoveable Property Tax Department of the Kosovo Ministry of Finance. Article 23 of the Law on Taxes on Immoveable Property No. 03/L –204, enacted by the post-UDI Kosovo Assembly on 7 October 2010.

⁶ Property Tax Department of the Kosovo Ministry of Finance, *Property Tax Guide*, 2011, p.7, available at <http://tatimineprone-rks.org/en/> (last accessed on 15 August 2012).

2. Legal framework regulating tax on immovable property and the specific position of IDP owners of immovable property in Kosovo

Since 2010 the tax on immovable property is in effect regulated⁷ by the Law on Taxes on Immovable Property (further: “Law on Property Tax”).⁸ Previously, the tax authorities were applying UNMIK Regulation 2003/29 on Taxes on Immovable Property in Kosovo, promulgated in September 2003, and slightly amended in 2004⁹ and 2006 respectively.¹⁰

In its major parts the Law on Property Tax repeats the provisions contained in the UNMIK legislation. Both sets of laws establish a uniform property tax liability for all natural or legal persons who own or possess property in Kosovo. Although around 250.000 persons have been displaced from Kosovo since 1999,¹¹ the tax laws enacted in Kosovo do not differentiate between the taxpayers residing in Kosovo and IDPs who, for the various conflict-related reasons, do not benefit from their property rights. Moreover, neither international nor local legislators took into account displacement-related obstacles to IDPs and their property being effectively included in the newly established property tax system.

3.1. Tax on immovable property and the actual use of property

The tax liability and all related rights and duties are established uniformly for any natural person owning or lawfully possessing immovable

⁷ After the unilateral declaration of independence (UDI) in February 2008, numerous laws and other legal acts have been adopted in Kosovo that are substituting, in effect, the previous legislation. No legislation passed by the Kosovo Assembly after the UDI has been promulgated by the United Nations Special Representative of the Secretary General (SRSG), which is contrary to the UN SC Resolution 1244 and the legal framework created by UNMIK (see Section 1.1 of UNMIK Regulation No. 1999/24 on the Law Applicable in Kosovo and Section 9.1.45 of UNMIK Regulation No. 2001/9 on Constitutional Framework for Provisional Self-Government in Kosovo). Given this, nothing in this paper should be taken to imply recognition of the legitimacy of the legislation adopted after the UDI. The author believes that the resolution of this issue should be endorsed through a mutually agreed settlement between the authorities in Kosovo and the authorities of the Republic of Serbia.

⁸ Law on Taxes on Immovable Property No. 03/L –204.

⁹ UNMIK Regulation 2004/24 amending Regulation 2003/29, as amended, on Taxes on Immovable Property in Kosovo, brought on 26 July 2004.

¹⁰ UNMIK Regulation 2006/59 amending Regulation 2003/29 on Taxes on Immovable Property in Kosovo, brought on 22 December 2006.

¹¹ According to the last estimates, the Republic of Serbia is currently hosting approximately 210.000 persons. See UNHCR, *2012 UNHCR Country Operations Profile – Serbia* (and Kosovo: SC Res. 1244), p. 252, available at: <http://www.unhcr.org/4ec2310915.pdf> (last accessed on 6 September 2012).

property in Kosovo.¹² The law does not provide for any exception on the ground of displacement¹³ even though a significant portion of the Kosovo pre-conflict population still lives in displacement. IDP owners are liable for payment of property taxes although they could not use their immovable property because of the conflict or displacement. They are held liable for the taxes on property even when their immovable property has been illegally occupied. Whether or not the IDP owners sought protection of their property rights before the judicial or quasi-judicial bodies in Kosovo has no relevance in determining their tax liability.

Displacement or other conflict-related obstacles to the use of property cannot be invoked as a reason to appeal the tax bill. The right of appeal, as envisioned in Article 22 of the Law on Property Tax, covers only the cases of excessive taxation. According to it, the appeal can only be lodged on the ground that the assessed value of the property is not in accordance with its market value, that there are errors in the property tax database, such as applicable tax rate, or “that the tax bill is otherwise incorrect”.¹⁴

Even though the low socio-economic status common for many IDPs is to a great extent caused by impossibility to use their immovable property in Kosovo, there are no legal provisions that would provide for their tax relief. Where the payment of property tax would place undue hardship on a taxpayer he or she can only ask for a tax deferral¹⁵ but under no circumstances could the taxpayer be permanently exempted from the accrued property taxes.¹⁶ According to Article 24 of the Administrative Instruction 08/2011 on Immovable Property Tax Collection, if a taxpayer cannot pay the tax debt due to his or her financial conditions, the taxpayer should address the Ministry of Social Welfare for assistance. Since IDPs cannot become beneficiaries of the social welfare system due to the residence related

¹² Article 4 of the Law on Property Tax.

¹³ The only exception to the general tax liability established by the Law on Property Taxes is envisioned in relation to the property “exclusively exploited for public benefit purposes” by certain category of organisations and institutions. Article 8 of the Law on Property Tax exempts from the payment of property taxes institutions of the Kosovo government, UN and its specialized agencies operating in Kosovo, EU and its agencies, KFOR, ICO, EULEX, other intergovernmental organisations, as well accredited NGOs, religious institutions and cultural and historical monuments. The same was the case with UNMIK Regulation 2003/29, which provided exemptions in its Section 7.

¹⁴ Although it is not fully clear what is the exact meaning of the last criteria contained in Article 22 para. 1 of the Law on Property Tax. See also Article 3 of the Administrative Instruction No. 05/2011 on Appeal Procedures for Immovable Property Tax.

¹⁵ Article 16 of the Law on Property Tax.

¹⁶ Article 24 para. 5 of the Administrative Instruction No. 08/2011 on Immovable Property Tax Collection.

requirements introduced after the unilateral declaration of independence (UDI),¹⁷ in practice they should pay taxes even if that could affect their and their family members life sustenance.

3.2. Tax on immovable property and illegally occupied property

Although the legislator did not see the need to exempt from tax liability those whose property is or has been illegally occupied, it did recognise the necessity of ensuring that widespread instances of illegal occupation of IDPs' properties do not affect the level of collected tax revenues.

The Law on Property Tax is unique in Europe¹⁸ with regards the way it defines the taxpayer. The rule that determines who shall be or could be held liable for property tax is laid down in its Article 5 which reads as follows:

- “1. The person liable for the payment of property tax is, in the first instance, the property owner.
2. If the property owner cannot be determined or cannot be located, the taxpayer is the natural or legal person who uses the immovable property.
3. If the owner or lawful user of immovable property cannot be determined, or can be determined but *has no access to the immovable property*, the taxpayer shall be the physical or legal person that *actually uses the property*. Such decision shall not confer any rights on the user regarding the right of ownership (italic added).”

The cited article shows that its drafters were aware that a great number of owners might not be able to use their immovable properties in Kosovo either because they are displaced or because their property has been illegally occupied. In order to ensure collection of property tax even in those cases,

¹⁷ The post-UDI changes of legal framework have significantly affected the rights of IDPs arising from the concept of “habitual residence” used by UNMIK to ensure that IDPs enjoy rights equally to those enjoyed by the non-displaced population. See Article 4 of the Law No. 04/L-096 on Amending and Supplementing the Law No. 2003/15 on Social Assistance Scheme in Kosovo, enacted on 10 May 2012.

¹⁸ According to a survey on the European property tax systems, in some of the European countries users are made responsible for paying the property tax when they use property owned by the state or when the owner is unknown. See: Richard Almy, *A Survey of Property Tax Systems in Europe*, (Final draft), 67-68, 2001, available at www.agjd.com/EuropeanPropertyTaxSystems.pdf (last accessed on 15 August 2012).

the law establishes some kind of primary and secondary tax liability. The rule contained in Article 5 designates the owners or lawful possessors to be the “principal taxpayers” while those who are lawfully or unlawfully using property are the “secondary taxpayers”.

When placed in the post-conflict context of Kosovo it becomes clear that the given provisions indeed cover the most usual scenarios of what happened to the immovable property of IDPs after displacement. Without mentioning them explicitly, the law presupposes three types of situations typically experienced by displaced persons in relation to their property rights. Firstly, if the property owner cannot be located, which would usually be the case with an IDP owner, the alternative taxpayer will be the person who uses the property with or without the consent of the owner. Secondly, if the immovable property records do not contain data about the owner of a property and the tax authorities cannot identify the owner by surveying of a property because he or she is an IDP, tax can also be paid by the person who lawfully or unlawfully uses the property. The third paragraph of Article 5 covers cases where the owner whose whereabouts are known to tax authorities is not able to exercise his or her property rights because the property has been illegally occupied, which is again very typical for the IDPs’ property. In the last case the illegal occupant or, in the terminology used by the legislator, “the physical or legal person that actually uses the property”, could also be held liable for the payment of taxes.

Further reading of this article shows that although the illegal occupant can have tax liability, the IDP owner as the principal taxpayer retains the responsibility for payment of property taxes.

The primary tax liability of the owner, as established in Article 5, stays intact even if the immovable property has been subject to the repossession proceedings before the Kosovo Property Agency (KPA) – a mass claims mechanism established for resolving conflict-related property repossession claims.¹⁹ Although the number of claims still pending before this body and other figures²⁰ clearly indicate that the post-conflict property repossession process in Kosovo is far from being completed, whether or not a property is being under dispute before the KPA was obviously of no relevance for the legislator. The same holds true for the repossession proceedings initiated before the local courts.

¹⁹ <http://www.kpaonline.org/> (last accessed on 22 September 2012).

²⁰ Such as frequency of illegal reoccupation of immovable property after the eviction conducted by the KPA. See: Kosovo Property Agency, *Annual Report for 2011*, 12-21, available at: <http://www.kpaonline.org/PDFs/AR2011.pdf> (last accessed on 15 May 2012).

There are also other problems arising in relation to the text of Article 5. For instance, the Law on Property Tax establishes the rule on “principal residence deduction“ whereby the taxpayer is granted deduction of ten thousand (10.000) Euro from the taxable value of the property which serves as his or her principal residence.²¹ In case where there is the dual tax liability of the owner and the illegal occupant the question is whose principal residence will be relevant for the application of the given rule.²²

On the same line, it is also not clear who is the primary source of information on the basis of which the tax bill or other decisions of tax authorities are to be determined. According to the law, the illegal occupants are not only “secondary taxpayers” but they also have other tax-related responsibilities. For instance, they are liable for the registration of property in the property tax register; they should enable inspection of property during the property survey; they can appeal the tax bill, etc. Under these circumstances, it is not clear which information will be registered in the property tax register if, for instance, the information provided by the owner were different than those provided by the illegal occupant.

3.3. Fiscal cadastre and the conflict-related changes of the immovable property in Kosovo

The conflict in Kosovo was characterized by massive destruction of property. For that reason identification of “the properties which are to be included in the tax base” was among the first tasks before the tax authorities.²³ This task was, however, not completed, until 2010.²⁴ According to the available information, the re-surveying of the real estate in Kosovo was completed seven years after the tax duty was nominally re-introduced.

In addition to this, the accuracy of the newly established immovable property register, which serves as the principal source of information for the tax authorities about the existing property rights, has been questionable for the various reasons. Before the conflict many property transactions were not

²¹ Article 9 of the Law on Property Tax.

²² Similar question arises in general when it comes to IDP owners as it is not clear whether the tax authorities would treat their abandoned homes in Kosovo as principal residence even though their current residence is in the place of displacement.

²³ That was among the first criteria for the certification of municipalities according to Section 3 of UNMIK Regulation 2001/23.

²⁴ According to the relevant information, the only Kosovo wide surveying for the property tax purposes took place in 2010. See http://tatimineprone-rks.org/images/uploads/files/Copy_of_Survey_EN.pdf (last accessed on 20 August 2012).

registered as a result of the legislation enacted during Milosevic regime²⁵, because the property would often be inherited without the completion of the inheritance proceedings or for other reasons. Following the 1999 conflict a significant portion of property records was destroyed or moved to Serbia proper. Even more problems arose in relation to re-registration of property of IDPs. One of the consequences of forced displacement was that a great number of IDPs lost documentation. For that reason, in the process of property repossession before the Housing and Property Directorate and Claims Commission (HPD/CC)²⁶, claimants were granted only the right to register as the lawful possessors, even in those cases when it was certain that they had had the ownership title.²⁷ In addition, a notable portion of the immovable property assets belonging to IDPs has been object of illegal sales based on forged documents.²⁸ As a result of this a wide gap had emerged between the official property records and facts on the ground which has not been closed yet.

The risk of having an incorrect property tax register is further deepened by certain provisions contained in the Administrative Instruction No. 03/2011.²⁹ This bylaw, in its Article 4 prescribes that, for the purpose of taxing property, data can be gathered by “surveying of premises and gathering data on the ground about taxpayers [and] [...] from the existing documents which are *sufficiently legal* so as to be considered as correct (italic added)”. Apart from contradicting the basic rules on the acquisition of ownership rights on immovable property in Kosovo³⁰, this provision could undermine reliability of the fiscal register. In light of the described problems with the immovable property rights register³¹ this bylaw makes possible that

²⁵ See: Law on Changes and Supplements on the Limitation of Real Estate Transactions (*Official Gazette of the Socialistic Republic of Serbia*, No. 30 of 22 July 1989), as amended on 18 April 1991 (*Official Gazette of Republic of Serbia*, No. 22 of 18 April 1991).

²⁶ In 1999, the United Nations Mission in Kosovo (UNMIK) established a Housing and Property Directorate and Claims Commission (HPD/CC) to settle residential property disputes in Kosovo. See: UNMIK Regulation 1999/23 on the Establishment of the Housing and Property Directorate and the Housing and Property Claims Commission of 15 November 1999.

²⁷ Section 22.5 of UNMIK Regulation 2000/60 On Residential Property Claims and the Rules of Procedure and Evidence of the Housing and Property Directorate and the Housing and Property Claims Commission, brought on 30 October 2000.

²⁸ See: OSCE Mission in Kosovo, *Fraudulent Property Transactions in the Pejë/Peć Region*, 2009, 4.; OSCE Mission in Kosovo, *Kosovo Communities Profile*, 2010, 252.

²⁹ Administrative Instruction No. 03/2011 on Gathering and Registration of Information on the Property and Taxpayer.

³⁰ See Law No. 03/L-154 On Property and Other Real Rights of 25 June 2009.

³¹ UNMIK Regulation 2002/22 on the Promulgation of the Law Adopted by the Assembly of Kosovo on the Establishment of an Immoveable Property Rights Register, brought on 20 December 2002.

the fiscal cadastre includes data which are based solely on the information collected through the field survey or on the “documents which are *sufficiently legal*”.³² Additionally, the bylaw also provides that the information about the property can be collected from the taxpayer whereby the taxpayer is taken to be a person whose tenure over the property “shall be *‘if possible’* supported by the documents (italic added)”.³³ The actual risk is that in this way the illegal forms of tenure, such as tenure based on usurpation and dubious transactions, can be treated in the same way as legal tenure and that this would further undermine the accuracy of the property tax register.

Where the property of an IDP was altered by illegal constructions after the conflict, this would mean that the property tax register could contain not only an inaccurate data on who has a property title but also what is the taxable value of the property. As a consequence of it IDP owners could be held liable for the taxes for immovable property that was illegally constructed on their property.

3.3.1. Taxation of property destroyed during the conflict

Although a great portion of immovable properties destroyed or gravely damaged during the conflict was never reconstructed nor have their owners, in greatest majority of cases being IDPs, ever received compensation for the losses suffered, they are asked to pay property taxes. For the purpose of determining tax rates, all the properties in Kosovo are classified in one of seven categories. One of these categories is determined as “abandoned immovable property and uninhabited structures” i.e. “land and uninhabited and unsteady buildings that cannot be used without making major renovations and changes of materials”.³⁴ A quick look at the list of property tax rates set by municipalities for year 2011 shows that 28 out of 34 municipalities have charged taxes for the property classified as “abandoned”. For instance, in Klinë/Klina³⁵ municipality the tax rate to be applied to the abandoned property is 0,20 % of its market value, which is equal to the tax

³² Article 4 of the Administrative Instruction No. 03/2011.

³³ Article 8 of the Administrative Instruction No. 03/2011.

³⁴ Article 7 para. 2 of the Law on Property Tax. This presents one of the few differences between the Law on Property Tax and the first UNMIK law on property tax, UNMIK Regulation 2001/23, which in its Section 6.2 provides that “[a] municipality may establish that below a certain threshold of value, property will be exempt from taxation.”

³⁵ The names of the municipalities used throughout the paper are in accordance with the rules contained in UNMIK Regulation 2000/43 on the Number, Names and Boundaries of Municipalities, of 27 July 2000.

rate charged in the same municipality for the residential and commercial property.³⁶

3.4. Access to information about the immovable property tax system while in displacement

Another problem arising from the fact that the law treats IDPs in the same way as the other immovable property owners although they are not physically present in Kosovo can be seen in the way the tax authorities have approached the issue of their access to information.

A logical precondition of a functional tax system is the effective and timely dissemination of information about the property taxation. An adequate provision of information to the taxpayers is even more so an essential prerequisite of a tax system when the tax obligations have been newly established or re-established. After the conflict, it took more than a decade to establish a functional tax system in Kosovo. Although the property taxation was nominally established already in 2003, it was not until 2010 that the tax authorities commenced issuing tax bills in a systematic manner while the first tax bills reached IDPs in 2011.³⁷ Given the time gap between the end of conflict until the re-establishment of the tax obligation, as well the physical remoteness of IDPs from the administrative centres in Kosovo, it could have been expected that the tax authorities would have invested significant efforts to pass the necessary information to displaced population. Yet, apart from the general public information campaign conducted in Kosovo, no public information activities specifically designed for the IDP recipients could be identified.

Moreover, it is unclear in which way the tax authorities have planned to establish and maintain communication with the IDP owners. There is no functional postal service between Kosovo and Serbia proper which makes a postal correspondence between the authorities in Kosovo and IDPs to be virtually impossible. In the given circumstances, it is not surprising that many IDPs learn about their tax obligations first time when they try to obtain possession list from cadastre or receive some other municipal service.³⁸

The lack of understanding on the part of legislator that certain portion of immovable property owners might not be able to receive in time all the necessary information about their tax duties is also visible in a way the legislator regulates situation when the tax bill was not successfully delivered.

³⁶ Available at <http://tatimineprone-rks.org/en/> (last accessed on 15 August 2012).

³⁷ According to data collected through the provision of free legal assistance to IDPs within the EU-funded Project "Further support to refugees and IDPs in Serbia".

³⁸ Ibid.

According to the Administrative Instruction No. 08/2011 on Immovable Property Tax Collection, it is for the taxpayer to contact the Municipal Property Tax office if he or she did not receive the tax bill.³⁹ Furthermore, the fact that the taxpayer did not receive the tax bill cannot be taken as a sufficient reason to release him or her from the duty to pay penalty for the delayed payment.⁴⁰

Even more worryingly, although many IDPs received the first tax bill only in 2011, they are held liable for a tax debt accrued for an undetermined number of past years. The lack of transparency of the tax bills prevents IDPs from understanding in which way their tax debt has been calculated.⁴¹ The limited access to information about the tax liability also limits the possibility of lodging an appeal for the accrued tax debt. According to Article 5 para. 1.1 of the Administrative Instruction No. 05/2011, appeals can in principle be lodged only for the bills issued in the current fiscal year. Municipal Board for Complaints, the first instance body that should review the appeals, can only exceptionally review appeals lodged for the tax owed for the previous fiscal years.⁴²

Another limitation of the possibility of challenging tax bill through the appeal procedure of this kind is closely related to the duty of a taxpayer to register taxable property. Namely, the Law on Property Tax establishes duty of the “persons owning, using or occupying immovable property [...] to register that property in the municipal property tax database, and supply the relevant municipality with information concerning the immovable property subject to registration, on or before 1 March of each tax period”.⁴³ According to Article 20 of the Law a failure to fulfil this duty has as a consequence “forfeiture of the right to appeal the tax bill”. Under these provisions one could imagine a situation where an IDP is taxed for the building that was illegally constructed on his illegally occupied property without even having the right to appeal the tax bill because he or she “failed” to timely register the illegally constructed property before the tax authorities.

³⁹ Article 7 para 12.

⁴⁰ *Ibid.*

⁴¹ According to data collected through the provision of free legal assistance to IDPs within the EU-funded Project “Further support to refugees and IDPs in Serbia”, none of the tax bills received by the Project beneficiaries included specific information about the date from which the tax debt was owed neither an indication of a method used by the tax authorities for the calculation of the tax debt.

⁴² Article 5 para. 1.7 of the Administrative Instruction No. 05/2011 on Appeal Procedures for Immovable Property Tax.

⁴³ Registration of a property is an obligation established in Article 10 of the Law on Property Tax Article 10.

3.5. Failure to pay immovable property tax and the specific position of IDPs

Depending on the phase of the tax collection process a failure to pay taxes and other tax-related debts can lead to a number of different sanctions. If a taxpayer fails to pay taxes, the tax authorities may confiscate or establish mortgage right over his or her personal property, sell his or her personal property, terminate municipal services delivered in relation to the immovable property or, in the final stadium of the tax collection process, seize, establish mortgage rights or sell his or her immovable property.⁴⁴ Within the range of different measures that can be undertaken by the tax authorities for the purpose of collecting taxes, two will be analysed in more detail because of their extremely negative impact on the property and other rights of IDPs. These are the termination of municipal services and the confiscation of immovable property.

3.5.1. Termination of municipal services

According to Article 18 of the Law on Property Tax “if a taxpayer fails to pay the full amount of the outstanding tax, penalties and interests [...] it shall be lawful for the municipal tax collectors to terminate municipal services to the taxpayer’s property”.⁴⁵ In the range of municipal services, which can be terminated for the non-payment of property taxes, the denial of access to cadastre is one that IDPs face more often than others.⁴⁶ This measure should be singled out also for its particularly negative interrelation with some of the already mentioned deficiencies of the property rights guarantees in Kosovo.

According to the relevant bylaw, the extracts from the immovable property rights register or cadastre plans are not to be issued for the immovable property over which there is an outstanding tax debt.⁴⁷ In the

⁴⁴ Procedure for the enforcement of all the enlisted measures standardly involves sending of the written notice to the last known address of a taxpayer and placing of a written notice at his or her residence or working premises.

⁴⁵ The municipal services that shall not be delivered to the taxpayer who fails to pay property taxes are defined in the Administrative Instruction No. 07/2011 on Orders to Ban Offering Municipal Services Aiming Enforced Payment or Property Taxes. These municipal services are supposed to be related to the immovable property, yet, the OSCE Mission in Kosovo in some municipalities has identified instances of the issuance of civil registration documents being conditioned with the payment of property taxes. See: OSCE Mission in Kosovo, *Access to Civil Registration in Kosovo*, July 2012.

⁴⁶ According to data collected through the provision of free legal assistance to IDPs within the EU-funded Project “Further support to refugees and IDPs in Serbia”.

⁴⁷ Article 3 of the Administrative Instruction No. 07/2011 on Orders to Ban Offering Municipal Services Aiming Enforced Payment or Property Taxes.

Kosovo context characterised by problems related to the accuracy of the immovable property register and to the widespread instances of illegal occupation of private property, a denial of access to the cadastre further decreases the IDPs' chances to protect their properties. Without having access to the public records, the capacity of IDPs to prove ownership or other title over the property is barely possible. As a consequence of this not only are they asked to pay taxes for the property they have no access to, but also they are further hampered in their attempt to protect their property rights before the relevant institutions. Such a measure can also become an obstacle for the free disposal of one's property or can lead to the sale of property at price that is below the market value of the property.

3.5.2. Confiscation of immovable property

Even more worrying is the possible loss of property title as a consequence of a failure to pay accrued taxes. The Law on Property Tax prescribes that "[i]f, after two years from the final notice for payment of tax the taxpayer's debt has still not been paid, the municipality may deliver a notice of seizure or establishment of mortgage right for the immovable property".⁴⁸ As in other aspects of the tax collection process, while drafting these provisions the legislator did not give any consideration to the specific position of IDPs.

Firstly, there is the already raised question of whether a fair balance between the public policy objectives and individual rights could be set when it comes to taxing of property belonging to IDPs. The displaced owners are taxed for the property they could not use for reasons which are not their personal choice but simply because there were no conditions for their return to the place of origin. Furthermore, if the property belonging to IDPs, as it is often the case in Kosovo, is or has been illegally occupied, taxation of it would in effect mean that IDP owners are asked to pay taxes for the property they could not use because the responsible institutions failed to protect their property rights. All these questions are even more troubling in light of the possibility of such immovable property being seized and sold by the tax authorities.

Second important question to be answered is on the basis of which parameters would the tax authorities categorize IDP property as residential or commercial? According to the last paragraph of Article 19, the residential property "cannot be sold in a public auction or otherwise involuntarily seized". Yet, the question is whether the tax authorities will grant this right to the taxpayers whose temporary residence is elsewhere due to displacement? This question is even more valid in the light of the post-UDI

⁴⁸ Article 19 para. 1.

changes of the legislation that have significantly altered the possibility of IDPs to have residence in Kosovo,⁴⁹ and the fact that by law the illegal occupant is a “secondary taxpayer”. In the Kosovo context it is not that hard to imagine the situation where an IDP owner, whose property is used by illegal occupant for commercial purposes, is threatened with its seizure because the tax authorities considered it to be the commercial property even though it served as the rightful owner’s residence before the conflict.

Another notable feature of these provisions is that the law does not set any mechanism which would ensure that ownership, or any other legal tenure over property existing at the moment of public sale, are adequately protected. Namely, according to Article 3 of the Administrative Instruction No. 09/2011 For the Loss of the Right on Property, the notice of sale shall contain declaration that the “property will be sold **“as if it is”** with no guarantee to the [...] ownership (emphasis added)”.⁵⁰

The analysed provisions also lack other important safeguards for IDPs. The law does not envision any specific procedure for notifying the IDP owner that his or her property will be the object of a public auction. A copy of the notice for sale should be sent to the “taxpayer” and not exclusively to the property owner or lawful possessor i.e. it is not clear whether the notice of upcoming sale would be considered as successfully delivered if it has reached solely the illegal occupant. There is also the problem of notifying IDP owners, whose whereabouts in majority of cases are not known to the tax authorities. Further question is how could the notification be delivered without an effective postal system connecting the places in Kosovo and Serbia proper?⁵¹ It is also of little avail for IDPs that the Law stipulates the notice of sale to be published “at least in one of the daily newspapers with big circulation in Kosovo [and] placed at least in three public visible places in the municipality or local community in which the property to be sold is located”.⁵² Taking into account the very basic

⁴⁹ See footnote no. 20.

⁵⁰ This is particularly worrying when it comes to IDP taxpayers in light of the problematic accuracy of the immovable property register in Kosovo and the fact that the law establishes tax liability of the illegal occupant as the secondary taxpayer.

⁵¹ If the attempt to submit the notice to the taxpayer personally has failed, “a copy of the notice should be sent to the last known address of the taxpayer”.

⁵² For instance, the Law on Property Tax does envision that the “list of properties subject to seizure shall be announced in a major Albanian language publication of general circulation in Kosovo and a major Serbian language publication”, but the bylaw which further regulate the forfeiture of property does not repeat this provision but just stipulates that “[t]he announcement of sale will be published in the local newspaper if there is such a newspaper in the region. In such a place where there is no newspaper at the general circulation in that region, then the announcement of sale will be stuck on the walls of the nearest municipal offices of the place of its sequestration and in at least two other public places.”

features of displacement, it is obvious that none of these methods of announcing forfeiture and sale of property could be reliable when it comes to IDPs.

3. Compatibility of the legal framework regulating the immovable property tax with the applicable international human rights standards

International public law recognizes the right of national authorities to control the use of private property in accordance with the public interest. This entitlement includes the power to impose taxes and take measures which are necessary to secure their payment. The right of a state to limit the right to property, if that is necessary for the enforcement of its tax legislation, is expressly recognized in the second paragraph of Article 1 of the First Protocol to the European Convention on Human Rights (European Convention). According to the case law of the European Court of Human Rights (ECtHR), State Parties to the Convention enjoy a wide margin of appreciation in this field.⁵³ The decisions about what kind of taxation policy a state should pursue “will commonly involve the appreciation of political, economic and social questions, which the Convention leaves within the competencies of the Contracting States”.⁵⁴

4.1. Taxation of the immovable property of IDPs and the right to return

This, however, does not mean that national authorities are free to impose any tax regime they deem may fit to their public policies. As the ECtHR stated in *WASA Omsesidigt, Forsakringsbolaget Valands Pensionsstiftelse v. Sweden*,⁵⁵ a government should strike proper balance between the need to generate revenues and other public policy objectives.

The above-presented analysis of the legal framework regulating property tax in Kosovo provides elements for the conclusion that the authorities in Kosovo have not achieved such balance. Return of displaced population is among the principal duties of the local authorities.⁵⁶ Yet, the

⁵³ Kosovo is not a signatory of the European Convention or of any other international or regional human rights instrument. However, its provisions are applicable in Kosovo by virtue of Article 22 of the post-UDI Constitution of Kosovo.

⁵⁴ *Kaira v. Finland*, Application No. 27109/95, Decision of 15 May 1996.

⁵⁵ Application no. 36689/02, Decision of 9 January 2007.

⁵⁶ This duty is explicitly laid down in Article 156 of the post-UDI Constitution of Kosovo from 2008 and it also arises from its Article 22, which provides for the direct applicability of the main international human rights instruments in Kosovo. Nevertheless, on 28 March 2012, the Government of Kosovo adopted a Decision No. 02/68 with the aim of amending the post-

property tax system in Kosovo was set without taking into account the special position of more than 200.000 internally displaced persons. On the same line, there are also no indications that the legislator has given any consideration to the fact that the post-conflict property repossession process in Kosovo is far from being completed. In fact, the risk is that the taxation of the immovable property of IDPs could in itself further hinder the return and property-repossession process. The accrued tax debt over immovable property of IDPs could easily join other serious obstacles to return such as limited access to property and housing, frequent security incidents against private property and the general lack of economic opportunities.⁵⁷

The position of the authorities in Kosovo seems to be contrary not only to the need to properly balance different policy objectives but also to the international standards on post-conflict property restitution and protection of IDPs. The economic sustainability of return policies could be hindered if the accrued taxes are charged for “the newly reposessed but as yet unproductive property of IDPs”.⁵⁸ The United Nations Guiding Principles on Internal Displacement⁵⁹ provide that competent authorities have the primary duty to establish conditions for the voluntary return of IDPs to their homes or places of habitual residence. According to its Principle 29, IDPs who have returned or resettled “shall not be discriminated against as a result of their having been displaced”. On the same line the Pinheiro Principles⁶⁰ require from the competent authorities to “ensure the right to housing, land and property restitution through all necessary legislative means, including through the adoption, amendment, reform, or repeal of relevant laws, regulations and/or practices”.⁶¹

UDI 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 Constitution (see: Constitutional Court Decision in Case K038/12).

⁵⁷ Such as theft, vandalism, burglaries and looting of empty returnee houses. See: OSCE Mission in Kosovo, *Community Rights Assessment Report* (Third Edition), 2012, 14-15; OSCE Mission in Kosovo, *Municipal Responses to Security Incidents Affecting Communities in Kosovo and the role of Municipal Community Safety Councils*, 2011, 1, 26.

⁵⁸ Brookings Institution – University of Bern: Project on Internal Displacement, *Protecting Internally Displaced Persons: A Manual for Law and Policymakers*, 2008, 202. In Kosovo this has been recognized in 2008 with regards the unsettled debts for the public utilities services involving property under the administration of the KPA. According to UNMIK Regulation 2008/5, the unsettled debt should not be charged from the property right holder for the property which was administered by the KPA, for the periods when the given property was illegally occupied.

⁵⁹ E/CN.4/1998/53/Add.2.

⁶⁰ E/CN.4/Sub.2/2005/17.

⁶¹ Principle 18.1

4.2. Tax on immovable property and the “ability to pay” principle

For these reasons, it does not seem that the legislator in Kosovo has succeeded in setting the fair balance between the general interest of the community and the individual rights. As the European Court found in *Travis v. Italy*, “[...] the financial liability arising out of the raising of tax or contributions may adversely affect the guarantee secured under Article 1 [of the First Protocol] if it places an excessive burden on the person or the entity concerned or fundamentally interferes with his or its financial position”.⁶² The similar principle is also contained in Article 1 of the International Covenant on the Civil and Political Rights (ICCPR) according to which the national authorities should abide by the “ability to pay principle” when designing their taxation policies.⁶³

As typical for protracted displacement, many IDPs from Kosovo live in poverty because their monthly income does not suffice to cover their life sustenance needs.⁶⁴ According to the available statistics, most of the IDP households with insufficient monthly income do own an apartment or a house in Kosovo (49%) yet, more than half of these persons are subtenants (48.9%) or live with relatives or friends (21.6%).⁶⁵ A plausible conclusion that could be established from these data is that low socio-economic status of IDPs might have been further aggravated by the imposition of immovable property taxes for the property they possess in the place of origin. Yet, as we have seen, the legislator in Kosovo places an unalterable duty on IDPs to pay property taxes. This tax liability cannot be challenged on the ground that a taxpayer could not use his or her property because of displacement nor the applicable law provides any subsidiary tax relief mechanism for IDPs.

4.3. Taxation of immovable property and the duty to protect

Although the poverty of IDPs is often a consequence of the lack of access to their properties in the place of origin because those have been illegally occupied, the tax legislation does not provide any form of exemption for this category of taxpayers. By introducing the concept of illegal occupant as the secondary taxpayer, the Law on immovable Property

⁶² Application No. 13013/87, Decision of 14 December 1988.

⁶³ Kosovo is not a signatory of the ICCPR. However, ICCPR binds its institutions, as its provisions are directly applicable in Kosovo by virtue of Article 22 of the post-UDI Kosovo Constitution of 2008.

⁶⁴ UNHCR and Commissariat for Refugees, *Assessment of the Needs of Internally Displaced Persons in Serbia*, February 2011.

⁶⁵ *Ibid*, 3-4.

takes into account this kind of situations only to ensure the unimpeded collection of tax revenues.

By doing this, it could be further argued, the legislator risks widening the gap between the actual level of protection of property rights in Kosovo and the requirements laid down in Article 1 of the First Protocol. Namely, although Article 5 of the Law on Property Tax includes a safeguard that it “shall not confer any rights on the user regarding the right of ownership” there is a danger that to make possible for the illegal occupants to pay property taxes could further instigate their unlawful expectations over property.⁶⁶ As a result of this it could become even harder for an IDP to evict the illegal occupant from his or her property.

Another type of violation of the right to property as guaranteed by the European Convention could be also caused by the fact that the law does not take into due account changes to property caused by conflict and displacement. To establish the duty of IDPs to pay taxes for the property which has been illegally constructed on their occupied property could place on them an excessive burden. The same could be stated for the taxation of property that was destroyed during the conflict. Here the connection between the tax liability and the use of property is even less visible in the light of the fact that the compensation scheme for the immovable property destroyed during the conflict has not been established yet, nor it is within sight at the moment.

4.4. Foreseeability and procedural fairness of the immovable property tax law

The inadequate level of information about the property tax system being provided to IDP taxpayers is another cause of potential violations of Article 1 of the First Protocol. As shown in the previous sections, due to the non-existence of media with regional coverage or a postal service that could connect places in Kosovo and in Serbia proper, IDPs have no possibility of receiving information about property tax. In spite of this, they are asked to retroactively pay them. As shown, IDPs are also almost left without the possibility to challenge the tax debt accrued for the past fiscal years. This

⁶⁶ For instance, in the Development Strategy of the Kosovo Cadastre Agency it is observed that some portion of taxpayers is “under the impression that being included in the property tax registry implies inclusion in the cadastre registry as well”; In: Kosovo Cadastre Agency, *Business Plan 2009 – 2014 and Development Strategy 2009-2011*, Pristina, 2008, 96.

could lead to the violation of Article 13 in conjunction with the procedural guarantees contained in Article 1 of the First Protocol.⁶⁷

4.5. Taxation of immovable property and the principle of equal treatment

The fact that the neither international nor the local legislator recognised IDPs as a specific category of taxpayers is a unifying feature of all the deficiencies of the property tax law identified throughout the paper. The Law on Property Tax and related bylaws treat IDPs in the same way as the other taxpayers despite the fact that, with minor exceptions, they cannot benefit from their property. This in turn leads to IDPs being exposed to a financial burden that is much greater than the financial burden placed on ordinary taxpayers with unimpeded access to property.

In accordance with international standards, the law applicable in Kosovo expressly prohibits indirect discrimination, which occurs when an apparently neutral law places certain category of persons at particular disadvantage compared with other persons. The law applicable in Kosovo prohibits indirect discrimination on a variety of grounds including status.⁶⁸ Article 14 and Protocol 12 to the European Convention protects individuals placed in analogous situations from being discriminated in their enjoyment of the rights guaranteed by the Convention, including the right to property. As the ECtHR said in *Darby v. Sweden*, difference in treatment will be discriminatory if there is no reasonable relationship of proportionality between the means employed and the aim sought to be realized.⁶⁹ In the Kosovo context, it could be argued, the legislator places an excessive burden on IDP taxpayers by treating them in the same way as other taxpayers with the aim of securing certain level of tax revenues, which negatively affects the enjoyment of their property and other rights.

5. Conclusion

There is no doubt that the imposition of immovable property tax is a legitimate way for the competent authorities to collect public revenues. Yet, the need to secure public revenues should be balanced with the other public policy objectives and carefully assessed vis-à-vis its impact on individual rights. Harmonizing different priorities and making sure that individuals are

⁶⁷ In *Hentrich v. France* the ECtHR held that the applicant “bore an individual and excessive burden which could have been rendered legitimate only if she had had the possibility – which was refused to her – of effectively challenging the measure taken against her.” Application No: 13616/88, Judgment of 22 September 1994, para. 49.

⁶⁸ See Article 2 of Anti-Discrimination Law No. 2004/ 3 of 19 February 2004.

⁶⁹ Application No: 11581/85, Judgment of 23 October 1990.

not exposed to excessive taxation is even more so a demanding task in post-conflict times. As seen in this analysis, the property tax system established in Kosovo after 1999 focuses on raising tax revenues to the extent which could put at peril other important policy objectives such as property repossession and return of displaced population as well the overall respect for property rights. The way in which the property tax legislation in Kosovo disregards the vulnerable situation of IDP/returnee owners could lead to nullification of the results achieved in the field of property-repossession. So misconceived property tax system could also reverse the already poor results in the field of return and reintegration of internally displaced.

In order to be in accordance with the Pinheiro Principles a program for property restitution and return of victims of forced displacement must take a comprehensive approach.⁷⁰ Public policies, including tax policies, should be designed in such a way as to create an environment conducive to return. Otherwise, what has been achieved in the field of property restitution and return might be easily reversed by the operation of a tax system that does not take into account the needs of IDPs. In fact, in its most worrisome shape, the property tax system could in itself lead to the dispossession of IDPs⁷¹ and further undermine their prospects of return. For these reasons it is suggested that the property tax system in Kosovo should be brought into compliance with international human rights standards and the duties of the local authorities vis-à-vis return of displaced population. These changes should, among else, eliminate the possibility of retroactive taxation of the immovable property belonging to IDPs, provide that their property is automatically exempted from the payment of the property tax⁷² and ensure that returnees are provided with the tax exemption for certain period of time following their return.

⁷⁰ See on this David L. Attanasio Nelson, Camilo Sánchez, Return Within the Bounds of The Pinheiro Principles: The Colombian and Restitution Experience, *Washington University Global Studies Law Review*, Vol. 11, No. 1, 2012.

⁷¹ Dispossession of IDPs through the forfeiture of their property for the accrued tax debts.

⁷² Except when the given property has been subject of the rental or lease agreements or other type of voluntary contractual agreements whereby the owner is receiving payment for the use of his or her property.

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О НЕКИМ АСПЕКТИМА СИСТЕМА ОПОРЕЗИВАЊА НЕПОКРЕТНОСТИ НА КОСОВУ И МЕТОХИЈИ И ИМОВИНСКИМ ПРАВИМА ИНТЕРНО РАСЕЉЕНИХ ЛИЦА

На Косову и Метохији је након сукоба из 1999. године уведен систем опорезивања непокретности који би могао да послужи као пример тога на који начин јавне политике могу негативно утицати на процес повратка расељених. Чланак анализира правне акте којима је регулисан порез на непокретности на Косову и Метохији у погледу њиховог утицаја на имовинска права интерно расељених те права на одржив повратак ових лица. Последице датог законодавног оквира разматране су у светлу ограниченог приступа интерно расељених лица њиховим непокретностима на Косову и Метохији као и спрам усклађености датих прописа са важећим међународним стандардима за заштиту људских права. Ауторка стоји на становишту да, иако наплата пореза на непокретности представља легитимно ограничење права на мирно уживање имовине, ова се активност не сме спроводити на начин који би довео до погоршавања положаја интерно расељених лица и ограничавања њихове могућности повратка у место порекла.

Кључне речи: *расељење, повраћај имовинских права након сукоба, заштита интерно расељених лица, повратак, тест пропорционалности, посредна дискриминација*