

Department of Human Rights and Communities

Legal System Monitoring Section

**Issues concerning the role of professional associates
and the initiation of proceedings in inheritance cases**

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Executive Summary

When courts in Kosovo fail to carry out inheritance proceedings in accordance with the law, the rights of individuals as guaranteed by international human rights instruments may not be adequately safeguarded. In particular, the Organization for Security and Co-operation in Europe Mission in Kosovo (OSCE) has observed that inheritance proceedings are not always carried out by a tribunal established by law. Further, inheritance proceedings are not initiated in accordance with the procedure foreseen by the legislative framework. While there are many factors which may affect the proper handling of an inheritance procedure, the OSCE has chosen in this report to examine only these two core procedural deficiencies. The report concludes with recommendations on how to address the identified shortcomings.

Introduction

The OSCE is concerned that some inheritance proceedings in courts in Kosovo are being carried out in a manner that may violate both domestic and international law. A lack of clarity in the legal framework which regulates the conduct of these proceedings and poor communication between municipal and judicial authorities severely hamper efforts by the courts to conduct inheritance proceedings in accordance with relevant legislation. In some municipal courts, inheritance proceedings are conducted by a professional associate, rather than by a judge, even though the law does not contemplate this arrangement. The procedure foreseen for initiation of review of the inheritance is almost never followed in practice.

Courts in Kosovo risk violating both international human rights standards and domestic law when they fail to carry out inheritance proceedings in accordance with the relevant normative framework. In particular, Articles 6 and 8, and Article 1, Protocol 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), and the corresponding delineation of these rights in the jurisprudence of the European Court of Human Rights (ECtHR)¹ are implicated by the conduct of these proceedings. Articles 15 and 16 of the Convention on the Elimination of all Forms of Discrimination against Women are also applicable and relevant.² Domestically, review of the hereditary estate should be carried out according to Articles 125-189 of the law

¹ Article 6, ECHR provides that “[i]n the determination of [. . .] civil rights and obligations [. . .] everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.” Article 8, ECHR guarantees, *inter alia*, “the right to respect for [. . .] private and family life.” Further, jurisprudence of the ECtHR has recognized inheritance rights on intestacy as falling under the scope of Article 8. See *Marckx v. Belgium*, ECtHR judgment of 13 June 1979. Article 1, Protocol 1, ECHR guarantees the right to “peaceful enjoyment of [. . .] possessions.” The concept of possessions “has an autonomous meaning which is not limited to ownership of physical goods and is independent from the formal classification in domestic law: certain other rights and interests constituting assets can also be regarded as ‘property rights’ and thus as ‘possessions’ [..].” *Beyeler v. Italy*, ECtHR Grand Chamber judgment of 5 January 2000, paragraph 100.

² See the Convention on the Elimination of all Forms of Discrimination Against Women. Article 15 accords women, *inter alia*, “equality with men before the law.” Article 16 requires the elimination of discrimination against women “in all matters relating to marriage and family relations,” and in particular, requires authorities to ensure, *inter alia*, “the same rights for both spouses in respect of ownership, acquisition, management, administration, enjoyment and disposition of property [. . .].”

on non-contested procedure (LNCP).³ The law on inheritance, which entered into force in 2005, although first in time, acts as *lex specialis* for the subject matter. A decedent's property may be transferred through the inheritance procedure either based on the law (intestacy) or through a will (testament).⁴ Property was passed by intestacy in the majority of inheritance proceedings monitored by the OSCE.

Tribunal established by law

Article 6(1) of the ECHR guarantees the right to a “tribunal established by law.” In order to satisfy the requirements of this right, a tribunal must function in accordance with the manner specified by the relevant substantive and procedural law.⁵

Both the LNCP and the law on inheritance regulate the manner in which inheritance proceedings should be carried out. Article 145 of the law on inheritance provides that “[t]he rules of procedure for courts, other bodies, and authorized persons in inheritance matters are regulated by the dispositions on non-contentious proceedings.” The LNCP provides that the “review of the hereditary estate is done in the court session.”⁶ Declarations of the parties on the hereditary estate can be either submitted in writing, in which case they must be signed by the party, or, alternatively, made verbally in front of the competent court.⁷ Pursuant to Article 131, “[t]he judges together with the recording clerk do the assumption of evidences and declarations for the withdrawal from the hereditary estate. The other declarations and the proposals of the participants of the procedure can be obtained in a record also by the professional collaborators.”⁸

Thus, the law appears to contemplate that a judge must be present when a party makes a declaration withdrawing from the hereditary estate. However, it is not clear how the court could know, prior to the hearing session, whether the parties who will be appearing at the session intend to withdraw or not. Nor is it clear whether “obtain[ing] in record”⁹ refers only to the compiling of a written record, or whether it refers to a court procedure whereby parties are heard, and proposals assessed, before a judge. This lack of clarity is a factor in the multiplicity of judicial practices the OSCE has observed in the processing of inheritance cases by the courts of Kosovo. In some municipal courts, inheritance proceedings are carried out by professional associates alone. For example:

In municipal courts in three out of five regions the OSCE observed that in non-contested inheritance cases, a professional associate scheduled sessions,

³ Law No. 03/L-007 on Out Contentious Procedure, 13 December 2008, which courts in Kosovo began applying on 28 January 2009. See also the Law No. 42/1986 on Non Contested Procedure, Official Gazette of the Socialist Autonomous Province of Kosovo. In line with common practice, this report refers to the Law on Out Contentious Procedure as the Law on Non Contested Procedure (LNCP).

⁴ See Article 1(2), Law No. 2004/26 on Inheritance, as promulgated by UNMIK Regulation 2005/7, 4 February 2005.

⁵ See *Zand v. Austria*, Application No. 7360/76, Report of the European Commission of Human Rights, 12 October 1978, paragraph 71.

⁶ Article 159(1), LNCP.

⁷ Article 163, 164 and 165, LNCP.

⁸ Article 131, LNCP.

⁹ *Ibid.*

performed assumption of evidence, received declarations for withdrawals, accepted proposals of the participants, and delivered judgments to parties all by himself or herself. Despite the fact that no judge was ever present in any session, minutes of hearings stated that the president of the court was present as a judge, and judgments were issued in the name of the president of the court as judge.

Although professional associates often perform their duties with a high level of competence, the fact that the legal framework does not authorize them to conduct inheritance proceedings alone means that they should not do so. Under the legal framework, judges are required to meet more stringent criteria than professional associates. It is the responsibility of court presidents to organize work within the court in such a way that inheritance proceedings can be conducted by a judge, as foreseen by law.

Initiation of Proceedings

The Law on Inheritance states “[u]pon the death of a person his inheritance shall be opened.”¹⁰ The LNCP provides that “[t]he procedure for the hereditary estate review is set in act from the court according to the official assignment as soon as the court is notified that a person has died or is announced dead by a court judgment.”¹¹ Further, “[w]hen a person dies or is announced dead by a court judgment, the communal body of the competent service for the maintenance of the death recording book is obliged that within the deadline of 15 days from the day that has recorded the death, to send the act of death to the [. . .] court.”¹²

Despite the procedure foreseen by law, in practice no such system is in place. The OSCE has observed that most municipal courts do not receive notification of deaths from municipal authorities.¹³ Instead, courts typically initiate inheritance procedures only upon submission of proposals by the parties. These proposals frequently are not made until many years after the death of the decedent. Below are only a few examples from cases monitored by the OSCE.

In a municipal court in the Gjilan/Gnjilane region, on 21 June 2010, a party filed a proposal requesting the initiation of inheritance proceedings for a decedent who died in 1979. By the time the procedure was initiated, two potential first rank heirs were already deceased.

¹⁰ Article 124(1), Law on Inheritance.

¹¹ Article 127, LNCP.

¹² Article 133(1), LNCP. Article 66 of the LNCP obliges the court to issue a final judgment on the death of disappeared persons and to send such judgment to, *inter alia*, “[. . .] the competent court for developing inheritance procedure.” Concerning the “death register” and persons and/or authorities that need to present the “fact of death”, see Articles 33-37, Law No. 2004/46 on Civil Status Registers, as promulgated by UNMIK Regulation 2005/21, 7 May 2005, and amended by UNMIK Regulation 2008/25, 16 May 2008.

¹³ The OSCE has observed that those municipal authorities who do send notice to the court, only do so upon the request of the parties interested in initiating the inheritance proceeding. The OSCE did not monitor any case of inheritance procedure related to a disappeared person who was declared dead through court judgment.

In a municipal court in the Prizren region, on 9 June 2010, a party filed a proposal requesting the initiation of inheritance proceedings for a decedent who died in 1980.

In a municipal court in the Pejë/Peć region, on 28 December 2009, a party filed a proposal requesting the initiation of inheritance proceedings for a decedent who died in 1984.

In a municipal court in the Mitrovicë/Mitrovica region, on 5 August 2010, a party filed a proposal requesting the initiation of inheritance proceedings for a decedent who died in 1987.

In a municipal court in the Prishtinë/Priština region, on 15 March 2009, a party filed a proposal requesting the initiation of inheritance proceedings for a decedent who died in 1988.

Delays in the initiation of inheritance proceedings following a death have potential negative consequences. Firstly, while there is no statute of limitations *per se* for claiming inheritance, inheritance rights vis-à-vis *bona fide* and *male fide* possessors are prescribed within ten and twenty years, respectively.¹⁴ Secondly, when an inheritance proceeding is not conducted until many years after a death, potential first rank heirs may die in the interim. These deceased potential first rank heirs may be deprived of the chance to enjoy the potential benefits of title to immovable property. Thirdly, the effect of failure to conduct inheritance proceedings means that immovable property may remain titled to deceased persons for long periods of time. This situation may encourage informal (non-legal) real estate transactions and hampers the ability of potential heirs to alienate the immovable property in a legal manner. Further, credit cannot be derived from immovable property the title to which is not accessible. Instead, economic power remains with those who exercise factual control over the immovable property, and those who may have a legitimate legal interest as heirs are deprived of the opportunity to decide whether to exercise their rights according to the law.

Recommendations

To the Kosovo Assembly:

- Consider amending the law on non-contested procedure to more clearly delineate the respective roles of judges and professional associates in inheritance proceedings.
- Consider amending the law on inheritance to take into account the prevailing practice for the initiation of inheritance proceedings in Kosovo today, especially the obstacles to timely referrals of cases to the courts.

¹⁴ Article 138, Law on Inheritance.

To the municipal institutions:

- Take steps to bring municipal practice in the area of inheritance proceedings into conformity with the requirements of the domestic law.

To the courts:

- Ensure that all inheritance proceedings brought before the courts are adjudicated by judges, as required by law, and not by professional associates.

To the Kosovo Judicial Institute:

- Continue to train judges on inheritance proceedings and their implications for human rights and the rule of law; consider offering this training to professional associates as well.